

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

VERNON EVANS, JR.,

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Plaintiff,

*

v.

*

Civil Action No. 06-CV-00149 BEL

MARY ANN SAAR, Secretary,
Department of Public Safety and
Correctional Services;

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FRANK C. SIZER, JR., Commissioner,
Maryland Division of Correction;

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LEHRMAN DOTSON, Warden,
Maryland Correctional Adjustment Center;

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GARY HORNBAKER, Warden,
Metropolitan Transition Center;

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and,

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JOHN DOES,

*

Defendants.

*

**PLAINTIFF'S REPLY TO DEFENDANT'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION**

On January 19, 2006, Plaintiff Vernon Evans, Jr. filed a Complaint in this Court, pursuant to 42 U.S.C. § 1983, alleging that Defendants' current practices and procedures for carrying out lethal injections create a grave risk that Evans will be executed in violation of the United States' Constitution's ban on cruel and unusual punishment. On January 20, 2006, Evans moved in this Court for a Temporary Restraining Order and Preliminary Injunction, pending resolution of his constitutional claims. In support of these motions, Evans showed that the balance of harms in

this case tips decisively toward the Plaintiff, that he has raised “grave or serious questions” in his Complaint, and that the public interest will be served by resolution of this case on the merits, thus entitling Evans to preliminary relief. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977).

Defendants’ response to Evans’s motions, filed on January 26, 2006, misconceives the nature of Evans’s Complaint and fails to rebut Evans’s showing in support of preliminary relief. Accordingly, Evans requests that this Court issue the preliminary relief sought and proceed to consideration of the merits of Evans’s claim.

Argument

1. Defendants’ first argument – waiver – misunderstands what Evans is challenging. The State’s argument is that Evans waived any objection to the *practices and procedures* employed by Defendants in performing lethal injections by failing to elect a particular *method* of execution prior to May 24, 1994. Defendant’s Memorandum in Opposition at 10 (hereinafter “Def. Opp.”); *see* Def. Opp. Exh. A (directing Evans to choose between two “method[s] of execution,” namely, “lethal gas” and “lethal injection”). But Evans has not challenged lethal injection as a method of execution, *see* Complaint at ¶ 2; he challenges the practices and procedures by which Defendants have chosen to carry out lethal injections. The Supreme Court’s opinion in *LaGrand v. Stewart*, 526 U.S. 115 (1999) (Opp. at 10), is therefore inapposite. *See id.* at 119 (where petitioner elected to be executed by lethal gas he would be held to have waived objection to that particular “*method* of execution”).

Moreover, even if Plaintiff had been notified in 1994 of the particular practices and procedures Defendants intended to employ in carrying out lethal injections—which he was not,

see Def. Mem. Exh. A—those practices and procedures have changed substantially in the intervening years.^{1/} Plaintiff cannot be deemed to have waived in 1994 his right to challenge practices and procedures for execution that were not put into place for another decade or more.

2. Nor are Defendants on any sounder ground when they argue that Plaintiff's request for preliminary relief should be denied because he has unduly delayed in bringing this challenge to Defendants' lethal injection procedures. According to Defendants, Evans could have brought this claim as soon as the Maryland legislature selected lethal injection as a method of execution. Def. Opp. at 11. Once again, however, Defendants have confused Evans's challenge to the particular practices and procedures employed in lethal injection with one attacking *any* lethal injection as unconstitutional.

In fact, there are substantial reasons why Evans brought this action when he did:

a. First, Defendants practices and procedures in lethal injection were a moving target, and any challenge to those procedures at a date far-removed from his own execution were likely to have been soon mooted by a change in procedures. Counsel for Defendants himself conceded in a status hearing in this Court that the practices and procedures that Defendants seek to use in executing Evans differ from those they used to execute Steven Oken in 2004. While counsel insisted that "not much" has changed since the Oken execution, and that the procedures would be "essentially" the same as those used in the Oken procedure, Evans has reasonable cause to question these bare assertions: counsel for Defendants made the

^{1/} For example, compare Plaintiff's Memorandum of Law ("Pl. Mem.") at Exh. A3, 6/14/04 Execution Operations Manual, "Contents of Syringes," with *id.* at Exh. A7, 4/1/94 Execution Operations Manual, "Contents of Syringes."

same assertions before Judge Messitte in *Oken v. Sizer*, 321 F. Supp. 2d 658 (D. Md. 2004), in justifying the State's refusal to turn over any information about an amended "Execution Protocol," *see id.* at 663 ("Defendants insist the Amended Execution Protocol made no substantive changes in the old" protocol), while in fact, for example, the quantities of drugs used had changed substantially from the "Execution Protocol" produced to Oken and that in place on May 26, 2004.^{2/}

b. Second, on the basis of these substantial changes that preceded the Oken execution, Evans could not assume that any change would reduce the risk that the State's processes would inflict on him grave pain, and, accordingly, he has been assiduously seeking documents that would inform him about the procedure for over 10 months. Thus, on March 7, 2005, Evans began seeking information about Defendants' lethal-injection execution practices and procedures through a public information request, *see* Pl. Mem. Exh. A2. He updated that request on December 20, 2005, to include any changes made for the execution of Wesley Baker, *see* Pl. Mem. Exh. A5. An evidentiary hearing concerning Evans's March 7, 2005, public-information request took place on January 24, 2006, and the record for that hearing will not close until January 27, 2006. Evans still does not have all the information to which he is entitled.

c. Third, substantial impediments to bringing this action earlier inhere in the law: (i) The processes for administrative exhaustion, discussed in paragraph 4(a) below, appear

^{2/} Compare Pl. Mem. at Exh. 3, 6/14/04 Execution Operations Manual, "Contents of Syringes," with *id.* at Exh. 7, 4/1/94 Execution Operations Manual, "Contents of Syringes." And on the day Judge Messitte issued his opinion, Defendants again amended their lethal injection procedures. *See Oken*, 321 F. Supp. 2d at 658 (opinion issued June 14, 2004); Pl. Mem. Exh. A3 ("Execution Operations Manual" dated June 14, 2004).

to require that such efforts commence *no earlier* than 30 days before the complained-of incident — presumably the issuance of the warrant, if not the execution itself. (ii) Moreover, ripeness limitations on federal court jurisdiction and principles of constitutional-issue avoidance, *see, e.g., Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring), made it seem unlikely that a federal court would hear the claims, with a number of meritorious legal challenges still pending, until no earlier than the issuance of an execution warrant.

d. Fourth, nonetheless, on December 9, 2005, weeks before the warrant issued, Evans began exhausting his administrative remedies. He did so having seen the prominence that the issue of “delay” played in the *Baker* litigation raising similar, though distinguishable, claims in this Court, and having read news reports that State’s Attorneys’ for Baltimore County might soon seek a warrant for his execution, and, despite doubts about the ripeness of his complaint and his ability to begin administrative exhaustion more than 30 days beyond the complained-of incident. Still, as of this date, those efforts to exhaust, addressed in more detail below, awaits action on Defendants’ counsel’s desk. Under the circumstances, Evans cut short the exhaustion efforts as futile or completed.

e. Fifth, the Supreme Court just stayed execution of Florida inmate Clarence Hill and agreed to hear his Section 1983 lethal-injection claim despite the fact that the petitioner there brought the action five weeks after the death warrant issued and just three days before the scheduled execution, and was strapped to a gurney for his execution when the stay issued.

f. Finally, *Nelson v. Campbell*, 541 U.S. 637 (2005), on which Defendants rely heavily in arguing that Evans has “abusive[ly] delay[ed],” (Opp. at 12), does not help them. To be sure, the *Nelson* Court observed that delay would be relevant to a court considering a

challenge to practices and procedures involved in lethal injections — in that case, the means of gaining venous access, *id.* at 649-50. Presumably, the *Nelson* District Court on remand, *see Nelson v. Campbell*, 377 F.3d 1162, 1163 (9th Cir. 2004) (remanding case to district court), heeded this explicit direction from the Supreme Court. Yet Nelson remains on Alabama’s death row 20 months later.^{3/} Indeed, the district court has referred consideration of his constitutional claim regarding venous access to a Special Master. *See Nelson v. Campbell*, Civil Action No. 2:03CV1008-T, (M.D. Ala. Jun. 16, 2005). While there is no published opinion from the district court on remand in the *Nelson* case, it is reasonable to assume that filing his complaint “three days before his scheduled execution,” *Nelson*, 541 U.S. at 639, did not lead inexorably to dismissal of his Section 1983 action.

g. It is clear, therefore, that, even if this Court were to determine that Evans had engaged in some delay in filing his claim — which we dispute — such a finding would not, as Defendants’ contend, require dismissal of Evans’s complaint. It is an equitable remedy that Evans seeks, and even if delay were relevant to the Court’s consideration, it is not conclusive. “Grave or serious” questions about the practices and procedures involved in executions as carried out by Defendants may — and do — justify the issuance of preliminary relief.

2. Turning to the *Blackwelder* standard, which governs issuance of preliminary relief in this Court, Defendants wholly fail to rebut the clear showing of irreparable harm, weighing heavily in Evans’s favor, that we demonstrated in our opening motion papers.

^{3/} See “Alabama Inmates Currently on Death Row,” <http://www.doc.state.al.us/deathrow.asp> (last visited January 26, 2006).

a. The Supreme Court has emphasized the obvious proposition that “irreparable harm” is “necessarily present in capital cases.” *Wainwright v. Booker*, 473 U.S. 935 n.1 (1985). Here, the irreparable harm necessarily present — imposition of the death penalty prior to vindication of one’s constitutional rights — is even more severe, given Evans’s claim that the execution he would endure would be excruciatingly, and unnecessarily, painful. To this, Defendants say (1) that the possibility of “negligence” in the execution of Evans does not weigh in the balance, and (2) that *Oken v. State*, 851 A.2d 538 (Md. 2004), establishes that Defendants’ practices and procedures in lethal injection are not violative of the Eighth Amendment. Neither response is persuasive.

b. Evans has alleged far more than “negligence” in the execution. While it is true that, in the performance of a lethal injection, a member of the “Execution Team” might fumble with the IV or take unduly long with their insertion and thus prolong an inmate’s dread or anxiety, or even cause some physical pain, Evans concedes that such facts do not amount to violation of his Eighth Amendment rights. But his rights *are* violated where practices and procedures for anesthesia that are impermissible outside the legal-injection context will be used to inject drugs into Evans that are banned for their cruelty in the euthanasia of animals.

c. Defendants’ assertion that the Maryland Court of Appeals’ “review” of similar claims in *Oken v. State*, 851 A.2d 538 (Md. 2004), definitively establishes that the State’s protocols are not cruel and unusual *under the federal constitution*, and thus cannot generate “irreparable harm,” is untenable. First, this Court owes no deference to a State court’s analysis of rights guaranteed by the *federal* constitution. Second, there is no analysis in *Oken* to which this Court could defer: the opinion states simply that “the method of execution intended to be

implemented by the Division of Correction does not . . . constitute cruel or unusual punishment.” *Id.* at 538. In *Oken v. Sizer*, *supra*, Judge Messitte refused to accord *res judicata* effect to that decision in considering *the very same claims*. According to Judge Messitte, “there are substantial reasons to doubt the quality, extensiveness, or fairness of procedures used in the state court.” *Oken*, 321 F. Supp. 2d at 663.

d. The assessment of “irreparable harm” by Judge Quarles of this Court in denying preliminary relief on a similar claim to Wesley Baker is unpersuasive for the same reasons. Judge Quarles failed to undertake any analysis of the balance of harms, stating simply that Baker’s showing of harm was “[i]nextricably linked” to his showing of a “likelihood of success on the merits.” *Baker v. Saar*, 402 F. Supp. 2d 606, 607 (D. Md. 2005). This conclusion misconstrues the law of this Circuit. *Blackwelder* clearly holds that the balance of harms is the “more important” consideration, and that “[i]f that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success.” *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977). And in concluding that Baker had not shown a likelihood of success, the *only authority* Judge Quarles cited was *Oken v. State*, *supra*. *See Baker*, 402 F. Supp. 2d at 608 – adopting the Maryland Court of Appeals’ conclusory analysis of the *federal* constitutional claims at issue, and undertaking *no independent analysis* of the claims raised.^{4/}

^{4/} This Court should also be aware of a material difference between the claims in the case before it and those brought by Wesley Baker and Steven Oken: neither Baker nor Oken raised the substantial question concerning Defendants’ ability to obtain sufficient venous access that Evans raises here and discusses in detail below, nor did either Baker or Oken engage in the attempts at administrative exhaustion demonstrated by Evans.

3. The cases on which Defendants rely in asserting harm that preliminary relief would cause them are distinguishable:

a. Defendants quote liberally from *Calderon v. Thompson*, 523 U.S. 538 (1998), but the “finality” interest at stake in *Calderon* was of an entirely different sort than that alleged here. In *Calderon*, the Supreme Court addressed the “extraordinary costs associated with a federal court of appeals’ recall of its mandate denying federal habeas relief” one year after a habeas petitioner’s request for rehearing en banc, 53 days after issuance of the mandate denying relief, and two days before the petitioner’s scheduled execution. *Id.* at 556. In such a case, the Court held, a habeas petitioner’s interest in having a federal appeals court consider the merits of his constitutional claims a second time, and *de novo*, were outweighed by a State’s interest in carrying out its judgment.

b. *Reid v. Johnson*, 333 F. Supp. 2d 543 (E.D. Va. 2004), addresses a claim similar to Evans’s, but distinct in a dramatic and highly material way. Important to that court’s consideration of “irreparable harm” was the fact that a “cut-down” procedure or significant difficulty in locating a vein was not at issue. *Id.* at 550-51. Despite Defendants’ assertion to the contrary, extreme difficulty in finding a vein, the invasive medical procedures necessary where peripheral venous access is unavailable, and the myriad catastrophic — and extraordinarily painful — events that can result from such procedures (even when performed by qualified medical personnel, let alone the staff employed by Defendants) are very much at issue in this case. That is the conclusion of an eminent expert, Dr. Thomas M. Scalea, physician-in-chief at University of Maryland Shock Trauma Center in Baltimore. *See* Declaration of Dr. Thomas M. Scalea (“Scalea Decl.”) at ¶¶ 7-10 (Attachment A hereto). Dr. Scalea performed a 20-minute

exam, which included extensive examination of Evans's upper- and lower-body peripheral veins and use of a sonogram. A Certified Nurse's Assistant ("CNA") in the Defendants' employ cursorily examined Evans and concluded that, despite an intravenous drug habit spanning several decades, his veins were not compromised, *see* Declaration of Vernon Evans, Jr. ("Evans Decl.") at ¶¶ 1-7 (Attachment B hereto); Report of CNA (Attachment C hereto). Dr. Scalea concluded otherwise. According to Dr. Scalea, not only would peripheral venous access not be possible, but even the invasive "cut-down" procedure likely would not establish sufficient access to Evans's blood stream. *Id.* at ¶ 10. Dr. Scalea also concluded that the state of Evans's veins not only suggested extreme difficulty in obtaining venous access, but also raised grave doubts that the Department of Corrections has staff or equipment capable of performing the complicated procedure necessary to assure reliable IV access. *Id. Reid*, therefore, does not impact the "irreparable harm" analysis before the Court in this case.

4. Because Evans has shown that the balance of harms tips in his favor, he need show only that "grave or serious" questions are raised in his request for relief. *Blackwelder*, 550 F.2d at 196. He has surely done this, and much more.

a. Evans can succeed even though his efforts to exhaust are not concluded. Evans has been seeking access to records necessary to litigate this matter responsibly for nearly a year. What is more, Evans began exhausting his administrative remedies by filing an Administrative Remedy Request on December 9, 2005 — before a warrant for his execution

issued, and before it was at all clear that such an administrative remedy would be available or ripe.^{5/}

It is telling that Defendants focus their argument as to exhaustion of administrative remedies on the procedures of the Inmate Grievance Office (“IGO”). Before Evans could file a grievance with the IGO, he was *required* to file an Administrative Remedy Procedure (“ARP”) request with Warden Dotson of the Maryland Correctional Adjustment Center. And when that ARP request was denied, he was *required* to appeal the Warden’s decision to Division of Correction Commissioner Sizer. Only after receiving a response from the Commissioner could Evans file a grievance with the IGO. Evans filed an ARP request with Warden Dotson, alleging that Defendants’ practices and procedures in carrying out lethal injection would violate his rights under the Eighth and Fourteenth Amendments. Warden Dotson denied relief, and Evans appealed that Decision to Commissioner Sizer. Division of Correction personnel have informed counsel for Evans that it is Mr. Oakley who currently is considering that appeal. While Mr. Oakley told the Court his views that the claims in Evans’s ARP request have no merit, as of this time the Department has not formally denied the ARP, and thus Evans *cannot* yet even *file* a grievance with the IGO. Evans should not face the “Catch-22” situation where the State prevents him from concluding efforts to exhaust at the same time as it seeks to block federal-court access

^{5/} See Pl. Mem. Exh. A1 (warrant signed January 9, 2006); Code MD. CODE REGS. 12.01.01.06(A) (stating that Administrative Remedy Procedure may only be invoked within 30 days of the occurrence complained of); *see also Beardslee v. Woodford*, 395 F.3d 1064, 1069 (9th Cir. 2005) (holding there was no delay or failure to exhaust where an inmate, “[o]nce an execution was imminent, . . . acted promptly,” the availability of administrative exhaustion prior to that point was unclear, and, where procedures used in lethal injection were subject to change up until the time of execution, the question of when such a claim becomes ripe is unclear).

to him for failing to have exhausted. Either Evans has exhausted administrative remedies sufficient to comply with 42 U.S.C. § 19977e(a), or any attempt at further exhaustion would be pointless. *See, e.g., Johnson v. True*, 125 F. Supp. 2d 186 (W.D. Va. 2000) (Dismissal of claims brought pursuant to 42 U.S.C. §1983 “would be inappropriate” where such attempts “would be futile”); *Washington v. Proffitt*, No. 704CV00671, 2005 WL 1176587 (W.D. Va. May 17, 2005) (“Where defendants have thwarted the plaintiff’s ability to exhaust their administrative remedies, the plaintiff is not required to do so.”); *O’Connor v. Featherston*, No. 01 Civ. 3251, 2002 WL 818085, at *2 (S.D.N.Y. Apr. 29, 2002) (exhaustion requirement may be satisfied “where . . . an inmate makes a ‘reasonable attempt’ to exhaust his administrative remedies, especially where . . . corrections officers . . . impeded or prevented his efforts”); *Griffith v. Selsky*, 325 F. Supp. 2d 247, 250 (W.D.N.Y. 2004) (“[T]here are circumstances in which an inmate plaintiff’s failure to exhaust his remedies may be excused”) (internal quotation marks and citation omitted).

b. Nor is the claim defective, as the States charges, for any failure to “allege that, because there are alternative methods of execution, the challenged protocol is wholly unnecessary to proceeding with the execution,” Opp. at 23 (quoting *Aldrich v. Johnson*, 388 F.3d 159, 161 (5th Cir. 2004)). As an initial matter, Evans has alleged that alternative methods of execution, which comply with both the Maryland lethal injection statute and the federal constitution, are available for Defendants’ use. Complaint ¶¶ 2, 42. Under the law of the Fourth Circuit, a complaint containing such an allegation is cognizable under 42 U.S.C. § 1983. *Reid v. Johnson*, 105 Fed. Appx. 500, 503 (4th Cir. 2004). Moreover, the State of Florida is raising the

very same defense in *Hill v. Crosby*, No. 05-8794, and the Court should therefore issue the requested injunction at least until a decision in that case.

5. The Defendants' assertion that Evans has not raised "grave or serious questions" in support of preliminary relief is grounded in a fundamental misunderstanding about Evans's allegations. Both Defendants in this Opposition and their expert, Dr. Mark Dershwitz, focus almost exclusively on whether, *if properly administered*, three grams of sodium pentothal would be sufficient to establish and maintain anesthesia. Dr. Dershwitz views "the time course of a drug's effect" as the "primary medical and scientific issue raised in this complaint," Declaration of Dr. Mark Dershwitz ("Dershwitz Decl.") ¶ 16, and he dedicates the first 11 pages of 17-page affidavit to discussion of this topic — a topic on which he apparently has some expertise. *See* Dershwitz Decl. ¶¶ 2-20. But Dr. Dershwitz misreads Evans's Complaint. Evans does not raise any issue to which this discussion of "pharmacodynamics" or "pharmacokinetics" is relevant.

a. Dr. Dershwitz fails, moreover, to rebut the substantial questions raised by Dr. Heath and Dr. Scalea (the doctor who actually examined Evans) about the ability of Defendants actually to administer a full dose of sodium pentothal and maintain anesthesia throughout the execution. As one example, Dr. Dershwitz takes issue with Dr. Heath's concern over leaking IV lines, and he suggests that the leaking IV lines documented in Defendants' execution of Tyrone Gilliam are no longer a concern because Defendants now use "Luer Locks." Dershwitz Decl. ¶ 20(b). Luer locks, however, even in trained hands, are no assurance against leaking IVs or improper administration of anesthesia.^{6/}

^{6/} See Katherine Holmes, *More Problems With Luer Lock Connections*, 61 ANAESTHESIA 73 (2006) (noting increasing reports of improperly assembled Luer locks and the concern these

b. Dr. Dershwitz also errs when he disputes the concerns raised by Dr. Heath about administration of anesthesia by taking apparent comfort from the participation of Certified Nursing Assistants (“CNAs”) in the process. Dershwitz Decl. at ¶ 21(c). Of course, it is just such a CNA — according to counsel for Defendants, *the very CNA who will attempt venous access during Evans’s execution* — who cursorily examined Evans’s arms for 50 seconds, rubbing them slightly, and then determined that they would support peripheral venous access. Her conclusion, of course, is rejected by Dr. Scalea — a leading shock trauma surgeon with years of experience attempting venous access on current and former intravenous drug users, Scalea Decl. ¶ 3 — who came to a dramatically different conclusion. Scalea Decl. ¶¶ 7-10. Dr. Dershwitz’s unsupported assertion that this CNA (who he does not claim to know personally) — or for that matter, any other person involved in lethal injections carried out by Defendants — is “well trained and highly skilled for their specialized tasks” is rendered utterly indefensible by Dr. Scalea’s extensive examination of Evans. Dr. Dershwitz’s dependent conclusion that “a rapid, painless, and humane execution can be accomplished by trained and experienced non-medical personnel,” Dershwitz Decl. ¶ 21(c), is, concomitantly, just as specious.^{7/}

c. Dr. Heath expresses concern that the “excessive pressure” involved in administering lethal injection, as planned by Defendants, could cause “tearing, rupture, or

incidents raise in the context of intravenous anesthesia, given “increasing public knowledge and fear of awareness under anesthesia”).

^{7/} Dr. Dershwitz’s assurances that personnel in Defendants’ employ will also adequately secure a catheter and check that arm straps are not acting as tourniquets, Dershwitz Decl. at ¶ 21(e), (f), are similarly weakened by his apparently misplaced faith in the training and skill of Defendants’ personnel.

leakage of the vein.” *Id.* ¶ 21(d). Dr. Dershwitz takes issue on this point too, but his opinion is undercut by his silent assumption that the state of Evans’s veins has no bearing on this conclusion. As described by Dr. Scalea, Evans’s veins have been severely compromised by years of intravenous drug use, making them particularly susceptible to rupture, a fact that is only compounded by the Defendants’ use of “pressure infusion bags” for intravenous injection. Scalea Decl. ¶ 8.

d. Notably, Dr. Dershwitz takes no issue whatsoever with Dr. Heath’s concerns about “incorrect insertion of the catheter,” “migration of the catheter,” or “perforation or rupture” of the vein caused during insertion of the IV. Pl. Mem. Exh. B (“Heath Decl.”) ¶ 26(f),(g),(h). These serious and uncontested potential errors are only compounded by the participation of potentially undertrained staff in lethal injections. In essence, Dr. Dershwitz, and Defendants’ Opposition in reliance on him, utterly fail to rebut the very serious concerns raised Dr. Heath, and now, Dr. Scalea about Defendants’ ability to ensure that a sufficient dosage of anesthetic is actually delivered.

e. Finally, both Defendants and Dr. Dershwitz defend procedures for lethal injection — banned for use in animals by the American Veterinary Medical Association (“AVMA”) and by the State of Maryland through its *criminal* law because of their cruelty—on the ground that they *save execution witnesses from lengthy or unpleasant viewing experiences*. Def. Opp. at 33; Dershwitz Decl. ¶ 19. Evans’s right to be free from cruel and unusual punishment may not be subordinated to the interest of an execution witness in viewing a speedy and deceptively peaceful lethal injection without upset.

f. Defendants have failed to rebut Evans’s demonstration that the practices and procedures employed by Defendants in carrying out executions create a grave risk that he will suffer wanton and unnecessary pain if he is subjected to these procedures, and they have not even attempted to rebut the rather modest contention that evolving standards of decency do not permit the killing of human beings in a manner deemed inhumane for animals. It is plain, therefore, that Defendants’ have not sufficiently contested the existence of “grave or serious questions” justifying Evans’s request for preliminary relief.

5. The Defendants’ treatment of the “public interest” component of the *Blackwelder* analysis would render this third consideration a mere redundancy. “The public interest is the State’s interest,” say Defendants. Def. Opp. at 37. Accordingly, they have merely repeated *verbatim* — typos included — their argument as to Defendant’s interest discussed under “irreparable harm.” See Def. Opp. 37-38, 20-21. But the public, most certainly, has an interest distinct from the Defendants’ in ensuring that the most solemn act of execution, carried out in its name, and shrouded by Defendants’ in secrecy, is performed humanely, in accordance with “the evolving standards of decency that mark the progress of a maturing society” and without “the unnecessary and wanton infliction of pain.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). This interest would clearly be served by preliminary relief allowing the merits of Evans’s complaint to be considered.

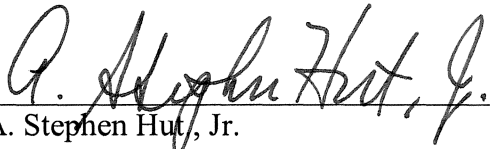
Conclusion

For reasons set forth above and in our opening motion papers, Evans has shown that he will suffer irreparable harm in the absence of temporary relief, that the balance of harms tips in his favor, and that “grave or serious” questions are raised in this case. Accordingly, this Court

should order Defendants Temporarily Restrained and Preliminarily Enjoined from performing any execution using their current practices and procedures for lethal injection.

Respectfully submitted,

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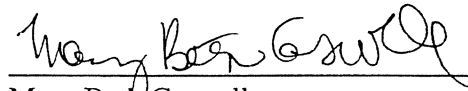
Dated: January 26, 2006

Counsel for Defendant Vernon Evans, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January 2006, I caused a copy of the foregoing motion to be sent via electronic filing to:

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Mary Beth Caswell

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLANDVERNON EVANS, JR.,
DOC Number 172357;

Plaintiff,

vs.

Civil Action No. 06-CV-00149 BBL

MARY ANN SAAR, Secretary,
Department of Public Safety and
Correctional ServicesFRANK C. SIZER, JR., Commissioner,
Maryland Division of CorrectionLEHRMAN DOTSON, Warden,
Maryland Correctional Adjustment CenterGARY HORNBAKER, Warden,
Metropolitan Transition Center

and,

JOHN DOES,

Defendants.

DECLARATION OF THOMAS M. SCALEA, M.D., F.A.C.S., F.C.C.M.

I, Dr. Thomas M. Scalea, declare as follows:

1. I am currently the Physician-in-Chief of the R. Adams Cowley Shock Trauma Center at the University of Maryland School of Medicine, Baltimore. I also teach as the Francis X. Kelly/MBNA Professor of Trauma surgery, and am the Director of the University of Baltimore School of Medicine's Program in Trauma.

2. I obtained my Bachelor of Arts degree from University of Virginia in 1972, where I graduated with distinction, and received my medical degree in 1978 from the Medical College of Virginia. I also completed a Fellowship in Critical Care/Trauma at New York Medical College in 1984. A copy of my current Curriculum Vitae is attached as Exhibit A to this Declaration.
3. My current practice is devoted almost exclusively to performing surgery on patients who have suffered severe trauma. I frequently deal with the issue of finding veins in these patients, and often encounter patients who are current or former intravenous drug users. I am therefore quite familiar with the difficulties that can arise with finding and maintaining IV access with current and former drug users.
4. On January 24, 2006, I evaluated Vernon Evans, Jr. for approximately 20 minutes in the Maryland Correctional Adjustment Center in Baltimore.
5. Mr. Evans told me that he had a more than thirty year history of near-daily intravenous drug use. The extent of his previous drug habit has ravaged his peripheral veins.
6. I understand that Mr. Evans is scheduled to be executed by lethal injection during the week of February 6, 2006. I have reviewed a Lethal Injection Checklist and an Affidavit of Dr. Mark Heath dated January 19, 2006, which were provided to me by one of Mr. Evans's attorneys.
7. In order for the execution to take place reliably, he would have to have two "free flowing" intravenous lines. Neither of Mr. Evans's arms nor his lower extremity, however, would

be suitable for performing a lethal injection. Mr. Evans has no useful veins in his right upper extremity. The small number of veins that he has on his right hand are not suitable for placement of a reliable IV line. He does have several veins that are somewhat larger in his left hand. I am concerned, however, that, given his drug use, the use of fluid and/or medication delivered by this route may not be transported quickly through his venous system.

8. The concern about utilizing the small veins in Mr. Evans's left hand results from the rapid injection of the sodium pentothal, pancuronium, and/or potassium chloride. I understand that the State of Maryland execution protocol calls for the use of pressure infusion bags to accomplish a more rapid injection of drugs than an ordinary IV line, which compounds the problem. If the drugs are injected quickly, the vein walls could rupture, and the drugs will be only partially absorbed and be only partially effective, possibly leading to horrific consequences. Among other problems, Mr. Evans could be inadequately sedated when the pancuronium and potassium chloride are injected. This would have him experiencing cardiac arrest and/or suffocating awake. Because of the pancuronium, he would be unable to move or breathe but would still be awake.
9. I examined Mr. Evans's legs as well, and I do not believe Mr. Evans has usable veins in his lower extremity either.
10. One alternative to peripheral venous access is a "cut-down" procedure. Because of the seriously compromised nature of Mr. Evans's veins, however, it is not clear that even this more invasive procedure would be sufficient to obtain venous access for purposes of lethal

injection or that the Maryland Division of Corrections has the proper staff or equipment for ensuring reliable IV access.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 25th day of January 2006.


Thomas M. Scalea, M.D., F.A.C.S., F.C.C.M.