

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT**

ELECTRONICALLY FILED

THOMAS CLYDE BOWLING,)
)
RALPH BAZE, and)
)
JEFFREY LEONARD)
)
Plaintiffs)
)
v.)
)
SCOTT HAAS, Medical Director)
Kentucky Department of Corrections,))
)
JOHN D. REES, Commissioner,)
Kentucky Department of Corrections,))
)
THOMAS SIMPSON, Warden,)
Kentucky State Penitentiary, and)
)
UNKNOWN EXECUTIONERS,)
)
Defendants.)

CIV. ACTION # 3:07-cv-32

CAPITAL CASE

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

Pursuant to Fed.R.Civ.P. 15(a), Plaintiffs hereby amend their complaint to the following:

I. NATURE OF ACTION

1. This action is brought pursuant to 28 U.S.C. §1331 for violations and threatened violations of the Federal Controlled Substances Act and the Federal Food, Drug, and Cosmetic Act. Plaintiffs seek equitable relief in the form of a declaratory judgment that Defendants are or intend to violate these statutes.
2. Under the Supremacy Clause of the United States Constitution, Defendants (state actors) are required to obey the Federal Controlled Substances Act, 21 U.S.C. §§801, et seq., and the Federal Food, Drug and Cosmetic Act., 21 U.S.C. §§301, et seq.
3. Defendants carry out lethal injections in Kentucky by injecting sodium thiopental, pancuronium bromide, and potassium chloride.
4. The Federal Controlled Substances Act lists schedules for controlled substances.
5. The Federal Controlled Substances Act says how and by whom controlled substances can be distributed.
6. Sodium thiopental is a controlled substance.
7. Defendants' means for obtaining the lethal injection chemicals does not comply with the Federal Controlled Substances Act.
8. The Federal Food, Drug and Cosmetic Act regulates permits the distribution of certain drugs only when a licensed medical practitioner issues a prescription.
9. Sodium thiopental is a schedule III drug.
10. No licensed medical practitioner prescribes sodium thiopental to Defendants for use in lethal injections.

11. The Federal Food, Drug and Cosmetic Act requires approval of drugs for the purposes in which they are intended to be used.
12. Using sodium thiopental, pancuronium bromide, and potassium chloride in lethal injections has not been approved by the FDA.
13. Because the use of the above chemicals for lethal injections has not been approved by the FDA, Defendants' use of these chemicals in lethal injections violates the Federal Food, Drug and Cosmetic Act.
14. Plaintiffs are not alleging that Defendants could never execute them by lethal injection. Rather, they assert that any execution by lethal injection must comport with the Federal Controlled Substances Act and the Federal Food, Drug and Cosmetic Act.
15. Plaintiffs seek a declaratory judgment that Defendants means for obtaining and administering the lethal injection chemicals violate the Federal Controlled Substances Act and the Federal Food, Drug and Cosmetic Act.

II. PLAINTIFFS

16. Thomas Clyde Bowling is a United States citizen and a resident of the Commonwealth of Kentucky. He is currently a death-sentenced inmate under the supervision of the Kentucky Department of Corrections. He is held at the Kentucky State Penitentiary in Eddyville, Kentucky.
17. Ralph Baze is a United States citizen and a resident of the Commonwealth of Kentucky. He is currently a death-sentenced inmate under the supervision of the Kentucky Department of Corrections. He is held at the Kentucky State Penitentiary in Eddyville, Kentucky.

18. Jeffrey Leonard is a United States citizen and a resident of the Commonwealth of Kentucky. He is currently a death-sentenced inmate under the supervision of the Kentucky Department of Corrections. He is held at the Kentucky State Penitentiary in Eddyville, Kentucky.¹

III. DEFENDANTS

19. Defendant Scott Haas is the Medical Director for the Kentucky Department of Corrections.

20. Defendant John D. Rees is the Commissioner of the Kentucky Department of Corrections.

21. Defendant Thomas Simpson is the Warden of the Kentucky State Penitentiary, where Plaintiffs' executions will occur.

22. Defendants Unknown Executioners are employed by or under contract with the Kentucky Department of Corrections, to make preparations for, and carry out Plaintiffs' executions. They include, but are not limited to, physicians, emergency medical technicians, phlebotomists, physicians assistants, the execution team, the executioner, the I.V. team, and the team leader. Plaintiffs do not know their identities and Defendants will not reveal the identities of these people.

¹ Jeffrey Leonard was convicted and sentenced to death under the name James Slaughter. Because his real name is

IV. JURISDICTION AND VENUE

23. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1651 (all writs), 2201 (declaratory relief), 2202 (further relief), 21 U.S.C. §332 (enjoining violations of the Federal Food, Drug, and Cosmetic Act); and Fed.R.Civ.P. 65 (injunctions).

24. Venue is proper under 28 U.S.C. §1391. All Defendants reside in the same state. The principle place of business for Defendant Haas, and Defendant Rees is Frankfort, Kentucky.

25. All Defendants are state actors acting under color of state law.

V. FACTS

26. Plaintiff Thomas Clyde Bowling has exhausted all automatic avenues of appeal, but has been granted DNA testing.

27. Plaintiff Ralph Baze has also exhausted all automatic avenues of appeal and may have an execution date set soon.

28. Plaintiff Jeffrey Leonard has also exhausted all automatic avenues of appeal and may have an execution date set soon.

29. Defendants are responsible for carrying out executions in Kentucky.

30. Defendants intend to carry out Plaintiffs' execution by injecting them with sodium thiopental, pancuronium bromide, and potassium chloride.

31. No doctor will be purchasing the lethal injection chemicals.

32. Either the Warden or the Commissioner of the Department of Corrections will purchase the lethal injection chemicals.

33. Neither the Warden nor the Commissioner of the Department of Corrections is a licensed physician.

Jeffrey Leonard, Leonard will be used throughout this litigation.

34. 21 U.S.C. §812, part of the Federal Controlled Substances Act, creates five schedules of controlled substances.
35. Drugs are considered schedule I controlled substances if:
- a) the drug or other substance has a high potential for abuse;
 - b) the drug or other substance has no currently accepted medical use in treatment in the United States; and,
 - c) there is a lack of accepted safety for use of the drug or other substance under medical supervision.
36. Drugs are considered schedule II controlled substances if:
- a) the drug or substance has a high potential for abuse;
 - b) the drug or substance has a currently accepted medical use in the United States or a currently accepted medical use with severe restrictions; and,
 - c) abuse of the drug or other substances may lead to severe psychological or physical dependence.
37. Drugs are considered schedule III controlled substances if:
- a) the drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II;
 - b) the drug or substance has a currently accepted medical use in the United States; and,
 - c) abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.
38. Drugs are considered schedule IV controlled substances if:
- a) the drug or substance has a low potential for abuse relative to the drugs or other substances in schedule III;

- b) the drug or other substance has a currently accepted medical use in treatment in the United States; and,
 - c) abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.
39. Drugs are considered schedule V controlled substances if:
- a) the drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV;
 - b) the drug or other substance has a currently accepted medical use in treatment in the United States; and,
 - c) abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.
40. Sodium Thiopental is a schedule III controlled substance.
41. Under 21 U.S.C. §829, part of the Federal Controlled Substances Act, unless dispensed directly by a practitioner other than a pharmacist, schedule III controlled substances may be dispensed only upon a prescription by a practitioner licensed by law to administer such a drug.
42. 21 U.S.C. §829 means that either a doctor medically licensed to administer sodium thiopental must administer the sodium thiopental to Plaintiffs, obtain the sodium thiopental, or issue a prescription for the use of the sodium thiopental.
43. A doctor medically licensed to administer sodium thiopental will not be administering sodium thiopental to Plaintiffs.
44. A doctor medically licensed to administer sodium thiopental will not be obtaining sodium thiopental for use as a lethal injection chemical.

45. A doctor medically licensed to administer sodium thiopental will not be prescribing sodium thiopental to Plaintiffs.
46. Under the Federal Food, Drug and Cosmetic Act., only a licensed medical practitioner can obtain and use drugs that require a prescription.
47. Pancuronium bromide is a regulated substance.
48. No licensed medical practitioner will be obtaining or using pancuronium bromide or potassium chloride for the purpose of executing Plaintiffs.
49. Under the Federal Food, Drug and Cosmetic Act, before a drug can be used, the FDA must authorize its use for the purpose for which a person intends to use it.
50. The FDA has not authorized the use of sodium thiopental, pancuronium bromide, and potassium chloride for lethal injections.
51. The United States Government could prosecute Defendants for violating the Controlled Substances Act and for violating the Federal Food, Drug and Cosmetic Act. *See Gonzales v. Raich*, 545 U.S. 1 (2005).
52. Plaintiffs are not seeking to force the Food and Drug Administration or any other United States governmental agency or official to enforce the Controlled Substances Act or the Federal Food, Drug and Cosmetic Act.
53. Because Plaintiffs are not seeking enforcement of the Controlled Substances Act or the Federal Food, Drug and Cosmetic Act, neither the Federal Administrative Procedures Act nor *Heckler v. Chaney*, 470 U.S. 821 (1985), apply to this action.
54. Plaintiffs only seek a declaration that Defendants intended actions as applied to Plaintiffs will violate the Controlled Substances Act and the Federal Food, Drug and Cosmetic Act.

VI. EXHAUSTION OF ADMINISTRATIVE REMEDIES

55. Although pleading exhaustion of administrative remedies is no longer a requirement, Plaintiffs have exhausted administrative remedies through the prison grievance system. The Commissioner's Review, the final level of denial of the grievance, was rendered on May 1, 2007, and affirmed the denial of Plaintiffs'

VII. CLAIMS FOR RELIEF

A. VIOLATION OF CONTROLLED SUBSTANCES ACT

56. Defendants intend to extinguish Plaintiffs' lives by injecting them with sodium thiopental even though the thiopental will neither be injected by a doctor licensed to administer thiopental nor as a result of a prescription by a doctor licensed to administer thiopental. Because a doctor medically licensed to administer sodium thiopental will neither be administering nor prescribing sodium thiopental to Plaintiffs, injecting sodium thiopental into Plaintiffs will violate the Controlled Substances Act.

B. ADMINISTERING CHEMICALS WITHOUT A DOCTOR'S PRESCRIPTION

57. Defendants intend to extinguish Plaintiffs' lives by injecting them with pancuronium bromide and potassium chloride despite the fact that the drugs will be obtained without a prescription from a licensed medical practitioner. This violates the Federal Controlled Substances Act.

C. ADMINISTERING DRUGS FOR A PURPOSE NOT APPROVED BY THE FDA

58. Defendants intend to extinguish Plaintiffs' lives by injecting them with drugs that have not been approved by the FDA for the purpose of lethal injection. This violates the Federal Food, Drug and Cosmetic Act.

59. Plaintiffs are not seeking enforcement by the FDA but rather are seeking declaratory relief. Thus, *Heckler v. Chaney*, 470 U.S. 821 (1985) is inapplicable.

VIII. PRAYER FOR RELIEF

60. Plaintiffs request a declaratory judgment that carrying out a lethal injection using sodium thiopental when the thiopental is neither administered by a doctor licensed to administer it nor prescribed by a doctor licensed to do so violates the Federal Controlled Substances Act.

61. Plaintiffs request a declaratory judgment that carrying out a lethal injection with chemicals obtained without a prescription from a licensed medical practitioner violates the Federal Controlled Substances Act.

62. Plaintiffs request a declaratory judgment that carrying out a lethal injection with chemicals that have not been approved by the FDA for use in lethal injections violates the Federal Food, Drug and Cosmetic Act.

RESPECTFULLY SUBMITTED,

/s/ David M. Barron

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June 18, 2007

CERTIFICATE OF SERVICE

I hereby certify that the this document was filed electronically using the CM/ECF filing system on this 18th day of June, 2007, and that a copy was mailed first class, postage prepaid, to counsel for the Department of Corrections and the named Defendants:

Jeff Middendorf
125 Holmes Street
Frankfort, KY 40601

/s/ David M. Barron

DAVID M. BARRON