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

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

VERNON BROWN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 4:05-CV-746-CEJ
	)	
LARRY CRAWFORD, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
MOTION TO SET ASIDE
ORAL DENIAL OF TEMPORARY RESTRAINING ORDER

COMES NOW the plaintiff, Vernon Brown, by and through counsel, Richard H. Sindel and John William Simon, and in support of his motion to set aside the Court's oral denial of his motion for temporary restaining order, and instead to grant the motion, states and alleges all as follows:

1. At the hearing of May 13, 2005, the defendants relied on mere procedural defenses to allow them to execute the plaintiff in a manner his expert declarations showed and their refusal to respond to discovery in the *Johnston* action confirms to be tortuous and therefore a badge of slavery.

2. Their first defense was that this section 1983 action was not "really" a section 1983 action, but a federal habeas corpus action. This court properly rebuffed the assertion, reasoning—as is eminently correct—that any other rule would allow the defendants to substitute an even more tortuous form of lethal injection for the one they have now, and get away with it because the condemned person would not be able to go back and put it in their federal habeas corpus petition because the defendants had just made it up. Transcript of TRO Hearing (hereinafter "Transcript") at 55-58 & 64-65.

3. The same reasoning shows that the defendants' second avoidance mechanism malfunctions. On the very same facts the Court posited, the defendants would assert that the condemned prisoner would have to file a string of papers as long as one's arm before he could even file a section 1983 action. It would not be enough to show that he had, like Mr. Johnston, received a response to his Informal Resolution Request (IRR) which said that the issue was not grievable. It would not be enough that he had received notice, through counsel, of the response to the IRR in Mr. Johnston's case, which is published on the Internet by this very Court. He would have to file it, get it back, grieve it, appeal it, etc., until it gets to the

Director. In the Court's scenario, the change had been made so close in time to the execution that no one could do through this process.

4. Is this case any different? Descriptively so, but not in principle. None of us know whether the defendants have changed the lethal-injection chemicals to increase the likelihood of causing pain and suffering: they won't disclose the relevant facts in *Johnston*, and they hope to kill the plaintiff in time to avoid responding to the more comprehensive interrogatories, guided by the experts who prepared the LANCET article, in this case.

5. Here, instead of openly changing the selection of chemicals, as in the Court's scenario, they have changed the response to the plaintiff's IRR. Plaintiff's counsel downloaded the Johnston IRR response and shared its contents with the petitioner. Petitioner filed in IRR in an abundance of caution, knowing what the response was in *Johnston*.

6. Specifically, the response in *Johnston* was: "This is a non-grievable issue per D5-3.2." (Attachment E.) It was signed by a duly appointed and acting agent of the Department of Corrections, Freda Moore CCA, on July 26, 2004. She or some other person with control of the paper wrote "Complete" in the box labeled "Staff Findings/Response."

7. Plaintiff herewith provides the Court a copy of the regulations Ms. Moore cited in her honest, correct response to Mr. Johnston's IRR. (Attachment P.) The subdivision defining "grievable issues" says:

> All matters related to institutional life except probation and parole matters; actions of state legislature or other federal, state and local agencies; actions in institutions where the offender does not reside, unless said actions personally involve or directly affect the offender; judicial proceedings; conditions which affect another offender without affecting the grieving offender personally.

8. To say that a matter related to institutional death is included in the phrase "institutional life" flies in the face of common sense. Only a lawyer would say something like that. The decision what specific means the Department uses to bring about an institutional death falls squarely into the phrase "actions of state legislature or other . . . state— . . . agencies," *i.e.*, the statute prescribing lethal gas or lethal injection and empowering the Director to fill in the details, and the Director's action in doing so. The substantive issue before this Court is not a grievable issue, and—before they were facing Dr. Lubarsky and his co-authors—the defendants admitted it.

9. The Court found that a caseworker did not have the authority to change the chemicals used in lethal injections. (Transcript 88.) But a caseworker ***does*** have the authority to speak for the Department about the metes and bounds of the grievance process. In the *Johnston* action, when that plaintiff's counsel introduced the IRR response as refuting the defendants' assertion of nonexhaustion, by showing that the issue was one for which the state's administrative grievance process did not provide a remedy, the defendant's counsel filed a reply to the overall pleading ***but dropped that point***. (Attachment F.) Plaintiff Johnston had a right to rely on their responses. So did this plaintiff.

10.Rather than admitting to changing the chemicals, which they may well have done, the defendants have changed the response. Confronted with the plaintiff's world-class experts, the defendants have moved the goalposts. In the *Johnston* action they had admitted, through their agents Moore and McElvein, that the Department of Corrections grievance process did not extend to claims like these plaintiffs'. Here, however, they introduced new weasel language into the response to this plaintiff's IRR, and refused to provide it to the plaintiff's counsel on his request in advance of the hearing; they did not provide it to the counsel until the hearing was

underway. (Transcript 21 & 83.) By itself, the latter acts and omissions within the litigation shifts the balance of equities in the plaintiff's direction on the question of granting a temporary restraining order.

11. In the response to this plaintiff's IRR, the post-LANCET position became: "Unable to resolve matter at this level." (Exhibit A to Respondent's Motion to Dismiss at 2.) It is signed "R White" and dated "5/11/05.)

12. On a separate page that the defendants' counsel could not find a professional oath-taker to sign, someone presumably purporting to act in our names as citizens of the State of Missouri says:

> Your IRR and all pertinent information have been received and reviewed. After investigating your complaint, it appears that your proposed action of 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.[1]

[1]Exhibit A to Respondent's Motion to Dismiss at 3.

13.Plaintiff is addressing in another place the question whether using a garrote or its functional equivalent instead of lethal gas or lethal injection is a "prison condition." He has shown that before the incentive to avoid scrutiny by the LANCET co-authors arose, the defendants and their predecessors in office admitted that the issue was non-grievable. The words of the regulation on grievances make it so even if they hadn't.

14.Although the Court dismissed the declarations of Drs. Heath and Lubarsky as "so much speculation" (Transcript 91) it did not dispute their expert status. It did not explain why the evidence that the problem with these three chemicals is "speculation" as applied to executing people while at the same time this problem is sufficient to make it illegal to use them when euthanizing animals. It would be paranoid to suggest that the AVMA guidelines, and the state statutes and administrative regulations driven by a "bias" for or against capital punishment.

15.Killing this plaintiff now will exacerbate the blind man's bluff of litigating this issue. It is a chicken-egg problem. As long as the defendants can manipulate the courts by changing their position so that a court can always find some administrative remedy which hasn't been tried, or can argue as these defendants did that the plaintiff's experts didn't have

Missouri data, or can rely on a court to find the experts' conclusions "speculative" because executioners generally don't gather, keep, or provide enough data, there will never be a perfect case in which a court can decide this as if it were an intersection collision suit. When one is looking into the abyss of terminating someone else's life in the name of a political subdivision of the United States in the year 2005, there is no need to wait for the perfect case, at least when, as here, the defendants are completely responsible for the lack of data on the basis of which an expert could make a dead-bang finding without some qualifications. This case is close enough.

WHEREFORE, the plaintiff prays the Court for its order as aforesaid.

Respectfully submitted,

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Certificate of Service

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

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