IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 06-3651

MICHAEL ANTHONY TAYLOR,
***Appellee*,**

v.

LARRY CRAWFORD, et al.,
Appellants.

On Appeal from the United States District Court
for the Western District of Missouri, Central Division
The Honorable Fernando J. Gaitan, District Judge

REPLY BRIEF OF APPELLANTS

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I. Legal Standard

In the opening brief, corrections officials demonstrated that the Eighth Amendment legal standard by which to measure a complaint concerning the method of execution was, as established by the Supreme Court, whether "the punishment [involved] the unnecessary and wanton infliction of pain." (Appellant's Brf., page 28 quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). Officials also noted that Taylor did not demonstrate and the district court did not find "purpose," "deliberate indifference," "maliciously or sadistically," or any other mental state by the corrections officials (Appellant's Brf., pages 35-38).

Taylor now contends that corrections officials did not raise this issue; thus, it is waived (Appellee's Brf., page 51, 54, 59). But corrections officials asserted that the legal standard of review for the method-of-execution claim was that set forth in Gregg. They made that contention in the original appeal to this court (Appellee's Brief in No. 06-1397 (8th Cir. March 17, 2006, page 27). And they presented that contention in various pleadings to the district court (App. 37, 104, 209-10, 360). The district court was aware of the proper Eighth Amendment standard, perhaps as best shown by its quotation of Gregg in its January 31, 2006 order (App. 139). The district court erred by failing to apply that standard.

In the opening brief, corrections officials demonstrated that neither the text of the Eighth Amendment nor the Supreme Court decisions interpreting that text encompass a notion that the Eighth Amendment protects the condemned against a

"risk" of pain during an execution (Appellant's Brf., pages 28-31). Corrections officials also demonstrated that the Eighth Amendment should not be expanded to encompass such a rule (Appellant's Brf., pages 32-34). Taylor offers no authority to the contrary (see Appellee's Brf., pages 52-53). Instead, Taylor concludes that the prohibition against an unnecessary infliction of pain is the same thing as the unnecessary risk of pain (Appellee's Brf., page 53). But there is no Supreme Court authority for that proposition (Appellee's Brf., page 53) nor does Taylor offer analysis in support of that assertion (Appellee's Brf., page 53).

Taylor argues that many local courts apply the "risk" standard (Appellee's Brf., pages 53-54). Corrections officials acknowledged this in their opening brief, but also demonstrated how the "risk" language traced its origins to preliminary injunction litigation (Appellant's Brf., page 31 citing Cooper v. Rimmer, 379 F.3d 1029, 1030 (9th Cir. 2004)). More telling is the fact that Taylor refers the court to no Supreme Court precedent holding that the Eighth Amendment is violated when a means of execution involved a risk of pain (Appellee's Brf., page 54).

Taylor contends that the risk standard is necessary in order for the federal courts to regulate the execution practices of several states (Appellee's Brf., page 55). Corrections officials do not believe such regulation should be a goal, in and of itself. And as articulated in the opening brief, the Eighth Amendment was designed to

prohibit the "unnecessary and wanton infliction of pain," Gregg v. Georgia, 428 U.S. at 173, not impose an assessment of risks.[1]

In the opening brief, corrections officials showed that the district court erred by failing to make a finding of scienter, a mental state, i.e. a finding that the corrections officials have the purpose to add an element of cruelty to the execution. Taylor contends that the intent of the corrections officials is irrelevant (Appellee's Brf., page 59) relying on Campbell v. Wood, 18 F.3d 662, 682 & n.12 (9th Cir. 1994). In contrast to the Ninth Circuit's Campbell decision, in whatever Eighth Amendment context a claim has arisen, the Supreme Court has required a showing of scienter. Taylor shows no wording to the contrary in the text of the Eighth Amendment and also identifies no Supreme Court case construing the amendment that holds to the contrary.

Taylor makes no argument that he can show that corrections officials act with "purpose" or "maliciously or sadistically" (Appellee's Brf., pages 59-61). Taylor suggests that he may be able to show "deliberate indifference" (Appellee's Brf., pages 61 n.34). To support that assertion, however, he only refers the court to pre-July, 14, 2006 protocol evidence that the Department remained dependent on Dr. Doe (Appellee's Brf., page 61 n.34). Of course, Taylor does not demonstrate any

[1]Of course, this is not to say that "risks" analysis has no place in the development of social policy generally or the use of capital punishment specifically. The appropriate place for that analysis however, is with the policymakers of the several states, not constitutional interpretation of the Eighth Amendment.

"deliberate indifference in the development and proposed implementation of the July 14, 2006 protocol.

II. No Unreasonable Risk Exists

Assuming the Eighth Amendment regulates "unreasonable risks," no such risks exist. In his first point, Taylor contends that the district court correctly found that the Missouri execution procedure violated the Eighth Amendment because it created a risk of pain (Appellee's Brf., page 26). Initially, Taylor contends that the third chemical, potassium chloride, causes pain (Appellee's Brf., page 29). That is why it is the third chemical. The first chemical injected was five grams of thiopental in a 60 cc syringe (June Tr. 370) and with today's written protocol, five grams is injected in a 200 cc solution (Add. 32; §B.2). Its purpose is to render the offender unconscious.

Taylor acknowledges that a five gram dose of thiopental "is more than sufficient to cause unconsciousness" (Appellee's Brf., page 30 n.11). But Taylor is apparently afraid that he may not receive the five gram dose. Id. To support this fear, Taylor asserts that corrections officials abdicated authority to Dr. Doe (Appellee's Brf., page 30). Director Crawford is the person who has authority to set the method of execution within the dictates of Missouri law (June Tr. 363). Upon learning of Dr. Doe's previous changes in the amount of thiopental administered, the director testified that he intended to issue a defined protocol so that this would not happen again (June Tr. 369). Director Crawford testified that an execution would begin with the administration of five grams of thiopental (June Tr. 370). Neither the chemicals

themselves nor the order of the chemicals could be changed by anyone other than Director Crawford (June Tr. 371).

Independently, under the July 14, 2006 protocol, "the quantities of these chemicals may not be changed without prior approval of the department director" (Add. 32 (§B.1)). The critical fact, the injection of five grams of thiopental into the condemned, is not the subject of discretion by Dr. Doe, and Dr. Doe is so aware (June Tr. 374; App. 731-33). So even assuming that Dr. Doe were to continue as a "medical personnel" under the protocol (Add. 32 (§A.2, A.3)), five grams of the first chemical, thiopental will be administered.

Taylor contends that Dr. Doe is not competent to be involved with an execution (Appellee's Brf., pages 32-33). The written July 14, 2006 protocol provides that a variety of medical personnel can prepare the chemicals used during the lethal injection, insert intravenous lines, monitor the offender, and supervise the injection of lethal chemicals by non-medical members of the execution team (Add. 32 (§A.2, A.3)). Assuming Dr. Doe were to participate, Taylor's sole complaint is that he cannot adequately prepare thiopental (Appellee's Brf., page 33). But the difficulty Dr. Doe had in mixing thiopental was the result of attempting to mix it at a high concentration (App. 645-46, 672-75). The July 14, 2006 protocol removes that difficulty because the five grams of thiopental is administered in 200 ccs of solution (Add. 32 (§B.2)), which is the standard 2 ½% solution that can be prepared exactly as the manufacturer intended (App. 226, 1252). The mixing is simple: one mixes the

powder that comes in a container with supplied dilutant (January 30 Tr. 14). Taylor's articulated concern is resolved by the written protocol.

The third concern expressed by Taylor is that corrections officials have no consistent procedure (Appellee's Brf., pages 33-34). But the sole basis for this concern is the same as for the first concern: the authority of Dr. Doe. That concern has been discussed earlier.

The fourth articulated concern by Taylor is with the "drug delivery mechanism" (Appellee's Brf., pages 34-35). The district court made no finding that "the drug delivery mechanism risked improper administration" (Appellee's Brf., page 34). Taylor refers the court to Addendum 18 (Appellee's Brf., page 34). But that page is a recitation of evidence heard by the district court, not a fact finding (Add. 18). Taylor also cites Addendum 21-22, but that finding by the district court was in the context of monitoring anesthetic depth (Concern 5, discussed below) and not a finding about "drug delivery mechanism." Similarly, Taylor cites Addendum page 23 as a fact finding by the district court. It is not; instead, that page is the district court's recitation of things it would like to see in a written protocol.

And Taylor's criticism in his brief does not discuss the July 14, 2006 written protocol. Before an execution begins, saline solution is used to confirm that the IV lines are properly inserted and that the lines are not obstructed (Add. 33 (§C.2)). The offender is monitored (Add. 33 (§D)). The execution support room is lit (Add. 33 (§E.1)). After injection of the five grams of thiopental, medical personnel inspect the catheter site (Add. 34 (§E.3)). Before the remaining chemicals are administered,

medical personnel confirm that the condemned is unconscious (Add. 34 (§E.4)). Taylor does not criticize the drug delivery mechanism contained in the written protocol.

Similarly, Taylor's fifth concern, the lack of monitoring anesthetic depth, is addressed in the July 14, 2006 written protocol. Taylor complains that the medical personnel could not see the offender through the window between the execution support room and the execution room. This concern is resolved by the repositioning of the condemned in the execution room so that he can be seen through the window (Appellee's Brf., page 46). The written protocol resolved these concerns to the district court's satisfaction (Add. 27).

The final concern articulated by Taylor is "the procedure as a whole." But risk, like fractions, do not grow larger as they are considered cumulatively. If one is going to be indoors 50% of the day and there is 50% chance of rain, the chance of getting wet is not 100%, but 25%. If one brings an umbrella half the time, the odds of getting wet fall to 12½%. And so on. See http://espse.ed.psu.edu/edpsych/faculty/rhale/statistics/chapters/chapter7/chap7.html, pp. 4-5 (Multiplicative law of probability) (lasted visited 1/5/07). Taylor provided no quanification for any of the perceived risks. And he can provide no quanification for the cumulative risk he now asserts existed.

III. Remedy

A large portion of Taylor's brief consists of claims that Missouri's lethal injection process is flawed. Much of the criticism refers to the practice as it occurred

before it was formalized into a written protocol (Add. 32-35; App. 215-18), so, with regard to prospective relief at least, it has little, if any continuing relevance.

Even the alleged flaws that existed before the process was set out in written form, however, do not render it inconsistent with the Eighth Amendment. Even when the Department's doctor had some difficulty preparing the thiopental, the condemned received at least 2.5 grams of this chemical (App. 647-53, 664-65, 672, 675). The doctor, based on his medical knowledge and experience, determined this amount was more than sufficient to render the condemned prisoner deeply unconscious and unable to experience any pain (App. 627-28, 629, 676, 687). Plaintiff's expert, Dr. Thomas Henthorn, testified that as little as 1.67 grams of thiopental will result in a deep state of unconsciousness in almost everyone (June Tr. 233, 241-42). There is no evidence of any occasion in which Dr. Doe accidently gave an incorrect[2] amount of thiopental to the condemned due to improper mixing.

The thrust of Taylor's arguments with regard to alleged flaws of the written protocol relate to whether there are assurances that the amount of thiopental intended to be administered to the condemned will actually be administered (Appellee's Brf., page 30 n.11). But, as discussed in the corrections officials' brief (Appellant's Brf., pages 59-61), the written protocol provides ample assurance that the five grams of thiopental will actually be delivered to the condemned's bloodstream.

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[2]Taylor takes issue with the use of the word "incorrect" at pages 32-33 of his brief, on the ground that there were occasions that the condemned prisoner did not receive the five grams of thiopental intended by corrections officials. The corrections officials, however use the word "incorrect" here to mean simply an amount of thiopental lower than that which would cause deep unconsciousness.

In particular, the written protocol provides that, between the administration of the first chemical (thiopental) and the second two chemicals, the medical person who set the IV line will return to the execution room and directly assess whether the condemned is conscious (App. 217; Add. 34 (§E.3)). Taylor, at page 46 of his brief, criticizes this step on the ground that only a professional anesthesiologist can appropriately apply techniques for assessment of consciousness. But doctors, nurses, and emergency medical technicians have the ability to assess level of consciousness to the extent that they can be confident that a person is sufficiently unconscious to be unaware of any pain that would normally be the result of noxious stimuli (App. 371B, paragraph 8). This direct assessment of the condemned prisoner by the medical person present will provide reasonable assurance that the condemned prisoner will be unconscious when the second and third chemicals are administered.

Moreover, the protocol provides that the medical person present will examine the IV catheter site following the administration of the thiopental (App. 217; Add. 34 (§E.3)). Doctors, nurses, and emergency medical technicians qualified to set IV lines are also qualified to examine their lines and the line entry sites to insure that the IV line is operating as it should be (App. 371A-371B, paragraphs 3-6). This direct examination of the catheter site will alleviate Taylor's concern (Appellee's Brf., pages 22, 27) that the execution will continue if the setting of the IV results in the laceration of a blood vessel, the formation of a hematoma under the skin at the IV entry site, and an infiltration that prevents an adequate dose of thiopental from

reaching the vein. It needs also to be noted here that significant hematoma formation from a femoral venous line is not a typical event (June Tr. 297).[3]

Taylor, at pages 31 and 34 of his brief, also contends that the corrections officials' expression of continued confidence in Dr. Doe and his capabilities will result in the doctor having "unbridled" authority in future executions (Appellee's Brf., page 34). But the officials' continued confidence in Dr. Doe does not mean they will not exercise the oversight called for in the written protocol (App. 218) over Dr. Doe or whoever else they may choose to prepare and administer the lethal chemicals. Moreover, the protocol specifically requires that any changes in the amounts of drugs used be pre-approved by the Director of the Department of Corrections (App. 215 (§ B.1)). The Director will make the medical personnel involved in executions fully aware of the terms of the protocol (June Tr. 374). And, if Dr. Doe continues to assist with executions, he understands that he is not to alter the amounts of chemicals used without first getting approval from the Director (App. 731-33).

Taylor, at page 40, n.16 of his brief, takes issue with the reservation by the corrections officials of the option of changing the amount of thiopental to be administered if circumstances prevent administration of five grams of this chemical. But there is no suggestion, and the corrections officials have no intention, that an

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[3]The corrections officials also note that Taylor's experts' diagnosis of the occurrence of a hematoma at the Johnston execution through their review of a photograph should be viewed with some skepticism (June Tr. 46-48, 153-54, 229-31). This is especially so because the passage of only five minutes between the administration of the first chemical and the time of death (Tr. 415, 804) indicates a good flow of the chemicals into Johnston's bloodstream.

amount inadequate to cause deep unconsciousness will ever be administered at an execution. As noted previously, even Taylor's expert, Dr. Henthorn, agreed that as little as 1.67 grams will be adequate to quickly cause a deep state of unconsciousness in almost everyone (June Tr. 233, 241-42).

Taylor also challenges the corrections officials' argument that the district court's requirement that they always have the assistance of a doctor at executions exceeded the court's remedial powers. Taylor, at pages 43-44 of his brief, contends that, once the court concluded there was a constitutional violation, it had the power to exercise remedial discretion to cure the violation.

The premise of Taylor's contention is incorrect. As the corrections officials have shown, there is no constitutional deficiency in their lethal injection procedure. Thus, the district court, as a matter of law, lacked any authority to impose injunctive relief. Swann v. Charlotte-Mecklenburg Bd. of Ed., 91 S. Ct. 1267, 1276 (1971).

Even if there were a constitutional violation here, Taylor's contention is still incorrect. As the Supreme Court made plain in Nelson v. Campbell, 541 U.S. 637, 650 (2004), challenges to execution procedures are challenges to prison conditions. As a challenge to prison conditions, the Prison Litigation Reform Act mandates that

> [p]rospective relief . . . shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. §3626(a)(1)(A). Even if Missouri's lethal injection procedure did violate any federal right, the prospective relief ordered here – assistance of a doctor at executions – exceeded the district court's remedial authority because that requirement is not the least intrusive necessary to correct any violation. The court could have simply ordered direct observation of the condemned after administration of the thiopental for signs of consciousness or examination of the IV catheter site after administration of the thiopental to determine whether the IV is operating as intended, as the written protocol now directs. Or the court could have directed that the medical personnel involved have some minimum level of training with regard to setting IV lines, assessing operation of these lines, and/or assessing anesthetic depth. There is certainly a level of training with regard to the discrete and relevant skill sets at issue here that is less than that level of training received by doctors in general and anesthesiologists in particular. At least the court could have given the corrections officials the option of execution by means of a massive dose of thiopental alone or some other barbiturate or combination of barbiturates, without any direction that a doctor be present. See Morales v. Hickman, 415 F. Supp. 2d 1037, 1047 (N.D. Cal. 2006), aff'd, 438 F.3d 926 (9th Cir. 2006), cert. denied, 126 S. Ct. 1314 (2006).

Moreover, the recent decision in Hamilton v. Jones, 2007 WL 18926 (10th Cir., Jan. 4, 2007), upheld Oklahoma's lethal injection procedure even though it did not provide for the assistance of a doctor. Rather, an EMT-P (paramedic) establishes the IV lines, insures their patency, and administers the chemicals. Id. at *2. The court also affirmed the district court's determination that the possibility that the thiopental

used might not actually take effect to anesthetize the condemned prisoner is, "[i]n light of the precautions already built into the protocol, . . . simply far too remote to rise to a constitutional level . . . ." Id.

The Hamilton decision demonstrates both that Missouri's written lethal injection protocol, which incorporates safeguards comparable to those embodied in the Oklahoma protocol, is consistent with Eighth Amendment requirements and that, even if there were some deficiency in Missouri's protocol, there is a less intrusive remedy than the requirement that a doctor take part in the process.

CONCLUSION

As demonstrated above and in the main brief, Missouri's lethal injection procedure is consistent with the Eighth Amendment. The corrections officials urge this Court to reverse the district court's entry of judgment against them, to vacate the district court's orders imposing conditions on, and continuing oversight over, the implementation of their execution procedure against plaintiff Taylor and other condemned prisoners, and to remand this case to the district court with instructions to enter judgment in their favor. Executions in Missouri should be allowed to proceed as provided in its written protocol.

Respectfully submitted,

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I hereby certify that two true and correct copies of this brief, and a 3½ inch, labeled diskette containing this brief, were mailed, postage prepaid, this 8 day of January, 2007, to:

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