

FILED
U. S. DISTRICT COURT
MIDDLE DISTRICT OF TENN.

OCT - 4 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

RECEIVED
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DON JOHNSON,

Plaintiff,

v

GEORGE LITTLE, in his official capacity as
Tennessee's Commissioner of
Correction;

RICKY BELL, in his official capacity as
Warden, Riverbend Maximum
Security Institution;

JOHN DOE EXECUTIONERS 1-100;

Defendants

OCT 04 2006
U.S. DISTRICT COURT
MID. DIST. TENN.

BY _____
DEPUTY CLERK

3 06 0946

) Death Penalty Case

) Execution Date October 25, 2006, 1:00 a.m.

JUDGE CAMPBELL

COMPLAINT

I. Nature of Action

1 This action is brought pursuant to 42 U.S.C. §1983¹ for violations and threatened violations of the right of Plaintiff to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. Plaintiff seeks equitable and injunctive relief.

II. Plaintiff

2. Plaintiff Don Johnson is a United States Citizen and a resident of the State of Tennessee. He is currently a death-sentenced inmate in the custody of Defendants and under the

¹The United States Supreme Court decisions in *Hill v McDonough*, 547 U.S. ____ (2006) and *Nelson v. Campbell*, 541 U.S. 647 (2004) confirm that a civil rights action pursuant to 42 U.S.C. §1983 is an appropriate vehicle for a claim alleging that the procedures used to carry out a death sentence violate the Eighth Amendment

control and supervision of the Tennessee Department of Corrections. He is held in the Riverbend Maximum Security Prison, 7475 Cockrill Bend Industrial Drive, Nashville, Davidson County, Tennessee; telephone (615) 350-3400.

III. Defendants

3. Defendant George Little is the Commissioner of the Tennessee Department of Corrections. Plaintiff sues Commissioner Little in his official capacity. Defendant is a state actor acting under color of state law, and his actions in seeking to execute or executing Plaintiff as described *infra* violate Plaintiff's constitutional rights, as described *infra*.

4. Defendant Ricky Bell is the Warden of Riverbend Maximum Security Institution. Bell is directly in charge of executing Plaintiff. Plaintiff sues Warden Bell in his official capacity. Defendant is a state actor acting under color of state law, and his actions in seeking to execute or executing Plaintiff as described *infra* violate Plaintiff's constitutional rights, as described *infra*.

5. Defendants John Doe Executioners 1-100 are employed or contracted by the Tennessee Department of Corrections to prepare for, and carry out, the scheduled execution of Plaintiff. Plaintiff does not know, and Defendants refuse to reveal, the identities of such persons. Such Defendants are state actors acting under color of state law, and their actions in seeking to execute or executing Plaintiff as described *infra* violate Plaintiff's constitutional rights, as described *infra*.

JURISDICTION/VENUE

6. In this action, Plaintiff invokes 28 U.S.C. §§1331 (federal question), 1343 (civil rights violations), 2201 (declaratory relief), and 2202 (further relief). This action arises under the Eighth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. §1983.

7. Venue is proper in this district under 28 U.S.C. §1391 and this Court has personal jurisdiction over the Defendants in this matter because the events giving rise to these claims will occur in Nashville, Tennessee which is within the Middle District of Tennessee.

V. FACTS

8. Plaintiff Donnie Johnson has been on death row since 1985.

9. Pursuant to Tenn. Code Ann. § 40-23-114, Defendant Bell and/or his agents must offer each condemned inmate in Tennessee sentenced to death prior to January 1, 2000, the option of selecting either lethal injection or electrocution as the method of execution. If a prisoner refuses to make a choice, Tenn. Code Ann. § 40-23-114, mandates that the prisoner be executed by lethal injection.

10. On June 20, 2006, the Tennessee Supreme Court set Mr. Johnson's execution for October 25, 2006. On June 21, 2006, Mr. Johnson, through counsel, sent a letter to the Commissioner of Corrections, Defendant Little, objecting to both methods of execution on the grounds that each method is torturous and violates the eighth and fourteenth amendments to the United States Constitution and seeking information to assist Mr. Johnson in making an informed selection between the two methods, including a request to have an independent expert test the electric chair.

11. On August 17, 2006, Defendant Little overruled Mr. Johnson's objections and declined to provide Mr. Johnson with any additional information.

12. On or about September 19, 2006, Mr. Johnson, through counsel, learned that the primary engineer and manufacturer of Tennessee's electric chair, Fred A. Leuchter, had recently stated that an execution in Tennessee's electric chair would be a "torture session", "tantamount to

somebody being burned at the stake ”

13. On September 19, 2006, Mr. Johnson through counsel renewed his objections to lethal injection and the use of the Tennessee electric chair to the Commissioner, citing Mr. Leuchter’s recent pronouncements and renewed his request for information necessary for Mr. Johnson to make an informed selection between the two methods of execution.

14. On September 28, 2006, Warden Bell presented Mr. Johnson with an “Affidavit Concerning Method of Execution ”

15 The affidavit is a pre-printed form

16 Mr. Johnson had no choice in the wording of the form.

17 Mr. Johnson placed a checkmark on the pre-printed form next to the words “I waive the right to have my execution carried out by lethal injection and choose to be executed by electrocution.”

18 Mr. Johnson, by counsel, attached a Notice of Objections to the pre-printed form. Mr. Johnson explicitly informed the Warden:

Your act of asking Donnie Johnson to elect how you, the Warden, shall kill him is barbaric, inhumane, cruel, and offensive to any notion of human dignity.

Each of the alternatives proposed by you in your proffered document requesting an election of the method of execution is unconstitutional because each method as administered by you involves cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and the Tennessee Constitution

Donnie Johnson does not consent to being tortured by any method or means, which includes both of the unconstitutional alternatives proposed in the document you have presented to him requesting an election.

Because you have presented Donnie Johnson a choice between two unconstitutional alternatives, any decision, selection, choice, waiver, or action by Donnie Johnson with respect to the form you have provided has not been free, knowing, voluntary, or intelligent. The choice you have provided is no choice at all and is thus fundamentally unfair, and unconstitutional as a violation of due process of law under the Eighth and Fourteenth Amendments

In addition, you and the Department of Corrections have failed to provide Donnie Johnson full and complete information which Donnie Johnson has requested concerning each of the alternatives proposed by the Warden. Donnie Johnson has also been denied any opportunity to test the electric chair. Thus, any alleged selection, choice, waiver, or action by Donnie Johnson with respect to the form provided by you has not been fully informed and any such action has not been knowing, voluntary, or intelligent. Where Donnie Johnson has not been provided or allowed to obtain requested necessary information to evaluate the alternatives proposed in the Warden's document, Donnie Johnson cannot be executed using either proposed method

Under the circumstances, your proposed execution of Donnie Johnson using either proposed method, including after you have requested a choice between two unconstitutional methods without providing full information, is unconstitutional and otherwise prohibited under the Eighth and Fourteenth Amendments to the United States Constitution

19. Mr. Johnson, by counsel and his objections, expressly informed Defendants that he did not consent to being tortured by any method of execution

A. Electrocutation

20. On or around November 29, 1989, Fred A. Leutcher, Jr., installed the Fred A. Leutcher Associates, Inc., Modular Electrocutation System (Electric Chair) at the Riverbend Maximum Security Institution (RMSI)

21. On or around April 16, 1994, Michael S. Morse visited the RMSI and performed tests

on the Electric Chair. Morse opined that the Electric Chair did not deliver an adequate current and did not have the capacity to function with a typical load for an execution. Morse made fourteen specific recommendations for modifications to the Electric Chair.

22. On or around April 25, 1994, Jay Wiechert visited the RMSI and examined the Electric Chair. Wiechert opined that the Electric Chair did not function properly. Wiechert made seven specific recommendations for modifications to the Electric Chair.

23. Prior to May 1, 1994, technical personnel at the RMSI made some, but not all, of the modifications Morse and Wiechert suggested.

24. On April 23, 1996, JVM Industries, the successor to Fred A. Leuchter, Associates, Inc., wrote the RMSI Associate Warden for Administration. JVM informed that it had become aware of the modifications made to the Electric Chair. JVM wrote that the modifications raised the specter of a "brain dead vegetable at the conclusion of the execution procedure", and said that if the modifications remained in place the Electric Chair was an "instrument of torture."

25. On September 14, 2006, a Nashville, Tennessee, television news program reported that Commissioner Little has acknowledged that, "In some other states, they haven't followed the proper procedures, and unfortunately they have ended up having some very terrible results with the executions." When asked whether that was his worst fear, Commissioner Little responded, "Well, yes." <http://www.newschannel5.com/Global/story.asp?s=5419521>. Last checked 10/3/06

26. In that same interview, Commissioner Little admitted that "Well, until you actually have somebody in the chair you can't have that 100 percent certainty." Id

27. On or about September 15, 2006, Fred Leuchter, wrote to Tennessee Governor Phil Bredesen imploring him not to use the Tennessee Electric Chair. Leuchter warned Governor

Bredesen that "It's tantamount to somebody being burned at the stake." *Builder of State's Electric Chair Calls it a Torture Device*, Tennessean, September 16, 2006, p 11A

28 Jay Wiechert, the engineer who has modified the electric chair that Leuchter built, has been involved in botched electrocutions in the State of Florida <http://www.newschannel5.com/Global/story.asp?s=5419521> (Last checked 10/3/06)

29 If the Tennessee electric chair is used to kill Donnie Johnson, Mr Johnson will be burned excessively, traumatized by a process of death where human and mechanical mistakes have resulted in prisoners receiving insufficient electrocution to kill them upon the first attempt, and he will face an unnecessary risk of pain and suffering.

30 While Tennessee has never used this particular electric chair, the experience of other states establishes that the use of the electric chair is cruel and unusual punishment.

31 The execution of Alpha Otis Odell Stephens in Georgia is but one example of a "botched" electrocution. Dick Pettys of the Associated Press described the Stephens execution:²

Seconds after a mask was placed over [Stephens's] head, the first jolt was applied, causing his body to snap forward and his fists to clench. His body slumped when the current stopped two minutes later, but shortly afterward, witnesses saw him struggle to breathe. During the required six minutes in which the body was allowed to cool before doctors could examine it, Stephens took about 23 breaths. At 12:26 a.m., two doctors examined Stephens and said he was alive. At the second jolt, administered at 12:28 a.m., Stephens again snapped upright. The charge was discontinued at 12:30 a.m., and at 12:36 a.m., he was pronounced dead.

32 The State of Alabama has also had multiple problems with its electric chair

²Audio recordings of Botched executions in Georgia can be accessed at http://www.soundportraits.org/on-air/execution_tapes Last checked 10/4/06

Mutilation, burns, and botched executions characterize Alabama's use of the electric chair. The history of Alabama's executions establishes a pattern of cruel, torturous, painful, and protracted executions.

33 During Horace Dunkins's execution, the prison warden activated the electric chair sometime shortly after midnight on July 13, 1989. Eyewitnesses said they observed Mr. Dunkins's right hand tense and his left arm jerk upward against the restraints. It quickly became apparent that Mr. Dunkins was not dead. A second execution was attempted which resulted in severe burning and mutilation of Mr. Dunkins's body. Witnesses saw smoke coming from Mr. Dunkins' ears and legs. It was subsequently reported by State representatives that cables attaching Alabama's power supply and the electric chair were improperly connected, resulting in insufficient voltage discharge to instantaneously kill Mr. Dunkins. It was also reported that Mr. Dunkins may have received 60 or 70 volts of electricity during the state's first attempt at execution, which likely caused great pain but did not produce death. Nearly twenty minutes elapsed before Mr. Dunkins was finally pronounced dead. Although electrodes were fixed on the head and left leg near the knee, Horace Dunkins received electrical burns in his hip, left thigh, buttocks, lower back, right shoulder and right thigh.

34. Michael Lindsay received burn marks on his scrotum and left arm. State Medical Examiner LeRoy Riddick, M.D., states that Lindsay had a "2 inch zone of burn on the left side of the scrotum." (Lindsay Postmortem Report) Dr. Riddick also described [a]rcing marks around left

groin.” Id. Furthermore, the state medical examiner’s autopsy revealed that Michael Lindsay’s body contained both “a small abrasion on the mid-portion of the right clavicle” and a 4 inch semicircular burn on his left forearm. Id.

35. Wayne Ritter’s autopsy similarly revealed burns to his scrotum and even burns to his chest, neck and abdomen. Ritter, as Lindsay, had a “2 inch zone of burns on the left side of the scrotum.” (Ritter Postmortem Report) This burn corresponded to a zone of burns on Ritter’s inside left leg. Ritter’s autopsy also revealed injuries to his chest in the form of “a zone of violaceous changes to the upper portion of the chest on each side of the sternal notch.” Id. LeRoy Riddick M D., and Gary Cumberland, M D., the State Medical Examiners for Ritter’s autopsy, also located burns on Ritter’s neck, “anteriorly on each side of the central portions of the neck.” Id.

36. Virginia, like Georgia and Alabama, has also experienced multiple problems with its electric chair. On August 10, 1992, Frank J. Coppola was put to death by electrocution. After two jolts of electricity had been applied to him, the death chamber reportedly filled with the smell and sizzle of burning as Coppola’s head and leg burst into flames. On October 17, 1990, blood poured from Wilbert Lee Evans’ eyes and nose after the current was applied. Witnesses noted audible moaning during the electrocution. Evans reportedly made a sizzling sound like a pressure cooker before its top has been put on. On August 22, 1991, Derick Lynn Peterson moaned audibly as electric current was applied to him. After two minutes of current and a four minute wait, a prison doctor checked Peterson’s pulse with his stethoscope and announced that Peterson was not dead. After another four-minute wait, the doctor again checked the pulse and announced that Peterson had not expired. Finally, a second surge of electricity was applied. In total, it took over thirteen minutes to complete Peterson’s execution. A witness to Roger Keith Coleman’s May 20, 1992 execution

reported smoke coming from Coleman's leg. Coleman required two 1,700-volt jolts to die.

37 Florida has also had similar problems with its electric chair, a chair that the current Tennessee consultant, Jay Weichert, has worked on. In 1997, Pedro Medina was put to death in the infamous "Old Sparky." During his execution, Medina's head literally caught on fire, the flames shooting more than a foot into the air, the room filled with smoke and the witnesses were hurriedly rushed from the room. "Old Sparky" was replaced with a new model. In 1999, Allen Lee "Tiny" Davis was put to death in the new and improved Florida electric chair. The chair had been built with Davis in mind. Davis's body literally burst open, blood pouring out. Photos of "Tiny" Davis are widely available on the internet. See <http://www.ccadp.org/tinydavis.htm> (Last checked 10/4/06).

38 The use of the electric chair has been repeatedly characterized as the modern day version of burning at the stake. See *Glass v Louisiana*, 471 U.S. 1080, 1994 (1988) (Brennan, J. respecting the denial of cert)

39 The Supreme Court of Georgia has found that the electric chair constitutes cruel and unusual punishment under the state Constitution. *Dawson v. State*, 554 S.E.2d 137, 144 (Ga. 2001).

B. Lethal Injection

40 The entire Tennessee Department of Correction lethal injection protocol is set forth in its "Execution Manual."

41 Under the protocol, an execution by lethal injection requires the participation of the Commissioner, the Warden, the Deputy Warden, the Administrative Assistant, the Death Watch Supervisor and assigned officers, a Chaplain, a Medical Doctor and associate, an "Execution Team," an "IV Team," and an "Extraction Team."

42 The Officer in Charge and/or the Assistant Officer in Charge is responsible for the

care and maintenance of the Death Chamber and all appliances and equipment, the training of the Execution Team, and carrying out the execution of the condemned prisoner

43 The Officer in Charge and assistant shall assemble the Execution Team in the Death Chamber four (4) days prior to a scheduled execution to prepare and test all appliances and equipment for the scheduled execution

44 The state, claiming a privilege under T.C.A. § 10-7-504(h), has refused to reveal the identities of the various individuals involved in an execution other than the Warden.

45 There is no discussion in the protocol of the qualifications or training of the Officer in Charge or his assistant

46 It appears that the actual lethal injection procedure is carried out entirely by the three Teams mentioned above

47 The Execution Team consists of one (1) Officer in Charge, one (1) Assistant Officer in Charge, and seven (7) members.

48 There is no description of the "IV Team" or the "Extraction Team."

49 The protocol is silent on how these teams are to be selected, or whether members of these teams shall have any specialized training or qualifications

50 The protocol prescribes the sequence of events surrounding an execution as follows: At the appointed hour, the Warden or Assistant Warden and the Extraction Team will remove the inmate from his cell, secure him on the gurney, and take him to a "designated area" in the "death chamber," a room where the inmate is to be killed.

51 IV Technicians will insert a catheter into each arm, attach the tubing, and start an IV consisting of saline solution. The IV team will then leave the execution chamber and return to the

holding cell area

52. The physician is to be available in the designated waiting area and able to perform a cutdown procedure if the IV Technicians are unable to find a vein that is adequate enough to insert the catheters.

53 The physician, in other words, is not present during the catheterization process, but is available to perform a “cutdown,” a surgical procedure, if the IV Team, with its indeterminate background and unspecified training, is unable to successfully place the IV’s into the veins in both of the Plaintiff’s arms

54 The protocol is equally silent as to the physician’s qualifications to perform this function

55. After the catheterization process is completed, the witnesses will be secured, the closed circuit television camera and audio system will be activated, and the Commissioner will be contacted

56 The Warden then signals the execution to proceed and the injection procedure will continue until all the chemicals have been injected into the condemned and the person is presumed dead

57 The Execution Manual does not describe the physical configuration of the death chamber or the lethal injection device.

58 The drugs to be used in the lethal injection are as follows, in the following order and amounts:

a. Sodium Pentothal [a/k/a Sodium Thiopental] (50 cc: 5 grams diluted by 48 ml of diluent)

- b Saline (50 cc)
- c Pancuronium bromide [a/k/a Pavulon] (50 cc: 5-10 cc vials containing 1 mg pancuronium bromide)
- d Pancuronium bromide [a/k/a Pavulon] (50 cc: 5-10 cc vials containing 1 mg pancuronium bromide)
- e Saline (50 cc)
- f Potassium Chloride (50 cc)(injectable solution)
- g Potassium Chloride (50 cc)(injectable solution)

59 The administration of all such drugs is to occur within a span of 2-2 5 minutes

Defendants' Procurement Of Drugs For Use Upon Plaintiff

60. To obtain the drugs used to kill Plaintiff, Defendant Bell will request them through Defendant(s) employed by the Department of Corrections, and such Defendant(s) will seek to secure such drugs from some pharmacy or source presently unknown to Plaintiff

61 A physician's order will be written by one or more of the Defendant(s) asking for the dispensing of the sodium thiopental, pancuronium bromide, and potassium which Defendants would intend to administer to Plaintiff to cause his death. It is unclear that such "physician's order" is actually written by a physician who may prescribe medicine.

62. One or more of the Defendant(s) will then deliver or dispense the drugs to Defendants, including Defendant Bell, who, following receipt, will, at some point before execution, prepare the sodium thiopental, pancuronium bromide, and potassium chloride for syringes to be used upon Plaintiff.

Anesthesia And Consciousness With Sodium Thiopental

63. Anesthesia is the process of blocking the perception of pain and other sensations, creating insensibility to pain.

64. Sodium Thiopental is a short acting barbiturate

65. In the Tennessee protocol, its alleged purpose is to cause anesthesia

66. Induction of anesthesia using thiopental occurs quickly, but its effect wears off in a matter of minutes.

67. Sodium thiopental is used as an anesthetic in surgery because it enables an anesthesiologist to quickly awaken a patient should complications arise

68. There are differing levels of anesthesia, and thus consciousness

69. The human body reacts to various stimuli differs depending upon the level of anesthesia

70. For example, when a person is administered sodium thiopental, a person will continue to have the following states of consciousness at the following serum levels of thiopental:

a. 0-13 mg/l: Consciousness

b. 13-18 mg/l: Loss of purposeful movement in response to verbal stimulation;

c. 23-28 mg/l: Loss of purposeful movement in response to tetanic nerve stimulation;

d. 33-46 mg/l: Loss of purposeful movement in response to trapezius muscle squeeze;

e. 45-57 mg/l: Loss of movement in response to laryngoscopy;

f. 63 mg/l >: Loss of movement in response to intubation

See Leonidas Koniaris et al, *Inadequate Anaesthesia In Lethal Injection For Execution*, 365 Lancet

1412-1414 (2005).

71 In fact, one study establishes that, upon administration of thiopental, EEG brain activity peaks at 13.3 mg/l, after which it drops back to normal activity at 31.2 mg/l, and zero brain waves per second occurs only with serum levels above 50 mg/l. See Buhrei et al., Thiopental Pharmacodynamics, *Anesthesiology* 77: 226-236 (1992)

72 Sodium thiopental as used in the Tennessee protocol does not adequately anesthetize a person prior to the introduction of pancuronium bromide and potassium chloride.

73 This is confirmed by findings made as a result of the autopsy of Robert Coe, whose serum thiopental levels were 10 mg/l, which as recent research establishes, is inadequate to establish unconsciousness. See Leonidas Koniaris et al, *Inadequate Anaesthesia In Lethal Injection For Execution*, 365 *Lancet* 1412-1414 (2005).

74. As a result, Plaintiff would be inadequately anesthetized under the Tennessee protocol, and as shown *infra*, would experience a gruesome and horrifying death through the painful use of pancuronium bromide followed by the introduction of potassium chloride.

75 The lack of inadequate anesthesia would apparently be even more pronounced in Plaintiff than in Robert Coe, as Mr. Coe only weighed 179.5 pounds when he was executed, and Plaintiff weighs significantly more than 200 pounds.

Pancuronium Bromide (Pavulon)

76 Pancuronium Bromide, marketed under the name Pavulon, is a neuromuscular blocking agent which causes paralysis of the skeletal muscles of an individual.

77 Pancuronium Bromide does not affect the brain or nervous system, nor does it block the actual reception of nerve impulses in the brain or the passage of such impulses within the brain.

78. Pancuronium Bromide does not affect consciousness or the sensation of pain or suffering

79. An individual under the influence of pancuronium bromide, though paralyzed, still has the ability to think, to be oriented to where he is, to experience fear or terror, to feel pain, and to hear.

80. While pancuronium bromide paralyzes the diaphragm to prevent breathing, it does not affect the heart muscle

81. Pancuronium bromide causes death by asphyxiation or suffocation.

82. If an individual is not properly anesthetized when injected with pancuronium bromide, he will consciously experience extreme pain while being completely paralyzed.

83. In this state, the person will undergo the terrorizing and excruciating experience of suffocation without the ability to move or to express the pain and suffering which he is experiencing as he is being suffocated

84. Because pancuronium bromide paralyzes all skeletal muscles including facial muscles and those used to speak or communicate through noises, an observer cannot detect, from outward appearance, any expression of pain, horror, or suffering experienced because of the use of pancuronium bromide.

85. Moreover, the paralyzing effect of pancuronium bromide also prevents any expression of the pain, horror, or suffering from any other source, such as potassium chloride. See *infra*, ¶¶ 59-67, incorporated by reference

86. Death caused by the use of pancuronium bromide is gruesome, horrible, and painful

The Use Of Pancuronium Bromide Is Arbitrary,

Unreasonable, Degrading To Human Dignity, And Serves No Legitimate Interest

87 Because pancuronium bromide causes paralysis, suffocation, and the suffering attendant to such paralysis and suffocation, in 2001, Tennessee declared in the “Nonlivestock Humane Death Act” (Tenn. Code Ann 44-17-301 *et seq*) that pancuronium bromide cannot be used to euthanize animals, because its use is not humane

88. Where the use of pancuronium bromide is not “humane” to use on non-humans, it is arbitrary to claim that its use is “humane” on humans, and its use on humans to cause death violates basic precepts of human dignity

89. The use of pancuronium bromide in execution is arbitrary.

90. The use of pancuronium bromide in execution is unreasonable.

91. The use of pancuronium bromide in execution serves no legitimate state interest and is not narrowly tailored to any compelling state interest

92 As Chancellor Ellen Hobbs Lyle has explained elsewhere:

[T]he use of Pavulon is . . . unnecessary. . . [T]he State [has] failed to demonstrate any reason for its use. The record is devoid of proof that the Pavulon is needed. Thus, the Court concludes that the State’s use of Pavulon is . . . in legal terms ‘arbitrary.’

Abdur’Rahman v Sundquist, No 02-2236-III, In The Chancery Court For The State Of Tennessee, Twentieth Judicial District, p. 13 (June 2, 2003).

Potassium Chloride

93 As used in Tennessee’s execution protocol, potassium chloride is supposed to cause cardiac arrest

94 The administration of potassium chloride is extremely painful, because it activates all the nerve fibers inside the venous system.

95 Because veins are replete with nerve fibers, the administration of potassium chloride into the veins creates extreme pain.

96 In the absence of adequate anesthesia, the introduction of potassium chloride, like the introduction of pancuronium bromide, creates extreme and excruciating pain.

97 Under Tennessee's protocol, 200 mEq of potassium chloride are introduced into the body through a vein

98 This method of administering this amount of potassium chloride is inadequate to stop the heart.

99 This is confirmed by the autopsy of Robert Coe, which demonstrates that his vitreous potassium was 9 mEq/l (9mmol/l).

100 It actually takes a serum concentration of more than 16 mEq/l (16mmol/l) of potassium to arrest the heart

101 The failure to arrest Plaintiff's heart would likely be even more pronounced *vis-a-vis* Robert Coe, as Plaintiff is significantly larger than Mr. Coe, assuming Plaintiff's larger blood volume and body surface area.

Death Under Tennessee's Lethal Injection Protocol

102 The person being lethally injected under Tennessee's protocol thus actually dies from the suffocation caused by the pancuronium bromide and the resulting anoxic state, and not from cardiac arrest due to the administration of potassium chloride.

103 Because the person being lethally injected under Tennessee's protocol is not

adequately anesthetized, he or she experiences the sensation and horror of suffocation from the pancuronium bromide, as well the excruciating pain associated with the introduction of potassium chloride.

C. Exhaustion of Remedies

104. Plaintiff has exhausted all available remedies. Plaintiff filed an objection to both electrocution and lethal injection with the Commissioner of Corrections which was denied by the Commissioner on August 17, 2006.

VI. CLAIMS FOR RELIEF

A. Violation of Eighth and Fourteenth Amendments: Cruel and Unusual Punishment (Electrocution)

105. Plaintiff incorporates paragraphs the preceding paragraphs in their entirety by reference.

106. Defendant's acting under color of state law, intend to execute Plaintiff in a manner that will cause unnecessary pain and suffering in the execution of a sentence of death, thereby depriving Plaintiff of his rights under the Eighth and Fourteenth Amendments to be free from cruel and unusual punishment in violation of 42 U.S.C. § 1983.

B. Violation of Fourteenth Amendment: Substantive Due Process (Electrocution)

107. Plaintiff incorporates the preceding paragraphs in their entirety by reference.

108. Defendant's acting under color of state law, intend to execute Plaintiff in a manner that "shocks the conscience," causing excessive burning, tissue-cooking, and mutilation of the body (at least) thereby depriving Plaintiff of his right to substantive due process under Fourteenth Amendment.

C. Violation Of Fourteenth Amendment: Due Process Of Law (Pancuronium Bromide)

109 Plaintiff incorporates the preceding paragraphs in their entirety by reference

110 The use of pancuronium bromide is arbitrary, unreasonable, and serves no legitimate or compelling state interest. The use of pancuronium bromide shocks the conscience and is inhumane. The use of pancuronium bromide violates Plaintiff's right to due process of law under the Fourteenth Amendment.

111 It is well-settled under the due process clause of the Fourteenth Amendment that a state cannot act in a way which fails to serve a legitimate state interest. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249 (1985). Likewise, when fundamental interests are involved (such as life) the state must act in a way that is necessary to promote a compelling state interest. Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000)

112 Without question, there is no legitimate interest in the use of pancuronium bromide upon Plaintiff or any other human being. As Chancellor Ellen Hobbs Lyle has held:

[T]he use of Pavulon is . . . unnecessary. . . [T]he State [has] failed to demonstrate any reason for its use. The record is devoid of proof that the Pavulon is needed. Thus, the Court concludes that . . . the State's use of Pavulon is . . . in legal terms 'arbitrary.'

Abdur 'Rahman v. Sundquist, No. 02-2236-III, In The Chancery Court For The State Of Tennessee, Twentieth Judicial District, p. 13 (June 2, 2003)

113 Further, use of pancuronium bromide violates substantive due process for the separate reason that its use shocks the conscience. See Rochin v. California, 342 U.S. 165 (1952). Without question, under Tennessee's "Nonlivestock Animal Humane Death Act," pancuronium bromide

cannot be used to euthanize a non-livestock animal in Tennessee. Tenn Code Ann §44-17-301 *et seq*, including §44-17-303(c)(any substance which “acts as a neuromuscular blocking agent . . . may not be used on any nonlivestock animal for the purpose of euthanasia.”). If pancuronium bromide can’t be used to kill a dog or a cat because it is not “humane,” it shocks the conscience to think that it can be used in an attempt to kill a human being

D. Violation Of Eighth And Fourteenth Amendments (Pancuronium Bromide)

114 Plaintiff incorporates the preceding paragraphs in their entirety by reference.

115. The use of pancuronium bromide is inhumane, violates the dignity of the human person, and is contrary to the evolving standards of decency

116 The use of pancuronium bromide violates Plaintiff’s right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments

117. The Eighth and Fourteenth Amendments prohibit punishments which do not comport with the evolving standards of decency that mark the progress of a maturing society Trop v. Dulles, 356 U S. 86 (1959).

118 In 2001, the State of Tennessee declared as inhumane – and illegal – the use of pancuronium bromide or any other neuromuscular blocking agent on nonlivestock animals. Tenn Code Ann. §44-17-303(c); 44-17-303(j)(criminal sanctions for violation of Humane Death Act) *A fortiori*, the legislative judgment of Tennessee establishes the fundamental baseline concerning the evolving standards of decency applicable to human beings. Especially where the Tennessee Legislature passed the Nonlivestock Humane Death Act in 2001 --after Defendants’ established their protocol – the very existence of the Act establishes an Eighth Amendment violation of the evolving standards of decency.

119. Further, where Tennessee has already determined that use of pancuronium bromide to kill animals is not “humane,” using such a substance to kill a human being is not humane either. It is likewise degrading to humanity itself to allow the Defendants to do what they would intend to do. It sends a message that the State can treat human being with the type of contempt and cruelty that is not befitting an animal.

E. Violation Of Fourteenth Amendment: Equal Protection (Pancuronium Bromide)

120 Plaintiff incorporates the preceding paragraphs in their entirety by reference.

121 The use of pancuronium bromide upon Plaintiff while its use is legally prohibited for use on animals because it is not “humane,” is inhumane, arbitrary, unreasonable, and serves no legitimate interest, nor is it narrowly tailored to serve a compelling state interest. The use of pancuronium bromide violates Plaintiff’s right to the equal protection of the laws under the Fourteenth Amendment.

122 By procuring and using pancuronium bromide upon Plaintiff, Defendants would invidiously discriminate against Don Johnson: Under Tenn. Code Ann. §44-17-303(h) & §39-14-201(3), the State of Tennessee has protected the following animals against the use of pancuronium bromide: any “pet normally maintained in or near the household or households of its owner or owners, other domesticated animal, previously captured wildlife, an exotic animal, or any other pet, including but not limited to, pet rabbits, a pet chick, duck, or pot bellied pig that is not classified as “livestock” pursuant to this part.” Tenn Code Ann §44-17-201(3) There is no legitimate basis – let alone a compelling state reason – for Tennessee to provide dogs, cats, chicks, ducks, and pot-bellied pigs more protection from cruelty than it would Don Johnson, who is a human being who retains a

fundamental right to life. This classification is arbitrary, unreasonable, and serves no legitimate interest, let alone a compelling state interest. Defendants' procurement and use of pancuronium bromide is therefore unconstitutional.

F. Violation Of Eighth and Fourteenth Amendments: Cruel And Unusual Punishment

123. Plaintiff incorporates the preceding paragraphs in their entirety by reference.

124. Defendants' use of sodium thiopental, pancuronium bromide, and potassium chloride under the Tennessee protocol causes unnecessary pain and suffering and does not conform with evolving standards of decency.

125. Defendants' use of the protocol violates the dignity of the human person and Plaintiff's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments.

G. Violation Of Eighth and Fourteenth Amendments: Cruel And Unusual Punishment

126. Plaintiff incorporates the preceding paragraphs in their entirety by reference.

127. Defendants' inadequate procedures in the use of sodium thiopental, pancuronium bromide, and potassium chloride under the Tennessee protocol creates the risk of unnecessary pain and suffering and does not conform with evolving standards of decency.

128. Defendants' use of the protocol violates the dignity of the human person and Plaintiff's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments.

VII. PRAYER FOR RELIEF

WHEREFORE, based on the foregoing complaint, incorporated herein by reference, this Court should do the following:

129. Enter an order granting a declaratory judgment to Plaintiff declaring unconstitutional the use of the Tennessee electric chair and prohibiting Defendant's from using the electric chair to execute Plaintiff.

130. Enter an order granting a declaratory judgment to Plaintiff declaring unconstitutional the use of pancuronium bromide by Defendants under the circumstances, and prohibiting Defendants from using, seeking to obtain, ordering, writing a prescription, writing a physician's order, prescribing, dispensing, or in any other manner transferring to Defendants Bell or any other Defendants involved in the execution process pancuronium bromide in any form whatsoever.

131. Enter an order granting a declaratory judgment to Plaintiff declaring unconstitutional the use of pancuronium bromide by Defendants under the circumstances, and enjoin Defendants from seeking to execute, or executing, Plaintiff using the above-described protocol which employs pancuronium bromide.

132. Enter an order granting a declaratory judgment to Plaintiff declaring unconstitutional the execution protocol the state has used to execute prisoners because it utilizes inadequate anesthesia through the use of sodium thiopental, and grant an injunction against the use upon Plaintiff of this execution protocol which uses sodium thiopental


133. Enter an order granting a declaratory judgment to Plaintiff declaring unconstitutional the execution protocol, and grant an injunction against the use of the protocol upon Plaintiff

134. Grant further relief that this Court finds necessary and just.

Respectfully submitted,

Paul R. Bottei
Kelley J. Henry
Christopher M. Minton
Gretchen L. Swift

Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
FAX (615) 736-5265

By: 

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served upon the Defendants Little and Bell by delivering a copy to Alice Lustre, Assistant Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243 via facsimile this 4th day of October, 2006

