

No. 07-7348

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IN THE  
SUPREME COURT OF THE UNITED STATES

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EARL WESLEY BERRY.,

*Petitioner*

v.

CHRISTOPHER EPPS, Commissioner of the  
Mississippi Department of Corrections,  
LAWRENCE KELLY, Superintendent of  
the Mississippi State Penitentiary at Parchman,  
and JOHN DOES 1-50,

*Respondents*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

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SUPPLEMENTAL BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI

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**ON PETITION FOR A WRIT OF CERTIORARI  
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**SUPPLEMENTAL BRIEF IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Earl Wesley Berry, filed his Petition for Writ of Certiorari on October 29, 2007. This Court stayed Berry's imminent execution on October 30, 2007.

The third question in Berry's Petition raised a challenge to Mississippi's method of lethal injection. The first question challenged the Court of Appeals' ruling which relied exclusively on the alleged untimeliness of Berry's Complaint to affirm the dismissal of Petitioner's Section 1983 civil action.

On April 16, 2008, this Court decided *Baze, et al. v. Rees*, 553 U.S. \_\_\_\_ (2008), No. 07-5439. In that case, the plurality opinion authored by the Chief Justice and joined by Justices Kennedy and Alito held that a method of execution that presented a “substantial risk of serious harm” would violate the Eighth Amendment’s prohibition against cruel and unusual punishment. Opinion of the Chief Justice at 11. The plurality opinion explained that conditions of execution that were “sure or very likely” to cause serious illness and needless suffering, and give rise to “sufficiently imminent dangers” of serious harm would meet this standard. *Id.*

However, the plurality further held that the Kentucky protocol at issue did not present these risks. In doing so, the opinion relied heavily on the findings of fact by the trial court in *Baze*. *Id.* at 15-17. For example, the Kentucky protocol specifies that:

- “members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman,” *id.* at 16;
- “these IV team members, along with the rest of the execution team, participate in at least 10 practice session per year . . . [which] encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers,” *id.*;
- during an execution, “the IV team [must] establish both primary and backup lines and to prepare two sets of the lethal injection drugs before the execution commences . . . these redundant measures ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected. *Id.*; and

- There are two persons in the execution chamber “to watch for signs of IV problems, including infiltration.” *Id.* at 17.

The Chief Justice’s plurality opinion made clear that “*in light of these safeguards*, we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation.” *Id.* (emphasis added).

To the extent publicly known, the details of the Mississippi Protocol are set out in the Complaint filed in this action. See Complaint, Supplemental Appendix E; Mississippi Protocol, Appendix C to Petition for Certiorari.

The Mississippi Protocol uses the same three drugs, in the same order, as does Kentucky, and in that respect Petitioner Berry’s case is similar to *Baze*. Mississippi, however, uses only two grams – not three – of sodium thiopental. Mississippi Protocol, App. C, page 1. *Compare Baze, supra*, Opinion of Roberts, C.J., at 5 (discussing increase to 3 gram dosage used in Kentucky after *Baze* litigation began), Opinion of Breyer, J., at 2 (only four States use the lower 2 gram dosage). Declaration of Mark Heath, M.D., App. D to Petition for Certiorari, at ¶41 (lower dosage of thiopental was used in the clearly painful execution of prisoner Angel Diaz in Florida).

Moreover, **unlike *Baze*, the Record in this case shows that Mississippi does not use the safeguards that the plurality opinion found significant to reduce the risk of serious harm during an execution.** In fact, the Mississippi procedure, as set forth in the only written evidence in this Record, deviates in several important ways, not just from Kentucky’s practice, but from the practice used in other States. For example:

- Mississippi employs a 2 gram dose of sodium thiopental, one gram lower than all but three other States;

- Mississippi requires a maximal concentration in preparing the mixture of thiopental with intravenous fluid;
- Mississippi does not have minimum qualifications for the IV execution team;
- Mississippi does not provide the training and practice sessions required in other States;
- Mississippi has no “back-up plan” in the event of failed IV insertion or other errors in administration of the chemicals.

In the district court, the State did not seek to disprove Berry’s allegations, did not allege or prove any facts other than those going to procedural chronology, and did not move for summary judgment on the merits of the case. Rather, the State attacked the Complaint on its face through a motion to dismiss. Thus, as this Court’s precedent requires, “[a]t this stage of the litigation, we must accept petitioner’s allegations as true.” *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also Sutton v. United Airlines, Inc.*, 527 U.S. 471, 475 (1999). The Complaint in this case thus established the following for purposes of the Petition before this Court:

"The absence of standardized procedures for administration of the chemicals, the lack of qualifications of the personnel involved in the process, and the combination of the three particular chemicals used in the process create a grave and substantial risk that plaintiffs will be conscious throughout the execution process and, as a result, will experience an excruciatingly painful and protracted death." Complaint, Supp. App. E, at 10.

The Complaint goes on to explain these allegations in detail:

12. The process lacks medically necessary safeguards, thus increasing the risk that plaintiff will suffer unnecessary pain during the lethal injection process. There is no standardized time to administer each of the three chemicals. . . .

13. The protocol established by the Department of Corrections’ procedures **does not establish any minimum qualifications or expertise required of the**

**personnel who perform all of the tasks in the lethal injection process.** There are no guidelines upon which these personnel can rely if they are required to exercise their discretion during the process. The protocol has no plan in place if the plaintiff requires medical assistance during the execution.

14. Sodium pentothal, in an ordinary clinical dose, is a very short acting barbiturate that is usually administered only during the preliminary phase of anesthesia administration. There is a reasonable likelihood that sodium pentothal, if ineffectively delivered (which is particularly likely given the inadequacy of the administrative procedures used by the Department of Corrections), will not provide a sedative effect for the duration of the execution process. Without adequate sedation, plaintiffs will experience excruciating pain as a result of the conscious asphyxiation caused by pancuronium bromide and the painful internal burn and cardiac arrest caused by a potassium chloride overdose.

. . . .

24. The Department of Corrections' lethal injection protocol requires utilization of three dangerous chemicals but does not ensure that the personnel entrusted with the lethal injection procedure possess the proper and necessary training, experience, or expertise to administer these drugs. Moreover, the protocol fails to specify any timing for the administration of the three separate chemicals, which is an essential requirement of their proper administration.

. . . .

29. The Department of Corrections' procedure contains no description of the training, credentials, certifications, experience, or proficiency required of any personnel involved in the administration of the lethal injection procedure . . . For example, the procedure does not require at the execution the presence of any personnel who possess sufficient expertise to insert an intravenous line properly, determine if there is a blockage in the intravenous line, or evaluate whether a prisoner is properly sedated before proceeding with the painful parts of the execution process.

Complaint, Supp. App. E, at 12-14, 24, 29 (emphasis added).

The Complaint further pointed out that Miss. Code Ann. § 99-19-51 requires that the Department of Corrections protocol for lethal injection comports with "accepted standard of medical practice," and that Petitioner Berry had a life and liberty interest, protected by the Fourteenth Amendment, in the enforcement of this statute. Complaint, Supp. App. E, at ¶¶ 35-38.

On October 23, 2007, District Judge W. Allen Pepper conducted a hearing on the motions filed by Berry and the State. Berry proffered a declaration and curriculum vitae from Dr. Mark Heath, M.D., Assistant Professor of Clinical Anesthesiology at Columbia University in New York City. Berry Exs. 11 and 12. The declaration detailed the many problems with the Mississippi Protocol.

At the hearing, not only did the Attorney General present no factual rebuttal to Dr. Heath's declaration, but counsel for the State, when asked by Judge Pepper what the Mississippi Protocol required, candidly answered, "I don't know." Hearing Transcript at 33. Counsel further stated that the MDOC would not make any changes to the Protocol because it had not been found unconstitutional. Id.

Dr. Heath's declaration vividly summarized the basic problems with the Mississippi Protocol as follows:

- a. **The MDOC injection team as described is not qualified to mix and prepare execution drugs or syringes.** The MDOC's apparent failure to require drug mixing and syringe preparation by a licensed pharmacist invites failure through under dosage of critical drugs. Numerous other states appropriately require the use of licensed pharmacists to prepare and dispense the drugs and the syringes.
- b. **The MDOC's intention to mix the maximal possible concentration of thiopental is bizarre and unacceptable. No other state to my knowledge mixes thiopental in this manner.** It is the standard for other states to specify the concentration that is to be mixed, and it is a concentration that is far below the maximal possible concentration. **Thiopental is a caustic solution, and if it leaks from veins during the execution process, it could in such highly concentrated form cause excruciating pain.** There is no legitimate or sensible possible reason for mixing and administering thiopental in this manner. It falls below any acceptable medical standard, and it falls below the standards of every other state's lethal injection procedures.

c. **The MDOC's failure to have appropriately qualified and trained personnel monitor the condemned inmate after the administration of thiopental to ensure that there has been no IV access issue and to assure that the inmate has reached an appropriate plane of anesthesia prior to the administration of drugs which would cause suffering is contrary to all standards of practice for the administration of anesthetic drugs and creates a severe and unnecessary risk that the condemned will not be adequately anesthetized before experiencing asphyxiation and/or the pain of potassium chloride injection.** This failure represents a critical and unacceptable departure from the standards of medical care and veterinary care, and falls below the lethal injection protocols of other states.

Heath Declaration, App. D at ¶19a – c.

After discussing these issues in detail, Dr. Heath's recapitulated the facts found by him as follows:

56. Overall, evaluation of the proposed MDOC lethal injection procedures reveals **several problematic themes:**

a. – The absence of a physician to supervise the use of the high-risk drugs pancuronium and potassium. Other states recognize their need to rely upon physicians to oversee the administration of pancuronium and potassium. By contrast, Mississippi does not provide for a physician to be physically present when pancuronium and potassium are administered and therefore cannot offer any protection.

\* \* \*

c. – . . . . There appear to be **no provisions for the participation of personnel who are capable of monitoring anesthetic depth, and there are no directives in the written protocol that would instruct such personnel, if they were present, to actually undertake the assessment of anesthetic depth.** Other states, and courts, and committees, have recognized that given the use of torture-causing drugs such as pancuronium and potassium, it is essential that meaningful and effective steps be in place to ensure that adequate anesthesia is established and maintained.

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



injection.

*Id.* at ¶56 a, c, and d (emphasis added). While Dr. Heath did make clear that his opinions were necessarily based only on the documents Mississippi had provided about the protocol through the open records process, the State did not challenge or rebut the facts set forth by the expert.

Dr. Heath concluded that it was his opinion “to a reasonable degree of medical certainty that, given the apparent absence of a central role for a properly trained professional in MDOC’s execution procedure, the characteristics of the drugs or chemicals used, the failure to understand how the drugs in question act in the body, the failure to properly account for foreseeable risks, the design of a drug delivery system that exacerbates rather than ameliorates the risk, the MDOC has created an execution protocol that does little to nothing to assure they will reliably achieve humane executions by lethal injection.” *Id.* at page 19.

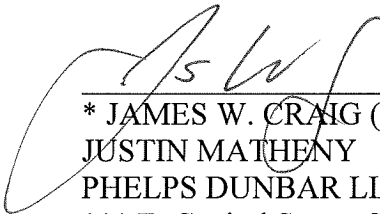
These facts, which were binding on District Judge Pepper and the Court of Appeals, distinguish Berry’s case from the Court’s disposition in *Baze*. Because, to the extent known to the Petitioner and to the extent disclosed by the State, Mississippi does not employ the safeguards for the administration of the three-drug lethal injection “cocktail,” Berry’s Complaint stated a claim on which relief could be granted consistent with the *Baze* plurality.

Thus, notwithstanding *Baze*, this Court should reach the First Question Presented in Berry’s Petition, grant the writ of certiorari, and either schedule briefing and argument on this question, or remand the case for reconsideration by the Fifth Circuit in light of *Baze*.

**CONCLUSION**

For the above reasons, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari, and either schedule briefing and argument on this question, or remand the case for reconsideration by the Fifth Circuit in light of *Baze*.

Respectfully submitted,



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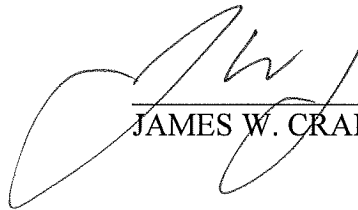
**CERTIFICATE OF SERVICE**

I, James W. Craig, hereby certify that I have served the foregoing pleading via electronic mail and U.S. mail, postage prepaid, on the following counsel for Respondents:

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This the 16<sup>th</sup> day of April, 2008.

  
\_\_\_\_\_  
JAMES W. CRAIG

**RECEIVED**

OCT 18 2007

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF MISSISSIPPI

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
GREENVILLE DIVISION

**FILED**

OCT 18 2007

DAVID CREWS, CLERK  
By *[Signature]*  
Deputy

ALAN DALE WALKER, EARL WESLEY  
BERRY, PAUL EVERETT WOODWARD,  
GERALD JAMES HOLLAND,  
and DALE LEO BISHOP,

PLAINTIFFS

VS.

CIVIL ACTION NO. 4:07CV176-P-B

CHRISTOPHER EPPS, Commissioner of the  
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LAWRENCE KELLY, Superintendent of  
the Mississippi State Penitentiary at Parchman,  
and JOHN DOES 1-50

DEFENDANTS

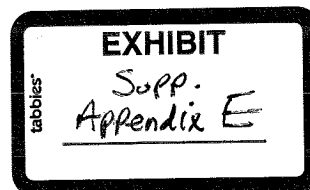
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**COMPLAINT FOR EQUITABLE AND  
INJUNCTIVE RELIEF [42 U.S.C. § 1983]  
(Includes Emergency Motion for Temporary Restraining Order Re: Execution of  
Plaintiff Earl Wesley Berry on October 30, 2007: Expedited Review Requested)**

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**NATURE OF ACTION**

1. This action is brought pursuant to 42 U.S.C. § 1983 for violations and threatened violations to be free from cruel and unusual punishment under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Plaintiffs seek temporary, preliminary, and permanent injunctive relief to prevent the defendants from executing them by means of lethal injection, as that method of execution is currently used in Mississippi. Plaintiffs contend that lethal injection, as performed in Mississippi, unnecessarily risks infliction of pain and suffering. Plaintiffs further contend that the use of pancuronium bromide [also known by its trade name – Pavulon], a paralytic agent that acts as a chemical veil over the lethal injection process, disguises to observers, but does not relieve, the pain and suffering to which he will be subjected. Plaintiffs additionally



contend that defendants, as a result of their failure to use medically approved procedures and properly trained personnel, have inflicted pain and torture on several executed prisoners in the past, making plaintiffs certain they will suffer the same fate unless defendants adopt a humane and safe execution protocol.

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 2201 and 2202. This action arises under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. § 1983.

3. Venue is proper pursuant to 28 U.S.C. § 1391(b) in that plaintiffs are currently incarcerated at the Mississippi State Penitentiary ("Parchman") in Parchman, Mississippi, located in this District. All executions conducted by the State of Mississippi occur at Parchman. The events giving rise to this complaint have occurred and will occur in this District.

### **THE PARTIES**

4. Plaintiffs Alan Dale Walker, Earl Wesley Berry, Paul Everett Woodward, Gerald James Holland, and Dale Leo Bishop ("Plaintiffs") are United States citizens and residents of Mississippi. Each of them is incarcerated at Parchman, in Sunflower County, Mississippi.

5. Defendant Christopher Epps is the Commissioner of the Mississippi Department of Corrections.

6. Defendant Lawrence Kelly is the Superintendent of the Mississippi State Penitentiary at Parchman, where plaintiffs are incarcerated and where their executions would be carried out.

7. Plaintiffs are ignorant of the true names of John Does 1-50 but alleges they have or will participate in the process of execution by virtue of their roles in designing, implementing, and/or carrying out the lethal injection process. When plaintiff discovers the Doe Defendants' true identities, he will amend his complaint accordingly.

#### **GENERAL ALLEGATIONS**

8. Pursuant to Miss. Code Ann. §99-19-51, "the manner of inflicting the punishment of death shall be by continuous intravenous administration of a lethal quantity of an ultra short-acting barbiturate or other similar drug in combination with a chemical paralytic agent until death is pronounced by the county coroner where the execution takes place or by a licensed physician according to accepted standards of medical practice." The statute prescribes no specific drugs, dosages, drug combinations, or the manner of intravenous line access to be used in the execution process; nor does the statute prescribe any certification, training, or licensure required of those who participate in the execution process. All of the details of the execution process are left by the statute to be determined by the Department of Corrections.

9. In performing the execution of any of the plaintiffs, the Department of Corrections will follow its established protocol. Under the protocol adopted by the Department of Corrections, plaintiffs would be executed by poisoning with a lethal combination of three chemical substances: sodium pentothal, a short-acting barbiturate; pancuronium bromide, also known by its trade name Pavulon, which paralyzes all voluntary muscles; and potassium chloride, an extremely painful chemical which activates the nerve fibers lining the prisoner's veins and interferes with the heart's contractions, causing cardiac arrest.

10. Upon information and belief, the procedure was adopted without any medical research or review to determine that a prisoner would not suffer a painful death. No member of the medical community was involved in its adoption.

11. The absence of standardized procedures for administration of the chemicals, the lack of qualifications of the personnel involved in the process, and the combination of the three particular chemicals used in the process create a grave and substantial risk that plaintiffs will be conscious throughout the execution process and, as a result, will experience an excruciatingly painful and protracted death.

12. The process lacks medically necessary safeguards, thus increasing the risk that plaintiff will suffer unnecessary pain during the lethal injection process. There is no standardized time to administer each of the three chemicals. The protocol identifies no procedures for ensuring the anesthetic agent is properly flowing into the prisoner, and it identifies no procedures for ensuring that the prisoner is properly sedated prior to the administration of the lethal chemicals as would be required in any medical or veterinary procedure before the administration of a neuromuscular blocking agent, such as pancuronium bromide, or the administration of a painful potassium chloride overdose.

13. The protocol established by the Department of Corrections' procedures does not establish any minimum qualifications or expertise required of the personnel who perform all of the tasks in the lethal injection process. There are no guidelines upon which these personnel can rely if they are required to exercise their discretion during the process. The protocol has no plan in place if the plaintiff requires medical assistance during the execution.

14. Sodium pentothal, in an ordinary clinical dose, is a very short acting barbiturate that is usually administered only during the preliminary phase of anesthesia administration. There is a reasonable likelihood that sodium pentothal, if ineffectively delivered (which is particularly likely given the inadequacy of the administrative procedures used by the Department of Corrections), will not provide a sedative effect for the duration of the execution process. Without adequate sedation, plaintiffs will experience excruciating pain as a result of the conscious asphyxiation caused by pancuronium bromide and the painful internal burn and cardiac arrest caused by a potassium chloride overdose.

15. Pancuronium bromide, the second chemical administered in the lethal injection process, paralyzes voluntary muscles, including the diaphragm, but it does not affect consciousness or the perception of pain. Pancuronium bromide, administered by itself is a "lethal dose," would not result in quick death; instead, it would ultimately cause someone to suffocate to death while still conscious. There is no indication in the Department of Corrections' lethal injection protocol, however, that pancuronium bromide is used to cause death. It is therefore completely unnecessary in the lethal injection process and only serves to mask any pain or suffering that the plaintiff may experience.

16. Pancuronium bromide could not lawfully be used alone as the fatal agent because death by suffocation violates the Eighth Amendment's prohibition against cruel and unusual punishment.

17. The Mississippi Department of Correction protocol by which lethal injection executions are performed, violate the provisions of the Fifth, Eighth, and



Fourteenth Amendments, insofar as those provisions protect the plaintiffs' rights to be free from State-inflicted cruelty, pain and torture.

18. The administrative review regulations of the Mississippi Department of Corrections provide that a complaint under the administrative procedure will be rejected if "the complaint concerns an action not yet taken." It would therefore be futile for plaintiffs to seek to exhaust administrative remedies within the Mississippi Department of Corrections.

19. Notwithstanding this futility, Plaintiff Alan Dale Walker has filed for administrative review of the Department's lethal injection procedures, but to date no response has been forthcoming from the Department. The Department's administrative procedures state that the Department need not respond to more than one request for administrative review of the same facts and circumstances; thus in addition to the reasons set forth in paragraph 18 above, it would be futile for any of the other plaintiffs to file for such review.

20. Thus, this Court should excuse any lack of exhaustion of administrative remedies on grounds such exhaustion would be futile. Furthermore, Plaintiff Earl Wesley Berry is scheduled to be executed at 6 p.m. on October 30, 2007, and the requirement of exhaustion as applied to Mr. Berry's constitutional claims would prevent any review of these claims by this Court.

**COUNT ONE**  
**VIOLATION OF RIGHT TO BE FREE FROM CRUEL AND UNUSUAL**  
**PUNISHMENT PURSUANT TO THE FIFTH, EIGHTH AND FOURTEENTH**  
**AMENDMENTS TO THE UNITED STATES CONSTITUTION**  
**42 U.S.C. § 1983**

21. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 20.

22. Defendants Epps, Kelly, and the Doe Defendants are acting under color of Mississippi law in causing to be administered to plaintiffs chemicals that will cause unnecessary pain the execution of a sentence of death, thereby depriving plaintiffs of their rights under the Fifth, Eighth and Fourteenth Amendments to be free from cruel and unusual punishment, in violation of 42 U.S.C. § 1983.

23. The Mississippi Department of Corrections procedure, which purports to specify the State's lethal injection protocol, violates plaintiffs' rights under the cruel and unusual punishment clause of the Eighth Amendment because (a) the protocol creates the unreasonable and unacceptable risk of unnecessary physical and psychological pain; (b) the protocol does not comport with contemporary norms and standards of society; and (c) the protocol offends the dignity of the person and society.

24. The Department of Corrections' lethal injection protocol requires utilization of three dangerous chemicals but does not ensure that the personnel entrusted with the lethal injection procedure possess the proper and necessary training, experience, or expertise to administer those drugs. Moreover, the protocol fails to specify any timing for the administration of the three separate chemicals, which is an essential requirement for their proper administration.

25. The use of pancuronium bromide as administered under the Department of Corrections' lethal injection protocol increases the risk that the use of this chemical, in combination with the initial dose of sodium pentothal, will result in plaintiff being paralyzed but conscious and suffering death from the burning veins and heart failure caused by the administration of potassium chloride to be administered in a lethal dose, the use of pancuronium bromide serves no purpose in the execution process. Pancuronium bromide unnecessarily increases the risk that a conscious prisoner will be paralyzed during the injection of an extremely painful drug, yet be entirely unable to inform the attendants of his condition. Without the use of pancuronium bromide, a prisoner would be able to indicate that he was still conscious prior to the administration of potassium chloride. This is particularly crucial because the Department of Corrections's protocol does not provide any procedure to determine whether a prisoner is conscious once he is paralyzed by the pancuronium bromide.

26. The American Veterinary Medical Association ("AVMA") states that a combination of a barbiturate and a neuromuscular blocking agent such as pancuronium bromide, a combination similar to that called for by the Department of Corrections's procedures, is not an acceptable euthanasia method for animals when used alone.

27. Sodium pentothal, which is an extremely fast-acting but not long-lasting barbiturate in an ordinary clinical dose, is used as the anesthetic agent in the Department of Corrections's lethal injection procedure. In veterinary medicine, sodium Phenobarbital, a somewhat slower-acting but longer-lasting barbiturate, is used for animal euthanasia. The AVMA states that when potassium chloride is used for euthanasia, it is extremely important for the personnel who perform euthanasia to be

trained and knowledgeable in anesthetic techniques and competent in assessing the anesthetic depth appropriate for potassium chloride administration, a depth at which animals are in a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli. The Department of Corrections' lethal injection protocol includes no comparable requirement; in fact, it does not require any training of the personnel who use the same drug in executing prisoners.

28. The Department of Corrections' lethal injection procedure fails to address the individual prisoner's medical condition and history. Several regularly prescribed drugs at Parchman interfere with the ability of sodium pentothal to act properly as an anesthetic.

29. The Department of Corrections' procedure contains no description of the training, credentials, certifications, experience, or proficiency required of any personnel involved in the administration of the lethal injection procedure, notwithstanding the fact that it is a complex medical procedure requiring a great deal of expertise in order to be performed correctly. For example, the procedure does not require at the execution the presence of any personnel who possess sufficient expertise to insert an intravenous line properly, determine if there is a blockage in the intravenous line, or evaluate whether a prisoner is properly sedated before proceeding with the painful parts of the execution process.

30. The absence of such trained personnel greatly increases the risk that a prisoner would not receive the necessary amount of anesthetic prior to being paralyzed by the pancuronium bromide and then experience the excruciatingly painful internal burn of the potassium chloride. Toxicology reports from prisoners executed by other states

suggest that some prisoners likely remained conscious during the administration of lethal drugs, which could have occurred because of improper insertion of the intravenous line, an unrecognized blockage in the line, or various other reasons.

31. Inducing unconsciousness by correctly administering sodium pentothal is indispensable to preventing the wanton infliction of pain when the potassium chloride overdose is administered. The Department of Corrections' procedure, however, does not require the preparation of back-up syringes of sodium pentothal.

32. The Department of Corrections' lethal injection protocol fails to address any reasonably foreseeable complications with any appropriate medical response. Moreover, the protocol includes no safeguards that would protect the prisoner in the event a stay of execution is entered after the lethal injection process has begun. Thus, the protocol fails to provide any protections to prevent a prisoner from being wrongly executed should a reprieve be granted after the process has begun but before death has occurred.

33. At any time before the potassium chloride is administered, the prisoner could readily be resuscitated if trained personnel and routine resuscitation medication and equipment were present at the execution site. Even after the potassium chloride is administered resuscitation would still be possible, although admittedly it would be more challenging. Any resuscitation, however, would require the close proximity of the necessary equipment, medication, and properly trained personnel. The omission of such personnel and equipment under the protocol set forth by the Department of Corrections further undermines the constitutionality of the procedure.

34. Although it is possible to conduct executions in a constitutionally compliant manner, the Department of Corrections has chosen not to do so. The Department of Corrections could choose to use different chemicals that pose a low risk of administration error yet do not cause extraordinarily grave consequences to a condemned inmate if not properly administered; instead it has knowingly or recklessly chosen to use chemicals that pose a high risk of administration error. Moreover, it has not taken precautions to ensure that the personnel who administer the lethal injection chemicals possess the training, experience, and expertise needed to administer those chemicals properly. Thus, while it is possible for the Department of Corrections to choose different lethal injection chemicals and/or retain qualified personnel to administer its chosen chemicals in order to ensure the constitutionality of its lethal injection procedure, the Department of Corrections has not done so.

**COUNT TWO**  
**VIOLATION OF MISS. CODE ANN. § 99-19-51**  
**THE DUE PROCESS CLAUSE OF THE**  
**FOURTEENTH AMENDMENT TO THE UNITED STATES**  
**CONSTITUTION, AND 42 U.S.C. § 1983**

35. Plaintiffs reallege and incorporate the allegations made by them in paragraphs 1 through 34 above.

36. Miss. Code Ann. § 99-19-51 requires that the Department of Corrections protocol for the lethal injection comport with "accepted standard of medical practice."

37. Plaintiffs have interests in life and liberty protected by this State statute.

38. For the reasons set forth above, the Departments' protocol does not comport with "accepted standards of medical practice," and therefore their application to

plaintiffs violate the statute itself, the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

### **EQUITABLE AND INJUNCTIVE RELIEF SOUGHT**

39. The use of pancuronium bromide under the protocol established by the Department of Corrections to paralyze plaintiff greatly increases the risk that a conscious prisoner will be subjected to a painful and protracted death. Moreover, it serves no legitimate penological purpose.

40. Pancuronium bromide does not play a legitimate role in killing a condemned person. The execution protocol provides that potassium chloride kills the condemned. The administration of pancuronium bromide cannot be justified on the grounds the drug paralyzes the breathing muscles because death by asphyxiation is itself a form of cruel and unusual punishment under the Eighth Amendment.

41. If pancuronium bromide is administered, paralyzing plaintiff during the execution procedure, he will have no alternative “reasonable and effective means of communication” to communicate that he was not properly anesthetized because he will be dead at the conclusion of the procedure.

42. Enjoining the administration of pancuronium bromide will have no appreciable impact on Mississippi correctional institution procedures. If anything, it will simplify the execution process by eliminating one step in the process.

43. The question of whether there exists readily available alternatives to pancuronium bromide is not an issue in this case because paralyzing a condemned inmate in the execution process is not a legitimate penological goal.

44. The Department of Corrections' failure to require sufficient training, credentials, certification, experience or proficiency of the personnel involved in the administration of lethal injection procedure greatly increases the risk that a conscious prisoner will experience excruciating pain as a result of the conscious suffocation caused by the pancuronium bromide and the painful internal burn and cardiac arrest caused by a potassium chloride overdose. Moreover, it serves no legitimate penological purpose.

45. Allowing personnel who lack sufficient training, credentials, certification, experience, or proficiency to conduct the lethal injection procedure does not play a legitimate role in killing the condemned person. Conscious suffocation, as caused by the administration of pancuronium bromide, violates the Eighth Amendment because death by asphyxiation is itself a form of cruel and unusual punishment. Similarly, conscious internal burning and cardiac arrest, as caused by a potassium chloride overdose, constitute unnecessary physical and psychological pain in violation of the Eighth Amendment.

46. If plaintiffs remain conscious during the administration of the pancuronium bromide and potassium chloride, they will have no alternative "reasonable and effective means of communication" to communicate the fact that they were not properly anesthetized because the pancuronium bromide will paralyze them, and they will be dead at the conclusion of the procedure.

47. Enjoining the administration of lethal injection procedure by personnel who lack sufficient training, credentials, certification, experience or proficiency will have no appreciable impact on the correctional institution.



48. The question of whether there exist readily available alternatives to requiring personnel who possess sufficient training, credentials, certification, experience or proficiency to conduct the lethal injection procedure is not an issue in this case because causing a prisoner who has not been properly anesthetized as a result of administration error to experience excruciating pain from the conscious suffocation caused by pancuronium bromide and the painful internal burn and cardiac arrest caused by a potassium chloride overdose is not a legitimate penological goal.

**MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY  
INJUNCTION -- EARL WESLEY BERRY**

49. Plaintiff Earl Wesley Berry is scheduled to be executed at 6 p.m. on October 30, 2007. The Department of Corrections is required to follow the protocol set forth above at this execution. For the reasons set forth above, Mr. Berry requests this Court to issue a Temporary Restraining Order prohibiting the Defendants, or any of them, or anyone acting in concert with them, from proceeding with the scheduled execution by means of the Department of Corrections' lethal injection protocol.

**PRAYER FOR RELIEF**

FOR THESE REASONS, Plaintiffs respectfully request the Court enter an order granting:

1. Temporary, preliminary, and permanent injunctive relief to enjoin the defendants, their officers, agents, servants, employees, and all persons acting in concert with them from executing plaintiff by lethal injection using the Department of Corrections' procedures;

2. In the event the Department of Corrections' procedures are not enjoined in their entirety as violating the Fifth, Eighth and Fourteenth Amendments, temporary, preliminary, and permanent injunctive relief to enjoin defendants, their officers, agents, servants, employees, and all persons acting in concert with them from administering pancuronium bromide during the execution process;

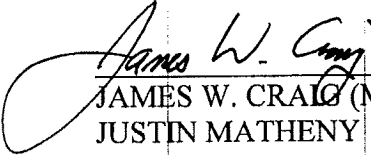
3. In the event the Department of Corrections' procedures are not enjoined in their entirety as violating the Fifth, Eighth and Fourteenth Amendments, temporary, preliminary, and permanent injunctive relief to enjoin defendants, their officers, agents, servants, employees, and all persons acting in concert with them from allowing personnel who lack sufficient training, credentials, certification, experience, or proficiency to conduct the lethal injection procedure;

4. Reasonable attorneys' fees pursuant to 42 U.S.C. §§ 1983, 1988 and the laws of the United States;

5. Costs of suit; and

6. Any other relief as the Court deems just and proper.

Respectfully Submitted,

  
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