IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WESLEY EUGENE BAKER,	*	
Plaintiff,	*	
v.	*	Civil Action No. WDQ-05-3207
MARY ANN SAAR, SECRETARY, et al.,	*	
Defendants.	*	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION

Defendants Mary Ann Saar, Secretary of the Maryland Department of Public Safety and Correctional Services, Frank C. Sizer, Jr., Commissioner of the Maryland Division of Correction, Lehrman Dotson, Warden of the Maryland Correctional Adjustment Center, and Gary Hornbaker, Warden of the Metropolitan Transition Center, by their attorneys J. Joseph Curran, Jr., Attorney General of Maryland, and Scott S. Oakley, Assistant Attorney General, oppose Plaintiff's Motion for Temporary Injunction, and as the grounds and authorities in opposition thereto Defendants state the following:

BACKGROUND

On October 26, 1992, Plaintiff Baker was found guilty by a jury in the Circuit Court for Harford County, Maryland, of the first-degree murder of Jane Frances Tyson, the robbery of Mrs. Tyson with a deadly weapon, and the use of a handgun in the commission of a felony. On October 30, 1992, the court sentenced Baker to death for his conviction of murder, to twenty years' incarceration for robbery with a deadly weapon, and to twenty years' incarceration for the use of a handgun in the commission of a felony.

The Maryland Court of Appeals affirmed Baker's convictions and sentence of death on direct appeal. *Baker v. State,* 332 Md. 542 (1993), *cert. denied*, 511 U.S. 1078 (1994).

On December 3, 1994, Baker filed his first petition for post conviction relief. An evidentiary hearing on this petition was conducted by Judge Maurice Baldwin of the Circuit Court for Harford County on July 6 and 7, 1995. Judge Baldwin subsequently denied post conviction relief in a written opinion on July 17, 1995, and in a supplemental denial filed on August 15, 1995. Baker then filed an application for leave to appeal in the Maryland Court of Appeals, which was declined on November 7, 1995. On April 29, 1996, the United States Supreme Court denied Baker's petition for writ of certiorari seeking review of the denial of post conviction relief. *Baker v. Maryland*, 517 U.S. 1169 (1996).

On October 21, 1996, Baker filed a petition to reopen post conviction proceedings, and a *second* petition for post conviction relief. On December 16, 1996, Judge Baldwin held a non-evidentiary hearing, and on December 18, 1996, he denied the relief sought. Baker subsequently filed an application for leave to appeal in the Maryland Court of Appeals, which was again denied on March 7, 1997.

Baker also filed a petition for writ of habeas corpus in this U.S. District Court. Baker's petition was denied by this Court on June 29, 1999. The United States Court of Appeals for the Fourth Circuit affirmed the District Court's rulings, and on February 26, 2001, the United States Supreme Court denied Baker's petition for writ of certiorari. *Baker v. Corcoran*, 531 U.S. 1193 (2001).

On March 9, 2001, and again on March 22, 2001, Baker filed motions in the Circuit Court for Harford County asking for a new sentencing on the basis of newly discovered evidence, a claim that his sentence was illegal, and a claim that the indictment

was defective for failure to allege principalship and aggravating factors. These motions were denied on April 2, 2001. Baker noted an appeal and the Maryland Court of Appeals affirmed the rulings of the circuit court. *Baker v. State*, 367 Md. 648, *cert. denied*, 535 U.S. 1050 (2002).

On March 28, 2001, Baker filed a *second* motion to reopen post conviction proceedings. One basis for relief was Baker's claim that his death sentence was a result of racial discrimination and was imposed "under the influence of passion, prejudice, and other arbitrary factors within the meaning of [Md. Code Ann. Art. 27 §414(e)(1)]." Petition for Post Conviction Relief at 11. Baker's motion was denied on April 9, 2002. Baker's application for leave to appeal was thereafter denied by the Maryland Court of Appeals on May 2, 2002. *Baker v. State*, Misc. No. 41, September Term, 2002.

On May 13, 2002, Baker noted an appeal, which was subsequently transferred to the Court of Appeals, in connection with Judge Turnbull's decision declining to quash Baker's death sentence for lack of jurisdiction by the trial judge. The Maryland Court of Appeals affirmed Judge Turnbull's decision. *Baker v. State*, 377 Md. 567 (2003).

On October 21, 2003, Baker filed a motion to correct an illegal sentence based on *Ring v. Arizona*, 536 U.S. 584 (2002). The trial court ultimately denied Baker's motion on December 18, 2003, and the Maryland Court of Appeals affirmed that denial. *Baker v. State*, 383 Md. 550 (2004), *cert. denied*, 125 S.Ct. 1931 (2005).

Baker then filed his *third* petition for post conviction relief, and a *third* petition to reopen post conviction proceedings; these petitions were denied by the Circuit Court for Harford County on November 18, 2004. On January 11, 2005, the Maryland Court of Appeals denied Baker's application for leave to appeal the denial of his motion to reopen post conviction proceedings in order to litigate his racial/geographic disparity claim

based on the University of Maryland "Paternoster Study." Baker noted an appeal to the Maryland Court of Appeals from the denial of the motion to correct an illegal sentence raising the same issue, and that Court affirmed the holding of the lower court. *Baker v. State*, ___ Md. ___, No. 132, September Term, 2005 (filed October 3, 2005). The Court's mandate issued on November 2, 2005.

On October 25, 2005, Baker filed a fourth petition for post conviction relief and a fourth petition to reopen post conviction based on the same racial disparity claim, together with a motion to correct an illegal sentence, claiming that under *Ring* the capital murder indictment was defective. On November 14, 2005, the Circuit Court for Harford County denied each of Baker's motions.

On November 3, 2005, Maryland Governor Ehrlich issued an execution warrant for Baker, specifying the five-day period beginning at 12:01 a.m. on Monday, December 5, 2005.

On November 7, 2005, Baker filed an Emergency Motion for Stay of Execution of Death Sentence in the Circuit Court for Harford County. That motion was denied by that court on November 14, 2005.

On November 23, 2005, the Maryland Court of Appeals summarily rejected all of Baker's appeals and applications then pending before that Court, including an Emergency Motion for Stay of Execution.

Baker filed this civil action on November 28, 2005.

BAKER'S MOTION FOR TEMPORARY INJUNCTION SHOULD BE DENIED BECAUSE HIS ABUSIVE DELAY DEFEATS HIS DEMAND FOR EQUITABLE RELIEF

Baker's challenge to lethal injection could have been brought at least a decade ago. Lethal injection has been an authorized method of execution in Maryland since

March 25, 1994. *See* 1994 Md. Laws, Ch. 5. Four Maryland inmates have been executed by lethal injection, including Steven Oken just last year. At the very least, Baker has been aware of Maryland's use of lethal injection since being given notice through his attorney on March 30, 1994, advising that pursuant to 1994 Md. Laws, Ch. 5 any execution of Baker's sentence of death "will be by lethal injection unless he elects on or before May 24, 1994 a lethal gas execution." Indeed, by his silence following receipt of this notice, Baker should be deemed to have waived any objection he may have to execution by lethal injection. *Orbe v. Johnson*, 601 S. E. 2d 547, 549 (Va. 2004) (relying on *Stewart v. LeGrand*, 526 U.S. 115, 199 (1999) to find, on appeal from dismissal of action for declaratory judgment and preliminary injunction, that challenge to lethal injection was waived where petitioner allowed statutory default provision to determine that he would be executed by lethal injection rather than by electrocution).

Legal challenges to lethal injection are nothing new; they have been repeatedly raised and uniformly rejected for nearly two decades. *See Heckler v. Chaney*, 470 U.S. 821, 823 (1985) (rejecting a civil claim that the drugs used for execution by lethal injection were not properly tested and were likely to be administered by untrained personnel); *Woolls v. McCotter*, 798 F.2d 695, 697-98 (5th Cir.) (rejecting a claim that the administration of sodium thiopental by untrained personnel in improper dosage violates the Eighth Amendment), *cert. denied*, 478 U.S. 1032 (1986); *State v. Moen*, 786 P.2d 111, 143 (Or. 1990) (rejecting a claim that the chemicals used by the state violated the Eighth Amendment); *Hill v. Lockhart*, 791 F. Supp. 1388, 1394 (E.D. Ark. 1992) (rejecting a claim that potential difficulty in locating a vein suitable for lethal injection would amount to cruel and unusual punishment); *State v. Deputy*, 644 A.2d 411, 420 (Del. 1994) (rejecting a claim that the state's procedures for lethal injection were

unconstitutional for failing to provide appropriate selection and training of persons administering lethal injection); *State v. Hinchey*, 890 P.2d 602, 610 (Ariz. 1995) (rejecting a claim that lethal injection is unconstitutional because it could be painful if carried out incorrectly); *State v. Webb*, 750 A.2d 448, 453 (Conn.) (rejecting a claim that lethal injection creates a "high risk" that the inmate will experience "excruciating pain" because the execution protocol does not ensure that a sufficient amount of thiopental sodium will be administered to render the inmate unconscious), *cert. denied*, 531 U.S. 835 (2000); *Sims v. State*, 754 So. 2d 657 (Fla.) (rejecting a claim that the lack of specific guidelines controlling the dosage, sequence, and delivery rates of lethal chemicals would violate the Eighth Amendment), *cert. denied*, 528 U.S. 1183 (2000); *Cooper v. Rimmer*, 379 F.3d 1029, 1030-33 (9th Cir. 2004) (per curiam) (rejecting a claim of alleged deficiencies in California's protocol, a challenge to the use of pancuronium bromide, and a claim that personnel were not adequately trained to carry out the protocol).[1]

Despite nearly two decades of legal precedent identifying the issues arising in challenges to execution by lethal injection, Baker has failed to raise his own challenge to Maryland's use of lethal injection until the eleventh hour -- less than one week before his scheduled execution. Baker cannot hide behind the excuse that he previously did not know of, or only recently obtained information about, Maryland's lethal injection procedures and protocols.

The U.S. Supreme Court decision in *Nelson v. Campbell*, 124 S. Ct. 2117 (2004) is instructive. Three days before his scheduled execution by lethal injection, Alabama

[1] Relying on the eleventh-hour nature of Cooper's case, the lower court in *Cooper* had denied motions for a temporary restraining order and a preliminary injunction, as well as a motion for expedited discovery. 379 F.3d at 1031.

death-row inmate David Nelson filed a §1983 civil rights action in federal district court alleging that the use of a "cut-down procedure" to access his veins would constitute cruel and unusual punishment and deliberate indifference to his serious medical needs in violation of the Eighth Amendment. 124 S. Ct. at 2121. Nelson sought a permanent injunction against use of the cut-down procedure, a temporary stay of execution to allow the federal district court to consider the merits of his claim, an order requiring that he be furnished a copy of the protocol setting forth the medical procedures to be used to gain venous access, and an order directing the promulgation of a venous access protocol that would comport with contemporary standards of medical care. *Id.* According to an affidavit from Dr. Mark Heath accompanying Nelson's complaint, safer and less-invasive contemporary means of venous access existed. *Id.*

While the Supreme Court held that Nelson had stated a cognizable claim under 42 U.S.C. §1983, *id.* at 2120, the Court underscored the notion that an eleventh hour attempt by a death-row inmate to manipulate the criminal justice system in order to secure a delay in his execution should not be countenanced:

> [A]s our previous decision in *Gomez v. United States Dist. Court for Northern Dist. of Cal.,* 503 U.S. 653, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992) *(per curiam),* makes clear, the mere fact that an inmate states a cognizable §1983 claim does not warrant the entry of a stay as a matter of right. *Gomez* came to us on a motion by the State to vacate a stay entered by an en banc panel of the Court of Appeals for the Ninth Circuit that would have allowed the District Court time to consider the merits of a condemned inmate's last-minute §1983 action challenging the constitutionality of California's use of the gas chamber. We left open the question whether the inmate's claim was cognizable under §1983, but vacated the stay nonetheless. The inmate, Robert Alton Harris, who had already filed four unsuccessful federal habeas applications, waited until the 11th hour to file his challenge despite the fact that California's method of execution had been in place for years: "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the

> judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." Id., at 654, 112 S.Ct. 1652.
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> A stay is an equitable remedy, and "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and ··· attempt[s] at manipulation." Ibid. Thus, before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, see *Blodgett,* 502 U.S. at 239, 112 S.Ct. at 674; *McCleskey,* 499 U.S. at 491, 111 S.Ct. at 1454, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

124 S. Ct. at 2125-26.

Any doubt that the Supreme Court meant what it said when it harkened back to its decision in *Gomez* is dispelled by the Court's actions both before and after its decision in *Nelson*, including its lifting of a stay granted by this Court (Messitte, J.) two days before Maryland's last execution -- that of Steven Oken. *See Sizer v. Oken*, 542 U.S. 916 (June 16, 2004). Other condemned inmates like Baker, who would not be subjected to a cut-down procedure and who brought eleventh hour challenges, of the kind Baker raises here, to their state's lethal injection procedures were denied stays of execution by the U.S. Supreme Court, or had stays of execution issued by lower courts vacated by the Supreme Court. *See Beardslee v. Woodford*, 125 S. Ct. 982 (January 18, 2005)(stay of execution in California denied); *Aldrich v. Johnson*, 125 S. Ct. 347 (October 12, 2004)(stay of execution in Texas denied); *Harris v. Dretke*, 542 U.S. 952 (June 30, 2004)(stay of execution in Texas denied); *Orbe v. True*, 541 U.S. 970 (March 31, 2004)(stay of execution in Virginia denied); *Ozmint v. Hill*, 541 U.S. 929 (March 19, 2004) (preliminary injunction enjoining execution in South Carolina vacated); *Robinson v.*

Crosby, 540 U.S. 1171 (February 4, 2004)(stay of execution in Ohio denied); *Roe v. Taft*, 540 U.S. 1171 (February 4, 2004)(stay of execution in Ohio denied); *Vickers v. Johnson*, 540 U.S. 1170 (January 28, 2004)(stay of execution in Texas denied); *Zimmerman v. Johnson*, 540 U.S. 1170 (January 21, 2004)(stay of execution in Texas denied); *Bruce v. Dretke*, 540 U.S. 1146 (January 14, 2004)(stay of execution in Texas denied); *Ward v. Darks*, 540 U.S. 1146 (January 13, 2004)(stay of execution in Oklahoma vacated); *Williams v. Taft*, 540 U.S. 1146 (January 13, 2004)(stay of execution in Ohio denied); *Beck v. Rowsey*, 540 U.S. 1098 (January 8, 2004)(stay of execution in North Carolina vacated).

Instructive on the issue of delay is the reasoning of the United States Court of Appeals for the Fifth Circuit in *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004)(per curiam). In that case, the federal district court had granted injunctive relief to Harris on the basis of his §1983 claim challenging the method in which his execution was to be carried out. *Id*. at 416. That claim was presented to the district court for the first time 18 years after his capital murder conviction and death sentence. *Id*. The Fifth Circuit vacated the temporary restraining order and dismissed Harris's complaint. *Id*. at 419.

The court cited the statement in *Nelson* that "[a] court may consider the last minute nature of an application to stay execution in deciding whether to grant equitable relief." *Id*. at 417 (quoting *Nelson*, 124 S. Ct. at 2126). The court determined that Harris was not entitled to equitable relief:

> Harris has been on death row for eighteen years, yet has chosen only this moment, with his execution imminent, to challenge a procedure for lethal injection that the state has used for an even longer period of time. Unlike the plaintiff in *Nelson*--who challenged a procedure that had been newly instituted to address his unique medical condition--Harris cannot excuse his delaying until the eleventh hour on the ground that he was unaware of the

> state's intention to execute him by injecting the three chemicals he now challenges.

Id. (footnote omitted). The court rejected all of Harris's rationales for delaying the filing of the claim. First, in response to Harris's argument that there was no reason to challenge the method of execution until all of his direct appeal and collateral challenges were resolved against him, the court pointed to the admonition in *Gomez* that a defendant is not entitled "to wait until his execution is imminent before suing to enjoin the state's method of carrying it out." *Id*. Referring to the brief time between a final denial of certiorari and the setting of an execution date, the court stated as follows:

> By waiting until the execution date was set, Harris left the state with a Hobbesian choice: It could either accede to Harris's demands and execute him in the manner he deems most acceptable, even if the state's methods are not violative of the Eighth Amendment; or it could defend the validity of its methods on the merits, requiring a stay of execution until the matter could be resolved at trial. Under Harris's scheme, and whatever the state's choice would have been, it would have been the timing of Harris's complaint, not its substantive merit, that would have driven the result.
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> This is an untenable position in which to place the state. For the entirety of his eighteen years on death row, Harris knew of the state's intention to execute him in this manner. It was during that period--in which the execution was not so much an imminent or impending danger as it was an event reasonably likely to occur in the future--that he needed to file this challenge. By waiting as long as he did, Harris leaves little doubt that the real purpose behind his claim is to seek a delay of his execution, not merely to effect an alteration of the manner in which it is carried out.

Id. at 417-18 (footnote omitted).

Second, "[t]he fact that Harris was challenging his conviction on direct and collateral appeal has no bearing on his right to use §1983 as a vehicle for challenging the conditions of his confinement, because the two claims can proceed parallel to one

another." *Id*. at 418. Third, reliance on a Fifth Circuit decision in 2002 did not excuse a late filing, "so it provides no explanation, let alone excuse, for Harris's refusal to bring this claim for the overwhelming amount of his lengthy stay on death row." *Id*. at 419. Finally, the court discounted Harris's argument that an Eighth Amendment method of execution claim can never be considered dilatory because of the evolving view of society relative to capital punishment. *Id*.

> Although we have ample reason to doubt whether societal standards of decency have evolved to the point at which Harris claims them to be, he could have chosen to take advantage of the legal procedures offered by a similarly mature and tolerant society just a few years ago. Had he done so, Harris would have had an opportunity to proceed to an adjudication of his claims on the merits. Having chosen instead to litigate this issue in the final days before the state carries out his execution, his suit can serve no purpose but to further delay justice that is already eighteen years in the making.

Id. (footnote omitted). The United States Supreme Court denied Harris's subsequent application for a stay of execution on June 30, 2004, and Harris was executed later that day. *See also White v. Johnson*, ___ F.3d ___, 2005WL2857456 *1 (5th Cir. Tex.)(Nov. 1, 2005)(per curiam)(denying equitable relief where defendant was dilatory in filing his claim); *Reid v. Johnson*, 333 F.Supp.2d 543, 554 (4th Cir. Va. 2004)(petitioner's 4-year delay in filing lethal injection claim "is of significant magnitude in and of itself to foreclose any claim to equity").

There is no reason for this Court to treat Baker differently. Baker was sentenced to death in October of 1992. Like the complainants in *Gomez* and *Harris*, Baker could have brought his action challenging lethal injection at least a decade ago. It would be grossly unfair to the State to permit expedited litigation on a claim that could have been raised long before now. Baker's rights have been the focus of litigation in which the fairness of his trial and validity of his convictions and sentence have been examined and

repeatedly upheld in State and federal court. If Baker had genuine concern regarding the legality of his execution by lethal injection, he would have sought relief as soon as he became aware that he was subject to that method of execution. Instead, although well aware of his claim, and having seen at close hand the futility of late filings in the Steven Oken case just 17 months ago, Baker deliberately chose to wait until the week before his execution to file suit in the hope of obtaining the equivalent of a stay of execution at the last minute. This Court should not be persuaded by Baker's attempt to manipulate the judicial system and avoid the sentence he received 13 years ago.

In sum, given Baker's undue delay in bringing his lethal injection challenge, there is an overwhelming equitable presumption against the relief Baker seeks. That Baker's substantive claims lack merit, all as more particularly discussed hereafter, is yet further reason to deny Baker's request for relief.

ALTERNATIVELY, BAKER'S MOTION FOR TEMPORARY INJUNCTION SHOULD BE DENIED ON THE MERITS

To obtain preliminary injunctive relief under F.R.Civ.P. 65, a party must demonstrate: 1) the likelihood he will be irreparably harmed if the preliminary injunction is denied; 2) the likelihood that the opposing party will not be harmed if the requested relief is granted; 3) the likelihood the moving party will succeed on the merits; and 4) that the public interest will be served if the injunction is granted. *Blackwelder Furniture Co. v. Selig Manufacturing Co.*, 550 F.2d 189, 195-96 (4th Cir. 1977). *Accord Ciena Corp. v. Jarrard,* 203 F.3d 312, 322-23 (4th Cir. 2000).

The less the balance of hardships favors the plaintiff, the greater must be the showing of likelihood of success on the merits. *Direx Israel, Ltd. v. Breakthrough*

Medical Corp., 952 F.2d 802, 813 (4th Cir. 1991). To be irreparable, the harm must be "neither remote nor speculative, but actual and imminent." *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989)(citation omitted).

With respect to the likelihood of harm to the defendants, the public has an interest in state criminal sanctions being administered by the persons authorized to do so because of their training and experience, not by the federal courts. *See Taylor v. Freeman*, 34 F.3d 266, 268 (4th Cir. 1994)("It is well established that absent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prisons or substitute their judgment for that of the trained penological authorities charged with the administration of such facilities.")

Since the enactment of the Prisoner Litigation Reform Act in 1995 (if not before, *see Lewis v. Casey*, 518 U.S. 343, 354 (1996)(vacating system-wide injunction relating to provision of legal materials and services in absence of actual deprivation of access except in isolated cases); *Taylor v. Freeman*, 34 F.3d at 269 (decrying breadth and detail of injunctive relief based on insufficient preliminary findings of violations and without giving prison officials first opportunity to craft remedy)), federal courts issuing injunctive relief in prisoner cases have been under the additional requirement that they "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of a Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1) & (2). Under the PLRA, federal courts are prohibited from becoming involved in the actions of the state's correctional system absent compelling

reasons. A court considering whether to grant injunctive relief in a prisoner case must give substantial weight to any adverse impact on public safety or the operation of the criminal justice system. *Id*. at § 3626(a)(1) & (2).

Last, but by no means least, and as more fully argued above, the Supreme Court has reiterated that the last-minute nature of a request for a stay of execution is a factor to be considered in determining whether to grant that particular form of equitable relief. The Court also reiterated that the state has a significant interest in enforcing its criminal judgments, creating a "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell,* 541 U.S. 637, 124 S.Ct. 2117 (2004).

Baker argues that he is entitled to preliminary injunctive relief upon a number of federal and state law claims. These claims will be addressed in turn.

BAKER'S CLAIM THAT THE EXECUTION WILL CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IS WITHOUT FACTUAL BASIS

The Eighth Amendment prohibits punishments that involve "'unnecessary and wanton inflictions of pain,'" *Estelle v. Gamble,* 429 U.S. 97,104 (1976) (quoting *Gregg v. Georgia,* 428 U.S. 153, 173 (1976) (plurality opinion)), or that are inconsistent with "'evolving standards of decency that mark the progress of a maturing *society,'" Estelle,* 429 U.S. at 102 (quoting *Trop v. Dulles,* 356 U.S. 86, 101 (1958)). Executing a person is not in and of itself cruel and unusual punishment within the meaning of the Eighth Amendment: "Punishments are cruel when they involve torture or a lingering death; but

the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies something inhumane and barbarous, something more than mere extinguishment of life." *In re Kemmler,*136 U.S. 436, 447 (1890).

The Eighth Amendment does require that the death penalty be performed in a manner that avoids unnecessary or wanton infliction of pain. *State of La. ex reI. Francis v. Resweber,* 329 U.S. 459, 463 (1947). Any punishment must be consistent with human dignity and comply with current civilized standards. *Trop* v. *Dulles,* 356 U.S. at 100-01. The method to be used in Baker's case meets this standard. Indeed, it is the method used by the overwhelming majority of states that have capital punishment.

Thirty-seven of the thirty-eight states with the death penalty use lethal injection as a method of execution.[2] The number of states authorizing lethal injection as a method of

[2] The 37 states that currently authorize lethal injection for execution are: Alabama, Ala.Code 1975 §15-18-82; Arizona, Ariz.Rev.Stat.Ann. §13-704; Arkansas, Ark.CodeAnn. §5-4-617; California, Cal.PenalCode §3604; Colorado, Colo.Rev.Stat.Ann. §16-11-401; Connecticutt, Conn.Gen.Stat. §54-100; Delaware, Del.Code Ann.tit.11, §4209(f); Florida, Fla.Stats. §922.105; Georgia, Ga.CodeAnn. §17-10-38; Idaho, IdahoCode §19-2716; Illinois, Ill.St.ch. 725, §5/119-5(a)(1); Indiana, Ind.CodeAnn §35-38-6-1; Kansas, Kan.Stat.Ann. §22-4001; Kentucky, Ky.Rev.Stat. §431.220; Louisiana, La. Rev. Stat. Ann. § 15:569 B; Maryland, Md. Code Ann., Corr. § 3-905; Mississippi, Miss. Code Ann. § 99-19-51 (1972); Missouri, Mo. Rev. Stat. § 546.720; Montana, Mont. Code Ann. § 46-19-103; Nevada, Nev. Rev. Stat. § 176.355 1; New Hampshire, N.H. Rev. Stat. Ann. § 630:5 XIII.; New Jersey, N.J. Stat. Ann. § 2C:49-2; New Mexico, N.M. Stat. Ann. § 31-14-11; New York, N.Y. Correct. Law § 658; North Carolina, N.C. Gen. Stat. § 15-187; Ohio, Ohio Rev. Code Ann. § 2949.22(B)(I); Oklahoma, Okla. Stat. Ann. tit. 22 § 1014; Oregon, Or. Rev. Stat. Ann. § 137.473; Pennsylvania, Pa. Stat. Ann. tit. 61 § 3004; Maryland, S.C. Code § 24-3-530; South Dakota, S.D. Codified Laws § 23A-27 A- 32; Tennessee, Tenn. Code Ann. § 40-23-114; Texas, Texas Code Crim. P. Ann. § 43.14; Utah, Utah Code Ann. § 77-18-5.5; Virginia, Va. Code § 53-1-233; Washington, Wash. Rev. Code Ann. § 10.95.180; and Wyoming, Wyo. Stat. Ann. § 7-13-904. In addition, the United States government and

execution has increased from twenty-two in 1992 to thirty-seven in 2002. In 1992, two-thirds of the executions in the United States were by means of lethal injection. In 2002, 99% of all executions in the United States have been by means of lethal injection.[3] Since the death penalty was reinstated in 1977, 80% of all executions in the United States have been by means of lethal injection (654 of 820: Bureau of Justice Statistics Bulletin, Capital Punishment 2002, Nov. 2003, NCJ201848). Recent news reports indicate that the one-thousandth lethal injection execution in the United States will likely take place before the end of this year.

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the United States military also currently authorize lethal injection for executions. *See* 28 C.F .R. § 26.3(4); Anny Reg. 190-55.

[3] Between January 1,2003 and November 7, 2003, there were 60 executions by civil authorities in the United States and 59 were by lethal injection and one by electrocution (Virginia). The states performing lethal injections during this period were: Texas (21); Oklahoma (14); North Carolina (5); Alabama (3); Florida (3); Georgia (3); Ohio (3); Indiana (2); Missouri (2); Virginia (2); Arkansas (1); Federal Government (1). Bureau of Justice Statistics Bulletin, Capital Punishment 2002, Nov. 2003, NCJ201848.

State and federal courts have consistently rejected challenges to lethal injection.[4] These legislative and judicial determinations are evidence of society's approval of lethal injection as an appropriate means of execution. *State* v. *Webb,* 252 Conn. at 145-46,750 A.2d at 457. "There is general agreement that lethal injection is at present the most humane type of execution available, and is far preferable to the sometimes barbaric means employed in the past. Many states have now abandoned other forms of execution in favor of lethal injection." *Hill v. Lockhart,* 791 F. Supp. at 1394. Indeed, medical experts have urged that death by lethal injection is the most humane of any method of

[4] Arizona: *State v. Hinchey,* 890 P.2d 602,610 (1995), *cert. denied,* 516 U.S. 993; California: *People v. Snow,* 30 Cal. 4th 43, 127 (2003); *People v. Welch,* 20 Cal. 4th 701, 770-73 (1999); *People v. Fairbank,* 16 Cal. 4th 1223,1255-56 (1997); *People v. Holt,* 15 Cal. 4th 619,702-03 (1997); *People v. Bradford,* 14 Cal. 4th 1005, 1058-59 (1997); Connecticut: *State v. Webb,* 680 A.2d 147 (Conn. 1996); *State v. Webb,* 252 Conn. 128, 138,750 A.2d 448 (Conn. 2000), *cert. denied,* 531 U.S. 835; Delaware: *Dawson v. State,* 673 A.2d 1186 (Del. 1996), *cert. denied,* 519 U.S. 844; Florida: *Sims v. State,* 754 So.2d 657 (Fla. 2000), *cert. denied,* 528 U.S. 1183; Idaho: *Sivakv. State,* 731 P.2d 192 (Idaho 1986); Illinois: *People* v. *Stewart,* 520 N.E.2d 348 (Ill. 1988), *cert. denied,* 488 U.S. 900; Indiana: *Harrison* v. *State,* 644 N.E.2d 1243 (Ind. 1995); Mississippi: *Russell* v. *State, 849 So.2d 95, 144-45 (Miss. 2003); Carr* v. *State,* 655 So.2d 824 (Miss. 1995), *cert. denied,* 516 U.S. 1076; Montana: *State* v. *Gollehon,* 864 P.2d 249 (Mont. 1993), *cert. denied,* 513 U.S. 827; Oklahoma: *Romano* v. *State,* 917 P.2d 12 (Ok. 1996); Oregon: *State* v. *Moen,* 309 Or. 45, 786 P.2d 111,143 (Or. 1990); South Dakota: *State* v. *Moeller,* 548 N.W.2d 465,487-89 (S.D. 1996); Texas: *Ex parte Granviel,* 561 S.W. 503,514 (1978) (use of sodium thiopental); Tennessee: *State* v. *Hines,* 919 S.W.2d 573,582 (Tenn. 1995), *cert. denied,* 519 U.S. 847; Virginia: *Spencer* v. *Commonwealth,* 238 Va. 563, 568-69,385 S.E.2d 850 (Va. 1989), *cert. denied,* 493 U.S. 1093; Wyoming: *Hopkinson* v. *State,* 798 P .2d 1186, 1187 (Wyo. 1990); District Court (Arizona): *Lambright* v. *Lewis,* 932 F.Supp. 1547 (D. Ariz. 1996), *aff'd in part and remanded en banc sub nom., Lambrightv. Stewart,* 191 F.3d 1181 (9thCir. 1999); *LaGrandv. Lewis,* 883 F.Supp. 469, 470- 71 (D.Ariz. 1995), *aff'd,* 133 F.3d 1253 (9th Cir. 1998), *cert. denied,* 525 U.S. 1050; District Court (Arkansas): *Baker* v. *Lockhart,* 791 F.Supp. 1388, 1394 (E.D. Ark. 1992); Fifth Circuit: *Kelly* v. *Lynaugh,* 862 F.2d 1126,1135 (5th Cir. 1988), *cert. denied,* 492 U.S. 925; Ninth Circuit: *Polandv. Stewart,* 117 F.3d 1094,1104-05 (9th Cir. 1997), *cert. denied,* 523 U.S. 1082; *Rupe* v. *Wood,* 93 F.3d 1434 (9th Cir. 1996), *cert. denied,* 519 U.S. 1142; Tenth Circuit: *Andrews* v. *Shulsen,* 802 F.2d 1256 (10th Cir. 1986), *cert. denied,* 485 U.S. 919; Federal prisoners: *United States* v. *Chandler,* 950 F.Supp. 1545 (N.D. Ala. 1996), *aff'd218* F.3d 1305, *cert. denied,* 531 U.S. 1204.

execution. *See People* v. *Stewart,* 121 Ill. 2d 93, 117 Ill. Dec. 187, 197,520 N.E.2d 348,358, *cert. denied,* 488 U.S. 900(1988).

Baker acknowledges that the chemicals used by the State of Maryland are identical to those used by other states which use lethal injection as a method of execution. However, Baker then argues that the use of the three drugs individually, and in combination, is unconstitutional. Baker's argument is based on speculation disguised as fact.

The affidavit of Dr. Mark Dershwitz, M.D., Ph.D., annexed hereto as Exhibit 1, refute Baker' s dramatic claims with scientifically supported facts. Dr. Dershwitz states:

> 8. It is my opinion, to a reasonable degree of medical certainty, that a 2.5% solution of thiopental sodium, the concentration specified above, administered at a rate of approximately 1 mL. per second, the low end of the range specified above, would render most people unconscious within sixty seconds from the start of administration. By the time all 120 mL. of thiopental sodium solution are injected, at the rate of 1 mL. per second, approximately 99.999999999% of the population of people weighing 286 pounds would be rendered unconscious.
>
> 9. It is my opinion, to a reasonable degree of medical certainty, that the administration of 120 mL. of a 2.5% solution of thiopental sodium, as specified above, would cause virtually every person to stop breathing within one minute of administration. While the subsequent administration

of pancuronium bromide would have the effect of paralyzing the person and preventing him from breathing, virtually every person given 3000 mg. of thiopental sodium, as specified above, will have stopped breathing prior to the administration of the pancuronium bromide. Thus, even in the absence of the administration of pancuronium bromide and potassium chloride, the administration of 3000 mg. of thiopental sodium alone would be lethal to virtually any person.

10. It is my opinion, to a reasonable degree of medical certainty, that there is approximately a 0.001% probability that a 130 kilogram (286 pound) person administered 3000 mg. of thiopental sodium would be conscious and able to experience pain five minutes after administration.

11. It is my opinion, to a reasonable degree of medical certainty, that there is approximately a .007% probability that a 130 kilogram (286 pound) person administered 3000 mg. of thiopental sodium would be conscious and able to experience pain ten minutes after administration.

12. It is my opinion, to a reasonable degree of medical certainty, that there is approximately a 0.077% probability that a 130 kilogram (286 pound) person administered 3000 mg. of thiopental sodium would be conscious and able to experience pain thirty minutes after administration.

13. It is my opinion, to a reasonable degree of medical certainty, that there is approximately a 1.5% probability that a 130 kilogram (286

pound) person administered 3000 mg. of thiopental sodium would be conscious and able to experience pain one hour after administration.

14. It is my opinion, to a reasonable degree of medical certainty, that the administration of 3000 mg. of thiopental sodium would render most people unconscious for a period of two hours.

15. It is my opinion, to a reasonable degree of medical certainty, that there is an exceedingly small risk that a 130 kilogram (286 pound) person administered 3000 mg. of thiopental sodium as specified above could or would experience any pain associated with the subsequent administration of pancuronium bromide and potassium chloride, as specified above.

Dr. Dershwitz also refutes many of the pseudo scientific and medical opinions expressed by Baker's medical expert, Dr. Mark Heath:

16. I have reviewed the affidavits of Dr. Mark Heath filed in this and other similar cases. I have noted that Dr. Heath's published works focus on the molecular mechanisms of pain. It does not appear that Dr. Heath has any particular expertise in the pharmacodynamics and pharmacokinetics of anesthetic medications. In other words, Dr. Heath has no apparent expertise in the time course of a drug's effect, which in my view is the primary medical and scientific issue raised in this case. While all anesthesiologists should be familiar with the use of thiopental sodium, pancuronium bromide, and potassium chloride, my primary research

interest throughout my career in anesthesiology has been the study of the time course of the effects of anesthetic drugs.

17. Dr. Heath's affidavit in this case, at page 3, expresses his opinion that "the lethal injection procedures selected by Defendants for use in Maryland and used elsewhere subject the prisoner to an increased and unnecessary risk of experiencing excruciating pain in the course of an execution." Dr. Heath's opinion is not itself a scientific or science-based statement, and it does not appear to be based upon any scientific study of Maryland's procedures. Rather, Dr. Heath's opinion appears to based upon his hypothetical consideration of potential mishaps.

18. Dr. Heath's affidavit, at page 9, refers to the administration of thiopental sodium at the outset of a lethal injection execution as "the provision of general anesthesia," and expresses his opinion "to a reasonable degree of medical certainty" that "the general anesthesia that is necessary for the humane conduct of the execution should not be provided by individuals who have not completed anesthesiology training." Dr. Heath's opinion fails to account for the fact that the provision of general anesthesia in the clinical context involves the goal of maintaining a patient at a certain level of unconsciousness, utilizing varying amounts of an anesthetic agent, like thiopental sodium during surgery, with the ultimate goal of having the patient awaken quickly at the conclusion of surgery. This does indeed require a high level of skill, but it is not a skill that is necessary when a

more than lethal dose of thiopental sodium is administered in combination with other lethal agents for the purpose of assuring death.

19. Dr. Heath's affidavit, at page 10, expresses his apparent concern over the mixing, storage and use of thiopental sodium (or sodium pentothal). It is my understanding that Maryland uses thiopental sodium packaged in 500 mg. kits containing the drug in powder form and 20 mL. of diluent. The mixing of the powder and the diluent is simple and straightforward as described in the package insert. The package insert also states that the reconstituted solution is stable for twenty-four hours at room temperature. It is my opinion, to a reasonable degree of medical certainty, that the mixing and preparation of the thiopental sodium approximately 60-90 minutes before the execution, in accordance with the package insert and as specified above, presents no substantial concern as to its stability and effectiveness when subsequently used as specified above. It is my opinion, to a reasonable degree of medical certainty, that the 2.5 % solution of thiopental sodium specified above would remain stable in solution at room temperature for at least 24 hours after preparation.

20. Dr. Heath's affidavit, at page 10, expresses his apparent concern over the possibility that the "IV setup" may leak because it consists of multiple components that are assembled by hand. It is my understanding that with the execution of Steven Oken in June, 2004, Maryland began to use "Luer Lock" IV components, a relatively recent innovation. Because

these components "lock" together, they substantially reduce the possibility of an IV setup loosening and leaking.

21. Dr. Heath's affidavit, at pages 10-11, expresses his apparent concern over the possibility of an improperly inserted catheter. It is my understanding that Maryland utilizes a Maryland Board of Nursing Certified Nursing Assistant ("CNA") to place the catheters in the execution procedure. These medical paraprofessionals are typically well trained and highly skilled for their specialized tasks, and they are increasingly utilized in clinical medical practice. The State's certification requirement helps to ensure that only qualified and competent individuals are permitted to perform these tasks. It is my opinion, to a reasonable degree of medical certainty, that it is not essential to staff an execution conducted in accordance with the procedures specified above exclusively with credentialed professional medical personnel. It is my opinion that IV catheters can properly be placed by appropriately trained, experienced, and credentialed paraprofessionals, like Maryland's CNA's, and that a licensed physician should be present throughout the lethal injection procedure. Thus, a rapid, painless, and humane execution can be accomplished by trained and experienced non-medical personnel.

22. Dr. Heath's affidavit, at page 11, expresses his apparent concern over the possibility that excessive pressure on the syringe plunger may result in tearing, rupture, or leakage of the vein. As I indicated above, it is

my understanding that Maryland's procedures provide that the contents of each syringe will be administered at a rate of approximately 1-1.5 mL. per second. It is my opinion, to a reasonable degree of medical certainty, that this rate of administration is not excessive and does not pose a significant risk of tearing or of rupturing the vein or of otherwise causing the vein to leak.

23. Dr. Heath's affidavit, at page 11, expresses his apparent concern that the catheter may become dislodged if it is not secured after insertion by sutures, tape, or other adhesive material. It is my understanding that Maryland's procedures provide for securing the catheter with tape.

24. Dr. Heath's affidavit, at page 11, expresses his apparent concern that a failure properly to flush the IV line between the injections of the three lethal drugs could result in precipitation of one of the drugs and interference with the delivery of the drugs to the inmate. As I indicated above, it is my understanding that Maryland's procedures provide for flushing the IV line between injections by running lactated ringers or saline "wide open" for approximately 10 seconds. It is my opinion, to a reasonable degree of medical certainty, that this method of flushing the IV line between the injections of the three lethal drugs poses virtually no risk of precipitation.

25. Dr. Heath's affidavit, at page 11, expresses his apparent concern that a failure to loosen or remove a tourniquet or restraining straps may

impair the delivery of the lethal drugs to the inmate. It is my understanding that Maryland's procedures provide specifically for the removal of any constricting bands used to assist in the insertion of the IV catheter, and for checking arm straps to ensure that they are not acting as tourniquets.

26. Dr. Heath's affidavit, at page 14, expresses his apparent concern that thiopental sodium, an "ultra-short acting barbiturate," will "wear out faster than other classes of barbiturates." It is my opinion, to a reasonable degree of medical certainty, that the use of thiopental sodium in the dose and manner specified above, in combination with the other drugs as specified above, will promote a rapid and painless death. When thiopental sodium is used for general anesthesia in surgery, it is normally administered in a dose of 300 to 400 mg. The dose used in the lethal injection procedure specified above, 3000 mg., is more than 7 to 10 times the commonly used anesthetic dose. Moreover, it is my opinion, to a reasonable degree of medical certainty, that the "continuous" administration of thiopental sodium for the duration of the execution procedure would not significantly decrease the already exceedingly low risk of the individual regaining consciousness from the initial administration of thiopental sodium, and is not necessary to promote a rapid and painless death.

27. Dr. Heath's affidavit, at page 14, expresses his view that "[t]here is no medical purpose to be served by the administration of pancuronium during lethal injection procedures." To the contrary, it is my

opinion, to a reasonable degree of medical certainty, that the administration of pancuronium bromide in the manner specified above would act to decrease the involuntary contraction of skeletal muscles caused by potassium chloride. These involuntary muscular contractions could erroneously be interpreted by the lay observer as pain or discomfort.

28. Dr. Heath's affidavit, at page 15, expresses his apparent concern that Maryland's procedures fail to provide for "testing" of the "surgical plane of anesthesia" after the administration of the thiopental sodium. However, a "surgical plane of anesthesia" is not the objective sought to be accomplished by the administration of 3000 mg. of thiopental sodium. The objective is to cause the inmate to become unconscious and to remain unconscious for a period of time that far exceeds the time required to administer the pancuronium bromide and the potassium chloride. As I have indicated above, the administration of 3000 mg. of thiopental sodium alone would be lethal to virtually any person.

Dr. Dershwitz's declarations, considered in light of the declarations of Assistant Commissioner Randall Watson in his Affidavit,[5] annexed hereto as Exhibit 2, give this court complete assurance as a matter of competent, scientific fact that the overwhelming likelihood is that Baker's execution will be accomplished without unconstitutional pain

[5] Assistant Commissioner Watson explains in his Affidavit that he will be the "Execution Commander" for the Baker execution, he confirms Dr. Dershwitz's understanding of the procedures that will be used in the course of the execution, and he dispels many of the non-medical concerns expressed by Baker's expert, Dr. Heath.

and suffering. In response, Baker offers only speculation as to what could possibly happen, through the claims of Dr. Heath and the belated and unsupported contention that there was a problem in the last execution carried out in Maryland that has not been remedied. Baker certainly has not come forth with competent evidence that the problem he claims occurred (dripping of a small amount of liquid from an IV line) resulted in an unconstitutional execution. More importantly, even if problems had occurred in the past, or might occur in the future, "[t]he risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review." *Campbell v. Wood,* 18 F.3d at 681.

In case nearly identical to Baker's, *Cooper* v. *Rimmer,* 358 F.3d 655 (9th Cir. 2004), the Ninth Circuit affirmed the district court's denial of a temporary restraining order, a preliminary injunction, and expedited discovery, all of which Cooper had sought in connection with his last-minute challenge to the state's lethal injection procedures. The court also found no merit in any of Cooper's substantive complaints about an allegedly deficient execution protocol, use of allegedly untrained personnel, or the administration of the same three drugs that will be used during Baker's execution. *See id.* at 657-59. The Ninth Circuit noted the widespread adoption of lethal injection and held that the possibility of error in the process is not enough to make a case of substantial risk of unconstitutional pain and suffering. This Court should follow the Ninth Circuit's decision in *Cooper* v. *Rimmer* and reject Baker's unsupported claims.

Lethal injection is used by nearly every state that imposes capital punishment. Its constitutionality as a method of execution has been upheld time and again. There can be no doubt that lethal injection is not cruel and unusual punishment *per se.* As for Baker's particular case, Defendants have demonstrated through the affidavits of Dr. Dershwitz and Assistant Commissioner Watson that the possibility of Baker enduring unconstitutional pain and suffering during his execution is extremely remote. Accordingly, Baker's motion for temporary injunctive relief should be denied.

BAKER'S CLAIM THAT THE EXECUTION OPERATIONS MANUAL VIOLATES MARYLAND'S STATE ADMINISTRATIVE PROCEDURE ACT IS WITHOUT LEGAL BASIS

The notice and comment provisions of the Maryland Administrative Procedure Act are not applicable to the Executions Operations Manual

Baker's contention that the Executions Operations Manual is a regulation that was enacted in violation of the Administrative Procedure Act (APA) is incorrect. §10-101(g)(1) of the Administrative Procedure Act defines "regulation" as follows: a statement or an amendment or repeal of a statement that: (i) has general application; (ii) has future effect; (iii) is adopted by a unit to: 1. detail or carry out a law that the unit administers; 2. govern organization of the unit; 3. govern the procedure of the unit; or 4. govern practice before the unit; and (iv) is in any form, including: 1. a guideline; 2. a rule; 3. a standard; 4. a statement of interpretation; or 5. a statement of policy. (2) "Regulation" does not include: (i) a statement that: 1. concerns only internal management of the unit; and 2. does not affect directly the rights of the public or the procedures available to the public; (ii) a response of the unit to a petition for adoption of a regulation,

under § 10-123 of this subtitle; or (iii) a declaratory ruling of the unit as to a regulation, order, or statute, under Subtitle 3 of this title. (3) "Regulation", as used in §§ 10-110 and 10-111.1, means all or any portion of a regulation. Md. Code Ann., State Gov't § 10-101(g).

The Execution Operations Manual does not have general application. The manual merely establishes internal rules and procedures for DOC staff to follow in order to ensure the DOC's orderly performance of its duty to administer lethal injection to an inmate sentenced to death. The manual is not a regulation within the meaning of the APA. *See* DCM 110-2. *See also Dep't of Health & Mental Hygiene v. Chimes, Inc.*, 343 Md. 336, 681 A.2d 484 (1996).

Baker misconstrues the Court of Appeals' recent decision in *Massey v. Secretary, Dep't of Public Safety and Correctional Services*, _____ Md. _____, 2005 WL 3092137 (November 21, 2005) in arguing that the Executions Operations Manual is invalid because it was not adopted in accordance with notice and comment provisions of the Maryland Administrative Procedure Act. Md. Code Ann., State Gov't §§ 10-101, (2004) et seq. Plaintiff's Memorandum of Law in Support of Complaint at 19.

In *Massey*, the Court of Appeals did not, as Baker alleges, strike down "DOC directives pertaining to the punishment of prisoners for the violations of custodial rules." Plaintiff's Memorandum of Law at 19. Rather, the Court held that two Department of Public Safety and Correctional Services Directives (DPSCSDs) - not Division of Correction Directives must be adopted in conformance with the APA to be legally effective. This is an important distinction, as the Court held that only the Commissioner

of Correction had the authority to adopt guidelines pertaining to the internal management of institutions of the DOC. The Executions Operations Manual was developed by the Commissioner of Correction, not the Secretary of the DPSCS, and thus, the *Massey* Court's *ultra vires* analysis is not applicable to the case at bar.

The *Massey* holding was a limited one. The Court was "not concerned . . . with the application or validity of the DCD 185 series, but only whether DPSCS 105-4 and 105-5 were legally effective." *Id*. at 6. The Court's holding that DPSCS directives 105-4 and 105-5, which encompass inmate discipline, are not merely guidelines pertaining to the routine internal management of the DOC facilities in no way limits the authority of the Commissioner to adopt procedures for carrying out the execution of inmates sentenced to death without having to submit the procedures to the Joint Committee on Administrative, Executive, and Legislative Review (AELR Committee) for review, and without having to afford the general public the opportunity to comment on the execution procedures. See State Gov't § 10-111(a).

Pertinent to the question of whether a rule or regulation must be adopted in accordance with the APA is whether it is an "internal procedural rule[] adopted for the orderly transaction of agency business rather than a rule that "affects individual rights and obligations" or "confers important procedural benefits." *Massey* at 12 (quoting *Accardi v. Shaughnessy,* 347 U.S. 260, 74 S. Ct. 499 (1954)).

Even a cursory review of the Executions Operations Manual demonstrates that the manual merely establishes internal rules and procedures for DOC staff to follow in order to ensure the DOC's orderly performance of its duty to administer lethal injection to an

inmate sentenced to death. *See* DCM 110-2 (assigning responsibilities, establishes time frames, listing frequency of drills, and addressing security measures). *See* Md. Code Ann., Corr. Servs., §§ 3-901 through 3-309 1999). The manual "identifies staff responsibilities in the preparation and implementation of the execution process." DCM 110-2, P2. To the extent that the Executions Operations Manual addresses inmate behavior at all, it simply sets forth "rules governing the details of prison life," -- "what inmates may wear, what they may or may not keep in their cells or on their persons, the rules governing security, . . . phone calls, mail, . . .visits" and the like -- that need not be adopted as regulations. *Massey,* at 15, DCM 110-2, 27 – 29.

Section II. is comprised purely of definitions. DCM 110-2, 4, 5. Section III, entitled, "Logistics and Responsibilities," established the responsibilities of the personnel involved in the execution process. DCM 110-2, 6 – 9. Section IV, entitled, " Pre-Execution Procedures," addresses the following: the frequency of conducting execution drills; initiation of a log to record all activities and actions related to the Warrant of Execution and the implementation of the death penalty; arranging inspection of the inmate in preparation of intravenous insertion; issuing a press release to the media; establishment of date and time of the execution; inspection of the execution area; ensuring that personnel, procedures, and equipment are prepared for the execution; coordinating traffic control efforts with the Baltimore City Police Department; ordering the pharmaceuticals utilized during the execution; designation of the members of the execution team; responsibilities of the Wardens of the relevant institutions; arranging the news media tour of the execution room; crowd control strategies; operability tests of

telephones; parking on the date of the execution; security measures; taking inventory of equipment; food service; and steps to be taken if a stay of execution is received prior to the initial surge of sodium pentothal. DCM 110-2, 9 – 25.

Section V, entitled, "Post-Execution Procedures" addresses details such as the Certificate of Death, contacting the funeral director, notifying the victim's family members, the media briefing, escorting the witnesses, completion of a Serious Incident Report, and the filing of the Certificate of Execution. DCM 110-2, 25 – 27. Section VI, entitled "Specialty Security Unit," addresses security provisions for individuals awaiting execution, inmate mail, visitation, inmate telephone calls, inmate exercise location restriction, property allowed in the inmate's cell, and inmate meals. DCM 110-2, 27 – 29. Finally, Section VII, entitled "Command Center," states, "[t]he Command Center is responsible for the management of the institution during the execution process and immediately following. It is also responsible for coordination of all activities associated with the execution process to include allied agencies." Section VII. also addresses the identification and responsibilities of the Command Center staff. DCM 110-2, 29 – 32. Clearly, the contents of the Executions Operations Manual do not confer important procedural benefits, nor do they affect fundamental rights that are constitutionally derived. This manual merely governs the orderly transaction of agency business and pertains to routine internal management of the execution process. *Id*. at 12.

The Delayed Effect of *Massey*

Because the "disposition of an appeal is evidenced not by the Court's opinion but by a mandate issued by the clerk in conformance with the opinion," *Massey* at 16, the

mere issuance of the *Massey* court's opinion has not rendered any DOC policies or procedures invalid. Indeed, the Court declined to declare the directives at issue "immediately ineffective" and directed the Clerk not to issue the mandate until 120 days after the issuance of the opinion. *Massey* at 15. For this reason, and because the *Massey* decision does not apply to policies and procedures, like the Executions Operation Manual, adopted by the Commissioner of Correction not to confer "important procedural benefits" but to govern the routine internal management of the DOC, this Court should reject Baker's argument.

BAKER'S CLAIM THAT THE THREE-DRUG COMBINATION USED IN THE EXECUTION PROCEDURE VIOLATES MD. CODE ANN. CORR. SERV. §3-905 IS CONTRARY TO BINDING PRECEDENT

Baker argues that the three-drug combination of sodium pentothal, Pavulon, and potassium chloride used by the State of Maryland in its execution procedure violates Md. Code Ann. Corr. Serv. §3-905, which provides that "[t]he manner of inflicting the punishment of death shall be the continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate or other similar drug in combination with a chemical paralytic agent until a licensed physician pronounces death according to accepted standards of medical practice."

In making this argument, Baker completely ignores *Oken v. State of Maryland*, 381 Md. 580, 851 A.2d 538 (2004)(*per curiam*). Precisely this same argument was presented by Steven Oken in a similar flurry of litigation attending his imminent execution in June, 2004, and this argument was squarely rejected by Maryland's Court of

Appeals just five days before the period specified for Oken's execution.[6] Maryland's high court held "that the method of execution intended to be implemented by the Division of Correction does not violate the provisions of Maryland Code (1999, 2003 Cum.Supp.) §3-905 of the Correctional Services Article or constitute a cruel or unusual punishment as argued by petitioner [Oken]."

This Court, like the U.S. Supreme Court, is of course "bound to accept the interpretation of [the State's] law by the highest court of the State." Alabama v. Shelton, 535 U.S. 654, 674, 122 S.Ct. 1764, 1776 (2002)(quoting Hortonville Ed. Assn., 426 U.S. 482, 488, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976). This Court is therefore bound to reject Baker's argument.

THIS CIVIL ACTION IS SUBJECT TO THE PRISONER LITIGATION REFORM ACT ("PLRA")

"The Prison Litigation Reform Act of 1995 (Act) imposes limits on the scope and duration of preliminary and permanent injunctive relief, including a requirement that, before issuing such relief, '[a] court shall give substantial weight to any adverse impact on ... the operation of a criminal justice system caused by the relief.'" *Nelson v. Campbell*, 541 U.S. 637, 650, 124 S.Ct. 2117, 2126 (2004)(quoting 18 U.S.C. §3626(a)(1)). Further, the PLRA "requires that inmates exhaust available state

[6] According to Oken's execution warrant and consistent with Maryland law, Md. Code Ann. Corr. Serv. §3-902(b), Oken's execution was to be carried out during the five-day period beginning Monday, June 14, 2004. Oken was executed on Thursday, June 17, 2004.

administrative remedies before bringing a §1983 action challenging the conditions of their confinement." *Id.*

There has been no allegation or substantiation by Baker that he has invoked, much less exhausted, any available state administrative remedies for his claims. His claims are therefore subject to dismissal by this Court upon the Court's own motion or on motion of the Defendants. *Id*. By submitting to these preliminary proceedings, Defendants do not waive their right to invoke the PLRA as the basis for dismissal.

CONCLUSION

For all of the foregoing reasons, therefore, Defendants respectfully request that this Court deny the preliminary injunctive relief requested by Plaintiff Baker.

Respectfully submitted,

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