IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT JACKSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C. A. No. 06-300-SLR
	)	
CARL DANBERG, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

Elizabeth R. McFarlan, ID No. 3759
Marc P. Niedzielski, ID No. 2616
Gregory E. Smith, ID No. 3869
Deputy Attorneys General
820 North French Street, 7th Floor
Wilmington, Delaware 19801
(302) 577-8500

DATED: December 19, 2008

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Page

Statutes and Rules

NATURE AND STAGE OF THE PROCEEDINGS

On May 8, 2006, Robert Jackson filed a complaint under 42 U.S.C. § 1983, seeking declaratory and injunctive relief against various Delaware Department of Correction officials responsible for carrying out court-ordered executions. (D.I. 2). Jackson simultaneously moved for a preliminary injunction to stay his pending execution. (D.I. 6). On May 9, 2006, the Court entered an order granting Jackson's motion for preliminary injunction. (D.I. 9). On September 8, 2006, the Defendants filed an answer to the complaint. (D.I. 14). On October 6, 2006, the Court entered a Rule 16 scheduling order that, among other things, set December 1, 2006 as the cut-off date for joinder of parties and amendment of the complaint. (D.I. 20). The Court scheduled trial for the week of September 4, 2007. (D.I. 23).

On December 1, 2006, Jackson filed a motion for class certification to include as plaintiffs every Delaware inmate under a sentence of death. (D.I. 26). On February 23, 2007, the Court granted Jackson's motion for class certification. (D.I. 33). On June 8, 2007, the Court entered an amended scheduling order, extending discovery through October 1, 2007, and re-scheduling trial to commence on October 9, 2007. (D.I. 43). On August 15, 2007, Plaintiffs filed a motion for leave to amend the complaint and a memorandum of law in support of his motion. In that motion, Plaintiffs sought to add claims under the state Administrative Procedures Act, 29 *Del. C.* ch. 101. (D.I. 55, 56). On August 26, 2007, Plaintiffs withdrew their motion to amend the complaint. (D.I. 60).

On September 25, 2007, this Court entered an order postponing the

previously scheduled trial in light of the United States Supreme Court's grant of *certiorari* in *Baze v. Rees*. (D.I. 80). The United States Supreme Court decided *Baze v. Rees*, 128 S.Ct. 1520 (2008) on April 16, 2008. Following a May 14, 2008 status conference, the Court ordered the parties to make various submissions before a pretrial conference set for June 23, 2008. (D.I. 85, 87). At the pretrial conference, an evidentiary hearing was scheduled for September 10. (D.I. 95).

On August 29, 2008, Defendants filed a revised lethal injection protocol. (D.I. 108). Thereafter, the September 10 evidentiary hearing was cancelled, and the case was referred to mediation. (D.I. 109). Mediation was conducted with the Magistrate Judge on October 26, 2008 without result. On October 30, the Court ordered Plaintiffs to specifically identify what portions, if any, of Delaware's protocol were substantially different from that approved by the Supreme Court in *Baze*. (D.I. 116). Following submissions by Plaintiffs and Defendants, the Court set a schedule for the filing of dispositive motions and briefing. (D.I. 120).

This is Defendants' opening brief in support of their concurrently filed motion for summary judgment.

SUMMARY OF THE ARGUMENT

Defendants are entitled to judgment in their favor as a matter of law. The decision of the United States Supreme Court in *Baze v. Rees* establishes that the Delaware lethal injection protocol is constitutional under the Eighth Amendment because it is essentially the same as the Kentucky protocol in that it contains sufficient safeguards to reasonably ensure a humane execution of Plaintiff class representative Robert Jackson.

STATEMENT OF FACTS[1]

During the afternoon of April 3, 1992, Robert Jackson and Anthony Lachette decided to burglarize a house in order to obtain money to buy marijuana. Lachette suggested they break into the home of Elizabeth Girardi. Lachette was familiar with the residence since he was acquainted with one of Mrs. Girardi's children. No one was home when the two broke into the house through the back door. Jackson wore a pair of gardening gloves he had brought with him. Once inside, the two gathered property that included jewelry, rare coins, compact discs, firecrackers, and a camera. After placing the stolen property in paper bags, Jackson and Lachette left the house the way they entered. As they headed toward the driveway, where Jackson had parked the car, they saw Mrs. Girardi, who had arrived home and was walking towards Jackson's car. Lachette decided to flee despite Jackson's attempt to persuade him to stay. Lachette dropped his bag and ran off, leaving Jackson behind.

After Lachette ran off, Jackson grabbed an ax from a shed and confronted Mrs. Girardi in the driveway. A struggle ensued, during which Mrs. Girardi fell to the ground, whereupon Jackson struck her several times in the face with the ax. Jackson then loaded his car with the stolen property. Before leaving, Jackson noticed that Mrs. Girardi was still alive. He struck her several more times in the

[1] The first two paragraphs of facts are drawn directly from the Delaware Supreme Court's opinion in Plaintiff class-representative Robert Jackson's direct appeal of his convictions. *Jackson v. State*, 643 A.2d 1360, 1363 (Del. 1994).

face with the ax, killing her, and then fled the scene. Shortly thereafter, Jackson found Lachette walking along the road and picked him up. Jackson told Lachette that he had killed Mrs. Girardi. Lachette noticed blood on Jackson's gloves and pant legs. Over the course of the next week, Jackson watched television news reports and spoke with Lachette and James Burton, his roommate and longtime friend, about the Girardi murder. During that time, Jackson told Burton that he had killed Mrs. Girardi.

Jackson was convicted of first degree murder and related offenses, and was sentenced to death on the murder convictions.[2]

---

[2] The other members of the Plaintiff class have been sentenced to death for the following murder convictions: Luis G. Cabrera, *Cabrera v. State*, 840 A.2d 1256, 1260-61 (Del. 2004) (the beatings and murders of Brandon Saunders and Vaughn Rowe); James E. Cooke, *State v. Cooke*, 2007 WL 2129018, *4 (Del. Super. Ct.) (the burglary, robbery, rape, arson, and murder by strangulation of Lindsey Bonistall); Robert A. Gattis, *Gattis v. State*, 637 A.2d 808, 811 (Del. 1994) (the murder and burglary of former girlfriend Shirley Slay); Shannon Johnson, *State v. Johnson*, 2008 WL 4140596 (Del. Super. Ct.) (the murder of Cameron Hamlin, the boyfriend of the mother of Johnson's child; she was also shot by Johnson, but survived); Michael R. Manley, *Manley v. State*, 709 A.2d 643, 648 (Del. 1998) (the murder of witness Kristopher Heath); Adam W. Norcross, *Norcross v. State*, 816 A.2d 757, 761 (Del. 2003) (the home invasion, robbery, and murder of Kenneth Warren in front of his wife and child); Allison L. Norman (the murder of Jamell Watson, and attempted murders of several other people in a shooting spree); Juan J. Ortiz, *Ortiz v. State*, 869 A.2d 285, 289 (Del. 2005) (the murder, decapitation and arson of former girlfriend Deborah Clay); Gary W. Ploof, *Ploof v. State*, 856 A.2d 539, 541 (Del. 2004) (the murder for insurance of his wife Heidi Ploof); Luis E. Reyes, *Reyes v. State*, 819 A.2d 305, 308 (Del. 2003) (the beatings and murders of Brandon Saunders and Vaughn Rowe); Steven W. Shelton, *Outten v. State*, 650 A.2d 1291, 1293 (Del. 1994) (the robbery and murder of Wilson Mannon); Chauncey S. Starling, *Starling v. State*, 882 A.2d 747, 751 (Del. 2004) (the murders of Darnell Evans and five-year-old Damon Gist, Jr. in a barbershop); David D. Stevenson, *Stevenson v. State*, 709 A.2d 619, 624 (Del. 1998) (the murder of witness Kristopher Heath); Ralph E. Swan, *Swan v. State*, 820 A.2d

Since Delaware first carried out an execution by lethal injection in 1992, it has employed a three-drug procedure involving sodium pentathol (also known as thiopental), pancuronium bromide (also known as pavulon), and potassium chloride. This three-drug combination has been used in the executions by lethal injection of 13 condemned prisoners.

On August 29, 2008, the Delaware Department of Correction issued a revised policy, procedure, and protocol (involving the same three drugs) to be used to perform the court-ordered executions by lethal injection of Jackson and all other Delaware inmates sentenced to death. The written protocol requires that the execution begin with the injection of 3 grams of sodium pentathol (2.5% concentration). (D.I. 113, JTVCC Procedure 2.7, Attachment #1 at 4). Sodium pentathol is an anesthetic that renders the condemned unconscious. *Baze*, 128 S.Ct. at 1527. Following the administration of 3 grams of sodium pentathol, the IV line is flushed with 50 mL of saline solution. (D.I. 113 at 4). The protocol then requires that the IV team wait a period of 2 minutes and for a signal from the Warden before administering the next chemical. (D.I. 113 at 7). During that two-

---

342, 347 (Del. 2003) (the home invasion, robbery, and murder of Kenneth Warren in front of his wife and child); Ambrose L. Sykes, *Sykes v. State*, 953 A.2d 261, 264-65 (Del. 2008) (the rape and murder by strangulation of sixty-eight year old Virginia Trimnell); Milton E. Taylor, *Taylor v. State*, 822 A.2d 1052, 1054 (Del. 2003) (the murder by beating, cutting, and strangulation of his pregnant girlfriend Theresa Williams); Jermaine M. Wright, *Wright v. State*, 633 A.2d 329, 331 (Del. 1993) (the murder of store clerk Philip Seifert during the course of a robbery of the Hi-Way Inn liquor store/bar); Craig A. Zebroski, *Zebroski v. State*, 715 A.2d 75, 77 (Del. 1998) (the murder of store clerk Joseph Hammond during the course of a robbery of a Conoco gas station).

minute period, a consciousness check is performed. *Id.* After the passage of two minutes and the Warden's signal, the IV team next administers 50 mg of pancuronium bromide. (D.I. 113 at 4). Pancuronium bromide is a muscle relaxant. Finally, the IV team administers 240 mEq of potassium chloride. (D.I. 113 at 4). Potassium chloride produces heart failure. *Baze*, 128 S.Ct. at 1527.

Delaware's written execution protocol provides that the IV team, who prepare the syringes, establish the IV lines, and administer the injection, will be composed of at least two persons who are EMTs, paramedics, certified medical assistants, phlebotomists, or military corpsmen. (D.I. 113 at 1). The execution team, which includes the members of the IV team, is required to conduct at least three simulations of the execution day within ninety days of a scheduled execution. *Id.* The simulation is to include training on all activities from removal of the condemned from the holding cell through the pronouncement of death, including insertion of IV lines. *Id.* The protocol also requires that the Warden maintain records of participation in the training exercises. *Id.* Delaware's written protocol also requires documentation of the procurement, storage, accountability, and transfer of chemicals used to carry out an execution by lethal injection. (D.I. 113 at 2-3). Delaware's written protocol also requires that the IV team prepare two complete sets of syringes; the primary set is color-coded red, and the backup set is color-coded blue. (D.I. 113 at 3-4). Each syringe is individually labeled with the name of its contents and numbered. (D.I. 113 at 3). One member of the IV team completes the preparation and labeling of syringes while the other

observes and verifies. (D.I. 113 at 3-4). A third person, who is designated the Lethal Injection Recorder, documents the chemical preparation on a Chemical Preparation Time Sheet. (D.I. 113 at 4). The IV lines themselves are appropriately labeled left and right. (D.I. 113 at 5).

Once the condemned has been strapped to the gurney in the execution chamber, one member of the IV team places the catheters. (D.I. 113 at 5). Before placing any catheter, the IV team members review a previously prepared memo regarding the condemned's venous access. *Id.* The IV team member in the execution chamber first verifies that the straps that restrain the condemned to the gurney do not restrict blood flow. *Id.* That IV team member selects a site to place the catheter. *Id.* The protocol prohibits the use of a cut-down to attain venous access. *Id.*

Once the IV team member selects a site and places a catheter, that IV team member attaches the catheter to the right saline solution set. (D.I. 113 at 6). The other IV team member, who has remained in the injection room, then opens the clamp to permit the flow of saline solution. *Id.* Once the IV team is confident that the IV line is well-functioning, the IV team member in the injection room signals that there is a successful line. *Id.* At that time, the IV team member in the execution chamber places a transparent dressing over the catheter and secures the line in place with tape. *Id.* Only after the right IV line has been established is the process repeated for the left IV line. *Id.* The members of the IV team continuously monitor the catheter sites and IV lines through a one-way glass

window and by means of a pan-tilt-zoom camera. *Id.* Plaintiffs' expert had an opportunity to use the camera on a tour of the execution chamber and injection room, and acknowledged that the camera was simple to use, that he could view all portions of a person placed on the gurney, and that its spatial resolution was "very, very impressive." (Deposition of Mark J.S. Heath, M.D., at App-20-21).

The execution does not commence until the Warden so signals. (D.I. 113 at 7). One member of the IV team pushes the syringes in the required order while the other observes and verifies. (D.I. 113 at 8). The Lethal Injection Recorder writes down the time that each syringe begins to be pushed. (*See* D.I. 113 at 12). After the syringes of sodium pentathol have been administered, and after the first saline flush has been administered, the IV team waits 2 minutes before administering the pancuronium bromide. (D.I. 113 at 7). If during the use of the primary IV line, the IV team encounters resistance in the administration of the chemicals, they begin the process over with the backup IV line, starting over with the initial syringe of sodium pentathol using the blue-coded syringe set. (D.I. 113 at 8). The Warden remains in the execution chamber with the condemned until the execution is complete.

Plaintiffs have alleged that the method of execution by lethal injection violates the Eighth and Fourteenth Amendments to the United States Constitution; that the State Defendants have failed to establish a protocol setting forth dosage and administration of chemicals; that the use of pancuronium bromide serves no legitimate purpose; and that the State Defendants fail to use credentialed and

trained personnel in proximity to the condemned during an execution. (D.I. 2 at ¶¶ 52-55).

It is undisputed that 3 grams of sodium pentathol will result in unconsciousness within 60 seconds, and that once unconscious, the condemned would not be able to feel the effects of the pancuronium bromide or potassium chloride. (Deposition of Steven M. Katz, M.D., at App-18-19; Deposition of Mark J.S. Heath, M.D., at App-22, 23; Deposition of Mark Dershwitz, M.D., at App-24).

ARGUMENT

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' § 1983 CLAIM BECAUSE THE DECISION OF THE SUPREME COURT IN *BAZE V. REES* ESTABLISHES THAT DELAWARE'S LETHAL INJECTION PROTOCOL IS CONSTITUTIONAL AS A MATTER OF LAW.

Introduction

Plaintiffs have filed a complaint pursuant to 42 U.S.C. § 1983, alleging that Delaware's method of execution by lethal injection violates the Eighth and Fourteenth Amendments to the United States Constitution by causing "unnecessary levels of pain and suffering." (D.I. 2 at ¶1). Plaintiffs allege that the Defendants have failed to establish a protocol setting forth dosage and administration of chemicals; that the use of pancuronium bromide serves no legitimate purpose; and that Defendants fail to use credentialed and trained personnel in proximity to the condemned during an execution. (D.I. 2 at ¶¶ 52-55). Plaintiffs assert that the method and manner of execution in Delaware creates "a grave and substantial risk" that the condemned "will experience a constitutionally actionable level of excruciating pain and an unnecessarily protracted death" while "unable to communicate his pain and suffering." (D.I. 2 at ¶10). Specifically, Plaintiffs object to the use of pancuronium bromide (one of the three chemicals used in Delaware's lethal injection procedure) as unnecessary and responsible for an increased risk of suffering. (D.I. 2 at ¶¶12-13). Further, Plaintiffs allege that the personnel responsible for the administration of the chemicals lack "the proper and necessary training, experience, or expertise to

prepare and administer those chemicals." (D.I. 2 at ¶31). Based on these allegations, Plaintiffs seek injunctive relief enjoining the execution of any member of the Plaintiff class "until the DOC's lethal injection protocol is brought into conformity with constitutional standards." (D.I. 2 at 24, ¶B). If not enjoined in its entirety, Plaintiffs seek to prevent the use of pancuronium bromide and to prevent the conduct of the lethal injection procedure by personnel who they allege lack sufficient training, credentials, certification experience, or proficiency. (D.I. 2 at 26, ¶¶C-D).

However, for the reasons that follow, Defendants are entitled to summary judgment under Rule 56(c): the record is devoid of any genuine dispute of material fact that the Delaware lethal injection protocol is constitutional in that it is not substantively different from the Kentucky protocol approved in *Baze* and contains additional safeguards to ensure that the Plaintiff class is humanely executed.

Standard of Review

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A genuine issue of material fact is one that "may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 259 (1986). The moving party bears the initial burden of demonstrating the absence of material issues of fact. *Celotex Corp.*, 477 U.S. at 323. However, the moving party need not support its motion with affidavits or other documents disproving the nonmoving party's claim, but need only "show - - that is point out to the district court - - that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. The nonmoving party must go beyond the pleadings and, through affidavits or other evidence, demonstrate the existence of a genuine issue of material fact. *Id.* at 314. The district court is required to construe the evidentiary record so as to give the nonmoving party reasonable factual inferences. *Hampton v. Borough of Tinton Falls Police Dept.*, 98 F.3d 107, 112 (3d Cir. 1996). Summary judgment should be granted if the court finds, after consideration of all the evidence, that no reasonable trier of fact could find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Merits of the Argument

The Eighth Amendment to the United States Constitution provides that no "cruel and unusual punishments" shall be inflicted. Capital punishment, however, is constitutional. *Baze v. Rees*, 128 U.S. 1520, 1529 (2008) (plurality) (citing *Gregg v. Georgia*, 428 U.S. 153,177 (1976)). "Punishments are cruel when they

involve torture or a lingering death . . . . It implies there something inhuman and barbarous, something more than the mere extinguishment of life." *In re Kemmler*, 136 U.S. 436, 447 (1890). But before a risk of harm can qualify as cruel and unusual punishment, "the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Baze*, 128 S.Ct. at 1530-31 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993) (emphasis added in *Baze*)). To prevail on a claim that the risk of harm violates the Eighth Amendment, a plaintiff must demonstrate a "substantial" and "objectively intolerable risk" of harm. *Baze*, 128 S.Ct. at 1531 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 (1994) (internal quotations omitted)). Indeed, the condemned prisoner must demonstrate that the procedure at issue is "cruelly inhumane." *Baze*, 128 S.Ct. at 1533 (quoting *Gregg*, 428 U.S. at 175 (internal quotations omitted)). Here, Plaintiffs cannot meet this standard.

(a) There is no genuine issue as to any material fact.

Plaintiffs do not suggest that Delaware's lethal injection protocol, if successful in the administration of 3 grams of sodium pentathol to the condemned, is unto itself cruel and unusual. It is undisputed that the administration of 3 grams of sodium pentathol would render a person unconscious within one minute and unable to feel the effects of any later administered chemicals thereby foreclosing any suggestion that the procedure is inhumane. (*See* Deposition of Steven M. Katz, M.D., at App-18-19; Deposition of Mark J.S. Heath, M.D., at App-22, 23; Deposition of Mark Dershwitz, M.D., at App-24). The Court, in *Baze*, noted that

"[t]he proper administration of the first drug [sodium pentathol] ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs." 128 S.Ct. at 1527. Thus, Plaintiffs' complaint is that the risk of maladministration of the sodium pentathol is substantial and objectively intolerable. That is, Jackson must demonstrate that the risk that the condemned would not receive sufficient sedation is "sure or very likely." Not only is there no evidence to support this contention, but the Supreme Court in *Baze* held that Kentucky's three-drug protocol (a protocol substantively identical to Delaware's protocol) did not create "a demonstrated risk of severe pain." 128 S.Ct. at 1537. Specifically, the Supreme Court found that the petitioners in *Baze* did not show "that the risk of an inadequate dose of the first drug is substantial." 128 S.Ct. at 1533.

In reaching the conclusion that Kentucky's lethal injection protocol is constitutionally sound, the Supreme Court looked to the specific provisions of the written protocol for evidence that the procedure would not create a substantial or imminent risk of severe pain. The Supreme Court particularly noted the simplicity of the preparation of the sodium pentathol was such that even a layperson could perform the task. 128 S.Ct. at 1533. Kentucky's written protocol requires those persons administering the chemicals to have at least one year of professional experience as a phlebotomist, paramedic or similar position, and those persons must participate in multiple training sessions every year. 128 S.Ct. at 1533-34. Those qualified persons are responsible for the placement of the IV catheters, the

establishment of two lines, and the preparation of two sets of the lethal injection chemicals. 128 S.Ct. at 1534. The Supreme Court found the presence of the warden and deputy warden in the execution chamber with the condemned allowed them to watch for signs of IV problems and the consciousness of the condemned. *Id.* The Court concluded that in light of the above referenced safeguards, "we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation." *Id.* And the Supreme Court explained, "A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard." 128 S.Ct. at 1538.

Delaware's lethal injection protocol is substantively identical to Kentucky's validated protocol. (*See* D.I. 117, *Plaintiffs' Response to the Court's October 30, 2008 Order*, at 1 ("Plaintiffs have not identified any substantive differences between the two protocols *as written.*") (emphasis in original)). In fact, the Delaware protocol provides even more safeguards than the Kentucky protocol. Delaware uses the same three-drug protocol, including the same amount of the fast-acting barbiturate (3 grams of sodium pentathol). (D.I. 113 at 4). The Delaware protocol, unlike Kentucky's, provides that the mixing of all chemicals be performed by qualified, licensed and trained personnel. (D.I. 113 at 1, 3). Delaware's lethal injection protocol similarly requires qualified personnel[3] for the

[3] Delaware's protocol, precisely like Kentucky's, requires that the members of the IV team be Certified Medical Assistants, Phlebotomists, Emergency Medical

insertion of the IV catheters and, unlike the Kentucky protocol, also requires qualified personnel for the actual administration of the chemicals. (D.I. 113 at 7). The personnel must participate in several on-site training exercises prior to a scheduled execution. (D.I. 113 at 1). Like Kentucky, Delaware requires that two sets of lines and chemicals in syringes be prepared for use at any execution. (D.I. 113 at 3). Not only are two sets of syringes prepared, the sets are color-coded and labeled to avoid any potential confusion. (D.I. 113 at 3-4). And, like Kentucky, the warden remains in the execution chamber throughout the execution proceedings, standing in close proximity to the condemned. (*See* D.I. 113 at 7). In Kentucky, the warden checks for consciousness after one minute, while in Delaware a full two-minute waiting period is provided after the administration of the sodium pentathol to ensure that the barbiturate has had more than ample time to act. *Id.* After the two-minute waiting period, a consciousness check is performed – the warden calling the inmate's name and an IV team member using tactile stimulation to assess consciousness. *Id; see Baze*, 128 S.Ct. at 1571 (Ginsburg, J., dissenting) (describing similar consciousness checks with approval as providing "a degree of assurance – missing from Kentucky's protocol – that the first drug has been properly administered."). In addition, Delaware has installed a pan-tilt-zoom camera to allow members of the IV team to monitor the catheters, IV lines and the facial movements of the condemned before and during the execution. (D.I. 113 at 6). Thus, Delaware's written lethal injection protocol is

---

Technicians, Paramedics, or Military Corpsmen. (D.I. 113 at 1).

substantively similar to, and actually provides more safeguards than, the Kentucky protocol determined to be acceptable by the United States Supreme Court in *Baze*. And as a result, Delaware's protocol is constitutional.[4]

(b) Delaware need not alter its humane method of execution

Just as in *Baze*, Plaintiffs here suggest several changes to the lethal

[4] Plaintiffs contend that Delaware's protocol remains unconstitutional because certain items are not included in the protocol (just as in Kentucky), and because Delaware allegedly has a history of "recorded problems." (D.I. 117 at 6). Plaintiffs cannot point to any execution in Delaware where the condemned experienced "serious illness and needless suffering." *Baze*, 128 S.Ct. at 1531 (internal quotations omitted). Notably, the *Baze* court approved Kentucky's protocol newly revised to increase the dosage from 2 to 3 grams of sodium thiopental, although no executions had actually taken place using the revised protocol. *See id.* at 1528 (Kentucky protocol was revised in 2004, while only execution by lethal injection had occurred in 1999). Moreover, as the court noted in *Raby v. Johnson*, 2008 WL 4763677, *4 (S.D. Tex.):

> Raby requests additional discovery that he hopes will uncover specific instances in which an execution encountered complications, or in which the written protocol was not followed. Assuming that Raby could develop such facts through additional discovery, they would be insufficient to avoid summary judgment. . . . [T]here is no basis to dispute that the Texas execution protocol is substantially similar to the Kentucky protocol upheld in *Baze*. Therefore, under the safe harbor established by *Baze*, Raby cannot demonstrate that the Texas procedure violates the Eight Amendment.

In *Clemons v. Crawford*, 2008 WL 2783233, *2 (W.D. Mo.), the plaintiffs also argued that Missouri had historically failed to adequately train personnel. The court noted that "the law does not allow the plaintiffs to select *the* most qualified medical personnel to serve on an execution team" or "allow plaintiffs input into who will be performing the executions." *Id.* And in Arkansas, the Department of Correction twice amended the lethal injection protocol since four allegedly "botched" executions took place under the original protocol. *See Nooner v. Norris*, 2008 WL 3211290, *3, *12 (E.D.Ark.). The district court nevertheless found that the newly added consciousness check and delay after the administration of the sodium thiopental, among other aspects of the current protocol, were sufficient to render the new protocol constitutional. *Id.* at *12-*15.

injection protocol that they contend would reduce the risk of causing a condemned prisoner unnecessary pain and suffering. "[A] condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." *Baze*, 128 S.Ct. at 1531. The *Baze* Court rejected most of the proposed alterations to the protocol, noting:

> The risks of maladministration they have suggested – such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel – cannot remotely be characterized as "objectively intolerable." Kentucky's decision to adhere to its protocol despite those asserted risks, while adopting safeguards to protect against them, cannot be viewed as probative of the wanton infliction of pain under the Eighth Amendment.

128 S.Ct. at 1537-38.

Here, Plaintiffs have suggested several features they believe would limit the risk of pain to the condemned. As all the experts in this case agreed, however, an average-sized person would be rendered unconscious from 3 grams of sodium pentathol within 60 seconds. (Deposition of Steven M. Katz, M.D., at App-18-19; Deposition of Mark J.S. Heath, M.D., at App-22, 23; Deposition of Mark Dershwitz, M.D., at App-24). Furthermore, the inmate would remain unconscious for approximately 280 minutes. (App-24). Following the administration of 3 grams of sodium pentathol, the probability of consciousness is approximately .000003 %. (App-24). Because the risk of maladministration of the sodium pentathol is so remote given the safeguards provided in the protocol, any alterations to procedures occurring subsequent to the administration of the sodium pentathol would have limited value in reducing the overall risk. *Baze*, 128 S.Ct. at

1535 n.5. Plaintiffs have not proposed any alternative method of execution that would significantly reduce an unnecessary risk that the condemned prisoner would suffer.

To the contrary, Plaintiffs have expressly stated that "[e]thical considerations prevent class counsel from suggesting acceptable, i.e. constitutional methods for executing their clients." (*Plaintiffs' Response to Defendants' 1st Set of Interrogatories*, App-16). Plaintiffs nonetheless, in response to a written interrogatory, stated that

> The [Delaware] execution process may be made to comport with the Eighth Amendment by coming into compliance with the American Veterinary Medical Association ("AVMA") standards for euthanasia of animals. Similarly, the execution process may be made to comport with the Eighth Amendment if a properly trained, licensed, and experienced anesthesiologist induces and monitors anesthesia and supervises the execution.

(App-17). The Supreme Court clearly rejected the attempts to engraft animal euthanasia standards to the execution of humans. *Baze*, 128 S.Ct. at 1536 ("veterinary practice for animals is not an appropriate guide to humane practices for humans"). The Supreme Court also described the asserted need for the participation of an anesthesiologist as "nothing more than an argument against the entire procedure." *Id.* at 1536. Thus, the Supreme Court in upholding as constitutional Kentucky's lethal injection protocol has already rejected the two alternatives offered by Plaintiffs in the present litigation.

(c) Post-*Baze*

Since the United States Supreme Court decision in *Baze v. Rees* was issued

in April 2008, several courts have considered various protocols in light of that decision. Several states have proceeded with executions. Through December 15, 2008, nine states have carried out 36 executions by lethal injection. Those nine states are: Georgia, Mississippi, Virginia, South Carolina, Texas, Oklahoma, Florida, Ohio, and Kentucky. No lethal injection protocol has been found to be unconstitutional under the *Baze* standard. To the contrary, courts have found summary judgment to be appropriate in states where the lethal injection protocol is substantially similar to the Kentucky protocol. *See, e.g., Emmett v. Johnson*, 532 F.3d 291 (4th Cir. 2008) (finding the Virginia lethal injection protocol to be substantially similar to the Kentucky protocol and affirming district court's grant of summary judgment); *Raby v. Johnson*, 2008 WL 4763677, *3 (S.D.Tex.) (holding that the Texas execution procedure lies within the "safe harbor created by *Baze*" and granting summary judgment); *Nooner v. Norris*, 2008 WL 3211290 (E.D.Ark.) (finding Arkansas' lethal injection protocol substantially similar to the protocols approved in *Baze* and granting summary judgment); *Clemons v. Crawford*, 2008 WL 2783233, *2 (W.D.Mo.) (finding revised Missouri protocol "constitutional on its face as judged by the standards established by the Supreme Court" and granting summary judgment). *See also In re Belisle*, __So.2d __ , 2008 WL 4447593 (Ala. 2008) (finding "Alabama's use of lethal injection as a method of execution does not violate the Eighth Amendment to the United States Constitution."); *Henyard v. State*, 992 So.2d 120, 130 (Fla. 2008) (finding that the Florida protocols "do not violate any of the possible standards"). Delaware's lethal

injection protocol meets even the most stringent standard discussed in *Baze*, and consequently, summary judgment is appropriate.

(d) Conclusion

In sum, Delaware's written lethal injection protocol sets in place numerous safeguards that ensure the successful delivery of 3 grams of sodium pentathol, and in so doing, ensures that the condemned is unconscious before the pancuronium bromide and potassium chloride are administered. Plaintiffs' expert, Dr. Mark Heath, agreed that "if the thiopental is delivered into the circulation in a 3-gram dose and delivered throughout the circulation and it exerts the effects of 3-grams of thiopental on the brain, it will necessarily be humane." (App-23). Thus, there is no material dispute of fact, and summary judgment is appropriate for Defendants.

CONCLUSION

For the above reasons, Defendants are entitled to judgment in their favor and against the Plaintiff class.

Respectfully submitted,

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Elizabeth R. McFarlan

Elizabeth R. McFarlan, ID No. 3759
Gregory E. Smith, ID No. 3869
Marc P. Niedzielski, ID No. 2616
Deputy Attorneys General
820 North French Street, 7th Floor
Wilmington, Delaware 19801
(302) 577-8500

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2008, I electronically filed the attached *Defendants' Opening Brief in Support of their Motion for Summary Judgment* with the Clerk of Court using CM/ECF which will send notification of such filing to:

Michael Wiseman, Esq.
Assistant Federal Defender
Suite 545 West – The Curtis Center
Philadelphia, PA 19106

/s/ Elizabeth R. McFarlan
Deputy Attorney General
Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-8500
Del. Bar. ID No. 3759
elizabeth.mcfarlan@state.de.us