IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

TERRICK TERRELL NOONER **PLAINTIFF**

DON WILLIAM DAVIS **INTERVENOR-PLAINTIFF**

JACK HAROLD JONES, JR. **INTERVENOR-PLAINTIFF**

v. **No. 5:06-CV- 110 SWW**

LARRY NORRIS, Director,
Arkansas Department of Correction;
GAYLON LAY, Warden,
Arkansas Department of Correction;
WENDY KELLY, Deputy Director for Health
and Correctional Programs,
Arkansas Department of Correction;
JOHN BYUS, Administrator, Correctional
Medical Services, Arkansas Department of Correction; and
OTHER UNKNOWN EMPLOYEES, Arkansas Department
of Correction **DEFENDANTS**

BRIEF IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I.
INTRODUCTION

This is a civil rights lawsuit brought by three Arkansas prisoners who were convicted of capital murder and sentenced to death. The prisoners challenge the Arkansas protocol for lethal injection.

Plaintiffs' Complaint is replete with unsupported assertions, but at bottom the Complaint alleges that Arkansas' three drug lethal injection protocol is unconstitutional in violation of the Eighth Amendment's ban on cruel and unusual punishment. Plaintiffs' primary contention is that the protocol unreasonably risks subjecting the condemned

prisoner to unnecessary pain. In particular, Plaintiffs contend that: (1) execution by lethal injection is essentially a surgical procedure and should be conducted according to the same approach used in hospitals for surgery; (2) anesthesiologists or comparable persons must be employed to carry out the execution procedures; (3) the amount of the first drug prescribed by the protocol to be given to the condemned prisoner is insufficient adequately to anesthetize the prisoner; and (4) the second and third drugs used for lethal injection result in unconstitutional pain. Each of these contentions is factually incorrect and/or legally insufficient and has already been rejected by the United States Court of Appeals for the Eighth Circuit.

Arkansas' lethal injection protocol uses the same three drugs prescribed by numerous other States that provide for execution by lethal injection. Challenges to the use of this three drug protocol have been rejected across the nation. In particular, Arkansas' protocol is substantially identical to the protocol used by the State of Missouri. In June of 2007 the United States Court of Appeals for the Eighth Circuit upheld Missouri's protocol in response to a challenge by Missouri prisoners raising claims nearly identical to the ones in the instant suit. The Court of Appeals specifically held that the protocol did not violate the Constitution by subjecting condemned prisoners to an unreasonable risk of unnecessary pain noting that: (1) the protocol is designed to ensure a quick, painless death and "no State can carry out an execution in the same manner that a hospital monitors an operation;" (2) "there is no need for the continuing careful, watchful eye of an anesthesiologist or one trained in anesthesiology, whose responsibility . . . is to ensure that the patient will wake up at the end of the procedure;" (3) the dose of the first drug in the protocol to render the inmate unconscious is more than sufficient to

anesthetize the inmate (the Missouri protocol calls for an amount of the first drug that is approximately 17 times the amount normally given as anesthesia for surgery; the Arkansas protocol calls for amount of the drug that is approximately 10 times the amount normally given for surgery); and (4) the risk of pain associated with the use of the second and third drugs in the protocol is too remote to be constitutionally significant. *Taylor v. Crawford*, 487 F.3d 1072, 1084-85 (8th Cir. 2007).

Since the Supreme Court's 2006 decision that prisoners could in some circumstances bring a Section 1983 suit to challenge the means of lethal injection, *Hill v. McDonough*, 126 S.Ct. 2096 (2006), courts across the country have heard and rejected challenges to the three drug protocol widely used by the states. *See, e.g.*, *Workman v. Bredesen*, No. 07-5562, 2007 WL 1311330 (6th Cir. May 7, 2007), *cert. denied,* 127 S. Ct. 2160 (2007)(upholding three drug protocol); *Hamilton v. Jones,* 472 F.3d 814 (10th Cir.), *cert. denied*, 127 S. Ct. 1054 (2007)(same); *Emmett v. Johnson*, No. 3:07CV227, 2007 WL 1597783 (E.D.Va. Jun 01, 2007)(same). Most importantly, the Eighth Circuit's decision upholding the Missouri protocol in *Taylor* in the face of the same challenges raised here is controlling precedent in this Circuit. Based on these precedents, and in light of the absence of any material dispute as to the applicable Arkansas protocol, Defendants are entitled to judgment as a matter of law and their Motion for Summary Judgment should be granted.

II.
FACTS

Arkansas administers the death penalty by lethal injection. Ark. Code Ann. § 5-4-617(a)(1). Under Arkansas law, the Arkansas Department of Correction ("ADC") is responsible for executing felons who have been sentenced to death in the courts of this

State. Ark. Code Ann. § 5-4-617; *see also* Declaration of Larry Norris. Larry Norris has been the ADC's Director since December 1993 and is responsible for the ADC's overall operations. (Declaration of Larry Norris) As the ADC's Director, Arkansas law requires Mr. Norris to determine the substances and procedures used during executions. Ark. Code Ann. § 5-4-617(a)(2).

On or about June 26, 2007, and July 12, 2007, Mr. Norris consulted with Mark Dershwitz, M.D., Ph.D. to determine what changes, if any, to Arkansas' lethal injection protocol would further reduce what Mr. Norris considered to be the already minimal possibility that a condemned inmate would experience unnecessary pain during an execution in the future. (Declaration of Larry Norris) Based on those consultations with Dr. Dershwitz, Mr. Norris' own previous observations of lethal injection executions, and discussions that he had had over the years with other correctional professionals concerning lethal injection executions, Mr. Norris amended the ADC's lethal injection protocol on July 16, 2007. (Declaration of Larry Norris)

The protocol requires that the Deputy Director or designee "be healthcare trained, educated, and/or experienced in matters related to the establishment and monitoring of IVs, the mixing and administration of lethal chemicals, and assessing the presence or absence of consciousness." (Declaration of Larry Norris, Ex. A, §I, ¶1)

The protocol requires the Deputy Director or designee to

> have an intravenous infusion device placed in each arm, or other standard anatomical venous point of entry, of the condemned inmate and a solution of D5NS available for an infusion medium. Those person(s) engaged in this activity will be referred to as the IV Team and shall be healthcare providers who are qualified by training or credentials such as an emergency medical technician, nurse, or physician to initiate IV lines.

(Declaration of Larry Norris, Ex. A, §II, ¶1) If a patent intravenous infusion site cannot be established, then the protocol requires the Deputy Director or designee

> to evaluate other possible infusion sites. All effort will be made to establish two (2) unrelated intravenous infusion sites. If one (1) patent infusion site is established, and a second site proves to be a futile effort, the Deputy Director, or designee, may direct the IV Team to suspend further action. In the case that no patent infusion site is established after reasonable attempts as determined by the IV Team, the Deputy Director, or designee will direct the IV Team to suspend further action and thereafter summon trained, educated, and experienced person(s) necessary to establish a primary IV line as a peripheral line or as a central venous line.

(Declaration of Larry Norris, Ex. A, §II, ¶8) The protocol makes clear that "[e]very effort will be extended to the condemned inmate to ensure that no unnecessary pain or suffering is inflicted by the IV procedure. Standard practice of using a local anesthetic will be accommodated as necessary." (Declaration of Larry Norris, Ex. A, §II (emphasis omitted)).

The protocol employs a series of syringes to inject three chemicals in the following doses and order:

- Syringe #1: 1.5 grams of sodium pentothal;
- Syringe #2: 1.5 grams of sodium pentothal;
- Syringe #3: 50cc of normal saline;
- Syringe #4: 50mg of pancuronium bromide;
- Syringe #5: 50mg of pancuronium bromide;
- Syringe #6: 50cc of normal saline;
- Syringe #7: 120 mEq of potassium chloride;
- Syringe #8: 120 mEq of potassium chloride.

(Declaration of Larry Norris, Ex. A, §III & IV, ¶1) After administration of Syringe #3, "the Deputy Director, or designee, will assess and monitor the condemned inmate's lack of consciousness by using standard procedures as taught in basic life support or CPR courses, such as checking for movement, opened eyes, eyelash reflex, and response to verbal commands and physical stimuli." (Declaration of Larry Norris, Ex. A, §III, ¶2.f) Only after the Deputy Director or designee determines that the condemned inmate is unconscious, and at least three (3) minutes have elapsed from starting Syringe #1, will the remaining chemicals be administered. (Declaration of Larry Norris, Ex. A, §III, ¶2.f) If the Deputy Director or designee determines that the condemned inmate is still conscious after administration of Syringe #3, then the protocol requires that the contents of back up syringes be injected in the secondary or alternative IV line as follows:

- Syringe #B1: 1.5 grams of sodium pentothal;
- Syringe #B2: 1.5 grams of sodium pentothal;
- Syringe #B3: 50cc of normal saline.

(Declaration of Larry Norris, Ex. A, §III, ¶2.f) "Once the Deputy Director, or designee, determines that the condemned inmate is unconscious, and at least three (3) minutes have elapsed from starting Syringe #B1, all remaining chemicals will be administered to the unconscious inmate in numerical sequence into the secondary or alternative IV line; Syringe #4 through Syringe #8." (Declaration of Larry Norris, Ex. A, §III, ¶2.f)

"Throughout the lethal chemical infusion process, the Deputy Director, or designee, will closely monitor the infusion site for evidence of infiltrate, vein collapse, or other challenge to the patency of the infusion site." (Declaration of Larry Norris, Ex. A, §III, ¶2.i) If the Deputy Director or designee suspects a problem, he "will direct

reduction of lethal chemical flow rate or redirect chemical to secondary site." (Declaration of Larry Norris, Ex. A, § III, ¶2.i(1)) "If a singular infusion site is suspected to be compromised, chemical flow rate will be reduced. If problem persists, the: (a) administration procedure will be ceased; (b) curtain to death chamber will be closed; (c) IV Team summoned, and infusion site problem corrected." (Declaration of Larry Norris, Ex. A, § III, ¶2.i(2)) The protocol further requires that

> If all efforts to re-establish patent infusion site fail, the Deputy Director, or designee, will direct the IV Team to suspend further action and trained, educated, and experienced person(s) necessary to establish a primary IV line as a peripheral line or as a central venous line will be summoned to facilitate an IV infusion site.

(Declaration of Larry Norris, Ex. A, §III, ¶2.i(3)) "When the infusion compromise is corrected, the IV Team and the summoned person(s) will be excused, the curtain reopened, and the lethal injection procedure continued." (Declaration of Larry Norris, Ex. A, §III, ¶2.i(4))

The protocol calls for the use of a cardiac monitor to be used to display heart function. (Declaration of Larry Norris, Ex. A, §III, ¶2.h) "When all lethal chemical syringes have been administered, and a flat-line is observed for a minimum of three (3) to five (5), three-second sweeps on the cardiac monitor, the Coroner shall be summoned for purpose of pronouncing death." (Declaration of Larry Norris, Ex. A, §III, ¶2.h)

A condemned inmate who is administered a 3,000 mg dose of thiopental sodium will be rendered unconscious, and not experience pain or suffering, for the time period necessary to complete the execution. (Declaration of Mark Dershwitz, M.D., Ph.D., ¶6) A 3,000 mg dose of thiopental sodium would render most people unconscious within 60 seconds from the time the injection of thiopental sodium begins. (Declaration of Mark

Dershwitz, M.D., Ph.D., ¶10) By the time all 3,000 mg of thiopental sodium solution are injected more than 99.9999999% of the population would be unconscious. (Declaration of Mark Dershwitz, M.D., Ph.D., ¶10)

There is an exceedingly small risk that a condemned inmate to whom the lethal injection protocol in Arkansas is properly administered would experience any pain or suffering associated with the administration of lethal doses of pancuronium bromide and potassium chloride. (Declaration of Mark Dershwitz, M.D., Ph.D., ¶16) The application of the protocol for the administration of lethal injection results in the condemned inmate undergoing a rapid, painless, and humane death, and furthermore the inmate will not experience any unnecessary pain or suffering. (Declaration of Mark Dershwitz, M.D., Ph.D., ¶17) As a result, Arkansas' lethal injection protocol does not present a substantial foreseeable risk of the wanton infliction of pain and the Defendants are entitled to judgment as a matter of law.

III.
STANDARD OF REVIEW

Summary judgment is to be "rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to demonstrate the absence of a genuine issue of material fact requiring the trier of fact to resolve the dispute in favor of one party or the other. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). An issue of fact is material only if the fact could affect the outcome of the case under governing law. *Anderson*, 477 U.S. at 248. The non-moving party must establish

that there is a genuine issue of material fact in order to survive a motion for summary judgment. *Celotex*, 477 U.S. at 322; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). To establish the existence of a genuine issue, the non-moving party must produce "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 587. The mere existence of some disputed factual issues will not defeat a summary judgment motion where the disputed issues are not genuine issues of material fact. *Anderson*, 477 U.S. at 247-48. A disputed issue is genuine if the evidence could lead a reasonable jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248.

IV.
ARKANSAS' LETHAL INJECTION PROTOCOL DOES NOT PRESENT A SUBSTANTIAL FORESEEABLE RISK OF THE WANTON INFLICTION OF PAIN AND IS CONSTITUTIONAL IN ALL RESPECTS.

Arkansas has broad discretion to determine the procedures for conducting an execution. *See Taylor*, 487 F.3d at 1084 (quoting *McKenzie v. Day*, 57 F.3d 1461, 1469 (9th Cir.), *cert. denied*, 514 U.S. 1104 (1995). By statute, Arkansas has authorized Defendant Larry Norris to exercise this wide discretion. Ark. Code Ann. § 5-4-617(a)(2). On July 16, 2007, Mr. Norris exercised it and adopted the lethal injection protocol that is currently in place in this State. "The whole point of [Arkansas'] protocol is to avoid the needless infliction of pain, not to cause it." *Taylor*, 487 F3d at 1085 (quoting *Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007).

In *Taylor v. Crawford*, a condemned Missouri inmate alleged that that State's lethal injection protocol created a significant risk that he would experience the wanton infliction of pain because if the first chemical, thiopental, did not sufficiently anesthetize him, he would feel pain caused by the third chemical, potassium chloride, but would not

be able to indicate that he was experiencing pain because of the paralyzing effects of the second chemical, pancuronium bromide. *Id*., 487 F.3d 1072, 1074 (8th Cir. 2007). The Plaintiffs make virtually identical claims in this lawsuit.

After an evidentiary hearing, the district court ruled that Missouri's protocol, which at that time had not been reduced to writing, was unconstitutional. *Id*. at 1078. Pursuant to an order from that court, Missouri submitted a written protocol that is very much like the one that is in effect in Arkansas today. The court ruled that that protocol was unconstitutional because, among other things, it did not require a physician with training in anesthesia to mix the chemicals and did not require the monitoring of anesthetic depth. *Id*. at 1078. Missouri sought reconsideration, which was denied, and appealed. *Id*.

On June 4, 2007, the United States Court of Appeals for the Eighth Circuit reversed and held that Missouri's written lethal injection protocol did not violate the Eighth Amendment. *Id*. at 1085. The court explained that a State's lethal injection procedure does not violate that Amendment's prohibition against cruel and unusual punishment unless it involves "a substantial foreseeable risk of the wanton infliction of pain." *Id*. at 1082. The risk of an accident is not a factor in that determination. *Id*., 487 F.3d at 1080. Indeed, the court left no doubt that the "risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review." *Id*. (citation and internal quotation marks omitted). The Eighth Circuit further emphasized that the courts must focus on the procedure as written and ask whether it inherently involves a substantial risk of the wanton infliction of pain. *Id*. "The Constitution does not require the use of execution procedures that may be medically

optimal in clinical contexts." *Id*. at 1085 (*citing Hamilton v. Jones*, 472 F.3d 814, 816 (10th Cir.), *cert. denied*, 127 S.Ct. 1054 (Jan. 8, 2007)). What could be done to update or improve the protocol is not the appropriate inquiry. *Id*. (*citing Abdur' Rahman v. Bredesen*, 181 S.W.3d 292, 309 (Tenn. 2005), *cert. denied*, 126 S. Ct. 2288 (2006). "Where the 'procedures are reasonably calculated to ensure a swift, painless death,' they are 'immune from constitutional attack.'" *Id*. (quoting *McKenzie v. Day*, 57 F.3d 1461, 1469 (9th Cir.), *cert. denied*, 514 U.S. 1104 (1995).

The Plaintiffs' allegations that Arkansas' lethal injection protocol creates an unnecessary risk that they will experience the wanton infliction of pain are unfounded for several reasons. First, the protocol requires the individuals who establish the IV lines to be "healthcare providers who are qualified by training or credentials such as an emergency medical technician, nurse, or physician to initiate IV lines." (Declaration of Larry Norris, Ex. A, §II, ¶1) Moreover, the Deputy Director or designee "shall be healthcare trained, educated, and/or experienced in matters related to the establishment and monitoring of IVs[.]" (Declaration of Larry Norris, Ex. A, §I, ¶1) Thus, Arkansas' protocol, like Missouri's, requires that the IV lines be started by qualified individuals.

Second, Arkansas' protocol requires the Deputy Director or designee to "closely monitor the infusion site for evidence of infiltrate, vein collapse, or other challenge to the patency of the infusion site" and to take appropriate action if a problem is suspected. (Declaration of Larry Norris, Ex. A, §III, ¶2.i) As stated in the preceding paragraph, this individual must be "healthcare trained, educated, and/or experienced in matters related to the establishment and monitoring of IVs[.]" (Declaration of Larry Norris, Ex. A, §I, ¶1)

Arkansas' protocol, like Missouri's, requires that the IV lines be monitored by a qualified individual.

Third, like Missouri's protocol, Arkansas' ensures that condemned inmates are unconscious before the pancuronium bromide and potassium chloride are administered. Arkansas' protocol calls for the injection of 3,000 mg of thiopental sodium before the other two chemicals are injected. This dose would render most people unconscious within 60 seconds from the time the injection of thiopental sodium began. By the time all 3,000 mg of thiopental sodium solution are injected more than 99.9999999% of the population would be unconscious. Even though a condemned inmate who is administered a 3,000 mg dose of thiopental sodium will be rendered unconscious, and not experience pain or suffering, for the time period necessary to complete the execution, the protocol contains the additional safeguard of requiring the Deputy Director or designee to assess and monitor the inmate's lack of consciousness after administration of Syringe #3. The protocol requires that this person be healthcare trained, educated, and/or experienced in assessing the presence or absence of consciousness. The pancuronium bromide and potassium chloride will be injected only if the Deputy Director of designee determines that the condemned inmate is unconscious, and at least three minutes have elapsed from the beginning of the administration of Syringe #1.

If the Deputy Director or designee determines that the inmate is still conscious after the first three syringes have been administered, then the protocol requires that a back-up dose of sodium pentothal and an additional saline flush be administered. The remaining chemicals may not be injected until after the Deputy Director or designee determines that the condemned inmate is unconscious and at least three minutes have

elapsed from the start of the administration of the back-up dose of sodium pentothal. Consequently, the risk that a condemned inmate to whom Arkansas' lethal injection protocol is properly administered would experience any pain or suffering associated with the administration of lethal doses of pancuronium bromide and potassium chloride is exceedingly small. The application of the protocol for the administration of lethal injection results in the condemned inmate undergoing a rapid, painless, and humane death, and furthermore the inmate will not experience any unnecessary pain or suffering.

As written, Arkansas' lethal injection protocol is substantively similar in all material respects to the Missouri protocol that the Eighth Circuit upheld in *Taylor v. Crawford*, 487 F. 3d at 1080 (explaining that if a lethal injection "protocol as written involves no inherent substantial risk of the wanton infliction of pain, any risk that the procedure will not work as designated in the protocol is merely a risk of accident, which is insignificant in our constitutional analysis.") Both protocols call for injection of the same three chemicals in the same sequence. *See id*. at 1074. Both protocols require qualified personnel to start, maintain, and monitor the IV lines. *See id*. at 1083. Both protocols require qualified personnel to determine that the condemned inmate is unconscious before injection of the pancuronium bromide and potassium chloride. *See id*. at 1084. Both protocols demand that three minutes elapse from the beginning of the sodium pentothal's administration before the pancuronium bromide is administered, and both protocols provide for back-up doses of sodium pentothal. *See id*. at 1084. Like Missouri's protocol, Arkansas' protocol does not present a substantial foreseeable risk of the wanton infliction of pain. In fact, Arkansas' protocol, like Missouri's, ensures that condemned inmates undergo rapid, painless, and humane deaths without experiencing

any unnecessary pain or suffering. Arkansas' lethal injection protocol completely satisfies the Constitution, so the Court should grant summary judgment in favor of the Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, C. Joseph Cordi, Jr., certify that on July 17, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to:

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I further certify that on July 17, 2007, I mailed a copy of the foregoing by the United States Postal Service, postage prepaid, to the following:

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