IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MICHAEL ANTHONY TAYLOR, *Plaintiff, and* RICHARD D. CLAY, *Plaintiff-Intervenor*, v. LARRY CRAWFORD, Director, Department of Corrections; JAMES D. PURKETT, Superintendent, Eastern Reception Diagnostic Correctional Center; and JOHN DOES 1-666, Anonymous Executioners, *Defendants*.	)	No. 05-4173-CV-C-SOW JURY TRIAL DEMANDED

FIRST AMENDED
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COME NOW the plaintiffs, Michael Anthony Taylor, by and through appointed counsel, John William Simon, and Richard D. Clay, by and through his appointed counsel, Elizabeth Unger Carlyle and Jennifer

Herndon, and—no answer or other responsive pleading having been filed—as authorized by 42 U.S.C. § 1983, pray the Court for its declaratory judgment holding that the existing procedure for lethal injection that the State of Missouri and its officials, officers, and employees, acting under color of state law, use in executions violates the Eighth, Thirteenth, and Fourteenth Amendments, because it would inflict on him cruel and unusual punishment, which would thereby deprive him of life, liberty, or property without due process of law, and would inflict on him a badge of slavery, in that the defendants' selection of a three-chemical sequence using a surgical procedure performed by a surgeon to obtain access to the femoral artery—itself unnecessary to bring about the statutory goal of his death—as a means of applying their chosen method of execution (lethal injection) creates a foreseeable risk of the infliction of gratuitous pain, *i.e.*, a specific form of an otherwise lawful method of execution which is more painful than necessary to accomplish the statutory purpose of bringing about the "mere extinguishment of life,"[1] and violates ethical rules which depend on state enforcement for the protection of consumers of medical services including but not limited to these plaintiffs.

[1]*In re Kemmler*, 136 U.S. 436, 447 (1890).

Plaintiffs do not in this action dispute whether the State of Missouri can kill them, but rather demonstrate that the way its agents have chosen to do so is unconstitutional. Plaintiffs pray the Court for its preliminary injunction to prevent the defendants from executing them at all, however, until they have had an opportunity to present their case after discovery and in open court and to receive an adjudication on the merits, and thereafter for its permanent injunction to prevent the defendants from using this form and method of lethal injection on the plaintiffs; for its order granting the plaintiffs reasonable attorneys' fees and costs; and for such other relief as the Court finds appropriate.

I. Summary

As set forth in detail in the declarations of anesthesiology professors Mark J.S. Heath, M.D. (Exhibit 1), and David A. Lubarsky, M.D. (Exhibit 2) which were filed with the original complaint, the use of a specific succession of chemicals in judicial executions by lethal injection—which the defendants or their predecessors in office have admitted they use—creates a foreseeable risk of the gratuitous infliction of pain and suffering, in that the first of the three chemicals is used by health-care professionals specifically because it wears off when the patient experiences stimuli which

produce pain; the second chemical paralyzes the prisoner such that he cannot breathe and he suffers from suffocation, but the prisoner cannot cry out or even flinch, because of the paralysis; the third chemical burns as it works its way through his veins to the heart, killing him with a heart attack—which to a conscious person is painful. The co-authors of a peer-reviewed study published April 16, 2005, in the world-renowned medical journal THE LANCET found that in 43% of the executions for which four states provided information, the levels of anesthesia were inadequate to render the prisoner unconscious at the time of his death; and ***those*** executions were in jurisdictions which (unlike Missouri) were careful enough to keep records and confident of the humanness of their several practices to share these data with the co-authors. None of the three chemicals are required by Missouri statute; neither any one of them nor the combination of them is necessary to bring about the death of the plaintiffs. Defendants could bring about the death of a prisoner by the administration of a single, lethal dose of a single anesthetic, pentobarbital, as their veterinarians would do if they had a pet which they decided to have euthanized. Discovery in this case has to date disclosed that the defendants use a board-certified surgeon to prepare the chemicals for

injection into the prisoner's body for the purpose of killing the prisoner, and that they also use the same board-certified surgeon to catheterize the femoral vein to achieve central vein access for the purpose not of healing but of injecting the chemicals for the purpose of killing the prisoner. The Eighth Amendment forbids the gratuitous infliction of pain and suffering, and the Fourteenth Amendment applies this guaranty against the states. The Thirteenth Amendment abolishes slavery, of which not only the contemporary infliction of the death penalty but more specifically the use of a form of execution more painful than necessary to bring about the death of the prisoner is a relic, a vestige, and a badge. In addition, the Fourteenth Amendment protects individuals from governmental conduct which is oppressive or shocks the conscience. Plaintiffs are entitled to the relief they seek.

II. Statement of Exhibits

Exhibits 1-18 are the same as those submitted with the original complaint, and are not resubmitted with this first amended complaint. The following Exhibits 19-22 are tendered with this amended complaint.

1. Declaration of Mark J.S. Heath, M.D. with curriculum vitae attached as "Heath Exhibit 1"

2. Declaration of David A. Lubarsky, M.B.A., M.D., with curriculum vitae and LANCET article attached as "Lubarsky Exhibits" 1 & 2 respectively

3. *Johnston v. Kempker*, No. 4:04-CV-1975-DJS, Defendant Gary Kempker's Answers and Objections to Plaintiff's First Set of Interrogatories (E.D. Mo. Dec. 22, 2004)

4. *Johnston v. Kempker*, No. 4:04-CV-1975-DJS, Defendants' Memorandum of Law in Support of Motion to Dismiss (E.D. Mo. Nov. 15, 2004)

5. *Johnston v. Kempker*, No. 4:04-CV-1975-DJS, Exhibit 1 to Plaintiff's Response to Defendants' Motion to Dismiss (E.D. Mo. Dec. 6, 2004)

6. *Johnston v. Kempker*, No. 4:04-CV-1975-DJS, Defendant's Reply to Plaintiff's Response to Motion to Dismiss (E.D. Mo. Dec. 20, 2004)

7. *Jones v. Crawford*, No. 4:05-CV-653-RWS, Transcript of Temporary Restaining Order Hearing (E.D. Mo. April 25, 2005)

8. Informal Resolution Request with Cover Affidavit by Vernon Brown, executed May 6, 2005

9. Affidavit of Stanley D. Payne with Informal Resolution Request and equivocal unsigned statement by staff attached

10. Declaration of Michael Lenza, Ph.D., with curriculum vitae (Exhibit 1)

11. M. LENZA, POLITICS OF DEATH: A STATISTICAL, THEORETICAL, AND HISTORICAL EXAMINATION OF THE DEATH PENALTY IN MISSOURI, University of Missouri–Columbia, 2005 (hitherto unpublished Ph.D. dissertation)

12. John F. Galliher, et al., REPORT TO THE OFFICE OF THE MISSOURI PUBLIC DEFENDER ON PROPORTIONALITY OF SENTENCING IN DEATH-ELIGIBLE CASES, filed by Missouri State Public Defender System in, inter alia, *State v. Parker*[2]

13. M. Lenza et al., THE PREVAILING INJUSTICES IN THE APPLICATION OF THE DEATH PENALTY IN MISSOURI (1978-1996) (2002), available May 18,

[2]886 S.W.2d 908 (Mo. 1994) (en banc), *cert. denied*, 514 U.S. 1098 (1995), *citing In re Estate of Danforth*, 705 S.W.2d 609, 610 (Mo. Ct. App., S.D. 1986) (providing for judicial notice of the record resulting in an opinion to determine grounds on which opinion is based). A published work coming after the original Galliher study but before the Lenza et al. study is J.R. SORENSEN AND D.H. WALLACE, *Capital Punishment in Missouri: Examining the Issue of Racial Disparity*, 13 BEHAVIORAL SCIENCES AND THE LAW 61, 75 (1995).

2004, at

http://www.umsl.edu/divisions/artscience/forlanglit/mbp/Lenza1.html

14. Denise Lieberman, Legal Director, American Civil Liberties Union of Eastern Missouri, PROSECUTORS: THE FIRST LINE OF OFFENSE—PROSECUTORIAL DISCRETION AND ARBITRARINESS IN ADMINISTRATION OF THE DEATH PENALTY, http://www.umsl.edu/~phillips/dp/ACLUDenise.html (2001)

15. J. SOSS ET AL., *Why Do White Americans Support the Death Penalty?* 65 J. OF POLITICS 397, 409 (2003), *http://www.polisci.wisc.edu/~soss/Research/Articles/JOP_2003.pdf*

16. Affidavit of Michael Anthony Taylor executed May 27, 2005, with Informal Resolution Request attached

17. Missouri Department of Corrections, Department Manual, D5-3.2, Offender Grievance

18. *Brown v. Crawford*, No. 4:05-CV-746, Transcript of Hearing on Motion for Temporary Restraining Order (E.D. Mo. May 13, 2005)

19. Defendant Crawford's Answers to Plaintiffs' First Interrogatories (partial, of course)

20. Curriculum vitae of Dr. Jonathan I. Groner

21. *Johnston v. Kempker*, No. 4:04-CV-1075-CAS, "Transcript of Temporary Restraining Order [*sic*]," U.S. District Court, Eastern District of Missouri (August 26, 2005)

22. AMA Code of Medical Ethics E-2.06

III. Parties

1. Plaintiff, **Michael Anthony Taylor, CP-89**, is a citizen of the United States and a resident of the State of Missouri.

2. Plaintiff Taylor is a person within the jurisdiction of the State of Missouri.

3. Plaintiff Taylor was sentenced to death in the Circuit Court of Jackson County (the Hon. Alvin G. Randall, Circuit Judge; on remand, the late Hon. Michael Coburn) for the kidnapping, rape, and murder of a minor child, A.H., while acting together with Roderick Nunley.

4. Plaintiff Taylor is attacking the conviction and sentence of the Circuit Court of Jackson County by a pending certiorari petition, No. 05-6135, seeking the review of the Supreme Court of the United States of the denial of his motion to recall the mandate of the Missouri Supreme Court in its Docket No. 85235, but not in this complaint.

5. Plaintiff Taylor is also attacking the same conviction and sentence in a state habeas corpus petition now pending before the Missouri Supreme Court in its Docket No. 87054, but not in this complaint.

6. Plaintiff **Richard D. Clay, CP 120**, is a citizen of the United States and a resident of the State of Missouri.

7. Mr. Clay is a person within the jurisdiction of the State of Missouri.

8. Mr. Clay was convicted upon his plea of not guilty of first degree murder in Callaway County, Missouri, Case No. CR594-4F and sentenced to death on September 12, 1995, for the murder of Randy Martindale. He was tried before a jury.

9. Mr. Clay has no pending actions involving this conviction and sentence in any court.

10. Plaintiffs are incarcerated at the Potosi Correctional Center, 11593 State Highway O, Mineral Point, Washington County, Missouri 63660.

11. The State of Missouri conducts its executions at the Eastern Missouri Reception, Diagnostic & Correctional Center, 2727 Highway K, Bonne Terre, St. Francois County, Missouri 63628.

12. Defendant **Larry Crawford** is Director of the Department of Corrections of the State of Missouri.

13. Defendant Crawford is specifically authorized and directed by state statute to prescribe and direct the means by which the Department of Corrections carries out executions within the statutorily specified methods of lethal gas or lethal injection.[3] Plaintiffs do not in this complaint contend that lethal injection is per se unconstitutional.

14. Defendant Crawford is sued in his individual and official capacity for the purpose of obtaining prospective declaratory and injunctive relief.

15. At all times and in all respects referred to in this complaint, defendant Crawford acted and will act under color of state law.

16. Defendant Crawford's office is at 2729 Plaza Drive, Jefferson City, Cole County, Missouri 65109.

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[3]Mo. Rev. Stat. § 546.720: "The manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection. And for such purpose the director of the department of corrections is hereby authorized and directed to provide a suitable and efficient room or place, enclosed from public view, within the walls of a correctional facility of the department of corrections, and the necessary appliances for carrying into execution the death penalty by means of the administration of lethal gas or by means of the administration of lethal injection."

17. Defendant Crawford is a resident of the Central Division of the Western Federal Judicial District of Missouri.

18. Defendant **James D. Purkett** is Superintendent of the Eastern Reception, Diagnostic & Correctional Center (ERDCC), in Bonne Terre, St. Francois County, Missouri.

19. Defendant Purkett is "warden" or chief executive officer of ERDCC, and is therefore charged with the management of ERDCC.

20. Defendant Purkett's principal place of business is the Eastern Reception, Diagnostic & Correctional Center (ERDCC), 2727 Highway K, Bonne Terre, St. Francois County, Missouri 63628.

21. Defendant Purkett is a resident of the Eastern District of Missouri.

22. ERDCC is where the State of Missouri began conducting its executions on April 27, 2005.

23. By virtue of his authority over the staff of ERDCC, defendant Purkett is responsible for the way in which executions are conducted in Missouri.

24. Defendant Purkett is sued in his individual and official capacity for the purpose of obtaining declaratory and injunctive relief.

25. At all times and in all respects referred to in this complaint, defendant Purkett acted and will act under color of law.

26. Defendants **John Does 1-666** are officials, officers, employees, agents, and servants of the State of Missouri who, by virtue of their employment or other status (including independent contractors and volunteers under the supervision of the defendants and their designees), participate in the planning of, purchasing and preparation for, carrying out of, and covering up of details about executions in the State of Missouri.

27. Plaintiffs cannot provide the Court the natural names of these individuals because the State of Missouri and its officials, officers, and employees have thus far kept them secret.

28. **John Does 1-666** are sued in their individual and official capacities for the purpose of obtaining declaratory and injunctive relief.

29. Defendants Does 1-666 reside in the Eastern and Western Districts of Missouri.

30. At all times and in all respects referred to in this complaint, defendants Does 1-666 acted and will act under color of law.

31. Each and all of the foregoing defendants Crawford, Purkett, and Does 1-666 at all times relevant to this complaint were acting in their

official capacities with respect to all acts and omissions described in this complaint, and were in each instance acting under color of state law.

32. Unless permanently enjoined against doing so, the defendants and each of them intend to act in their respective official capacities and under color of state law to execute the plaintiffs by lethal injection in the manner set forth in this complaint.

IV. Jurisdiction

33. Plaintiffs bring this action to enforce and protect their rights under the Eighth Amendment to the United States Constitution, as applied against the states by the Fourteenth Amendment, and also to enforce and protect their rights under the Thirteenth Amendment.

34. This Court has jurisdiction over this cause under 28 U.S.C. § 1331, in that it arises under the Constitution of the United States; under 28 U.S.C. § 1343(a)(3), in that it is brought to redress deprivations, under color of state law, of rights, privileges, and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that it seeks to secure equitable relief under an Act of Congress, *i.e.*, 42 U.S.C. § 1983, which provides a cause of action for the protection of rights, privileges, or immunities secured by the Constitution and laws of the United States;

under 28 U.S.C. § 2201(a), in that one purpose of his action is to secure declaratory relief; and under 28 U.S.C. § 2202, in that one purpose of his action is to secure permanent injunctive relief.

35. In addition to the foregoing, this Court has jurisdiction by virtue of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment.

36. Article 1, ¶ 1 of the Convention defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, ***punishing him for an act he or a third person has committed or is suspected of having committed***, or intimidating or coercing him or a third person, or ***for any reason based on discrimination of any kind***, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." (Emphasis supplied.)

37. Article 2, ¶ 1, provides that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

38. Article 1, ¶ 1 adds that torture "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." Because the plaintiffs invoke the treaty as providing a remedial structure rather than as a source of substantive law, it would be begging the question or beside the point for the defendants to argue that the pain from their specific method of lethal injection is part of a "lawful" sanction. The Eighth Amendment controls on the question whether such an execution is lawful.

39. Consequently, because this Court's jurisdiction does not depend on a federal statute, 42 U.S.C. § 1997e would not bar relief even if the selection of a garrote rather than lethal injection were a "prison condition."

V. Venue

40. Venue is proper in this federal judicial district under 28 U.S.C. § 1391(b)(1)-(3) in that (1) defendant Crawford resides in its territorial jurisdiction; (2) defendant Crawford's decisions regarding the specific means of using lethal injection are made in its territorial jurisdiction, and (3) defendant Crawford may be found in its territorial jurisdiction.

VI. Facts

41. Plaintiffs restate and reallege the contents of each preceding paragraph as if fully set forth again.

Facts Specifically Bearing on Count I

42. Defendants intend to execute the plaintiffs by lethal injection using a succession of three chemicals: sodium pentothal, pancuronium bromide, and potassium chloride.

43. As set forth in greater detail in the declarations of anesthesiologists, Mark J.S. Heath, M.D. (Exhibit 1), and David A. Lubarsky, M.D. (Exhibit 2), the use of this succession of chemicals in judicial executions by lethal injection creates a foreseeable risk of the gratuitous infliction of pain and suffering. The use of this succession of chemicals, or of any one or more of them, is absolutely unnecessary to bring about the death of the plaintiffs. (*E.g.*, Exhibit 1, ¶¶ 25, 36, 41 & 45.)

44. Specifically, sodium pentothal, also known as thiopental, is a ultra-short acting substance which produces shallow anesthesia. Health-care professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and use ***different*** drugs to bring to patient to a "surgical plane" of anesthesia that ***will*** last through the operation and ***will*** block the stimuli of surgery which would otherwise cause pain. Sodium pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the

long-run, deep anesthesia; the patient is ***supposed*** to be able to wake up and signal the staff that something is wrong. (Exhibit 1 ¶¶ 20-22.)

45. Sodium pentothal is unstable in liquid form. To be effective as an anesthetic, it must be mixed up and administered by a person with the qualifications of a licensed health-care professional. Licensed health-care professionals cannot by law and professional ethics participate in executions. (Exhibit 1, ¶ 26.)

46. The sodium penthothal which the defendants administer to condemned persons in Missouri ***either*** has not been prepared and administered by one who is qualified under Missouri law to do so in the therapeutic environment ***or*** has not been prepared and administered by a health-care professional who respects the ethical norms of his or her profession and perceives the loss of his or her license as an incentive to confirm his or her conduct to its standards. This fact increases the risk—if not guarantees the result—that the sodium pentothal will not have the intended anesthetic effect on the condemned person.

47. The second chemical the defendants use in lethal injections is pancuronium bromide, sometimes referred to simply as pancuronium. It is not an anesthetic. It is a paralytic agent, which prevents any of the

voluntary muscles of the body from moving, including those which control breathing, and effectively stops the lungs from functioning. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech. (Exhibit 1, ¶¶ 27-30.)

48. When sodium pentothal is exposed to pancuronium bromide, it precipitates, *i.e.*, returns to the solid condition it was in before the executioner of unknown qualifications or lack thereof mixed it up in preparation for the execution. Once it returns to its solid condition, the sodium pentothal is no longer active as an anesthetic. Any one of a number of mistakes—the type of mistakes that one would ***expect*** to occur when sodium pentothal is prepared and administered by a non-licensed person or one who scoffs at the norms of his or her profession and is given license to do so by the defendants' protection of his or her anonymity—or simply bad luck, can cause this abatement of the anesthetic effect toward the beginning of the lethal injection. In the absence of the assurance that the executioners have the same skills as anesthesiologists, nurse-anesthetists, or even veterinarians or their staff, the likelihood is substantial

that this will happens in any given execution by lethal injection performed in the State of Missouri.

49. Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. It has the unconscionable effect of creating the possibility that the sodium pentothal will become ineffective when the prisoner begins to suffer suffocation from the pancuronium bromide. Its only relevant function is to prevent the media and the conscientious staff from knowing when the sodium pentothal has worn off and the prisoner is suffering from suffocation or from the administration of the third chemical. (Exhibit 1, ¶ 41.)

50. That third chemical is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it goes through the veins toward the heart. Because the veins are running back to the heart after the arteries have carried it to the extremities, the blood runs more slowly than it does in the arteries. This prolongs the pain the prisoner suffers when the sodium pentothal wears off, as it is selected by surgical anesthetists because it does. (Exhibit 1, ¶¶ 43-44.)

51. When the potassium chloride reaches the heart, it causes a heart attack. If the sodium pentothal has worn off by the time the potassium

chloride reaches the heart (as it foreseeably would, given the shallow nature of the anesthesia sodium pentothal is ***supposed*** to produce, from the potassium chloride burning its way through the veins), the prisoner feels the pain of a heart attack, but no one but the prisoner can tell, because the pancuronium bromide has paralyzed his face, his arms, and his entire body so that he cannot express himself either verbally or otherwise. (Exhibit 1, ¶¶ 43-46.)

52. Veterinarians would not use any of these three chemicals in euthanizing animals, because the veterinary profession knows that the first is short-acting and that the second and third are cruel means of bringing about the death of a sentient being; for these reasons it would be illegal to use either of the latter two chemicals in euthanizing a pet. (Exhibit 1, ¶¶ 25, 37-40 & 47-50.) They cause pain and suffering far in excess of what is necessary to bring about the mere extinguishment of life.

53. Veterinarians are forbidden to use these chemicals even though they may personally participate in euthanasia and may also recruit and retain the most qualified available personnel to assist them. By contrast, physicians are forbidden by the Hippocratic Oath and by positive law from participating in executions. (Exhibit 1, ¶¶ 55-58.)

54. A veterinarian would use a lethal dose of pentobarbital, a long-acting anesthetic, to perform euthanasia consistently with professional regulations, positive law, and the values of humaneness which the latter norms reflect. This substance is an alternative to the three-chemical formula the defendants use on other people. Although neither plaintiff is advocating his own death, they point out pentobarbital as a specific alternative to the three-chemical sequence, with the amount, concentration, and timing, and the qualifications of staff performing and monitoring the execution, to be determined in the course of discovery.

55. On April 16, 2005—the day after the Missouri Supreme Court set the execution date in the *Vernon Brown* case—Dr. David A. Lubarsky and three co-authors published in the world-renowned medical journal THE LANCET the results of their research on the effects of these chemicals in lethal injections in the few states which bothered to conduct autopsies and prepare toxicology reports, and which did not refuse to produce these data for these scholars.

56. This publication is Exhibit 2 to Exhibit 2, the declaration of Dr. Lubarsky.

57. The LANCET team found that in 43% of the lethal injections they studied, the prisoner had an inadequate amount of sodium pentothal in his bloodstream to provide anesthesia. (Exhibit 2, ¶ 16.) In other words, in close to half of the cases, the prisoner felt the suffering of suffocation from pancuronium bromide, and the burning through the veins followed by the heart attack caused by the potassium chloride.

58. In their answers to Plaintiffs' interrogatories, the defendants have admitted that these three chemicals are used in Missouri executions. Defendants have refused to disclose the training or lack thereof which the actual executioners have had. Only blind faith would lead this Court to find that the personnel they have been able to recruit to participate in this activity have the skills of licensed medical and veterinary professionals which would be necessary to administer the chemicals in a minimally competent manner. (Exhibit 1, ¶¶ 55-58; Exhibit 2, ¶¶ 19.f & 21.)

59. Although a Missouri statute specifies that death sentences will be carried out by lethal gas or lethal injection, it does not prescribe any given chemical to be used in either process, but leaves these decisions up to defendant Crawford.[4]

[4]Mo. Rev. Stat. § 546.720.

60. Although the defendants have provided partial responses to discovery indicating that they use a larger initial injection of sodium pentothal than the typical lethal-injection jurisdiction uses, they have failed to meet the problem of neutralization through precipitation by their subsequent use of pancuronium bromide, and they have failed to address the original complaint's quality-assurance concerns in that they have refused to identify the participants with sufficient particularity that counsel can assess their actual qualifications. All we know is that the physician and the nurse who participate in these executions are outlaws within their respective professions.

Facts Specifically Bearing on Count II

61. In an attempt to meet the foregoing analysis as presented by the plaintiffs in *Johnston v. Kempker*, No. 4:04-CV-1975-DJS (E.D. Mo.) and in this case, the defendants have averred, in pleadings in the *Johnston* case and in partial response to the first set of interrogatories in this case, that their specific method of lethal injection is not subject to the critiques of Drs. Heath and Lubarsky because they use a large initial dose of sodium pentothal delivered through a central line catheter. *See* Defendant Crawford's Answers to Plaintiffs' First Interrogatories (which are

submitted with this amended complaint and marked "Exhibit 19), at 8-9. In making these averments, the defendants, while trying to jump out of the frying pan, have landed in the fire.

62. Dr. Jonathan I. Groner, Clinical Associate Professor of Surgery at Ohio State University College of Medicine & Public Health, will testify to all or substantially all of the averments of fact in support of this count. (Curriculum vitae submitted as "Exhibit 20.")

63. The procedure the defendants rely on for extra-efficient access to the condemned man's bloodstream is unnecessarily invasive, painful, and time-consuming, and hence creates the certainty of gratuitous pain and suffering beyond the "mere extinguishment of life."

64. The femoral vein lies in close proximity to the femoral artery and femoral nerve. The technique for inserting the catheter involves inserting a large needle directed to an anatomic landmark in order to puncture the vein. Once the vein is punctured, a wire is passed into the vein, then a scalpel is used to make a small incision where the guidewire enters the skin, then the catheter is passed over the guidewire and into the vein. Because the catheter has three separate channels, it is quite a bit larger than a standard peripheral IV. It is also usually 15 cm. longer. In

ethical medical practice, local anesthesia is normally used in the skin at the puncture site. Puncture of the artery is exceptionally painful because a large hematoma often will develop after the needle is removed and redirected toward the vein. Puncture of the femoral ***nerve*** is excruciatingly painful. The same holds true if the needle passes through the vein and strikes the bones in the pelvis which lie below the vein.

65. Doctors who are qualified in the placement of central lines are in general surgeons, critical care specialists, interventional cardiologists, interventional radiologists, and some emergency medicine physicians. Most doctors in standard office practice, and probably many surgeons, would not know who to do this procedure because the procedure is usually performed by specialists.

66. Complications of femoral venous central lines include (a) severe pain; (b) hemorrhaging and/or hematoma at the catheter site; (c) unrecognized arterial catheter placement, which would make the lethal injection process exceedingly painful (because the drugs would flow down the leg instead of into the heart and brain); (d) catheter tip malposition, in which case the catheter tip lies outside the vein, causing the lethal injection drugs to be absorbed slowly, which would produce a slow, tortuous death;

(e) air embolism, which when the catheter allows introduction of air into the vein causing sudden death from air embolism; (f) hemorrhage into the abdomen; and (g) femoral arterial occlusion, which causes severe leg pain due lo the absence of blood flow to the affected leg; and (h) perforation of the heart by the metal guidewire used in the catheter insertion procedure. All of the foregoing negative consequences of this procedure are known risks associated with it assuming it is performed by medical professionals with the baseline credentials required to do it rather than hypotheticals outside the scope of clinical experience.

67. Insertion of the standard peripheral IV is the preferred procedure for access to a vein unless (a) the patient has absolutely no visible veins; (b) the patient is in shock and the peripheral veins are collapsed or inaccessible; or (c) the patient needs venous pressure monitoring during an operation.

68. Femoral line insertions are dangerous and, at best, uncomfortable procedures which are performed in awake, unsedated patients only in dire situations and in a rare case where there are absolutely no veins for the standard peripheral IV. A femoral line is just one type of central line. Others include subclavian and internal jugular lines.

69. It is standard medical procedure to obtain a radiograph (x-ray) after catheter insertion to confirm that the catheter is in the appropriate position. Failure to do so can result in catheter malfunction.

70. Use of a femoral central line therefore creates a substantial risk of inflicting severe and unnecessary pain and suffering during the lethal injection process.

71. Defendant Crawford's partial responses to the first set of interrogatories also say that the state uses a "triple lumen central venous catheter." (Exhibit 19 at 7, 9, 17 & 20.)

72. Triple lumen central venous catheters are highly sophisticated medical devices. They should only be inserted by practitioners who have a strong understanding; of the anatomy of arteries, veins, and their appropriate landmarks. Furthermore, the practitioner must be able to recognize and initiate treatment of life and limb-threatening complications including puncture of the heart, arterial puncture, nerve damage, hematoma, and air embolism. Insertion of these catheters is associated with a known, foreseeable likelihood of extreme pain, even assuming the procedure is performed by medical professionals with the baseline credentials required to do it. Ethical physicians do not use triple lumen

femoral catheters are not used for administration of intravenous anesthetic agents when peripheral IV sites are available.

73. Whereas the kit one uses for a peripheral IV contains three pieces, the kit surgeons use when they perform a central line procedure consists of about 15-20 pieces, including a "dilator" that goes over the guidewire to stretch out the tissues and thereby clear a path through the person's body for the actual catheter. The dilator looks like a small harpoon.

74. This procedure is not medically indicated and essentially amounts to an unnecessary surgery performed on the prisoner without his consent.

75. This procedure involves the use of a surgeon, implicating the medical profession in executions in violation of medical norms from the Hippocratic Oath to the present.

76. Like the use of pancuronium bromide, the foregoing procedure is performed ***not*** because it is necessary to bring about the "mere extinguishment of life" but as part of the defendants' esthetic-political agenda for prolonging the death penalty after the remainder of the countries with which the United States enjoys being compared have

abolished it, by putting a veneer medical practice and technology on the ***opposite*** of medicine—the deliberate killing of a defenseless human being.

Facts Specifically Bearing on Count III

77. According to the expert on the other side of the litigation involving lethal injections, Mark Dershwitz, M.D., PH.D.—in testimony which the defendants' counsel adduced in open court at the evidentiary hearing in the *Johnston* case—and according to defendant Crawford's partial responses to the first set of interrogatories in this case, the defendants use a "board certified surgeon" to mix the chemicals intended to kill the condemned man, to perform the procedure to achieve central line access through the femoral vein, to monitor the condemned man's heart activity as reflected on their EKG, and to prescribe more "deadly drugs" if the first batch does not do the trick. (Exhibit 21 at 25 (board certified surgeon), 26 (mixing chemicals) & 27-33; Exhibit 19 at 32-33.)

78. The State of Missouri undertakes to regulate the practice of medicine. *See, e.g.*, Mo. Rev. Stat. §§ 334.010, .020, .040 & .100.

79. This regulation has the purpose "to safeguard the public health and welfare"[5] of Missouri residents (such as the plaintiffs in this action)

[5]*Boyd v. State Board of Registration for Healing Arts*, 916 S.W.2d 311, 317

from physicians' misuse of their special knowledge and their time-honored position of trust.

80. The state's structure for the regulation of physicians incorporates medical ethics. Mo. Rev. Stat. § 334.100 authorizes the Board of Registration for the Healing Arts to discipline a physician (by revoking their license or other sanctions) for "unethical conduct or unprofessional conduct."[6] Although the statute provides examples of such conduct, the Board's authority to discipline is not limited to these examples.[7]

81. Medical ethics forbids physician participation in executions. The Hippocratic Oath of about 400 B.C. specifically binds the physician not to give any deadly drug: "I will not give a drug that is deadly to anyone if asked . . . nor will I suggest the way to such a counsel."[8] The AMA Code of Medical Ethics E-2.06 allows physicians to prescribe palliative medications

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(Mo. Ct. App. E.D. 1995).

[6]Mo. Rev. Stat. § 334.100.2(4).

[7]*E.g.*, *Hughes v. State Board of Health*, 348 Mo. 1236, 159 S.W.2d 277, 278 (1942), *citing State ex rel. Lentine v. State Board of Health*, 334 Mo. 220, 65 S.W.2d 943, 950 (1933).

[8]Translation by Heinrich Von Staden in *"In a pure and holy way:" Personal and Professional Conduct in the Hippocratic Oath*, JOURNAL OF THE HISTORY OF MEDICINE AND ALLIED SCIENCES 406-408 (1996), available Sept. 11, 2005, at http://www.indiana.edu/~ancmed/oath.htm (downloaded Sept. 11, 2005, and available in PDF from John William Simon).

for a prisoner who is suffering distress in advance of an execution and to certify that an executed prisoner is dead after another person has pronounced him dead, but expressly forbids several of the acts which the "board certified surgeon" whom the defendants use to carry out their executions performs. *See* Exhibit 22.[9]

82. In *Wilkins v. Bowersox*, 933 F.Supp. 1496 (W.D. Mo. 1996), *aff'd*, 145 F.3d 1006 (8th Cir. 1998), *cert. denied*, 512 U.S. 1094 (1999), this Court explained that there are situations in which a state creates a protection for its citizens and may not arbitrarily withdraw that protection consistently with the United States Constitution:

> In *Hicks v. Oklahoma*, 447 U.S. 343, 346 . . . (1980), the Supreme Court held that a state creates a liberty interest when it provides a criminal defendant with a "substantial and legitimate expectation" of certain procedural protections. "[A]n arbitrary deprivation of such entitlement may create an independent federal constitutional violation". *Toney v. Gammon*, 79 F.3d 693, 699 (8th Cir.1996) quoting *Hicks*, 447 U.S. at 346 . . . . The whole purpose of the Due

[9]AMA Code of Medical Ethics, E-2.06 Capital Punishment, available September 10, 2005, at http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/E-2.06.HTM&&s_t=&st_p=&nth=1&prev_pol=policyfiles/HnE/E-1.02.HTM&nxt_pol=policyfiles/HnE/E-2.01.HTM&. PDF and hard copy available from John William Simon, J.D., Ph.D., 2683 South Big Bend Boulevard, Suite 12, St. Louis, Missouri 63143-2100.

> Process Clause is to prevent arbitrary deprivations of liberty or property. *Honda Motor Co. v. Oberg*, 512 U.S. 415, ----, 114 S.Ct. 2331, 2342 . . . (1994). [933 F.Supp. at 1525-26.

83. Under the facts and circumstances of this case, the state's own violation of a fundamental tenet of the regulatory system it has created for the protection of these plaintiffs and all other persons whom physicians treat within its jurisdiction violates the plaintiffs' right to due process of law under the United States Constitution.

84. Plaintiffs have a substantial and legitimate expectation that a physician will not use his or her special skills and position of trust to kill rather than to treat.

85. Defendants' use in the name of the state of the special skills and position of trust of a physician to kill rather than to treat violates due process as measured by the teachings of history and the basic values that underlie our society.

86. Defendants' action in using a physician to perform acts which violate medical ethics is deliberate.

87. Defendants are arbitrarily withholding the protection of the state's regulatory structure by employing or allowing a physician to perform a state function in violation of medical ethics, and by withholding

his or her name to keep the state's medical regulators from disciplining this physician (assuming he or she is licensed in Missouri).[10]

88. Employing—or accepting the volunteer/vigilante services of—a physician to perform acts forbidden by medical ethics, and concealing the name of that physician, increases the risk that he or she will not conform to the technical standards of medical practice when he or she has shown his or her contempt for the substantive standards of the profession, and when the state has rendered him or her immune from professional discipline because of his or her willingness to violate professional norms when he or she sees fit in order to kill.

89. By employing—or accepting the volunteer/vigilante services of—a physician to perform acts forbidden by medical ethics, when the state has itself undertaken a duty to enforce medical ethics, the defendants are abusing the power of government or employing it as an instrument of oppression. .

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[10]If the physician is ***not*** licensed in Missouri, then the defendants' use of his or her services is a crime committed in the name of punishing crime. *See* Mo. Rev. Stat. §§ 334.010 (unlicensed practice of medicine), 334.250.1 (violation of section 334.010 a class C felony) & 562.041.1 (criminal responsibility for acting with another).

90. Under the facts and circumstances of this case, state actors' use of a physician to kill a citizen of the United States shocks the conscience.

Facts Specifically Bearing on Count IV

91. Plaintiffs rely on certain facts set forth in the Ph.D. dissertation of Michael Lenza, and in his declaration submitted with the original complaint memorandum, which is incorporated herein and marked as "Exhibit 10"; his curriculum vitae is attached to, incorporated in his declaration, and marked as "Declaration Exhibit 1."

92. Dr. Lenza's Ph.D. dissertation is entitled POLITICS OF DEATH: A STATISTICAL, THEORETICAL, AND HISTORICAL EXAMINATION OF THE DEATH PENALTY IN MISSOURI, University of Missouri–Columbia (2005). It is attached hereto, incorporated herein, and marked as "Exhibit 11."

93. Its central finding is that in the customs and practices of the State of Missouri, there is a strong historical association between the presence of black slavery, the incidence of lynching, and a disproportionate number of death sentences after *Furman v. Georgia*[11] and *Gregg v. Georgia.*[12] It bears not only on the absence of a lawful capital punishment régime—which is

[11] 408 U.S. 238 (1972).

[12] 428 U.S. 153 (1976).

beyond the scope of this action—but also on the defendants' selection of lethal-injection chemicals and procedures that have an elevated likelihood of inflicting gratuitous pain, when they could use at least one (pentobarbital) which would—as they advertise their current practice, in contradiction to veterinary law and practice—be like putting a dog to sleep.

94. In the research for his dissertation, Dr. Lenza discovered that there is a strong historical association in fact within Missouri between counties that had the heaviest levels of black slavery until the Civil War, the incidence of lynching, and an elevated rate of death sentences after *Furman v. Georgia* and *Gregg v. Georgia*. (Exhibit 10.) In the judicial circuits falling into the slave and Southern cultural regions as Dr. Lenza defines them, a homicide case is 286% more likely to be prosecuted as a capital case and taken to trial as such than in the circuits he categories as urban. (Exhibit 11 at 232.) Such a case was 71% more likely to result in a death sentence. (*Id.* at 233.) Whether a case arose in the slave and Southern cultural regions was the most important variable in predicting death sentences even when compared such other reliable predictors to the color of the accused versus the color of the decedent, whether the accused was a stranger to the decedent, whether the homicide was performed with a knife (producing

better gruesome photographs to inflame the jury), and whether the accused had prior convictions and was represented by a public defender (both of which are surrogates for lower socio-economic status of the accused). (*Id.* at 233-35.) These data are not samples, but the universe of cases; there is a 92% certainty that the associations Dr. Lenza found did not happen by chance fluctuation in the data. (*Id.* at 235.)

95. Just as 89% of executions occur in states which used to have slavery (Exhibit 11 at 3-5), the practice of the death penalty in Missouri today is a reflection of the attitudes towards one's fellow human beings which allowed slavery to exist and thrive until put down by force of arms.

96. An underlying explanatory principle is that slavery "vested white citizens with the power of the State to utilize extra-legal violence to maintain the social order," *i.e.*, the supremacy of whites over African-Americans. (Exhibit 11 at viii.) Like all Ph.D. theses, this one finds that more research is called for, but also suggests that the results are consistent with the proposition that the death penalty is "an institutionalized social artifact of slavery, maintaining the racialized social order through violence, carried forth into our present by our social institutions." (Exhibit 11 at 244.)

97.One of the subsidiary themes of Dr. Lenza's dissertation is that greater pain was imposed on slaves and their descendents who were executed—officially or unofficially—than on members of the master race who were executed: this frequently took the form of burning alive (Exhibit 11 at 7, 63, 82, 108, 160-62 & 174-76), for which potassium chloride is as close as the defendants can get away with in the court of public opinion. *See* Exhibit 10, ¶¶ 8-11.

98.Plaintiffs do not here contend that the death penalty in Missouri is unlawful because despite the color-neutral statutes, it discriminates against men of color and on other arbitrary or independently unlawful bases. Plaintiffd d, however, plead—as in an intermediate premise in their claim for relief under the Thirteenth Amendment—that the death penalty in Missouri falls disproportionately on African-American residents. Plaintiffs plead this premise in the course of establishing that the specific method of lethal injection the defendants have chosen is a badge of slavery.

99.In support of the intermediate premise regarding disparate impact of the death penalty, the plaintiffs rely on four additional attachments, including one which was chiefly co-authored by Dr. Lenza before he completed his dissertation. Because the plaintiffs donot advance this

premise as a freestanding ground for relief, this Court need not consider whether *McCleskey v. Kemp*[13] need be overruled.

100. In other death-sentenced persons' cases before the Missouri Supreme Court, the Missouri State Public Defender System presented a study by University of Missouri–Columbia Professor John F. Galliher of the reports from Missouri circuit judges that the Missouri Supreme Court itself collected as the statute on proportionality review mandated. The Missouri State Public Defender System filed this study with the Missouri Supreme Court in *State v. Parker*.[14] Plaintiffs present it here as Exhibit 12. There is also available on the Internet a subsequent report based on later and more inclusive data prepared by Professor Galliher's original co-author, Professor David Keys, and others, headed by Dr. Michael Lenza.[15] Plaintiffs present it as Exhibit 13.

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[13]481 U.S. 279 (1987).

[14]886 S.W.2d 908 (Mo. 1994) (en banc), *cert. denied*, 514 U.S. 1098 (1995), *citing In re Estate of Danforth*, 705 S.W.2d 609, 610 (Mo. Ct. App., S.D. 1986) (providing for judicial notice of the record resulting in an opinion to determine grounds on which opinion is based).

[15]M. LENZA ET AL., THE PREVAILING INJUSTICES IN THE APPLICATION OF THE DEATH PENALTY IN MISSOURI (1978-1996) (2002), available May 18, 2004, at http://www.umsl.edu/divisions/artscience/forlanglit/mbp/Lenza1.html. (Exhibit 13.)

101. The original Galliher report was based entirely on the reports of Missouri trial judges in homicide cases that the Missouri Supreme Court gathered in response to Mo. Rev. Stat. § 565.035.6. The report showed that out of 439 death-eligible cases during the period it covered, the prosecutors had waived the death penalty in 212, or 52%. (Exhibit 12 at 1.) The remainder of the report showed that aggravating and mitigating factors played virtually no role in determining whether a person actually got the death penalty for a homicide. (*Id.* at 2-8.) For example, in respect to eight of the fourteen statutory aggravating factors, sentencers were more likely to impose life without parole than death if they found that factor;[16] in cases where accused citizens received life without parole, the sentencer found an average of 2.17 statutory mitigating factors, whereas in cases where the accused received a death sentence, the sentencer found 2.2.[17] Whereas the relationship between the total number of aggravating factors and a sentence of death is positive, it is only slightly so. (*Id.* at 2-3.)

102. By contrast, the clearest, strongest predictor of whether a prosecutor would seek the death penalty was whether the accused was a

[16] *Id.* at 4-5.

[17] *Id.* at 6.

black person and the decedent was a white person. In 89% of the cases in which prosecutors waived the death penalty, the accused and the decedent were the same color, and prosecutors rarely charged whites for killing blacks. (*Id.* at 11.) Prosecutors were radically less likely to waive the death penalty in cases where they charged blacks with killing whites than in any other class of death-eligible cases:

> For black offenders 44 percent of those receiving the death penalty killed a white victim, 44 percent of black offenders sentenced by a jury to life in prison killed a white victim, but only 18 percent of black offenders where the death penalty was waived killed a white victim. These figures indicate that in Missouri the race of the victim makes little difference for the legal outcome of white offenders, but ***for black offenders killing a white victim severely reduces the chances of having the death penalty waived by the prosecution—a reduction from 97 percent of white offenders who had killed white victims to 78 percent of black offenders who had killed white victims.***[18]

103. The Galliher study examined the influence of youth on charging and sentencing decisions, because it is a statutory mitigating factor. The data from the circuit judges collected by the Missouri Supreme Court showed that youth was a mitigating factor for white accused citizens but not for black ones:

> Among cases where the prosecution waived the death penalty 14 percent of defendants were 18 years old or less, and 32 percent were 21 or less with a mean age of 28.2 years. In cases where a jury handed down a life sentence 9 percent were 18 or less, and 25 percent were 21 or less with a mean age of 28.2 years—exactly the same average age as for cases in which the prosecutor waived the death penalty. Those receiving the death penalty were slightly older than others. Prosecutors perhaps correctly perceive the common bias of jurors against imposing the death penalty against the very young.
>
> . . .
>
> The mean age of black offenders sentenced to death is 27.7 years, and for whites the mean age is 35 years. Twenty-two percent of black defendants under the age of 21 were sentenced to death, while this was true of only 14 percent of white offenders under 21.[19]

The authors concluded that "young black defendants are in greater jeopardy of a death sentence than are white offenders."[20]

104. Another factor that the Galliher study explored was the reputation of the decedent as a mitigating factor. The data from the circuit judges, as collected by the Missouri Supreme Court, showed that the

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[18] *Id.* at 11 (emphasis supplied).

[19] *Id.* at 8.

[20] *Id.* at 17.

reputation of the decedent made a difference only if the decedent was white:

> While killing a white person with a bad reputation nearly always saved a defendant from death, it is much less likely to operate in the same fashion in the case of black victims. Perhaps this is true because all black victims were devalued whether or not they were noted to have a bad reputation.[21]

105. Prosecutors waived the death penalty as a rule if the accused was a woman, as long as she was white:

> Prosecutors seem less likely to seek the death penalty against female defendants than juries are to sentence females to death. The application of this apparent chivalry is, however, differentially distributed across races. Among death waived cases 20 percent of white offenders and only 3 percent of black offenders were females. In other words, white females were proportionately nearly seven times as likely to benefit from a waived death penalty as were black females.[22]

106. Dr. Lenza's study included data into 1996, and was not available until 2002. Whereas the Galliher study observed that the reports from the trial judges in the Missouri Supreme Court's database were incomplete, and listed 189 names of persons in the Department of Corrections for death-eligible offenses at the relevant time that were

[21] *Id.* at 13.

missing from the database,[23] the authors of the Lenza et al. study used FBI Supplemental Homicide Reports to enhance their coverage.[24] They divided capital cases into three stages: (1) the prosecutor's decision whether to charge a death-eligible offense, (2) the prosecutor's decision whether to seek the death penalty for a death-eligible offense, and (3) the result of a penalty phase once the prosecutor had decided to seek death.[25] The first stage accounts for most of the decision-making, as prosecutors charged only 5.8% of homicides (574 out of 9857) as death-eligible cases; the second stage accounts for the next largest number of decisions, as prosecutors waived the death penalty in 49% of the cases they had charged as death-eligible (270 out of 551).[26] Of the remaining cases, circuit courts sentenced 54% of the accused (152 out of 281) to death.[27]

107. At the first stage, in which the prosecutor decides whether to charge a homicide as "capital murder" or "first-degree murder" (depending on the statutory classification of death-eligible homicide at the

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[22]*Id.* at 16.

[23]*Id.* at 18 & attached memorandum.

[24]Exhibit 13:4

[25]*Id.* at 4-5.

[26]*Id.* at 4-5. The authors dropped 23 cases due to insufficient data.

time of the case), Missouri prosecutors were almost twice as likely to charge a black who killed a white with death-eligible homicide as they were to charge a white who killed a black:[28]

Accused/Decedent	**Capital**	**Total**	**Percent**
White/White	274	2945	8.39%
White/Black	12	254	4.72%
Black/Black	188	6045	3.11%
Black/White	88	599	14.69%
Missing Cases	12	14	N/A
Totals	574	9857	5.8%

The authors explained that these data confirmed previous studies:

> The percentages of all Missouri homicides charged with capital murder by offender/victim racial characteristics indicates blacks killing whites are 5 times more likely to be charged with capital murder than blacks killing blacks. Whites with black victims are half as likely to be charged with capital murder than whites killing other whites. . . . this pattern confirms the suspicion that whiteness is valued over non-whiteness, predicting that the severest punishment would be visited on cases where the non-white offender kills a Caucasian (-/+) 14.69%, followed by a descending hierarchical

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[27]*Id.* at 5.

[28]*Id.* at 8.

> structuring of the proportion of cases charged with capital murder based on racial characteristics: whites killing whites (+/+) 8.39%, whites killing blacks (+/-) 4.72%, to the lowest, blacks killing blacks (-/-) 3.11%.[29]

108. At the next stage of a capital case—the prosecutor's decision whether to waive the death penalty for a death-eligible homicide—the Lenza study found that the color of the accused and the color of the decedent played a strong explanatory role:

> Compared to whites killing whites (W/W) one sees that blacks with black victims (B/B) are 59% less likely to be taken forward to trial, while ***blacks killing whites (B/W) are 56% more likely than (W/W) to be taken to trial.*** In the few cases where whites have killed a black victim and were charged with capital murder, they were 115% more likely to be taken to trial than whites taking the lives of other whites. The last category, whites killing blacks (W/B), represents the only 12 cases in Missouri over 18 years in which white defendants were charged with capital murder for killing an African-American, a mere 2% of the total cases.[30]

109. In contrast to the decisions made by prosecutors, the Lenza et al. study found, the decisions made by judges and juries in the third stage of a capital case—the actual sentence—did ***not*** reflect bias according to the

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[29] *Id.* at 14 (emphasis supplied).

[30] *Id.* at 15.

color of the accused or the color of the decedent.[31] The Lenza et al. study found other factors—such as low socio-economic status of the accused and the availability of gruesome photographs to inflame the jury—that were associated with prosecutorial decisions to seek death.[32] For example, whereas juries and sentencing judges did not in fact respond measurably differently to cases involving the use of firearms as opposed to knives, prosecutors were 133% more likely to seek the death penalty in knife cases, such as Mr. Taylor's case, because they produce more gruesome photographs they could use to inflame the jury, as this prosecutor did, regardless of the relative moral blameworthiness of the offense.[33] The conclusions of the Lenza study pointed to prosecutorial discretion as the main cause of racial disparity in the use of the death penalty in Missouri:

> the seat of prosecutorial discretion is also the location of and the mechanism responsible for the greatest racial disproportionality in capital sentencing [in] Missouri. It is those elements of the process, in the hands of prosecutors, who are charged with selecting offenders and crimes for eventual capital consideration and sentencing, that

[31] *Id.* at 15-16.

[32] *Id.* at 17-19 & 20-22.

[33] *Id.* at 17-18.

> put in place factors which proportionate sentencing has sought to avoid.[34]

110. In 2001, the Executive Director of the ACLU of Eastern Missouri presented data on Missouri death sentences both from the time the state created a central execution process in 1937 until 1965, when the pre-*Furman* moratorium took effect, and then from the post-*Gregg* reinstitution of the death penalty until the date the paper was written in October 2001.[35] This study, which was obviously not available at the time of the plaintiff's consolidated appeal, complements the data the Missouri State Public Defender System had provided the Missouri Supreme Court in *State v. Parker*. Initially this paper emphasizes the variation among counties in the state: several sizable counties had no one under sentence of death, regardless of their homicide rate.[36]

111. From the creation of a centralized state death penalty to the pre-*Furman* moratorium, the split between black and white persons that

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[34]*Id.* at 22.

[35]DENISE LIEBERMAN, Legal Director, American Civil Liberties Union of Eastern Missouri, PROSECUTORS: THE FIRST LINE OF OFFENSE—PROSECUTORIAL DISCRETION AND ARBITRARINESS IN ADMINISTRATION OF THE DEATH PENALTY, http://www.umsl.edu/~phillips/dp/ACLUDenise.html (2001) (Exhibit 14.)

[36]*Id.* at 5-10.

Missouri executed was 23 to 16 over almost thirty years.[37] The split after *Gregg* was 21 to 30 to one Native American over about eleven years.[38] The state achieved this leveling of racial impact by increasing the executions per year by about 300%, and killing more white men:[39]

Period	**Black**	**White**	**Native American**	**Total**	**Years**	**Annual Rate**
1937-65	23	16	0	39	28	1.4
1989-2001	21	30	1	52	12	4.3
Totals	47	43	1	91	40	2.3

112. Although this state is executing more white men, its death penalty continues to fall on black men convicted of killing whites far out of proportion to any other combination of homicide convicts and their decedents. While the death penalty continues to target black men out of proportion to their numbers, it has added white men to the pie of persons executed and has thereby decreased the proportion of blacks.

113. A 2003 article—which is not limited to Missouri data—shows that support for the death penalty among white people tends to vary

[37] *Id.* at 1-2.

[38] *Id.* at 11.

[39] *Id.* at 11-12.

strongly according to a combination of racial prejudice and the proximity of black residents to the person surveyed:[40]

> as the black percentage of a county's population rises, racial prejudice becomes a much more powerful predictor of whether a white person will strongly favor state executions. Indeed, the effect of context on the relationship between prejudice and white support is dramatic. Among white people who live in all-white counties, the largest possible increase in prejudice (from 0 to 100) produces only a 34-point increase in the probability of strong death penalty support (from .52 to .86). By contrast, when the black percentage of the county population stands just below 20%, the same increase in prejudice raises the probability of strong support from fairly unlikely (.29) to a virtual certainty (.95). Thus, the interplay of racial beliefs and racial proximity go far to explain strong white preferences for state executions—but neither factor can be adequately understood in isolation from the other.[41]

114. The case against Plaintiff Taylor arose in Jackson County, one with a high proportion of African-American citizens, yet one in which they are a distinct minority. This is exactly the kind of jurisdiction in which the foregoing article would predict a high correlation between racist attitudes and support for the death penalty.

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[40] J. SOSS ET AL., *Why Do White Americans Support the Death Penalty?* 65 J. OF POLITICS 397, 409 (2003). (Exhibit 15.)

[41] *Id.* at 411.

115. As elected officers who retain their positions at the will of the electorate, Missouri prosecutors are presumptively aware of and responsive to the level of support for the death penalty. In its current form, the prosecutorial discretion created by Missouri statutes leads to racial discrimination in the imposition of the death penalty. The longitudinal data in the latter two articles cited in this response raise the question whether after *Furman* and *Gregg* have addressed various aspects of fairness at the jury and trial-judge level, it is possible in ***any*** case for there to be a death-***charging*** decision which is free from impermissible attention—one way or the other—to the color of the accused and the color of the decedent.

116. Because the death penalty as practiced in Missouri both before and after *Furman* and *Gregg* is disproportionately applied against African-American men like Stanley Hall, Donald Jones, and Vernon Brown—and plaintiff Taylor—the fact that it is ***more tortuous*** than it need be is consistent with the behavior Dr. Lenza found beginning with the introduction of slavery into the Missouri Territory.

117. The use of a gratuitously painful form of suffocation, followed by the burning through the veins and the heart attack caused by potassium chloride, instead of a single, lethal dose of an otherwise legitimate

medication such as pentobarbital is evidence that the state keeps the death penalty around primarily for "them."

118. The proposition that the death penalty itself bears more heavily against blacks than whites is not before this Court as a claim for relief. In light of this fact, however, the additional fact that the defendants use a special form of lethal injection which creates a foreseeable, completely unnecessary, risk of inflicting gratuitous pain and suffering, when the executions of slaves and their descendants have historically been more painful than the execution of others in a slave jurisdiction such as Missouri, is a badge or vestige of slavery over and above the existence of the death penalty in the abstract and over and above the judicial decision to impose the death penalty in a given case.

119. The foregoing reasoning applies with equal force to Mr. Clay notwithstanding the fact that he is white. The numbers of persons executed before and after *Furman* and *Gregg* show that Missouri has increased the number of executions per year by increasing the number of white men it has executed. Of course that might just be a coincidence, but another view would be that state actors execute more white men, like Mr. Clay, in order to maintain the practice of capital punishment which

continues to bear disproportionately on black men, like Mr. Taylor. The racist character of this practice is unaffected by the selection of a relatively small proportion of white homicide convicts to improve the numbers under sentence of death when one takes account of the color of the decedent, which shows that the State of Missouri values a white life six times more highly than it values a black life.

VII. Claims for Relief

120. Plaintiff restates and realleges the contents of each preceding paragraph as if fully set forth again.

Count I

121. Unless this Court stops them, the defendants, acting individually and under color of state law, will violate the plaintiffs' right to be free of cruel and unusual punishments secured to them by the Eighth Amendment to the Constitution of the United States as applied against the states by section 1 of the Fourteenth Amendment by executing them using the sequence of three chemicals (sodium pentothal a/k/a thiopental, pancuronium bromide, and potassium chloride) which they have admitted to be their practice in their discovery responses in *Johnston v. Kempker* as aforesaid, which is unnecessary as a means of employing lethal injection

and not required by the statute creating this form of execution in the State of Missouri, and which creates a foreseeable risk of inflicting gratuitous pain and suffering.

Count II

122. Unless this Court stops them, the defendants, acting individually and under color of state law, will violate the plaintiffs' right to be free of cruel and unusual punishments secured to them by the Eighth Amendment to the Constitution of the United States as applied against the states by section 1 of the Fourteenth Amendment by executing them using a painful, invasive, involuntary procedure to gain access to a central vein for the purpose of killing them rather than treating them.

Count III

123. Unless this Court stops them, the defendants, acting individually and under color of state law, will violate the plaintiffs' right to due process of law as guaranteed by section 1 of the Fourteenth Amendment by executing them by unlawfully using a physician to carry out essential steps in an execution in violation of medical ethics.

Count IV

124. Defendants' chosen use of a specific form of lethal injection which is more painful than necessary to bring about the statutory objective

of killing the condemned person is a vestige and badge of slavery, and therefore violates the Thirteenth Amendment as well as the Eighth and Fourteenth, and impinges on the vertical-equity (color and socio-economic status of accused) and horizontal-equity (irrationality of who among the mass of homicide defendants gets the death penalty, even irrespective of color and SES) prongs of Eighth Amendment analysis (applied against the states through the Fourteenth) as well as the severity prong, the latter of which is the focus of Counts I-III.

VIII. Exhaustion of Administrative Remedies

125. Plaintiffd have exhausted any available administrative remedy for the issues contained in this complaint, because the selection of chemicals for lethal injection is not a grievable issue within the meaning of the administrative grievance procedure as adopted and applied by the defendants' actual penological agents as distinguished from the Department's outside counsel in the Attorney General's Office, and these agents have so informed him in response to his attempt to seek administrative remedies. (Exhibit 16.)

126. As noted, in the *Johnston, Jones*, and *Brown* litigation, the defendants initially asserted that the plaintiff had failed to exhaust administrative remedies.

127. In *Johnston*, the defendants' clients in the Department of Corrections had admitted, by signed notation on Mr. Johnston's IRR, that the issue of which chemicals the executioners use is "non-grievable." (Exhibit 5).

128. Counsel for the defendants in *Johnston* (who were also counsel for the defendants in *Jones* and *Brown*) recognized this fact by dropping the nonexhaustion point in the reply to Mr. Johnston's response to which the IRR was attached as an exhibit. (Exhibit 6.)

129. The same counsel raised the same defense in *Jones*, knowing that this issue was not grievable according to the Department of Corrections, in whose favor the exhaustion requirement of 42 U.S.C. § 1997e is supposed to run; the Court relied on her representations; Mr. Jones was executed by the use of the specific chemical sequence which Mr. Johnston's pleadings and Mr. Jones's pleadings showed to create a foreseeable risk of inflicting gratuitous pain and suffering in violation of the Eighth and Fourteenth Amendments.

130. As of the time this claim manifested itself beyond cavil with the publication of the LANCET article, Vernon Brown was not only aware of what happened to Mr. Johnston's grievance but had also heard that when other prisoners have attempted to file IRR's on this issue, the staff of the Department of Corrections have actually refused to give them IRR forms because of the Department's position that the issue was not grievable. (Exhibit 8.)

131. Nonetheless, on the advice of counsel, Mr. Brown filed an IRR, and plaintiff Taylor submitted with the original complaint in this action a true and correct copy of it with the above-referenced affidavit by Mr. Brown as Exhibit 8. This filing was expressly made in an abundance of caution and not by way of admission that the issue is grievable notwithstanding the well-established position of the Department of Corrections, reflected both to the federal courts through counsel and to the prisoners affected by the issue by the staff of the Department.

132. Because the issue of how the state does lethal injections is not within the scope of the Department of Corrections grievance policy, this complaint is not subject to the requirement of 42 U.S.C. § 1997e.

133. Parties in privity with the State of Missouri, such as these defendants, are estopped to assert the nonexhaustion of administrative remedies because the Department of Corrections does not consider this issue grievable (and their attorneys know it).

134. In Mr. Brown's case, the staff who responded to Mr. Brown's IRR changed the response from what it had been in *Johnston* and what Mr. Brown had heard it had been to other prisoners under sentence of death, and asserted that Mr. Brown—whose execution date had already been set—had to pursue multiple levels of review in order to exhaust administrative remedies on the issue. (Exhibit 9.)

135. In Mr. Brown's case, the district court relied on these representations to deny a temporary restraining order. A divided United States Court of Appeals for the Eighth Circuit denied a stay of execution, as did the United States Supreme Court over the dissenting votes of four Justices, and Mr. Brown was executed on May 18, 2005.

136. Plaintiff Taylor filed an Informal Resolution Request, and the staff returned it to him with the explanation that he could not file it because the subject-matter of the issue was not grievable but was involved in litigation. (Exhibit 16.) Defendants' counsel are estopped to contradict

their clients' correct interpretation of their own administrative regulations in order to avoid this issue once more.

137. After counsel had prepared and circulated a complete draft of this complaint, he received a telephone call from plaintiff Taylor, indicating that the staff had told the plaintiff he could, after all, file an IRR, but that there was no guaranty the result would be any different. Plaintiff proceeded with the re-filing of an IRR.

138. On or about September 1, 2005, agents of the Department of Corrections returned the "appeal" to plaintiff Taylor, after which there is no even arguable recourse for him within the state's grievance process. By pursuing this process to the full extent the state even pretended to offer one, however, this plaintiff does not admit that there ***was*** an available grievance process. The subject-matter fell outside the language of the federal statute offering this defense to participating states and the state regulation defining the scope of the process. The state and its agents have not regularly followed a position that there was any administrative remedy for this grievance. Once the institutional staff indicated the issue was not grievable or not subject to resolution at the institutional level, there was nothing further the state could do for the plaintiff by this process.

139. Pendency of this new IRR from the filing of this action through its return to plaintiff Taylor is not a cloud on this complaint. Selection of a specific means of lethal injection is not a "prison condition" within the meaning of 42 U.S.C. § 1997e(a), the source of the requirement of exhaustion of administrative remedies. Selection of a specific means of lethal injection is not a matter of "institutional life" within the meaning of the administrative remedy the Department of Corrections adopted to take advantage of section 1997e. (Exhibit 17 at 2, ¶ D5-3.2, II.J.) Defendants' agents have admitted the inapplicability of the grievance procedure in *Johnston*. (Exhibits 5-6.)

140. This Court should not allow the defendants to avoid accountability for their actions by invoking section 1997e. Their shift of ground in the *Vernon Brown* case was belied by their attorneys' admissions in the hearing on Mr. Brown's motion for a temporary restraining order. During the hearing, the issue of exhaustion of administrative remedies was discussed at some length. Defendants represented the complete exhaustion of administrative remedies requires three steps: (1) the filing of an IRR, (2) the filing of a grievance, and (3) the filing of a grievance appeal. (Exhibit 18 at 60.) Defendants further represented the grievance is filed with the

superintendent of the institution where the prisoner is incarcerated, and the grievance appeal is addressed by "central office," which counsel for the defendants elided with defendant Crawford, the Director of the Department of Corrections. (*Id.* at 61-62.)

141. In Vernon Brown's case, the defendants—who were the same as the defendants in *Johnston* and *Jones*, and one of whom was opposing counsel on these plaintiffs' federal habeas corpus petition and on his motion to recall the mandate of the Missouri Supreme Court—conceded that the corrections classification worker who would address the initial IRR has no authority to change the lethal injection protocol; they further conceded the superintendent of the institution where the prisoner is incarcerated has no authority to change the protocol for the lethal injection. (*Id.* at 61.) They admitted the only person with authority to change the protocol would be defendant Crawford. When asked whether an inmate had the ability to bring an initial grievance before the Director, they conceded there was no procedure for that:

> THE COURT: Okay. Could Mr. [Brown] have bypassed the IRR procedure and the grievance? Since it is clear that no one at the institution had authority to make any changes, could he have bypassed the institutional officials and gone directly to the director with his complaint?

> MS. McElvein: No, your Honor. Not that I am aware of. [*Id.* at 62-63.]

142. There is therefore no administrative process available to the plaintiff to grieve this claim. By the defendants' admissions in open court, the Director's role in the normal administrative process is to function as an ***appellate*** decisionmaker, reviewing the disposition of the grievance filed with the ***superintendent*** of the institution where the prisoner is incarcerated. In this case, the defendants concede that the superintendent of an institution, even of the institution where the executions occur, has no authority—no jurisdiction—to change the protocol for lethal injections. Thus, as the appellate decisionmaker reviewing any decision made by the superintendent, the only role the Director would serve would be to determine whether the superintendent correctly determined the superintendent had no authority to change the chemicals which other personnel use in lethal injections. The Director's appellate role in the administrative grievance process is not the same as his role as the initial decisionmaker. Here, the defendants have conceded there was no administrative grievance procedure available to seek to change the Director's position as the initial decisionmaker, rather than in the role of an appellate decisionmaker reviewing the question whether the

superintendent had the authority to determine which chemicals to use, which they concede he does not.

143. It is therefore irrelevant whether the staff of the Department of Corrections adhere to their correct position that the issue in theseplaintiffs' IRR is not grievable, or attempt to manipulate this Court as they did a sister court in Vernon Brown's case by moving the goalposts.

144. Missouri does not provide an administrative grievance process for presenting this issue, and therefore section 1997e would not apply even if the method of execution were a "prison condition," even if "institutional death" equaled "institutional life," and even if the United Nations Convention Against Torture were not part of "the supreme law of the land" requiring the United States to afford the plaintiff a forum for raising this issue.

IX. Prayer for Relief

145. Initially, the plaintiffs seek a preliminary injunction to prevent the defendants from executing either or them until the defendants have responded to their discovery (including what appears to be the inevitable time it will take to litigate motions to compel as Mr. Johnson had to do) and until this Court has adjudicated his underlying claim for relief on the

merits (including the time it would take for any appeal from the disposition).

146. Second, the plaintiffs seek a declaratory judgment holding that the defendants' current means, methods, practices, procedures, and customs regarding execution by lethal injection violate the Eighth, Thirteenth, and Fourteenth Amendments.

147. Plaintiff seeks a permanent injunction preventing the defendants from using their current means, methods, practice, procedures, and customs regarding execution by lethal injection.

148. Finally, the plaintiffs seek an order granting them reasonable attorney fees under 42 U.S.C. § 1988 and the laws of the United States; for his costs of suit; and for such other and further relief as the Court deems appropriate.

WHEREFORE, the plaintiffs pray the Court for its orders as aforesaid.

Respectfully submitted,

/s/ JOHN WILLIAM SIMON

2683 South Big Bend Blvd, # 12
St. Louis, Missouri 63143-2100

(314) 645-1776
FAX (314) 645-2125

Attorney for Plaintiff Taylor

/s ELIZABETH UNGAR CARLYLE

200 S.E. Douglas, Suite 200
Lee's Summit, Missouri 64063-2375

(816) 525-9652
FAX (816) 525-1917

Attorney for Plaintiff Clay

Certificate of Service

I hereby certify a true and correct copy of the foregoing was forwarded for transmission via Electronic Case Filing (ECF) this twelfth day of September, 2005, to the offices of:

Michael Pritchett, Esq.
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102

/s/ John William Simon
Attorney for Plaintiff Taylor