

includes connecting special monitoring equipment to the prisoner, placing the prisoner in restraints, inserting the shunts that are used to administer the fatal drug combination, and the inmate's ceremonial final steps into the execution chamber.

3. By preventing the witnessing of the entire execution procedure, Defendant deprived and continues to deprive the Plaintiffs and those similarly situated of their rights under the First and Fourteenth Amendments, specifically the right of the public and press to observe an execution.

PARTIES

4. Plaintiff Arkansas Times, Inc. is an Arkansas corporation with its principal place of business in Little Rock, Arkansas, where it publishes the Arkansas Times Newspaper. It is a party to this action for the purpose of enforcing its First Amendment rights to inform the public and to report the news.

5. Plaintiff Northwest Chapter of The Society of Professional Journalists is a professional society of Arkansas journalists located in Benton County, Arkansas, and Washington County, Arkansas. It is a party to this action for the purpose of enforcing its First Amendment rights to inform the public and to report the news.

6. Plaintiff Max Brantley is an individual and a citizen and resident of Little Rock, Pulaski County, Arkansas, and is the Editor of the Arkansas Times Newspaper. He is a party to this action for the purpose of enforcing his First Amendment rights to inform the public and to report the news and as a citizen who has a First Amendment right to receive information about an execution through the access provided to the press.

7. Defendant Larry B. Norris is, and at all times relevant hereto was, Director of the Arkansas Department of Correction ("ADC"), a department of the State of Arkansas that was created and is maintained pursuant to state statute. Mr. Norris determines the procedures to be used in the

execution and witnessing the execution of an Arkansas prisoner, and he and/or his designees conduct each execution.

8. The Defendant, at all times relevant hereto, was acting with respect to all acts described herein, and in each instance acting under color and authority of state law, including establishing and designing the ADC execution policies and protocol, and will act under color of State law in carrying out future executions.

JURISDICTION AND VENUE,

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331; § 1343; § 2201; and § 2202.

10. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) in that the defendant is within the State of Arkansas and resides within the Eastern District of Arkansas, and under 28 U.S.C. § 1391(b)(2) in that all of the events described herein transpired within, or will, absent judicial relief, transpire within this judicial district, specifically in Pine Bluff, Jefferson County, Arkansas.

FACTS

11. Currently, and at all times relevant hereto, it is the responsibility of the Defendant, as the Director of the ADC, to carry out a sentence of death imposed by a court in Arkansas.

12. Conducted as public spectacles, historically, executions in common law jurisdictions have by long custom and usage been matters of public concern to which public access is afforded. Presently, in every state that practices capital punishment, statutes or administrative regulations require that certain public and media witnesses attend, and consequently, view every execution.

13. In 1983, the Arkansas State Legislature enacted a statute, Ark. Code Ann. § 5-4-617,

prescribing executions be by lethal injection for all defendants whose capital crimes were committed after July 4, 1983. The statute prescribes no specific drugs, dosages, drug combinations, manner of intravenous line access, or certifications, training, or licensure for those who participate in executions. All of the details for carrying out executions are left up to the Director of the ADC who “shall determine the substances to be uniformly administered and the procedures to be used in any execution.”

14. At an execution, Ark. Code Ann. § 16-90-502(d)(2) requires the presence of “the director or an assistant, the Department of Correction official in charge of medical services or his or her designee, and a number of respectable citizens numbering not fewer than six (6) nor more than twelve (12) whose presence is necessary to verify that the execution was conducted in the manner required by law.” Counsel for and the spiritual adviser to the person being executed and “other persons designated by the director may be present, but the maximum number of persons at the execution shall not exceed thirty (30).”

15. In 1996, by Administrative Directive, the Defendant limited the number of witnesses to a total of twenty-five (25). “Two members of the media” are to be included as witnesses in addition to the six (6) to twelve (12) “respectable citizens.” No witnesses may be chosen by the condemned.

16. On information and belief, executions by lethal injection in Arkansas are performed in the following way:

A. The condemned prisoner is strapped to a gurney in the execution chamber. His head is completely immobilized by two pieces of plastic, which press against the sides of his face like bookends, and a tight leather strap is placed across his forehead. His arms are spread at angles away from his body, and each hand is strapped to a board that protrudes from each side of the

gurney. A leather breastplate is held in place by a strap across his chest, straps running over each shoulder, and a strap across his waist. Another strap runs across his thighs. Finally, leather shackles are placed around his ankles and then fastened to the gurney, immobilizing his lower legs.

B. ADC employees insert two intravenous ("IV") lines into the condemned prisoner and attach an electrocardiogram monitor. The execution protocol states only that the Defendant Deputy Director of Health and Correctional Programs, or her designee, "shall have catheters placed in each arm or other appropriate areas." This simple statement, in actuality, refers to a significant medical procedure that can be fraught with problems and complications. The typical site for obtaining intravenous access is the area of the antecubital fossae, or elbow folds. However, such access is not always obtainable and other increasingly invasive procedures may be the only methods available. Despite this fact, the execution protocol fails to provide any further guidance as to how intravenous access is to be secured. No procedures govern which IV insertion point will be selected, the circumstances under which an alternate IV insertion point will be selected, which alternate site will be selected, or the qualifications of the person or persons who will perform surgical procedures such as insertion of subclavian lines or cut-downs.

C. When the IV lines are in place, the curtain across the window that divides the execution chamber from the witness room is lifted. A section of the IV lines is visible and can be seen running from the condemned prisoner's body, draping across the floor of the chamber, and passing through a hole in a glass window that leads to a separate control room where the two executioners wait. Extended IV lines are required in order to stretch into the control room. Last statements are made, and then the Warden orders the execution to begin.

D. The two lay-executioners then begin attaching and plunging up to eight hand-held plastic syringes in a complicated sequence prescribed by the ADC protocol. First, one

drug, then a saline flush, then two syringes of the next drug, another saline flush, and next, up to three syringes of a third drug. It is not known who, if anyone directs the sequence of drug administration for the executioners or how they divide the various tasks between them.

E. When the prisoner no longer exhibits any signs of life, the Warden summons the coroner into the death chamber to pronounce death.

17. The Defendant does not allow the public and media witnesses to view an execution in its entirety. Specifically, witnesses are not allowed to see or hear the condemned take his final steps into the execution chamber; the ADC personnel strapping the condemned prisoner to the gurney; immobilizing his or her head; spreading his or her arms away from his or her body; strapping the hands to the board; putting in place the leather breastplate; placing the straps over the shoulders, waist, and thighs; placing the leather shackles around the condemned's ankles; fastening to the gurney, immobilizing the lower legs; inserting the two IV lines into the condemned; attaching an electrocardiogram monitor; selecting alternate IV insertion points; or the performance of more invasive or surgical procedures such as insertion of subclavian lines or cut-downs. Further, microphones are not on during any of the execution procedures, other than to give the condemned a chance for last words or statements and to pronounce the condemned dead. Therefore, conversations with the condemned, or exclamations or statements by the condemned during the execution process cannot be heard.

18. At all times relevant hereto, Defendant has enforced and continues to enforce the practice and custom of the ADC and its employees with respect to the connection of special monitoring equipment, the placement of the prisoner in restraints, and the insertion of shunts used to administer the fatal drug. These procedures constitute the policy, practice, custom, and usage of the

Defendant, the ADC, and the State of Arkansas with respect to the subject matter thereof.

19. Witnesses should be allowed to see the entire process, including strapping the condemned down and the insertion of needles. The public has “a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber, including those initial procedures that are inextricably intertwined with the process of putting the condemned inmate to death.” Independent public scrutiny “plays a significant role in the proper functioning of capital punishment. An informed public debate is critical in determining whether execution by lethal injection comports with the evolving standards of decency which mark the progress of a maturing society.” “Further, public access . . . fosters an appearance of fairness, thereby heightening public respect for the judicial process.” “Public observation of executions fosters the same sense of catharsis that public observation of criminal trials fosters.” Quotations from *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 876-877 (9th Cir. 2002).

20. The Defendant, those acting in concert with him, and the State of Arkansas have consciously and as a matter of policy and practice chosen to limit public access to less than all phases of an execution. The Plaintiffs have made the Defendant aware of the violations of the Constitution and Arkansas statutes and the policies for these laws by letter dated September 21, 2006, which is attached hereto as Exhibit “A” and made a part hereof. The Defendant indicated that he would not be willing to change the practices.

21. As a direct and proximate result of the Defendant's practice and custom of preventing media and lay witnesses from viewing the execution from beginning to end: (a) the media and others First Amendment right of access to prisons and to governmental proceedings is violated; and (b) vigorous public debate about the merits of this form of execution of the death penalty is

unreasonably restricted. Allowing such observation would not only ensure access to a public governmental proceeding, but would foster understanding, discussion, and debate concerning an issue of public controversy, to wit, the propriety of capital punishment in Arkansas.

CAUSE OF ACTION

VIOLATION OF THE PLAINTIFFS' FIRST AMENDMENT RIGHT OF ACCESS TO GOVERNMENTAL PROCEEDINGS

22. Plaintiffs incorporate as if fully restated here, each and every relevant claim, assertion and allegation set forth in all previous and subsequent paragraphs of this Complaint.

23. In creating, maintaining, and carrying out the practice and custom of preventing witnesses' uninterrupted viewing of the entire execution process, Defendant was at all times relevant hereto acting under the color and authority of state law.

24. Defendant's practice and custom is to prevent execution witnesses from completely seeing and hearing, thereby fulfilling their role as witnesses, when ADC personnel connect special monitoring equipment to the prisoner, place the prisoner in restraints, and insert the shunts that are later used to administer the fatal combination of drugs.

25. It has and continues to be the practice and custom to prevent witnesses to an execution from seeing and hearing the prisoner as he is escorted from the holding cell to the execution chamber and from witnessing the official declaration of death.

26. Because the First Amendment guarantees the public and the press a qualified right of access to governmental proceedings, preventing Plaintiffs and those similarly situated from viewing the execution from beginning to end violates their First Amendment right of access.

27. Defendant may not arbitrarily restrict access to only portions of an execution, thus

preventing Plaintiffs from viewing the execution from beginning to end. The policy and practice of doing so advances no legitimate government interest and is simply intended to conceal from the public those portions of the lethal injection process that might be perceived as cruel, brutal, or reflecting badly on capital punishment.

28. The media must have a witness attend executions to observe and report upon that execution for its readers and membership, and to gather information used in its public education and advocacy. Under the present scheme, that witness will not be permitted to view and to report upon the execution in its entirety, and will thus be frustrated in reporting all events as they actually occurred.

29. Because the execution is a unique event, viewing executions in their entirety is something for which no ready alternative or right of access exists, and the policy and practice of concealing a part of that event completely forecloses an informed public discussion regarding that portion of the execution.

30. Representatives of the media, on behalf of the public, and selected members of the public have traditionally been able to view executions at least from before the condemned was attached to the lethal apparatus to at least just after the onset of death.

31. To determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information about the "initial procedures" which are invasive, possibly painful and may give rise to serious complications. Preventing the Plaintiffs from viewing executions from beginning to end, or having the execution thus viewed, is unconstitutional viewpoint discrimination in that it allows people to view the death penalty in only one certain way.

32. As the direct and proximate result of these actions by the Defendants complained of

herein, Plaintiffs have suffered and will continue to suffer the harms and damages complained of with greater particularity in the previous Paragraphs of this Complaint, and these harms will persist absent the issuance of a declaration and injunction by this Court.

33. The First Amendment right of the public to view government proceedings exists in the interest of open government and the transparent functioning of governmental agencies. This right inures to the benefit not only of the public at large, by ensuring that government is conducted in the open and subject to public scrutiny, and thus worthy of public confidence; it also inures to the benefit of those who are the subject of governmental proceedings, who can be assured of proper and humane treatment only when those proceedings are open to public scrutiny and critique.

34. The State of Arkansas has recognized an ongoing public interest in the conduct of executions and the importance of having those executions conducted in a manner that is open to public view and scrutiny. This interest is recognized in the adoption and maintenance of Ark. Code Ann. § 16-90-502, under which the public, in the form of witnesses, is permitted to view the execution of a death sentence.

35. An execution is the process of putting a prisoner to death. All processes that are inextricably linked with that enterprise are part of the execution, including connecting special monitoring equipment to the prisoner, placing the prisoner in restraints, inserting the catheters through which the fatal drugs are administered, the act of escorting the prisoner to the execution chamber, and the official declaration of death.

36. The Plaintiffs are persons interested in and whose rights are affected by the procedures set out above and are entitled to obtain a declaration of rights. There is an actual controversy between Plaintiffs and Defendant with regard to Plaintiffs' claims, thereby rendering appropriate a declaratory judgment.

37. Plaintiffs have no adequate remedy at law to redress the deprivation of their constitutional rights as alleged above, and this action for declaratory and injunctive relief is the only means of protecting such rights. Plaintiffs will suffer irreparable injury unless appropriate redress is provided by the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court declare that the practice, custom, and usage of preventing witnesses to an execution from viewing the entire execution process violates the First Amendment to the United States Constitution as well as the Constitution's Due Process Clause, as incorporated by the Fourteenth Amendment to the United States Constitution; grant a permanent mandatory injunction requiring that all phases of the execution process, including the insertion of shunts, heparin locks, the restraining of the condemned inmate on the gurney, the attachment of medical and medical monitoring devices, the inmate's procession into the execution chamber and the procedures surrounding the official declaration of death be conducted in full and open view of the assembled witnesses to that execution; nominal damages; reasonable attorney fees and costs of suit pursuant to 42 U.S.C. § 1988 and Fed.R.Civ.P. 54, and all other proper relief.

Respectfully submitted,

James G. Lingle, Ark. Bar No. 76070
Lingle Law Firm
110 S. Dixieland Road
Rogers, Arkansas 72758
479-636-7899
479-636-0095 Fax
jim@linglelaw.com

Attorney for Plaintiffs
On behalf of the Arkansas Civil Liberties Union

Foundation, Inc.