

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

vs.

JAMES J. FILIAGGI,

Appellant.

* Supreme Court Case No. 98-0287

*

* On Appeal from the
* Lorain County Court of
* Appeals, Ninth Appellate
* District

*

* Court of Appeals
* Case No. 97CA006964

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DEATH PENALTY CASE

JAMES J. FILIAGGI'S EMERGENCY MOTION FOR STAY
EXECUTION SET FOR APRIL 24, 2007

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FILED

APR 20 2007

MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

JAMES J. FILIAGGI'S EMERGENCY MOTION FOR STAY

James J. Filiaggi, through undersigned counsel, respectfully asks this Court to grant him an emergency motion for stay of his execution currently scheduled for 10:00 a.m. on April 24, 2007.

After a period of indecision, Mr. Filiaggi determined, on April 19, 2007, that he wished to participate in the case challenging Ohio's lethal injection procedures and protocols as violative of the Eighth and Fourteenth Amendments to the United States Constitution.¹ On that date, he filed a motion to intervene in the lethal injection litigation and, also, a proposed complaint in intervention. The Court has not, at this writing, ruled on his motion. A copy of the motion and proposed complaint is appended hereto.

If the case is ultimately successful, if it is determined that lethal injection as practiced in Ohio violates the constitutional prohibition against cruel and unusual punishment, and if Mr. Filiaggi is denied a stay, his execution will have been unconstitutional. And there will, of course, be no remedy.

It is to avoid that eventuality that Mr. Filiaggi seeks this emergency stay.

Respectfully submitted,



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¹The case is *Cooey v. Strickland*, U.S. District Court, Southern District of Ohio, Case Number 04-CV-1156.

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CERTIFICATION

This is to certify that a copy of the foregoing emergency motion for stay was served by facsimile transmission on Anthony D. Cillo, counsel of record for the State of Ohio, at (440) 323-1015 this 20th day of April, 2007. A courtesy copy was this same day served by facsimile transmission on Daniel R. Ranke, Assistant Attorney General and Michael L. Collyer, Principal Assistant Attorney General, both at (216) 787-3480.



JEFFREY M. GAMSO (0043869)

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

RICHARD COOEY, et al.,	:	Case No. 2:04cv1156
Plaintiffs,	:	Judge Frost
	:	Magistrate Abel
vs.	:	Proposed Complaint of Intervener
	:	Attached as Exhibit A
ROBERT TAFT, Governor, et al.,	:	
Defendants.	:	This is a death penalty case.

**JAMES J. FILIAGGI'S MOTION
TO INTERVENE AS PLAINTIFF-INTERVENOR**

James J. Filiaggi hereby moves this Honorable Court under Rule 24(a)(2) of the Federal Rules of Civil Procedure, for leave to intervene in this action as of right. In the alternative, and pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure, Filiaggi requests permissive intervention. As a death-sentenced individual, Filiaggi has a significant interest in the subject matter of this case and the existing parties may not adequately represent that interest. Further, the parties to these proceedings will not be prejudiced by this intervention. The reasons in support of this motion are more fully set forth in the attached Memorandum in Support, which is fully incorporated herein.

Respectfully submitted,

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COUNSEL FOR JAMES J. FILIAGGI

**MEMORANDUM IN SUPPORT OF JAMES J. FILIAGGI'S
MOTION TO INTERVENE AS PLAINTIFF-INTERVENOR**

Plaintiff Richard Cooley, an Ohio death-row inmate, filed this action under 42 U.S.C. § 1983 for violations of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. Proposed intervenor, James J. Filiaggi, is also an Ohio death-row inmate awaiting execution, with an immediate execution date of April 24, 2007. Filiaggi is a true party in interest because he is similarly situated and asserts the same causes of action as the Plaintiff. See Intervenor's Proposed Complaint (attached hereto as Exhibit A). Further, Filiaggi's intervention will not substantially impair the rights of the original parties to the pending action.

A. The Intervenor satisfies the requirements for intervention as of right as set forth in Fed. R. Civ. P. 24(a)(2).

Rule 24(a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

Upon timely application anyone shall be permitted to intervene in an action...when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the

applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). The purpose of this provision is to avoid a rash of lawsuits on related questions "by involving as many apparently concerned persons as is compatible with efficiency and due process." Coalition of Arizona/New Mexico Counties v. Department of Labor of the Interior, 100 F.3d 837, 841 (10th Cir. 1996) (citing decisions by three Courts of Appeals). Therefore, "[t]he need to settle claims among a disparate group of affected persons militates in favor of intervention." Jansen v. City of Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990).

In light of the Rule and its goals, courts have granted motions to intervene as of right when the following criteria are met: (1) the motion is timely; (2) the applicant has a significant legal interest in the subject matter of the pending litigation; (3) the disposition of the action may impair or impede the applicant's ability to protect his interest; and (4) the existing parties cannot adequately protect the applicant's interests. Id. In the instant case, Carter meets those requirements.

1. The application is timely.

This lawsuit was filed on December 8, 2004. The discovery deadline has not yet occurred. Although the Sixth Circuit Court of Appeals has issued a ruling on an interlocutory appeal, a motion for en banc rehearing is pending. Therefore, the proposed intervention will not impair the progress of the proceedings or affect the interests of the original parties. See, e.g., Baker v. City of Detroit, 504 F. Supp. 841, 848 (E.D. Mich. 1980), *aff'd sub nom.*, Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (case filed in November and December 1975; trial undertaken in August 1978; motion to intervene filed in May 1978; motion granted). Filiaggi's position is clear. If the allegations of the complaint are correct, and absent relief, he will be subjected to cruel and unusual punishment in violation of the

Eighth Amendment to the United States Constitution and deprived of his substantive and procedural due process rights under the Fourteenth Amendment in less than one week.

2. Filiaggi has a “significant legal interest” in this case.

Filiaggi’s shared and individual interests are far more urgent, direct, and addressable than the Rule requires. The precise contours of an interest sufficient to support intervention as of right have not been delineated. See Purnell v. City of Akron, 925 F.2d 941, 947 (6th Cir. 1991); Arizona/New Mexico, 100 F.3d at 840. The interest requirement, however, “is to be construed liberally.” Bradley v. Milliken, 828 F.2d 1186, 1192 (6th Cir. 1987). See also Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1996) (overruling the District Court’s denial of intervention and noting the “rather expansive notion of the interest sufficient to invoke intervention of right” in the Sixth Circuit).

Indeed, failure to satisfy the interest prong of the test has rarely barred prospective intervenors from participating. The range of interests deemed sufficient is broad, and their character is often general. See, e.g., Linton v. Commissioner of Health and Environment, 973 F.2d 1311, 1319 (6th Cir. 1992) (economic interest sufficient for intervention); Herdman v. Town of Angelica, 163 F.R.D. 180, 183 (W.D.N.Y. 1995) (purity and integrity of local air and water and in residential and rural character of a town); Arizona/New Mexico, 100 F.3d at 841-44 (interest of a naturalist photographer in the protection of an owl species).

Filiaggi’s interest in not being executed by a method that would violate his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments is the same legal and equitable interest as the original Plaintiff and is sufficient to permit intervention.

3. Filiaggi’s ability to protect his interests will be impaired if he is not permitted to intervene.

The impairment prong of the test requires only a hypothetical showing: applicants need show neither “substantial impairment” of their interests nor that “impairment will inevitably ensue from an unfavorable disposition.” Purnell, 925 F.2d at 947. Rather, as stated in Rule 24, they need show only that the disposition may harm their ability to protect their interests. Id. For that reason, the *stare decisis* effect of a potential adverse holding is sufficient to show impairment. Jansen, 904 F.2d at 342; Linton, 973 F.2d at 1319. In this case, if Coeey did not prevail, it would impair, if not completely destroy, Filiaggi’s ability to advance his arguments and put forth evidence in a separate action in this Court.

4. Coeey cannot adequately protect the applicant’s interests, which are wholly dependent on the timeline of the applicant’s case.

The inadequate representation prong of the test, like the impairment prong, requires only a minimal and hypothetical showing:

The requirement of the Rule is satisfied if the applicant shows that representation of his interest “may be” inadequate; and the burden of making that showing should be treated as minimal.

Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n.10 (1972). Therefore, applicants “should be allowed to intervene unless it is clear that [Coeey] will provide representation.” 7C Wright, Miller, and Kane, *Federal Practice and Procedure* at 319 (2d ed. 1986). The nature of Filiaggi’s claims makes intervention necessary to protect his interests because Coeey’s litigation does not contemplate Filiaggi’s independent schedule, which will end in his execution. Since it is clear that Coeey cannot adequately represent Filiaggi, Filiaggi has the right to represent himself.

B. In the alternative, Filiaggi satisfies the requirements for permissive intervention as set forth in Civ. R. 24(b)(2).

The decision whether to allow permissive intervention is within the sound discretion of the trial court. Meyer Goldberg, Inc. v. Goldberg 717 F.2d 290, 294 (6th Cir. 1983). This rule is to be construed liberally and excludes many of the requirements of intervention of right. Id. For example, the Rule 24(a)(2) requirement that a proposed intervenor establish inadequate representation by existing parties is not a consideration for purposes of Rule 24(b).

Filiaggi has a direct and substantial interest in the outcome of this matter. Filiaggi's interests and Coeey's interests both share the same questions of law and fact. Since this case is on hold pending completion of the interlocutory appeal with a determination of *en banc* review, discovery has not taken place and the ultimate issue has yet to be placed before this Court. The proposed intervention will not prejudice or delay the rights of any of the original parties. Filiaggi therefore requests that the Court grant permissive intervention under Civil Rule 24(b), should the Court decide not to grant intervention as of right.

CONCLUSION

For the foregoing reasons, proposed intervenor James J. Filiaggi respectfully requests that his motion be granted and that he be permitted to intervene in the instant action.

Respectfully submitted,

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COUNSEL FOR JAMES J. FILIAGGI

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2007, I electronically filed the foregoing Motion to Intervene with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties.

s/ Jeffrey M. Gamso
Jeffrey M. Gamso (0043869)

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JAMES J. FILIAGGI

311-180

Mansfield Correctional Institution

P.O. Box 788

Mansfield, Ohio, 44901-0788

Plaintiff,

vs.

TED STRICKLAND, Governor

State of Ohio

77 South High Street, 30th Floor

Columbus, Ohio 43215,

and

TERRY J. COLLINS, Director

Ohio Dept. of Rehabilitation & Correction

1050 Freeway Drive North

Columbus, Ohio 43229,

and

EDWIN C. VOORHIES, JR., Warden

Southern Ohio Correctional Facility

1724 State Route 728

Lucasville, Ohio 45699,

Defendants.

: Number: 2:04-cv-1156

: Judge Frost
Magistrate Judge Abel

:
:
:
: **Intervenor-Plaintiff's Proposed**
: **Complaint for Injunctive and**
: **Declaratory Relief, Attorney Fees,**
: **and Costs of Suit Pursuant to**
: **42 U.S.C. § 1983**

COMPLAINT

I. Nature of Action

1. This action is brought under 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, and Plaintiff's rights to be free from violations of his substantive and procedural due process rights under the Fourteenth Amendment to the United States Constitution. Plaintiff seeks equitable, injunctive, and declaratory relief.
2. In this action, Plaintiff claims that Defendants' current method of lethal injection can and will, in effect, cause him to be tortured to death. No government within the United States can intentionally or negligently use an arbitrary, cruel, or unreliable method of execution.
3. Defendants intend to violate Plaintiff's constitutional rights by executing him with drugs that include a paralyzing agent veterinarians will not use for the euthanasia of cats and dogs. This paralyzing drug can and will cast a chemical veil over the excruciatingly painful effects of death by suffocation and heart attack. Defendants' lethal injection protocol includes an unreliable ultrashort-acting anesthetic that can and will leave Plaintiff conscious but trapped in a paralyzed body wracked with the pain of suffocation and a heart attack. Defendants intend to execute Plaintiff with unreliable and arbitrary drugs, administered by inadequately trained personnel who use inappropriate equipment and methods to cause death by lethal injection.
4. The claims in this complaint are cognizable under 42 U.S.C. § 1983; they need not be brought in a habeas action. This lawsuit is not and should not be treated as a successor habeas corpus petition. See Hill v. McDonough, ____ U.S. ____, 126 S. Ct. 2096 (2006).

Plaintiff is not challenging his underlying capital conviction or death sentence in this present action; he is not saying that Defendants could never execute him. Plaintiff could be executed if (1) no separate legal challenge overturns his capital conviction or death sentence; (2) he is not granted executive clemency; and (3) Defendants design a constitutionally acceptable method for executing him.

5. Plaintiff seeks a preliminary and permanent injunction preventing Defendants from executing him by the means currently employed for carrying out an execution by lethal injection in the state of Ohio. Plaintiff also seeks an Order declaring that Defendants' current methods for conducting an execution by lethal injection violates the Eighth and Fourteenth Amendments to the United States Constitution.

II. Plaintiff

6. James J. Filiaggi is a United States citizen and a resident of the state of Ohio. He is currently a death-sentenced inmate in the custody of Defendants, and under the control and supervision of the state of Ohio Department of Rehabilitation and Correction, who have him incarcerated in the Mansfield Correctional Institution in Mansfield, Ohio, under Inmate Number 311-180. If Plaintiff Filiaggi's capital conviction or death sentence is not overturned in another judicial proceeding or through executive clemency, then Defendants will execute him. Upon information and belief, it is the intention of Defendants, acting in concert with other state officials not named as defendants herein, to use the lethal injection methods described herein to execute James J. Filiaggi in the death house located on the grounds of the Southern Ohio Correctional Facility in Lucasville, Ohio, which is operated and controlled by the Defendants.

III. Defendants

7. Defendant Ted Strickland is, and at all times relevant was, the Governor of the State of Ohio. He is the final executive authority in the state, statutorily and constitutionally responsible for the execution of all sentences of death in Ohio and the manner in which those sentences are executed.
8. Defendant Terry J. Collins is, and at all times relevant was, the Director of the State of Ohio Department of Rehabilitation and Correction (“DRC”), a department of the state of Ohio that was created and is maintained under Ohio Revised Code Section 5120. As such, Defendant was charged and authorized under Ohio Revised Code Section 5120.01 to prescribe and direct the promulgation of rules and regulations for the DRC, including the rules and regulations for the conduct of prison operations and execution procedures. He is sued here in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.
9. Defendant Edwin C. Voorhies, Jr., is, and at all times relevant was, the Warden of the Southern Ohio Correctional Facility at Lucasville (“SOCF”), a correctional institution of the DRC that was created and is maintained under Ohio Revised Code Section 5120.05, and which is the prison where sentences of death are executed in the state of Ohio. Under Ohio Revised Code Section 5120.38, Defendant Voorhies, as the Warden of the SOCF, is charged with management of the SOCF and the oversight and conduct of operations there, including the oversight and conduct of executions carried out there. He is sued here in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.
10. Defendants, and each of them at all times relevant hereto, were acting in their respective official capacities with respect to all acts described herein, and were in each instance acting

under the color and authority of state law. Upon information and belief, unless preliminarily and permanently enjoined, the Defendants, and each of them, intend to act in their respective official capacities and under the authority of state law by executing Plaintiff by utilizing lethal injection methods that will violate his constitutional rights.

IV. Jurisdiction and Venue

11. Plaintiff brings this action to enforce and protect rights conferred by the Eighth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment to the United States Constitution, and to enforce and protect his rights conferred by the Fourteenth Amendment.
12. This Court has jurisdiction over this matter under 28 U.S.C. § 1331, in that it arises under the Constitution of the United States; under 28 U.S.C. § 1343(a)(3), in that it is brought to redress deprivations, under color of state authority, of rights, privileges, and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that it seeks to secure equitable relief under an act of Congress, specifically 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights; under 28 U.S.C. § 2201(a), in that, one purpose of this action is to secure declaratory relief; and under 28 U.S.C. § 2202, in that one purpose of this action is to secure preliminary and permanent injunctive relief.
13. This Court has supplemental jurisdiction over any state statutory claim asserted by Plaintiff under 28 U.S.C. § 1367, in that, the state and federal claims are derived from a common nucleus of operative facts.
14. This Court has venue under 28 U.S.C. § 1391(b)(1) in that all of the Defendants are situated within the state of Ohio and each of them resides within the Southern District of Ohio, and under 28 U.S.C. § 1391(b)(2), in that all of the events described herein have and

will transpire (absent judicial relief) within this judicial district. Defendant Strickland exercises his final authority over the other Defendants in the seat of Ohio's government, located in Franklin County, Ohio; the lethal injection execution procedures were promulgated by Defendant Collins in Franklin County, Ohio; and Warden Voorhies has executed other Ohio inmates and intends to execute Plaintiff in Scioto County, Ohio, by the method of lethal injection described herein.

V. Facts Common to All Claims and Relief Sought

15. Plaintiff incorporates by reference all facts and allegations described throughout this complaint as if fully re-written herein.
16. The state of Ohio intends to execute Plaintiff employing means and methods of execution by lethal injection that will violate Plaintiff's rights under the United States Constitution.
17. Under the Eighth Amendment to the United States Constitution, cruel and unusual punishment claims involving 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 execution; (e) unnecessary psychological suffering; (f) the particular means of effectuating the sentence of death violates evolving standards of decency.
18. Defendants have created, maintained, and implemented a method of execution (i.e. lethal injection), and procedures, practices, policies, protocols, or means for accomplishing that method of execution, which, if utilized in Plaintiff's case, will subject Plaintiff to an unlawful deprivation of his constitutional rights, including his right to be free from cruel and unusual

punishment, his right to substantive and procedural due process, his right to equal protection of the law, and his right to not be exposed to ex post facto laws.

19. Specifically included within this complaint is a constitutional challenge under § 1983 to the Defendant's adoption and anticipated use of DRC Policy No. 01-COM-11, entitled "Execution," with an effective date of July 10, 2006 ("DRC Execution Protocol"), and any other procedures, practices, policies, protocols, or means for accomplishing Plaintiff's execution by lethal injection that are or might be adopted by Defendants for use at Plaintiff's contemplated execution and that are the same as or similar to the DRC Execution Protocol in those respects challenged herein.
20. Defendants did not notify Plaintiff of the adoption of the DRC Execution Protocol and did not provide him with a copy of it when adopted.
21. In the event that the DRC Execution Protocol and any other procedures, practices, policies, protocols, or means for accomplishing Plaintiff's execution by lethal injection that are or might be adopted by Defendants for use at Plaintiff's contemplated execution and that are the same as or similar to the DRC Execution Protocol in those respects challenged herein were to be used in Plaintiff's execution, Plaintiff would be subjected to an unlawful deprivation of his constitutional rights, including his right to be free from cruel and unusual punishment, his right to substantive and procedural due process, his right to equal protection of the law, and his right to not be exposed to ex post facto laws.
22. Plaintiff further alleges that said Defendants have failed, at all times through and including the date of this complaint, to create, maintain, and implement procedures, practices, policies, protocols, or means for carrying out an execution by lethal injection that would allow for Plaintiff's execution by lethal injection to occur in a manner and by means

that would not violate his constitutional rights. Unless enjoined, Defendants will continue with their unconstitutional failure to create and implement procedures, practices, protocols, or means for carrying out an execution by lethal injection that do not violate Plaintiff's constitutional rights. Such constitutional means for carrying out an execution by lethal injection do exist. Defendants have refused to adopt a constitutional means and Defendants will persist in that refusal unless enjoined by this Court.

23. Among other claims, and in addition to those already outlined above, Defendants adoption and use of DRC Execution Protocol? or any other procedures, practices, policies, protocols, or means of executing Plaintiff by lethal injection that are or might be adopted by Defendants for use at Plaintiff's contemplated execution and that are the same as or similar to the DRC Execution protocol in those respects challenged herein? violates or would violate Plaintiff's constitutional rights in at least the following respects to be more fully developed at trial:

- a) The use of three drugs specified in the DRC Execution Protocol (thiopental sodium, Pancuronium Bromide, and Potassium Chloride), and the manner in which those drugs are to be administered, create an undue risk that Plaintiff will be subjected to extreme, excruciating, and unnecessary pain and suffering, and that Plaintiff will be forced to endure an agonizing death.
- b) The Defendants have failed to incorporate into the DRC Execution Protocol a requirement that the personnel assigned to establish and maintain the intravenous lines are properly trained. Further, Defendants have made insufficient preparation for the real possibility, encountered for example in the execution of Joseph Clark on May 2, 2006, that IV access to Plaintiff's veins cannot be successfully established or maintained.
- c) The Defendants have failed to incorporate into the DRC Execution Protocol the same safeguards that accompany the administration of anesthesia in medical procedures; they have failed to require that execution teams include persons with sufficient training in the intravenous administration of anesthesia; they have failed to require the use of trained personnel to determine whether Plaintiff has been properly and effectively anesthetized before the other two

drugs are injected. The Defendants have failed to require that the anesthesia provided to Plaintiff is to be provided by only those individuals who possess the experience and proficiency of physicians who have completed residency training in Anesthesiology or by nurses who have undergone the requisite training to become Certified Registered Nurse Anesthetists.

- d) The use of the drug pancuronium bromide serves no rational or legitimate purpose and compounds the risk that Plaintiff will suffer excruciating pain during his execution. Pancuronium bromide paralyzes all voluntary muscles, but does not affect sensation, consciousness, cognition, or the ability to feel pain and suffocation. Pancuronium bromide is a neuromuscular blocking agent. Its effect is to render the muscles unable to contract, but it does not affect the brain or the nerves. It is used in surgery to ensure that there is no movement and that the patient is securely paralyzed so that surgery can be performed without contraction of the muscles. If sodium thiopental has not first been properly administered in a dose sufficient to cause death or at least the loss of consciousness for the duration of the execution procedure, then the use of pancuronium places Plaintiff at risk for consciously experiencing paralysis, suffocation, and the excruciating pain of the intravenous injection of high dose potassium chloride.
- e) By mandating the use of pancuronium bromide in the DRC Execution Protocol, or any other paralytic agent designed to paralyze Plaintiff, the Defendants are seeking to ensure that Plaintiff will be physically unable to signal consciousness and, thus, unable to cry out or scream for help in the event that Plaintiff is experiencing extreme, excruciating, and unnecessary pain and suffering during the execution. Defendants are mandating the use of this drug because they are much more interested in creating the appearance of a humane execution and in concealing from the execution team, the witnesses, and the public how truly horrific death by potassium chloride is for the inmate than they are in ensuring that Plaintiff's execution is in fact humane and is in fact consistent with the Eighth Amendment.
- f) By mandating the use of the drug potassium chloride in the DRC Execution Protocol, Defendants have needlessly increased the risk that Plaintiff will experience excruciating pain prior to his execution. There exist, however, alternative chemicals that do not present such a risk. Defendants have failed to choose a chemical that would cause death in a manner that does not subject Plaintiff to extreme, excruciating, and unnecessary pain and suffering.
- g) Defendants have failed to incorporate into the DRC Execution Protocol a requirement that a qualified and licensed Ohio physician be in attendance at the execution, and that such physician be responsible for supervising the conduct of the execution team during the execution, and for ensuring that the execution is carried out in accordance with basic tenets of medical practice and safety.

h) The DRC Execution Protocol is not compliant with the guidelines set forth by the American Veterinary Medical Association for the euthanasia of animals.

24. The DRC Execution Protocol does not disclose all the material details surrounding the process by which an inmate sentenced to die will be executed pursuant to lethal injection; and the Defendants have not disclosed the details surrounding the qualifications and training of the personnel involved in the administration of lethal injection. Accordingly, as more information about the process is made available to Plaintiff through discovery in this litigation or otherwise, Plaintiff reserves the right to make additional constitutional challenges to the DRC Execution Protocol and to any other procedures, practices, policies, protocols, or means Defendants intend to employ in carrying out Plaintiff's execution.
25. According to the opinions of qualified medical experts and other reliable sources, detailed at length in, for example, pleadings filed by other plaintiffs in this litigation (see, e.g., Docket # 2) and in similar litigation throughout the country, and to be more fully developed at trial, it cannot be established to a reasonable degree of certainty that the drugs administered in the lethal injection process will adequately sedate Plaintiff so as to spare him the excruciating pain and suffering that attends death by suffocation and heart failure. More particularly, Plaintiff alleges that the DRC Execution Protocol creates an unacceptable risk that he will not be anesthetized to the point of being unconscious and unaware of pain for the duration of the execution procedure.
26. Likewise the DRC Execution Protocol does not require that a person with adequate medical training administer and monitor the execution so as to detect whether a condemned inmate is suffering pain and if so to determine whether and what appropriate medical steps may be taken to alleviate the pain.

27. The DRC Execution Protocol does not include or require the use of medical equipment designed to effectively and accurately monitor a condemned person's heartbeat, pulse rate, or brain waves during the execution. The absence of such equipment from the protocol suggests that the procedures employed by the Defendants to cause death by lethal injection are inadequate and indifferent to whether a condemned person experiences extreme pain and suffering during the course of his or her execution by reasons of any number of factors including but most especially due to the injection of inappropriate drugs or the injection of inadequate doses or combinations of drugs or the improper delivery of drugs into the condemned inmate's body.
28. For the foregoing reasons, the DRC Execution Protocol or any other procedures, practices, policies, protocols, or means for accomplishing Plaintiff's execution by lethal injection that are or might be adopted by Defendants for use at Plaintiff's contemplated execution and that are the same as or similar to the DRC Execution Protocol in those respects challenged herein is inadequate, unreliable and arbitrary such that the lethal injection process will likely cause Plaintiff to suffer excruciating pain and cruel and unusual punishment in the course of his death.
29. Under the circumstances set forth in this Complaint, Plaintiff faces the risk of irreparable harm in the form of excruciating pain and suffering in the course of his execution for which there is no adequate remedy at law in the absence of temporary, preliminary, and permanent injunctive relief enjoining the Defendants from using the means and methods of execution by lethal injection that cause cruel and unusual punishment in violation of the United States Constitution.

VI. First Claim: Eighth Amendment Violation

30. Plaintiff incorporates by reference each and every statement and allegation set forth in paragraphs 1 through 29 of this Complaint as if fully rewritten herein.

31. Defendants have created, maintained, and implemented lethal injection procedures, practices, customs, and methods that they intend to use to execute Plaintiff. Defendants' lethal injection methods manifest their deliberate indifference towards Plaintiff's constitutional rights, both by what Defendants include and what they exclude from their methods of execution by lethal injection. These execution methods will violate Plaintiff's constitutional rights to be free from arbitrary, capricious, cruel, and unusually painful punishment, which rights are secured and guaranteed to him by the Eighth Amendment of the United States Constitution, as incorporated by the Fourteenth Amendment of the United States Constitution to limit Defendants' powers while acting individually or under the color and authority of state law.

VII. Second Claim: Fourteenth Amendment Due Process Violation

39. Plaintiff incorporates all preceding paragraphs as if fully rewritten herein.

40. Defendants have created, maintained and implemented lethal injection procedures, practices, customs, and methods that they intend to use to execute Plaintiff. Defendants' lethal injection methods manifest their deliberate indifference towards Plaintiff's constitutional rights, both by what Defendants include and what they exclude from their methods of execution by lethal injection. These execution methods will violate Plaintiff's constitutional rights to substantive and procedural due process as secured and guaranteed to him by the Fourteenth Amendment of the United States Constitution, which limits Defendants' powers while acting individually or under the color and authority of state law.

VIII. Prayer for Relief

- A. Plaintiff requests a temporary restraining order and preliminary injunction barring Defendants and their agents, officials, representatives and employees or others working in concert or cooperation with any of them from carrying out Plaintiff's execution during this lawsuit.
- B. Plaintiff requests that this Court grant him injunctive relief by granting a preliminary and permanent injunction barring Defendants from executing Plaintiff in the manner by which Defendants currently intend to execute Plaintiff, in order to prevent Defendants from violating Plaintiff's federal constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution.
- C. Plaintiff requests that this Court grant him declaratory relief by issuing an Order declaring that the Defendants' current means, methods, practices, procedures, and customs regarding execution by lethal injection violate the Eighth and Fourteenth Amendments to the United States Constitution.
- D. Plaintiff requests that this Court grant him reasonable attorney fees pursuant to 42 U.S.C. § 1988 and the laws of the United States.
- E. Plaintiff requests that this Court grant such further relief as it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2007, I electronically filed the foregoing Proposed Complaint with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties.

s/ Jeffrey M. Gamso
Jeffrey M. Gamso (0043869)