IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MICHAEL ANTHONY TAYLOR	)	
	)	
Plaintiff,	)	
vs.	)	No. 05-4173-CV-W-FJG
	)	
LARRY CRAWFORD, et al.,	)	
	)	
Defendants.	)	
_____	)	

MOTION FOR RECONSIDERATION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60

Plaintiff Taylor respectfully asks this Court to reconsider its order of May 2, 2006 ("Order") severely limiting the scope of discovery in this case. By denying Plaintiff even the opportunity to present argument in favor of allowing most forms of discovery, this Court has acted inconsistently with the unanimous opinion of the Eighth Circuit, and the 9-1 vote of that Court sitting on en banc. Because the Eighth Circuit's opinion concluded that the previous hearing-- through no fault of this Court-- was infected with due process error, it would be an abuse of discretion to hold a new hearing on remand that does not correct the error found by the appellate court. Plaintiff is fully committed to litigating his case in a timely manner in accordance with the schedule ordered by the Eighth Circuit. But at the same time, Plaintiff is entitled not to be held to the limited body of evidence that the Eighth Circuit found constitutionally inadequate. The Court's Order all but shuts the 30-day window of discovery that the Eighth Circuit has ruled be open.

I. THE COURT'S ORDER IS INCONSISTENT WITH THE EIGHTH CIRCUIT'S OPINION.

The Eighth Circuit's opinion ("Opinion") makes clear that the prior hearing before this Court was constitutionally inadequate as a result of timetable imposed by the appellate court. In unmistakable language, the Eighth Circuit offered its "*mea culpa*" for denying Plaintiff the opportunity to "make the record he felt necessary for the full and fair consideration of the merits of the case." Opinion at 6. The panel recognized that it "asked the district court and the parties to do too much in too little time" and that it was appropriate to "expand or supplement the record." *Id.* It also noted the 9-1 vote of the *en banc* Court to grant a stay, and on that basis remanded the case back to this Court for a "continuation of the hearing." *Id.* at 7. The appellate court further found that "some further opportunity for discovery may be warranted" and committed the choice of discovery to this Court. *Id.*

The Court's Order is fundamentally inconsistent with the Eighth Circuit's opinion. *First*, the order bars witnesses who have already testified from testifying further. This ruling cannot be reconciled with the Eighth Circuit's holding that the hearing in which those witnesses testified was constitutionally defective. The Eighth Circuit's recognition that short-notice hearing imposed a "burdensome strain" necessitates that Plaintiff should not be held to the affirmative case and cross-examination that Plaintiff's counsel was able to prepare on just a few hours notice. Instead, Plaintiff should be entitled, consistent with the new time frame imposed by the Eighth Circuit and the normal rules of evidence, to present whatever witnesses and evidence he believes relevant to support his case. This is *not* asking for an entirely new hearing, but rather the opportunity, consistent with the Eighth Circuit's instructions, to "expand or supplement the

record" with any additional evidence that may shed light on the legal issues at stake here.[1] Under the Eighth Circuit's order, it is an abuse of discretion to preserve the flawed evidence of that proceeding rather than allow Plaintiff, who now has adequate time to present his case, to revisit those issues as appropriate.

Second, the Court's order does not carry out the Eighth Circuit's instructions regarding discovery. The Opinion is extremely clear that additional discovery may be warranted and that this Court should use its discretion in deciding what discovery is open to the parties. This Court could not have exercised its discretion soundly by ruling on all the discovery issues before it before Plaintiff has had any opportunity to argue why its proposed discovery is relevant. For example, although the Court has stated that it "sees no need for any other depositions" beyond a limited deposition of Mr. Crawford, Plaintiff has not even had the opportunity to present its reasons. Indeed, the Court's order denies access to discovery that the *State* has agreed to, such as the deposition of the State's primary expert, Dr. Dershwitz. Similarly, the Court has limited the scope of document requests to the past six executions, without allowing argument by Plaintiff as to relevance of going beyond the State's chosen scope of discovery. In short, it would be an abuse of discretion within the terms of the Eighth Circuit's order to peremptorily cut off critical avenues of discovery during the very period in which the appellate court has asked this court to consider Plaintiff's requests.

II. THE DISCOVERY DENIED BY THE COURT'S ORDER IS HIGHLY RELEVANT AND SO CENTRAL TO THE MERITS OF THIS CASE THAT THE DENIAL VIOLATES DUE PROCESS.

[1] The Order's proviso that witnesses may be recalled to testify regarding "previously unavailable" information is far too narrow to rectify the constitutional flaws of the prior proceeding. For example, although Plaintiff was able to obtain some information in discovery prior to the first hearing, counsel was unable to prepare an effective presentation of that information in light of the "burdensome strain" of timing that hearing imposed.

If this Court were to consider the merits of Plaintiff's requests for discovery, it would find them compelling. The State objects to Plaintiff's requested deposition of John Doe 1, the doctor who assists with executions. This deposition is crucial to determining the merits of Mr. Taylor's claims. Plaintiff understands that John Doe 1 inserts the catheter into the femoral vein of the inmate to be executed. Part of Plaintiff's claim is that this unnecessary, painful femoral line procedure itself violates the Eighth Amendment. Femoral vein access is an extremely risky procedure that is rarely used in the medical context except in extraordinary circumstances. It is therefore far from a routine procedure, and it poses, among other problems, serious risk of infection. This risk is particularly troubling given that some inmates scheduled to be executed receive last minute stays that halt an execution after the inmate's veins have been accessed.[2] (Along similar lines, a deposition would be essential in determining what steps are taken by John Doe 1 and the other people involved if there is in fact a last minute stay.)

It is also essential to know the qualifications of the doctor inserting the line. Because femoral lines are rarely used in medicine, many doctors have little or no experience inserting them. Similarly, because complications often arise during femoral line procedures, only doctors performing such procedures with some regularity would be equipped to deal with such complications. Determining John Doe 1's qualifications and experience in this regard -- which could not be done without deposing him -- is a crucial component of evaluating the State's use of the femoral line. Additionally, because sodium pentothal only works as an anesthetic if it is properly administered, it is essential to know how the femoral vein is accessed by Missouri. Any errors arising from femoral access could lead to improper administration of the three chemicals. Such errors would therefore not only amount to Eighth Amendment violations in their own right

[2] The State of Florida, for instance, had already strapped down Mr. Hill and accessed his veins when he received a last-minute stay halting his execution.

(due to the painful and humiliating femoral vein access) but also result in improper administration of the chemicals, thus leading to additional Eighth Amendment violations. Only by talking to the person who actually performs this procedure could Plaintiff gather the relevant information on this issue.[3]

On a related note, it would also be crucial to determine whether John Doe 1 (or any other doctor participating in the procedure) is an anesthesiologist trained to monitor anesthetic depth. As alleged in Plaintiff's Complaint, if the first chemical, sodium pentothal, fails to anesthetize the inmate properly, he will suffer excruciating pain as a result of the other two chemicals. But only an anesthesiologist is properly trained and qualified to monitor such depths. Deposing John Doe 1 would give Plaintiff the necessary opportunity to determine whether he has the necessary training to monitor anesthetic depths at all and whether his position in the execution room relative to the inmate affords him a proper view to do so.

Just as a deposition of the doctor (John Doe 1) would yield information absolutely central to this case and unobtainable in any other form, so too would depositions of the other John Does (John Does 2-6) yield similarly critical information. The nurse (John Doe 2) might, for instance, mix the chemicals used in the process. Her qualifications and experience are therefore of great significance, as is a detailed account of the exact steps she takes during every execution. Similarly, the "plunger" who actually pushes the syringe (John Doe 3) is a vital person on the execution team whose first hand knowledge of the lethal injection procedures is central to this case. Once again, this person's experience and qualifications are important, since an unqualified

[3] Indeed, because Missouri has failed to provide any published protocol, there exists *no* way for Plaintiff to access this information, other than by deposition. But even if Missouri's procedure for accessing the femoral vein were published, a deposition of John Doe 1 would be necessary to see how the procedure actually is performed by the person who performs it. All other information would merely describe how the State *says* its executions *should* proceed, but would give no insight into what actually is happening.

person could administer the chemicals improperly, potentially resulting in any of a number of errors, including a broken syringe. It would also be important to know exactly how John Doe 3 carries out his duties during each execution. And, as for John Doe 4, he is believed to be the only person in the room during the execution. Clearly, he would have knowledge and understanding of how the procedure is actually carried out that nobody else would have and that would not be obtainable from the State in any other way. And any other people involved in the execution procedure (John Does 5-6) would obviously also have firsthand knowledge crucial to this case. Plaintiff therefore asserts that the State's contention that these depositions would not lead to relevant evidence could not be further from the truth.

The State also contends that providing the identities of the persons involved in carrying out executions will impinge on the security interests of these persons and of the prison, and of the privacy interests of these persons. Plaintiff fully understands that any information revealing or reasonably leading to the discovery of the identity of any or all of these persons will be subject to a protective order crafted by this Court. Plaintiff's counsel represents that it will abide by the terms of such a protective order. Given that these depositions are central to the Plaintiff's case and that the State's security and privacy concerns could easily be protected by a protective order, the State's objections on this ground do not justify a decision so drastic as denying Plaintiff access to key information upon which this case turns. Accordingly, Plaintiff represents that due to the protective order, disclosure will not hamper the ability of the State to find personnel to carry out its executions.

The State's entire case turns on the accuracy and credibility of Dr. Dershwitz's testimony on the effectiveness of the State's procedures in preventing unconstitutional pain. For this reason, it is essential that Mr. Taylor depose Dr. Dershwitz. The constitutionally inadequate

hearing did not provide Mr. Taylor with a proper opportunity to cross examination the State's medical expert. It was impossible for Mr. Taylor's counsel to prepare for Dershwitz's nuanced testimony on the several hours' notice that he received. At a minimum, Dr. Dershwitz must be deposed because his scientific conclusions and the graphs on which they are based have never been publicly challenged, and the assumptions underlying Dr. Dershwitz's evidence are fundamentally flawed. Even Dr. Dershwitz's definition of unconsciousness, for example, is inconsistent with how the term is understood in the medical community. In addition, the State itself has already agreed to the deposition of Mr. Dershwitz.

It also is essential that Mr. Taylor receive any records of the State's past executions dating back to 1989. Dr. Dershwitz has previously made two critical assertions, both of which have been belied in other States by precisely the evidence that Mr. Taylor seeks here. First, Dershwitz has alleged that the inmate will stop breathing within one minute of the administration of thiopental. Second, he has testified that death results within one minute of the administration of potassium chloride. We now know these allegations to be incorrect. *See, e.g., Morales v. Hickman*, No. C-06-219-JF, --F.Supp.2d--, 2006 WL 335427, at *8 (N.D. Cal. Feb. 14, 2006), *aff'd*, No. 06-99002, --F.3d--, 2006 WL 391604 (9th Cir. Feb. 19, 2006) (per curiam), *cert. denied*, No. 05-9291, 2006 WL 386765 (U.S. Feb. 20, 2006); *Brown v. Beck*, No. 5:06-CT-3018-H (April 7, 2006, E.D. N. Car.). There are reasons to believe that the same evidence is available in Missouri. For example, the complications in Leroy Hunter's execution by lethal injection, which took place in 2000, are notorious, but the State has refused to provide any documentation regarding lethal injections dating back even six years to that execution. Moreover, it is critical to discover the changes made in the lethal injection procedures (in terms of dosage, saline flushes, ordering of the chemicals, IV access, length of tubing, time between femoral placement

and administration of chemicals, etc.) in order to determine the types of complications inherent in the current procedure and whether the State is acting with the necessary level of deliberate care. This in no fishing expedition. Mr. Taylor's document requests are narrowly tailored to provide critical information through a narrow set of documents pertaining only to 66 executions.

At a minimum, Mr. Taylor requests that the Court reconsider granting his document requests for executions dating back to January 1, 1995. On information and belief, the State stopped using the Leuchter machine for administering lethal injections around this time. For this reason, the decisions made in 1995 and going forward are especially relevant to the procedures used today. Any changes in the procedures and the executions that precipitated those changes are of course relevant as they shed light on the problems that arose in prior executions and the degree to which the State's actions were responsive to those known inadequacies in its procedures.

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For the foregoing reasons, Plaintiff asks that this Court reconsider its Order. If the Court grants the motion, Plaintiff requests that the Court schedule a conference on Wednesday, May 3. 2006 to determine the proper scope of discovery. In the event that the Court will not reconsider its Order, Plaintiff will seek immediate review of the order in the Eighth Circuit under that court's retained appellate jurisdiction.

Respectfully Submitted,

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May 2, 2006

Certificate of Service

I hereby certify a true and correct copy of the foregoing was forwarded for transmission via Electronic Case Filing (ECF) this 2nd day of May, 2006, to the offices of:

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