TEMPORARY RESTRAINING ORDER & PRELIMINARY INJUNCTION REQUESTED
EXECUTION SCHEDULED FOR 12:01 A.M. ON MAY 18, 2005

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VERNON BROWN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. _____
	)	
LARRY CRAWFORD, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT

COMES NOW the plaintiff, Vernon Brown, by and through counsel, Richard H. Sindel and John William Simon, and in support of his complaint under 42 U.S.C. § 1983, states and alleges all as follows:[1]

1. In *Timothy Johnston v. Gary B. Kempker*, No. 4:04-CV-01075-DJS (E.D. Mo. Mar. 31, 2005) (memorandum in support of motion to compel

[1]Plaintiff has addressed, in the body of the complaint, the defendants' contention in previous actions that he had to exhaust administrative remedies, and has submitted documentary evidence that there is no administrative remedy on this issue. If the Court desires further briefing on this issue, the petitioner's counsel requests a reasonable time in which to generate it and points out the necessity of a temporary restraining order or preliminary injunction to keep the defendants from avoiding accountability for their choice of chemicals by proceeding to kill the plaintiff with the very

answers filed by plaintiff Johnston's counsel), and *Donald Jones v. Larry Crawford*, No. 4:05-cv-00653-RWS, the defendants in similar actions alleged that the plaintiffs' complaints under 42 U.S.C. § 1983 were not "really" what they were, but were "really" successive federal habeas corpus petitions.

2. Defendants raise this objection because if this section 1983 action were "really" a federal habeas corpus petition, it would be successive, and would therefore require leave of the United States Court of Appeals to be filed. 28 U.S.C. § 2244(b)(2). It isn't, and it doesn't.

3. The objection is a snare and a delusion. Plaintiff does not here attack his conviction and sentence; he does not here attack the death penalty; he assumes lethal injection is, in the abstract, a form of execution consistent with *Gregg v. Georgia*,[2] its progeny, and the historic practices and decisions on which they are based. Although he believes he should not be executed at all, he is pursuing this objective through other, appropriate, means. It ill-behooves the defendants to avoid being held responsible for

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chemicals which are at issue here.

[2]*Gregg v. Georgia*, 428 U.S. 152, 173 (1976) (plurality opinion).

their inhumane acts and omissions by accusing the plaintiff of dishonesty in the framing of this meritorious complaint.

4. The first case in point is *Nelson v. Campbell*.[3] There, as here, an Alabama prisoner under sentence of death challenged the constitutionality of a particular incident of a given lethal injection procedure which was unnecessary to bring about his death. In *Nelson*, it was a particular form of "cut-down" procedure to gain access to a vein; here, it is a particular set of chemicals which are only a few of many which could be used to bring about "the mere extinguishment of life."

5. In *Nelson*, the Supreme Court rejected the section 1983 defendants' argument that the plaintiff was "really" doing something besides what the papers his counsel filed did:

> Respondents at oral argument conceded that § 1983 would be an appropriate vehicle for an inmate who is not facing execution to bring a "deliberate indifference" challenge to the constitutionality of the cut-down procedure if used to gain venous access for purposes of providing medical treatment. . . . We see no reason on the face of the complaint to treat petitioner's claim differently solely because he has been condemned to die.

[3]541 U.S. 637, 124 S.Ct. 2117 (2004).

Respondents counter that, because the cut-down is part of the execution procedure, petitioner's challenge is, in fact, a challenge to the fact of his execution. They offer the following argument: A challenge to the use of lethal injection as a method of execution sounds in habeas; venous access is a necessary prerequisite to, and thus an indispensable part of, any lethal injection procedure; therefore, a challenge to the State's means of achieving venous access must be brought in a federal habeas application. Even were we to accept as given respondents' premise that a challenge to lethal injection sounds in habeas, the conclusion does not follow. That venous access is a necessary prerequisite does not imply that a particular means of gaining such access is likewise necessary. Indeed, the gravamen of petitioner's entire claim is that use of the cut-down would be gratuitous. Merely labeling something as part of an execution procedure is insufficient to insulate it from a § 1983 attack. If as a legal matter the cut-down were a statutorily mandated part of the lethal injection protocol, or if as a factual matter petitioner were unable or unwilling to concede acceptable alternatives for gaining venous access, respondents might have a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself. But petitioner has been careful throughout these proceedings, in his complaint and at oral argument, to assert that the cut-down, as well as the warden's refusal to provide reliable information regarding the cut-down protocol, are wholly unnecessary to gaining venous access. Petitioner has alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled. . . . No Alabama statute requires use of

> the cut-down, see Ala.Code § 15-18-82 (Lexis Supp.2003) (saying only that method of execution is lethal injection), and respondents have offered no duly-promulgated regulations to the contrary.[4]

6. So here, nothing in Missouri's statute on lethal injection requires the defendants to use the three-chemical sequence of sodium pentothal, pancuronium bromide, and potassium chloride. It does not use lethal doses of the first two. The third is one of many it could use to bring about his death. It is like a brutal cut-down as opposed to some other means of gaining venous access.

7. In the previous actions, the defendants have cited *Fugate v. Department of Corrections*[5] for the proposition that a section 1983 action by a Georgia death row prisoner raising constitutional infirmities in the specific way in which specific corrections officials, officers, and employees planned to carry out a lethal injection. Plaintiff acknowledges the existence of this per curiam, out-of-circuit order, which is not mandatory authority. It says, "[a] complaint seeking relief under 42 U.S.C. § 1983 from a sentence of death as cruel and unusual punishment 'constitutes the "functional

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[4] *Id.* at 2123-24.

[5] 301 F.3d 1287, 1288 (11th Cir. 2002).

equivalent" of a second habeas petition,' and 'the district court [i]s subject to the law applicable to successive habeas petitions.'"[6] The same per curiam goes on to say that if Mr. Fugate had sought permission of the same court of appeals to file a successive habeas corpus petition on the basis on which he sought relief under section 1983, it cited one of its own decisions and said would have denied leave on the general ground that it disagree that such claims would ever justify granting leave to file a successive petition.[7] That the Eleventh Circuit so held before the LANCET article appeared is no reason why this Court should try to put a square peg into a round hole in order to deny this plaintiff the relief he deserves under this remedial statute, in order to deny him any relief at all.

8. To the extent that *Nelson* suggested that some ambiguity remained about the borderline between section 1983 actions and section 2254 actions, the Supreme Court resolved the ambiguity in the plaintiff's favor in *Dickinson v. Dotson*,[8] announced on March 7, 2005. In it the Court held that state prisoners could raise a constitutional challenge to state parole

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[6]*Id.*, *Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir.1997), *citing Felker v. Turpin*, 101 F.3d 95, 96 (11th Cir.1996).

[7]*Id.*, *citing In re Provenzano*, 215 F.3d 1233, 1235-36 (11th Cir. 2000).

procedures under section 1983 in spite of the state corrections officials' contention that doing so was, as here, "really" a federal habeas corpus petition. The Court analyzes its decisions on the borderline between 1983 and 2254, and held that because these prisoners' actions did not call into question the validity of their convictions or sentences, and would not necessarily result in a speedier release from confinement, they did not fall within the "core" of claims for which federal habeas corpus (with its time limitations and severe limitations on successive petitions) would be the exclusive federal-court remedy.[9]

9. *Dickinson* dooms the defendants' avoidance of the merits of this case. Plaintiff does not attack the validity of his conviction or his sentence. (He does attack the latter in other actions, but that fact is irrelevant to this action except by showing that he has selected his remedies correctly.) A judgment for the plaintiff would not invalidate the judgment against him in the Circuit Court of the City of St. Louis. A judgment for him would not result in his release from confinement at all; it would not even excuse him from the death penalty, unless the defendants refused to conform to the

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[8]125 S.Ct. 1242 (2005).

Eighth and Fourteenth Amendments in the manner in which, within the spacious words of the state statute on executions, they choose to kill him.

10. Although the defendants made the same unfounded argument in the *Jones* case, and Mr. Jones was executed using their three-chemical sequence, they were on notice—in *Johnston*, because Mr. Johnston's counsel had filed a memorandum calling this Court's attention to *Dickinson*—that the Supreme Court had, since *Nelson* and trumping *Fugate*, drawn the bright line the plaintiff explains here: because this action does not implicate the validity of the judgment against him in the state trial court, and a favorable decision will not necessarily (or at all) result in his immediate release from confinement, it is proper under section 1983.

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[9] *Id.* at 1248.

WHEREFORE, the plaintiff renews his prayer for the relief he requests in his complaint and accompanying papers.

Respectfully submitted,

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Certificate of Service

I hereby certify a true and correct copy of the foregoing was forwarded for transmission via Electronic Case Filing (ECF) ***or otherwise e-mailed*** this [Click here and type ordinal number of day of month] day of May, 2005, to the offices of:

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