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JAMES BONINI
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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

In The United States District Court
For Southern District Of Ohio, Eastern Division

Romell Broom,	:	
Plaintiff,	:	Case No.
v.	:	2:09 cv 823
Ted Strickland, et al.,	:	
Defendants.	:	

Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction

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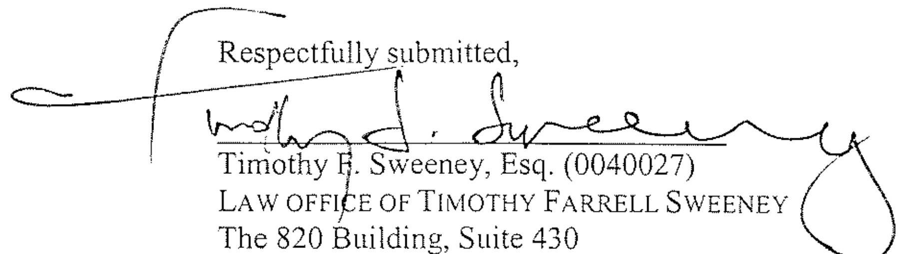
Plaintiff Romell Broom moves this court for a temporary restraining order and preliminary injunction prohibiting Defendants from proceeding with his execution currently scheduled for September 22, 2009 at 10 a.m. at the Southern Ohio Correctional Facility. The reasons supporting this request are addressed in the attached memorandum in support.

Respectfully submitted,



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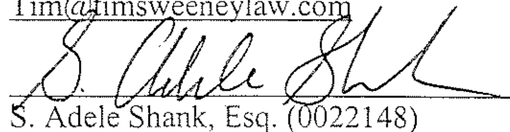

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In The United States District Court
For Southern District Of Ohio, Eastern Division

Romell Broom, :
:
Plaintiff, : Case No.
:
V. :
:
:
Ted Strickland, et al., :
:
Defendants.

Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction

I. Introduction.

Plaintiff Romell Broom filed this action to vindicate his rights under Eighth and Fourteenth Amendments to the United States Constitution. Broom's litigation centers around Defendants' botched efforts to execute him on September 15, 2009 and their express intent to try again on September 22, 2009. Broom argues in his Complaint that Defendants have failed once in trying to execute him. The result was a horrific and torturous event detailed in Broom's affidavit (Exhibit A, Affidavit of Romell Broom). It would be unconstitutional to allow Defendants a second attempt to torture Broom to death. In addition, Broom argues that Defendants' attempt to execute him on September 15 was anything but quick and painless. Finally, he asserts that if Defendants are not disentitled from trying again to execute him, they cannot use the same flawed protocol that they tortured him with on September 15, 2009.

II. Facts.

Romell Broom is a death row inmate. He was sentenced to die by lethal injection at the Southern Ohio Correctional Facility on September 15, 2009 at 10:00 a.m. Defendants spent "about two hours" attempting to access a vein. Jon Craig, *Botched execution brings reprieve,*

Cincinnati Enquirer, Sept. 15, 2009 (online version attached as Exhibit B). He was stuck approximately 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 C). Broom was "clearly frustrated as he leaned back on the gurney, covering his face with his hands and visibly crying." Craig, *Botched execution brings reprieve.* The execution staff moved on to try to place IVs in his legs with Broom grimacing from pain at least four times. Id. "As Broom's anxiety grew, he repeatedly wiped his sweaty forehead with toilet paper." Id. Broom said, that he was in pain. At one point the execution team members were placing needles in areas that were already bruised and swollen. In an attempt to find a vein in his ankle, the execution team member missed and the needle hit his bone. The pain was so severe that it caused him to scream. Exhibit A, ¶18, 20. When the execution team attempted to find a vein in his hands Broom's pain was extreme. By that time eighteen attempts to place the needles had been made. Ex. A, ¶21.

Prior to the execution Broom was denied the right to consult with his counsel privately. During the course of the execution, after it became apparent that the procedure was not proceeding according to Ohio's execution protocol, counsel was denied access to Broom and Broom was denied access to his counsel. Ex. A, ¶18. Counsel was denied use of the telephone in the death house and was not allowed to have cell phone in the death house. Counsel was required to leave the building in order to make telephone calls to co-counsel and others in order to take legal steps to try to stop the execution-gone-wrong.

After more than two hours of poking and prodding that brought Broom to tears, the State of Ohio was required to abandon its efforts to execute Broom for that day because Ohio Governor Ted Strickland issued a one week reprieve during which time the Ohio Department of Rehabilitation and Correction is required to recommend "appropriate next steps" to be used in

Broom's next execution attempt. Exhibit D, Reprieve, ¶2. The Governor's reprieve expires on September 22, 2009, at which time Defendants intend to try again to execute Broom.

Neither Broom nor his counsel have been provided any information about the "next steps" that are to be provided to the governor.

III. Law and argument.

"The purpose of a [temporary restraining order] under Rule 65 is to preserve the status quo so that a reasoned resolution of the dispute may be had." Leaf Funding, Inc. v. Butera, Case No. 3:06-CV-00938, 2006 U.S. Dist. LEXIS 72887 at * 13-14 (M.D. Tenn. Oct. 5, 2006) (citing P & G Co. v. Bankers Trust Co., 78 F.3d 219, 226 (6th Cir. 1996)). In determining whether to grant a temporary restraining order under FRCP 65, the Court must consider the four preliminary injunction factors: "(1) whether the party seeking the order has a strong likelihood of prevailing on the merits of the case; (2) whether the moving party will suffer irreparable injury if the order is not entered; (3) the potential harm the order would cause others; and (4) the public interest." Leaf Funding, Inc., 2006 U.S. Dist. LEXIS 72887 at *7 (citing Leary v. Daeschner, 228 F.3d 729, 736 (6th Cir. 2000)).

The four factors are to be balanced; they are not prerequisites to be met. Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 542 (6th Cir. 2007) (citing Jones v. City of Monroe, 341 F.3d 474, 476 (6th Cir. 2003); In re De Lorean Motor Co., 755 F.2d 1223, 1228 (6th Cir. 1985)). Accordingly, the degree of likelihood of success required to obtain a preliminary injunction, and thus by implication a temporary restraining order, may depend on the strength of the other three factors. See De Lorean Motor Co., 755 F.2d at 1229.

In addition to consideration of the four preliminary injunction factors, Fed. R. Civ. P. 65(b) requires support of the alleged immediate and irreparable injury through affidavit or

verified complaint. Plaintiff Broom's affidavit supporting his claims of immediate and irreparable injury is attached as Exhibit A. Finally, counsel is required to certify in writing the "efforts, if any, which have been made" to give notice to the adverse party and the reasons supporting the claim that notice should not be required. Counsel's certification is included at the end of this document.

A. Broom has a strong likelihood of success on the merits

1. Repeated attempts unconstitutional

Broom's litigation centers around Defendants' botched efforts to execute him on September 15, 2009 and their express intent to try again on September 22, 2009. After more than two hours of pain and terror with no results, Ohio plans to subject Broom to this same procedure in a matter of days. As the Supreme Court noted in Baze v. Rees, 128 S. Ct. 1520 (2008), "a hypothetical situation" involving "a series of abortive attempts" at execution "*would present a different case.*" Id. at 1531 (citing Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring) (emphasis added)). "[S]uch a situation ... would demonstrate an 'objectively intolerable risk of harm' that officials may not ignore." Id. (citing Farmer v. Brennan, 511 U.S. 825, 846 and n.9 (1994)). Broom presents that "different" case. Baze, 128 S. Ct. at 1531.

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947), does not resolve this issue. In Resweber, the Court, in a 4-1-4 decision, approved a second attempt at electrocuting a death-sentenced inmate. In so doing, four justices of Court held, while assuming but not deciding that the Eighth Amendment applied o the states, that there was no violation of the Eighth Amendment prohibition against cruel and unusual punishment when "an accident with no suggestion of malevolence" occurs. Id. at 463-64. While Defendants actions may not rise to "malevolence,"

they have certainly demonstrated willful indifference to the problems with Ohio's lethal injection protocol. They have been on notice for more than five years as to potential problems. Moreover, venous access problems have been evident in at least two recent executions.

The fifth vote that allowed the execution of Resweber to go forward came from Justice Frankfurter who fond that the Eighth Amendment did not apply to the states and therefore the test of whether the second execution was cruel and unusual under that amendment was inapplicable. He said, "But the penological policy of a State is not to be tested by the scope of the *Eighth Amendment* and is not involved in the controversy which is necessarily evoked by that Amendment as to the historic meaning of "cruel and unusual punishment.": Id. at 429 (Frankfurter , J. concurring).

Since the decision in Resweber was made, the United States Supreme Court has held that the Eight Amendment is applicable to the states. Robinson v. California, 370 U.S. 660 (1962), Furman v. Georgia, 408 U.S. 238 (1972). Hence Resweber decided today would bar the second execution attempt.

Other Ohio executions have gone wrong. Joseph Clark's execution did not go as ODRC 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.

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 Mr. Newton's arm. It took approximately one hour and fifteen minutes to place the second IV. Mr. 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 Mr. Newton unconscious. Several minutes after the drugs began, Mr. 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. Mr. 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 Mr. 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 E attached hereto).

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

Clark and Newton demonstrate that this is not an "isolated mishap." Baze, 128 S. Ct. at 1531. Defendants have been on notice for several years of this problem. They ignored it.

Ohio aborted its attempt to execute Broom, a second attempt would be both cruel and unusual. Broom has a strong likelihood of success on his alleged the Eighth Amendment violation as contemplated by Baze. See 128 S. Ct. at 1531 (citing Resweber, 329 U.S. at 471 (1947) (Frankfurter, J., concurring) ("a hypothetical situation" involving "a series of abortive attempts" at execution "would present a different case.").

2. No quick and painless execution

Broom also has a strong likelihood of success on his due process claim relating to O.R.C. § 2949.22. Ohio Revised Code § 2949.22 mandates that lethal injections in Ohio "shall" be quick and painless. State v. Rivera, Case No. 04CR065940, Judgment Entry at p. 5 (Lorain C.P. June 10, 2008) (Exhibit F). 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.

Defendants' September 15, 2009 attempt to execute Broom was anything but "quick" and "painless." Rather Defendants spent "about two hours" attempting to access a vein. Jon Craig, *Botched execution brings reprieve*, Cincinnati Enquirer, Sept. 15, 2009 (online version attached as Exhibit B). He was stuck 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 C). Broom was "clearly frustrated as he leaned back on the gurney, covering his face with his hands and visibly crying." Craig, *Botched execution brings reprieve.* The staff moved on to try to site IVs in his legs with Broom grimacing from pain at least four teams. Id. "As Broom's anxiety grew, he repeatedly wiped his sweaty forehead with toilet paper." Id

Ohio Revised Code § 2949.22 imposes the statutory obligation 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 failed in this duty. Resultantly, there is a strong likelihood that Broom will succeed on this due process claim.

3. No execution under this flawed protocol

If Defendants are not precluded from a second attempt at executing Broom, Broom has a strong likelihood of success on the merits of his claim that they certainly are precluded from using the current constitutionally flawed protocol to execute Broom. Defendants may not ignore what is now an "objectively intolerable risk of harm." Baze, 128 S. Ct. at 1531. Ohio's lethal injection protocol does not account for accessing Broom's veins in any manner other than via the peripheral veins. After more than two hours, and 18 sticks, Defendants could not obtain peripheral vein access. There is no backup plan, no alternative access for which Ohio's execution team is trained and prepared to use—if there was Defendants would have utilized that plan rather than post-pone Broom's execution.

Resultantly, one of two things will happen on September 22, 2009—either Defendants will utilize the same torturous methods they abandoned on September 15th or they will implement a procedure that has not been considered, practiced, or vetted. Using this same protocol, which has proven demonstrably flawed, would be ignoring Broom's needs and will lead to an increased likelihood of harm. A viable claim is present in this suit. As four dissenting Supreme Court Justices noted in Resweber, "[a]lthough the failure of the first attempt, in the present case, was unintended, the reapplication of the electric current will be intentional." 329

U.S. at 476 (Burton, J., dissenting). If Defendants utilize the same flawed protocol to torture Broom to death, their actions will be intentional.

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. Counsel can find no case where a state has aborted its efforts to execute an inmate because of inability to access a vein. 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 Broom, is objectively intolerable. See Baze, 128 S. Ct. at 1532.

Moreover, all of the Baze opinions make clear that "the constitutionality of a particular method of execution will depend on the specific factual details of its administration." Getsy, 2009 U.S. App. LEXIS 18125 at 30-31 (Merritt, J., dissenting). And, if Defendants intend to use a method unaccounted for in Ohio's lethal injection protocol, then Broom would have yet another vehicle in which to challenge Ohio's lethal injection practices. See Getsy v. Strickland, Case No. 08-4199, 2009 U.S. App. LEXIS 18125 at ** 9-10 (6th Cir. Aug. 13, 2009) (Moore, J., concurring) ("Numerous conceivable protocol changes--for example, a change in the type of drugs that Ohio administers in the current three-drug protocol--would clearly merit resetting the statute of limitations. But I also believe that a less obvious change to the protocol could require a new accrual date as well if the amended protocol posed a "substantial risk of serious harm."

Baze, 128 S. Ct. at 1531-32."). At this time, neither Broom nor his counsel have been informed of the "next steps" required to be identified by Governor Strickland's one week reprieve. If Ohio intends to stray from its written protocol, it must immediately disclose this intent to Broom and describe the new procedures to be used so that he may evaluate the chosen procedure and determine if further legal action is necessary. Cf. Nelson v. Campbell, 541 U.S. 637 (2004) (inmate found out only days before his execution that state intended to use a cut-down procedure to access his veins during his lethal injection).

B. Broom will suffer irreparable injury

Defendants will try again on September 22, 2009 to execute Broom if a restraining order, and subsequent injunction, is not granted—quite possibly causing excruciating agony beyond what he already suffered. Ohio's first botched attempt to execute Broom is stark evidence of this fact. Defendants 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 B). 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 C). Broom was "clearly frustrated as he leaned back on the gurney, covering his face with his hands and visibly crying." Craig, *Botched execution brings reprieve*. The staff moved on to try to site IVs in his legs with Broom grimacing from pain at least four teams. Id. "As Broom's anxiety grew, he repeatedly wiped his sweaty forehead with toilet paper." Id.

There is a serious and compelling risk that Broom will suffer an unconstitutional execution, including several more hours of torturous efforts to gain venous access, should Defendants be allowed to proceed on September 22, 2009. Furthermore, Broom will be unable to consult with counsel if the process begins to go wrong and counsel will be unable to

communicate with Broom under the present system. Without a temporary restraining order, a subsequent preliminary injunction, Broom will suffer irreparable harm.[1]

C. No substantial harm to others

While recognizing that the State of Ohio has an interest in seeing finality by imposing the sentence of death, substantial harm will not ensue from issuing a temporary restraining order and subsequent preliminary injunction. Broom's execution was botched despite the fact that Defendants have been on notice for more than five years that their protocol presents unconstitutional risks to the condemned inmate based on numerous lawsuits that have been filed by Ohio death row inmates. Moreover, this is not the first time that Ohio has had difficulty gaining peripheral vein access during an inmate's execution. Clark and Newton's executions are detailed elsewhere in this motion and are incorporated herein by reference.

Ohio's system suffers from the flaw—lack of planning and lack of preparation. There is no alternative to peripheral vein access in Ohio's lethal injection protocol, so inmates like Broom, and Clark and Newton before him, are made to suffer repeated needle sticks, hours of poking a prodding. For Broom, he now faces the mental anguish of knowing he will face death again and the real physical pain the same torturous methods may be employed yet again.

Defendants could have avoided this problem had they responded to the five years of litigation asserting there were real problems with Ohio's lethal injection protocol. Any harm to

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[1] Broom's inability to obtain damages from Defendants in a § 1983 action, should Ohio successfully torture him to death on September 22, 2009, reduces the showing necessary to establish irreparable harm. Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 360 (4th Cir. 1991). A "plaintiff's harm is not irreparable if it is fully compensable by money damages." See Basicomputer Corp. v. Scott, 973 F.2d 507, 511 (6th Cir. 1992) (citing Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 386 (7th Cir. 1984)). But here, the nature of Broom's loss will make damages difficult, if not impossible, to calculate. See id. ("an injury is not fully compensable by money damages if the nature of the plaintiff's loss would make damages difficult to calculate").

Defendants is obviated by the fact that this is a problem of their own creation, one which they have repeatedly refused to address. Broom should not be penalized by a delay Defendants could have prevented.

D. The public interest

Finally, granting a temporary restraining order and subsequent preliminary injunction would serve the public interest because the public has an interest in the enforcement of constitutional rights. Chabad, 363 F.3d at 436 (citing Chabad of S. Ohio v. City of Cincinnati, 233 F. Supp. 2d 975, 987 (S.D. Ohio 2002); Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, 274 F.3d 377, 400 (6th Cir. 2001)). While ultimately rejecting the petitioner's claims, the Supreme Court continued to adhere to its case law that the Eighth Amendment prohibits cruel and inhumane executions in Baze.

The public interest will also be served because these problems likely will continue to confront Ohio as the Defendants resume executions in Ohio if they are not forced to confront and remedy this problem. Joseph Clark was not the first person with difficult vein access who Ohio has struggled to execute and Romell Broom will not be the last. Ohio must take real steps to address this problem prior to attempting again to execute Broom. Until it does so, this Court should restrain and enjoin it from inflicting its constitutionally flawed lethal injection protocol on Broom.

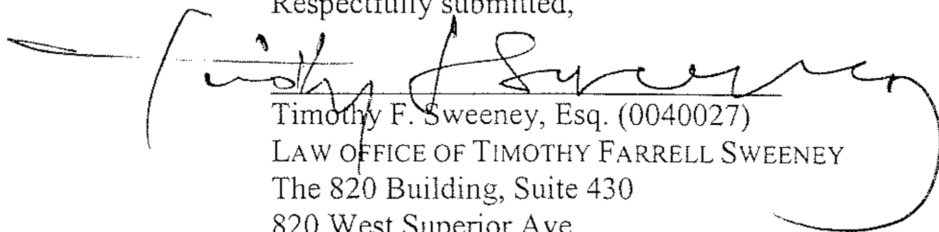
The public has an interest in addressing these concerns and ending this litigation. Broom stands ready to present his case on whatever expedited schedule this Court deems appropriate. Indeed, this Court's current scheduling order contemplates a trial on the merits in another lawsuit, Cooey v. Strickland et al, in just over a month. The factual development necessary to

pursue Broom's claims, while significant, will be far less onerous because of the pending litigation.

IV. Conclusion

The strong likelihood of success weighs in favor of a temporary restraining order and subsequent preliminary injunction in this matter. The four factors this Court must balance weigh in favor of preserving the status quo. Broom respectfully requests that this Court grant a preliminary injunction barring Defendants from executing him until the conclusion of this litigation.

Respectfully submitted,



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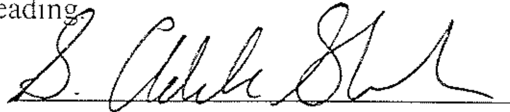
Counsel for Petitioner Romell Broom

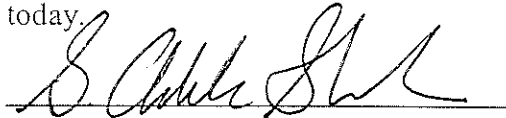
Certification

I hereby certify that counsel spoke to Charles Wille, counsel for Defendants, Friday, September 18, 2009 to advise him of this pleading.



Certificate of Service

I hereby certify that the foregoing was filed served by email to Charles Wille, counsel for Defendants, at charles.wille@ohioattorneygeneral.gov this 18th day of September, 2009, and will also be hand-delivered at a hearing later today.



IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

ROMELL BROOM :
:
:
-vs- :
:
:
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.

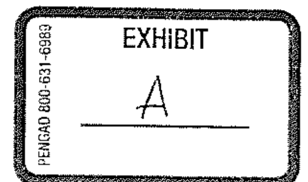
3. Correction officials took me from the Ohio State Penitentiary to SOCF on September 14, 2009.

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 thee 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

My Commission Expires: 11-5-2013

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

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.

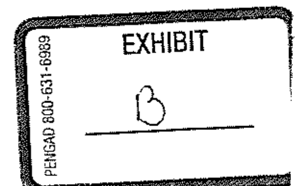
As Broom's anxiety grew, he repeatedly wiped his sweaty forehead with toilet paper.

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

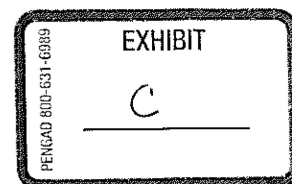
4. Accordingly, I direct that the sentence of death for Romell Broom be reprieved until September 22, 2009.

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



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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.

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

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

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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."

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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

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

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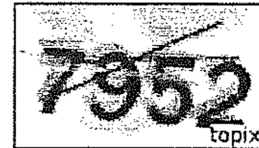

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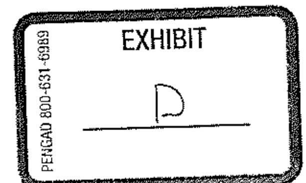
5. Mr. Broom should remain incarcerated in the custody of the Ohio Department of Rehabilitation and Correction. The Department should carry out Mr. Broom's sentence on that day unless further reprieve or clemency is granted.

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

Ted Strickland, Governor

Filed on the ___th day of September 2009 with the Cuyahoga County Common Pleas Clerk of Court by Jose A. Torres.



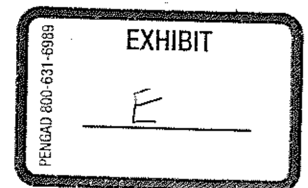
IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACK E. ALDERMAN, Plaintiff, v. 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.	)	Civil Action No. 1:07-CV-1474-BBM

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.

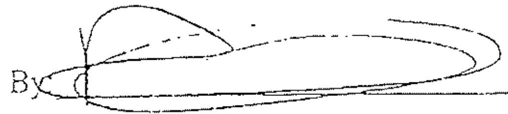
t. The curtain was drawn at 11:51 a.m.

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

Case 2:08-cv-00442-GLF-MRA Document 19-2 Filed 06/17/2008 Page 1 of 9

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LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

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JOURNAL ENTRY
James M Burge, Judge

Date June 10, 2008 Case No 04CR065940
05CR068067

STATE OF OHIO — Plaintiff
LORAIN COUNTY PROSECUTOR — Plaintiff's Attorney

VS

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

JUDGMENT ENTRY

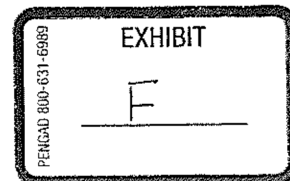
The Case

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

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

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

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



Case 2 08-cv-00442-GLF-MRA Document 19-2 Filed 06/17/2008 Page 2 of 9

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

Findings of Fact

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

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

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

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

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

> "...it does not affect our ability to think, or to feel, or to hear, or anything, any of the senses, or any of our intellectual processes, or consciousness. So a person who's given pancuronium...would be wide awake, and - - but looking at them, you would - - they would look like they were peacefully asleep...But they would, after a time, experience intense desire to breathe. It would be like trying to hold one's breathe. And they wouldn't be able to draw a breath, and they would suffocate." (Heath, Tr. 72)
>
> ...
>
> "Pancuronium also would kill a person, but again, it would be excruciating. I wouldn't really call it painful, because I don't think being unable to breathe exactly causes pain. When we hold our breath it's clearly agonizing, but I wouldn't use the word "pain" to describe that. But clearly, an agonizing death would occur." (Heath, Tr. 75)

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

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

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

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

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

7. The court fines further that:

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

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

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

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

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

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

<u>Conclusions of Fact</u>

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.

<u>Analysis</u>

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

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

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

<u>Remedy</u>

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. <u>Geiger</u> v. <u>Geiger</u> (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. <u>State</u> v. <u>Foster</u> (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.

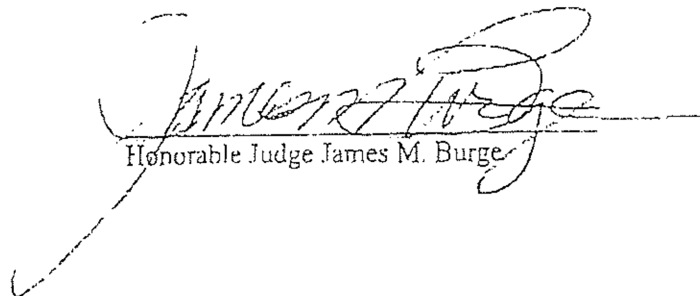
Holding

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