IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT W. JACKSON, III,	:	**Civil Action No.**
	:	06-CV-300
Plaintiff,	:	
	:	United States District Judge
-against-	:	Sue L. Robinson
	:	
CARL C. DANBERG, et al.,	:	Electronically Filed
	:	
Defendants.	:	
	:	**CLASS ACTION**

PLAINTIFFS' BRIEF IN OPPOSITION
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Michael Wiseman
Helen A. Marino
Maria K. Pulzetti
Capital Habeas Corpus Unit
Federal Community Defender Office
for the Eastern District of Pennsylvania
Suite 545 West – The Curtis Center
Philadelphia, PA 19106
215-928-0520

Dated: January 16, 2009

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STATEMENT OF THE NATURE AND STAGE OF PROCEEDINGS

On December 19, 2008, Defendants filed a Motion for Summary Judgment (D.I. 121), an Opening Brief in Support of Their Motion for Summary Judgment (D.I. 122) (hereafter, *Defendants' Brief*), and an Appendix (D.I. 123). Plaintiffs, through undersigned counsel, hereby respond.

Because Defendants cannot show there is no genuine issue as to any material fact, this Court should not enter judgment in Defendants' favor.

SUMMARY OF ARGUMENT

Defendants argue lethal injection in Delaware is constitutional under the Eighth Amendment because the protocol is "essentially the same" as the Kentucky protocol examined by the Supreme Court in Baze v. Rees, 128 S.Ct. 1520 (2008). For a number of reasons, Defendants are wrong; any facial similarity between Delaware's protocol and Kentucky's does not entitle Defendants to summary judgment.

1. Substantial similarity between written protocols is not the Baze standard. The concept of substantial similarity is discussed in Baze in the context of the standard for a stay of execution to permit factual development for a plaintiff with an undeveloped factual record. In those narrow circumstances, which do not apply here, Baze held that a district court has discretion to deny a stay if the state's protocol is substantially similar to Kentucky's.

2. Focused as it is on the Delaware and Kentucky written protocols, Defendants' motion ignores entirely the rich factual record developed in the discovery process. The record shows Defendants have never conducted an execution by lethal injection that met the requirements of th then-existing protocol. Deviations, which include *inter alia* failures to train the executioners, failures to administer drugs in called-for dosages, and a failure to administer adequate anesthesia, defeat summary judgment. These failures (a) undercut Defendants' substantial similarity arguments

– after all, if Defendants cannot consistently follow their protocol, it matters little if it is similar, or even identical to, Kentucky's protocol; and (b) prove that, in Delaware, there exists a substantial risk that a prisoner sentenced to death will suffer excruciating pain at his execution, despite similarity between Delaware's written protocol and Kentucky's.

3. Defendants's protocol is incomplete. It fails to set forth the procedures Defendants will follow in the event executioners are not able to establish peripheral venous access. In that case, which Defendants' expert says is to be expected in some number of executions, Defendants are effectively "off-protocol" – without guidelines, and unable to show that they can and will insure that the execution comports with the Eighth Amendment.

4. Defendants blatantly misstate the record when they argue Plaintiffs have not proposed an alternative. After the Supreme Court clarified the standard in Baze, requiring a feasible alternative, Plaintiffs presented one to this Court and proffered expert testimony regarding it.

5. Finally, Defendants' reliance on other courts that have granted summary judgment motions is misplaced. Defendants have failed to cite any case, and to Plaintiffs' knowledge there are none, in which summary judgment was granted when the plaintiffs, through discovery, had been able to uncover a pattern of constant errors

in the state's implementation of its execution protocol. Summary judgment based on a "similar to Kentucky" argument has applied only when plaintiffs have not been able to prove errors and/or failures to follow the written protocol.

STATEMENT OF FACTS

I. Errors in Prior Executions

Each of the thirteen executions by lethal injection in Delaware has failed to comply with the written protocol in effect at the relevant time. Defendants' failures to ensure that prisoners are administered correct dosages of the lethal drugs, and failures to ensure that IV team members have attended the required training sessions and read the relevant portions of the execution protocol, in combination paint an alarming picture of lethal injection in Delaware.

A. Dosage Errors

Discovery shows recorded dosage errors in at least five of the prior thirteen Delaware executions by lethal injection; this is an error rate of thirty-eight percent (38%). In an additional three executions, as well as in one of the executions with a recorded dosage error, execution team members failed to record the dosage of one or more of the drugs. This failure to record happened in four of the thirteen prior executions, or thirty percent (30%). All told, in eight of the prior thirteen Delaware executions, or over sixty-one percent (61%), Defendants cannot prove the correct dosages of the three lethal drugs were administered to the prisoners.

Execution records show that five prisoners in Delaware were given the wrong dose of one of the drugs, potassium chloride. Mr. Red Dog was given 240mEq of

potassium chloride, Discovery, 1152,[1] and Mr. Clark, Mr. Lawrie, Mr. Weeks, and Mr. Steckel were given 200mEq of potassium chloride. Discovery, 1711 (Clark); 1729, 1733 (Lawrie); 1775, 1778 (Weeks); 1849, 1870 (Steckel). At all relevant times, the Delaware protocol called for the administration of 100mEq of potassium chloride. Defendants' expert, Dr. Mark Dershwitz, acknowledged in his trial testimony that these dosages were given in error. Dershwitz deposition 9/24/07, 47-49.[2]

Moreover, in four other executions, it is unknown whether the IV team administered correct dosages, because dosages of one or more of the drugs were not recorded. No dosages at all were recorded for the execution of Mr. Sullivan. Discovery, 1759. In the executions of Mr. Shelton, Mr. Flamer, and Mr. Clark, no dosage of pancuronium bromide was recorded. Discovery, 1622 (Shelton); 1667

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[1]Plaintiffs are not attaching excerpts from depositions or document production because of confidentiality concerns. The relevant deposition transcripts and Bate-stamped document production from Defendants to Plaintiffs were provided to this Court under seal on July 18, 2008. For ease of syntax, the Document Production from Defendants to Plaintiffs is referred to in citations as "Discovery," followed by the Bate-stamp number.

[2]When trial was scheduled in 2007, Dr. Dershwitz was unavailable, and therefore his trial deposition was taken on Sept. 24, 2007. The very next day, the Supreme Court granted certiorari in Baze v. Rees, and this case was stayed on September 26, 2007. D.I. 80. The September 24 deposition was filed with the Court on July 18, 2008, along with other discovery.

(Flamer); 1711 (Clark).

In the most recent execution, that of Mr. Steckel, the first IV line infiltrated.[3] Reportedly, the IV team noticed the infiltration during the injection of the first drug, sodium thiopental. Deposition of John Doe 2, 5/21/2007, 117-118; Deposition of John Doe 3, 5/25/2007, 109. When the team reportedly switched to the second line, they should have administered a second dose of thiopental, because it is doubtful that the full dose of thiopental was delivered through the problematic IV line. Defendants' records indicate Mr. Steckel was not administered a second dose. Discovery, 1849 (Death Investigation Report - Final); 1870 (List of Drugs Administered to Brian Steckel). Thus, as far as records indicate, Mr. Steckel's execution violated the standard articulated in Baze, because he was administered a paralytic drug and then an excruciating heart-stopping drug without a guarantee that he received an adequate does of the anesthetic drug.

Defendants have administered erroneous dosages in five of Delaware's thirteen executions by lethal injection. In more than half of the executions, Defendants cannot prove they administered the requisite dosages of the lethal drugs. Defendants have

[3]When an IV line infiltrates, the catheter comes out of the vein and delivers the drug directly into the tissue instead of the bloodstream. Because the drug is not delivered into the circulation, "that person would not be expected to lose consciousness in a minute or two." Dershwitz deposition, 9/24/07, 41.

administered paralyzing and heart-stopping drugs after the IV line delivering anesthetic failed, without ensuring an adequate dosage of anesthetic.

B. Failures to Follow Protocol

The record shows Defendants routinely fail to follow the "safeguards" in the lethal injection protocol. Time and time again, Defendants have allowed executions to go forward when members of the IV team have not attended any training sessions, and when IV team members have not completed the minimum training required by the then-existing protocols. Defendants have also allowed executions to go forward when members of the IV team have not read the portions of the protocol describing their tasks, again contrary to the written protocol.

Execution team members testified in deposition that they did not attend the required practice sessions prior to performing executions. Defendants' lethal injection protocols since 1992 have stated that execution team members shall attend practice sessions in the period immediately prior to an execution. See, e.g., Discovery, 15 (1992), 144 (1993), 221 (1995), 291 (1999), 368 (2000), 429 (2005), 2469 (8/31/07), 2529 (10/2/07); D.I. 113, 1 (8/29/08 protocol). In 1992, the procedure for preparations within seven days of execution read: "The execution team shall be notified establishing times and dates for at least two (2) practice sessions prior to the execution as determined by the Delaware Correctional Center (DCC)

Warden." Discovery, 15. It was the Warden's responsibility to arrange these practice sessions. This wording remained essentially unchanged until 2007, when the section entitled "Training" was added. This new section requires the execution team to conduct a minimum of three simulations within one month of execution, including "training on all activities from removal of the ISDP [inmate sentenced to the death penalty] from holding cell through pronouncement of death excluding insertion of IV lines and introduction of chemicals or saline." Id., 2529. The 2008 protocol now requires the insertion of two IVs into a volunteer. D.I. 113, 1. The protocol fails to specify whose obligation it is to arrange the simulations.

Execution team members have conducted executions in Delaware without attending any training sessions, or without attending the requisite number of training sessions. John Doe 1, who participated in two executions, and John Doe 3, who has participated in six executions, *have never attended a practice session*. John Doe 1, Deposition 7/6/07, 52-53; John Doe 3, Deposition 5/25/07, 77-78. The only training of John Doe 2, who has participated in eleven executions, was a (single) "dry run through" without starting an IV. John Doe 2, Deposition 5/21/07, 82-83. Jane Doe 1 testified she attended two practice sessions prior to the Pennell execution in 1992, but did not attend any practice sessions prior to the subsequent six executions in which she participated. She also described the practice sessions as "ludicrous" and

"a farce," explaining that they focused on security issues. She said she did not practice mixing drugs, inserting IV catheters, drawing syringes, or injecting drugs. Jane Doe 1, Deposition, 6/5/07, 52-56.

Injection team members also do not consistently check the equipment and materials prior to an execution, although the protocol requires two inventory checks. The protocols in place during all executions by lethal injection required members of the injection team to conduct an equipment check within one week of the execution date, and to re-inventory the supplies on the day of execution upon entering the injection room. The supply check list was to be completed, dated, and initialed by a member of the execution team. Discovery, 30 (March 1992 protocol), 159 (February 1993 protocol), 236 (September 1995 protocol), 310 (March 1999 protocol), 397 (October 2000 protocol), 444 (August 2005 protocol). Plaintiffs do not know whether this requirement remains in the present protocol; although it is not included in the portions of the present protocol that have been disclosed to Plaintiffs, D.I. 113, 1-14 (August 2008 Protocol), it may be included in redacted portions.

Despite this requirement, one execution team member has conducted executions without seeing any paperwork at all (John Doe 1, Deposition 7/6/07, 56); IV team members state it is not their responsibility to fill out any paperwork (John Doe 2, Deposition 5/21/07, 66; John Doe 3, Deposition 5/25/07, 43); and at least one

is entirely unfamiliar with the contents of the supply checklist, and thus unfamiliar with the medical supplies available during a lethal injection (John Doe 2, Deposition 5/21/07, 92-93).[4]

Defendants also have conducted executions without showing the IV team the step-by-step directions in the lethal injection protocol. Some IV team members have seen only the dosages and/or the supply checklist. John Doe 1 was not shown any written protocol or other paper before administering lethal injections. John Doe 1, Deposition 7/6/07, 56. John Doe 3 was shown the one-page "Contents of Syringes" and the two-page Supply Checklist from the protocol, but not the sections of the protocol describing the role of the IV team, including: "Pre-Execution Inventory and Equipment Check," "Obtaining Drugs," "IV Set-up Procedure," "Injection Procedure," and "When the Signal to Commence Shall be Given by the Warden." John Doe 3, Deposition 5/25/07, 94.

As the chart below shows, **Defendants have not conducted a single execution that met the requirements of their own protocol at the time**:

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[4]John Doe 2 testified that he was not aware whether cut-down supplies were available, although the supply checklist included topical anesthetic, a "cut-down set," two scalpels and two blades, see e.g., Supply Checklist (8/1/05 Protocol), Discovery at 451-52. (This was changed in the August 2007 protocol, which expressly bars cut-downs but leaves unaddressed the alternative means of achieving venous access to be used if peripheral venous access is not obtainable.)

Execution Errors and Failures to Follow Protocol

Prisoner, Date of Execution	**IV Team**	**Dosage Error**	**Team Member w/ Inadequate Training**	**Team Member Not Shown Protocol**
Steven Brian PENNELL, 3/14/1992	Jane Doe 1 John Doe 1		X	X
James Allen "RED DOG," 3/3/1993	Jane Doe 1 John Doe 1	X	X	X
Kenneth DESHIELDS, 8/31/1993	Jane Doe 1 John Doe 2		X	
Andre DEPUTY, 6/23/1994	Jane Doe 1 John Doe 2		X	
Nelson SHELTON, 3/17/1995	Jane Doe 1 John Doe 2		X	
William FLAMER, 1/30/1996	Jane Doe 1 John Doe 2 Jane Doe 2		X	
James CLARK, 4/19/1996	Jane Doe 1 John Doe 2 Jane Doe 2	X	X	
David LAWRIE, 4/23/1999	John Doe 2 John Doe 3	X	X	X
Willie SULLIVAN, 9/24/1999	John Doe 2 John Doe 3		X	X
Dwayne WEEKS, 11/17/2000	John Doe 2 John Doe 3	X	X	X
David DAWSON, 4/26/2001	John Doe 2 John Doe 3		X	X
Cornelius FERGUSON (HAMEEN), 5/25/2001	John Doe 2 John Doe 3		X	X
Brian STECKEL, 11/4/2005	John Doe 2 John Doe 3	X	X	X

II. No Alternative to Peripheral Venous Access

The written protocol does not include any alternative to peripheral venous access. Here, the Defendants' own expert, Dr. Dershwitz, testified that there should be a "Plan B" to establish venous access should peripheral IV insertion not be achievable. Dershwitz deposition 9/10/07, 136-38; Dershwitz deposition 9/24/07, 60.

Dr. Dershwitz testified that an execution protocol ought to include a contingency plan in the event that peripheral venous access is not attainable. He said that failure to obtain peripheral access has happened in executions around the country; therefore, procedures should be in place in the event that placement cannot be obtained.[5] Such contingencies could include placement of an IV in the neck or groin (a "central line"), which Dr. Dershwitz testified would require "a greater degree of skill" than placement of a peripheral IV; if people with such skills are not part of the execution team,[6] then the execution should be postponed to find and use people

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[5]Indeed, Nelson v. Campbell, 541 U.S. 637, 640 (2004), notes that the authorities there could not obtain peripheral access because "due to years of drug abuse, petitioner has severely compromised peripheral veins, which are inaccessible by standard techniques for gaining intravenous access, such as a needle." According to Dr. Dershwitz, IV drug use and obesity are among the reasons why it is difficult, if not impossible, to obtain peripheral IV access in some prisoners. Dershwitz deposition 9/24/07, 60.

[6]Neither paramedics nor EMTs in Delaware are licensed to place central lines. See, e.g., John Doe 2, Deposition 5/21/07, 96 (EMTs are not licensed to place central lines, but may do so under the supervision of a physician, if the physician takes

with the necessary competence. Dershwitz deposition 9/10/07, 136-38; Dershwitz deposition 9/24/07, 58-61.

Delaware's protocol, like Kentucky's, proposes only to postpone the execution procedure if venous access cannot be obtained after one hour.[7] Nothing in the written protocol describes how Defendants will proceed to remedy the problem at a subsequent scheduled execution date. Despite Defendants' own expert's testimony, Defendants appear to reserve, without any written procedures or guidelines, the unfettered right to determine, by some unspecified means and by some unspecified person, whether and what alternative method it will use in the event peripheral venous access is not achieved. And, because the written protocol does not address what alternative method will be used, it fails to guarantee that qualified, competent medical personnel be present to obtain alternative access. What is clear is that many of the professionals presently listed as suitable members of the lethal injection team are not licensed or competent to establish non-peripheral venous access.

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responsibility for the procedure).

[7]"If the IV team cannot secure a primary and back-up site within one (1) hour, the Governor's Office shall be contacted by the Commissioner and a request shall be made that the execution be scheduled for a later date." D.I. 113, 5-6.

ARGUMENT

Summary judgment should be granted only when the pleadings, depositions, answers to interrogatories, and admissions, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). All facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Summary judgment is not appropriate where, as here, the non-moving party has set forth specific facts showing a genuine issue for trial. Moreover, Baze makes clear that a "substantially similar" protocol alone, without a record of problem-free implementation, does not satisfy the Eighth Amendment.

I. Defendants's Misreading of *Baze*

In Baze v. Rees, 128 S.Ct. 1520 (2008), a three-Justice Plurality held that to prove that a state's method of execution violates the Eighth Amendment, prisoners must demonstrate that the challenged protocol would subject them to a "substantial risk of serious harm." Baze, 128 S.Ct. at 1532. The Plurality recognized that such a risk exists where an inadequately anesthetized prisoner is given pancuronium and potassium. Id. at 1533 ("failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the

injection of potassium chloride.").[8] The Plurality further held that a method of execution is unconstitutional where it imposes a substantial risk of serious harm, and there is a feasible and readily available alternative that significantly reduces the risk. Id. at 1532.

Baze relied upon a line of Eighth Amendment cases, including Helling v. McKinney, 509 U.S. 25 (1993), and Farmer v. Brennan, 511 U.S. 825 (1994), that expressly state an Eighth Amendment claim may succeed based upon a proven risk of future harm. In Helling, a case concerning a prisoner's exposure to second-hand smoke, the Court held:

> We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery. Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.
>
> That the Eighth Amendment protects against future harm to inmates is not a novel proposition. . . . We thus reject petitioners' central thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment.

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[8]Defendants make much of phrases pulled out of context from Baze purportedly describing the standard for an Eighth Amendment violation. See Defendants' Brief at 14 ("'sure or very likely to cause serious illness and needless suffering;'" "'objectively intolerable risk of harm'"). Defendants ignore the crucial fact that the Supreme Court held in Baze that a risk of maladministration of thiopental is constitutionally unacceptable.

509 U.S. at 34.

Defendants argue, "Baze establishes that the Delaware lethal injection protocol is constitutional under the Eighth Amendment because it is essentially the same as the Kentucky protocol." *Defendants' Brief* at 3. This gross overstatement obscures the concerns that led to the Court's use of this language. The "substantially similar" language from Baze demonstrated the Court's particular concern that lethal injection litigation would be used to delay executions. Accordingly, Baze set forth a rigorous standard for obtaining **stays of execution**:

> Justice STEVENS suggests that our opinion leaves the disposition of other cases uncertain, see *post,* at 1542 - 1543, but the standard we set forth here resolves more challenges than he acknowledges. A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. 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 1537. In other words, a plaintiff whose state has a protocol "substantially similar" to Kentucky's will not be able to stay his execution in order to conduct discovery and build a record of the practice of lethal injection in that state. Such a plaintiff must bring suit, and develop that record, without needing a stay. Plaintiffs in this case have now developed just that record.

Defendants further ignore that the Supreme Court in Baze evaluated the risk of pain to the prisoner based upon a slim state court record. Kentucky had conducted only one execution by lethal injection, and **no problems had been noted**. 128 S.Ct. at 1528. The plaintiffs in that case claimed "a significant risk that the procedures will not be properly followed, in particular, that the sodium thiopental will not be properly administered to achieve its intended effect," id. at 1530, but, in the absence of any record of errors in Kentucky,[9] they could point only to theoretical concerns. Thus, the holding of Baze was based upon the written protocol and the limited evidence of implementation available in Kentucky.

Still, "[it] is clear that the Baze court did not limit its consideration of Kentucky's procedures to its written protocol." Alderman v. Donald, (N.D.Ga. May 2, 2008) (Slip Op., 21). The Baze Court "agree[d] with the state trial court and the State Supreme Court, however, that petitioners have not shown that the risk of an inadequate dose of the first drug is substantial." 128 S.Ct. at 1533. Plainly, Kentucky's implementation of the three-drug protocol was no less relevant to the likelihood of substantial harm to the plaintiffs than were the terms of the written protocol.

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[9]Plaintiffs in Kentucky did not have the opportunity to depose execution team members, so they were limited to eye witness accounts and the written records available.

In this case, unlike Baze, Plaintiffs are able to present this Court with a pattern of errors and maladministration of the lethal injection protocol. In Delaware, errors have not been "isolated mishap[s] alone," 128 S.Ct. at 1531, but regular occurrences. They cannot be dismissed as the Supreme Court dismissed the hypothetical possibility of error in Baze. On the contrary, Delaware's consistent failure to follow its own written protocol in carrying out executions by lethal injection provides a significant piece of probative evidence that the Court must weigh when determining whether Delaware's method of execution carries a substantial risk of serious harm to the Plaintiffs. In short, this record of errors raises a material issue of fact, and summary judgment is not appropriate.

Further, Defendants have overlooked another significant distinction between Plaintiffs' case and Baze. The constitutional significance of Kentucky's failure to provide a meaningful "Plan B" was never at issue or considered in Baze, because the plaintiffs did not present a claim based upon problems that would arise if peripheral venous access was not obtained. As the case before this Court is a *class* action, the Court must consider that, among the present and future class members, there *will* be those for whom peripheral access will not be possible. Dr. Dershwitz, in fact, acknowledged the problem can come up, and has come up in other states. Dershwitz deposition 9/24/07, 60. Consequently, this Court, unlike the Supreme Court in Baze,

must consider whether Delaware's failure to provide a plan for administration of lethal chemicals when peripheral access is *not* possible is constitutionally acceptable.

II. Defendants' Record of Errors

Plaintiffs have developed an extensive factual record showing real risks of maladministration of Delaware's lethal injection protocol. Defendants have thus far offered no explanation of their errors and the failures to follow the protocol, nor have they explained why this Court should be confident that their carelessness will change and they will now begin to comply fully with the protocol's written directives.

A. Dosage Errors

Defendants' failure to ensure that condemned prisoners receive correct dosages of the lethal drugs and failure to follow this elementary requirement of the protocol creates a substantial risk of serious harm. Ensuring adequate dosages of the lethal drugs is required to meet the constitutional standard. The Supreme Court has held:

> It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.

Baze at 1533. Defendants' reliance on various descriptions of the "substantial risk" standard, *Defendants' Brief* at 14, is a red herring. The Supreme Court has held that

a substantial risk of maladministration of sodium thiopental meets the Eighth Amendment standard for harm.

Defendants have administered incorrect dosages in five of the thirteen executions. Defendants failed to record dosages in an additional three executions. Thus, in over sixty-one percent (61%) of the executions in Delaware, Defendants cannot show that they administered the correct dosages of the lethal drugs. Additionally, there is a serious question whether another prisoner, Brian Steckel, received a complete dose of sodium thiopental.

These multiple errors, in an alarming percentage of the executions conducted by Defendants, show a substantial, and constitutionally unacceptable, risk that condemned prisoners will not receive the correct doses of lethal drugs. At the very least, these facts are material to the constitutional inquiry, and bar granting judgment as a matter of law to the Defendants.

B. Failures to Follow Protocol

Defendants' consistent failure to follow their own lethal injection protocols undercuts any reliance this Court may place on safeguards in the written protocol. Plaintiffs can show Defendants do not follow these safeguards. There was no such evidence before the Supreme Court in Baze.

In Baze, the Supreme Court relied upon the safeguards in Kentucky's protocol

in holding that the risk of serious harm did not meet the constitutional standard:

> Kentucky has put in place several important safeguards to ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner.

Baze at 1533. The safeguards relied upon are all within the written protocol. Id. at 1533-34. The safeguards include the Kentucky protocol's experience requirements and the training required for IV team members: at least ten practice sessions per year.

Plaintiffs in Baze presented no evidence that the defendants had failed to follow those safeguards. Here, evidence that Defendants repeatedly and consistently have not followed the requirements of their own protocol undermines any reliance this Court might place on the "safeguards" in the Delaware protocol.

In addition, Plaintiffs have discovered disturbing evidence of Defendants' misuse of their discretion in following their own protocol. For instance, Defendants chose a retired, no longer certified paramedic to participate in the execution of Brian Steckel in 2005. John Doe 3 deposition 5/25/07, 132-33. John Doe 3 frankly expressed a callous disregard for the risk of causing pain to a prisoner during lethal injection. He stated he would be "okay with" an execution causing pain and suffering to a prisoner, because "the prisoner did not appear to care about the pain and suffering of his victims." Id. at 106. John Doe 2 testified that he executed a prisoner in a case where he knew the victims as a patients; Defendants were apprised of this fact before

the execution, but did nothing to change personnel. John Doe 2 deposition, 5/21/07, 159-60, 164-65. These two incidents illustrate Defendants' failure to select with care competent and appropriate execution personnel.

Defendants point out that Baze "approved" Kentucky's newly revised protocol that had not yet been used in an execution. *Defendant's Brief* at 18 n.4. This may be true, but it is either irrelevant, or helpful to Plaintiffs. In this case, Plaintiffs do not claim that the amended Delaware protocol is unconstitutional because some safeguards are **untested**. To the contrary, Plaintiffs can show that the **tested safeguards** in Delaware have failed multiple times. The Supreme Court in Baze did not have before it any evidence of error or failure to follow the Kentucky protocol. Had Plaintiffs similarly discovered that Delaware had diligently followed its protocol, then Defendants' new and "untested" safeguards might be compelling evidence that Delaware's present protocol could be relied upon to ensure constitutionally acceptable executions. But Delaware's record of implementation does just the opposite; it is one of ignoring the safeguards in the protocol. In the face of those prior failures, this Court must not rely upon new written safeguards to allow lethal injection in Delaware to pass constitutional muster; they can be as easily ignored or overlooked as the old safeguards.

III. The Incomplete Protocol

Simply because defendants have replicated the Kentucky protocol on paper does not mean that the Court should turn a blind eye to a serious problem that was not considered or addressed in Baze. The lack of an alternative to peripheral venous access is such a serious problem, particularly in light of Defendants' record of errors.

Plaintiffs have proffered and repeat here that the lack of a stated alternative for proceeding with an execution should peripheral access not be achieved in one hour is constitutionally unacceptable. As Defendant's own expert recognized, it is plainly and reasonably foreseeable that Defendants will encounter a member of the Plaintiff class for whom peripheral venous access is not possible or advisable. Delaware's protocol makes no reasonable provision for that foreseeable situation. Presumably, that prisoner will have to endure an hour's worth of attempts to gain venous access before the execution is postponed. Then, Delaware will, in effect, go "off protocol." The present protocol makes no provision for the rescheduled execution and allows the Defendants simply to jerry-rig an alternative procedure. *Nothing* about that alternative is known. What, if any, aspects of the written protocol would apply? Would Defendants merely repeat the attempt to gain peripheral venous access? Would they attempt a central line or some other method of access? Who would determine what procedure should be used? Who would perform the

unspecified procedure? Would that person be trained and qualified to perform that procedure? How much discretion would be vested in the executioner to alter or modify the method? Particularly in light of Defendants' past errors in administration of its protocol, the Court cannot assume that the currently-unknown procedure that would be used, will pass constitutional muster.

IV. Defendants' Other Arguments

A. Plaintiffs Have Proposed an Alternative

Contrary to Defendants' assertion, *Defendants' Brief* at 20, Plaintiffs have raised an alternative method of lethal injection that reduces the risk of an inhumane execution: a single drug protocol.

In the initial Complaint, Plaintiffs did not propose an alternative method of execution by lethal injection, for the simple reason that the Supreme Court had never required plaintiffs to present alternatives when challenging a method of execution. In Baze, the Supreme Court changed the law, requiring plaintiffs to show a substantial risk of serious harm and to proffer an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." 128 S.Ct. at 1532.

In light of this new requirement, Plaintiffs have taken the position that an anesthetic-only or barbiturate-only protocol – a large overdose of a single anesthetic

or barbiturate – would eliminate the risk of administering painful drugs to a prisoner who has not reached the necessary level of anesthesia, and reliably would cause death. See, e.g. D.I. 89 (Plaintiffs' Pre-Trial Submission), 32-34. In addition, Defendants' expert testified that a single-drug protocol, in comparison to a three-drug protocol, would reduce the overall risk of an inhumane execution, and testified that there is no medical "downside" to the use of a single-drug protocol. Dershwitz deposition 9/10/07, 51-53 ("The advantage of a one-drug protocol is once it's given, if no other drug is being given, then there is less risk of suffering should a person awaken under the influence of pancuronium and potassium chloride.");[10] Dershwitz deposition 9/24/07, 29-31.[11]

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[10]Q. So my question was things that might make an execution less risky for the condemned, not things that might make an execution easy to carry out for a state. So from the perspective of whether the execution would entail less or engender less risk for the condemned, does the one-drug protocol do that?

A. Yes.

Q. Does it have less risk than multi-drug protocols for the condemned?

A. Again, if we assume that multi-drug consists of pancuronium plus potassium chloride, the answer is yes.

Dershwitz deposition 9/10/07, 52-53.

[11]Q: Now, would you agree that removing the pancuronium and potassium chloride from the Delaware execution process would reduce

Given Defendants' record of maladministration, errors, and failures to follow their own protocols during any of the prior executions by lethal injection, Plaintiffs assert that the only way to ensure a human execution in Delaware is to require a one drug protocol. Because no paralytic agent or agonizing heart-stopping drug is administered, a one-drug protocol is far less likely to cause actionable pain and suffering even if the Defendants err in its administration.

B. Other Lethal Injection Cases are Different

Defendants' documented errors and failures uncovered in discovery distinguish this case from other states where defendants have been granted summary judgment on §1983 lethal injection claims after Baze. The facts before this Court are not "hypothetical possibilities of human error or failure to follow the protocol." Raby v. Johnson, 2008 WL 4763677, *3 (S.D. Tex. Oct. 27, 2008) (granting summary

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considerably the risk of an inhumane execution?

A: I would agree that the overall risk of the person being either paralyzed awake or experience potassium chloride in the awake state would be reduced.

Q: And therefore would you agree that it would reduce the risk of an inhumane execution?

A: Yes.

Dershwitz deposition 9/24/07, 29.

judgment where the Plaintiff's Eighth Amendment claim rested on "hypotheticals").

Defendants' errors and failures to follow the protocol are neither "hypothetical" nor "possibilities." They are documented, and they are sufficient in number as not to be an "isolated mishap alone." Baze at 1530 ("[A]n isolated mishap alone does not give rise to an Eighth Amendment violation."). There are documented dosage errors in thirty-eight percent (38%) of Delaware executions; in sixty-one percent (61%) of executions, Defendants cannot prove that accurate dosages were administered. Errors that occur in more than one-third of executions cannot be characterized as "isolated."

Defendants' failure to follow their own written protocol is similarly not an "isolated mishap." Defendants have routinely allowed executions to go forward where members of the IV team had not completed the practice sessions required in the protocol, and had not reviewed the relevant portions of the written protocol. As described above, Defendants have **never conducted an execution that adhered to the requirements of their own protocol.**

In Raby, as Defendants concede, *Defendants' Brief*, 18, the plaintiffs were denied "discovery that [plaintiff] hopes will uncover specific instances in which an execution encountered complications, or in which the written protocol was not followed." Raby, *4. Of course, in this case Plaintiffs have uncovered both evidence

of an execution encountering complications and evidence of many executions in which the written protocol was not followed.

To the extent the court in Raby stated that no matter what evidence the plaintiff were to present, it would be insufficient to defeat summary judgment, the court abused its discretion. However, that statement was not part of the holding, because no such evidence was before that court; the summary judgment opinion denied that discovery request. At any rate, Raby is not binding upon this Court.

Plaintiffs are unaware of any other lethal injection case that has proceeded to summary judgment with as extensive a record of maladministration and errors as this one. In none of the cases cited by Defendants, see *Defendants' Brief* at 21, was there executioner and expert testimony or documents confirming errors in executions.[12] Plaintiffs in the Arkansas case, Nooner v. Norris, 2008 WL 3211290, at *31-37 (E.D. Ark.), relied on newspapers and eyewitness accounts of past executions to show maladministration of the protocol. In three other cases, plaintiffs relied upon less

[12]Moreover, the lethal injection protocols in those states differ significantly from the protocol in Delaware. In Missouri, for instance, IV lines are inserted by a physician, nurse, or EMT; and there is an anesthesiologist on site. Clemons v. Crawford, 2008 WL 2783233, *1 (W.D. Mo.). Delaware, of course, requires neither the assistance of a physician or nurse, nor the presence of an anesthesiologist. In Virginia, two physicians are present; a physician trains the IV team and signs off on their qualifications; and the IV team remains in the execution chamber, three feet or less from the prisoner. Emmett v. Johnson, 532 F.3d 291, 294-96 (4th Cir. 2008). None of these safeguards is present in Delaware.

evidence of maladministration and errors than the plaintiffs here. In Raby, the District Court granted summary judgment because plaintiffs raised only "hypothetical possibilities of human error or failure to follow the protocol." In Clemons v. Crawford, 2008 WL 2783233 (W.D. Mo.), the District Court granted summary judgment where plaintiffs' claim was based solely on the state's failure to employ qualified and trained personnel, not on actual errors that occurred during executions. In the Virginia case, Emmett v. Johnson, 532 F.3d 291 (4th Cir. 2008), the Fourth Circuit characterized the plaintiff's assertion of possible errors in executions as "speculation and building of inferences" insufficient to create a genuine issue of material fact. 532 F.3d at 304. In this case, Plaintiffs can show, through expert testimony, lay testimony, and the Defendants' own records, the pervasive pattern of errors and maladministration that characterizes lethal injection in Delaware.

V. Specific Facts Showing a Genuine Issue for Trial

As described above, Plaintiffs can point to specific facts, pointing to a substantial risk of serious harm, to defeat Defendants' summary judgment motion. These facts include:

- In 38% of executions by lethal injection (five executions), an erroneous dosage of at least one drug was administered; in an additional four executions, the dosages administered were not recorded;

- In the most recent execution, the second two drugs – the ones that cause pain if a person is not under anesthesia – were administered after the IV line delivering the anesthetic failed, but no additional thiopental was administered;

- Defendants have never conducted an execution by lethal injection that conforms with the written protocol;

- Defendants have conducted executions with untrained or inadequately trained personnel, in violation of their own protocol;

- Defendants have conducted executions without showing the IV team the portions of the execution protocol related to their tasks, in violation of their own protocol;

- Defendants have no specified means of gaining intravenous access should peripheral IV access be unobtainable in a prisoner, a possibility described by their own expert as real.

CONCLUSION

For the above reasons, Defendants have not shown they meet the standard for summary judgment in their favor.

Respectfully Submitted,

/s/ Michael Wiseman

_____

Michael Wiseman
Helen A. Marino
Maria K. Pulzetti
Capital Habeas Corpus Unit
Federal Community Defender Office
for the Eastern District of Pennsylvania
Suite 545 West – The Curtis Center
Philadelphia, PA 19106
215-928-0520

Dated: Philadelphia, PA
January 16, 2009

Certificate of Service

I, Michael Wiseman, hereby certify that on this 16th day of January, 2009, I served the foregoing upon the following persons by e-mail and United States Mail:

Gregory E. Smith, Esq.
Elizabeth McFarlan, Esq.
Marc P. Niedzielski, Esq.
Office of the Attorney General
820 North French Street, 6th Floor
Wilmington, Delaware 19801

/s/ Michael Wiseman
_____
Michael Wiseman