IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AMERICAN CIVIL LIBERTIES UNION OF MONTANA; MONTANA ASSOCIATION OF CHURCHES; MONTANA CATHOLIC CONFERENCE; SENATORS BRENT CROMLEY, STEVE GALLUS, DAN HARRINGTON, DON RYAN, and DAN WEINBERG; REPRESENTATIVES NORMA BIXBY, PAUL CLARK, GAIL GUTSCHE, JOEY JAYNE, and JEANNE WINDHAM,

Plaintiffs,

vs.

MIKE FERRITER, DIRECTOR; WARDEN MIKE MAHONEY; MIKE McGRATH, ATTORNEY GENERAL; and JOHN DOES 1-10,

Defendants.

Cause No. CV 06-35-H-DWM

ORDER

Plaintiffs filed this action late in the day on Friday, August 4, 2006, seeking an injunction against all executions in the State of Montana. They request an injunction in order to have time to litigate the issue of whether lethal injection, the only statutorily prescribed method of capital punishment in Montana, is administered in a manner that is consistent with the Eighth Amendment

to the United States Constitution.

Upon the filing of the Complaint,[1] an Order was issued setting a hearing for today, Monday, August 7, at 1:00 p.m. The parties were directed to submit briefs and affidavits before the hearing to facilitate their presentations in open court. Today, Plaintiffs filed a First Amended Complaint, and Defendants filed a motion to dismiss and a brief and affidavits in support. The Court also heard argument. All of the parties' submissions have been carefully considered. The fundamental issue in the case at this point is whether Plaintiffs have standing to assert a violation of the Eighth Amendment.

Plaintiffs allege that lethal injection masquerades as quick and painless death when, in terms of medical affidavit, it is beset by a risk that the condemned inmate will experience terrible pain but be unable to signal his distress to anyone.[2] The Declaration of Dr. Mark Heath is compelling. It has

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[1] Pursuant to Standing Order DWM-43, Plaintiffs contacted the Clerk of Court the day before filing.

[2] State law calls for the administration of two drugs, an ultra-fast-acting barbiturate and a chemical paralytic agent. See Mont. Code Ann. § 46-19-103(3) (1999). The Department of Corrections carries out the law by using sodium pentothal as the barbiturate, pancuronium bromide as the paralytic agent, and a third, unlegislated chemical, potassium chloride, to cause cardiac arrest. The DOC chooses to administer potassium chloride because cardiac arrest causes death more quickly than would respiratory suffocation induced by pancuronium bromide. Although there may be drugs other than potassium chloride that could cause the same effect without risk of pain, see Heath Decl. at 8, ¶ 15, it is clear that the DOC chooses to administer potassium chloride for humane reasons, that is, to cause death more quickly.

The irony is that, because sodium pentothal is an ultra-fast-acting barbiturate and pancuronium bromide is a paralytic agent, and because the three-drug "cocktail" is administered by executioners who are not anesthesiologists and who are working under less than ideal conditions, potassium chloride may cause an inmate to feel, perhaps for a period of a full minute or more, the physical force of encroaching death until consciousness ends. At the same time, "regardless of whether the person is properly anesthetized or wide awake and paralyzed, he will appear serene and tranquil, because pancuronium relaxes all voluntary muscles including facial muscles. The prisoner could be chemically entombed by the paralytic effect of the pancuronium, desperate to cry out and to draw breath, but would appear to all witnesses to be comfortably sleeping." Heath Decl. (doc. 5-

not been subjected to adversarial testing at this point and may ultimately prove inaccurate or insubstantial. Nonetheless, it establishes that Plaintiffs' concerns are serious. It also raises significant questions as to why the State would proceed with a State-sanctioned homicide[3] despite serious constitutional issues that ultimately cannot be avoided.

The gravity of Plaintiffs' concerns cannot be ignored. Courts, however, are not empowered to change a law, or the manner of its enforcement, at the request of anyone who believes it to be bad law or bad procedure. The justice and fitness of the law is the concern of the legislature and the executive branch. A federal court may only consider a "case or controversy" within the meaning of Article III, § 2 of the United States Constitution. Under law that this Court is duty-bound to follow, Plaintiffs here cannot present a justiciable case or controversy. They have no standing.

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III," § 2, of the United States Constitution. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum of standing" requires that a plaintiff show, among other things, that he has "suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Id. Plaintiffs here allege that the manner in which lethal injections are administered creates an unacceptable *risk* that an inmate will experience excruciating pain and that this risk amounts to a violation of the Eighth Amendment. Since the risk is the

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5) at 9, ¶ 18. As a consequence, the people who do their best to ensure that an inmate does not endure gratuitous suffering *will not know* whether the inmate is experiencing pain that is literally unimaginable. In effect, the purpose of administering pancuronium bromide to the inmate is to anesthetize *the witnesses*. See also Dershwitz Decl. (doc. 5-6) at 8, ¶ 25.

[3] See Compl. App. Ex. 1 (doc. 5-2 at 13), Block 26 (death certificate of Terry Langford, executed on February 24, 1998, showing "cause of death" as "homicide").

Plaintiffs' focus, the Court accepts, at least for present purposes, that the asserted injury is actual and imminent, not conjectural.

However, Plaintiffs cannot show that the manner of execution in Montana causes them a "concrete and particularized" injury. The Lujan Court noted, "[b]y particularized, we mean that the injury must affect the plaintiff in a personal and individual way." 504 U.S. at 560 n.1. "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." Allen v. Wright, 468 U.S. 737, 754 (1984).

Allen is a close parallel to this case. There, the plaintiffs sued to compel the Internal Revenue Service to deny tax exemptions to racially discriminatory private schools. Plaintiffs were parents of African-American children who attended school in communities where racially discriminatory schools were receiving the exemptions in question. They alleged that the exemptions amounted to federal financial aid to the discriminatory schools and encouraged the schools in resisting desegregation, thus denigrating their right "to have the Government avoid the violation of law" and creating a stigmatic injury "suffered by all members of a racial group when the Government discriminates on the basis of race." 468 U.S. at 753-54. Nonetheless, the Court held that the asserted injury was no greater than the injury suffered by anyone when the Government violates the law. "[S]uch injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." Id. at 755. Because none of the plaintiffs alleged that their children attended or wanted to attend a racially discriminatory school, id. at 746, the Court found that they lacked standing to proceed.

Similarly, here, Plaintiffs allege that the State must not violate the Eighth Amendment, and they allege that they have significant personal interest in this matter. However, conviction that the

State must not implement cruel and unusual punishment, no matter how sincerely or personally held, does not confer standing on a person who is not facing cruel and unusual punishment at the hands of the State.[4] Some people have sincere and personally held convictions on the other side of the issue. The Constitution's solution for that dilemma is not litigation but legislation. "Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." Lujan, 504 U.S. at 576. "The province of the court is, solely, to decide on the rights of individuals." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

The fact that some of the Plaintiffs are legislators does not support their case for standing. Legislators have standing to contest the enactment of legislation they voted against under two conditions: if their votes would have been sufficient to defeat the legislation in question and if, for some reason, their votes were not counted. See, e.g., Raines v. Byrd, 521 U.S. 811, 823 (1997). That narrowly circumscribed situation is not presented here. The legislators have made no showing that they voted against enactment of Mont. Code Ann. § 46-19-103(3) (1999), much less that their votes would have defeated its enactment but were not counted.

Raines does, however, emphasize the contours of the general rule on standing: that "a plaintiff must allege a personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Id. at 818 (quoting Allen, 468 U.S. at 751)

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[4] In fact, even an inmate who *is* facing capital punishment would not have standing to stop another inmate's execution. See Whitmore v. Arkansas, 495 U.S. 149 (1990). Nonetheless, a death row inmate would be able to show a personal injury in support of standing to pursue this action.

(internal quotation marks, brackets, and emphasis omitted).[5] Plaintiffs assert that their ability to advocate on behalf of their causes will be diminished if they are not found to have standing in this case. See First Am. Compl. at 2-4, ¶ I. Since they may not litigate where they have no standing, their assertion is no doubt true. But harm to these organizations' ability to advocate their interests is not traceable to the Defendants' allegedly unlawful conduct in this case. The Defendants' conduct is not preventing Plaintiffs from advocating. Article III, § 2 of the Federal Constitution prevents them from advocating their cause in this Court without a plaintiff who might be personally injured if the Defendants are violating the Eighth Amendment. They may advocate in the Montana Legislature, they may go to the Department of Corrections itself, they may go to the Governor, they may air their views publicly, and they might even have standing to proceed in state court. Here, they do not.

In sum, all Plaintiffs can allege in this case is a profound interest in ensuring that the ultimate punishment the State can impose, the punishment of death, should be administered in a way that

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[5] The same general rule applies where an association seeks standing to sue:

> An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Oregon Advocacy Ctr. v. Mink, 322 F.3d 1101, 1109 (9th Cir. 2003) (quoting Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977) (internal quotation marks and brackets omitted)). While the third requirement is merely prudential in nature, the first two are constitutional and go to the heart of a federal court's power to hear a case. See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 555-57 (1996). There is no indication that any member of the Montana Association of Criminal Defense Lawyers, the American Civil Liberties Union of Montana, the Montana Association of Churches, or the Montana Catholic Conference currently faces sentence of death in Montana.

honors the Eighth Amendment.[6] That is not enough:

> The uniqueness of the death penalty and society's interest in its proper imposition, [Plaintiffs] maintain[], justify a relaxed application of standing principles. The short answer to this suggestion is that the requirement of an Art. III "case or controversy" is not merely a traditional "rule of practice," but rather is imposed directly by the Constitution. It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case. We have previously resisted the temptation to import profound differences of opinion over the meaning of the Eighth Amendment to the United States Constitution into the domain of administrative law, and restraint is even more important when the matter at issue is the constitutional source of the federal judicial power itself.

Whitmore v. Arkansas, 495 U.S. 149, 161 (1990).

At the conclusion of the hearing, Plaintiffs' counsel requested that a Notice of Appeal be entered to expedite an appeal. The Court notes that the Clerk entered a Notice of Appeal only as to the oral Order. The Notice will be re-entered as to this Order.

Accordingly, IT IS HEREBY ORDERED as follows:

1. Plaintiff's First Amended Complaint (doc. 7) is DISMISSED for lack of jurisdiction on the grounds that Plaintiffs lack standing;

2. All pending motions are DENIED AS MOOT;

3. The case is CLOSED and the Court will not entertain any motion to reopen or reconsider or to enter a stay pending appeal;

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[6] Plaintiffs' reference to First Amendment cases is unavailing. In that context, courts have relaxed the requirements of standing because the very fact of the State's restriction of the speech at issue may persuade persons who are directly affected to avoid conflict with the State. See, e.g., Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 956-57 (1984) (referring to a "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."). There is nothing about capital punishment or the manner of its imposition that prevents the person who is sentenced to death from bringing a court challenge. On the contrary, such a person has the greatest possible incentive to do so.

4. The Clerk of Court shall immediately enter a Notice of Appeal that includes this Order as well as the oral dismissal.

DATED this 7th day of August, 2006, at 4:07 p.m.

DONALD W. MOLLOY, Chief Judge
United States District Court