

IN THE SUPREME COURT OF OHIO

CLEVELAND JACKSON,

Plaintiff-Appellee,

v.

THE STATE OF OHIO,

Defendant-Appellant.

Case No.: _____

**ON APPEAL FROM THE COURT OF APPEALS, TENTH APPELLATE DISTRICT,
FRANKLIN COUNTY, OHIO, NOS. 19 AP 260 and 19 AP 289**

**APPELLANT CLEVELAND JACKSON'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

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Explanation Of Why This Case Is A Matter Of Great Public Or General Interest Or Involves A Substantial Constitutional Question

On January 13, 2021, the State of Ohio intends to execute Mr. Jackson pursuant to ODRC 01-COM-11,¹ even though that protocol is invalid.

In the trial court and on appeal, Jackson raised three challenges to 01-COM-11. The first challenge argued that 01-COM-11 is a rule and that the Ohio Department of Corrections (ODRC) failed to comply with R.C. 111.15 when it adopted 01-COM-11. This case is of great public interest because the courts below improperly narrowed the reach of R.C. 111.15.

The second and third challenges included arguments that 01-COM-11 will not result in a quick and painless death. Ohio's executions must be carried out "*quickly and painlessly.*" R.C. 2949.22(A) (emphasis added). Throughout this litigation, the Defendants have never denied that the IV-administration of the second and third drugs identified in 01-COM-11 to a sensate person would cause pain. Indeed, that understanding has been consistent across the litigation between death row inmates and Defendants.

From December 11 to 14, 2018, The Federal District Court for the Southern District of Ohio conducted a four-day evidentiary hearing on Warren Henness's Motion for Preliminary Injunction. During the course of this hearing, the court heard from six nationally and world-renowned experts concerning the drugs used in Ohio's three drug execution cocktail. At the conclusion of the hearing, the Court found:

Based on the evidence presented here, both at the December hearing and as designated from prior hearings, the Court finds as a matter of fact that it is certain or very likely that a 500 mg IV-injected dose of midazolam cannot reduce consciousness to the level at which a condemned inmate will not experience *the*

¹ "ODRC 01-COM-11" refers to the execution protocol Defendants adopted effective October 7, 2016. Hereafter, Jackson will refer to this document as "01-COM-11." 01-COM-11 appears in the record in several places. Jackson will cite to R. 184, Jackson's Motion for Summary Judgment, Exhibit 1 when citing to 01-COM-11.

severe pain associated with injection of the paralytic drug or potassium chloride or the severe pain and needless suffering that is certain or very likely to be caused by the pulmonary edema which is very likely to be caused directly by the midazolam. This finding of fact is independent of the hypothesis that it is the acidic state of injected midazolam that causes pulmonary edema.

In re: Ohio Execution Protocol Litg. (Heness), S.D. Ohio No. 2-11-cv-1016, 2019 WL 244488, *65 (Jan. 14, 2019)(emphasis added).

The State did not challenge the district court's factual finding that the administration of the second and third drugs listed in 01-COM-11 to a sensate person violated the Eighth Amendment bar on cruel and unusual punishment. Rather, the State argued that the first drug, midazolam, protects the condemned person from the unconstitutional pain that flows from the IV-injection of the second and third drugs. The district court rejected that argument as scientifically unsound.

We now know on the best expert testimony available that [midazolam] does not have any analgesic effect. Moreover, we have good evidence that midazolam will cause the "waterboarding" effects of pulmonary edema.

Id. at * 71. Although the Federal District Court found that Henness proved that Ohio's execution process causes unconstitutionally severe pain, it denied Henness's motion for preliminary injunction because he had not proved his proposed alternative execution methods were available, feasible, and could be readily implemented. *Id.* at * 70.

Heness appealed to the Sixth Circuit Court of Appeals. *In re Ohio Execution Protocol Litg. (Heness)*, 946 F.3d 287 (6th Cir. 2019). That Court began its analysis by observing that for a prisoner to demonstrate an Eighth Amendment violation, he must prove that the execution method will result in "severe pain" such as the pain that occurs during execution by "[b]reaking on the wheel, flaying alive, rending asunder with horses." *Id.* at 290 (citations omitted)(emphasis added). After observing that the pain associated with hanging (suffocation over several minutes) did not constitute "severe pain" or an Eighth Amendment violation, the court concluded that the

risk of pain associated with pulmonary edema (waterboarding) also was not an Eighth Amendment violation because it “looks a lot like the risks of pain associated with hanging, and indeed may present fewer risks in the typical lethal-injection case.” *Id.* at 290.

The Sixth Circuit applied the same reasoning to reject the District Court’s finding that because midazolam was incapable of suppressing the pain caused by the administration of the second and third execution drugs, its use in an execution violated the Eighth Amendment. “The fact that midazolam may not prevent an inmate from experiencing pain is irrelevant to whether the pain the inmate might experience is unconstitutional [severe pain such as breaking on the wheel, flaying alive, rending asunder with horses].” *Id.*

For purposes of Jackson’s second and third causes of action, he did not need to demonstrate that Ohio’s current execution procedure would cause him to experience pain so severe that it would be the equivalent to “[b]reaking on the wheel, flaying alive, rending asunder with horses” or greater than hanging. *Id.* He needed only to demonstrate that Ohio current execution procedure would not be satisfy Ohio’ statutory standard: a painless execution. Contrary to the federal constitutional standard, *all* degrees of pain are relevant to the Ohio statutory standard.

Statement of the Case

Trial Court Proceedings

On January 24, 2018, O’Neal and Tibbets filed their complaint requesting that the trial court: (1) rule that 01-COM-11 was improperly adopted and violated the federal constitution; and (2) issue an injunction precluding Defendants from executing them. R. 10.² On July 18, 2018, the trial court granted Cleveland Jackson’s motion to intervene. R. 102.

² On July 25, 2018, the trial court granted Tibbets’ motion to withdraw because the governor commuted his death sentence. R. 108.

On January 25, 2019, Jackson, O’Neal, and Defendants filed their motions for summary judgment, R. 184, 193, 197. On February 8, 2019, the parties filed their responses opposing motions for summary judgment. R. 217, 220. On February 15, 2019, the parties filed replies in support of their respective motions for summary judgment. R. 222, 223, 224. On April 4, 2019, the trial court issued its opinion and judgment denying Jackson and O’Neal’s motions for summary judgment and granting Defendants’ motion for summary judgment. R. 230.

Appellate Court Proceedings

On April 24, 2019, Jackson timely filed his notice of appeal.³ On June 10, 2019, Jackson filed his merit brief. On July 15, 2019, Defendants filed their brief. On July 25, 2019, Jackson filed his reply brief. On February 13, 2000, the court of appeals rendered its opinion affirming the decision of the trial court and six days later filed its judgment entry. Appendix, p. 1 and 4. On February 24, 2000, Jackson filed his motion for reconsideration. On March 4, 2004, Defendants filed their response opposing Jackson’s motion for reconsideration. On March 11, 2020, Jackson filed his response in support of its motion for reconsideration. On April 16, 2020, the court of appeals filed its memorandum decision denying Jackson’s motion for reconsideration and its entry journalizing that decision. Appendix, p. 11 and 13.

³ Jackson and O’Neal pursue separate appeals which the appellate court combined for purpose of oral argument, its decision affirming the judgement of the trial court, and its ruling denying their motions for reconsideration.

Statement of Facts

The parties agree on the essential facts:

1. Defendants adopted 01-COM-11 to govern the actions of Ohio Department of Rehabilitation and Corrections (ODRC) employees when they carry out death sentences.
2. Defendants never filed 01-COM-11 with the secretary of state or with the director of the legislative service commission, pursuant to R.C. § 111.15.
3. Cleveland Jackson is subject to a death sentence.
4. Absent some intervening act, Defendants will execute Cleveland Jackson on January 13, 2021, pursuant to 01-COM-11.
5. ODRC compliance with 01-COM-11 involves administering to a condemned person an IV-injection of a 500 mg bolus of midazolam, then a paralytic, and then potassium chloride. *See* R. 184, 01-COM-11, §§ VI. F-H.
6. Unless a condemned person is rendered insensate, an IV-injection of the paralytic followed by an IV-injection potassium chloride causes unconstitutionally severe pain, in violation of the Eighth Amendment.

Argument

First Proposition of Law

Ohio’s execution protocol 01-COM-11 governs the day-to-day staff procedures and operations by which ODRC carries out a core statutory function – the execution of condemned persons – and thus is a “rule” subject to R.C. 111.15.

I. 01-COM-11 Meets the R.C. 111.15 Statutory Definition of “Rule.”

The Statute defines “Rule” to include “*any* rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency under the authority of the laws governing the agency.” R.C. 111.15(A)(1) (emphasis added). The three elements of a “rule” subject to R.C.

111.15 are: (A) an Agency of State Government; (B) adopts a standard (the Rule); and (C) that Rule has general or uniform operation.

A. ODRC is an Agency Subject to R.C. 111.15.

The statute defines “Agency” to “mean any governmental entity of the state and includes, but is not limited to, any ... *department* ...” of the state. R.C. 111.15(A)(2) (emphasis added). ODRC is a “department” of state government. R.C. § 121.02(P); *State, ex rel. AFSCME v. Taft*, 156 Ohio App.3d 37, 2004-Ohio-493, 804 N.E.2d 88, ¶ 35 (3rd Dist.). Therefore, ODRC is an “Agency.” R.C. 111.15(A)(2).

B. ODRC Adopted 01-COM-11.

There is no dispute that ODRC adopted 01-COM-11. *See* R. 184, 01-COM-11, § I.

C. The Rule has General or Uniform Operation.

The critical issue is whether 01-COM-11 is to “be uniformly applied by the promulgating agency to those affected by the rule.” *Ohio Assn. of Cty. Bds. of Mental Retardation & Developmental Disabilities v. Pub. Emp. Retirement Sys.*, 61 Ohio Misc.2d 836, 842-843, 585 N.E.2d 597 (C.P. 1990), cited with approval in *B&T Express, Inc. v. Pub. Util. Comm.*, 145 Ohio App.3d 656, 665, 763 N.E.2d 1241 (10th Dist. 2001).

It is manifestly self-evident that ODRC intends to apply 01-COM-11 to everyone who is affected by it: inmates, ODRC staff members, inmates’ counsel, victims’ and inmates’ family members, and the press. The document, by its express terms, applies to all of those classes of people: “This policy applies to all individuals involved in carrying-out a court-ordered death sentence in accordance with all applicable polices, administrative regulations, and statutes.” *See* 01-COM-11, Sec. III. Applicability. Defendants followed (or at least attempted to follow) 01-COM-11 in every Ohio execution since its effective date of October 7, 2016. Absent some

intervening event, Defendants will follow (or at least attempt to follow) 01-COM-11 when they execute Mr. Jackson on January 13, 2021.

II. At Minimum, ODRC 01-COM-11 Is An Internal Management Rule.

The trial court found that ODRC 01-COM-11 “is an ‘internal management rule’ which governs the operations of the Department in carrying out the statutory duty of execution.” R. 230, Order, at p. 6. There was ample evidence before the trial court to support that finding. The statutory definition is dispositive: “‘Internal management rule’ means *any* rule, regulation, bylaw, or standard governing the day-to-day staff procedures and operations within an agency.” R.C. 111.15(A)(3) (emphasis added). By its express terms, Execution Protocol governs ODRC day-to-day staff procedures and operations related to one of Defendants’ core statutory functions: carrying out the execution of a condemned inmate. *Id.* “The purpose of this policy is to establish guidelines for carrying out a court-ordered sentence of death.” *See*, R. 184, 01-COM-11, § II. Purpose. Defendants intend 01-COM-11 to govern the day to day staff procedures and operations related to executions. “I would expect and presume that the Department will carry out, if his execution goes forward with the then-current version of 01-COM-11.” *See*, R. 147, October 16, 2018 Deposition Testimony of Stephen Gray, Chief Counsel and Managing Director of Risk Management for the Ohio Department of Rehabilitation and Correction, p. 31, lines 14-16 (hereafter referred to as “Gray Depo.” and cited as “R. 147, Gray Depo.”).

The Tenth District erred when it determined that 01-COM-11 does not govern ODRC “day-to-day procedures or operations” because it governs Ohio’s method of execution, and executions do not occur on a regular or frequent basis. *O’Neal v. State*, 10th Dist. Franklin, No. 19AP-260, 19AP-289, 2020-Ohio-506, ¶ 19. That analysis misses the mark. The Court has never limited the reach of R.C. 111.15 to require that the agency action contemplated by the rule must literally occur

daily – nor does such a limitation comport with the ordinary understanding of “day-to-day operations.” It is sufficient that, every time ODRC carries out its core statutory duty to conduct a court ordered execution, ODRC requires everyone involved in the process to comply with 01-COM-11.

III. ODRC 01-COM-11 Is Not Effective Because Defendants Failed to File It in Compliance with R.C. 111.15(B)(1).

Proposed rules, including proposed internal management rules, become effective ten days after the proponent agency files the proposed internal management rule “with the secretary of state and the director of the legislative service commission.” R.C. 111.15(B)(1)(a).⁴ Because Defendants never filed ODRC 01-COM-11 with either the secretary of state or with the director of the legislative service commission, it has never become effective. The failure to comply with R.C. 111.15 filing requirements invalidates the proposed rule. *State, ex re. Bd. of Edn. of North Canton Exempted Village School Dist. v. Holt*, 174 Ohio St. 55, 57, 186 N.E.2d 862 (1962); *B & T Express, Inc. v. PUC of Ohio*, 145 Ohio App.3d 656, 667, 763 N.E.2d 1241 (10th Dist. 2001).

IV. Jackson is Entitled to a Declaration that ODRC 01-COM-11 is not effective, and an Injunction to Prohibit Defendants from Executing Him Pursuant to ODRC 01-COM-11.

The State has never contested Jackson’s claim that he was entitled to declaratory relief if the law actually required ODRC to follow R.C. 111.15. Rather, the State has always rested its defense on an assertion that R.C. 111.15 does not apply, and therefore Jackson cannot demonstrate a right to declaratory relief. Because R.C. 111.15 does apply to 01-COM-11, Jackson was entitled to both declaratory and injunctive relief.

⁴ Because Defendants acknowledge they did not even meet the relaxed filing requirements for an internal management rule, they necessarily admit they did not meet the more stringent filing requirements for the broader “rule” as defined in R.C. 111.15(A)(1).

SECOND PROPOSITION OF LAW

The Ohio Department Of Rehabilitation And Correction Usurped Legislative Power In Promulgating 01-COM-11 Because It Exceeds The Scope Of The Enabling Authority Granted By The General Assembly.

ODRC and its Director: (1) exceeded the scope of the rule making authority delegated under R.C. 5120.01; and (2) unconstitutionally usurped legislative powers.

I. The Relevant Statutes Did Not Grant the Director the Authority to Adopt Execution Protocols.

An administrative agency has only such regulatory power as the Ohio General Assembly delegates to it. Authority conferred by the Ohio General Assembly cannot be extended by the administrative agency. *Central Ohio Joint Voc. School Dist. Bd. of Ed v. Admr., Ohio Bureau of Emp. Serv.*, 21 Ohio St.3d 5, 10, 487 N.E. 2d 288 (1986).

Defendants admit that 01-COM-11 states that it “is issued in compliance with R.C. 5120.01.” R. 125, p. Defendants’ Answer to Complaint of Plaintiff Cleveland Jackson, p. 3 (hereafter referred to as “Answer” and cited as “R. 125, Answer”). Defendants admit that ODRC issued 01-COM-11 to set forth “guidelines for carrying out a court-ordered sentence of death” pursuant to the authority of 5120.01. R. 39, Defendant's Motion to Dismiss, p. 8 (hereafter referred to as “Motion to Dismiss” and cited as “R. 39, Motion to Dismiss”). However, R.C. Chapter 5120 confers no authority on “divisions and institutions of the department” regarding carrying out death sentences.

II. The Director’s Election to Execute by “IV Injection” Results in a Separate Violation of the Statute.

The Ohio Legislature requires that “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.*” R.C. 2949.22(A) (emphasis added). The current execution procedure violates both these statutory mandates.

A. IV Injection executions will not be quick.

Once the IV lines are established, three injections into those lines follow: the first injection purports to cause unconsciousness, the second injection paralyzes the inmate, and the third injection stops the inmate’s heart. Former Director Mohr testified that when ODRC adopted OI-COM-11 ODRC anticipated it would take 15 to 20 minutes from the first "IV injection" to death. Mohr Depo. 12/22/2016, p. 118, line 20 - p. 119, line I. This fifteen to twenty-minute sequential death is not the quick death mandated in R.C. 2949.22(A) and thus conflicts with the statute.

B. IV injection executions will not be painless.

The United States Court of Appeals for the Sixth Circuit recently reviewed Ohio’s execution protocol in the context of the three drug protocol: midazolam, a paralytic agent, and potassium chloride. *In re: Ohio Execution Protocol Litigation (Hennes)*, 946 F.3d 287 (6th Cir. 2019). In the District Court, the Judge found that: (1) a 500 milligram dose of midazolam was likely to cause pulmonary edema (i.e., “chest tightness, chest pain, and sensations of drowning, suffocating, and dying”) and (2) because midazolam has no analgesic properties, it would not suppress the inmate’s consciousness deeply enough to prevent him from experiencing the pain caused by the combination of the paralytic agent and potassium chloride. *Id.* at 289-90. The Sixth Circuit reviewed the District Court’s findings under the Eighth Amendment standard of whether the three drug protocol is sure or very likely to cause serious illness and needless suffering.” *Id.* at 289 (quoting *Glossip v. Gross*, — U.S. —, 135 S. Ct. 2726, 2736, 192 L.Ed.2d 761 (2015)). The Court observed that *Glossip* “presents a high bar.” *Id.* at 290.

The Sixth Circuit reversed the District Court's first finding because it found that the pain associated with pulmonary edema is no greater than the pain associated with hanging, which has been found to be constitutional. *Id.* The Sixth Circuit reversed the District Court's second finding because the plaintiff failed to demonstrate that the use of midazolam will result in the inmate experiencing "constitutionally excessive pain." *Id.*

The standard under the Ohio statute is much lower; Mr. Jackson need only demonstrate that the execution will not result in a painless death. Given the findings of the Sixth Circuit, it is clear that Ohio Department of Rehabilitation and Correction adopted an execution protocol that violates R.C. 2949.22(A).

III. The Current Execution Protocol Violates the Right to Counsel.

01-COM-11 limits the inmate's right to have privileged consultation with his/her attorney the day before execution. First, it imposes undescribed special "gender specific" search procedures on defense counsel in order to obtain a privileged consultation with the condemned inmate. R. 184, 01-COM-11, VI. E.7. Second, it prohibits privileged consultation between the condemned inmate and his/her counsel on the day of execution by allowing only cell front attorney-client meetings with one or more members of the execution team present, *Id.* Third, it restricts the inmate's counsel's access to telephones to contact the courts or governor should such a need arise on execution day. 01-COM-11 restricts counsel's access to an internal telephone system that can be used to call to another location in the prison where a second defense team member is waiting and has access to a telephone that is connected to an outside line. *Id.* at G. 2. a.

The Sixth Amendment right to counsel attaches when the "prosecution is commenced." *McNeil v. Wisconsin*, 501 U. S. 171, 175, 111 S.Ct. 2204, 115 L. Ed. 2d 158 (1991). For the death sentenced inmate, the execution is the final stage of the adjudicatory process—the stage which

effectuates the trial court's sentence. It is unquestionably a stage at which Mr. Jackson's constitutional right not to be subjected to a cruel or unusual punishment could be sacrificed or lost.

IV. Conclusion, Proposition of Law No. II.

Neither ODRC nor the Director have any special expertise in devising or choosing execution methods or procedures. Director Mohr testified that he lacked experience, competence, or expertise in such matters. R. 214, Mohr 2016 Depo., p.13, 99, 102, 118-19. ODRC usurped legislative power in promulgating 01-COM-11 because it exceeds the scope of the enabling authority granted by the General Assembly.

Third Proposition of Law

To The Degree That The Ohio General Assembly Intended To Delegate To The Ohio Department Of Rehabilitation And Correction The Authority To Promulgate 01-COM-11, Such Delegation Violated Section 1, Article II Of The Ohio Constitution.

The Ohio Constitution grants all legislative power to the Ohio General Assembly. Ohio Constitution, Article II, Sec. 1. *Matz. v. J.L. Curtis Cartage Co.*, 132 Ohio St. 271, 279, 7 N.E.2d 220 (1937). In the exercise of its lawmaking power the Ohio General Assembly is the “ultimate arbiter of public policy.” *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 21. The Ohio General Assembly cannot delegate its lawmaking authority. *State ex rel. Bryant v. Akron Metro. Park Dist.*, 120 Ohio St. 464, 478, 166 N.E. 407 (1929).

Former Director Mohr, prior to adopting 01-COM-11, engaged in his own information gathering system. He (1) gathered information from other states concerning their methods of execution, (2) obtained input from lawyers representing individuals sentenced to death, and (3) sought federal court approval. The Former Director described his role in the process:

As we sit here today, there are no legislators being deposed, it's up to the director of the agency to do everything that we can to comply with state law which supports the execution of individuals on dates prescribed by the Supreme Court.

R. 161, Exhibit 7 attached thereto, Mohr 12/22/2016 Depo, p. 108, lines 8-13.

I. The Ohio Legislature impermissibly delegated its authority to Defendants to change the method of execution from “injection” to “IV injection.”

R.C. 2949.22(A) requires a quick and painless death caused by “a lethal *injection* of a drug or combination of drugs.” (emphasis added). 01-COM-11 provides only for “IV injection” as opposed to “injection.” The two terms are not synonymous. Consequently, the change from “injection” to “IV injection” constituted a change in method of execution. *See* Second Proposition of Law, § IIA, *supra*.

II. The Ohio Legislature impermissibly delegated its authority to Defendants to identify and change the drugs used in executions.

The drug or drugs used in an execution must cause a “quick and painless death.” R.C. 2949.22(A). The statute does not identify the drugs to be used, only that they cause a “quick and painless death.”

Former Director Mohr testified that he relied on R.C. 5120.01 when he selected Ohio's execution drugs. R. 161, Mohr 09/25/18 Depo., p. 23, line 11 through p. 24, line 4. He received no guidance from the Ohio General Assembly regarding the choice of drugs; he chose barbiturates. *Id.* at p. 24, lines 15-19. When barbiturates became unavailable, the Former Director decided that it was within his authority to select drugs that, given in a series, would cause death in stages. R. 161, Exhibit 18 attached thereto, Mohr 12/22/2016 Depo. P. 108, line 8 - p. 109, line 15.

III. The Ohio Legislature impermissibly delegated its authority to Defendants to determine the procedures surrounding executions.

R.C. 2949.29(A) requires that the execution team conduct an execution so that the inmate's death be quick and painless. When the statute was enacted, it required an injection.

The statute was not unlike those execution methods that the General Assembly previously approved, including hanging and electrocution. A simple action on the part of the executioner—placing the inmate in the electric chair and pushing a button, placing a noose around his/her neck and pulling the lever to release the gallows floor, or filling a syringe and injecting a drug or combination of drugs into the inmate's arm or hip—was the essence of each method.

When Defendants adopted 01-COM-11, they changed the execution procedure regarding the length of time that it can take. No longer is it a simple procedure such as pulling a lever, flipping a switch, or injecting a syringe into the inmate's arm. Instead, 01-COM-11 now requires establishing intravenous access to inmate's veins and entails a series of three injections into an IV tube to inflict death in stages. Establishing the IV lines is a process that has been known to take more than two hours. *State v. Broom*, 146 Ohio St.3d 60, 2016-Ohio-1028, 51 N.E.3d 620, ¶ 4-16. 01-COM-11 places no limits on the methods that will be used to obtain IV access, including puncturing, or cutting into the condemned inmate's veins, the number of wounds, or the duration of the process. R. 184, Exhibit 2, 01-COM-11 G.7.b., c., and d.

II. The Ohio Legislature Impermissibly Delegated to Defendants Rulemaking Authority for Purposes of 01-COM-11.

Though legislative authority cannot be delegated, rulemaking authority can be delegated. However, to properly delegate rulemaking authority the legislature must establish “an intelligible principle to which the administrative officer or body must conform and further establish[] a procedure whereby exercise of the discretion can be reviewed effectively.” *Blue Cross of Northeast Ohio v. Ratchford*, 64 Ohio St. 2d 256, 260, 416 N.E.2d 614 (1980).

The Ohio General Assembly did not establish any intelligible principles to which Defendants must comply. The Director and his chief counsel both testified that they were provided no legislative guidance on designing Ohio's method of execution and the surrounding processes. In the absence of legislative guidance, the Director felt an obligation to decide the means to conduct executions. In addition, the Ohio General Assembly did not establish any mechanism for the review of the Director's discretion when he promulgated execution rules.

III. Conclusion, Third Claim

To the extent that the Ohio Legislature intended to delegate its legislative authority to enact Ol-COM-11 to Defendants, that delegation was constitutionally invalid. Alternatively, to the extent that the Ohio Legislature intended to grant Defendants rule making authority to adopt Ol-COM-11, that delegation was invalid because it did not include adequate guidelines for the adoption of execution protocols or the effective review of those protocols.

Conclusion

For the reasons set forth in the Memorandum, this Court should grant jurisdiction as to both Propositions and set the case for full briefing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 20, 2020 I served a copy of the foregoing Memorandum in Support of Jurisdiction via email, to counsel of record for all parties herein, at the addresses listed below:

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