COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIV. I

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, and, HON. ERNIE FLETCHER, Governor of Kentucky Defendants.	CIV. ACTION # 04-CI-1094 **EMERGENCY MOTION** **EXECUTION IMMINENT** **EXECUTION SCHEDULED FOR NOVEMBER 30, 2004 TUESDAY**

MOTION FOR A TEMPORARY INJUNCTION BARRING DEFENDANTS FROM EXECUTING BOWLING ON NOVEMBER 30, 2004 UNDER THE CURRENT EXECUTION PROCEDURES AND DURING THE PENDENCY OF THE ADJUDICATION OF THE MERITS OF CHALLENGE TO DEFENDANTS' LETHAL INJECTION PROCEDURES.

NOTICE

Please, take notice that this Motion has been docketed for emergency consideration in the above referenced Court on Tuesday, November 23, 2004, at 10:00 a.m.

MOTION

I. INTRODUCTION.

Despite substantial legal issues remaining unresolved by this Court, Plaintiff, Thomas Clyde Bowling, is scheduled to be executed by lethal injection on Tuesday, November 30, 2004. Unless this Court intervenes, Defendants intend to use a combination of lethal chemicals that creates a risk of unnecessary pain and suffering beyond what the Eighth Amendment to the United States Constitution and section 17 of the Kentucky Constitution tolerate. This risk is greater in Kentucky than many other states because Defendants are not properly trained in carrying out lethal injections, have admitted that lethal injections are difficult procedures, which they have had problems with in the past, use an inadequate execution protocol, because during discovery, it has become clear that Defendants are not only unprepared to carry out a lethal injection but also do not possess the requisite knowledge to ensure that Bowling's execution does not cause unnecessary pain and suffering, and because Defendants may use a cut down procedure to access Bowling's veins despite having no procedures for doing so and not being prepared to perform a cut down procedure. Because of this risk, Bowling is entitled to a temporary injunction.

Bowling also is entitled to a temporary injunction because Defendants are unwilling to and unprepared to provide emergency life saving medical treatment if a stay of execution is granted after the first chemical is administered, because this Court is unable to resolve the merits

of Bowling's claims prior to his execution, because discovery has not been completed and depositions have begun, because a denial of a temporary injunction will result in a violation of Bowling's due process and First Amendment right of access to the courts, and because Defendants have purposely delayed adjudication of the merits, and then argued that a temporary injunction should not be granted because Bowling waited too long to file his claim. Bowling filed this claim on August 9, 2004. But for the Commonwealth's delaying tactics, this case could have already been resolved on the merits after a full trial.

Bowling respectfully requests a temporary injunction barring Defendants from executing him under the current execution procedures for lethal injection and during the pendency of this litigation challenging those procedures (the means of effectuating Bowling's sentence of death by lethal injection including the chemicals Defendants intend to use in executing Bowling). *See* CR 65.[1]

CR 65.04 (temporary injunction) authorizes this Court to grant a temporary injunction if "the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual." This action falls directly within the meaning of CR 65.04.

Bowling is currently scheduled to be executed on Tuesday, November 30, 2004. Bowling's imminent execution constitutes an emergency requiring this Court to issue a temporary injunction to reach the merits of a claim that this Court has already found substantial enough to survive a motion to dismiss.

[1] As stated in the Complaint, Memorandum of Law, and other pleadings filed in this matter, Bowling does not challenge lethal injection on its face, but rather the specific chemicals and procedures Defendants plan to use in carrying out Plaintiffs' death sentences. Bowling incorporates by reference the Complaint for Injunctive and

II. PROCEDURAL HISTORY.

Open Records Requests.

On December 19, 2003, co-plaintiff Ralph Baze filed an Open Records Act request seeking Defendants' lethal injection protocol and other documents concerning execution by lethal injection. This request was denied on December 23, 2003.

On July 16, 2004, Baze filed a second Open Records Act request seeking the same information and all other documents pertaining to lethal injections in Kentucky. Within five days, Baze was notified that Defendants needed an additional week to respond to the Open Records Act request. On August 3, 2004, Defendants disclosed the lethal injection chemicals, the sequence in which the chemicals are administered, and the concentration of chemicals administered.[2]

Filing the lawsuit - - early stage litigation.

Within days of receiving the latest Open Records Act response, on August 9, 2004, Bowling filed this civil action seeking declaratory and injunctive relief barring Defendants from carrying out his execution by lethal injection under the current execution protocol, which, due to the chemical combination and sequence, inadequacies within the procedures, and lack of training of the execution team, will result in an unnecessarily high likelihood that Bowling will

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Declaratory Relief, the memoranda of law in support thereof with its accompanying exhibits, and all other pleadings filed in this matter.

[2] Prior to filing the second Open Records Act request, counsel for Baze and Bowling learned of an Open Records Act Response concerning lethal injection obtained by an attorney with the Department of Public Advocacy Appeals Branch. That response also disclosed the lethal injection chemicals, but did not state, as did the latest Open Records Act response, that the current protocols are the same as the protocols used during the last lethal injection in Kentucky. However, that is not true. Defendants' execution procedures seem to have gone through numerous revisions in recent times. On November 1, 2004, Plaintiffs received a redacted copy of the execution procedures. The lethal injection section was revised in 2002. Other portions of the execution procedures were revised during this litigation.

experience undue pain and suffering during his execution in violation of the Eighth Amendment right to be free from cruel and unusual punishment, and section 17 of the Kentucky Constitution.

The following day, August 10, 2004, Bowling served Defendants with a Request to Enter and Inspect Land, First Set of Interrogatories, and Request for Production of Documents. Bowling also filed a motion for expedited discovery, which was docketed for oral argument on August 18, 2004.

Defendants' Undue Delay.

On August 18, 2004, Defendants orally objected to the entire discovery request and to any ruling that expedited the litigation, claiming that no emergency existed because Bowling's execution had not yet been scheduled. Over Defendants' objection, this Court ordered Defendants to file a responsive pleading to Bowling's complaint no later than September 1, 2004, and a response to Bowling's discovery request no later than September 6, 2004 (because September 6th was a holiday, the response was not filed until September 7, 2004).

On September 1, 2004, Defendants filed a motion to dismiss. Two days later, Bowling filed a response to the motion to dismiss, a motion for an immediate trial date, a motion to bar any physical examination of Bowling in connection with this suit, an amended complaint naming Governor Ernie Fletcher as a Defendant and adding further statutory authority invoking this Court's jurisdiction, and a motion for a temporary injunction barring Bowling's execution during the pendency of this litigation. Each of these motions was docketed for argument on September 8, 2004.

During the September 8th argument, Defendants again stated that no emergency existed because Bowling's execution had not yet been scheduled. Defendants also argued that this Court had no authority to enjoin the Governor from scheduling an execution date. This Court agreed,

denied the motion for a temporary injunction, and orally told Bowling that the motion for a temporary injunction should not be refiled until a warrant is issued. This Court also denied the motion to bar physical inspection of Bowling and the motion for an immediate trial date. This Court, however, permitted Bowling to amend his Complaint, and took the motion to dismiss under advisement.

Shortly thereafter, Bowling filed a notice of supplemental authority and a motion to compel discovery, which was argued on September 30, 2004. During this argument, lead counsel for Defendants, the Honorable David Smith, asserted that he had not read the execution protocols. After a lengthy discussion concerning the execution protocols and the rest of Bowling's discovery request in which Defendants argued that no information concerning their execution procedures should be disclosed, this Court orally stated that it would issue a written ruling on Bowling's discovery request, which would deny the Request for Entry and Inspection of Land, but would grant other aspects of the discovery request. This Court also dismissed portions of Bowling's Complaint, but ruled that it had subject matter jurisdiction over Bowling's challenge to the "manner" of execution by lethal injection. This Court also ruled that Defendants would have ten days from the entry of judgment denying, in part, Defendants motion to dismiss, to file an Answer to Bowling's Complaint (and presumably a response on the merits).

On October 13, 2004, this Court issued a written order denying the motion to dismiss the challenge to the "manner" of execution by lethal injection and requiring Defendants to file a responsive pleading within ten days - - October 23, 2004. This Court also ordered Defendants to disclose to this Court – under seal -- complete redacted and unredacted copies of the execution protocols within seven days - - October 20, 2004.

On October 27, 2004 (after the expiration of the ten days), Plaintiffs received a two page answer on the merits that merely listed paragraph numbers that were either admitted or denied. On November 1, 2004, Plaintiffs received a redacted copy of Defendants' execution procedures/protocol.

Defendants are not ready for trial - - Plaintiffs want immediate trial date.

On October 4, 2004, the United States Supreme Court denied Bowling's Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. On October 8, 2004, Plaintiffs filed a renewed motion for an immediate trial date. Oral argument on that motion was held on October 13, 2004. After Defendants stated they were not ready for trial and this Court stated that depositions had not been taken, this Court denied the motion for an immediate trial date.

Depositions and Discovery.

While in court arguing the motion for an immediate trial date on October 13, 2004, Plaintiffs served notices of depositions for Warden Haeberlin, Doctor Hiland, and Nurse Hiland. Defendants provided oral notice that they would be back in court on Monday, October 18, 2004, to argue a motion to quash the depositions.

Although Defendants' motion to quash was served on Plaintiffs at 4:45 p.m. on Friday, October 15, 2004, oral argument on this issue was held the following Monday. At the argument, Defendants continuously repeated their theme - - no emergency exists because an execution warrant has not been signed. This Court ruled Plaintiffs could depose Warden Haeberlin and Nurse Hiland, but quashed the deposition of Doctor Hiland. The depositions were taken on Tuesday October 19, 2004.

On Thursday November 4, 2004 Plaintiffs deposed Defendant John Rees, Commissioner of the Department of Corrections; Dr. Scott Haas, Medical Director of the Department of Corrections; and, Mr. George Million, Deputy Commissioner for Adult Institutions for the Department of Corrections. During the deposition of Dr. Haas, Defendants disclosed a three page document concerning the execution by lethal injection of Edward Lee Harper in 1999.

The next day, based on these depositions, Plaintiffs filed a motion to permit the deposition of Dr. Hiland, and a renewed motion to compel discovery. Plaintiffs also filed a motion to disclose an unredacted copy of Defendants' execution procedures/protocols.

The Emergency is Here - - Bowling's Execution is Imminent.

Throughout this case, Defendants have argued that no emergency exists because Plaintiffs' execution has not been scheduled. Now that emergency exists - - Defendants created it. On October 12, 2004, the Attorney General requested that the Governor schedule Bowling's execution for November 16, 2004. On November 8, 2004, the first business day after Bowling filed a motion to disclose a complete copy of the execution procedures, the Governor signed the death warrant - - scheduling Thomas Bowling's execution for Tuesday, November 30, 2004. Now, there is no doubt that an emergency exists - - the execution date is almost here - - one week from the date this motion is scheduled to be heard..

III. STANDARD FOR GRANTING A TEMPORARY INJUNCTION.

This Court must carefully scrutinize colorable claims of violations of federal and state law. *See Barefoot v. Estelle*, 463 U.S. 880 (1983); *Zant v. Stephens*, 462 U.S. 862, 885 (1983). In determining whether a temporary injunction shall be granted, this Court must consider the following factors: 1) whether the plaintiff will suffer irreparable injury if the injunction is not granted; 2) whether "the equities [are] in plaintiff's favor, considering the public interest, harm to

the defendant, and whether the injunction will merely preserve the status quo;" and, 3) whether a substantial question is at issue. *Commonwealth, et al. v. Picklesimer*, Ky., 879 S.W.2d 482, 484 (1994); *accord*, *Sturgeon Mining Company, Inc. v. Whymore Coal Company, Inc.*, Ky., 892 S.W.2d 591, 592 (1995); *Maupin v. Stansbury*, Ky. App., 575 S.W.2d 695 (1978). Under CR 65.04, this Court also can grant a temporary injunction if "the movant's rights are being or will be violated" and "the acts of the adverse party will tend to render such final judgment ineffectual."

Where, "a party requesting temporary injunction has shown the probability of irreparable injury, presented a substantial question as to the merits and the equities are in favor of issuance, then a temporary injunction should be granted." *Commonwealth v. Wilkinson*, Ky., 828 S.W.2d 610, 613 (1992).

IV. AN INJUNCTION MUST ISSUE BECAUSE A STRONG POSSIBILITY EXISTS THAT DEFENDANTS WILL USE A CUT DOWN PROCEDURE TO ACCESS BOWLING'S VEINS. A CUT DOWN IS AN UNNECESSARY AND EXTREMELY PAINFUL SURGICAL PROCEDURE THAT DEFENDANTS' ARE NOT PREPARED TO PERFORM.

A. FACTS

Defendants admit that the most difficult and painful portion of a lethal injection is the insertion of the IV needle. *Answer to paragraph 119 of Complaint*. They also admit that a cut down procedure is a surgical procedure used to obtain access to a vein when an intravenous port cannot be established. *Answer to paragraph 111 of the Complaint*. According to Defendants, this surgical procedure can be carried out without using a scalpel, *see Answer to paragraph 112*, despite their own medical director saying otherwise and his expert opinion that a cut down "involves really cutting down through the skin to the vein to gain access. *Unofficial Transcript of Dr. Scott Haas' Deposition* at 12-13. It is a widely known fact that "bad veins" increase the

likelihood that a cut down will be needed. Yet, Defendants deny this in their Answer. Although a cut down is rarely used in medical settings, it is still used in prisons, including the Kentucky State Penitentiary at Eddyville. During the deposition of Dr. Haas, Defendants disclosed a three page document, in which one page (entitled lethal injection IV site placement) has a code of abbreviations. On this document, "CUT DOWN" is included in a given list of procedures. It is given the abbreviation "CVL" (see attached). This document also shows that Defendants were unable to insert one of the IV lines into Harper. *Id.* In his deposition, Warden Haeberlin was questioned about cut downs. His response was that "[a]t this point in time, uh, we're, we're not in a position to do that." *Unofficial Transcript of Warden Haeberlin's Deposition* at 41, and that he will ask his attorney, who has no medical training or experience with executions, what to do if a vein cannot be found. *Id.* Nurse Hiland stated in her deposition that additional training beyond that for inserting an IV line is necessary to perform a cut down procedure. *Unofficial Transcript of Nurse Hiland's Deposition* at 10. Defendants' execution protocols/procedure, however, do not explain how to perform a cut down, or even mention procedures related to cut downs as do most other execution protocols. Yet, Defendants refuse to rule out the possibility of using a cut down procedure during an execution when accessing a vein becomes difficult. *Answer to paragraph 129 of the Complaint*. More specifically, they refuse to rule out that a cut down procedure will be used to access Bowling's veins during his execution. *Answer to paragraph 131 of the Complaint*.

B. The use of a cut down procedure to access veins during an execution violates the Eighth Amendment to the United States Constitution and section 17 of the Kentucky Constitution because it serves no penological justification. Usage of cut down procedure, particularly in light of Defendants' lack of knowledge about cut down procedures, creates a risk of unnecessary pain and suffering that is more than the state and federal constitutions tolerate.

A punishment is cruel when it involves "something more than the mere extinguishment of life," such as "torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). This definition, "forbids the infliction of unnecessary pain in the execution of the death sentence." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *accord Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (holding that the Eighth Amendment prohibits punishments that "involve the unnecessary and wanton infliction of pain). Among the 'unnecessary and wanton' inflictions of pain are those that are "nothing more than the purposeless and needless imposition of pain and suffering," *Francis*, 329 U.S. at 463, and those that are "totally without penological justifications." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (*quoting Gregg*, 428 U.S. at 183); *Workman v. Commonwealth*, Ky App., 429 S.W.2d 374, 378 (1968) (holding that a punishment is cruel and unusual when "it exceeds any legitimate penal aim").

Thus, in determining whether a punishment constitutes unnecessary pain, a court must judge the cruelty of the method of execution in light of currently available alternatives. *Workman*, 429 S.W.2d at 378 (a cruel and unusual punishment approach "should always be made in light of developing concepts of elemental decency."); *Furman v. Georgia*, 408 U.S. 238, 430 (1970) (Powell, J., dissenting) ("[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.").

The United States Supreme Court was faced with a challenge to the usage of a cut down procedure in *Nelson v. Campbell*, 124 S.Ct. 2117 (2004). The Court recognized that a cut down

procedure can cause severe pain and is not the only means to obtain venous access since a less painful and easier procedure for obtaining venous access, a percutaneous procedure, could be used. *Id*. at 2122; *see Affidavit of Dr. Heath exhibit 7 to Memorandum of Law*. The Court also cited Dr. Heath's affidavit concerning the lack of training of the execution team in how to perform a cut down procedure. *Id*. After reviewing these facts, the Court granted Nelson a temporary injunction and remanded for the lower court to consider whether a cut down procedure is a necessary and integral part of the Alabama execution process, and to determine whether a cut down is gratuitous. *Id*. *Nelson* presented the same factual concerns about a cut down procedure during an execution as Bowling presents. But, Bowling's factual situation is more compelling.

More so than in *Nelson*, cut downs in Kentucky lethal injections are unnecessary and needlessly inflict pain and suffering while serving no penological justification. Defendants could use a percutaneous procedure, but instead, they choose to use the riskier, more painful cut down procedure. Defendants are not properly trained to perform a cut down. Their medical director recognizes that a scalpel is necessary to perform a cut down and that a cut down involves cutting deeply into the skin. He, however, is not involved in performing a cut down used during a lethal injection. Instead, the execution team performs this procedure. Warden Haeberlin is in charge of this team. And, through the Answer, he has denied that a scalpel is necessary and that a cut down goes deep into the skin. He has admitted that they are not prepared to perform a cut down procedure. The execution protocols do not explain how to perform a cut down procedure. So, how will a cut down procedure be performed? What training does a person performing a cut down possess? What equipment is used? What procedures will be followed? What will be done if a serious complication arises? These are all questions for which Alabama had answers. Yet,

the United States Supreme Court still granted an injunction and allowed an Eighth Amendment challenge to the cut down procedure to proceed because questions remained concerning the lack of cut down training, whether a percutaneous procedure should be used instead, and the high risk of unnecessary pain and suffering caused by a cut down. Defendants, on the other hand, have no answers to these questions, and cannot come up with answers for they have admitted that they are not in a position to carry out a cut down. But, they will still perform a cut down procedure if they have difficulty accessing Bowling's veins. They almost had to do it in Harper. Their first attempt to access a vein failed. A cut down procedure is mentioned on the IV site placement form. Fortunately for Harper, they were able to access his veins in a second and third location without using a cut down. Bowling may not be as lucky. Whether a cut down procedure will be necessary cannot be determined until the execution team attempts to insert an IV into Bowling's veins. Defendants already have stated that they cannot rule out that they will have to use a cut down to access his veins. The possibility that they may use a cut down, particularly in light of their ignorance of what a cut down procedure entails and their lack of procedures and training for performing a cut down, creates a risk of unnecessary pain and suffering that is more than the state and federal constitution tolerates. In *Reid v. Johnson*, 540 U.S. ___ (2004), the United States Supreme Court upheld an injunction in light of *Nelson* where the Department of Corrections made an affirmative statement that they could not rule out that a cut down procedure would be used.[3] Like *Nelson* and *Reid*, Bowling is entitled to an injunction to allow him to challenge the use of a cut down, the lack of cut down training, and the lack of training for any procedure that may become an ad hoc substitute for a cut down.

[3] That injunction was vacated once the Department of Corrections informed the court that an alternative method of venous access would be used.

V. IF A STAY OF EXECUTION OCCURS AFTER THE FIRST CHEMICAL IS ADMINISTERED, THE EXECUTION MUST STOP. BOWLING IS ENTITLED TO A TEMPORARY INJUNCTION BECAUSE DEFENDANTS BELIEVE AN EXECUTION CANNOT BE STOPPED AT THAT POINT AND BECAUSE DEFENDANTS HAVE NO PROCEDURES OR PLANS TO REVERSE THE EFFECTS OF THE FIRST CHEMICAL.

The most basic premise of a civilized society is the right to life. That right is held above all other rights. It can only be taken away in return for taking another person's life, and even then, it can only be taken away by judicial order. Any execution not sanctioned by the courts is both illegal and unconscionable. Once a stay of execution is granted, an execution is no longer sanctioned by the courts. Thus, the carrying out of an execution despite a stay is illegal. This is true even if the stay is granted after the first chemical is administered, because at that point, the inmate's right to life remains fully intact. *See In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d 207, 211 (N.J.Super. 2004). In essence, the injection of the first chemical would be considered to have been in error. Thus, the failure to take every step possible to correct that error by reversing the effects of the sedative (thiopental) violates due process and fundamental fairness. *Id*.

Defendants, however, believe that a stay of execution granted after the first chemical is administered "is too late," because, according to Defendant Rees, the effects of the sedative are irreversible. *Unofficial Transcript of Defendant Rees' Deposition* at 33. Thus, Rees says, that despite a stay of execution, they would proceed to inject the final two chemicals. *Id*. at 34. Injecting those two chemicals violates the law and comes perilously close to murder, because the stay of execution deprives the execution team of authority to continue carrying out that execution. Instead, the stay creates an affirmative obligation under contemporary standards of decency and morality to take measures to give the inmate a chance at life. *See In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d at 211. Defendants,

however, are wholly unprepared to do so because they believe that the lethal injection chemicals are lethal once injected into the inmate. (unofficial transcript of Defendant Rees' deposition at 33). That blind assumption cannot be relied upon. *See In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d at 211.

Defendants provide no articulated medical basis or expert testimony showing the irreversibility of thiopental. Rather, all available evidence suggests that the effects of thiopental are reversible. Thiopental is not used as the "killing agent." It is merely intended to render the inmate unconscious so the inmate does not feel the pain of the other chemicals. Information collected by departments of corrections in other jurisdictions show that death is not instantaneous but may take up to thirty minutes. *In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d at 211. Warden Haeberlin stated in his deposition that executions by lethal injection take 15 minutes. It took 12 minutes for Harper to die by lethal injection in Kentucky in 1999. *See xxx*. And, Defendants own medical director, Dr. Haas, believes that, if a stay of execution is granted after the injection of thiopental but before the other two chemicals take effect, a doctor "absolutely" could and should revive the inmate. *Unofficial Transcript of Dr. Haas Deposition* at 33. Defendants, however, are not willing to follow Dr. Haas' advice. They are both unwilling and unprepared to take actions to provide Bowling with the chance at life that the court would have determined he should have. *See Unofficial Transcript of Defendant Rees* at 34. That is unacceptable. Although, "the grant of a stay of execution communicated to prison authorities after the lethal injection has been administered is not a likely event, it can happen," *In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d at 211, and has happened (one example is the execution of Leon Moser in Pennsylvania). Thus, "it is a foreseeable occurrence. And should it occur, there can be no justification for depriving

that inmate a chance at life." *Id*. A matter of minutes may separate the state of being sedated, close to dead, and dead. Prompt medical attention is necessary to maintain life. Defendants not only are currently unwilling to allow a physician to perform life saving measures, but they also do not have the necessary equipment nearby for a physician to use in attempting to save a life. Thus, Bowling is entitled to a temporary injunction until Defendants: 1) agree that the second and third chemicals will not be administered if a stay of execution is granted; 2) permit a physician to render life saving measures if a stay of execution is granted after the first chemical is injected; and, 3) provide readily available medical equipment for a physician (that would have to be at the execution chamber) to use in rendering life saving treatment.

VI. BOWLING IS ENTITLED TO A TEMPORARY INJUNCTION BASED ON THE MERITS OF HIS CHALLENGE TO THE EXECUTION PROCEDURES FOR LETHAL INJECTIONS IN KENTUCKY.

Each of the factors for determining whether to grant a temporary injunction establishes a colorable claim of a violation of constitutional rights, and, therefore, favors granting Bowling injunctive relief pending the final outcome of the instant litigation.

1. Irreparable injury ---first factor

The first factor clearly favors granting a temporary injunction. If the injunction is not granted, Bowling will suffer irreparable injury, because he will be executed before the merits of his cogent claim is addressed. *See Commonwealth, et al. v. Picklesimer*, Ky., 879 S.W.2d 482, 484 (1994) (holding that a Circuit Court finding that prohibiting a duly elected Property Valuation Administrator from taking office constituted "irreparable injury" was not "clearly erroneous"); *see also Wainwright v. Booker*, 473 U.S. 935 n. 1 (1985) (Powell, J., concurring) (recognizing that there is little doubt that a prisoner facing execution will suffer irreparable injury if a stay is not granted); *Harris v. Johnson*, No. H-04-CV-1514 (S.D. Tex. June 29, 2004);

Oken v. Sizer, 2004 WL 1334521 (D. Md. June 14, 2004); *Hill v. Ozmint*, No. 2:04-0489-18AJ (D. S.C. March 4, 2004). *Harris*, *Oken* and *Hill* are attached to a previously submitted motion for injunctive relief.

2. Whether the equities are in Bowling's favor---the second factor

The second factor for granting a temporary injunction, whether the equities are in the Bowling's favor, requires this Court to consider three subfactors: the public interest; whether the injunction will merely preserve the status quo; and the harm to Defendants. *Picklesimer* at 483, citing *Maupin.*. Each of these subfactors manifestly favors Plaintiffs.

a. The public interest.

"Executions are unquestionably matters of great public importance." *California First Amendment Coalition v. Calderon*, 150 F.3d 976, 981 (9th Cir. 1998). The public interest, will be served, rather than disserved, by providing "reasonable assurance that [Bowling's execution] will be carried out humanely." *Hill v. Ozmint, et al.*, No. 2:04-0489-18AJ (D. S.C. March 4, 2004). Under such circumstances, "[it] is . . . beyond [] comprehension that a temporary injunction in this case, that [might] delay, but not halt the execution, could disserve the public interest." *Harris v. Johnson*, No. H-04-CV-1514 (S.D. Tex. June 29, 2004). Furthermore, it is in the public's interest for this Court to determine whether the public has a right to observe the effects of the chemicals on the condemned inmate's body, and, if so, whether pavulon can be administered in light of its intended purpose to prevent the witnesses from observing the convulsions and seizures caused by potassium chloride.

b. Preserving the status quo.

Because Plaintiffs raise substantial questions concerning the constitutionality of Defendants' execution procedures for lethal injection, it is "appropriate to maintain the status quo until the Court has a chance to consider his claim that the protocol lacks sufficient safeguards . . . [and] to ensure that he is not subject to either cruel or unusual punishment as prohibited under the Eighth Amendment during the execution process." *Perkins v. Beck*, No. 5:04-CT-643-BO (E.D. N.C. Oct. 1, 2004) (previously submitted as supplemental authority).

c. Harm to Defendants.

The temporary injunction will do no harm to Defendants if they are unable to carry out Bowling's execution on the date currently intended. If Defendants bring their execution procedures in conformance with the Eighth Amendment and Section 17 of the Kentucky Constitution, they will be able to execute Bowling as soon as they wish. "There is no fear here of the state's judgment being avoided or denied; in fact, plaintiff does not seek such relief. All [they] seek[] is a death in 'accord with the dignity of man, which is the basic concept underlying the Eighth Amendment.'" *Hill v. Ozmint*, No. 2:04-0489-18AJ (D. S.C. March 4, 2004) (*quoting*, *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *accord*, *Harris v. Johnson*, No. H-04-CV-1514 (S.D. Tex. June 29, 2004; *Oken v. Sizer*, 2004 WL 1334521 (June 14, 2004). Defendants will not be prejudiced by the short delay in executing Bowling that is necessary to bring Defendants' execution procedures in conformance with the Eighth Amendment, particularly in light of the fact that the reason why the merits of this claim have not been resolved is due to Defendants' delay tactics.

Should Defendants prevail in a trial on the merits they will have suffered no harm, only the slight delay that they have caused.

3. Whether a substantial question is at issue --- the third factor.

The issues this case present are substantial questions of law - - 1) whether the current chemicals utilized during lethal injections, and/or Defendants' procedures for carrying out lethal injections (including the lack of proper training of the execution team) violate K.R.S. section 431.220 or any one of the prongs of the cruel and unusual punishment test under section 17 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution; 2) whether Defendants refusal to disclose a full copy of the execution protocols so that Plaintiffs can determine whether an Eighth Amendment violation will occur during their execution, violates due process and fundamental notions of fairness; 3) whether Defendants' use of a cut down procedure to access veins, particularly in light of the fact that they have no training in performing a cut down, violates the Eighth Amendment; and, 4) whether Defendants' refusal to allow a physician to perform life saving measures and their failure to provide a physician with the necessary equipment to perform life saving measures violate due process and fundamental fairness.

In the complaint and memorandum of law, Bowling presented substantial evidence that Defendants' procedures for carrying out lethal injection (not lethal injection on its face) violates the cruel and unusual punishment clause, or, at the least, poses a risk of unnecessary pain and suffering that is more than the state and federal constitutions tolerate. In addition, Plaintiffs have presented evidence that pavulon, a chemical that is unnecessary in the execution process and only serves to mask the effects of potassium chloride, causes extreme pain and suffering in a conscious person. As the toxicology results from the execution of Edward Harper, in Kentucky, and numerous toxicology results from North Carolina and South Carolina demonstrate (see attached charts and graphs), a substantial probability exists that Bowling will be conscious

during his execution; thereby suffering intense pain caused by both pavulon and potassium chloride. This is assuming that the usage of a "cut down" procedure, an unnecessary and painful procedure, to access veins, does not kill Bowling first. Under these circumstances, it is clear that Bowling has presented a substantial issue raising concerns about the constitutionality of Defendants' means of effectuating a sentence of death by lethal injection.

4. Conclusion.

Because all relevant factors favor Bowling, an injunction barring Defendants from carrying out his execution under the current lethal injection procedures until completion of discovery and a trial must be granted.

VI. EVIDENCE RECENTLY OBTAINED THROUGH DISCOVERY STRENGTHENS BOWLING'S CLAIM THAT THE CHEMICALS AND PROCEDURES DEFENDANTS WILL USE TO CARRY OUT HIS EXECUTION CREATE A RISK OF UNNECESSARY PAIN AND SUFFERING BEYOND WHAT THE STATE AND FEDERAL CONSTITUTION TOLERATE.

During the discovery process, a wealth of information became available demonstrating that Defendants are unprepared to carry out Bowling's lethal injection in conformance with section 17 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution. In addition to the likelihood that Defendants will access Bowling's veins through a cut down procedure - - a procedure that the discovery shows Defendants are wholly ignorant about and unprepared to perform - - , and that Defendants are unwilling and ill-equipped to render life saving measures to a death row inmate if a stay of execution is granted after the first chemical is administered, at least four other aspects of Bowling's claim have been strengthened by the discovery process:

1) the likelihood that Bowling will be conscious when the excruciatingly painful second and third chemicals are administered;

2) Defendants may insert the I.V. line into a part of Bowling's body that would be extremely painful and purposeless;

3) the execution protocols leave many questions unanswered that increase the risk that Bowling will suffer an unnecessarily painful execution; and,

4) Defendants will not have the necessary equipment on hand during Bowling's execution to ensure that he does not suffer the unnecessarily infliction of pain.

A. Defendants' own employees acknowledge that Bowling likely will be conscious during his execution and thereby suffering excruciating pain.

Information collected by departments of corrections in other jurisdictions show that death is not instantaneous but may take up to thirty minutes. *In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d at 211. According to Warden Haeberlin, an execution by lethal injection takes fifteen minutes. *See Unofficial Transcript of Haeberlin's Deposition*. Harper's execution took twelve minutes. *See xxx*. Pavulon and Potassium Chloride are painful in a conscious person. *See Unofficial Transcript of Dr. Haas' Deposition* at 26. To prevent Bowling from feeling the excruciating pain of those chemicals, Defendants intend to first inject him with sodium thiopental (a chemical that is rarely used in surgery anymore) to render him unconscious. According to Defendants' medical director, thiopental only renders a person unconscious for five minutes or less. *Unofficial Transcript of Dr. Haas' Deposition* at 23. So, what will happen during the seven, ten, or more minutes that it will take for Bowling to die? He likely will regain consciousness. But, he will not be able to tell anyone because pavulon paralyzes the body. *Id*. at 25. Likewise, he will not be able to communicate the intense pain that he will be feeling as pavulon collapses his organs causing him to suffocate, while potassium chloride creates an extreme burning sensation while inducing a massive heart attack. Defendants, through their medical director, are now aware of the pain that Bowling will suffer

during his execution and that using a stronger anesthetic likely will alleviate or, at least, lessen the risk that Bowling will regain consciousness and thereby suffer excruciating pain. Such pain, the risk of that pain, and Defendants' deliberate indifference to that pain violates section 17 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution. Therefore, Bowling is entitled to a temporary injunction.

B. Defendants will attempt to insert a needle into Bowling's neck if they have difficulty accessing a vein. Placing a needle in the neck needlessly inflicts pain and never should be done.

Warden Haeberlin says that the execution team may place the I.V. line in Bowling's neck if they have difficulty accessing a vein. *Unofficial Transcript of Warden Haeberlin's Deposition*. Sticking a needle in a person's neck is extremely painful, most likely should not be done, and definitely should not be anything but a last alternative of where to place an I.V. line. Defendants' medical director is unable to think of any reason why an I.V. line should be started in the neck. *Unofficial Transcript of Dr. Haas' Deposition* at 15. In fact, he goes one step further. He never would start an I.V. line in a person's neck. *Id.* Neither should Defendants. Haeberlin's statement that an I.V. line may be started in Bowling's neck exemplifies their lack of training for lethal injections and the extreme pain that they likely will inflict on Bowling during his execution. A temporary injunction to ensure that an I.V. line is not started in Bowling's neck or any other place that could inflict extreme pain, or by an execution team member that does not have a thorough understanding of the primary locations for inserting an I.V., must be granted.

C. Defendants' execution protocol lacks crucial information, which increases the risk that Bowling will suffer an excruciatingly painful death. The protocols also contain information that increases the risk of a painful death.

How the chemicals are mixed and stored are crucial to whether thiopental will render Bowling unconscious and whether the chemicals will neutralize each other. Defendants' execution protocols contain no information about this. The protocol also contains no information about the concerns expressed at pages 32-38 of Bowling's memorandum of law in support of his complaint. The failure to have procedures that address the storing and mixing of the chemicals, and the failure to address the issues discussed in Bowling's memorandum of law increase the risk that he will suffer an unnecessarily painful death.

In addition, pages 3-4 of the portion of the execution procedures entitled, *The Execution: Lethal Injection*, states that a second set of pavulon and potassium chloride but not sodium thiopental will be administered if the first set of chemicals does not kill Bowling. Surely, Bowling will be conscious at that point, and Defendants are now aware of that. Dr. Haas told them during his deposition that sodium thiopental wears off in five minutes or less. *Unofficial Transcript of Dr. Haas' Deposition* at 23. Defendants' continued plan to administer chemicals if Bowling is alive after the first set of chemicals, with full knowledge that he will be conscious at the time, constitutes deliberate indifference towards a known medical condition, and creates a risk of unnecessary pain and suffering beyond what the state and federal constitutions tolerate. Thus, a temporary injunction must be granted.

D. Defendants do not have the necessary equipment on hand for Bowling's execution to ensure that he does not suffer an excruciatingly painful death.

I.V. needles and catheters come in different sizes, and multiple sizes may be needed during the same procedure *Unofficial Transcript of Dr. Haas' Deposition* at 8-9. Extra supplies are on hand during surgical procedures. "You don't walk in there with just exactly what you need in that room." *Id*. at 46. Defendants, however, have no idea how much of each chemical they would purchase, stating only that they would purchase what they need. *Unofficial Transcript of Defendant Rees' Deposition*, at 37-38. Defendants have no idea how many supplies are needed or would be purchased. What happens if they have the wrong size needle? Break a needle? Spill chemicals? Improperly mix chemicals? Defendants would be in a bind. They need to carry out a lawful execution, but they no longer would have the equipment necessary to do so in painless manner. Likely, they will use the wrong size needle, which could cause extreme pain inserting the I.V. line, and which could end up in the tissue or muscle instead of the vein - - that is assuming that they are even able to start an I.V. line with that size needle. If not, they would have to perform a cut down. A shortage of chemicals would mean that they may not have enough sedative to render Bowling unconscious or that the quantity of the killing agent may be so small that Bowling suffers a long and protracted death. Defendants' failure to anticipate these foreseeable complications and to ensure that they have the necessary equipment and procedures in place to deal with such setbacks not only creates an unnecessary risk of extreme pain and suffering, but exacerbates Deefendants' inadequate execution procedures and lack of training. Under these circumstances, a temporary injunction should be granted.

VII. BOWLING IS ENTITLED TO A TEMPORARY INJUNCTION UNTIL THIS COURT IS ABLE TO RESOLVE THE MERITS OF HIS CHALLENGE TO THE EXECUTION PROCEDURES FOR LETHAL INJECTION IN KENTUCKY.

"A death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding." *Barefoot*, 463 U.S. at 888. Bowling has presented compelling evidence that many death row inmates across the country including Edward Harper - - the only death row inmate executed by lethal injection in Kentucky - - were consciously suffering pain during their execution by lethal injection. Former Warden Phillip Parker has admitted that members of the execution team have had problems inserting IV needles during training exercises. Defendants have stated that the same procedures that caused problems in the past and were used in the Harper execution will be used to execute Bowling. These facts (which are discussed in detail in the memorandum of law) create a substantial legal issue as to whether the lethal injection procedures that will be used to execute Bowling constitute cruel and unusual punishment or create an intolerable risk of pain and suffering. This Court has not resolved the merits of Bowling's claims. "Approving the execution of [Bowling] before his [claim] is decided on the merits would clearly be improper, *Barefoot*, 463 U.S. at 890, particularly because any judgment in favor of Bowling after his execution would be ineffectual. *See* CR 65.04. Thus, Bowling "is entitled to a[n] [injunction] to permit due consideration on the merits." *Barefoot*, 463 U.S. at 889.

VIII. BOWLING IS ENTITLED TO A TEMPORARY INJUNCTION BECAUSE THE DISCOVERY PROCESS HAS BEGUN, FURTHER DISCOVERY WOULD BENEFIT BOWLING'S CLAIM, AND SUBSTANTIAL QUESTIONS RELATED TO BOWLING'S CLAIM HAS ARISEN AS A RESULT OF THE DISCOVERY.

On Monday, November 1, 2004, Plaintiffs received the redacted Execution Protocol pursuant to this Court's order. Numerous issues have been raised through this protocol and Plaintiffs currently have a motion to reveal redacted portions of the protocol pending before this Court. The information contained in Defendants' execution protocol may be essential to Bowling's claim. He should have the opportunity to review those portions of Defedants' execution protocol prior to his execution.

At the November 4, 2004 depositions, Plaintiffs were, for the first time, presented with a three page document that appears to have been prepared by the execution team that conducted Eddie Lee Harper's execution. This document raises serious questions about the method that will be employed in the executions of the plaintiffs – these issues can only be explored by allowing the discovery process to continue. Defendants have maintained that Plaintiffs have all information concerning Harper's execution because Department of Public Advocacy attorney's represented Harper and because the post-mortem execution reports were turned over to Bowling. *See Defendants' Objection to Plaintiffs' Discovery Requests*. This, however, is now known to not be true. Defendant Rees stated on November 4, 2004, that he has seen a document concerning Harper's execution that was prepared by an attorney. *Unofficial Transcript of Defendant Rees' Deposition* at 35. He also stated that he believes the document is in his office. *Id*. Bowling has not seen these documents, which may go to the heart of his claim. These documents should be disclosed to Bowling. He should have the opportunity to review these

documents prior to his execution, and to bring to this Court's attention any information in these documents related to Bowling's pending claim.

Warden Glenn Haeberlin stated at his October 15, 2004 deposition, under questioning by his attorney, that the two "IV Team" members of the execution team are a phlebotomist and an emergency medical technician. Plaintiffs have yet to depose these team members to discern their actual qualifications and proficiencies.

At his November 4, 2004, deposition Dr. Scott Haas said that he thought Dr. Steve Hiland would have some involvement with any execution. At her October 15, 2004 deposition, Nurse Chanin Hiland said that she thought Dr. Steve Hiland would be involved with any execution. On November 9, 2004, counsel for Defendants, Jeff Middendorf, told undersigned counsel that Dr. Rafi would be the physician involved with the execution of Plaintiff Bowling. This is a complete change from representations Middendorf made before this Court during oral arguments on Defendants' motion to quash depositions. At that motion, Middendorf stated that Dr. Haas would conduct the physical examination of Bowling prior to his execution. Middendorf's representations a few days ago was the first time Plaintiffs have heard the name Dr. Rafi in connection with this lawsuit. Plaintiffs have yet to depose Dr. Rafi, and should be entitled to due so prior to Bowling's execution, particularly in light of Defendants' representations that Dr. Haas would conduct the physical examination - - representations that went uncorrected until Plaintiffs filed a motion to reinstate the notice of deposition on Dr. Hiland. Defendants have also represented to undersigned counsel that they would oppose the taking of any depositions between now and Bowling's execution because they are too busy preparing for Bowling's execution to attend a deposition. That alone demonstrates that an injunction should be granted to allow the discovery process to continue. Otherwise, Defendants

would have free reign to bring this type of litigation to screeching halt merely by scheduling executions.

This list of partial discovery findings is far from exhaustive and is intended only to illustrate the very real need for discovery to continue in this case. Material issues of fact and law have been raised and remain unresolved – only a trial on the merits can resolve these issues. Thus, Bowling is entitled to a temporary injunction until discovery can be completed.

IX. THE DENIAL OF A TEMPORARY INJUNCTION WILL VIOLATE BOWLING'S FIRST AMENDMENT AND DUE PROCESS RIGHT OF ACCESS TO THE COURTS.

If this Court does not grant Bowling a temporary injunction, he will be denied his First Amendment and due process right of access to the courts. Bowling filed this suit while his petition for a writ of certiorari was pending before the United States Supreme Court and prior to the scheduling of his execution. At the time of filing, no impediments existed to the speedy resolution of the merits of Bowling's claim. Unless this Court grants a temporary injunction, Bowling's execution date bars his due process and First Amendment rights of access to the courts on his lethal injection claim.

Due process requires

> that prisoners be afforded access to the courts in order to challenge unlawful convictions and seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.

Procunier v. Martinez, 416 U.S. 396, 419 (1974).

The First Amendment likewise confers to inmates a right of access to the courts. Mere formal access to the courts does not comport with the First Amendment. Rather, inmate

access to the courts must be adequate, effective, and meaningful. *Bounds v. Smith*, 430 U.S. 817, 822 (1977). That access to the courts cannot be accomplished when this Court has less than one month to give careful scrutiny to Bowling's lethal injection claim. By scheduling Bowling's execution despite knowledge of this suit, Defendants are attempting to truncate and negate these proceedings. Not granting a stay of execution would deny Bowling his First Amendment and due process right of access to the courts. To preserve death row inmates' right of access to the courts in general, and Bowling's right of access to the courts in this particular case, this Court must grant a temporary injunction that will remain in effect until it can reach the merits of Bowling's claim.

X. DEFENDANTS' ATTEMPTS TO PREVENT THIS COURT FROM REACHING THE MERITS OF PLAINTIFFS' CLAIMS SHOULD NOT BE TOLERATED AND CONSTITUTE GROUNDS TO ISSUE A TEMPORARY INJUNCTION PENDING A RULING ON THE MERITS OF PLAINTIFFS' CLAIMS.

Defendants' strategy in this case has been apparent from the beginning. They will do anything they can to prevent adjudication of Plaintiffs' claims on the merits. Plaintiff Baze filed an Open Records Act request for the execution procedures in December of 2003, and was told that the execution procedures and the names of the chemicals utilized in Kentucky lethal injections are confidential. Baze requested the same information in July of 2004. Defendants responded by disclosing the lethal injection chemicals, but claimed that all other information is confidential. In so doing, Defendants decided to remain one of only a handful of states that refuse to disclose full information about its execution procedures. Despite not having the execution procedures, Plaintiffs filed suit in early August of 2004. Defendants' delay tactics continued.

At the first court appearance - - and at almost every subsequent court appearance - - Defendants claimed that no emergency existed because neither Baze nor Bowling's execution had been scheduled. They also objected to each discovery request, and to any ruling that would shorten the time period stated in the Kentucky Rules of Civil Procedure for each stage of the case. This Court exercised its discretionary authority under the rules of civil procedure by expediting Defendants' response time. Defendants, however, continued to employ delay tactics.

Currently, Defendants have delayed adjudication of Plaintiffs' claims for more than three months. Now, they have scheduled Bowling's execution. In so doing, they have created the emergency that they claimed has not existed over the past two months. They now argue that the discovery process cannot continue because they are too busy preparing for Bowling's execution to have time to deal with discovery issues including depositions. They also argue that a temporary injunction barring Defendants' execution during the pendency of this litigation should not be granted. They cannot have it both ways. They cannot argue that there is no emergency basis for granting an injunction, then create the need for an injunction, and afterwards, argue that Plaintiffs' are not entitled to an injunction. This would be an abuse of the system and would allow Defendants to create a mechanism that prevents any death row inmate from having a claim challenging execution procedures from being adjudicated by any court prior to the inmate's execution. These tactics should not and cannot be tolerated. In itself, Defendants' delay tactics form an independent basis for granting an injunction allowing this Court to do what it may have been able to do over three months ago if not for Defendants' tactics, reach the merits of Plaintiffs' claims before Bowling is executed.

XI. CONCLUSION.

Defendants have delayed adjudication of the merits of Plaintiffs' claims and then knowingly scheduled Bowling's execution while this litigation is pending. But, "a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding." *Barefoot*, 463 U.S. at 888. Therefore, it is only by granting a temporary injunction that the effective presentation and resolution of Bowling's colorable claims can be ensured. *See In re Hearn*, 2004 WL 1497552 (5th Cir. July 6, 2004). Any other form of relief could result in the untenable situation where this Court finds in favor of Plaintiffs on the merits, but cannot grant any relief to Bowling because he was executed. Thus, this Court must grant a temporary injunction barring Bowling's execution until this Court can resolve the merits. *See Barefoot*, 463 U.S. at 889.

REQUEST FOR RELIEF

Bowling requests a temporary injunction barring Defendants from executing him during the pendency of this litigation, under execution procedures and chemicals that are challenged in this lawsuit and used by improperly trained members of the execution team.

In the alternative, Bowling requests that this Court hold an evidentiary hearing on this motion where he can present evidence in support of the underlying claim and the need for a temporary injunction.

As a further alternative, Bowling requests that this Court grant a temporary injunction barring Defendants from executing him until this Court can complete an evidentiary hearing on the merits of this matter.

RESPECTFULLY SUBMITTED,

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November 12, 2004.

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing

MOTION FOR A TEMPORARY INJUNCTION BARRING DEFENDANTS FROM EXECUTING BOWLING ON NOVEMBER 30, 2004 UNDER THE CURRENT EXECUTION PROCEDURES AND DURING THE PENDENCY OF THE ADJUDICATION OF THE MERITS OF CHALLENGE TO DEFENDANTS' LETHAL INJECTION PROCEDURES

and its accompanying attachments to be served VIA PERSONAL DELIVERY on the following individuals:

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Hon. David Smith and Hon. Brian Judy
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_____
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November 12, 2004.