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State of Wisconsin Department of Corrections

June 1, 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.
Dodge Co. Case No. 07-CV-0392

Dear Judge Bissonnette:

I just became aware that through inadvertence the May 22, 2009 affidavits of Dr. David Burnett and Timothy Lundquist, which were referenced in the Notice of Motion and Motion for Relief Pending Appeal and Brief in Support Thereof, were not attached. Therefore, we enclose the affidavits of David Burnett and Timothy Lundquist, both of which were signed on May 22, 2009, to be attached to the original Notice of Motion and Motion for Relief Pending Appeal and Brief in Support Thereof which was filed on May 29, 2009.

I have arranged for Mr. Lilly to be served with copies of the documents today.

I apologize for any inconvenience this might have caused.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Gloria Thomas'.

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

Enclosures

cc: Warren Lilly, Jr., DOC #447655

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

Case No. 2009AP _____

In matter of Warren Lilly, Jr.:

WISCONSIN DEPARTMENT OF CORRECTIONS,

Petitioner-Appellant,

v.

WARREN LILLY, JR.,

Respondent-Respondent.

AFFIDAVIT OF TIMOTHY C. LUNDQUIST

STATE OF WISCONSIN)
) ss.
COUNTY OF DODGE)

TIMOTHY C. LUNDQUIST, being first duly sworn, on oath deposes and says:

1. I make this affidavit on the basis of my own personal knowledge.
2. I am employed by the Wisconsin Department of Corrections as the Warden of the Dodge Correctional Institution. I have been employed in this capacity since January 20, 2008. I have been employed by the Department of Corrections since May 19, 1980. Prior to taking my current position at the Dodge Correctional Institution in Waupun, I have held positions as Correctional Officer, Correctional Sergeant, Lieutenant, Captain, and Unit Manager. I was Deputy Warden at Kettle Moraine Correctional Institution and Warden at New Lisbon Correctional Institution. I have worked at Waupun Correctional Institution, a maximum security institution, Oshkosh Correctional Institution, a medium security institution, and Wisconsin Resource

Center an institution operated by the then Department of Health and Family Services that provides mental health services to inmates.

3. In my capacity as Warden, I am responsible for the operation, planning, direction and management of the institution. I direct the operation of, among other things, security.

4. All Department of Corrections institutions are concerned when an inmate dies in its institution. In my experience, there is a perceived change in the prison climate when an inmate dies as it relates to inmate distrust of prison staff.

5. I know of Mr. Lilly as an inmate at the Dodge Correctional Institution, as an inmate that was on a hunger strike, and as a result of security issues involving Mr. Lilly. Warren G. Lilly Jr. has been housed at Dodge Correctional Institution since February 27, 2009. Mr. Lilly has been consuming foods and fluids requiring no involuntary feeding or hydration since February 28, 2009.

6. If Mr. Lilly dies as a result of a hunger strike, the security at Dodge Correctional Institution will be significantly and adversely affected. It will be adversely affected because inmates expect staff will exercise prudent actions to protect inmates' health, safety and welfare. The failure of correctional staff to take life saving actions and allowing an inmate to die while in custody will destabilize the correctional population. It will also do so because it jeopardizes the inmates' reliance on staff to act in inmates' best interests.

7. To allow any inmate to die by self-imposed starvation will give rise to rumors that staff mistreated the inmate, thus causing his death. Inmates are naturally suspicious of staff and correctional management and seldom know all of the information about an incident such as an inmate death and so believe the worst. This applies to Mr. Lilly as well.

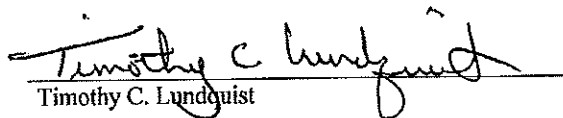
8. Mr. Lilly has made himself well-known and his death may have a greater impact on the institution. He has solicited other inmates to participate in his hunger strike. Mr. Lilly's death may create a greater distrust among inmates that management failed to adequately respond to Mr. Lilly's health care needs due to the prolonged period of a hunger strike resulting in death.

9. In 1983, there was an inmate riot at Waupun Correctional Institution during which prison staff were taken hostage. A precipitating factor of this riot was the suicide death of one of the institution's inmates. Some of the inmate population perceived that the prison staff could or should have taken more steps to prevent

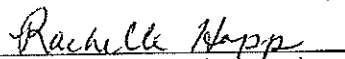
the inmate's death. Mr. Lilly has stated he is not attempting to commit suicide. Regardless of Mr. Lilly's motives, the end result of his hunger strike may be death.

10. Upon information and belief, the general public expects the Department of Corrections to provide appropriate care to its inmate population and to not allow inmates to die under these circumstances while in custody.

11. The restraint chair is used when an inmate is uncooperative as a temporary means to provide a safer environment for both the inmate and staff. The use of the restraint chair with Mr. Lilly was consistent with security procedures and health professionals were present throughout its use.


Timothy C. Lundquist

Subscribed and sworn to before me
this 22nd day of May 2009.


Notary Public, State of Wisconsin
My Commission: April 11, 2010

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

Case No. 2009AP _____

In matter of Warren Lilly, Jr.:

WISCONSIN DEPARTMENT OF CORRECTIONS,

Petitioner-Appellant,

v.

WARREN LILLY, JR.,

Respondent-Respondent.

AFFIDAVIT OF DAVID E. BURNETT

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

DAVID E. BURNETT, being first duly sworn, on oath deposes and says:

1. I make this affidavit based upon my review of Mr. Lilly's medical records, affidavits of Department of Corrections' physicians who have provided medical care to Mr. Lilly and discussions with physicians and medical personnel regarding his care.

2. I am employed by the Wisconsin Department of Corrections as the Medical Director. I have been employed in this capacity since April 2001, first as Limited Term

Employee consultant/interim Medical Director. I was appointed to the Medical Director position in October 2001.

3. I am licensed to practice medicine by the State of Wisconsin's Department of Regulation and Licensing. I was granted the license to practice medicine on October 17, 1980.

4. In my capacity as medical director, I am responsible for overseeing medical care in the Department of Corrections including general medical care, mental health and dental care, development of medical policy, and quality and utilization of medical services in the prison system. My duties include oversight of all medical care in the Department of Corrections institutions and providing supervision and guidance to physicians who provide medical care to inmates in the DOC institutions. In the performance of my duties I have access to the inmates' medical records, which are kept in the normal and ordinary course of business at the institution's Health Services Unit (HSU) and which are relied upon by the medical personnel on the unit for providing health care to the inmates. I also have access to the physicians to review and discuss cases as needed.

5. I know of Mr. Lilly by having been involved in many case conferences to discuss his care and providing advice and direction to practitioners, as well as having seen some of his medical records. I first became aware of Mr. Lilly in late February or early March of 2005 when he started a hunger strike and a court order was obtained to start involuntarily feeding him. Over the past four years, I have had a number of conference calls with staff regarding his care. The conferences have included doctors involved in the direct care of Mr. Lilly. Some conferences were done as periodic updates

on how the feedings were progressing. More often the conferences came up in response to questions or incidents at the institutions or to discuss the next prison for transfer. Sometimes the conference might be in preparation for upcoming court review. Sometimes the conference was problem solving in nature and responding to Mr. Lilly's behaviors. I am aware that Mr. Lilly has challenged being involuntarily fed and hydrated under court order, the length of the feeding, and the use of the restraint chair.

6. My review of care records reveals that at the time of his intake assessment at Dodge Correctional Institute on August 15, 2003, Mr. Lilly's weight was 190 pounds. Prior to 2003 while he was in the Milwaukee County Jail, Mr. Lilly went on a hunger strike which resulted in so much weight loss that he developed a cardiomyopathy, part of which was a previously inconsequential atrial-septal defect that became hemodynamically significant, most likely due to muscle mass loss. This condition required surgical repair shortly after he was incarcerated in state prison system. In other words, his previous hunger strike contributed to a significant health-threatening change in his heart's ability to function properly. This change required surgical intervention to minimize the risk to his health and life. On or about May 18, 2004 Mr. Lilly stopped eating solid food, and on or about February 28, 2005 he stopped consuming any water. Nasogastric (NG) tube feedings were initiated at that time pursuant to a court order. I am also aware from security reports that he stopped wearing clothes on or about February 15, 2007 and was allowing the nurses to cover him with a towel or blanket during tube feedings.

7. In response to the Department of Corrections' petition to evaluate and treat, on January 11, 2008, Judge Bissonnette issued an order which modified the original order

by restricting NG feedings to six days per week. On August 7, 2008, the judge continued the feeding restriction of six days per week and also restricted the feeding time to 15 minutes or less. The medical record reflects that Mr. Lilly's weight declined from 166 pounds on December 21, 2007, shortly before the order, to 125 pounds on January 2, 2009. This put him at a body mass index (BMI) of 16 which is markedly underweight and moderately malnourished.

8. Dr. Sumnicht, treating physician at Waupun Correctional Institution, concluded Mr. Lilly was purging, or inducing vomiting after his feedings. Dr. Sumnicht based this conclusion on the low sodium level in Mr. Lilly's blood and his evaluation of Mr. Lilly. It should be noted that Mr. Lilly had purged previously when housed at Fox Lake Correctional Institution in 2007. In combination with his heart condition Mr. Lilly was at significant risk of sudden cardiac death. During January and February 2009, Dr. Sumnicht evaluated Mr. Lilly on several occasions and case conferences were held that included Dr. Hoftiezer and myself. Dr. Sumnicht found in February that there was evidence that Mr. Lilly was drinking water excessively, based on a laboratory measurement of anti-diuretic hormone. Measures were taken to address both the purging and excess water drinking which included water restriction one hour prior to feeding, keeping him in the chair for an hour after feeding to prevent purging, and adding some salt to his water. Despite these measures and giving 9 cans of food supplement (totaling approximately 3150 calories) per day, there was no increase in his weight. Due to the fact that the Court order restricted the involuntary feedings to six days per week, the calorie intake actually only averaged approximately 2700 calories per day per week. It was decided that he needed to be fed seven days per week to maintain his health and

prevent sudden death therefore a modification of the court order was requested. On February 23, 2009, in Judge Bissonnette's absence, Judge Pfitzinger granted the Department of Corrections petition for temporary emergency modifying Judge Bissonnette's feeding orders in order to properly care for Mr. Lilly and prevent his death.

9. As stated in Paragraph 7, although he was being involuntarily feed, Mr. Lilly's weight steadily declined from approximately 166 pounds late December 2007 to a low weight of 125 pounds on January 2, 2009. At this weight and his underlying cardiac condition, he was in danger of sudden cardiac death due to his state of malnutrition.

10. NG tube insertions are commonly performed procedures done by nursing staff. Nursing staff are trained on the procedure. This is a medical procedure done in correctional institutions when necessary. The generally accepted procedure is to measure the distance for the tube to be inserted, insert through the nostril after checking for obstruction or deviation, and to check for proper insertion by inserting air through the tube and listen over the stomach with a stethoscope. Delivery rates and formula types are determined by the physician based on the patient's medical needs. Formula and any additional water are given at room temperature. There is no medical indication that warm water is necessary. Periodic laboratory monitoring, nutritional assessments and examinations are done with prolonged feeding. To date, there is no clinical evidence that Mr. Lilly was being harmed by the frequent NG feeding tube insertions. Nursing has reported easy access through either nostril and he appears to have tolerated the feedings well. The amount of water given would not affect Mr. Lilly's core temperature. Based on a review of the records, it is my opinion that all of Mr. Lilly's involuntary feedings were performed consistent with appropriate medical standards.

11. On February 27, 2009, Mr. Lilly was transferred to Dodge Correctional Institution Infirmary due to his persistence in vomiting around the NG tube and continued difficulty with maintaining his weight. Shortly after arrival Mr. Lilly decided to voluntarily consume some food and liquids so that NG feedings ceased on February 28, 2009 after he had one NG feeding that morning. Since being transferred to Dodge Correctional Institution on February 27, 2009, Mr. Lilly's weight has come up and stabilized between 160 and 165 pounds which is at or above his estimated ideal body weight by body mass index (BMI) of 21, based on height. It should be noted that it took some time, over a month, for his weight to become stable. Initially, his weight went up to 172 pounds and he had evidence of edema. In addition, Mr. Lilly had evidence of malnutrition as both his albumin and protein levels were below normal. He also had anemia of chronic disease with his hemoglobin and hematocrit levels low. This was also believed to be due to malnutrition. Our goal for him would be to keep him well above his minimum allowable BMI of 19 or 140 pounds for ideal health.

12. Mr. Lilly now wears clothes and thus does not have problems with shivering. He needs to continue to wear clothes to avoid shivering. Temperatures are maintained at a level in the institutions so he will not be cold if he wears clothes. His shivering while not wearing clothes did not contribute to his weight loss.

13. Mr. Lilly has stated to various DOC staff including health care providers and also stated in court that he plans to resume his hunger strike after the current legal proceeding in Judge Bissonnette's court was concluded.

14. It is my professional opinion that if Mr. Lilly resumes refusing to consume or to

retain foods and fluids long enough to absorb for his body to use nutrients, he would be diagnosed with moderate to severe dehydration or malnutrition, or both.

15. It is my professional opinion that if Mr. Lilly continued to refuse to consume and retain foods and fluids long enough to absorb for his body to use nutrients, he would again be in imminent danger of suffering serious harm or death.


16. It is my professional opinion that the court order restricting the feeding to six days per week allowed a slow insidious weight loss which allowed Mr. Lilly to put himself in a compromised health position. In addition, the restrictions on the rate of feeding put the staff in a position whereby they had to seek relief of the Court's order to counter Mr. Lilly's efforts to subvert the feedings with self induced vomiting. It is my opinion that the physician needs to have sufficient latitude to make adjustments in feeding rates to address efforts by a manipulative patient such as Mr. Lilly who will try to subvert the feeding process and put himself in danger as he has done previously.

17. Based upon my review of Mr. Lilly's medical records and history and statements by Mr. Lilly, it is my opinion to a reasonable degree of medical certainty that Mr. Lilly will resume refusals of solid food and liquids in the future. It is also my opinion to a reasonable degree of medical certainty that if NG tube feedings are not compelled, he will become severely dehydrated within 72 hours or severely malnourished within 10 to 14 days or both, and that his death will occur as a result of hemodynamic collapse and multiorgan system failure. It is further my opinion, that he risks permanent multiorgan system injury (such as kidney failure, heart attack, infections, etc.) if allowed to go without fluid or nutrition for prolonged periods of time.

18. A restraint chair has been used periodically since NG tube feedings were started on or around February 2, 2005. It is used for both the safety of the patient and the staff. It is safe for the patient because the upright position minimizes chances of aspiration (food supplement regurgitated into the lungs) and nasal trauma with insertion of the tube. In addition, the patient's hands are not free to induce vomiting and potential aspiration. A restrained patient cannot grab the tube, throw feces or urine or aim his vomit at staff, any vomiting or self injury is easily observable, and he cannot grab care givers or equipment. When Mr. Lilly has cooperated, tube feedings were done without the restraint chair. When Mr. Lilly engaged in resistive behavior, the restraint chair was used for his safety and staff safety.


David E. Burnett

Subscribed and sworn to before me
this 22nd day of May 2009.


Notary Public, State of Wisconsin
My Commission: permanent