IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEVEN H. OKEN, # 212-612	*	
Plaintiff,	*	
v.	*	Civil Action No.: PJM-04-____
FRANK C. SIZER, JR., *et al.*	*	
Defendants.	*	

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DEFENDANTS' MEMORANDUM IN SUPPORT OF OPPOSITION TO REQUEST FOR STAY OF EXECUTION AND MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Defendants, Frank Sizer, Jr., Commissioner of the Maryland Division of Correction (DOC), William Williams, Warden of the Maryland Correctional Adjustment Center (MCAC), Gary Hornbaker, Warden of the Metropolitan Transition Center (MTC), by their attorneys, J. Joseph Curran, Jr., Attorney General of Maryland, and David P. Kennedy, Ann N. Bosse, and Scott S. Oakley, Assistant Attorneys General, in support of their Opposition to Request for Stay of Execution and Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, file this Memorandum of Law and state as follows:

I. **Introduction**.

Plaintiff, Steven Oken, is an inmate currently in the custody of the Maryland Division of Correction and incarcerated in Baltimore, Maryland. Oken is under a sentence of death imposed in 1991 following his capital murder conviction in the Circuit Court for Baltimore County. Oken is due to be executed by lethal injection during the week beginning June 14, 2004.

On June 11, 2004, Oken filed this action under 42 U.S.C. §1983 alleging that his execution by lethal injection would violate his 8th Amendment right to be free from cruel and unusual punishment. He seeks a temporary restraining order and preliminary injunction preventing his upcoming execution, and attorney's fees and costs.

Oken's last-minute legal pleas must be rejected, for many reasons. First and foremost, the present complaint, though styled a civil rights action under 42 U.S.C. § 1983, challenges the legality of Oken's impending execution. Under the Supreme Court's recent decision in *Nelson v. Campbell*, 541 U.S. ___, 2004 WL 1144374 (May 24, 2004)(No. 03-6821), this claim is in fact a claim for *habeas corpus* relief. Because Oken has previously petitioned for *habeas corpus*, this is a successive petition, over which this Court lacks jurisdiction. Second, even if this Court had jurisdiction over this claim as a § 1983 claim, Oken would not be entitled to a stay of execution to have the claim heard because he has purposely waited until the last minute to raise it. Third, the present claims are *res judicata*, having been adjudicated against Oken in a parallel action he filed in state court. Finally, the defendants are entitled to summary judgment on the merits: Oken's execution by lethal injection will not constitute cruel and unusual punishment.

II. **Factual and Procedural Background**.

Oken's case is well-documented. The facts of Oken's heinous crimes are concisely stated in the decision of the Maryland Court of Appeals affirming his convictions and sentence. *Oken v. State*, 327 Md. 628, 635-36, 679, 612 A.2d 258 (1992). The lengthy history of Oken's relentless but unsuccessful attempts to overturn his conviction and sentence, on both direct and collateral review, on every conceivable ground other than innocence, is summarized in the most recent opinion of the Court of Appeals relating to Oken. *Oken v. State*, 378 Md. 179, 183-84, 835 A.2d 1105 (2003), *cert. denied*, 124 S. Ct. 2084 (2004). This Court's denial of Oken's petition for federal *habeas corpus* relief, *Oken v. Nuth*, 64 F. Supp. 2d 488 (D. Md. 1999), was affirmed by the Fourth Circuit in *Oken v. Corcoran*, 220 F.3d 759 (4th Cir. 2000), *cert. denied*, 531 U.S. 1165 (2001). In addition to the above sources of background on Oken's case, the history of Oken's case is summarized in Exhibit A.

Before filing this action, Oken filed a complaint in state court raising the same claims and seeking the same relief sought here: *Oken v. Sizer*, No. 24-C-004242 (Cir. Ct. for Baltimore City)(filed May 16, 2004; transferred to Cir. Ct. for Baltimore County, May 25, 2004). All claims for relief in that case were denied by Judge John Grayson Turnbull on June 2, 2004.[1] On appeal from the decision of the Circuit Court for Baltimore City transferring the

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[1] Oken had filed a separate motion on May 14, 2004 in his criminal case in Baltimore County, No. 89-CR-3102, seeking relief on the limited grounds that DOC's planned method of execution did not comply with the language of the statute, Md. Corr. Serv. Code Ann, § 3-905 (1999), a claim repeated in the action Oken later filed in the City. Judge Turnbull also denied that motion on June 2, 2004. The Court of Appeals also affirmed this ruling in its June 9th decision. *See* Ex. B. Despite the Court of Appeals' ruling, Oken continues to assert that the intended procedure violates the Maryland statute, though he disclaims any intention of relying on that as a substantive basis for relief. *See* Plaintiff's Memorandum, at 5 n.1. The Maryland Court of Appeals has ruled as a matter of state law that the intended procedure is not in violation of the statute. In any event, this Court lacks jurisdiction to review such a purely state-law question.

case to Baltimore County and Judge Turnbull's decision of June 2, 2004, the Maryland Court of Appeals heard oral argument on June 8, 2004. On June 9, 2004, the Court denied Oken's request for a stay and rejected his claims on the merits, including his claim that his execution by lethal injection would constitute cruel or unusual punishment. *Oken v. State*, Misc. No. 31 and No. 143, September Term 2003 (June 9, 2004)(*per curiam*). The decision of the Court of Appeals is attached as Exhibit B.

III. Standards for Injunctive Relief and Summary Judgment

A. Injunctive Relief

Oken seeks preliminary injunctive relief in the form of a stay of execution. 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). While the irreparable nature of the harm to one seeking a stay of execution would ordinarily be obvious, Oken does not here claim to be contesting the right of the state eventually to execute him. He purports merely to challenge the presently planned manner of execution. Therefore, the true measure of the likelihood of irreparable harm to Oken is the chance that his execution by lethal injection as now planned will be unconstitutionally painful. As is shown in Argument E below, that chance is minimal.

On the other hand, the likelihood of harm to the defendants is substantial. The state has a significant interest in enforcing its criminal judgments. *Nelson,* 541 U.S. ___, 2004 WL 1144374 at *8. The public also 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).

Finally, the Supreme Court recently 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. Because of the state's interest in carrying out its criminal judgments, 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." *Nelson,* 541 U.S. ___, 2004 WL 1144374 at *8.

B. Summary Judgment

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56. "A defendant moving for summary judgment has the burden of showing the absence of any material fact and that he is entitled to judgment as a matter of law. ... Once a defendant makes a necessary showing, the plaintiff must go forward and produce evidentiary facts to support his contention." *Barwick v. Celotex Corp.*, 736 F.2d 946, 958 (4th Cir. 1984). *See also* Rule 56(e). The standard under Rule 56(c) mirrors that for judgment as a matter of law under Fed. R. Civ. P. 50(a). "[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Although the non-movant is entitled to have all reasonable inferences drawn in his favor, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970), *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985), unverified allegations are insufficient to create a genuine dispute of material fact, *Rivanna Trawlers, Unl'td v. Thomson Trawlers, Inc.*, 840 F.2d 236, 240 (4th Cir. 1988), and "[a] mere scintilla of evidence is not enough to create a fact issue; there must be evidence on which a jury might rely." *Barwick*, 736 F. 2d at 958-59, *quoting Seago v. North Carolina Theatres, Inc.*, 42 F.R.D. 627, 640 (E.D.N.C. 1966), *aff'd*, 388 F.2d 987 (4th Cir. 1967), *cert. denied*, 390 U.S. 959 (1968). Speculative allegations are insufficient to challenge a summary judgment motion, because they are not based on personal knowledge. *See Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256, 1260 (4th Cir. 1993). The non-moving party cannot create a genuine dispute of material fact "through mere speculation or the building of one inference upon another." *Id.*; *PPM Am., Inc. v. Marriott Corp.*, 875 F. Supp. 289, 296 (D. Md. 1995)("A party cannot create an issue of fact for trial by the building of one inference upon another.")

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Only disputed issues of material fact will preclude the entry of summary judgment. "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The function of a motion for summary judgment is to avoid a useless trial in cases where it is unnecessary and would only cause delay and expense. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Summary judgment should be granted if it appears from an application of substantive law to the uncontroverted facts that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The court has an obligation to ensure that factually unsupported claims do not go to trial. *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987), *citing Celotex Corp. v. Catrett*, 477 U.S. at 323-24. Summary judgment is required by Rule 56 where a party cannot establish an evidentiary basis for an essential element of his claim, an element on which he will bear the burden of proof at trial. *Drewitt v. Pratt*, 999 F.2d 774, 778 (4th Cir. 1993). Self-serving affidavits with no basis of fact in the record are insufficient to avoid summary judgment. *Palmer v. Marion County*, 327 F.3d 588 (10th Cir. 2003). "[A] defendant … should not be required to undergo the considerable expense of preparing for and participating in a trial" unless the plaintiff has produced "'evidence on which a jury might rely'" in support of the claims alleged. *E.F. Hutton Corp. v. Equitable Bank, N.A.*, 678 F. Supp. 567, 573 (D. Md. 1988)(citations omitted).

IV. Argument.

A. Oken's Complaint Fails to State a Claim for Relief Under 42 U.S.C. § 1983.

Oken's claim is a thinly veiled attempt to stop his execution, thereby preventing the state from carrying out its criminal judgment, not a challenge to any conditions of his confinement or other purported civil rights violations. Where an inmate seeks injunctive relief in federal court, challenging the fact of his conviction, the duration of his sentence, or the manner of execution, the claim falls within the core of *habeas corpus* and is not cognizable when brought pursuant to 42 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475, 479 (1973); *In re Sapp*, 118 F.3d 460, 462 (6th Cir.), *cert. denied*, 521 U.S. 1130 (1997). By contrast, claims in federal court that merely challenge conditions of confinement may be brought pursuant to § 1983. The Supreme Court made clear just last month in *Nelson v. Campbell*, that suits such as Oken's are the former, not the latter, because granting the relief Oken seeks would necessarily prevent his execution. Oken has argued that the *Nelson* decision somehow supports his claim. A review of the case shows that it does not.

Nelson was an Alabama death-row inmate. Three days before his scheduled execution by lethal injection, Nelson filed a civil rights action in federal district court against Alabama Department of Corrections personnel pursuant to § 1983, alleging that use of a cut-down procedure[2] to access his veins constituted cruel and unusual punishment and deliberate indifference to his serious medical needs in violation of the Eighth Amendment. 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 respondents to furnish a copy of the protocol setting forth the medical procedures to be used to gain venous access; and an order directing respondents to promulgate a venous access protocol that comported with contemporary standards of medical care. According to an affidavit from Dr. Mark Heath[3] that accompanied Nelson's complaint, safer and less-invasive contemporary means of venous access existed.

The federal district court dismissed Nelson's suit for lack of jurisdiction, finding that Nelson's § 1983 claim and request for a stay were the functional equivalent of a second or successive petition for federal *habeas corpus* relief. Before filing a second or successive federal *habeas* petition in district court, Nelson, among other things, would have to obtain authorization from the United States Court of Appeals for the Eleventh Circuit. The standard for obtaining such authorization is an onerous one. *See* 28 U.S.C. § 2244(b).

In a decision issued May 24, 2004, which it characterized as "extremely limited," the Supreme Court simply held that Nelson had stated a cognizable claim under 42 U.S.C. §

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[2] As will be discussed below, Oken's case does not involve the need for a cut-down, or any other unusual medical procedure in preparation for his execution. Oken does not allege that his case will involve a cut-down.

[3] Oken also uses Dr. Heath to support his claims in this court on different aspects of the lethal injection process.

1983. *Nelson*, 541 U.S. ___, 2004 WL 1144374, at *2, 8. This holding, given the unique and different facts of *Nelson*, is of no benefit to Oken. Moreover, as argued below, the Court's opinion strongly condemns eleventh hour attempts by death-row inmates to manipulate the criminal justice system to delay execution.

The Court's limited holding that Nelson had stated a cognizable claim under 42 U.S.C. § 1983 by alleging that an unnecessary and painful cut-down procedure would be used to prepare him for execution is, of course of no help to Oken, because his case does not involve a cut-down. Moreover, the *Nelson* holding cannot be divorced from the particular circumstances of the case, which make the decision even less helpful to Oken. At oral argument in *Nelson*, respondents conceded that § 1983 would be an appropriate vehicle for an inmate, who was not facing execution, to bring a "deliberate indifference" challenge to the constitutionality of a cut-down procedure if used to gain venous access for purposes of providing medical treatment. The Supreme Court saw no reason on the face of Nelson's complaint to treat Nelson's Eighth Amendment claim differently solely because he was condemned to die. Furthermore, no Alabama statute or regulation required use of the cut-down procedure in connection with a lethal injection execution; Nelson had alleged alternatives to the cut-down procedure that would have allowed Alabama to proceed with Nelson's execution as scheduled; and, Alabama had maintained from the outset of litigation that it would attempt other methods of venous access prior to engaging in the cut-down procedure. Thus, the Court was faced only with a challenge to the use of a painful and unnecessary medical procedure, that just happened to be a precursor to a planned execution.

Leaving aside the issue of the stay, which had been rendered moot by the expiration of the warrant, the Supreme Court viewed Nelson's complaint as asking only to enjoin Alabama's allegedly unnecessary use of the painful cut-down procedure, not his execution by lethal injection *per se*. A finding that the cut-down procedure was unconstitutional would not require changing Alabama's death penalty statute. By altering the method of execution in a way suggested by Nelson, which Alabama did not oppose, Alabama could go forward with its sentence. Given the nature of Nelson's claim, then, the Court was not faced with a situation, such as the present one, where success on the merits of the claim coupled with injunctive relief would call into question the present ability of the state to carry out the death sentence itself.

Because the execution warrant in Nelson's case had expired by the time of the Supreme Court's decision, there was nothing before the Court requiring different treatment of Nelson's otherwise cognizable § 1983 claim just because it was a death penalty case. For the benefit of the lower court, which might have to address the question on remand, the Court did spell out the standard for determining when a complaint in these unusual circumstances sounds in *habeas*, not § 1983. Analogizing to the favorable termination rule developed in civil rights cases that "fall at the margins of habeas," such as *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Edwards v. Basilok*, 520 U.S. 641 (1997), the Court said the key question is whether a successful challenge to the execution procedure in question would necessarily prevent the state from carrying out its sentence. *Nelson*, 541 U.S. ___, 2004 WL 1144374, at *7.

Oken's case is therefore not helped by the decision in *Nelson*. On the contrary, *Nelson* compels the conclusion that Oken's complaint is in fact a request for *habeas corpus* relief. Oken's execution by lethal injection will not involve a cut-down procedure, or any other allegedly painful and unnecessary preliminary procedure. His complaint does not seek merely to avoid some collateral aspect of the execution process. Oken seeks to stop his execution by lethal injection altogether. Granting relief on Oken's present complaint would necessarily stop his execution. Therefore, the complaint is in fact one that seeks *habeas* relief, not one that can be brought under § 1983.

B. Oken's Complaint Must Be Dismissed As A Successive *Habeas* Petition

Treated as a federal *habeas* petition, Oken's present complaint is a successive petition under 28 U.S.C. § 2244(b) that this Court lacks authority to consider. This Court's jurisdiction over Oken's successive *habeas* petition is governed by the terms of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter the AEDPA), which applies to cases filed after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997); *Mueller v. Angelone*, 181 F.3d 557, 565-73 (4th Cir.), *cert. denied*, 527 U.S. 1065 (1999).

A second or successive federal *habeas* petition may not be filed in the district court unless the petitioner moves in the appropriate circuit court for an order authorizing the district court to consider the petition, and a three-judge panel of the circuit court approves the filing of such a petition. 28 U.S.C. § 2244(b)(3); *see Felker v. Turpin*, 83 F.3d 1303, 1305-07 (11th Cir.), *cert. dismissed*, 518 U.S. 651, 654-65 (1996); *In re Williams*, 330 F.3d 277, 278-84 (4th Cir. 2003); *In re Fowlkes*, 326 F.3d 542, 543-47 (4th Cir. 2003); *Buchanan v. Gilmore*, 139 F.3d 982, 983-84 (4th Cir. 1998) (*per curiam*); Rule 22(d) of the Local Rules of the United States Court of Appeals for the Fourth Circuit (specifying procedure for seeking authorization to file a second or successive petition).[4]

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[4] Local Rule 22(d) provides:

> Any individual seeking to file in the district court a second or successive application for relief pursuant to 28 U.S.C. § 2254 or § 2255 shall first file a motion with the Court of Appeals for authorization as required by 28 U.S.C. § 2244, on the form provided by the clerk for such motions. The motion shall be entitled "In re _________, Movant." The motion must be accompanied by copies of the § 2254 or § 2255 application which movant seeks authorization to file in the district court, as well as all prior § 2254 or § 2255 applications challenging the same conviction and sentence, all court opinions and orders disposing of those applications, and all magistrate judge's reports and recommendations issued on those applications. The movant shall serve a copy of the motion with attachments on the respondent named in the proposed application and shall file an original and three copies of the motion with attachments in the Court of Appeals. Failure to provide the requisite information and attachments may result in denial of the motion for authorization.
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> If the Court requires a response to the motion, it will direct that the response be received by the clerk for filing within no more than seven days. The Court will enter an order granting or denying authorization within 30 days of receipt of the motion by the clerk for filing, and the clerk will certify a copy of the order to the district court. If authorization is granted, a copy of the application will be attached to the certified order for filing in the district court. No motion or request for reconsideration, petition for rehearing, or any other paper seeking review of the granting or denial of authorization will be allowed.

Oken has previously sought and been denied federal *habeas corpus* relief for the state conviction now at issue. *See Oken v. Nuth*, 64 F. Supp. 2d 488 (D. Md. 1999), *aff'd sub nom. Oken v. Corcoran*, 220 F.3d 759 (4th Cir. 2000), *cert. denied*, 531 U.S. 1165 (2001). Because Oken has not sought and obtained leave from the United States Court of Appeals for the Fourth Circuit to file a second petition for *habeas* relief, the present complaint, which seeks such relief, should be dismissed as not allowed by law.

C. Oken Is Not Entitled To Injunctive Relief.

Even if Oken's claim were legally cognizable in this Court, injunctive relief should be denied. Through his delay, Oken has squandered any equities that even conceivably might have supported his claim. Oken has demonstrated by his own dilatory conduct that he has no interest in adjudicating the legality of Maryland's use of lethal injection *per se*, his ostensible purpose.

Long past the proverbial eleventh-hour, thirteen years after his conviction, after many other legal proceedings raising many other issues, Oken complains for the first time about the details of an execution method he has long known would be his fate. Obviously, this last-minute litigation is for the sole purpose of delaying his execution. The law must not countenance such manipulation.

"[N]o matter what the challenge to the method of execution is called, it is an appeal to equity," and a court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief. *In re Sapp*, 118 F.3d at 463. This principle was clearly stated by the Supreme Court in *Gomez v. United States District Court*, 503 U.S. 653, 654 (1992)(*per curiam*), and powerfully reinforced just last month in *Nelson*. *See supra* at 5-6, *infra* at 21-22.

The lower court in *Gomez* had entered a stay to permit condemned inmate Robert Harris to litigate a claim, framed as a civil rights claim pursuant to § 1983, that execution by lethal gas violated the Eighth Amendment. The Supreme Court vacated the lower court's stay. Recognizing that Harris filed under § 1983 because a *habeas* petition from him would be dismissed as an abuse of the writ[5], the Court stated:

> [w]hether his claim is framed as a habeas petition or as a § 1983 action, Harris seeks an equitable remedy. Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation. 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.

Gomez, 503 U.S. at 653-54 (citations omitted).

Like Harris, Oken could have brought his action challenging lethal injection 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. Three Maryland inmates have been executed by that method. At the very least, Oken has been aware of Maryland's use of lethal injection since March 30, 1994 when his attorney, Fred Warren Bennett, was advised by letter that, pursuant to 1994 Md. Laws, Ch. 5, any execution of Oken's sentence of death "will be by

[5] At the time of the *Gomez* case, a second or successive federal habeas petition was subject to denial, as an abuse of the writ, pursuant to principles announced in *McClesky v. Zant*, 499 U.S. 467 (1991).

lethal injection unless he elects on or before May 24, 1994 a lethal gas execution."[6]

Oken's many legal challenges to his convictions and sentence have proceeded to completion through the state and federal post conviction systems. Yet it was not until a matter of weeks before his scheduled execution that Oken took issue with Maryland's use of lethal injection in any legal forum. There is no good reason for Oken's failure to bring his challenge previously, here or in state court. He certainly must have been aware of the possibility of rasing such a claim.

Legal challenges to lethal injection are nothing new; they have been repeatedly raised and rejected for nearly two decades. *See Heckler v. Chaney*, 470 U.S. 821, 823 (1985) (claim in civil suit that drugs used for execution by lethal injection not appropriately tested and likely to be administered by untrained personnel); *Woolls v. McCotter*, 798 F.2d 695, 697-98 (5th Cir.) (claim that administration of sodium thiopental by untrained personnel in improper dosage violates Eighth Amendment), *cert. denied*, 478 U.S. 1032 (1986); *State v. Moen*, 309 Or. 45, 98 786 P.2d 111, 143 (1990) (claim that chemicals used by state violate Eighth Amendment); *Hill v. Lockhart*, 791 F. Supp. 1388, 1394 (E.D. Ark. 1992) (possible difficulty locating a vein suitable for lethal injection claimed to be cruel and unusual punishment); *State v. Deputy*, 644 A.2d 411, 420 (Del. 1994) (claim that state's procedures for lethal

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[6] Indeed, by his silence in the wake of this notice, Oken should be deemed to have waived any objection he may have to execution by lethal injection. *Orbe v. Johnson*, ___ S. E. 2d ___, 2004 WL 743795 (Va. Mar. 30, 2004) (No. 040598), at *2-3 (finding, 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 the method of execution, i.e., by lethal injection rather than by electrocution). A copy of the March 30, 1994 letter quoted in the text is an exhibit to Exhibit 15 accompanying Oken's Complaint in this Court.

injection unconstitutional for failing to provide appropriate selection and training of persons administering lethal injection); *State v. Hinchey*, 181 Ariz. 307, 315, 890 P.2d 602, 610 (1995) (lethal injection allegedly unconstitutional because if carried out incorrectly it could be painful); *State v. Webb*, 252 Conn. 128, 136-37, 750 A.2d 448, 453 (claim lethal injection creates a "high risk" inmate will experience "excruciating pain" because execution protocol does not ensure sufficient amount of thiopental sodium will be administered to render inmate unconscious), *cert. denied*, 531 U.S. 835 (2000); *Sims v. State*, 754 So. 2d 657 (Fla.) (claim that lack of specific guidelines controlling the dosage, sequence, and delivery rates of lethal chemicals violates Eighth Amendment), *cert. denied*, 528 U.S. 1183 (2000); *Cooper v. Rimmer*, 358 F.3d 655, 656-59 (9th Cir. 2004) (*per curiam*) (rejecting, among others, claim of alleged deficiencies in California's protocol, challenge to use of pancuronium bromide, contention that personnel not adequately trained).

Despite nearly two decades of legal challenges to execution by lethal injection across the country, Oken failed to raise any challenge to Maryland's use of lethal injection in either state or federal court until May 14, 2004.[7] Oken cannot claim he did not know at least the basics of Maryland's lethal injection process. Attached to the pleading Oken filed in his criminal case in Baltimore County on May 14, 2004, was a copy of Maryland's lethal injection protocol in effect for prior executions. Oken does not explain how or when he

[7] Oken's first filing on this issue was a "Motion for Appropriate Relief, to Vacate and Set Aside Warrant and for Immediate (Emergency) Hearing," filed in the Circuit Court for Baltimore County May 14, 2004. In that motion, Oken complained that the execution protocol established by the Division of Correction violated § 3-905 of the Correctional Services Article of the Maryland Annotated Code. This contention, which Oken says he is not relying on here as a substantive basis for relief, was rejected by the Maryland Court of Appeals on June 9, 2004. *See* Ex. B.

obtained the document, but it seems reasonable to assume that it had been in his possession for some time as he never claimed to have just learned of it. Additionally, there is no mystery as to the basic procedure for execution by lethal injection to be used in Maryland. In a letter to the General Assembly in 1994 when Maryland's lethal injection statute was enacted, then-DOC Commissioner Richard Lanham outlined the procedure that would be used to carry out lethal injection executions under the proposed statute.[8] Essentially the same procedure is used throughout the country. *See infra* at 27. It has been widely known for years. For instance, on January 30, 1998, Amnesty International published "Lethal Injection: The Medical Technology of Execution." (Viewed online at www.amnesty.org/library/Index/engACT500011998 on June 2, 2004.) That document discusses the procedure in detail.[9]

Moreover, any claimed lack of specific information about the exact details of the

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[8] Commissioner Lanham's letter is part of the legislative history of the statute. It is contained in the "bill file" for the legislation that became § 3-905, House Bill 498. These files are readily available for review at the Department of Legislative Reference in Annapolis. The letter is an exhibit to Exhibit 3 accompanying Oken's Complaint in this Court.

[9] Oken argues that the State has withheld information from him about the lethal injection process, prejudicing his ability to litigate his claims. However, Oken's request under the Maryland Public Information Act (MPIA) was not transmitted to counsel for the Division of Correction until May 11, 2004, *see* Complaint Ex. 1. By letter dated May 12, 2004, counsel for DOC expressed the expectation that Oken would receive a response from the Division "within the reasonable period required by the MPIA," *See* Oken Complaint, Ex. 6, Vol.II, Appendix O. Oken also fails to mention that his request for discovery, directed to the Circuit Court for Baltimore City and requesting "leave to conduct the above-requested discovery," *Id.*, Appendix P (copy of Motion for Production of Documents and Things), was not transmitted to counsel for the Division of Correction until May 17, 2004. Oken also refuses to acknowledge that the information provided in the affidavits previously provided to him, *see id.* Appendix G, Appendix J, and Appendix L, are more than adequate to litigate his complaints about lethal injection.

execution procedure is demonstrably not the reason for Oken's delay. Instead, Oken's attorney all but admitted he was holding this issue in reserve. On December 29, 2003, a reporter for *The Sun* wrote the following in an article about challenges to the drugs used in the lethal injection process in a number of states:

> Fred Bennett, the attorney for death row inmate Oken, said he would be interested in pursuing a similar argument if his appeals – he has asked the Maryland Court of Appeals to reverse its earlier decision rejecting Oken's arguments – are not successful.
>
> "We are looking carefully at the number of federal cases that are percolating dealing with the method and manner of execution and the drugs that are being used," he said. **"But we don't have to deal with that yet."**

(Emphasis added.)[10]

The equities in this matter undeniably favor the defendants. Federal jurisprudence reflects an "enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'" *Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (quoting *Brecht v. Alabama*, 507 U.S. 619, 635 (1993)). In addressing the compelling state interest in finality, the United States Supreme Court observed:

> Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," *Herrera v. Collins*, 506 U.S. 390, 421, 113 S.

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[10] Oken's counsel acknowledged at oral argument before the Maryland Court of Appeals on June 8th, in response to questioning from Judge Harrell, that Oken's 8th amendment challenges could have been brought at the time of the issuance of the penultimate warrant in the Spring of 2003 but that at the time he was concentrating his efforts on other legal arguments. A copy of the newspaper article referred to is an exhibit to Exhibit 15 accompanying Oken's Complaint in this Court.

> Ct. 853, 122 L. Ed. 2d 203 (O'Connor, J., concurring), an interest shared by the State and the victims of crime alike.

Calderon, 523 U.S. at 556 (citation omitted).

For more than a decade, Oken'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 reexamined. Oken's convictions and sentence have repeatedly been upheld in state and federal court. If Oken had genuine concern regarding the legality of his execution by lethal injection, he would have sought relief on this ground in 1994 when he became aware that he was subject to that method. Instead, although well aware of the existence of a possible claim, he deliberately chose to wait until a short time before his execution to raise this claim in the hope of obtaining a last-minute stay of execution.

The impropriety of a stay of execution in a case such as this was recently restated by the Supreme Court in *Nelson v. Campbell.* As discussed above, the issue first posed in *Nelson* was whether a complaint brought under 42 U.S.C. § 1983 by a state prisoner seeking to challenge the procedure for carrying out his execution was more properly characterized as a claim for *habeas corpus* relief. Given the unique facts of the case, the Court found it unnecessary to decide that issue and merely held that Nelson's § 1983 complaint should not have been dismissed out of hand. The strongest message of the Court's decision in *Nelson,* however, is that no matter how a challenge to lethal injection is characterized, last-minute challenges to lethal injection and stay requests are highly disfavored:

> [A]s our previous decision in *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653 (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.
>
> 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, [(citations omitted)], 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.

541 U.S. at ___, 2004 WL 1144374, at *8.

Any doubt that the Supreme Court meant exactly what it said in *Nelson* when it harkened back to its decision in *Gomez* is dispelled by other actions taken by the Court earlier in the term. Despite the pendency of the *Nelson* case, the Court denied stays of execution, or vacated stays issued by lower courts, in many eleventh hour challenges to lethal injection executions that did not involve a cut-down procedure. *See Orbe v. True*, 124 S. Ct. 1740 (Mar. 31, 2004) (denying Virginia inmate's application for stay of execution); *Ozmint v. Hill*, 124 S. Ct. 1627 (Mar. 19, 2004) (granting, in a South Carolina case, application to vacate preliminary injunction of execution); *Robinson v. Crosby*, 124 S. Ct. 1196 (Feb. 4, 2004) (stay of execution in Ohio case denied); *Roe v. Taft*, 124 S. Ct. 1196 (Feb. 4, 2004) (stay of execution in Ohio case denied); *Vickers v. Johnson*, 124 S. Ct. 1196 (Jan. 28, 2004) (stay of execution in Texas case denied); *Zimmerman v. Johnson*, 124 S. Ct. 1196 (Jan. 21, 2004) (stay of execution in Texas case denied); *Bruce v. Johnson*, 124 S. Ct. 1142 (Jan. 14, 2004) (stay of execution in Texas case denied); *Ward v. Darks*, 124 S. Ct. 1142 (Jan. 13, 2004) (stay of execution in Oklahoma case vacated); *Williams v. Taft*, 124 S. Ct. 1142 (Jan. 13, 2004) (stay of execution in Ohio case denied); *Beck v. Rowsey*, 124 S. Ct. 980 (Jan. 8, 2004) (stay of execution in North Carolina case vacated). *See also Cooper v. Rimmer*, 358 F.3d 655 (9th Cir. 2004)(affirming district court's denial of injunctive relief and discovery in connection with last-minute challenge to lethal injection that could have been brought years earlier).

There is no reason for this Court to treat Oken differently. Oken's case is indistinguishable from the many other cases nominally filed under § 1983 challenging lethal injection in which the Supreme Court has refused to grant, or has lifted, stays of execution. *See* Exhibit C: Defendants' Response and Memorandum in Opposition to Motion for Preliminary Injunction or Stay of Execution in *Hill v. Ozmint*, Civil Action No. 2:04-0489-18AJ (U.S. Dist. Ct. for the District of South Carolina), *stay lifted*, *Ozmint v. Hill*, 124 S. Ct. 1624 (Mar. 9, 2004). Oken's last-minute request for equitable relief must be denied.

D. This Claim Is Barred By *Res Judicata*

As previously stated, Oken has already brought the claims raised here in an action filed in state court, *Oken v. Sizer*, Cir. Ct. for Baltimore County, Case No. 03-C-045732.

Judgment for the defendants was entered in that case by Judge John Grayson Turnbull on June 2, 2004. The Maryland Court of Appeals denied Oken's request for a stay, and ruled against him on the merits on June 9, 2004. (A copy of the decision of the Court of Appeals, Oken's complaint, the order of the Circuit Court for Baltimore City transferring the case to the County, and Judge Turnbull's ruling, are attached as Exhibits B, D, E and F.) Because the same issues have been litigated between the parties, this action is barred by *res judicata*.

The preclusive effect given by a federal court to a prior state court judgment is to be determined by the law of the state. *E.g.*, *Migra v. Warren City Sch. Dist. Bd. of Ed.*, 465 U.S. 75, 81 (1984). Under Maryland law, a prior court decision between the same parties has full preclusive effect on claims that were brought, or could have been brought, in the earlier action. *See Colandrea v. Wilde Lake Comm. Ass'n*, 361 Md. 371, 392, 761 A.2d 899 (2000)("[A] judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action and is conclusive, not only as to all matters decided in the original suit, *but also as to matters that could have been litigated in the original suit.*")(emphasis in original). Because Oken has litigated these same claims in a state court action, he is barred from bringing them again in this Court.

E. Defendants Are Entitled to Summary Judgment

Even if Oken has stated a claim, the defendants would be entitled to summary judgment. Oken's application for relief of any kind should be denied because his claim that his execution by lethal injection would be unconstitutional is without merit. Oken's incorrect assertion that he is likely to suffer a needlessly painful death rests only on speculation and erroneous assumptions, not on a disputed issue of material fact.

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 rel. 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 Oken'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.[11] The number of states authorizing lethal injection as a method of

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[11] 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. Code Ann. § 5-4-617; California, Cal. Penal Code § 3604; Colorado, Colo. Rev. Stat. Ann. § 16-11-401; Connecticut, Conn. Gen. Stat. § 54-100; Delaware, Del. Code Ann. tit. 11, § 4209(f); Florida, Fla. Stats. § 922.105; Georgia, Ga. Code Ann., § 17-10-38; Idaho, Idaho Code § 19-2716; Illinois, Ill. St. ch. 725, § 5/119-5 (a)(1); Indiana, Ind. Code Ann. § 35-38-6-1; Kansas, Kan. Stat. Ann. § 22-4001; Kentucky, Ky. Rev. Stat. § 431.220;

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 executions were by lethal injection.[12] 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).

State and federal courts have consistently rejected challenges to lethal injection.[13]

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)(1); 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-27A- 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 the United States military also currently authorize lethal injection for executions. *See* 28 C.F.R. § 26.3(4); Army Reg. 190-55.

[12] 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.

[13] 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

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 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).

Oken acknowledges that the chemicals used by the State of Maryland are identical to

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657 (Fla. 2000), *cert. denied*, 528 U.S. 1183; Idaho: *Sivak v. 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.*, *Lambright v. Stewart*, 191 F.3d 1181 (9th Cir. 1999); *LaGrand v. 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): *Oken 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: *Poland v. 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'd* 218 F.3d 1305, *cert. denied*, 531 U.S. 1204.

those used by other states which use lethal injection as a method of execution. *See* Plaintiff's Memorandum at 11. However, Oken then argues that the use of the three drugs in combination is unconstitutional. *Id.* Oken's argument is based on speculation disguised as fact.

The affidavits of Dr. Mark Dershwitz, M.D., Ph. D., (submitted by the defendants in the state case, copies of which are attached as Exhibit G), refute Oken'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/sec, 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 a rate of 1 mL/sec, 99.999999999% of a population 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 every 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 0.007% 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.
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> 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 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 goes on to say:

> 18. Paragraphs 11, 12 and 13 of Dr. Heath's affidavit discuss the more typical anesthetic use of thiopental sodium and suggest that its use in the manner specified above is inappropriate for the purpose of execution. To the contrary, it is my opinion, to a reasonable degree of medical certainty, that the use of thiopental sodium in the quantity and manner specified above, in combination with the other drugs as specified above, will promote a rapid and painless death. When thiopental sodium is commonly 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 surgical 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 the thiopental sodium , and is not necessary to promote a rapid and painless death.

19. Paragraphs 12, 17, and 27(k) of Dr. Heath's affidavit discuss his concerns about the effect of the possible mixing, in the intravenous tubing, of the thiopental sodium and the pancuronium bromide. To the contrary, it is my opinion, to a reasonable degree of medical certainty, that if the intravenous tubing is flushed for 10 seconds following the administration of the sodium pentothal and prior to the administration of the pancuronium bromide, as specified above, there is no risk of such mixing. Furthermore, Dr. Heath is in error in his contention that the mixing of the standard solutions of thiopental sodium and pancuronium bromide will cause the thiopental sodium to precipitate and thus become inactive. In fact, when these two medications are mixed, it is the pancuronium bromide that precipitates and becomes inactive, while the thiopental sodium retains its full activity.

20. Many Paragraphs of Dr. Heath's affidavit, particularly Paragraph 24, refer to his opinion that the use of pancuronium bromide serves no legitimate purpose in an execution, instead constituting merely a "chemical veil" that "deceives observers into believing that they have witnessed a humane event." 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 stop breathing, if breathing has not already stopped as a result of the administration of thiopental sodium, and would act to prevent the outward manifestation of the seizure activity that commonly occurs when a person's heart stops beating. Such seizure activity could erroneously be interpreted by the lay observer as pain or discomfort.

21. At Paragraph 30 of his affidavit, Dr. Heath seems to suggest that not even emergency medical technicians and physician assistants have the requisite training and experience to properly implement the procedures necessary to promote a rapid, painless, and humane execution. To the contrary, 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 medical personnel. It is my opinion that IV catheters can properly be placed by appropriately trained, experienced, and credentialed medical paraprofessionals, and that a licensed physician should be present throughout the lethal injection procedure.

Dr. Dershwitz's declarations give this court complete assurance as a matter of competent, scientific fact, that the overwhelming likelihood is that Oken's execution will be accomplished without unconstitutional pain and suffering. In response, Oken 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. *See* Complaint ¶ 23. Oken certainly has not come forth with competent evidence that the problem he claims occurred (dripping 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 a case nearly identical to Oken's, *Cooper v. Rimmer*, 358 F.3d 655 (9th Cir. 2004), the Ninth Circuit recently 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 Oken'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 Oken'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 Oken's particular case, Defendants have demonstrated through the affidavits of Dr. Dershwitz that the possibility of Oken enduring unconstitutional pain and suffering during his execution is remote. Accordingly, the defendants are entitled to summary judgment on the merits.

IV. Conclusion.

For the foregoing reasons, the defendants respectfully request that this Court deny Oken's requests for a stay of execution and dismiss the complaint, or, in the alternative grant summary judgment in their favor.

Respectfully submitted,

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