IN THE CIRCUIT COURT
FOR FRANKLIN COUNTY
COMMONWEALTH OF KENTUCKY

RALPH BAZE, and, THOMAS C. BOWLING, Plaintiffs, v. JONATHAN D. REES, Commissioner, KentuckyDepartment of Corrections, Frankfort, Kentucky GLENN HAEBERLIN, Warden, Kentucky State Penitentiary, Eddyville Kentucky, and, UNKNOWN EXECUTIONERS, Defendants.	CIV. ACTION # _____

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

I. NATURE OF ACTION[1]

1. This action is brought pursuant to Kentucky Rules of Civil Procedure, Rule CR 57 (declaratory judgment), CR 65.01 (injunctive relief), and CR 65.04 (temporary injunctions) for violations and threatened violations of the right of plaintiffs to be free from cruel and unusual punishment under the Eighth Amendment of the United States Constitution ("nor shall cruel and unusual punishment be inflicted") and section 17 of the Kentucky Constitution ("nor cruel punishment inflicted"), and for violating plaintiffs' due process rights.

2. CR 57 authorizes declaratory judgment as a form of relief and explicitly states that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief."

3. CR 65.01 authorizes a temporary injunction to "restrict or mandatorily direct the doing of an act."

4. CR 65.04 authorizes a temporary injunction "during the pendency of an action on motion if it is clearly shown by verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual."

5. Defendants' current lethal injection procedure violates K.R.S. section 431.220 because the "execution procedures" do not require a continuous administration of a short acting barbiturate.

[1] Plaintiffs incorporate the attached memoranda of law and exhibits by reference. For this court's convenience, Plaintiffs submit and incorporate a separate memorandum of law concerning the electrocution claim.

6. Defendants' current method of lethal injection will cause Plaintiffs to be tortured to death. No government within the United States may intentionally or negligently use an excruciatingly painful and unreliable procedure for carrying out executions, particularly when readily available alternative means of carrying out the sentence exist.

7. Usage of a "cut down" procedure violates both the state and federal cruel and unusual punishment clauses.

8. The usage of pancurium bromide (pavulon or also pancuronium) during a lethal injection violates the Eighth Amendment of the United States Constitution and section 17 of the Kentucky Constitution.

9. Defendants have refused to disclose the "execution procedures" to plaintiffs, in violation of fundamental notions of fairness and due process. Due process compels Defendants to disclose to plaintiffs the "execution procedures" that will be utilized in extinguishing their lives.

10. Kentucky's alternative method of execution for individuals sentenced to death prior to 1998, electrocution, violates the Eighth Amendment of the United States Constitution and section 17 of the Kentucky Constitution.

11. Plaintiffs are not saying that Defendants could never execute them. Rather, they assert that any execution must comport with K.R.S. section 431.220, the Kentucky Constitution, and the United States Constitution. Plaintiffs could be executed if: 1) no separate legal challenges reverse their convictions or death sentences; 2) Plaintiffs do not receive executive clemency; 3) Defendants' execution of Plaintiffs is conducted consistent with the manner established by the Kentucky Legislature and codified at K.R.S. section 431.220; 4) Defendants design a constitutionally acceptable method for executing Plaintiffs, which can include lethal

injection if done in a manner that does not inflict unnecessary pain and suffering; and, 5) Defendants disclose their "execution procedures" in accordance with principles of due process.

12. Plaintiffs seek an Order declaring that Defendants' current "execution procedures" for lethal injection violate K.R.S. section 431.220 because the "execution procedures" do not permit a "continuous" administration of an effective barbiturate.

13. Plaintiffs also seek an Order declaring that Defendants' current method of conducting an execution by lethal injection, including utilizing pancurium bromide (pavulon), providing a low dose of sodium thiopental, utilizing a "cut down" procedure to obtain venous access, and failing to implement adequate "execution procedures" violates the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution and section 17 of the Kentucky Constitution.

14. Plaintiffs seek an Order declaring that Defendants' refusal to disclose its "execution procedures" violates due process and fundamental notions of fairness, and an Order compelling Defendants to disclose their "execution procedures" to Plaintiffs in a timely manner sufficient to allow Plaintiffs to investigate and evaluate the procedure to ensure that it does not violate section 17 of the Kentucky Constitution or the Eighth Amendment to the United States Constitution.

15. Plaintiffs seek an Order declaring that execution by electrocution violates section 17 of the Kentucky Constitution and the Eighth Amendment of the United States Constitution.

16. Plaintiffs further seek a temporary restraining order, and preliminary injunction preventing Defendants from scheduling their execution while this litigation is pending if the execution is to be carried out:

1) under the means and procedures currently employed for carrying out an execution by lethal injection in Kentucky;

2) without using a "continuous" administration of an effective barbiturate;

2) utilizing pancurium bromide; or,

3) in a manner that may involve a "cut down" procedure to obtain venous access;

4) utilizing untrained individuals to prepare and insert the needle(s) and chemicals;

5) without providing Plaintiffs with a complete copy of the execution procedures, and opportunity to be heard concerning the procedures.

II. JURISDICTION AND VENUE

17. This Court has jurisdiction pursuant to K.R.S. section 23A.010(1), which grants this Court general and original jurisdiction over all civil matters not exclusively vested in another court.

18. This action arises under the Eighth and Fourteenth Amendments of the United States Constitution, and section 17 of the Kentucky Constitution.

19. Venue is proper in Franklin County because it is where the Kentucky Department of Corrections' headquarters is located.

III. PLAINTIFFS

20. Ralph Baze is a United States citizen and a resident of the Commonwealth of Kentucky. He is currently a death sentenced inmate under the supervision of the Kentucky Department of Corrections. He is held at the Kentucky State Penitentiary in Eddyville, Kentucky 42038.

21. Thomas C. Bowling (T.C. Bowling) is a United States citizen and a resident of the Commonwealth of Kentucky. He is currently a death sentenced inmate under the supervision of the Kentucky Department of Corrections. He is held at the Kentucky State Penitentiary in Eddyville, Kentucky 42038.

IV. DEFENDANTS

22. Defendant John D. Rees is the Commissioner of the Kentucky Department of Corrections.

23. Defendant Glenn Haeberlin is the Warden of the Kentucky State Penitentiary, where the executions will occur.

24. Defendants Unknown Executioners are employed by or under contract with the Kentucky Department of Corrections, to make preparations for, and carry out, Plaintiffs' execution. They include, but are not limited to, physicians, emergency medical technicians, physician's assistants, the "execution team," and the "team leader." Plaintiffs do not yet know their identities and it is Plaintiffs' understanding that Defendants will not reveal the identities of these persons.

V. FACTS

25. Plaintiff Ralph Baze's death sentence was recently affirmed by the Sixth Circuit Court of Appeals. If the Sixth Circuit (on rehearing) or the United States Supreme Court does not reverse his conviction or death sentences, his execution will be scheduled within a few months, a short period of time which requires Plaintiff to file this action now in order to provide him and this Court with adequate time to resolve the disputed issues.

26. Plaintiff Thomas C. Bowling's death sentence was affirmed by the Sixth Circuit Court of Appeals on September 17, 2003. Rehearing en banc was denied on December 30, 2003. His petition for certiorari is currently pending before the United States Supreme Court.

27. Defendants are responsible for carrying out each execution.

28. Under the Eighth Amendment to the United States Constitution, cruel and unusual punishment claims involving a particular means of effectuating a sentence of death are analyzed under a four prong test in which any one prong is sufficient to establish an Eighth Amendment violation:

a) unnecessary infliction of pain and suffering in light of readily available alternatives;

b) the risk of unnecessary infliction of pain and suffering in light of readily available alternatives;

c) mutilation of the body during the execution;

d) whether the particular means of effectuating the sentence of death violates evolving standards of decency.

29. At a minimum, section 17 of the Kentucky Constitution applies the same standard for analyzing cruel and unusual punishment claims as the Eighth Amendment standard.

A. Facts Relevant to the Statutory Violation

30. The manner of judicial executions in Kentucky is governed by K.R.S. 431.220, which provides in relevant part that a "death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death."

31. The Kentucky Department of Corrections has implemented administrative procedures for carrying out executions.[2]

32. Kentucky's administrative procedures for lethal injection contradict and thus violate Kentucky statutes.

33. K.R.S. section 431.220 requires the "continuous" administration of a drug or combination of drugs sufficient to cause death.

34. According to a Department of Corrections 2002 letter (exhibit 1), Defendants intend to execute Plaintiffs by administering the following drugs in the following manner:

a) sodium pentothal (2 grams) ;

b) saline (25 milligrams);

b) pavulon [also referred to as pancurium bromide] (50 milligrams);

c) saline (25 milligrams); and,

c) potassium chloride (240 milliequivalents)

The drugs are injected in rapid succession "a" through "e."

35. By injecting the drugs in rapid succession, the Department of Corrections is in violation of K.R.S. section 431.220, which requires a continuous administration of the drugs used to cause death including the short acting barbiturate (sodium pentothal).

[2] A 2002 letter from the Kentucky Department of Corrections stating the chemicals utilized during a lethal injection, the dose of these chemicals, and the order of administration, is attached as exhibit 1.

B. Facts Relevant to Unnecessary Pain and Suffering.

36. The usage of sodium thiopental is not mandated by K.R.S. section 431.220.

37. The usage of pavulon (pancurium bromide) is not mandated by K.R.S. section 431.220.

38. The usage of potassium chloride is not mandated by K.R.S. section 431.220.

39. Finding that any one, a combination of, or all these chemicals violates section 17 of the Kentucky Constitution or the Eighth Amendment to the United States Constitution will not require statutory amendment or variance.

40. Sodium thiopental (pentothal) is an ultrashort-acting barbiturate that begins to wear off almost immediately.

41. Pavulon (pancurium bromide) is a curare-derived agent that paralyzes all skeletal or voluntary muscles, but which has no affect whatsoever on awareness, cognition, or sensation.

42. Potassium chloride is an extraordinarily painful chemical which activates the nerve fibers lining a person's veins and interferes with the rhythmic contractions of the heart, causing cardiac arrest.

The chemicals utilized in lethal injections in Kentucky will cause unnecessary pain and suffering.

43. Defendants intend to execute Plaintiffs by administering the following drugs in the following manner:

a) sodium pentothal (2 grams) ;

b) saline (25 milligrams);

b) pavulon [also referred to as pancurium bromide] (50 milligrams);

c) saline (25 milligrams); and,

d) potassium chloride (240 milliequivalents)

The drugs are injected in rapid succession “a” through “e.”

44. This particular combination and sequence of chemicals will cause Plaintiffs to consciously suffer an excruciatingly painful and protracted death in violation of section 17 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution.

45. Sodium thiopental is a short-acting barbiturate which is ordinarily used only in the induction phase of anesthesia to render a surgical patient unconscious for mere minutes, , specifically so that the patient may re-awaken and breathe on their own power if any complications arise in inserting a breathing tube pre-surgery.

46. Sodium thiopental is never used as the only anesthetic during a surgical proceeding.

47. Because of its brief duration (usually about five to seven minutes), it is highly unlikely that sodium thiopental will provide a sedative effect throughout the entire execution process.

48. Two grams is a relatively low dosage of sodium thiopental which increases the likelihood that it will not have a sedative effect or will wear off almost immediately.

49. Two grams of sodium thiopental or any larger dose is insufficient to induce unconsciousness if the sodium thiopental does not reach the condemned prisoner’s bloodstream.

50. Defendants fail to ensure that the full quantity of sodium thiopental reaches the inmate’s bloodstream.

51. Defendants fail to determine if the inmate is unconscious prior to administering pavulon and potassium chloride.

52 North Carolina and South Carolina administer two grams of sodium thiopental.

53. Toxicology reports on death row inmates in North Carolina prove that at least three North Carolina death row inmates were conscious during execution by lethal injection, and another death row inmate likely was conscious during his execution.

54. Toxicology reports on death row inmates in South Carolina prove that at least three South Carolina death row inmates were conscious during execution by lethal injection, and another three death row inmates likely were conscious during execution by lethal injection.

55. Toxicology reports show that the level of thiopental in Edward Harper at the time of his execution by Defendants was between 3 mg/L and 6.5 mg/L.

56. Edward Harper likely was conscious when pavulon was administered.

57. Edward Harper likely was conscious when potassium chloride was administered.

58. Defendants have taken no precautions or corrective measures to ensure that two grams of sodium thiopental (the same dosage as has been problematic in North Carolina, South Carolina, and during the execution of Edward Harper) will reach an inmate's veins, and render the inmate unconscious.

59. In surgical procedures, the quantity of anesthetic administered depends upon factors unique to the patient including size, weight, and past drug usage.

60. In an individual who is resistant to sodium thiopental, a higher dose of sodium thiopental is necessary to induce unconsciousness.

61. An overweight person is likely to be more resistant to sodium thiopental.

62. Prolonged usage of barbiturates builds up a resistance to sodium thiopental.

63. Edward Harper presented none the above mentioned risk factors, and yet, insufficient sodium thiopental reached his bloodstream.

64. Due to the chemical combination and sequence used in the Kentucky execution process, there is a probability that the sedative effect of the sodium thiopental will be neutralized instantly by the second chemical, pavulon.

65. If Plaintiffs are not adequately sedated, they will suffer an excruciatingly painful death by suffocation.

66. The second chemical involved in the lethal injection process, Pavulon, is a derivative of curare that acts as a neuromuscular blocking agent.

67. While Pavulon paralyzes skeletal muscles, including the diaphragm, it has no effect on consciousness or the perception of pain or suffering.

68. To the extent that the first chemical, sodium pentothal, is neutralized by the second, Pavulon, the paralytic chemical (Pavulon) will serve only to mask the excruciating pain of Plaintiffs.

69. Pavulon prevents a conscious individual from notifying anyone that he or she is conscious or pain.

70. Pavulon prevents a conscious individual from showing any signs of consciousness.

71. A condemned inmate could regain consciousness because:

1) less than the expected dose of the anesthetizing drug, thiopental, had been successfully injected into the individual's bloodstream;
2) sensitivity to thiopental varies greatly among the population and some individuals;
3) the duration of the effectiveness of thiopental wore off; OR,
4) the dose of thiopental was insufficient to render the inmate unconscious.

72. If a condemned inmate regains consciousness during an execution, the inmate will suffer excruciating pain caused by pavulon and potassium chloride.

73. Pavulon collapses the lungs and, in a conscious person, causes the extreme pain of suffocation.

74. Death by suffocation is akin to drowning.

75. Death by suffocation is akin to dying in a gas chamber.

76. Pavulon can cause individuals to have a gastric reaction that causes vomit to fill their mouths.

77. The vomit caused by the usage of pavulon can flow into a person's lungs causing suffocation.

78. Because pavulon paralyzes the diaphragm, a person is unable to regurgitate the vomit.

79. If a person is conscious when the vomit flows into the mouth, a person paralyzed by pavulon is likely to suffer extreme pain and suffering as the person silently chokes to death on vomit.

80. The American Veterinary Medicine Association (AVMA) condemns the use of neuromuscular blocking agents such as Pavulon in the euthanasia of animals.

81. At least nineteen states have made the use of pavulon on domestic animals illegal. Kentucky is one of a majority of States that have banned its use. K.R.S. section 321.181(17) and 201 K.A.R. 16:090.

82. The first lethal injection procedure designed in the United States used pavulon to cause death.

83. Potassium chloride, the third chemical involved in Kentucky's lethal injection process, is intended to stop the prisoner's heart, and, thereby cause cardiac arrest and death.

84. With the use of potassium chloride, pavulon is not necessary to cause death.

85. Pavulon serves no legitimate purpose in a lethal injection execution, particularly considering the readily available alternative of conducting the lethal injection execution without pavulon.

86. New Jersey carries out executions utilizing only sodium thiopental and potassium chloride.

87. A chancery court in Tennessee has found the usage of pavulon during lethal injections to be arbitrary and unnecessary.

88. Pavulon is administered to make the lethal injection process more aesthetically palatable for the official witnesses by preventing the witnesses from seeing any involuntary twitching or seizures that may be caused by the potassium chloride or the dying process itself.

89. Preventing official witnesses from seeing the effects of each chemical during the lethal injection process is not a legitimate reason to administer a drug, particularly when the drug increases the risk of inflicting horrific pain and suffering upon the condemned person.

90. The use of pavulon during an execution violates evolving standards of decency.

91. The use of pavulon during an execution creates an unacceptable risk that Plaintiffs will suffer an unnecessarily painful death.

92. Potassium chloride is a strong alkaline chemical.

93. Potassium chloride is used as road salt.

94. In practice, the administration of potassium chloride is extremely painful because, when administered intravenously.

95. Potassium chloride ravages the organs by causing an extremely painful burning sensation as it courses through the body.

96. Defendants have shown a deliberate indifference to the risk of inflicting unnecessary pain and suffering and towards serious medical needs, by copying lethal injection procedures from other states without investing meaningful and independent efforts to ensure that Kentucky's lethal injection execution procedures comply with contemporary medical standards and long-standing constitutional standards.

97. The risk of inflicting severe and unnecessary pain and suffering upon Plaintiffs during their execution is also grave because the Commonwealth has not carried out a lethal injection in over five years.

98. The risk of inflicting severe and unnecessary pain and suffering upon Plaintiffs during their execution is also grave because Warden Haeberlin, who is in charge of the prison where executions take place, has never been involved in an execution by lethal injection.

99. The risk of inflicting severe and unnecessary pain and suffering upon Plaintiffs during their execution is also grave because execution team members regularly have had difficulty inserting the IV needle during mock lethal injections.

100. This risk of unnecessary pain and suffering is also grave because when the Kentucky Department of Corrections carried out its first and only lethal injection, unanticipated problems occurred and the Department of Corrections proceeded without correcting these problems.

101. According to witnesses at the execution of Edward Harper on May 25, 1999, it took ten minutes and at least three stabs with a needle to find a suitable vein to inject the chemicals.

102. According to witnesses at the execution of Edward Harper on May 25, 1999, within two minutes of the administration of sodium thiopental, Harper's face turned purple and became puffy.

103. Defendants did not determine if a purple and puffy face was normal during an execution by lethal injection, but decided to continue with the execution.

104. Defendants have taken no steps subsequently to determine whether a purple and puffy face is normal during a lethal injection.

105. This risk of unnecessary pain and suffering is also particularly grave in Kentucky because the procedures and protocols designed by Defendants:

a) do not include safeguards regarding the manner in which the execution is to be carried out;

b) do not rule out the possibility that a cut down procedure will be necessary to reach a vein;

c) do not establish the minimum qualifications and expertise required of the personnel performing the critical tasks in the lethal injection procedure;

d) do not establish appropriate criteria and standards that personnel must rely upon in exercising their discretion during the lethal injection procedures;

e) use "volunteers" to carry out the execution rather than highly trained individuals with proper credentials;

f) do not require the Deputy Commissioner to have any specialized training in administering the chemicals utilized in lethal injections;

g) do not require the Warden, Deputy Warden, Assistant Warden, Execution Commander, Team Leader, and Execution Team to have any specialized training in administering the chemicals utilized in lethal injections;

h) permit the usage of additional needles if considered necessary by the execution team without providing any guidance to determine if additional needles are necessary;

i) allow modifications to any and all of the procedures at any time, and without providing advance notice to any death-sentenced inmate;

j) do not include or require the execution team to determine that the condemned inmate is unconscious prior to administering the second and third chemicals;

k) do not include or require the use of any medical equipment designed to monitor the condemned inmate's heart beat, pulse, or brain waives during the execution;

l) do not establish the methods for obtaining, storing, mixing, and appropriately labeling the drugs;

m) do not establish the minimum qualifications and expertise required for the person who will determine the concentration and dosage of each drug;

n) do not establish the manner in which the IV tubing, three-way valve, saline solution and other apparatus shall be modified or fixed in the event it is malfunctioning during the execution process, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising such discretion;

o) do not establish the manner in which a heart monitoring system shall be installed and utilized to ensure that the inmate is deeply sedated while dying and the qualifications and expertise required for the person who operates this equipment;

p) do not establish the manner in which the IV catheters shall be inserted into the condemned inmate, and the minimum qualifications and expertise required for the person who is given the responsibility and discretion to decide when efforts at inserting the IV catheters should be abandoned in favor of some other constitutionally acceptable procedure;

q) utilize a needle that is too large to obtain intravenous access in a significant number of people;

r) permit individuals who have no medical training to be part of the execution team, and in some instances, to inject the lethal chemicals;

s) perform the entire lethal injection, including administering the chemicals, from a room adjacent to where the condemned inmate lies strapped to a gurney; and,

t) only permit doctors to pronounce death and sign the death certificate.

106. The risk of unnecessary pain and suffering during a lethal injection in Kentucky is also grave because Defendants have not and will not consider the individual characteristics of each Plaintiff in determining the dosage of thiopental to administer to each Plaintiff during his execution.

107. Defendants' failure to take into consideration the individual circumstances of each Plaintiff in determining the quantity of thiopental to administer during their executions, and unwillingness to modify the amount as needed for each Plaintiff creates an unreasonable risk of unnecessary pain and suffering during their execution.

108. Plaintiff Ralph Baze is currently being treated with an acid reflux drug for a stomach condition.

109. Plaintiff Baze's medical condition substantially increases the likelihood that he will suffer a gastric reaction to the lethal injection chemicals.

110. Plaintiff Baze's medical condition substantially increases the likelihood that he will choke on vomit during his execution by lethal injection.

C. Facts relevant to a "cut down" procedure.

111. A "cut down" procedure is a surgical procedure used to obtain access to a vein when an intravenous port cannot be established.

112. A "cut down" procedure involves the use of a scalpel to make a series of incisions through the skin, the subcutaneous fat, and the underlying muscle, to reach the relatively deeply located central vein. The length of these incisions is in the range of two inches.

113. A "cut down" procedure can result in massive bleeding.

114. A "cut down" procedure can result in serious cardiac arrhythmias (abnormal beating of the heart causing shock).

115. A "cut down" procedure can cause pneumothoras (lung collapse due to collection of air between the lung and chest wall).

116. The amount of pain suffered during a "cut down" procedure depends on the experience of the person performing the procedure.

117. "Cut down" procedures performed during an execution in Kentucky are conducted by inadequately trained personnel.

118. No member of the execution team is a nurse or doctor.

119. The most difficult and painful portion of a lethal injection is the insertion of the IV needle.

120. Members of the execution team have repeatedly had difficulty inserting IV needles during mock lethal injections.

121. "Cut down" procedures utilized during an execution in Kentucky are conducted without anesthetizing the condemned inmate.

122. A "cut down" procedure can cause death.

123. A "cut down" procedure is not the preferred medical procedure for obtaining venous access.

124. In the medical profession, a "cut down" procedure is only utilized when a "percutaneous" procedure is not possible.

125. A "percutaneous" procedure is less invasive, less painful, easier to administer, and cheaper than a "cut down" procedure.

126. A "cut down" procedure is not mandated by K.R.S. section 431.220.

127. In Kentucky, doctors and nurses are not involved in obtaining venous access.

128. In Kentucky, doctors and nurses are not permitted to intervene if complications arise from attempting to obtain venous access.

129. Defendants refuse to rule out the use of a "cut down" procedure to obtain venous access during an execution when accessing a vein becomes difficult.

130. The use of a "cut down" procedure despite alternative methods of obtaining venous access that pose less risk of causing death or extreme pain and suffering violates section 17 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution.

131. Defendants are unable to rule out the possibility that a cut down procedure will be used to access the veins of each Plaintiff.

132. The likelihood that a "cut down" procedure will be used during the execution of each Plaintiff is substantially increased because Defendants had difficulty accessing a vein during the only lethal injection they have carried out.

133. In executing Edward Harper on May 25, 1999, it took Defendants ten minutes to access his veins, which began with sticking the needle in his left arm and concluded with the needle in his left hand.

134. The difficulty accessing Edward Harper's vein during his execution in 1999 was an unanticipated problem.

135. The likelihood that a "cut down" procedure will be used in Kentucky also increases dramatically because Defendants utilize a needle that is too large to obtain venous access in most people.

136. Prolonged drug use damages veins, a condition called "bad veins."

137. "Bad veins" substantially increases the likelihood that a "cut down" procedure will be used to obtain venous access.

138. The likelihood that a "cut down" procedure will be used to obtain venous access substantially increases in a person with a prolonged history of intravenous drug use.

139. Defendants are aware that it is difficult to properly insert IV needles when a prisoner's veins have shrunk considerably because of longtime intravenous drug use.

D. Facts Relevant to the Due Process and Fundamental Fairness Claim.

140. The Due Process clause prevents a person from being sentenced to death and executed upon information that he is barred from refuting.

141. The Due Process clause requires notice and the opportunity to be heard prior to depriving a person of life, liberty, or property.

142. In Kentucky, inmates sentenced to death prior to March 31, 1998 are permitted to choose electrocution.

143. In order to make a knowing and intelligent choice between lethal injection and electrocution, death sentenced inmates must have an opportunity to review the entire execution procedures for both methods.

144. Defendants refuse to disclose the execution procedures that will be utilized in carrying out Plaintiffs' executions.

145. Due process and notions of fundamental fairness mandates that Defendants provide Plaintiffs with a copy of the execution procedures that will be used to extinguish their lives so that they can make an intelligent and knowing decision of a method of execution.

146. Due process and notions of fundamental fairness mandate that Defendants provide Plaintiffs with a copy of the execution procedures that will be used to extinguish their life so that they can independently determine whether a particular aspect of the lethal injection process may constitute cruel and unusual punishment, and to consult medical experts concerning that possibility.

147. Due process requires an evidentiary hearing on plaintiffs' claims prior to the scheduling of an execution date.

E. Facts Relevant to the Electrocution Claim.

148. Under K.R.S. section 431.220, condemned inmates sentenced prior to March 31, 1998, may choose between electrocution and lethal injection.

149. Plaintiffs will not select a method of execution.

150 The default method of execution in Kentucky is lethal injection.

151. Electrocution violates section 17 of the Kentucky Constitution and the Eighth Amendment of the United States Constitution.

152. Nebraska is the only state in the country that utilizes electrocution as the sole method of execution.

153. Warden Haeberlin, who is in charge of the prison where executions take place, has never been involved in an electrocution.

154. Execution by electrocution will cause Plaintiffs to consciously suffer an excruciatingly painful and protracted death.

155. The American Veterinary Medicine Association bans electrocution in the euthanasia of animals.

156. Electrocution causes death by asphyxia and cardiac arrest.

157. At least 2000 volts of electricity are necessary to cause heart death.

158. If heart death is not immediately achieved, execution by electrocution is excruciatingly painful.

159. During an execution by electrocution, the body fluids heat to a temperature near the boiling point of water.

160. Execution by electrocution causes third and fourth degree burns.

161. Third and fourth degree burns are extremely painful.

162. Consciousness is controlled by the brain.

163. The human skull insulates the brain from high voltage electricity.

164. If high voltage electricity does not reach the brain, Plaintiff will remain conscious during his execution.

165. There are documented cases of condemned inmates who were alive after the first administration of electricity.

166. Condemned inmates' hearts have beaten after the flow of electricity has stopped.

167. The continued beating of the heart after the cessation of the current indicates that unconsciousness was not instantaneous.

168. Respiratory movement has been observed in condemned inmates after the flow of electricity has stopped.

169. Respiratory movement indicates brain function and a lack of instant incapacitation.

170. Respiratory centers are located near deep pain centers.

171. Respiratory movement shows that the pain centers are not instantly destroyed.

172. If Plaintiffs are conscious during the electrocution, they will suffer an excruciatingly painful death by asphyxia and cardiac arrest.

173. Unnecessary pain and suffering is inherent in executions by electrocution.

174. Botched electrocutions have occurred in the United States.

175. Execution by electrocution causes mutilation of the body including:

a) severe burns to the face and scalp;

b) burns to the legs;

c) burns to other parts of the body;

d) discoloring of the skin;

e) layers of skin pealing and melting away;

f) contortion of the limbs, fingers, and toes;

g) vomiting blood;

h) vomiting drool; and,

i) occasionally exploding body parts.

176. The Commonwealth of Kentucky has carried out one execution by electrocution since 1962, the electrocution of Harold McQueen in 1997.

177. According to the post mortem examination of Harold McQueen conducted by the Western Regional Medical Examiner, McQueen suffered the following types of injuries from the electrocution:

a) a 1-2 mm ring like contact electrical burn encircling the parietal and frontal scalp, gray-brown in color, which was bordered by a 5mm –1 cm rim of pallor, which was bordered by a lateral rim of up to 3cm. of subcutaneous congestion;

b) a 17 x 6 cm. “irregular” contact electrical burn on the right calf just below the knee;

c) partially charred skin with blistering;

d) a 1-2 mm “C” shaped electrical burn on the right thigh;

e) pressure marks from the electric chair straps present on the face, back of head, extremities, and abdomen;

f) red-purple ecchymosis (escape of blood into the tissue) on the right bicep;

g) “irregular” red-purple ecchymosis on the upper left forearm; and,

h) a cluster of red-purple petechiae (hemmorrhage) on the dorsal right foot.

178. Execution by electrocution violates section 17 of the Kentucky Constitution and the cruel and unusual punishment clause of the Eighth Amendment because electrocution:

a) causes unnecessary pain and suffering;

b) creates a risk of unnecessary pain and suffering that is more than the Kentucky Constitution and the United States Constitution can tolerate;

c) mutilates the body;

d) serves no legitimate purpose considering the existence of readily available and less painful alternatives; and,

e) violates evolving standards of decency.

VI. CLAIMS FOR RELIEF

Claim A

179. Defendants are acting outside of, beyond, and in direct violation of their statutory authority by failing to provide a "continuous" administration of sodium thiopental.

Claim B

180. Defendants intend to extinguish Plaintiffs' lives by administering chemicals in a manner that will cause unnecessary pain, thereby depriving Plaintiffs of their right to be free from cruel punishment under section 17 of the Kentucky Constitution.

Claim C

181. Defendants intend to extinguish Plaintiffs' lives by administering chemicals in a manner that will cause unnecessary pain, thereby depriving Plaintiffs of their right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution.

Claim D

182. Defendants intend to extinguish Plaintiffs' lives by administering chemicals in a manner that creates a risk of unnecessary pain that is more than section 17 of the Kentucky Constitution tolerates.

Claim E

183. Defendants intend to extinguish Plaintiffs' lives by administering chemicals in a manner that creates a risk of unnecessary pain and suffering that is more than the cruel and unusual punishment clause of the Eighth Amendment tolerates.

Claim F

184. Defendants inadequate execution procedures create a risk of unnecessary pain and suffering that is more than section 17 of the Kentucky Constitution tolerates.

Claim G

185. Defendants inadequate execution procedures creates a risk of unnecessary pain and suffering that is more than the cruel and unusual punishment clause of the Eighth Amendment tolerates.

Claim H

186. The use of pavulon (pancurium bromide) does not conform with evolving standards of decency, and, thereby, violates section 17 of the Kentucky Constitution.

Claim I

187. The use of pavulon (pancurium bromide) does not conform with evolving standards of decency, and, thereby, violates the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.

Claim J

188. The use of a "cut down" procedure creates a risk of unnecessary pain and suffering that is more than section 17 of the Kentucky Constitution tolerates.

Claim K

189. The use of a "cut down" procedure creates a risk of unnecessary pain and suffering that is more than the cruel and unusual punishment clause of the Eighth Amendment tolerates.

Claim L

190. The chemicals Kentucky uses in lethal injection executions create an unacceptable risk of unnecessary pain and suffering in violation of section 17 of the Kentucky Constitution.

Claim M

191. The chemicals Kentucky uses in lethal injection executions create an unacceptable risk of unnecessary pain and suffering in violation of the cruel and unusual punishment clause of the Eighth Amendment tolerates.

Claim N

192. Defendants refusal to provide Plaintiffs with a complete copy of the execution procedures for extinguishing Plaintiffs' lives violates due process and fundamental fairness under the Kentucky Constitution.

Claim O

193. Defendants refusal to provide Plaintiffs with a complete copy of the execution procedures for extinguishing Plaintiffs' lives violates the Due Process Clause of the United States Constitution and fundamental notions of fairness.

Claim P

194. Execution by electrocution constitutes cruel punishment under section 17 of the Kentucky Constitution.

Claim Q

195. Execution by electrocution constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

Claim R

196. Execution by electrocution creates a risk of unnecessary pain and suffering that is beyond the amount tolerated by section 17 of the Kentucky Constitution.

Claim S

197. Execution by electrocution creates a risk of unnecessary pain and suffering that is beyond the amount tolerated by the Eighth Amendment to the United States Constitution.

VII. PRAYER FOR RELIEF

198. Plaintiffs request that this Court grant a temporary restraining order and preliminary injunction barring Defendants from scheduling Plaintiffs' execution in the manner they currently utilize for carrying out lethal injections in Kentucky, and enter a declaratory judgment that the current manner for carrying out lethal injections violates both the Kentucky Constitution and the United States Constitution.

199. Plaintiffs request that this Court grant a temporary restraining order and preliminary injunction barring Defendants from scheduling Plaintiffs' execution by a lethal injection process that utilizes an inadequate anaesthetic (i.e sodium thiopental), and enter a declaratory judgment that the usage of sodium thiopental violates both the Kentucky Constitution and the United States Constitution.

200. Plaintiffs request that this Court grant a temporary restraining order and preliminary injunction barring Defendants from scheduling Plaintiffs' execution by a lethal injection process that utilizes Pavulon, and enter a declaratory judgment that the usage of pavulon violates both the Kentucky Constitution and the United States Constitution.

201. Plaintiffs request that this Court grant a temporary restraining order and preliminary injunction barring Defendants from scheduling Plaintiffs' execution by a lethal injection process that utilizes a "cut down" procedure to obtain venous access, and enter a declaratory judgment that the use of a "cut down" procedure violates both the Kentucky Constitution and the United States Constitution.

202. Plaintiffs request that this Court grant a temporary restraining order and preliminary injunction barring Defendants from scheduling Plaintiffs' execution by a lethal injection process that does not provide a "continuous" administration of sodium thiopental, and enter a declaratory judgment that Defendants' execution procedures violate K.R.S. section 431.220.

203. Plaintiffs request that this Court grant a temporary restraining order and preliminary injunction barring Defendants from scheduling Plaintiffs' execution until Defendants provide Plaintiffs with a complete copy of the execution procedures Defendants intend to use in carrying out Plaintiffs' executions, and enter a declaratory judgment that the failure to disclose the execution procedures violates due process and fundamental notions of fairness.

204. Plaintiffs request that this Court enter a declaratory judgment that execution by electrocution violates section 17 of the Kentucky Constitution.

205. Plaintiffs request that this Court enter a declaratory judgment that execution by electrocution violates the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.

206. Plaintiffs request such further relief that this Court finds necessary.

RESPECTFULLY SUBMITTED,

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IN THE CIRCUIT COURT
FOR FRANKLIN COUNTY
COMMONWEALTH OF KENTUCKY

RALPH BAZE, and, THOMAS C. BOWLING, Plaintiffs, v. JONATHAN D. REES, Commissioner, Kentucky Department of Corrections, Frankfort, Kentucky GLENN HAEBERLIN, Warden, Kentucky State Penitentiary, Eddyville Kentucky, and, UNKNOWN EXECUTIONERS, Defendants.	CIV. ACTION # _____ **CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION (LETHAL INJECTION BRIEF)**

I. INTRODUCTION

In 1999, Kentucky injected Edward Harper with a tri-chemical cocktail – first a barbiturate to render Harper unconscious (sodium thiopental), next a paralyzing agent (pavulon), and finally a vein-burning, heart stopper (potassium chloride). After Harper was strapped to a gurney, it took ten to fifteen minutes and three stabs with a large needle before untrained lay executioners located a vein. It took another twelve minutes after the chemicals were injected for Harper to be pronounced dead.

Harper's toxicology report presents a 67% to 100% probability that he was conscious when pavulon (banned in the euthanasia of animals) paralyzed him and potassium chloride seared through his body and stopped his heart. Such a death shocks the conscious and contradicts evolving standards of decency. It violates K.R.S. section 431.220, Section 17 of the Kentucky Constitution and the Eighth Amendment cruel and unusual punishment clause of the United States Constitution.

This case is about Defendants' ability to extinguish human life in a manner consistent with section 17 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution in the face of compelling evidence that they are incompetent to do so. It is about whether Defendants can execute Plaintiffs when they are aware that their procedure likely will result in Plaintiffs' consciously feeling the pain of pavulon and potassium chloride as occurred with the execution of Edward Harper in 1999. It is about how Defendants, have ignored and plan to continue ignoring the express instructions of the General Assembly for carrying out humane executions. It is about

whether Defendants can execute Plaintiffs in a secretive manner that even Plaintiffs and their legal counsel are not fully aware of. It is about evolving standards of decency and the very blunt question– where a Kentucky veterinarian is prohibited from using a class of drugs to euthanize a dog–may Defendants use those drugs to kill a human being? It is about whether Defendants are allowed to stick a knife two inches into Plaintiffs' unaesthetized body (which can result in bleeding to death, choking to death, dying from shock, and suffocating to death) despite readily available alternatives that pose much less risk of pain, suffering, or death. It is about whether Defendants can manipulate the system by scheduling an execution date to prevent a court from developing a sufficient record to determine whether Defendants' manner for carrying out lethal injections violates section 17 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution.

This case is also about a fundamental premise of humanity; whether an individual thoroughly despised by the polity remains a human being possessed of common human dignity.

II. SUMMARY OF ARGUMENT

Defendants intend to execute Plaintiffs in direct violation of Kentucky and federal law, utilizing a secret procedure that they will not disclose in its entirety to Plaintiffs, and in a manner that likely will cause extreme pain and suffering. Executions by lethal injection in Kentucky are governed by K.R.S. section 431.220, which requires the "continuous" administration of a drug or combination of drugs sufficient to cause death. Kentucky's "Execution Procedures" (administrative regulations for carrying out executions that will be followed in carrying out Plaintiffs' executions) expressly do not permit the continuous administration of a barbiturate or any other drug.[1]

[1] Barbiturates are commonly used to reduce pain. During an execution, a barbiturate is injected to render the condemned inmate unconscious so the inmate does not feel the pain caused by the other chemicals.

Administrative regulations cannot contradict state statutes nor can administrative agencies disregard a statute. By failing to abide by K.R.S. section 431.220 in carrying out executions, Defendants are in violation of state law, and also in violation of the doctrine of separation of powers as the "Execution Procedures" constitute an illegal exercise of administrative authority.

Aside from the statutory violations, the current manner for carrying out lethal injections in Kentucky violates section 17 of the Kentucky Constitution, and the cruel and unusual punishment clause of the Eighth and Fourteenth Amendments to the United States Constitution. These provisions are violated when a particular means of effectuating a punishment 1) constitutes a lingering death as characterized by the unnecessary infliction of pain beyond that which is necessary to inflict death, 2) creates a risk of unnecessary pain and suffering, or 3) no longer conform with evolving standards of decency. Kentucky's "Execution Procedures" for lethal injection violate all three prongs.

Two of the three chemicals administered under Kentucky's "execution procedures" are likely to cause Plaintiffs to suffer an extremely painful death. The first chemical, sodium thiopental, is a barbiturate that acts as a sedative. Many people build up a resistance over the years to barbiturates, like sodium thiopental, which begins to wear off almost immediately, increasing the likelihood that Plaintiffs will be conscious during execution. Toxicology reports from the only lethal injection carried out in Kentucky demonstrate that the thiopental either wore off quickly or never reached Edward Harper's veins. Harper's postmortem thiopental levels were so low that it is between 67% and 100% guaranteed that he was conscious during his execution, and feeling the extreme pain and suffering caused by the other two chemicals.

Kentucky's second chemical, pavulon, paralyzes the body and causes extreme pain by suffocation in a conscious individual. For this reason, the American Veterinary Medical Association along with 19 states, including Kentucky, has banned its use in the euthanasia of animals. The use of pavulon violates evolving standards of decency. Moreover, pavulon is unnecessary in lethal injections as it only serves to prevent witnesses from observing the inmate's physical reaction to the chemicals.

In order to administer lethal injection chemicals, Defendants must obtain venous access. In many individuals, particularly drug abusers, alternative methods of obtaining venous access must be utilized. Kentucky has refused to affirm or deny whether it will use a cut down procedure. All states that have addressed this issue, however, use a "cut down" procedure to obtain venous access. A "cut down" procedure poses significant risks of unnecessary pain, and is unnecessary in light of safer medical procedures that do not pose a high risk of bleeding, choking, or suffocation.

Regardless of whether or not any risk factors have been identified for an individual condemned prisoner, it is impossible to rule out the need for a cut down prior to an execution. No risk factors had been identified for Edward Harper, for instance, and yet it took three stabs with a needle to access a vein. Furthermore, the likelihood that a cut down procedure will be necessary in any Kentucky execution by lethal injection is substantially increased by the lack of adequate preparation and training of the execution team and the inadequate execution procedures. Despite the fact that it took three stabs and ten minutes to locate a vein during the execution of Harper in 1999, Defendants have neither taken any additional measures to ensure that the "execution team" is properly trained in inserting a catheter, nor taken any precautions to ensure availability of an

alternative method of obtaining venous access, one that comports with constitutional mandates. The failure to do so, despite 1) recognizing that administering an IV line is the most difficult part of the lethal injection process particularly in an IV drug user; 2) knowing the potential risks of a "cut down" procedure; and, 3) the strong probability that it will be used in carrying out Plaintiffs' executions, creates a risk of unnecessary pain and suffering that is more than the state or federal constitution tolerates.

The chemicals utilized in Kentucky lethal injections, the "cut down" procedure, the lack of adequate training of the execution team, and the inadequate execution procedures create such a high risk of unnecessary pain and suffering during an execution that Plaintiffs are denied the basic constitutional right to death with the "dignity of man." Furthermore, Defendants failure to take adequate measures to ensure that the condemned inmate is unconscious in light of 1) known evidence showing that Edward Harper was conscious during his execution; 2) medical conditions that create a strong probability that Plaintiffs will have an adverse reaction to the chemicals; and, 3) the probability that a "cut down" procedure will be necessary, constitutes deliberate indifference towards known and reasonably anticipated medical needs. For these reasons, Plaintiffs are entitled to equitable relief in the form of a temporary restraining order, preliminary injunction, and declaratory relief, barring their execution by lethal injection until Defendants can bring their "Execution Procedures" into conformity with constitutional principles.

III. ARGUMENT

This portion of the memorandum of law proceeds in nine parts.

Part A provides an overview of legal principles relevant to each claim for relief.

Part B establishes that the chemicals that Defendants use during lethal injections, which are

not mandated by statute, create a risk of unnecessary pain and suffering that is more than the state and federal constitutions tolerate. Defendants' intent to utilize these chemicals (despite knowledge that individual physical characteristics of the Plaintiffs substantially increase the likelihood that the chemicals will cause them extreme pain) constitutes "deliberate indifference" to serious medical needs.

Part C establishes that Defendants' execution procedures and the lack of adequate safeguards creates a risk of unreasonable pain and suffering that is more than the state and federal constitutions tolerate.

Part D establishes that Defendants' execution procedures violate K.R.S. section 431.220 because, according to a letter from the Department of Corrections, the procedures fail to utilize a continuous administration of the short acting barbiturate and other drugs.

Part E establish that Defendants use of Pavulon, a chemical that is unnecessary in the execution process and banned for the euthanasia of animals, violates evolving standards of decency.

Part F proves that the use of a "cut down" procedure violates section 17 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution, and that Defendants' failure to design alternative measures of venous access in light of knowledge that obtaining venous access has been difficult in the past constitutes "deliberate indifference" towards serious medical needs.

Part G establishes that Defendants' failure to disclose the entire execution procedures violates due process and notions of fundamental fairness.

Part H establishes that Plaintiffs are entitled to declaratory relief, a temporary restraining order, and a preliminary injunction barring Defendants from scheduling Plaintiffs' execution dates

during the pendency of this litigation.

Part I establishes that Plaintiffs' claims are ripe for adjudication.

A. Overview of Relevant Legal Principles.

1. Cruel and Unusual Punishment under section 17 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution

An inquiry into whether an execution procedure violates section 17 of the Kentucky Constitution or the Eighth Amendment to the United States Constitution focuses on: 1) the physical pain inflicted during the particular means for carrying out a lethal injection; 2) the risk of pain caused by the means for carrying out a lethal injection; and 3) whether evolving standards of decency condemn the means for effectuating a sentence of death.

First, a punishment is cruel when it involves "something more than the mere extinguishment of life," such as "torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). This definition, however, "proscribes more than physically barbarous punishments." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). It "forbids the infliction of unnecessary pain in the execution of the death sentence." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *accord Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (holding that the Eighth Amendment prohibits punishments that "involve the unnecessary and wanton infliction of pain. Among the 'unnecessary and wanton' inflictions of pain are those that are "nothing more than the purposeless and needless imposition of pain and suffering," *Francis*, 329 U.S. at 463, and those that are "totally without penological justifications." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (*quoting Gregg*, 428 U.S. at 183); *Workman v. Commonwealth*, Ky App., 429 S.W.2d 374, 378 (1968) (holding that a punishment is cruel and unusual when "it exceeds any legitimate penal aim").

Thus, in determining whether a punishment constitutes unnecessary pain, a court must judge the cruelty of the method of execution in light of currently available alternatives. *Workman*, 429 S.W.2d at 378 (a cruel and unusual punishment approach "should always be made in light of developing concepts of elemental decency."); *Furman v. Georgia*, 408 U.S. 238, 430 (1970) (Powell, J., dissenting) ("[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.").

"[D]eliberate indifference to serious medical needs of prisoners [also] constitutes the unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment." *Gamble*, 429 U.S. at 104. "Deliberate indifference" means that "the official was subjectively aware of the risk." *Farmer v. Brennan*, 511 U.S. 825, 828-29 (1994). In other words, a plaintiff must establish that "the official knows of and disregards an excessive risk to inmate health or safety." *Id*. at 837. Therefore, "[i]n order to state a cognizable claim, a [plaintiff] must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Gamble*, 429 U.S. at 106.

Second, lurking in the background of whether a punishment is cruel and unusual is the risk of error that the Eighth Amendment tolerates. In capital cases, as in other cases, the teaching of the Supreme Court's cases is that Eighth Amendment adjudication cannot proceed just by correcting ugly but isolated instances of deviation from generally acceptable standards of procedure. Rather, it must be concerned with assuring that general procedures themselves are adequately designed and maintained to avoid undue risks of inflicting inhumane punishments. *Farmer v. Brennan*, 511 U.S. at 846 (acknowledging that the focus of the inquiry is whether there exists an "objectively intolerable risk of harm"); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding that the "Eighth Amendment analysis "requires a court to assess whether society considers the risk that the prisoner

complains of." *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994) (holding that an Eighth Amendment challenge to a method of execution must be considered in terms of the risk of pain).

Finally, the cruel and unusual punishment clause has an "expansive and vital character," *Weems v. United States*, 217 U.S. 349, 373 (1909), that has been interpreted "in a flexible and dynamic manner." *Stanford v. Kentucky*, 492 U.S. 361, 371 (1989). Consistent with this expansive and flexible reading, the cruel and unusual punishment clause "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop*, 356 U.S. at 101; *accord Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), which "changes with the continual development of society and with sociological views." *Workman*, 429 S.W.2d at 377; *accord*, *Robinson v. California*, 370 U.S. 660, 666 (1962).

"Although the Constitution contemplates . . . that the Court's judgment will be brought to bear . . . , to the maximum extent possible, [these] 'evolving standards should be informed by objective factors,'" *Atkins v. Virginia*, 536 U.S. 304, 312 (*quoting Penry*, 492 U.S. at 331, *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)),[2] which include historical evidence, the consensus of the international community, and legislative developments within the states. *Atkins*, 536 U.S. at 312-16; *see also Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (recognizing that international law is a legitimate factor for this Court to consider as an objective indicator of contemporary standards). According to the Court, "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the countries legislatures." *Id*. at 312 (*quoting Penry*, 492 U.S. at 331).

[2] *See also Thompson v. Oklahoma*, 487 U.S. 815 (1988) (invalidating the death penalty for fifteen-year olds, noting that all eighteen states to consider a minimum age for imposing the death penalty require a defendant to be at least sixteen years of age); *Enmund v. Florida*, 458 U.S. 782, 786-88 (1982) (invalidating the death penalty for felony murder, emphasizing that only eight of thirty-six jurisdictions authorized similar punishments); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that it was cruel and unusual punishment to impose a death sentence for rape, where only three states permitted such a sentence).

But, the number of states enacting legislation is not as important as the "consistency of the direction of change." *Atkins*, 536 U.S. at 315.

2. Statutory Violations.

As a corollary of the separation of powers doctrine, the delegation doctrine permits the legislature to delegate authority to implement law, but prevents the legislature from delegating authority to make law. *Legislative Research Com'n by and through Prather v. Brown*, Ky., 664 S.W.2d 907, 915 (1984). Therefore, administrative powers, but not legislative powers, may be conferred upon a board or administrative agency. *Bloxton v. State Highway Commission*, Ky., 8 S.W.2d 392 (1928). Under this principle, delegation of legislative authority is only proper when the legislative scheme is essentially complete on its face leaving administrative rather than policy decisions to the regulatory authority. *Louisville and Jefferson County Planning Commission v. Schmidt*, Ky., 83 S.W.3d 449, 455 (2001).

3. Due Process

Substantive due process prevents the deprivation of a fundamental right. Procedural due process demands that citizens be given a meaningful opportunity to attest a constitutional violation. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (June 28, 2004). The central meaning of procedural due process is clear:

> parties who rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.

Id. at 2649 (*quoting*, *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

The "process due in any given circumstance is determined by weighing 'the private interest

that will be affected by the official action against the government's asserted interest 'including the functions involved and the burdens the Government would face in providing greater process.'" *Hamdi*, 124 S.Ct. at 2646 (*quoting, Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

4. Standards for granting injunctive relief and declaratory judgment

Injunctive relief and declaratory judgment are equitable remedies that are granted in the discretion of the court. The factors that must be applied in determining whether to grant injunctive relief are: 1) whether the plaintiff will suffer irreparable injury if the injunction is not granted; 2) whether "the equities [are] in plaintiff's favor, considering the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo"; and, 3) whether a substantial question is at issue. *Commonwealth, et al. v. Picklesimer*, Ky., 879 S.W.2d 482, 484 (1994); *accord, Sturgeon Mining Company, Inc. v. Whymore Coal Company, Inc.*, Ky., 892 S.W.2d 591, 592 (1995).

Declaratory judgment is available to determine the validity of a statute despite the existence of another remedy unless a specific statute is clearly intended to provide an exclusive remedy. *Iroquois Post No. 229, Am. Legion v. City of Louisville*, Ky., 279 S.W.2d 13 (1955); Kentucky Rules of Civil Procedure, Rule CR 57.

B. The Tri-chemical Cocktail Currently Utilized in Kentucky Lethal Injections Creates a Substantial Risk of Unnecessary Pain and Suffering During an Execution in Violation

of Section 17 of the Kentucky Constitution and the Eighth Amendment Cruel and Unusual Punishment Clause.

Kentucky's lethal injection protocol violates section 17 of the Kentucky Constitution and the Eighth Amendment cruel and unusual punishment clause because 1) each chemical utilized under the protocol by itself and in combination creates a risk of unnecessary pain and suffering that is more than the state or federal constitution tolerates, 2) toxicology reports demonstrate that many inmates have been conscious during their executions including Edward Harper in Kentucky, and 3) individual physical characteristics of the Plaintiffs create a substantial likelihood that they will either be resistant to the lethal injection chemicals or have an adverse reaction to the chemicals causing them to suffer excruciating pain that is unnecessary to carry out their sentence of death by lethal injection.

1. The combination of chemicals used to execute inmates in Kentucky creates a strong probability of unnecessary pain and suffering.

Defendants intend to execute Plaintiffs by poisoning them with a lethal combination of three chemical substances. None of these chemicals are mandated by statute. Thus, each or all of these chemicals could be eliminated from Defendants' execution procedures and replaced with other chemicals without calling into question the validity of the statute or requiring Defendants to expend a large amount of money. The three chemicals are: Sodium Thiopental (or Sodium Pentothal); (Pancuronium Bromide (also called Pancurium Bromide, or Pavulon); and, potassium chloride. A letter from the Department of Corrections in response to an Open Records Act request states as much:

a. Thiopental (pentothal) - 2 grams (G)

b. Pavulon (Pancurium Bromide) - 50 milligrams (MG)

c. Potassium Chloride - 240 milliequivalents (MEQ)

Letter from the Kentucky Department of Corrections, dated May 14, 2002 (exhibit 1).[3]

Sodium thiopental is an ultra short acting barbiturate that begins to wear off almost immediately.

Pavulon is a curare-derived agent, which paralyzes all skeletal or voluntary muscles, but which has no effect on awareness, cognition, or sensation.

Potassium chloride is an extraordinarily painful chemical which activates the nerve fibers lining the inmate's veins, and which interferes with the rhythmic contractions of the heart causing cardiac arrest

These chemicals are identical to those used in North Carolina, South Carolina, and many other states, which use lethal injection as a method of execution. *See* Affidavit of Dr. Mark Heath, M.D. (exhibit 7); *see also* Deborah Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 106, n. 303 (2002) [hereinafter Denno, *Lethal Injection*]. While there are concerns about whether any of these chemicals should be used in the execution process, it is clear that combining these chemicals violates constitutional protections. Far from producing a rapid and sustained loss of consciousness and humane death, the particular combination of chemicals utilized in Kentucky often causes inmates, such as Edward Harper in Kentucky (*see infra* this section), to

[3] This letter was filed on behalf of another individual on death row. Prior to becoming aware of this letter, Plaintiffs filed an Open Records Act request for the entire execution procedures. *See* exhibit 2. The request was promptly denied. *See* exhibit 3. Shortly before initiation the instant lawsuit, Plaintiffs again filed an Open Records Acts request for the entire execution procedures for lethal injection, *see e*xhibit 4, and electrocution. *See* exhibit 5. This

consciously suffer an excruciatingly painful and protracted death. The sequence of the administration of the chemicals and failure to provide professional medical monitoring of the effects of the drugs virtually assures that the objectionable character of the lethal injection chemicals will go undetected.

a. **Sodium thiopental – Kentucky's first drug**

request also was promptly denied. *See* exhibit 6.

Kentucky's execution procedures require that 2 grams of sodium thiopental be injected into the condemned prisoner prior to the injection of any other chemicals. Sodium thiopental, or sodium pentothal, which is commonly used during surgery as an introductory anesthetic, is a short-acting barbiturate that renders the patient unconscious for only a few minutes. Thus, the patient may re-awaken and breathe on his or her own power if any complications arise in inserting a breathing tube pre-surgery. Sodium thiopental begins to wear off immediately and will "dissipate after five to seven minutes." *State v. Webb*, 750 A.2d 448, 451-52 (Conn. 2000); *accord, Drug Companies and Their Role in Aiding Executions, available at*, www.ncadp.org/html/report.htm, *quoting*, Dr. Lawrence Egbert, Visiting Assistant Professor of Anesthesiology, John Hopkins Medical School (stating that sodium pentothal "begins to wear of almost immediately, rendering the person conscious within minutes") (exhibit 8). Because of sodium thiopental's brief duration, Kentucky's failure to provide a continuous administration of sodium thiopental, the likelihood that the thiopental would not reach the inmate's bloodstream, and the low quantity administered, there is a high likelihood that sodium thiopental may not provide a sedative effect throughout the entire execution process --which lasts more than seven minutes. This is exactly what happened when Defendants executed Edward Harper, whose thiopental levels show at least a 67% percent probability that he was conscious during his execution. *See* Autopsy Report of Edward Harper (exhibit 9); Toxicology report of Edward Harper specimen blood-right axilla (exhibit 10); Toxicology report of Edward Harper specimen blood-vena cava (exhibit 11); Toxicology report of Edward Harper specimen blood-heart (exhibit 12); Toxicology report of Edward Harper thiopental level in the right axilla as plotted on Dr. Dershwitz's Exhibit D (exhibit 13); Toxicology report of Edward Harper thiopental level in the vena cava as plotted on Dr. Dershwitz's Exhibit D (exhibit 14); Toxicology report of

Edward Harper thiopental level in the heart as plotted on Dr. Dershwitz's Exhibit D (exhibit 15).[4]

According to Dr. Mark Heath, Assistant Professor of Clinical Anesthesia at Columbia University, in the present of pavulon induced paralysis, the failure to administer a continuous infusion of sodium thiopental creates a situation where the prisoner may emerge from anesthesia, and be conscious, paralyzed, and suffering. Affidavit of Dr. Heath (exhibit 7). As Dr. Dennis Geiser, the chairman of the Department of Large Animal Clinical Sciences at the College of Veterinary Medicine at the University of Tennessee, recently explained:

> Sodium thiopental is not a proper anesthetic for use in lethal injection. Indeed, the American Veterinary Medical Association standards for euthanasia indicate that the ideal barbituric acid derivative for animal euthanasia should be potent, long acting, stable in solution, and inexpensive. Sodium pentobarbital (not sodium thiopental) best fits these criteria. Sodium thiopental is a potent barbituric acid derivative but very short acting with one therapeutic dose.

Affidavit of Dr. Dennis Geiser, in the case of *Texas v. Jesus Flores*, No. 877,994A (exhibit 16).

In Kentucky, only two grams of thiopental is administered. As Dr. Heath explains, the risk that the inmate will be conscious, and, therefore, suffer excruciating pain masked by pavulon is

[4] This probably was also the case during the execution of Stephen McCoy in Texas. McCoy reacted violently to the drugs; his chest heaved, he gasped for air, and appeared to be choking. According to Texas' Attorney General, the first chemical, sodium thiopental, "might not have sedated McCoy enough so that when the second chemical sodium pancurate began to act and cut off his breathing, he was conscious as he suffocated." Kathy Fair, *Witness to an Execution*, HOUSTON CHRONICLE, May 27, 1989 (exhibit 51); Matt Bean, *Lethal Injection-The Humane Alternative*, COURT T.V. ONLINE, *available at*, http://www.courttv.com/news/mcveigh_special/botched_ctv.html (exhibit 52).

greater in Kentucky than in most other states because Kentucky administers a much lower dosage of thiopental than most states. Affidavit of Dr. Heath (exhibit 7). Even assuming, *arguendo*, that two grams of thiopental would render a particular inmate unconscious, as discussed *infra*, Kentucky's "Execution Procedures" creates a high risk that the sodium thiopental will not reach the inmate's bloodstream, rendering the inmate conscious throughout the execution as occurred when Kentucky executed Edward Harper in 1999.

There is also a probability that the sedative effect of the sodium thiopental is neutralized by Kentucky's second chemical, pavulon. As Dr. Heath states:

> Sodium Thiopental is not used to maintain a patient in a surgical plane of anesthesia for purposes of performing surgical procedures. It is unnecessary, and risky, to use a short-acting anesthesia in the execution procedure. If the solution of sodium thiopental comes into contact with another chemical, such as pancuronium bromide, the mixture of the two will cause the sodium thiopental immediately to crystallize. These factors are significant in the risk of the inmate not being properly anesthetized, especially since no-one checks that the inmate is unconscious before the second drug [pancuronium] is administered.

Affidavit of Dr. Heath (exhibit 7).

These concerns with the usage of sodium thiopental are heightened by the lack of medical personnel,[5] the lack of proper monitoring of the inmate during the process,[6] and the lack of inmate-specific dosage of the barbiturate. According to Dr. Geiser:

> [T]he dosage of thiopental sodium must be measured with some degree of precision, and the administration of the proper amount of the dosage will depend on the

[5] K.R.S. section 431.220 prevents doctors from having involvement in an execution except to pronounce death.

[6] The chemicals are administered by a volunteer executioner physically situated outside the execution chamber. *See* Associated Press, *Kentucky Ready to Execute Prisoners by Lethal Injection*, THE EVANSVILLE COURIER, July 26, 1998 at A 5 (exhibit 17).

> concentration of the drug and the size and condition of the subject. Additionally, the drug must be administered properly so that the full amount of the dosage will directly enter the subject's blood stream at the proper rate. If the dosage is not correct, or if the drug is not properly administered, then *it will not adequately anaesthetize the subject, and the subject may experience the untoward effects of the neuromuscular blocking agent. . . .*

Affidavit of Dr. Dennis Geiser, in the case of *Abu-Ali Abdur' Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000) (emphasis supplied) (exhibit 18). Thus, "[e]ven a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation." *Heckler v. Cheney*, 718 F.2d 1174, 1191 (D.C. Cir. 1983).

"In order to determine the proper concentration of lethal injection chemicals, chemicals should be designated in two ways: 1) by weight . . . and 2) by volume. The volume of dilutent for chemicals should be 1) at least large enough so that all the chemicals will be dissolved, and 2) sufficiently dilute so that it will not irritate the inmate's vein and cause the inmate pain" or clog the veins. Denno, *Lethal Injection*, at 119. Furthermore, because people differ in physiological composition "as well as their drug tolerance . . . some prisoners may need a far higher dosage of sodium thiopental than others 'before losing consciousness and sensation.'" *Id*. at 108, *citing*, Affidavit of Brunner, *infra*; *see also*, *Webb*, 750 A.2d at 452 (noting that "the effect of thiopental sodium varies from person to person"). By administering the same quantity of sodium thiopental to all inmates subject to execution while not specifying the volume or concentration of the chemical, Kentucky's usage of sodium thiopental during lethal injection creates a high probability that the inmate will not be rendered unconscious before the other drugs are administered.

Not only is there a high probability that sodium thiopental will not serve its only purpose during lethal injection, to render the inmate unconscious, but there is also a high probability that sodium thiopental will cause the inmate to suffer a painful and excruciating death. Drug

manufacturers warn that without careful medical supervision of dosage and administration, sedatives including sodium thiopental can cause "paradoxical excitement" and can heighten sensitivity to pain. *See* Physicians Desk Reference, 56th Ed. (2002) at 485-87, 877 (exhibit 19). For this reason, manufacturers warn against administration by intravenous injection unless a patient is unconscious or out of control. *Id*. Moreover, sodium thiopental is likely to cause a person to choke or gag and aspirate stomach contents when administered within eight hours of consuming any food or beverage. *See* Denno, *Lethal Injection*, at 123, *citing*, Affidavit of Edward A. Brunner, M.D., Ph.D., Exhibit B of Verified Complaint in Chancery, *Gacy v. Peters*, No. 94 CH (Ill. April 1994).

As demonstrated above, it is predictable that sodium thiopental will either fail to render the inmate unconscious, causing the inmate to suffer excruciating pain from the other chemicals, including the pain of suffocation, or will cause unnecessary pain in and of itself. For these reasons, the usage of sodium thiopental, as currently administered in Kentucky, creates an unacceptable risk that the inmate will suffer an excruciatingly painful death, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and section 17 of the Kentucky Constitution.

b. Pavulon

The second chemical Kentucky injects in the lethal injection process is pavulon (also called pancurium bromide, and pancuronium bromide) a derivative of curare that acts as a neuromuscular blocking agent. In other words, pavulon paralyzes the body and collapses the organs, causing suffocation. If, as is probable in the Kentucky execution process, the sedative effect of the sodium thiopental is ineffective or neutralized, the pavulon would serve only to mask the excruciating pain

of the condemned inmate while he or she suffocates to death.[7] According to Dr Heath,

> [i]n the lethal injection process, Pancuronium bromide makes the prisoner appear serene because of its paralytic effect on the muscles. The facial muscles cannot move or contract to show pain and suffering, and become relaxed and thereby generate an impression of tranquility. Pancuronium shrouds the procedure like a chemical veil to the procedure. Because pancuronium bromide is an invisible chemical veil and not a physical veil like a blanket or hood that is easily identifiable, the use of this chemical in lethal injection deceives observers into believing they have witnessed a humane event. Pancuronium obscures the fact that there is a disguise over the process. Thus, visual monitoring by citizen witnesses, counsel for the inmate, medical and prison personnel is rendered meaningless, as these individuals are unable to make any determination as to whether the procedure is humane.

Affidavit of Dr. Heath (exhibit 7).

In *Abdur' Rahman v. Bell*, Dr. Geiser asserted that while Pavulon paralyzes skeletal muscles, including the diaphragm, it has *no effect on consciousness or the perception of pain or suffering*.

Experiencing the effects of Pavulon is ***like being tied to a tree, having darts thrown at you, and feeling the pain without any ability to respond.*** Exhibit 18 (Affidavit of Dr. Dennis Geiser in the case of *Abu-Ali Abdur' Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), *cert. granted* on other grounds, 122 S.Ct. 1463 (U.S. April 8, 2002) (No. 01-9094) (emphasis added)). This assertion is corroborated by the experience of eye surgery patient, Carol Weihrer. During Ms. Weihrer's surgery, the sedative she received was ineffectual meaning that Ms. Weihrer was conscious during the entire operation. Due to the administration of a neuromuscular blocking agent like pavulon,

[7] In this situation, the inmate would suffer an extremely painful and lengthy death by suffocation, which has been held unconstitutional by the Ninth Circuit. *See Fierro v. Gomez*, 77 F.3d 301, 308 (9th Cir. 1996) (holding that execution by lethal gas violates the Eighth Amendment because the inmate is likely to be conscious for fifteen seconds to one minute, and, during this period, the inmate is likely to suffer the intense physical pain of suffocation).

however, she was unable to indicate her consciousness to doctors:

> I therefore experienced what has come to be known as Anesthesia Awareness, in which I was able to think lucidly, hear, perceive and feel everything that was going on during the surgery, but I was unable to move. It burnt like the fires of hell. It was the most terrifying, torturous experience you can imagine. The experience was worse than death.

Affidavit of Carol Weihrer at ¶ 1 in the case of *Texas v. Jesus Flores*, No. 877,994A (exhibit 20). Thus, the combination of these kinds of chemical resulted in what is commonly known as "intraoperative awareness"; the horrifying experience in which a person who appeared sedated to trained medical personnel closely monitoring the operation actually was fully sensitive to the horrifying agony of having her eyeball removed, but was disabled from displaying her agony. "Intraoperative awareness" is a well-recognized complication of general anesthesia, and discussed at length in the professional literature. Also, significant professional medical research and training are directed at decreasing the incidence of these events.

Pavulon, not only is likely to cause severe pain, but also serves no legitimate purpose in an execution now that potassium chloride (rather than pavulon) is used to cause death. *See Abdur'Rahman v. Sundquist*, No. 02-2236-III (Tenn. Chancery Ct. 2003) (exhibit.21); *see also*, Denno, *Lethal Injection* at 96-98 (detailing that first lethal injection procedure did not use potassium chloride, but rather used pavulon to cause death). According to government experts, pavulon is used to prevent witnesses from observing outwardly aesthetically unpleasant reactions to the chemicals (including twitches, convulsions, and seizures) so that "a witness to an execution could not distinguish between a 'peaceful' or 'agonizing' death based upon [] reflex movements." *See* Affidavit of Dr. Carl Rosow (exhibit 22);[8] Testimony of Dr. Kris Sperry in *State v. Nance*, Superior

[8] Dr. Carl Rosow submitted an affidavit on behalf of the Ohio Department of Corrections in litigation concerning

Court, Indictment No. 95-B-2461-4 (exhibit 23).[9] As a result, witnesses to a lethal injection and the public in general will never realize that a cruel fraud is being perpetrated upon them - - instead of witnessing an inmate quiet and motionless while being "put to sleep," they witness the cover-up of a deliberate act of excruciating torture during which the inmate may be fully conscious.

Preventing the public from viewing the reactions to the chemicals and observing the condemned inmate's conscious pain and suffering is a purpose not recognized or allowed by the Kentucky Constitution or the Eighth Amendment. *See California First Amendment Coalition v. Woodford*, 2000 WL 33173913, *9 (N.D. Cal. July 26, 2000) (exhibit 24) (recognizing that "the public's perception of the amount of suffering endured by the condemned and the duration of the execution is necessary in determining whether a particular execution protocol is acceptable" under the cruel and unusual punishment clause"). Because the usage of pavulon serves no legitimate purpose during an execution and guarantees that the condemned inmate will be forced into a state of "chemical entombment" while the inmate consciously experiences the potassium chloride ravaging his internal organs, the use of pavulon in an execution violates the Kentucky Constitution and the

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the use of pavulon in Ohio lethal injections.

[9] Dr. Kris Sperry testified on behalf of the State of Georgia at an evidentiary hearing concerning the constitutionality of lethal injection on its face.

Defendants use of pavulon also intentionally deprives the public of its First Amendment right to view an execution by intentionally preventing the public from observing certain non-pleasant aspects of the execution. *See California First Amendment Coalition v. Woodford*, 299 F.3d 868, 877 (9th Cir. 2002). Defendants' interest in preventing the public from viewing the unpleasant aspects of lethal injection do not outweigh the public's right "to be reliably

Eighth Amendment cruel and unusual punishment clause.

c. Potassium Chloride

The third chemical Kentucky injects during a lethal injection execution, potassium chloride, also raises important Eighth Amendment concerns because it causes an extreme burning sensation. If an inmate is not properly anaesthetized, the inmate will suffer an excruciatingly painful death while the potassium chloride ravages his organs. Denno, *Lethal Injection*, *supra*; *Drug Companies and Their Role in Aiding Executions*, *supra* (attached as exhibit 8). The pain is so severe that the American Veterinary Medical Association states that the "administration of potassium chloride intravenously requires animals to be in a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli." *2000 Report of the American Veterinary Medical Association Panel on Euthanasia*, 218 Journal of the American Veterinary Medical Association, 669, 681 (2001)) (exhibit 25). If the pain is so excruciating that the veterinarians must be certain that an animal is unconscious before administering potassium chloride, then surely the same precautions to ensure that a condemned inmate is unconscious before injecting potassium chloride must be taken. But, as discussed *infra* part C, this is not the case, because Defendants inject the chemicals from outside the execution chamber and do not monitor the condemned inmate before injecting the second and third chemicals.

2. Toxicology Reports of Executed Inmates in North Carolina and South Carolina demonstrate that many death row inmates were conscious during their executions, thereby suffering the extreme pain caused by pavulon and potassium chloride.

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informed about [] lethal injection." *Id.* at 884.

According to Dr. Dershwitz,[10] a Professor of Anesthesiology at the University of Massachusetts, most people would be rendered unconscious by 7 mcg/ml (mcg/ml is the same as mg/L), meaning that the two grams of thiopental administered during lethal injections in Kentucky, North Carolina, and South Carolina, is sufficient to render a person unconscious (assuming that the 2 grams reaches the person's bloodstream). *See* Affidavit of Dr. Dershwitz (exhibit 26). To demonstrate this, Dr. Dershwitz has provided a graph that determines the likelihood of consciousness based upon the concentration of thiopental in the bloodstream. *See* Dr. Dershwitz's Exhibit D (exhibitt 27).[11] This graph, however, shows that condemned inmates in North Carolina and South Carolina probably were conscious during their execution, despite the administration of two grams of thiopental

a. North Carolina toxicology results.

By applying Dr. Dershwitz's theoretical model to inmates executed in North Carolina for whom blood levels of thiopental are available, it becomes quite clear that Dr. Dershwitz's graph shows that at least three inmates had a 100% probability of consciousness during their execution. When North Carolina executed Desmond Keith Carter, the Medical Examiner ascertained that Mr. Carter's blood contained only "trace" amounts of thiopental. *See* Toxicology Report of Desmond Keith Carter (exhibit 28). Assigning 2.6 mg/L for "trace amounts" and plotting this value on Dr. Dershwitz's Exhibit D produces a probability of consciousness for Mr. Carter of 100%. *See* Toxicology Report of Desmond Keith Carter's Postmortem Blood Concentration of Thiopental as

[10] Dr. Dershwitz appeared as an expert witness by affidavit for the State of South Carolina in litigation concerning its chemicals and procedures for carrying out lethal injections.

[11] As Dr. Dershwitz explains, Exhibit D was created from his pharmacodymamic analysis which shows the "probability that an average man will be conscious as a function of the blood concentration of thiopental. In other words, the concentrations of thiopental." Affidavit of Dr. Dershwitz at ¶7 (exhibit 26).

Plotted on Dr. Dershwitz's Exhibit D (exhibit 29). In the same fashion, plotting the 2.6 mg/L of thiopental found in Mr. Arthur Martin Boyd's blood, Toxicology Report of Arthur Martin Boyd (exhibit 30), likewise, produces a 100% probability of consciousness. *See* Toxicology Report of Arthur Martin Boyd's Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Exhibit D (exhibit 31). Plotting Michael Earl Sexton's thiopental blood value of 3.7 mg/L, *see* Toxicology Report of Michael Earl Sexton (exhibit 32) produces a 100% probability that he was conscious. *See* Toxicology Report of Michael Earl Sexton's Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Exhibit D (exhibit 33) Plotting Ronald Wayne Frye's thiopental blood value of 8.2 mg/L, *see* Toxicology Report of Ronald Wayne Frye (exhibit 34, produces a 40% probability that he was conscious. *See* Toxicology Report of Ronald Wayne Frye's Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Exhibit D (exhibit 35).

b. South Carolina toxicology results.

The toxicology results in South Carolina indicate that at least two death row inmates executed in South Carolina had a 100% likelihood of consciousness while many others probably were conscious during their executions. There was a 50% probability that Messrs. Larry Gilbert (thiopental blood level 7.1 mg/L) (exhibit 36); Louis Truesdale (thiopental blood level 7.5 mg/L) (exhibit 37), and Richard Johnson (thiopental blood level 7.8 mg/L) (exhibit 38) were conscious when injected with Pancurium Bromide and Potassium Chloride. Michael Passaro, thiopental level 6.1 mg/L (exhibit 41), Ronald Howard, thiopental level detected (exhibit 39), and Kevin Dean Young, thiopental level 3.4 mg/L (exhibit 40), had a greater likelihood of consciousness during their executions.

Plotting Mr. Howard's Sodium Thiopental blood levels onto Dr. Dershwitz's Exhibit D reveals a 100% probability that Mr. Howard was conscious throughout his execution. *See* Toxicology Report of Ronald Howard Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Exhibit D (exhibit 42). Similarly, Mr. Young's thiopental level establishes a 100% probability that he too was conscious throughout his execution. *See* Toxicology Report of Kevin Dean Young Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Exhibit D) (exhibit 43). Moreover, there is a 90% probability that Michael Passaro was conscious throughout his execution. *See* Toxicology Report of Michael Passaro Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Exhibit D) (exhibit 44); *see also,*Toxicology Report of Larry Gilbert Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Exhibit D)(exhibit 45); Toxicology Report of Louis Truesdale Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Exhibit D)(exhibit 46); Toxicology Report of Richard Johnson Postmortem Blood Concentration of Thiopental as Plotted on Dr. Dershwitz's Exhibit D)(exhibit 47).

In short, approximately, one quarter of all individuals subjected to lethal injection in South Carolina were conscious while they were suffocating from pavulon (banned in Kentucky for the euthanasia of animals), and suffering the agony of a potassium chloride induced heart attack.

3. Toxicology reports clearly demonstrate that Edward Harper was conscious during his execution in Kentucky, thereby suffering the extreme pain caused by pavulon and potassium chloride, and that the two grams of thiopental administered during Kentucky lethal injections is not reaching the condemned inmate's bloodstream.

Immediately after Edward Harper became the only person executed by lethal injection in Kentucky, members of the Department of Corrections reportedly stated their belief that Harper's

execution went smoothly as planned, and that Harper died peacefully. *See* Associated Press, *Harper's Remains to be Buried in Prison Cemetery*, ASSOCIATED PRESS NEWSWIRES, May 27, 1999 (exhibit 48). But, Harper's lethal injection was anything but painless. In fact, there is between a 67% and a 100% likelihood that Harper was fully conscious when the pavulon and potassium chloride ravaged his organs.

After Harper's execution, the Medical Examiner's Office took blood samples from three locations in his body: two locations in the vein, and one in the heart. *See* Autopsy Report of Edward Harper (exhibit 9). The thiopental level in each blood sample drawn from the vein was 3 mg/L. *See* Toxicology Report of Edward Harper specimen blood-right axilla (exhibit 10); Toxicology Report of Edward Harper specimen blood-vena cava (exhibit 11). The thiopental level in the heart was 6.5 mg/L, approximately twice the concentration of the blood. *See* Toxicology Report of Edward Harper specimen blood-heart (exhibit 12).

Plotting the 6.5 mg/L of thiopental on Dr. Dershwitz's Exhibit D reveals approximately a 67% likelihood of consciousness. *See* Toxicology Report of Edward Harper Postmortem Blood Concentration of Thiopental in heart as Plotted on Dr. Dershwitz's Exhibit D (exhibit 15). A 2/3 probability of consciousness is a risk that is much more than section 17 of the Kentucky Constitution and the Eighth Amendment of the United States Constitution tolerates. Plotting the 3 mg/L of thiopental on Dr. Dershwitz's Exhibit D reveals a 100% probability of consciousness. *See* Toxicology Report of Edward Harper Postmortem Blood Concentration of Thiopental in right axilla as Plotted on Dr. Dershwitz's Exhibit D (exhibit 13); Toxicology Report of Edward Harper Postmortem Blood Concentration of Thiopental in vena cava as Plotted on Dr. Dershwitz's Exhibit D (exhibit 14). Therefore, the most reliable indicator of consciousness shows that it is a virtual

certainty that Harper was conscious during his execution by lethal injection. But, no matter how one looks at the varying thiopental concentrations, there is at least a 2/3 likelihood that Harper was conscious when the pavulon and potassium chloride ravaged his system. A 2/3 likelihood of failure is unacceptable in all facets of society and surely is too high to be tolerated under the state and federal constitutions.

While these startling numbers demonstrate at least a 67% probability that Harper was conscious during his execution, the numbers alone do not explain why a low level of thiopental was found in Harper's bloodstream. Comparing the thiopental concentration to the concentration of pavulon in Harper's bloodstream, however, sheds light on this issue. According to the toxicology reports, the pavulon concentration in Harper's blood was 18 mg/L in the right axilla, 30 mg/L in the vena cava, and 39 mg/L in the heart. *See* Toxicology report of Edward Harper Postmortem Blood Concentration of Thiopental in right axilla (exhibit 10); Toxicology report of Edward Harper Postmortem Blood Concentration of Thiopental in vena cava (exhibit 11); Toxicology report of Edward Harper Postmortem Blood Concentration of Thiopental in heart (exhibit 12). Considering the low thiopental concentrations reported in Harper's toxicology reports and the quantity of pavulon administered, these numbers are surprising. Kentucky administers 50 mg/L of pavulon and 2 grams of thiopental. *See* Letter from Department of Corrections, dated May 14, 2002 (exhibit 1). While these two chemicals are different, the quantity of each drug in the bloodstream should be proportional to the amount administered. In other words, the concentration of pavulon in Harper's body was, depending on what part of the body the blood was drawn from, between approximately 40% and 80% of the quantity administered.[12] One would expect that the same percentage of

[12] The concentration of pavulon in Harper's bloodstream makes one wonder why there is such a discrepancy

thiopental would be in Harper's bloodstream. But this was not the case. Instead, the concentration of thiopental in Harper's bloodstream was a miniscule fraction of the concentration administered. The logical conclusion that can be drawn from this is that the full two grams of thiopental never reached Harper's bloodstream, but a relatively large dose of pavulon did reach his bloodstream. Therefore, it is virtually certain that Harper consciously felt the excruciatingly painful effect of pavulon and potassium chloride ravaging his internal organs; thereby, establishing a violation of section 17 of the Kentucky Constitution and the Eighth Amendment Cruel and Unusual Punishment Clause.

4. Mr. Baze's individual physical characteristics substantially increase the already strong likelihood that the lethal injection chemicals utilized in Kentucky will cause him to suffer excruciating pain and suffering during his execution.

As previously discussed, the chemicals Defendants use during lethal injections pose an unnecessary risk of pain and suffering for each Plaintiff during his execution. But, many medical conditions increase the likelihood that the chemicals utilized during lethal injections in Kentucky will cause extreme pain and suffering during a lethal injection. Individuals who suffer from seizure disorders, or regularly utilize barbiturates, build up a tolerance for thiopental that can neutralize the sodium thiopental or lessen the impact of the drug on a person's consciousness; thereby causing them to feel the excruciating pain of the lethal injection chemicals. Furthermore, the lethal injection chemicals can cause individuals with stomach disorders to vomit, which ordinarily would not be a problem. But, pavulon paralyzes the body, and, thereby prevents a person from spitting out the vomit; creating a strong probability that a person with a stomach condition would suffocate or choke on their own vomit. Mr. Baze and possibly Mr. Bowling suffer from at least one of these medical

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between the quantity of pavulon administered and the percentage of pavulon that reached the bloodstream.

conditions, thereby, substantially increasing the likelihood that they will suffer an extremely painful and lingering death.

Mr. Baze currently suffers from an acid reflux disorder. This disorder substantially increases the likelihood that he will have an adverse reaction to Kentucky's chosen lethal injection chemicals. The chemicals will likely aggravate his acid reflux disorder, resulting in vomiting. Normally, this would be a minor side effect to a drug that would cause little pain. But, that is not the case during an execution by lethal injection because pavulon paralyzes the body, preventing Mr. Baze from aspirating his vomit. As a result, his lungs will fill up with vomit causing him to suffocate while he chokes on the vomit that remains in his mouth; both extremely painful complications. The likelihood that these complications will occur during Mr. Baze's execution violates section 17 of the Kentucky Constitution and the Eighth Amendment Cruel and Unusual Punishment Clause because the risk of unnecessary pain is more than these constitutional provisions tolerate, particularly since pavulon serves no legitimate purpose, and all lethal injections could be carried out without the use of pavulon.

5. Conclusion.

There is no dispute that pavulon and potassium chloride cause excruciating pain in a conscious individual. Therefore, it is imperative to monitor each condemned inmate to ensure that the inmate is completely unconscious prior to administering pavulon and potassium chloride. This, Defendants do not do. Instead, they immediately administer the second and third chemicals.

Therefore, the barbiturate utilized to induce unconsciousness is extremely important. The "American Veterinary Medical Association standards for euthanasia indicate that the ideal barbituric acid derivative for animal euthanasia should be potent, long acting, stable in solution, and inexpensive. Sodium thiopental is a potent barbituric acid derivative but very short acting with one therapeutic dose. Sodium pentobarbital (not sodium thiopental) best fits these criteria." Affidavit of Dr. Dennis Geiser, in the case of *Texas v. Jesus Flores*, No. 877,994A) (exhibit 16). Thus, Defendants should inject sodium thiopental continuously throughout the execution, use a longer acting barbiturate or, as is done in surgical procedures, administer a second longer acting barbiturate once it is determined that the condemned inmate had no adverse reaction to the initial anaesthetic.

Instead, Defendants intend to continue using sodium thiopental to carry out Plaintiffs' executions by lethal injection. *Compare*, Letter from Department of Corrections, dated May 14, 2002 (exhibit 1) (listing the chemicals utilized during lethal injections); *with*, Letter from Department of Corrections, dated December 23, 2003 (exhibit 3) (denying an Open Records Act request for Defendants execution procedures, but admitting that the procedures have not changed since December 1998). Defendants are and have been aware of toxicology results from the execution of Edward Harper showing a high probability if not certainty that he was conscious throughout his execution, causing him to suffer the extreme pain caused by pavulon and potassium chloride. Moreover, as discussed above, Mr. Baze has unique characteristics that make it more likely that the thiopental will not render him unconscious. In light of all of this information, Defendants' continued intent to use a single injection of two grams of thiopental, and pavulon (which is unnecessary in the execution process and would cover up any visible pain suffered) not only violates section 17 of the Kentucky Constitution and the Eighth Amendment Cruel and Unusual

Punishment Clause, but also constitutes "deliberate indifference" to serious medical needs in violation of the Eighth Amendment.

C. The Risk that Lethal Injection, as Currently Carried Out in Kentucky, will Create Unnecessary Pain and Suffering is Greatly Increased by the Department of Corrections Inadequate Execution Procedures.

The risk of inflicting severe and unnecessary pain and suffering upon Plaintiffs during the lethal injection process is particularly grave in Kentucky because the meager execution procedures designed by the Kentucky Department of Corrections 1) fail to include adequate safeguards regarding the manner in which the execution is to be carried out, 2) fail to include adequate safeguards regarding the minimum qualifications and expertise required of the personnel performing the critical tasks in the lethal injection procedure, and 3) fail to establish appropriate criteria and standards that these personnel must rely upon in exercising their discretion during the lethal injection procedures.

Furthermore, there are no available directions or standards for the training, education, or expertise of the personnel who will be exercising this critical discretion and performing these tasks and duties. The Kentucky execution protocols completely fail to articulate the criteria or standards that such personnel must rely upon in exercising this discretion. As occurred in Virginia (where an injunction barring the execution of James Reid remains in effect), Defendants have stated that such information will not be made known because it threatens the security of the facility. *See* Letter from Department of Corrections, dated December 23, 2003 (exhibit 3) (denying Open Records Act request for Defendants execution procedures); Letter from Department of Corrections, dated August 3, 2004 (exhibit 6) (denying Open Records Act request for Defendants execution procedures). The consequences of this failure will likely result in the unnecessary and wanton infliction of severe pain

and suffering.

Perhaps most importantly, there are no apparent answers to critical questions governing a number of crucial tasks and procedures in the lethal injection procedure such as:

(a) the methods for obtaining, storing, mixing, and appropriately labeling the drugs, the minimum qualifications and expertise required for the person who will be determining the concentration and dosage of each drug to administer, and the criteria that shall be used in exercising this discretion[13];

(b) the minimum qualifications, training, and expertise required of the person(s) inserting the needle and catheter into the condemned inmate's veins[14];

(c) the minimum qualifications, training, and expertise required for the different personnel performing the tasks involved in the lethal injection procedure after the catheter is inserted;

(d) the manner in which the IV tubing, three-way valve, saline solution and other apparatus shall be modified or fixed in the event it is malfunctioning during the execution process, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion;

(e) the manner in which the IV catheters shall be inserted into the condemned prisoner, the professional training of the individual(s) who is given the responsibility and discretion to decide when efforts at inserting the IV catheters should be abandoned and the cut down procedure begun, and the criteria that shall be used in exercising this discretion;[15]

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[13] The shelf life of sodium pentothal is extremely short. An improper conversion of the solid form into the liquid form or letting the chemical sit for too long will prevent the chemical from having its normal effect of rendering the inmate unconscious. *See* Affidavit of Dr. Heath (exhibit 7).

[14] The training of the individuals inserting the needle and catheter is extremely important considering 1) the difficulty the execution team had in inserting a catheter into Edward Harper's vein; 2) admissions by agents of Defendants that the insertion of IV needles is the most difficult part of the execution; and, 3) that neither nurses nor doctors are involved in inserting an IV line or any other part of a lethal injection. *See* Associated Press, *Kentucky Ready to Execute Prisoners by Lethal Injection*, THE EVANSVILLE COURIER, July 26, 1998 at A 5 (exhibit 17). Defendants' execution procedures have not changed since 1998. *See* Letter from Department of Corrections, dated December 23, 2003 (exhibit 3).

[15] *See* Denno, *Lethal Injection*, at 106, n. 303 (*citing* Thomas O. Finks, Lethal Injection: An Uneasy Alliance of Law and Medicine, 4 J. Legal Med. 383, 397 (1983) (explaining that "[l]ethal injections may not work effectively on diabetics, drug users, and people with heavily pigmented skins"); Harold L. Hirsh, Physicians as Executioners, Legal Aspects of Med. Prac., Mar. 1984, at 1 (noting that "if a person is nervous or fearful, his veins become constricted"); *On Lethal Injections and the Death Penally*, 12 Hastings Center Rep. 2, 2 (Oct. 1982) (explaining that lethal

(f) the minimum qualifications, training, and expertise required of the person performing the "cut down" procedure and any other procedure used to obtain venous access;

(g) the manner in which the condition of the condemned prisoner will be monitored to confirm that proceeding to the next procedure would not inflict severe and unnecessary pain and suffering on the condemned prisoner;

(h) the manner in which the condemned prisoner will be monitored to ensure that the sodium thiopental reached the inmate's bloodstream[16];

(i) the manner in which the condemned prisoner will be monitored to ensure that the prisoner remains in a plane of unconsciousness throughout the execution process;

(j) the minimum qualifications and expertise required of the person who is given the responsibility and discretion to order the staff to divert from the established protocols if necessary to avoid inflicting severe and unnecessary pain and suffering on the condemned prisoner, and the criteria that shall be used in exercising this discretion; and,

(k) the minimum qualifications and expertise required of the person who is given the responsibility and discretion to insure that appropriate procedures are followed in response to unanticipated problems or events arising during the lethal injection procedure, and the criteria that shall be used in exercising this discretion.

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injections are particularly difficult to administer "to people with heavily pigmented skins . . . and to diabetics and drug users"); Jacob Weisberg, *This is Your Death: Capital Punishment: What Really Happens*, *New Republic*, July 1, 1991, at 23 (describing the 45 minutes required for technicians to find a serviceable vein in a former heroin addict); Another U.S. Execution Amid Criticism Abroad, N.Y. Times Apr. 24, 1992, at B7 (reporting that the difficulty in executing Billy Wayne White was due to his history as a heroin user).

[16] Under the current execution procedures, the person responsible for administering the chemicals is unable to check the condemned inmate to ensure that the thiopental reached the inmate's veins and that the inmate is unconscious prior to administering pavulon and potassium chloride because this member of the execution team administers the chemicals from a machine located in a room adjacent to the death chamber. *See* James Prichard, *Inmate is First in Kentucky to Die by Injection*, ASSOCIATED PRESS NEWSWIRES, May 26, 1999 (exhibit 49).

In light of the likelihood that Edward Harper was conscious during his execution, and the high potential for complications during the lethal injection process, Defendants' failure to create and modify execution procedures that either utilize different chemicals or ensure that Plaintiffs are unconscious prior to administering pavulon and potassium chloride not only creates a risk of unnecessary pain and suffering that is more than the Constitution tolerates, but also constitutes "deliberate indifference" towards serious medical conditions.[17]

Furthermore, the disturbing lack of outlined medical procedure and personnel in Kentucky contributes to the likelihood that correctable errors in the lethal injection process, which have transpired in most states that have carried out an execution by lethal injection, will occur during Plaintiffs' execution. *See e.g.*, Deborah Denno, *Lethal Injection*, at 111 (*quoting* Fred Leuchter, "the highly controversial and later-discredited creator of much, if not most, of the execution equipment in this country," as admitting that "about eighty percent of the lethal injections in Texas have had one problem or another"). In fact, all of the states which carry out the most executions by lethal injection have had some form of "botched" execution. *See* Denno, *Lethal Injection*, at 139-41, Table 9; *see also* Michael Radelet, "On Botched Executions" Peter Hodgkinson and William Schabas (eds.); Michael Radelet, *Post-Furman Botched Executions, available at*, www.deathpenaltyinfo.org/article.php?scid=8&did=478 (providing information on 24 botched lethal injections in ten states including at least eight executions where the inmate was conscious) (exhibit 50); Stephen Trombley, *The Execution Protocol*, (1992).

Many of these botched executions involved problems with the chemicals. On May 24, 1989, Stephen McCoy violently reacted to the drugs. His gasping, coughing, and choking seriously

[17] In their August 3, 2004 letter, Defendants admit that they have no procedures addressing these issues. *See* Letter

affected witnesses. The Texas Attorney General admitted that the inmate "seemed to have a somewhat stronger reaction," adding "the drugs might have been administered in a heavier dose or more rapidly," and that the first chemical, sodium thiopental, "might not have sedated McCoy enough so that when the second chemical, sodium pancurate, began to act and cut of his breathing, he was conscious as he suffocated." Kathy Fair, *Witness to an Execution*, HOUSTON CHRONICLE, May 27, 1989 (exhibit 51); Matt Bean, *Lethal Injection-The Humane Alternative*, COURT T.V. ONLINE, *available at*, http://www.courttv.com/news/mcveigh_special/botched_ctv.html (exhibit 52); Trombley, at 14.

The same problem occurred during the May 7, 1992 execution of Justin Lee May, who reacted violently to the lethal drugs. Associated Press reporter Michael Graczyk wrote that "[h]e went into a coughing spasm, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back if he had not been belted down. After he stopped breathing, his eyes and

mouth remained open." Michael Browning, *Botched Efforts Scar Capital Punishment Legislature to Consider Lethal Injection*, PALM BEACH POST, January 3, 2000 (exhibit 53); *accord*, exhibit 50.

In May 1997, Oklahoma inmate Scott Dawn Carpenter shook uncontrollably, emitted guttural sounds and gasped for air until his body stopped moving. Michael Overall & Michael Smith, *22-Year Old Killer Gets Early Execution*, TULSA WORLD, May 8, 1997 (exhibit 54). An attorney who witnessed the June, 2000 execution of Bert Leroy Hunter reported that Hunter had

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from Department of Corrections in Response to Open Records Act Request, dated August 3, 2004 (exhibit 6).

violent convulsions. His head and chest jerked rapidly upward as far as the gurney restraints would allow, and then he fell quickly down upon the gurney. His body convulsed back and forth repeatedly. Cheryl Rafert, *Letter to Governor of Missouri Urging Governor to Appoint Board of Inquiry into Botched Execution* (exhibit 55).

In Oklahoma, Robyn Parks suffered needlessly. Parks had a violent reaction to the drugs used in the lethal injection. "He spewed out all the air in his lungs. . . . Parks groaned and turned his head back and forth. . . . Two minutes after the drugs were administered, the muscles in his jaw, neck, and abdomen began to react spasmodically for approximately 45 seconds. . . . Parks continued to gasp and violently gag. . . . Four minutes into the execution, Parks was hardly moving. His deep troubled breathing were still audible. . . . Death came eleven minutes after the drugs were administered." Wayne Greene, *11-minutes that Took a Lifetime//Parks' Observers Stunned by His Body's Resistance*, TULSA WORLD, March 11, 1992(exhibit 56).

In Maryland, Defendants continued the execution of Tyrone X. Gilliam, despite a continuously leaking IV line causing a puddle of liquid to form on the floor. Affidavit of Jerome H. Nickerson Jr. Esq. (exhibit 57).

Because of Defendants' inadequate execution procedures, the risk that Plaintiffs' execution by lethal injection will be "botched" causing Plaintiffs to suffer an extremely painful death similar to those that have occurred in other states is greater than the state and federal constitutions tolerate.

D. Defendants "Execution Procedures" Violate K.R.S. section 431.220.

K.R.S. section 431.220 provides that a Kentucky "death sentence shall be executed by a

continuous intravenous injection of a substance or combination of substances sufficient to cause death." Thus, the Kentucky Legislature requires that the administration of all chemicals including the barbiturate be *continuous*. Notwithstanding these very specific codified rules, Defendants have enacted an execution protocol that they intend to use to kill Plaintiffs that does not call for the *continuous* intravenous administration of a lethal quantity of a barbiturate or any other drug. *See* Letter from the Kentucky Department of Corrections, dated May 14, 2002 (exhibit 1). Defendants' direct violation of a statute that is plain in language and specific in its requirements is inconsistent, out of harmony with, and alters, adds to, extends or enlarges the act being administered. Thus, the Department of Corrections has no authority to carry out Plaintiff's execution under the "Execution Procedures." By doing so, they would be allowed to disregard a statute and allowed to create and execute legislation, thereby violating the separation of powers doctrine. *See Legislative Research Com'n by and through Prather v. Brown*, Ky., 664 S.W.2d 097, 915 (1984); *Bloxton v. State Highway Commission*, Ky., 8 S.W.2d 392 (1928).

E. Defendants' Use of Pavulon Violates Evolving Standards of Decency as Evidenced by the Consistency of the Legislative Trend Against Using a Neuromuscular Blocking Agent to Euthanize Animals, and the American Veterinary Medical Associations' Prohibition Against Using Neuromuscular Blocking Agents to Euthanize Animals.

Section 17 of the Kentucky Constitution and the Eighth Amendment Cruel and Unusual Punishment Clause mandate that Defendants' lethal injection process comports with "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86

(1958); *accord, Stanford v. Kentucky*, 492 U.S. 361 (1989). Evolving standards of decency are judged by norms and standards of American society, *see Weems v. United States*, 217 U.S. 349 (1910). The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the countries legislatures. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). Moreover, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Id*. at 315.

Recent research in, and subsequent legislation regarding pet euthanasia proves that Defendants' use of pavulon in its execution procedures violates evolving standards of decency. Specifically, Defendants intend to use paralyzing agents which if used on animals would violate veterinarians' ethical standards, Kentucky law, and the law of eighteen other states.

In 1981, states began banning neuromuscular agents as a means of euthanizing animals. Currently, at least nineteen states, including Kentucky, have passed laws that either expressly or implicitly preclude the use of a sedative in conjunction with a neuromuscular blocking agent. The states that expressly forbid such practice (thiopental in combination with pavulon) are the following: Florida, Fla. Stat. §§ 828.058 and 828.065 (enacted in 1984); Georgia, Ga. Code Ann. § 4-11-5.1 (enacted in 1990); Maine, Me.Rev.Stat. Ann. tit. 17, § 1044 (enacted in 1987); Maryland, Md.Code Ann., Criminal Law, § 10-611 (enacted in 2002); Massachusetts, Mass.Gen.Laws § 140:151A (enacted in 1985); New Jersey, N.J.S.A. 4:22-19.3 (enacted in 1987); New York, N.Y.Agric. & Mkts § 374 (enacted in 1987); Oklahoma, Okla. Stat., Tit. 4, § 501 (enacted in 1981); Tennessee, Tenn.Code Ann. § 44-17-303 (enacted in 2001); and, Texas, Tex. Health & Safety Code, § 821.052(a). In 1998, Kentucky became one of many states that implicitly banned such practices. K.R.S. section 312.181 (17) and KAR 16:090 section 5(1); s*ee* Connecticut, Conn. Gen.Stat. § 22-

344a; Delaware, Del.Code Ann., Tit. 3, § 8001; Illinois, 510 Ill. Comp. Stat., ch. 70, § 2.09; Kansas, Kan. Stat. Ann. § 47-1718(a); Louisiana, La. Rev. Stat. Ann. § 3:2465; Missouri, 2 CSR 30-9.020(F)(5); Rhode Island, R.I. Gen. Laws § 4-1-34; and, S.C. Code Ann. § 47-3-420; *see also*, Chart of state statutes banning pavulon in the euthanasia of animals (exhibit 58). Furthermore, in 2000, the leading professional association of veterinarians, the American Veterinary Medical Association, promulgated guidelines for euthanasia that explicitly forbid the combinatory use of a sedative with a neuromuscular blocking agent during euthanasia. *See 2000 Report of the American Veterinary Medical Association Panel on Euthanasia*, 218 Journal of the American Veterinary Medical Association, 669, 681 (2001)) (exhibit 25).

Given the consistency in the statutory regulations condemning the use of neuromuscular blocking agents (including pavulon) in the euthanasia of animals, and the American Veterinary Medical Associations' express prohibition against such practice, Defendants' use of pavulon during lethal injections is outside the bounds of evolving standards of decency. *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) ("It is not so much the number of these States that is significant, but the consistency of the direction of change."). These recent alterations of euthanasia protocol for pets underscore the inhumanity of using pavulon to execute human beings. A euthanasia practice widely considered unfit for a dog is certainly unfit for humans as well, especially in light of the fact that Defendants recognize that they can easily accomplish the same result using a combination of chemicals that does not include pavulon. *See* exhibit 22 and 23. It can hardly be disputed that if certain euthanasia techniques are banned as overly cruel to animals, those same practices must violate our current standards of decency regarding the execution of humans. Pavulon is one such banned chemical. Therefore, its use to execute humans violates section 17 of the Kentucky Constitution and the cruel

and unusual punishment clause of the Eighth Amendment to the United States Constitution.

F. Using Improperly Trained Execution Team Members to Obtain Central Venous Access Creates an Unnecessary Risk of Pain and Suffering in Violation of Section 17 of the Kentucky Constitution and the Eighth Amendment Cruel and Unusual Punishment Clause as Does Defendants' Use of a "Cut Down" Procedure Because the Pain Inherent in a "Cut Down" Procedure is Unnecessary in Light of Readily Available Alternatives.

1. Facts relevant to obtaining venous access

"Obtaining central venous access is a complex medical procedure that involves serious risks and should only be performed by properly trained personnel." *Motion for Leave to File Brief and Brief of Alabama Physicians as Amici Curiae in Support of Petitioner in Nelson v. Campbell*, at *1 (exhibit 59) (hereinafter "Alabama Physicians"); *accord*, Affidavit of Dr. Heath (exhibit 7). Central venous access is only attempted when a vein cannot be accessed by the ordinary method of inserting a needle, "peripheral access." *Alabama Physicians* at *6.[18] The two main methods of central venous access are the "cut down" procedure and the "percutaneous" procedure.

a. "Cut down " procedure

A "cut down" procedure is an invasive medical procedure properly performed only under deep sedation that includes the administration of potent intravenous analgesics (drugs that block pain) so the patient does not feel pain. Success in using the procedure corresponds to the "experience of the medical practitioner performing the procedure." *Alabama Physicians* at *2; *accord*, Affidavit of Dr. Heath (exhibit 7). This procedure involves using a scalpel to make a series of surgical incisions through the skin, through the underlying connective tissue, through the

[18] Many physical conditions increase the likelihood that peripheral access will not be possible. These conditions

underlying layers of fat, and through the underlying layers of muscle, until the region surrounding a large vein is reached. The incisions can be several inches deep, sometimes causing blood vessels to have to be closed either by the use of cautery or the use of ligatory suture. Affidavit of Dr. Heath (exhibit 7); *Alabama Physicians* at *9. The closing of blood vessels is not the only complication that may occur during a "cut down" procedure.

Some of the more serious complications include the excruciatingly painful and life-threatening conditions of severe hemorrhage (with accompanying sense of cardiovascular collapse), pneumothorax (with accompanying sense of asphyxiation, chest pain, and terror), and cardiac dysrhythmia (abnormal electrical activity of the heart leading to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia). Affidavit of Dr. Heath (exhibit 7); *Alabama Physicians* at *2, *12.

Because of the likelihood of severe complications during a "cut down" procedure, whenever this procedure is performed in a medical setting, the medical team has immediate access to a variety of resuscitation drugs and medical equipment that includes but is not limited to suction, surgical lighting, surgical instruments, cautery, chest tubes, EKG monitors, and a defibrillator. Affidavit of Dr. Heath (exhibit 7).

b. Percutaneous Technique[19]

The percutaneous technique is an alternative method of obtaining venous access that has supplanted the rarely used "cut down" procedure because it is less invasive, less painful, faster,

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will not be possible. These conditions include 1) obesity; 2) usage of corticosteroids, which is used to treat arthritis and lupus; 3) diabetes treated with insulin; 4) edema; and, 5) a history of intravenous drug abuse.

[19] Percutaneous technique is also referred to as percutaneous central line placement, percutaneous central access, and percutaneous central venous cannulation.

cheaper, and safer. Affidavit of Dr. Heath (exhibit 7); *Alabama Physicians* at *3. This procedure involves "inserting a needle through the skin and into the vein, then passing a thin wire through the lumen of the needle, then removing the needle over the wire to leave the wire placed in the vein, and then finally advancing a thin flexible catheter over the wire into the vein." *Alabama Physicians* at *8-9; *accord*, Affidavit of Dr. Heath (exhibit 7).

c. Necessary training for obtaining venous access.

Obtaining venous access through a central access procedure is complicated. Many physicians do not have the experience and credentials to place a central catheter through either a "cut down" procedure or a "percutaneous technique," or treat the complications that are associated with a "cut down" procedure. Affidavit of Dr. Heath (exhibit 7); *Alabama Physicians* at *7. Performance of a "cut down" procedure can be achieved only by "thorough knowledge of the procedure and attention to its many details. . . . Detailed knowledge of anatomy is necessary to go deeply into an arm, leg, or chest to locate large, uncompromised veins." *Brief of Laurie Dill, M.D. et al., as Amici Curiae in Support of Petitioner in Nelson v. Campbell* at *4 (exhibit 60). Furthermore, experience and training is necessary to determine which vein to access. *Id*. Accordingly, "cut down" procedures are not performed except in the most exceptional circumstances by physicians with specialized training in central venous access. *Id*. In fact, many, if not most, physicians have never personally performed a "cut down" procedure." Affidavit of Dr. Heath (exhibit 7).

Unlike Alabama, where physicians perform "cut down" procedures to access a vein for an execution (a physician was planning to perform a "cut down" procedure on David Nelson until the United States Supreme Court granted a stay of execution), Kentucky law forbids a physician from performing a "cut down" procedure or any other form of central venous access if it involves

accessing a vein for an execution. *Compare*, Ala. Code section 15-18-82.1 (expressly stating that a physician, nurse, or pharmacist is not required to assist in any aspect of an execution); *with*, K.R.S. section 431.220 (prohibiting a physician from having any involvement in an execution other than to pronounce death. Furthermore, none of the members of Defendants' execution team are nurses. *See* Associated Press, *Kentucky Ready to Execute Prisoners by Lethal Injection*, THE EVANSVILLE COURIER, July 26, 1998, at A 5 (exhibit 17); Letter from the Department of Corrections, dated December 23, 2003 (exhibit 3) (stating that the current execution procedures have not changed since 1998). Therefore, any "cut down" procedure or any other central venous access procedure utilized to execute Plaintiffs will be performed by a member of the execution team who neither is specifically trained in central venous access nor a physician or a nurse.

d. Obtaining venous access during the execution of Edward Harper

According to Defendants, inserting an IV line is the most difficult aspect of the lethal injection process. Associated Press, *Kentucky Ready to Execute Prisoners by Lethal Injection*, THE EVANSVILLE COURIER, July 26, 1998 at A 5 (exhibit 17). This became evident during the execution of Edward Harper, who was believed not to have compromised veins. It took Defendants ten minutes to insert the IV and catheter. James Prichard, *Inmate is First in Kentucky to Die by Injection*, ASSOCIATED PRESS NEWSWIRES, May 26, 1999 (exhibit 49). Defendants stuck Harper with a needle in at least three locations in attempting to insert the IV and catheter. *See* Autopsy Report of Edward Harper exhibit 9). They intended to insert a needle into each arm. "But, the execution team couldn't find an acceptable vein in his left arm, so the needle was inserted into a vein on the top of his left hand." James Prichard, *Inmate is First in Kentucky to Die by Injection*, ASSOCIATED PRESS NEWSWIRES, May 26, 1999 (exhibit 49).

2. Defendants failure to ensure that properly trained execution team members perform the central venous access procedure creates a risk of unnecessary pain and suffering that is more than the state and federal constitutions tolerate, and in light of known alternatives and the probability that peripheral access will be unsuccessful in establishing an IV line during Plaintiffs' execution, such failures constitute "deliberate indifference" towards a serious medical condition.

Although Defendants refuse to disclose their full execution procedures, it is well known that physicians are not allowed to take part in an execution in Kentucky for it is forbidden by statute. K.R. S. section 431.220. Therefore, the complicated and detailed procedure of inserting a needle and catheter through a central venous access procedure is performed by someone who is not a trained medical professional.

It is well recognized that central venous access procedures can cause serious medical complications, possibly resulting in death, if not performed by a person with substantial training and experience in accessing a vein through invasive procedures such as any of the central venous access procedures. Subjecting a person to a central venous access procedure in the hands of inexperienced personnel represents a substantial risk of medical misadventure and unnecessary pain and suffering in the execution process, in violation of the Eighth Amendment and section 17 of the Kentucky Constitution.

Furthermore, Defendants have admitted that inserting an IV line is the most difficult aspect of the lethal injection process. In fact, during the only lethal injection carried out in Kentucky, it took ten minutes and at least three attempts to access the vein of a man who was not known to have compromised veins. In light of this information, one would expect that Defendants would make it a priority to ensure that the member of the execution team responsible for inserting the IV line is adequately trained not only in peripheral access, but also in any and all methods of central venous

access that may be necessary to access a vein during a lethal injection. Defendants have failed to do so. Such failure constitutes "deliberate indifference" towards a serious medical condition, in violation of section 17 of the Kentucky Constitution and the Eighth Amendment Cruel and Unusual Punishment Clause.

3. Defendants' use of the extremely painful "cut down" procedure to carry out Plaintiffs' execution despite available alternatives constitutes the unnecessary infliction of pain in violation of section 17 of the Kentucky Constitution and the Eighth Amendment Cruel and Unusual Punishment Clause, and demonstrates Defendants' "deliberate indifference" to a serious medical need.

It is beyond dispute that a "cut down" procedure is an extremely painful invasive surgical procedure for accessing a person's veins. As previously discussed, it involves using a scalpel to cut two inches into the body to reach a vein. Complications include hemorrhaging, cardiac arrest, and many other complications that can cause death. These complications and the underlying pain from the incisions are exacerbated when the "cut down" procedure is performed by a person who is not experienced in performing a central venous access procedure as is the case during lethal injections in Kentucky. All of this could be avoided by using the safer, quicker, cheaper, and less painful means of obtaining central venous access, a percutaneous procedure. In determining whether the "cut down" procedure constitutes unnecessary pain and suffering, the procedure must be analyzed in light of readily available alternatives that pose less risk of pain than a "cut down" procedure. *See Workman*, 429 S.W.2d at 378 (a cruel and unusual punishment approach "should always be made in light of developing concepts of elemental decency."); *Furman v. Georgia*, 408 U.S. 238, 430 (1970) (Powell, J., dissenting) ("[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives."). Surely, the percutaneous procedure is a viable and preferred alternative to the "cut down" procedure.

Accordingly, Defendants failure to ensure that central venous access will not be obtained through a "cut down" procedure not only constitutes cruel and unusual punishment, but also evinces "deliberate indifference" towards a serious medical need.

4. Conclusion

Peripheral access is the preferred method of obtaining venous access. But, until an execution is about to begin, Defendants will be unable to conclusively determine if peripheral access will be successful at accessing a vein. *See Johnson v. Reid*, *Supplement to Response to Reid's Reply to Motion to Vacate* (the Virginia Department of Corrections admits they cannot rule out the possibility that a "cut down" procedure will be necessary to access veins) (exhibit 61). Central venous access is a complicated and dangerous method of obtaining venous access that is necessary when peripheral access is not possible. Central venous access should only be performed by trained medical professionals who have the knowledge and necessary equipment to adequately deal with any of the potentially life threatening complications that may occur.

The "cut down" procedure is an archaic and barbaric medical procedure that is rarely used today except in carrying out an execution by lethal injection. In light of the safer and easier alternative, percutaneous procedure, there is no reason to use a "cut down" procedure during Plaintiffs' execution. Accordingly, the use of the "cut down" procedure during a lethal injection constitutes cruel and unusual punishment.

Given that Defendants refuse to disclose their full execution procedures, neither Plaintiffs nor this Court can be confident that Defendants have eliminated the usage of a "cut down" procedure, and are taking all necessary and appropriate steps to minimize the known significant risk of

inflicting severe and unnecessary pain and suffering during a central venous access procedure. Accordingly, Defendants procedures (if they have any) for central venous access, which is performed by neither a nurse nor a physician, creates a risk of unnecessary pain and suffering that is more than the state and federal constitution tolerate. Defendants failure to address these problems in light of compelling evidence (including their own admissions) that they are not competent to conduct a central venous access procedure, constitutes "deliberate indifference" to a serious medical need, in violation of the Eighth Amendment.

G. FUNDAMENTAL NOTIONS OF FAIRNESS AND DUE PROCESS MANDATE THAT DEFENDANTS PROVIDE PLAINTIFFS WITH A COPY OF THE ENTIRE EXECUTION PROCEDURES SO THEY CAN MAKE A CHOOSE BETWEEN LETHAL INJECTION AND ELECTROCUTION, AND TO DETERMINE THE EXTENT THAT THEIR CONSTITUTIONAL RIGHTS ARE BEING VIOLATED BY DEFENDANTS' EXECUTION PROCEDURES.

1. Disclosure of Defendants execution procedures is necessary to make a meaningful choice between electrocution and lethal injection.

Plaintiffs sentenced to death prior to March 31, 1998 are given the right to choose between lethal injection and electrocution. K.R.S. section 431.220. In order for this right to have any meaning, Plaintiffs must have enough information to make a knowing and intelligent choice among

the options. A knowing and intelligent choice can only be made if Plaintiffs are notified of the procedures Defendants intend to utilize in carrying out their execution by lethal injection and electrocution. It is only through this information that Plaintiffs can make a knowing and intelligent decision as to which method of execution they believe would be less painful for them. Therefore, it is imperative that this Court order Defendants to disclose to Plaintiffs a complete copy of the execution procedures for lethal injection and electrocution.

2. Fundamental notions of fairness and Due Process require that Defendants provide Plaintiffs with a complete copy of the execution procedures.

Procedural due process demands that citizens be given a meaningful opportunity to contest a constitutional violation. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (June 28, 2004). The central meaning of procedural due process is clear:

> parties who rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.

Id. at 2649 (*quoting*, *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Procedural due process takes on a heightened meaning in capital cases.

"Because death is a different kind of punishment from any other which may be imposed in this country," *Gardner v. Florida*, 430 U.S. 349, 357 (1977), the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment Cruel and Unusual Punishment Clause prevent a criminal defendant from being executed based on secret information (information that he was unaware of and unable to obtain to no fault of his own), *id*., or information for which he was not given an opportunity to rebut. *Simmons v. South Carolina*, 512 U.S. 154 (1994). Surely, if a condemned inmate cannot be sentenced to death based on secret information, then likewise, the condemned inmate cannot be executed under a secret procedure that the condemned inmate had no

notice of or opportunity to challenge. *See Oken v. Sizer,* 2004 WL 1334521 (D. Md. June 14, 2004) (exhibit 62).

Furthermore, inmates facing the death penalty are entitled to notice when there has been a post-conviction change in mode of execution. *See, e.g., Stewart v. LaGrand,* 526 U.S. 115, 119 (1999); *Poland v. Stewart,* 117 F.3d 1094, 1105 (9th Cir. 1997); *Vickers v. Stewart,* 144 F.3d 613, 617 (9th Cir. 1998); *Sims v. Florida,* 754 So.2d 657, 665 (Fla. 2000); *DeShields v. State,* 534 A.2d 630, 639 n. 7 (Del.1987); *State v. Fitzpatrick,* 684 P.2d 1112, 1113 (1984). "And, it is clear that in innumerable death penalty cases the execution protocols have been examined by courts for their compliance with constitutional requirements." *Oken v. Sizer,* 2004 WL 1334521 (D. Md. June 14, 2004) (*citing by e.g., Nelson,* 124 S.Ct. 2117; *In re Williams,* 359 F.3d 811 (6th Cir.2004); *Poland v. Stewart,* 117 F.3d 1094 (9th Cir.1997); *Campbell v. Wood,* 18 F.3d 662 (9th Cir.1994); *Cooper v. Rimmer,* 2004 WL 231325 (N.D.Cal.2004), *aff'd,* 358 F.3d 655; *Cal. First Amendment Coalition v. Woodford,* 2000 WL 33173913 (N.D.Cal.2000), *aff'd,* 299 F.3d 868; *Jones v. McAndrew,* 996 F.Supp. 1439 (N.D.Fl.1998); *LaGrand v. Lewis,* 883 F.Supp. 469 (D.Ariz.1995). Court review of the execution procedures presupposes knowledge of the contents of those procedures. *See Oken v. Sizer*, 2004 WL 13345231 (D. Md. June 14, 2004) (exhibit 62). Therefore, it is clear that a procedural right exists to know the procedures that will be used in carrying out an execution by any method. What procedures are required is determined by a balancing test.

The "process due in any given circumstance is determined by weighing 'the private interest that will be affected by the official action against the government's asserted interest 'including the functions involved and the burdens the Government would face in providing greater process.'" *Hamdi*, 124 S.Ct. at 2646 (*quoting, Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

Defendants claim that their execution procedures must remain confidential in order to protect security. Plaintiffs' interest is making sure that they will not suffer excruciating pain during their executions. In other words, they only seek a death in accord with the dignity of man. *See Gregg v. Georgia,* 428 U.S 153, 176 (1976). Although Defendants' interest is weighty, it is not as strong as the interest in ensuring a painless death, particularly in light of evidence demonstrating that Defendants are not currently capable of carrying out a humane lethal injection and that the "execution procedures" are only in possession of Defendant Haeberlin. *See* Exhibit 6. Therefore, the weighing of the respective interests favors disclosing the entire execution procedures so that Plaintiffs do not have to take Defendants' word that their Eighth Amendment rights will not be violated. *See Oken v. Sizer*, 2004 WL 1334521 (D. Md. June 14, 2004) (exhibit 62); *see also, Nelson v. Campbell*, 124 S.Ct. 2117 (May 24, 2004) (requiring the Alabama Department of Corrections to disclose its execution procedures as part of the remand order to determine if the use of a cut down procedure during a lethal injection violates the Eighth Amendment).

H. Plaintiffs are Entitled to Injunctive and Declaratory Relief Barring Defendants from Scheduling their Executions in the Manner Intended and During the Pendency of this Litigation.

As previously discussed, the following three factors are determinative as to whether to grant an injunction: 1) whether the plaintiff will suffer irreparable injury if the injunction is not granted; 2) whether "the equities [are] in plaintiff's favor, considering the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo"; and, 3) whether a substantial question is at issue. *Commonwealth et al. v. Picklesimer*, Ky., 879 S.W.2d 482, 484 (1994); *accord, Sturgeon Mining Company, Inc. v. Whymore Coal Company, Inc.*, Ky., 892 S.W.2d 591, 592 (1995).

Each of these three conditions manifestly favors Plaintiffs.

1. Irreparable injury ---first factor

The first factor clearly favors granting a temporary injunction. If the injunction is not granted, Plaintiffs will suffer irreparable injury, because they will be executed before the merits of their cogent claim is addressed. *See Wainwright v. Booker*, 473 U.S. 935 n. 1 (1985) (Powell, J., concurring) (recognizing that there is little doubt that a prisoner facing execution will suffer irreparable injury if a stay is not granted); *Harris v. Johnson*, No. H-04-CV-1514 (S.D. Tex. June 29, 2004 (exhibit 63); *Oken v. Sizer*, 2004 WL 1334521 (D. Md. June 14, 2004) (exhibit 62); *Hill v. Ozmint*, No. 2:04-0489-18AJ (D. S.C. March 4, 2004) (exhibit 64). In addition to the finality and irreparable injury of death, if this Court does not grant an injunction barring Defendants from scheduling Plaintiffs' execution date during the pendency of this litigation, Defendants could schedule Plaintiffs' execution solely to force the merits of the litigation to be decided in haste due to the time constraints of an impending execution. That situation would substantially impede this Court's ability to adequately determine the merits of Plaintiffs' claim, and, thereby, could result in a violation of section 17 of the Kentucky Constitution, and the Eighth Amendment solely because the time constraints would deprive Plaintiffs' from presenting all the information necessary for this Court to determine whether a state or federal constitutional violation exists.

2. Whether the equities are in Plaintiffs' favor---the second factor

The second factor for granting a temporary restraining order and injunction barring Defendants from scheduling Plaintiffs' execution during the pendency of this litigation, whether the equities are in the Plaintiffs' favor, requires this Court to consider three subfactors: a) the public interest; b) whether the harm will merely preserve the status quo; and, c) the harm to Defendants.

Each of these subfactors manifestly favors Plaintiffs.

a. The public interest.

"Executions are unquestionably matters of great public importance." *California First Amendment Coalition v. Calderon*, 150 F.3d 976, 981 (9th Cir. 1998). The public interest, will be served, rather than disserved, by providing "reasonable assurance that [Plaintiff's execution] will be carried out humanely." *Hill v. Ozmint, et al.*, No. 2:04-0489-18AJ (D. S.C. March 4, 2004) (exhibit 64). Under such circumstances, "[it] is . . . beyond [] comprehension that a temporary restraining order in this case, that [might] delay, but not halt the execution, could disserve the public interest." *Harris v. Johnson*, No. H-04-CV-1514 (S.D. Tex. June 29, 2004 (exhibit 63). Furthermore, it is in the public's interest for this Court to determine whether the public has a right to observe the effects of the chemicals on the condemned inmate's body, and, if so, whether pavulon can be administered in light of its intended purpose to prevent the witnesses from observing the convulsions and seizures caused by potassium chloride.

b. Preserving the status quo.

Granting Plaintiffs an injunction barring the Commonwealth from scheduling their execution during the pendency of this litigation merely preserves the status quo. At the moment, none of the Plaintiffs have a scheduled execution date. In fact, Defendants are currently unable to schedule an execution date for any of the Plaintiffs because appeals are still pending. But, within the next two months, Mr. Bowling will have exhausted his appeals, allowing Defendants to schedule his execution despite the instant litigation. Mr. Baze's appeals likely will be exhausted shortly thereafter allowing Defendants to schedule his execution at this point. Granting an injunction would

only serve to maintain the present status for only as long as necessary to litigate the merits of Plaintiffs' substantial claims. Accordingly, it would not require any changes to be made or prevent Defendants from doing anything they currently are permitted to do.

c. Harm to Defendants.

The injunction will do no harm to Defendants because they currently are unable to schedule an execution date for any of the Plaintiffs, and if they prevail on the merits of the litigation, they will be able to execute Plaintiffs as soon as all appeals have been exhausted which could happen prior to the conclusion of this litigation. "There is no fear here of the state's judgment being avoided or denied; in fact, plaintiff[s] do[] not seek such relief. All [they] seek[] is a death in "accord with the dignity of man, which is the basic concept underlying the Eighth Amendment.'" *Hill v. Ozmint*, No. 2:04-0489-18AJ (*quoting*, *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (exhibit 64); *accord*, *Harris v. Johnson*, No. H-04-CV-1514 (S.D. Tex. June 29, 2004 (exhibit 63); *Oken v. Sizer*, 2004 WL 1334521 (June 14, 2004) (exhibit 62).

3. Whether a substantial question is at issue --- the third factor.

The issues this case presents are substantial questions of law - - 1) whether the current chemicals utilized during lethal injections, and/or Defendants' procedures for carrying out lethal injections violate K.R.S. section 431.220 or any one of the prongs of the cruel and unusual punishment test under section 17 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution, and, 2) whether Defendants refusal to disclose a full copy of the execution protocols so that Plaintiffs can make a knowing and intelligent choice between electrocution and lethal injection, and determine whether an Eighth Amendment violation will occur

during their execution violates due process and fundamental notions of fairness.

Plaintiffs have presented substantial evidence that Defendants' procedures for carrying out lethal injections (not lethal injection on its face) violates the cruel and unusual punishment clause, or, at the least, poses a risk of unnecessary pain and suffering that is more than the state and federal constitution tolerates. In addition, Plaintiffs have presented evidence that pavulon, a chemical that is unnecessary in the execution process, banned in the euthanasia of animals, and only serves to mask the effects of potassium chloride, causes extreme pain and suffering in a conscious person. As the toxicology results from the execution of Edward Harper, in Kentucky, and numerous toxicology results from North and South Carolina lethal injections demonstrate, a substantial probability exists that Plaintiffs will be conscious during their execution; thereby suffering intense pain. That is assuming that the use of a "cut down" procedure, an unnecessary and painful procedure, to access the veins of many of the Plaintiffs, does not kill them first. Under these circumstances, it is clear that Plaintiffs have presented a substantial issue raising concerns about the constitutionality of

defendants' means of effectuating a sentence of death by lethal injection. *See Nelson v. Campbell*, 124 S.Ct. 2117 (May 24, 2004).

4. Conclusion.

Plaintiffs have satisfied each condition precedent for obtaining an injunction. Furthermore, Plaintiffs have presented disturbing facts concerning the likelihood that Plaintiffs will suffer an excruciatingly painful death; a likelihood that Defendants could avoid. But, rather than address the problems, Defendants have been and continue to be deliberately indifferent to the substantial issues and likelihood of unnecessary pain raised by Plaintiffs. This has been shown by Defendants refusal

to disclose the full execution procedures while, at the same time, admitting that the current procedures are the same as the pre-Harper execution procedures. Based on these facts, it "would be odd to deny a temporary injunction to an inmate who will suffer loss of life under possibly cruel and unusual circumstances." *Hill v. Ozmint, et al.*, No. 2:04-0489-18AJ (D. S.C. March 4, 2004) (exhibit 64).

I. Plaintiffs' Claims are Ripe for Adjudication.

Plaintiffs' claims are ripe for adjudication and are the proper subject upon which this Court may exercise jurisdiction. Defendants, however, may assert that Plaintiffs are somehow "too early" in seeking to invoke this Court's jurisdiction and must await a death warrant. Any suggestion that Plaintiffs' claims are "unripe" are disingenuous because had Plaintiffs waited until they were under death warrant before filing this claim, "defendants undoubtedly would have claimed they were here too late and were engaged in an 'obvious attempt at manipulation' and 'abusive delay.'" *Jones v. McAndrew*, 996 F.Supp. 1439, 1437 (N.D. Fla. 1998) (*quoting*, *Gomez v. United Dist. Court*, 503 U.S. 653, 654 (1992). Thus, "any attempt to delay adjudication of this claim is both puzzling and, in any event, unfounded." *Id*. (holding that a challenge to the constitutionality of electrocution procedures is ripe prior the scheduling of an execution date); *accord*, *Treesh v. Taft*, 122 F.Supp.2d 881, 886-87 (S.D. Ohio 2000).

Furthermore, a case is ripe for judicial decision where, the issues to be considered are purely legal ones and where the agency rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rules. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds*, by *Califano v. Sanders*, 430 U.S. 99 149 (1977). Predominantly legal issues are fit for decision even when further factual development would

be helpful. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). As the Sixth Circuit has noted, ripeness is determined by 1) "whether the issues at stake are fit for judicial decision; and 2) the extent of the hardship to the parties of withholding court consideration." *Cleveland Branch, National Association for the Advancement of Colored People v. City of Parma*, 263 F.3d 513, 533 (6th Cir. 2001); *accord, Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1362 (6th Cir. 1995). "In the context of a pre-enforcement challenge, a case is ripe for review only if the probability of the future event occurring is substantial and of sufficient immediacy and reality." *People Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998). Plaintiffs satisfy each of these requirements.

First, the issues before this Court are the pure legal questions of whether Defendants' lethal injection procedures and chemicals violate Plaintiffs' right to be free of unnecessarily cruel and unusual punishment during their execution and/or violate K.R.S. section 431.220. These claims arise directly from the Kentucky Department of Corrections' Open Records Act response letter stating the chemicals and quantity of chemicals administered during lethal injections in Kentucky. (exhibit 1 There is nothing speculative regarding the protocol discussed in the letter and utilized by the Department of Corrections. The protocol is a final decision of the Department of Corrections as to how lethal injections will be conducted, and has not been changed since December 1998. *See* Letter from Department of Corrections, dated December 23, 2003 (exhibit 3). But, even to the extent that this Court may decide that further factual development concerning the procedures would be helpful, Plaintiffs' claims are pure legal issues that are ripe without further factual development. *See Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

Second, the probability that Plaintiffs' will be executed in the manner intended by Defendants is substantial. Currently, there are no legal impediments to their execution other than the remote possibility that a court may reverse their death sentences. If no court intervenes and the Governor does not commute their sentences, Plaintiffs will be executed in the manner intended by Defendants. Defendants have no ability to choose to not execute Plaintiffs. Accordingly, the probability that Plaintiffs' will be executed under the questionable procedures and utilizing unconstitutional chemicals is substantial.

Third, there is little question that Plaintiffs satisfy the hardship prong. The hardship prong has never required actual enforcement. Rather, immediacy of the threat of enforcement is all that is required, and, where enforcement is certain, ripeness is satisfied even when a delay in enforcement is present. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) ("Where the inevitably of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justifiable controversy that their will be a time delay before the disputed provisions will come into effect."); *Lake Carriers Association v. MacMullan*, 406 U.S. 498, 507-08 (1972) (express statement that prosecutions would not begin until construction of necessary infrastructure, which would take years to complete, did not alter the fact that enforcement was inevitable). Defendants have requested execution warrants for Plaintiffs in the past and may request a warrant for Mr. Bowling's execution possibly as soon as two months from now. Mr. Baze's execution likely could be scheduled a few months later. This alone demonstrates that Plaintiffs' claims are ripe for adjudication. In addition, many months may be necessary to conduct discovery, and hold a hearing on the issues presented herein. *See Harris v. Johnson*, No. 04-70028 (5th Cir. June 30, 2004) (exhibit 65). Accordingly, waiting for an execution warrant could prevent Plaintiffs from ever

having enough time to adequately litigate the issue. *See id.* Thus, the necessity of litigating the claim as soon as possible could never be more important.

Finally, the nature of the harm (death) that will be imposed upon Plaintiffs if these claims are not adjudicated is unique. Unlike every other type of Plaintiff requesting injunctive or declaratory relief, Plaintiffs will not survive the alleged violation of their constitutional rights. If they are ever to have their day in court, it must be here and now while there is adequate time to litigate the merits of the claim, conduct discovery, and hold an evidentiary hearing. Accordingly, any assertion by Defendants that this litigation can only go forward under the difficult conditions imposed by a scheduled execution are disingenuous and must be rejected.

IV. CONCLUSION.

The enforcement and punishment of criminal acts is undisputedly an important and legitimate public concern. These goals, however, must be achieved in a manner consistent with the state statutes, and with the protections and procedures derived from our state and federal Constitution. The execution methods employed by the Commonwealth of Kentucky fail to pass constitutional muster. Not only are the "Execution Procedures" in direct violation of K.R.S. section 431.220, but also far from producing a rapid and sustained loss of consciousness and humane death, lethal injection likely will cause Plaintiffs to consciously suffer an excruciatingly painful and protracted death; a risk that is increased and likely to go undetected because of the failure to provide professional medical monitoring of the effects of the drugs. Furthermore, Defendants method of obtaining venous access when peripheral access becomes difficult creates a substantial risk if not a certainty of unnecessary pain and suffering in violation of the Constitution. Because of the constitutionally intolerable risk that Plaintiffs' execution will result in unnecessary suffering and

pain, and the direct disregard for state law, Plaintiffs are entitled to the redress they seek.

RESPECTFULLY SUBMITTED,

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