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MAY 07 2008 THE UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION
JAMES BONINI, CLERK
COLUMBUS, OHIO

LAWRENCE REYNOLDS
#296-121
Ohio State Penitentiary
878 Coitsville-Hubbard Road
Youngstown, Ohio 44505,

Plaintiff,

vs.

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

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

PHIL KERNS, Warden
Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #1, Execution Team Member
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #2, Execution Team Member
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #3, Execution Team Member
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

CASE NO.: 08 cv 442

JUDGE

JUDGE FROST

MAGISTRATE JUDGE

MAGISTRATE JUDGE ABEL

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

JOHN/JANE DOE #4, Execution Team Member
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #5, Execution Team Member
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #6, Execution Team Member
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #7, Execution Team Member
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #8, Execution Team Member
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #9, Execution Team Member
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #10, Execution Team Member
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #11, Execution Team Member
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

and

JOHN/JANE DOE #12, Execution Team Member
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

Defendants.

COMPLAINT

I. SUMMARY OF ACTION

1. Plaintiff contends that Defendants plan to violate his constitutional rights by executing him with a lethal injection protocol that violates his constitutional rights.
2. Defendants' current method of lethal injection will cause Plaintiff substantial pain the type of which at least two others (Mr. Clark and Mr. Newton) suffered at the Defendants' hands during botched executions. In the face of these botched executions, Defendants have refused to change their lethal-injection execution protocol by adopting a one-drug execution method, and/or by employing reliable equipment, and/or by adequately training members of the execution team.
3. Alternate means of execution are readily available that would significantly reduce a substantial risk of severe pain that will otherwise be inflicted on Plaintiff under Defendants' current execution protocol. Defendants have no legitimate penological justification for their refusal to adopt alternative methods of execution in the face of Defendants' track record of botched executions under their previous and current execution protocols.
4. Defendants' lethal-injection protocol is not substantially similar to Kentucky's; therefore Plaintiff's suit is not barred by the Supreme Courts decision in Baze v. Kentucky, 2008 U.S. LEXIS 3476 (April 16, 2008). Defendants adopted a new lethal-injection protocol effective in July of 2006, as amended again in October of 2006. Therefore, Plaintiff's suit is not time-barred by the Sixth Circuit Court of Appeals decision in Cooey v. Strickland, 479 F.3d 412 (6th Cir. 2007), cert. denied 2008 U.S. LEXIS 3626 (April 21, 2008).
5. The Baze plurality went well beyond a mere discussion of the three drugs, delving deeply into the details of the drugs and equipment used, and the training of the executioners. Baze,

2008 LEXIS 3476, * 34-39. Baze holds that a complaint such as like Plaintiff's, that challenges the drugs, the details of the equipment used, and the training of the executioners; states claims that merit full and fair litigation.

6. Furthermore, Plaintiff contends that Defendants plan to violate his constitutional rights by denying him the unfettered right to have his counsel present to witness his execution. This right is granted to Defendants, whose counsel is present, and representatives of the victim(s) and law enforcement without requiring the victim(s)'s representatives to otherwise give up one of three statutory-allotted seats for witnesses at Plaintiff's execution.

II. JURISDICTION AND VENUE

7. This action is brought under 42 U.S.C. § 1983 for threatened violations of Plaintiff's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution; Plaintiff's rights to be free from violations of his substantive and procedural due process rights under the Fourteenth Amendment to the United States Constitution; and Plaintiff's right to Equal Protection under the Fourteenth Amendment to the United States Constitution. Plaintiff seeks equitable, injunctive, and declaratory relief; and Plaintiff's right to equal protection under the law.
8. This Court has jurisdiction over this matter under 28 U.S.C. § 1331, in that it arises under the Constitution of the United States; under 28 U.S.C. § 1343(a)(3), in that it is brought to redress deprivations, under color of state authority, of rights, privileges, and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that it seeks to secure equitable relief under an act of Congress, specifically 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights; under 28 U.S.C. § 2201(a), in that one purpose of this action is to secure declaratory relief; and under 28 U.S.C. § 2202, in that

one purpose of this action is to secure preliminary and permanent injunctive relief. This Court has supplemental jurisdiction over any state statutory claim asserted by Plaintiff under 28 U.S.C. § 1367, in that, the state and federal claims are derived from a common nucleus of operative facts.

9. This Court has venue under 28 U.S.C. § 1391(b)(1) in that all of the Defendants are situated within the State of Ohio and each of them resides within the Southern District of Ohio, and under 28 U.S.C. § 1391(b)(2) in that all of the events described herein have occurred and will transpire within this judicial district. Defendant Strickland exercises his final authority over the other Defendants in the seat of Ohio's government, located in Franklin County, Ohio; the lethal injection execution procedures were promulgated by Defendant Collins in Franklin County, Ohio; and Warden Kerns and the execution team members intend to execute Plaintiff in Scioto County, Ohio, by the method of lethal injection described herein.
10. Plaintiff has exhausted his administrative remedies under O.A.C 5120-9-31, Inmate Grievance Procedure. On September 17, 2007, Plaintiff filed a grievance with the Inspector of Institutional Services, alleging that the method and means of execution used in Ohio would subject him to a violation of his rights to substantive and procedural due process and to be free from cruel and unusual punishment. (Ex. 1) The Inspector of Institutional Services disposed of Plaintiff's grievance, Plaintiff appealed, and on October 02, 2007, the Chief Inspector dismissed the grievance. (Ex. 2) O.A.C. 5120-9-31(J)(3) and (L) state that "[t]he decision of the chief inspector or designee is final." Therefore, Plaintiff has exhausted his administrative remedies. Plaintiff's grievance procedure began after Defendants amended Ohio's lethal injection protocol on July 10, 2006.

III. THE PARTIES

11. Lawrence Reynolds is a United States citizen and a resident of the State of Ohio. He is currently a death-sentenced inmate in the custody of Defendants, and under the control and supervision of the State of Ohio Department of Rehabilitation and Correction, who have him incarcerated in the Ohio State Penitentiary, in Youngstown, Ohio, under Inmate #296-121. If Plaintiff Reynold's capital conviction and/or death sentence is not overturned in another judicial proceeding or through executive clemency, then Defendants will execute him. Upon information and belief, it is the intention of Defendants to use the lethal injection methods described herein to execute Plaintiff Reynolds in the death house located at the Southern Ohio Correctional Facility, which is operated and controlled by the Defendants.
12. Defendant Ted Strickland is, and at all times relevant was, the Governor of the State of Ohio. He is the final executive authority in the state, statutorily and constitutionally responsible for the execution of all sentences of death in Ohio and the manner in which those sentences are performed. He is sued here in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.
13. Defendant Terry Collins is, and at all times relevant was, the Director of the State of Ohio Department of Rehabilitation and Correction (DRC), a department of the State of Ohio created and maintained under O.R.C. § 5120. O.R.C. § 5120.01 charges and authorizes Defendant Collins is to prescribe and direct the promulgation of rules and regulations for the DRC, including the rules and regulations for the conduct of prison operations and execution procedures. He is sued here in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.

14. Defendant Phil Kerns is, and at all times relevant was, Warden of the Southern Ohio Correctional Facility at Lucasville (SOCF), a correctional institution of the DRC that was created and is maintained under O.R.C. § 5120.05, and which is the prison where sentences of death are executed in the State of Ohio. Under O.R.C. § 5120.38, Defendant Kerns, as the Warden of SOCF, is charged with management of SOCF and the oversight and conduct of operations there. This includes the oversight of training of personnel and implementation of executions carried out there. He is sued here in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.
15. Defendants John/Jane Doe Numbers One through Twelve are, and were at all times relevant to this action, employees and/or agents of the Ohio Department of Rehabilitation and Corrections, who served and/or currently serve as members of the execution team charged with implementing Defendants' lethal-injection execution protocol in a manner designed to cause the death of others in the past, and who will be charged with the duty to cause Plaintiff's death under Defendants' current execution protocol. The identities of these Defendants are presently unknown to Plaintiff. Their identities are uniquely within the knowledge of one or more of the named Defendants (Gov. Strickland, Director Collins, and/or Warden Kerns) and/or their agents. As their identities become known to Plaintiff, the proper names of the "John/Jane Doe" Defendants will be added to this action.
16. Defendants, at all times relevant hereto, were acting in their respective official capacities with respect to all acts described herein, and were in each instance acting under the color and authority of state law. Unless preliminarily and permanently enjoined, the Defendants intend to act in their respective official capacities and under the authority of state law by executing Plaintiff by utilizing lethal injection methods that will violate his constitutional rights.

**IV. FACTS IN SUPPORT OF THE FIRST AND SECOND CLAIMS FOR RELIEF:
LETHAL INJECTION PROTOCOL VIOLATES CONSTITUTIONAL STANDARDS**

17. Plaintiff incorporates by reference all facts and allegations described throughout this complaint as if fully re-written herein.
18. If Plaintiff's capital conviction or death sentence is not overturned in another judicial proceeding or through executive clemency, Defendants will execute Plaintiff.
19. Defendants intend to execute Plaintiff by employing the same means and methods of lethal injection as identified in the July 10, 2006 and October 11, 2006 protocols.
20. Defendants intend to execute Plaintiff by employing the same means and methods of lethal injection as they or their predecessors used to execute Christopher Newton on May 24, 2007.
21. Defendants intend to execute Plaintiff by using drugs that will cause agony and suffering because those drugs will not be properly administered by adequately trained personnel using appropriate equipment in proper facilities.
22. Defendants intend to execute Plaintiff by using drugs designed in theory to first anesthetize him, then paralyze him, then stop his heart. The second drug creates the substantial risk of severe pain being caused by the third drug as a result of a constitutionally flawed attempt to anesthetize him with procedures and equipment employed by inadequately trained persons under flawed conditions.
23. Plaintiff's review of the available lethal injection logs for executed inmates Barton, Ferguson, Lundgren, and Filliaggi reveal that the pancuronium bromide was administered before three minutes after the administration of the sodium thiopental. This reveals Defendants' failure to ensure that the anesthetic has taken full effect before the second and third drugs are administered.

24. On July 10, 2006, Defendants enacted a version of their execution protocol that superseded all previous versions of Defendants' execution protocols. (Ex. 3) Defendants modified this protocol on October 11, 2006 (Ex. 4).
25. Defendants execution of Joseph Clark on May 2, 2006, did not go as Defendants planned.
26. As a result of problems encountered by Defendants when they executed Joseph Clark, Defendants changed their lethal injection execution protocol effective on or about July 10, 2006, and they amended it again in October of 2006.
27. The July 2006 changes to Defendants' lethal injection protocol "resulted from difficulties encountered during the execution of Joseph Clark on May 2, 2006." Cooey, 470 F.3d at 423. "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. Cooey was decided on March 2, 2007; thus, the court could not incorporate Mr. Newton's botched execution into its decision.
28. As demonstrated during the May 24, 2007 botched execution of Christopher Newton, these changes either failed to alleviate the problems associated with Ohio's lethal injection protocol or created new problems. 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 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) (Ex. 5 attached hereto).

29. Defendant's current lethal injection protocol failed to address the substantial risk of serious harm posed by the previous protocol as evidenced by the combined impact of the botched executions of Mr. Clark and Mr. Newton. Alternatively, the amendments to Ohio's lethal injection protocol created a substantial risk of serious harm, as evidenced by Christopher Newton's botched execution. The changes in Ohio's lethal injection protocol on July 10, 2006, thus re-started the statute of limitations.
30. Upon information and belief, neither Defendants nor their agents have publicly disclosed to Plaintiff or anyone else all material and relevant details surrounding the process by which Defendants chose the method of lethal injection they use; the details pertaining to the personnel involved in the lethal injection execution procedure, including but not limited to any education, credentials, training, expertise, or other factors that qualify or disqualify them from being involved in Ohio's lethal injection execution procedures; the details of all of the equipment utilized to effectuate an execution by lethal injection; or the details of the facilities

used to carry out an execution by lethal injection, including but not limited to the room(s) not seen by witnesses to an execution, in which room(s) certain actions essential to an execution are undertaken by unknown persons.

31. The plurality decision in Baze v. Kentucky relied upon the detail with which Kentucky's spelled out its execution protocol in order to uphold Kentucky's protocol. See, e.g., Baze, 2008 U.S. LEXIS 3476 at * 34-39.
32. On its face and as applied, Defendants' lethal injection protocol for Ohio is not substantially similar to Kentucky's protocol (Ex. 6).
33. No matter how Defendants' protocol compares on paper to Kentucky's protocol, Defendants have a track record that includes at least two botched executions (Clark and Newton), whereas Kentucky's record before the United States Supreme Court included only one execution that evidenced no problems.
34. Upon information and belief, Plaintiff contends that Defendants also botched Ohio's first execution in the modern era when they or their predecessors executed Wilford Berry in 1999. The members of Mr. Berry's execution team could not locate a vein for the IV line, so they resorted to violently beating his arms in order to raise a vein adequate to acquire an IV site for the transmission of the lethal drugs into his body. And upon information and belief, Plaintiff contends that details that remain undisclosed by Defendants will reveal that other inmates executed by Defendants (or their predecessors) since 1999 did not go as planned in ways that expose constitutional deficits.
35. On their face, Defendant's Ohio protocol and Kentucky's protocol are substantially different. Compare Exhibits 3, 4, and 6. Compared to Kentucky's protocol, Defendants' protocol

substantially differs in many ways that renders it constitutionally offensive, including but not limited to the following deficiencies:

- A. Inadequate training requirements for the execution team members who, unlike Kentucky, are not required to undertake as many annual “dry runs” that include inserting IVs into volunteers;
- B. Failure to provide adequate training, equipment, and alternative procedures to follow in the event an IV cannot be inserted into a peripheral vein; *e.g.*, Defendants have no procedure detailed in their protocol for gaining access to relatively deep veins in an inmate’s neck area or other more invasive procedures necessitated when access cannot be gained to a peripheral vein (*e.g.*, central line, percutanous line, cut down);
- C. Failure to allow adequate time between the insertion of the anesthetic and the insertion of the next two drugs as is required in order to ensure the inmate is anesthetized before the next drugs are administered;
- D. Failure to station properly trained personnel within immediate proximity of the inmate (versus some distance away behind a barrier) who are charged with, among other things, the duty to monitor whether the inmate is properly anesthetized before additional drugs are injected, and who are additionally charged with, and trained to effectuate the duty of, ordering alternate procedures in the event that, after sixty seconds, the inmate has not been anesthetized;
- E. Failure to station properly trained personnel within immediate proximity of the inmate (versus some distance away behind a barrier) who are charged with, among other things, the duty to monitor whether there is a failure in the IV site during the execution process;
- F. Failure to utilize a cardiac monitoring device to ascertain whether, after a maximum of ten minutes, the heart has stopped;
- G. Failure to utilize a cardiac monitoring device to signal that additional drugs must be injected if the heart has not stopped after ten minutes have passed since the onset of the lethal injection procedure, and failure to have ready-at-hand a second set of syringes to administer the second round of drugs (Kentucky provides for this, Ohio does not);
- H. Failure to utilize more than 2 grams of the anesthetic sodium thiopental (Kentucky uses 3 grams); and
- I. Failure to provide a stabilization procedure to prevent the inmate’s death if stay or clemency issues after the lethal injection process begins but before the inmate is dead – Ohio has nothing; Kentucky has medical staff, an ambulance, a defibrillator, and a medical “crash cart” ready at hand to revive an inmate in such circumstances.

36. Additional facts in support of Plaintiff's claims arise from similar, ongoing state-court litigation in Lorain County, Ohio. State v. Rivera, Case no. 04CR065940 (Lorain C.P.). In that litigation, trial-level capital defendants challenged Ohio's (*i.e.*, Defendants here) lethal injection protocol. Defendants or their agents were required (over objection) to disclose documents related to Ohio's lethal injection protocol.
37. These documents were reviewed by anesthesiologist Mark Heath, a medical doctor who was qualified to render expert testimony in that state-court proceeding. After reviewing the documents disclosed, Dr. Heath prepared a declaration and report in February 2008 that was submitted prior to his testimony. (Ex. 7) Plaintiff anticipates that Dr. Heath will testify on his behalf at the trial on the merits of Plaintiff's complaint (note that Dr. Heath proffered a report about Ohio's previous protocol, based on very limited information available at the time, in support of the Plaintiff in the case that resulted in the statute-of-limitations ruling announced in Cooley).
38. During Dr. Heath's testimony in the on-going, similar state court proceeding, his expert opinion was that Defendant's Ohio lethal injection protocol contains flaws. Plaintiff contends that those flaws violate his federal constitutional rights, including but not limited to, Dr. Heath's following opinions expressed during his testimony:
- A. Death can be caused in a short time by a barbiturate drug alone, which would eliminate the substantial risk of gratuitous pain that, upon the failure of the anesthetic, would certainly be caused by the administration of a paralytic drug and/or potassium chloride, a point with which the Lorain County prosecutor's expert, Dr. Dershwitz, essentially agreed;
 - B. There are drugs that can, unlike potassium chloride, painlessly stop the human heart and cause death;
 - C. A host of problems in Defendants' "machinery of death" create easily avoided and substantial risks of significant pain (points that the Lorain County prosecutor's expert, Dr. Dershwitz, essentially conceded), including but not limited to:

- i. Ohio's procedures fail to detail adequate alternative mechanisms for achieving peripheral or non-peripheral access to the condemned's vein;
- ii. Ohio's procedures invite problems by placing all or most members of the execution team in a dimly lit room some distance from the condemned inmate into whom they are attempting to inject lethal drugs without the ability to observe closely signs that there is leakage in the long tubes leading to the condemned, that the IV inserted into the condemned failed, that the condemned is not adequately anesthetized;
- iii. Ohio's procedure fails to guard against the mistakes in the complex process of mixing and administering the sequence of lethal drugs into an adequately monitored system for delivering those drugs into the condemned's body in amounts that will cause death without inflicting gratuitous pain;
- iv. Ohio's procedures fail to guard against failures in the IV insertion at its inception and/or throughout the course of the execution process – even if the IV is inserted properly at the outset, many factors can cause the IV to fail, which Ohio's protocol does not adequately monitor, including a disruption in the flow caused by the restraints placed on the condemned to fix him to the death gurney, and disruptions caused by a vein that collapses due to excessive pressure on the syringe, and/or intrinsic weaknesses in an inmate's vein;
- v. Ohio's procedure fails to provide mechanisms that ensure that the inmate is adequately anesthetized before the paralytic and potassium-based heart stopping drugs are administered – and the county prosecutor's expert, Dr. Dershwitz, agreed that the administration of the Defendants' second (paralytic) and third (potassium chloride) drugs increase the risk of an inhumane execution; and
- vi. Ohio's procedures fail to guard against the problems common during medical procedures, including but not limited to a retrograde injection (*i.e.*, the drugs go the wrong way so they do not wind up into the inmates body), leakage, and improper pressure applied to the syringe which would rupture the vein.

39. Dr. Heath's declaration and report, completed in February 2008 for the Rivera litigation, supports Plaintiff's First and Second Claims, and is incorporated as if fully rewritten herein.

(Ex. 7). The following excerpts from Dr. Heath's declaration are included in the text of Plaintiff's complaint to emphasize how Defendants' protocol violates Plaintiff's constitutional rights with regard to the chemicals used, the means by which those chemicals