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MESSAGE: Michael Taylor

IN THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MICHAEL ANTHONY TAYLOR, et al.	)	
Appellant,	)	
v.	)	Case No. 06-1397
	)	(District Court No. 05-4173-CV-C-SOW)
LARRY CRAWFORD, et al.,	)	
Appellees.	)	

APPELLEES' SUGGESTIONS IN OPPOSITION TO APPLICATION FOR STAY AND SUGGESTIONS IN SUPPORT OF SUMMARY AFFIRMANCE

Appellees Crawford and Purkett (Prison Officials) oppose Appellant Taylor's (Taylor) application for a continued stay of execution and urge this Court to summarily affirm the district court's judgment in this case. The Prison Officials have demonstrated here (as they did previously in *Johnston v. Crawford*, No. 4:04-CV-1075 CAS (E.D. Mo. Aug. 26, 2005)) that Missouri's method of lethal injection does not violate the Eighth Amendment. Additionally, the Prison Officials have established that the presence of a doctor during executions is neither a breach of medical ethics nor a violation of the condemned prisoner's due process rights, and also that Missouri's execution procedure does not violate the Thirteenth Amendment.

PROCEDURAL HISTORY

Appellee Taylor pled guilty to first degree murder, armed criminal action, kidnapping and forcible rape for which he was sentenced to death, fifty years, fifteen

years, and life imprisonment, all sentences to run consecutively. The court affirmed the convictions and sentences as well as the denial of post-conviction relief. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996), *cert. denied*, 519 U.S. 1152 (1997).

Taylor initiated a petition for writ of habeas corpus in the United States District Court for the Western District of Missouri. The district court denied the petition, and the court of appeals affirmed. *Taylor v. Bowersox*, 329 F.3d 963 (8the Cir. 2003), *cert. denied*, 541 U.S. 947 (2004).

On June 3, 2005, Taylor filed a suit asserting civil rights claims under 42 U.S.C. § 1983 that his execution by means of Missouri's lethal injection procedure would violate his constitutional rights. On November 22, 2005, the Missouri Supreme Court sustained the state's motion to set an execution date. Then, on January 3, 2006, the Supreme Court of Missouri set an execution date of February 1, 2006, for Taylor. On January 19, 2006, the district court entered its order in this case prohibiting Taylor's execution on February 1 and directing that no execution take place until the court held a hearing on the merits beginning on February 21, 2006, and further order of the court.

The Prison Officials appealed and moved to vacate this order. On January 29, 2006, this Court vacated the district court's order, directed an immediate hearing to resolve the issues, and entered its own stay of execution through January 6, 2006. The district court held a full hearing on the merits (via telephone to accommodate the

witnesses, three out of four of whom were doctors who reside in other states) on January 30 and 31. On January 31, the district court ruled against Taylor on all his claims and entered judgment in favor of the Prison Officials. Thereafter, following a motion by the Prison Officials, this Court vacated its earlier stay, but entered a new stay through 5 p.m. on February 1, 2006. In the meantime, Taylor filed this appeal.

STANDARD OF REVIEW

Review of the Stay. The Supreme Court set forth the standard of review for stays 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). 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). In light of this standard of review, this Court should vacate its stay in this case and permit Taylor's execution to go forward.

Review of the Judgment. Regardless of whether this case retains its identity as a suit under 42 U.S.C. § 1983, or it has been transformed into a habeas action, *see Nelson v. Campbell*, 124 S. Ct. 2117, 2125 (2004), the district court order rejecting

Taylor's claims should be affirmed. If this case has changed into a habeas action, the rejection of Taylor's claims is appropriate because he never obtained approval to proceed from this Court as required by 28 U.S.C. § 2244(b)(3) (before a second or successive application for habeas relief is filed in the district court, the applicant must obtain authorization to do so from the Court of Appeals).

If this case really does remain one under § 1983, then the district court's judgment should also be affirmed because that court's well-supported findings of fact and its cogent application of the law to those facts. On review of a bench trial, the appellate court reviews the trial court's findings of fact for clear error and its conclusions of law *de novo*. *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Housing Auth.*, 339 F.3d 702, 710-11 (8th Cir. 2003). Additionally, a well-reasoned opinion of the district court may be summarily affirmed. *Lashley v. Delo*, 997 F.2d 512 (8th Cir. 1993) (citing 8th Circuit Local Rule 47B).

ARGUMENT

The district court's January 31, 2006 order concluded that Taylor's execution would not violate his Eighth, Thirteenth or Fourteenth Amendment rights (Order, p. 9). In particular, as to the three drug sequence, the district court found that Taylor would not be conscious after receiving a 5 gram dose of sodium pentothal, the first drug (Order, p. 5; Defendants' Trial Exhibits 1, 3, 4, and 5 (all these exhibits were included in Exhibit E to the Application for Vacation of District Court's Order

Prohibiting Execution, filed by the Prison Officials with this Court in Case No. 06-1278WMJC on January 20, 2006)). This finding, was based on testimony by Dr. Dershwitz (Order, p. 3, 5). In fact, Taylor's experts testified that 5 gram dose was itself lethal over a period of two to twenty minutes (Order, p. 4). Relying on decisions from around the country and Missouri, the district court properly concluded there would be no Eighth Amendment violation. Similarly, administering the drugs through the femoral vein would result in "little if any pain" (Order, pp. 6-7). As the district court found, "an injection is administered to numb the area before a catheter is inserted so that the inmate will experience little if any pain (Order, pp. 6-7). The court also reached the correct legal conclusion that the small possibility of complications in the procedure does not open it to valid challenge under the Eighth Amendment (Order, pp. 5 & 9) (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947); *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994)).

As to the due process claim, the district court concluded it was meritless. The district court concluded that a physician's participation in the execution process does not violate the physician's code of ethics and does not violate a condemned prisoner's due process rights (Order, pp. 7 & 9). The court supported this conclusion both logically and on the basis of the existing case law on this point (Order, p. 7) (citing *Abdur'Rahman v. Bredesen*, No. M2003-01767-COA-R3-CV, 2004 WL 2246227, *9

(Tenn. Ct. App. Oct. 6, 2004), *aff'd*, 2005 WL2615801 (Tenn. Oct 17, 2005).

Similarly, the district court found the Thirteenth Amendment claim was meritless as a matter of law because the amendment expressly excepts those being punished for a crime and because Taylor failed to show how prisoners of different races are treated differently (Order, p. 8) (citing *Wendt v. Lynaugh*, 841 F.2d 619, 620 (5th Cir. 1988); *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963), *cert. denied*, 375 U.S. 915, 84 S. Ct. 214 (1963).

Contrary to Taylor's assertion, there is no "rush" to execution here. He has had ample time and ability (and has made good use of it) to pursue his claims since his conviction. His opportunities to address his claims in this case with regard to the constitutionality of Missouri's lethal injection procedure are no different. Despite a fair opportunity to litigate the matter, the district court here correctly concluded that Missouri's lethal injection procedure is constitutional (Order, p. 9). *See also Johnston v. Crawford*, No. 4:04-CV-1075 CAS, slip op. at pp. 9-10 (E.D. Mo. August 26, 2005); *Johnston v. Roper*, 421 F.3d 1152 (8th Cir. 2005) (en banc) (review and denial of Johnston's motion for stay of execution). Recognition of the invalidity of Taylor's claims by the district court after conducting its own hearing and independent review on the question does not constitute undue haste.

Taylor's protestations of lack of fair notice to prepare his case before the hearing do not take note of his own failure to file a motion for any sort of equitable relief

regarding his impending execution until more than two weeks after his execution date had been set or his failure to seek a ruling from the court on the merits of his claims. His suit has been on file since June 2005. He had over six months to prepare for the hearing he sought and which he knew would need to occur before his expected execution. He also had nearly a month after the issuance of the execution warrant in this case to prepare his case. This preparation could easily have included the taking of discovery and preservation depositions.

In particular, Taylor complains of an inability to present evidence from Dr. Sri Melethil, a pharmacokineticist. But he never addresses his access to Dr. Melethil before January 31, 2006, and admits that this doctor had returned from "out of town" by the morning of January 31. Thus, Taylor could have called this doctor because the hearing in this case reconvened at 9:30 a.m. and continued until nearly noon. Taylor asserts, however, that he was still unable to provide the doctor with data from the defense expert, Dr. Mark Dershwitz. Aside from noting again that Taylor had more than six months to conduct discovery in this case, Taylor also had knowledge that Dr. Dershwitz would be the defense expert from early in this suit and had a copy of Dr. Dershwitz's affidavit from the *Johnston* case reporting his opinion of Missouri's lethal injection procedure (and likely also had a transcript of Dr. Dershwitz's testimony from the *Johnston* case). Leaving these opportunities aside, Taylor also made no apparent attempt to call Dr. Melethil to testify even to the simple and

straight forward proposition, as expressed in Taylor's brief, that Dr. Dershwitz's analysis was allegedly flawed because his conclusions were based on drug levels in the blood instead of drug levels in the brain.

Having passed on the opportunities to develop his case, Taylor's complaints now about lack of a full opportunity to provide relevant evidence are not compelling.

Even if the declaration of Dr. Melethil that has been presented to the Prison Officials this morning could be taken into account in the review of the district court's order, it shows that evidence from this doctor would have added little to the trial anyway and does not call the district court's judgment into doubt.[1] The district court found the 5 gram dose of sodium pentothal sufficient to render the condemned unconscious, based on the testimony of Dr. Dershwitz (Order, pp. 3, 5; Defendants' Trial Exhibits 1, 3, 4, and 5 (all these exhibits were included in Exhibit E to the Application for Vacation of District Court's Order Prohibiting Execution, filed by the Prison Officials with this Court in Case No. 06-1278WMJC on January 20, 2006)). Dr. Melethil's speculation in the declaration, based on animal studies and lower dosages, does not demonstrate the wanton infliction of pain during the execution. That is true especially because he does not contradict the evidence that the dose of thiopental sodium at issue here is not a marginal one, but one that even Taylor's

[1] In fact, the Declaration shows that another lawyer who had been working on this case with Taylor's counsel (counsel to former co-plaintiff Richard D. Clay) has been in contact with Dr. Melethil since mid-September.

testifying experts state was itself lethal (*see* Order, p. 4).

Taylor's related claim, that he was denied a fair opportunity to make his case at the district court hearing because he was not permitted to call the doctor and nurse who are present at Missouri's executions is also unavailing. Testimony from these witnesses would be of little relevance. The challenge here is to the method of execution. Taylor has been given detailed information as to the drugs used, their doses, and the order and the manner of administration. That method is what it is regardless of who prepares the drugs and sets the IV.

Taylor's contention that the testimony of these witnesses is relevant for their observations at executions is also of no avail because there are other witnesses to executions who could provide such testimony - and he does not claim to have made any effort to obtain such testimony.

While the qualifications of the doctor and nurse may have some relevance, the district court has assessed Taylor's need for information on qualifications of personnel involved in the process and instructed petitioner to provide Taylor with the necessary relevant information. Pursuant to this instruction petitioners have provided to Taylor background facts including that the doctor involved in Missouri executions is a licensed physician and a board-certified surgeon and that the nurse is a licensed practical nurse.

The district court's decision with regard to information about and testimony from

the doctor and nurse struck the proper balance between Taylor's need for information and the Prison Officials' (and the doctor's) concern that identifying the doctor and nurse would result in their safety and security being put at risk from strident death penalty opponents.

The district court's decisions as to the challenged evidentiary matters were very reasonable and cannot be disturbed as an abuse of discretion.

There was more than sufficient evidence to support the district court judgment as outlined above and as contained in Exhibit E (containing Defendants' trial exhibits 1, 3, 4, and 5) before the district court). The Court should decline Taylor's invitation to reweigh the evidence.

WHEREFORE, the Prison Officials pray this court to deny Taylor's request for a stay and to summarily affirm the district court's well-reasoned decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1 day of February, 2006, I mailed, by United States Mail, a copy of the foregoing to the following:

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