

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at FRANKFORT

GREGORY WILSON,)
Plaintiff)
v.)
JOHN D. REES,) Civil Action No. _____
in his official capacity as)
Commissioner,) **CAPITAL CASE**
Kentucky Dept. of Corrections) **Electronically filed**
Frankfort, Kentucky)
THOMAS SIMPSON,)
in his official capacity as)
Warden,)
Kentucky State Penitentiary)
Eddyville, Kentucky)
SCOTT HAAS,)
in his official capacity as)
Medical Director for the)
Kentucky Dept. of Corrections)
ERNIE FLETCHER,)
in his official capacity as)
Governor of the Commonwealth)
of Kentucky)
and)
UNKNOWN EXECUTIONERS,)
Defendants.)

**COMPLAINT FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF**

I. NATURE OF ACTION

1. This action is brought pursuant to 42 U.S.C. §1983 for violations and 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 seeks equitable, injunctive and declaratory relief.

2. The Defendants' current method of lethal injection is unconstitutional because there is an unnecessary risk that the Plaintiff will be tortured to death.

3. Kentucky Revised Statute (KRS) 431.220(1)(b) provides that lethal injection shall be the default method of execution for condemned inmates who receive a death sentence prior to March 31, 1998, unless the condemned inmate elects electrocution as the method of execution at least twenty (20) days before the scheduled execution.

4. The Plaintiff received a sentence of death prior to March 31, 1998, and has not elected electrocution pursuant to KRS 431.220(1)(b). Consequently, the Defendants intend to utilize lethal injection to carry out the imposition of Plaintiff's sentence of death.

5. In the administration of lethal injection, Defendants currently employ three chemicals: sodium thiopental, pancuronium bromide and potassium chloride.

6. Each of Defendants' lethal injection chemicals poses an unnecessary risk of pain and suffering.

7. Plaintiff does not allege that the Defendants may not carry out the imposition of a death sentence against him. Rather, any imposition of the death sentence must comport with the United States Constitution. Specifically, the Defendants may carry out a death sentence against him if: 1) no separate legal challenge reverses his conviction or death sentence; 2) Plaintiff does not receive executive clemency; 3) Defendants design a constitutionally permissible method for carrying out a sentence of

death that does not pose an unnecessary risk of pain and suffering, and which monitors for consciousness; and 4) Defendants maintain proper equipment at the execution chamber for maintaining life if a stay of execution is granted after the first or second chemical is administered, and have adequately trained individuals at the execution chamber to operate the equipment and render life saving measures.

8. Plaintiff seeks a preliminary injunction preventing Defendants from carrying out his execution by the means currently employed for the administration of lethal injection in the Commonwealth of Kentucky.

9. Plaintiff seeks an order declaring that the Defendants' current chemical combination and means for conducting an execution by lethal injection violates the Eighth and Fourteenth Amendments to the United States Constitution and Section Seventeen of the Kentucky Constitution.

10. Plaintiff seeks an order declaring that the Defendants' refusal to provide the execution protocols for the administration of lethal injection and electrocution violates the Fourteenth Amendment to the United States Constitution and Section Two of the Kentucky Constitution.

II. PLAINTIFF

11. Gregory Wilson is a United States citizen and a resident of the Commonwealth of Kentucky. He is currently a death sentenced inmate under the supervision of the Kentucky Department of Corrections. He is housed at the Kentucky State Penitentiary in Eddyville, Kentucky.

III. DEFENDANTS

12. Defendant John D. Rees in his official capacity as the Commissioner of the Kentucky Department of Corrections.

13. Defendant Thomas Simpson in his official capacity as the Warden of the Kentucky State Penitentiary. He is responsible for the oversight and implementation of death sentences at Kentucky State Penitentiary.

14. Defendant Scott Haas in his official capacity as the Medical Director for the Kentucky Department of Corrections. He is responsible for designating a physician to examine Plaintiff in the weeks leading up to his execution, and for designating a physician to be present at the execution facility to render medical treatment if a stay of execution is granted after the first and/or second chemical is administered.

15. Defendant Ernie Fletcher in his official capacity as the current Governor of Kentucky. He is the final executive authority in the Commonwealth of Kentucky and is responsible for the administration of all sentences of death in Kentucky.

16. Defendants Unknown Executioners in their official capacity are employed by, or are under contract with, the Kentucky Department of Corrections to make preparations for, and carry out, Plaintiff's execution. Plaintiff does not yet know the identities of the Executioners.

IV. JURISDICTION

17. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, in that it arises under the Constitution of the United States; pursuant to 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; pursuant to 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; pursuant to 28 U.S.C. § 2201(a), in that one purpose of the action is to secure declaratory relief; pursuant to 28 U.S.C. § 2202, in that one purpose of this action is to secure preliminary and permanent injunctive relief; and pursuant to 28 U.S.C. § 1367, in that the Court has supplemental jurisdiction for Plaintiff's claims under the Kentucky Constitution.

18. Venue is proper under 28 U.S.C. § 1391, in that the official capacity address for several Defendants is in the Eastern District of Kentucky. Specifically, the official capacity address for Defendants Rees, Simpson and Fletcher are in the Eastern District of Kentucky.

19. All Defendants are state actors acting under color of state law.

V. FACTS

20. Plaintiff, Gregory Wilson, is a death sentenced inmate in the custody of the Kentucky Department of Corrections. Plaintiff's petition for habeas corpus was denied by the United States District Court for the Eastern District of Kentucky at Covington by Memorandum Opinion and Order Denying Petition for Writ of Habeas Corpus entered on September 30, 2004 (Civil Action No. 99-78-DLB). The Plaintiff timely appealed the District Court's denial of the Petition for Writ of Habeas Corpus and the appeal is currently under submission to the Sixth Circuit Court of Appeals.

21. Defendants are responsible for carrying out executions in Kentucky.

22. Under the Eighth Amendment to the United States Constitution, cruel and unusual punishment claims involving a particular means of effectuating a sentence of death are analyzed under a six prong test in which proof of any one prong establishes an Eighth Amendment violation:

- a) the physical pain inflicted is excessive in light of readily available alternatives;
- b) the risk of pain is more than the Constitution tolerates;
- c) the risk of pain and suffering is unnecessary in light of available alternatives;
- d) mutilation of the body during the execution;
- e) unnecessary psychological suffering; and
- f) the particular means of effectuating the sentence of death violates evolving standards of decency.

23. Defendants intend to execute Plaintiff by administering the following drugs in the following manner:

- a) sodium thiopental (also known as sodium pentothal) (3 grams);
- b) pancuronium bromide (also known as pavulon) (50 milligrams); and
- c) potassium chloride (240 milliequivalents).

The drugs are injected in succession, one after the other. Saline solution is injected in between each drug.

24. The use of sodium thiopental in lethal injection protocol is not mandated by Kentucky law.

25. The use of pancuronium bromide in lethal injection protocol is not mandated by Kentucky law.

26. The use of potassium chloride in lethal injection protocol is not mandated by Kentucky law.

27. Finding that any one of the chemicals, or a combination thereof, used by the Defendants in Kentucky's lethal injection protocol violates the Eighth Amendment to the United States Constitution will not require statutory amendment or variance.

28. To carry out Plaintiff's execution, Defendants intend to insert two intravenous ("I.V.") lines into Plaintiff.

29. The three chemicals will be injected from only one I.V. line.

30. The I.V. insertion team will spend up to sixty (60) minutes attempting to insert an I.V. into Plaintiff's body.

31. If the I.V. insertion team is unable to insert the I.V. lines after sixty (60) minutes, Defendant Rees and Defendant Simpson will ask Defendant Fletcher to call off the execution and reschedule it.

32. If the I.V. lines are successfully inserted into Plaintiff's body, the chemicals are injected from outside the execution chamber by pushing them through a tube that flows approximately five feet to the catheter that is inserted into the condemned inmate's vein.

33. The chemicals are injected by a member of the execution team referred to as the executioner. The executioner is not a licensed physician or a registered nurse.

34. Sodium thiopental is an ultra-short acting barbiturate.

35. Pancuronium bromide is a curare-derived agent that paralyzes all skeletal and voluntary muscles.

36. Potassium chloride is a strong alkaline chemical that acts to stop the heart thereby causing cardiac arrest and death.

37. Sodium thiopental is a powder that must be mixed into a liquid before injecting it into the condemned inmate.

38. Sodium thiopental is an ultra short-acting barbiturate that is ordinarily used only in the induction phase of anesthesia to render a surgical patient unconscious for mere minutes, specifically so that the patient may re-awaken and breathe on their own power if any complications arise in inserting a breathing tube pre-surgery.

39. Defendants administer sodium thiopental to prevent the condemned inmate from feeling pain.

40. Prior to injecting sodium thiopental, Defendants offer the condemned inmate Valium.

41. If Plaintiff refuses to take Valium prior to his execution, Defendants will force him to do so if Defendants determine that Valium should be administered.

42. The administration of Valium can interfere with sodium thiopental's effectiveness.

43. The concentration of thiopental injected determines the potency of sodium thiopental, i.e., if the sodium thiopental is too diluted, it will be less potent and be unable to ensure that the condemned inmate does not feel pain at any point during his execution.

44. According to the package insert for sodium thiopental, it should be administered only "by individuals experienced in the conduct of intravenous anesthesia."

45. According to the package insert for sodium thiopental, "individual response to the drug is so varied that there can be no fixed dosage."

46. According to the package insert for sodium thiopental, "dose is usually proportional to body weight and obese patients require a larger dose than relatively lean persons of the same weight."

47. The Defendants responsible for the administration of sodium thiopental to condemned inmates are not licensed physicians or registered nurses.

48. Defendants inject the same dose of sodium thiopental to all condemned inmates.

49. Because the Defendants are inadequately trained to administer sodium thiopental, there exists a substantial likelihood that the Defendants will improperly administer the chemical thereby resulting in the Plaintiff regaining consciousness during the execution procedure. Because the second chemical, pancuronium bromide, will effectively paralyze the Plaintiff, he will be unable to communicate any pain that results from improperly administered sodium thiopental.

50. When sodium thiopental is exposed to pancuronium bromide, sodium thiopental precipitates, i.e. returns to the solid condition.

51. Once sodium thiopental returns to its solid condition, it no longer performs its anesthetic function.

52. If an individual is able to feel pain, pancuronium bromide and potassium chloride would be extremely painful.

53. The second chemical utilized by Defendants in the lethal injection process is pancuronium bromide, a derivative of curare that acts as a neuromuscular blocking agent.

54. Pancuronium bromide is a long acting neuromuscular blocking agent. The administration of pancuronium bromide causes paralysis throughout the inmate's body thereby depriving him of any form of communication once it is administered throughout the remainder of the execution procedure.

55. There are multiple levels of unconsciousness.

56. Defendants' only form of monitoring for unconsciousness prior to injecting the second and third chemicals is physical observation of the inmate.

57. The use of pancuronium bromide during an execution creates an unacceptable risk that Plaintiff will suffer an unnecessarily painful death through the immobilization of Plaintiff's musculature thereby preventing him from signaling or otherwise communicating in the event of consciousness during the procedure. The use of pancuronium bromide denies the Plaintiff any means of communicating pain in the event that the ultra-short acting sodium thiopental is ineffective in rendering him unconscious for the duration of the execution procedure.

58. Pancuronium bromide prevents witnesses from seeing convulsions caused by potassium chloride.

59. Plaintiff is suffering and, without judicial relief, will suffer irreparable harm for which he has no adequate remedy at law.

VI. FIRST CLAIM - EIGHTH AMENDMENT VIOLATION

60. The particular combination and sequence of chemicals used by the Defendants in the lethal injection protocol create an unnecessary risk that the Plaintiff will be subjected to an excruciating and unnecessarily painful and protracted death in violation of the Eighth Amendment to the United States Constitution.

61. The Defendants' failure to provide sufficient information regarding the execution protocols denies Plaintiff adequate assurances that the personnel assigned to administer the lethal injection are adequately trained to insert I.V.'s, mix lethal injection chemicals, inject lethal injection chemicals and monitor to ensure that the condemned inmate cannot feel pain.

62. Because the lethal injection chemicals are administered by individuals who are improperly and/or inadequately trained and who are not licensed physicians or registered nurses, there exists a reasonable likelihood that the chemicals will be improperly administered thereby resulting in the unnecessary infliction of excruciating conscious pain and/or conscious asphyxiation to the Plaintiff.

VII. SECOND CLAIM - SECTION SEVENTEEN CRUEL PUNISHMENT VIOLATION

63. The particular combination and sequence of chemicals used by the Defendants in the lethal injection protocol create an unnecessary risk that the Plaintiff will be subjected to an excruciating and unnecessarily painful and protracted death in violation of Section Seventeen of the Kentucky Constitution.

64. Section Seventeen of the Kentucky Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted."

65. The Defendants' failure to provide sufficient information regarding the execution protocols denies Plaintiff adequate assurances that the personnel assigned to

administer the lethal injection are adequately trained to insert I.V.'s, mix lethal injection chemicals, inject lethal injection chemicals and monitor to ensure that the condemned inmate cannot feel pain.

66. Because the lethal injection chemicals are administered by individuals who are improperly and/or inadequately trained and who are not licensed physicians or registered nurses, there exists a reasonable likelihood that the chemicals will be improperly administered thereby resulting in the unnecessary infliction of excruciating conscious pain and/or conscious asphyxiation to the Plaintiff.

VIII. THIRD CLAIM - FOURTEENTH AMENDMENT DUE PROCESS VIOLATION

67. The Due Process clause prevents a person from being sentenced to death and executed upon information that he is barred from refuting.

68. The Due Process clause requires notice and the opportunity to be heard prior to depriving a person of life, liberty or property.

69. In Kentucky, inmates sentenced to death prior to March 31, 1998, are permitted to choose electrocution as a method of execution.

70. In order to make a knowing and intelligent choice between lethal injection and electrocution, death sentenced inmates must have an opportunity to review the entire execution procedures for both methods.

71. Upon information and belief, Defendants refuse to disclose the execution procedures that will be utilized in carrying out Plaintiff's execution.

72. Due process and notions of fundamental fairness mandate that Defendants provide Plaintiff with a copy of the execution procedures that will be used to extinguish his life so that he may independently determine whether a particular aspect of the lethal

injection and/or electrocution process may constitute cruel and unusual punishment, and to consult medical experts concerning that possibility. The Defendants' failure to disclose the execution protocols for lethal injection and electrocution constitutes a denial of Plaintiff's right to Due Process under the Fourteenth Amendment to the United States Constitution.

IX. FOURTH CLAIM - SECTION TWO VIOLATION

73. Section Two of the Kentucky Constitution prohibits the governmental exercise of absolute and arbitrary power over the lives, liberty and property of Kentucky citizens.

74. In Kentucky, inmates sentenced to death prior to March 31, 1998, are permitted to choose electrocution as a method of execution.

75. In order to make a knowing and intelligent choice between lethal injection and electrocution, death sentenced inmates must have an opportunity to review the entire execution procedures for both methods.

76. Upon information and belief, Defendants refuse to disclose the execution procedures that will be utilized in carrying out Plaintiff's execution.

77. The Defendants' failure to provide the execution procedures for either lethal injection or electrocution constitutes an exercise of absolute and arbitrary power thereby denying Plaintiff the opportunity to knowingly and intelligently determine whether a particular aspect of the lethal injection and/or electrocution process may constitute cruel and unusual punishment, and to consult medical experts concerning that possibility. The Defendants' failure to disclose the execution protocols for lethal

injection and electrocution constitutes a denial of Plaintiff's right to Due Process under Section Two of the Kentucky Constitution.

X. ADMINISTRATIVE REMEDIES

78. Plaintiff, Gregory Wilson, has exhausted his administrative remedies and/or has done everything required for exhaustion to be deemed complete and/or futile. He timely pursued his administrative remedies pursuant to Kentucky Department of Corrections Policies and Procedures ("CPP") 14.6(II)(D) by co-filing a group grievance on July 21, 2004 regarding the lethal injection procedure. [Dkt. 144].

79. Plaintiff's grievance was denied as a "non-grievable" issue.

80. Under these circumstances, Plaintiff has timely and completely exhausted the administrative remedies available to him and/or has done everything required for exhaustion to be deemed complete and/or deemed futile.

REQUEST FOR RELIEF

Plaintiff respectfully requests the following:

81. A preliminary injunction barring Defendants, and their agents, from carrying out Plaintiff's execution by the means currently employed for the administration of lethal injection during the pendency of this action;

82. A preliminary and permanent injunction barring Defendants from executing Plaintiff in the manner by which Defendants currently employ to carry out a death sentence;

83. An order declaring that the Defendants' current means, methods, practices, procedures and customs regarding execution by lethal injection violate the Eighth and

Fourteenth Amendments to the United States Constitution and Section Seventeen of the Kentucky Constitution;

84. A preliminary injunction barring Defendants from carrying out Plaintiff's execution until he has been provided with a copy of the lethal injection and electrocution protocols and given adequate time to review the protocols;

85. An order declaring that the failure to disclose the execution protocols for lethal injection and electrocution violates due process and fundamental notions of fairness and constitutes an improper exercise of absolute and arbitrary power; and

86. Such further relief as this Court deems just and proper.

Respectfully submitted,

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