

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

CAREY DALE GRAYSON,)
)
Plaintiff,)
)
v.)
)
JEFFERSON S. DUNN, *et al.*,)
)
Defendants.)
)
)
)
)
)

CASE NO. 2:12-CV-0316-WKW

and,

CHARLES LEE BURTON,)
ROBERT BRYANT MELSON,)
RONALD BERT SMITH,)
GEOFFREY TODD WEST,)
TORREY TWANE MCNABB,)
Plaintiffs,)
v.)
)
JEFFERSON S. DUNN, *et al.*,)
)
Defendants.)

CASE NOS. 2:16-CV-0267-WKW
2:16-CV-0268-WKW
2:16-CV-0269-WKW
2:16-CV-0270-WKW
2:16-CV-0284-WKW

ORDER

Plaintiffs Charles Lee Burton, Robert Bryant Melson, Ronald Bert Smith, Geoffrey Todd West, and Torrey Twane McNabb are Alabama death-row inmates who have been committed to the custody of the Alabama Department of Corrections. In this 42 U.S.C. § 1983 lawsuit, Plaintiffs challenge the legal injection procedures that the State of Alabama intends to use to carry out their death sentences. Pending is Defendants' Motion to Dismiss. (Doc. # 160.)

Only one Plaintiff, Smith, has an execution date: December 8, 2016. Earlier in this case (the "Midazolam Litigation"), Defendants offered Plaintiff Christopher Brooks the opportunity to have that which he had asked for: execution with a one-drug protocol of midazolam. (Doc. # 93, at 11–12 & n.4.) Mr. Brooks refused (*see* Doc. # 78) and was executed with the three-drug protocol on January 21, 2016. After his execution, a witness in the viewing room testified that Mr. Brooks's eye opened after the consciousness assessment and remained open until the curtain was closed in the viewing room. The eye episode has become a central component of the Eighth Amendment claim in the current complaint of Mr. Smith, in the motion to dismiss, and in the response to it—particularly in Mr. Smith's objection to midazolam as a sedative in the three-drug protocol. Mr. Smith argues that midazolam will inadequately anesthetize him, thereby causing severe pain upon the infusion of the second and third drugs in the protocol, rocuronium bromide and potassium chloride,

respectively. It is undisputed that potassium chloride causes severe pain to a conscious person.

Ultimately, the court dismissed the notion of a one-drug protocol in Mr. Brooks's case as "fraught with peril" arising out of a number of unanswered concerns. (Doc. # 93, at 12 n.4.) "Because of the time constraints, and because this case resolves on other grounds, the consent issue will be left for another day." (*Id.*) That day is here. Changes in the posture of the case dictate that the court explore the midazolam option pled and urged by Mr. Smith and presently offered by Defendants. First, the court in *Arthur* has concluded, after a trial on the merits, that neither pentobarbital nor sodium thiopental is available for execution in Alabama. *See Arthur v. Dunn*, No. 2:11-CV-438-WKW, 2016 WL 1551475, at *9–10 (M.D. Ala. Apr. 15, 2016), appeal dismissed (July 12, 2016), *aff'd sub nom. Arthur v. Comm'r, Ala. Dep't of Corr.*, No. 16-15549, 2016 WL 6500595 (11th Cir. Nov. 2, 2016). Second, the state's "offer" is not contingent on Plaintiff executing a consent, as was the case with Brooks. Third, a year of reflection on the issue brings it to the forefront. Fourth, a one-drug midazolam protocol exists. (*See* Doc. # 93, at 12 n.3.)

Because Mr. Smith has pled it and offered the option as viable, readily implemented and available, Defendants have accepted the offer. (Doc. # 160, at 26 n.5.) The parties all agree that (1) midazolam is available, (2) it is feasible, (3) it is readily implementable, and (4) it is not risky with regard to unnecessary pain and

suffering. Mr. Smith’s complaint proposes a one-drug protocol consisting of a “large initial dose of midazolam, followed by continuous infusion.” (*Smith v. Dunn*, No. 2:16cv269 (M.D. Ala. Apr. 15, 2016) (Compl., at 18–19.) Defendants offered such a protocol in *Brooks*, and an unredacted one will be ordered to be submitted to the court for *in camera* inspection in this case, along with a copy of the current three-drug protocol for comparison.

Accordingly, Defendants are ordered to submit to the chambers of the undersigned for *in camera* inspection, on or before **November 14, 2016**, a current one-drug execution protocol and a current three-drug execution protocol for *in camera* inspection.

Further, Plaintiff Ronald Bert Smith is ordered to show cause in writing, on or before **November 16, 2016, at noon Central Standard Time**, if any he has, why the court should not order Defendants to execute him using the method pled in his complaint, *viz.*, “a large initial dose of midazolam, followed by continuous infusion.” (Doc. # 1 at page 18 ¶ 64 in Case No. 2:16-CV-269-WKW.) Defendants shall reply by **November 18, 2016, at noon Central Standard Time**.

DONE this 9th day of November, 2016.

/s/ W. Keith Watkins
CHIEF UNITED STATES DISTRICT JUDGE