

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DAVID LARRY NELSON, }
 }
 Plaintiff, }
 }
vs. }

No. 2:03cv1008-T

DONAL CAMPBELL, }
In his individual and }
official capacity as }
Commissioner of the Alabama }
Department of Corrections and }
 }

GRANTT CULLIVER, }
In his individual and }
official capacity as Warden }
of William C. Holman }
Correctional Facility, }
 }
 Defendants. }

 }

SECOND AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

NOW COMES Plaintiff David Larry Nelson by and through undersigned counsel and, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure and this Court’s Order of April 12, 2005, hereby submits his Second Amended Complaint for Injunctive and Declaratory Relief against the Defendants named herein in the above-styled matter.

PART I

JURISDICTION

1. This action arises under the authority vested in the Court by virtue of 42 U.S.C. §1983, 28 U.S.C. §1331, 28 U.S.C. §1343, 28 U.S.C. §1651, 28 U.S.C. §2201, and 28 U.S.C. §1367.

VENUE

2. Venue is proper pursuant to 28 U.S.C. 1391(b) because one or more of the Defendants resides in the Middle District of Alabama.

PARTIES

3. Plaintiff David Larry Nelson is and has been at all times pertinent to this matter a citizen of the United States of America and a citizen of the State of Alabama. He has been an inmate in the State of Alabama since 1978 and presently is incarcerated at William C. Holman Correctional Facility in Atmore, Alabama.

4. Defendant Donal Campbell is and has been at all times relevant to this action the Commissioner of the Alabama Department of Corrections.

5. Defendant Warden Grantt Culliver is and has been at all times relevant to this action, the Warden of William C. Holman Correctional Facility in Atmore, Alabama.

FACTUAL ALLEGATIONS

6. The Plaintiff presently is incarcerated at William C. Holman Correctional Facility in Atmore, Alabama (hereinafter referred to as "Holman").

7. The Plaintiff is scheduled to be executed by lethal injection on October 9, 2003 at Holman at 6:00 p.m..

8. The Plaintiff was previously incarcerated at W. E. Donaldson Correctional Facility in Bessemer, Alabama (hereinafter referred to as "Donaldson").

9. The Plaintiff was transferred to Holman upon his death

warrant being issued by the Alabama Supreme Court.

10. Pursuant to Ala.Code 1975 §15-18-82, Defendant Culliver, as the Warden at Holman, shall be the executioner at the Plaintiff's execution and Defendant Campbell (hereinafter referred to as "Defendant D.O.C.") acting in his official capacity of the Commissioner of the Alabama Department of Corrections will provide the necessary "room and appliances to carry out" the Plaintiff's execution.

11. The Plaintiff has severely compromised veins and has encountered problems over the last two decades with prison medical personnel gaining venous access during routine physical examinations.

12. The Plaintiff is unable to attach a copy of his medical records to this pleading in support of the above allegation, because Defendant D.O.C. has refused to allow the Plaintiff access to his own medical records. (See, Correspondence to undersigned counsel Smith from the Alabama Department of Corrections, attached to this pleading as Attachment 1).

13. On at least one occasion, prison medical personnel has relinquished control of medical apparatus to the Plaintiff for the Plaintiff to draw his own blood after failed attempts by the medical personnel to do same.

14. Counsel for the Plaintiff contacted Defendant Culliver the day that the Plaintiff was transferred from Donaldson to Holman and informed Defendant Culliver of the Plaintiff's physical problems regarding his veins and of concerns regarding

the protocol for gaining venous access for the lethal injection procedure.

15. At that time, counsel for the Plaintiff requested that either a private practice physician hired by the Plaintiff be allowed to examine and consult with the Plaintiff regarding venous access for the lethal injection procedure or that a prison physician examine and consult with the Plaintiff regarding same.

16. Defendant Culliver assured counsel for the Plaintiff that he would arrange for a physician to examine and consult with the Plaintiff regarding this issue soon after the Plaintiff's arrival at Holman. (See Correspondence from undersigned counsel Smith to Warden Culliver confirming their telephone conversation, attached to this pleading as Attachment 2).

17. As of the filing date of this pleading, Defendant Culliver has failed to have a physician so examine and consult with the Plaintiff.

18. Defendant Culliver has refused repeated requests that a private physician hired by the Plaintiff be allowed to examine and consult with the Plaintiff.

19. Said refusal is a clear violation of Ala.Code 1975 §15-18-81, which provides in relevant part, "...all persons outside the said prison shall be denied access to him, except his physician and lawyer, who shall be admitted to see him when necessary to his health or for the transaction of business...". A copy of Ala.Code 1975 §15-18-81 is attached to this pleading as

Attachment 3.

20. Defendant Culliver furthermore has refused to allow that same private physician to conduct a telephone conference with the medical personnel Defendant Culliver intends to have perform the venous access procedure immediately prior to the Plaintiff's execution or with any other prison medical personnel.

21. During the telephone conversation referenced in Paragraph 14 above, counsel for the Plaintiff requested from Defendant Culliver a copy of the State of Alabama's protocol for the lethal injection procedure.

22. Defendant Culliver refused to provide counsel for the Plaintiff with same. (See Attachment 2).

23. Furthermore, Defendant Culliver refused to provide any meaningful information concerning the protocol for the lethal injection procedure or for the medical procedure that would have to be implemented to gain venous access to the Plaintiff immediately preceding the execution despite counsel's representation to Defendant Culliver that the Plaintiff had a valid basis for his concerns. (See Attachment 2).

24. It should be noted that counsel for the Plaintiff also contacted Defendant D. O. C. by telephone and then by faxed correspondence to request a copy of Alabama's protocol for the lethal injection procedure and the medical procedure that would have to be implemented to gain venous access to the Plaintiff as a prior to the execution. (See Attachment 4).

25. Defendant D. O. C. denied the request by email

message. (See Attachment 5).

26. Defendant Culliver and a prison nurse employed at Holman have met with the Plaintiff on two separate occasions since the Plaintiff's arrival at Holman and have described to the Plaintiff the procedure Defendant Culliver intends to implement in order to gain venous access prior to the execution.

27. Ironically, this nurse is the same medical personnel referred to in Paragraph 13 above who had to relinquish medical apparatus to the Plaintiff for the Plaintiff to draw his own blood during a routine physical examination.

28. Notably, Defendant Culliver during the first meeting acknowledged to the Plaintiff that the Plaintiff does exhibit compromised veins.

29. Of paramount importance for purposes of this pleading, during that first meeting, Defendant Culliver also informed the Plaintiff that a medical procedure will have to be performed on the Plaintiff prior to the Plaintiff's execution in order for Defendant Culliver to gain venous access.

30. Defendant Culliver furthermore acknowledged to counsel for the Plaintiff that the Plaintiff's execution will be the first instance of the State of Alabama having to perform a medical procedure prior to the execution to gain venous access.

31. Based upon conversations in which counsel for the Plaintiff has engaged with Defendant Culliver and with Defendant D. O. C., counsel for the Plaintiff in good faith submits to this Court that the State of Alabama does not have as part of its lethal injection protocol written medical procedures that

comport with contemporary medical standards for gaining venous access in condemned inmates such as the Plaintiff prior to an execution.

32. Furthermore, counsel for the Plaintiff in good faith submits to this Court that Defendant Culliver and Defendant D. O. C. are designing a medical procedure to be followed as a predicate to the Plaintiff's execution without being qualified to so design such medical procedure.

33. Furthermore, counsel for the Plaintiff in good faith submits to this Court that the State of Alabama is overstepping its authority in attempting to perform medical procedures outside of a medical setting without appropriate medical safeguards in an attempt to carry out the legal procedure of execution.

34. Assuming arguendo that this Court finds that it is appropriate for Defendant Culliver and Defendant D. O. C. to design and implement a medical procedure to be performed outside of a suitably equipped medical facility as a predicate to the legal procedure of execution by lethal injection, counsel for the Plaintiff alerts this Court that the procedure as described by Defendant Culliver to the Plaintiff is exceptionally suspect and carries with it a significant risk that the Eighth Amendment's prohibitions against cruel and unusual punishments will be violated by its use.

35. Specifically and as stated above, Defendant Culliver and the aforementioned nurse have met with the Plaintiff together on two separate occasions to describe the medical

procedure that Defendant Culliver intends to implement with the Plaintiff to gain venous access.

36. Defendant Culliver and the nurse initially described the medical procedure as (1) involving an incision of approximately 0.5 inch being made in the Plaintiff's arm through which a catheter would be inserted into a vein and (2) being performed at least twenty-four hours in advance of the execution.

37. More recently, however, Defendant Culliver and the nurse informed the Plaintiff that (1) the incision will be approximately two inches in length and will be made either in the Plaintiff's leg or arm, (2) this medical procedure will not be performed until approximately one hour before the execution, and (3) only a local anesthetic will be used during the procedure.

38. Logically, if the State of Alabama had a written protocol for the medical procedure necessary to be performed immediately prior to an execution of condemned prisoners with whom peripheral intravenous access was not possible, there would be no discrepancies between Defendant Culliver's descriptions of the procedure to the Plaintiff.

39. Also troublesome is the fact that Defendant Culliver described the procedure to undersigned counsel on October 3, 2003 as basically being that described in Paragraph 31 above-- which involves a two inch incision being made in the Plaintiff and a catheter being inserted through the incision into a vein-- but also claimed that the procedure would not be a cut-down

procedure.

40. According to Dr. Mark Heath, a licensed physician who is a Board Certified anesthesiologist and assistant professor at Columbia University College of Physicians and Surgeons, the procedure described by Defendant Culliver is precisely a cut-down procedure. (See Paragraph 8 of the Affidavit of Mark Heath, M.D., attached to this pleading as Attachment 6).

41. Clearly, Defendant Culliver does not have the requisite knowledge base to be in charge of designing, performing, or overseeing this medical procedure.

42. From the descriptions of the procedure Defendant Culliver has given the Plaintiff and undersigned counsel and based upon a telephone conversation between undersigned counsel Smith and Mr. Andy Redd of the legal department of the Alabama Department of Corrections, undersigned counsel in good faith believes that Defendant Culliver in fact does intend to perform a cut-down procedure on the Plaintiff to gain venous access prior to the Plaintiff's execution by lethal injection.

43. A cut-down procedure is an invasive and barbaric medical procedure which does not comport with the contemporary practice of medical care. (See Paragraphs 21, 22, 23, and 24 of the Affidavit of Mark Heath, M.D.).

44. If the State of Alabama does intend to perform a cut-down procedure, this clearly would constitute cruel and unusual punishment because this medical procedure is invasive, it may give rise to serious medical complications, it involves unnecessary pain and suffering, it involves the mutilation of

the Plaintiff's body, and there are better methods available for a qualified physician to perform on the Plaintiff to gain venous access which would comport with contemporary medical care standards. (See Paragraphs 18, 20, 21, 22, 23, and 24 of Affidavit of Mark Heath, M.D.).

45. According to Dr. Mark Heath, a cut-down procedure involves making a series of surgical incisions through the skin, through the underlying connective tissue, through the underlying layers of fat, through the underlying layers of muscle, until the region surrounding a large vein is reached. (See Paragraph 9 of Affidavit of Mark Heath, M.D.).

46. During a cut-down procedure, blood vessels may have to be closed either by the use of cautery or the use of ligatory suture. (See Paragraph 11 of Affidavit of Mark Heath, M.D.).

47. Furthermore, cut-down procedures are usually performed under deep sedation that includes the administration of potent intravenous analgesics (drugs that block pain) because otherwise, it would be an extraordinarily disturbing and distressing experience. (See Paragraph 13 of Affidavit of Mark Heath, M.D.).

48. Of great concern is the fact that many complications of the cut-down procedure are well-recognized by the medical community. (See Paragraph 18 of Affidavit of Mark Heath, M.D.).

49. These complications include the very painful and life-threatening conditions of severe hemorrhage (with accompanying sense of asphyxiation and terror), pneumothorax (with accompanying severe distress, sense of suffocation and potential

cardiovascular collapse), and cardiac dysrhythmia (abnormal electrical activity of the heart leading to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia). (See Paragraph 18 of Affidavit of Mark Heath, M.D.).

50. Whenever a cut-down procedure is performed in the elective surgical setting, it is imperative that the medical personnel performing the procedure have immediate access to a variety of drugs and medical equipment that includes but is not limited to suction, surgical lighting, surgical instruments, cautery, chest tubes, EKG monitors and equipment, and a defibrillator. (See Paragraph 18 of Affidavit of Mark Heath, M.D.).

51. The Defendants have not assured the Plaintiff that any of the drugs or medical equipment described above will be available during the medical procedure they intend to perform at Holman.

52. Furthermore, the Defendants refuse to supply the Plaintiff with any information concerning the personnel who will be present during the medical procedure to be performed on the Plaintiff prior to the legal procedure of his execution by lethal injection.

53. As Dr. Mark Heath explains, many, if not most, physicians have never personally performed a cut-down procedure and do not possess the requisite skills for competently and safely performing such a procedure. (See Paragraph 14 of Affidavit of Mark Heath, M.D.).

54. Hospitals in the private sector require medical practitioners to be credentialed for the specific procedure of cut-downs for the purpose of safeguarding patients by ensuring that procedures are performed by experienced and competent personnel. (See Paragraph 15 of Affidavit of Mark Heath, M.D.).

55. Subjecting a person to a cut-down procedure in the hands of inexperienced personnel would represent a clear risk of a medical misadventure and botched outcome. (See Paragraph 16 of Affidavit of Mark Heath, M.D.).

56. Any person undergoing a cut-down procedure should be entitled to review the credentials, certification, and training record of the medical personnel who will be performing the procedure. (See Paragraph 17 of Affidavit of Mark Heath, M.D.).

57. In the absence of such a review, and particularly given Defendant Culliver's refusal to permit such scrutiny, there is a complete lack of any reasonable assurance that the medical procedure Defendant Culliver intends to perform on the Plaintiff as a predicate to his execution will be humane. (See Paragraph 17 of Affidavit of Mark Heath, M.D.).

58. The cut-down procedure Defendant Culliver apparently intends to perform on the Plaintiff carries with it a substantial risk of inflicting substantial and prolonged pain. See Farmer v. Brennan, 511 U.S. 825, 847 (1994) (punishments are cruel when they entail exposure to risks that "serve[] no 'legitimate penological objective'"; prison official may be held liable under Eighth Amendment for denying humane conditions of confinement if he knows that inmates face substantial risk of

serious harm) (citations omitted).

59. The cut-down procedure Defendant Culliver apparently intends to perform on the Plaintiff does not comport with evolving standards of decency. See Gregg v. Georgia, 428 U.S. 153, 171 (1976) and Trop v. Dulles, 356 U.S. 86, 101 (1958).

60. The cut-down procedure the Defendants apparently intend to perform on the Plaintiff impermissibly entails unnecessary mental as well as physical pain and suffering during the execution process. See Trop v. Dulles, 356 U.S. 86, 111 (1958) (Brennan, J., concurring).

61. If the risks of inflicting pain and suffering associated with execution by lethal injection in the Plaintiff's case may be easily remedied or mitigated by employing alternative methods or altering the procedures employed in the execution process, the Defendants' failure to take these steps violates the Plaintiff's rights under the United States Constitution.

62. According to Dr. Mark Heath, there is an alternative procedure that the Defendants could utilize in gaining venous access in the Plaintiff that would easily remedy or mitigate the risks of unnecessary pain and suffering inherent in the cut-down procedure Defendant Culliver intends to utilize. (See Paragraphs 20, 21, 22, and 23 of Affidavit of Mark Heath, M.D.).

63. This alternative procedure is referred to by several terms, including percutaneous central line placement, percutaneous central access, percutaneous central venous cannulation, and percutaneous technique. (See Paragraph 23 of Affidavit of Mark Heath, M.D.).

64. This procedure has, except in rare circumstances, supplanted the use of the cut-down procedure and is superior to the cut-down procedure in virtually all regards. (See Paragraph 23 of Affidavit of Mark Heath, M.D.).

65. This procedure is less invasive, less painful, faster, cheaper, and safer than the cut-down procedure. (See Paragraph 23 of Affidavit of Mark Heath, M.D.).

66. Because of this procedure's more widespread use, more physicians are proficient and competent in performing this procedure as compared to the cut-down procedure.

67. It would be extraordinarily rare to perform a central venous cut-down procedure without first attempting and failing to successfully obtain venous access using this procedure.

68. The Defendants have not articulated a reason for implementing the barbaric cut-down medical procedure on the Plaintiff in lieu of the medical procedure available that meets contemporary standards of medical care.

69. Of great significance and as referenced above, Defendant Culliver will not disclose the training or qualifications of the person(s) responsible for performing either the medical procedure on the Plaintiff that Defendant Culliver has acknowledged must be performed as a predicate to

the legal procedure of execution or the legal procedure of execution by lethal injection.

70. As such, it is unknown to anyone other than the Defendants whether a physician with the appropriate credentials, training, and experience will be present during the requisite medical procedure and/or the legal procedure of execution by lethal injection.

71. The refusal of the Defendants to identify and describe the medical personnel, if any, that will be present during the medical procedure performed on the Plaintiff and during the execution itself raises issues of constitutional importance.

72. The Defendants are deliberately preventing the public, the courts, and the condemned prisoners themselves from knowing any meaningful information about the lethal injection protocol and any accompanying medical procedure protocol that the Defendants intend to use in the killing of citizens of the State of Alabama.

73. Independent public scrutiny undeniably plays a significant and indispensable role in the proper functioning of capital punishment.

74. Public disclosure of Alabama's lethal injection protocol and accompanying mandated medical procedures for gaining venous access are critical in allowing the public to determine whether the punishment of execution by lethal

injection in the State of Alabama comports with "the evolving standards of decency which mark the progress of a maturing society". Trop v. Dulles, 356 U.S. 86 (1958).

75. For this Court and for the public to determine whether lethal injection execution in the State of Alabama is being humanely administered in cases where peripheral intravenous access is not possible, the State of Alabama must disclose reliable information about its lethal injection protocol and the mandated medical procedures that will be employed to gain venous access in condemned prisoners.

76. As it stands now, this Court, the public, and the Plaintiff are being forced to rely upon the very people responsible for designing and administering the protocol and performing the invasive and risky medical procedures for assurances that the protocol and procedures are sound and that they comport with "the evolving standards of decency".

77. In order to pass constitutional muster, an independent body - - such as this Court or the public - - must be allowed to review the State of Alabama's protocol.

78. It should be stressed that there exists a humane method for gaining venous access in the Plaintiff that does not violate the Plaintiff's Eighth Amendment rights, but Defendant Culliver is adamant that he intends to implement an inhumane method for gaining venous access in the Plaintiff that does violate the Plaintiff's Eighth Amendment rights.

79. Given the fact that Defendant Culliver has conceded that the Plaintiff's execution will mark the first instance of

the State of Alabama having to first perform an invasive medical procedure on a condemned inmate to gain venous access, there exists a substantial risk that the Defendants intend to violate the Eighth Amendment's prohibitions against inflicting cruel and unusual punishments with respect to the Plaintiff.

80. Given the posture that the Defendants have taken regarding the secrecy of the lethal injection protocol and accompanying mandated medical procedures, this Court cannot be confident that the Defendants are taking all necessary and appropriate steps to minimize the known significant risks of inflicting severe and unnecessary pain and suffering in administering the punishment of lethal injection execution to the Plaintiff.

81. Where, as here, the Plaintiff has demonstrated the existence of genuine and realistic concerns about the humaneness of the execution procedure, it is respectfully submitted that this Court cannot, in good conscience, condone the risk of sending the Plaintiff to his state sponsored death without first assuring itself that the constitutional prohibitions against the infliction of "unnecessary pain in the execution of the death sentence" will be honored. Louisiana ex re. Francis v. Resweber, 329 U.S. 459 (1947).

82. Failure to provide injunctive relief will result in irreparable harm in that the Defendants will perform the above-described cut-down procedure on the Plaintiff prior to his execution which is scheduled for October 9, 2003 at 6:00 p.m..

CAUSE OF ACTION

COUNT I

**Deprivation of Constitutional Rights
Under the Eighth Amendment**

83. Plaintiff has the right under the Eighth Amendment to the United States Constitution, as applied to states through the Fourteenth Amendment, to be free from cruel and unusual punishments.

84. The actions of the Defendants will result in the deprivation of the Plaintiff's rights as guaranteed by the Eighth Amendment.

State Law Claim

85. By Defendant Culliver refusing to allow a physician to examine and consult with the Plaintiff regarding the likely ability of Defendant Culliver to gain venous access to the Plaintiff as a predicate to the Plaintiff's execution, Defendant Culliver has violated Ala.Code 1975 §15-18-81.

In Forma Pauperis Status

86. The Plaintiff has been incarcerated since 1978.

87. The Plaintiff previously has been allowed to proceed in forma pauperis in the United States District Court for the Northern District of Alabama, the United States Court of Appeals for the Eleventh Circuit, and the Supreme Court of the United States.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff requests that this Court provide the Plaintiff with the following relief:

a. Enter an order allowing the Plaintiff to proceed in forma pauperis in this proceeding.

b. Enter an order granting injunctive relief and staying the Plaintiff's execution, which is currently scheduled for October 9, 2003 at 6:00 p.m.;

c. Enter an order that directs the Defendants to provide the Plaintiff with the protocol concerning the medical procedure which will be followed to gain venous access as a predicate to the Plaintiff's execution and the legal procedure of execution by lethal injection;

d. Enter an order that directs the Defendants to consult with medical experts and promulgate a protocol concerning venous access that comports with contemporary standards of medical care and the Eighth Amendment to the United States Constitution;

e. Enter an order that directs the Defendants to allow the Plaintiff to meet with his physician pursuant to Ala.Code 1975 §15-18-81;

f. Enter an order that provides for attorney's fees and costs of litigation under Title 28 of the Federal Code, and 42 U.S.C. 1988; and

g. Such other and further relief as this Court deems just and appropriate.

PART II

88. Plaintiff hereby incorporates by reference Paragraphs 1 through 87 of his original Complaint and amends said Complaint

as set forth below.

89. The Defendants through their actions are treating the Plaintiff with "deliberate indifference". See ___ Estelle v. Gamble, 429 U.S. 97 (1976) and Farmer v. Brennan, 511 U.S. 825 (1994).

90. The Defendants' "deliberate indifference" to the Plaintiff's serious medical needs violates the Eighth Amendment's prohibitions against cruel and unusual punishments and creates a risk of "unnecessary and wanton infliction of pain". See Estelle v. Gamble, 429 U.S. 97 (1976).

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff requests that this Court provide the Plaintiff with the following relief:

a. Enter an order allowing the Plaintiff to proceed in ___ forma pauperis in this proceeding.

b. Enter an order granting injunctive relief and staying the Plaintiff's execution, which is currently scheduled for October 9, 2003 at 6:00 p.m.;

c. Enter an order that directs the Defendants to provide the Plaintiff with the protocol concerning the medical procedure which will be followed to gain venous access as a predicate to the Plaintiff's execution and the legal procedure of execution by lethal injection;

d. Enter an order that directs the Defendants to consult

with medical experts and promulgate a protocol concerning venous access that comports with contemporary standards of medical care and the Eighth Amendment to the United States Constitution;

e. Enter an order that directs the Defendants to allow the Plaintiff to meet with his physician pursuant to Ala.Code 1975 §15-18-81;

f. Enter an order that provides for attorney's fees and costs of litigation under Title 28 of the Federal Code, and 42 U.S.C. 1988; and

g. Such other and further relief as this Court deems just and appropriate.

PART III

91. The Plaintiff reasserts the allegations contained in Paragraphs 1 through 90 as though fully set out herein.

92. Pursuant to Ala.Code 1975 §15-18-82, Defendant Culliver, as the Warden at Holman, shall be the executioner at the Plaintiff's execution and Defendant Campbell (hereinafter referred to as "Defendant D.O.C.") acting in his official capacity as the Commissioner of the Alabama Department of Corrections will provide the necessary "room and appliances to carry out" the Plaintiff's execution.

93. The Plaintiff has severely compromised veins and has encountered problems over the last two decades with prison medical personnel gaining venous access during routine physical

examinations.

94. Prior to the Plaintiff's scheduled execution date of October 9, 2003, Defendant Culliver met with the Plaintiff and acknowledged that the Plaintiff exhibited compromised veins.

95. Defendant Culliver also informed the Plaintiff that a medical procedure would have to be performed on the Plaintiff prior to the Plaintiff's execution in order for Defendant Culliver to gain venous access.

96. Defendant Culliver furthermore acknowledged to counsel for the Plaintiff that the Plaintiff's execution will be the first instance of the State of Alabama having to perform a medical procedure prior to the execution to gain venous access.

97. In Nelson v. Campbell , 541 U.S. 637 (2004), the Supreme Court of the United States (hereinafter, the "Supreme Court") found that the Plaintiff's §1983 action should proceed, that the District Court had jurisdiction over the subject matter, and that the Plaintiff had stated a claim upon which relief could be granted.

98. Subsequent to the Plaintiff's case being remanded to the Eleventh Circuit and then to this Court, the Defendants agreed not to utilize the cut-down procedure to gain venous access to the Plaintiff prior to the Plaintiff's execution.

99. The Defendants have now stated that, in lieu of a cut-down procedure, the defendants intend, should it become

necessary, to gain venous access to the Plaintiff utilizing a percutaneous central line placement procedure.

100. The only information that the Defendants have provided the Plaintiff concerning the percutaneous central line placement procedure that the Defendants intend to utilize to gain venous access to the Plaintiff is a three-sentenced paragraph from the Defendants' execution protocol, which does not even refer to percutaneous central line placement and which states in full:

If lethal injection is the means of execution, the I. V. Team will be escorted into the execution chamber to start the I. V. The heart monitor leads will be applied to the condemned. If the veins are such that intravenous access cannot be provided, contract medical personnel will perform a central line procedure to provide an intravenous access.

101. The Plaintiff submits to this Court that the Defendants' three-sentenced paragraph from their execution protocol does not describe in any meaningful manner a process that comports with contemporary medical standards for gaining venous access in condemned inmates such as the Plaintiff prior to an execution.

102. Counsel for the Plaintiff in good faith submits that the Defendants are designing a medical procedure to be followed as a predicate to the Plaintiff's execution without being qualified to so design such a medical procedure.

103. Furthermore, counsel for the Plaintiff in good faith

submits that the Defendants are overstepping their authority in attempting to perform medical procedures outside of a medical setting without appropriate medical safeguards in an attempt to carry out the legal procedure of execution.

104. Assuming arguendo that this Court finds that it is appropriate for the Defendants to design and implement a medical procedure to be performed outside of a suitably equipped medical facility as a predicate to the Plaintiff's execution by lethal injection, counsel for the Plaintiff alerts this Court that the procedure as described in the Defendants' three-sentenced protocol is suspect and carries with it a significant risk that the Eighth Amendment's prohibitions against cruel and unusual punishments will be violated by its use.

105. The Plaintiff is in a position of having to rely upon the Defendants to promulgate and carry out a venous access protocol that comports with contemporary standards of medical care and which does not violate the Eighth Amendment.

106. Significantly, these are the same Defendants who were planning to promulgate and carry out a venous access protocol that was unanimously rejected by the Supreme Court. Nelson v. Campbell, 541 U.S. 637 (2004).

107. Tellingly, after the Plaintiff's case was remanded back to this Court, counsel for the Defendants during a teleconference conducted by this Court on August 6, 2004 stated:

Well, let me tell you what we're going to represent to the Court now and subsequently in writing, having educated ourselves in all these matters, that we are not going to utilize the challenged procedure, the cut-down procedure.

(emphasis added). The clear implication is that the Defendants did not exert the effort to educate themselves regarding the subject matter of venous access prior to the case being decided by the Supreme Court despite the fact that they were in charge of promulgating and carrying out the protocol to gain venous access to the Plaintiff.

108. The Plaintiff asserts that the conduct of the Defendants from September 2003 to the present time indicates that they cannot be relied upon to promulgate a venous access protocol that comports with contemporary standards of medical care and which does not violate the Eighth Amendment without this Court's intervention.

109. The percutaneous central line placement procedure is a complex medical procedure. In order for that procedure to comport with contemporary standards of medical care and not violate the Eighth Amendment, the Defendants' protocol must provide at a minimum the following information:

(a) A reasonably detailed description of the procedure which they intend to utilize in order to gain venous access to the Plaintiff;

(b) Information as to who will perform the procedure to

gain venous access to the Plaintiff;

(c) Information concerning the qualifications of the individual(s) who will perform the procedure to gain venous access to the Plaintiff;

(d) Information as to where the procedure to gain venous access to the Plaintiff will be performed; and

(e) Information concerning the availability of necessary and precautionary medical apparatus at the location where the procedure to gain venous access will be performed.

110. As was the case in October 2003, the Defendants have refused to provide the Plaintiff with any of the above-described information.

111. If the Defendants intend to perform a percutaneous central line placement procedure without providing the Plaintiff with the above-described information, said conduct would not comport with contemporary standards of medical care and would constitute cruel and unusual punishment under the Eighth Amendment.

112. It is well recognized by the medical community that complications can occur when utilizing the percutaneous central line placement procedure. These complications include the very painful and life-threatening conditions of severe hemorrhage (with accompanying sense of asphyxiation and terror), pneumothorax (with accompanying severe distress, sense of

suffocation and potential cardiovascular collapse), and cardiac dysrhythmia (abnormal electrical activity of the heart leading to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia).

113. Whenever a percutaneous central line placement procedure is performed in the elective surgical setting, it is imperative that the medical personnel performing the procedure have immediate access to a variety of drugs and medical equipment that includes but is not limited to suction, surgical lighting, surgical instruments, cautery, chest tubes, EKG monitors and equipment, and a defibrillator.

114. The Defendants have not assured the Plaintiff that any of the drugs or medical equipment described above will be available during the medical procedure they intend to perform at Holman.

115. Furthermore, the Defendants refuse to supply the Plaintiff with any meaningful information concerning the personnel who will be present during the medical procedure to be performed on the Plaintiff prior to the legal procedure of his execution by lethal injection.

116. Most physicians do not possess the requisite skills to competently and safely perform a percutaneous central line placement procedure.

117. Subjecting a person to a percutaneous central line

placement procedure in the hands of inexperienced personnel would represent a clear risk of a medical misadventure and botched outcome.

118. Any person undergoing a percutaneous central line placement procedure should be entitled to review the credentials, certification, and training record of the medical personnel who will be performing the procedure.

119. In the absence of such a review, and particularly given the Defendants' refusal to disclose any meaningful information, there is a complete lack of any reasonable assurance that the medical procedure the Defendants intend to perform on the Plaintiff as a predicate to his execution will be humane.

120. Given the Defendants' refusal to disclose any meaningful information and refusal to confirm adequate safeguards will be in place, the percutaneous central line placement procedure that the Defendants apparently intend to perform on the Plaintiff carries with it a substantial risk of inflicting substantial and prolonged pain. See Farmer v. Brennan, 511 U.S. 825, 847 (1994) (punishments are cruel when they entail exposure to risks that "serve[] no 'legitimate penological objective'"; prison official may be held liable under Eighth Amendment for denying humane conditions of confinement if he knows that inmates face substantial risk of

serious harm) (citations omitted).

121. Given the Defendants' refusal to disclose any meaningful information and refusal to confirm adequate safeguards will be in place, the percutaneous central line placement procedure that the Defendants apparently intend to perform on the Plaintiff does not comport with evolving standards of decency. See Gregg v. Georgia, 428 U.S. 153, 171 (1976) and Trop v. Dulles, 356 U.S. 86, 101 (1958).

122. Given the Defendants' refusal to disclose any meaningful information and refusal to confirm adequate safeguards will be in place, the percutaneous central line placement procedure that the Defendants apparently intend to perform on the Plaintiff impermissibly entails unnecessary mental as well as physical pain and suffering during the execution process. See Trop v. Dulles, 356 U.S. 86, 111 (1958) (Brennan, J., concurring).

123. The Defendants through their actions are treating the Plaintiff with "deliberate indifference". See Estelle v. Gamble, 429 U.S. 97 (1976) and Farmer v. Brennan, 511 U.S. 825 (1994).

124. The Defendants' "deliberate indifference" to the Plaintiff's serious medical needs violates the Eighth Amendment's prohibitions against cruel and unusual punishments and creates a risk of "unnecessary and wanton infliction of

pain". See Estelle v. Gamble, 429 U.S. 97 (1976).

125. If the risks of inflicting pain and suffering associated with execution by lethal injection in the Plaintiff's case may be easily remedied or mitigated by employing adequate safeguards, the Defendants' failure to take these steps violates the Plaintiff's rights under the United States Constitution.

126. The Defendants have not articulated a reason for refusing to provide the Plaintiff with the information requested in Paragraph 109, supra..

127. Significantly, as referenced above, the Defendants refuse to disclose the training or qualifications of the individuals responsible for performing the percutaneous central line placement procedure on the Plaintiff as a predicate to the Plaintiff's execution by lethal injection.

128. As such, it is unknown to anyone other than the Defendants whether a physician with the appropriate credentials, training, and experience will even be present during the percutaneous central line placement procedure.

129. The refusal of the Defendants to identify and describe the medical personnel, if any, that will be present during the percutaneous central line placement procedure performed on the Plaintiff raises issues of constitutional importance.

130. Given the posture that the Defendants have taken regarding the secrecy concerning the utilization of the

percutaneous central line placement procedure, this Court cannot be confident that the Defendants are taking all necessary and appropriate steps to minimize the known significant risks of inflicting severe and unnecessary pain and suffering in gaining venous access as a predicate to the Plaintiff's execution.

131. Where, as here, the Plaintiff has demonstrated the existence of genuine and realistic concerns about the medical dangers associated with the execution procedure, it is respectfully submitted that this Court cannot, in good conscience, condone the risk of sending the Plaintiff to his state sponsored death without first assuring itself that the constitutional prohibitions against the infliction of "unnecessary pain in the execution of the death sentence" will be honored. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).

132. In response to the Defendants' assertion that they intend to utilize the percutaneous central line placement procedure in order to gain venous access to the Plaintiff, the Plaintiff believes that he is entitled at the minimum to have the Defendants:

(a) Provide the Plaintiff with a detailed description of the procedure which they intend to utilize in order to gain venous access to the Plaintiff;

(b) Provide information to the Plaintiff as to who will

perform the procedure to gain venous access to the Plaintiff;

(c) Provide information to the Plaintiff concerning the qualifications of the individual(s) who will perform the procedure to gain venous access to the Plaintiff;

(d) Provide information to the Plaintiff as to where the procedure to gain venous access to the Plaintiff will be performed; and

(e) Provide information to the Plaintiff concerning the availability of necessary and precautionary medical apparatus at the location where the procedure to gain venous access will be performed.

133. As was the case in October 2003, the Defendants have refused to provide the Plaintiff with any of the above-described information.

134. In fact, the only information that the Defendants have provided the Plaintiff concerning the manner in which the Defendants intend to gain venous access to the Plaintiff is a three-sentenced paragraph which fails to even mention the procedure that the Defendants intend to utilize, i.e., the percutaneous central line placement procedure.

135. If the percutaneous central line placement procedure performed on the Plaintiff is not performed by a qualified physician in an appropriate medical environment that has the necessary and precautionary medical apparatus, the Defendants'

"percutaneous central line placement" procedure could, like the 'cut down procedure' addressed in Nelson v. Campbell , 541 U.S. 637 __, 124 S.Ct. 2117 (2004), be 'gratuitous' and 'wholly unnecessary,' Id. at __, 124 S.Ct. at 2123-2124, since there are other, safer appropriate means to gain venous access to the Plaintiff and still carry out the Plaintiff's execution by lethal injection.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff requests that this Court provide the Plaintiff with the following relief:

a. Enter an order allowing the Plaintiff to proceed in forma pauperis in this proceeding.

b. Enter an order granting injunctive relief and staying the Plaintiff's execution pending resolution of the present action;

c. Direct the Defendants to consult with medical experts and promulgate a protocol concerning venous access that comports with contemporary standards of medical care and the Eighth Amendment to the United States Constitution and to provide a copy of that protocol to the Plaintiff;

d. Enter an order that provides for attorney's fees and costs of litigation under Title 28 of the Federal Code, and 42 U.S.C. 1988; and

e. Such other and further relief as this Court deems just

and appropriate.

Respectfully

submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2005, I electronically filed the foregoing **Second Amended Complaint for Injunctive and Declaratory Relief** with the Clerk of Court using the CM/ECF system which will send notification of such filing to Assistant Attorney General J. Clay Crenshaw.

/s/ Michael Kennedy McIntyre
MICHAEL KENNEDY McINTYRE