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, UNKNOWN EXECUTIONERS, and, HON. ERNIE FLETCHER, Governor of Kentucky Defendants.	CIV. ACTION # 04-CI-1094

RESPONSE TO MOTION TO DISMISS

NOTICE

Please, take notice that this Plaintiffs move this Court to be heard on Defendants' *Motion to Dismiss* on Wednesday, September 8, 2004 at 9:00 a.m.

MOTION

Plaintiffs file this response to Defendants' *Motion to Dismiss*.

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER MR. BAZE AND MR. BOWLING'S CLAIM THAT THE PARTICULAR MEANS FOR EXECUTING THEIR SENTENCES OF DEATH VIOLATE THE EIGHTH AMENDMENT AND SECTION 17 OF THE KENTUCKY CONSTITUTION.

At the outset, Defendants acknowledge that Plaintiffs seek two forms of relief, injunctive and declaratory relief that the means of execution be declared unconstitutional. *See Motion to Dismiss* at 2 ("Plaintiffs' complaint consists of two specific requests, namely, that no execution be scheduled and that the means of execution be declared unconstitutional."). Nevertheless, Defendants' assert that this Court has no subject matter jurisdiction to entertain any part of this action because "this Court is without authority to enjoin the scheduling of an execution date." *Motion to Dismiss* at 2. This argument fails for two reasons.

First, as the Defendants acknowledge, Plaintiffs seek more than a temporary restraining order barring the scheduling of an execution date. They seek declaratory judgment that 1) the particular means of effectuating a sentence of death by lethal injection are unconstitutional, 2) electrocution is unconstitutional, and 3) that Plaintiffs have a right to review the execution procedures both for electrocution and lethal injection. *See Complaint* at 22 paragraphs 140-147 (due process and fundamental fairness right to review execution procedures); *Complaint*, generally on electrocution claim and means of effectuating sentence of death by lethal injection.

The Commissioner of the Department of Corrections, the Warden of the prison where executions are carried out, and Unknown Executioners are among the most appropriate Defendants for such an action.

Undersigned counsel have been notified that General Counsel for the Department of Corrections do not have a copy of the execution procedures, and that the only person with specific knowledge of the full execution procedures is the Warden of the prison where executions are carried out. Thus, based on representations made to undersigned counsel, Warden Haeberlin is the only person whom judgment concerning the execution procedures can be enforced against; therefore, this Court has subject matter jurisdiction over the claim against him.

Furthermore, the Commissioner of the Department of Corrections has the authority to promulgate, review, and implement policies and procedures, and also to oversee procedures implemented by those working for him. The Warden is in charge of carrying out executions. A declaratory judgment and/or a temporary restraining order directly implicates their ability to promulgate policies and procedures and to carry out an execution. Because a ruling in favor of Plaintiffs would affect Defendants' execution procedures and ability to implement Plaintiffs' death sentence in the particular manner they intend, the Commissioner of the Department of Corrections and Warden Haeberlin are appropriate individuals to enjoin and issue declaratory relief against, thereby granting this Court subject matter jurisdiction over that portion of this action.

Second, Defendants cite *Bowling v. Commonwealth*, Ky., 926 S.W.2d 667 (1996), for the proposition that this Court has no jurisdiction to restrain the powers of the executive branch. *See Motion to Dismiss* at 1-2. This proposition, however, fails for two reasons: 1) it is inapposite to

the principle of checks and balances, and 2) *Bowling* in no way addresses the specific facts presented by the instant case.

Defendants would have this Court believe that the executive branch could never be enjoined. But, what if the Governor decided to inform the Court that he plans to schedule Mr. Bowling's execution for midnight tonight? Surely, the Court would have the power to enjoin such retaliatory action. Defendants affirmatively point out that execution dates can be scheduled before the exhaustion of any level of appeals. *See Motion to Dismiss* at 11 (. . . opportunity to file a certiorari petition, which does not automatically stay an execution date he might have"). Our governmental system of checks and balances is intended to prevent such arbitrary actions and can only function to the fullest extent of this purpose if courts have the power to enjoin unconstitutional actions by the executive branch, a power that is not abrogated by *Bowling*. *See Rasul v. Bush*, 124 S.Ct. 2686 (recognizing that executive branch power is not absolute and is subject to judicial review); *Anderson v. Commonwealth*, Ky., 107 S.W.3d 193 (2003) (recognizing that the Governor has the power to issue partial pardons except where to do so violates the Constitution).

Defendants comment that it is remarkable that *Bowling* is not mentioned anywhere in Plaintiffs pleadings. *Motion to Dismiss* at 2. But, a careful reading of *Bowling* explains why the case is not mentioned - - it is not on point.

Bowling holds that a court "does not have the power to interfere with the Governor's policy concerning the signing of death warrants." 926 S.W.2d at 669. But, Plaintiffs' suit does not deal with the Governor's policy of signing warrants. The word "policy" or anything like the word "policy" is not mentioned anywhere in Plaintiffs' pleadings. There are only two plaintiffs to the instant action not the entire 34 members of Kentucky's death row. A lawsuit affecting the

Governor's execution policy would have to implement the rights of all condemned inmates. This action does not do that and under the rules of civil procedure, individuals not party to an action are not bound by the action. Thus, admittedly the instant action has no implications on the Governor's ability to schedule the execution of anyone other than Mr. Baze and Mr. Bowling. In fact, the instant action does not even allege that the Governor's general policy of scheduling executions is invalid as applied to Mr. Baze and Mr. Bowling.

Rather, Plaintiffs' claim that their execution cannot be scheduled because the particular means of effectuating death, including the lethal injection chemicals, procedures, and lack of training, violate the state and federal constitution. In making this argument, Plaintiffs also rely on medical conditions unique to themselves that increase this risk. Again, none of this implicates the Governor's policy. Instead it alleges that the act of scheduling these two particular executions at this current moment cannot be permitted because of constitutional infirmities.

In sum, there is a fundamental difference between a policy and a particular action. The former is a discretionary action applied across the board and is inherent within the express powers of the individual carrying out the action. The latter is a particular act that is subject to constitutional constraints and review by the judiciary, the only branch of government with the authority to determine whether an action violates the laws. While a general policy that does not implicate fundamental rights (such as the policy for when a warrant is scheduled) cannot be enjoined by this Court, a specific act (such as scheduling an execution under unconstitutional conditions) surely can be enjoined under both fundamental principles of a system of checks of balances and under *Bowling*.

II. THIS COURT HAS PERSONAL JURISDICTION OVER EACH PARTY.

Defendants once again neglect to address the full nature of Plaintiffs' complaint, choosing to only address the request for injunctive relief. *See Motion to Dismiss* at 2-3. Plaintiffs expressly request multiple forms of relief - - the Complaint is entitled *Complaint for Declaratory Judgment and Injunctive Relief*. Thus, for the reasons discussed *supra part I*, the nature of the relief being sought provides grounds for personal jurisdiction over all parties.

IV. CONSTITUTIONALITY OF ELECTROCUTION.

Plaintiffs stand by the affirmations made in their complaint and supported by the Complaint's accompanying memorandum of law and exhibits.

V(D). PLAINTIFFS CHALLENGE TO THE PARTICULAR MEANS OF EFFECTUATING A SENTENCE OF DEATH BY LETHAL INJECTIN ARE PROPERLY BEFORE THIS COURT.

Defendants mischaracterize Plaintiffs' claims as a broad, general challenge to the use of lethal injection. This is not the case – Plaintiffs make no facial challenge to lethal injection. Instead, Plaintiffs challenge particular procedures and chemicals that are unnecessary in a lethal injection, and the lack of adequate procedures and trained personnel that make the risk of unnecessary pain and suffering more than the Eighth Amendment to the United States Constitution and section 17 of the Kentucky Constitution tolerates.

Plaintiffs' ability to maintain this narrow suit turns upon whether their claims "necessarily imply the invalidity of their conviction[s] or sentence[s]" *Heck v. Humphrey*, 512 U.S. 475, 487 (1994). The "requirement to resort to state post conviction litigation and federal habeas corpus before filing a civil suit for injunctive relief is not, however, implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence." *Muhammad v. Close*, 124 S.Ct. 1303 (2004). In *Muhammad*, a prisoner filed a

section 1983 suit against a prison official alleging that he had been charged with an institutional infraction that subjected him to mandatory pre-hearing lockup. *Id*. The Court held that "these administrative determinations do not as such raise any implication about the validity of the underlying conviction, and although they may affect the duration of the time to be served that is not necessarily so." *Id*. Accordingly, the Court held that the suit was properly filed under section 1983.

Like *Muhammad*, Plaintiffs suit for injunctive relief cannot be "construed as seeking judgment at odds with his conviction [or sentence]." 123 S.Ct. at 1305. Plaintiffs do not challenge their death sentence or even the constitutionality of lethal injection *per se*. Their complaint, memorandum of law, and motion for a temporary restraining order, are clear on this. They only seek to bar Defendants from executing them in the manner they currently intend (the use of chemicals that violate the cruel punishment clause of the Kentucky Constitution and the cruel and unusual punishment clause of the Eighth Amendment, and procedures [or the lack thereof] that increase the likelihood that Plaintiffs will suffer an excruciatingly painful death). Accordingly, under *Muhammad*, Plaintiffs' suit does not challenge the method of execution and therefore must be allowed to proceed as an independent civil action.

Any doubt about the meaning of *Muhammad* and its implications for Plaintiffs were clarified in *Nelson v. Campbell*, 124 S.Ct. 2117 (2004), where the Court cited *Muhammad* for the proposition that its holding is "consistent with [its] approach to civil rights damages actions." *Id*. In *Nelson*, the Court addressed the issue of "whether section 1983 is an appropriate vehicle for petitioner's Eight Amendment claim seeking a temporary stay and permanent injunctive relief" on the grounds that the particular means for effectuating petitioner's death sentence by lethal injection violated the Eighth Amendment Cruel and Unusual Punishment Clause. *Id*. at 2120.

In addressing this issue, the Court noted that "a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself." *Id*. at 2123. On the other hand, the Court held that "[a] suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself' because "by altering its method of execution, the State can go forward with the sentence." *Id*. Moreover, "merely labeling something as part of an execution procedure is insufficient to insulate it from a section 1983 attack." *Id*. Rather, a three-part test should be used to determine whether a claim challenges a method of execution: 1) whether the challenged procedure is a statutorily mandated part of the execution; 2) whether the protocol is necessary for administering the lethal injection; and, 3) whether the plaintiff is willing to concede acceptable alternatives. In applying these principles to Nelson's challenge to a particular aspect of the lethal injection procedure, the Court held that his claim was properly filed under section 1983 because the allegation "that venous access is a necessary prerequisite does not imply that a particular means of gaining such access is likewise necessary." *Id*. at 2122-25. Like *Nelson*, as discussed in Plaintiffs' complaint and memorandum of law, each of these factors permitting Plaintiffs' claims to proceed in a civil action.

Furthermore, not one of these factors is specifically limited to a "cut down" procedure. Therefore, contrary to Defendants' assertions, *Nelson* is not limited to "just a cut down." This contention is further unmasked by reference to the questions presented by *Nelson*. The first question asked:

> Whether an action brought by a death-sentenced prisoner pursuant to 42 U.S.C. section 1983, which does not attack a conviction or sentence, is simply because the person is under a sentence of death – to be treated as a habeas corpus case subject to the restriction on successive petition which categorically precludes review of any constitutional violation not related to innocence, or can be maintained as section 1983 action?

The second question asked, "whether a cut-down procedure which involves pain and mutilation, conducted prior to an execution by lethal injection, violates the Eighth Amendment to the United States Constitution? *See Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*, in *Nelson v. Campbell*. (questions presented attached as exhibit 1). Although the United States Supreme Court granted certiorari, the Court expressly limited the issue for consideration to the first question presented. *Nelson v. Campbell*, 124 S.Ct. 835 (2003) (order granting petition for writ of certiorari). Therefore, any suggestion that *Nelson* is limited to a "cut-down" procedure is inaccurate. If *Nelson*'s reach is circumscribed to merely a cut down procedure, then the Court would have granted review on the second question and would thereby have prevented any inmate, other than those exposed to lethal injection with poor venous access from bringing an allegation of a violation of the Eighth Amendment after completing one round of federal habeas review. Instead, *Nelson* dealt directly with the procedural question of the proper forum for claims that do not directly challenge the state's ability to carry out an execution, and establishes that a federal district court retains subject matter jurisdiction to hear section 1983 claims filed by a prisoner under a state sentence provided that the claim does not imperil execution of the sentence. *Nelson*, 124 S.Ct. at 2121-25, and provided such a claim asserts that cruel and unusual punishment will be inflicted as a result of state actors "deliberate indifference" to conditions of which the state actors are aware. *Id*. (*citing*, Nelson's complaint, *id.* (*citing*, Dr. Heath's affidavit in *Nelson* that given the execution procedures which were disclosed to Nelson there "is no comprehensible reason [to use those procedures] unless there exists an intent to render the procedure more painful and risky then it otherwise needs to be."), *id.* ("we therefore conclude that deliberate indifference to serious medical needs of

prisoners constitutes the 'unnecessary infliction of pain' proscribed by the Eighth Amendment.'") *(quoting, Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).[1]

Clearly, by recognizing section 1983 as a proper vehicle to bring such claims, the Court could not have believed that only cut down cases are cognizable under section 1983. Rather, Justice O'Connor's opinion contemplates that other "method – of – execution claims" will be brought but that "it need not reach the difficult question of how to categorize method – of – execution claims generally." *Nelson*, 124 S.Ct. at 2123.

These aspects of the Court's opinion do not support the conclusion that the universe of particular means of effectuating a death sentence claims are limited exclusively to "cut down cases." Rather, these aspects of *Nelson* suggest that the Court is well aware that there will be other manner of method – of – executions suits in the future and will reserve ruling on those cases for another day.

In short, if *Nelson* extends only to lethal injection cut down cases, the Court certainly would have closed the "floodgates" by granting certiorari on merely the second question. This it did not do. Instead, it recognized a procedural mechanism in section 1983 and a federal district court's subject matter jurisdiction over those claims when brought by death sentenced prisoners. Such action by the United States Supreme Court, as many post-*Nelson* courts have recognized, clearly "opens" the courthouse door to more than death sentenced inmates with bad veins.

Since *Nelson*, all courts that have dealt with lethal injection claims agree with Defendants admission that "challenges to the manner or procedure by which an execution is carried out – apart from the method itself – is cognizable in a civil proceeding." *Motion to Dismiss* at 9. Each

[1] The *Nelson* Court's reliance on *Gamble*, which required deliberate indifference on the part of the Department of Corrections, is likewise not circumscribed to the condition of Mr. Nelson's veins. Fifteen years later, in *Wilson v.*

of these cases dealt with challenges to the chemicals utilized in lethal injections, the lack of procedures for carrying out lethal injections, and the lack of training of the lethal injection team.

In *Oken v. Sizer*, 2004 WL 1334521 (D. Md. June 14, 2004) (upheld by the Fourth Circuit), the court viewed

> a challenge to the manner of administration of an IV line in a death setting as little different from its administration in a non-death setting. Both instances involve inserting an IV into the individual, infusing chemicals, monitoring vital signs, and making appropriate adjustments as circumstances may require. The procedures relate to each other in much the same fashion as a cut-down procedure in a non-death setting relates to such a procedure in a death setting.

Id. at *3. For this reason, the court held that Oken's challenge to the particular means for effectuating a sentence of death is a challenge to the conditions of confinement rather than the fact of his conviction, because as the Supreme Court concluded in *Nelson*, to conclude otherwise would be to impermissibly "treat petitioner's claim differently solely because he has been condemned to die." *Nelson*, 124 S.Ct. 2123. A federal district court in Texas reached the same conclusion in *Harris v. Johnson*, No. H-04-CV01514 (S.D. Tex. June 30, 2004), *vacated, on other grounds by*, *Harris v. Johnson*, 2004 WL 1472813 (5th Cir. June 30, 2004). As these cases demonstrate, *Nelson* stands for the proposition that Plaintiffs' claim, which does not challenge lethal injection on its face, is cognizable as a civil action.

Even assuming, *in arguendo*, that Plaintiffs claim is a challenge to the method of execution, that does not preclude this Court from reviewing the merits of the claim. As Defendants acknowledge, *Nelson* "expressly left open the question whether challenges to the method of execution are cognizable in a civil proceeding." *Motion to Dismiss* at 9. Nevertheless, Defendants rely on the pre-*Nelson* case, *In re Sapp*, 118 F.3d 460 (6th Cir. 1997), for the

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Seiter, 501 U.S. 294, 303 (1991), the Court found that deliberate indifference governs both medical needs suits and conditions suits.

proposition that method of execution claims are not cognizable in civil actions. Where Defendants argument falters though is in their belief that *Sapp* is still valid law after *Nelson*. *Sapp* held that any challenge to any part of an execution is not cognizable as a civil action because "[t]he prevention of the execution is itself an overturning of the sentence." *Id*. at 463. *Nelson*, however, makes clear that this is not the case for the *Nelson* Court saw no reason to "to treat petitioner's claim differently solely because he has been condemned to die." *Nelson*, 124 S.Ct. at 2123. Furthermore, Nelson's challenge to the cut down procedure involved his execution so if *Sapp* is still good law, the Court would have denied Nelson's claim rather than rule 9-0 in his favor.[2] Accordingly, whether a method of execution claim is cognizable in a civil action is an open question that this Court must review in the first instance if Plaintiffs' claim is considered to challenge more than the conditions of his confinement.

IV(E). PLAINTIFFS' CLAIM IS NOT BARRED BY PRINCIPLES OF EQUITY.

Defendants argue that Plaintiffs' claim should be dismissed because they could have filed this claim at various points during their direct appeal and post-conviction proceedings.[3] In support of this claim, Defendants rely on *Gomez v. United States District Court*, 503 U.S. 653 (1992). *Gomez*, however, is drastically different from the facts presented here.

Gomez was a three paragraph *per curiam* opinion in which the United States Supreme Court recognized that principles of equity come into play in determining whether to grant a stay

[2] *Sapp* relied on Eleventh Circuit case law holding that any challenge raised by a death row inmate concerning the carrying out of a death sentence is a challenge to the method of execution that must be raised in a habeas petition. The federal district court and the panel of the Eleventh Circuit that originally ruled on Nelson's claim also relied on these opinions. The Supreme Court, however, remanded Nelson's claim and stated that if a cut down procedure is found to be a necessary part of the lethal injection, the "District Court will need to address the broader question, left open here, of how to treat method-of-execution claims generally." *Nelson*, 123 S.Ct. at 2124. Therefore, the Supreme Court ruled that the cases relied upon in *Sapp* no longer mean that a method of execution claim automatically must be treated as a habeas petition. Consequently, Defendants reliance on *Sapp* is misplaced because it is no longer good law.

of execution. *Id*. at 653. Specifically, the Court held that Gomez's suit should be dismissed because it was his fifth successive claim for relief, and, therefore, constituted deliberate manipulation of the judicial process. *Id*. at 653-54.

The Court clarified *Gomez* a few years later in *Lonchar v. Thomas*, 517 U.S. 314 (1996), a case dealing with a first habeas petition filed by a death row inmate shortly before execution after changing his mind about waiving his appeals. Although *Lonchar* was a habeas case, its discussion of *Gomez* is instructive. The Court emphasized that *Gomez* dealt with an abuse of the writ resulting from a fifth attempt to secure collateral review filed on the day the execution was scheduled to take place. *Id*. at 322. Plaintiffs' suit is vastly different from *Gomez* because Plaintiffs have filed only one habeas petition and filed the instant action well before the scheduling of their execution (contrary to Defendants assertion, Plaintiffs have not concluded their federal habeas action). This is hardly the manipulation of the judicial system found to exist in *Gomez*.

Defendants also argue that Plaintiffs could have filed their suit more than six years ago when lethal injection was enacted. This argument, however, completely misinterprets Plaintiffs' claim. They are not challenging lethal injection as a manner of execution. Instead, they challenge the particular combination of chemicals currently used during lethal injection, the lack of appropriate execution procedures, and the lack of properly trained execution team members. Therefore, it is not Plaintiffs' knowledge of the manner of execution, but their knowledge of the particular chemical combination utilized during the execution and access to medical information concerning the effects of these chemicals on human beings that bares importance to when the claim first became available.

[3] Because the issue of undue delay involves balancing equities, this claim is more appropriately reserved for

In 1998, when lethal injection became a method of execution and when Defendants assert Plaintiffs should have raised their claim, no one had access to the Department of Corrections Execution Protocol because it is considered confidential and restricted information. Despite repeated requests and attempts over the years, under the Open Records Act, to obtain the Kentucky Department of Corrections Execution Protocol, obtaining this information has remained nearly impossible. As a result, for years, no one including lawyers for death row inmates had any knowledge of the chemical combination used during lethal injection or the training of the executioners. It was not until recently that Plaintiffs learned the chemicals (quantity, order, and dose) used during lethal injections in Kentucky. Therefore, through no fault of their own, Plaintiffs have been denied access to information necessary to raise this claim. And then when the information finally became available, Defendants argue that Plaintiffs are too late. Such argument is disingenuous, particularly in light of the fact that it is Defendants that have spent the past month and are still continuing to delay reaching the merits of this claim, and that the Eighth Amendment evolving standards of decency continue to change.

"Current legislative trends" is one of the factors considered in determining whether the Eighth Amendment has been violated. *Atkins v. Virginia*, 536 U.S. 304, 315 (2002). The medical information concerning the effects of the chemicals utilized during lethal injection has only recently become available. Furthermore, during the past few years, many states have banned the use of pavulon in euthanasia of animals, and the American Veterinary Assocation (AMVA) did not publish its policy condemning pavulon in euthanasia until 2001. Accordingly, this information was unavailable to Plaintiffs until recently, and therefore, could not have been presented in a prior petition.

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consideration in conjunction with the merits of the claim rather than in a motion to dismiss.

In sum, it would have been impossible for Plaintiffs to file their claim when Defendants allege the claim should have been presented because 1) the Department of Corrections repeatedly denied Plaintiffs access to the execution procedures (Defendants still have not disclosed anything about the execution procedures other than the chemicals); and, 2) medical information concerning the effects of the chemicals only recently became available. Under such circumstances, Plaintiffs cannot be said to have manipulated the system or unduly delayed in filing this claim. Rather, any current delay is a direct result of Defendants actions concerning the pleadings and originally refusing and then changing their mind (in part) about disclosing information necessary to this litigation. In equity, a party must have "unclean hands." Defendants do not. They cannot be responsible for a delay and then cry later that they are prejudiced because the claim was not filed earlier. Because of these actions and that the medical information was not available until recently, Defendants undue delay argument must be rejected.

REQUEST FOR RELIEF

Plaintiffs respectfully request that this Court deny Defendants' *Motion to Dismiss*.

In the alternative, Plaintiffs request that this Court hold Defendants' *Motion to Dismiss* in abeyance pending the outcome of a trial in this matter.

RESPECTFULLY SUBMITTED,

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September 3, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing *Response to Motion to Dismiss*, and its accompanying exhibits to be served VIA PERSONAL DELIVERY on the following individuals:

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