IN THE CIRCUIT COURT
FOR FRANKLIN COUNTY
COMMONWEALTH OF KENTUCKY

RALPH BAZE, and, THOMAS C. BOWLING, Plaintiffs, v. JONATHAN D. REES, Commissioner, KentuckyDepartment of Corrections, Frankfort, Kentucky GLENN HAEBERLIN, Warden, Kentucky State Penitentiary, Eddyville Kentucky, UNKNOWN EXECUTIONERS, and, HON. ERNIE FLETCHER, Governor of Kentucky Defendants.	CIV. ACTION # 04-CI-1094

MOTION TO COMPEL DISCOVERY

Pursuant to Kentucky Rules of Civil Procedure, Rule 37.01, Plaintiffs Ralph Baze and Thomas C. Bowling hereby move this Court to grant an order compelling discovery directing the above-named Defendants to comply with each request made in Plaintiffs' *Motion for Production of Documents, First Set of Interrogatories,* and *Request for Entry Upon Land for Inspection*.

Plaintiffs have raised substantial questions concerning whether the chemicals used for lethal injection, the cut down procedure, lack of training of the execution team, and inadequate (or lack of) execution procedures, create an unacceptable risk of unnecessary pain and suffering during Plaintiffs' execution. *See Complaint and Memorandum of Law*. In order to further support this claim, fundamental fairness and due process requires that Defendants disclose all discovery materials previously requested through the discovery process.

Procedural due process demands that citizens be given a meaningful opportunity to contest a constitutional violation. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (June 28, 2004). The central meaning of procedural due process is clear:

> parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'

Id. at 2649 (*quoting*, *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Procedural due process takes on a heightened meaning in capital cases.

"Because death is a different kind of punishment from any other which may be imposed in this country," *Gardner v. Florida*, 430 U.S. 349, 357 (1977), the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment Cruel and Unusual Punishment Clause prevent a criminal defendant from being executed based on secret information (information that he was unaware of and unable to obtain through no fault of his own), *id*., or information for

which he was not given an opportunity to rebut. *Simmons v. South Carolina*, 512 U.S. 154 (1994). Surely, if a condemned inmate cannot be sentenced to death based on secret information, then likewise, the condemned inmate cannot be executed under a secret procedure that the condemned inmate had no notice of or opportunity to challenge. *See Oken v. Sizer*, 2004 WL 1334521 (D. Md. June 14, 2004) (exhibit 62).

Furthermore, inmates facing the death penalty are entitled to notice when there has been a post-conviction change in mode of execution. *See, e.g., Stewart v. LaGrand,* 526 U.S. 115, 119 (1999); *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997); *Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998); *Sims v. Florida*, 754 So.2d 657, 665 (Fla. 2000); *DeShields v. State*, 534 A.2d 630, 639 n. 7 (Del.1987); *State v. Fitzpatrick,* 684 P.2d 1112, 1113 (1984). "And, it is clear that in innumerable death penalty cases the execution protocols have been examined by courts for their compliance with constitutional requirements." *Oken v. Sizer*, 2004 WL 1334521 (D. Md. June 14, 2004) (*citing by e.g., Nelson*, 124 S.Ct. 2117; *In re Williams*, 359 F.3d 811 (6th Cir.2004); *Poland v. Stewart*, 117 F.3d 1094 (9th Cir.1997); *Campbell v. Wood*, 18 F.3d 662 (9th Cir.1994); *Cooper v. Rimmer*, 2004 WL 231325 (N.D.Cal.2004), *aff'd*, 358 F.3d 655; *Cal. First Amendment Coalition v. Woodford*, 2000 WL 33173913 (N.D.Cal.2000), *aff'd*, 299 F.3d 868; *Jones v. McAndrew*, 996 F.Supp. 1439 (N.D.Fl.1998); *LaGrand v. Lewis*, 883 F.Supp. 469 (D.Ariz.1995). Court review of the execution procedures presupposes knowledge of the contents of those procedures. *See Oken v. Sizer*, 2004 WL 13345231 (D. Md. June 14, 2004) (exhibit 62). Therefore, it is clear that a procedural right exists to know the procedures that will be used in

carrying out an execution by any method.[1] What procedures are required is determined by a balancing test.

The "process due in any given circumstance is determined by weighing 'the private interest that will be affected by the official action against the government's asserted interest 'including the functions involved and the burdens the Government would face in providing greater process.'" *Hamdi*, 124 S.Ct. at 2646 (*quoting*, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Defendants claim that they need not comply with Plaintiffs discovery requests because: 1) Plaintiffs already have the requested material; 2) their execution procedures must remain confidential in order to protect security even though the majority, if not all, of the members of the execution do not know the condemned inmate as they are selected from individuals working outside the facility where executions are carried out; and, 3) rules of discovery in habeas cases bar discovery here because there is little chance that Plaintiffs will prevail on the merits. All of these arguments, however, must fail.

First, although both Harold McQueen and Edward Harper were represented by Assistant Public Advocates at the time of their executions, Plaintiffs are not in possession of all information concerning their execution.[2] No Assistant Public Advocates witnessed Mr. Harper's

[1] In their *Response to Discovery Motions*, in an attempt to show that Plaintiffs are unlikely to succeed on the merits, Defendants provide a litany of cases involving challenges to lethal injection. Defendants, however, fail to note that in each of those cases, many of which were by order of the court, Plaintiffs were provided with copies of the execution procedures. Undersigned counsel are aware of no cases where a court has denied a request for a copy of the execution procedures, where a plaintiff has challenged particular aspects of the execution procedures.

[2] Plaintiffs acknowledge that they recently were able to obtain copies of the post-mortem documents pertaining to Mr. McQueen and Mr. Harper's execution. But, that does not exempt Defendants from complying with the requisite portions of Plaintiffs discovery requests for two reasons. First, Defendants refuse to provide Plaintiffs with copies of any post-mortem photographs/slides. Second, part of Plaintiffs' allegations is that Defendants are deliberately indifferent to known risks of unnecessary pain during an execution; a claim that is based in part on Defendants knowledge of the post-mortem documents pertaining to McQueen and Harper's execution. To prove this, Plaintiffs must be able to establish that Defendants are in possession of the same post-mortem information concerning McQueen and Harper that Plaintiffs recently obtained.

execution. Furthermore, much of the execution process is not visible to execution witnesses, and much of the information requested concerns what Defendants do prior to the viewing curtain opening in the execution chamber. Consequently, Plaintiffs are not aware of the contents of, and do not on their own have the means to become aware of, the information they seek in their discovery requests.

Second, Defendants claim that security interests bar the disclosure of Defendants' execution procedures. In support of this argument, Defendants cite K.R.S. section 197.025 of the Open Records Act. *Response to Discovery Motions* at 2. This provision, however, does not apply to discovery requests under the Kentucky Rules of Civil Procedure. K.R.S. section 61.878, an exemption provision within the specific portion of the privilege section of the Open Records Act cited by Defendants, makes this clear. In relevant part, this provision states that "no court shall authorize the inspection by any party of any material pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery." K.R.S. section 61.878(1). By separating the Rules of Civil Procedure from the Open Records Act, this statute makes it clear that what is discoverable under the Rules of Civil Procedure is different from what is public under the Open Records Act. Therefore, K.R.S. section 197.025 provides no basis for denying Plaintiffs access to Defendants' execution procedures.

Putting K.R.S. section 197.025 aside, balancing the interests of the parties favors full disclosure of the documents Plaintiffs requested in their discovery motions. Plaintiffs' interest is making sure that they will not suffer excruciating pain during their executions. In other words, they only seek a death in accord with the dignity of man. *See Gregg v. Georgia*, 428 U.S 153, 176 (1976). Although Defendants' interest is weighty, it is not as strong as the interest in ensuring a painless death, particularly in light of evidence demonstrating that Defendants are not

currently capable of carrying out a humane lethal injection and that the "execution procedures" are only in possession of Defendant Haeberlin.[3] Therefore, the weighing of the respective interests favors disclosing the entire execution procedures so that Plaintiffs do not have to take Defendants' word that their Eighth Amendment rights will not be violated. *See Oken v. Sizer*, 2004 WL 1334521 (D. Md. June 14, 2004) (exhibit 62); *see also*, *Nelson v. Campbell*, 124 S.Ct. 2117 (May 24, 2004) (requiring the Alabama Department of Corrections to disclose its execution procedures as part of the remand order to determine if the use of a cut down procedure during a lethal injection violates the Eighth Amendment).[4]

In addition to disclosing the full execution procedures and the other documents relevant to those procedures as requested in the *Request for Production of Documents*, inspecting the execution chamber and the equipment (including chemicals) is essential to this litigation. As explained in detail in the *Memorandum of Law*, the equipment utilized during lethal injections, the storage of the chemicals, and the manner in which the equipment is utilized to deliver the chemicals to the condemned inmate's body, is essential to whether the execution team, even if properly trained, can deliver the chemicals directly to the inmate's body in a manner that will not create an unacceptable risk of unnecessary pain during the execution.

Finally, Defendants appear confused. They spend more than two of their six substantive pages discussing the rules of discovery in 28 U.S.C. section 2254 habeas cases. These rules, however are not applicable to the instant action for two obvious reasons: 1) this case is proceeding in a state court not a federal court making federal habeas corpus rules inapplicable;

[3] During oral argument on September 8, 2004, counsel for Defendants admitted that he has not seen Defendants' execution procedures.

[4] As an alternative to full and open disclosure of the requested discovery materials, undersigned counsel are willing to enter into a sealing agreement, whereby we will agree to not disclose the discovery materials to Mr. Baze, Mr. Bowling, any other death row inmate, or the media. Undersigned counsel are also willing to take anonymous depositions.

and, 2) this case is a civil actin rather than a state post conviction matter. Therefore, court rules and opinions concerning criminal cases and habeas cases challenging a conviction or sentence are not applicable to Plaintiffs' claims. Furthermore, the cases cited by Defendants on page 6 of their *Response to Discovery Motions* are quite distinguishable from Plaintiffs' civil action and do not support the proposition that there is little likelihood of success on the merits.[5] As previously discussed, in each of those cases, Plaintiffs received copies of the execution procedures. In the first case cited, *Cooper*, no toxicology information concerning thiopental levels was available to call into doubt the calculations of Dr. Dershwitz. *Harris*, also cited by Defendants, as discussed in Plaintiff's original pleadings and motion for a temporary restraining order, held that the plaintiff's claim was cognizable, and could have proceeded on the merits if it the plaintiff did not unduly delay in filing. In *Oken*, where undersigned counsel Barron was counsel of record, the focus of the litigation was on a leaking IV line in a prior execution and the probability that the IV line would also leak during Mr. Oken's execution. The portion of *Reid* that Defendants refer to actually references *In re Sapp*, only to state that the district court relied on *Sapp* in dismissing the case. Defendants, however, fail to mention that the Fourth Circuit reversed the district court and remanded the case on the merits. In sum, contrary to what Defendants would lead this Court to believe, all of the cases cited by Defendants (except *Ritchie*, which was a direct appeal challenge to the method of execution, and *Cooper*, which did not have the benefit of the toxicology information currently before this Court), found that a similar claim to that raised by Plaintiffs

[5] Defendants' argument concerning the likelihood of success on the merits and accompanying list of cases is not an appropriate fact to consider in determining whether to grant discovery. Rather, that argument should have been presented, if at all, in their motion to Dismiss filed six days earlier. Adding it in a the end of its *Response to Discovery Motions* can only be seen as an attempt to provide further authority for their motion to dismiss, which they easily could have prevented in their *Motion to Dismiss*. Such back door attempts to provide additional authority when otherwise barred to do so should not be tolerated.

was cognizable, must survive a motion to dismiss, and required discovery of the execution procedures and other relevant information concerning execution by lethal injection.

CONCLUSION AND REQUEST FOR RELIEF.

"Defendants ask too much of [Plaintiffs] and of the Court. They ask that it be taken on faith" that the Kentucky Department of Corrections' Execution Procedure do not pose an unacceptable risk of pain and suffering during an execution and that they have taken precautions to ensure this. *Oken v. Sizer*, 2004 WL 1334521 (D. Md. June 14, 2004). Such blind faith in light of compelling evidence showing otherwise cannot be permitted. Denying Plaintiffs the right to review the requested documents and inspect the execution chamber so that they will have a fair opportunity to object under Section 17 of the Kentucky Constitution and the Eighth Amendment to the U. S. Constitution, would be a gross violation of Fourteenth Amendment due process and fundamental fairness

WHEREFORE, this Court should enter an order compelling full compliance with all discovery requests by Ralph Baze and Thomas C. Bowling, within 72 hours of this Court's ruling.

RESPECTFULLY SUBMITTED,

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