Jim Doyle
Governor

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Department of Corrections

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May 29, 2009

BY EMAIL AND FIRST CLASS MAIL

The Honorable Andrew P. Bissonnette
Dodge County Circuit Court Judge, Branch 3
Dodge County Justice Facility
210 West Center Street
Juneau, WI 53039-1091

Re: In the matter of Warren Lilly, Jr.: Wisconsin Department of Corrections v. Warren Lilly, Jr., Case No. 07CV392

Dear Judge Bissonnette:

Pursuant to the Wisconsin Court of Appeals order of May 27, 2009, enclosed for filing are the Petitioner's Notice of Motion and Motion for Relief Pending Appeal and Brief in Support Thereof.

Sincerely,

Gloria Thomas
Assistant Legal Counsel
Office of Legal Counsel
State Bar No. 1019345

Enclosure

Cc: Warren Lilly, Jr., DOC #447655

STATE OF WISCONSIN | CIRCUIT COURT BRANCH III | DODGE COUNTY

WISCONSIN DEPARTMENT OF CORRECTIONS,

Petitioner,

v. Case No. 2007CV000392

WARREN LILLY, JR. #447655,

Respondent.

NOTICE OF MOTION AND
MOTION FOR RELIEF PENDING APPEAL

TO: Mr. Warren G. Lilly #447655
Dodge Correctional Institution
PO Box 700
Waupun, WI 53963-0700

NOTICE OF MOTION

PLEASE TAKE NOTICE that at a date, time and place to be set by the court, the Petitioner, Wisconsin Department of Corrections, by and through its undersigned attorneys, will bring the attached motion on for hearing before the Honorable Andrew Bissonnette.

MOTION

NOW COMES the Wisconsin Department of Corrections ("DOC"), Petitioner, by and through its undersigned attorney and respectfully moves the court for an order staying and suspending the "Order Terminating Force Feeding and Injunction Against Force Feeding" in Case No. 2007CV000392 entered in said proceeding on May 19, 2009, by the Circuit Court for Dodge County, the Honorable Andrew P. Bissonnette presiding.

In support of this motion DOC asserts and alleges as follows:

1. Warren G. Lilly ("Lilly") is a prison inmate in the legal custody of the Wisconsin Department of Corrections ("DOC"). Affidavit of David Burnett at ¶ 6, dated May 22, 2009;

2. While incarcerated with DOC, Lilly has engaged in a hunger strike whereby he has refused to voluntarily consume solid food on or about May 18, 2004 and stopped voluntarily taking water and hydration on or about February 28, 2005. Affidavit of David Burnett at ¶ 6, dated May 22, 2009;

3. In the past, due to a hunger strike and the resulting weight loss, Lilly's health was compromised and his health and life were put into jeopardy; due to his hunger strike, Lilly developed cardiomyopathy which ultimately led to surgical intervention to preserve his health and life. Affidavit of David Burnett at ¶ 6, dated May 22, 2009;

4. In response to Lilly's deteriorating health and his unwillingness to voluntarily consume food and liquids, DOC previously sought and obtained a circuit court order from the Racine County Circuit Court, permitting DOC to forcibly feed and hydrate Lilly when such is required to maintain his health and life. Affidavit of David Burnett at ¶ 6, dated May 22, 2009;

5. During Lilly's hunger strike, DOC has had to regularly invoke the circuit court order to properly feed and hydrate Lilly against his will. Affidavit of David Burnett at ¶ 6, dated May 22, 2009;

6. When DOC forcibly feeds and/or hydrates Lilly, it is typically done by insertion of a nasogastric tube into Lilly's stomach, and is always carried out pursuant to appropriate medical standards. Affidavit of David Burnett at ¶ 6, dated May 22, 2009;

7. Lilly resists, challenges and attempts to obstruct DOC's ability to forcibly feed and hydrate him. Affidavit of David Burnett at ¶ 5, dated May 22, 2009;

8. Following the Court of Appeals, decision in *DOC v. Saenz*, 2007 WI App 25, 299 Wis. 2d 486, 728 N.W.2d 765, DOC petitioned Dodge County Circuit Court Judge Andrew P. Bissonnette for an order to Evaluate and Medically Treat Lilly pursuant to the standards set forth in *Saenz*. R.2[1]

[1] Unless otherwise indicated, record citations will be to the certified record in 2008AP000228 and will be denoted as "R." followed by the document number and then the page number(s).

9. On January 11, 2008, Judge Bissonnette entered his order granting DOC's petition and ordering, *inter alia*, that:

   a. "...(DOC) may continue, through any licensed physician or any person acting under his or her direction and control, to evaluate and medically treat Warren G. Lilly, Jr., including providing him with any feeding or hydration, or both, by force or otherwise, which in the physicians (*sic*) medical judgment is necessary to protect the life and good health of Mr. Lilly."

   b. "...this order will sunset six months from (January 11, 2008). If the (DOC) want to continue the forced nutrition/hydration of Mr. Lilly, it will need to set a hearing towards the end of the six month period."

   c. "...the forced nutrition/hydration of Mr. Lilly may take place six days a week, Monday through Saturday. It is ordered that the (DOC) not forcibly provide nutrition or hydration to Mr. Lilly on Sundays unless the inmate requests it."

   January 11, 2008 Decision and Order.

10. Following the entry of Judge Bissonnette's order limiting DOC's ability to feed Lilly seven days a week, DOC complied with the order and limited Lilly's feedings to six days per week. Affidavit of David Burnett at ¶ 7, dated May 22, 2009;

11. Prior to the sunset date set forth above, DOC petitioned Judge Bissonnette to extend the order permitting forced nutrition and hydration of Lilly. Affidavit of David Burnett at ¶ 7, dated May 22, 2009;

12. On August 7, 2008, Judge Bissonnette entered an order granting DOC's petition to continue the forced nutrition and hydration of Lilly. However, Judge Bissonnette, again, further limited DOC's ability to provide nutrition and hydration to Lilly by providing that the feeding time for Lilly must not last any longer than 15 minutes. Affidavit of David Burnett at ¶ 7, dated May 22, 2009;

13. On December 21, 2007, approximately three weeks prior to Judge Bissonnette's first order limiting DOC's authority to feed and hydrate Lilly, Lilly's documented weight was 166 pounds. Affidavit of David Burnett at ¶ 7, dated May 22, 2009;

14. On January 2, 2009, Lilly's documented weight was 125 pounds, and Lilly was markedly underweight and moderately malnourished; Lilly's weight and

malnourished condition, coupled with his underlying cardiac condition (*See* ¶ 3 supra) put Lilly in danger of sudden cardiac death. Affidavit of David Burnett at ¶ 7, dated May 22, 2009;

15. On February 28, 2009, Lilly reached an agreement with DOC personnel whereby he would temporarily agree to voluntarily consume a limited amount of food. Affidavit of David Burnett at ¶ 7, dated May 22, 2009;

16. Lilly only reached the temporary agreement with DOC personnel because he knew that if he did not voluntarily consume the food and hydration, he would be subjected to further forced administration of nutrition and hydration. May 19, 2009 Decision and Order at 42, 44;

17. Since Lilly commenced his voluntary consumption of food and hydration in February 2009, Lilly's weight has increased and his condition has become somewhat more stabilized. Affidavit of David Burnett at ¶ 7, dated May 22, 2009;

18. Lilly has informed DOC personnel and Judge Bissonnette that he fully intends to resume his hunger strike after the legal proceedings before Judge Bissonnette have concluded. Affidavit of David Burnett at ¶ 13, dated May 22, 2009; May 19, 2009 Decision and Order at 54;

19. On May 19, 2009, Judge Bissonnette entered his Memorandum Decision and Order Terminating Force Feeding and Injunction Against Force Feeding, providing, *inter alia*, that:

    a. "...all previous orders allowing forced feeding or the forced provision of hydration to inmate Warrant G. Lilly, Jr. are hereby terminated"; and

    b. "...(DOC) is hereby enjoined from further forced provision of nutrition or hydration to inmate Lilly unless and until he asks for it. Among other things, this means that the DOC may not go to a different trial court in the state and ask for another forced feeding order to replace the one that the Court is hereby terminating."

    May 19, 2009 Decision and Order at 61;

20. If Lilly refuses to consume foods and hydration, and if DOC is unable to forcibly administer nutrition and hydration, Lilly will likely become severely dehydrated within 72 hours and severely malnourished within 10-14 days; as a result of these inevitable health conditions, Lilly will likely be at risk of

sustaining permanent multi-organ system injury. Affidavit of David Burnett at ¶ 17, dated May 22, 2009;

21. If Lilly refuses to consume foods and hydration, and if DOC is unable to forcibly administer nutrition and hydration, Lilly will likely become severely dehydrated within 72 hours and severely malnourished within 10-14 days; as a result of these inevitable health conditions, Lilly will likely be at risk of death as a result of hemodynamic collapse and multi-organ system failure. Affidavit of David Burnett at ¶ 17, dated May 22, 2009;

22. DOC is likely to succeed in its appeal of Judge Bissonnette's May 19, 2009 Order because the legal authorities, including the Wisconsin Court of Appeals (*See DOC v. Saenz*, 2007 WI App 25, 299 Wis. 2d 486, 728 N.W.2d 765), have already recognized that a State has legitimate and countervailing interests which permit the forced administration of nutrition and hydration to prison inmates;

23. DOC has legitimate and compelling interests in preventing Lilly from starving himself to death; those interests, include, but are not limited to:

    a. The State's right to prevent suicide;

    b. The State's right to preserve life; and

    c. The State's right to maintain prison safety, security and order. *See Cruzan v. Director, Missouri Dept. of Health,* 497 U.S. 261, 270, 110 S. Ct. 2841 (1990); *Guardianship of L.W.*, 167 Wis. 2d 53, 90, 482 N.W.2d 60 (1992); *Freeman v. Berge,* 441 F.3d 543, 547 (7th Cir. 2006)

24. In *DOC v. Saenz*, 2007 WI App 25, 299 Wis. 2d 486, 728 N.W.2d 765, the Court of Appeals recognized and accepted that DOC, "in pursuit of legitimate and countervailing interests, may, under certain circumstances, infringe upon (an inmate's) liberty interest by forcing him to ingest food and fluids against his will"; *Id* at 500.

25. Under the Standards set forth in *Saenz*, to obtain a court order authorizing the forced administration of nutrition and hydration to an inmate, DOC must establish that:

    a. The inmate "has refused to consume food and fluids sufficient to maintain his health for an extended period";

b. As a result of his failure to consume food and fluids, "he has been diagnosed by a physician as suffering from moderate to severe malnutrition, dehydration or other deleterious condition"; and

c. "[P]ursuant to reliable medical opinion, (the inmate) is in imminent danger of suffering serious harm or death unless he is given medical treatment, including, if necessary, forced hydration and/or forced feeding."

Saenz, 299 Wis. 2d at 510-511.

26. There is no dispute that Lilly has been engaged in a hunger strike since 2004 and has refused to voluntarily consume food and fluids sufficient to maintain his health. Affidavit of David Burnett at ¶ 6, dated May 22, 2009;

27. There is no dispute that Lilly has let it be known that he fully intends to resume his total hunger strike as soon as possible, and at that point, he will not consume food and/or fluids sufficient to maintain his health. Affidavit of David Burnett at ¶ 13, dated May 22, 2009; May 19, 2009 Decision and Order at 54;

28. There is no dispute that Lilly has been previously diagnosed as suffering from moderate to severe malnutrition and dehydration as a result of his unwillingness to consume sufficient food and fluids. Affidavit of David Burnett at ¶ 7, dated May 22, 2009;

29. As a result of his refusal to consume sufficient food and fluids, Lilly has developed cardiomyopathy, and is now at greater risk of harm and/or death. Affidavit of David Burnett at ¶ 6, dated May 22, 2009;

30. If Lilly does as he says he will (i.e., resume his total hunger strike), and if DOC is unable to provide medical treatment, including, forced hydration and nutrition to Lilly, Lilly will be in imminent danger of suffering serious harm or death. Affidavit of David Burnett at ¶¶ 14 and 15, dated May 22, 2009;

31. Unless the May 19, 2009 "Order Terminating Force Feeding and Injunction Against Force Feeding" is stayed, DOC will be at risk of suffering irreparable harm due to the potential harm and/or death that may befall Lilly and the resultant effect that this will have on the legitimate and compelling interests of the State;

32. The granting of relief as requested by DOC will not substantially harm Lilly; but, rather, will preserve the status quo;

33. While Lilly has asserted that the forced feedings are uncomfortable and/or painful to endure, there is no evidence that he has suffered any harm as a result of said feedings. Affidavit of David Burnett at ¶ 10, dated May 22, 2009. In fact, to the contrary, the nearly five years of forced nutrition and hydration has kept Lilly alive;

34. The granting of relief as requested by DOC will not harm the public interest; in fact, to the contrary, the granting of relief will further the public's interest in that the public expects that DOC will safeguard inmates, staff and the public at large;

35. DOC is seeking appeal of the court's May 19, 2009 Order and is further, pursuant to Wis. Stats. § 809.12, seeking relief pending appeal;

36. If the relief is not granted as requested herein, Lilly may suffer serious harm or death prior to the Court of Appeals' full consideration of DOC's appeal;

WHEREFORE, the Department of Corrections respectfully requests that the court enter an order staying and suspending the "Order Terminating Force Feeding and Injunction Against Force Feeding" in Case No. 2007CV000392 entered in said proceeding on May 19, 2009, by the Circuit Court for Dodge County, the Honorable Andrew P. Bissonnette presiding.

Dated in Madison, Wisconsin the 29 day of May, 2009.

Gloria J. Thomas

GLORIA J. THOMAS
Assistant Legal Counsel
State Bar No. 1019345

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH III | DODGE COUNTY

WISCONSIN DEPARTMENT OF CORRECTIONS,

Petitioner,

v. Case No. 2007CV000392

WARREN LILLY, JR. #447655,

Respondent.

BRIEF IN SUPPORT OF PETITIONER'S MOTION FOR RELIEF PENDING APPEAL

STATEMENT OF FACTS

Inmate Warren Lilly, Jr. (hereinafter "Lilly") has been on a total hunger strike since May 2004. Lilly stopped voluntarily consuming solid food on May 18, 2004 and ceased voluntarily taking water and hydration on or about February 28, 2005. R.66:51[1] Since approximately February 28, 2005, the Wisconsin Department of Corrections (hereinafter "DOC") has been administering forced nutrition and hydration to Lilly for the purposes of preserving his life. R.2:1; R.66:51 The hydration and nutrition has been ongoing pursuant to the authority vested in DOC via a court order issued by the Racine County Circuit Court on May 28, 2004.[2] R.2:30

[1] Unless otherwise indicated, record citations will be to the certified record in 2008AP000228 and will be denoted as "R." followed by the document number and then the page number(s).

[2] The Racine County Circuit Court's order was issued prior to the Court of Appeals decision in *DOC v. Saenz*, 299 Wis. 2d 486, 728 N.W.2d 765 (2007).

Pursuant to the Court of Appeals decision in *DOC v. Saenz*, 2007 WI App 25, 299 Wis. 2d 486, 728 N.W.2d 765, DOC, on May 31, 2007, filed in the Dodge County Circuit Court, a "Petition for Authority to Evaluate and Medically Treat Warren Lilly, Jr." R.2 A hearing was held on the DOC petition on December 13, 2007.

The circuit court appointed two different attorneys for Lilly, but Lilly expressed dissatisfaction with each one, and informed the court that he would not "be satisfied with anybody (the court) would choose...." Therefore, Lilly decided to proceed *pro se*. R.66:4 Further, the circuit court afforded Lilly the opportunity to appear at the hearing in person. However, Lilly, who, in protest, had not worn clothing since approximately January 10, 2007, refused to wear clothing as directed by the court and therefore, appeared at the hearing via telephonic communication. R.66:2

At the hearing, Dr. Charles Larson, M.D. testified that an inmate who is engaged in a total hunger strike will suffer severe dehydration within 48 to 72 hours, and within three days to two weeks will suffer failing health including renal failure and cardiovascular collapse that will ultimately result in certain death. R.66:22-23 Dr. Larson testified that at the present time, Lilly's vital signs were within normal limits. R.66:29 However, the satisfactory status of Lilly's vital signs was only being maintained because DOC had been vigilant in administering the forced hydration and nutrition to Lilly. R.66:28, 37 Dr. Larson opined that if the forced nutrition and hydration were to be discontinued, and Lilly continued to engage in his total hunger strike, Lilly's health would deteriorate and he would be in imminent harm and at risk of serious bodily harm and/or death. R.66:31, 37

At the conclusion of the hearing, the trial court determined that the appropriate standard by which to judge DOC's petition was the following three-part test:

1. The inmate is still refusing to consume food and fluids sufficient to maintain his health for an extended period of time;

2. The inmate has been refusing food and fluids for a sufficient length of time that had the forced provision of nutrition and/or hydration been absent, the inmate would have suffered from death or serious bodily harm; and

3. It is likely that if the forced provision of nutrition and/or hydration were withdrawn, the inmate would continue to hunger strike and suffer serious harm or death.

R.67:12-13

Utilizing the foregoing standard, the court concluded that:

- A total hunger strike of any significant duration would severely compromise the health and life of a human being; R.67:8

- Lilly has consistently and steadfastly engaged in a total hunger strike for more than two years; R.67:14

- But for the forced nutrition and hydration provided by DOC since February 2005, Lilly would have died; *Id.*

- Lilly is only alive due to the care and treatment provided by DOC; *Id.*

- It is extremely likely that Lilly would continue to engage in his hunger strike if the forced nutrition and hydration were to be withdrawn; *Id.*

- If the forced hydration and nutrition were terminated, Lilly would quickly become in imminent danger of death or serious harm as a result of his continued total hunger strike. *Id.*

Based upon the findings, the court authorized DOC's continued administration of forced hydration and nutrition to inmate Lilly so long as a licensed physician believes same is medically necessary to protect the life and good health of Lilly. R.67:15 In

accord with the principles set-forth by the Court of Appeals in *Saenz* the trial court limited its order to a term of six months and provided for subsequent orders upon appropriate judicial review. R.67:15 Judge Bissonnette's order further provided that:

> ...the forced nutrition/hydration of Mr. Lilly may take place six days a week, Monday through Saturday. It is ordered that the (DOC) not forcibly provide nutrition or hydration to Mr. Lilly on Sundays unless the inmate requests it."

Based upon the court's order, DOC limited Lilly's nutrition and hydration to six days per week. R.67:15

On August 7, 2008, Judge Bissonnette entered a subsequent order further limiting DOC's ability to provide nutrition and hydration to Lilly. The order provided that the feeding time for Lilly may not last any longer than 15 minutes. August 7, 2008 Order

On December 21, 2007, approximately three weeks prior to Judge Bissonnette's first order limiting DOC's authority to feed and hydrated Lilly, Lilly's documented weight was 166 pounds. May 22, 2009 Aff. David Burnett ¶ 13 On January 2, 2009, after being fed pursuant to the limitations set forth by Judge Bissonnette, Lilly's documented weight was down to 125 pounds. May 22, 2009 Aff. David Burnett ¶ 14 At 125 pounds, Lilly was determined to be markedly underweight and moderately malnourished. May 22, 2009 Aff. David Burnett ¶ 14 Lilly's condition, coupled with his underlying cardiomyeopathy put Lilly in danger of sudden cardiac death. May 22, 2009 Aff. David Burnett ¶ 7

On February 28, 2009, Lilly reached an agreement with DOC personnel whereby Lilly agreed that he would temporarily agree to voluntarily consume a limited amount of

food and hydration. May 22, 2009 Aff. David Burnett ¶ 7; May 19, 2009 Decision and Order at 42, 44 However, Lilly only agreed to voluntarily consume the food and hydration because he knew that if he did not voluntarily consume the food and hydration, he would be subjected to further forced administration of nutrition and hydration. May 19, 2009 Decision and Order at 42, 44

Since Lilly began voluntarily consuming food and hydration in February 2009, Lilly's weight has increased and his condition has become somewhat more stabilized. May 22, 2009 Aff. David Burnett ¶ 7 However, Lilly has informed DOC personnel and Judge Bissonnette that he fully intends to resume his hunger strike after the legal proceedings before Judge Bissonnette have concluded. May 22, 2009 Aff. David Burnett ¶ 13; May 19, 2009 Decision and Order at 54

On May 19, 2009, Judge Bissonnette entered his "Memorandum Decision and Order Terminating Force Feeding and Injunction Against Force Feeding". The decision and order provided, *inter alia*, that:

> The Court therefore is finding compelling circumstances which warrant the following orders:
>
> IT IS THEREFORE ORDERED that all previous orders allowing forced feeding or the forced provision of hydration to inmate Warrant G. Lilly, Jr. are hereby terminated.
>
> IT IS FURTHER ORDERED that...(DOC) is hereby enjoined from further forced provision of nutrition or hydration to inmate Lilly unless and until he asks for it. Among other things, this means that the DOC may not go to a different trial court in the state and ask for another forced feeding order to replace the one that the Court is hereby terminating.

May 19, 2009 Decision and Order at 61

DOC has filed an appeal from the May 19, 2009 Decision and Order and now submits this Motion for Relief Pending Appeal.

STANDARD FOR RELIEF PENDING APPEAL

The filing of an appeal does not automatically stay the enforcement of the judgment or order being appealed. Wis. Stat. § 808.07(1). However, a party may move the circuit court for an order for relief pending appeal pursuant to Wis. Stats. § 809.12.

To be granted a stay pending appeal, a movant must demonstrate that:

1. The moving party is likely to succeed on the merits of the appeal;
2. Unless a stay is granted, the moving party will suffer irreparable injury;
3. No substantial harm will come to the other interested parties; and
4. A stay will not harm the public interest.

Leggett v. Leggett, 134 Wis. 2d 384, 385, 396 N.W.2d 787 (Ct. App. 1986).

ARGUMENT

DOC IS LIKELY TO SUCCEED ON THE MERTIS BECAUSE LEGITIMATE GOVERNMENTAL AND PENOLOGICAL INTERESTS JUSTIFY THE FORCED HYDRATION AND NUTRITION OF LILLY.

A. A prison regulation or practice must be reasonably related to the legitimate penological interests.

Whenever a prison regulation or practice implicates an inmate's constitutional rights, the appropriate standard of review is the "reasonable relationship" test laid-down

in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254 (1987).[3] Pursuant to the reasonable relationship test, a prison regulation or practice shall be "valid if it is reasonably related to legitimate penological interests." *Turner,* 482 U.S. at 89. Such a standard recognizes the need to balance the principle that an inmate is not divested of all constitutional rights upon incarceration, against the competing principle that courts should accord significant deference to the decisions of prison officials in the "inordinately difficult" task of prison administration. *Turner,* 482 U.S. at 84-85.

In *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028 (1990), the United States Supreme Court stated that "the standard of review we adopted in *Turner* applies to **all circumstances in which the needs of prison administration implicate constitutional rights**." *Id.* at 224. (emphasis added).

In the instant case, prison officials determined that allowing Lilly to starve himself to death would unduly jeopardize the legitimate state interests in promoting the needs of the prison and its administration.

B. An individual's right to refuse unwanted medical treatment is balanced against the relevant interests of the State.

The Due Process Clause of the Fourteenth Amendment prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law." *United States Constitution Amendment XIV.* In *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261, 110 S.Ct. 2841 (1990), the United States Supreme Court

[3] DOC is aware that in *Saenz* the Court of Appeals rejected such a standard of review. *DOC v. Saenz*, 299 Wis. 2d at 497-98. However, for the purposes of preserving its argument on any further appeal, DOC reasserts its position that the "reasonable relationship" test is the appropriate standard of review.

acknowledged that the Fourteenth Amendment provides competent individuals with a constitutionally protected liberty interest in refusing medical treatment. *Id.* at 278. However, the right is necessarily limited by, and must be balanced against, the relevant interests of the state. *Id.* at 279.

Similarly, the Wisconsin Supreme Court has held that an individual may refuse unwanted medical treatment. *Guardianship of L.W.,* 167 Wis. 2d 53, 67, 482 N.W.2d 60 (1992). However, again, the court established that the right is not absolute. Rather, the individual's right must be balanced against the relevant interests of the State. *Id.* at 90.

In *Cruzan*, the U.S. Supreme Court's analysis was centered on the state's interest in the protection and preservation of life. *Cruzan,* 497 U.S. at 280. In *Guardianship of L.W.*, the Wisconsin Supreme Court identified four distinct state interests that must be balanced against an individual's right to refuse medical treatment. First, the State's interest in preserving life; second, the interest of safeguarding the integrity of the medical profession; third, the State's interest in preventing suicide; and fourth, the protection of innocent third parties. *Guardianship of L.W.*, 167 Wis. 2d at 90. Thus, it is clear that, just as the limited right of the individual to refuse unwanted treatment has been established as a matter of law, so to have the interests of the State.

C. Inmate constitutional rights are severely limited and restricted by the relevant interests of the State in providing for safety, security and order within the prison.

Though a prison inmate does not forfeit all of his constitutional rights upon being incarcerated, an inmate only "'retains those [constitutional] rights that are not

inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" *Turner,* 482 U.S. at 95 (quoting *Pell v. Procunier*, 417 U.S. 817, 822, 94 S.Ct. 2800 (1974)). Further, any right retained by an inmate under the Due Process Clause must be "defined in the context of the inmate's confinement" in a prison milieu. *Washington*, 494 U.S. at 222. Thus, the rights of inmates are necessarily limited and restricted in terms of the State interests unique to the prison context. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125, 97 S.Ct. 2532 (1977).

It is manifest that the State has legitimate and compelling interests in maintaining prison safety, security and order, and it is prison officials who are best equipped to make the difficult decisions regarding the maintenance of those interests. *Washington*, 494 U.S. at 223-24. The policies and practices of such officials must be upheld unless they fail the reasonable relationship test set-forth in *Turner.* Further, the judgment of prison authorities should be "presumed valid unless it is shown to be such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such judgment." *White v. Napoleon*, 897 F.2d 103, 113 (3rd Cir 1990).

D. The State's request for authorization to administer hydration and nutrition to Lilly is reasonably related to the State's legitimate penological interests.

In *Turner*, the U.S. Supreme Court put forth four factors that should be considered in determining the reasonableness of a prison regulation or practice that infringes on a right asserted by an inmate. First, whether there is a "valid, rational connection" between

the regulation or practice and a legitimate neutral governmental interest put forward to justify it; second, whether there are alternative means of exercising the asserted constitutional right that remains open to inmates; third, whether, and to what extent, an accommodation of the asserted right will impact prison staff, inmate liberty, and on the allocation of limited prison resources; and fourth, whether there are sufficient readily available alternatives to the policy and practice. *Turner*, 482 U.S. at 89-90.

Application of the reasonable relationship test to the facts at hand reveals that the State's policy and practice of preventing death by providing nutrition and hydration to hunger striking inmates is reasonably related to legitimate penological purposes and must be upheld.

It must be acknowledged that the State has legitimate and substantial interests in providing for the safety, security and order of the correctional institution, and in the health and safety of Lilly, as well as the other inmates and staff within the institution. *Washington*, 494 U.S. at 223; *Jones*, 433 U.S. at 132. The U.S. Supreme Court has stated that:

> The interest in preserving order and authority in the prison is self-evident. Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagration. Responsible prison officials must be permitted to take reasonable steps to forestall such a threat, and they must be permitted to act before the time when they can compile a dossier on the eve of a riot.

Jones, 433 U.S. at 132-133. (citation omitted)

Indeed, courts have found that the State not only has an interest in providing for safety and security within its prisons, it has a ***duty*** to take measures for the protection of

prison inmates and staff. *Washington*, 494 U.S. at 225. In *Freeman v. Berge*, 441 F.3d 543 (7th Cir. 2006), the 7th Circuit recognized the duty of prison officials to protect inmates:

> Prison officials who let prisoners starve themselves to death would also expose themselves to lawsuits by the prisoners' estates. Reckless indifference to the risk of a prisoner's committing suicide is a standard basis for a federal civil rights suit. The idea behind liability in such cases is that incarceration can place a person under unusual psychological strain and the jail or prison under a commensurate duty to prevent the prisoner from giving way to the strain. The analysis is applicable when suicide takes the form of starving oneself to death.
>
> So at some point...the prison doctors would have had a duty and certainly a right to step in and force him to take nourishment.

Id. at 547. (citations omitted)

The Court also recognized that an inmate's self-imposed death via starvation would interfere with the State's interest in maintaining safety, security and order in the prison.

> If prisoners were allowed to kill themselves, prisons would find it even more difficult than they do to maintain discipline, because of the effect of a suicide in agitating the other prisoners.

Id. at 547.

Clearly, DOC's request seeking an order authorizing involuntary administration of nutrition and hydration to Lilly is designed to further and protect, among other interests, the State's legitimate and compelling interest in maintaining institutional safety, security and order. DOC has had direct experience with the effect that an inmate's death at his own hand can have on this interest. May 22, 2009 Aff. of Timothy Lundquist ¶¶ 4, 6, 7, 8, 9.

In this case, the circuit court observed that "...Lilly has stated repeatedly that he has no intention of committing suicide, that he is not suicidal, he has no intention of dying." May 19, 2009 Decision and Order at 58 However, the simple fact remains that Lilly's actions in refusing nourishment and hydration would, without intervention, bring about the precipitous end of his life[4]. May 22, 2009 Aff. David Burnett ¶¶ 14, 15 The court conceded as much in its decision and order when it was stated:

> The Court finds from his testimony as well as his writings that Lilly has no intention to commit suicide....The Court acknowledges that he may continue his hunger strike and lose additional weight, and get down to a range where he could become severely malnourished and at medical risk. He could try to maintain a particular weight assuming that it would keep him in sufficient health, and he may guess wrong. Either on his way to that weight or while maintaining that weight, he could go into cardiac arrest and die just like that. While that is a possibility, it is outside the scope of Mr. Lilly's intent as expressed continuously throughout his writings and testimony in this entire case.

May 19, 2009 Decision and Order at 45-46 Whether Lilly desires to take his life is irrelevant to this court's inquiry into the state's right to prevent his death, and the resultant adverse impact that such a death will have on the prison system.

Moreover, the State's interests are not limited to preventing suicide. It is well settled that the State also has interests in preserving and protecting life, and, as previously discussed, in maintaining institutional integrity and safety within its prison walls. *See Guardianship of L.W.*, 167 Wis. 2d at 90; *Jones*, 433 U.S. at 132-33.

[4] This is not a situation where Lilly is in a persistent vegetative state, or is waning in the final stages of a terminal illness. Lilly, other than the physical problems created by his unwillingness to take in nourishment and hydration, is, by all accounts, an otherwise healthy individual.

Clearly, any alleged right that Lilly may have to play Russian Roulette with his life must necessarily yield to the State's compelling and legitimate interests. The State's only ability to protect those interests against the actions of Lilly is through compulsory nutrition and hydration. If Lilly refuses to voluntarily take in proper nutrition and hydration, the only alternative is to introduce that nourishment through involuntary methods. Lilly's own actions in refusing nourishment have left the State with no alternative but to proceed with the introduction of nourishment against his will.

While DOC's requested relief would certainly not allow Lilly an unfettered right to refuse nutrition and hydration, it must be noted that the requested relief would only restrict Lilly's right in limited circumstances; specifically, where a licensed physician determines in his or her medical judgment that the feeding and/or hydration of Lilly is necessary to protect and maintain his health. In other instances where Lilly chooses not to eat or take treatment, his right to refuse remains intact. Thus, a court order would not unnecessarily restrict Lilly's right to refuse treatment; it only limits that right in situations where the exercise of it unduly conflicts with the State's interest in providing for institutional safety, security and order.[5]

E. Federal courts and the majority of State courts support a State's right and duty to obtain forcible feeding and medicating orders.

The federal courts that have considered the question hold that a forced-feeding order "does not violate a hunger-striking prisoner's constitutional rights." *In re: Grand Jury*

[5] The trial court acknowledged that during Lilly's temporary period of consuming modest nutrition, DOC did not continue to feed him against his will. May 19, 2009 Decision and Order at 45

Subpoena John Doe v. U.S., 150 F.3d 170, 172 (2nd Cir. 1998) (*per curiam*) (collecting cases).

> Although Doe, as a civil contemnor, has been convicted of no crime, the institution where he is housed is still responsible for his care while incarcerated. Other compelling governmental interests, such as the preservation of life, prevention of suicide, and enforcement of prison security, order, and discipline, outweigh the constitutional rights asserted by Doe in the circumstances of this case.

Id. Also see Martinez v. Turner, 977 F.2d 421 (8th Cir. 1992) (upholding forced feeding of a pre-trial detainee if the inmate's life or permanent health is in danger); *Garza v. Carlson*, 877 F.2d 14 (8th Cir. 1989) (no constitutional violation by the treatment of involuntary nourishment); *In re Sanchez,* 577 F. Supp. 7 (S.D.N.Y. 1983) (allowing government to force feed a civil contemnor on a hunger strike who was in immediate danger of suffering permanent bodily damage as a result of complications from malnutrition and dehydration). *Also see In re Habil Ahmed Soliman*, 134 F. Supp. 2d 1238, 1255-57 (N.D. Ala. 2001) (collecting state and federal cases), and Annotation, *Prisoner's Right To Die Or Refuse Medical Treatment*, 66 A.L.R. 5th 111 (1999).

Likewise, the majority of state courts allow prison officials to force feed inmates on the grounds that the state's interest in one or more of the following, overrides a prisoner's right to privacy: (1) preserving life, (2) preventing suicide, (3) the orderly administration of the prison system, (4) protecting a third party, and (5) the integrity of the medical profession. *See Polk County Sheriff v. Iowa Dist. Court,*594 N.W.2d 421, 431-32 (Iowa 1999) (state can intervene when refusal of medical treatment is used to manipulate system); *Laurie v. Senecal*, 666 A.2d 806, 809-10 (R.I. 1995) (state has duty

to intervene); *Penn. v. Kallinger*, 134 Pa. Cmwlth. 415, 522, 580 A.2d 887, 891 (Pa. 1990) (needed for orderly administration of prison system); *In re Caulk*, 125 N.H. 226, 232, 480 A.2d 93, 97 (N.H. 1984) (balance between right to privacy and administration of prisons and preservation of life); *White v. Narick*, 170 W.Va. 195, 199, 292 S.E.2d 54, 58 (W.Va. 1982) (state's interest in preserving life superior to right to privacy); *Von Holden v. Chapman*, 87 A.D.2d 66, 68-69, 450 N.Y.S.2d 623, 625-26 (N.Y. App. Div. 1982) (state has interest in preventing suicides). *See also Comm. of Corrections v. Myers*, 379 Mass. 255, 266, 399 N.E.2d 452, 458 (Mass. 1979) (forced kidney dialysis).

F. In *DOC v. Saenz*, the Wisconsin Court of Appeals recognized the legitimate interests of the State in administering forced hydration and/or nutrition.

In *Saenz*, the Court of Appeals noted that though an inmate has a liberty interest in avoiding forced nutrition and hydration, the liberty interest may be infringed by the State in the pursuit of legitimate and countervailing interests.[6] *Saenz*, 299 Wis. 2d at 500. The court stated that an inmate's liberty interest could be overcome by the State's interests where it is shown that:

1. The inmate has refused to consume food and fluids sufficient to maintain his health for an extended period;

2. As a result of the inmate's failure to consume sufficient food and fluids, the inmate has been diagnosed by a physician as suffering from moderate to severe malnutrition, dehydration or other deleterious condition; and

[6] In *Saenz* the parties agreed that the inmate's right could be limited by the legitimate interests of the State. *Saenz*, 299 Wis. 2d at 498. However, the Court still reviewed the applicable case law and determined that the parties' concessions were "well founded" and that under appropriate circumstances, the State may infringe upon an inmate's right to be free from forced hydration and nutrition. *Id.* at 499-500.

3. Pursuant to reliable medical opinion, the inmate is in imminent danger of suffering serious harm or death unless he is given medical treatment, including, if necessary, forced hydration and/or forced feeding.

Id. at 510-11.

There is no dispute that Lilly has been engaged in a hunger strike for more than five years. May 22, 2009 Aff. David Burnett ¶ 6; May 19, 2009 Decision and Order at 55 Although commencing in February 2009, Lilly temporarily resumed a modest consumption of food and hydration, there is no dispute about his intention to fully resume his hunger strike when the order permitting his forcible nutrition and hydration is withdrawn or terminated. May 22, 2009 Aff. David Burnett ¶¶ 7, 13; May 19, 2009 Decision and Order at 42, 44, 54

Further, there is no dispute that Lilly's hunger striking activities have resulted in his development of cardiomyeopathy which required surgical intervention at State expense. May 22, 2009 Aff. David Burnett ¶ 6 Additionally, Lilly's hunger strike has resulted in prior diagnoses of moderate to severe malnutrition and dehydration. May 22, 2009 Aff. David Burnett ¶ 7

Finally, Dr. Burnett states that if Lilly resumes his hunger strike and if DOC is unable to forcibly provide nutrition and hydration, Lilly will be in imminent danger of suffering serious harm or death. May 22, 2009 Aff. David Burnett ¶ 14, 15

G. There are no compelling circumstances which should permit Lilly to take his life.

The court's "compelling circumstances" doctrine does not provide any consideration for the legitimate and compelling interests of the State. The fact that Lilly may be an intelligent and competent prison inmate who is not trying to commit suicide, but, rather, is using his hunger strike as a mechanism to protest and object to the way in which justice is administered in the United States of America cannot outweigh the State's compelling interests in preventing his death and maintaining prison discipline and security.

There is no case law supporting any such "compelling circumstances" exception under the facts in this case. The various court holdings regarding the forced administration of nutrition and hydration do not offer any special dispensation for those who may be perceived by the trial court as competent, intelligent or purposeful. In fact, *Saenz* himself was not found to be unintelligent or incompetent, and he too stated that he had no desire to take his life, but, instead, was dedicating his hunger strike to policy reform.

Whether or not Lilly is competent and/or intelligent, his self imposed death by starvation will have the same detrimental impact upon the legitimate and compelling state interests that the courts have consistently recognized and protected. The true purpose behind Lilly's hunger strike is to "disrupt things as they are in the DOJ/DOC and to create expenses for it which exacerbate its present precarious financial condition." May 19, 2009 Decision and Order at 29 Such is precisely the sort of attack on the interests of

the state that reasonable prison regulations and practices are designed to prevent. *See Jones*, 433 U.S. at 132-133. Such is precisely the sort of attack on the interests of the state that DOC is trying to prevent by preventing Lilly from taking his own life (whether he purposefully intends to or not).

CONCLUSION

Wherefore, it is respectfully requested that the Court enter an order staying and suspending the "Order Terminating Force Feeding and Injunction Against Force Feeding" in Case No. 2007CV000392 entered in said proceeding on May 19, 2009, by the Circuit Court for Dodge County, the Honorable Andrew P. Bissonnette presiding.

Dated this 29 day of May, 2009.

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