In the Supreme Court of Ohio

| | | |
|---|---|---|
| State of Ohio, | : | |
| Appellee, | : | |
| -vs- | : | Case No.: 1998-1475 |
| Brett Hartman, | : | |
| Appellant. | : | **This is a Capital Case.** |

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Brett Hartman's Motion for Stay of Execution

**Execution Date: April 7, 2009**

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FILED
MAR 12 2009
CLERK OF COURT
SUPREME COURT OF OHIO

In the Supreme Court of Ohio

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| State of Ohio, | : | |
| Appellee, | : | |
| -vs- | : | Case No.: 1998-1475 |
| Brett Hartman, | : | |
| Appellant. | : | **This is a Capital Case.** |

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Appellant Brett Hartman's Motion for Stay of Execution

**Execution Date: April 7, 2009**

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Brett Hartman has moved to intervene in the declaratory judgment action pending in the Court of Common Pleas for Franklin County, Ohio which seeks to have Ohio's lethal injection protocols declared violative of Ohio Statutes, the Ohio Constitution, and the United States Constitution. *Gary Otte v. Ted Strickland, Governor,* Case No. 08 CV 013337. (Ex. A) Because no other Ohio court is authorized to consider a stay of execution after this Court sets an execution date, Brett Hartman hereby moves this Court to stay the execution his death sentence scheduled for April 7, 2009 pending the ultimate resolution of the declaratory judgment action.

The State of Ohio violates the United States Constitution, the Ohio Constitution, and the Ohio Revised Code each time it executes a condemned inmate. The only court that has considered the merits after permitting factual development of Ohio's lethal injection protocol concluded that the protocol creates an unnecessary and arbitrary risk that the condemned will experience an agonizing death, in violation of constitutional and statutory obligations that executions be quick and painless. This Court cannot permit Brett Hartman's execution to proceed under a protocol that violates the Ohio Revised Code and the United States and Ohio Constitutions, especially while the statutory and constitutional validity is being litigated in state courts, as well as the federal courts.

Therefore, Brett Hartman moves this Court to stay his April 7, 2009 execution under the authority of *State v. Steffen*, 70 Ohio St. 3d 399, 639 N.E.2d 67 (1994).

Respectfully submitted,

Michael J. Benza by DJ (Sullivan) (0005839)

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**Counsel of Record**

## Memorandum in Support

### I. Background.

Brett Hartman was sentenced to death in Summit County, Ohio, in September 1998, for his conviction for the aggravated murder of Winda Snipes. Hartman has thus far been unsuccessful in his attempts to obtain relief in state and federal court on the merits of his case. He faces an execution date of April 7, 2009

This request for stay of execution relies in part on the June 10, 2008 judgment entry issued in *State v. Rivera*, Case No. 04CR065940 (Lorain C.P.) (Ex. B). After a two-day evidentiary hearing, the *Rivera* Court made several key factual findings concerning Ohio's lethal injection protocol:

> ●Pancuronium bromide, the second drug used by Ohio, prevents the condemned from breathing, moving, or communicating, while "it does not affect our ability to think, or to feel, or to hear, or anything, any of our senses, or any of our intellectual processes, or consciousness. So a person who's given pancuronium...would be wide awake, and - - but looking at them, you would – they would look like they were peacefully asleep...But they would, after a time, experience intense desire to breathe. It would be like trying to hold one's breath. And they wouldn't be able to draw a breath, and they would suffocate. (Heath, Tr. 72)"
>
> ●"Pancuronium also would kill a person, but again, it would be excruciating. I wouldn't really call it painful, because I don't think being unable to breathe exactly causes pain. When we hold our breath it's clearly agonizing, but I wouldn't use the word 'pain' to describe that. But clearly, an agonizing death would occur. (Heath, Tr. 75)"
>
> ●"The second drug in the lethal injection protocol with properties which cause pain is potassium chloride. The reason is that before stopping the heart, 'it gets in contact with nerve fibers, it activates the

nerve fibers to the maximal extent possible, and so it will activate pain fibers to the maximal extent that they can be activated. And so concentrated potassium causes excruciating pain in the veins as it travels up the arms and through the chest.' (Heath, Tr. 73)"

●"Based upon the foregoing, and upon the agreement of the expert witnesses presented by each party, the court finds that pancuronium bromide and potassium chloride will cause an agonizing or an excruciatingly painful death, if the condemned person is not sufficiently anesthetized by the delivery of an adequate dosage of sodium thiopental."

●"The experts testifying for each party agreed, and the court finds that mistakes are made in the delivery of anesthesia, even in the clinical setting, resulting in approximately 30,000 patients per year regaining consciousness during surgery, a circumstance which, due to the use of paralytic drugs, is not perceptible until the procedure is completed." The potential for error is "not quantifiable and hence, is not predictable."

●"Circumstantial evidence exists that some condemned prisoners have suffered a painful death, due to a flawed injection; however, the occurrence of suffering cannot be known, as post-execution debriefing of the condemned person is not possible.

*Rivera*, Case No. 04CR065940, Judgment Entry at pp. 2-4 (Lorain C.P. June 10, 2008) (Ex. B).

Those combined findings led the *Rivera* Court to determine that Ohio's lethal injection protocol violated the Ohio Revised Code and the Constitution:

●The court holds that the use of two drugs in the lethal injection protocol (pancuronium bromide and potassium chloride) creates an unnecessary and arbitrary risk that the condemned will experience an agonizing and painful death. Thus, the right of the accused to the expectation and suffering of a painless death, as mandated by R.C. 2949.22(A), is "arbitrarily abrogated."

> ●Thus, because the Ohio lethal injection protocol includes two drugs (pancuronium bromide and potassium chloride, which are not necessary to cause death and which create an unnecessary risk of causing an agonizing or excruciatingly painful death, the inclusion of these drugs in the lethal injection protocol is inconsistent with the intent of the General Assembly in enacting R.C. 2949.22, and violates the duty of the Department of Rehabilitation and Correction, mandated by R.C. 2949.22, to ensure the statutory right of the condemned person to an execution without pain, ***and to the expectancy that his execution will be painless.***

*Rivera*, Case No. 04CR065940, Judgment Entry at pp. 6, 7 (Ex. B).[1]

The *Rivera* Court concluded that *Baze v. Rees,* __ U.S. __, 128 S. Ct. 1520 (2008), while informing the court's decision by suggesting that all such claims are subject to Eighth Amendment analysis, *Baze* did not necessarily control the outcome of this case. The Kentucky statute and protocol at issue in *Baze* were different from those at issue in Ohio and also did not include a requirement that executions be quick and painless. Thus, *Baze*'s analysis did not preclude relief either under Ohio's statutory standard or under broader Eighth Amendment principles since the Supreme Court in *Baze* concluded that factual development of each case was critical to the analysis. *Rivera*, Case No. 04CR065940, Judgment Entry at p. 7 (Ex. B).

## II. Good cause exists to grant Hartman's motion

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[1] The state has appealed the decision of the Court of Common Pleas. *State v. Ruben Rivera,* 9th District Court of Appeals for Lorain County, Case No. 08CA009426. Oral Argument was had on January 21, 2009. A decision on the appeal is expected soon.

On March 6, 2009, Hartman filed a Motion to Intervene in pending litigation seeking a declaratory judgment in the Franklin County Court of Common Pleas.[2] Hartman and the other plaintiffs have asserted that Ohio's lethal injection protocol violates the statutory requirement of a quick and painless method of execution under Ohio Revised Code §2949.22(A)("a death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage *to quickly and painlessly cause death*" )(emphasis supplied)

The *Rivera* Court concluded that the Ohio Legislature's use of the term "shall" in Ohio Revised Code § 2949.22(A) imposes a mandatory duty upon the Ohio Department of Rehabilitation and Correction to provide the condemned with an execution that is both quick and painless. *Rivera*, Case No. 04CR065940 at p. 5, ¶ 4 (Ex. B). Because the obligation is mandatory, the condemned has a substantive right to be executed in a manner that is both quick and painless. *Id.* at 5-6, ¶¶ 5-6 (Ex. B).

But, the State of Ohio is not meeting that obligation; its use of pancuronium bromide and potassium chloride in its protocol "creates an unnecessary and arbitrary risk that the condemned will experience an agonizing painful death." *Id.* at p. 6, ¶ 7 (Ex. B). Use of those two drugs "violates the duty of the Department of

[2] The original Plaintiffs filed an amended complaint on September 24, 2008.

Rehabilitation and Correction, mandated by R.C. 2949.22 to ensure the statutory right of the condemned person to an execution without pain" and to the condemned's "expectancy that his execution will be painless." *Id.* at p. 7, ¶ 14 (Ex. B).

The State of Ohio has conceded that it is bound by the *Rivera* decision and its finding that the use of pancuronium bromide and potassium chloride will violate both its statutory obligation to impose a quick and painless death and the condemned's right to a quick and painless execution. *State v. Rivera*, Case No. 08CA009426, Appellant's Motion to Expedite Appeal (filed Lorain Ct. App. July 28, 2008) (Ex. C). Hartman, and the other declaratory judgment plaintiffs have argued that the doctrine of collateral estoppel commands a ruling in their favor on the constitutionality of Ohio's lethal injection protocol. See *Hicks v. De La Cruz*, 52 Ohio St. 2d 71, 74, 369 N.E.2d 776, 778 (1977) ("If an issue of fact or law actually is litigated and determined by a valid and final judgment, such determination being essential to that judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. A party precluded under this principle [collateral estoppel] from re-litigating an issue with an opposing party likewise is precluded from doing so with another person unless he lacked full and fair opportunity to litigate that issue in the first action, or unless other circumstances justify according him an opportunity to relitigate that

issue."). Because Hartman is entitled to a ruling in his favor, this Court should not permit his execution to go forward so long as the *Rivera* decision and his declaratory judgment action remain pending in the Ohio courts.

## III. Details of declaratory judgment action

The State of Ohio intends to execute Brett Hartman on April 7, 2009, by using three drugs designed in theory to first anesthetize, then paralyze, and finally stop his heart. Execution begins with the administration of sodium thiopental, then pancuronium, followed by potassium chloride. It is undisputed that the second drug, pancuronium bromide, and the third drug, potassium chloride, are unnecessary to cause death. Further, they "create an unnecessary risk of causing an agonizing or an excruciatingly painful death." *Rivera*, Case No. 04CR065940 at p. 6 (Ex. B).

Pancuronium bromide renders the "condemned person unable to breathe, move, or communicate." *Id.* at p. 2 (Ex. B). However, this drug does not affect the condemned's "ability to think, or to feel, or to hear, or anything, any of the senses, or any of our intellectual processes, or consciousness. So a person who is given pancuronium...would be wide awake, and – but looking at them, you would – they would look like they were peacefully asleep...But they would, after a time, experience intense desire to breathe. It would be like trying to hold one's breath. And they wouldn't be able to draw a breath, and they would suffocate." *Id.* at p. 2

(citing Heath, Tr. 72) (Ex. B). This drug will kill, but the death would be "agonizing." *Id.* (citing Heath, Tr. 75) (Ex. B).

The third drug, potassium chloride stops the condemned's heart. But prior to doing so, "it gets in contact with nerve fibers, it activates the nerve fibers to the maximal extent possible, and so it will activate pain fibers to the maximal extent that they can be activated. And so concentrated potassium causes excruciating pain in the veins as it travels up the arms and through the chest." *Id.* (citing Heath, Tr. 73) (Ex. B).

These facts are rendered more significant because death can be caused in a short time by a barbiturate drug alone, which would eliminate the substantial risk of gratuitous pain that, upon the failure of the anesthetic, would certainly be caused by the administration of pancuronium bromide and potassium chloride. *Id.* at p. 7 (Ex. B).

In addition to problems with the drugs the State of Ohio uses in executions, there are many foreseeable – if not predictable – situations where human or technical errors could result in the failure to successfully administer the intended doses of the three drugs. The Ohio procedures both foster these potential problems and fail to provide adequate mechanisms for recognizing or correcting these problems. Heath Affidavit, ¶ 41 (Ex. D). The problems include, but are not limited to:

●Inadequate training of the execution team members *Id.* at ¶ 50 (Ex.C)

●Placement of all or most members of the execution team in a dimly lit room some distance from the condemned inmate into whom they are attempting to inject lethal drugs, thus leaving them without the ability to closely observe signs that there is leakage in the long tubes leading to the condemned, that the IV inserted into the condemned failed, and that the condemned is not adequately anesthetized. *Id.* at ¶ 50 (Ex.C).

●Procedures that fail to guard against the mistakes in the complex process of mixing and administering the sequence of lethal drugs into the condemned's body in amounts that will cause death without inflicting gratuitous pain. *Rivera*, Case No. 04CR065940, Judgment Entry at p. 3 (Ex. B); Heath Affidavit, ¶ 42 (Ex. D).

●Procedures that fail to guard against failures in the IV insertion at its inception and/or throughout the course of the execution process. Even if the IV is inserted properly at the outset, many factors can cause the IV to fail, which the State of Ohio's protocol does not adequately monitor, including a disruption in the flow caused by the restraints placed on the condemned to fix him to the death gurney, and disruptions caused by a vein that collapses due to excessive pressure on the syringe, and/or intrinsic weaknesses in an inmate's vein. *Rivera*, Case No. 04CR065940, Judgment Entry at p. 3 (Ex. B); Heath Affidavit, ¶ 42 (Ex. D).

●Failure to include alternative procedures to follow in the event that an IV cannot be inserted into a peripheral vein; e.g., the State of Ohio has no procedure detailed in their protocol for gaining access to relatively deep veins in an inmate's neck area or other more invasive procedures necessitated when access cannot be gained to a peripheral vein (e.g., central line, percuntanous line, cut down). Heath Affidavit, ¶ 54 (Ex. D).

●Failure to require adequate time between the insertion of the anesthetic and the insertion of the next two drugs as is necessary to ensure that the inmate is anesthetized before the next drugs are administered. The State of Ohio, during the executions of Barton, Ferguson, Lundgren, and Filliaggi incorrectly administered the pancuronium bromide (the second drug) less than three minutes after the administration of the sodium thiopental.

●Failure to provide mechanisms that ensure that the inmate is adequately anesthetized before the paralytic and potassium-based heart stopping drugs are administered. It is "impossible to determine the condemned person's depth of anesthesia before administering the agonizing or painful drugs, in that medical equipment supply companies will not sell medical equipment to measure depth of anesthesia for the purposes of carrying out an execution", "[p]hysicians will not participate in the execution process," and that the warden is required to determine whether there is sufficient anesthesia, but is unable to "fulfill his duty without specialized medical equipment. *Rivera,* Case No. 04CR065940, Judgment Entry at p. 3 (Ex. B).

●Failure to utilize more than 2 grams of the anesthetic sodium thiopental.

●Failure to guard against the problems common during medical procedures, including but not limited to a retrograde injection (i.e., the drugs go the wrong way so they do not wind up in the inmate's body), leakage, and improper pressure applied to the syringe that would rupture the vein. *Id.* at p. 3 (Ex. B).

●Failure to provide a stabilization procedure to prevent the inmate's death if a stay or clemency issues after the lethal injection process begins but before the inmate is dead.

These are the only identifiable problems because the state continues to guard particulars of the lethal injection protocol. These contentions are supported by no less than three botched executions in Ohio's recent past.

The state botched the first execution - Wilford Berry - in 1999. It appears that the execution team could not locate a vein for the IV line, so it has been reported that they beat his arms in order to raise a vein adequate for an IV site.

Again on May 2, 2006, "when preparing [Joe] Clark for execution, prison officials could find only one accessible vein in Clark's arms to establish a heparin lock, through which the lethal drugs are administered. (Two locks usually are

inserted.) However, once the execution began and the drugs were being administered, this vein collapsed, and Clark repeatedly advised officials that the process was not working. Officials stopped the lethal injection procedure, and after a significant period of time, were able to establish a new intravenous site." *Cooey v. Strickland*, 479 F.3d 412, 423-24 (6th Cir. 2007)[3].

As a result of problems encountered in the execution of Joe Clark, the protocol was changed in July of 2006, and again in October of 2006. (Exs. H, I) *Cooey v. Strickland*, 479 F.3d at 423

Despite these changes, the new protocol resulted in more problems in the execution of Christopher Newton. It took approximately twenty-two minutes to insert the first IV into Newton's arm. It took approximately one hour and fifteen minutes to place the second IV. Newton continued to talk for several minutes after the administration of the lethal injection drugs began, which means that the anesthetic drug (Ohio's first of three drugs) did not have its intended effect of immediately rendering Newton unconscious. Several minutes after the drugs

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[3] For twenty-five minutes prior to his execution, the State of Ohio attempted to place shunts in his arms. (*Id.*, ¶ 17) Departing from the lethal injection protocol, the State of Ohio proceeded to execution with only one heparin lock in place. (*Id.* at ¶ 18) The State of Ohio's first attempt to execute Clark failed, probably due to a collapsed vein. (*Id.* at ¶ 21) This was discovered when Clark repeatedly stated, "It don't work." (*Id.* at ¶22) Clark asked members of the execution team if there was "any alternate means of administering a lethal dose were available." (*Id.* at ¶ 23) See Complaint, *Estate of Joseph Lewis Clark v. Voorhies et al.*, Case No. 1:07CV510 (S.D. Ohio)(Ex. E)

began, Newton's chest and stomach area moved approximately eight to ten times and his chin moved in a jittery manner, and at 11:45 a.m. his chest moved, which means the paralytic drug (Ohio's second of three drugs) did not have its intended effect.

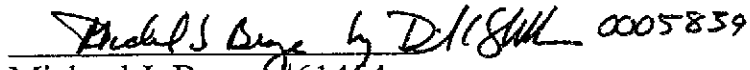
There are real problems with Ohio's lethal injection protocol. This Court should stay Hartman's execution until these problems are addressed, or until this Court has an opportunity to rule on either the *Rivera* decision or on Hartman's declaratory judgment action.

## III. Conclusion

The only Ohio court that has permitted factual development of the merits of the lethal injection claims underlying Hartman's declaratory judgment complaint found in his favor. See *Rivera* discussion *infra.* Until this Court ultimately decides the issues raised in the *Rivera* case and the issues raised in the declaratory judgment case, this Court cannot permit Hartman's execution to go forward.

Brett Hartman respectfully requests this Court to issue an Order staying his April 7, 2009 execution date.

Respectfully submitted,



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**Certificate of Service**

I hereby certify that a true copy of the foregoing Motion for Stay of Execution was forwarded by regular U.S. mail to Richard S. Kasay, Assistant Prosecuting Attorney, Summit County Prosecutor's Office, 53 University Avenue, 6th Floor, Akron, Ohio 44308-1680, and also via email at kasay@prosecutor.summitoh.net , and to Thomas Madden and Stephen Maher, Office of the Ohio Attorney General, Capital Crimes, 150 East Gay Street, 16th Floor, Columbus, OH 43215 on this 12th day of March, 2009.

Michael J. Benza
**Counsel for Brett Hartman**

# EXHIBIT A

In The Court of Common Pleas,
Franklin County, Ohio

| | | |
|---|---|---|
| Brett Hartman, et. al, | : | Case No. 08 CVH 09 13337 |
| Plaintiff | : | |
| vs. | : | |
| Ted Strickland, Governor, et al., | : | Judge Guy Reese |
| Defendants-Appellees. | : | |

# BRETT HARTMAN'S MOTION TO INTERVENE AS PLAINTIFF-INTERVENOR

Plaintiff-intervenor Brett Hartman moves this Court under Ohio R Civ. P. 24(A)(2) for leave to intervene as of right in this action. Alternatively, Mr. Hartman requests permissive intervention under Civil Rule 24(B)(2). The reasons in support of this motion are more fully set forth in the attached Memorandum in Support. Mr. Hartman's complaint — seeking a declaratory judgment that Ohio's lethal injection protocol is invalid under O.R.C. §2949 22 — is attached to this motion as Exhibit 1.

FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
2009 MAR -6 PM 12: 14
CLERK OF COURTS

Respectfully submitted,

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By _____
COUNSEL FOR PLAINTIFFS

## MEMORANDUM OF LAW

Brett Hartman moves to intervene in this case. Mr. Hartman satisfies the test for intervention because he has a protectable interest in this case. Ohio R. Civ. P. 24(A)(2). Mr. Hartman' interest in this suit may be impaired if his request to intervene is denied. The original plaintiffs cannot adequately protect Mr. Hartman's interest in the subject matter of this case.

### I. BACKGROUND INFORMATION.

Plaintiffs are death-row inmates who filed a complaint seeking a declaratory judgment in this Court. Plaintiffs assert that the Ohio's execution protocol (lethal injection) violates Ohio's statute which requires that the Ohio Department of Rehabilitation and Correction enact a quick and painless method of execution. O.R.C. §2949.22.

Just like the original plaintiffs, Mr. Hartman is a death-row inmate. The state and federal courts have denied his regular course of appeals. He is in the process of preparing an appeal to the United States Supreme Court from the decision of the United States Court of Appeals denying him habeas relief. An execution date has not been set for Mr. Hartman but he will die by lethal injection if his appeal and subsequent request for clemency fail.

## II. MR. HARTMAN SATISFIES THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT.

Civil Rule 24(A)(2) provides for intervention of right "when the applicant claims an interest relating to the . transaction that 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 the existing parties" (Emphasis added.)

Intervention under Civil Rule 24 is favored and the rule is construed liberally to permit intervention. See State ex. rel. Watkins v. Eight District Court of Appeals , 82 Ohio St. 3d 532, 534 696 N.E.2d 1079, 1081 (1998); State ex. rel. Smith v. Frost, 74 Ohio St. 3d 107, 108, 656 N.E.2d 673, 675 (1995). "The need to settle claims among a disparate group of affected persons militates in favor of intervention." Jansen v. Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990).[1]

An applicant must meet four conditions to satisfy the test for intervention of right Civil Rule 24(A)(2). First, the applicant needs a protectable interest in the subject matter of the litigation. Second, the applicant's request to intervene must be timely. Third, the applicant must show that his interest may be impaired or impeded if he is not allowed to intervene Finally, the applicant needs to demonstrate that his interest will not be adequately represented without intervention. *See State ex. rel.* Smith v. Frost, 74 Ohio St. 3d 107, 108, 656 N.E.2d 673, 675-76 (1995); Peterman v. Village of Pataskala, 122 Ohio App. 3d 758, 760-61, 702 N.E 2d 965, 966 (1997)

**A. Mr. Hartmna has a protectable interest.**

Like the original plaintiffs, Mr. Hartman is a death row inmate who faces the prospect of death by lethal injection. He, too, will suffer pain if he is executed under a flawed lethal injection

[1] The Tenth Appellate District has recognized that it is proper for state courts to reference federal case law when interpreting Ohio Civil Rule 24. See Fairview General Hospital v. Fletcher, 69 Ohio App. 3d 827, 831, 591 N.E.2d 1312, 1314 (1990).

protocol And like the original plaintiffs, he has the statutory right to a quick and painless death. O.R C §2949.22 This protectable interest requirement "is to be construed liberally." See Brady v. Milliken, 828 F.2d 1186, 1192 (6th Cir. 1987).

**B. Mr. Hartman's motion to intervene is timely.**

The parties have just begun the discovery process Defendants have moved for summary judgment However, they have recognized that the motion is not well taken and filed a notice that they intend to file a motion for judgment on the pleadings

**C. Mr. Hartman's interest will be impaired and the original Plaintiffs cannot protected that interest.**

Mr. Hartman meets the final two prongs of the test for intervention of right. Mr. Hartman's burden of proving that plaintiffs will not adequately protect his interest "is a minimal one." Fairview Gen. Hosp., 69 Ohio App. 3d at 835, 591 N.E.2d at 1317. Plaintiffs assert that death by Ohio's lethal injection protocol will result in a cruel and painful death for each of them But plaintiffs do not assert that Mr. Hartman will suffer a cruel and painful death by lethal injection protocol if the Defendants are permitted to continue using the protocol now in effect In addition, given the importance of the issue, the present litigation may ultimately result in the Supreme Court issuing a dispositive interpretation of O.R C §2949 22. The *stare decisis* effect of a potential adverse ruling is sufficient to demonstrate that Mr. Hartman's interests cannot be adequately protected unless this Court permits him to intervene. See Jansen, 904 F.2d at 342; Linton v. Comm'r of Health & Env't , 973 F.2d 1311, 1319 (6th Cir. 1992).

## III. MR. HARTMAN SATISFIES THE REQUIREMENTS FOR PERMISSIVE INTERVENTION.

Even if he did not meet the requirements for intervention of right, Mr. Hartman meets the test for permissive intervention. Ohio R Civ P 24(B)(2) Mr. Hartman's "claim . and the main

action have a question of law [and] fact in common" Id. Mr Hartman's attached complaint (Exhibit 1) is substantially similar to the main complaint.

## III. CONCLUSION: THE COURT SHOULD GRANT THIS MOTION.

Plaintiff-Intervenor Brett Hartman has a protectable interest in this case His request to join this case was filed promptly. Because Mr Hartman challenges the manner in which Defendants will execute him, his interest in this case is unique. That interest cannot be protected unless he is allowed to join this suit.

Respectfully submitted,

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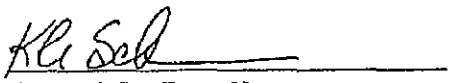
By
COUNSEL FOR BRETT HARTMAN

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brett Hartman's Motion To Intervene As Plaintiff-Intervenor and attached Intervenor's Complaint, attached 1 was served by regular U S Mail on Seth P. Kestner, Assistant Attorney General, Capital Crimes Unit, and Melissa A. Montgomery of the Corrections Litigation Unit, 150 E Gay Street - 16th Floor, Columbus, OH 43215 and Ron O'Brien, Franklin County Prosecutor, 373 S. High St. Columbus, Ohio 43215, on this 6th day of March, 2009.



Counsel For Brett Hartman

295593

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
GENERAL DIVISION

BRETT HARTMAN
#357-869
Ohio State Penitentiary
878 Coitsville-Hubbard Road
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Plaintiff,

vs.

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TERRY COLLINS, DIRECTOR
Ohio Dept of Rehabilitation & Correction
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PHIL KERNS, WARDEN
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JOHN/JANE DOE #3, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
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Lucasville, Ohio 45699,

JOHN/JANE DOE #4, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
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Lucasville, Ohio 45699,

CASE NO. 08 CVH 09 13337

**Complaint for Declaratory Judgment and Injunctive Relief**

**Evidentiary Hearing Requested**

EXHIBIT
1

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JOHN/JANE DOE #6, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
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Lucasville, Ohio 45699,

JOHN/JANE DOE #7, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #8, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #9, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #10, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #11, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

and

JOHN/JANE DOE #12, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

Defendants.

## Summary of Action

1 Plaintiff Brett Hartman ("Plaintiff) was indicted, tried, convicted and sentenced to death in the State of Ohio He remain on the State of Ohio's death row. If ("Plaintiff") does not obtain relief in his cases or are not granted clemency, he will be executed.

2. The Ohio Legislature has established the procedure for executing persons in the State of Ohio, "a death sentence *shall* be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage *to quickly and painlessly cause death*." O.R.C. § 2944 22(A) (emphasis added).

3 The Ohio Legislature's use of the term "shall" in O.R C § 2944.22(A) imposes a mandatory duty upon the Ohio Department of Rehabilitation and Correction to provide the condemned with an execution that is both quick and painless. *State v. Rivera,* Lorain C.P. No. 04CR065940, p. 5, ¶ 4. [Exhibit A]

4. Because the State has a mandatory obligation to execute a condemned in a manner that is both quick and painless, the condemned has a substantive right to be executed in a manner that is both quick and painless *State v. Rivera,* pp. 5-6, ¶¶ 5-6.

5. The State of Ohio's current execution protocol requires the use of the administration of three drugs in the execution of an individual: 1) sodium thiopental, 2) pancuronium bromide, and 3) potassium chloride. [Exhibit B, p. 7; Exhibit C, p. 7]

6. The State of Ohio's use of pancuronium bromide and potassium chloride to execute an individual "creates an unnecessary and arbitrary risk that the condemned will experience an agonizing painful death." *State v. Rivera,* p 6, ¶ 7.

7 Defendants' inclusion of pancuronium bromide and potassium chloride in its lethal injection protocol "violates the duty of the Department of Rehabilitation and Correction, mandated by R C 2949 22 to ensure the statutory right of the condemned person to an execution without

pain" and to the condemned's "*expectancy that his execution will be painless*" *Id.* at p 7, ¶ 14. (emphasis in original).

8 The Defendants have conceded that they are bound by the *Rivera* decision and its finding that the use of pancuronium bromide and potassium chloride will violate both its statutory obligation to impose a quick and painless death and the condemned's right to a quick and painless execution. [Exhibit D].

9 The doctrine of collateral estoppel further commands a ruling in Plaintiff's favor. *See Hicks v. De La Cruz*, 52 Ohio St 3d 71, 74, 369 N E.2d 776, 778 (1977) ("if an issue of fact or law actually is litigated and determined by a valid and final judgment, such determination being essential to that judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. A party precluded under this principle [collateral estoppel] from re-litigating an issue with an opposing party likewise is precluded from doing so with another person unless he lacked full and fair opportunity to litigate that issue in the first action, or unless other circumstances justify according him an opportunity to relitigate that issue.").

10. Plaintiff seeks declaratory judgment and injunctive relief from Ohio's lethal injection protocol. If relief is not granted, the Defendants will execute Plaintiff using a faulty three-drug protocol that is neither "quick" nor "painless" as required by O.R.C. § 2949 22(A) and Ohio's Constitution.

## Jurisdiction

11. This action is brought under Ohio Rev Code Ann § 2949.22(A). This Court has jurisdiction to grant the relief requested herein under Ohio Const. art. IV, § 4(B), O R.C. §§ 2721.02, 2721.03, 2721 06, 2721.09, and 2727.03.

## The Parties

12 Plaintiff Brett Hartman 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 Ohio Department of Rehabilitation and Correction, (DRC), who have him incarcerated in the Ohio State Penitentiary, in Youngstown, Ohio, as Inmate #357-869. If Plaintiff does not receive relief in the federal courts or if his death sentence is not commuted through executive clemency, then Defendants will execute him. Upon information and belief, it is the intention of Defendants to use the lethal injection protocol described herein to execute Plaintiff in the death house located at the Southern Ohio Correctional Facility, (SOCF), which is operated and controlled by the Defendants

13. Defendant Ted Strickland is the Governor of the State of Ohio. He is the ultimate executive authority in the state, statutorily and constitutionally responsible for implementing all sentences of death in Ohio and the manner in which those sentences are performed He is sued here in his official capacity for the purpose of obtaining declaratory and injunctive relief.

14. Defendant Terry Collins is, and at all times relevant was, the Director of the DRC, a department of the State of Ohio created and maintained under O.R.C. § 5120. Ohio Revised Code § 5120.01 charges and authorizes Defendant Collins to prescribe and direct the promulgation of rules and regulations for DRC, including the rules and regulations for the conduct of prison operations and execution procedures. He is sued here in his official capacity for the purpose of obtaining declaratory and injunctive relief

15. Defendant Phil Kerns is, and at all times relevant was, Warden of the SOCF at Lucasville, a correctional institution of the DRC that was created and is maintained under O R.C § 5120.05. SOCF is the prison where sentences of death are carried out in the State of Ohio. Under O.R.C. § 5120.38, Defendant Kerns, as the Warden of SOCF, is charged with management of SOCF and the oversight and conduct of operations there This includes overseeing the training of

personnel and implementation of executions carried out there He is sued here in his official capacity for the purpose of obtaining declaratory and injunctive relief.

16. Defendants John/Jane Doe Numbers One through Twelve are, and were at all times relevant to this action, employees and/or agents of the DRC, who served and/or currently serve as members of the execution team charged with implementing Defendants' lethal-injection execution protocol They have implemented the protocol to execute former inmates, and they will be charged with the duty to execute Plaintiff under Defendants' current execution protocol. The identities of these Defendants are presently unknown to the Plaintiff Their identities are uniquely within the knowledge of one or more of the named Defendants (Governor Strickland, Director Collins, and/or Warden Kerns) and/or their agents. As their identities become known to Plaintiff, the proper names of the "John/Jane Doe" Defendants will be added to this action

17. Defendants, at all relevant times, 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 Unless preliminarily and permanently enjoined, the Defendants intend to act in their respective official capacities and under the authority of state law, executing Plaintiff using lethal injection methods that will violate their constitutional and statutory rights.

## FACTS SUPPORTING PLAINTIFF'S CLAIMS FOR RELIEF

18. Plaintiff incorporate by reference all facts and allegations contained throughout this complaint as if fully re-written herein

19. Defendants will execute Plaintiff unless his death sentence is vacated by the courts or commuted through executive clemency.

20. Defendants intend to execute Plaintiff by employing the same means and methods of lethal injection as identified in their July 10, 2006 and October 11, 2006 execution protocols [Exhibits B and C].

21 The Ohio Legislature has decreed that "(A) Except as provided in division (C) of this section, a death sentence *shall be executed* by causing the application to the person upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to *quickly and painlessly cause death*" O.R.C § 2949.22 (Emphasis added)

## OHIO'S LETHAL INJECTION DRUGS

22 Defendants intend to execute Plaintiff by using three drugs designed in theory to first anesthetize, then paralyze, and finally stop their hearts. Execution begins with the administration of sodium thiopental, then pancuronium, followed by potassium chloride.

23. The second drug, pancuronium bromide, and the third drug, potassium chloride, are unnecessary to cause death. Further, they "create an unnecessary risk of causing an agonizing or an excruciatingly painful death[.]" *State v. Rivera*, p. 6 [Exhibit A].

24. Pancuronium bromide renders the "condemned person unable to breathe, move, or communicate" *Id.* at p. 2. However, this drug does not affect the condemned's "ability to think, or to feel, or to hear, or anything, any of the senses, or any of our intellectual processes, or consciousness So a person who is given pancuronium . would be wide awake, and – but looking at them, you would – they would look like they were peacefully asleep. But they would, after a time, experience intense desire to breathe. It would be like trying to hold one's breath. And they wouldn't be able to draw a breath, and they would suffocate." *Id.* at p. 2 (citing Heath, Tr. 72) This drug will kill, but the death would be "agonizing" *Id.* (citing Heath, Tr. 75).

25 The third drug, potassium chloride stops the condemned's heart. But prior to doing so, "it gets in contact with nerve fibers, it activates the nerve fibers to the maximal extent possible,

and so it will activate pain fibers to the maximal extent that they can be activated. And so concentrated potassium causes excruciating pain in the veins as it travels up the arms and through the chest." *Id.* (citing Heath, Tr 73)

26 "[P]ancuronium bromide and potassium chloride will cause an agonizing or an excruciatingly painful death, if the condemned person is not sufficiently anesthetized by the delivery of an adequate dosage of sodium thiopental." *Id* at p 3.

27 Death can be caused in a short time by a barbiturate drug alone, which would eliminate the substantial risk of gratuitous pain that, upon the failure of the anesthetic, would certainly be caused by the administration of pancuronium bromide and potassium chloride. *Id.* at p. 7.

## Faulty Procedures And Practices

28 Many foreseeable situations exist in which human or technical errors could result in the failure to successfully administer the intended doses of the three drugs identified in paragraphs 26-31. The procedures implemented by the Defendants both foster these potential problems and fail to provide adequate mechanism for recognizing these problems, and it does these things needlessly and without legitimate reason. Heath Affidavit, ¶ 41 [Exhibit E].

29. The execution team members have received inadequate training. *Id.* at ¶ 50

30. Defendants have placed all or most members of the execution team in a dimly lit room some distance from the condemned inmate into whom they are attempting to inject lethal drugs, thus leaving them without the ability to closely observe signs that there is leakage in the long tubes leading to the condemned, that the IV inserted into the condemned failed, and that the condemned is not adequately anesthetized. *Id. at* ¶ 50

31 Defendants' lethal injection procedures fail to guard against the mistakes in the complex process of mixing and administering the sequence of lethal drugs into the condemned's

body in amounts that will cause death without inflicting gratuitous pain *State v. Rivera*, p. 3 [Exhibit A]; Heath Affidavit, ¶ 42 [Exhibit E].

32. Defendants' lethal injection procedures fail to guard against failures in the IV insertion at its inception and/or throughout the course of the execution process Even if the IV is inserted properly at the outset, many factors can cause the IV to fail, which Defendants' protocol does not adequately monitor, including a disruption in the flow caused by the restraints placed on the condemned to fix him to the death gurney, and disruptions caused by a vein that collapses due to excessive pressure on the syringe, and/or intrinsic weaknesses in an inmate's vein. *State v. Rivera*, p 3 [Exhibit A]; Heath Affidavit, ¶ 42 [Exhibit E].

33. Defendants' lethal injection procedures contain no alternative procedures to follow in the event that an IV cannot be inserted into a peripheral vein; *e.g.*, Defendants have no procedure detailed in their protocol for gaining access to relatively deep veins in an inmate's neck area or other more invasive procedures necessitated when access cannot be gained to a peripheral vein (*e.g.*, central line, percuntanous line, cut down). Heath Affidavit, ¶ 54 [Exhibit E].

34. Defendants' lethal injection procedures fail to require adequate time between the insertion of the anesthetic and the insertion of the next two drugs as is necessary to ensure that the inmate is anesthetized before the next drugs are administered. Defendants during the executions of Barton, Ferguson, Lundgren, and Filliaggi incorrectly administered the pancuronium bromide (the second drug) less than three minutes after the administration of the sodium thiopental.

35. Defendants' lethal injection procedure fails to provide mechanisms that ensure that the inmate is adequately anesthetized before the paralytic and potassium-based heart stopping drugs are administered. It is "impossible to determine the condemned person's depth of anesthesia before administering the agonizing or painful drugs, in that medical equipment supply companies will not sell medical equipment to measure depth of anesthesia for the purposes of carrying out an

execution", "[p]hysicians will not participate in the execution process," and that the warden is required to determine whether there is sufficient anesthesia, but is unable to "fulfill his duty without specialized medical equipment. *State v. Rivera*, p. 3 [Exhibit A]

36. Defendants' lethal injection procedure fails to utilize more than 2 grams of the anesthetic sodium thiopental.

37 Defendants' lethal injection procedures fail to guard against the problems common during medical procedures, including but not limited to a retrograde injection (*i.e.*, the drugs go the wrong way so they do not wind up in the inmate's body), leakage, and improper pressure applied to the syringe that would rupture the vein. *State v. Rivera*, p. 3 [Exhibit A].

38. Defendants' lethal injection procedures fail to provide a stabilization procedure to prevent the inmate's death if a stay or clemency issues after the lethal injection process begins but before the inmate is dead.

**Defendants Have Not Released All Relevant Information**

39 At no time have the Defendants or their agents publicly disclosed all material and relevant details: 1) the process by which Defendants chose their method of lethal injection; 2) the personnel involved in the lethal injection execution procedure, including but not limited to any education, credentials, training, expertise, or other factors that qualify or disqualify them from being involved for involvement on the execution team, 3) the equipment utilized to effectuate an execution by lethal injection; and 4) the facilities used to implement an execution, including but not limited to the room(s) not seen by witnesses to an execution, in which room(s) certain actions essential to an execution are undertaken by unknown persons referred to in this Complaint as the John/Jane Doe Defendants

**Botched Executions**

40. Defendants intend to execute Plaintiff by employing the same means and methods of lethal injection as they or their predecessors used to execute Christopher Newton and Joseph Clark. Those methods resulted in both individuals suffering painful and slow executions.

**Wilford Berry**

41. Defendants botched Ohio's first execution in the modern era when they or their predecessors executed Wilford Berry in 1999. Upon information and belief, the members of Berry's execution team could not locate a vein for the IV line, so they resorted to violently beating his arms in order to raise a vein adequate to acquire an IV site for the transmission of the lethal drugs into his body.

**Joseph Clark**

42. On May 2, 2006, "when preparing Clark for execution, prison officials could find only one accessible vein in Clark's arms to establish a heparin lock, through which the lethal drugs are administered. (Two locks usually are inserted.) However, once the execution began and the drugs were being administered, this vein collapsed, and Clark repeatedly advised officials that the process was not working. Officials stopped the lethal injection procedure, and after a significant period of time, were able to establish a new intravenous site." *Cooey v. Strickland*, 479 F.3d 412, 423-24 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 2047 (April 21, 2008).

43. As a result of problems encountered by Defendants when they executed Joseph Clark, Defendants changed their lethal injection execution protocol effective on or about July 10, 2006, and again in October of 2006. [Exhibits B and C]. The July 2006 changes to Defendants' lethal injection protocol "resulted from difficulties encountered during the execution of Joseph Clark on May 2, 2006." *Cooey*, 479 F.3d at 423.

**Christopher Newton**

44 Defendants' new protocol resulted in the botched execution of Christopher Newton The changes either failed to alleviate the problems associated with Ohio's lethal injection protocol or created new problems

45. It took approximately twenty-two minutes to insert the first IV into Newton's arm. It took approximately one hour and fifteen minutes to place the second IV. Newton continued to talk for several minutes after the administration of the lethal injection drugs began, which means that the anesthetic drug (Ohio's first of three drugs) did not have its intended effect of immediately rendering Newton unconscious Several minutes after the drugs began, Newton's chest and stomach area moved approximately eight to ten times and his chin moved in a jittery manner, and at 11:45 a.m. his chest moved, which means the paralytic drug (Ohio's second of three drugs) did not have its intended effect

46 Newton was pronounced dead some sixteen minutes after the lethal drugs began flowing—about fifty percent longer than Ohio's average of nine to eleven minutes, which indicates that the potassium chloride (Ohio's third and final drug) failed to stop Newton's heart within the time frame predicted by the protocol. *See* Declaration of Robert K. Lowe, Esq, Regarding the Execution of Christopher Newton, *Alderman v. Donald, et al.*, Case no. 1:07-CV-1474-BBM (N.D. GA), (Ex. A in that litigation); and [Exhibit F attached hereto].

**Other Executions**

47 Upon information and belief, Plaintiff believe that through factual development, Defendants will reveal that other inmates executed by Defendants (or their predecessors) since 1999 suffered from the same constitutional and statutory defects as alleged in this complaint

48. Defendants' current lethal injection protocol fails to address the risk that future executions will result in slow and painful death. The executions of Clark and Newton demonstrate

that Ohio's lethal injection protocol as applied does not comport with the directive of O.R.C. §2949.22 that the manner of death be quick and painless.

## FIRST CLAIM FOR RELIEF

49. Plaintiff incorporates by reference all facts and allegations described throughout this complaint as if fully re-written herein.

50. Defendants' protocol violates O.R.C. §2949.22. Dr. Heath's findings document this conclusion. Heath Affidavit, [Exhibit E] "Circumstantial evidence exists that some condemned prisoners have suffered a painful death, due to a flawed lethal injection[.]" *State v. Rivera*, p. 4 [Exhibit A]. Newton's execution (and Clark's before him) reveal that Defendants have failed to comply with the statutory mandate of that executions be "quick and painless."

## SECOND CLAIM FOR RELIEF

51. Plaintiff incorporates by reference all facts and allegations described throughout this complaint as if fully re-written herein.

52. The use of "shall" in O.R.C. §2949.22, "when qualifying a state's duty to provide a quick and painless death signifies that the duty is mandatory." *State v. Rivera*, p. 5 [Exhibit A]. This statutory language "demands avoidance of any unnecessary risk of pain, and as well, any unnecessary expectation by the condemned person that his execution may be agonizing, or excruciatingly painful." *Id.* at p. 7.

53. The mandatory nature of this duty creates "a property interest. .in the benefit conferred upon the individual." *Id.* (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *see also Wolff v. McDonnell*, 418 U.S. 539, 557 (1974); Ohio Const. art. I, § 16. This right outweighs any State interest in a "quick" execution, if such an interest exists. *State v. Rivera*, p. 6.

54. Defendants have created, maintained, and implemented lethal injection protocols that fail to fulfill the statutory mandate of a "painless" execution. This deprives Plaintiff of his state constitutional and statutory rights to a "painless" death *id.* at p 5

55 By adopting and employing a protocol that uses two drugs that can cause an excruciating and agonizing death, if Defendants execute Plaintiff under their current lethal injection protocol, Defendants will violate their constitutional rights to due process under Ohio Const. art. I, §16 *Id* at p. 6-7

<u>Injunctive Relief Warranted</u>

56. Plaintiff is entitled to a preliminary and permanent injunction preventing Defendants from executing them with the methods and procedures described herein because 1) Plaintiff will suffer irreparable injury; 2) Plaintiff can show a "substantial likelihood of success on the merits"; and 3) the injunction will not "cause substantial harm to others"; and the public interest will "be served by issuing a preliminary injunction" *Ohio Serv. Group, Inc. v. Integrated & Open Sys., L.L.C.*, 2006-Ohio-6738, ¶11 (Franklin Ct App Dec. 19, 2006) (citing *International Assn. of Firefighters v. Middletown*, Case No CA83-02-020, 1983 Ohio App. LEXIS 15897 (Butler Ct App. Aug. 31, 1983)).

57. Plaintiff will be irreparably harmed by the denial of relief whereas the harm to the defendants by granting relief will not be substantial If one or more of the other persons sentenced to death in Ohio is executed and in the process suffers excruciating pain, no later action by this Court can repair this harm. This is to be contrasted with the entrance of a preliminary injunction that will only cause a temporary delay for the Defendants, lasting only as long as it takes them to bring their execution protocol into compliance with the constitutional and legal standards set forth in this complaint

58 There is a substantial likelihood of success on this issue. The only court to address the standard contained in O.R C. § 2949 22(A) found that Defendants were violating their statutory

mandate. *State v. Rivera*. [Exhibit A].

59 While the public has a right to have its sentences enforced, it has a similar right to know that its sentences are lawfully effectuated. The public and society have a vested right in knowing that the condemned are not subjected to slow and painful deaths in the pursuit of justice.

60 Plaintiff does not seek injunctive relief under O.R.C. §§ 2721.02, 2721.03, 2721.06, 2721.09, and 2727.03 as a means of attacking their underlying conviction or death sentence; rather, he simply seeks to utilize Ohio's declaratory judgment statutes as a legitimate means to stop Defendants from executing them in a manner that violates their constitutional and statutory rights.

## PRAYER FOR RELIEF

Plaintiff requests that this Court grant him the following relief because Defendants are not complying with their statutory mandate:

A. Injunctive relief barring Defendants from executing him in a manner that does not comply with O.R.C. § 2949.22(A)

B. Declaratory relief declaring that the Defendants' current means, methods, practices, procedures, and customs regarding execution by lethal injection violate the Ohio Constitution and O.R.C. §2949.22.

C. In the alternative, should their executions move forward, that Plaintiff's executions must be carried out by the use of a single drug, designed to provide Plaintiff with their statutory and constitutional right to a quick and painless death.

D. For such further relief as this Court may deem just and proper.

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295595

# EXHIBIT B

FILED
LORAIN COUNTY

2008 JUN 10 A 9:41

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RON NABAKOWSKI

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

RON NABAKOWSKI, Clerk
JOURNAL ENTRY
James M Burge, Judge

Date June 10, 2008

Case No. 04CR065940
05CR068067

STATE OF OHIO
Plaintiff

LORAIN COUNTY PROSECUTOR
Plaintiff's Attorney

VS

RUBEN O RIVERA
RONALD MCCLOUD
Defendant

KREIG J BRUSNAHAN
DANIEL WIGHTMAN
Defendant's Attorney (440) 930-2600

## JUDGMENT ENTRY

### The Case

These causes came on to be heard upon the motion filed by each defendant, challenging the Ohio lethal injection protocol as constituting cruel and unusual punishment, proscribed by the Eighth Amendment to the United States Constitution and by Section 9, Article 1 of the Ohio Constitution.

Defendants argue further that the Ohio lethal injection protocol violates the very statute which mandates that executions in Ohio be carried out by lethal injection, R.C.2949.22. Defendants claim that the three-drug protocol currently approved for use by the Ohio Department of Rehabilitation and Correction violates R.C.2949.22 because the drugs used create an unnecessary risk that the condemned will experience an agonizing and painful death. Defendants argue that the use of this protocol is contrary to the language of the statute, which mandates that the method of lethal injection cause death "quickly and painlessly." Defendants maintain that the use of this three-drug protocol arbitrarily abrogates the condemned person's statutorily created, substantive right to expect and to suffer a painless execution.

The state of Ohio has responded that the current lethal injection protocol conforms to the statute because death is caused quickly, and unless an error is made in conducting the execution, which the state claims is extremely unlikely the drugs used will cause a painless death.

The court conducted hearings over two days and heard expert testimony from the defense (Mark Heath, M.D.) and from the state (Mark Dershwitz, M.D.). After reviewin the reports of the physicians, together with other written materials submitted with each

report, and after evaluating the testimony provided by each physician, the court makes the following findings of fact, draws the following conclusions of law, and enters its judgment accordingly

## Findings of Fact

1 The state of Ohio uses a three-drug lethal injection protocol consisting of sodium thiopental, pancuronium bromide and potassium chloride, administered in the above order, as follows:

A. sodium thiopental: 40 cc;
B. sodium thiopental: 40 cc;
C. saline flush: 20 cc;
D. pancuronium bromide: 25 cc;
E. pancuronium bromide: 25 cc;
F. saline flush: 20 cc;
G potassium chloride: 50 cc;
H saline flush: 20 cc.

2 The properties of the above drugs produce the following results:

A. sodium thiopental – anesthetic;
B. pancuronium bromide – paralytic;
C. potassium chloride – cardiac arrest.

3. The issue of whether an execution is painless arises, in part, from the use of pancuronium bromide, which will render the condemned person unable to breath, move, or communicate:

"...it does not affect our ability to think, or to feel, or to hear, or anything, any of the senses, or any of our intellectual processes, or consciousness. So a person who's given pancuronium...would be wide awake, and - - but looking at them, you would - - they would look like they were peacefully asleep... But they would, after a time, experience intense desire to breathe. It would be like trying to hold one's breathe. And they wouldn't be able to draw a breath, and they would suffocate." (Heath, Tr. 72)

...

"Pancuronium also would kill a person, but again, it would be excruciating I wouldn't really call it painful, because I don't think being unable to breathe exactly causes pain. When we hold our breath it's clearly agonizing, but I wouldn't use the word "pain" to describe that. But clearly, an agonizing death would occur." (Heath, Tr. 75)

4 The second drug in the lethal injection protocol with properties which cause pain is potassium chloride. The reason is that before stopping the heart,

"it gets in contact with nerve fibers, it activates the nerve fibers to the maximal extent possible, and so it will activate pain fibers to the maximal extent that they can be activated. And so concentrated potassium causes excruciating pain in the veins as it travels up the arms and through the chest." (Heath, Tr. 73)

5 Based upon the foregoing, and upon the agreement of the expert witnesses presented by each party, the court finds that pancuronium bromide and potassium chloride will cause an agonizing or an excruciatingly painful death, if the condemned person is not sufficiently anesthetized by the delivery of an adequate dosage of sodium thiopental.

6 The following causes will compromise the delivery of an adequate dosage of sodium thiopental:

A. the useful life of the drug has expired;
B the drug is not properly mixed in an aqueous solution;
C. the incorrect syringe is selected;
D. a retrograde injection may occur where the drug backs up into the tubing and deposits in the I.V. bag;
E. the tubing may leak;
F. the I.V. catheter may be improperly inserted into a vein, or into the soft issue;
G. the I.V. catheter, though properly inserted into a vein, may migrate out of the vein;
H. the vein injected may perforate, rupture, or otherwise leak.

7. The court fines further that:

A. It is impossible to determine the condemned person's depth of anesthesia before administering the agonizing or painful drugs, in that medical equipment supply companies will not sell medical equipment to measure depth of anesthesia for the purpose of carrying out an execution;

B. Physicians will not participate in the execution process, a fact which results in the use of paraprofessionals to mix the drugs, prepare the syringes, run the I V. lines, insert the heparin lock (catheter) and inject the drugs; and,

C. The warden of the institution is required to determine whether the condemned person is sufficiently anesthetized before the pancuronium bromide and the potassium chloride are delivered, and the warden is not able to fulfill his duty without specialized medical equipment.

8 The experts testifying for each party agreed, and the court finds that mistakes are made in the delivery of anesthesia, even in the clinical setting, resulting in approximately 30,000 patients per year regaining consciousness during surgery, a circumstance which, due to the use of paralytic drugs, is not perceptible until the procedure is completed

9 The court finds further that the occurrence of the potential errors listed in finding no. 6, *supra*, in either a clinical setting or during an execution, is not quantifiable and, hence, is not predicable.

10 Circumstantial evidence exists that some condemned prisoners have suffered a painful death, due to a flawed lethal injection; however, the occurrence of suffering cannot be known, as post-execution debriefing of the condemned person is not possible

## Conclusions of Fact

1. Pancuronium bromide prevents contortion or grotesque movement by the condemned person during the delivery of the potassium chloride, which also prevents visual trauma to the execution witnesses should the level of anesthesia not be sufficient to mask the body's reaction to pain. Pancuronium is not necessary to cause death by lethal injection.

2. Potassium chloride hastens death by stopping the heart almost immediately. Potassium chloride is not necessary to cause death by lethal injection.

3 The dosage of sodium thiopental used in Ohio executions (2 grams) is sufficient to cause death if properly administered, though death would not normally occur as quickly as when potassium chloride is used to stop the heart.

4. If pancuronium bromide and potassium chloride are eliminated from the lethal injection protocol, a sufficient dosage of sodium thiopental will cause death rapidly and without the possibility causing pain to the condemned.

A. Executions have been conducted where autopsy results showed that cardiac arrest and death have occurred after the administration of sodium thiopental, but before the delivery of pancuronium bromide and potassium chloride.

B. In California, a massive dose (five grams) of sodium thiopental are used in the lethal injection protocol.

## Conclusions of Law

1 Capital punishment is not per se cruel and unusual punishment, prohibited by the Eighth Amendment to the United States Constitution and by Section 1, Article 9 of the Ohio Constitution Gregg v. Georgia (1976), 428 U.S 153,187 (FN5 ); State v. Jenkins (1984), 15 Ohio St 3d 164, 167-169.

2. Capital punishment administered by lethal injection is not per se cruel and unusual punishment, prohibited by the Eighth Amendment to the United States Constitution and by Section 1, Article 9 of the Ohio Constitution. Baze v Rees (2008), 128 S. Ct 1520, 1537-1538

3 The Ohio statute authorizing the administration of capital punishment by lethal injection, R C.2949.22, provides, in relevant part, as follows:

"(A) Except as provided in division (C) of this section, a death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of *a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death*. The application of the drug or combination of drugs shall be continued until the person is dead..." (emphasis supplied)

4 The purpose of division (A), *supra*, is to provide the condemned person with an execution which is "quick" and "painless;" and the legislature's use of the word, "shall," when qualifying the state's duty to provide a quick and painless death signifies that the duty is mandatory.

5. When the duty of the state to the individual is mandatory, a property interest is created in the benefit conferred upon the individual, i.e. "Property interests....are created and their dimensions are defined by existing *rules* or understandings that *stem from an independent source such as state law rules*....that secure certain benefits and that support claims of entitlement to those benefits " Board of Regents of State Colleges v. Roth (1972), 408 U.S. 564, 577 (emphasis supplied).

6. If a duty from the state to a person is mandated by statute, then the person to whom the duty is owed has a substantive, property right to the performance of that duty by the state, which may not be "arbitrarily abrogated." Wolf v McDonnell (1974), 418 U.S. 539, 557

7. The court holds that the use of two drugs in the lethal injection protocol (pancuronium bromide and potassium chloride) creates an unnecessary and arbitrary risk that the condemned will experience an agonizing and painful death. Thus, the right of the accused to the expectation and suffering of a painless death, as mandated by R.C.2949 22(A), is "arbitrarily abrogated."

8. The court holds further that the words, "quickly and painlessly," must be defined according to the rules of grammar and common usage, and that these words must be read together, in order to accomplish the purpose of the General Assembly in enacting the statute, i e. to enact a death penalty statute which provides for an execution which is painless to the condemned. R.C 1 42, 1 47.

9. The parties have agreed and the court holds that the word, "painless," is a superlative which cannot be qualified and which means "without pain."

10. The word, "quickly," is an adverb that always modifies a verb, in this case, the infinitive form of the verb, "to be." It describes the rate at which an action is done. Thus, the meaning of the word, "quickly," is relative to the activity described: to pay a bill "quickly" could mean, "by return mail;" to respond to an emergency "quickly," could mean, "immediately." Hence, the word "quickly" in common parlance means, "rapidly enough to complete an act, and no longer."

11. Therefore, the court holds that when the General Assembly, chose the word, "quickly," together with the word, "painlessly," in directing that death by lethal injection be carried out "quickly and painlessly," the legislative intent was that the word, "quickly," mean, "rapidly enough to complete a painless execution, but no longer."

12. This holding, supra, is consistent with the legislature intent that the death penalty in Ohio be imposed without pain to the condemned, the person for whose benefit the statute was enacted, but that the procedure not be prolonged, a circumstance that has been associated with protracted suffering

13. Further, because statutes defining penalties must be construed strictly against the state and liberally in favor of the accused (condemned), the court holds that any interest the state may have, if it has such an interest,

in conducting an execution "quickly," i.e. with a sense of immediacy, is outweighed by the substantive, property interest of the condemned person in suffering a painless death. R.C. 2901.04(A).

14. Thus, because the Ohio lethal injection protocol includes two drugs (pancuronium bromide and potassium chloride) which are not necessary to cause death and which create an unnecessary risk of causing an agonizing or an excruciatingly painful death, the inclusion of these drugs in the lethal injection protocol is inconsistent with the intent of the General Assembly in enacting R.C. 2949.22, and violates the duty of the Department of Rehabilitation and Correction, mandated by R.C. 2949.22, to ensure the statutory right of the condemned person to an execution without pain, *and to an expectancy that his execution will be painless.*

15. As distinguished from this case, the Kentucky lethal injection statute has no mandate that an execution be painless, Ky. Rev. Stat. Ann. §431.220(1)(a). Thus, the analysis of that statute, having been conducted under the Eighth Amendment "cruel and unusual" standard, is not applicable here because "...the [U.S.] Constitution does not demand the avoidance of all risk of pain in carrying out executions." Baze, supra, 128 S. Ct. at 1529. In contrast, the court holds that R.C. 2949.22 demands the avoidance of any unnecessary risk of pain, and, as well, any unnecessary expectation by the condemned person that his execution may be agonizing, or excruciatingly painful.

16. The purpose of R.C. 2949.22 is to insure that the condemned person suffer only the loss of his life, and no more.

17. The mandatory duty to insure a painless execution is not satisfied by the use of a lethal injection protocol which is painless, assuming no human or mechanical failures in conducting the execution.

18. The use of pancuronium bromide and potassium chloride is ostensibly permitted because R.C. 2949.22 permits "a lethal injection of a drug or combination of drugs."

19. However, as set forth *supra*, the facts established by the evidence, together with the opinions expressed by the experts called to testify by each party, compel the conclusion of fact that a single massive dose of sodium thiopental or another barbiturate or narcotic drug will cause certain death, reasonably quickly, and with no risk of abrogating the substantive right of the condemned person to expect and be afforded the painless death, mandated by R.C. 2949.22.

## Analysis

1. The court begins its analysis of R.C.2949 22 with the presumption of its compliance with the United States and Ohio Constitutions, and that the entire statute is intended to be effective. R.C.1.47(A),(B). However, the court holds that the phrase, "or combination of drugs," ostensibly permits the use of substances which, *de facto*, create an unnecessary risk of causing an agonizing or an excruciatingly painful death

2. This language offends the purpose of the legislature in enacting R.C 4929.22, and thus, deprives the condemned person of the substantive right to expect and to suffer an execution without the risk of suffering an agonizing or excruciatingly painful death.

3. The court holds, therefore, that the legislature's use of the phrase, "or combination of drugs," has proximately resulted in the arbitrary abrogation of a statutory and substantive right of the condemned person, in a violation of the Fifth and Fourteenth Amendments to the United Constitution and Section 16, Article 1 of the Ohio Constitution (due process clause)

## Remedy

1. R.C.1.50, however, allows the court to sever from a statute that language which the court finds to be constitutionally offensive, if the statute can be given effect without the offending language. Geiger v. Geiger (1927), 117 Ohio St. 451, 466.

2. The court finds that R.C 2949.22 can be given effect without the constitutionally offense language, and further, that severance is appropriate. State v. Foster (206), 109 Ohio St. 3d. 1, 37-41.

3. Thus, the court holds that the words, "or a combination of drugs," may be severed from R.C 2949 22; that the severance will result in a one-drug lethal injection protocol under R.C.2949.22; that a one-drug lethal injection protocol will require the use of an anesthetic drug, only; and, that the use of a one-drug protocol will cause death to the condemned person "rapidly," i e. in an amount of time sufficient to cause death, without the unnecessary risk of causing an agonizing or excruciatingly painful death, or of causing the condemned person the anxiety of anticipating a painful death.

## Holding

4 Therefore, the holds that severance of the words, "or combination of drugs," from R.C 2949.22 is necessary to carry out the intent of the legislature and thus, to cure the constitutional infirmity.

## ORDER

Accordingly, it is ordered that the words, 'or combination of drugs," be severed from R C 2949.22; that the Ohio Department of Rehabilitation and Correction eliminate the use of pancuronium bromide and potassium chloride from the lethal injection protocol; and, if defendants herein are convicted and sentenced to death by lethal injection, that the protocol employ the use of a lethal injection of a single, anesthetic drug

It is so ordered.

Honorable Judge James M Burge

# EXHIBIT C

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
LORAIN COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO | ) | CASE NO 08CA009426 |
| Appellant, | ) | |
| v. | ) | ON APPEAL FROM LORAIN COUNTY COURT OF COMMON PLEAS CASE NUMBER 04CR065940 |
| RUBEN RIVERA | ) | |
| Appellee. | ) | |
| | ) | APPELLANT'S MOTION TO EXPEDITE APPEAL |

Now comes Appellant, the state of Ohio, by and through the Lorain County Prosecutor's Office, the Ohio Attorney General's Office, and the Ohio Department of Rehabilitation and Corrections, and hereby move this Honorable Court to expedite the above matter for purposes of appellate litigation, for the reasons which are set forth in the Memorandum in Support which is attached hereto and incorporated herein.

FILED
LORAIN COUNTY
2009 JUL 28 A 11:
CLERK OF COMMON PLEAS
RON HABAKOWSKI
9TH APPELLATE DIST

Respectfully submitted,

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MEMORANDUM IN SUPPORT

The Supreme Court of Ohio has set execution dates for Richard Cooey (October 14, 2008), Delano Hale, (November 6, 2008), and Gregory Bryant-Bey (November 19, 2008). *State v Cooey*, 2008-Ohio-3467 (Case Announcements); *State v. Hale*, 2008-Ohio-3514 (Case Announcements); *State v Bryant-Bey*, 2008-Ohio-3584 (Case Announcements) In each case, the Court ordered "that appellant's sentence be carried into execution by the Warden of the Southern Ohio Correctional Facility . , in accordance with the statutes so provided " One those statutes is RC § 2949.22(A) However, the lower court in this case held that a portion of RC § 2949.22(A) was unconstitutional. The State of Ohio respectfully asks this Honorable Court to expedite these appeals in order to ensure the uniform application of RC § 2949.22(A) and full compliance with the Supreme Court's order

The vagueness of the lower court's original order makes it impossible to determine the purported scope of the order The lower court 1) found the "or combination of drugs" portion of RC § 2949 22(A) unconstitutional and ordered it severed; 2) ordered DRC to remove pancuronium bromide and potassium chloride from the drug protocol; and 3) ordered that DRC is to use a single anesthetic protocol if Defendants are sentenced to death. After the State filed its Notice of Appeal, the trial court amended its order to indicate that the order would not go into effect unless Defendants were sentenced to death. Following that, the Supreme Court of Ohio set an October 14, 2008 execution date for inmate Richard Cooey, and required the execution to be accordance with statute. Because RC § 2949 22(A) is one of the statutes that regulates the execution procedure, and because

the lower court's order questions the validity of RC § 2949.22(A), the State of Ohio respectfully asks this Honorable Court to expedite resolution of the pending appeal.

The State of Ohio has been put into a tenuous position of being unable to determine whether proceeding with the October 14, 2008 execution of Richard Cooey would violate a judicial order from the Lorain County Common Pleas Court The lower court order allows for no distinction between individuals, as it stands for the proposition that "The mandatory duty to insure a painless execution is not satisfied by the use of a lethal injection protocol which is painless, assuming no human or mechanical failures in conducting the execution." Order, p. 7, ¶17. The lower court's original order plainly states that RC § 2949.22(A) is unconstitutional because of the three drug protocol implemented by DRC Order, p. 8, Analysis, ¶¶1-3 The same three drug protocol will be used in the execution scheduled for October 14, 2008. It would appear that the lower court's ruling that RC § 2949.22(A) is unconstitutional would therefore apply to the executions of Cooey, Hale, and Bryant-Bey.

The lower court's July 8 journal entry further confuses the issue. The lower court determined that the protocol adopted by DRC violated and made unconstitutional RC § 2949.22(A). After the State appealed, the court then indicated that its order would only become "effective" if a sentence of death is imposed on Defendants. However, the lower court declared a portion of Ohio's statutory scheme unconstitutional and struck language from the statute. It is unclear how that could only become "effective" at a later date. There is no evidence in the record or in the lower court's opinion that the three drug protocol is only unconstitutional as applied to Defendants, and thus the lower court appears to have made the declaration of facial unconstitutionality contingent upon conviction of a particular defendant. If, as the lower court asserted, the protocol itself creates the constitutional

violation then the court cannot merely ignore the alleged unconstitutionality by predicating the court's finding on becoming "effective" at some later date.

Thus, the State of Ohio has been put in a position where it has been required to execute Richard Cooey in accordance with a statute that a trial court has found a statute to be facially unconstitutional. However, the trial court has then deemed that although the statute is unconstitutional and severed, that the court's order is not "effective" until some future event that may not come to pass. While the State recognizes that expediting this appeal will be burdensome, the issues involved are of significant state-wide interest and are necessary to the proper implementation of the Supreme Court's order. For these reasons, the State respectfully requests that the merits resolution of this appeal be expedited

## CONCLUSION

For the foregoing reasons, this Honorable Court should permit the above matters to be expedited for purposes of appellate litigation.

Respectfully Submitted,

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PROOF OF SERVICE

A copy of the foregoing Motion was served upon Appellee by serving a copy upon Krieg J. Brusnahan, Esq., Counsel for Appellee, 158-A Lear Road, Avon Lake, Ohio 44012 and Jeffrey Gamso, Esq , 4506 Chester Avenue, Cleveland, Ohio 44103, Counsel for Appellee, by regular U.S Mail this 21 day of July, 2008

MATTHEW A. KANAI
Assistant Attorney General

# EXHIBIT D

DECLARATION OF MARK J.S. HEATH, M.D.

The undersigned, Mark J.S. Heath M.D. being of lawful age states the following:

## I. Introduction and Qualifications

1. I am an Assistant Professor of Clinical Anesthesiology at Columbia University in New York City. I received my Medical Doctorate degree from the University of North Carolina at Chapel Hill in 1986 and completed residency and fellowship training in Anesthesiology in 1992 at Columbia University Medical Center. I am Board Certified in Anesthesiology, and am licensed to practice medicine in New York State. My work consists of approximately equal parts of performing clinical anesthesiology (specializing in cardiothoracic anesthesiology) teaching residents, fellows, and medical students, and managing a neuroscience laboratory. As a result of my training and research I am familiar with and proficient in the use and pharmacology of the chemicals used to perform lethal injection. I am qualified to do animal research at Columbia University and am familiar with the American Veterinary Medical Association's guidelines for animal research and animal euthanasia.

2. Over the past several years as a result of concerns about the mechanics of lethal injection as practiced in the United States, I have performed many hundreds of hours of research into the techniques that are used during this procedure. I have testified as an expert medical witness regarding lethal injection in courts in California, Missouri, Maryland, Tennessee, Georgia, Kentucky, Virginia, Oklahoma, Florida, and Indiana in the following cases: *Morales v. Tilton*, Nos. 06-219-JF-RS, C-06-926-JF-RS (N.D. Cal.); *Taylor v. Crawford*, No. 05-4173-CV-C-FJG (W.D. Mo.); *Patton v. Jones*, No. 06-CV-00591-F (W.D. Okla.); *Evans v. Saar*, 06-CV-00149-BEL (D. Md.); *Baker v. Saar*, No. WDQ-05-3207 (D. Md.); *Reid v. Johnson*, No. 3:03CV1039 (E.D. Va.); *Abdur'Rahman v. Bredesden*, No. 02-2336-III (Davidson County Chancery Ct., Ky.); *Commonwealth v. Lamb*, CR05032887-00 (Rockingham County Cir. Ct., Ky.), *State v. Nathaniel Code*, No. 138860 (1st Judicial District Court of La. for Caddo Parish); and *Timberlake (Intervenor Woods) v. Donahue*, No. 06-cv-01859-KLY-WTL (S.D. Ind.). I have also filed affidavits or declarations that have been reviewed by courts in the above states and also in Pennsylvania, New York, Alabama, North Carolina, South Carolina, Ohio, Texas, Missouri, Connecticut, Arkansas, Delaware, Nevada, Mississippi, and Montana, and by the United States Supreme Court.

3. I have reviewed the execution protocols and autopsy data (when available) from each of the above referenced states and the federal government. Additionally, I have reviewed execution protocols and/or autopsy data from Connecticut, Idaho, Oregon, and Arizona.

4. As a result of the discovery process in other litigation, I have participated in inspections of the execution facilities in Maryland, Missouri, California, Delaware, North Carolina, Texas, Alabama, Connecticut, and the Federal Execution Facility in Terre Haute, Indiana. During court

proceedings I have heard testimony from prison wardens who are responsible for conducting executions by lethal injection

5. I have testified before the Nebraska Senate Judiciary Committee regarding proposed legislation to adopt lethal injection. I have testified before the Pennsylvania Senate Judiciary Committee regarding proposed legislation to prohibit the use of pancuronium bromide or other neuromuscular blockers in Pennsylvania's lethal injection protocol, and have testified before the Maryland House and Senate Judiciary Committees regarding legislation on the administrative procedures that govern the creation of lethal injection protocols. I have also testified before the South Dakota House Committee on State Affairs regarding proposed legislation to amend the lethal injection statute. Most recently, I testified before the Florida Governor's Commission on Administration of Lethal Injection as part of the Commission's review of the method in which lethal injection protocols are administered by the Florida Department of Corrections

6 My research regarding lethal injection has involved extensive conversations with recognized experts in the fields of anesthesiology, toxicology and forensic pathology, and correspondence with Drs Jay Chapman and Stanley Deutsch, the physicians responsible for introducing lethal injection as a method of execution in Oklahoma.

7. My qualifications are further detailed in my curriculum vitae, a copy of which is attached hereto as Exhibit I and incorporated herein.

8 I hold all opinions expressed in this declaration to a reasonable degree of medical certainty unless otherwise specifically noted

9 In preparing this declaration, I have referred to and relied on:

a My training and experience as a practicing physician and anesthesiologist;

b. My research into lethal injection, including media and witness accounts of executions, media accounts of legislative and governmental activities related to lethal injection, materials reviewed in litigation, scholarly articles about lethal injection, and the research and work that is involved in serving as an expert witness in the cases described above.

c. Documentation provided to me by attorney Jeffrey Gamso regarding the procedures and practices used by the Ohio Department of Rehabilitation and Correction (ODRC) and the Southern Ohio Correctional Facility (SOCF) to carry out executions by lethal injection. The material includes a set of documents bearing Bates stamps 0001 through 0632, a document that is contains "Survey Responses", and photographs and schematic diagrams of the execution facility These documents contain many successive iterations of the lethal injection procedures and policies.

d. The American Veterinary Medical Association (AVMA) AVMA Guidelines on Euthanasia" of June 2007; in particular its discussion of the

precautions that apply when using potassium as an intravenous euthanasia agent in animals. Also, I have relied upon my own research of Ohio's regulations regarding the use lethal injection in veterinary euthanasia, including Ohio Revised Code 4729.532.

## II. Introductory comments on Ohio's lethal injection protocol and its deficiencies

10. It is useful to think of the procedure of lethal injection as comprising the following four stages: (1) The first stage is achieving intravenous access. (2) The second stage is the administration of general anesthesia (sodium thiopental). (3) The third stage is the administration of a neuromuscular blocking agent that has a paralyzing effect to ensure the execution appears serene and peaceful (pancuronium bromide). (4) The fourth stage is the execution through the administration of potassium chloride, which kills the prisoner by stopping his heart. The application of this formalism to the process of lethal injection is discussed in a commentary in the Mayo Clinic Proceedings entitled "Revisiting Physician Involvement in Capital Punishment: Medical and Nonmedical aspects of Lethal Injection" (attached).

11. Further, it is useful to highlight the two principal problems that can result in an inhumane execution: A) the obtaining of IV access, which when done improperly has resulted in painful mutilation in previous executions, and which requires demonstrated proficiency and skill, and B) failure to produce and maintain adequate general anesthesia so that the agonizing effects of pancuronium and potassium are not experienced by the prisoner. It is important to recognize that the discretionary use by the ODRC of pancuronium and potassium makes the anesthetic component of the procedure a matter of extreme importance.

12. The current ODRC protocol contains unacceptable deficiencies in both of these areas. The problematic features of the Ohio lethal injection protocol render it deficient with respect to minimum standards of safe care, deficient with respect to acceptable standards of veterinary care, deficient with respect to acceptable standards of medical care, and deficient with respect to the lethal injection practices of other states, as recognized by Courts, Committees, and Departments of Corrections.

13. It is important to understand that lethal injection is performed on animal such as dogs and cats with great frequency, with reliability, and in ways that are humane. Thus, the problem with Ohio's lethal injection protocol is not that lethal injection is in itself necessarily inhumane, but rather that the manner in which Ohio currently plans to undertake lethal injection is gratuitously fraught with unnecessary and avoidable risk, principally because it deviates from acceptable and legal standards of veterinary euthanasia.

14. As in other states, Ohio's method of execution by lethal injection involves the sequential administration of three separate drugs. The ODRC protocol specifies the drugs used for execution by lethal injection to be the following:

a. The intended dose of sodium thiopental is 2.0 grams, administered in a concentration of 25 milligrams (mg) per milliliter (ml).

b The intended dose of pancuronium is 100 milligrams (mg)

c The intended dose of potassium chloride 100 milliequivalents (mEq)

d Infusions of saline are also part of the process.

e. The drugs, and intervening infusions of saline solution, are intended to be delivered serially, one after another

f Of note, there is no description of the actual mechanics of the administration of the drugs, including the rate at which they should be injected. This is a departure from the written protocols of many other states, which describe in detail the intended mechanical steps to be taken during the sequence of injections. It is not clear to me whether the protocol that was provided to me is an incomplete version of the actual protocol or a complete version of a protocol that fails to describe this critical part of the overall process

15. There is no plan articulated for the contingency in which the IV team is unable to achieve IV access in the veins of the arms or other peripheral sites This is a problem that has bedeviled executions in many states, including Ohio, and has required prisons to perform invasive procedures such as cut-downs and central line placement No information is provided about who would perform such a procedure were it to be necessary

16. The ODRC does not monitor the condemned inmate to ensure that he or she has been adequately anesthetized for the administration of potassium chloride, an excruciatingly painful event. The observational roles provided by the personnel who are at the bedside are entirely inadequate to meaningfully and reasonably ensure that a surgical plane of anesthesia, which is required for the administration of potassium (see below), is established and maintained.

17. Based upon my review of the foregoing material and my knowledge of and experience in the field of anesthesiology, I have formed several conclusions with respect ODRC's protocol for carrying out lethal injections. These conclusions arise both from the details disclosed in the materials I have reviewed and available at this time and from medically relevant, logical inferences drawn from the details in those materials My principal conclusions are as follows:

a The ODRC's failure to have appropriately qualified and trained personnel monitor the condemned inmate after the administration of thiopental to ensure that there has been no IV access issue and to assure that the inmate has reached an

appropriate plane of anesthesia prior to the administration of drugs which would cause suffering is contrary to all standards of practice for the administration of anesthetic drugs and creates a severe and unnecessary risk that the condemned will not be adequately anesthetized before experiencing asphyxiation and/or the pain of potassium chloride injection This failure represents a critical and unacceptable departure from the standards of medical care and veterinary care, and falls below the lethal injection protocols of other states.

b. Pancuronium bromide (or any other similar neuromuscular blocking agent) serves no legitimate medical purpose during execution, and it will, with certainty, cause great suffering if administered to an inadequately anesthetized person The inclusion of such an agent adds a severe and unnecessary risk of masking body movements that could signal condemned inmate distress during execution.

c Potassium is not statutorily required as part of a Ohio lethal injection, it serves no legitimate medical purpose during execution, and it will, with certainty, cause great suffering if administered to an inadequately anesthetized person.

## III. Stages of Ohio's Lethal Injection Protocol

18 As described above, it useful to divide the procedure of lethal injection into four stages. The first stage is achieving intravenous access. The second stage is the administration of general anesthesia The third stage is the administration of neuromuscular blocking agent that has a paralyzing effect to ensure the execution appears serene and peaceful The fourth stage is the execution through the administration of potassium chloride, which kills the prisoner by stopping his heart. For purposes of this discussion about the risks of the execution process, it is helpful to consider the execution process in reverse order.

### A Potassium Chloride Causes Extreme Pain

19. I have reviewed execution logs and electrocardiogram ("EKG") strips from executions around the country. These data show clearly that in the great majority of cases the administration of potassium chloride disrupts the electrical signals in the heart, paralyzes the cardiac muscle, and causes death by cardiac arrest. In other words, condemned inmates are alive until killed by the administration of potassium chloride.

20. There is no medical dispute that intravenous injection of concentrated potassium chloride solution, such as that administered by the ODRC, causes excruciating pain The vessel walls of veins are richly supplied with sensory nerve fibers that are highly sensitive to potassium ions. There exist other chemicals which can be used to stop the heart and which do not cause pain upon administration.

21. The ODRC has elected potassium chloride to cause cardiac arrest Thus, the ODRC has exercised its discretion and chosen a means of causing death that causes extreme pain upon administration, instead of selecting available, equally effective yet essentially painless medications, for stopping the heart. In so doing, the ODRC has assumed the responsibility of ensuring, through all reasonable and feasible steps, that the prisoner is sufficiently anesthetized and cannot experience the pain of potassium chloride injection.

22. A living person who is to be intentionally subjected to the excruciating pain of potassium injection must be provided with adequate anesthesia. This imperative is of the same order as the imperative to provide adequate anesthesia for any person or any prisoner undergoing painful surgery. Given that the injection of potassium is a scheduled and premeditated event that is known without any doubt to be extraordinarily painful, it would be unconscionable and barbaric for potassium injection to take place without the provision of sufficient general anesthesia to ensure that the prisoner is rendered and maintained unconscious throughout the procedure, and it would be unconscionable to allow personnel who are not properly trained in the field of anesthesiology to attempt to provide or supervise this anesthetic care.

23. Indeed, the need for proper medical anesthetic care before death by potassium chloride is so well understood that standards for animal euthanasia require that euthanasia by potassium chloride be performed only by one qualified to assess anesthetic depth:

> It is of utmost importance that personnel performing this technique [euthanasia by potassium chloride injection] are trained and knowledgeable in anesthetic techniques, and *are competent in assessing anesthetic depth* appropriate for administration of potassium chloride intravenously. *Administration of potassium chloride intravenously requires animals to be in a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli.*

*2007 AVMA Guidelines on Euthanasia*, page 12(emphasis added)(see attached). As result of the ODRC's failure to assess anesthetic depth and its failure to provide personnel who are competent in assessing anesthetic depth, the ODRC protocol for executing humans is unacceptable for the euthanasia of animals.

B. Administration of Neuromuscular Blocking Agents Is Medically Unnecessary and Causes an Extreme Risk of Suffering

24. The ODRC hopes to administer 100 milligrams of pancuronium bromide. Pancuronium bromide is one of a class of drugs called neuromuscular blocking agents. Such agents paralyze all voluntary muscles, but do not affect sensation, consciousness, cognition, or the ability to feel pain and suffocation. The effect of the pancuronium bromide is to render the muscles (including the diaphragm which moves to permit respiration) unable to contract. It does not affect the brain or sensory nerves.

25. Clinically, the drug is used to ensure a patient is securely paralyzed so that surgical procedures can be performed without muscle contraction. Anesthetic drugs are administered before neuromuscular blocking agents so that the patient does not consciously experience the process of becoming paralyzed and losing the ability to breathe. Thus, in any clinical setting where a neuromuscular blocker is to be used, a patient is anesthetized and monitored to ensure anesthetic depth throughout the duration of neuromuscular blocker use. To assess anesthesia, a trained medical professional, either a physician anesthesiologist or a nurse anesthetist provides close and vigilant monitoring of the patient, their vital signs, using various diagnostic indicators of anesthetic depth. The appropriate procedures for monitoring a patient undergoing anesthesia

and who is about to be administered a drug which masks the ability to convey distress are detailed in the American Society of Anesthesiology's recently published *Practice Advisory for Intraoperative Awareness and Brain Function Monitoring*, 104 Anesthesiology 847, 850-51 (Apr. 2006) (describing preoperative and intraoperative measures for gauging anesthetic depth, including close monitoring of sites of IV access) *See also ASA Standards for Basic Anesthetic Monitoring* (Oct. 25, 2005). ODRC's procedure, to the extent disclosed, indicates that, contrary to all medical practice, no one, let alone a properly trained individual, assesses anesthesia prior to the administration of pancuronium bromide

26. It is important to understand that pancuronium bromide does not cause unconsciousness in the way that an anesthetic drug does; rather, if administered alone, a lethal dose of pancuronium bromide would cause a condemned inmate to lose consciousness only after he or she had endured the excruciating experience of suffocation. It would totally immobilize the inmate by paralyzing all voluntary muscles and the diaphragm, causing the inmate to suffocate to death while experiencing an intense, conscious desire to inhale Ultimately, consciousness would be lost, but it would not be lost as an immediate and direct result of the pancuronium bromide. Rather, the loss of consciousness would be due to suffocation, which would be preceded by the torment and agony caused by suffocation. This period of torturous suffocation would be expected to last at least several minutes and would only be relieved by the onset of suffocation-induced unconsciousness. The experience, in onset and duration and character, would be very similar to that of being suffocated by having one's nose and mouth blocked off. However, there would be the additional element of being unable to move or writhe or communicate the agony.

27 Based on the information presently available, this type of problem has occurred in other states But before commenting on specific executions, I think it is important to explain how assessing the degree of consciousness that may have been felt in an execution differs from assessing consciousness in a clinical context. In the clinical context, anesthesiologists closely monitor patients for signs of awareness, and conduct post-operative interviews to assess to what extent a patient may have consciously experienced any part of his or her surgical procedure. The American Society of Anesthesiologists has recently commented that "[i]ntraoperative awareness cannot be measured during the intraoperative phase of general anesthesia, because the recall component of awareness can only be determined postoperatively by obtaining information directly from the patient." *See Practice Advisory for Intraoperative Awareness and Brain Function Monitoring*, 104 Anesthesiology 847, 850 (Apr. 2006).

28. Neither monitoring nor post-process interviews take place with an execution; we can therefore never know with absolute certainty the degree of consciousness felt in an execution But, to the extent we can know, after the fact, we look for signs of intravenous access problems, physical reaction to the process, and postmortem blood concentrations of anesthetic drugs. Based on the information presently available, this information suggests terrible problems have occurred during some executions. For example, in the State of Oklahoma's execution of Loyd LaFevers in 2001, witnesses observed an infiltration (a problem with intravenous access) in the intravenous (IV) line delivering the anesthetic thiopental. This problem was confirmed by the Medical Examiner's office notes attached to Mr LaFevers's autopsy file. Witnesses to Mr. LaFevers's execution observed movements that they described as convulsions or seizures lasting for many minutes. A similar problem appears to have occurred in the 2006 execution of Mr.

Angel Diaz in Florida which lasted 34 minutes. An autopsy of Mr Diaz showed that the veins in each arm had through and through punctures showing that the IV lines were improperly seated in his veins and that he had chemical burns on both arms from what was most likely an infiltration of the drugs into his muscle tissue. During execution, observers report Mr Diaz moved and tried to mouth words. Given the sequence of drugs he was administered, the only drug that could have caused chemical burns would be thiopental It is virtually certain that there was a deep failure to achieve the goal of a smooth execution, that something went disastrously wrong with the administration of the drugs, that the executioners were slow to confront and address the problems with the IV drug delivery and catheters, and that Mr. Diaz did not experience the sort of rapid humane death that is the intended result of the lethal injection procedure These kinds of inadequate anesthesia experiences have resulted from the completely avoidable problem of poorly designed protocols for the delivery of anesthetic drugs, and the gratuitous inclusion of neuromuscular blocking agents like pancuronium bromide, which I will discuss in full below.

29. When thiopental is not properly administered in a dose sufficient to cause loss of consciousness for the duration of the execution procedure, it is my opinion held to a reasonable degree of medical certainty, that the use of paralytic drugs such as pancuronium or pancuronium bromide will cause conscious paralysis, suffocation, and the excruciating pain of the intravenous injection of concentrated potassium chloride, such as Mr. LaFevers and Mr Diaz likely experienced

30. There is no legitimate reason for including pancuronium bromide in the execution process and assuming the foregoing risks Because potassium chloride causes death in executions by lethal injection, there is no rational place in the protocol for pancuronium bromide; the drug simply serves no function in the execution process Its inclusion, therefore, only adds risk, with no medical benefit.

31. Because of the concerns enumerated above, medical practitioners eschew the use of neuromuscular blocking agents in circumstances similar to that of executions, end of life care:

> NMBAs [neuromuscular blocking agents] possess no sedative or analgesic activity and can provide no comfort to the patient when they are administered at the time of withdrawal of life support. Clinicians cannot plausibly maintain that their intention in administering these agents in these circumstances is to benefit the patient. Indeed, unless the patient is also treated with adequate sedation and analgesia, the NMBAs may *mask the signs of acute air hunger* associated with ventilator withdrawal, *leaving the patient to endure the agony of suffocation in silence and isolation.* Although it is true that families may be distressed while observing a dying family member, the best way to relieve their suffering is by reassuring them of the patient's comfort through the use of adequate sedation and analgesia.
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> * * *
>
> As a general rule, therefore, *pharmacologic paralysis should be avoided at the end of life.*

Robert D. Truog et al., *Recommendations for end-of-life care in the intensive care unit. The Ethics Committee of the Society of Critical Care Medicine*, 29(12) CRIT. CARE MED 2332, 2345 (2001) (emphasis added).

32. Indeed, even the creator of the original "triple drug" lethal injection protocol, Dr Jay Chapman, now questions whether his initial contribution warrants reconsideration in light of the problems that have been brought to light nationwide. In a CNN article placed online on April 30, 2007 Dr. Chapman is quoted as saying "It may be time to change it," Chapman said in a recent interview. "There are many problems that can arise ... given the concerns people are raising with the protocol it should be re-examined." Regarding the pancuronium, the article states "When asked why he included the asphyxiation drug in his formula Chapman answered, "It's a good question If I were doing it now, I would probably eliminate it."
http://www.cnn.com/2007/HEALTH/04/30/lethal.injection/index.html

33. Additionally, the ODRC lethal injection protocol provides no information about the timing of the injections A problem encountered in other states is that unless the timing is carefully planned, movements that might be caused by potassium will occur before pancuronium has had time to cause paralysis Given that the ODRC has not taken steps to establish a regime for properly timing the injections, the risks of pancuronium are assumed without any clear reason to believe it will achieve its stated purpose of preventing movement (which, as described above, is not in the first place a legitimate purpose).

C. Problems with the Use and Administration of General Anesthesia.

1. The ODRC's Administration of General Anesthesia Fails to Adhere to a Minimum Standard of Care

34. Because of the potential for an excruciating death created by the use of potassium chloride and the risk of conscious asphyxiation created by the use of the pancuronium bromide, it is necessary to induce and maintain a deep plane of anesthesia. The circumstances and environment under which anesthesia is to be induced and maintained in an Ohio execution create, needlessly, a significant risk that inmates will suffer It is my opinion, stated to a reasonable degree of medical certainty, that the lethal injection procedures selected by the ODRC subject condemned inmates to an increased and unnecessary risk of experiencing excruciating pain in the course of execution.

35. Presumably, because of the ODRC's awareness of the potential for excruciating pain evoked by potassium, the protocol plans for the provision of general anesthesia by the inclusion of thiopental. When successfully delivered into the circulation in sufficient quantities, thiopental causes sufficient depression of the nervous system to permit excruciatingly painful procedures to be performed without causing discomfort or distress. Failure to successfully deliver into the circulation a sufficient dose of thiopental would result in a failure to achieve adequate anesthetic depth and thus failure to block the excruciating pain

36. The ODRC's procedures do not comply with the medical standard of care for inducing and maintaining anesthesia prior to and during a painful procedure. Likewise, the ODRC's

procedures are not compliant with the guidelines set forth by the American Veterinary Medical Association for the euthanasia of animals

2. The Dangers of Using Thiopental as an Anesthetic

37. Thiopental is an ultrashort-acting barbiturate that is intended to be delivered intravenously to induce anesthesia In typical clinical doses, the drug has both a quick onset and short duration, although its duration of action as an anesthetic is dose dependant.

38. When anesthesiologists use thiopental, we do so for the purposes of temporarily anesthetizing patients for sufficient time to intubate the trachea and institute mechanical support of ventilation and respiration. Once this has been achieved, additional drugs are administered to maintain a "surgical depth" or "surgical plane" of anesthesia (i.e., a level of anesthesia deep enough to ensure that a surgical patient feels no pain and is unconscious). The medical utility of thiopental derives from its ultrashort-acting properties: if unanticipated obstacles hinder or prevent successful intubation, patients will likely quickly regain consciousness and resume ventilation and respiration on their own.

39. The benefits of thiopental in the operating room engender serious risks in the execution chamber The duration of unconsciousness provided by thiopental is dose-dependent If the intended amount of thiopental fails to reaches the condemned inmate's brain (as can occur as a result of an infiltration, leakage, mixing error, or other causes), and the condemned inmate receives a near surgical dose of thiopental, the duration of narcosis will be brief and the inmate could reawaken during the execution process. Then, a condemned inmate in Ohio would suffer the same fate that apparently befell Mr. Angel Diaz in Florida who was intended to receive a 5 gram dose of thiopental, but who did not, and then apparently experienced a conscious or semi-conscious response to the execution process.

40. Of note, the Ohio veterinary regulations regarding euthanasia require the use of pentobarbital. (Pentobarbital should not be confused with Pentothal/thiopental; they are different drugs with different durations of action). This vastly reduces the risk of the anesthetic wearing off prematurely.

41. Many foreseeable situations exist in which human or technical errors could result in the failure to successfully administer the intended dose. The ODRC's procedure both fosters these potential problems and fails to provide adequate mechanism for recognizing these problems, and it does these things needlessly and without legitimate reason.

3. Drug Administration Problems

42. Examples of problems that could occur (and which have occurred in executions) that could prevent the proper administration of thiopental include, but are not limited to, the following:

a Errors in Drug Preparation. Thiopental is delivered in powdered form and must be mixed into an aqueous solution prior to administration. This preparation requires the correct application of pharmaceutical knowledge and familiarity with terminology and abbreviations. Calculations are also required, particularly if the

protocol requires the use of a concentration of drug that differs from that which is normally used. Recently drug preparation problems were revealed in the State of Missouri, which was using a board-certified physician to prepare drugs. *See* Excerpts of Transcript of June 12, 2006 Bench Trial, at 30-39, *Taylor v. Crawford*, No. 05-4173-CV-C-FJG (W.D. Mo.).

b. Error in Labeling of Syringes. It is of paramount importance that the drugs in an execution be given in the correct order. If the drugs are mislabeled, it greatly increases the chances the drugs will not administered in the correct order. \

c. Error in Selecting the Correct Syringe. As presently configured, the ODRC protocol uses the serial injection of fluid from 5 syringes. With that number of syringes it would be easy to make a mistake in selecting the correct syringe. Medication errors are widespread within the clinical arena, and it is recognized by all health care professionals that the most important step in preventing medication errors is the acceptance of the fact that they can and do occur. In the context of lethal injection it is equally important to recognize the possibility of medication errors, particularly given the gratuitous use of pancuronium and potassium. The proposed ODRC procedures do not recognize the possibility of error. The proper way to detect error during the induction of general anesthesia is to assess anesthetic depth and thereby ensure that the drugs have exerted their intended and predicted effects.

d. Error in Correctly Injecting the Drug into the Intravenous Line. If the syringe holding the drug is turned in the wrong direction, a retrograde injection of the drug into the IV fluid bag rather than into the inmate will result. Even experienced anesthesiologists sometimes make this error, and the probability of this error occurring is greatly increased in the hands of inexperienced personnel.

e. The IV Tubing May Leak. An "IV setup" consists of multiple components that are assembled by hand prior to use. If the drugs are not at the bedside, which they are not in Ohio, but are instead in a different room then it will be impossible to maintain visual surveillance of the full extent of IV tubing so that such leaks may be detected. The configuration of the death chamber and the relative positions of the executioners and the inmate in Ohio will hinder or preclude such surveillance, thereby risking a failure to detect a leak. Leaking IV lines have been noted in executions in other states. The induction of general anesthesia in the medical context, and I believe in the veterinary context, is always a "bedside procedure"; it is never conducted by the administration of drugs in tubing in one room that then is intended to travel into the body of a person in another room.

f. Incorrect Insertion of the Catheter. If the catheter is not properly placed in a vein, the thiopental will enter the tissue surrounding the vein but will not be delivered to the central nervous system and will not render the inmate unconscious. This condition, known as infiltration, occurs with regularity in the clinical setting. Recognition of infiltration requires continued surveillance of the IV site during the injection, and that surveillance should be performed so as to

permit correlation between visual observation and tactile feedback from the plunger of the syringe. One cannot reliably monitor for the presence of infiltration through a window from another room. There have been occasions where departments of correction have failed to recognize infiltrations during execution. In Oklahoma an infiltration in the catheter delivering the anesthetic thiopental was reported (followed by condemned inmate convulsions) Another such occurrence has been reported during the Florida execution of Angel Diaz These occurrences appear to have directly contributed to the condemned inmates' conscious experience of the execution process.

g. Migration of the Catheter. Even if properly inserted, the catheter tip may move or migrate, so that at the time of injection it is not within the vein This would result in infiltration, and therefore a failure to deliver the drug to the inmate's circulation and failure to render the inmate unconscious

h. Perforation or Rupture or Leakage of the Vein During the insertion of the catheter, the wall of the vein can be perforated or weakened, so that during the injection some or all of the drug leaves the vein and enters the surrounding tissue. The likelihood of rupture occurring is increased if too much pressure is applied to the plunger of the syringe during injection, because a high pressure injection results in a high velocity jet of drug in the vein that can penetrate or tear the vessel wall Recently, during the Clark execution, the personnel failed to recognize that the condemned's veins had "collapsed" until the inmate himself notified them that the procedure had gone awry.

i. Excessive Pressure on the Syringe Plunger. Even without damage or perforation of the vein during insertion of the catheter, excessive pressure on the syringe plunger during injection can result in tearing, rupture, and leakage of the vein due to the high velocity jet that exits the tip of the catheter Should this occur, the drug would not enter the circulation and would therefore fail to render the inmate unconscious. The ODRC protocol provides no meaningful instructions about the rate or speed of injections, meaning that there are no instructions to prevent the lay executioners from pushing the syringe plungers in a manner that injures the vein and causes failed delivery of some or all of the thiopental dose.

j Securing the Catheter. After insertion, catheters must be properly secured by the use of tape, adhesive material, or suture. Movement by the inmate, even if restrained by straps, or traction on the IV tubing may result in the dislodging of the catheter.

k. Failure to Properly Loosen or Remove the Tourniquet or position restraining straps. A tourniquet is used to assist in insertion of an IV catheter. Failure to remove such tourniquets from the arm or leg after placement of the IV catheter will delay or inhibit the delivery of the drugs by the circulation to the central nervous system. This may cause a failure of the thiopental to render and maintain the inmate in a state of unconsciousness. Restraining straps may act as tourniquets and thereby impede or inhibit the delivery of drugs by the circulation to the

central nervous system. This may cause a failure of the thiopental to render and maintain the inmate in a state of unconsciousness. Even if the IV is checked for "free flow" of the intravenous fluid prior to commencing injection, a small movement within the restraints on the part of the inmate could compress the vein and result in impaired delivery of the drug. It has been noted in at least one execution by lethal injection that the straps hindered the flow of drugs. *See* Editorial, *Witnesses to a Botched Execution*, ST. LOUIS POST-DISPATCH, at 6B (May 8, 1995).

43. These types of drug administration problems are not uncommon in the practice of medicine. A number of medical publications detail exactly these types of administration issues. For example, the National Academy of Sciences Institute on Medicine has published the report of the Committee on Identifying and Preventing Medication Errors, which details the rates of drug preparation and administration errors in hospital setting and concludes "[e]rrors in the administration of IV medications appear to be particularly prevalent." PREVENTING MEDICATION ERRORS: QUALITY CHASM SERIES 325-60 (Philip Aspden, Julie Wolcott, J. Lyle Bootman, Linda R. Cronenwett, Eds. 2006); *id.* at 351. Likewise a recent study shows that "drug-related errors occur in one out of five doses given to patients in hospitals." *See* Bowdle, T. A., *Drug Administration Errors from the ASA [Am. Soc. Anesthesiologists] Closed Claims Project*, 67(6) ASA NEWSLETTER, 11-13 (2003). This study recognizes that neuromuscular blockers have been administered to awake patients and to those who have had inadequate doses of general anesthetic. *Id.*

44. The ODRC documentation recognizes that contingencies need to be planned for, however, it does not describe how any of the myriad contingencies that can and do arise during the induction of general anesthesia would be detected and corrected during the conduct of a lethal injection procedure.

45. In the practice of medicine, preventing pain and/or death as a result of these common drug administration problems is achieved by having persons in attendance who have the training and skill to recognize problems when they occur and the training and skill to avert the negative consequences of the problems when they arise.

4. <u>The Need for Adequate Training in Administering Anesthesia</u>

46. Because of these foreseeable problems in administering anesthesia, in Ohio and elsewhere in the United States, the provision of anesthetic care is performed only by personnel with advanced training in the medical subspecialty of Anesthesiology. The establishment of a surgical plane of anesthesia is a complex task which can only reliably be performed by individuals who have completed the extensive requisite training to permit them to provide anesthesia services. *See Practice Advisory for Intraoperative Awareness and Brain Function Monitoring*, 104 Anesthesiology 847, 859 Appendix 1 (Apr. 2006) (recommending the use of "multiple modalities to monitor depth of anesthesia") If the individual providing anesthesia care is inadequately trained or experienced, the risk of these complications is enormously increased. The President of the American Society of Anesthesiologists, writing about lethal injection, recently stated that "the only way to assure [a surgical plane of anesthesia] would be to have an anesthesiologist prepare and administer the drugs, carefully observe the inmate and all pertinent

monitors and finally to integrate all this information." Orin F. Guidry M.D. *Message from the President: Observations Regarding Lethal Injection* (June 30, 2006).

47. In Ohio and elsewhere in the United States, general anesthesia is administered by physicians who have completed residency training in the specialty of Anesthesiology, and by nurses who have undergone the requisite training to become Certified Registered Nurse Anesthetists (CRNAs). Physicians and nurses who have not completed the requisite training to become anesthesiologists or CRNAs are not permitted to provide general anesthesia.

48. In my opinion, individuals providing general anesthesia in the Ohio prison should not be held to a different or lower standard than is set forth for individuals providing general anesthesia in any other setting in Ohio. Specifically, the individuals providing general anesthesia within Ohio's prisons, should possess the experience and proficiency of anesthesiologists and/or CRNAs. Conversely, a physician who is not an anesthesiologist or a nurse who is not a CRNA or any person who lacks the requisite training and credentials should not be permitted to provide general anesthesia within Ohio's prisons (or anywhere else in Ohio or the United States).

49. There is no evidence, at this time, that any person on the ODRC's injection team has any training in administering anesthesia, or, if personnel are given training, what that training might be. This raises critical questions about the degree to which condemned inmates risk suffering excruciating pain during the lethal injection procedure. The great majority of nurses are not trained in the use of ultrashort-acting barbiturates; indeed, this class of drugs is essentially only used by a very select group of nurses who have obtained significant experience in intensive care units and as nurse anesthetists. Very few EMTs are trained or experienced in the use of ultrashort-acting barbiturates and/or pancuronium. Of the three medical personnel who are described as participating in lethal injection procedures in Ohio, 2 are EMTs and the medical background of the third is unknown. There is no evidence that the third medical person has any meaningful experience in the establishment, maintenance, and assessment of a surgical plane of anesthesia. Based on my medical training and experience, and based upon my research of lethal injection procedures and practices, inadequacies in these areas elevate the risk that the lethal injection procedure will cause the condemned to suffer excruciating pain during the execution process. Failure to require that the injection team have training equivalent to that of an anesthesiologist or a CRNA compounds the risk that inmates will suffer excruciating pain during their executions.

50. In addition to apparently lacking the training necessary to perform a lethal injection, the ODRC's protocol imposes conditions that exacerbate the foreseeable risks of improper anesthesia administration described above, and fails to provide any procedures for dealing with these risks. Perhaps most disturbingly, the protocol makes no mention of the need for effective monitoring of the inmate's condition or whether he is anesthetized and unconscious. After IV lines are inserted and the execution begins, it appears that the injection team will be in a different room from the prisoner, and thus will not have the ability to properly monitor the IV delivery system and catheter sites as they would if they were at "the bedside". Accepted medical practice, however, dictates that trained personnel are physically situated so that they can monitor the IV lines and the flow of anesthesia into the veins through visual and tactile observation and examination. The apparent lack of any qualified personnel present in the chamber during the execution thwarts the execution personnel from taking the standard and necessary measures to

reasonably ensure that the thiopental is properly flowing into the inmate and that he is properly anesthetized prior to the administration of the pancuronium bromide and potassium. In recognition of this concern, other states have taken steps to place personnel with medical backgrounds actually within the execution chamber for the purpose of properly monitoring the IV delivery system during the injection process.

51 In my opinion, having a properly equipped, trained, and credentialed individual examine the inmate after the administration of the thiopental (but prior to, during, and after the administration of pancuronium, until the prisoner is pronounced dead) to verify that the inmate is completely unconscious would substantially mitigate the danger that the inmate will suffer excruciating pain during his execution. This is the standard of care, and in many states the law, set forth for dogs and cats and other household pets when they are subjected to euthanasia by potassium injection Yet the ODRC protocol does not apparently provide for such verification during the execution of humans

52. Indeed, it appears that departments of correction around the country are now agreeing that some assessment of anesthetic depth is required to ensure a humane execution As a result of my participation in lethal injection litigations around the country I have become aware that the State of Indiana and the State of Florida now concede that some attempt at measuring or assessing anesthetic depth should be performed. Additionally, in Missouri a federal district judge has ordered that an appropriately qualified person assess anesthetic depth. While Judge Fogel in California has not, to my understanding, issued a final decision regarding the evidence presented to him it is clear from his written discussion of the case that he recognizes that the use of drugs that cause great pain or suffering (such as pancuronium and potassium) places a heightened burden on the execution team and the state to properly monitor and maintain adequate anesthetic depth

D. Establishing IV access

53. The first step in the lethal injection process is creating effective intravenous access for drug delivery. The subsequent administration of the anesthetic drugs can only be successful if IV access is properly achieved. But the ODRC has put in place a protocol that exacerbates the risk that IV access will not be adequately achieved There have been problems in other states, most notably the Diaz execution in Florida, wherein the personal professional qualifications of the personnel providing IV access had not been subjected to adequate scrutiny.

54. Despite its best attempts, ODRC has twice in recent years encountered extreme difficulty in obtaining peripheral IV access. Unlike other states, Ohio does not appear too have a plan in place to deal with the need for a cut-down or central line procedure. This is a glaring deficiency. Further, it is unclear whether the personnel who are currently participating in lethal injection procedures in Ohio have the necessary training and experience to perform central line placement and cut-downs.

55. It is my opinion that, to reasonably minimize the risk of severe and unnecessary suffering during the ODRC's execution by lethal injection using the drugs thiopental, pancuronium, and potassium, there must be: proper procedures that are clear and consistent; qualified personnel to ensure that anesthesia has been achieved prior to the administration of pancuronium bromide and

potassium chloride; qualified personnel to select chemicals and dosages, set up and load the syringes, insert the IV catheter, and perform the other tasks required by such procedures; and adequate inspection and testing of the equipment and apparatus by qualified personnel. The ODRC's procedures for implementing lethal injection, to the extent that they have been made available provide for none of the above.

IV. Assessment of the ODRC lethal injection protocol.

56 Overall, evaluation of the proposed ODRC lethal injection procedures reveals several problematic themes:

a – The absence of qualified personnel to supervise the use of the high-risk drugs pancuronium and potassium. Other states recognize their need to rely upon physicians to oversee the administration of pancuronium and potassium. By contrast, Ohio does not provide for a physician or adequately trained person to be physically present at the bedside to assess anesthetic depth when pancuronium and potassium are administered and therefore cannot offer any protection.

b –The use of pancuronium confers high risk of torturous death, which prevents the detection by witnesses and execution personnel of inadequate anesthesia, and which is speciously justified by a need to prevent witnesses seeing movement when no such steps are taken for electrocution and/or gas in Ohio or other states.

c – The absence of any articulated recognition that the establishment and maintenance of a surgical plane of anesthesia is essential for the non-cruel completion of the execution procedure. There appear to be no provisions for the participation of personnel who are capable of monitoring anesthetic depth, and there are no directives in the written protocol that would instruct such personnel, if they were present, to actually undertake a meaningful assessment of anesthetic depth. Further, the equipment that is necessary to meaningfully assess anesthetic depth appears not to be present or to be deployed. Other states, and courts, and committees, have recognized that given the use of torture-causing drugs such as pancuronium and potassium, it is essential that meaningful and effective steps be in place to ensure that adequate anesthesia is established and maintained.

d – IV access – as described above, there is no "back-up" plan for achieving IV access if the IV team is unable to successfully place catheters within the veins of the arms. Other states provide for such plans, and in this regard Ohio falls below the standards set by other states when performing execution lethal injection.

## VI. Conclusions.

Based on my research into methods of lethal injection used by various states and the federal government, and based on my training and experience as a medical doctor specializing in anesthesiology, it is my opinion stated to a reasonable degree of medical certainty that, given the apparent absence of a central role for a properly trained professional in ODRC's execution procedure, the characteristics of the drugs or chemicals used, the failure to understand how the drugs in question act in the body, the failure to properly account for foreseeable risks, the design of a drug delivery system that exacerbates rather than ameliorates the risk, the ODRC has created an execution protocol that does little to nothing to assure they will reliability achieve humane executions by lethal injection.

This declaration was, of necessity, prepared with limited information. It appears that the lethal injection procedures provided to me are incomplete, as they do not describe how the injections should be delivered. I reserve the right to revise my opinion if warranted by new information.

I declare under the laws of the United States and under penalty of perjury that the foregoing is true and correct.

DATED this 14th day of February, 2008

Mark J S Heath, M D.

Curriculum Vitae

1) Date of preparation: March 10, 2006

2) Name: Mark J. S. Heath

Birth date: March 28, 1960
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3) Academic Training:

Harvard University B A., Biology 1983

University of North Carolina Chapel Hill M D 1987

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1987 – 1988 Internship Internal Medicine. George Washington University Hospital, Washington, DC

1988 – 1991 Residency. Anesthesiology Columbia College of Physicians and Surgeons, New York, NY

1991 – 1993 Fellowship, Anesthesiology Columbia College of Physicians and Surgeons, New York NY

5) Board Qualification:

Diplomate, American Board of Anesthesiology, October 1991.
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6) Military Service: None

7) Professional Organizations:

International Anesthesia Research Society

8) Academic Appointments:

1993 – 2002 Assistant Professor of Anesthesiology. Columbia University New York NY

2002 - present Assistant Professor of Clinical Anesthesiology Columbia University, New York, NY

9) Hospital/Clinical Appointments:

1993 – present Assistant Attending Anesthesiologist, Presbyterian Hospital, New York, NY.

10) Honors:

Magna cum laude, Harvard University
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First Prize New York State Society of Anesthesiologists Resident Presentations, 1991

11) Fellowship and Grant Support:

Foundation for Anesthesia Education and Research, Research Starter Grant Award Principal Investigator, funding 7/92 - 7/93, $15,000.

Foundation for Anesthesia Education and Research Young Investigator Award, Principal Investigator, funding 7/93 - 7/96 $70,000

NIH KO8 'Inducible knockout of the NK1 receptor"
Principal Investigator, KO8 funding 12/98 - 11/02, $431,947 over three years
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NIH RO1 'Tachykinin regulation of anxiety and stress responses'

Principal Investigator funding 9/1/2002 – 8/30/2007
$1,287,000 over 5 years

12) Departmental and University Committees:

Research Allocation Panel (1996 – 2001)
Institutional Review Board (Alternate Boards 1-2 full member Board 3) (2003 - present)

13) Teaching:

Lecturer and clinical teacher: Anesthesiology Residency Program, Columbia University and Presbyterian Hospital, New York, NY

Advanced Cardiac Life Support Training

*Anesthetic considerations of LVAD implantation* Recurrent lecture at Columbia University LVAD implantation course

Invited Lecturer:

*NK1 receptor functions in pain and neural development.* Cornell University December 1994

*Anxiety, stress, and the NK1 receptor.* University of Chicago, Department of Anesthesia and Critical Care, July 2000

*Anesthetic Considerations of LVAD Implantation* University of Chicago, Department of Anesthesia and Critical Care, July 2000

*NK1 receptor function in stress and anxiety*, St. John's University Department of Medicinal Chemistry, March 2002

*Making a brave mouse (and making a mouse brave).* Mt Sinai School of Medicine, May 2002

*Problems with anesthesia during lethal injection procedures*, Geneva, Switzerland. Duke University School of Law Conference, "International Law, Human Rights, and the Death Penalty: Towards an International Understanding of the Fundamental Principles of Just Punishment" July 2002

*NK1 receptor function in stress and anxiety* Visiting Professor NYU School of Medicine, New York, New York. October 2002.

*Anesthetic Depth, Paralysis, and other medical problems with lethal injecton protocols evidence and concerns* Federal Capital Habeas Unit Annual Conference, Jacksonville, Florida May 2004

*Medical Scrutinyof Lethal Injection Procedures.* National Association for the Advancement of Colored People Capital Defender Conference Airlie Conference Center Warrenton Virginia. July 2004.

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*Medical Scrutinyof Lethal Injection Procedures Advanced Criminal Law Seminar 2005, Fordham University School of Law, March 2005*

*Medical Scrutinyof Lethal Injection Procedures Advanced Criminal Law Seminar 2005, Fordham University School of Law: January 2007*

*Anesthetic considerations of LVAD implantation.* Recurrent lecture at Columbia University LVAD implantation course.

14) Grant Review Committees: None

15) Publications:

Original peer reviewed articles

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# EXHIBIT E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

07 JUL 2 AM 9:10

ESTATE OF JOSEPH LEWIS CLARK,
IRMA CLARK, ADMINISTRATOR

PLAINTIFF

-vs-

EDWIN C. VOORHIES, JR.
SOUTHERN OHIO
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Case No. 1:07 CV 510

Judge J. BARRETT

COMPLAINT AND JURY DEMAND

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Defendants. /
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**Preliminary Allegations**

1. This is an action based upon 42 U.S.C. § 1983, and Eighth Amendment of the United States Constitution.

2. This court has jurisdiction to hear § 1983 claims pursuant to 28 U.S.C. § 1331.

3. Plaintiff was a citizen of Lucas County, Ohio.

4. All events giving rise to this claim occurred in took place in Lucasville, OH, at the Southern Ohio Correctional Facility. The defendants performed all conduct in question under color of law.

**General Allegations**

5. Joseph Clark was sentenced to death by lethal injection for the 1984 murder of David Manning.
6. Prior to his arrest, Mr. Clark had been a long-time intravenous drug user.
7. The Ohio Department of Rehabilitation and Corrections (ODRC) is responsible for carrying out all executions. ODRC chooses a penal institution at which executions are to be carried out, and the warden or deputy warden of that facility is responsible for carrying out those executions.
8. The execution team consists of ODRC employees with some medical technician training.
9. Ohio's execution protocol gives the warden discretion to allow the attendance of "such number of physicians of the institution...and medical personnel as the Warden or Acting Warden thinks necessary."
10. Pursuant to § 4(g) of Ohio's execution protocol, the warden is required to "brief key personnel...including medical and mental health, in order to allow intake information to be obtained".
11. Section 5(a) of Ohio's execution protocol requires that "prior to the execution and upon arrival at the institution, a medical review of the inmate shall be conducted to establish any unique factors which may impact the manner in which the execution team carries out the execution."

12. Upon information and belief, the warden did not request the attendance of any physicians or medical personnel to advise or assist the execution team in case difficulties arose in carrying out Mr. Clark's execution.

13. Upon information and belief, the warden did not hold a briefing of execution team members to gather intake information for Mr. Clark's execution.

14. Upon information and belief, ODRC officials failed to carry out the pre-execution medical review required by the execution protocol.

15. Mr. Clark's execution took place on May 02, 2006 at the Southern Ohio Correctional Facility in Lucasville, Ohio.

16. During the execution, Mr. Clark climbed up on the gurney himself, offering no resistance to the procedure.

17. For 25 minutes prior to the beginning of Mr. Clark's execution, the execution team attempted to place shunts in both of his arms. Mr. Clark's veins were difficult to IV due to scar tissue built up over years of drug use.

18. In a break with normal procedure, the execution team proceeded with heparin lock in only one of Mr. Clark's arms.

19. Like other lethal injection states, Ohio employs three drugs in the execution procedure.

20. According to an execution log provided by the Ohio Department of Corrections, Mr. Clark received syringes 'one' and 'two' containing Thiopental Sodium and the first saline IV flush. This first series of injections was completed by 10:37AM.

21. The first execution attempt failed, probably due to a collapsed vein.

22. The execution team discovered the problem when Mr. Clark lifted his head from the gurney and repeatedly stated, "It don't work".

23. Mr. Clark also asked members of the execution team if any alternate means of administering a lethal dose were available.

24. After the failed first attempt, the execution team contacted the Ohio attorney general's office, and also the governor's office, for instructions on how to proceed.

25. The execution team closed a curtain between the execution chamber and the witness room. Terry Collins, Ohio Department of Rehabilitation and Correction Director, ordered the curtain closed to "reduce pressure on the execution team".

26. Attempts by the execution team to find a good vein took almost 1/2 hour.

27. While the execution team attempted to find a good vein, witnesses could hear Mr. Clark's groans from behind the curtain.

28. Once the execution team was able to find a usable vein, all eight syringes of chemicals were administered as prescribed by the lethal injection protocol. This series of injections included a repeat of the two sodium thiopental injections and saline flush administered during the first attempt.

29. Mr. Clark was pronounced dead at 11:26 A.M.

30. An autopsy of Mr. Clark's body confirms the problematic nature of Mr. Clark's execution. Specifically, the presence of 19 needle puncture wounds is indicative of technical difficulties the execution team encountered during this execution process.

31. The autopsy of Mr. Clark also revealed evidence (intensive redness of skin and local tissues) indicating paravenous injection of the lethal injection drugs.

32. Properly carried out, an execution by lethal injection normally takes less than 10 minutes.

33. At 86 minutes, Mr. Clark's execution was the 2nd longest lethal injection in American history.

**COUNT ONE:**

**Violation of Civil Rights under 42 U.S.C. § 1983**

34. Plaintiff re-alleges paragraphs 1-33.

35. A successful lethal injection necessarily depends on the lethal chemicals entering the body of the inmate in a predictable, timely fashion.

36. In past executions by lethal injection, inmates with scarred or otherwise inaccessible veins have suffered through lengthy, sometimes excruciatingly painful, lethal injection procedures.

37. Because Mr. Clark was an intravenous drug user, there was a substantial risk that the condition of Mr. Clark's veins would not provide adequate access for the lethal injection chemicals.

38. Due to the accessibility problems with Mr. Clark's veins, additional medical measures were required to ensure that Mr. Clark's execution would be reasonably quick and humane, as required by Ohio Revised Code § 2949.22(C) and the "Cruel and Unusual Punishments" clause of the Eighth Amendment.

39. On information and belief, Defendants failed to examine Mr. Clark for potential medical difficulties prior to carrying out his execution as required by Ohio's execution protocol.

40. In addition, Defendants lacked adequate training and equipment to quickly and effectively manage Mr. Clark's problematic execution once the execution was underway.

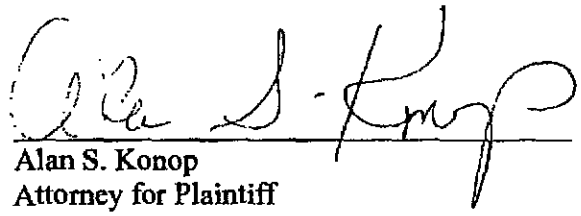
41. As a result of Defendants' deliberate indifference to the substantial risk of a problematic execution, Mr. Clark needlessly suffered humiliation, pain and suffering, and emotional distress. The excessive suffering inflicted on Mr. Clark was entirely preventable, and served no legitimate penological purpose.

Wherefore, Plaintiff Joseph Clark demands of Defendants jointly and severally in their individual capacities compensatory damages in the amount of $150,000. Plaintiff also demands such other and further relief, both in law and in equity, as the court deems just.

**JURY DEMAND**

Plaintiff demands a jury for all issues properly tried to a jury.

Respectfully submitted,



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