

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MICHAEL ANTHONY TAYLOR,	)	
	)	
<i>Plaintiff-Appellant,</i>	)	
	)	App. No. 06-1397
v.	)	
	)	Dist. No. 05-4173-WMJC
LARRY CAMPBELL, et al.,	)	
	)	
<i>Defendants-Appellees.</i>	)	

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

Michael Anthony Taylor prays the Court’s panel or, failing that, the Court en banc, for its order vacating its panel order of today denying his application for a stay of execution, entering a stay pending the disposition of this appeal, and granting rehearing en banc or in the alternative remanding the cause with instructions to vacate the judgment entered after a truncated hearing without adequate discovery, in that the panel’s judgment conflicts with *Nelson v. Campbell*, 541 U.S. 637 (2004); *Dickerson v. Dotson*, 125 S.Ct. 1242 (2005), *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Furman v. Georgia*. 408 U.S. 238, 273 (1972); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *In re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878).

The constitutional proscription against cruel and unusual punishments in U.S. Const. amend. VIII, and the English Bill of Rights of 1688 forbids “the unnecessary and wanton infliction of pain.” *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion).. In addition to disproportionality to a given offense, it

is the infliction of unnecessary or “wanton” pain in carrying out a death sentence which lies at the heart of the constitutional prohibition in capital cases. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (“unnecessary cruelty”). One of the characteristics that marks a cruel and unusual execution is “a lingering death.” *In re Kemmler*, 136 U.S. 436, 447 (1890). A punishment is particularly offensive to constitutional norms if it involves the foreseeable infliction of suffering: in *Louisiana ex rel. Francis v. Resweber*, an electric chair had malfunctioned, and Mr. Francis had not died at the appointed time; he contended that re-executing him would be unconstitutional. A divided Court rejected his claim, based in part on lack of mens rea by the state actors: the plurality reasoned that if the failed execution been intentional and not unforeseen, the second punishment would have been, like torture, “so degrading and indecent as to amount to a refusal to accord the criminal human status” The Court relied on this principle from *Francis* in its reasoning in *Furman v. Georgia*. 408 U.S. 238, 273 (1972).

These constitutional guaranties apply to lethal injections, and a cause of action exists for preventing the infliction of gratuitous pain and suffering under 42 U.S.C. § 1983, in cases of lethal injection, at least when they involve the use of a precursor operation such as a “cut-down.” *Nelson v. Campbell*, 541 U.S. 637 (2004). Last week the Supreme Court issued a stay of execution in the *Hill* case to

examine whether such actions are, as the appellees argued below, “really” a second habeas corpus. Yesterday it granted a stay in the *Rutherford* case, which involved that issue plus the question whether the plaintiff had waited too long to file the section 1983 action.

For the reasons set forth in the plaintiff’s brief and application for a stay directed to the panel, which counsel understands have been sent to every judge in active service, the plaintiff is at the very least entitled to litigate an appeal from the district court’s drumhead denial of relief. Counsel would repeat those arguments here but for the fact that the panel’s stay expires at 5:00 p.m. today, about an hour and a half from now.

As explained in those document, the State and its privies created the situation in which the plaintiff is litigating this issue under this unconscionable pressure. They will continue to do so until this Court or the Supreme Court draws a line in the sand. What is at stake is not only human decency, but the independence of the judiciary. God save the United States and this Honorable Court.

WHEREFORE, the appellant prays the Court for its order as aforesaid.

Respectfully submitted,


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Certificate of Service

I hereby certify a true and correct copy of the foregoing was e-mailed this
first day of February 2006, to the office of:

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