

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

MICHAEL HOOPER,

Plaintiff,

V.

**JUSTIN JONES, in his capacity as Director
of the Oklahoma Department of Corrections;**

**RANDALL WORKMAN, in his capacity as
Warden of the Oklahoma State Penitentiary; and
DOES, UNKNOWN EXECUTIONERS, in their
capacities as employees or agents of the Oklahoma
Department of Corrections,**

Defendants.

Case No. _____

DEATH PENALTY CASE

COMPLAINT

I. PRELIMINARY STATEMENT

1. Plaintiff, Michael Hooper, is a prisoner sentenced to death by the State of Oklahoma. His execution date has been set for August 14, 2012, by the Oklahoma Court of Criminal Appeals. By statute, Oklahoma employs lethal injection as its method of execution. Defendants and the Oklahoma Department of Corrections [hereinafter “ODOC”] have designed a procedure for carrying out Oklahoma’s statutory method of execution that purports to induce death only after a condemned prisoner has been anesthetized and rendered unable to experience pain. In this particular instance, Oklahoma currently has only one (1) dose of pentobarbital – the first drug in the protocol, which is intended to induce anesthesia – available for Mr. Hooper’s

execution.¹ This specific and unique circumstance renders meaningless the safeguard provision of OSP Procedure 040301-01, Section IX(C)(6), which provides in pertinent part as follows:

Prior to the administration of the vecuronium bromide,² the physician present in the Execution Room will monitor the condemned offender's level of consciousness through whatever means the physician believes are appropriate, to ensure that the condemned is sufficiently unconscious prior to the administration of the vecuronium bromide. . . . If the physician pronounces death of the condemned before the administration of all three drugs, the injection of any remaining drugs will continue until completed.

The protocol is entirely silent as to what will transpire in a case such as Mr. Hooper's, where monitoring of consciousness has the potential to show he has not been rendered sufficiently unconscious and is therefore able to experience pain, but where there is no additional anesthetic (the first drug) which could render him sufficiently unconscious. By contrast, in *Baze v. Rees*, 553 U.S. 35 (2008), the seminal United States Supreme Court case wherein the Supreme Court upheld the constitutionality of Kentucky's lethal injection protocol, Kentucky did provide for an analogous eventuality:

16. Upon the Warden's order to "proceed" and the microphone turned off, a designated team member will begin a rapid flow of lethal chemicals in the following order:

¹As confirmed to undersigned counsel by Jerry Massie, Public Information Officer, of the Oklahoma Department of Corrections, in a telephone call on June 25, 2012.

²The second drug in the 3-drug protocol, a paralytic.

1) Sodium thiopental (3gm.)

NOTE: If it appears to the Warden That the condemned is not unconscious within 60 seconds to his command to “proceed”, the Warden shall stop the flow of Sodium Thiopental in the primary site and order that the backup IV be used with a new flow of Sodium Thiopental.³

In other words, Kentucky’s protocol, found to be valid under the Eighth Amendment, calls for a second administration of the anesthetic if the first dose is not efficacious.

Many states also call explicitly for a backup dose of the anesthetic to be on hand:

“In the unlikely event that the Deputy Director, or designee, determines that the condemned inmate remains conscious following the administration of Syringe #3 (normal saline wash), the back-up syringes of the first chemical (Syringe #B1 and #B2) and a repeat normal saline wash (Syringe #B3), shall be administered into the secondary or alternative IV line.” **Arkansas** Department of Correction, Procedure for Execution, Attachment C, § III.2.f.

“The amount of chemicals and saline is sufficient, at a minimum, to make two complete sets of syringes. One set is color-coded red and the back-up set is color-coded blue. . . . This process shall be repeated to create a second, back-up set of syringes.” **Delaware** Department of Correction, Policy 2.7 – Execution Procedure, Attachment #1, pp. 3, 5.

“The execution team member who has prepared the lethal chemicals will transport them personally, in the presence of one or more additional members of the execution team, to the executioner’s room. Stand “A” will be placed on the worktop for use by the primary executioner, to be used during the execution by lethal injection. Stand “B” will be placed on a shelf underneath the worktop within easy reach of the executioner should they be needed during the execution.” **Florida** Department of Corrections, Execution by Lethal Injection Procedures, Specific Procedures § (9)(g).

³Kentucky State Penitentiary protocol in effect at time *Baze v. Rees* was litigated, as revised 12/14/2004.

“The Pharmacist shall prepare the syringes as follows, witnessed by the Deputy Warden or designee:

- a. one set of syringes for the lethal injection (primary syringe)
- b. one backup set of syringes for the lethal injection.”

Montana Department of Corrections, Execution Technical Manual, TM 01/05.12 § E.2.a&b.

“The drug team shall have available a back-up set of the normal saline syringes and the lethal injection drugs in case unforeseen events make their use necessary.” **Texas** Department of Criminal Justice, Execution Procedure § VI.C.

Kentucky views the backup dose as so important that the State once considered having two executions on one day because the State had only three doses of the first drug, one of which was about to expire. The reasoning was that if the first execution did not require use of the second dose of anesthetic, then the next execution could proceed the same day with the third dose as the backup dose. The close-to-expiration date drug could be used in the first execution, and since it was iffy, there would be a backup dose. This plan was made public and the controversy contributed to the idea being scrapped, but it shows the importance of a backup dose to Kentucky. See Attachment D hereto for internal official documents surrounding that proposed procedure.

The lack of a backup dose of pentobarbital for Mr. Hooper’s execution, together with the absence in the ODOC protocol of any direction to the physician of how to proceed in the event that Mr. Hooper is not adequately anesthetized by the first drug, creates an unnecessary risk that Mr. Hooper will be conscious to experience

suffering and pain during his execution. The protocol requires that the second and third drugs be administered even if death is pronounced before their administration. There is no certainty or explicit requirement that the physician stop the execution if Mr. Hooper shows signs of being insufficiently anesthetized such that he therefore has the ability to experience the excruciating pain of the third drug, potassium chloride.

This action is brought pursuant to Title 42, section 1983, of the United States Code for violations and threatened violations of the rights of Plaintiff to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution, to be free from arbitrary and capricious Department of Corrections' procedures and protocols in violation of the Fifth and Fourteenth Amendments of the United States Constitution, and to be free from the deliberate indifference of Defendants toward Plaintiff's health and safety in violation of the Eighth and Fourteenth Amendments of the United States Constitution. Plaintiff seeks equitable and injunctive relief.

This lawsuit does not challenge the fact of Plaintiff's sentence of death, nor does it challenge the constitutionality of Oklahoma's statute requiring execution by lethal injection.

II. PLAINTIFF

2. Michael Hooper is a United States citizen and resident of the State of Oklahoma. He

is currently a prisoner under the supervision of the Oklahoma Department of Corrections, ODOC Number 236125, who is sentenced to death by lethal injection. Mr. Hooper is held at H-Unit of the Oklahoma State Penitentiary at P.O. Box 97, McAlester, Oklahoma 74502-0097.

III. DEFENDANTS

3. Defendant, Justin Jones, is the current Director of the Oklahoma Department of Corrections, 3400 Martin Luther King Avenue, Oklahoma City, Oklahoma 73111; Defendant, Randall Workman, is the current Warden of Oklahoma State Penitentiary, P.O. Box 97, McAlester, Oklahoma 74502-0097.
4. Defendants, Unknown Executioners, are the officers, agents, employees, and successors in office, along with those acting in concert with them, of the Oklahoma Department of Corrections who will assist in carrying out the execution of Plaintiff. Plaintiff does not yet know the identities of the Unknown Executioners.
5. Defendants are acting under color of State law in establishing and designing the ODOC execution policies and protocol and will act under color of State law in selecting and administering to Plaintiff chemicals in amounts, combinations, and by methods that in this circumstance will unnecessarily risk conscious suffering and pain in the execution of a sentence of death and/or which are deliberately indifferent to the health, welfare, and safety of Plaintiff. Plaintiff is requesting that his execution not proceed until Oklahoma has a sufficient quantity of pentobarbital to ensure that the

intent and purpose of the protocol, that he will be unable to experience pain after its administration, carries little or no risk to him.

IV. JURISDICTION AND VENUE

6. This action arises under 42 U.S.C. § 1983 to redress the deprivation under color of State law of rights, privileges, and immunities secured by the Constitution of the United States. The rights sought to be redressed are guaranteed by the Eighth, Fifth, and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction over this complaint pursuant the following provisions: 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1343 (civil rights violations); 28 U.S.C. § 2201 (declaratory relief); and 28 U.S.C. § 2202 (further relief).
7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

V. FACTUAL ALLEGATIONS

8. Plaintiff realleges and incorporates paragraphs 1 to 10, as if fully set out herein.
9. Lethal injection has been promoted as a peaceful way to induce death, like euthanizing a pet – a single injection, quick unconsciousness, no struggling or movement, and death within a few minutes. However, comparing Oklahoma's lethal injection procedure to animal euthanasia mischaracterizes how ODOC carries out executions, because the manner in which executions are carried out presents a substantial risk of serious harm to condemned inmates. In fact prisoners executed under protocols similar to Oklahoma's have suffered immense pain and grievous

suffering as a result of maladministration of three-drug protocols. Because of the use of paralytic drugs, such as vecuronium bromide or pancuronium bromide, there is a substantial risk that additional, unknown prisoners have experienced excruciating pain and suffering during their executions but were unable to manifest or communicate their distress because they were immobilized. Ohio, Idaho, Arizona and Washington have executed prisoners using a one-drug protocol, deploying a fast-acting barbiturate such as sodium thiopental or pentobarbital. The one-drug protocol eliminates the risks of pain and suffering which still exist in Oklahoma due to ODOC's continued adherence to the three-drug protocol. At least twenty (20) executions have been carried out using the one-drug protocol, a fact which has led one Kentucky Circuit Judge to inquire whether the three-drug protocol creates such greater risk of pain and suffering than the one-drug protocol that it violates the Eighth Amendment.⁴ That Kentucky ruling stated, in pertinent part:

In light of recent developments in the use of the one-drug protocol in other states, this Court finds well-established alternatives now exist for the Department of Corrections to consider to the three-drug protocol currently required by Kentucky's administrative regulations. 501 KAR 16:330. . . . [If Kentucky does not change to a one-drug protocol] the Court will schedule a date for a trial on the merits to determine whether a three-drug protocol as the exclusive means of lethal injection remains constitutional under the Eighth Amendment as applied

⁴Order in *Baze et al. v. Kentucky Department of Corrections*, April 25, 2012, Civil Action No. 04-CI-1094, Franklin Circuit Court, Division I, issued by Hon. Phillip J. Shepherd. Attached hereto as Attachment "A."

in *Baze v. Rees*, 553 U.S. 35 (2008)].

The same judge, on the same day, with many of the same petitioners, in a separate order in Civil Action 06-CI-574,⁵ noted:

Since the *Baze* decision, at least five states – Arizona, Idaho, South Dakota, Ohio, and Washington – have adopted a one-drug, barbiturate-only protocol. Thus the Supreme Court’s primary basis [in *Baze v. Rees*, *supra*] for rejection of one-drug protocol no longer applies. The Department of Corrections continues to argue that the Supreme Court’s decision in *Baze* is controlling, and that its three-drug protocol has been held to meet all constitutional requirements. Yet any fair reading of the *Baze* decision by the Supreme Court must yield the conclusion that the Supreme Court’s affirmation of the three-drug protocol was contingent upon its finding that there was no alternative method of lethal injection that had ever been successfully implemented. . . . *Baze* simply does not address the issue of whether the three-drug protocol can withstand constitutional scrutiny in the context of a proven alternative that carries less risk of a “cruelly inhumane” outcome.

13. Scott Carpenter was executed by the State of Oklahoma on Thursday, May 8, 1997. At ten minutes after midnight, as lethal drugs entered his body, witnesses report that Mr. Carpenter “moaned loudly. He exhaled and then his body convulsed. As the drugs began to take effect, [Mr.] Carpenter made loud rasping sounds and continued to convulse his muscles [and] visibly tensed as he struggled to breathe as the color drained from his face.” Four minutes after the execution began, Mr. Carpenter “[t]urned a deep shade of blue.” Mr. Carpenter “let out a guttural moan,

⁵Attached hereto as Attachment “B.”

gasped for breath and convulsed violently, stretching the belt that strapped his body to the table as his body arched upward,” his body “shuddered with 18 violent convulsions, followed by eight lesser ones.” Twelve minutes after the execution began, Mr. Carpenter was pronounced dead.

14. Robyn Parks was executed by the State of Oklahoma on Tuesday, March 10, 1992. At forty-two minutes after midnight, the execution began. Mr. Parks said “I’m still awake.” “Less than two minutes after Warden Dan Reynolds ordered the execution to begin, Parks' body began bucking under straps that held him to a gurney. He spewed out all the air in his lungs, spraying a cloud of spit.” Witnesses said “[i]t was overwhelming, stunning, disturbing.” Eleven minutes after the execution began, Mr. Parks was pronounced dead.

15. Loyd LaFevers was executed by the State of Oklahoma on Tuesday, January 30, 2001. As the lethal drugs began to flow, Mr. LaFevers “laid his head back, and he began to go into convulsions, gasping for breath, his chest heaving.” He “started raising off the bed” and “[t]he rising of his chest and the burst of air happened together over and over, as if he were gasping.” “[H]is eyes stayed open.” “[H]e appeared to have a bruise and swelling in his left arm . . . where he had an IV tube.” After six minutes of convulsions, Mr. LaFevers was dead.

16. Oklahoma's capital punishment statute authorizes the use of a one-drug protocol.⁶

Unless and until ODOC changes to a one-drug protocol, its execution procedures will unnecessarily place Mr. Hooper and other prisoners at risk of suffering excruciating, tortuous deaths. At a minimum, ODOC must have at least one backup dose of pentobarbital before proceeding with Mr. Hooper's execution.

17. There is great risk to Hooper simply from being anesthetized ineffectively. If a non-fatal amount of pentobarbital is administered but fails to render Hooper unconscious in a situation where there is no medical intervention/resuscitation, Hooper would have a period of non-respiration that would lead to organ damage, including brain damage. It's likely there would be a prolonged period of uncertainty of whether Hooper will live or die. There could be seizures. When Hooper resumes consciousness, there would be pain and suffering. His state could range from mildly impaired to vegetative, depending on how long his body is deprived of oxygen. *In addition such a failure of the drug, with no recourse to a backup drug, could render Hooper incompetent to be executed.*

18. Vecuronium bromide, the second drug in the three-drug protocol, is a neuromuscular blocking agent and a curariform drug – in layman's terms, a drug that

⁶22 O.S. § 1014: "The punishment of death shall be carried out by the administration of a lethal quantity of **a drug or drugs**. . . ." [Emphasis supplied] Kentucky also allows for either a one- or three-drug protocol, making the rulings of Judge Shepherd in those Kentucky cases even more on all fours with Oklahoma.

induces paralysis. Neuromuscular blocking agents are used clinically to induce skeletal muscle relaxation to facilitate tracheal intubation or to suppress spontaneous respiration.

19. Neuromuscular blocking agents must be administered with great care because they have no effect on consciousness or the ability to sense and perceive pain. Unless consciousness is assessed before the administration of the neuromuscular blocker, the paralysis induced in the prisoner will prevent anyone, even a person with advanced medical training, from ascertaining whether the prisoner is awake and capable of experiencing pain.

20. Neuromuscular blocking agents are typically accompanied by product warnings that require the drugs to be administered by experienced clinicians who are familiar with the drug's actions and the possible complications of its use. The warnings caution that the drugs have no known effect on consciousness, pain threshold, or thinking and observing. Therefore, administration must be accompanied by adequate anesthesia or sedation.

21. The effect of neuromuscular blocking agents in immobilizing patients and masking external indications of their pain is well known. Patients who have been administered neuromuscular blocking agents with inadequate anesthesia have been conscious during surgery and have reported terrifying and torturous experiences where they were alert, experiencing pain, yet utterly immobilized and unable to signal

their distress.

22. The consequences of erroneous administration of neuromuscular blocking agents is so profound that at least eighteen states, including Oklahoma, have banned by statute the use of such drugs in the euthanization of animals. The AVMA never permits the use of neuromuscular blocking agents in combination with barbiturate anesthetics. The ODOC has thus settled on a protocol and procedure to kill the State's condemned prisoners, which is considered too risky and dangerous for the euthanization of pets. *There is no need* for the protocol to risk the conscious suffocation (along with the pain inflicted by administration of potassium chloride, as discussed below) of prisoners as a result of the administration of neuromuscular blocking agents. Oklahoma has eliminated its former statutory requirement for a "paralytic agent" to be used during executions. Thus it is no longer necessary to deploy a neuromuscular blocking agent that paralyzes prisoners, renders them incapable of communicating distress, and disrupts their respiration. If the ODOC would abandon use of the paralytic drug, it would eliminate the risk that a condemned prisoner will consciously asphyxiate.

23. The third drug, potassium chloride, contains essential blood ions and in clinical practice is typically administered in trace amounts as a necessary electrolyte. While a certain potassium level is important for normal cardiac electrical activity, a rapid increase in blood concentration of potassium causes cardiac arrest. Injection of

concentrated potassium activates sensory nerve fibers, causing severe pain as the drug travels through the venous system. There is universal medical agreement that, without anesthesia, an injection of a potassium chloride overdose causes excruciating pain.

24. The American Veterinary Medical Association is so confident that death by Potassium Chloride will cause unnecessary suffering that it prohibits its use as a euthanasia agent unless the practitioner administering the Potassium Chloride has the skill and training to assure that the subject to be euthanized has reached a surgical plane of anesthesia.

25. The Oklahoma statute does not require the administration of Potassium Chloride, or indeed require any particular drug at all, nor any particular type of drug, such as a paralytic or a drug designed to stop the heart. Thus the ODOC has arbitrarily and needlessly continued to utilize vecuronium bromide and potassium chloride despite the gratuitous risks of pain and suffering they bring to ODOC's execution procedures.

26. Autopsy reports reveal at least two cases in which full (unused) syringes of the anesthetic Thiopental have accompanied bodies to the medical examiner's office. On information and belief, these data indicate that the ODOC has, on several occasions, arbitrarily and unnecessarily failed to administer all of the required and intended dose of the first drug, risking inadequate anesthesia and conscious suffering.

27. A one-drug protocol will reduce or eliminate the risk of a torturous death and still comply with 22 O.S. § 1014, as is now demonstrated by the executions carried out

in Arizona, Idaho, Ohio and Washington. Moreover, persisting in using the three-drug protocol when ODOC has only one dose of pentobarbital violates the monitoring provision of ODOC's protocol [Section IX(C)(6)], reveals a defect in the protocol in not addressing what happens if the anesthetic fails to render the condemned sufficiently unconscious, and violates the Eighth Amendment as a result of completely avoidable problems in protocol and procedure. It is possible to conduct execution by lethal injection in a manner that both complies with Oklahoma's statute and is humane. However, Defendants and the ODOC have arbitrarily, capriciously, and unnecessarily devised a protocol and practice for carrying out executions by lethal injection that does not do so.

VII. CLAIMS

28. Plaintiff realleges and incorporates the preceding paragraphs as if fully set out herein.

29. By subjecting Plaintiff to the three-drug method with no provision in case of first drug failure to induce sufficient unconsciousness, the ODOC proposes in Mr. Hooper's case a method of execution that creates an unnecessary and substantial risk of inflicting agonizing and prolonged pain. Defendants thus deprive Plaintiff of his rights under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution to be free from cruel and unusual punishment and to be free from arbitrary and capricious processes.

30. By subjecting Plaintiff to an arbitrary, capricious, and irrational method of execution that creates an unnecessary and significant risk of inflicting agonizing and prolonged pain, Defendants, with deliberate indifference to Plaintiff's serious medical needs, violate Plaintiff's rights to be free from cruel and unusual punishment and the unnecessary and wanton infliction of pain in violation of the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

31. Defendants' inability to ensure compliance with the mandates of Section IX(C)(6) of the protocol, since it has insufficient anesthetic to do so, violates Mr. Hooper's rights to Due Process and Equal Protection of law. The risks to Mr. Hooper are detailed in Paragraph 17, *supra*.

32. Stubborn insistence on the three-drug protocol in light of the demonstrated risk reduction and superiority of the one-drug protocol, even though Oklahoma's statute provides for a one-drug protocol, necessitates this civil § 1983 action. In either protocol, nonetheless, having a backup dose is crucial, as indicated by the emphasis most other states put on having a backup dose available. Given the huge risk that the execution might proceed even if the anesthesia did not accomplish its humane task, the execution should be required by this Court either to timely proceed with a one-drug protocol or to be postponed until Oklahoma acquires at least one more dose of anesthesia. A separate motion for injunction requests that relief.

VIII. PRAYER FOR RELIEF

33. Plaintiff realleges and incorporates the preceding paragraphs as if fully set out herein.

WHEREFORE, Plaintiff prays as follows:

- That this Honorable Court issue a judgment declaring that failure to have at least one additional dose of anesthetic available violates Plaintiff's rights as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States;
- That this Honorable Court further declare that in light of use of a one-drug protocol after the decision in *Baze v. Rees*, *supra*, the three-drug protocol now creates an unconstitutional risk of inflicting unnecessary pain and suffering such that the use of three drugs now violates Mr. Hooper's Eighth Amendment rights;
- That this Honorable Court temporarily and permanently enjoin Defendants, their officers, agents, employees, and successor in office, along with those acting in concert with them, from engaging in the unlawful practices described herein;
- That this Honorable Court retain jurisdiction over this cause until the Court's order is carried out; and
- Any and all other such relief as this Court deems just, proper, and equitable under the circumstances.

Respectfully submitted,

/s/ James Alexander Drummond

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ATTORNEY FOR MICHAEL HOOPER

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of July, 2012, I electronically transmitted the attached document to the Clerk of Court using the ECF E-mail System for filing news cases, and served the General Counsel of the Oklahoma Department of Corrections and the Attorney General of Oklahoma by U.S. mail, mailed July 5, 2012.

/s/ James Alexander Drummond
