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

VERNON BROWN, ---------- Plaintiff,

vs.

LARRY CRAWFORD, DIRECTOR MISSOURI DEPARTMENT OF CORRECTIONS, ---------- Defendant.

Case No. 4:05-CV-746-CEJ

BEFORE THE HONORABLE CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE
TEMPORARY RESTRAINING ORDER HEARING
MAY 13, 2005

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ST. LOUIS, MISSOURI; MAY 13, 2005

2:14 p.m.

THE COURT: Good afternoon. This is Vernon Brown v.

Larry Crawford, and it is before the Court on the plaintiff's motion for a Temporary Restraining Order and for the purpose of determining in conjunction with that request whether the plaintiff should be allowed to proceed in this matter or whether the Court lacks jurisdiction to hear this matter.

You are Mr. Simon?

MR. SIMON: Yes, Your Honor. John William Simon for the plaintiff Vernon Brown.

THE COURT: And who is here for the defendant?

MR. HAWKE: Steven Hawke with the Missouri Attorney General, Your Honor.

MS. McELVEIN: And Denise McElvein with the Attorney General.

THE COURT: Thank you. The plaintiff's motion and the complaint and related papers were filed several days ago, and it appears that service was made on the defendant. So I assume that you all have everything that's been filed?

MR. HAWKE: We have received e-mail copies of the material from the plaintiff, Your Honor.

THE COURT: Okay. Good. All right. Are you all ready to proceed?

MR. SIMON: Yes, Your Honor.

THE COURT: All right. Why don't we start with you, Mr. Simon? If you'll just come up to the podium and present whatever argument you'd like to make? And before we get too far into this, I know that Mr. Brown is scheduled to be executed on May 18th. So, certainly, time is of the essence in reviewing this matter.

And because of the time considerations and of course depending on how much information you all want to present to

me this afternoon, it may be that I will not be able to prepare a written decision. I will make a decision on the record in the event that there isn't enough time to place my ruling in writing. And I would hope that that would be sufficient to the Eighth Circuit, because I assume that one of you will be taking an appeal from whatever decision I make. So why don't we proceed in that fashion?

MR. SIMON: Your Honor, this is a case about torture and about human rights; but the defendant's counsel are trying to turn it into a case about paperwork. And this is one in which the declarations that we have presented with the verified complaint and the Verified Memorandum in Support of Temporary Restraining Order show that this is at least a 43 percent chance that if Vernon Brown is executed by the defendants on May 18th he will be conscious at the time of his death.

The method of lethal injunction that the defendants

use in this state is the chemical equivalent the garrote. A garotte, for the record, is a form of punishment that was used in Spain and Portugal until they abolished the death penalty a few decades ago. The essence of execution by garotte is strangulation. The condemned person suffers suffocation and the pain of strangulation.

The way that lethal injections are performed in Missouri, the condemned citizen suffers suffocation and instead of the pain of strangulation suffers the worst pain of potassium chloride flowing through his veins to his heart and giving him a heart attack. It is not the kind of penalty that the jury had in mind in this case. It is not kind of penalty that the sentencing judge or the prosecutor or any of

the judges including this Court that affirmed his sentence had in mind.

It is not the kind of penalty that I had in mind when I prepared the responses to show cause in five cases for the Attorney General's Office, four of which the plaintiff's -- petitioners -- were executed. It is a different punishment from what the law presumed, and these defendants should not be able to carry it out. The evidence is all on one side in this matter. Under the Dataphase standards, this isn't even a close case on probability of success on the merits.

What are the defendants's defenses? One of them is

that, although this client is not here attacking his conviction and sentence and he is not attacking the death penalty as such and he is not attacking lethal injection as such, that although it doesn't attack any of these things that fall within the core of habeas corpus, because they feel they have to say something, they say, "Well, it is not a 1983. It is a habeas corpus." And of course that means they win, because this isn't an appropriate claim for federal habeas corpus. Your Honor?

THE COURT: Well, the claim itself may be appropriate for habeas corpus. But the problem here is that if it is construed as habeas corpus, then it would be a successive petition for which plaintiff has not secured permission to file from the Eighth Circuit. And so I would not have jurisdiction.

MR. SIMON: Understood, Your Honor. And that's what they're saying. The reason I know it is not appropriate for federal habeas corpus is that I've tried making analogous

arguments in federal habeas corpus.

THE COURT: In what case?

MR. SIMON: Analogous arguments in both of the John Middleton cases and in the David Barnett case. The claim was that the clemency procedures in Missouri failed to maintain the due process in regard to under Woodard. And you know what the Attorney General's Office said? "Well, that's not

ripe. You can't raise that in federal habeas corpus. For all you know, you're going to get clemency, or we don't know what the clemency process is going be like when you reach clemency." You see?

Your Honor, if you've got a winning claim in federal habeas corpus, you're always raising it too early or too late. And this is a situation in which if Vernon Brown had put this in the habeas corpus petition that this Court adjudicated, they would have argued that the claim wasn't ripe; that at the time of the offense, Missouri provided for lethal gas. At the time of the sentencing, it provided for lethal gas or lethal injection; that there is more than one way of doing a lethal injection.

Frankly, Your Honor, I can't believe they're still doing that three-chemical sequence. And if Miss Trog and Mr. Sindel had raised this claim in the original petition for Writ of Habeas Corpus in 1995, frankly, I believe it would have been unripe. What they are trying to do is create a legal no man's land in which one can never raise this claim. But this is a very meritorious claim, and it is up to us to figure out how you can raise it.

THE COURT: Let me ask you a couple of questions, first of all, Mr. Simon, before you continue. Mr. Brown did

file a federal habeas petition in this Court. He did not raise this particular issue in those proceedings.

MR. SIMON: Correct, Your Honor.

THE COURT: And the habeas petition was filed -- I am sorry. I thought I brought everything with me.

MR. SIMON: It was a 1995 case, Your Honor.

THE COURT: All right. And it was ruled in what? 2000?

MR. SIMON: I believe it was 2000, Your Honor.

THE COURT: 2000? First of all, you state that had you raised this issue or had Mr. Brown's counsel in the habeas petition raised the issue in 1995 or anytime between when it was filed and when it was ruled, then you anticipate that the State would have argued that the claim was premature?

MR. SIMON: Exactly, Your Honor.

THE COURT: Well, we couldn't know that, because it wasn't raised; and so there wasn't any response to it. So I guess that would be really speculative.

MR. SIMON: Your Honor --

THE COURT: But more to the point --

MR. SIMON: -- I think it would have been premature. I wouldn't argue with that.

THE COURT: Well, more to the point, though, how do you respond to the fact that in 1997 the Eighth Circuit in Williams v. Hopkins ruled that a challenge to the constitutionality of the execution -- and in that case I

think involved electrocution -- was in essence a habeas

claim?

Now, in that case, the claimant I believe had asserted that claim by way of Section 1983. But the Eighth Circuit said, "No, it's a habeas claim." The Court didn't say it was premature. And there were cases that were decided before the Williams case in other circuits where the courts ruled the same way. So even if this had been an argument made by the state that this claim was premature in a habeas petition, certainly, there was case law to suggest that habeas is the way to bring this claim.

MR. SIMON: Your Honor, that decision was rendered years before the Wilkinson decision of last March. It is our position that Wilkinson changed the legal landscape.

THE COURT: The tell me about Wilkinson. Do you have a citation to that?

MR. SIMON: Yes, Your Honor. In fact, that was a subject of a separate pleading in this case which includes a full copy of Wilkinson decision. It is one in which the Memorandum of Law in Support of the Verified Complaint mistakenly referred to the case as "Dickenson." I caught this almost immediately and called up the people who were processing the filing at the Court, and I filed a Notice of Error and Submission of Opinion. And so the entire opinion is in the court file, and it is "Wilkinson."

And if I may address it for a minute? It was a parole case.

THE COURT: Hold on for just a moment. Let me see if I can locate that. Tell me again what pleading was it attached to?

MR. SIMON: The pleading began Notice of Error.

THE COURT: When did you submit that?

MR. SIMON: The same day that the case was filed.

THE COURT: Okay.

MR. SIMON: And, Your Honor, if I may bring my computer over here, I can be a good deal more helpful to the Court.

THE COURT: Okay. That's fine. And maybe someone can get that attachment for you.

MR. SIMON: Indeed, Your Honor, if I plug my printer back in, I can print it out.

THE COURT: That's all right. I'll get it.

MR. SIMON: I am pulling this up, Your Honor. By the way, Your Honor, I received the defendant's responsive pleading when they got to court; I having been here first. And it addresses that. Apparently, they didn't catch the error in the name either. And they rely on the fact that it is a parole case.

Well, that isn't the way the law works. If an appellate court decides a case laying down principles of law

that provide a rule of decision, it doesn't follow that because one case is about a horse and other is about a mule that the principles of law doesn't apply. What the Court held in Wilkinson is the fact that something looks like an attack on a conviction and sentence doesn't mean it is an attack on the conviction and sentence. Wilkinson answered any question that was left after Nelson about whether a case like this sounds in 1983.

Now, if Vernon Brown were contending in this case that his sentence should be waived, this would not be a 1983. It would be a federal habeas. I would be the first to

proclaim that, but this isn't about whether he should be executed. It isn't about whether he should be executed by lethal injection. It is about the specific operations that state employees are planning on carrying out on the 18th that will inflict a death sentence on him which he is not here contesting; but that they will inflict it on him in a way that creates gratuitous pain.

According to the Lancet article -- and the Lancet article was based upon empirical search on states -- the jurisdictions -- that did autopsy toxicology reports and that kept them and were confident enough in their own competence to share those results with the scholars who prepared the Lancet article. There, they found there was a 43 percent chance that the condemned citizen was conscious at the time

that potassium chloride was burning through his veins and giving him a heart attack.

And when it is 43 percent in the cleanest states in the country, the odds have to go up in the places that wouldn't come clean. And of course Missouri is one of them. So Wilkinson means that if something doesn't becomes a habeas corpus just because you take it and that it has something to do with the carrying out of conviction and sentence. If that were the rule, there would be no prisoner suits.

Now, I know that would make a lot of people happy; but there would be no prisoner suits if you applied the defendant's reasoning. I mean I don't bring these. But if I had a client who brought a suit that said that the beans were too cold in the institution, by the same reasoning that the defendants are using in this case, they could argue that that was really an attack on his conviction and sentence, because

if he hadn't been convicted of a crime and sentenced to prison, he wouldn't be eating those cold beans. This is purely and simply a case that falls squarely under Section 1983.

It is a case in which persons, acting under color of state law, will, absent action by this Court, violate the constitutional rights of my client, Vernon Brown, by killing him in a manner that creates the foreseeable risk of excruciating pain which is completely unnecessary. Some of

the indicia of a 1983 as opposed to a federal habeas is that the plaintiff does not contest the conviction and sentence; that he does not contest the legality of the statute -- the constitutionality of the statute -- under which he was sentenced to death; that the statute does not require the use of pancuronium bromide or a short-acting anesthetic; that the statute commits to defendant Campbell the choice of what means to use. Defendant Campbell could choose lethal gas. He could choose a form of lethal injection such as pentobarbital that is a long-acting anesthetic.

And in their response, the defendants claim that, "The petitioner has not shown an alternative." The alternatives are either present in the declarations and in the pleadings, or I have just missed them somewhere. I mean, it is conceivable they aren't there; but it is virtually self-evident. If you take the obverse of Dr. Heath's testimony, using a long-acting barbiturate -- a lethal dose of a long-acting barbiturate is a main, simple, obvious alternative. It goes without saying.

This is what the veterinarians use. They specifically use pentobarbital. If the defendant's

veterinarians put an animal down the way they intend to put Vernon Brown down, they would lose their licenses. The State of Missouri would not allow them to practice veterinary medicine. And yet the State of Missouri intends to do that

to Vernon Brown on May 18th unless this Court stops them. And if the merits of this case weren't enough, there is more to it.

THE COURT: Well, let me ask you this: If the Court were to grant the restraining order, exactly what would you expect the Court to enjoin the defendants from doing?

MR. SIMON: Carrying out the execution. It would be a two-part order, Your Honor.

THE COURT: All right.

MR. SIMON: First of all, I don't mean to be needlessly repetitive, but because I anticipate what we're going to hear from the other side of the room, I feel I have to say this. We are not asking the Court to stop them from executing Vernon Brown. We are not asking the Court to --

THE COURT: Just tell me what it is that you would expect the Court to enjoin the defendants from doing?

MR. SIMON: In the short term, from executing Vernon Brown.

THE COURT: Okay. I thought you just said you're not asking for that?

MR. SIMON: No. To enjoin; not to stop. Obviously, we would in order for them to respond to the discovery that we've propounded, the way that the pleading were drawn initially, they could have responded to the discovery today. Now, the Lancet co-authors are waiting for whatever data the

Department of Corrections is willing to provide. I am sorry, Your Honor.

THE COURT: It's off the point again. Let me try again. Tell me specifically what it is that you expect the Court to enjoin the defendants from doing? You said enjoin them from --

MR. SIMON: "Executing the plaintiff --

THE COURT: Okay.

MR. SIMON: -- until further order of the Court" is what the draft order says. And I would anticipate that that further order of the Court could be granted if and when the defendants make a showing of facts about their plans to execute Vernon Brown; that the expert testimony, including that of the Lancet co-authors -- who are waiting for this data and virtually clamoring for the data -- until they can evaluate the data and render a professional opinion whether Mr. Brown will be unconscious at the time of his death. And, Your Honor, this is something that they could have provided months ago.

THE COURT: Okay. Is there anything else that you are asking the Court to enjoin the defendants from doing?

MR. SIMON: Your Honor, I could draft another order that would enjoin them from executing him in a manner that would create the foreseeable risk of gratuitous suffering and pain. And that actually would be closer to the nub of what

we're looking for. What we're looking for is a change in the method of execution that ensures that the condemned citizen will not suffer the pain of potassium chloride and the suffocation caused by the pancuronium bromide.

THE COURT: Okay. Under the statute, as I read it,

the Missouri statute -- and I guess it is cited in your complaint -- the statute that provides for the lethal injection or how the death penalty is to be executed, as I understand it, the statute allows for lethal gas or lethal injection. Those are the only two choices that the state has.

MR. SIMON: Yes, ma'am.

THE COURT: All right. And I don't know for how long, but Missouri has used lethal injection for some period of time.

MR. SIMON: Since 1989, Your Honor.

THE COURT: All right. And the three drugs that are used in a lethal injection procedure are the ones that you and your experts claim are unconstitutional; and that they result in an unnecessary infliction of pain on the inmate who is being executed?

MR. SIMON: As a matter of candor, Your Honor, I want to make clear that the Lancet co-authors would not rule out that there was some possible way of conducting a lethal injection using those three chemicals that would not create

that risk. They would need to review in the fine grain the quantities of each chemical that were used; the timing that was used; the training of the staff. But, Your Honor, the whole thing is that simply choosing those three chemicals, as opposed to a single, lethal dose of pentobarbital is asking for trouble.

THE COURT: All right. If the defendants in this case were to respond by stating that Mr. Brown would not be executed using these three chemicals and that -- was it pentobarbital?

MR. SIMON: Pentobarbital.
THE COURT: -- will be used or if the State decided to use lethal gas, which is the other option, what then?
MR. SIMON: Your Honor, for one thing, the State of Missouri no longer has the physical capability to use lethal gas.
THE COURT: Well, I understand that. But I am talking about what if I were to enjoin the defendants from using these three chemicals --
MR. SIMON: Uh-huh.
THE COURT: -- and a month from now they geared up and obtained the capability of using lethal gas?
MR. SIMON: Your Honor, based on intervening decisions, we would oppose the use of lethal gas. Intervening decisions have made findings that a person being

executed by lethal gas suffers a good deal. It has the same -- it has the same flaws as the three-chemical sequence with the difference that the pancuronium bromide shields the observers, for instance, the pangs of death from the condemned citizen is suffering; whereas in a gas chamber, unless they put a hood over the condemned citizen, well, you could see the pangs of pain in the body.
THE COURT: Right.
MR. SIMON: But --
THE COURT: Have there been any decisions that you're aware of in courts anywhere in the country where lethal gas is used? Have there been any decisions in which the courts have found that the use of lethal gas per se is cruel and unusual punishment?
MR. SIMON: Your Honor, as of this moment, I don't

know. But I think there have been, but I am not going to represent to the Court that there are.

THE COURT: All right.

MR. SIMON: I will certainly be happy to research that and report to the Court on what there is and what there isn't. The other part of the Court's question was: What if they provide some second option for lethal injection? Well, Your Honor, that's the object of this lawsuit. This lawsuit is not out to stop executions. That's a whole different question.

The point of this is that lethal injections can be done in a humane manner. Every veterinarian in the United States does the equivalent thing. These defendants won't. It is a willful infliction of gratuitous pain on people. It is in fact a badge of slavery. I have a witness here who is prepared to testify that one of the ways in which the punishments for slaves differed from the punishments for masters was that for any given offense where there was going be an execution, it'd be more painful for the slaves.

And given the linkage that the witness will testify to between the presence in a given county in Missouri of slavery, lynching, and death sentences, this is all one ball of wax. They're inflicting pain on these people on purpose. They could use pentobarbital or any number of other lethal doses of things that don't cause pain and don't cover up the suffering, but they use these instead because they've chosen to.

THE COURT: All right. And is that the gist of what your witness would testify to?

MR. SIMON: Yes, Your Honor.

THE COURT: All right. Well, I'm not going to hear any testimony on that issue, because I believe that it puts us too far away from the important point, and that has to do with the lethal injection and whether this is in fact a 1983 action or a habeas action. So --

MR. SIMON: Your Honor, may I address the point of exhausted administrative remedies?

THE COURT: Well, in a moment. I have a few other questions for you before you get into that, and that's one of them. I did want to ask you about the status of the exhaustion issue. Can you tell me that, if the State were to agree to use pentobarbital only in a dosage high enough to produce death, would that satisfy Mr. Brown?

MR. SIMON: If this is what they were doing, this lawsuit would not have been brought.

THE COURT: All right.

MR. SIMON: I'm not here in a position to stand here and make a deal right on the spot.

THE COURT: No, I am not asking you to. I am trying to figure out what are the limits are of what you are asking for.

MR. SIMON: The Court has assessed the limits perfectly well. That is the best example that I know of an alternative to the three-chemical sequence.

THE COURT: All right. Now, why did it take so long for Mr. Brown to raise this issue? He's been under a death sentence for some time. And as you're stated, the current protocol that's used for lethal injection have been in place for a number of years while Mr. Brown has been under the death sentence. It wasn't raised in his habeas petition.

MR. SIMON: Uh-huh.

THE COURT: He has not requested permission from the Eighth Circuit to file a successive petition in order to raise that issue. And this 1983 action, which assuming this is the right vehicle, wasn't filed until earlier this week. Why has it taken this long?

MR. SIMON: Among other things, Your Honor, this issue came in on little cat's feet. There were arguments made in one state. Arguments made in another State. It percolated up to the point where in Missouri in August my friend, Michael Gorla filed the 1983 on behalf of Timothy Johntson.

I was following the Johnston case to see what was going to happen. There has been a Motion to Dismiss filed by the defendants in the Johnston action who are substantially identical to the defendants here; the main difference between that Mr. Kempker was director of the Department of Corrections at the time and now Mr. Crawford is.

The Motion to Dismiss has been filed. A response to it has been filed. A reply has been filed. Both sides have filed exhibits. The main thing that is holding the Johnston action up is the defendant's failure to make discovery. There are multiple Motions to Compel out. And that is a good deal of the delay in getting to this issue is definitely not attributable to Mr. Brown.

Another factor in Mr. Brown's case is that he was told by staff that he had heard through the grapevine that if a prisoner asked a staff member for an IRR they were likely

to be told they couldn't even have the IRR form, because it was not a grievable issue. Mr. Brown did request an IRR. He filled it out. He has now received a response, and the response was that this is not within the responsibility of the Department of Corrections; that this is not grievable within the grievance system.

I would have a copy of it, Your Honor. But he just got his response. And the staff at the institution refused to fax it to me to provide to the Court. I have the name of the man who refused that information for the Court. And if I had that here, Your Honor, I could obviously be more persuasive of what they've done. It is their position that it is not grievable.

THE COURT: And I also am aware that Mr. Brown did file a Rule 91 petition in the State Supreme Court which is --

MR. SIMON: Your Honor, I have information to add about that as well as.

THE COURT: Okay.

MR. SIMON: Indeed, that will loop me back to another point that I need to make in response to the Court's original question. Today, I filed another Rule 91 that takes

advantage of the expert and investigative services that were recently authorized. Those were previously filed with the Board of Probation and Parole and the governor's legal counsel.

THE COURT: And this second Rule 91 motion was filed today?

MR. SIMON: It was filed today. This is one of the points that it raises. Another point is that the State of

Missouri does not have a legal death penalty because of the persuasive discrimination and other reliance on arbitrary factors in selecting who to prosecute for the death penalty and who in fact to execute once that decision has been made. Those are the two points in that state habeas action that was filed this morning. Or early this morning or late this afternoon.

THE COURT: And the first issue again?

MR. SIMON: The lethal injection issue, Your Honor.

THE COURT: All right.

MR. SIMON: Indeed, Your Honor --

THE COURT: I am sorry to keep interrupting you.

MR. SIMON: That's your job, Your Honor.

THE COURT: But the first Rule 91 motion only raised the issue of the lethal injection?

MR. SIMON: Yes, ma'am. There were two grounds for relief. The first was the merits of the lethal injection

issue -- the 814 and Missouri constitutionally merits -- The second was one that we actually did include in the second Rule 91 petition as well. And that it shows a want of comity to proceed with the execution while the Johnston litigation is getting very long on the tooth and while we have this action pending. So there are actually three points: The racial discrimination and other arbitrate factors; the merits of the lethal injection claim; and the want of comity.

Now, another factor that the Court is I am sure aware of that while this issue came in on little cat feet and some of us I am sure were a little dubious about it -- we're not anesthesiologists. These people are using a lot of big words. And for all we know, they have some ax to grind --

but the day after the Missouri Supreme Court set Vernon Brown's execution date, the Lancet published the work of Dr. Lubarsky and his three co-authors. And this gave worldwide medical science recognition, first of all, to the underlying theory of this.

But more than just recognizing it as theory, these researchers found that in practice in the jurisdictions that were as close as you could come to being as clean as a hound's tooth, there was a 43 percent chance that the victim of these defendant's practices was not anesthetized at the time of his death.

In other words, the world changed about this issue

on April 16th. And for any defense that the defendants want to assert where manifestation of the claim is at issue, it is my position that it is manifested on April 16th.

THE COURT: Well, you're not asserting -- are you? -- that this Lancet article is conclusive on the issue that there is a 43 percent likelihood that someone who is administered the chemicals that are used in lethal injection are going to experience pain?

MR. SIMON: Your Honor, I would say that 43 percent is a floor. Now, I don't know about "conclusive." I just don't know what the Court means about that.

THE COURT: Well, I wouldn't call this "conclusive" by any stretch of the imagination. I did read the Lancet article. And I'll confess that there is some medical terminology that I may not fully understand. But there is language in here that I think really weakens the point that you're trying to make.

As I read this article -- and where I'm looking at

page 1413 -- the authors -- apparently what they did in states that were that were willing to provide them with the information that they requested -- and there weren't many of them -- they wrote that "The only available" -- and I am going back now -- "The only available objective data were postmortem concentrations of thiopental." I am sorry. I am looking at page 1412.

And then they go on to say on page 1413 that "Extrapolation of antemortem depth of anesthesia" -- that is, any kind of conclusion that you would draw about the level of anesthesia of an individual before death -- "based on postmortem" -- after death -- "blood thiopental concentrations is admittedly problematic."

MR. SIMON: Uh-huh.

THE COURT: So they're saying that the objective data that they had was problematic in terms of making any kind of extrapolations or drawing any conclusions. Yet they go ahead and make the conclusion anyway or not really a strong conclusion. They say that the data suggests that the lethal injection methods are flawed. The data suggests that there was a problem.

But they also note that there are some variables that they were not able to control; one being the autopsy that was conducted or the anesthesia methods. And of course they either didn't have any information about those things or the information they had was not sufficient. Are you familiar with the Reid case that came out of the Fourth Circuit?

MR. SIMON: No, Your Honor.

THE COURT: I noted it wasn't cited in any of your

papers, nor were some of the other cases that I was able to find in my research on this, but I am referring to Reid v.

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Johnson, and it is reported at 333 F.Supp. 2d 543.

That was the District Court opinion following remand of the case by the Fourth Circuit. And just to give you a little history, this was an action brought by a Virginia inmate who was challenging under Section 1983 the protocol that was used for lethal injection. And in the Reid case the protocol involved using the three drugs that I believe are involved in the Missouri protocol.

First was the sodium thiopental. The second injection was pancuronium bromide, and then the third injection was potassium chloride. I don't know whether the dosages used in Virginia are the same as in Missouri, but we know they were the same three substances. And the plaintiff in Reid made the same argument that you are making here: That there was an insufficient dosage of the thiopental who produces the anesthesia. And because of that, there was a likelihood that an inmate would be conscious during the administration of the second and third drugs, which could be quite painful. At least the third would be very painful, but the second would paralyze him so that he couldn't exhibit the pain.

MR. SIMON: Uh-huh.

THE COURT: Initially, the District Court denied Mr. Reid's complaint or dismissed it because the Court said, "This is a habeas petition, and it's a successive petition

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which the Court doesn't have jurisdiction over."

But the case went up to the Fourth Circuit, and the

Fourth Circuit made a very interesting ruling. The Court ruled that the claim that the challenge to the protocol was distinct from a challenge to lethal injection, in general, as a method of execution. And because of that distinction and because the plaintiff was only challenging the protocol and was not claiming that he should not be executed, he was not challenging the judgment or the sentence. He was simply saying, "The protocol that the State has chosen to use" --

MR. SIMON: Uh-huh.

THE COURT: And it sounds like the Virginia statute is similar to Missouri's -- the Virginia statute did not specify you have to use these particular substances --

MR. SIMON: Uh-huh.

THE COURT: -- it was the policy of the Department of Corrections in Virginia to use these three drugs. But the Fourth Circuit said that the challenge to the protocol is one that can be presented by way of a 1983 action and remanded the case to the District Court.

I encourage you to read the District Court's opinion on remand. That's the citation I gave you, because it was interesting for a number of reasons. Number one, the remand decision was in 2004. And one thing that I noted was that the Court considered whether the plaintiff was entitled to a

Temporary Restraining Order on his 1983 challenge and went into a lengthy discussion of the lethal injection protocol that was used in Virginia and mentioned the name that is familiar to all of us: Dr. Mark Heath. I am not sure if that's his first name. But it is Dr. Health, who is your expert, who submitted an affidavit in this case.

MR. SIMON: The basic science expert, Your Honor.

THE COURT: Right. And Dr. Heath is also mentioned in the Reid case. So I am taking a long time to make the point which is that if you were to examine the Reid opinion, I think that you would find a lot of information in here that is reflected in your papers.

And when I compare the Reid decision to the Lancet article which came out I guess last month in April, the question is: What do the reporters in the Lancet article contribute to the discussion? You know, it doesn't sound like much more was learned that we didn't know about in 2004 when Reid was decided.

The only difference I think is that in the Lancet article the authors actually had some hard data that they obtained from the states regarding execution. And based on that data, they were able to draw some conclusions. But as far as the underlying science is concerned, that's the same.

MR. SIMON: Uh-huh.

THE COURT: That hasn't changed. They haven't

learned anything new about that. The bottom line is that I did not find the Lancet article very persuasive at all. But that point I think is more appropriately addressed in terms of whether Mr. Brown can show a likelihood of success on the merits, but we may get to that later. But I thought there were too many may be's and too many uncertainties in the Lancet article that the authors recognized.

MR. SIMON: Well, Your Honor, the declaration of Dr. Lubarsky, the senior co-author of the Lancet, is a good deal clearer than the article was as applied to the facts of this case and to the data that the Lancet co-authors would have to have in order to render an opinion that this execution would

be consistent with the Eighth Amendment.

And this is important enough to do right. This is not a case about the death penalty. But if the United States is going to engage in the death penalty, it can do it without engaging in torture. And the fact that there is some risk is enough to make a constitutional difference. That was what Judge Bataillon found in Palmer v. Clark, the Nebraska electric chair case.

Now, Judge Bataillon granted penalty phase relief on other grounds. But if the Nebraska respondents had appealed and won, then one would have been driven back to Judge Bataillon's declaration that the electric chair was unconstitutional. And it was unconstitutional for the same

reason that this three-chemical sequence is unconstitutional. Judge Bataillon held -- well, he didn't find. The respondent in that case admitted that there was a 20-second gap in jolts of electricity; and that there was both expert testimony and eyewitness testimony.

Expert testimony as a general rule of medical fact and eyewitness testimony about the Willie Otey execution that during that 20-second gap a person could, in the abstract, regain consciousness and that Willie Otey had regained consciousness. And Judge Bataillon found that there was a foreseeable risk of the gratuitous infliction of pain; and therefore, Nebraska, which provided no alternative at the time, could not execute, could not execute the petitioner in that case.

I'll be candid that he said it is not ripe. I mean, he made the finding but prefaced it by the fact that it was not ripe. So, Your Honor, obviously, he's my boy, because he

both agrees that a claim like this isn't ripe in federal habeas; but he comes to the constitutional conclusion that an analogous form of infliction of death in a gratuitously painful manner, it is unconstitutional, even if there isn't a certainty of gratuitous pain.

Where the State is engaging in ceremonial killing of one of its own citizens, it can do it without the foreseeable risk of gratuitous infliction of pain. And these defendants

should be made to do that. That's the point of this lawsuit.

THE COURT: I also noticed in your papers that you did not make any mention of -- and maybe I just overlooked it -- but it doesn't appear that you made any mention of the Eighth Circuit's decision in Williams v. Hopkins. And that was the decision authored by Judge Hansen in which the plaintiff challenged the constitutionality of execution by electrocution.

And in that case, the Eighth Circuit ruled that the plaintiff's 1983 challenge was the functional equivalent of habeas -- and in this case a successive habeas petition -- which ultimately -- well, which the District Court had insisted and the Court of Appeals affirmed that dismissal.

Tell me why you think Mr. Brown's challenge is different or why you think the Williams case should not be controlling?

MR. SIMON: Your Honor, I don't think Williams is controlling after Nelson and Wilkinson. Actually, Nelson is a good deal closer, but Wilkinson, as we discussed earlier, deals with the global question of what goes in 1983 and what goes in 2254 based on what one is attacking. And, Your Honor, I think Judge Hansen would decide this case the way

that I am advocating it to be decided. I think that he can count chevrons, and that's the Supreme Court of the United States saying that Mr. Nelson had a 1983 despite arguments

like the defendants are making here.

And I think that the Court in Nelson, in light of the bulk of its opinion, is quizzical that they said that the District Court will need to look at the question of the general metes and bounds of 1983 vis-a-vis 2254. But I think that that hypothetical that the Court raised, after holding that Mr. Nelson had a 1983, that was resolved in Wilkinson and not for the lethal injection cases but for parole cases and many other cases that 1983 defendants have argued to be habeases for purposes of boxing-out the accused citizen from any relief at all.

This is just like Nelson in terms of the Court's jurisdiction under 1983, because Nelson involved a cut-down procedure that wasn't necessary to execute the man. It wasn't necessary to make him dead. It wasn't necessary to satisfy the statute. There was no reason for them to do it that way as opposed to some way that didn't cause gratuitous pain and suffering. And the Supreme Court of the United States said, "Yes. That's a 1983." So is this.

THE COURT: Yes. But the difference here is that in Nelson the focus was on the means by which the prisoner authorities would be able to get access to the prisoner's vein in order to administer the lethal injection.

MR. SIMON: Uh-huh.

THE COURT: There wasn't any challenge to the

chemicals that were going to be injected. It was this surgical procedure that the State said was necessary to be done in order to carry out the lethal injection. So that was the focus there.

We're not talking about in this case any kind of surgical procedure that would precede the administration of the lethal drugs to Mr. Brown. We're not talking about anything other than the drugs that will be given to him to execute him.

MR. SIMON: Well, Your Honor --

THE COURT: And in Nelson, Justice O'Connor specifically left open and said that the Court was specifically leaving open the question of whether a challenge to the particular method of execution is one that can be made under 1983 or whether it is in fact the subject of a habeas action.

MR. SIMON: Your Honor, I am well-aware of that language. That's what I find quizzical, in light of what the Court in fact held. That is clearly dicta. What it held was that Mr. Nelson's claim sounded in 1983. And the distinction --

THE COURT: Right. Mr. Nelson's claim. I mean the facts of his case determined the Court's ruling, and the Court I believe limited its ruling to Mr. Nelson's situation and did not make any blanket ruling that in every case would

be construed as a 1983 action.

But my point is that Mr. Nelson's situation is very different. We're talking about a surgical procedure that was going to be done and that had nothing to do with the drugs that were being used. In this case, we're only talking about

the drugs.

MR. SIMON: Your Honor, I think that if the Supreme Court were to decide this case on the merits, it would find no distinction between those two sets of facts.

THE COURT: Well, that's possible. And I think what helps you is that Reid case that I cited, even though on the merits the Court denied injunctive relief, I think that the Fourth Circuit's reasoning helps your case immensely. But I am not persuaded by your argument that the Nelson case and the Wilkinson case make Williams v. Hopkins inapplicable here, because I don't think Nelson or Wilkinson help you.

MR. SIMON: Well, Your Honor, I would certainly like to address Williams in writing, as it appears to call for that.

THE COURT: Well, I don't know that that's going to be necessary. Well, let's go ahead, and I want to go ahead with your argument. I am sorry. Let me go back to something you said about this new Rule 91 motion that you filed --

MR. SIMON: Yes, Your Honor.

THE COURT: -- do you have any indication of how

quickly the Supreme Court is likely to rule on that? Is that a motion that you are asking to be heard on or is it just submitted on your written papers?

MR. SIMON: The way that generally works, Your Honor, is that by the time the other attorney will file it in Jefferson City has returned to St. Louis, it will be denied.

THE COURT: Okay.

MR. SIMON: The other factors under Dataphase and of course one of the things that Dataphase was written to make clear is that likelihood of success on the merits is not a

50-percent-plus 1 test. If one could show that one was going to win, one probably wouldn't need a TRO.

The other factors to be considered are the irreparable nature of the harm. And of course I've addressed that toward the end of the Verified Memorandum in Support of Temporary Restraining Order. This is a situation in which we'll see this happen every time someone has an execution until the Courts are willing to deal with this issue. The issue won't go away. And the only thing they can do in this case is kill the evidence; is bury the evidence.

This is not a situation in which we are attempting to stop the execution; only to get the data about the execution on the basis of which a Court can make a decision. There is no actual data from the defendants in this action except the names of the three chemicals and the three

chemicals are the problem; not the solution.

If they were required to respond to the discovery on an expedited basis and the Lancet co-authors were given a reasonable opportunity -- and I stress "reasonable"; not "dilatory" -- but an opportunity to review this data with the care that is appropriate to the subject of the litigation, the defendants would really suffer nothing.

They have waited about 20 years to execute Mr. Brown. Now, that's not a situation in which Mr. Brown should be in. If we're going to talk about dilatory conduct and sleeping on one's rights, I think that's 99 percent on the defendants and one percent on Mr. Brown. Whether the Court find the Lancet article to clinch the case or not, at the very least, it gives it the imprimatur of a worldwide scientific community that it didn't have before.

No one can dismiss this as a crank claim now after the Lancet article. And I don't think that this is any foul at all in not bringing this action until the Lancet came out. I don't think there is any foul in not bringing it until I had experts, rather than just citing an article. In fact, one of the main reasons, Your Honor, why we filed the Rule 91 in the Missouri Supreme Court is that the previous Rule 91 just tacked on the Lancet article.

But when the Court doesn't find it completely persuasive, I mean, that's a good reason for filing a second

Rule 91 with an affidavit from Dr. Heath and an affidavit from Dr. Lubarsky. So the dilatory conduct in the Johnston litigation -- I mean but for the defendant's dilatory conduct in the Johnston litigation, we wouldn't be here, because this issue would have been resolved in Johnston. The Court in Johnston doesn't have access to the data that we're asking for here; that the Lancet co-authors and Mr. Brown and I are asking for in this case.

And the only thing that is going bring that data into this Court is the prospect that they won't get to kill somebody quite as soon as they want to. They've taken this long. There is no reason why they can't take a few days or a few weeks in order to do it consistently with the Eighth Amendment or to rule out a good-faith challenge that they have been doing it inconsistently with the Eighth Amendment.

The balance of equities between the parties distinctly favors the plaintiff in this case, because he is facing at least the 43 percent chance of being tortured to death; and they are facing not ordering a pizza for a few days. That is really what it boils down to. They can wait

perfectly well while the Court gets this data and hears from the experts.

The public interest is the last factor, and this is not a case about the death penalty. But the country obviously wants to have the death penalty, and we're not here

to stop them. All we're saying is what it should be delivered by these defendants the way it's been promised by the politicians, which is, it is like putting a dog to sleep. And I don't mean to belabor the point. But it is certainly worth repetition that any veterinarian who put a dog down the way these people intend to kill Vernon Brown would lose his license.

It would violate their own state's law to do this to a dog. And my client is a human being. He should not be treated like a dog. He should not be treated worse than a dog. It hurts the United States that these defendants and the defendants in all but two of the other lethal injection jurisdictions use this three-chemical formula. And whether the Court finds the Lancet article to be clincher or not, it is going to hurt the standing of the United States in the war against terror if other countries believe that we torture our own citizens.

They will not cooperate with us in producing people if there's a risk those people will get the death penalty in the manner that these defendants propose to use it on Vernon Brown. From a legal, technical point of view, this is a case about discovery, because if we get the discovery, the odds are that either they will clean up their act before providing the delivery or that our experts will find that what they have been doing comes within some minimum acceptable level of

suffering under the Eighth Amendment. I don't know what that is. But I am just -- I am just seeing this is not an attack on death penalty.

It is not an attack on lethal injection. It is in fact on one particular set of means analogous to one particular cutdown. And this Court should put the United States on the boards against terror against torture and in favor of a strict enforcement of Eight and Fourteen Amendment and the Thirteenth as well, as we'll be raising in a supplemental pleading.

THE COURT: Let me just try to clarify what I said earlier about the Lancet article. I did state that I didn't find it persuasive, but I didn't mean to imply that in order to be entitled to injunctive relief that this Lancet article would have to be essentially a slam dunk. That's not the standard that I would hold the plaintiff to. That's much too high.

My concern is that the Lancet article as well as the declarations that have been submitted, are not persuasive, in that I don't believe that they show any likelihood of success on the merits. The Lancet article and the statements of the experts are really the core of the plaintiff's claim.

MR. SIMON: Uh-huh.

THE COURT: And I just felt that they contained more speculation than I believe is appropriate in order to

demonstrate likelihood of success on the merits. But, again, I wasn't expecting articles that would establish beyond a reasonable doubt that this is what happens.

MR. SIMON: Your Honor, the reason the experts could

not say, "This set of defendants using this set of chemicals will cause unconstitutional pain and suffering" is because they don't have the data.

THE COURT: No, I understand that. I understand that they were working with the data they had.

MR. SIMON: Uh-huh. Uh-huh.

THE COURT: But I think they started with a presumption about what they thought the data would bear out, and they found that the data was problematic, in terms of supporting a presumption that they had. Yet, they went ahead and said, "Well, we still think we're right about this. Even though there are some problems with drawing these conclusions from this data, we still think we're right."

So I thought that there was a bias going in when they began this article. And I understand there were limits on the study that they could do, and I also understand that the data from Missouri was not obtained. No, I am not holding it against you that you don't have the Missouri data --

MR. SIMON: Uh-huh.

THE COURT: -- because I am sure if you did you

would present that. And I understand also that you are seeking to get that data in the hopes of having it examined and analyzed by your experts.

MR. SIMON: And the "we" is broadly defined, Your Honor, to include Michael Gorla and Chris McGraw, both of them who I have known for years and with whom I have corresponded regularly about this issue. The delivery was filed on November 24, and they have the names of the three chemicals. Well, a lot of things that just say, "Drop dead."

And that's where they are in discovery. I think there might be something else, but it is so insignificant that I can't remember.

THE COURT: All right.

MR. SIMON: It is going to stay that way as long as they can kill people without providing the data.

THE COURT: Is there anything else you want to say? I'll give you another chance --

MR. SIMON: Okay.

THE COURT: -- to respond to the defendants. But is there anything else that you want to say right now?

MR. SIMON: Your Honor, I would orally request leave to file an amendment by interlineation of the 13th Amendment claim which came to my attention on the basis of a telephone conversation with Dr. Lenza last night.

THE COURT: Tell me what you want to amend by

interlineation?

MR. SIMON: The Verified Complaint.

THE COURT: Oh.

MR. SIMON: And I would provide a declaration from Dr. Lenza and a copy of his Ph.D. thesis.

THE COURT: That's fine.

MR. SIMON: Thank you, Your Honor.

THE COURT: Good afternoon.

MR. HAWKE: Good afternoon. May it please the Court, my name is Steven Hawke, an Assistant Attorney General with the State of Missouri. With me at counsel's table is Denise McElvein, also an Assistant Attorney General with the State of Missouri, and we are representing the defendants this afternoon.

Before I go into the text of the comments this afternoon, I represent the State of Missouri's interest in federal habeas litigation out of Jefferson City. Denise McElvein works in 1983 litigation out of the St. Louis office here. So in terms of discussion today here, I'll probably be --

THE COURT: You are the habeas expert and she's the 1983 expert.

MR. HAWKE: Thank you, Your Honor.

THE COURT: Okay. I got it. Now, tell me why you think this is a habeas action? Because I assume that's the

position that the State is going to take?

MR. HAWKE: That's correct.

THE COURT: Tell me why.

MR. HAWKE: This afternoon about 1:45, I received word from Jefferson City that the people down there were able to file with the Court a Motion to Dismiss as well as Suggestions in Opposition to the Motion for Temporary Restraining Order. And that should be filed --

THE COURT: As we speak?

MR. HAWKE: -- as we speak. Hopefully, a little bit before that. I gave Mr. Simon a copy of that response five or ten minutes before the hearing began, because that's when I had it.

THE COURT: It was being filed electronically?

MR. HAWKE: Yes, ma'am.

THE COURT: All right. We'll check on that.

MR. HAWKE: So why is this a habeas? Before looking at the factors to look at why this is a habeas, I'll point out that the Court's description of the circuit case law is

from Williams v. Hopkins, which dealt with a case out of Nebraska involving a challenge to the method of execution in Nebraska at that time; it being electrocution, where the Eighth Circuit found that it was a proper habeas claim.

The plaintiff this afternoon drew that circuit conclusion into question by suggesting that the legal

landscape has changed since Nelson v. Campbell. Nelson v. Campbell, as the Court pointed out, involved a challenge to the use of a cut-down procedure upon an offender in order to obtain access to the veins for the execution.

And in Nelson, again, what the Court pointed out and, again, what I think is important to note is that the offender offered an alternative to the cut-down procedure. And in fact the State of Alabama during the course of the Supreme Court litigation agreed that the cut-down was not necessary and that the alternative was an acceptable means of gaining access to the offender's veins.

So in that situation, the U.S. Supreme Court said that the offender's claims sounded in 1983. And one of the reasons why it sounded in 1983 was because the offender was not asking that the execution be called off forever. And in fact the offender offered an alternative to calling off the execution to forever. So --

THE COURT: Got it.

MR. HAWKE: Excellent. That is the lesson in Nelson. What you look at Nelson and look at what the offender presents to you in this piece of litigation, it sounds in habeas; not in 1983. The three things I think you should look at or four things I think you should look at: First, what is in the prayer for relief? The prayer for the

relief or in the prayer for relief was to enjoin the

execution temporarily and then there is a second paragraph or another paragraph that asks the Court to enjoin the execution permanently. So that's what the complaint prays for: That the execution be enjoined.

Second place I think you can look is at the proposed order offered by the petitioner. The proposed order from the petitioner -- proposed order granting Temporary Restraining Order -- also cancels, postpones, or eliminates the execution.

The third thing that I think you can look for is: Does the petitioner offer a specific alternative? And the answer to that is "no." He does not offer a particular drug and a particular dosage that he finds acceptable for his execution.

THE COURT: Well, if he were to do that, would that be acceptable to the State?

MR. HAWKE: I can't answer that.

THE COURT: Okay.

MR. HAWKE: It would depend on whether or not it would be lethal dose; whether it worked. So I am not really in this position to say "yes" or "no" to that.

THE COURT: Well, let's talk about this a little bit more, because are you suggesting that the State would be amenable to some alternative? An alternative to the current protocol of the three drugs that it uses now? I mean, is

that an option?

MR. HAWKE: The statute does not specify the drugs

that are to be used.

THE COURT: Right.

MR. HAWKE: Now, whether or not an alternative could be used by the Department of Corrections, I am not able to say. That's a technical policy issue that I am not able to answer.

THE COURT: Okay.

MR. HAWKE: But in terms of --

THE COURT: So the fact that he hasn't offered an alternative really isn't a valid argument, because you don't even know whether the Department of Corrections would consider any proposed alternative?

MR. HAWKE: I think I could speak for the department that it would consider an alternative. I can't say that it would immediately accept one at all. That would be purely within the discretion of the director of the Department of Corrections.

THE COURT: Okay.

MR. HAWKE: The fourth place that I think you can look to see if this litigation is a habeas or if it is a 1983 suit probably occurred about 30 minutes into the plaintiff's comments this morning or this afternoon when you asked the question once, twice, three times: "You know, what does the

plaintiff want? What do you want the order to say?" And the first answer that he gave was, "Enjoin the execution until further order of the Court." He was asking for habeas relief when you asked him that question, and he gave you that answer.

Now, two or three minutes later, I think you asked the same question again, and the answer was rephrased. I

think the words that we were used were, "Well, I could "-- "I" being Mr. Simon -- "could draft an order that would say that, 'The execution is enjoined until the State of Missouri is able to avoid a gratuitous risk of pain'" or words to that effect. Again, you know, a little bit different language. But, again, language that says, "Enjoin the execution," and that is habeas relief that is requested there.

So I think you can look to those four places to see whether this particular litigation is a habeas litigation or a 1983 suit: The complaint; the proposed order; whether a specific alternative is given; and the questions to you this afternoon. So those four places I think emphasize that what the plaintiff is requesting is habeas relief.

Now, during your discussion with Mr. Simon this afternoon, you asked about the Reid case out of Virginia and suggested that Mr. Simon take a look that litigation. And I think when you look that litigation closely, it does mesh into the defendant's position this afternoon. When you look

at the August 2, 19 -- I believe 1984 opinion out of Fourth Circuit, the offender offered an alternative to the drugs that he was complaining about.

And there is a citation in the Court of Appeals' opinion to some piece in the record where that alternative was given. So based upon the petitioner -- the plaintiff -- giving that alternative, the Court of Appeals found that it was properly a 1983 suit, which of course fits in I believe to the defendant's analysis of the litigation before the Court.

THE COURT: Well, you keep going back to this alternative being proposed, and the point you make here is

that Mr. Brown hasn't proposed any alternative, and in the Reid case an alternative was proposed. Mr. Brown is not the first Missouri inmate who has challenged the method of execution -- the lethal injection. Am I right?

MR. HAWKE: That's correct.

THE COURT: Mr. Johnston has challenged it. I don't know who else. But certainly Mr. Brown is not the first. Have there ever been any discussions that you're aware of in the office of the director of the corrections department that anyone in that department has ever considered changing the protocol?

MR. HAWKE: I am unaware of any such discussions.

THE COURT: Okay. So I keep going back to my point

that the fact that the plaintiff hasn't proposed any alternative to me doesn't seem to be a fair argument, because it's up to the director of the Department of Corrections to determine the protocol. And the determination has been made to use this particular protocol, but certainly the director is free to change that; right?

MR. HAWKE: I believe so.

THE COURT: A policy of the department can be changed by the department. They've never done that. And they don't need a lawsuit to force them to do it. They can do it without a lawsuit.

So if the director of the Department of Corrections looks around the country and saw that some other states were using a different protocol, then he could consider that; and he could he could change the Missouri policy and use a different protocol. So I don't think it's fair to harp on the fact that there are no proposed alternatives. But you

heard Mr. Simon when I asked him if the State were to switch its protocol and use it on this pentobarbital drug, his response was, "We wouldn't even be here if that were the case."

So you do have a proposal of sorts. A proposal alternative of sorts. But it's up to the director of the Department of Corrections to determine what the protocol will be, and he's made the determination that it's going to be

this. But he's free to change that at any time.

MR. HAWKE: If I may interject there, Your Honor? What I wrote down when you asked that question of the plaintiff this afternoon was -- and what I wrote down and what I wrote this quote marks is, "I am not going to bargain."

THE COURT: Right. My point is you don't need -- that is, the Department of Corrections is free to make a change in the protocol in its policy if it so chooses. And it doesn't require the impetus of a lawsuit; whether it is a 1983 lawsuit by a prisoner or a habeas petition. You don't need that.

So all right. I'm going to let you go on. As I understand it, the defendant's believe that the Nelson -- I am sorry -- the Williams v. Hopkins case in which the Eighth Circuit ruled that challenges to the method of execution fall under the habeas procedure, as opposed to 1983 procedure. And your position is that that is the case that governs, and other cases that preceded it and followed it reach the same conclusion.

MR. HAWKE: Yes. Williams governs, and Nelson does not overturn.

THE COURT: Okay.

MR. HAWKE: Probably the rigid method of thinking about it.

THE COURT: Well, I will agree with you there. I don't believe that Nelson governs in this case; however, I think it is instructive in that the Supreme Court appears to recognize that there may be circumstances in which a claim that might appear to be a habeas claim is really a 1983 claim. I think that's what they found in the Nelson case. They found that Mr. Nelson's claim was a 1983 claim.

So I don't believe that the Supreme Court had ruled out the possibility that there can be a challenge to a method of execution that would be viable under 1983. So I don't think that the Nelson case hurts the plaintiff's position. I don't think it necessarily helps. And I agree with you that I don't believe that given the circumstances and the facts of Nelson that it governs in this case. But go ahead.

MR. HAWKE: Okay.

THE COURT: Now you've told me why you think this is a habeas. And one of the things you focus on is the relief that the plaintiff is seeking, which is to enjoin the execution. In the typical habeas case, though, what the petitioner is asking for is to have the sentence vacated. In other words, that the death sentence be vacated because of some constitutional infirmity.

I don't understand Mr. Brown to be asking that. I don't understand that he is asking this Court to disturb the judgment of the state court -- that is, the conviction -- or

that he is arguing that the death penalty should not have

been imposed. I mean, he made that argument in his habeas petition; but he's not saying here that, "The Court should never have imposed the death penalty in my case." What he is saying is, "That the death sentence has been imposed. I am not questioning that. I am not challenging that. What I am challenging is how the State is going to implement it." And I don't think he's arguing that lethal injection can never be used. "And it can't be used in my case under any circumstances, because lethal injection is always cruel and unusual punishment." I mean, are you reading something into his complaint that maybe I'm missing?

MR. HAWKE: What I am seeing at the end of his complaint is a request that the Court enjoin temporarily and then permanently his execution. Now --

THE COURT: Well, let's put aside the "permanently" part. Let's say I decide right now that he's not entitled to an injunction that would prevent on a permanent basis his execution. What about the "temporary" part of it? In your view, why does that request in your view make this sound in habeas?

MR. HAWKE: Let's step back and walk through the criminal process and then get to May 18 of 2005. The offender was convicted of first-degree murder here in St. Louis City. As a result of that jury verdict, he was

sentenced to death. That conviction has been affirmed by the Missouri Supreme Court on direct appeal. And on post-conviction review, that conviction and sentence have been affirmed -- not affirmed -- federal habeas corpus relief has been denied by the federal district and appellate courts.

So, as a result of that litigation, at the

conclusion of that litigation, the Missouri Supreme Court did what or issued a warrant based upon the judgment of the St. Louis City Circuit Court. And that warrant requires the director of the Department of Corrections to carry out the judgment of that Circuit Court. That judgment being that the offender be executed.

Now, if the offender had prevailed on direct appeal in state court or a post-conviction in state court, that sentence would have been set aside. If he had prevailed in federal habeas at any level, that conviction and sentence would have been set aside, depending on the claim, of course. On the type of claim.

And in this situation, if the offender were to prevail and receive the relief that he is requesting -- that being that his execution be permanently enjoined -- that is tantamount to the functional equivalent of which is the language that the Courts use in describing 1983 challenges to the method of execution. That is the fundamental equivalent of a federal habeas corpus petition, because that is the type

of relief that you would get if you prevailed in a federal habeas corpus petition.

Now, during the course of a federal habeas corpus petition, you know, the Federal District Court has the power to issue a stay of execution as part of its habeas power. And that is similar to if not the same as or perhaps in the language of cases the "functional equivalent" of -- a Temporary Restraining Order would be the functional equivalent of such a stay of execution. It's the same thing. It has the same effect; the effect being that the director of the Department of Corrections would not be able to follow the

lawful order of the Missouri Supreme Court.

Sort of long-winded answer, but it sort of gets us from 1986 to 2005.

THE COURT: Okay.

MR. HAWKE: Long-winded answer, because it covers 19 years. So I don't think you can separate, you know, a permanent injunction. I don't think you can say a permanent injunction is like a federal habeas but a temporary injunction is not. Because a temporary injunction, if it lasts long enough, can have the effect of a permanent injunction in this situation.

THE COURT: I see. Let me ask you a question that is a little bit off the subject that you were just addressing. This is a "what if" question. If the State

decided to change the protocol tomorrow, whatever new protocol were put in place would apply to Mr. Brown and every other inmate who is awaiting execution. Am I right?

MR. HAWKE: As I understand the department's policy, there is one protocol per inmate. So one protocol applies to one individual.

THE COURT: Well, right now, the State does not administer lethal gas, although the statute would allow for that.

MR. HAWKE: That is correct.

THE COURT: If the State decided to go back to lethal gas, then under the statute, you could do that; right?

MR. HAWKE: I believe so. Yes.

THE COURT: Okay. And so you have the authority to use the lethal injection, but the statute doesn't dictate what chemicals you have to use; right?

MR. HAWKE: That is correct. Yes.
THE COURT: And that's within the decision-making authority of the Department of Corrections?
MR. HAWKE: Yes, that's correct.
THE COURT: So, if the Department of Corrections decided tomorrow that in Mr. Brown's case that it was going to change the protocol of using the three drugs that we've been talking about, then the department could do that, provided whatever that new protocol was would still have the

effect of being a lethal injection, as required by the statute.
MR. HAWKE: I believe that's correct. But I've, you know, thought it for the 15 seconds that you've asked the question.
THE COURT: Well, if the State did change the protocol to use a different drug to carry out the lethal injection and if it were undisputed that that new drug was one that was extremely caustic and painful when administered producing violent reactions in an inmate, how would someone like Mr. Brown be able to challenge the use of a drug that everyone agrees -- including the director of Department of Corrections -- is extremely painful and may not be constitutional, how could Mr. Brown do that at this point? What would he need to do?
MR. HAWKE: Okay. Let me add to your hypothetical there and assume away the state court --
THE COURT: Right.
MR. HAWKE: -- remedies. And, you know, that's a big assumption, because I think your question was focusing, you know, "What are the federal remedies?"

THE COURT: Right.

MR. HAWKE: I just wanted to lay that out on the table. At that point, if the offender were to file this lawsuit. But instead of the three chemicals that are listed

there, you know, you would have the insertion of the caustic chemical. I believe through the remedy to that situation would lie in a 1983 suit but in an application to file a successive federal habeas permission. And that application should be filed in the Eighth Circuit.

THE COURT: Okay. If that were the case, would you agree that, if Mr. Brown's lawyer had half a brain, he would also ask for a stay of execution or an injunction to enjoin the Department of Corrections from administering the drug until the issue could be resolved?

MR. HAWKE: In our hypothetical situation here, I would hypothetically agree that a habeas petitioner's counsel would file whatever appropriate motions would be necessary.

THE COURT: Okay.

MR. HAWKE: So I guess what I would like to do from your hypothetical is abstract from that specific to the general. And that abstraction would be that the nature of chemical does not really change the nature of the lawsuit. In a hypothetical, my answer was, it should be filed as an application to file a successive habeas corpus petition. And that's my same answer or my second or the government's position as to this lawsuit. I think that sort of concludes what I was wanting to say from the habeas side of the litigation.

THE COURT: And you're particular with the Reid

case; are you not?

MR. HAWKE: Yes.

THE COURT: How do you address the distinction that the Court in Reid made between a challenge to protocol and a challenge to lethal injection and the method of execution in general?

MR. HAWKE: And to answer that question, that refers back to the discussions of a few minutes ago. What you're looking at I believe is the District Court decision in Reid.

THE COURT: No, I am looking at the Fourth Circuit's decision --

MR. HAWKE: Okay.

THE COURT: -- because it was the Fourth Circuit that drew that distinction. As you'll recall, initially, the District Court dismissed the 1983 claim as a successive habeas. And, on appeal, the Fourth Circuit took a different view.

MR. HAWKE: Right. And the reason articulated by the Fourth Circuit for taking that different view was because the offender offered a specific alternative to the method of execution.

THE COURT: I am sorry. I guess you did mention that before, but you think that was the reason?

MR. HAWKE: That's what the Fourth Circuit articulated, yes. If I may? "Rather he" -- the plaintiff,

petitioner -- "asserts only that the particular protocol the State plans to use is impermissible. He acknowledges that other protocols would pass constitutional muster."

THE COURT: Right.

MR. HAWKE: Then there is a citation to the offender's reply.

THE COURT: So, you're not suggesting -- are you? -- that if Mr. Brown were to amend his complaint here and make a specific proposal as to other drugs that could be used, that that would somehow convert this into a 1983 case?

MR. HAWKE: What I'm suggesting is that he has to propose -- not suggesting -- what I am stating he has to give a specific alternative. He can't just say something else other than in those three and leave it.

THE COURT: Well, if I give him leave to amend to propose a specific drug or specific drugs as an alternative to the three that are used now, will you concede that this a Section 1983 case?

MR. HAWKE: He would have to give a specific alternative. And by "specific," I mean he would have to give the name.

THE COURT: And the dosage and -- what's the word? -- "concentration." If he were to do that, the State would concede that this is a 1983 action?

MR. HAWKE: Yes.

THE COURT: Mr. Simon?

MR. SIMON: Judge? Yes, Your Honor.

THE COURT: You know, I don't know what your reaction to that is?

MR. SIMON: It is basically one of agreement. But I would need to check. I am not competent to specify the dosage or the concentration. I believe it is inferable from the pleadings originally filed in this case that pentobarbital was an alternative.

I don't think that it is a screen hit to say that no alternative was presented. I don't have settlement authority because I would need to have the input from the experts, and I would need to have the signoff from the client. And I fail to see how that's at all unreasonable. I am not an anesthesiologist, and I am not the one they're trying to kill; however, I think this action is clearly a 1983.

I think that the pleadings were sufficient from that point of view. But if what is needed to get us into 1983 for absolutely certain then the chemical is pentobarbital. And all I basically I would need to have the review of the experts and principally the Lancet experts. They would need to have some physical facts about Mr. Brown.

And the one thing that neither the Court nor the defendant's counsel has addressed as of this point that is addressed in the declarations and in the pleadings is the

qualifications of the staff. In other words, if we here and the experts at the University of Miami and New York City came up with an ideal chemical cocktail for lethal injection but it were employed by people who didn't have the qualifications to sharpen a pencil, then obviously, that would not satisfy the Eighth Amendment?

There would still remain that risk. But what I have in mind as a alternative is pentobarbital. And indeed, lest there be any doubt, this is not some revelation that has occurred to me in the last five minutes. The pleading that we filed in the Missouri Supreme Court on January 21st led of with the fact that the State could use a single lethal does of an otherwise legitimate anesthetic. In other words, I'll defer to the transcript as to whether I ever said, "I am not

going to bargain." Actually, I think this would be an appropriate case for settlement.

THE COURT: No, I am not suggesting any kind of settlement.

MR. SIMON: Uh-huh.

THE COURT: My point is simply this: Right now, you and the defense counsel disagree about whether this is a habeas case --

MR. SIMON: Uh-huh.

THE COURT: -- or a 1983 case.

MR. SIMON: Uh-huh.

THE COURT: And what Mr. Hawke has just said is that that disagreement would be eliminated if the plaintiff were to propose an alternative and make a specific proposal about an alternative. He's not saying that the State agreed to that proposal. But --

MR. SIMON: Uh-huh.

THE COURT: -- what he's saying is that gets you over the jurisdictional hump.

MR. SIMON: In that case, Your Honor, I would agree as well. I will agree to provide a specific alternative. And the only thing I think that's lacking as of this point is the amount and the concentration. And I think as long as that gets us over the statutory jurisdiction hurdle, then we can litigate the qualifications of the staff and other ministerial questions. But I would concur with the Court's initiative if that's how I should construe it.

THE COURT: I am quite surprised to hear that: This concession on the State's part. I wasn't expecting that from you, but if that's all it takes. I mean if in the State's

view jurisdiction in this case depends on whether the plaintiff has made a specific allegation about a specific proposed alternative, then I think you're going to be seeing more of these down the road, Mr. Hawke, because I am sure that other counsel who represent people awaiting execution will take your concession to heart and pursue it.

MR. SIMON: Your Honor, I don't think they will see any more. I think if this gets resolved once, it'll be the last one.

THE COURT: Well, maybe. Maybe not. We'll see. Okay. All right. Let's -- and I would add to this that I don't read the Reid decision in the same way you do, Mr. Hawke, because I don't believe that the Court in Reid meant that all the plaintiff had to do was make a proposal to the contrary of the protocol that was in place; and that would be enough to get the plaintiff over the jurisdictional hurdle.

I think that would have been much too simplistic a result. I think in Reid, unlike Williams v. Hopkins and the cases that the Eighth Circuit cited in Williams v. Hopkins, in Reid, the focus was on the specific protocol that was in place; not on lethal injection as a rule.

And in this case, Mr. Brown is not saying that under no circumstances is lethal injection constitutional. What he is saying is that lethal injection may be constitutional, but the way that the plaintiffs -- I mean the defendants are implementing it is unconstitutional. And that's why I asked you about this change in the protocol to using a drug that was admittedly painful.

But, anyway, while I understand that the Eighth Circuit was presented with a challenge to the

constitutionality of electrocution, there was no challenge to

protocol of the electrocution. That is, in Williams, the plaintiff was saying the electrocution is unconstitutional as cruel and unusual punishment.

He wasn't arguing that execution that is carried out in a particular way in the prison in Nebraska is unconstitutional. He was saying, "Electrocution, the way it's done in Nebraska; the way it's done in Oregon; the way it is done in any other state that has electrocution and the death penalty is unconstitutional." And so that's why the Eighth Circuit I believe rejected this as a habeas claim.

I think that the difference here is that if Mr. Brown wins this lawsuit, the effect on that would be that the State would be required to find a different chemical or array of chemicals or different protocol for lethal injections. The state would not be required to abandon lethal injection altogether, it would just have to do it a different way. And so that's not habeas, because Mr. Brown is still subject to executions once the protocol changes.

So all right. Well, you know, coming into this I had a sense that the jurisdictional issue might weigh more in favor of the plaintiff than the defendants. And based on what I've heard from both of you and based on the Reid case, I'm convinced that the Court does have jurisdiction. And I am also convinced that the plaintiff's claim that is based on Section 1983 is not frivolous; and that 1983 is a permissible

vehicle by which Mr. Brown can challenge the protocol by which the lethal injection form of execution is to be carried out.

Now, the next issue is whether he's entitled to a Temporary Restraining Order. And I'd like you to address, if you would, or I don't know if Miss McElvein is going to do that whether this issue of likelihood of success on the merits, because that of course is one of the elements that has to be established.

MR. HAWKE: And that is within Miss McElvein's scope.

THE COURT: Okay. Thank you.

MS. McELVEIN: Your Honor, the plaintiff is not entitled to a Temporary Restraining Order. As I think we pointed out on pages five and six of our memorandum, which I believe you have a copy of now?

THE COURT: Yes, I just received it maybe 30 minutes ago.

MS. McELVEIN: That challenges to lethal injection are not new. And, certainly, Brown could have brought his a lot sooner. The murder of this nine-year-old child occurred in 1996. He was convicted in 1991, and that was 14 years ago.

The cases that we cited on page six and particularly looking down through them you can see that basically, there's

been like 20 years of challenges to lethal injection. In the Heckler case, that was 1985. That was a challenge -- a civil rights suit -- challenging the drugs used for execution by lethal injection as not being properly tested; likely to be administered by untrained necessary. That's one of the issues that the plaintiff brought up just a few minute ago.

We also have a 1995 Arizona case, State v. Hinchey, lethal injection allegedly unconstitutional, because, if it

carried out incorrectly, could be painful.

State v. Webb, that was a 2000 case which claimed that lethal injection creates a high risk: "Inmate will experience excruciating pain because execution protocol does not ensure sufficient amount of thiopental sodium would be administered to render an inmate unconscious."

The Simms case. That is another 2000 case which claims a lack of specific guidelines and controlling the dosage sequence and delivery rates of lethal chemicals violates the Eighth Amendment. Those are just like four of the cases that we cited. So I think that, despite that, the plaintiff has failed to raise until now until basically the last minute.

And the plaintiff has not cited any reported decision where a judge has found that execution by lethal injection has been held unconstitutional. So, therefore, he is not entitled to a TRO. And I think as United States

Supreme Court has said in the Gomez case, you know, at some point, the Supreme Court has taken into consideration that the State's strong interest in proceeding with its judgments -- since his conviction in 1991, it has been 14 years.

And in this case, I think given the history of the litigation and lethal injection, there is a strong equitable presumption that he is going to be able to prevail on the merits anyway. What I want to do also is previously address where he talks about the Lancet article, and I just wanted to point out for the record on that that that was based on -- it was an article. It wasn't a study.

And it was also based on four other states' review

of I think it is toxicology reports and autopsy reports from four other states; none of those states being Missouri. And, again, as I think as the Court already pointed out, we're talking very soft language, as far as "suggest" or "seems to suggest." That type. But it also most importantly did not include any data from Missouri.

So I don't think it has any relevance to how executions are carried out in Missouri. And, finally, what I would like to argue is that the plaintiff has not exhausted his administrative remedies. As we pointed out on page eight of our memorandum, McAlphin v. Morgan, an Eighth Circuit case and also the U.S. Supreme Court case of Nelson v. Campbell,

that inmates are required to abide by the execution requirements; and that, as pointed in Nelson, includes capital cases.

And under the Eighth Circuit precedent, they are required to exhaust it before filing the Section 1983 lawsuit; not while it's pending. And I think the plaintiff submitted this like the IRR that he filed. And I think in the response, he received a response to his Informal Resolution Request that he should proceed.

THE COURT: The Informal Resolution Request was filed before the complaint was filed in this case; am I right?

MS. McELVEIN: Yes, Your Honor. I think that the complaint -- well, wait a minute. This was dated May 11th. I am not sure what date the complaint was filed.

THE COURT: I think --

MS. McELVEIN: May 11th? So that would have been two days ago.

THE COURT: The complaint was filed May 11th. Hadn't the Informal Resolution Request been filed before that?

MS. McELVEIN: No, the date that I have on here is that it was signed May 11th.

THE COURT: Oh, really?

MS. McELVEIN: Yes, Your Honor.

THE COURT: Okay. This lawsuit was filed on May 10th and you're saying that the IRR was filed on May 11th?

MS. McELVEIN: Yes, Your Honor.

THE COURT: Okay.

MS. McELVEIN: No, Your Honor. In fact, Vernon Brown's signature on here, if you look at the Informal Resolution Request, you have the offender's signature. It is next to his signature. I mean the only dates that I can find on here are May 11th after his signature. And the only other date is at the bottom where he signed again, and that was dated May the 12th.

THE COURT: Okay. The reason I thought the IRR had preceded the filing of the complaint is that I believe the complaint refers to the IRR. Yes. On page 22, paragraph 68 of the complaint, it states that, "Mr. Brown has filed an IRR." And it says that it is attached as an Attachment H. There was no Attachment H to my copy. But my point is that the complaint makes it appear as if the IRR had already been filed, but you're saying that the dates don't --

MS. McELVEIN: And I don't know why that is. All I all I have is a copy here of the IRR. I don't have any other date on this, other than May 11th and then at the very bottom

May 12th. But even if he had filed it on May 10th, it is not enough to file the IRR for exhaustion of administrative

remedies.

THE COURT: Now, Mr. Simon mentioned earlier that the IRR has been responded to by the prison officials; and that that response is that the challenge to the execution protocol is not grievable. Are you aware of any response that's been given by the prison officials?

MS. McELVEIN: Yes, Your Honor. Would you like me to read that into the record as well?

THE COURT: Yes, please.

MS. McELVEIN: What I have here is the Informal Resolution Request. And I have the findings on the Informal Resolution Request for Vernon Brown. And for the record, this is IRR number ERDCC05-1156.

And it says and the findings state: "Your IRR and all pertinent information have been received and reviewed. After investigating your complaint, it appears that your proposed action after delaying all executions cease while the method of execution is examined is outside the scope of our responsibility and authority. Execution procedure is determined at a level outside this institution; and, therefore, ERDCC is unable to address your complaint. Should you wish to pursue this matter further, we suggest persisting to the grievance appeal level, where the issue can be effectively reviewed. Therefore, your IRR is denied."

THE COURT: And the appeal level under the IRR

appear would involve Mr. Brown asking for relief. What would

be the next level?

MS. McELVEIN: Okay. Your Honor, I think we have Smith v. Stubblefield at 30 F.Supp.2d 1158 Eastern District of Missouri 1998. And that's cited on page nine and kind of sets forth what an offender must do to exhaust administrative remedies.

So the next thing that the plaintiff would do in this case is to file a grievance. Once your IRR is denied, then the next step a grievance. And the grievance is reviewed. And once there is a decision on the grievance, then the offender may file a grievance appeal. So then the appeal would be determined by -- and that goes to the central office.

So once the appeal is determined and once he's gone through -- this is also a way for them to do a second appeal. But the department considers the issue exhausted once the offender completes the appeal of the denial of his grievance.

THE COURT: All right. So all right. At this point, the IRR has been denied.

MS. McELVEIN: Yes, Your Honor.

THE COURT: And the denial of the IRR is done by whom? Who makes that decision? What individual or what committee within the institution reviews the IRR's?

MS. McELVEIN: Usually, Your Honor, that's the case

worker.

THE COURT: And is that what happened in Mr. Brown's case?

MS. McELVEIN: I see a staff signature on here, and it's "C.N.D." It is "RYCCW," and that indicates to me that that's the correction classification worker, which would be

the case worker.

THE COURT: Okay. So, had he pursued a grievance, which is the next step in the process, to whom would that grievance go?

MS. McELVEIN: The grievance goes to the superintendent, unless if it is medical, then it wouldn't go to the superintendent. You know --

THE COURT: Right.

MS. McELVEIN: -- if it was like a claim against CMS or something different. But, generally speaking, it would go to the superintendent --

THE COURT: All right.

MS. McELVEIN: -- for his review.

THE COURT: All right. And then it proceeded past the grievance level, it would go to the central office?

MS. McELVEIN: Yes.

THE COURT: Okay. Now, let me ask you this: To your knowledge, does a case worker -- case classification worker?

MS. McELVEIN: Yes. They call them a "case worker." I think the formal name is "corrections classification."

THE COURT: Would a corrections classification worker have any authority to change the lethal injection protocol?

MS. McELVEIN: No, Your Honor.

THE COURT: To your knowledge, does the superintendent of this institution have any authority to change the protocol for the lethal injection?

MS. McELVEIN: No, Your Honor.

THE COURT: Any change in the protocol, as I

understand it, based on what Mr. Hawke told me, is made at the level of director of the Department --

MS. McELVEIN: Yes, Your Honor.

THE COURT: -- of Corrections? Okay. Okay. Go ahead. So you're saying he didn't exhaust?

MS. McELVEIN: Yes, Your Honor.

THE COURT: All right.

MS. McELVEIN: And so, for that reason, his Section 1983 action cannot go forward, because he has failed to exhaust his administrative remedies.

THE COURT: When you use the term, "central office," are you referring to the director's office?

MS. McELVEIN: Oh, yes. Yes, Your Honor. I am sorry. I am referring to Jefferson City. What happens, just

to be clear for the record, the IRR and the grievance, they're handled at the individual institutions.

THE COURT: All right.

MS. McELVEIN: And then from there, the appeals go to central office, which would be at the director's level.

THE COURT: Okay.

MS. McELVEIN: And in this case, given the nature of his IRR by the require a change in the Department of Corrections's policy and not the policy of the local institution. So, therefore, an appeal by him to the department level would be necessary for exhaustion of administrative remedies.

THE COURT: Okay. Could Mr. Johnston have bypassed the IRR procedure and the grievance? Since it is clear that no one at the institution had authority to make any changes, could he have bypassed the institutional officials and gone

directly to the director with his complaint?

MS. McELVEIN: No, Your Honor. Not that I am aware of.

THE COURT: Okay.

MS. McELVEIN: I think that the policy of the department -- and just for the record, are you meaning Mr. Brown? You said "Mr. Johnston."

THE COURT: I am sorry. Mr. Brown?

MS. McELVEIN: Just for the record.

THE COURT: Thank you.

MS. McELVEIN: But, no. Mr. Brown, there is not a method by which the offenders can go and jump over all of these steps and go directly to the departmental level.

THE COURT: All right. Thank you.

MS. McELVEIN: And, you know, in many cases are involved at the IRR level.

THE COURT: Right. But clearly, this is not an issue that could have been resolved at the IRR level or at the institution level at all. I guess my question is: Are there any exceptions? Certainly, you don't want every inmate to send every complaint directly to the director's office. But certainly there are some complaints that only the director has any authority in. So does the policy allow for admitting these kinds of complaints directly to the head of the Department of Corrections?

MS. McELVEIN: As far as I know, the policies always require them to follow this procedure.

THE COURT: Okay.

MS. McELVEIN: Start with the IRR. They can't even jump like say to the grievance level. If they believe that

this is something that a case worker can't do or can't resolve, they can't just file a grievance. They always have to file the IRR before the grievance.

THE COURT: All right. Thank you.

MS. McELVEIN: That's all I have, Your Honor.

THE COURT: All right.

MR. SIMON: Your Honor, may it please the Court?

THE COURT: You probably have a number of things that you want to say, Mr. Simon. But if you would indulge me before I forget about this? I wanted you to address the exhaustion issue first --

MR. SIMON: Absolutely.

THE COURT: -- while it is still fresh in my mind.

MR. SIMON: Absolutely, Your Honor. And I have taken the liberty of printing a copy of Attachment H, since it is apparent that the Court didn't have one.

THE COURT: Thank you.

MR. SIMON: Did the counsel for the defendants not get Attachment H?

MR. HAWKE: No.

MR. SIMON: I'll take care of that. It is the affidavit of Vernon Brown describing how and when he filed the grievance. The Court will see that in the place that was filled out there were no dates.

The dates that were added relate to the discussion section, unless there is a different form. You see, Your Honor, the one I am looking at is the more relevant form. The one I am looking at is the one in Timothy Johnston's case, which is Attachment E. And I was asking since there

was a problem about Attachment H, is there any problem about Attachment E? Is anyone lacking Attachment E?

THE COURT: Hold on. I don't remember seeing anything pertaining to Mr. Johnston. It was an attachment to your complaint?

MR. SIMON: Yes, Your Honor.

THE COURT: Okay. I am not saying it wasn't filed. I may not have received a complete copy, and I am not saying it wasn't filed. That's something that we can determine later.

MR. SIMON: Well, Your Honor, the reason --

THE COURT: I don't have it.

MR. SIMON: -- why it is so important to the Court's question is that the data that Vernon Brown had to rely on before filing this case was all in the direction of saying, "You can't do it. You can't grieve it. It is nongrievable." I didn't hear any response from defense table about them not getting Attachment E. They didn't have to get it, because they get it in Johnston. And what it says in Johnston is, "This is a nongrievable issue." Now, that's the information that Vernon Brown had.

THE COURT: And how was that communicated to Mr. Johnston?

MR. SIMON: In the same manner that the new response that they made up after we filed this 1983 action was

communicated to Mr. Brown.

THE COURT: Okay. Hold on. I want to talk about Mr. Johnston.

MR. SIMON: Yes, ma'am.

THE COURT: He filed an IRR --

MR. SIMON: Uh-huh.
THE COURT: -- and was told in response to that that his challenge to the protocol was not grievable?
MR. SIMON: Yes, ma'am.
THE COURT: Okay. Do you know whether Mr. Johnston presented that challenge up through the appeals process the director?
MR. SIMON: I don't believe so, ma'am. If it is not grievable, it is not grievable. Look. It doesn't fall within the statute.
THE COURT: Okay.
MR. SIMON: There are several levels at which the defendants have no case for nonexhaustion. The first one is -- let's start with the statute, 42 US Code 1997(e) is limited to prison conditions. Prison conditions, is that the beans aren't warm enough in the chow line. It is not the selection, quantity, and sequence of lethal injection chemicals.
If Vernon Brown had not raised this action and he was going to be executed on May 18th and instead of wheeling

out a gurney, they wheeled out a garotte, these people would have argued that he would had to have filed a grievance. That's garbage. That's and Eighth Amendment violation.
THE COURT: Maybe I am not sure about the terminology and maybe that's one thing that needs to be addressed.
MR. SIMON: Is using a garotte instead of lethal injection a prison condition?
THE COURT: I understand the difference between a garotte and lethal injection. But the terminology I don't

believe so is "nongrievable." I don't know what that means within the context of the exhaustion process. And maybe Miss McElvein can address that, because if a prisoner's complaint -- whatever it may be -- is determined by the institution -- either by the case worker or by the superintendent to be nongrievable -- what does that mean? Does the appeal process only apply to claims that are grievable? I don't know. Maybe you can help out. I don't know what that means. You'll have to come up to the microphone.

MR. SIMON: Your Honor, should I print out another copy of Attachment H, since the defendant's counsel don't appear to have one?

THE COURT: We'll take care of it.

MR. SIMON: Thank you, Your Honor.

MS. McELVEIN: Your Honor, I think that under the Prison Litigation Reform Act, the offender is required to exhaust. Whatever they write in there as a response, the offender still needs to take it through to completion. So, if they say it may be that that's nongrievable because the case worker can't address it, then that doesn't mean that the superintendent won't be able to or the director won't be able to.

THE COURT: Well, that's what I am asking: Whether "nongrievable" means, you know, shutting the door in your face. And, you know, you can't take this any further, because this is not a subject that you can get any kind of consideration or relief on.

MS. McELVEIN: No, Your Honor.

THE COURT: Okay.

MS. McELVEIN: What I would like to do is object for the record as far as all this discussion about the Johnston case, because that's not an issue in this case. And in that case, just for the record, there is a Motion to Dismiss that is pending and is still pending.

THE COURT: Well, I asked the question about Johnston only because if Mr. Johnston had taken his grievance or his complaint all the way up to the director and been told, you know, "This is not something that the department is going to change. You have no reason or any cause or right to

challenge the protocol," then I think that would have some bearing on whether Mr. Brown should have been required to do the same thing. That is, if the director has already told one inmate, "We're not going to change it and you can't complain about it," then I wonder whether it would be appropriate to require Mr. Brown to go to the director only to be told the same thing?

I know the statute requires exhaustion. But, you know, it is a basic principal that an individual is not required to pursue exhaustion if it is going be futile. So that's why I wanted to know at what level something could have been done and whether Mr. Johnston had received an unfavorable response from the director. But I understand he didn't get that far.

MS. McELVEIN: Right, Your Honor. My understanding is -- well, first of all, too, for the record, Vernon Brown is incarcerated at the ERDCC. And Mr. Johnston is incarcerated at Potosi. So they would have no knowledge of each other, and they shouldn't anyway of each other's grievances or IRR's. Offenders do not have access to other

offender files, but they are incarcerated at two different locations. My understanding is that Mr. Johnston has not filed a grievance from his IRR.

THE COURT: Okay. Now, Mr. Simon, it is not disputed that Mr. Brown didn't submit a grievance or a

complaint beyond the IRR stage?

MR. SIMON: He hasn't yet, Your Honor. But the fact that 42 US Code Section 1997(e) doesn't apply to this issue. This is not a prison condition within the meaning of Subsection A of 42 US Code Section 1997(e). It does not fall within the legislative intent. It doesn't fall within the plain English.

It doesn't fall within the administrative regulations that the Department of Corrections has promulgated to take advantage of Section 1999(e). As they're posted on the Internet, they relate to all aspects of institutional life. This is more like whether the State uses the garotte or the State uses legal injection. That's exactly the kind of issue it is with a slight difference that it is worse than the garotte.

There is no excuse from them running from the merits of this issue by virtue of nonexhaustion, and that's exactly what they're to do by moving the goalposts in the response they have made to Vernon Brown.

THE COURT: I want to understand what you're arguing. You're saying that there is no requirement in a 1983 action --

THE WITNESS: Uh-huh.

THE COURT: -- this 1983 action and that Mr. Brown exhaust his remedies prior to filing the suit?

MR. SIMON: Exactly, Your Honor. This is not a prison condition. Section 1999(e) did not immunize every legitimate claim from a Section 1983 action. First of all, it didn't fall within the federal statute. Second, it doesn't fall within the state regulations. Third, state agents with due and apparent authority have told a steady string of prisoners that they can't file. If either they refused them the form or if they let them have the form, they get a response back like Timothy Johnston did. Only when they were faced the Lancet co-authors did they come up with a different policy. I got this after the hearing started.

THE COURT: Okay. All right. All right. Well, I wanted you to address the exhaustion issue, and you've done that. Do you have any other reply to make?

MR. SIMON: Yes, Your Honor. For the defendants in this case to fault the Lancet co-authors and Dr. Heath in their analysis of the facts of this case as applied to Missouri and for them to fault these experts who know what they're doing by saying that they don't have Missouri data when these same people represent the Johnston defendants, it is like the man who murdered his parents and argued for mercy because he was an orphan.

THE COURT: I have already, I think, addressed that point, Mr. Simon. I am not holding it against you that you don't have Missouri data. I am also not holding it against

you or Mr. Brown that the authors of the Lancet article were not able to get data from certain states because those states refused or either they didn't have it or they refused to

provide it. I understand that the Lancet article is based on an examination of data from just a few states. And I don't question the author's statement about efforts that they made to get more data than they actually received.

MR. SIMON: Your Honor, the question of timeliness here -- and I will not be repetitive -- except to note for the record that what my experience has been in at analogous area at clemency challenges and that if this had been brought twenty years ago, ten years ago, five years, three years, or two years they would argue it is too soon.

We bring it at just the right time. When we have a ripe claim and when we know what the procedure is going to be to the best of our ability and when the only obstruction we have to finding out exactly what their plans are is that they won't tell us. We bring it at the right time.

Now they say it is too late; and that this is like Gomez. This is not like Gomez. A person and a citizen of the United States raising a claim under the Constitution and under fundamental ethics at the right time and the right Court. And the United States should turn its face against torture. The Court has made clear and examined in its examination of the defendant's counsel that only the federal

courts will make these people shape up under the Constitution; and that absent the action of this Court, this issue will never be resolved. They'll be one more fractious piece of litigation on the eve of an execution after another until they decide to do the right thing.

And the balance of equities clearly favors the plaintiff, who does not seek to challenge the judgment of the Circuit Court of the City of St. Louis or any of the previous

Courts but only the practice of these defendants to go out of their way to choose a subdivision of the method of execution which the plaintiff does not challenge that ratchets up the pain from what it has to be in order to satisfy their statutory duty to kill him.

For that reason, Your Honor, we pray the Court for its order granting a Temporary Restraining Order so that this matter can be litigated, and the defendants can't bury their mistakes.

THE COURT: All right. Thank you. I have the attachments that were referred to in the complaint. So here's what I need: I need just a little time to review my notes and take a closer look at the defendant's response as I was trying to read it as you were presenting your argument. But I need to give it a little more consideration than that.

So why don't we take a short recess. And as I said before, I intend to give you my decision on the record before

we adjourn today. So we'll be in recess.

(Whereupon, a recess took place.)

THE COURT: Okay. I'm going to try not to repeat what I've already said. You know, I'll try to be as organized as I can in making this ruling.

And as I said before, there will not be a written order, in view of the fact that I don't believe that there is sufficient time for me to do that in order to enable you all to pursue any review of the order with the Eighth Circuit before May 18th. So you will be able to get a transcript of the proceedings, and the record of the proceeding will include my ruling. And that's what you'll be basing any appeal on.

This is a motion for a Temporary Restraining Order which, as we all know by now, is governed by the Dataphase case, which sets out specific elements that the plaintiff is required to demonstrate in order to prevail in his request. The elements that the Court has to consider include the probability of success on the merits of case; the threat of irreparable harm to the party seeking the injunction or in this case the TRO; the balance of harms between the alleged harm and the injury that may be inflicted on the parties; and of course the public interest.

Ultimately, the question is whether the balance and equities is such that it favors the movant such that justice

would require the Court to grant injunctive relief in order to maintain the status quo until the merits of the case can be determined.

In this situation, you all have addressed orally and in your memoranda some of the issues that the Court has to consider. We focused today on one issue perhaps more than others, and that is the likelihood of success on the merits. There are two subparts to this. We've overcome the jurisdictional hurdle, as I've already indicated.

But if this is a Section 1983 action -- which I believe it to be -- then under the PLRA, the plaintiff must receive an exhaustion requirement. Specifically, the PLRA requires exhaustion before a prisoner can seek judicial relief under 1983 or in any action brought with respect to prison conditions.

In this instance, the Department of Corrections for the State of Missouri does have a grievance procedure. As Miss McElvein outlined, that procedure involves several

steps, the first of which is the filing of an Internal -- an Informal -- excuse me -- Resolution Request or an IRR.

In this case, Mr. Brown did file an IRR. While it's disputed when he filed it, it is not disputed that he did file one; and that he received a response to that IRR from a case worker. And the response was that the claim that he was raising, which is the same claim he is raising in this

lawsuit, was not grievable.

Mr. Brown did not go beyond the IRR level. The next step would have been to file a grievance with the superintendent of the institution. If he didn't obtain relief at that level, then the next step would have been to submit a grievance to the director of the Department of Corrections. But Mr. Brown has not gone past the first step of the grievance procedure.

I don't think there's any dispute that a case worker at the facility -- at the prison -- does not have authority to change the protocol for lethal injection. I don't think that there is any serious dispute that a superintendent of that facility has the authority to change the type of drugs or the manner in which they're administered in carrying out an execution by lethal injection. So I don't think it was any surprise that the case worker did not do anything beyond responding to Mr. Brown's IRR.

Only the director of the Department of Corrections has the authority to change the policy of the department; specifically, the policy that governs the protocol for the lethal injection. Mr. Brown never presented his complaint to the director of the department. He never presented his grievance to the director. I don't know what the outcome

might have been. I mean we can speculate as to what the director's position might have been, but I can't say that it

would have been futile for him to present the issue for the director to consider.

Now, the plaintiff has taken the position that the exhaustion requirement doesn't apply to him because under 1997(e) the exhaustion requirement only applies in actions brought with respect to prison conditions. And his argument is that this is not a prison conditions case. And so he was not required to satisfy the exhaustion requirement.

I don't think you're right about that, Mr. Simon. And I would support my conclusion by citing the Porter v. Nussle case, N-u-s-s-l-e, which was decided by the Supreme Court in 2002. The citation is 534 US 516. And in this case, the plaintiff who was a prisoner had filed a lawsuit involving excessive use of force by one of the corrections officers. And the question was whether he was required to exhaust prior to pursuing that claim.

And ultimately the Court said that the exhaustion requirement did apply in his case. And I will just read a part of this opinion to you, because I think it's important and relevant here. The Court wrote, "For the reasons stated, we hold that the PLRA's exhaustion requirements applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes and whether they allege excessive force or some other wrong."

So I think it is clear that the term "prison

conditions" in 1997(e) is to be construed broadly, and I certainly would think that if it would apply in an excessive

use of force case, which is in this context an Eighth Amendment claim, then it would also apply to an Eighth Amendment claim as the one plaintiff is bringing in this case.

So, I think it's clear that Mr. Brown was subject to the exhaustion requirement. It does apply to him. He did not meet the exhaustion requirement, and so he did not satisfy a right to file this lawsuit under Section 1983. On that ground alone, I believe that the likelihood of success on the merits cannot be demonstrated by the plaintiff. But I'm going to go ahead and address some additional points, because I want to provide as complete a record as possible on this.

The other basis for the plaintiff's assertion that he does have a likelihood of succeeding on the merits consists of the expert declarations from Dr. Heath and Dr. Lubarsky. Dr. Lubarsky was one of the authors of the Lancet article; am I right? Yes. He was involved in the Lancet article that is also a basis for the plaintiff's claim that he's likely to succeed on the merits.

And I have talked a little bit about the Lancet article already, and I have explained I hope clearly why I believe that the Lancet article and these expert declarations

do not "carry the day," as it were. And, again, I am not suggesting that plaintiff has to prove his case at this point. But he does have to present some information or evidence that would indicate a likelihood of success on the merits. And I don't believe that the Lancet article or the declarations are persuasive, in that they all contain so much speculation.

And as I've already pointed out, even the Lancet article authors expressed their belief that the conclusions that they were drawing from these toxicology reports that they say examined were problematic. So I am not sure that even these doctors convinced that they're on the right track. I think, at best, the declarations and the Lancet article suggest that there is a possibility that the method by which the lethal injection procedure is carried out using these three drugs may produce pain the prisoner.

But I think they looked at all of these reports and said, "Well, gee. There may be something there." Well, again, that's speculation. And that may be sufficient for medical researchers to proceed to the next step, but I don't believe sufficient for the issuance of a Temporary Restraining Order.

And this kind of ties into the other element, which is irreparable harm. I don't believe either of you really talked about that. And it may be that you are accepting that

there is irreparable harm in this case or there would be if the TRO were denied. And while it is true that Mr. Brown is scheduled to be executed and if that execution takes place, then that's the end of any arguments that he can make. But the execution is a result of his conviction and sentence. It doesn't flow from protocol for the lethal injection.

I think it is also important to point out that -- and this is again a weakness in the Lancet article and in the declarations -- there is certainly a concern about anyone being subjected to pain, whether it is a medical procedure or in this case an execution. But at this point, there isn't any evidence that would support a conclusion that the pain if

any that Mr. Brown might suffer is such that would rise to the level of a constitutional violation.

I'm not prepared at this point and I don't believe that the evidence supports any assertion that this procedure amounts to torture or excruciating, unnecessary infliction of pain. I just don't believe at this stage there is sufficient evidence to support drawing that kind of conclusion.

One of the points that I wanted to talk about is the equities here. And I asked I believe Mr. Simon why Mr. Brown did not bring this claim sooner. And if I am not mistaken, the language that you used was that this information came on "little cat's feet"; and my impression is that what prompted the filing of this lawsuit was the Lancet article.

But as I have indicated, there has been information presented for quite some time -- many years before now -- suggesting that possibly a plaintiff could make a viable challenge to this protocol. And, in fact, one of the participants in a Lancet article -- I am sorry -- not a participant -- but one of the experts whose declarations was submitted who is Dr. Heath who provided information to the District Court in Virginia in the Reid case, which was decided back in 2004. So none of this is new.

I don't believe that this is an issue that the plaintiff could not have included in his habeas petition. And even if he did not include it in his habeas petition, I don't believe that it is a claim that he could not have asserted in a 1983 action brought sooner than two days ago. The timeliness factor is one that the Court can consider and that is relevant to the equities here.

And the plaintiff is seeking equitable relief, and

it is appropriate for the Court to determine and to assess this essentially last-minute effort to present a claim that could have been presented much sooner.

I guess my conclusion is that the plaintiff has not established his entitlement to a Temporary Restraining Order. And for the reasons I've stated, the motion for a Temporary Restraining Order will be denied.

Is there anything else from the plaintiff,

Mr. Simon?

MR. SIMON: May it please the Court, I understand from the Court that the transcript will be prepared?

THE COURT: You have to request it. You have to talk to Mr. Bond and make those arrangements.

MR. SIMON: I just wanted a clarification on that. Thank you, Your Honor.

THE COURT: Okay. Anything else from the defendants?

MS. McELVEIN: No, Your Honor.

THE COURT: All right. Thank you. We're adjourned.

(Whereupon, the proceedings concluded at 6:04 p.m.)

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UNITED STATES OF AMERICA)
) ss:
EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION)

C E R T I F I C A T E

I, Gary Bond, Certified Shorthand Reporter in and for the United States District Court for the Eastern District of Missouri, do hereby certify that I was present at and reported in machine shorthand the proceedings had the 13th day of May, 2005, in the above mentioned court; and that the foregoing transcript is a true, correct, and complete transcript of my stenographic notes.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys in this action, nor financially interested in the action.

I further certify that this transcript contains pages 1 through 94 and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

IN WITNESS WHEREOF, I have hereunto set my hand at St. Louis, Missouri, this 16th day of May, 2005.

/s/Gary Bond

Gary Bond, RPR, RMR
Certified Shorthand Reporter