

UNITED STATES SUPREME COURT

LARRY CRAWFORD, Director,)
Missouri Department of Corrections,)
JAMES D. PURKETT, Superintendent,)
Eastern Reception Diagnostic &)
Correction Center and JOHN DOES,)
1-666 Anonymous Executioners,)
)
Petitioners,)
)
vs.)
)
MICHAEL ANTHONY TAYLOR,)
)
Respondent.)

APPLICATION TO VACATE STAY OF EXECUTION

Petitioners apply to vacate the modified stay of execution imposed the evening of January 31, 2006, by the United States Court of Appeals for the Eighth Circuit in *Michael Taylor v. Larry Crawford, et al.*, No. 06-1278 (8th Cir. Jan. 31, 2006). After that court received a decision from the United States District Court for the Western District of Missouri finding no merits in the claims on which the unexplained stay is based.

Procedural History

The court is familiar with the procedural history of this case. Petitioners refer the court to their discussion of the procedural history in the motion to vacate the January 29 stay filed on January 31, 2006 in *Taylor v. Crawford*, No. 05A695 at pages 1-2.

This court denied that application shortly after the district court denied § 1983 relief on January 31, 2006 (Application Exhibit Q; "*Taylor* slip op."). Petitioners filed an

application to vacate stay with the court of appeals shortly thereafter. Respondent filed a notice of appeal with the district court. At 9:25 p.m., CST, the court of appeals vacated its previous stay, but reinstated a stay that would by its own terms at 5:00 p.m., CST, on February 1, 2006, 17 hours into the execution "day." The court ordered:

The Appellants' pending Motion to Vacate the Stay of Execution entered by this court on January 29, 2006 is granted in part to the extent that the expiration day and time of the stay is modified so that the stay shall expire and terminate at 5:00 p.m., Central Standard Time, on Wednesday, February 1, 2006.

Judge Beam dissents from this order and would vacate the stay in its entirety.

(Application Exhibit R). Petitioners now approach this court with a request that the court vacate the January 31, 2006 stay of execution in *Michael Taylor v. Larry Crawford, et al.*, No. 06-1278.

Standard of Review

This court set forth the standard of review in this situation in *Bowersox v. Williams*, 517 U.S. 345 (1996).

A stay of execution pending disposition of the second or successive federal habeas petition should be granted only when there are "substantial grounds upon which relief might be granted. . . . Entry of a stay on a second or third habeas petition is a drastic measure, and we have held that it is particularly egregious to enter a stay absent substantial grounds for relief.

Id. at 346 (citations and quotation marks omitted). In light of this standard of review, this court should vacate the lower court's stay of execution. This standard, developed in a capital

habeas appeal context, similarly applies with stays issued in a civil rights litigation. *Gomez v. United States District Court*, 503 U.S. 653, 653-54 (1992).

Why The Stay Should Be Vacated

The Court of Appeals' January 31, 2006 order is a summary order granting a stay of execution. It gives no explanation whatsoever. Such stays without explanation should be disfavored. *Bowersox v. Williams*, 517 U.S. at 346, citing *Netherland v. Tuggle*, 515 U.S. 951 (1995) (per curiam). Reading the stay order in conjunction with the district court's January 31, 2006 judgment (Application Exhibit Q) shows no basis for a stay. Respondent fails to show substantial grounds justifying issuance of a stay.

In Missouri, execution warrants are issued by the Missouri Supreme Court for a particular date. *See, e.g.*, Missouri Supreme Court order of January 3, 2006, and Warrant of Execution (Application Exhibits O and P). *See Delo v. Stokes*, 495 U.S. 320, 110 S. Ct. 1880, 1881 (1990). They thus permit the execution to take place any time between 12:01 a.m. and 11:59 p.m. The Missouri Department of Corrections begins preparation for the execution days before the warrant date. Preparation accelerates during the day before the warrant day, with the object of being ready for the execution itself immediately after the execution "day" begins – *i.e.*, by 12:01 a.m. of the date fixed by the Missouri Supreme Court.

There are, of course, myriad reasons that an execution might be delayed – though the most common by far are a stay entered by a court or an executive delay resulting from pending judicial proceedings. By setting the execution for 12:01 a.m., the Department

ensures that there is a full, 24-hour day in which to resolve any such issues. But if an issue is unresolved and the execution does not take place before midnight, the executive authority is erased. The matter returns to the Missouri Supreme Court for a new execution warrant.

The state must continue, and is continuing, to prepare for the execution scheduled for Wednesday, February 1, in anticipation of legal challenges to the execution being determined against respondent Taylor. The stay entered by the Eighth Circuit will interfere with the completion of that process. The stay threatens to force the entire process to begin again. Although the Eighth Circuit order permits the state an opportunity to show again before the appellate court (as it has already shown before in the *Johnston* case and in the district court) that its lethal injection process does not violate the Constitution, it does not call for a decision by the appellate court on this question until 5:00 p.m. on February 1 – more than two-thirds through execution “day” as set by the Missouri Supreme Court.

What makes that situation particularly problematic is not the demand for yet another appeal. It is the presence of the stay in place until Wednesday, February 1, at 5:00 p.m. When the court of appeals rules, no matter how it rules, the process will not be over. Even if it rules in the State’s favor – as we expect it to do, for reasons further explained below – the State will be unable to act immediately. The en banc court may be called upon to consider the appeal, and then, this court again.

Litigation on the day *before* an execution has become, unfortunately, commonplace. But litigation on the *day of* an execution is a taboo that should not be broken lightly,

especially by a circuit court of appeals. It is hard to imagine that such timing would not affect the ability of the State to meet the requirements of the February 1 warrant, while preserving security and order in the process, and adequately caring for victim's family, public, and other witnesses.

Why The Stay Should Be Vacated

Respondent Taylor makes three claims in this case, which he filed as a § 1983 action. He first challenges Missouri's method of lethal injection as violative of the Eighth Amendment's ban of cruel and unusual punishments. He next claims that his due process rights under the Fourteenth Amendment will be violated because a physician will assist in preparations for the execution and such assistance by a physician is a violation of medical ethics. Then, he asserts that lethal injection, as performed in Missouri, violates the Thirteenth Amendment in that it constitutes a badge of slavery.

Respondent Taylor cannot succeed on the merits on any of these claims.

Missouri's method and means of administration of lethal injection are not cruel and unusual. The Eighth Amendment prohibits punishments that involve "unnecessary and wanton inflictions of pain." *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 290 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925 (1976)). It also prohibits those that are inconsistent with "evolving standards of decency that mark the progress of a maturing society." *Estelle*, 429 U.S. at 102, 97 S. Ct. at 290 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590, 598 (1958)). Any punishment must be consistent with human

dignity and comply with current civilized standards. *Trop*, 356 U.S. at 96-102, 78 S. Ct. at 597-98.

Missouri is among 37 of the 38 states with the death penalty that use lethal injection as a method of execution. See *Cooper v. Rimmer*, 379 F.3d 1029, 1032 (9th Cir. 2004). "There is general agreement that lethal injection is at present the most humane type of execution available and many states have abandoned other forms of execution in favor of lethal injection." *Hill v. Lockhart*, 791 F. Supp. 1388, 1394 (E.D. Ark. 1992). See also *LaGrand v. Lewis*, 883 F. Supp. 469, 471 (D. Ariz. 1995) (citing cases that have affirmed the constitutionality of lethal injection), *aff'd*, 133 F.3d 1253 (9th Cir. 1998), *cert. denied*, 525 U.S. 971, 119 S. Ct. 422 (1998). Moreover, medical experts have urged that death by lethal injection is more humane than previously used means of execution. See *People v. Stewart*, 520 N.E.2d 348, 358 (Ill. 1998), *cert. denied*, 488 U.S. 900, 109 S. Ct. 246 (1988).

In addition to this case law generally finding lethal injection to be a humane method of execution, Missouri's particular method of lethal injection and means of administering the drugs have recently been found to pass constitutional muster, today in the district court decision (Application Exhibit Q), at pages 4-7 and in *Johnston v. Crawford*, No. 4:04-CV-1075 CAS, slip op. at pp. 9-10 (E.D. Mo. August 26, 2005) (Application Exhibit A; "*Johnston* slip op."). Although in *Johnston*, the Eighth Circuit did not need to rule on the merits of the district court's grant of summary judgment upholding Missouri's method of lethal injection as a proper means of execution, the Eighth Circuit, en banc, did review the

prisoner's motion for stay of execution, denied the stay, and permitted the execution to proceed. *Johnston v. Roper*, No. 05-3353, 421 F.3d 1152 (8th Cir., Sept. 1, 2005) (en banc) (Application Exhibit B); *Johnston v. Roper*, No. 05-3353 (8th Cir., Aug. 30, 2005) (panel order) (Bowman, Circuit Judge, dissenting) (Application Exhibit C). In *Johnston*, the plaintiff raised the same two Eighth Amendment issues Taylor raises here:

(1) There is a significant risk that the sodium pentothal (also called thiopental sodium) administered first in the execution process, either through administration by untrained personnel or due to the amount administered, will not render the condemned prisoner unconscious until his death, with the result that he will be conscious and suffer pain from the administration of pancuronium bromide (also called pavulon), which is the second drug administered and which causes paralysis and suffocation, and of potassium chloride, which is the third drug administered and which causes pain as it goes through the veins before it reaches the heart and stops it. (It was also asserted in *Johnston*, as here that the paralysis caused by the pancuronium bromide would render the inmate incapable of demonstrating that he was conscious and experiencing pain.) *Johnston* slip op. at p. 1; *Taylor*, slip op. at 4-6.

(2) The administration of the three drugs used in the execution process into the femoral vein by means of a triple lumen catheter causes undue pain. *Johnston* slip op. at p. 7; *Taylor*, slip op. at 6-7.

With regard to the first claim, Dr. Dershwitz, the defense expert, testified in the *Johnston* case that the 5 gram dose of sodium pentothal given in Missouri¹ would render most people unconscious within a few seconds and that by the time all 5 grams are injected over 99.9999999% of the population would be unconscious. *Johnston* slip op. at p. 5; Testimony of Dr. Dershwitz (Application Exhibit D), at p. 18; Affidavit of Dr. Dershwitz (Application Exhibit E), at ¶ 8.² (Dr. Dershwitz also testified to the same effect yesterday in the hearing in this case.) The *Johnston* court found that this testimony was essentially un rebutted by Dr. Heath, the plaintiff's expert, in that he testified only that the dose of sodium pentothal would be insufficient *only if it was administered incorrectly*. *Johnston* slip op. at pp. 5-6. The court also noted that Dr. Heath had conceded in *Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005), that a 5 gram dose of sodium pentothal, if administered properly, "would likely be sufficient to cause unconsciousness and probably death prior to the administration of pancuronium bromide." *Johnston* slip op. at p. 5 (quoting *Beardslee*). With regard to the possibility that an error in administration of the drugs could result in a risk of suffering, the court, citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463-65,

¹No changes in the means used in the execution of *Johnston* are anticipated for the execution of respondent Taylor. Application Exhibit F (Answer to Supplemental Interrogatory No. 18 (p. 2).

²Dr. Dershwitz also explained that "[b]ecause these probability calculations by definition could never be 0 percent on one end or 100 percent on the other, we end up with probabilities with a lot of nines in them because mathematically you cannot have in this type of calculation 100 percent. But this is practically speaking a dose that guarantees unconsciousness in everybody for a significant period of time." Exhibit D, at p. 18.

67 S. Ct. 375, 376-77 (1947), ruled that such a "possibility of human error or accident is insufficient to establish a constitutional violation." *Johnston* slip op. at p. 4; see also *Johnston* slip op. at p. 7. It should also be noted that a 5 gram dose of sodium pentothal is 12.5 times the normal surgical dosage and would render most people unconscious for more than 13 hours. See *Beardslee*, 395 F. 3d at 1075. The district court here properly concurred in those findings and conclusions. *Taylor* slip op. at 5.

Additionally, the court in *Johnston* found the doctor and nurse involved in Missouri executions to be qualified. *Johnston* slip op. at p. 7. The court specifically noted the evidence that the doctor had prepared sodium pentothal (the only one of the three drugs that requires mixing on site) 1000 times and had placed IV central lines 20,000 to 30,000 times. *Johnston* slip op. at p. 7 n.1. This same doctor is expected to be involved in respondent Taylor's execution. Defendant Crawford's Answers to Plaintiffs' Supplemental Interrogatories (Application Exhibit F), responses to Interrogatory No. 18 (p. 2), No. 22a (p. 8), and 22c (p. 10).

The *Johnston* court also rejected the claim that administering the drugs through the femoral vein with a triple lumen catheter was improper "because the mere possibility rather than any probability of the infliction of . . . pain, and because the possibility is dependent upon mistakes in the procedure involving accidental punctures and other complications not

reasonably foreseeable and not constitutionally relevant.” *Johnston* slip op. at p. 8.³ The court then specifically pointed out that the doctor performing the procedure in Missouri is a board-certified surgeon and qualified to perform the procedure. *Johnston* slip op. at p. 8. *See also* Application Exhibit F, response to Supplemental Interrogatory No. 18 (p. 2) and No. 22a (p. 8) (doctor expected to perform the procedure at Taylor’s execution, who is also doctor that performed the procedure in the last five executions, is a board-certified surgeon). Similarly, the *Taylor* district court rejected this claim. *Taylor* slip op. at 6.

The court in *Johnston* granted summary judgment against the prisoner on the challenge to Missouri’s means of lethal injection, stating:

plaintiff’s proof, even if accepted as true and accurate, is insufficient to establish the Eighth Amendment will be violated by Missouri’s lethal injection protocol. Both qualitatively and quantitatively, the opinions of plaintiff’s expert are inadequate to rationally support a conclusion that his execution as planned carries an unconstitutional risk of the unnecessary and wanton infliction of pain sufficient to violate standards of decency in the context of the purposeful and lawful extinguishment of life.

Slip op. at pp. 9-10. *See also* Application Exhibit D, at p. 25 (Dr. Dershwitz testified that “I think that if the protocol as described here is implemented, the likelihood that the inmate will

³Petitioners Crawford and Purkett also note that one of respondent Taylor’s own experts here, Dr. Heath, provided an affidavit in *Nelson v. Campbell*, 541 U.S. 637, 645-647, 124 S. Ct. 2117, 2124 (2004), that appears to have supported the use of a percutaneous central line as a proper means administration of the drugs in an execution. A percutaneous central line is one inserted by “passage through the skin by needle puncture, including introduction of wires and catheters.” *Stedman’s Medical Dictionary* 1325 (26th ed. 1995) (definition of percutaneous). This is the type of central line challenged by respondent Taylor as described in the Amended Complaint (Doc. No. 36) in ¶ 73.

experience any suffering is negligible"); Application Exhibit E, at ¶ 5 (Dr. Dershwitz's opinion that "a condemned inmate who is administered five grams of thiopental sodium will be rendered unconscious, and not experience pain, for the time period necessary to complete the execution"); Application Exhibit E, at ¶¶ 9-14 (Dr. Dershwitz's opinions regarding the vanishingly small probabilities that a condemned inmate given a 5 gram dose of thiopental sodium could be conscious, and able to experience any pain associated with the subsequent administration of pancuronium bromide and potassium chloride); *Taylor* slip op. at 5.

The Eighth Amendment claims of respondent Taylor here (even assuming he has a valid individualized method-of-execution § 1983 claim under *Nelson*, 541 U.S. at 644, 124 S. Ct. at 2123) are no different from those already ruled in the *Johnston* case. Taylor has offered no facts here different than the facts that existed in *Johnston*, which the court concluded were insufficient to state a claim as a matter of law.⁴ In this absence of any legitimate contention by Taylor contradicting the petitioner prison officials' demonstration that Missouri's means of execution does not gratuitously inflict pain, the stay of execution

⁴*Johnston's* general approval of Missouri's lethal injection procedure also precludes any argument by respondent Taylor that the chance of error in his execution could render that procedure constitutionally infirm in his particular case. The Supreme Court has rejected constitutional challenges based on an "unforeseeable accident," and has presumed that state officials [will act] 'in a careful and humane manner.'" *Beardslee*, 395 F.3d at 1075 (quoting *Louisiana Ex rel. Francis v. Resweber*, 329 U.S. 459, 461-463, 67 S. Ct. 374, 375 & 376 (1947)). "The risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review." *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994); *State v. Webb*, 750 A.2d 448, 455 (Conn. 2000). See also *Cooper*, 379 F.3d at 1033; *Reid v. Johnson*, 333 F. Supp. 2d 543, 551 (E.D. Va. 2004).

here should be vacated. Taylor has no chance of success on the merits of the claim he raises here.

Further, with regard to the Eighth Amendment claims here, petitioners Crawford and Purkett note that the drugs used in Missouri's lethal injection process, have also been approved, either in the context of rulings on the merits or on requests for injunctive relief or stays, by many other courts. *Beardslee*, 395 F.3d at 1076 (denial of stay and injunctive relief); *Cooper*, 379 F.3d at 1033 (denial of stay and injunctive relief); *In re Williams*, 359 F.3d 811, 813-14 (6th Cir. 2004) (denial of stay and injunctive relief); *Abdur'Rahman v. Bredesen*, 2004 WL 2246227, at *15-*18 (Tenn. Ct. App., October 6, 2004) (decision on merits), *aff'd*, 2005 WL 2615801, at *9-*13 (Tenn. Oct 17, 2005) (affirmed on the merits); *Reid v. Johnson*, 333 F. Supp. 2d 543, 552-54 (E.D. Va. 2004) (denial of injunctive relief); *Johnson v. State*, 827 N.E.2d 547, 552-53 (Ind. 2005) (denial of post-conviction relief); *Sims v. State*, 754 So. 2d 657, 666-70 (Fla. 2000) (denial of habeas relief); *State v. Webb*, 750 A.2d 448, 457 (Conn. 2000) (decision on the merits).

Respondent Taylor's past contentions that there was no full hearing on the merits in the *Johnston* case disregards the evidentiary hearing held in that case on August 26, 2005. See Application Exhibit D. Johnston had the opportunity to produce evidence in support of the contention that Missouri's method of execution would result in the infliction of gratuitous pain and did so fully through documentary evidence. *Id.* at 5. See also Application Exhibit A (references throughout to opinions of Johnston's expert). Johnston's lawyer also had a full

and fair opportunity at the hearing to cross-examine the state's expert. Application Exhibit D, pp. 34-54. And now Taylor has had his own hearing, and the district court found his claims meritless (Application Exhibit Q).

Like *Johnston*, Respondent Taylor produced nothing to contradict the evidence that the 5 gram dose of sodium pentothal given in Missouri would render most people unconscious within a few seconds and that by the time all 5 grams are injected over 99.9999999% of the population would be unconscious. Application Exhibit A, at p. 5; Testimony of Dr. Dershwitz (Application Exhibit D), at p. 18; Affidavit of Dr. Dershwitz (Application Exhibit E), at ¶ 8. Nor did he suggest that given more time, he might find such evidence.

Respondent Taylor's past suggestion that the sufficiency of the level of sodium pentothal administered is "belied" by the use of pancuronium bromide to "mask symptoms" of an inadequate level of anesthesia is incorrect. First, in making this point Taylor does not even attempt to refute the evidence of Dr. Dershwitz that 99.9999999% of the population would be unconscious after the administration of the sodium pentothal. Second, petitioners Crawford and Purkett explained the reasons for use of pancuronium bromide in their discovery responses. This drug mitigates the seizure activity and other involuntary bodily movements that will commonly result from use of sodium pentothal and potassium chloride alone and thus will result in a more peaceful, dignified, solemn, and humane death of the condemned prisoner. Application Exhibit F, at pp. 13-14.

Respondent Taylor has also suggested that there is some contradiction between the prison officials' own statistics that "death does not occur until after the administration of the third chemical" and "the contrary contention of their expert." Taylor appears to be perceiving a contradiction between Dr. Dershwitz's testimony that the administration of 5 grams of sodium pentothal will cause most persons to stop breathing within a minute of drug administration (Application Exhibit E, at ¶ 8) and a table provided in discovery showing that 2 to 5 minutes pass between the time of the injection of the first drug and the time of death (Defendant Crawford's Supplemental Answer to Plaintiffs' Interrogatory No. 6n; Application Exhibit J⁵). As can be seen by the explanation of "Time of Death" in Application Exhibit J, there is no discrepancy here because death is pronounced based on electrical activity of the heart, not based on when breathing stops.

Physician's role in executions does not violate due process. Respondent Taylor asserts that his right to due process will be violated if a physician has a role in the execution process because such a role by a physician violates medical ethics and thereby his "legitimate expectation that a physician will not use his or her special skills and position of trust to kill rather than treat." Amended Complaint, ¶ 84 (Doc. No. 36). The district court found the

⁵The initial response to Interrogatory 6n did not include the explanation of "Time of Death" included at the end of the supplemental response. The supplemental response was provided shortly after respondent Taylor raised his contention that the table contradicted Dr. Dershwitz's testimony.

claim meritless as a matter of law. *Taylor* slip op. at 7. There is no substantial ground for issuance of a stay.

Respondent Taylor cites the Code of Ethics of the American Medical Association to support his claim that physician involvement in the execution process is a breach of medical ethics. Amended Complaint, ¶ 81. But, it is not the AMA Code of Ethics that governs the conduct of physicians in Missouri. See Chapter 334, RSMo (§ 334.100 sets out ethical standards). The petitioner prison officials have searched for, but been unable to find, any interpretation of medical ethics imposed upon physicians in Missouri that would prohibit the physician from having a role in the execution process. A California court, however, has examined this issue with regard to California law and determined that physician involvement in executions does not constitute unprofessional conduct. *Thorburn v. Department of Corrections*, 78 Cal. Rptr. 2d 584, 590-91 (Cal. Ct. App. 1998).

Respondent Taylor here fails to establish a premise of his argument – physician involvement in executions is a violation of ethics in Missouri. In fact, such involvement is quite consistent with medical ethics. Physician involvement shows the medical profession's compassion for all, including those sentenced to death. By their involvement, physicians are promoting the basic medical tenet of easing pain and suffering by doing what they can to make executions as humane as possible.

Even if physician involvement in Missouri executions were prohibited as unethical conduct, respondent Taylor still has not stated a claim. The claim that death-sentenced

inmates have a "legitimate expectation that a physician will not use his or her special skills and position of trust to kill rather than treat" is incongruous in the context in which it is raised here. Logically, an inmate sentenced to death would have no legitimate expectation that anyone involved in the execution would direct any of his or her skills toward diminishing the likelihood of death.

Further, as the court in *Abdur'Rahman v. Bredesen*, 2004 WL 2246227, at *8 n.45 (Tenn. Ct. App., Oct. 6, 2004), *aff'd*, 2005 WL 2615801 (Tenn. Oct. 17, 2005), stated:

Were [medical licensing] requirements applicable to executions by lethal injection, the Department's ability to carry out its statutory mandates would be undermined because many licensed medical professionals would decline to participate in the procedure. It was for this reason that the Tennessee Supreme Court noted that "no public policy is violated by allowing physicians or anyone else to participate in carrying out a lawful sentence." *Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (Tenn. Order Apr. 19, 2000).

2004 WL 2246227, at *9. Where public policy is not violated by a physician having a role in the execution process (even where such a role might be inconsistent with the ethical pronouncements of a professional regulating body), it cannot be said, as respondent Taylor contends, that there is any legitimate expectation that a physician will not have a role in executions. Without such a legitimate expectation, Taylor has no due process right that is constitutionally protected. *See Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 2103-04 (1979).

Further, at least in the prison disciplinary context, state created liberty interests giving rise to due process rights are generally limited to those that impose "atypical and significant

hardship." *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300 (1995). Respondent Taylor's claim here that he has some sort of protected right that a physician not have a role in the execution process fails under the *Sandin* standard because the presence of a physician at his executions will not cause him any hardship at all, much less one that is atypical and significant. The presence of a physician may, on the contrary, be a benefit to Taylor.

As the district court concluded, *Taylor* slip op. at p. 7 and 9, Taylor fails to show either that Missouri physicians who are involved in the lethal injection process are violating their ethical obligations or that physician's involvement violates a condemned prisoner's due process rights. He has no likelihood of success on the merits of this claim.

Missouri's method of lethal execution does not violate the Thirteenth Amendment. Respondent Taylor contends that Missouri's method of lethal injection constitutes a vestige and badge of slavery and therefore violates the Thirteenth Amendment. Amended Complaint, ¶ 124. Similar, the district court found this claim meritless as a matter of law, *Taylor* slip op. at 7-8. This is not a substantial ground for issuance of a stay. The Thirteenth Amendment provides:

Neither slavery nor involuntary servitude, *except as a punishment for crime*, whereof the party shall have been duly convicted shall exist within the United States or any place subject to their jurisdiction.

(Emphasis added.) The Thirteenth Amendment does not apply here because this case involves neither slavery nor involuntary servitude. Even if it did, the Amendment specifically makes exception for instances in which a person is being punished for a crime.

Respondent Taylor here falls within this exception. *See Wendt v. Lynaugh*, 841 F.2d 619, 620 (5th Cir. 1988) (plaintiff who has been convicted of a crime in no position to claim a right under the Thirteenth Amendment because exempted by precise words from its application); *Jobson v. Henne*, 355 F.2d 129, 131 (2d Cir. 1966) ("Thirteenth Amendment has no bearing on the legality of the imprisonment of persons duly convicted of a crime; such persons are explicitly excepted from the Amendment's coverage"); *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) ("Thirteenth Amendment has no application where a person is held to answer of a violation of a penal statute").

Moreover, a difference in treatment based on race is required to establish a claim under the Thirteenth Amendment of imposition of a "badge of slavery." *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445, 88 S. Ct. 2186, 2206 (1968). Missouri's method of execution is used on condemned prisoners of all races. Therefore, it cannot be considered as a "badge of slavery."

Respondent Taylor also has no likelihood of success on this claim.

Effect of Recent Capital Litigation

The recent grant of certiorari in *Hill v. Crosby*, No. 05-8794 (U.S. S. Ct., Jan. 25, 2006), does not support Taylor's argument here that his execution is properly barred. Although the *Hill* case does arise from claims regarding the constitutionality of Florida's method of lethal injection, the questions on which certiorari was granted are procedural only and have no bearing on the question here of whether respondent Taylor has established a

sufficient basis on which to support an order to prohibit his execution. The questions presented in the petition for certiorari in *Hill* were:

1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?

2. Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983?

Hill v. Crosby Petition for Certiorari, p. i. These questions merely address the proper procedural vehicle by which to challenge a specific method of execution. The lower courts in *Hill* addressed only the question of jurisdiction, found it wanting, and never considered the means of execution. *Hill v. Crosby*, No. 4:06-CV-032-SPM (N.D. Fla., Jan. 21, 2006) (claim denied for lack of jurisdiction) (Application Exhibit H); *Hill v. Crosby*, No.06-10621 (11th Cir., Jan. 24, 2006) (denying stay of execution due to district court's lack of jurisdiction to hear case in first instance) (Application Exhibit I). This Court's interest in *Hill* does not appear to arise from any question as to the method of execution,⁶ but rather from an intent to better define the circumstances in which method of execution claims may be pursued as

⁶Even if the Court's interest were the method of execution, it should be noted that the method of execution in Florida provides for the administration of no less than 2 grams of sodium pentothal, *Hill v. State*, 2006 WL 91302, at footnote 3, while Missouri's method of execution provides for the administration of 5 grams of that drug. Exhibit D, at p. 12; Exhibit E, at ¶ 4B.

claims under § 1983, an issue expressly left open in *Nelson v. Campbell*, 541 U.S. 637, 644, 124 S. Ct. 2117, 2123 (2004).

Here, petitioners and the lower courts have proceeded as if the *Hill* issue had been decided in Taylor's favor. And with good reason: The procedural question in *Hill* was ruled against Crawford and Purkett in the *Johnston* litigation. *Johnston v. Crawford*, 2005 WL 1474022, at *2 (W.D. Mo. 2005). Thereafter the prison officials demonstrated at a hearing that the method was humane. Application Exhibits A and D. Petitioners do not concede that the procedural ruling in *Johnston* was correct. But rather than delay proceeding by arguing against it, they have presented — and now in the expedited proceedings ordered by the Eighth Circuit, recreated — the *Johnston* record. The conclusion in *Johnston* that Missouri's execution process is lawful, reconfirmed here by the district court, is not called into question by the grant of review on the procedural question in *Hill*.

Even if Taylor is correct that this case properly remains a § 1983 action, the order barring his execution was still an abuse of the court's discretion. It is an abuse of discretion because the underlying claims here are meritless. Whichever form of action is proper, the stay of Taylor's execution should be vacated and that execution allowed to proceed.

This view of *Hill* seems confirmed by this Court's recent denial of certiorari in *Bieghler v. Indiana*, No. 05-8824 (Jan. 26, 2006). Mr. Bieghler raised a claim against the same three-drug sequence used in executions as does respondent Taylor in this case. Indiana, like Missouri petitioners here, did not rest on a challenge Mr. Bieghler's use of the § 1983

as a remedial vehicle (Application Exhibit K). The district court declined to enjoin Mr. Bieghler's execution (Application Exhibit K). The Seventh Circuit, voting 2-1, ordered a delay in the execution (Application Exhibit L), but this Court overturned that order (Application Exhibit M) and the execution proceeded.

Given where it has led, respondent Taylor's claim here should have been pursued in a habeas action. But that is not an issue petitioners raise in seeking for vacation of the stay order, because even if this case is properly pursued under § 1983, the order prohibiting Taylor's execution still constitutes an abuse of discretion. Again, as shown in the *Johnston* proceedings, discussed above, and by the district order today in this case, Missouri provides a humane method of execution that does not inflict any gratuitous pain on the condemned. The showing made by petitioners here goes beyond that shown in the *Bieghler* proceedings.

This Court's vacation of the stay entered in *Bieghler* seems to demonstrate that its grant of certiorari in *Hill* case was based on a view that there was a need to resolve the question left open in *Nelson v. Campbell*, 541 U.S. 637, 644, 124 S. Ct. 2117, 2123 (2004), of when a method-of-execution claim should be brought in a habeas or civil rights suit. While that issue has been raised here, petitioners have also gone past that issue and established that Missouri's execution process does not constitute cruel and unusual punishment. Resolution of the questions in *Hill* will not have any ultimate impact on Taylor's claims here.

Interests of the Parties and the Public

To the extent that the Court considers an assessment of the interests of the parties and the public appropriate here, the balance of those interests favors vacation of the stay of execution. The potential harm to respondent Taylor to be assessed is not whether his death will be the result of his execution, for he asserts that he is not challenging the fact of his death sentence. He is challenging the means of his execution. Thus, the harm to Taylor for the Court to consider here is the harm to him from execution by means of Missouri's three-drug process. In other words, will Taylor's execution as planned cause him significant pain that is unnecessary? *See Reid*, 333 F. Supp. 2d at 551. As shown above by the decision in *Johnston v. Crawford*, and by the district court's order today, and by the testimony of Dr. Dershwitz, respondent Taylor's execution by Missouri's three-drug process is humane and will not result in any significant discomfort.

The harm to others and the public interest that results from an order barring Taylor's execution on February 1, 2006, is the harm to the family of the victim and the harm to Missouri's public policy that would result in an interference with the imposition of the just punishment of Taylor. The state of Missouri has determined that the death penalty is appropriate in certain circumstances. Those circumstances were found to exist in this case⁷

⁷Respondent Taylor and an accomplice kidnapped a 15-year old girl while she was waiting for a school bus, bound and blindfolded the girl, threatened her with death, raped her, put her in the trunk of their car, and then stabbed her repeatedly with kitchen knives. The girl probably lived for 30 minutes after she was stabbed. *State v. Taylor*, 929 S.W.2d 209, 214 (Mo. banc 1996), *cert. denied*, 117 S. Ct. 1088 (1997).

and respondent Taylor was sentenced to death. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996), *cert. denied*, 519 U.S. 1152, 117 S. Ct. 1088 (1997). He has now pursued his post-conviction remedies and his conviction and sentence of death have been approved. States have "a significant interest in meting out a sentence of death in a timely fashion." *Nelson*, 541 U.S. at 644, 124 S. Ct. at 2123. *See also Gomez*, 503 U.S. at 654, 112 S. Ct. at 1653; *In re Blodgett*, 502 U.S. 236, 239, 112 S. Ct. 674, 676 (1992). Stopping Taylor's execution now, based on unfounded assertions of inhumanity in Missouri's execution process, would interfere with the victim's family's ability to obtain closure and with the state's policy that crimes such as Taylor's call for the ultimate punishment.

Conclusion

For the foregoing reasons, petitioners pray that this court vacate the court of appeals' latest order granting a stay of execution in *Taylor v. Crawford*, No. 06-1278WMJC (8th Cir. Jan. 31, 2006). To leave it in place will force the resolution of any remaining legal issues and completion of the execution protocol in the few hours between 5:00 p.m. and midnight. Vacating the stay will lead to resolution of any remaining issues early enough to eliminate the possibility - if not probability that the Missouri Supreme Court's execution warrant will be effectively erased by a stay order that lacks any explanation. And it will vindicate once again the conclusion of a competent finder of fact that the execution method chosen by Missouri and 37 other states does not violate constitutional strictures.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of
January, 2006, I mailed, by United States
Mail, and a copy of the foregoing to the
following:

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Stephen D. Hawke

No. _____

In The
SUPREME COURT OF THE UNITED STATES

LARRY CRAWFORD, et al.,

Petitioners,

v.

MICHAEL ANTHONY TAYLOR,

Respondent.

**SUGGESTIONS IN OPPOSITION
TO APPLICATION TO VACATE MODIFIED STAY OF EXECUTION**

Petitioner state officials seek to have this Court vacate what remains of the stay the court below issued when it forced Taylor to litigate the “hearing” of an action filed June 3, 2005, about how they plan to execute him in roughly two days. This would have the effect that he would have no appellate review of the denial of his action under circumstances in which no plaintiff could possibly have prevailed. *See* Declaration in Support of Supplemental Suggestions in Opposition to Application to Vacate Stay of Execution (e-mailed to this Court yesterday at 6:25 p.m. EST).

They do so in order to avoid filing a motion for the Missouri Supreme Court to set a new execution date. In light of the ease of performing this task and the certainty of its success, it is more likely that the reason for filing the present application was to

divert Taylor's counsel from litigating the appeal in the court below when the avowed purpose of the pending application is to deny Taylor any appeal. As they did in their previous application to vacate the stay the court below issued—which had radically cut back on the relief the district judge regularly assigned the case had granted—the petitioner state officials would have this Court apply the standard of review for second or successive habeas corpus petitions. Then, as now, their assertion depends on their argument that the underlying action sounds in 28 U.S.C. § 2254 rather than 42 U.S.C. § 1983, which Taylor has refuted in the district court and refutes again here. This Court has granted a stay and certiorari to consider this question in *Hill v. Crosby*, No. 05-8794. As best Taylor's counsel can tell, that question and another question about federal judicial remedies for lethal injection claims also arise in the Arthur Rutherford matter in which this Court granted a stay of execution at or about 6:00 p.m. EST yesterday.

Petitioner state officials and their privies seek to sweep all such claims under the rug by a combination of arguments that Taylor's claim is "really" a successive federal habeas corpus claim, or that this Court should not allow him even a few hours to appeal from the district court's denial of a section 1983 action raising it, when the court below shifted district judges on him and required the new district judge to hold in "immediate" hearing and render judgment by noon on the date set for Taylor's execution.

Petitioner state officials and their privies have created the supposed time bind on the basis of which they would have now have this Court deny Taylor an opportunity

for any appellate review of the district court's drumhead denial of relief. As privies of the State of Missouri, the petitioners here are estopped to complain of any "delay" on the part of Taylor in bringing his section 1983 action, as their state supreme court (which sets Missouri execution dates) has held that a Missouri condemned person cannot seek relief from a method of execution until its specific modalities are ascertained, which cannot be until shortly before or after the execution. *See Worthington v. State*, 166 S.W.3d 566, 583 n.3 (Mo. 2005) (en banc), in which the Missouri Supreme Court rejected a Missouri condemned person's challenge to the state's lethal-injection procedure by holding it premature:

As it is unknown what method, if any, of lethal injection may be utilized by the State of Missouri at such future time, if any, as Mr. Worthington's right to seek relief in state and federal courts is concluded and his execution date and method are set, it is premature for this Court to consider whether a particular method of lethal injection violates the Eighth Amendment because it causes lingering, conscious infliction of unnecessary pain.

It is the strategy they have used in the Timothy Johnston case and here: if someone has a good challenge to their lethal-injection practices going in federal court, they set an execution date once the district court denies the motion to dismiss. *Someone* should be able to litigate these claims fairly: it should now be Michael Taylor after the Eighth Circuit or this Court reverses the judgment which the district court entered after a mere simulacrum of a "hearing."

In arguing that the action of the district court in conducting a truncated hearing on the merits of this case should affect the court's order staying Mr. Taylor's execution, the defendants omit significant facts relevant to that hearing.

Pursuant to this court's order of Sunday, January 29, 2006, the district court attempted to conduct a hearing on the merits of this matter on Monday, January 30, 2006 and Tuesday, January 31, 2006. The court began proceedings with a telephone conference at 10:00 a.m. This was approximately two hours after counsel for plaintiff learned of the order; he had been traveling on January 29, 2006 and did not check his e-mail until that morning. During the conference, the court expressed some concern about the logistics of such a rapid hearing. While the court concluded that it could conduct a fair hearing within the confines of the time provided by this court, the court allowed with the defendants' acquiescence, the intervenor to withdraw. The intervenor's motion to dismiss stated, as cause for the dismissal:

Based on their evaluation of their ability to present adequately Mr. Clay's claims in the hearing contemplated by the court, Mr. Clay's counsel do not believe that his interests will be served by further participation in this case. He cannot fairly present his claims and evidence to the court in the limited time allowed for the hearing in this matter. Since he is not under execution warrant, he has no need to limit his presentation based on the constraints on Mr. Taylor. His interests are now divergent from those of Mr. Taylor, and he will be prejudiced if he is required to continue as a party to this action.

By granting this motion, both the court and the defendants implicitly conceded that a fair hearing was impossible. Further developments made that even clearer. At the initial telephone conference, the district court denied the plaintiffs the right to call the doctor and nurse who have participated in multiple executions pursuant to the protocol proposed by the state in this case. At issue in this case is whether this protocol results in unnecessary and excessive pain and suffering. While not dispositive, it is at least relevant to this issue whether the medical professionals who conduct the execution are alert to the possibility of such pain and suffering during the procedure. It is also relevant whether they have observed symptoms in executed persons which indicate that these persons are suffering discomfort during the procedure. Plaintiff was unable to present this evidence because of the court's peremptory ruling excluding it. Nor was the plaintiff able to determine whether the qualifications of the medical professionals involved were in fact as the defendant Crawford said they were, because the court refused to provide the plaintiff with the identity of the medical professionals. The court below, in the case of *Timothy Johnston v. Larry Crawford et al.*, denied a writ of prohibition sought by the state and required that the identities be provided to Johnston's counsel pursuant to a protective order. Mr. Taylor did not even have the benefit of that limited discovery before a final hearing on the merits of his case.

In addition to the inability to present evidence in support of his claim from crucial fact witnesses, the short period provided by the court below and its specially assigned judge prevented Mr. Taylor from presenting evidence from Dr. Sri Melethil,

Ph.D., J.D., a pharmacokineticist. Dr. Melethil had previously consulted with counsel for the plaintiffs' team and expressed concern about the data on which the opinions of Dr. Mark Dershwitz, the state's expert, were based. In particular, Dr. Melethil is aware that the rate at which sodium thiopental leaves the brain is greater than that at which it leaves the blood. Dr. Dershwitz's conclusions were based on blood levels, but it is the brain level which determines whether anesthesia has occurred. Dr. Melethil was out of town and out of touch until the morning of January 31, 2006. Because complete discovery had not been obtained from Dr. Dershwitz, and because of Dr. Melethil's previous commitments, counsel for Mr. Taylor were unable to provide him with the data he needed to form an expert opinion in this matter.

Taylor's counsel filed a notice of appeal promptly on receipt of the judgment of the district court. On appeal, the foregoing issues will be presented, as well as the sufficiency of the evidence to support the trial court's judgment and the propriety of conducting a hearing on the merits of a claim on substantially less than twenty-four hours notice. The state petitioners make much of the fact that the action has been on file since June 2005. Much of that time has been consumed with discovery disputes and the litigation of a motion to dismiss, which the district judge whom the court below chose to replace had denied on December 28, 2005. These state officials created all of the latter delay; the undersigned is unaware of a day of delay attributable to the plaintiff.

Two business days after the regularly assigned district judge denied the state defendants' motion to dismiss, the Missouri Supreme Court issued its execution

warrant, before the state had even filed its answer in the district court case. But even if full discovery had been granted, it is highly irregular to set the final trial of a matter without even allowing a full working day for plaintiff's counsel to prepare.

Petitioner-defendants present the idea of an appeal in this case as some form of abomination, when in fact it is the expectation of the legal system. The court below has never reached the merits of a lethal-injection claim. Petitioner-defendants intend to keep it that way by manipulating the judicial system to deny the most vulnerable of their citizens a day in court. This Court has made clear in *Nelson* and in its disposition of stay applications over the past several days that that is not its position, especially where, as here, there is a precursor medical procedure involved which is unnecessary to bring about the "mere extinguishment of life," and the only question is how much unnecessary pain it causes rather than whether it causes any at all.

On appeal, it is likely that the judgment of the district court will be overturned. First, the exclusion of testimony from medical personnel who actually witness executions clearly violated Fed. R. Evid. 401. While a district court's rulings on exclusion of evidence are reviewed for abuse of discretion, such abuse occurs when the court bases "its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), cited in *Beck v. Haik*, 377 F.3d 624 (6th Cir. 2004). Under Fed. R. Evid. 401, "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

it would be without the evidence.” Here, the issue is whether the mode of execution employed by the State of Missouri causes unconstitutional pain and suffering. To hold that testimony by medical personnel (trained observers of symptoms) who actually participate in the execution is irrelevant to this determination flies in the face of the expansive language of Rule 401. In *Beck v. Haik*, 377 F.3d 624 (6th Cir. 2004), the court reversed the judgment on the grounds that the trial court improperly excluded both expert evidence bearing on a contested issue, and a letter which the court held “would clearly support one of the plaintiffs' main theories of the case.” *Beck v. Haik*, 377 F.3d at 637-38. The court held that the cumulative effect of these errors was prejudicial, and reversed the judgment.

This case is also similar to *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987), where the judgment was reversed after the trial court sustained the defendants' motions *in limine* and excluded much of the plaintiff's evidence. The court noted, “[A]s the judge's discretion was exercised on a wholesale basis before trial began, rather than in response to the developing course of the trial, careful appellate review is necessary to make sure the judge did not truncate the trial prematurely.” Since the state in this case presented no evidence as to the lack of pain and suffering during the execution process, and presented no witnesses who had personally observed the process in Missouri, the plaintiff's lack of opportunity to explore this area is even more serious.

Second, the lack of notice of the hearing also deprived the plaintiff of the ability to prove his claim. The situation, while somewhat unique, is similar to the denial of a

continuance, and can be examined using the same standards. At the close of the hearing, plaintiff's counsel attempted to make an offer of proof to the court of the information he was seeking from his expert, Dr. Melethil, but could not do so because of the time-pressure created by the January 29, 2006, order of the court below and Dr. Melethil's absence from the state. Because this expert has not yet been able to obtain this data, he is unable to be more specific about his opinion. It should be noted, however, that Dr. Dershwitz did not testify concerning this data, although his testimony was presented in support of the defendants' case.

History of the Case

Since Timothy Johnston filed an action under 42 U.S.C. § 1983 in August 2004, Missouri prisoners under sentence of death have been attempting to litigate claims that the state's method of conducting lethal injections violates the Eighth Amendment and other federal constitutional provisions. Agents of the State of Missouri have manipulated the judicial process to avoid any resolution on the merits by delaying discovery and other information until the Missouri Supreme Court had set an execution date. These state agents have then gotten the plaintiffs' claims denied on the basis of defenses other than the merits of their case or in a hearing for which the plaintiff's counsel was unable to marshal their evidence because of the late disclosure of the state's position.

Plaintiff Taylor filed this action on June 3, 2005. At that time, he was within the ninety days in which he could seek certiorari after the Missouri Supreme Court denied

his motion to recall the mandate touching his conviction and sentence. He filed a timely petition for writ of certiorari, which was not denied until November 28, 2005.

In this case, the parties have litigated for months over discovery issues. When the defendants sprang radically new information about their execution practices on Timothy Johnson's counsel a week after the Missouri Supreme Court had set an execution date, counsel in this case incorporated this information into an amended complaint (Attachment 1): in order to attempt to avoid some of the constitutional infirmities in the way everyone had thought Missouri lethal injections had proceeded, the defendants introduced new constitutional violations including a central-line access when it is not medically indicated and a violation of the Hippocratic Oath and AMA Code of Ethics when the state is supposed to be enforcing rather than violating medical ethics. Defendants' counsel filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). (Attachment 2) Plaintiffs filed a response, and the defendants filed a reply.

On December 28, 2005, the district court issued an order rejecting the defenses the defendants had raised in their motion to dismiss, and holding that the case presented factual issues which had to be resolved in a hearing or, at least, on summary judgment. (Attachment 3.) The undersigned counsel for Michael Taylor was out-of-state for Christmas with his family on the day the district court issued this order. The very next day, he faxed a copy of the order, with a cover letter, to Bill Thompson, Staff Attorney (a/k/a Death Clerk), at the Missouri Supreme Court. (Attachment 4.)

On January 3, 2006—the second business day after the undersigned counsel for Michael Taylor faxed the Missouri Supreme Court a copy of this district court's order

holding that the action needed to go forward—the Missouri Supreme Court set a February 1, 2006, execution date.

The next day, counsel filed an application for stay of execution with the Missouri Supreme Court, attaching a copy of the district court's order. (Attachment 5.) Several days later, counsel received a response from the defendants' co-counsel. (Attachment 6.) The next day, January 13, 2005, the undersigned counsel for Michael Taylor filed a reply. (Attachment 7.)

In a telephone conference beginning at 9:51 a.m. on Wednesday, January 18, 2006, the district court informed counsel for all parties that it would set an evidentiary hearing in this matter for February 21, 2006, with the hearing to extend to February 22, 2006, should the district court need a second day to complete taking the evidence in the matter. Counsel were informed that the district court had attempted to schedule the hearing in time to decide the case before February 1, 2006, but that it would have been impossible to do so. Counsel for the defendants presented neither argument or evidence against the district court's entering the order under discussion, but instead informed the district court that they would seek to overturn any order that their clients' execution of plaintiff Taylor not proceed according to their schedule.

At 10:34 on January 18, the undersigned counsel for Michael Taylor faxed to the Missouri Supreme Court a supplemental notice in support of his pending application for a stay from that court. (Attachment 8.) In a subsequent fax to that court, he requested a call on his cellular phone if the clerk had any information to convey in the matter. (Attachment 9.) By the end of the afternoon, he had received no response. Only after giving the Missouri Supreme Court an opportunity to stay its ordered

execution or to vacate its execution warrant without prejudice to setting another execution date if the district court ruled against the plaintiffs.

Throughout this litigation and the previous litigation over the Missouri lethal injection procedure, the defendants have asserted in pleadings and affidavits or declarations, and admitted in the discovery they have chosen to respond to, that they use the three-chemical sequence to which the original complaint was directed and that they also use a central-line access and a licensed physician, to which the amended complaint was also directed. (*E.g.*, Application to Vacate [filed by defendants in this Court January 20, 2006] Exhibit F at 1-2 (no change from procedure and practices used to execute Timothy Johnston planned for executions of these plaintiffs) & 6-7 (use of central-line access and licensed physician).)

The same day that the district court entered its order requiring the defendants not to execute plaintiff Taylor until further order of the court, with any such order to be issued within a reasonable time after the hearing on February 21 or February 21-22, the defendants filed a notice of appeal to this Court. (Attachment 10.) On Friday, January 20, 2006, they faxed the Eighth Circuit an “application” to vacate the district court’s preliminary injunction.

On Sunday, January 29, 2006, a panel of the Eighth Circuit issued an order vacating the district judge’s preliminary injunction, a panel of the Eighth Circuit ordered that the Chief Judge of the district court reassign the section 1983 action to another district judge, and that the latter district judge conduct a hearing immediately and render judgment by noon on Wednesday, February 1, 2006. It issued a stay of execution through 11:59 p.m. on Friday, February 3, 2006.

Respondents, represented by the hundreds of attorneys in the Office of the Attorney General, have *both* conducted their end of the immediate “hearing,” which was entirely by telephone and excluded over objection several witnesses that the petitioner’s counsel sought to present, *and* filed an application to vacate the three-day stay by the Eighth Circuit. Because the Eighth Circuit truncated the section 1983 action beyond recognition, the plaintiff-intervenor dismissed without prejudice and the intervenor-application withdrew his application to intervene, leaving the undersigned sole practitioner to handle the immediate hearing in the truncated section 1983 action alone. He has been unable to seek relief from the Eighth Circuit’s defenestration of the experienced district judge who had denied the motion to dismiss and had scheduled a hearing for February 21. *See* Declaration in Support of Supplemental Suggestions in Opposition to Motion to Vacate Stay of Execution filed yesterday at 6:25 p.m. EST.

Discussion

- I. Under the applicable standard of review, Taylor was entitled to have the Eighth Circuit uphold the preliminary injunction which the district court entered in order to allow it to hear the case adequately; a fortiori, the pending application to vacate any stay at all should be denied.**

In reliance on the defense which is before this Court on certiorari in *Hill v. Crosby*, No. 05-8794, the state petitioners here argue that the standard of review is the same as it would be if Taylor had filed a second or successive federal habeas corpus petition. Application at 5-6. Nothing could be further from the truth.

A district court’s decision to order parties to maintain the status quo in order to give it a chance to decide a matter within its jurisdiction is reviewable only for abuse of discretion. *Bell v. Sellevold*, 713 F.2d 1396, 1399 (8th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984). The standard of review of a district court’s entry of a preliminary injunction is

abuse of discretion. *Ashcroft v. Amer. Civil Liberties Union*, 542 U.S. 656, 664 (2004). In *Emerson Elec. Co. v. Rogers*, 418 F.3d 841, 844 (8th Cir. 2005), the Eighth Circuit explained: “A district court has broad discretion when ruling on preliminary injunction requests, and we will reverse only for clearly erroneous factual determinations, an error of law, or an abuse of discretion. *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir.1998).” It has amplified on this standard of review, collecting cases, in *Aaron v. Target Corp.*, 357 F.3d 768, 773-74 (8th Cir. 2004):

A district court has broad discretion when ruling on a request for preliminary injunction, and it will be reversed only for clearly erroneous factual determinations, an error of law, or an abuse of its discretion. *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir.1998). . . . The abuse of discretion standard means that a court has a “range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.” *Verizon Communications, Inc. v. Inverizon Int’l, Inc.*, 295 F.3d 870, 873 (8th Cir.2002) (citing *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir.1984)). An abuse of discretion occurs if a relevant factor that should have been given significant weight is not considered, if an irrelevant or improper factor is considered and given significant weight, or if a court commits a clear error of judgment in the course of weighing proper factors. *Id.*

Because appellate review of a district court’s issuance of a preliminary injunction is only for abuse of discretion, an appellate court which might have handled the matter differently in the first instance “should uphold the injunction” and remand for a hearing on the merits *even* “[i]f the underlying constitutional question is close.”

Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon, 428 F.3d 1139, 1145 (8th Cir. 2004), quoting *Ashcroft v. Amer. Civil Liberties Union*, 542 U.S. at 664-65.

The only way the petitioner state officials could possibly justify the use of the standard of review they advocate is by persuading the Court of their longstanding argument that this action is “really” a petition under 28 U.S.C. § 2254 rather an action

under 42 U.S.C. § 1983. But the district courts' order—which the defendants and their privies made necessary by seeking and setting an execution date while the case was pending—did not turn this section 1983 complaint into a successive section 2254 petition.

Defendants attempt to shoehorn the district court's preliminary injunction into 28 U.S.C. § 2254 by arguing that the district court did not specify by what means the defendants could not execute plaintiff Taylor. (AVDCOPE:4-5.)¹ They argue that because the district court forbade them to execute plaintiff Taylor until after its hearing in the case without specifying that the execution would be the kind of execution which they have pleaded and given affidavits that they would use, the whole action ceased to be a civil case under 42 U.S.C. § 1983 and became, instead, a petition under 28 U.S.C. § 2254. That makes no sense, but if it were accepted, the plaintiff could not have brought the action in the first place based on the district court's response, seven months later, to the defendants' privy's setting an execution date immediately after the district court denied a motion to dismiss.

Defendants could have raised this objection in the district court, either in the telephone conference in which all counsel were informed of the district court's hearing on February 21, or in response to the district court's solicitation the defendants' counsel's review of the order the district court intended to issue. The court's information was clear that it was not attempting to fine-tune the state's execution plans

¹The state officials (petitioners here, defendants in the district court) make mostly the same arguments in this Court for vacating the Eighth Circuit's stay that they made for vacating the district court's preliminary injunction. Taylor cites to their pleading in the Eighth Circuit by its initials, "AVDCOPE."

without the benefit of a hearing, and the court indicated that the defendants' counsel should advise it of any problem they had with the order it directed plaintiff Taylor's counsel to draft. He, in turn, e-mailed the draft to counsel for the defendants hours before the district court entered its order. If the defendants thought the order swept beyond the section 1983 action in which the district court issued it, they should have brought this to the attention of the district court rather than sandbagging in the hope that some other body would buy their theory that a court's action in response to the action by their privy, the Missouri Supreme Court, would recast the entire litigation in order to bring about its dismissal.

The district court's order makes clear that the order became necessary to resolve the merits of the "pending" litigation, not some other litigation that it was creating in spite of the plaintiffs' care in pleading their case under section 1983 rather than under section 2254. Plaintiffs are the masters of the action at this level, and have never sought, in this action, relief from their convictions and sentences—or even from execution by lethal injection per se—but only from a form of lethal injection which violates the Constitution of the United States. Not only did the district court make its decision within the context of the action the plaintiffs filed—not the action the defendants wish the plaintiffs had filed—but it could not denature that action if it had tried.

In the context of this case and of the need for preliminary injunctive relief to hold a hearing on the merits, it would have made no sense to have requested, or ordered, preliminary injunctive relief other than the defendants' simply refraining from executing plaintiff Taylor until after the hearing, scheduled for only a few weeks after the district court's denial of the motion to dismiss and only three weeks after the

execution date the Missouri Supreme Court set after it had been notified of the dismissal. The alternative would have been for the district court to have ordered the defendants not to execute him using the three-chemical sequence, the central-line access, and the licensed physician. Defendants have repeatedly filed pleadings and affidavits and—when they got around to it—discovery responses, indicating that they intend to perform all executions in this manner. (*E.g.*, Exhibit F at 1-2 & 6-7, *supra*.) It would require a hearing to establish that any new form of lethal injection the district court might have ordered rather than simply telling them to hold off on the execution until it could conduct a hearing. If the district court could have held a hearing by February 1, 2006, it would have held the one it has scheduled for February 21. Given the defendants' unconstitutional response to critiques of their former botched executions, they would most likely have come up with some other alternative to the three-chemical sequence, central-line access, and licensed physician which would have been even worse than the status quo from a constitutional and treaty point of view. A federal court order to come up with a new form of lethal injection would actually have been intrusive into the defendants' activities—whereas corrections personnel in death-penalty states know, going in, that there will be times when courts or executives tell them to keep an execution on hold: obeying such orders is part of their expected duties, whereas changing execution protocols and procedures and the substance of the lethal acts themselves at the last minute would be highly unusual. Such an order would not have respected the rights and responsibilities of *either* the plaintiffs *or* the defendants, and no one should be criticized for the fact that the district court's order proceeded on the more parsimonious path.

In this respect, the defendants are attempting to relitigate the denial of their motion to dismiss about the nature of the action ab initio. It would stand the judicial process on its head to hold that after they have lost on a motion in which they argued that this litigation was “really” a federal habeas corpus action, any court would agree with them because the district court took a modest, limited action which it found necessary to resolve the case on the merits.

Although the plaintiffs do not regard the district court’s order as overbroad, if this Court were to disagree, the remedy would be to remand with instructions rather than to reach back in time and grant, at the appellate level, the motion to dismiss insofar as it pleaded the case was “really” a successive federal habeas corpus action. *See, e.g., Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d at 1145-46. Defendants and their privies should not be allowed to take an interlocutory appeal on the motion to dismiss by setting an execution date in order to force the district court to issue preliminary relief. They do not like the fact that they are losing in the district court, and by setting an execution date after it denied the defendants’ motion to dismiss but before the district court can adjudicate the case on its merits, they are attempting an illegitimate end run.

Although the Court should reject the defendants’ attempt to denature this 1983 action on grounds common to all litigation, in this special area it bears remarking that the plaintiffs *could not* have raised lethal injection claims in their habeas corpus petitions. Defendants have not disclosed their modus operandi until the discovery in the Timothy Johnston case—even then, only weeks after the district court issued an order compelling discovery and, to a large extent, after their privies in the Missouri

Supreme Court had set an execution date. That court has held a Missouri prisoner cannot litigate claims regarding lethal injection methods and personnel in the forms of state-court litigation which would be a prerequisite for raising such claims under section 2254. In *Worthington v. State*, 166 S.W.3d 566, 583 n.3 (Mo. 2005) (en banc), a Missouri condemned person attempted to raise such a claim in his state post-conviction relief appeal; the state court which sets execution dates held the challenge premature:

As it is unknown what method, if any, of lethal injection may be utilized by the State of Missouri at such future time, if any, as Mr. Worthington's right to seek relief in state and federal courts is concluded and his execution date and method are set, it is premature for this Court to consider whether a particular method of lethal injection violates the Eighth Amendment because it causes lingering, conscious infliction of unnecessary pain.

Not only would the plaintiffs have had no opportunity to raise these claims in the state courts, but at the time they filed their habeas corpus petitions there would be no way of saying what the state's practices for lethal injection would be. Defendants and their privies have shown time and again that they will not disclose a syllable that would support even a doubt about the efficacy of their procedures and personnel for bringing about a speedy, painless death unless they are under the gun of a federal court and opposing counsel is laboring under an execution warrant, and only then, when broad areas of their belated responses are subject to gag orders which hobble the plaintiffs' counsel in preparation for hearings. Only through offensive affidavits which the defendants submitted in the Timothy Johnston case did these plaintiffs' counsel learn that the state uses central-line access via the femoral vein, and a licensed physician. These facts are key elements of two of the plaintiffs's causes of action. They appear to be reactions to botched executions which occurred after or at about the same time that the plaintiffs' habeas corpus petitions were due; they did not *exist* within the

limitations period for a section 2254 petition, yet the defendants say they are the relevant facts for these plaintiffs' projected executions.

Unless this Court wishes to make the novel holding that there is no legal or equitable remedy of any kind for a specific execution procedure which violates the Eighth Amendment and other constitutional guaranties, therefore, it follows that because habeas corpus cannot provide a remedy, section 1983 does.

II. Plaintiffs do not challenge lethal injection broadly, but only a narrow band of behavior analogous to the "cut-down" procedure at issue in *Nelson v. Campbell* and authoritatively held to sound in section 1983.

What the defendants say they are going to do to the plaintiffs subjects the condemned person to a femoral central line access—an invasive and painful and complicated precursor to execution that is not medically accepted as the first form of IV access. What Missouri does is as invasive as what the Alabama defendants wanted to do to Mr. Nelson—but with less justification, as Mr. Nelson had a bona fide venous-access issue, whereas these Missouri defendants have decided that all condemned persons, regardless of their health, will be subjected to the femoral central-line surgical procedure as a precursor to execution.

III. The district court's order acted within its discretion in holding that the *Dataphase* standard supported the limited preliminary relief which it granted.

A. Defendants' assertion that the plaintiffs are unlikely to prevail on the merits is an attempt to circumvent the district court's denial of their motion to dismiss, which pleaded the same premises, and on which the district court found it necessary to set a hearing.

1. Defendants are estopped to argue unlikelihood of prevailing on the merits in light of the fact that they have litigated and lost on their motion to dismiss for failure to state a claim.

State official petitioners (defendants in the district court) cite numerous cases upholding lethal injection generally or the three-chemical sequence on a variety of factual arrays as if they somehow doom Taylor's claim as a matter of law. Nothing could be further from the truth, as the district court's denial of the motion to dismiss and the grudging admission by the court below that some semblance of a hearing was necessary. Petitioner-defendants cite no case involving a femoral line access. That is a precursor operation, without medical necessity except in the case of lifelong intravenous drug abusers without an adequate venous system, which makes this case like *Nelson v. Campbell* and unlike the plain-vanilla three-chemical cases on which the state relies for its headnote law.

From the defendants' motion to dismiss, the district court was well aware of the history of their treatment of Timothy Johnston's constitutional grievances. That is undoubtedly one reason it denied the motion to dismiss, scheduled a hearing, and issued a preliminary injunction to permit the hearing to proceed.

Defendants' reliance on the courts' actions in the Timothy Johnston case is unsound because this Court did not reach the merits of that plaintiff's claims and the stay was issued over the district court's refusal to grant such relief rather than at the district court's instance. Defendants rely, as well, on a grant of summary judgment against plaintiff Timothy Johnston for their assertion that their method of lethal injections is constitutional. (AVDCOPE:8.) In that case, their counsel withheld discovery in the face of an order compelling it until the Missouri Supreme Court had set an execution date, then sprang new data on Mr. Johnston's counsel and filed motions for summary judgment and for an expedited hearing. Defendants did not complete their responses to discovery until this Court denied rehearing on the denial of their petition for a writ of prohibition to keep the district court from requiring them to provide the discovery they had agreed to provide subject to a protective order before the Missouri Supreme Court set an execution date. Mr. Johnston's counsel was forced to litigate the case with one and a half hands tied behind their backs. It should come as no surprise that they received an adverse holding.

There is no reason why the district court in this case should have deferred to another district court holding rendered under the circumstances of the *Johnston* holding, instead of setting the case for a hearing at which the defendants would not enjoy the element of surprise which they created by defying a sister court's order until their privies in the Missouri Supreme Court had set an execution date.

Defendants protestations that the sodium pentothal couldn't possibly fail to anesthetize the condemned person throughout the execution are belied by their

insistence on using pancuronium bromide to mask the symptoms of inadequate or inefficient administration of sodium pentothal.

2. Defendants have failed to show that the state's use of a licensed physician in violation of medical ethics is constitutionally permissible when the state has undertaken to enforce medical ethics.

In an attempt to obviate the constitutional deficiencies in their lethal-injection procedure, the defendants have committed yet another constitutional violation. In their application to proceed with an execution before the district court can take evidence on this issue, they make various legal arguments and some amateur medical-ethics arguments. Far from making it appear that the plaintiff has no likelihood of succeeding on the merits, the defendants' arguments are practically contradictory in typical "guilty client" fashion—for example, that a physician can care for a person and kill them at the same time (AVDCOPE:14), and that if this were a prison disciplinary proceeding, the plaintiff would have to show "atypical and significant hardship," whereas being executed by a physician is neither atypical nor a hardship (AVDCOPE:15-16). Stating what one does not know (AVDCOPE:14) about medical ethics does not demonstrate that one's opponent is unlikely to succeed on the merits if one can't kill the opponent before he gets a hearing.

3. Defendants attempt to recycle the same arguments they used, without effect, in their motion to dismiss to the effect that the use of an unnecessarily painful form of execution is not a badge of slavery.

Once more, the defendants attempt to use the pending "application" as an end run around the district court's denial of their motion to dismiss.

In this action, the plaintiffs do not claim that the death penalty is a badge of slavery—only that the use of a form of execution which causes unnecessary pain and suffering is a badge of slavery. Defendants do not question the historical evidence the plaintiffs submitted with their original and amended complaints, but argue that if a practice isn't a carbon copy of chattel slavery, the plaintiffs have no likelihood of prevailing on the merits. That is why we have hearings. The only question is whether this one will go on when the lead plaintiff is six feet under.

B. Defendants beg the question of irreparable harm to plaintiff Taylor by asserting the very propositions of fact and law on which they have lost in the denial of their motion to dismiss and on which the district court has set a hearing for February 21.

Defendants cannot seriously contend that being put to death by a means society does not tolerate for euthanizing animals would be an “irreparable injury.” Because they cannot bring themselves to acknowledge any claim that would cast doubt on their actions, they attempt to meet this point in the *Dataphase* analysis by asserting that their case is so strong on the merits that an execution by their chosen means couldn't possibly work an irreparable harm on anyone. That would have been a good argument if the district court had agreed with their motion to dismiss; it is another attempt at an end run in light of the district court's rejection of it.

Our law is repelled by the notion of hanging in the morning and trying in the afternoon. In light of the fact that the plaintiffs have prevailed on the motion to dismiss, the district court did not abuse its discretion in issuing an order that they may present

their case before one of them is rendered unable to proceed with the case because the very means he challenged in it have been used to kill him.

C. Defendants fail to establish that “the harm to other interested parties if the relief is granted” rises to the level to make the district court’s decision an abuse of discretion.

Defendants assert that the decedent’s family will suffer harm if plaintiff Taylor is executed on February 22 or March 1 rather than February 1. (AVDCOPE:18 (talismanic invocation of “closure”).) Assuming the defendant’s suppressed and dubious premise that the decedent’s want plaintiff Taylor executed at all, the defendants do not suggest that the decedent’s family wants him executed in a manner that will create unnecessary pain and suffering. There is no difference in principle between allowing the district court the minimal amount of time it found that it needs to conduct a hearing on the action filed June 3, 2006, and forbidding the defendants to execute plaintiff Taylor in a way the district court had already found to be unconstitutional. If denying condemned persons a day in court were an acceptable price for “closure,” then no constitutional rights of persons convicted of capital offenses (including those implicating their guilt of the underlying offense) would be safe from the political branches.

D. Defendants' vague allegations of "the effect on the public interest" of holding a hearing on their method of lethal injection before using in on a litigant who filed his action months before they and their privies set an execution date less than a week after the district denied their motion to dismiss do not rise to the level to make the district court's decision an abuse of discretion.

Defendants attempt to inject the facts of the underlying offenses as if that justified their infliction of gratuitous pain and suffering on plaintiff Taylor.

(AVDCOPE:18 n.8.) They would thereby have this Court sanction a reversal of thousands of years of progress in the criminal law. Although the Supreme Court has allowed the states and the federal government to extract the "mere extinguishment of life," the presence of unsavory facts in the underlying case is no more a defense to using unnecessarily painful forms of execution than it would be to denying trials altogether because the condemned person did not give the decedent a fair trial.

Boilerplate about the state's interest in seeing that sentenced be carried out proves too much, in that this Court sees them even when there is absolutely no doubt that an execution cannot go forward according to the executioners' timetable. In this procedural context, the question is not whether there is absolutely no doubt, but only whether the district court abused its discretion in granting the limited relief it granted.

Recent months have seen a heightened awareness of the issue of torture. In the amended complaint, the plaintiffs invoke the jurisdiction of the district court in part on the basis of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment—art. I, ¶ 1, of which defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally

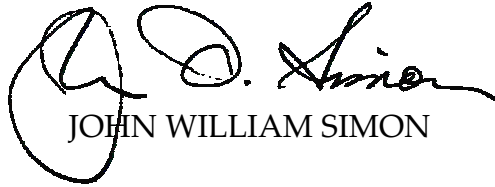
inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed . . . or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” (Attachment 1 at 15-16.) Because the defendants’ use of a form of lethal injection which causes the certainty (at least in respect to the central-line procedure) or known risk of unnecessary pain and suffering is an official act done for the purpose of punishment, it falls within the definition of “torture” which is most relevant to assessing the harm to the public interest of denying plaintiff Taylor a day in court on his constitutional claims.

In the district court, the plaintiffs pleaded that the public interest militates heavily in favor of an adjudication on the merits of this claim, rather than on letting the defendants avoid it by torturing the plaintiff to death under a chemical veil. Plaintiffs’ action is absolutely neutral about the death penalty, and if the country wants to keep it for the time being, it is most likely to do so if the boil with the habitual three-chemical sequence is lanced in this action. At the same time, it is not in the public interest for the citizens of all but two lethal-injection jurisdictions to be implicated in torture when the ostensible purpose of lethal injection is to bring about the “mere extinguishment of life.” The place of the United States in an increasingly interdependent world—in which its mere practice of the death penalty has pro tanto alienated it from all but a few mostly repressive, backward countries including two which our fathers (including the district judge who entered the order here challenged) have fought seriatim throughout the Pacific and then in Korea. It is reasonable to anticipate that when the LANCET article

(Lubarsky Exhibit 2 to Plaintiff's Exhibit 2) has had the effect in Western Europe that it ought to have here, the United States will be substantially impaired in its ability to obtain extradition of those charged with crimes against the United States. That, and not respecting the prerogative of the district court to hold a hearing before signing off on yet another execution, is the appropriate focus of the public interest inquiry.

WHEREFORE, for the foregoing reasons, respondent Taylor prays the Court for its order that the pending application to vacate stay of execution be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. W. Simon". The signature is fluid and cursive, with the first name "J." and last name "Simon" clearly distinguishable. It is positioned above the printed name "JOHN WILLIAM SIMON".

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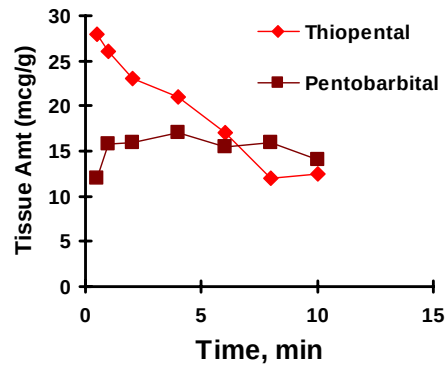
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A. Extent of Distribution

B. Rate of Distribution



Brain concentrations of thiopental and pentobarbital after iv administration

in the rat. Adapted from: *Principles of Drug Action - The Basis of Pharmacology*, p. 264, 1990.