

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DON JOHNSON,)
)
 Plaintiff,)
)
 v) No. 3:06-0946
) **JUDGE CAMPBELL**
) **Death Penalty Case**
) **Execution Date: Oct. 25, 2006,**
) **1:00 a.m.**
)
 GEORGE LITTLE, in his official capacity as)
 Tennessee's Commissioner of)
 Correction;)
)
 RICKY BELL, in his official capacity as)
 Warden, Riverbend Maximum)
 Security Institution;)
)
 JOHN DOE EXECUTIONERS 1-100;)
)
 Defendants.)

**MOTION FOR PRELIMINARY INJUNCTION
AND MEMORANDUM IN SUPPORT**

Pursuant to 42 U.S.C. §1983, Plaintiff Don Johnson has filed a complaint seeking injunctive relief prohibiting Defendants from executing him on October 25, 2006 employing their proposed electrocution or their proposed lethal injection protocol. R. 1: Complaint. Plaintiff and Defendants agree that Mr. Johnson's lethal injection claim is not currently justiciable. R. 7, Memorandum in Support of Motion to Dismiss; R. 13, Response in Opposition to Motion to Dismiss (filed contemporaneously). Given that the State of Tennessee intends to subject Mr. Johnson to death by electrocution on October 25, 2006, which will, in all likelihood, submit Mr. Johnson to excruciating pain and torture, Mr. Johnson moves this Court for a preliminary injunction enjoining the State of Tennessee from executing Mr. Johnson in the Tennessee electric chair until this Court

can conduct further proceedings in this case. In support of his motion, Mr. Johnson states the following:

1. Were Don Johnson executed using the Tennessee Electric Chair employed by the Defendants, he would experience an excruciating and horrifying death. Dr. John P. Wikswo,¹ an expert on the use of the electric chair, who has reviewed numerous autopsies of individuals who have been electrocuted, opines that:

a. Execution by electrocution is extremely painful, because of the direct stimulation of nerves and pain receptors, the direct and indirect contraction of virtually all of the skeletal muscles in the body, the contraction of intestinal and other smooth muscle, and the intense pain associated with electrical burns.

b. There is no scientific evidence suggesting that the intense electrical currents during execution by electrocution induce instantaneous anesthesia or analgesia, and/or unconsciousness. There is ample evidence from the medical literature on high-voltage (greater than 1,000 volts) electrical accidents that individuals can maintain consciousness during strong electrical shocks, even shocks to the head that produce severe tissue damage.

c. There is ample evidence, from judicial electrocutions,

¹An expert on the use of the electric chair, Dr. Wikswo is an experimental biophysicist, electrophysiologist, and biomedical engineer, who is employed at Vanderbilt University in the positions of Gordon A. Cain University Professor, the A.B. Learned Professor of Living State Physics, the Director of the Vanderbilt Institute for Integrative Biosystems Research and Education, and Professor of Biomedical Engineering, Molecular Physiology & Biophysics. See Exhibit 1, Curriculum Vitae of Dr. John P. Wikswo, Ph.D.

electrical accidents, and fibrillation research, that at the voltages utilized in judicial execution, the heart will not reliably enter into fibrillation and hence can remain capable of pumping blood through the body after the end of the electrical shock used in judicial electrocution

d. Death is caused primarily by suffocation due to paralysis of the respiratory muscles and respiratory arrest, and by thermal heating of the brain.

e. Death by electrocution is not instantaneous.

f. The minimum voltage and current and duration of this voltage and current required to execute a particular individual by electrocution are unknown, and will vary substantially from individual to individual.

See Exhibit 2, Declaration of Dr. John Wikswow, Ph.D., p.2.

2. The Tennessee Electric Chair is defective. The Tennessee Electric Chair was designed by Fred Leuchter. On or Around November 29, 1989, Fred A. Leuchter, Jr., installed the Fred A. Leuchter Associates, Inc., Modular Electrocution System (Electric Chair) at the Riverbend Maximum Security Institution (RMSI). See Exhibit 3, Fred A. Leuchter Associates Equipment Certification.

3. On or around April 16, 1994, Michael S. Morse visited the RMSI and performed tests on the Electric Chair. Morse opined that the Electric Chair did not deliver an adequate current and did not have the capacity to function with a typical load for an execution. Morse made fourteen specific recommendations for modifications to the Electric Chair. See Exhibit 4, April 18, 1994 Letter from Michael S. Morse.

4. On or around April 25, 1994, Jay Wiechert visited the RMSI and examined the Electric Chair. Wiechert opined that the Electric Chair did not function properly. Wiechert made seven specific recommendations for modifications to the Electric Chair. See Exhibit 5, April 27, 1994 Letter from Jay Wiechert.

5. Prior to May 1, 1994, technical personnel at the RMSI made some, but not all, of the modifications Morse and Wiechert suggested. See Id. at p.2.

6. On April 23, 1996, JVM Industries, the successor to Fred A. Leuchter, Associates, Inc., wrote the RMSI Associate Warden for Administration. JVM informed that it had become aware of the modifications made to the Electric Chair.² JVM wrote that the modifications raised the specter of a “brain dead vegetable at the conclusion of the execution procedure”, and said that if the modifications remained in place the Electric Chair was an “instrument of torture.” See Exhibit 7, April 23, 1996 Letter from JVM Industries.

7. On September 14, 2006, a Nashville, Tennessee, television news program reported that Commissioner Little has acknowledged that, “In some other states, they haven't followed the proper procedures, and unfortunately they have ended up having some very terrible results with the executions.” When asked whether that was his worst fear, Commissioner Little responded, “Well, yes.” See <http://www.newschannel5.com/Global/story.asp?s=5419521>. Last checked 10/3/06.

²It is unclear to Mr. Johnson what modifications have been made to Tennessee's electric chair to date. While Tennessee's “Execution Manual” does include directives regarding the use of the electric chair, they are general and do not include specifics regarding the innerworkings of the chair. See Exhibit 6, Tennessee Department of Corrections Execution Manual for Electrocution.

8. In that same interview, Commissioner Little admitted that "Well, until you actually have somebody in the chair you can't have that 100 percent certainty." *Id.*

9. On or about September 15, 2006, Fred Leuchter, wrote to Tennessee Governor Phil Bredesen imploring him not to use the Tennessee Electric Chair. Leuchter warned Governor Bredesen that "It's tantamount to somebody being burned at the stake." *See Exhibit 8, Builder of State's Electric Chair Calls it a Torture Device, The Tennessean, September 16, 2006, p. 11A.*

10. Jay Wiechert, the engineer who has modified the electric chair that Leuchter built, has been involved in botched electrocutions in the State of Florida. *See <http://www.newschannel5.com/Global/story.asp?s=5419521>* (Last checked 10/3/06).

11. If the Tennessee electric chair is used to kill Donnie Johnson, Mr. Johnson will be burned excessively, traumatized by a process of death where human and mechanical mistakes have resulted in prisoners receiving insufficient electrocution to kill them upon the first attempt, and he will face an unnecessary risk of pain and suffering.

12. The execution of Alpha Otis Odell Stephens in Georgia is but one example of a "botched" electrocution. Dick Pettys of the Associated Press described the Stephens execution:³

Seconds after a mask was placed over [Stephens's] head, the first jolt was applied, causing his body to snap forward and his fists to clench. His body slumped when the current stopped two minutes later, but shortly afterward, witnesses saw him struggle to breathe. During the required six minutes

³Audio recordings of Botched executions in Georgia can be accessed at http://www.soundportraits.org/on-air/execution_tapes. Last checked 10/4/06.

in which the body was allowed to cool before doctors could examine it, Stephens took about 23 breaths. At 12:26 a. m., two doctors examined Stephens and said he was alive. At the second jolt, administered at 12:28 a. m., Stephens again snapped upright. The charge was discontinued at 12:30 a. m., and at 12:36 a. m., he was pronounced dead.

See http://www.soundportraits.org/on-air/execution_tapes/botched_execution.php3
(last checked 10/18/06).

13. The State of Alabama has also had multiple problems with its electric chair, including mutilation, burns, and botched executions. The history of Alabama's executions establishes a pattern of cruel, torturous, painful, and protracted executions.

a. During Horace Dunkins's execution in Alabama, the prison warden activated the electric chair sometime shortly after midnight on July 13, 1989. Eyewitnesses said they observed Mr. Dunkins's right hand tense and his left arm jerk upward against the restraints. It quickly became apparent that Mr. Dunkins was not dead. A second execution was attempted which resulted in severe burning and mutilation of Mr. Dunkins's body. Witnesses saw smoke coming from Mr. Dunkins' ears and legs. It was subsequently reported by State representatives that cables attaching Alabama's power supply and the electric chair were improperly connected, resulting in insufficient voltage discharge to instantaneously kill Mr. Dunkins. It was also reported that Mr. Dunkins may have received 60 or 70 volts of electricity during the state's first attempt at execution, which likely caused great pain but did not produce death. Nearly twenty minutes elapsed before Mr. Dunkins was finally pronounced dead. Although electrodes were fixed on the head and left leg near the knee, Horace Dunkins received electrical burns in his hip, left thigh, buttocks, lower back, right shoulder and right

thigh. See Exhibit 9, State of Alabama Department of Forensic Sciences, Autopsy Protocol for Horace Dunkins.

b. Michael Lindsay received burn marks on his scrotum and left arm. State Medical Examiner LeRoy Riddick, M.D., states that Lindsay had a “2 inch zone of burn on the left side of the scrotum.” See Exhibit 10, State of Alabama Department of Forensic Sciences, Autopsy Protocol for Michael Lindsay. Dr. Riddick also described [a]rcing marks around left groin.” Id. Furthermore, the state medical examiner’s autopsy revealed that Michael Lindsay’s body contained both “a small abrasion on the mid-portion of the right clavicle” and a 4 inch semicircular burn on his left forearm. Id.

c. Wayne Ritter’s autopsy similarly revealed burns to his scrotum and even burns to his chest, neck and abdomen. Ritter, as Lindsay, had a “2 inch zone of burns on the left side of the scrotum.” See Exhibit 11, State of Alabama Department of Forensic Sciences, Autopsy Protocol for Wayne Eugene Ritter. This burn corresponded to a zone of burns on Ritter’s inside left leg. Ritter’s autopsy also revealed injuries to his chest in the form of “a zone of violaceous changes to the upper portion of the chest on each side of the sternal notch.” Id. LeRoy Riddick M.D., and Gary Cumberland, M.D., the State Medical Examiners for Ritter’s autopsy, also located burns on Ritter’s neck, “anteriorly on each side of the central portions of the neck.” Id.

14. Virginia, like Georgia and Alabama, has also experienced multiple problems with its electric chair.

a. On August 10, 1992, Frank J. Coppola was put to death by electrocution. After two jolts of electricity had been applied to him, the death chamber reportedly filled with the smell and sizzle of burning as Coppola’s head and leg burst

into flames.

b. On October 17, 1990, blood poured from Wilbert Lee Evans' eyes and nose after the current was applied. Witnesses noted audible moaning during the electrocution. Evans reportedly made a sizzling sound like a pressure cooker before its top has been put on.

c. On August 22, 1991, Derick Lynn Peterson moaned audibly as electric current was applied to him. After two minutes of current and a four minute wait, a prison doctor checked Peterson's pulse with his stethoscope and announced that Peterson was not dead. After another four-minute wait, the doctor again checked the pulse and announced that Peterson had not expired. Finally, a second surge of electricity was applied. In total, it took over thirteen minutes to complete Peterson's execution.

d. A witness to Roger Keith Coleman's May 20, 1992 execution reported smoke coming from Coleman's leg. Coleman required two 1,700-volt jolts to die.

15. Florida has also had similar problems with its electric chair, a chair that the current Tennessee consultant, Jay Weichert, has worked on.

a. In 1997, Pedro Medina was put to death in the infamous "Old Sparky." During his execution, Medina's head literally caught on fire, the flames shooting more than a foot into the air, the room filled with smoke and the witnesses were hurriedly rushed from the room. "Old Sparky" was replaced with a new model.

b. In 1999, Allen Lee "Tiny" Davis was put to death in the new and improved Florida electric chair. The chair had been built with Davis in mind. Davis's body literally burst open, blood pouring out. Photos of "Tiny" Davis are widely available

on the internet. See <http://www.ccadp.org/tinydavis.htm> (Last checked 10/4/06).

16. The use of the electric chair has been repeatedly characterized as the modern day version of burning at the stake. See Glass v. Louisiana, 471 U.S. 1080, 1994 (1988) (Brennan, J. respecting the denial of cert).

17. The Supreme Court of Georgia has found that the electric chair constitutes cruel and unusual punishment under the state Constitution. Dawson v. State, 554 S.E.2d 137, 144 (Ga. 2001).

18. Based on these facts, it is clear that the use of Tennessee's electric chair will, in all likelihood, submit Mr. Johnson to excruciating pain and torture, and is unconstitutional under the Eighth and Fourteenth Amendments. This Court should grant a preliminary injunction, enjoining the use of the electric chair upon Don Johnson to allow for further proceedings.

19. The appropriateness of a preliminary injunction here is confirmed by the traditional four-part test governing injunctive relief:

a. Under that test, a court is required to assess: (a) the movant's likelihood of success on the merits; (b) irreparable harm to the movant absent a stay; (c) the prospect that others will be harmed; and (d) the public interest. See e.g., Nader v. Blackwell, 230 F.3d 833, 834 (6th Cir. 2000)(granting stay pending appeal); Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991).

b. These four factors "are factors to be balanced, not prerequisites that must be met." Nader, 230 F.3d at 834; Michigan Coalition of Radioactive Material Users, Inc., 945 F.2d at 153; In Re Delorean Motor Co., 755 F.2d 1223, 1229 (6th Cir.

1985).

c. “The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other.” Michigan Coalition of Radioactive Material Users, Inc., 945 F.2d at 153; In Re Delorean Motor Co., 755 F.2d at 1229.

d. Thus, it has long been the law of this Circuit that a stay is appropriate where the movant “*at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued.*” Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100, 105 (6th Cir. 1982) (emphasis supplied). See also Family Trust Foundation of Kentucky, Inc. v. Kentucky Judicial Conduct Commission, 388 F.3d 224, 227 (6th Cir. 2004).

e. Here, these four considerations require a preliminary injunction.

1) Plaintiff’s complaint (R. 1) is far from frivolous, and there is clear evidence that, in violation of the Eighth and Fourteenth Amendments, if Don Johnson is to be executed in Tennessee’s electric chair, he will be conscious and suffering terror and excruciating pain during the execution process. In the end, Mr. Johnson will die from asphyxiation and will literally burn up from the inside. Mr. Johnson’s claims are properly before this Court, and he will likely prevail on the merits.

2) It is also apparent that Don Johnson would suffer irreparable injury absent the requested relief: He would face the loss of life under cruel and torturous circumstances. This point is vividly illustrated by the execution of Allen “Tiny” Davis by the State of Florida in 1999. Davis’s execution has been recounted in a recent essay by Michael Radelet:

"Before he was pronounced dead ... the blood from his mouth had poured onto the collar of his white shirt, and the blood on his chest had spread to about the size of a dinner plate, even oozing through the buckle holes on the leather chest strap holding him to the chair." His execution was the first in Florida's new electric chair, built especially so it could accommodate a man Davis's size (approximately 350 pounds). Later, when another Florida death row inmate challenged the constitutionality of the electric chair, Florida Supreme Court Justice Leander Shaw commented that "the color photos of Davis depict a man who -- for all appearances -- was brutally tortured to death by the citizens of Florida." Justice Shaw also described the botched executions of Jesse Tafero and Pedro Medina (q.v.), calling the three executions "barbaric spectacles" and "acts more befitting a violent murderer than a civilized state."

See Exhibit 12, Radelet, Michael, *Some Examples of Post-Furman Botched Executions*, May 3, 2006. Photographs of Mr. Davis after the execution are attached as Exhibits 13-14.

3) Additional Proof in Support of Mr. Johnson's claim that he will suffer irreparable injury is provided to the Court in the form of autopsy reports and photos,⁴ as well as affidavits from individuals who have viewed electrocutions,⁵ all of

⁴ See Exhibit 15, Photographs of Robert Wayne Williams Taken after he was executed in Louisiana, December 14, 1983; Exhibit 16, Postmortem Examination of the body of Jesse Tafero including photos of Tafero taken at the autopsy and after; Exhibit 17, Postmortem Examination of the body of Daniel M. Thomas and photographs; Exhibit 18, Postmortem Examination of the body of David Livingston Funchess and photos; Exhibit 19, Postmortem Examination of the body of Ronald John Michael Straight and photos; Exhibit 20, Postmortem Examination of the body of Beuford White and autopsy photographs; Exhibit 21, Postmortem Examination of the body of Willie Jasper Darden, Jr. and autopsy photographs; Exhibit 22, Postmortem Examination of the body of Jeffrey Joseph Daugherty and autopsy photographs; Exhibit 23, Postmortem Examination of the body of Theodore Robert Bundy and autopsy photographs; Exhibit 24, Postmortem Examination of the body of Aubrey Adams and autopsy photographs; Exhibit 25, State of Alabama Department of Forensic Sciences, Autopsy Protocol for John Lewis Evans, III; Exhibit 26, State of Alabama Department of Forensic Sciences, Autopsy Protocol for Arthur Lee Jones; Exhibit 27, State of Alabama Department of Forensic Sciences, Autopsy Protocol for Herbert Lee

which are attached as Exhibits 15-33. These show time and again that individuals who are subjected to death in the electric chair are subjected to a horrific, torturous death.

4) In addition, there is little potential harm to the Defendants, who would merely be required to temporarily refrain from engaging in cruel and inhumane actions.

5) Finally, the public manifestly has no interest in allowing state agents to willfully inflict a most gruesome death on one of its citizens. The public interest lies with a proper and deliberate examination of the complaint.

6) In the balance of these factors, therefore, a preliminary injunction is appropriate.

CONCLUSION

This Court should grant a preliminary injunction prohibiting Defendants from executing Don Johnson in Tennessee's electric chair, pending final disposition of this case.

Respectfully submitted,

Kelley J. Henry
Gretchen L. Swift
Assistant Federal Public Defenders

Richardson; Exhibit 28, State of Alabama Department of Forensic Sciences, Autopsy Protocol for Wallace Norell Thomas.

⁵See Exhibit 29, Affidavit of Russell F. Canan; Exhibit 30, Affidavit of Samuel Glasscock; Exhibit 31, Affidavit of Jonathan Eig; Exhibit 32, Affidavit of Johnny Robinson; Exhibit 33, Affidavit of Reverend J.D. Brown.

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By: /s/ Kelley J. Henry

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served upon the Defendants Little and Bell by delivering a copy to Mark Hudson, Assistant Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243 this 18th day of October, 2006.

/s/ Kelley J. Henry
Counsel for Plaintiff