IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

BRIAN KEITH MOORE,

Plaintiff

v.

JOHN D. REES,
Commissioner,
Kentucky Department of Corrections,
Frankfort, Kentucky

THOMAS SIMPSON,
Warden, Kentucky State
Penitentiary, Eddyville Kentucky,

SCOTT HAAS
Medical Director for the
Kentucky Department of Corrections

ERNIE FLETCHER,
Governor of the Commonwealth
of Kentucky

and,

UNKNOWN EXECUTIONERS,

Defendants.

CIV. ACTION # 3:06-CV-22 KKC

CAPITAL CASE

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

I. NATURE OF ACTION[1]

1. This action is brought pursuant to 42 U.S.C. §1983 for violations and threatened violations of Plaintiff's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. Plaintiff seeks equitable and injunctive relief.

2. Defendants' current method of lethal injection is unconstitutional because there is an unnecessary risk that Plaintiff will be tortured to death. No government within the United States may intentionally or negligently use an excruciatingly painful and unreliable procedure or chemical for carrying out executions, particularly when readily available alternative means of carrying out the sentence exist.

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

4. Plaintiff has damaged, compromised veins.

5. Plaintiff's compromised veins make it difficult if not impossible for Defendants to insert an I.V. by the normal mode, peripheral access.

6. Plaintiff's compromised veins make it likely that the chemicals will not remain in the venous system and circulate throughout the body, even if an I.V. can be inserted.

7. Kentucky uses three chemicals to carry out lethal injections: sodium thiopental, pancuronium bromide, and potassium chloride.

8. Each of Defendants' lethal injection chemicals poses an unnecessary risk of pain and suffering.

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

9. Defendants' execution procedures fail to ensure that personnel responsible for anesthesia and monitoring of lethal injection are properly trained and qualified.

10. Monitoring to ensure that the inmate is in the appropriate plane of consciousness to prevent the inmate from feeling pain is essential to ensuring that the condemned inmate does not feel pain during an execution.

11. Defendants' protocol lacks standards for administering lethal injection and monitoring consciousness.

12. Defendants' fail to monitor for the appropriate plane of consciousness that prevents the condemned inmate from feeling pain during the execution by lethal injection.

13. Defendants' execution procedures fail to provide for identification of and addressing of contingencies that may occur during an execution, in event of problems.

14. Kentucky's failure to have adequate equipment to maintain life if a last minute stay is granted after the first or second chemical is administered and failure to have adequately trained individuals to operate the equipment violates the Eighth Amendment to the United States Constitution and federal due process.

15. Plaintiff is not alleging that Defendants could never execute him. Rather, he asserts that any execution must comport with the United States Constitution. Plaintiff could be executed if: 1) no separate legal challenge reverses his conviction or death sentence; 2) Plaintiff does not receive executive clemency; 3) Defendants design a constitutionally acceptable method for executing Plaintiff, which can include lethal injection if done in a manner that does not pose an unnecessary risk of pain and suffering, and which monitors for consciousness; and, 4) Defendants maintain proper equipment at the execution chamber for maintaining life if a stay of execution is granted after the first or second chemical is administered, and have adequately trained individuals at the execution chamber to operate the equipment and render life saving measures.

16. Plaintiff seeks a temporary restraining order and preliminary injunction preventing Defendants from carrying out his execution until Defendants come up with a means of guaranteeing venous access.

17. Plaintiff seeks a temporary restraining order and preliminary injunction preventing Defendants from carrying out his execution by the means currently employed for carrying out an execution by lethal injection in the Commonwealth of Kentucky.

18. Plaintiff does not claim that lethal injection is per se unconstitutional, but instead seeks an Order declaring that Defendants' current chemicals and means for conducting an execution by lethal injection violates the Eighth and Fourteenth Amendments to the United States Constitution.

19. Plaintiff also seeks an Order that Defendants' failure to have proper drugs and equipment for maintaining life if a last minute stay of execution is granted and Defendants' failure to have adequately trained personnel at the death chamber to operate the life-maintaining equipment violate due process and the Eighth Amendment to the United States Constitution.

20. Plaintiff seeks an Order declaring that electrocution violates the Eighth and Fourteenth Amendments.

II. PLAINTIFF

21 Brian Keith Moore 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.

III. DEFENDANTS

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

23 Defendant Thomas Simpson is the Warden of the Kentucky State Penitentiary, where Plaintiff's execution will occur.

24 Defendant Scott Haas is the Medical Director for Kentucky Department of Corrections. He is responsible for designating a physician to examine Plaintiff in the weeks leading up to his execution, and for designating a physician to be present at the execution facility to render medical treatment if a stay of execution is granted after the first and/or second chemical is administered.

25 Defendant Ernie Fletcher is the Governor of Kentucky. He is responsible for scheduling Plaintiff's execution and has the authority to call off an execution if a suitable vein in Plaintiff's body cannot be accessed within 60 minutes of attempting peripheral venous access.

26 Defendants Unknown Executioners are employed by or under contract with the Kentucky Department of Corrections, to make preparations for, and carry out, Plaintiff's execution. They include, but are not limited to, physicians, emergency medical technicians, phlebotomists, physician's assistants, the execution team, the executioner, the I.V. team, and the team leader. Plaintiff does not yet know their identities and Defendants will not reveal the identities of these persons.

IV. JURISDICTION AND VENUE

27. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights violation), 1651 (all-writs), 2201 (declaratory relief), and 2202 (further relief).

28. This action arises under the Eighth and Fourteenth Amendments of the United States Constitution, and 42 U.S.C. § 1983.

29. Venue is proper under 28 U.S.C. § 1391. All Defendants reside in the same state. The principal place of business for Defendant Rees, Defendant Fletcher, and Defendant Haas is Frankfort, Kentucky.

30. All Defendants are state actors acting under color of state law.

V. FACTS

31. Plaintiff Brian Keith Moore's death sentence was recently affirmed by the United States Court of Appeals for the Sixth Circuit. Rehearing en banc was denied on February 28, 2006. His petition for a writ of certiorari is due in the United States Supreme Court in late May 2006. Because Moore's execution could be scheduled soon, he is filing this action now (rather than closer to an execution date) in order to provide him and this Court with adequate time to resolve the disputed issues.

32. Defendants are responsible for carrying out executions in Kentucky.

33. 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 six prong test in which proof of any one prong establishes an Eighth Amendment violation:

a) the physical pain inflicted is excessive in light of readily available alternatives;

b) the risk of pain is more than the Constitution tolerates;

c) the risk of pain and suffering is unnecessary in light of available alternatives;

d) mutilation of the body during the execution;

e) unnecessary psychological suffering;

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

34. Defendant Rees worked with the Oklahoma Department of Corrections from July 1976 until December 1980.

35. The first state to adopt lethal injection was Oklahoma in 1977.

36. Defendant Rees was involved in creating the policies and procedures for carrying out lethal injections in Oklahoma.

37. In 1978, Oklahoma drafted the first lethal injection protocol in the country.

38. Defendant Rees was involved in drafting Oklahoma's 1978 lethal injection protocol.

39. Prior to adopting the 1978 protocol, Oklahoma neither conducted nor consulted any medical or scientific studies in deciding what chemicals to use or the quantities of the chemicals to administer.

40. Oklahoma's original execution protocol called for the administration of a short acting barbiturate in conjunction with a paralytic agent. Potassium chloride was mentioned as a possible paralytic agent.

41. Potassium chloride is not a paralytic agent.

42. The first lethal injection execution in the United States was carried out in Texas in 1982 by the administration of sodium thiopental, pancuronium bromide, and potassium chloride.

43. Prior to the first lethal injection in 1982, no state conducted or consulted any medical or scientific studies in determining which chemicals to use for lethal injections or in what quantity to administer them.

44. No state has conducted or consulted any medical or scientific studies on sodium thiopental, pancuronium bromide, or potassium chloride during lethal injections, or into the quantity of each drug to administer.

45. Defendants intend to execute Plaintiff by administering the following drugs in the following manner:

a) sodium thiopental (also known as sodium pentothal) (3 grams);

b) pancuronium bromide (also referred to as pavulon) (50 milligrams); and,

c) potassium chloride (240 milliequivalents)

The drugs are injected in succession, one after the other. Saline solution is injected in between each drug.

46. Defendants use these three chemicals because these chemicals were used by other states at the time Kentucky created its first lethal injection protocol.

47. Defendants neither conducted nor relied upon any medical or scientific studies in determining to use these chemicals.

48. Defendants neither conducted nor relied upon any medical or scientific studies in determining the quantity of chemicals to administer.

49. In deciding which chemicals to use in Kentucky lethal injections, Defendants did not consult with any anesthesiologists, doctors, or other medically trained personnel.

50. During lethal injection litigation on behalf of Ralph Baze and Thomas Bowling, Defendants changed their protocol to increase the dose of sodium thiopental from 2 grams to 3 grams. This change was made in late 2004.

51. The decision to increase the amount of sodium thiopental was made by Defendant Rees.

52. Defendant Rees has no medical training.

53. Prior to increasing the amount of thiopental from 2 grams to 3 grams, Defendant Rees did not consult any medical professionals about increasing the dose of thiopental.

54. Defendant Rees conducted no medical or scientific studies on the effects of the lethal injection chemicals before increasing the amount of thiopental from 2 grams to 3 grams.

55. Defendant Rees did not consult any anesthesiologists or medically trained person about increasing the amount of thiopental before increasing the dose from 2 grams to 3 grams.

56. Prior to April 18, 2005, Defendant Rees thought the directions on the lethal injection chemical bottles would say how much of the chemical to administer.

57. The package inserts and labels on the lethal injection chemicals do not say how much of the chemicals to administer during a lethal injection.

58. Other than the fact that sodium thiopental, pancuronium bromide, and potassium chloride are used in other states, prior to April 18, 2005, Defendant Rees had no idea why these three chemicals are used in Kentucky lethal injections.

59. Defendant Rees currently has no knowledge why these three chemicals are used in Kentucky lethal injections.

60. Prior to April 18, 2005, Defendant Rees did not know why Kentucky lethal injections used three chemicals instead of one or two.

61. Defendant Rees still does not know why Kentucky lethal injections used three chemicals instead of one or two.

62. Until April 18, 2005, Defendants thought that all states that carry out lethal injection administer sodium thiopental, pancuronium bromide, and potassium chloride.

63. New Jersey's lethal injection protocol does not use pancuronium bromide. Instead, they administer only sodium thiopental and potassium chloride.

64. Prior to April 18, 2005, Defendants were unaware that New Jersey uses only two chemicals: sodium thiopental and potassium chloride to carry out lethal injections.

65. Defendants have not consulted with the New Jersey Department of Corrections about why they do not use pancuronium bromide or any other neuromuscular blocking agent in lethal injections.

66. Defendants have not considered adopting New Jersey's chemical combination (sodium thiopental and potassium chloride).

67. Defendants have not consulted any anesthesiologists about the viability of administering only sodium thiopental and potassium chloride.

68. Defendants have not consulted any medical professionals about the viability of administering only sodium thiopental and potassium chloride.

69. Assisted suicide is legal in Oregon. According to the Death with Dignity reports required by Oregon law, more than 170 terminally ill people have been prescribed medication to end their lives in Oregon.

70. In almost all of these cases, the terminally ill person was prescribed a large dose of pentobarbital, a long-acting barbiturate, as the only chemical to cause death.

71. Defendants have not consulted any medical personnel about replacing sodium thiopental with pentobarbital.

72. Defendants have not considered replacing sodium thiopental with pentobarbital.

73. Defendants have not consulted any medical personnel about administering pentobarbital as the sole chemical to cause death.

74. Defendants have not considered administering pentobarbital as the sole lethal injection chemical.

75. The usage of sodium thiopental is not mandated by Kentucky law.

76. The usage of pancurium bromide is not mandated by Kentucky law.

77. The usage of potassium chloride is not mandated by Kentucky law.

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

79. To carry out Plaintiff's execution, Defendants intend to insert two I.V.'s into Plaintiff.

80. The three chemicals will be injected from only one I.V. line.

81. The I.V. insertion team will spend up to 60 minutes attempting to insert an I.V. into Plaintiffs' body.

82. If the I.V. insertion team is unable to insert the I.V.'s after 60 minutes, Defendant Rees and Defendant Simpson will ask Defendant Fletcher to call off the execution and reschedule it.

83. The chemicals are injected from outside the execution chamber by pushing them through a tube that flows approximately five feet to the catheter that is inserted into the condemned inmate's vein.

84. The chemicals are injected by a member of the execution team referred to as the executioner.

85. The executioner (the person who actually injects the chemicals) has no medical training.

A. Facts related to the unconstitutionality of the tri-chemical cocktail used in Kentucky lethal injections.

86. Sodium thiopental (pentothal) is an ultra-short acting barbiturate.

87. Sodium thiopental begins to wear off almost immediately.

88. Pancuronium bromide is a curare-derived agent that paralyzes all skeletal and voluntary muscles.

89. Pancuronium bromide has no impact whatsoever on awareness, cognition, or sensation.

90. 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.

91. This particular combination and sequence of chemicals create an unnecessary risk that Plaintiff will suffer an excruciatingly painful and protracted death in violation of the Eighth Amendment to the United States Constitution.

92. Prior to injecting sodium thiopental, Defendants offer the condemned inmate Valium.

93. If Plaintiff refuses to take Valium prior to his execution, Defendants will force him to do so if Defendants determine that Valium should be administered.

94. Defendants have no guidelines for determining under what circumstance a forced administration of Valium should take place.

95. Valium can interfere with sodium thiopental's effectiveness.

96. Sodium thiopental is a powder that must be mixed into a liquid before injecting it.

97. According to the package insert for sodium thiopental, it should be administered only "by individuals experienced in the conduct of intravenous anesthesia."

98. Defendants are not experienced in the process of intravenous anesthesia.

99. The executioner, the person administering thiopental, is not experienced in the conduct of intravenous anesthesia.

100. According to the package insert for sodium thiopental, "individual response to the drug is so varied that there can be no fixed dosage."

101. Larger individuals need a higher dose of thiopental than smaller individuals.

102. According to the package insert for sodium thiopental, "dose is usually proportional to body weight and obese patients require a larger dose than relatively lean persons of the same weight."

103. Body mass index is calculated by dividing the subject's weight in kilograms by the square of his height in meters.

104. A body mass index of 30 to 35 is characterized as obese.

105. A body mass index of over 35 is characterized as morbidly obese.

106. Plaintiff is morbidly obese as defined above.

107. Defendants inject the same dose of thiopental to all condemned inmates.

108. The concentration of thiopental injected determines the potency of sodium thiopental, i.e., if the sodium thiopental is too diluted, it will be less potent, and not ensure that the condemned inmate does not feel pain at any point during his execution.

109. Defendants are not adequately trained in mixing the lethal injection chemicals to ensure that the concentration of thiopental injected into the condemned inmate prevents the inmate from feeling pain.

110. Sodium thiopental is an ultra 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.

111. Defendants administer sodium thiopental to prevent the condemned inmate from feeling pain.

112. Sodium thiopental is the only chemical administered by Defendants to prevent the condemned inmate from feeling pain.

113. Sodium thiopental does not relieve pain.

114. Analgesics (which include opiates) are the class of chemicals that relieve pain.

115. Sodium thiopental is not an analgesic.

116. Defendants do not administer an analgesic while carrying out lethal injections.

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

118. During surgical procedures, a barbiturate is administered to render a person unconscious and an analgesic is administered to ensure that the patient does not feel pain.

119. Both a barbiturate and an analgesic are continuously administered during surgical procedures.

120. Sodium thiopental was a state of the art barbiturate in 1977 when lethal injection first became a method of execution in the United States.

121. Sodium thiopental has been supplanted in the medical field by propafol.

122. As of April 20, 2005, Defendants are aware that sodium thiopental has been supplanted in the medical field by propafol.

123. Propafol is a safer and longer acting barbiturate than sodium thiopental.

124. Defendants have not consulted any medical professionals about the viability of using propafol instead of sodium thiopental.

125. Defendants have not taken any steps to look into the viability of using propafol instead of sodium thiopental.

126. Defendants have not taken any steps to look into the viability of replacing sodium thiopental with pentobarbital.

127. Because of its brief duration (usually about five to seven minutes), there is a reasonable probability that sodium thiopental will fail to provide a sedative effect throughout the entire execution process.

128. Three grams of sodium thiopental or even a larger dose is insufficient to induce unconsciousness if sufficient sodium thiopental does not reach the condemned prisoner's bloodstream.

129. The concentration of sodium thiopental not the dose of thiopental injected into the condemned inmate determines whether the condemned inmate will feel pain.

130. Defendants fail to monitor the concentration of sodium thiopental and fail to monitor to ensure that the full quantity of sodium thiopental reaches the inmate's bloodstream.

131. Defendants fail to determine if the inmate is unconscious to the point of being unable to feel pain prior to administering pancuronium bromide and potassium chloride.

132. Defendants' only form of monitoring for unconsciousness prior to injecting the second and third chemical is physical observation of the inmate.

133. Prior to the administration of pancuronium bromide, checking corneal reflexes or pinching a person to see if a person responds are methods that could indicate whether a person can feel painful stimuli.

134. After the injection of pancuronium bromide, machines such as an EEG monitor can be used to monitor for the ability to feel painful stimuli.

135. If a person is able to feel pain, pancuronium bromide and potassium chloride would be extremely painful.

136. Because Defendants choose to use potassium chloride, instead of less painful alternatives, it is essential to ensure that a person cannot feel pain.

137. There are multiple levels of unconsciousness.

138. General anesthesia, also known as surgical anesthesia, is the level of anesthesia a person must be in to not feel pain during a lethal injection.

139. A person who appears unconscious to the lay observer may not be in a state of general anesthesia.

140. A person who appears unconscious can feel pain or wake up from painful stimuli if they are not in a state of general anesthesia.

141. A person who is unable to respond to verbal stimuli might be conscious enough to wake and feel painful stimuli, such as the pain caused by pancuronium bromide and potassium chloride.

142. When sodium thiopental is the sole anesthetic, at least 39-42 mg/L of thiopental in the bloodstream is necessary to ensure that a person will not wake up from painful stimuli. *See* Baselt, Disposition of Toxic Drugs and Chemicals in Man.

143. The 39-42 mg/L is the amount of thiopental necessary in the blood stream to prevent a person from waking from painful stimuli (in other words, the amount of thiopental necessary to achieve surgical anesthesia), not the amount of thiopental necessary to prevent a person from responding to a verbal command.

144. North Carolina injects sodium thiopental during executions.

145. Numerous toxicology reports on executed death row inmates in North Carolina, including toxicology results from four executions conducted between November 2005 and the end of January 2006, indicate thiopental levels below 39-42 mg/L.

146. Because the level of thiopental in bodies of inmates executed in North Carolina was below 35-39 mg/L, these inmates were likely able to feel pain during their executions.

147. Because North Carolina injects pancuronium bromide, the condemned inmate could not communicate that they were conscious and feeling pain, and evidence of consciousness could not be apparent to the observers of the execution.

148. South Carolina administers two grams of sodium thiopental.

149. Toxicology reports on death row inmates in Arizona and South Carolina indicate that numerous death-sentenced inmates in Arizona and South Carolina had less than 39-42 mg/L of thiopental in their bloodstream when executed.

150. Because the level of thiopental in body of inmates executed in Arizona and South Carolina was below 39-42 mg/L, these inmates were likely able to feel pain during their execution.

151. Because both Arizona and South Carolina inject pancuronium bromide, none of the condemned inmates could communicate that they were conscious and feeling pain, and evidence of consciousness could not be apparent to the observers of the execution.

152. Edward Harper is the only person judicially executed by lethal injection in Kentucky.

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

154. The concentration of thiopental in Harper's bloodstream was insufficient to ensure that he could not feel painful stimuli during his execution.

155. Edward Harper likely was conscious enough to feel pain when pancuronium bromide was administered.

156. Edward Harper likely was conscious enough to feel pain when potassium chloride was administered.

157. Because Defendants injected Harper with pancuronium bromide, Harper could not communicate that he was conscious and feeling pain, and evidence of consciousness was not apparent to the observers of the execution.

158. Dr. Dershwitz, who has testified on behalf of multiple correctional departments in lethal injection challenges in many states asserts that neither Harper nor any other inmate were likely conscious, defined by him as the ability to respond to verbal stimuli, during their execution.

159. Dr. Dershwitz has conducted no studies on sodium thiopental.

160. Dr. Dershwitz bases his opinions on how chemicals, other than sodium thiopental, react with the human body.

161. Dr. Dershwitz bases his opinion on his knowledge of the use of sodium thiopental in conjunction with other chemicals to render an inmate unconscious.

162. Dr. Dershwitz's opinion is also based on the amount of thiopental necessary to ensure a lack of response to verbal stimuli.

163. Dr. Dershwitz rarely relies on thiopental as the sole anesthetic during surgical procedures.

164. Dr. Dershwitz has not reviewed literature on injecting thiopental as the sole anesthetic and, until he testified in *Baze v. Rees*, he was unfamiliar with Baselt's standard text for determining the amount of thiopental necessary to ensure that a person will not respond to painful stimuli.

165. A larger concentration of sodium thiopental is necessary to obtain and maintain unconsciousness when thiopental is used as the only chemical for this purpose.

166. An individual who is unable to respond to verbal stimuli can feel pain.

167. A larger concentration of sodium thiopental is necessary to ensure that a person who cannot respond to verbal stimuli also cannot feel pain.

168. Even according to Dershwitz, with 7 mg/L of sodium thiopental in the bloodstream, 50% of the population will be able to respond to verbal commands.

169. Based on Dershwitz's calculations, the amount of thiopental in the blood necessary to prevent a person from feeling pain must be higher than 7 mg/L.

170. Toxicology results from numerous individuals executed in Arizona, North Carolina, South Carolina, and the lone lethal injection in Kentucky indicate that the thiopental levels in the bloodstream were lower than 7 mg/L.

171. Dershwitz has calculated the amount of thiopental he expects to find in the blood five minutes after an injection of 3grams of thiopental. Dershwitz's predictions on this change depending on what state has hired him as an expert.

172. In litigation in Maryland on behalf of Steven Oken, Dr. Dershwitz testified (by affidavit) that 30.15 mg/L of thiopental should be in Oken's blood five minutes after injection.

173. 30.15 mg/L is below the 39-42 mg/L threshold level necessary to prevent a person from feeling painful stimuli, according to Baselt.

174. Toxicology results from Oken's execution show that 10 mg/L of thiopental, not 30.15 mg/L, was found in Oken's bloodstream.

175. In the four most recent executions in North Carolina, blood to test for the amount of thiopental was drawn shortly after death and at the time of the autopsy.

176. Steven Van McHone's toxicology results showed thiopental levels of 1.5 mg/L and 21 mg/L.

177. The thiopental levels in McHone were lower than predicted by Dershwitz.

178. The thiopental levels in McHone were lower than the amount Dershwitz says is necessary to prevent 50 % of the population from responding to verbal stimuli.

179. The thiopental levels in McHone were lower than the 39-42 mg/L of thiopental necessary to prevent a person from feeling painful stimuli, according to Baselt.

180. Elias Syriani's toxicology results showed thiopental levels of 4.4 mg/L, 11 mg/L, and 12 mg/L.

181. The thiopental levels in Syriani were lower than predicted by Dershwitz.

182. The thiopental levels in Syriani were lower than the amount Dershwitz says is necessary to prevent 50 % of the population from responding to verbal stimuli.

183. The thiopental levels in Syriani were lower than the 39-42 mg/L of thiopental necessary to prevent a person from feeling painful stimuli, according to Baselt.

184. Kenneth Boyd's toxicology results showed thiopental levels of 11 mg/L, and 29 mg/L.

185. The thiopental levels in Boyd were lower than predicted by Dershwitz.

186. The thiopental levels in Boyd were lower than the amount Dershwitz says is necessary to prevent 50 % of the population from responding to verbal stimuli.

187. The thiopental levels in Boyd were lower than the 39-42 mg/L of thiopental necessary to prevent a person from feeling painful stimuli, according to Baselt.

188. Perrie Simpson's toxicology results showed thiopental levels of 8.7 mg/L, 12 mg/L, 42 mg/L.

189. Two of the thiopental levels in Simpson were lower than predicted by Dershwitz.

190. Two of the thiopental levels in Simpson were lower than the amount Dershwitz says is necessary to prevent 50% of the population from responding to verbal stimuli.

191. Two of the thiopental levels in Simpson were lower than the 39-42 mg/L of thiopental necessary to prevent a person from feeling painful stimuli, according to Dershwitz.

192. According to Dershwitz, 5 grams of thiopental should render a person unconscious in about one minute.

193. Recently, Delaware executed Brian Steckel. It took many minutes for the chemicals to take effect.

194. After the sodium thiopental was injected, Steckel was able to speak and asked why it was taking so long for the chemicals to take effect.

195. Steckel was not rendered unconscious within a minute of the injection of thiopental.

196. The length of time it took for Steckel to be rendered unconscious shows that the concentration or amount of thiopental (or both) that reached his bloodstream was insufficient to prevent him from reacting to painful stimuli.

197. Witnesses to Steckel's execution observed Steckel's convulsions during his execution.

198. Convulsions are caused by potassium chloride.

199. Pancuronium bromide prevents witnesses from seeing convulsions caused by potassium chloride.

200. Because Steckel convulsed during his execution, the pancuronium bromide did not paralyze the body.

201. Because the sodium thiopental did not prevent Steckel from feeling pain, he was able to feel the excruciating agony of pancuronium bromide and pain of potassium chloride.

202. California administers 5 grams of sodium thiopental.

203. Recently disclosed information on the last 13 lethal injections in California establishes that many inmates are conscious, and thus feeling the pain of pancuronium bromide and potassium chloride during their executions.

204. Because sodium thiopental begins to wear off almost immediately and cessation of respiration does not mean death, within five minutes or less of the injection, the inmates will be able to feel painful stimuli.

205. According to Dershwitz, a 5 gram dose of sodium thiopental will cause virtually all people to cease respiration and consciousness within a minute.

206. Evidence from six executions in California show that, even after a 5 gram dose of sodium thiopental, a condemned inmate's breathing does not stop within a minute, and in some situations has lasted for as long as twelve minutes.

207. Jaturun Siripongs was executed in California on February 9, 1999. The administration of sodium thiopental began at 12:04 a.m. and the administration of pancuronium bromide began at 12:08 a.m., yet respiration did not cease until 12:09 a.m., five minutes after the administration of sodium thiopental began and one minute after the administration of pancuronium bromide.

208. The amount of time that elapsed before respiration stopped establishes that Siripongs did not stop breathing within one minute of the injection of sodium thiopental.

209. The amount of time that elapsed before respiration stopped creates a high likelihood that the sodium thiopental was not working and that Siripongs was able to feel pain during his execution.

210. Manuel Babbitt was executed in California on May 4, 1999. The administration of sodium thiopental began at 12:28 a.m. and the administration of pancuronium bromide began at 12:31 a.m., yet respiration did not cease until 12:33 a.m., five minutes after the administration of sodium thiopental began and two minutes after the administration of pancuronium bromide began.

211. In addition, brief spasmodic movements were observed in Babbitt's upper chest at 12:32 a.m. Babbitt maintained a steady heart rate of 95 or 96 beats per minute for seven minutes after he was injected with sodium thiopental.

212. Babbitt's heart rate and the amount of time that elapsed before respiration ceased establishes that Babbitt did not stop breathing within one minute of the injection of sodium thiopental

213. Babbitt's heart rate and the amount of time that elapsed before death establishes that the sodium thiopental was not working and that Babbitt was likely able to feel pain during his execution.

214. Darrell Keith Rich was executed in California on March 15, 2000. The administration of sodium thiopental began at 12:06 a.m. and the administration of pancuronium bromide began at 12:08 a.m., yet respiration did not cease until 12:08 a.m., when pancuronium bromide was injected, two minutes after the administration of sodium thiopental began.

215. Chest movements were observed in Rich from 12:09 a.m. to 12:10 a.m.

216. The above information on Rich's execution establishes that Rich did not stop breathing within one minute of the injection of sodium thiopental

217. The above information on Rich's execution establishes that the sodium thiopental was not working and that Rich was able to feel painful stimuli during his execution.

218. Stephen Wayne Anderson was executed in California on January 29, 2002. The administration of thiopental began at 12:17 a.m. and the administration of pancuronium bromide began at 12:19 a.m., yet respiration did not cease until 12:22 a.m., five minutes after the administration of sodium thiopental began and three minutes after the administration of pancuronium bromide began.

219. The above information establishes that Anderson did not stop breathing within one minute of the injection of sodium thiopental.

220. The above information establishes that the sodium thiopental was not working and that Anderson was likely able to feel painful stimuli during his execution.

221. Stanley Tookie Williams was executed on December 13, 2005. The administration of sodium thiopental began at 12:22 a.m., the administration of pancuronium bromide began at 12:28 a.m., and the administration of potassium chloride began at 12:32 a.m. or 12:34 a.m., yet respiration did not cease until either 12:28 a.m. or 12:34 a.m.

222. The above information establishes that Williams did not stop breathing within a minute of the injection of sodium thiopental.

223. The above information establishes that the sodium thiopental was not working and that Williams was likely able to feel painful stimuli during his execution.

224. Clarence Ray Allen was executed on January 17, 2006. The administration of sodium thiopental began at 12:18 a.m., yet respiration did not cease until 12:27 a.m., when pancuronium bromide was injected.

225. The above information establishes that Allen did not stop breathing within one minute of the injection of sodium thiopental.

226. The above information establishes that the sodium thiopental was not working and that Allen was likely able to feel painful stimuli during his execution.

227. Defendants do not keep logs on whether and how long the condemned inmate is breathing.

228. Defendants have taken no precautions or corrective measures to ensure that three grams of sodium thiopental will reach an inmate's bloodstream in the correct concentration and render the inmate unconscious enough to not feel pain.

229. Defendants do not use any medical equipment to monitor the condemned inmate's respiration, heart beat, pulse, or brain waves during the execution.

230. If thiopental is not injected directly into a vein, it will not render a person unconscious.

231. If the vein collapses, thiopental will leak into the surrounding tissue and fail to render the inmate unconscious.

232. If thiopental is injected into a location in the body that is not a vein, the thiopental in the inmate's body would be extremely painful.

233. In a person with damaged (compromised) veins, there is a high risk that the accessed vein will collapse while the chemicals are being administered.

234. In a person with cardiovascular disease, there is a high risk that the chemicals will not flow through body properly, preventing the chemicals from having the desired effect, and causing the inmate to suffer the excruciating pain of pancuronium bromide and potassium chloride.

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

236. Administration of valium can lessen the efficacy of sodium thiopental.

237. In an individual who is resistant to sodium thiopental, a higher dose of sodium thiopental is necessary to induce unconsciousness to the point where the person will not feel pain.

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

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

240. Edward Harper presented none of the above mentioned risk factors.

241. An insufficient amount or concentration of sodium thiopental reached Edward Harper's bloodstream.

242. Plaintiff has risk factors that substantially increase the likelihood that he will be resistant to sodium thiopental, including the fact that he is substantially overweight.

243. Plaintiff's excessive weight means that a larger concentration of sodium thiopental will be necessary to render him unconscious and to maintain unconsciousness throughout his execution than would be necessary for a person of average weight.

244. According to the package insert, complications and additional risks exist with injecting sodium thiopental into a person who suffers from severe cardiovascular disease.

245. Plaintiff has suffered at least one heart attack.

246. Plaintiff's heart attack creates additional risks associated with the use of sodium thiopental.

247. Sodium thiopental should not be administered to Plaintiff because of his cardiovascular disease.

248. Defendants have not consulted any medical professionals about potential problems with using sodium thiopental to execute Plaintiff, stemming from Plaintiff's cardiovascular disease.

249. 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, pancruonium bromide.

250. When sodium thiopental is exposed to pancuronium bromide, sodium thiopental precipitates, i.e., returns to the solid condition.

251. Once sodium thiopental returns to its solid condition, it no longer performs its anesthetic function.

252. If Plaintiff is not adequately sedated to the point where he cannot feel painful stimuli, he will suffer the conscious experience of being paralyzed while suffocating and an intense fiery burning sensation in every nerve in his body, if Defendants execute him with the three chemicals Kentucky plans to use for his execution.

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

254. Pancuronium bromide is a long acting neuromuscular blocking agent.

255. While pancuronium bromide paralyzes skeletal and voluntary muscles, including the diaphragm, it has no effect on consciousness or the ability to feel pain.

256. Pancuronium bromide will serve only to mask the excruciating pain and convulsions suffered by Plaintiff.

257. Pancuronium bromide prevents a conscious individual from notifying anyone that he or she is conscious or in pain.

258. Pancuronium bromide prevents a conscious individual from showing any signs of consciousness or pain.

259. Defendants do not monitor for consciousness or pain after the injection of sodium thiopental or pancuronium bromide.

260. Many means of monitoring for consciousness after injecting pancuronium bromide exist, including blood pressure cuffs, EEG monitoring, using an EKG machine (if located in the execution chamber and read throughout the execution, not just at the end to determine death).

261. None of the above means of monitoring for consciousness after injecting sodium thiopental or pancuronium bromide are used by Defendants.

262. A condemned inmate who appears unconscious could feel pain because

1) less than the expected dose of the anesthetizing drug, sodium thiopental, has been successfully injected into the individual's bloodstream, or has failed to remain in the person's bloodstream;
2) sensitivity to sodium thiopental varies greatly among the population and some individuals;
3) the duration of the effectiveness of sodium thiopental has worn off; OR,
4) the concentration of sodium thiopental was insufficient to render the inmate unconscious to the point where the inmate cannot feel pain.

263. If a condemned inmate regains consciousness or the ability to feel pain during an execution, the inmate will suffer the agony of suffocation and paralysis due to pancuronium bromide and the excruciating pain of potassium chloride.

264. The pain suffered by a conscious inmate would be less if Defendants replaced potassium chloride with some other chemical to stop the heart.

265. Pancuronium bromide collapses the lungs and, in a conscious person, causes the extreme agony of paralysis and suffocation.

266. Death by suffocation is akin to drowning.

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

268. Pancuronium bromide can cause individuals to have a gastric reaction that causes vomit to fill an inmate's mouth.

269. The vomit caused by the usage of pancuronium bromide can flow into a person's lungs causing suffocation.

270. Because pancuronium bromide paralyzes the diaphragm, a person is unable to regurgitate the vomit.

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

272. The American Veterinary Medicine Association (AVMA) condemns the use of neuromuscular blocking agents such as pancuronium bromide in the euthanasia of animals when a sedative (anesthetic or barbiturate) is administered.

273. At least 31 states have made the use of pancuronium bromide 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.

274. Since legislatures began prohibiting using neuromuscular blocking agents with sedatives, no legislature or other governing body has expressly condoned this practice or repealed statutes forbidding it.

275. The first lethal injection procedure designed in the United States called for a paralytic agent to cause death.

276. Using pancuronium bromide or any chemical to stop respiration is not necessary to cause death.

277. Potassium chloride, the third chemical involved in Kentucky's lethal injection process, stops the prisoner's heart, and, thereby cause cardiac arrest and death.

278. With the use of potassium chloride, pancuronium bromide is not necessary to cause death.

279. Pancuronium bromide serves no legitimate purpose in a lethal injection execution, particularly considering the readily available alternative of conducting the lethal injection execution without pancuronium bromide.

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

281. The involuntary muscle reactions caused by potassium chloride can be avoided by using many other non painful ways of stopping the heart that will not cause involuntary muscles reactions.

282. Eliminating pancuronium bromide from the lethal injection process will not increase the amount of pain that a condemned inmate suffers during the dying process.

283. 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.

284. Preventing witnesses from seeing the effects of the killing agent prevents public perception and awareness regarding that agent, and thus violates the Eighth Amendment to the United States Constitution because it prevents the public from moving towards an informed consensus either for or against the use of the killing chemical.

285. A chancery court in Tennessee has found the usage of pancuronium bromide during lethal injections to be arbitrary and unnecessary.

286. The use of pancuronium bromide during an execution violates evolving standards of decency.

287. The use of pancuronium bromide during an execution creates an unacceptable risk that Plaintiff will suffer an unnecessarily painful death.

288. Potassium chloride, the third chemical used in Kentucky's lethal injection process, is a strong alkaline chemical.

289. Potassium chloride is commonly used as road salt.

290. In Kentucky lethal injections, potassium chloride is used to stop the heart from beating, and thus to cause death.

291. The EKG printout from the one lethal injection execution in Kentucky (that of Edward Harper) shows that Harper was alive when potassium chloride was administered and that potassium chloride caused his death.

292. During the execution of Clarence Ray Allen in California on January 17, 2006, a second administration of potassium chloride had to be administered because the first one did not kill him.

293. The dose of potassium chloride administered to Allen should have caused his death in less than a couple of minutes, as soon as the potassium chloride cycled through Allen's body.

294. The fact that a second dose of potassium chloride had to be administered to Allen establishes that the full dose of potassium chloride did not reach Allen's heart.

295. When potassium chloride reaches the heart in large doses, such as that used in Kentucky lethal injections, it causes a massive heart attack.

296. The administration of potassium chloride is extremely painful when administered intravenously.

297. Potassium chloride ravages the organs by causing an extremely painful burning sensation in every nerve as it courses through the body.

298. Pancuronium bromide prevents an inmate from expressing the pain caused by potassium chloride.

299. Potassium chloride can be replaced by many non-painful chemicals that would stop the heart in a short period of time without causing any convulsions.

300. Dilantin is a non-painful chemicals that would stop the heart in a short period of time without causing any convulsions.

301. Veterinarians do not use potassium chloride in euthanizing animals.

302. Veterinarians euthanize animals by injecting a lethal dose of pentobarbital.

303. Pentobarbital is a long acting barbiturate.

304. Pentobarbital is a potential alternative to the tri-chemical cocktail used in Kentucky lethal injections.

305. 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.

306. Upon information and belief, Defendants have conducted no scientific or medical studies concerning the chemicals and procedures they use for lethal injection since they were made aware of potential problems with the process in August 2004.

307. Defendants' failure to conduct medical or scientific tests on the chemicals since August 2004 and their failure to adopt alternative chemicals and procedures in light of the information presented to them since August 2004 shows their deliberate indifference towards known medical needs.

308. The risk of inflicting severe and unnecessary pain and suffering upon Plaintiff during his execution is grave because Warden Simpson, who is in charge of the prison where executions take place, has never been involved in an execution by lethal injection.

309. The risk of inflicting severe and unnecessary pain and suffering upon Plaintiff during his execution is grave because Warden Simpson, who is in charge of the prison where executions take place, has never witnessed an execution by lethal injection.

310. The risk of inflicting severe and unnecessary pain and suffering upon Plaintiff during his execution is grave because execution team members regularly have had difficulty inserting the IV needle into test subjects during mock lethal injections.

311. The risk of unnecessary pain and suffering is 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.

312. 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.

313. 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.

314. Defendants did not determine if a purple and puffy face was normal during an execution by lethal injection, but continued with the execution.

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

316. The risk of unnecessary pain and suffering is grave in Kentucky because the individuals responsible for mixing the chemicals, inserting the I.V.s, and injecting the chemicals are not adequately trained.

317. The risk of unnecessary pain and suffering and malfunctions in the lethal injection process is grave in Kentucky because Defendants inject the chemicals from outside the execution chamber by sending the chemicals through a tube that carries the chemicals to the vein rather than injecting the chemicals directly into the vein.

318. The lethal injection chemicals travel through a tube in the wall for five feet before entering the condemned inmate.

319. Defendants could inject the chemicals directly into the vein if the executioner was inside the execution chamber and inserted the chemicals directly into the catheter.

320. Plunging the chemicals through a tube connected to a catheter rather than injecting the chemicals directly into the vein increases the risk that the condemned inmate will suffer unnecessary pain during his execution.

321. How fast the lethal injection chemicals are pushed through the plunger into the tube impacts whether the chemical will get into a person's vein.

322. How fast the lethal injection chemicals are pushed through the plunger into the tube impacts how long it will take for a chemical to take effect and how quickly that effect will wear off.

323. The executioner is not trained in how fast to push the plunger.

324. The executioner is not instructed on how fast to push the plunger.

325. The package inserts and labels on the lethal injection chemicals do not say how fast to push the plunger.

326. There is a high risk that the executioner may push the lethal injection chemicals into Plaintiffs too quickly or too slowly.

327. If the lethal injection chemicals are pushed into Plaintiff too quickly or too slowly, Plaintiff will suffer unnecessary pain.

328. Defendants use one size catheter to inject the lethal injection chemicals.

329. The size of the catheter used during lethal injections is different than the size standardly used in medical settings for drawing blood or inserting an I.V.

330. If too small a catheter is used during Plaintiff's execution, the chemicals will not reach Plaintiffs' bloodstream as quickly as they should.

331. Using too small a catheter creates an unnecessary risk that the injection of sodium thiopental will not prevent the inmate from feeling pain throughout the execution.

332. Plaintiff suffers from diabetes.

333. Plaintiff suffers from coronary artery disease.

334. Plaintiff's coronary artery disease causes problems with blood flowing throughout his body.

335. Because of problems with blood flow in Plaintiff's body, there is a likelihood that the chemicals will not flow through his body at the desire speed, causing him to suffer extreme pain during his execution.

B. Facts relevant to inserting an I.V.

336. Defendants plan to insert two I.V. lines into Plaintiff.

337. Different size catheters are used in medical proceedings depending on the height and weight of the patient and the size of the patient's veins.

338. If the catheter is too large, the vein could blow out.

339. A blown vein means that the chemicals would be going into a part of the body other than the vein or not entering the body at all if it causes the I.V. to dislodge.

340. Injecting the lethal injection chemicals into a part of the body other than the vein would be extremely painful.

341. Injecting the lethal injection chemicals into a part of the body other than the vein would prevent the chemicals from having the desired effect.

342. Injecting sodium thiopental into a part of the body other than the vein means that the thiopental would not render a person unconscious.

343. Defendants use only one size catheter during lethal injections.

344. Defendants do not take into consideration the condemned inmate's weight, height, or the size of the inmate's veins in determining what size catheter to use during the inmate's execution.

345. The size of the catheter used by Defendants during lethal injections is different from the size most commonly used when drawing blood or inserting an I.V. in a medical setting.

346. The size of the catheter used in lethal injections increases the likelihood that Defendants will not be able to insert an I.V. into Plaintiff's veins.

347. Training and experience in drawing blood is different from training and experience in inserting a catheter.

348. The I.V. team has no experience in inserting a catheter.

349. The I.V. team has no training in inserting a catheter.

350. Defendants will spend up to 60 minutes attempting to insert the two I.V. lines.

351. The decision to spend up to 60 minutes inserting an I.V. is a change to Defendants' execution procedures that occurred during the lethal injection litigation on behalf of Ralph Baze and Thomas Bowling.

352. Defendant Rees made the decision to require the execution team to attempt to insert the I.V. for 60 minutes.

353. Defendant Rees did not consult any medical professionals concerning attempting to insert an I.V. for 60 minutes prior to requiring the execution team to spend 60 minutes attempting to insert an I.V.

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

355. 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 a relatively deeply located central vein. The length of these incisions is in the range of two inches.

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

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

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

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

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

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

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

363. A "percutaneous" procedure (which involves using a needle and guidewire rather than a scalpel) is less invasive, less painful, easier to administer, and cheaper than a "cut down" procedure.

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

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

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

367. Defendants have stated that they are not adequately trained to perform a cut-down procedure.

368. 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 the Eighth Amendment to the United States Constitution.

369. Defendants have stated that they will not use a cut-down procedure or a percutaneous procedure to execute Thomas Clyde Bowling or Ralph Baze.

370. Defendants have not ruled out using a cut-down procedure or percutaneous procedure to insert an I.V. during Plaintiff's execution.

371. The circuit court Order in *Baze v. Rees*, which was not appealed, prohibits Defendants from inserting an I.V. in the neck because doing so violates the Eighth Amendment cruel and unusual punishment clause.

372. Defendants may attempt to insert an I.V. into the groin.

373. Inserting an I.V in the groin creates an unnecessary risk of pain and suffering.

374. Inserting an I.V. in the groin mutilates the body.

375. Inserting an I.V. in the groin violates the dignity of man.

376. Defendants have stated that if they are unable to insert an I.V. after 60 minutes, they will ask Defendant Fletcher to call off the execution.

377. Defendants have not declared what they will do if Defendant Fletcher refuses to call off the execution.

378. If Defendant Fletcher refuses to call off the execution, Defendants may use a cut down procedure to insert an I.V. into Plaintiff during his execution.

379. If Defendant Fletcher calls off the execution, Defendants will practice and attempt the same process of inserting a needle into Plaintiff.

380. This cycle of calling off Plaintiff's execution, practicing inserting I.V.'s, rescheduling Plaintiff's execution, and performing the same method of inserting an I.V. will continue repeatedly with no likelihood that Defendants will be able to insert an I.V. into Plaintiff.

381. The likelihood that a problem will arise inserting an I.V. needle is great because Defendants had difficulty inserting an I.V. needle in the only lethal injection execution they carried out, and because Plaintiff has bad veins.

382. In executing Edward Harper on May 25, 1999, it took Defendants ten minutes to access his veins.

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

384. Prolonged drug use damages veins, causing a condition know as "bad veins," or "compromised veins."

385. "Bad veins" (compromised veins) make it difficult to insert an I.V. needle.

386. Defendants are aware that it is difficult to properly insert an I.V. when a prisoner's veins have shrunk considerably because of longtime intravenous drug use.

387. Plaintiff has a lengthy history of I.V. drug use.

388. Plaintiff suffers from diabetes.

389. Plaintiff has damaged (compromised or bad) veins.

390. Throughout Plaintiff's incarceration, Defendants and their agents have had difficulty inserting I.V.'s in Plaintiff. They have had to make many attempts at inserting an I.V. and resorted to alternative locations of the body.

391. It is likely that Defendants will have difficulty inserting an I.V. into Plaintiff during his execution.

392. A person with bad veins likely will not be able to handle the flow of the lethal injection chemicals, causing the veins and other blood vessels to blow.

393. If veins or blood vessels blow during an execution, the chemicals will not have the desired effect.

394. Because of Plaintiff's bad veins, even if Defendants are able to insert an I.V. into Plaintiff, the chemicals likely will not remain in his veins.

395. If the chemicals do not remain in Plaintiff's veins, Plaintiff will suffer an excruciatingly painful death.

396. It should only take two to three minutes to insert an I.V.

397. Well before 20 minutes of attempting to insert an I.V. has elapsed, the inmate will experience a great deal of pain and discomfort.

398. After 20 minutes of attempting to insert an I.V., the I.V. team will have exhausted all available locations to insert a needle.

399. Attempting to insert a needle for 60 minutes mutilates the body in violation of the Eighth Amendment to the United States Constitution.

400. Attempting to insert a needle for 60 minutes is excessive in violation of the Eighth Amendment to the United States Constitution.

401. Attempting to insert a needle for 60 minutes is unnecessarily painful in violation of the Eighth Amendment to the United States Constitution.

402. In light of Moore's compromised veins, subjecting him to the possibility of multiple attempts to execute him causes unnecessary psychological suffering, in violation of the Eighth Amendment to the United States Constitution.

C. Facts relevant to Defendants' inadequate equipment and personnel for maintaining life if a stay of execution is granted after the first or second chemical is administered.

403. Life can be maintained after 3 grams of sodium thiopental has been injected into a person.

404. Maintaining life after an injection of 3 grams of sodium thiopental would not be difficult if medical personnel certified in cardiac life support are present at the execution chamber and provided with the proper equipment.

405. Life can be maintained after the administration of pancuronium bromide during lethal injections.

406. Maintaining life after an injection of pancuronium bromide would not be difficult if medical personnel certified in cardiac life support are present at the execution chamber and provided with the proper equipment.

407. There are chemicals that will stop the heart, but are easier to reverse than potassium chloride.

408. EMT's, phlebotomists, and doctors of general medicine are not trained in how to reverse the effects of sodium thiopental or pancuronium bromide.

409. No member of Defendants' execution team is adequately trained in reversing the effects of sodium thiopental or pancuronium bromide.

410. No doctor or medical professional is present inside the execution chamber to reverse the effects of sodium thiopental or pancuronium bromide.

411. Having a medical professional trained in how to reverse the effects of sodium thiopental and pancuronium bromide physically located in the execution chamber is essential to reversing the effects of the chemical before death occurs.

412. If a stay of execution is granted after sodium thiopental or pancuronium bromide is administered, Defendants have an obligation to take measures to maintain the life of the condemned inmate.

413. General Counsel for the Kentucky Department of Corrections and counsel for Defendant Rees, and Defendant Simpson is Jeff Middendorf.

414. Jeff Middendorf is not a medical professional.

415. During lethal injection litigation on behalf of Ralph Baze and Thomas Bowling, Middendort created a one page document on the duration of onset of the chemicals, and how to reverse the effects of the lethal injection chemicals.

416. This one page document is based on Middendorf's own research.

417. Middendorf's document is what Defendants are relying on in determining how to reverse the effects of the lethal injection chemicals.

418. Middendorf's one page document is incorrect on how to reverse the effects of the lethal injection chemicals.

419. Middendorf's one page document instructs Defendants to use equipment and chemicals to reverse the effects of the lethal injection chemicals that could cause the inmate's death.

420. Middendorf's one page document instructs Defendants to use equipment and chemicals to reverse the effects of the lethal injection chemicals that would not reverse the effects of the lethal injection chemicals.

421. Middendorf's one page document fails to instruct Defendants to use equipment and chemicals to reverse the effects of the lethal injection chemical that are absolutely necessary to reverse the effects of the lethal injection chemicals.

422. Defendants have a "crash cart" available purportedly to maintain life if a stay of execution is granted after sodium thiopental or pancuronium bromide is administered.

423. Defendants' crash cart does not have all the chemicals listed on Middendorf's one page document.

424. Defendant Haas designates the person who will operate the crash cart.

425. For the previously scheduled execution of Thomas Clyde Bowling, Defendant Haas was the individual who would operate the crash cart.

426. Defendant Haas is the Medical Director for the Department of Corrections.

427. Defendant Haas has not worked in an emergency medical setting since medical school.

428. Defendant Haas is a practicing psychiatrist.

429. Defendant Haas has not treated patients in many years.

430. Defendant Haas is not adequately trained in maintaining life after sodium thiopental or pancuronium bromide has been injected into a person.

431. No medical professional employed by the Kentucky Department of Corrections is adequately trained in maintaining life after sodium thiopental or pancuronium bromide has been injected into a person.

432. The crash cart Defendants have available at the Kentucky State Penitentiary is insufficient to maintain life after sodium thiopental or pancuronium bromide has been administered.

433. Medications to increase blood pressure and contract the heart are necessary to maintain life after 3 grams of sodium thiopental has been administered.

434. Epinephrine is necessary to maintain life once 3 grams of sodium thiopental has been administered.

435. Once pancuronium bromide is administered, artifical ventilation is necessary to maintain life.

436. Artificial ventilation is not part of the equipment included on Defendants' crash cart.

437. Insulin is also necessary to maintain life if a stay of execution is granted after the lethal injection chemicals have begun to flow through the condemned inmate's body.

438. Insulin is not one of the drugs in Defendants' crash cart.

439. Neostigmine is necessary to maintain life if a stay of execution is granted after the lethal injection chemicals have begun to flow through the condemned inmate's body.

440. Neostigmine is not one of the drugs in Defendants' crash cart.

441. Because Defendants' crash cart does not contain the equipment necessary to maintain life after sodium thiopental or pancuronium bromide have been injected, Defendants' crash cart does not meet the minimum constitutional requirements for maintaining life.

442. It would not be difficult for Defendants to obtain the necessary equipment for maintaining life after the first or second chemical has been administered.

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

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

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

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

446. 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.

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

448. 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 lives so that they can make an intelligent and knowing decision of a method of execution.

449. 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 lives so that they can independently determine whether a particular aspect of the lethal injection or electrocution process may constitute cruel and unusual punishment, and to consult medical experts concerning that possibility.

E. Facts Relevant to the Electrocution Claim.

450. In Kentucky, condemned inmates sentenced prior to March 31, 1998, may choose between electrocution and lethal injection.

451. Plaintiffs will not select a method of execution.

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

453. If lethal injection is found unconstitutional on its face, Kentucky law requires executions to be carried out by electrocution.

454. Execution by electrocution violates the Eighth Amendment of the United States Constitution.

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

456. Warden Simpson, who is in charge of the prison where executions take place, has never been involved in an execution by electrocution.

457. The Deputy Wardens at the Kentucky State Penitentiary have not participated in an execution by electrocution.

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

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

460. Electrocution causes death by asphyxia and cardiac arrest.

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

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

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

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

465. Third and fourth degree burns are extremely painful.

466. Consciousness is controlled by the brain.

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

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

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

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

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

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

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

474. Respiratory centers are located near deep pain centers.

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

476. If Plaintiff is conscious during his electrocution, he will suffer an excruciatingly painful death by asphyxia and cardiac arrest.

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

478. Botched electrocutions have occurred in the United States.

479. 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) exploding body parts.

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

481. 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.

482. Execution by electrocution violates 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;

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. EXHAUSTION OF ADMINISTRATIVE REMEDIES

483. Exhausting administrative remedies through a prison grievance policy is not required for this type of action because the injuries are prospective in the sense that the injuries will not occur until the execution takes place.

484. On March 22, 2006, Plaintiff filed a grievance with the Kentucky Department of Corrections, in accordance with the grievance policy at the Kentucky State Penitentiary (where Plaintiff is incarcerated) (grievance is attached).

485. Plaintiff's grievance challenged the chemicals and procedures used in lethal injections, the failure to maintain proper equipment to maintain life if a stay of execution is granted after the first or second chemical is injected, the means of inserting an I.V., and execution by electrocution.

486. Plaintiff's grievance named the necessary parties to this action.

487. On March 27, 2006, Plaintiff's grievance was rejected as non-grievable because it is an "issue dealing with legislative mandate and court decisions."

488. Because Plaintiff's grievance was found to be non-grievable, there is no avenue of administrative appeals available to Plaintiff.

489. The Kentucky Department of Corrections refuses to accept an appeal of Plaintiff's grievance.

490. Plaintiff has exhausted all administrative remedies concerning the claims in this action through the Department of Corrections grievance process.

VII. CLAIMS FOR RELIEF

Claim A - - administration of chemicals.

491. Defendants intend to extinguish Plaintiff's life by administering chemicals in a manner that creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution.

Claim B - - three chemical combination.

492. Defendants intend to execute Plaintiff by injecting a combination of three chemicals - - sodium thiopental, pancuronium bromide, and potassium chloride - - that creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution.

Claim C - - analgesic

493. Defendants' failure to administer an analgesic during the lethal injection process creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution.

Claim D - - sodium thiopental

494. Defendants' use of sodium thiopental as one of the lethal injection chemicals creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution.

Claim E --- sodium thiopental with Plaintiff's risk factors

495. Using sodium thiopental to execute Plaintiff will create an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution, because Plaintiff is overweight and suffers from cardiovascular disease.

Claim F - - deliberate indifference to Plaintiff's risk factors

496. Defendants' intentions to use sodium thiopental to execute Plaintiff despite his severe obesity and his cardiovascular disease constitutes deliberate indifference to known medical needs, in violation of the Eighth Amendment to the United States Constitution.

Claim G - - pancuronium bromide as lethal injection chemical

497. Defendants' use of pancuronium bromide as one of the lethal injection chemicals creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution.

Claim H - - pancuronium bromide preventing public perception of effects of chemicals

498. The use of pancuronium bromide prevents public awareness necessary to any change in consensus for or against lethal injection, in violation of the Eighth Amendment to the United States Constitution.

Claim I - - pancuronium bromide under standards of decency

499. The use of pancuronium bromide does not conform with evolving standards of decency, and thus, Defendants' use of pancuronium bromide violates the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.

Claim J - - potassium chloride

500. Defendants' use of potassium chloride as one of the lethal injection chemicals creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution.

Claim K - - deliberate indifference involving the chemicals

501. Defendants' adoption of lethal injection chemicals on the basis that other states use the same chemicals, their failure to consult with medical professionals, and their failure to consider using alternative chemicals for lethal injections after they were put on notice of problems with the lethal injection chemicals and less painful alternative chemicals that could be used to carry out lethal injections constitutes deliberate indifference towards medical needs in violation of the Eighth Amendment to the United States Constitution.

CLAIM L - - monitoring to ensure that the inmate does not feel pain after sodium thiopental injected

502. Defendants' failure to ensure that the condemned inmate is incapable of feeling pain after the injection of sodium thiopental and before the injection of pancuronium bromide creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution.

CLAIM M - - deliberate indifference for not monitoring to ensure that the inmate does not feel pain after sodium thiopental injected

503. Defendants' failure to ensure that the condemned inmate is incapable of feeling pain after the injection of sodium thiopental and before the injection of pancuronium bromide creates constitutes deliberate indifference towards medical needs in violation of the Eighth Amendment to the United States Constitution.

CLAIM N - - monitoring to ensure that the inmate does not feel pain after pancuronium bromide is injected

504. Defendants' failure to ensure that the condemned inmate is incapable of feeling pain after the injection of pancuronium bromide creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution.

CLAIM O - - deliberate indifference for not monitoring to ensure that the inmate does not feel pain after pancuronium bromide is injected

505. Defendants' failure to ensure that the condemned inmate is incapable of feeling pain after the injection of sodium thiopental and before the injection of pancuronium bromide constitutes deliberate indifference towards medical needs in violation of the Eighth Amendment to the United States Constitution.

CLAIM P - - training of execution team

506. Defendants' failure to provide adequate training in inserting I.V.'s, mixing lethal injection chemicals, injecting the lethal injection chemicals, and monitoring to ensure that the condemned inmate cannot feel pain creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution.

CLAIM Q - - cut-down procedure

507. The use of cut-down procedure creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution.

CLAIM R - - inserting an I.V. in the groin

508. Inserting an I.V. in the groin creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution.

CLAIM S - - attempting to insert an I.V. for up to 60 minutes

509. Attempting to insert an I.V. for up to 60 minutes causes excessive pain and suffering in violation of the Eighth Amendment to the United States Constitution.

CLAIM T - - pain from attempting to insert I.V. for up to 60 minutes

510. Attempting to insert an I.V. for up to 60 minutes creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution.

CLAIM U - - mutilation by attempting to insert I.V. for up to 60 minutes

511. Attempting to insert an I.V. for up to 60 minutes mutilates the body in violation of the Eighth Amendment to the United States Constitution.

CLAIM V- - not having a guaranteed method of obtaining venous access

512. Defendant's failure to have a guaranteed means for accessing Plaintiff's veins, in light of his compromised veins and other health problems, will cause Plaintiff unnecessary psychological suffering in violation of the Eighth Amendment to the United States Constitution.

CLAIM W- - deliberate indifference for not having guaranteed means of accessing Plaintiff's veins

513. Defendant's failure to have a guaranteed means for accessing Plaintiff's veins, in light of his compromised veins and other health problems, evinces deliberate indifference towards known medical needs in violation of the Eighth Amendment to the United States Constitution.

CLAIM X - - maintaining life if a stay of execution is granted after the first or second chemical is administered.

514. Defendants' failure to have the proper equipment, chemicals, and personnel available at the execution chamber in case a stay of execution is granted after the first or second chemical is administered constitutes the arbitrary deprivation of life in violation of the Eighth Amendment and violates substantive due process.

CLAIM Y - - deliberate indifference involving maintaining life if a stay of execution is granted after the first or second chemical is administered.

515. Defendants' failure to have the proper equipment, chemicals, and personnel available at the execution chamber in case a stay of execution is granted after the first or second chemical is administered is deliberate indifference towards known medical needs in violation of the Eight Amendment to the United States Constitution.

CLAIM Z - - deliberate indifference for lack of training in emergency cardiac life support

516. Defendants' failure to adequately train its personnel in reversing the effects of the chemicals and in emergency cardiac life support is deliberate indifference towards known medical needs in violation of the Eighth Amendment to the United States Constitution because despite knowing that a stay of execution could be granted after the first or second chemical is administered, Defendants have done nothing to ensure that their execution team is adequately trained to maintain Plaintiff's life if such a stay is granted.

CLAIM AA - - deliberate indifference for not seeking medical advice on what equipment, chemicals, and personnel are necessary to maintain life after the first or second chemical is injected.

517. Defendants' reliance on their general counsel, who is not a medical professional, to inform them of what chemicals, personnel, and equipment is necessary to maintain life after sodium thiopental or pancuronium bromide is injected, rather than consulting medical professionals experienced with these chemicals, is deliberate indifference towards known medical needs, in violation of the Eighth Amendment to the United States Constitution.

CLAIM BB - - Refusal to provide Plaintiff with execution protocols.

518. Defendants' refusal to provide Plaintiff with a complete copy of the electrocution and lethal injection execution protocols deprives Plaintiff of federal due process and fundamental fairness because it prevents them from making a meaningful choice between methods of execution as permitted under Kentucky law, and because it prevents them from reviewing the execution procedures to determine if additional constitutional violations may exist for which they are currently unaware.