

ORIGINAL

In the Supreme Court of Ohio

State of Ohio,

Plaintiff-Appellee,

-vs-

Case No. 1996-1956

Lawrence Reynolds,

Defendant-Appellant.

This is a Capital Case.

Petitioner Lawrence Reynolds' Motion for Stay of Execution

Execution date: October 8, 2009

Sherri Bevan Walsh
Summit County Prosecutor

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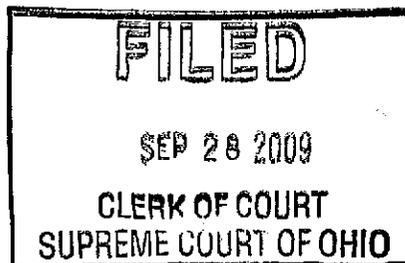
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On September 15, 2009, the state of Ohio demonstrated that it is not prepared or able to execute Lawrence Reynolds in a manner consistent with the United States and Ohio Constitutions and the O.R.C. § 2949.22 mandate that executions in Ohio be both quick and painless. Until the state of Ohio demonstrates its ability to adequately implement its protocol and also develops a contingency plan should peripheral vein access be unavailable, it should not move forward with Reynolds' execution.

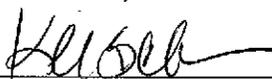
Petitioner Reynolds moves this Court to stay his October 8, 2009 execution under the authority of State v. Steffen, 70 Ohio St. 3d 399, 639 N.E.2d 67 (1994).

Respectfully submitted,

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Memorandum in Support

I. Background

An Ohio jury convicted Reynolds of aggravated murder and death penalty specifications. He was sentenced to death on June 9, 1994. This Court affirmed his conviction and death sentence on January 14, 1998. State v. Reynolds, 80 Ohio St. 3d 670, 687 N.E.2d 1358 (1998). Reynolds has exhausted all state and federal court challenges to his convictions and death sentence.

With respect to Ohio's lethal injection protocol, Reynolds has an appeal pending in the Sixth Circuit Court of Appeals, Reynolds v. Strickland et al, Case No. 08-4144, which is fully briefed. Reynolds has requested argument in that case, which has not been scheduled as of the filing of this motion. It is not clear whether this litigation will conclude prior to Reynolds' scheduled execution date. In addition, Reynolds is also a plaintiff in a state court declaratory judgment action, Otte et al v. Strickland et al, Case No. 08 CV 013337 (Franklin C.P.) This is still in the very early stages of litigation and will not be completed prior to Reynolds' scheduled execution date of October 8, 2009. Finally, contemporaneously with this motion, Reynolds is filing a state habeas petition before this Court.

II. Good cause exists to grant Reynolds' motion

A. Constitutional and statutory mandates

States must implement capital punishment in compliance with the Eighth Amendment. Baze v. Rees, 128 S. Ct. 1520, 1537 (2008). The Eighth Amendment prohibits “wanton exposure to [an] ‘objectively intolerable risk.’” Id. (citing Farmer v. Brennan, 511 U.S. 825, 846, and n 9(1994)).

Ohio Revised Code § 2949.22 mandates that lethal injections in Ohio “shall” be quick and painless. 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.” State v. Rivera, Case No. 04CR065940, Judgment Entry at p. 7 (Lorain C.P. June 10, 2008) (Exhibit A).

B. Reynolds' execution should not proceed without adequately skilled professionals and a contingency plan

The State of Ohio attempted to execute Romell Broom on September 15, 2009; it failed in this attempt. Execution team members spent “about two hours” attempting to access a vein. John Craig, *Botched execution brings reprieve*, Cincinnati Enquirer, Sept. 15, 2009 (online version attached as exhibit I). He was stuck at least 18 times in efforts to gain venous access. Alan Johnson, *Effort to kill inmate halted*, Columbus Dispatch, Sept. 16, 2009 at A1 (online version attached as exhibit B). The execution team continued trying to place IVs “in areas that were already bruised and swollen.” Broom Affidavit, Exhibit C. One attempt to place an IV resulted in a needle hitting Broom’s bone. Id. at ¶20. Broom’s affidavit further reveals that he was properly hydrated and that he was not an IV drug user. Id. at ¶ 5, 15.

And Broom’s attempted execution is not the first time Ohio has botched an execution. Three years ago, Joseph Clark’s execution did not go as Defendants planned. Indeed,

Defendants made several changes to Ohio's lethal injection protocol as a result of the "difficulties encountered during the execution of Joseph Clark on May 2, 2006." Cooey v. Strickland, 479 F.3d 412, 423 (6th Cir. 2007). "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." Id. at 423-24. Clark's body revealed 19 needle puncture wounds "indicative of technical difficulties the execution team encountered during this execution procedure." (Exhibit O) "Intensive redness of the skin" in the "left elbow pit...resulted from paravenous injection of the poisonous chemicals." (Id.)

Then, on May 24, 2007, problems were encountered during Christopher Newton's execution. 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. 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 – indicating 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) (Exhibit D attached hereto).¹

In three years, Ohio has experienced three botched executions. On September 15, 2009, during Broom's execution, the State of Ohio demonstrated that it is wholly incapable of administering Ohio's lethal injection protocol in a manner that comports with the United States and Ohio Constitutions and the Ohio revised code. It is now apparent that Ohio's IV team is incompetent to perform the task of placing IVs to administer the lethal injection drugs. In addition, it is evident that there are significant deficiencies in Ohio's lethal injection protocols; the mere fact that they were unable to administer the lethal drugs demonstrates this fact. And, finally, the implications of Ohio's failure to develop a contingency plan should it be unable to gain peripheral vein access are significant and compelling.

Broom's execution is the first in 60 years that has failed to proceed because the execution team was unable to perform its task. But Broom's botched execution teaches another lesson. Broom's affidavit (Exhibit C) reflects that he was properly hydrated at the time of his execution and that he was not an IV drug user. The lesson—the State of Ohio can fail at its obligations under the United States and Ohio Constitutions and the Ohio Revised Code at any time. “It [is] the statutory duty of the state officials to make sure there [is] no failure.” Louisiana ex rel.

¹ Fearing similar complications, Richard Cooley filed a 42 U.S.C. § 1983 lawsuit on August 7, 2008, urging Defendants to address the issue of inaccessible peripheral veins in its lethal injection protocol. Cooley v. Strickland, et al., Case No. 2:08-cv-747 (S.D. Ohio) (Exhibit G). While Cooley's lawsuit was dismissed and his execution uneventful, his suit did alert Defendants, once again, that their protocol had no contingency plan to address inaccessible peripheral veins.

Francis v. Resweber, 329 U.S. 459, 477 (1947) (Burton, J., dissenting with 3 justices). Yet, Ohio has proved itself incapable of ensuring there is no failure.

The state of Ohio and its spokespeople have contended at times in the media that they anticipated difficulties in Broom's execution. If Broom's affidavit and the accounts that there were no perceived problems are incorrect, the State still proves Broom's point. The execution went forward in spite of problems with incompetent and ill-trained staff implementing a flawed protocol that is completely inadequate to deal with the inability to access peripheral veins.²

Clark, Newton, and Broom demonstrate the complete incompetence of those charged with administering Ohio's lethal injection protocol and the inadequacy of Ohio's lethal injection protocol. Resweber is instructive. In Resweber, the Court approved a second attempt at electrocuting a death-sentenced inmate. In so doing, the Court held that there was no Eighth Amendment violation when "an accident with no suggestion of malevolence" occurs. 329 U.S. at 463-64. Reynolds case does not present a second attempt to execute the same inmate. What is present, however, is a history of serious problems with the administration of lethal injection in Ohio. In the past three years, three executions have not gone as Ohio anticipated. The State knows there are problems with their protocol, and with the qualifications, competency, and training of those who administer it. They have had repeated difficulty with peripheral vein access, yet the protocol still does not include a contingency plan to address this problem. While the State's actions may not rise to "malevolence," it has demonstrated willful indifference to the problems with Ohio's lethal injection protocol and an unwillingness to correct even the most

² In addition to these points, Reynolds notes that the medical literature suggests that had Broom's execution gone forward after 18 needlesticks, and the IV drugs had been administered in one of those veins that were repeatedly struck, the likelihood of IV infiltration was a very real possibility. See, e.g., Kelli Rosenthal, Reducing the risks of infiltration and extravasation at 1 (detailing that infiltration and extravasation occur when the vein is torn resulting in problems including swelling, leakage, and seepage) (attached as Exhibit H).

basic flaw in the protocol—developing a contingency plan should peripheral vein access be unobtainable. The state of Ohio, and this Court, may not ignore what is now an “objectively intolerable risk of harm.” Baze, 128 S. Ct. at 1531.

The objectively intolerable risk of harm is apparent because there is no reason to assume that these same events will not transpire at Reynolds’ execution, or at executions to follow. And there is evidence that the state of Ohio will continue to ignore the risk. Following the attempt to execute Broom, Director Terry Collins has been quoted stating “I won’t have discussions about ‘what if it doesn’t work next week’ at this point,” Mr. Collins said, “because I have confidence that my team will be able to do its job.” Bob Driehaus, *New York Times*, *Ohio Plans to Try Again as Execution Goes Wrong*, Sept. 17, 2009 (online edition attached as Exhibit E). The State claims its team of executioners has the skill to obtain IV access; Broom’s failed execution demonstrates they do not. Moreover, an *agreed to* temporary restraining order is in place to prevent Broom’s execution until November 30, 2009 demonstrating that there still is no contingency plan in place should an inmate’s peripheral veins be inaccessible. (Exhibit F) But if Reynolds’ execution goes forward, the State will cross its fingers and hope they can do a job it has already demonstrated it is incapable of performing.

With three botched executions in three years, the state of Ohio has shown a complete incompetence in executing inmates in a manner consonant with the mandates of the United States and Ohio Constitutions and the Ohio Revised Code. In particular, the state of Ohio demonstrated through its failed attempts to execute Broom that it is not prepared or able to execute Lawrence Reynolds in a constitutional manner.

The Baze plurality noted the difficulty of finding a procedure that is widely tolerated to be “objectively intolerable.” 128 S. Ct. at 1532. Like 36 other states, Ohio’s mode of execution

is lethal injection. But no other state has the history of repeated botched executions—Clark, Newton, and now Broom. Broom’s case is the first case in the United States in over 60 years where efforts to execute an inmate were stopped because the executioners could not complete their task. Even the attempts to access Broom’s veins have lasted longer than any other documented incident. See <http://deathpenaltyinfo.org/some-examples-post-furman-botched-executions> visited Sept. 17, 2009 (review of these cases demonstrates that the longest reported attempt at IV access in other states was Arkansas’ January 24, 1992 execution of Rickey Ray Rector where it took medical staff more than 50 minutes to find a suitable vein). The risk present in Ohio, particularly with respect to Reynolds, is objectively intolerable. See *Baze*, 128 S. Ct. at 1532.

Staying Reynolds’ execution is consistent with actions taken by other state and federal courts and state officials pending review of a variety of states’ lethal injection protocols. See, e.g., Jim Salter, *Other states watching Ark. lethal injection case*, The Seattle Times, Sept. 24, 2009 (online version attached as Exhibit J); *Brown v. Vail, et al.*, Case No. 82832-6 (Washington Sup. Ct. Mar. 12, 2009) (Exhibit K); Theo Emery, *U.S. Judge Blocks Lethal Injection in Tennessee*, The New York Times, Sept. 20, 2007 (online version attached as Exhibit L); Adam Liptak, *Florida Governor Halts the Death Penalty*, The New York Times, Dec. 16, 2006 (online version attached as Exhibit M); David A. Lied, *Mo. executions on hold because of federal review*, Associated Press (online version attached as Exhibit N); Executions have resumed in some of these states, but not before their lethal injection processes were reviewed. This is particularly compelling support for Reynolds’ request given that the only Court to review the

merits of a constitutional challenge to Ohio's lethal injection protocol ruled in unconstitutional.³ Rivera, Case No. 04CR065940, Judgment Entry at p. 7 (Lorain C.P. June 10, 2008) (Exhibit A).

III. Conclusion

The State of Ohio has an interest in seeking finality by imposing the sentence of death. But the State cannot seek finality at the expense of its duties under the United States and Ohio Constitutions and the Ohio Revised Code. Ohio cannot impose cruel and unusual punishments, no matter how reprehensible the offense committed. Similarly, the horrors of Reynolds' crime cannot absolve the State of its statutory duty to ensure a quick and painless execution. Ohio's current protocol is insufficient to ensure those duties. The team assembled to conduct Ohio's executions is ill-qualified and inadequately trained and a protocol employed that is incapable of meeting those duties for the State.

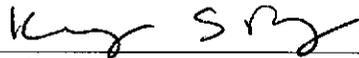
Ohio's system suffers from a fatal flaw—lack of planning and lack of preparation. Ohio Revised Code § 2949.22 imposes the statutory on Ohio's officials to administer a quick and painless death. "It was the statutory duty of the state officials to make sure there was no failure." Resweber, 329 U.S. at 477 (Burton, J., dissenting with 3 justices). Defendants could have avoided this problem had they responded to the problem that looms and the five years of litigation asserting there were real problems with Ohio's lethal injection protocol.

Reynolds respectfully requests a stay of his October 8, 2008 execution date pending resolution of his appeals, his state habeas litigation, and the trial on the merits of Ohio's lethal injection protocol scheduled to commence in November 2009.

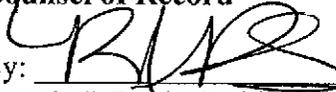
³ The Federal District Court for the Southern District Of Ohio held an evidentiary hearing on a preliminary injunction in March 2009, but a trial on the merits of the underlying claims in that suit is not scheduled until November 2, 2009. Cooey v. Strickland, Case No. 2:04-cv-1156.

Respectfully submitted,

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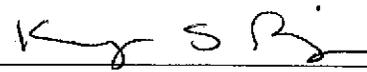
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Certificate of Service

I hereby certify that a true copy of the foregoing Appellant Lawrence Reynolds Notice of Appearance of Counsel was forwarded by regular U.S. mail to Shari Bevan Walsh, Prosecuting Attorney, Summit County Prosecutor's Office, 53 University Avenue, 6th Floor, Akron, Ohio 44308-1680 and via facsimile to 330-643-8277, on the 28th day of September, 2009.


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LORAIN COUNTY, OHIO

2008 JUN 10 A 9:41

RON NABAKOWSKI, Clerk
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James M Burge, Judge

CLERK OF COMMON PLEAS
RON NABAKOWSKI

Date June 10, 2008 Case No. 04CR065940
05CR068067
STATE OF OHIO LORAIN COUNTY PROSECUTOR
Plaintiff Plaintiffs Attorney

VS

RUBEN O. RIVERA KREIG J BRUSNAHAN
RONALD MCCLOUD DANIEL WIGHTMAN
Defendant Defendant's Attorney (440) 930-2600

JUDGMENT ENTRY

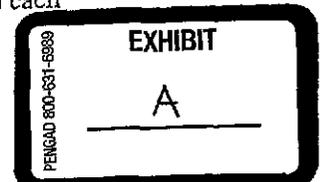
The Case

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 reviewing 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." (Hcath, 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 tissue;
- 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 finds 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. Am. §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 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.

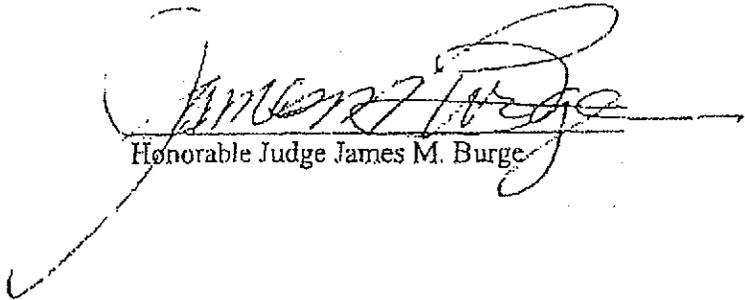
Holding

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

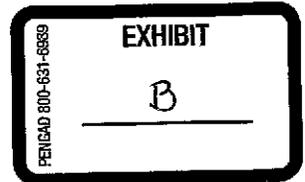
Accordingly, it is ordered that the words, "or combination of drugs," be severed from R.C.2949.22; that the Ohio Department of Rehabilitation and Correction eliminate the use of pancuronium bromide and potassium chloride from the lethal injection protocol; and, if defendants herein are convicted and 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

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Effort to kill inmate halted

2 hours of needle sticks fail; Strickland steps in

Wednesday, September 16, 2009 3:10 AM

BY ALAN JOHNSON

THE COLUMBUS DISPATCH

LUCASVILLE, Ohio -- Ohio's lethal-injection process is under attack again as Gov. Ted Strickland intervened yesterday and halted the execution of Cleveland killer Romell Broom after a prison medical team spent two tense hours trying without success to attach IV lines.

Using his executive clemency power, Strickland postponed Broom's execution until 10 a.m. next Tuesday.

That would be one day after the 25th anniversary of when Broom abducted, raped and stabbed to death 14-year-old Tryna Middleton of Cleveland as she walked home from a football game.

Strickland acted at the urging of Ohio prisons chief Terry Collins after Broom was jabbed repeatedly with lethal-injection needles in both arms and both legs -- a total of 18 attempts, Broom told his Columbus attorney, S. Adele Shank.

Media witnesses said Broom, 53, appeared to grimace in pain and clench and unclench his fists several times. At one point, he covered his face with both hands and appeared to be sobbing, his stomach heaving.

After numerous failures, Broom himself began pointing out new places on his arms to try. The prison team took a break after the first hour, but efforts to find suitable veins for the IV connections were unsuccessful in the second hour as well.

Collins said the medical technicians found suitable veins several times, only to have them collapse when a saline solution was injected.

Collins said he plans to "reassess the process" in the next few days



Romell Broom faces death again at 10 a.m. Tuesday.

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to see whether any changes are needed. But he added emphatically, "I have confidence in the process. I have confidence in my team."

Broom's attorneys, Shank and Timothy Sweeney of Cleveland, were upset with the execution problems and said they will review the situation to see if further legal action is warranted.

"It was obviously a flawed process," Shank told reporters. "We felt things were going badly, and the governor made the right decision to grant this reprieve."

Almost forgotten in the commotion were Bessye and David Middleton, the murdered girl's parents, and her aunt, Hattie McIntosh. They sat quietly and patiently in the Death House, displaying little emotion during the entire ordeal.

The sunrise-to-sunset drama at the Southern Ohio Correctional Facility near Lucasville began as Broom had a last-minute visit with his attorney and a phone call with his brother before preparing to take the 17 steps from his holding cell to the death chamber.

But a last-minute appeal to the 6th U.S. Circuit Court of Appeals pushed back the scheduled execution by about three hours. There was another brief delay as prison technicians replaced the lethal-injection syringes and drugs with a new batch.

Shortly before 2 p.m., media witnesses were escorted to the Death House. They would remain there for more than two hours.

At one point, Shank said, she and Sweeney called Strickland and Chief Justice Thomas J. Moyer, asking them to intervene.

The problem execution prompted the group Ohioans to Stop Executions to issue a statement saying that "no amount of adjustment to the death penalty process can achieve an outcome absent of pain and suffering for victims' family members, witnesses, corrections workers and the condemned inmate."

The group asked Strickland to halt all executions "pending a complete investigation and thorough review of Ohio's capital punishment system."

The effort was the longest failed attempt at an Ohio execution. In May 2006, it took 90 minutes to establish an IV line for Joseph Clark, 57, a Toledo murderer who had weak veins from years of drug use.

The difficulty in Clark's execution led the state to change its lethal-injection procedures, which generally had gone smoothly.

Broom had a pattern of molesting young girls, records show. He was arrested three months after Middleton's murder when he forced an 11-year-old into his car. He earlier served 8 1/2 years in prison for raping a 12-year-old baby sitter.

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Ohio has executed 32 men since 1999, including three this year.

ajohnson@dispatch.com

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

ROMELL BROOM

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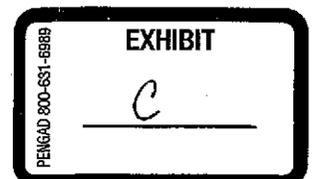
TED STRICKLAND

COUNTY OF SCIOTO))
STATE OF OHIO))

AFFIDAVIT OF ROMELL BROOM

I, Romell Broom do hereby state and attest to the following:

1. I am a death row inmate in the State of Ohio.
2. I had an execution date scheduled for Tuesday, September 15, 2009. The execution was to take place at the Southern Correctional Facility (SOCF), in Lucasville, Ohio.
3. Correction officials took me from the Ohio State Penitentiary to SOCF on September 14, 2009.
4. After my arrival, a nurse came over to where I was housed on J-1. The nurse came in found two veins on both my right and left arms, tied up my arm and took note of what she found.
5. After the nurse came in prison officials kept offering liquids. I accepted. During the day I drank coffee, Kool-Aid and water. I had seven cups of coffee, five cups of water and three cups of Kool-Aid.
6. On September 15, 2009, I woke up took a shower and talked to my brother on the phone. At one point, the death squad leader advised me that one of the courts was reviewing my case and that the execution was delayed pending the court's review. Because of the length of the delay, I believed that the court was going to accept my case for review.
7. However, at about 2:00 my attorney informed me that the court had denied my appeal and that there were no more avenues left. The state was going to go through with my execution.



8. While I was in the cell, Warden Phillip Kerns came in with guard escorts and read the death warrant to me. After that, two nurses came in and advised me to lay down. One of the nurses was a white male and the other was a white female.
9. There were three guards present in the room. One guard was on the right side of me, one was on the left side of me and one was at my feet.
10. The nurses were simultaneously trying to access the veins in my arms. The female nurse tried three separate times to access veins in the middle of my left arm. The male nurse tried three separate times to access veins three times in the middle of my right arm.
11. After those six attempts, the nurses told me to take a break. I continued to lay on the bed for around two and one half minutes.
12. After the break, the female nurse tried twice to access veins in my left arm. She must have hit a muscle because the pain made me scream out loud. The male nurse attempted three times to access veins in my right arm. The first time the male nurse successfully accessed a vein in my right arm. He attempted to insert the IV, but he lost it and blood started to run down my arm. The female nurse left the room. The correction officer asked her if she was okay. She responded, "No" and walked out.
13. The death squad lead made a statement to the effect that this was hard on everyone and suggested that they take another break. The male nurse then left. The correction officer on my right patted me on my right shoulder and told me to relax while we take a break. At this point, I was in a great deal of pain. The puncture wounds hurt and made it difficult to stretch or move my arms.
14. The male nurse returned with some hot towels which he applied to his left arm. The male nurse applied the towels to my arms and massaged my left arm. The nurse told me that the towels would help them access the veins.
15. After applying the towels, the male nurse attempted to access my veins once in the middle of my left arm and three more times in my left hand. After the third attempt to access veins in my hands, the nurse made a comment that heroin use affected my veins. I was upset with this comment because I never used heroin or any intravenous drugs. I told the nurse that I had never told him that I used heroin.
16. The male nurse kept saying that the vein was right there, but they could not get it. I tried to assist them by helping to tie my own arm. A correction officer came over, tapped on my hand to indicate that he also saw the vein and attempted to help the nurse locate the vein.
17. The death squad leader advised me that we were going to take another break and again told me to relax.

18. At that point I became very upset. I began to cry because I was in pain and my arms were swelling. The nurses were placing needles in areas that were already bruised and swollen. I requested that they stop the process, and I requested to speak with my attorney.
19. The death squad leader asked me to sit up so that the blood would flow more freely. After that, the head nurse, an Asian woman, came into the room.
20. The head nurse, attempted to access veins in my right ankle. The head nurse requested for someone to "give her a twenty" and someone handed her a needle. During this attempt the needle hit my bone and was very painful. I screamed. At the same time the head nurse was attempting to access a vein in the lower part of my left leg, the male nurse was simultaneously attempting to access a vein in my right ankle. After these failed attempts, the head nurse took the needle and left the room.
21. The male nurse made another attempt to access veins twice in my right hands. It appeared as though they had given up on the left arm because at that point it was bruised and swollen. The level of pain was at its maximum. I had been poked at least 18 times in multiple areas all in an attempt to give me drugs that would take my life.
22. The death squad leader again told me to relax. There was conversation between the correction officers about how they could see the veins right there.
23. After a while, Director Terry Collins came in the room and told me that they were going to discontinue the execution. Director Collins indicated that he appreciated my cooperation and noted my attempts to help the team. He also expressed his confidence in his execution team and their professionalism. Director Collins advised me that they would call Governor Strickland and advise the Governor of the situation.
24. After the nurses and Director Collins left, the correction officers asked if I would like some coffee and a cigarette. I was still on the bed with the lights down.
25. About a half hour later my attorney, Adele Shank, came and told me that the Governor had issued a reprieve for a week. I told Attorney Shank about my pain and showed her the areas of my bruising.
26. After Attorney Shank left, correction officials moved me to the hospital.
27. The next morning, my arms started to show further evidence of bruising and swelling. Every cite on my arm where an attempt was made showed visible bruising and swelling. Some of the bruising on my hands and ankle have disappeared and some of the swelling went away the next evening.
28. To this day, my arms have large visible bruises, and there is swelling in my arms. The multiple cites where the nurses attempted to access my veins continue to hurt.

29. Correction officials made the decision to keep me housed at SOCF during the week reprieve. During this time, I am constantly watched by the execution crew and the correction officers.
30. Waiting to be executed again is anguishing. It is very stressful to think about the fact that the State of Ohio intends to cause me the same physical pain next week.
31. I am constantly reminded of the fact that next week I will have to undergo the same torture that the State of Ohio exacted on me on Tuesday, September 15, 2009 because there has been no change to Ohio's execution protocol, and there has been no change to my veins.

Further Affiant Sayeth Naught

Romell Broom #187-343
ROMELL BROOM

Sworn to, affirmed and subscribed in my presence this 17th day of September, 2009.

Marcia Dukes
NOTARY PUBLIC



MARCIA DUKES
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES 11-5-2013

My Commission Expires: 11-5-2013

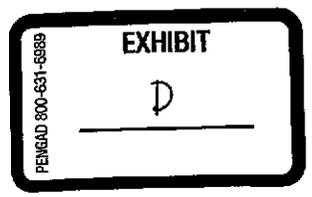
IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACK E. ALDERMAN,)
)
)
 Plaintiff,)
)
)
 v.) Civil Action No.
) 1:07-CV-1474-BBM
)
 JAMES E. DONALD, in his capacity as)
 Commissioner of the Georgia Department)
 of Corrections; HILTON HALL,)
 in his capacity as Warden, Georgia)
 Diagnostic and Classification Prison;)
 DOES 1-50, UNKNOWN)
 EXECUTIONERS, in their capacities)
 as employees and/or agents of the)
 Georgia Department of Corrections.)
)
 Defendants.)

**DECLARATION ROBERT K. LOWE, ESQ. REGARDING
THE EXECUTION OF CHRISTOPHER NEWTON**

I, Robert K. Lowe, Esq., declare that:

1. My name is Robert K. Lowe, and I have been a licensed Ohio attorney since 2000. I currently serve as an Assistant State Public Defender for the Office of the Ohio Public Defender in the death penalty section, and I have held that position since July 2001.



2. During my tenure as Assistant State Public Defender, my office has continually represented Christopher Newton during his direct appeal to the Ohio Supreme Court. It was in my capacity as Mr. Newton's counsel that I witnessed his execution on May 24, 2007 at the Southern Ohio Correctional Facility.

3. As one of the witnesses, the following occurred for Mr. Newton's execution:

a. The media was taken into the death house (J-Block of Southern Ohio Correctional Facility) about 8-10 minutes before 10:00 a.m.

b. The victim's witnesses, three prosecutors from Richland County, were taken into the death house about 5 minutes before 10:00 a.m.

c. Mr. Newton's witnesses, including myself were taken into the death house about 2 minutes before 10:00 a.m.

d. All witnesses were in place and seated at about 10:01 a.m.

e. At 10:03 a.m. the video prompter came on and the "medical team" started to put the locks into Mr. Newton's arms. There was at least one person on each side. Mr. Newton was in the holding cell on a bed.

f. The lock was inserted and taped down on the left arm. This was achieved on the third or fourth attempt, after 22 minutes. An IV line

was attached to Mr. Newton to keep the vein open. The IV bag hung over his head (could not see what it was attached to).

g. As for the right arm, it took approximately an hour and fifteen minutes to insert the lock.

h. At approximately 10:35 a.m. I asked if Greg Trout was in the area and asked to speak with him or Mr. Newton due to the length of time finding a vein. I was not permitted to speak to Mr. Newton. However, a few minutes later, I was asked to leave the witness area to talk with Greg Trout. Mr. Trout informed me that there was no time table to find a vein and that the "team" was told to take their time to find a viable vein. I inquired about cutting down and was informed that they had not even come close to thinking that that was required.

i. At 10:40 a.m. the "medical team" did look at the right leg as an option to access a vein, no "pricks" were attempted in the leg. After a couple of minutes looking, the "medical team" went back to the right arm.

j. At 10:48 a.m. the "medical team" started looking at the right arm and right leg.

k. At 10:57 a.m. the "medical team" left. They returned at 11:00 a.m. with a new tray of medical items.

l. At 11:05 a.m. Mr. Newton got up and left the view of the video prompter. I was pulled out of the witness area and Greg Trout informed me that Mr. Newton asked and was permitted to use the restroom due to the bag of fluids being pumped into Mr. Newton to keep the left vein open.

m. After Mr. Newton went to the restroom, the "team" searched for a vein while he sat on the bed. At 11:22 a.m. Mr. Newton laid back down on his bed. After searching for a vein for a short period of time, Mr. Newton laid there with the "team" just looking at Mr. Newton.

n. At about 11:30 a.m. I was pulled out of the witness room again. I was told that they had found a second vein but it was running really slow – but running continuously. They were going to move Mr. Newton slowly into the chamber and proceed with the execution. I was informed that if there was failure, that the curtain would be closed and Mr. Newton moved onto a gurney and taken back to the holding cell in order to search for a vein under the camera with the video prompter turned back on.

o. At about 11:33 a.m., Mr. Newton walked into the execution chamber. He was strapped onto the execution table at 11:34 a.m. One of the guards (grey shirt) who was strapping Mr. Newton's left arm had shaky hands.

p. At 11:36 a.m., Mr. Newton was given his opportunity to make a statement. Warden Voorhies stood to Mr. Newton's right with a white shirt guard (head of the execution team—introduced himself as that during Wednesday's visit) at Mr. Newton's head. These two remained in the execution chamber during the execution.

q. For several minutes after his statement, Mr. Newton was still talking and laughing with the guard and Warden Voorhies.

r. After Mr. Newton stopped talking, there was a short time period and then movement was observed. At one point, the guard looked at Warden Voorhies with a bewildered or confused look. Mr. Newton's chest/stomach moved about 8-10 times and his chin was moving in jittery manner.

s. At 11:45 a.m. Mr. Newton's chest made one movement.

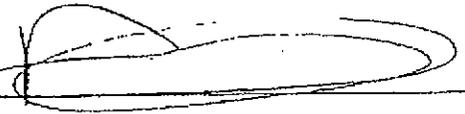
t. The curtain was drawn at 11:51 a.m.

u. The curtain was re-opened and death was pronounced at 11:53 a.m.

v. The witnesses were escorted out of the death house with the media first, then Mr. Newton's witnesses, and then the victim's witnesses.

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

Dated: August 15, 2007

By 

Robert K. Lowe, Esquire

The New York Times

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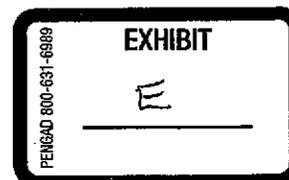
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September 17, 2009

Ohio Plans to Try Again as Execution Goes Wrong

By BOB DRIEHAUS



CINCINNATI — The State of Ohio plans to try again next week to execute a convicted rapist-murderer, after a team of technicians spent two hours on Tuesday in an unsuccessful effort to inject him with lethal drugs.

This is the first time an execution by lethal injection in the United States has failed and then been rescheduled, according to Richard C. Dieter, executive director of the Death Penalty Information Center, in Washington.

The only similar case in modern times, Mr. Dieter said, occurred in Louisiana in 1946, when electric shock failed to kill a convicted murderer, Willie Francis. He was electrocuted the next year, after the United States Supreme Court ruled that executing a prisoner in the wake of a failed first attempt was constitutional.

Tuesday's one-week postponement was ordered by Gov. Ted Strickland after he was alerted by the Ohio corrections department that technicians at the state prison in Lucasville, some 70 miles east of Cincinnati, had struggled for more than two hours to find a suitable vein in either the arms or the legs of the inmate, Romell Broom, 53.

In a log reviewed by The Associated Press, the executioners attributed their troubles to past intravenous drug use by Mr. Broom. Julie Walburn, a spokeswoman for the Ohio corrections department, said that Mr. Broom had once told officials he had been an IV drug user but that he had later recanted. His lawyers said they were not aware of any IV drug use.

Mr. Broom was convicted of the 1984 abduction, rape and killing of Tryna Middleton, 14, who had been walking home from a football game in Cleveland with two friends.

His lawyers described what happened Tuesday as torture and said they would try to block the execution. One of them, Adele Shank, said: "He survived this execution attempt, and they really can't do it again. It was cruel and unusual punishment."

Ms. Shank watched Tuesday's procedure on closed-circuit television. "I could see him on the screen," she said, "and it was apparent to me that he was wincing with pain."

The Ohio chapter of the American Civil Liberties Union said Wednesday that the state must abolish lethal injection.

"This is the third screwed-up execution in three years," said Jeffrey M. Gamso of the A.C.L.U. of Ohio. "They keep tweaking their protocol, but it takes more than tweaks. They don't know how to do this competently,

and they need to stop.”

In referring to two previous troubled executions in Ohio, Mr. Ganso was speaking of the death of Joseph Clark in 2006, delayed more than an hour because of problems with IV placement, and the 2007 execution of Christopher Newton, also delayed more than an hour while technicians tried at least 10 times to insert the IV.

The director of the state corrections department, Terry J. Collins, said he and his staff were seeking the advice of doctors and others to plan for a successful execution next Tuesday.

“I won’t have discussions about ‘what if it doesn’t work next week’ at this point,” Mr. Collins said, “because I have confidence that my team will be able to do its job.”

Kent Scheidegger, legal director of the Criminal Justice Legal Foundation, which supports the death penalty, said problems with veins were inevitable in lethal injection by IV.

Mr. Scheidegger said he favored execution methods involving intramuscular injection or a return to gas chambers, but with a poison other than cyanide, which was long under attack because of the suffering it can inflict.

Mr. Dieter, of the Death Penalty Information Center, said that given the likelihood of legal appeals, there was little chance that Mr. Broom would be put to death next Tuesday.

“The question of whether this is still an acceptable punishment in our society,” he said of executions generally, “is compounded by this mistake.”

John Schwartz contributed reporting from New York.

This article has been revised to reflect the following correction:

Correction: September 19, 2009

An article on Thursday about a rescheduling of the execution of a convicted murderer in Ohio after the first attempt failed incorrectly attributed a statement concerning drug use by the murderer, Romell Broom. It was Julie Walburn, a spokeswoman for the Ohio Department of Rehabilitation and Correction — not Amanda Wurst, a spokeswoman for Gov. Ted Strickland — who said Mr. Broom had told officials that he had once been an IV drug user, but later recanted.

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

FILED

SEP 18 2009

JAMES BONINI, Clerk
COLUMBUS, OHIO

ROMELL BROOM,

Plaintiff,

v.

TED STRICKLAND, et al.,

Defendants.

Case No. 2:09-cv-823

JUDGE GREGORY L. FROST

Magistrate Judge Terence P. Kemp

AGREED ORDER

On September 18, 2009, Plaintiff, Romell Broom, filed the captioned case (Doc. # 3) and a motion for a temporary restraining order and preliminary injunction (Doc. # 4). Pursuant to S.D. Ohio Civ. R. 65.1, the Court therefore held an informal preliminary conference with the parties, followed by an in-court hearing in which the parties asked this Court to approve a temporary restraining order staying the execution of Plaintiff for a period of ten days.

This Agreed Order memorializes the results of these proceedings as follows:

(1) By the request and agreement of the parties, the Court **GRANTS** the motion for a temporary restraining order. Thus, it is **ORDERED, ADJUDGED, and DECREED** that the State of Ohio, and any person acting on its behalf, is hereby **STAYED** from implementing an order for the execution of Romell Broom issued by any court of the State of Ohio for a period of ten days from the date of filing of this Agreed Order. Unless otherwise ordered by this Court, the temporary restraining order shall expire at 11:59 p.m. on September 28, 2009.

(2) The Court schedules an in-court hearing on the motion for a preliminary injunction for September 28, 2009, at 9:00 a.m. in a courtroom to be determined.

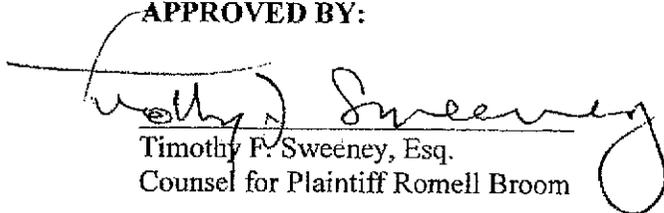
(3) Defendants shall file a memorandum in opposition to the motion for a preliminary

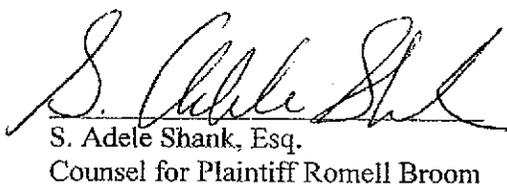
injunction by 4:00 p.m. on September 23, 2009. Plaintiff shall file a reply memorandum by 4:00 p.m. on September 25, 2009.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

APPROVED BY:


Timothy F. Sweeney, Esq.
Counsel for Plaintiff Romell Broom


S. Adele Shank, Esq.
Counsel for Plaintiff Romell Broom


Charles L. Wille, Esq.
Counsel for Defendants Ted Strickland, Governor,
Terry Collins, Director, Phil Kerns, Warden,
John/Jane Doe # 1, Execution Team Member,
John/Jane Doe # 2, Execution Team Member,
John/Jane Doe # 3, Execution Team Member,
John/Jane Doe # 4, Execution Team Member,
John/Jane Doe # 5, Execution Team Member,
John/Jane Doe # 6, Execution Team Member,
John/Jane Doe # 7, Execution Team Member,
John/Jane Doe # 8, Execution Team Member,
John/Jane Doe # 9, Execution Team Member,
John/Jane Doe # 10, Execution Team Member,
John/Jane Doe # 11, Execution Team Member,
John/Jane Doe # 12, Execution Team Member

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

RICHARD COOEY

#194-016
Ohio State Penitentiary
878 Coitsville-Hubbard Road
Youngstown, Ohio 44505,

Plaintiff,

CASE NO. 2:08-cv-747

JUDGE FROST

MAGISTRATE JUDGE ABEL

vs.

TED STRICKLAND, Governor

State of Ohio
77 South High Street, 30th Floor
Columbus, Ohio 43215,

TERRY COLLINS, Director

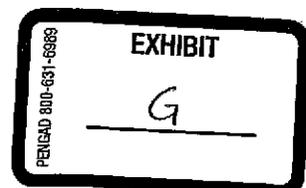
Ohio Dept. of Rehabilitation & Correction
1050 Freeway Drive North
Columbus, Ohio 43229,

PHIL KERNS, Warden

Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

**Plaintiff's Amended Original
Complaint for Injunctive and
Declaratory Relief, Attorney Fees,
and Costs of Suit Under 42 U.S.C.
§ 1983**

**This is a death penalty case.
Execution scheduled on
October 14, 2008.**



COMPLAINT

I. JURISDICTION AND VENUE

1. This action is brought under 42 U.S.C. § 1983 for threatened violations of Plaintiff's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and Plaintiff's right to be free from violations of his substantive and procedural due process rights under the Fourteenth Amendment to the United States Constitution. Plaintiff seeks equitable, injunctive, and declaratory relief.
2. This Court has jurisdiction over this matter under 28 U.S.C. § 1331, as it arises under the Constitution of the United States; under 28 U.S.C. § 1343(a)(3), as it is brought to redress deprivations, under color of state authority, of rights, privileges, and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), as it seeks to secure equitable relief under an act of Congress, specifically 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights; under 28 U.S.C. § 2201(a), as one purpose of this action is to secure declaratory relief; and under 28 U.S.C. § 2202, as one purpose of this action is to secure preliminary and permanent injunctive relief. This Court has supplemental jurisdiction over any state statutory claim asserted by Plaintiff under 28 U.S.C. § 1367, as the state and federal claims are derived from a common nucleus of operative facts.
3. This Court has venue under 28 U.S.C. § 1391(b)(1) as all Defendants are situated within the State of Ohio and each of them resides within the Southern District of Ohio, and under 28 U.S.C. § 1391(b)(2) as all of the events described herein have, or will, occur within this judicial district. Defendant Strickland exercises his final authority over the other Defendants in the seat of Ohio's government, located in Franklin County, Ohio; Defendant Collins promulgated the lethal injection execution procedures in Franklin County, Ohio; and Warden

Kerns and the execution team members intend to execute Plaintiff in Scioto County, Ohio, by the method of lethal injection described herein.

II. THE PARTIES

4. Richard Cooley is a United States citizen and a resident of the State of Ohio. He is currently a death-sentenced inmate in the custody of Defendants, and under the control and supervision of the State of Ohio Department of Rehabilitation and Correction, who have him incarcerated in the Ohio State Penitentiary, in Youngstown, Ohio, under Inmate #194-016. If Mr. Cooley's death sentence is not overturned in another judicial proceeding or through executive clemency, then Defendants will execute him on October 14, 2008. Upon information and belief, it is the intention of Defendants to use the lethal injection methods described in Exhibits A and B to execute him in the death house located at the Southern Ohio Correctional Facility, which the Defendants operate and control.
5. Defendant Ted Strickland is, and at all times relevant was, the Governor of the State of Ohio. He is the final executive authority in the state, statutorily and constitutionally responsible for the execution of all sentences of death in Ohio and the manner in which those sentences are performed. He is sued here in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.
6. Defendant Terry Collins is, and at all times relevant was, the Director of the State of Ohio Department of Rehabilitation and Correction (ODRC), a department of the State of Ohio created and maintained under O.R.C. § 5120. O.R.C. § 5120.01 charges and authorizes Defendant Collins to prescribe and direct the promulgation of rules and regulations for the ODRC, including the rules and regulations for the conduct of prison operations and execution

procedures. He is sued here in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.

7. Defendant Phil Kerns is, and at all times relevant was, Warden of the Southern Ohio Correctional Facility at Lucasville (SOCF), an ODRC correctional institution that was created and is maintained under O.R.C. § 5120.05, and is where sentences of death are executed 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 the oversight of training of personnel and implementation of executions carried out there. He is sued here in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.
8. Defendants, at all relevant times, were acting in their 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, under the authority of state law, by executing Plaintiff by utilizing lethal injection methods that will violate his constitutional rights.

III. FACTS SUPPORTING PLAINTIFF'S CLAIMS FOR RELIEF

9. Plaintiff is presently incarcerated at the Ohio State Penitentiary in Youngstown, Ohio (OSP).
10. Plaintiff is scheduled to be executed by lethal injection on October 14, 2008 at 10:00 a.m. at the Southern Ohio Correctional Facility (SOCF).
11. Defendants intend to execute Plaintiff by employing the same means and methods of lethal injection as identified in the July 10, 2006 and October 11, 2006 protocols. (Exs. A, B)

12. Plaintiff alerted undersigned counsel to difficulty in accessing his veins during attempts to draw his blood. Review of his records demonstrated a potential vein access issue. Similarly, Plaintiff advised counsel that he currently is receiving medication to treat cluster migraines.
13. After being alerted to this information, Plaintiff provided to Mark J.S. Heath, MD his relevant institutional records as well as the interdisciplinary notes created when Plaintiff faced an execution date in July 2003 (Ex. C). Plaintiff also provided Dr. Heath with his current height and weight. [Plaintiff requested his entire ODRC medical record on May 22, 2008. (Ex. D) To date, Plaintiff has not received those records. Therefore, Plaintiff could not provide Dr. Heath with additional, current medical records.]
14. Dr. Heath provided Plaintiff with a declaration based on his review of the materials identified within his affidavit, as well as the information he relied on in preparing his February 2008 affidavit in State v. Rivera, Case nos. 04CR065940, 05CR068067 (Lorain C.P.). (Ex. E) Dr. Heath's review establishes that venous access during Plaintiff's execution, as a result of his poor veins and morbid obesity, will be difficult, and quite possibly impossible under Ohio's current lethal injection protocol. Plaintiff's current treatment of cluster migraines could render him tolerant to the first drug administered during Ohio's lethal injection protocol. In addition, Plaintiff is at a greater risk of anesthesia awareness as result of that same medication.

Venous access

15. Plaintiff previously faced an execution date in July of 2003. He was transferred to SOCF in preparation for his July 2003 execution date. Staff at SOCF evaluated Plaintiff's veins on July 23, 2003 apparently "specifically for the purpose of determining the suitability of [Plaintiff's] veins for IV access for execution." (Ex. E, p. 2). Those findings are contained

in an interdisciplinary progress note completed by Mona Parks, RN. (Exs. D, E) The notes reveal that Plaintiff advised Parks that “when you start the IV’s come 15 min early, I don’t have any veins.” (Id.) The notes went on to indicate that the IV team was informed that Cooley’s veins are “sparce” [sic]. (Id.) The IV team was advised that Plaintiff “has good vein to right hand – smaller on [sic] on left.” (Id.)

16. Plaintiff’s attorneys also informed Dr. Heath that Plaintiff indicated that “Mansfield Correctional medical staff encountered problems on two occasions when attempting to find a vein when they were drawing blood.” (Ex. E, p. 2) Dr. Heath notes that while blood tests were performed that show that it was possible to draw blood, “removal of blood from a vein is, in almost all cases, significantly easier than properly inserting an IV catheter within a vein.” (Id.)

17. One additional fact impacts on Defendants’ ability to access Plaintiff’s veins for purposes of lethal injection. Plaintiff’s height is 5’7” and his weight is 267 pounds. (Id.) His current Body Mass Index (BMI) is 41.8. (Id.) Thus, “it appears that Mr. Cooley suffers from morbid obesity, a condition that increases the risk that IV access, either peripheral or central, may be problematic.” (Id.) In particular, morbidly obese people “often have significant deposits of adipose tissue (fat) overlying their veins, making it difficult or impossible to successfully establish peripheral IV access.” (Id.) Dr. Heath expressed the concern that “[i]f Mr. Cooley has gained weight since the 2003 [execution date] it is possible that the single ‘good’ vein on his right hand identified by Ms. Parks may now be obscured.” Upon information and belief, Plaintiff is heavier today than in 2003 when Defendants previously evaluated his veins.

Tolerance as a result of Topamax treatment

18. Dr. Heath also expressed concern over medication Plaintiff is currently taking to treat cluster migraines, Topamax (topiramate). (Ex. E, p. 1) Topamax, a drug used to treat seizures, “interacts with the GABA neurotransmitter system in the brain.” (Id.) The GABA neurotransmitter is also involved in the actions of many other depressant/sedative/anesthetic drugs, such as ethanol (alcohol) and barbiturates. (Id.) “A person who has been taking any of the substances over time is likely to develop resistance to the effects of other substances that interact with the GABA neurotransmitter system.” (Id. at 1-2) Resultantly, “Mr. Cooley’s ongoing exposure to Topamax may decrease his sensitivity to barbiturates, including thiopental,” which is the first drug administered by Defendants during Ohio’s lethal injection process. (Id. at 2)
19. Further, “Topamax also has analgesic (pain reducing) properties, and thus may place Mr. Cooley at increased risk for awareness during the attempted anesthetic component of the lethal injection procedure.” (Ex. E, p. 2)
20. Although a “full dose of thiopental [was] successfully delivered into his circulation” Plaintiff would be deeply anesthetized regardless of his treatment with Topamax, (id.), “it is also likely that his use of Topamax decreases the margin of safety and therefore makes him more vulnerable to the consequences of a partially failed thiopental administration.” (Id.) In addition, Plaintiff’s morbid obesity (weight of 267 pounds) and the “relatively low dose of thiopental used by Ohio compared with other states [Ohio administers two grams of sodium thiopental in contrast to 3 to 5 gram doses found in other states], increases the risk that Mr. Cooley, in particular, would not be adequately anesthetized if he is executed under the current Ohio protocol.” (Id.)

Efforts by Plaintiff to address these issues

21. In response to this information, and Dr. Heath's declaration, Plaintiff's counsel contacted Defendants' counsel on June 19, 2008. (Ex. F) Undersigned counsel identified these problems outlined in the preceding paragraphs and provided Dr. Heath's declaration. Counsel noted that ODRC had yet to provide Plaintiff with his current medical records. Counsel then identified the issues of venous access and tolerance. Counsel requested that Defendants identify "what alternative means of obtaining venous access the IV team [would] use if it is unable to obtain peripheral vein access" during Plaintiff's lethal injection (ODRC's current lethal injection protocol provides no guidance on how the IV team will gain venous access when peripheral access cannot be achieved. (Exs. A, B)). Counsel also asked what, "if any, alterations [would be made] to Ohio's lethal injection protocol, including [] the dosage of drugs and ascertainment of depth of anesthesia, to ensure that Mr. Coeey will be adequately anesthetized during any execution." (ODRC's current lethal injection protocol does not provide for consideration of issues of tolerance, including changes in the dosage of sodium thiopental or additional evaluations to ensure proper anesthesia. (*Id.*)) As of the filing of this pleading, the only response Plaintiff has received is a letter from Defendants' counsel indicating that Exhibit F had been provided to Defendants. (Ex. G)

Conclusions

22. The State of Ohio has scheduled Plaintiff's execution for October 14, 2008. There is presently no assurance that the manner in which ODRC will obtain access to Plaintiff's veins will be humane. Moreover, there is presently no assurance that Defendants will ensure that Plaintiff is properly anesthetized during his scheduled execution. Plaintiff has raised issues, which Defendants are not addressing, that raise a "substantial risk of serious harm." *Baze v.*

Rees, ___ U.S. ___, 128 S. Ct. 1520, 1532 (2008). Moreover, because of Defendants' failure to detail the specifics of how it will address the issues raised by Cooley, he is unable to offer a remedial alternative to this Court.

23. If the "substantial risk of serious harm" associated with an execution by lethal injection in the Plaintiff's case may be easily remedied or mitigated by employing alternative methods or altering the procedures employed in the execution process, Defendants' failure to take these steps violates Plaintiff's rights under the United States Constitution. Defendants have failed to even identify how they plan to address potential problems in Plaintiff's lethal injection execution, despite the fact his scheduled execution is less than three months away (October 14, 2008). Defendants' refusal to identify and describe the procedure and personnel that will be employed during Plaintiff's execution itself raises issues of constitutional importance. Plaintiff is precluded from knowing any meaningful information about any deviation from Ohio's lethal injection protocol that will be used during his execution.
24. Any means and methods devised by Defendants to address the problems Plaintiff raised in Exhibits E and F may not comport with the mandates of the Constitution and O.R.C. § 2949.22. Foreseeable alternatives include a cut-down or a central line, but there is no "meaningful articulated plan that takes this issue into account." (See Ex. E, p. 3) Defendants' failure to describe the procedures they intend to put in place to address these issues means that Plaintiff cannot evaluate them. Similarly, this Court cannot make that evaluation. "By dint of its failure to plan, the ODRC is planning to fail, and at this time appears to intend to embark down the same path that led to the problematic execution of Mr. Clark." (Id.) Ohio's current protocol's wholesale failure to address issues of venous access and/or drug tolerance means that this Court cannot be confident that Defendants are taking all

necessary and appropriate steps to minimize the known risks specific to Plaintiff, that there is a “substantial risk of serious harm.” Baze, __ U.S. at __, 128 S. Ct. at 1532.

25. Where, as here, Plaintiff has demonstrated the existence of genuine concerns about the humaneness of the execution procedure, this Court cannot condone the risk of allowing Plaintiff’s execution without assuring itself that the constitutional prohibitions against the infliction of “unnecessary pain in the execution of the death sentence” will be honored. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).

26. Where, as here, Plaintiff has demonstrated the existence of genuine concerns about whether Ohio’s lethal injection protocol “will quickly and painlessly cause death,” O.R.C. § 2949.22, this Court cannot condone the risk of allowing Plaintiff’s execution without assuring itself that Plaintiff’s due process interest in O.R.C. § 2949.22 will be honored.

27. Failure to provide injunctive relief will result in irreparable harm—the Defendants will execute Plaintiff under Ohio’s current lethal injection protocol, which does not consider the venous access issue or Plaintiff’s potential tolerance to sodium thiopental. Those failures will subject Plaintiff, as described herein, to a substantial risk of serious harm. Baze, __ U.S. at __, 128 S. Ct. at 1532.

FIRST CLAIM

28. Plaintiff has the right under the Eighth Amendment, as applied to the states through the Fourteenth Amendment, to be free from cruel and unusual punishment.

29. The Defendants’ inactions—failing to devise (and disclose) deviations from Ohio’s lethal injection protocol to address the unique issues raised by Plaintiff’s physical and medical condition—will result in the deprivation of Plaintiff’s rights as guaranteed by the Eighth Amendment.

SECOND CLAIM

30. O.R.C. § 2949.22 authorizes Defendants to execute Plaintiff by lethal injection. It provides 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.”
31. 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, Case No. 04CR065940, Judgment Entry at p. 5 (Lorain C.P. June 10, 2008) (Ex. H). 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 7.
32. This duty’s mandatory nature 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 Wolf v. McDonnell, 418 U.S. 539, 557 (1974). This right outweighs any State interest in a “quick” execution, if such an interest exists. Rivera, Case No. 04CR065940, Judgment Entry at p. 6 (Ex. H).
33. The Defendants’ inactions—failing to devise and disclose deviations from Ohio’s lethal injection protocol to address the individual issues raised by Plaintiff’s physical and medical condition will result in the deprivation of Plaintiff’s Fourteenth Amendment property interest in the benefit of a “painless” death assigned by O.R.C. § 2949.22. See id. at p. 5.
34. If Defendants execute Plaintiff under their current lethal injection protocol, without adjusting it to address Plaintiff’s individual, current medical conditions, Defendants will violate

Plaintiff's constitutional right to due process under the Fourteenth Amendment of the United States Constitution. See id. at p. 6-7.

PRAYER FOR RELIEF

Plaintiff requests that this Court provide him with the following relief:

- A. Grant him injunctive relief by granting a permanent injunction barring Defendants from executing Plaintiff under Ohio's current lethal injection as it fails to provide for, or identify an alternative mode of venous access and/or fails to address issues of potential drug tolerance. This order is necessary to prevent Defendants from violating Plaintiff's federal constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution.
- B. Enter an order that directs the Defendants to provide Plaintiff with any alterations it plans to make to Ohio's current lethal injection protocol concerning the two issues raised by Plaintiff—venous access and tolerance.
- C. Enter an order directing Defendants to promulgate a protocol which addresses venous access and comports with the Eighth Amendment and O.R.C. § 2949.22.
- D. Enter an order directing Defendants to promulgate a protocol to address potential drug interactions (i.e. tolerance) with sodium thiopental that comports with the Eighth Amendment and O.R.C. § 2949.22.
- E. Enter an order that provides for attorney's fees and costs of litigation under Title 28 of the Federal Code and 42 U.S.C. § 1988.
- F. Enter an order granting such further relief as this Court deems just and proper.

Respectfully submitted,

Office of the Ohio Public Defender

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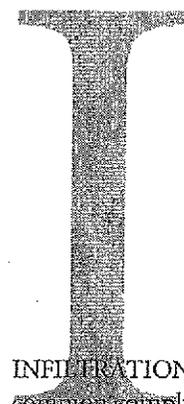
Counsel For Richard Cooley

281936

Reducing the risks of infiltration and extravasation

Protect your patients from potentially disabling complications by following these practice guidelines.

By Kelli Rosenthal, RN,BC, ANP, APRN,BC, CRNI, MS



INFILTRATION AND EXTRAVASATION are all-too-common complications of intravenous (I.V.) infusion therapy, especially therapy involving peripheral I.V. sites. You can significantly reduce their likelihood by understanding what causes them, choosing the right veins and equipment for the prescribed therapy, and monitoring the I.V. site closely. In this article, I'll review guidelines for protecting your patients from these painful, costly, and potentially dangerous complications.

Getting down to definitions

According to the Infusion Nursing Standards of Practice, infiltration is "the inadvertent administration of nonvesicant medication or fluid into the surrounding tissue instead of into the intended vascular pathway." This definition applies to most I.V. fluids and drugs, including irritants—fluids that can cause discomfort or pain at the venipuncture site or inside the vein or ones that can cause skin irritation such as contact dermatitis. Extravasation is infiltration with a vesicant medication or fluid. When these highly irritating fluids leak out of a vein, they cause blisters and can even damage or destroy surrounding tissue.

Because of these concerns, some infusates aren't ap-

propriate for peripheral delivery. To prevent or reduce vascular complications, Infusion Nurses Society (INS, formerly Intravenous Nurses Society) standards recommend that you choose the type of vascular access according to the pH and osmolarity of the infusion. (See *Special concerns with central venous access and implanted ports.*)

Infiltration and extravasation occur when the I.V. catheter isn't fully in the vein or the vein has torn, letting the infusate leak. These complications occur when:

- the catheter isn't inserted correctly into the vein
- the lining of the vein has been damaged and swells, preventing the infusate from flowing forward; instead, the infusion stops or leaks out into the surrounding tissue
- a clot forms within the vein or around the cannula, causing infusate to seep into surrounding tissue or the vein to tear and infusate to leak out. Phlebitis or thrombophlebitis can also result.
- the cannula punctures or erodes through the opposite wall of the vein. This can also be accompanied by phlebitis or thrombophlebitis.
- the catheter is pulled out of the vein during patient movement or because it wasn't secured well.

Although infiltration and extravasation are more

likely to occur with peripheral I.V. infusions, these complications can develop with central venous catheters and implanted infusion ports as well. The effects are sometimes devastating because of the volume involved and because these devices are more likely to be delivering vesicant medications. Be sure to closely monitor any infusion for signs of infiltration or extravasation, especially if the infusate is an irritant or vesicant.

Range of effects

Most I.V. infiltrations don't cause serious tissue damage, but they're uncomfortable for the patient. Also, infiltrations require you to remove the catheter and insert a new one elsewhere, reducing the number of I.V. sites available, taking up valuable time, and increasing the money spent on supplies.

The most serious consequences occur with extravasation of large amounts of highly irritating solutions, such as those containing calcium, potassium, some antibiotics, vasopressors, or chemotherapeutic agents. Tissue damage

from vesicant solutions may be directly related to the drug's pH: Extremely acidic or caustic drugs and solutions can cause severe chemical burns. Extremely concentrated fluids or medications can cause tissue necrosis.

The extent of injury from infiltration or extravasation may depend on how quickly you intervene and how much fluid leaks into tissues, although even a moderate amount of fluid can cause damage due to compression. By detecting and treating infiltrations or extravasations early, you may prevent nerve damage and tissue sloughing requiring surgery. Failure to detect these complications promptly can lead to permanent disfigurement and loss of function, even if the patient undergoes reconstructive surgery. Patient injury related to infiltration and extravasation is a lawsuit waiting to happen.

Watch for these signs

To avoid problems, be alert for common signs and symptoms of I.V. infiltration, which include:

- skin that looks blanched, taut, or stretched or that the pa-

Special concerns with central venous access and implanted ports

According to the Infusion Nurses Society (INS) Standards, a medication or solution with a pH less than 5 or greater than 9 should not be delivered through peripheral cannulas. Some examples of medications with extremely high or low pH are vancomycin (pH ~7.4) and phenytoin (pH ~12). Likewise, parenteral nutrition solutions containing more than 3% protein hydrolysate or 10% dextrose must be infused through a central venous access device.

Because an extravasation of a vesicant could be devastating, the INS standards call for all continuous vesicant infusions to be administered through a central venous catheter or port. If a bolus of a known vesicant or irritant medication must be infused peripherally, it should be administered through the side port of a running I.V. line, preferably one placed for this specific purpose.

When administering a vesicant or irritant through a central venous access device, always assess for a blood return

before starting the infusion and recheck for blood return frequently. Loss of blood return may indicate that a fibrin sheath has formed on the outside of the catheter. If this sheath is patent over the catheter, it can cause retrograde infusion, which could lead to leakage of fluid and medication into the surrounding tissue. Notify the health care provider to obtain orders for a thrombolytic medication to restore a free-flowing and aspirated blood return.

If blood return isn't restored with a thrombolytic, the health care provider will order a dye study through the catheter to assess for other possible causes of the occlusion, such as pinch-off syndrome. A possible complication of subclavian catheters, pinch-off syndrome occurs when the catheter is scissorsed between the first rib and the clavicle, usually from a too-medial placement. This can lead to catheter fracture.

If your patient has central access via an implanted port, a dislodged noncoring infusion needle can lead to extravasations. Always choose a needle that's long enough to hit the back of the port or access, but not so long that a portion of the needle sits above the septum. Using a needle that's too long can cause "rocking" within the port, damaging the septum and leading to extravasation of fluid from the septum.

When patients are connected to an infusion via their implanted ports, assess the port access site frequently (as you would a peripheral I.V. line), looking for any leaking under the dressing or subcutaneous swelling around the port. If the patient complains of any sensation while you flush or infuse fluid through the port, stop the infusion and notify the health care provider, who'll assess whether a port-catheter separation has occurred. Although rare, this complication can result from repeated friction, stress, or other causes.

patient says feels "tight"

- edema at the insertion site
- cool skin temperature
- discomfort
- slowing or stopped gravity infusion
- I.V. fluid leaking out of the insertion site or from under the dressing
- a tourniquet applied above the I.V. insertion site that doesn't stop fluid from infusing
- no visible blood return when the infusion bag is lowered and you apply pressure on the vein proximal to the tip of the cannula. (*Note:* Blood return doesn't rule out infiltration.)

Discomfort or burning while an irritant or vesicant is

pect, are usually a good choice. Forearm bones act as a natural splint to support the site, providing stability.

Start as low on the forearm as possible (avoid any site below a recent venipuncture in the same vein), but don't use veins on the volar aspect of the wrist because they lie close to nerves. Also avoid using the inner aspect of the elbow (the antecubital fossa) to administer I.V. therapy. An infiltration in this area is difficult to detect until it becomes quite large. Fluid infiltrating the antecubital fossa could compress important structures in the area, such as the brachial artery and median nerve, causing nerve damage or tissue necrosis.

To maximize hemodilution of the medication, choose the smallest possible I.V. catheter that will safely deliver the

Failure to detect infiltration and extravasation promptly can lead to permanent disfigurement and loss of function, even if the patient undergoes reconstructive surgery. Patient injury related to infiltration and extravasation is a lawsuit waiting to happen.

being administered may indicate damage to the vessel. Consider a complaint of pain to be a warning sign that extravasation may occur if you continue to administer the medication. According to the INS, you should take these steps:

- turn off the infusion
- start an I.V. line in the other arm if not contraindicated
- follow your facility's policy for treating an infiltration or extravasation. For example, for an infiltration you may need to remove the line and apply warm or cool compresses; for an extravasation, you may need to administer an antidote before you remove the I.V. line.

Preventing problems

Before administering a vesicant, vasoconstricting, or corrosive medication, be aware of your facility's policies for administering them and their antidotes. If an extravasation occurs, intervene appropriately before discontinuing the I.V. site.

To prevent infiltration, start by choosing a vein suitable for the therapy. Choose a vein that feels smooth and resilient, not one that's hard or cordlike. Avoid areas of flexion because movement can dislodge the catheter. If you must choose a site near an area of flexion, use an armboard per your facility policy. Arm boards are recommended by the INS in areas of flexion and directly adjacent to areas of flexion. If your patient will be using her hands for activities, avoid hand veins.

The veins of the forearm, especially on the inner as-

infusion. This will allow blood flow to dilute the infusate and carry it away from the insertion site, and blood can return to the heart with minimal impedance from the catheter.

Always insert the I.V. device with its bevel facing up to reduce the risk of puncturing the vein's opposite wall. Consider using catheter securement or protection devices to reduce the risk of dislodgment, especially in pediatric or geriatric patients.

Assessing the site

After establishing a central venous access device or a peripheral I.V. access, assess the insertion site often—every 1 or 2 hours for a patient receiving a continuous infusion.

Make sure the site is easily visible by covering it with a clear, moisture-vapor transmissible dressing.

Palpate around the site for tenderness or coolness and swelling. Pick up the patient's arm to check for dependent edema. You can use a bright flashlight. A large, diffuse circle of light around the I.V. site indicates a collection of subcutaneous fluid. This can signal infiltration unless the patient has general edema.

Act fast when problems occur

If you discover that an I.V. line has infiltrated or extravasated, stop the infusion and thoroughly examine the site. If the patient has suffered a large infiltration or if an irritant or vesicant is involved, notify the patient's health care provider.

If the catheter remains lodged in tissue, you can attempt to aspirate any fluid remaining in the catheter to lessen the amount of drug pooled at the site. Some vesicant antidotes can be infused into the I.V. catheter before it's removed; check your facility policy, a drug reference, or the pharmacy to find out the recommended antidote, if any.

After removing the catheter, elevate the affected arm if it makes the patient more comfortable and apply cool compresses (or warm compresses, if vinca alkaloids or epipodophyllotoxins are involved). If the patient develops blistering, which may occur 48 to 96 hours after the injury, he may need to be examined by a plastic surgeon or the wound care service.

Documenting the problem

Follow your facility's guidelines for documenting infiltration or extravasation. Take exact measurements of arm circumference or the area of infiltration or extravasation. Following policy, take pictures of extravasations to help clinicians gauge progress and to document the scope of the injury.

Refer to the *Infusion Nurses Society Standards of Practice Infiltration Scale* to grade the infiltration, then incorporate the grade and criteria into your documentation. These standardize the description of an infiltration.

All infiltrations and extravasations, especially those that cause tissue damage, should be tracked for quality improvement purposes.

Improving practice in the future

If it hasn't already been done, partner with the pharmacy to develop a list of "alert" medications that have been involved in extravasation injuries so that patients needing these medications can be evaluated for central line placement. Also consider working with the pharmacy to develop grand rounds focused on these "alert" medications to enhance staff awareness of the risks of extravasation injury.

Routinely using commercially available securement devices can dramatically reduce the incidence of peripheral catheter dislodgment, a primary cause of infiltration. Educate patients about which signs and symptoms to report so the nursing staff can limit the severity of any infiltrations that occur.

By using the best and most appropriate practices for I.V. therapy, you'll lessen the chances of your patient having an infiltration or extravasation. If they occur despite your best efforts, you can limit the damage by recognizing the problem quickly and responding appropriately. ■

Infusion Nurses Society Standards of Practice Infiltration Scale

Grade	Clinical criteria
0	No symptoms
1	Skin blanched Edema < 1 inch (2.5 cm) in any direction Cool to touch With or without pain
2	Skin blanched Edema 1 to 6 inches (2.5 to 15 cm) in any direction Cool to touch With or without pain
3	Skin blanched, translucent Gross edema > 6 inches (15 cm) in any direction Cool to touch Mild to moderate pain Possible numbness
4	Skin blanched, translucent Skin tight, leaking Skin discolored, bruised, swollen Gross edema > 6 inches (15 cm) in any direction Deep pitting tissue edema Circulatory impairment Moderate to severe pain Infiltration of any amount of blood product, irritant, or vesicant

Source: Infusion Nurses Society. *Infusion nursing standards of practice*. *Journal of Infusion Nursing*, 29(1S):S1-S92, January/February 2006.

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Kelli Rosenthal is president and chief executive officer of ResourceNurse Continuing Education, Inc., of Long Beach, N.Y., and past president of the Association for Vascular Access.



September 15, 2009

Botched execution brings reprieve

By Jon Craig and Lisa Preston
jcraig@enquirer.com

LUCASVILLE - A condemned inmate whose execution was stopped because of problems finding a usable vein will remain in the same maximum security prison over the next week.

Prisons spokeswoman Julie Walburn says inmate Romell Broom has been placed in a cell in the infirmary at the Southern Ohio Correctional Facility in Lucasville.

Walburn says Broom is on close watch similar to the constant observation of death row inmates in the three days before an execution.

Death row inmates are housed in a Youngstown prison and executed in the death chamber at Lucasville. There's no precedent for housing an inmate whose execution didn't work.

After an execution team spent about two hours trying to find a usable vein on Broom's arms and legs, Gov. Ted Strickland ordered a week's reprieve for the 53-year-old convicted rapist-murderer from Cleveland.

In a prison witness room, the parents and aunt of Tryna Middleton — who was fatally stabbed on Sept. 21, 1984 — watched silently as prison nurses struggled to keep Broom's veins open for a lethal mix of chemicals to execute him.

There were so many logistical problems encountered Tuesday by an experienced execution team that Broom was never moved to the injection table in the adjoining death chamber. The Middletons and four news reporters, including from The Enquirer, watched the process via television monitors as prison staff tried to hook Broom to tubes in preparation for lethal injection.

Several times, Broom rolled onto his left side, pointed at veins, straightened tubes or massaged his own arms to help prison staff keep a vein open. He was clearly frustrated as he leaned back on the gurney, covering his face with his hands and visibly crying. His stomach heaved upward and his feet twitched. There is no audio from the holding cell, so reporters could only watch his movements. When the staff tried to put IVs in his legs, Broom looked up toward the camera above, appearing to grimace, at least four times, from pain.

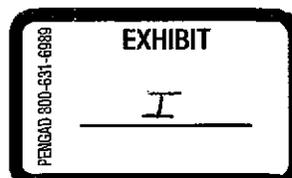
As Broom's anxiety grew, he repeatedly wiped his sweaty forehead with toilet paper.

Broom had no witnesses present; however, his attorney, S. Adele Shank, asked to watch after an hour of failed attempts to find a working vein.

"I want to know what Romell wants me to do," she said. "He's always been very cooperative. ... I started getting worried."

Shank left the witness area for about 30 minutes before returning to say Strickland and Ohio Supreme Court Chief Justice Thomas J. Moyer had been notified about the problems.

"I was very distressed," Shank said afterward. "We are grateful this was stopped today."



Terry J. Collins, director of the Ohio Department of Rehabilitation and Correction, said prison staff had asked Broom several times if he wanted to take a break, but the inmate said no. Shank and Collins both stated that each had made a recommendation to Strickland to halt the process for the day. The execution was rescheduled for 10 a.m. Tuesday, but Shank said legal appeals are a certainty.

The problems prompted the American Civil Liberties Union of Ohio to ask state officials to immediately halt executions.

"With three botched executions in as many years, it's clear that the state must stop and review the system entirely before another person is put to death," ACLU Ohio counsel Carrie Davis said. In addition to the delayed execution of Joseph Clark in 2006, the state also had difficulty finding the veins of inmate Christopher Newton, whose May 2007 execution was delayed nearly two hours. In that case, the state said the delay was caused by team members taking their time.

The problems led to changes in Ohio's lethal injection process. Since then, the state's execution rules have allowed team members to take as much time as they need to find the best vein for the IVs that carry three chemicals.

Collins said the difficulty in the process "absolutely, positively" does not shake his faith in the state's lethal injection procedure.

Legal appeals delayed the start of the execution process by 3½ hours, to 2 p.m.

This was the first of 33 executions carried out since 1999 that was stopped for procedural reasons. Others were postponed due to court stays.

At least 20 protesters showed up. Many left for home by 1:30 p.m. because of the long drive home and the sweltering heat.

The one group that was there to the end was from Cincinnati. Sister Alice Gerdeman is president of Ohioans to Stop Executions. There were four of them remaining when the execution was halted. All four were still praying and weeping for Broom and his victims as the empty hearse drove out the prison gate.

The Associated Press contributed.

Additional Facts

Read Strickland's order

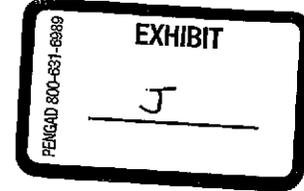
WARRANT OF REPRIEVE

1. Romell Broom is currently in the custody of the Ohio Department of Rehabilitation, has been sentenced to death, and the Ohio Supreme Court scheduled his execution for September 15, 2009.
2. Difficulties in administering the execution protocol necessitate a temporary reprieve to allow the Department to recommend appropriate next steps to me.
3. Ohio Revised Code Section 2967.08 provides that the Governor may grant a reprieve for a definite time to a person under sentence of death, with or without notices or application.
4. Accordingly, I direct that the sentence of death for Romell Broom be reprieved until September 22, 2009.
5. Mr. Broom should remain incarcerated in the custody of the Ohio Department of Rehabilitation and Correction. The Department should carry out Mr. Broom's sentence on that day unless further

reprieve or clemency is granted.

6. I signed this Warrant of Reprieve on September 15, 2009 in Columbus, Ohio.

Ted Strickland, Governor



The Seattle Times

Thursday, September 24, 2009 - Page updated at 02:01 PM

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Other states watching Ark. lethal injection case

By **JIM SALTER**
Associated Press Writer

An attorney for four Arkansas death row inmates who are challenging the state's lethal injection procedure told a federal appeals court panel Thursday that even with new methods in place, the process can cause pain and suffering.

A three-judge panel of the 8th U.S. Circuit Court of Appeals heard the case filed on behalf of convicted killers Don William Davis, Jack Harold Jones Jr., Terrick Nooner and Frank Williams Jr.

Other death penalty states are watching the outcome, which isn't expected for several weeks. In fact, an attorney for Missouri death row inmate Reginald Clemons was in court to observe. The issue also drew attention earlier this month after a failed attempt to execute an inmate in Ohio.

Lethal injection had been on hold across the country until a Supreme Court ruling last year in a case out of Kentucky about whether the three-drug combination used in executions causes unconstitutional pain and suffering. Roughly three dozen states use the combination - an anesthetic, a muscle paralyzer and a substance to stop the heart.

After that ruling, Arkansas prison officials introduced new procedures. Joe Cordi of the Arkansas Attorney General's office told the panel the new protocol is thorough in trying to ensure that the inmate doesn't suffer.

But the attorney for the inmates, Scott Braden, said concerns remain both about the written procedures and how they would be carried out, especially because Arkansas has a history of botched executions.

In January 1992, 40-year-old Rickey Ray Rector could be heard groaning for almost 20 minutes before workers pulled back the curtain shielding the execution chamber. An autopsy found 10 puncture marks where the execution team tried to insert IV lines, and showed that executioners likely cut into muscle on his right arm to find a vein.

Arkansas' new protocol calls for executioners to check condemned inmates for fluttering eyelids and shake them to ensure that they are unconscious before delivering the two final drugs.

While the written protocol does not specify that a doctor be part of the IV team, Cordi told the panel he would advise the state Department of Corrections to have a physician present.

Cordi said the state will examine inmates in the days prior to executions to make sure a suitable vein is found, most likely in the arm. Still, the new procedure does allow for execution room "incisions," which Braden questioned.

"It's not a clinical setting," Braden said. "It's on an execution table in a concrete room in a prison system."

The process of making incisions in the execution room could itself be painful, Braden said, and could also call into question whether the lethal drugs are administered properly.

"If the IV isn't established correctly, the inmate suffers excruciating pain with the two lethal chemicals," he said after the hearing. "You, in a sense, drown."

Arkansas has not conducted an execution since 2005, but the appeals court case and another lawsuit by Williams before the state Supreme Court are the last legal challenges. Forty men are on death row, and chief deputy attorney general Justin Allen said that once the Williams case is resolved his office will begin seeking execution dates.

Legal challenges remain in other states as well.

In Missouri, Clemons' lawsuit claims the state has not shown that it can carry out lethal injection procedures correctly. Clemons was scheduled to die in June, but the 8th Circuit granted an indefinite stay without giving a reason.

In Ohio, a federal judge issued a temporary reprieve this month for an inmate after executioners couldn't find a usable vein for the IV line. Inmate Romell Broom, who wept during the procedure, later said he was stuck with needles as many as 18 times.

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THE SUPREME COURT OF WASHINGTON

CAL COBURN BROWN,)
PETITIONER,)
v.)
ELDON VAIL, SECRETARY OF)
DEPARTMENT OF CORRECTIONS, ET)
AL.,)
RESPONDENTS.)

ORDER
Supreme Court No. 82832-6
FILED
STATE OF WASHINGTON
SUPREME COURT
MAR 12 P 4:20
BY CALDON BROWN
CLERK

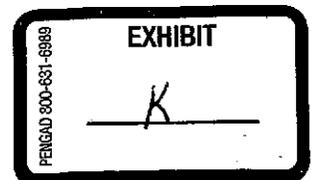
This matter coming before this Court on Petitioner's Motion for Discretionary Review of a Thurston County Superior Court decision denying a preliminary injunction, and seeking a stay of execution from this Court. This Court being further advised that this case has been consolidated in Thurston County Superior Court with *Darold R.J. Stenson v. Eldon Vail, et al.*, Thurston County Superior Court No. 08-2-02080-8, challenging the constitutionality of lethal injection as a method of execution and other challenges. This Court further being advised that proceedings are scheduled in Thurston County Superior Court in May, 2009, to resolve these issues. Based on a majority vote, it is hereby:

Ordered that the Motion for Discretionary Review is granted for the limited purpose of addressing Petitioner's request for a stay of execution. It is further

Ordered that the execution of Cal Coburn Brown, which is scheduled for March 13, 2009, is stayed pending further order of this Court. It is further

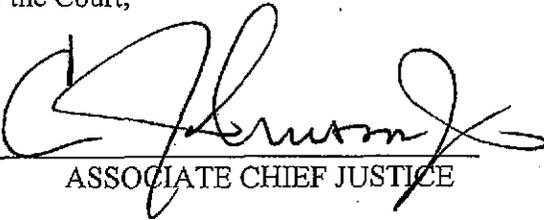
Ordered that this matter is returned to the Thurston County Superior Court.

555/14



DATED at Olympia, Washington this 12th day of March, 2009.

For the Court,


ASSOCIATE CHIEF JUSTICE

Dissenting:

Alexander, C.J.
Owen, J.
Fairhurst, J.
I dissent, with opinion to follow
J. McQuinn, J.

cc: Hon. Jim Gibbons, Governor, State of Nevada
ACLU of Nevada
Allen Lichtenstein
Lee B. Rowland
Howard Skolnik, Director, Nevada Department of Prisons
Attorney General Catherine Cortez Masto/Carson City

September 20, 2007

U.S. Judge Blocks Lethal Injection in Tennessee

By THEO EMERY

NASHVILLE, Sept. 19 — A federal judge on Wednesday blocked next week's scheduled execution of a prisoner in Tennessee, ruling that newly revised lethal injection procedures were unconstitutional.

Judge Aleta A. Trauger of Federal District Court here ruled that the state cannot execute the prisoner, Edward J. Harbison, 52, because Tennessee's use of a three-drug lethal injection would present "a substantial risk of unnecessary pain." Mr. Harbison had been scheduled to die by lethal injection next Wednesday.

Tennessee is among 11 states in which executions have been postponed or blocked over concerns about lethal injection and whether it constitutes cruel and unusual punishment, according to the Death Penalty Information Center, a nonprofit research group. Thirty-seven of 38 states with the death penalty allow lethal injection; Nebraska requires electrocution.

In February, Gov. Phil Bredesen imposed a 90-day moratorium on four executions while the state revised its death penalty protocols, which had been criticized as a hodgepodge of conflicting, confusing instructions.

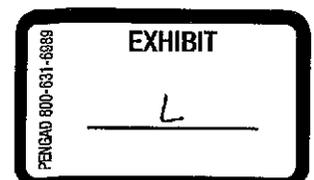
After the state released a clarified and updated set of procedures, it resumed lethal injections in May, with the execution of Philip R. Workman. Last week, Tennessee put Daryl Holton to death by electric chair.

A spokeswoman for State Attorney General Robert E. Cooper Jr. said no decision had been made on whether to appeal Judge Trauger's ruling.

Mr. Harbison, who has been on death row since he was convicted in 1983 for beating an elderly woman to death, had appealed his sentence, arguing that the new protocols were illegal.

In her ruling, Judge Trauger wrote that the protocols do not safeguard against pain. If the three drugs are not administered with proper anesthesia, she wrote, the result could be "a terrifying, excruciating death."

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Deborah W. Denno, an authority on execution at the Fordham University Law School, said Judge Fogel's decision was "both bold and safe."

"Judge Fogel's decision is the most definitive response so far in concluding that a state's lethal injection protocol, in its current form, is unconstitutional under the Eighth Amendment," Professor Denno said.

Even as Judge Fogel issued a withering critique of the way California executes condemned inmates, he invited the state to submit a revised protocol to remedy the shortcomings. Similarly, Mr. Bush suggested that executions in Florida might resume after his panel gives its final report in March.

Judge Fogel found that prison execution teams had been poorly screened and had included people disciplined for smuggling drugs and with post-traumatic stress disorder. Moreover, the team members are poorly trained and supervised, he said.

Record keeping is spotty, the judge found, and the chemicals used are sometimes improperly prepared. The death chamber, he added, is badly lighted and overcrowded.

"Defendants' actions and failures to act have resulted in an undue and unnecessary risk of an Eighth Amendment violation," Judge Fogel wrote. "This is intolerable under the Constitution."

Judge Fogel also noted concerns about the chemicals that California, Florida and 35 other states use. The protocols vary slightly, but almost all call for a series of three chemicals. The first is a barbiturate to render the inmate unconscious. The second is a paralyzing agent that makes the inmate unable to speak, move or breathe. The third is potassium chloride, which stops the heart.

Both sides in California agreed that it would be unconstitutional to inject a conscious person with either or both of the second two chemicals. The paralyzing agent would leave the inmate conscious while he suffocated, and potassium chloride is extremely painful.

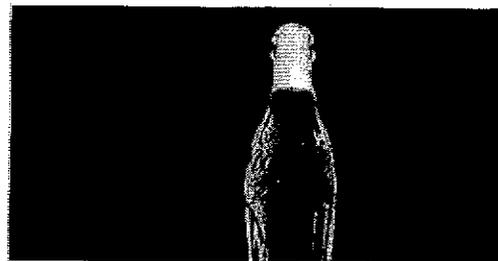
The two sides also agreed that if the first drug was effective, using the others did not violate the constitution.

Judge Fogel suggested a way out. Were inmates executed in the same way that animals were euthanized, solely by an anesthetic, that would, he wrote, "eliminate any constitutional concerns, subject only to the implementation of adequate, verifiable procedures to ensure that the inmate actually receives a fatal dose of the anesthetic."

Kent Scheidegger, the legal director of the Criminal Justice Legal Foundation, which supports the death penalty, said the decision was in that sense a welcome one.

"It's unfortunate that we have another delay," Mr. Scheidegger said. "But it does appear that there is at least one path to a constitutional procedure."

Florida started its moratorium two days after Angel N. Diaz's execution appeared to go awry. Dr. William Hamilton, medical examiner in Alachua County, Fla., said yesterday that the needle with the lethal chemicals that should have gone directly into Mr. Diaz's veins punctured the veins before entering soft tissue. It took a second dose and 34 minutes for him to die.



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Mo. executions on hold because of federal review

By DAVID A. LIEB - 19 hours ago



JEFFERSON CITY, Mo. (AP) — The state's incoming chief justice said Tuesday that it was unlikely any executions would be scheduled in Missouri while the courts assess an inmate's lawsuit challenging the state's lethal injection procedure.

Executions had been on hold in Missouri for four years until the state executed an inmate last month. Reginald Clemons' execution was the second scheduled in the state since the courts ruled that lethal injection in general, and the state's three-drug method in particular, was constitutional.

However, the 8th Circuit U.S. Court of Appeals put a hold on Clemons' June 17 execution after his attorneys challenged those lethal injection procedures. They are seeking further court proceedings to ensure Missouri is using competent personnel who will not cause inmates pain with insufficient amounts of anesthesia before lethal injections.

A federal decision in the Clemons case could apply to all Missouri inmates facing execution, incoming Chief Justice William Ray Price Jr. said, so it is unlikely any more would be scheduled.

"We're back on hold," Price said in an interview with The Associated Press.

Executions are set by the full seven-member Supreme Court, not just the chief justice, but Price said he doubted the court would "do anything so long as the 8th Circuit is looking at issues of general applicability."

Of the 35 states that allow the death penalty, executions also are effectively on hold because of court cases or moratoriums in California, Delaware, Illinois, Maryland, Nevada and North Carolina, according to the Washington, D.C.-based Death Penalty Information Center.

Missouri, once a leading death penalty state, had conducted no executions from October 2005 until this May.

Price said the Missouri Supreme Court has "tried to move as expeditiously as possible" in setting executions but has been slowed by the federal courts. "We can't help that," he added.

In 2006, a federal judge declared Missouri's lethal injection process unconstitutional after the surgeon who was overseeing executions testified he sometimes transposed numbers and operated without written procedures or supervision.

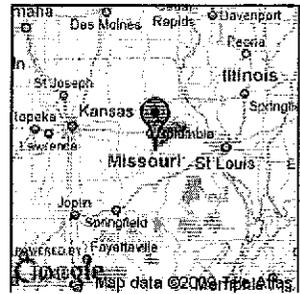
The Missouri Department of Corrections responded by adopting written procedures detailing the precise amounts and order of the chemicals to be injected. A federal judge upheld the protocol in 2008, and the state Supreme Court in February upheld the process by which Missouri adopted the execution procedures.

Clemons' attorneys argued before the 8th Circuit in February that the state has not shown that it can carry out the procedures correctly. The court, which has not yet ruled on the appeal, granted a stay on June 5 without giving a reason.

Clemons was sentenced to death for the April 1991 murders of 20-year-old Julie Kerry and 19-year-old Robin Kerry. Prosecutors say Clemons, who was 19 at the time, and three acquaintances randomly came across the Kerrys on an abandoned bridge in St. Louis. Prosecutors say the women were raped, then pushed to their deaths into the Mississippi River.

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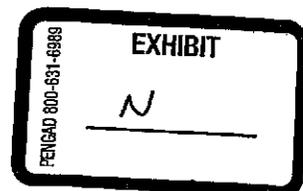
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APPENDIX C



L. BROOKS PATTERSON, OAKLAND COUNTY EXECUTIVE

COUNTY MICHIGAN

OFFICE OF THE MEDICAL EXAMINER

L. J. Dragovic, M.D., Chief Medical Examiner
K. Virani, M.D., Deputy Chief Medical Examiner
B. Pazni, M.D., Deputy Medical Examiner
R. Ortiz-Reyes, M.D., Deputy Medical Examiner
P. Nora, M.D., Deputy Medical Examiner

PUBLIC SERVICES

G. Kunsman, Ph.D., Chief Forensic Toxicologist
R. Gerds, Administrator

August 15, 2006

**Alan S. Konop, Esq.
Attorney at Law
413 Michigan Street
Toledo OH 43624**

Dear Mr. Konop:

RE: Execution of Joseph Clark, OCME #06-1663

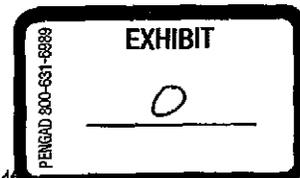
In response to your question, I can state the following:

1.) Based on the official timeline provided, the actual procedure of the execution lasted from 10:24 a.m. to 11:26 a.m. with Mr Clark likely retaining consciousness until at least, 11:18 a.m. Hence, the total estimated length of the interval of consciousness during the procedure was approximately fifty-four minutes.

N.B.: It should be pointed out that under usual circumstances, death is expected to occur between two minutes and ten minutes counting from the moment an intravenous line is established.

2.) The presence of 19 needle puncture wounds is indicative of technical difficulties the execution team encountered during this execution procedure.

3.) There was local irritation of the tissues around the injection sites in the left elbow pit, manifested by intensive redness of the skin in the area, that resulted from paravenous injection of the poisonous chemicals.

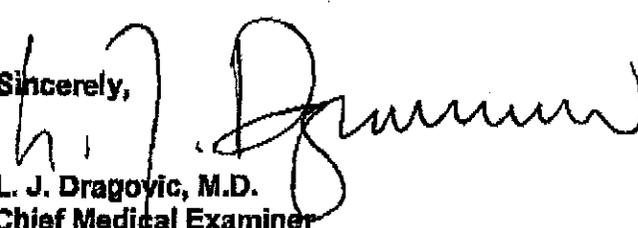


Page 2
Alan S. Konop, Esq.

This finding coupled with the above described multiple (19) injection attempts suggests inadequate technical skills of the personnel involved in carrying out this procedure.

I trust this answers your queries.

Sincerely,


L. J. Dragoyic, M.D.
Chief Medical Examiner

LJD/cr

CLARK, Joseph
#08-1663

Page 2 of 9

EXTERNAL EXAMINATION

The body clad in a short-sleeved heavy cotton woven T-shirt labeled CLARK 183984 Ohio State Penitentiary, a navy color pants with orange side stripes, and black canvas belt, is that of a 5' 7", 181 pounds, medium developed, well-nourished black male reported to be 57 years of age. Rigor mortis is moderate (early phase of disappearance) in the cold body and livor mortis is dorsally distributed and fixed. The scalp hair is curly, salt and pepper and measuring up to 1" in length. Facial hair consists of a short, salt and pepper, trimmed beard and moustache. The scalp is without note. The irides are brown, the corneae are clear with mild arcus senilis bilaterally, and the sclerae and conjunctivae are without note. The right earlobe is pierced twice. The left ear is without note. The external ear canals are free of foreign material or abnormal secretions. The nostrils are without note and the nasal skeleton is palpably intact. The lips are without evident injury. There is a denture in the upper jaw and partial plates are present in the lower jaw. The oral cavity is unremarkable. The neck, chest and belly are without note. The external genitalia are those of an uncircumcised adult male type. The posterior torso and anal orifice are unremarkable. An irregular scar is noted on the back aspect of the right upper arm and another irregular scar is observed extending from the distal part of the right upper arm across the back of the elbow and into the inner aspect of the right forearm. A faded tattoo is noted on the inner aspect of the left forearm. Finger clubbing and peripheral edema are absent.

EVIDENCE OF INJURY: There are nine fresh needle puncture wounds in the right antecubital fossa. There are six fresh needle puncture wounds in the outer aspect of the right forearm, right wrist and back of the right hand. There are three identifiable fresh needle puncture wounds in the left antecubital fossa surrounded by extensive confluent redness of the skin. There is one needle puncture wound in the back aspect of the left hand near the web of the left thumb.

CLARK, Joseph
#06-1663

Page 3 of 9

INTERNAL EXAMINATION

HEAD: The scalp is reflected after making the usual intermastoid incision and is free of subcutaneous and subgaleal hemorrhage. The calvarium is intact. The external meninges are unremarkable, without epidural or subdural hemorrhage. The 1448 grams brain is covered by glistening transparent leptomeninges and the cerebrospinal fluid is clear. The vessels at the base of the brain pursue their usual anatomic courses and are patent. Old or recent traumatic lesion or other abnormality is not evident externally or on serial coronal sectioning in the fresh state. The bones at the base of the skull are without evidence of fracture.

NECK: There is no evidence of injury to the soft tissues or bony structures of the neck. The laryngeal cartilages, hyoid bone and cervical spine are intact. The lumen of the larynx and trachea is free of foreign material and abnormal secretion. The mucosa is without note.

BODY CAVITIES: The body cavities are entered in the usual manner. All cavities are free of excess or abnormal fluid accumulation and adhesions. The organs are in their usual anatomic locations. The lungs are expanded. There is no internal evidence of blunt force or penetrating injury to the thoraco-abdominal region.

CARDIOVASCULAR SYSTEM: The 478 grams heart has a glistening epicardial surface with an unremarkable myocardium, endocardium and heart valves. The left ventricle myocardium is 1.4 cm in thickness and the right ventricle myocardium is 0.4 cm in thickness. No focal lesion is identified. The tricuspid valve circumference is 13 cm, the pulmonic valve circumference is 7 cm, the mitral valve circumference is 10 cm, and the aortic valve circumference is 7 cm. The coronary ostia are patent and the coronary arteries show moderate to marked narrowing as a result of involvement by atherosclerosis. There is up to 50% narrowing of the lumen of the left coronary

CLARK, Joseph
#06-1863

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CARDIOVASCULAR SYSTEM (cont.):

artery, between 50 and 60% narrowing of the lumen of the left anterior descending coronary artery, up to 50% narrowing of the lumen of the left circumflex coronary artery and between 30 and 40% narrowing of the lumen of the right coronary artery. The aorta and its major branches show mild patchy atherosclerosis without significant compromise of their lumina. The venae cavae and pulmonary arteries are free of antemortem thrombus.

RESPIRATORY TRACT: The right lung weighs 786 grams and the left lung weighs 640 grams. Their pleural surfaces are smooth and glistening. On sectioning the parenchyma is markedly congested and edematous exuding large amounts of frothy fluid. Focal lesion is not evident. The bronchi and their major branches are without note.

LIVER, BILIARY TRACT, SPLEEN, AND PANCREAS: The 1391 grams liver has a glistening capsular surface with an unremarkable parenchyma. The gallbladder contains approximately 25 ml of bile and the bile passages are patent. The 115 grams spleen has an intact capsule and an unremarkable parenchyma. The pancreas is without external or sectioned abnormality. The lymph nodes of the chest and belly cavity are without note.

GENITO-URINARY SYSTEM: The left kidney weighs 142 grams and the right kidney weighs 152 grams. Their capsules strip with ease to reveal smooth cortical surfaces. On sectioning there is good cortico-medullary definition and the calyces, pelves and ureters are without note. The urinary bladder contains approximately 50 ml of urine and its mucosa is without gross lesion. The prostate gland is of the usual size and consistency.

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GASTRO-INTESTINAL TRACT: The tongue is without evident recent injury. The pharynx and esophagus are unremarkable. The stomach contains approximately 70 ml of tan-pink fluid with no identifiable solid food particles. The mucosa is without note. The duodenum and remainder of the small and large bowels are unremarkable. The appendix is present.

ENDOCRINE SYSTEM: The thyroid shows a solitary left lobe adenoma, measuring 3 ½ cm in greatest diameter. The pituitary and adrenal glands are without note.

MUSCULOSKELETAL SYSTEM: The skeletal muscle is firm and without note. The long bones of the extremities, the bony thorax, the bony pelvis, and vertebral column are without evidence of fracture.

MICROSCOPIC EXAMINATION:

SKIN OF THE LEFT ANTECUBITAL FOSSA – Patchy, fresh bleed into the corium and the subcutaneous tissue.

CENTRAL NERVOUS SYSTEM – No pathological diagnosis.

HEART – Coronary atherosclerosis; mild perivascular fibrosis.

LUNGS – Congestion with extensive intra-alveolar hemorrhage and patchy edema.

LIVER – Mild fatty change.

KIDNEYS – Early autolysis.

THYROID – Solitary colloid (macrofollicular) adenoma.

STOMACH – Autolysis.

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DIAGNOSIS:

- I. State Execution -- Poisoning by Intravenously Injected Substances
 - A. Multiple intravenous injection sites
 - B. Extensive perivenous injection in the left antecubital fossa

- II. Moderate Coronary Atherosclerosis

OPINION: This 57-year-old black male, Joseph Clark, died as a result of the judicially ordered execution by intravenous injection of poisonous substances. There was evidence of multiple, repetitive unsuccessful attempts to accomplish the intravenous injections. A total of nineteen fresh needle puncture wounds were identified. In consideration of the circumstances surrounding this death, the results of this postmortem examination and the toxicological analyses, the manner of death is homicide.



L. J. DRAGOVIC, M.D.
CHIEF MEDICAL EXAMINER

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OAKLAND COUNTY

NAME JOSEPH CLARK CASE # 06-1663

