IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 06-1397

MICHAEL ANTHONY TAYLOR,
Appellant-Plaintiff,

v.

LARRY CRAWFORD, et al.,
***Appellees-Defendants*.**

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

BRIEF OF APPELLEES/DEFENDANTS

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant Michael Anthony Taylor challenges Missouri's three-drug lethal injection procedure as violative of the Eighth Amendment's ban of cruel and unusual punishments. Taylor also claims that his due process rights under the Fourteenth Amendment will be violated because a physician will assist in preparations for the execution in that such assistance by a physician is a violation of medical ethics. Additionally, Taylor asserts that lethal injection, as performed in Missouri, violates the Thirteenth Amendment in that it constitutes a badge of slavery. Finally, Taylor contends that he was denied due process because of the trial being scheduled on short notice and because of evidentiary rulings of the district court.

Taylor, however, had sufficient time to develop and to present his case, including sufficient time to prepare and present the witnesses whose testimony he concluded was necessary. The evidence that could have been provided by the witnesses Taylor was precluded from calling, could have been provided by alternative witnesses. The district court's findings and conclusions as to the constitutional validity of Missouri's lethal injection procedure were also well supported both factually and legally.

The defendant-appellee prison officials request twenty minutes for oral argument.

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I.

Whether the district court erred by entering judgment for the defendant-appellee prison officials after a two day evidentiary hearing because the district court's fact findings were not clearly erroneous. Because of the facts found, the district court properly denied relief. [Responds to Point II of Appellant's Brief.]

Johnston v. Crawford, No. 4-04-CV-1075 CAS, (E.D.Mo. Aug. 26, 2005);

Beardslee v. Woodford, 395 F.3d 1064 (9th Cir. 2005);

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); and

Reid v. Johnson, 333 F. Supp. 2d 543 (E.D.Va. 2004).

II.

Whether the district court abused its discretion (1) in refusing to permit plaintiff-appellant Taylor to call the doctor and nurse involved in Missouri executions as witnesses where the testimony Taylor proposed to elicit from them would have added little or nothing of relevance or could have been provided by other witnesses available to Taylor, or (2) in holding the hearing in a time frame that may have prevented Taylor from presenting testimony from an expert witness where the expert's testimony would not have been of

critical import and where Taylor neither articulated the substance of the expert's expected testimony nor unequivocally asked for a continuance of any length for the purpose of obtaining the expert as a witness. [Responds to Point I of Appellant's Brief.]

Mercurio v. Nissan Motor Corp., 81 F. Supp. 2d 859 (N.D. Ohio 2000);

Woods v. Lecureux, 110 F.3d 1215 (6th Cir. 1997);

Dakota Indus., Inc., v. Dakota Sportswear, Inc., 988 F.2d 61 (8th Cir. 1993); and

Beard v. Flying J, Inc., 266 F.3d 792 (8th Cir. 2001).

STATEMENT OF THE CASE & FACTS

Plaintiff-appellant Michael Anthony Taylor initiated this litigation on January 3, 2005, by filing a complaint for preliminary injunctive relief, declaratory injunctive relief, and a permanent injunction against his execution by means of Missouri's current lethal injection procedure (Doc. No. 1). He filed the amended complaint on September 12, 2005 (Doc. No. 36). In his complaints, Taylor challenged Missouri's execution process generally. The defendant-appellee prison officials filed their motion to dismiss the case on September 26, 2005 (Doc. No. 30). Meanwhile, the prison officials filed answers to interrogatories on August 30, 2005, and to supplemental interrogatories on October 5, 2005 (Doc. Nos. 33, 42). They provided supplemental interrogatory answers on November 18, 2005 (Doc. No. 48).

On November 27, 2005, after the conclusion of Taylor's habeas proceeding, the state asked the Supreme Court to set an execution date. On November 22, 2005, the Missouri Supreme Court sustained the state's motion to set an execution date. It ordered that an execution date would be set in due course. With this information, Taylor did not seek a hearing or other disposition of his complaint before his execution.

On December 28, 2005, the district court denied the prison official's motion to dismiss the case (Doc. No. 54). After this ruling, Taylor made no request for a hearing.

On January 3, 2006, the Missouri Supreme Court set February 1, 2006 as Taylor's execution date (Doc. No. 55).

On January 19, 2006, the district court granted plaintiff's application for an order prohibiting his execution (Doc. Nos. 60, 61, 62). The prison officials appealed that order (Doc. No. 63). On January 29, 2006, the Court of Appeals vacated the stay in part and remanded the cause to the District Court for further proceedings. *Taylor v. Crawford*, No. 06-1278 (8th Cir. January 29, 2006).

On January 30-31, 2006, the district court held an evidentiary hearing (Doc. Nos. 74, 75). The district court found Taylor's claims meritless (Doc. No. 76). Judgment was entered in favor of the prison officials on January 31, 2006 (Doc. No. 77). Taylor filed a Notice of Appeal on the same day (Doc. No. 80). On February 1, 2006, a panel of this Court denied Taylor's request for stay of execution, but the Court en banc issued a stay. The United States Supreme Court declined to vacate that stay.

State Court Procedural History

Taylor was charged by indictment in the Circuit Court of Jackson County, State of Missouri, with one count of murder in the first degree, in violation of §565.020, RSMo. 1994; one count of the felony of armed criminal action, in violation of §571.015, RSMo. 1994; one count of the Class B felony of kidnapping, in violation of §565.110, RSMo. 1994; and one count of the felony of forcible rape, in violation of §566.030, RSMo. Cum. Supp. 1993.

On February 8, 1991, Taylor appeared with his attorneys before the Honorable Alvin C. Randall and expressed his desire to enter a plea of guilty to these charges in open court and on the record pursuant to Missouri Supreme Court Rule 27.01(b). After a three day punishment phase hearing, Judge Randall sentenced Taylor to death. Taylor was also sentenced to life imprisonment for rape, fifteen years imprisonment for kidnapping, and ten years imprisonment for armed criminal action, all terms to run consecutively.

Taylor brought a post-conviction action pursuant to Missouri Supreme Court Rule 24.035, challenging his guilty plea and sentence. After an extensive evidentiary hearing the circuit court denied Taylor's post-conviction motion.

Taylor filed an appeal challenging the guilty plea, the imposition of the death penalty and the denial of the Rule 24.035 motion for post-conviction relief, and argued to

the Missouri Supreme Court some fifteen claims of error. The Missouri Supreme Court issued the following order on June 29, 1993:

ORDER

Judgment vacated. Cause remanded for new penalty hearing, imposition of sentence, and entry of new judgment.

Taylor's second punishment phase hearing before Judge Michael Coburn began on May 2, 1994. Initially, Judge Coburn heard evidence for three days. The evidence was held open, and Taylor was allowed to present the testimony of additional witnesses on May 12, 1994 and June 6, 1994. The state adduced evidence concerning the abduction and murder of Ann Harrison, as well as evidence of Taylor's escape from custody. The defense called ten witnesses in purported mitigation of punishment.

On June 17, 1994, over three years after he had first received the penalty of death, Taylor appeared before Judge Coburn for formal sentencing. In oral and written findings, Judge Coburn found six statutory aggravating circumstances beyond a reasonable doubt, as well as three non-statutory aggravating circumstances. Judge Coburn found the existence of one mitigating circumstance, rejecting several others offered by Taylor, and concluded that the mitigating circumstance did not outweigh the aggravating circumstances of this case, making the sentence of death appropriate. Taylor also received fifty years for armed criminal action, fifteen years for kidnapping and life imprisonment for rape, all terms to run consecutively. Taylor filed an appeal. He also sought post-

conviction relief under Missouri Supreme Court Rule 24.035. This time, again on consolidated appeal, the Missouri Supreme Court affirmed. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996). The United States Supreme Court denied discretionary review. *Taylor v. Missouri*, 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 on May 7, 2003, this Court affirmed. *Taylor v. Bowersox*, 329 F.3d 963 (8th Cir. 2003), *cert. denied*, 541 U.S. 947 (2004).

Statement of Facts

The Supreme Court of Missouri described the circumstances surrounding Taylor's offenses in the direct appeal opinion.

> According to Taylor's testimony at his guilty plea, Taylor's videotaped statement and other evidence adduced in the sentencing hearing, Taylor and a companion, Roderick Nunley, spent the night of March 21, 1989, driving a stolen Chevrolet Monte Carlo, stealing "T-tops," smoking marijuana and drinking wine coolers. At one point during the early morning hours of March 22, they were followed by a police car, but lost the police after a high speed chase on a highway. About 7:00 a.m., they saw fifteen-year-old Ann Harrison waiting for the school bus at the end of her driveway. Nunley told Taylor, who was driving at the time, to stop so Nunley could snatch her purse. Taylor stopped the car, Nunley got out, pretended to need directions, grabbed her and put her in the front seat between Taylor and Nunley. Once in the car, Nunley blindfolded Ann with his sock and threatened to stab her with a screwdriver if she was not quiet. Taylor drove to Nunley's house and took Ann to the basement. By this time her hands were bound with cable wire. Nunley removed Ann's clothes and had forcible sexual intercourse with her. Taylor then had forcible intercourse

with her. They untied her, and allowed her to dress. Ann tried to persuade them to call her parents for ransom, and Nunley indicated he would take her to a telephone to call home. They put the blindfold back on her and tied her hands and led her to the trunk of the Monte Carlo. Ann resisted getting into the trunk until Nunley told her it was necessary so she would not be seen. Both men helped her into the trunk.

Nunley then returned to the house for two knives, a butcher knife and a smaller steak knife. Nunley argued with Taylor about whether to kill her. Nunley did not want Ann to be able to testify against him and emphasized he and Taylor were in this together. Nunley then attempted to slash her throat but the knife was too dull. He stabbed her through the throat and told Taylor to "stick her." Nunley continued to stab, and Taylor stabbed Ann "two or three times, probably four." He described how "her eyes rolled up in her head, and she was sort to like trying to catch her, her breath."

Nunley and Taylor argued about who wold drive the Monte Carlo, and Nunley ended up driving it following Taylor who was driving another car. Taylor picked up Nunley after he abandoned the Monte Carlo with Ann Harrison in the trunk. They returned to Nunley's house where Nunley disposed of the sock, the cable wire, and the knives.

When the school bus arrived at the Harrison home to pick up Ann, the driver honked because she was not there. Mrs. Harrison looked out of the window and noticed Ann's purse, gym clothes, books, and flute lying on the driveway. She waved for the bus to go on and began to look for her daughter. Police quickly mounted a ground and air search. Ann Harrison's body was discovered the evening of March 23rd when police found the abandoned Monte Carlo and a friend of the car's owner opened the trunk.

The State's physical evidence included hair matching Taylor's collected from Ann Harrison's body and the passenger side of the Monte Carlo, hair matching Ann's collected from Nunley's basement, sperm and semen belonging to Taylor found on Ann's clothes and body. An autopsy revealed a lacerated vagina, six stab wounds to Ann's chest, side, and back which penetrated her heart and lungs, and four stab wounds to her neck. The medical examiner testified Ann Harrison was alive when all the wounds

> were inflicted and could have remained conscious for ten minutes after the stabbing. She probably lived thirty minutes after the attack.

State v. Taylor, 929 S.W.2d 209, 214 (Mo. banc 1996) (footnote omitted).

With regard to Taylor's challenges to Missouri's execution process in this case, the district court described the lethal injection procedure as follows:

> [T]he procedure is accomplished through the use of three drugs which are administered by a board certified physician. The physician first administers five grams of sodium pentothal, also known as thiopental, which is a substance that produces anesthesia. Thereafter, the physician administers a syringe of saline to flush the IV line. Next, the physician administers pancuronium bromide, also referred to as pancuronium. This drug is a paralytic agent which prevents any involuntary movement of the body. The physician then again administers the saline solution. Finally, the third drug which is administered is potassium chloride, which is a drug which stops the electrical activity of the heart. . . . [T]he average time to complete administration of the drugs is between two and five minutes and the average time of death from when the drugs are administered until the time of death was between two and five minutes. Dr. Dershwitz [the prison official defendants' expert] testified that if the above outlined protocol is followed, there is no chance that an inmate
> would experience pain or suffering.

Order of January 31, 2006 (Doc. No. 76), at pp. 2-3.[1]

[1]This Order is included in the addendum to this Brief.

SUMMARY OF THE ARGUMENT

The district court properly entered judgment on behalf of the defendant-appellee prison officials. The evidence produced by plaintiff-appellant Taylor and the prison officials at the evidentiary hearing amply support the fact findings and legal conclusion of the district court that Missouri's lethal injection process does not inflict cruel and unusual punishment. As the district court found, following the administration of the first drug – on anesthetic - there is not a significant risk that a condemned prisoner will be conscious to experience the lethal effects of the other two drugs. The evidence also supported the district court's conclusion that administration of the drugs through a femoral vein IV catheter would cause little if any pain.

Taylor's additional claims that Missouri's lethal injection procedure violates his due process and Thirteenth Amendment rights, even if not abandoned due to omission from his brief, are also meritless. Presence of a doctor at the execution is not a breach of the doctor's ethical obligations and, thus, cannot violate the condemned prisoner's due process rights for that reason. Taylor's Thirteenth Amendment claim fails because that amendment expressly excepts from its coverage those being punished for a crime and because Taylor failed to show how prisoners of different races are treated differently.

With regard to Taylor's issues concerning evidence and witnesses, the district court did not abuse its discretion in holding the hearing in a time frame that may have prevented

Taylor from presenting testimony from a third expert witness. That expert's testimony would not have been of critical import and, additionally, Taylor neither articulated the substance of the expert's expected testimony nor asked for a continuance of any length for the purpose of securing the testimony of the expert.

Neither did the district court abuse its discretion in declining to permit Taylor to call the doctor and nurse involved in Missouri executions as witnesses. The testimony Taylor proposed to elicit from them would have added little or nothing of relevance and could have been provided by other witnesses available to him.

STANDARD OF REVIEW

On review of a bench trial, as occurred here, 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).

With regard to questions involving the admissibility of evidence, district courts have wide discretion and their decisions on such questions will not be disturbed absent a showing of a clear and prejudicial abuse of discretion. *Bennett v. Hidden Valley Golf and Ski, Inc.*, 318 F.3d 868, 878 (8th Cir. 2003).

The standard of review of a denial of a motion for continuance is abuse of discretion. *Beard v. Flying J, Inc.*, 266 F.3d 792, 802 (8th Cir. 2001).

ARGUMENT

I.

There was sufficient evidence from which the fact finder could find that the Missouri method of execution process was proper and conclude that plaintiff-appellant Taylor's Eighth Amendment rights would not be violated by his execution because the evidence demonstrated that the dosage of the first drug in the three drug sequence rendered the condemned unconscious while the remaining drugs stopped breathing and the heart and use of the femoral vein was effective and without pain.

In the district court, Taylor contended that use of the three drug sequence would violate his Eighth Amendment rights against cruel and unusual punishment because the first drug (sodium pentothal) would wear off before death, the second drug (pancuronium bromide) would result in paralysis preventing any communication of awareness of pain, and the third drug (potassium chloride) would cause pain as it travels to the heart and stops it (Amended Complaint (Doc. No. 36), pp. 20-21). In his second count, he contended that the injection into the femoral vein would also be painful (Amended Complaint (Doc. No. 36), pp. 25-26). The district court properly rejected these grounds after an evidentiary hearing. The judgment of the district court should be affirmed.

The Three-Drug Sequence. Evidence at hearing showed that Missouri uses a three-drug sequence in its lethal injection process. The first drug administered is sodium pentothal, also known as thiopental, which is a substance that produces anesthesia. The dosage used in Missouri is 5 grams - - more than 10 times the amount used to begin a surgery. Then the line is flushed with saline solution. The second drug is pancuronium bromide, which acts upon the body's muscles to prevent movement. Following a second saline solution flush, the third drug administered is 240 millequivalent dose of potassium chloride, which is a drug that stops the electrical activity of the heart. Order of January 31, 2006 (Doc. No. 76, at pp. 2-3). Taylor contends in his amended complaint that the dosing of the first drug may be insufficient to prevent the painful effects of drugs two and three on the condemned. Amended Complaint (Doc. No. 36), at pp. 3-4 & 20-21.

The district court rejected Taylor's contention, finding that the initial dose of sodium pentothal was sufficient to render the condemned unconscious when the second and third drugs are administered. In particular, the district court held:

> However, based upon the testimony which was presented by the witnesses, the Court does not find that there is a significant risk that the means and method which the Missouri Department of Corrections uses will cause unnecessary pain and suffering. Dr. Dershwitz testified that the dose of sodium pentothal which is administered, 5 grams, has a very long lasting effect. Thus, the likelihood that the inmate will still be conscious when the other drugs are administered is highly unlikely. Other courts who have examined this procedure have also found that it is not cruel and unusual. In *Johnston v. Crawford*, No. 4-04-CV-1075 CAS, (E.D.Mo. Aug. 26, 2005), the Court stated:

> Plaintiff's evidence is inadequate to demonstrate that Missouri's execution protocol would subject him to the unnecessary and wanton infliction of pain, torture or a lingering death. Plaintiff's evidence suggests only a possibility, rather than a probability, that he may remain conscious and sensate long enough to experience pain during his execution. For instance, in the affidavit of Dr. Heath submitted in support of the TRO motion, Dr. Heath opines that "the failure to properly administer the sodium pentothal" would create an unjustifiable risk that a prisoner will be conscious during the remainder of the execution. But as previously noted the ever-present possibility of human error or accident is insufficient to establish a constitutional violation. *Louisiana ex rel. Francis [v. Resweber]*, 329 U.S.[459,] 464 [(1947)]: *see also Estelle [v. Gamble]*, 429 U.S. [97,] 105 [(1976)]; *Beardslee [v. Woodford]*, 395 F.3d [1064,] 1075 [(9th Cir. 2005)].
>
> Furthermore, plaintiff's evidence does not adequately demonstrate the nature or the duration of the possible pain relative to the likely degree of sedation so as to establish that the quantum of pain would violate Eighth Amendment standards. ... The record fails to establish any foreseeable probability that the use of the Missouri protocol would result in an execution involving torture of unnecessary pain of unconstitutional magnitude or length.

Id. at pp. 4-5. This conclusion has been reached by other courts that have also considered challenges to lethal injection protocols. In *Beardslee v. Woodford*, No. C 04-5381 JF, 2005 WL 40073 (N.D. Cal. Jan. 7, 2005), *aff'd* 395 F.3d 1064 (2005), the Court stated, "even with protocols under which only two grams of sodium pentothal-as opposed to the five grams used in California- are to be administered, the likelihood of such an error occurring 'is so remote as to be nonexistent.'" *Id.* at *3. *See also Reid v. Johnson*, 333 F. Supp. 2d 543 (E.D.Va. 2004). Therefore, the Court does not find that the plaintiff has demonstrated that Missouri's means of accomplishing lethal injection violate the Eighth Amendment.

Order of January 31, 2006 (Doc. No. 76), at pp. 5-6. As amply demonstrated by the district court order, there was sufficient evidence to support the district court order.

Mr. Terry Moore, the Director of Adult Institutions for the Missouri Department of Corrections testified about the procedures that would be used to execute Taylor. Order of January 31, 2006 (Doc. No. 76), at pp. 2-3. Dr. Dershwitz testified that the procedures produced no chance that an inmate would experience pain or suffering. *Id.*, at p. 3. In particular, evidence from Dr. Dershwitz showed that the dose of the first drug, sodium pentothal, was so large that 99.9999999% of the population would be unconscious after receiving it. Defendants' Trial Exhibit 1, at ¶ 8.[2] Of course, unconsciousness, instead of death, would depend on the presence of life support devices to keep the lungs going and to support blood pressure. Testimony of Dr. Dershwitz. The effect of the sodium pentothal itself would kill the condemned, but more slowly than if all three drugs are administered. Testimony of Dr. Dershwitz; Defendants' Trial Exhibit 1, at ¶ 8. Although not an anesthesiologist, plaintiff's expert, Dr. Groner, concurred that the dose of sodium pentothal was lethal. Order of January 31, 2006 (Doc. No. 76), at p. 3. Taylor's other expert, Dr. Heath, concurred in this conclusion, with the caveat that death would take up to twenty minutes in some individuals. *Id.*, at p. 4.

[2]Defendants' Trial Exhibit 1 is included in the addendum to this Brief.

Again, the district court's findings and conclusions were amply supported by the evidence - not only by the testimony cited by the court, but by Defendants' Trial Exhibits 1, 3, 4 and 5.[3] As reported by the district court, even the testimony presented by Taylor is consistent as to the effect of the five gram dose of sodium pentothal upon the body. Order of January 31, 2006 (Doc. No. 76), at pp. 3-4. That dose produces immediate unconsciousness and, over a slightly longer period, death. *Id.* Taylor articulates no disagreement with these findings and conclusions in his brief before this court.

Instead, on appeal Taylor attempts to find a reversible issue as to drug 3, potassium chloride. He claims that administration of drug 3 is painful. Taylor's brief, p. 17. Assuming that is true, it ignores the context of the lethal injection, where potassium chloride is the third drug injected, not the first. The five gram dose of the first drug, sodium pentothal, which renders 99.9999999% of the condemned unconscious (Defendants' Trial Exhibit No. 1), fulfills its purpose of being an effective anesthesia. In the context of lethal injection, the condemned would not feel any of the alleged pain from the potassium chloride. Testimony of Dr. Dershwitz; Defendants' Trial Exhibit No. 1.

On appeal, Taylor cannot validly argue that drug 3 will cause pain. Thus, he suggests that drug 3 creates a "needless risk of pain." Taylor's brief, p.17. But again, all experts agreed that the five grams of sodium pentothal was a lethal dose. Dr. Dershwitz

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[3]Defendants' Trial Exhibits 3, 4, and 5 are also included in the addendum to this Brief.

established that 99.9999999% of the condemned would be unconscious after receiving that dose. Defendants' Trial Exhibit No. 1. The risk of pain is minuscule.

On appeal, Taylor also suggests that Dr. Dershwitz "presented no testimony about the data he used to form this opinion, and [he] had never witnessed a Missouri execution." Taylor's brief, p. 17. Taylor did not object to Dr. Dershwitz testifying as an expert witness. He did not object to the testimony and opinions of Dr. Dershwitz as not having a sufficient foundation. And, as noted by the district court, Taylor's experts, Drs. Groner and Heath, also testified that five grams of sodium pentothal was a lethal dose.

Taylor also criticizes Dr. Dershwitz's testimony because Dr. Dershwitz had not personally administered a dose of five grams of sodium pentothal. Taylor's brief, p. 20. If this is a criticism of Dr. Dershwitz's opinion, then, as noted, Taylor did not object on this basis at trial. And Taylor's experts did not testify that they had administered five grams of sodium pentothal; thus, under Taylor's theory, their testimony is similarly inadmissable or suspect. But Dr. Dershwitz did properly identify himself with sufficient qualifications to be an expert witness. Defendants' Trial Exhibit 2 (Dr. Dershwitz's CV).

Taylor also criticizes Dr. Dershwitz's testimony because Dr. Dershwitz works in an operating room with monitoring equipment. Taylor brief, pp. 20-21. Taylor did not make an evidentiary objection at trial on this basis. Moreover, operating room equipment does not make Drs. Dershwitz, Heath, or Groner any more or any less an expert witness

with relevant testimony. And, in any event, the condemned is linked to a monitor, an EKG, which will show the end of electrical activity in the heart. See testimony of Terry Moore.

On appeal, Taylor asserts that the lethal injection process is a "medical procedure"; thus, he has a constitutional right to have it conducted according to a "medical standard of care." Taylor's brief, p. 21. The premise of the contention is unproven. It is not a "medical procedure," but rather a means of implementing punishment, carried out due to the lawful judgment entered by the Jackson County (Missouri) Circuit Court due to Taylor's conviction for first degree murder. Lethal injection is a method of punishment that the Missouri Legislature has made the Missouri Department of Corrections responsible for implementing. Whether the Department uses or does not use medical personnel is a matter of discretion for the Department. And its use of such personnel does not transform the punishment into a "medical procedure," that is to be measured by a "medical standard of care" by a preemptive medical malpractice lawsuit, cloaked as a civil rights lawsuit or a habeas petition before each and every execution.

In summary, the five gram dose of sodium pentothal is sufficient to render 99.9999999% of the condemned unconscious. Accordingly, the district court, and indeed every court that has considered this issue, has properly concluded that the Eighth

Amendment prohibition against cruel and unusual punishment is not violated by execution by lethal injection.

Femoral Vein Access. In Count II of the amended complaint, Taylor complained about the use of his femoral vein for the lethal injection. Amended complaint, pp.25-26. The district court heard evidence about this process during the trial and concluded that Taylor's Eighth Amendment rights would not be violated by use of this process. The district court determination should be affirmed.

After hearing evidence about access to the venous system through the femoral vein, the district court concluded:

> Plaintiff also argues that method by which the drugs are administered is also cruel and unusual in that the drugs are administered through the femoral vein, rather than through a vein in the inmates's arm. However, the Court is also not persuaded that this constitutes cruel and unusual punishment. The testimony was that an injection is administered to numb the area before the catheter is inserted so that the inmate will experience little if any pain. There was testimony that complications can arise with the placement of the catheter and that it might become dislodged or that it is sometimes difficult to locate the femoral vein. However, as noted, above, these slim possibilities do not show that the procedure is cruel and unusual.

Order of January 31, 2006 (Doc. No. 76), at pp. 6-7. The text of Taylor's brief does not challenge the factual findings by the district court. He does not show that they are "clearly erroneous." Fed. R. Civ. P. 52(a). Instead Taylor quibbles about the weight of the evidence vis-a-vis those findings. The court should reject those arguments.

The evidence at the hearing showed the importance of delivering the initial five gram dose of sodium pentothal. Plaintiff's expert Dr. Heath premised his conclusion that five grams of sodium pentothal was a lethal dose upon it being administered properly into the condemned. *See also Johnston v. Crawford*, No. 4:04-CV-1075 CAS, slip op. at 5 (E. D. Mo. Aug. 26, 2005) (quoting *Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005). Indeed, Taylor alleges 12 "botched" executions due to problems with IV access through the peripheral (hands and arms) venous access, Taylor's brief, p. 22,[4] the alternative to femoral vein access. But testimony by Taylor's experts at the hearing provided anecdotal evidence of two executions involving the access: Mr. High of Georgia and Mr. Ross of Connecticut. Testimony indicated there were multiple attempts to find a suitable peripheral vein on those individuals. With Mr. Ross, after several attempts, a vein was found, and with Mr. High, a doctor obtained access to a vein under the clavicle.

And testimony at the hearing indicated that access by the femoral vein is easy to obtain. Generally, the vein is big and easy to locate. Access to the vein is obtained by needle. A local numbing agent reduces discomfort. The area is cleansed to avoid infections. Access is obtained by a board-certified surgeon. Testimony at the hearing

[4]There was no testimony about 12 or 22 "botched" executions before the district court and Taylor cites no evidence to support his contention about "botched" executions. Taylor's brief, p. 22.

establishes the rigorous training all surgeons receive. The *Johnston* court also recognized that the procedure in Missouri was performed by a board-certified surgeon who was qualified to perform the procedure. *Johnston v. Crawford*, No. 4:04-CV-1075 CAS, slip op. at 8 (E. D. Mo. Aug. 26, 2005).

Taylor contends, at page 18 of his brief, that use of the femoral vein creates an "additional risk of discomfort." He argues, in essence, that because it is not known that the peripheral veins will not be sufficient, the state should be required to try those first - despite the problems his experts identified in the High and Ross cases. As noted above, effective access to the venous system is necessary to deliver the five gram dose of sodium pentothal.

Taylor's experts suggested there is a risk of accident by femoral vein access. But as noted by Dr. Heath, Taylor's expert, there are also risks of accident by using the peripheral veins. The word "risks" is but another name for accident, which Taylor concedes is not a basis for an Eighth Amendment claim. Taylor brief, p. 18. *See also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 461-3 (1947).

On appeal, Taylor complains that with femoral vein access, there is a risk of accident from striking bone or a nerve. Taylor brief, p. 20. Dr. Heath testified that a similar risk exists with the peripheral vein access. And there was also testimony about those problems with Mr. High and Mr. Ross. But accidents with either the peripheral vein

access or femoral vein access do not constitute a violation of the Eighth Amendment. *Francis*, 329 U.S. at 461.

Lastly, Taylor suggests that use of the femoral vein access is a procedure that is not medically necessary; thus, it is inconsistent with the "medical standard of care" necessary for a medical procedure. Taylor's brief, p. 21. As noted earlier, a lethal injection is not a medical procedure for which the Eighth Amendment requires a preexecution malpractice suit in the guise of a civil rights or habeas action. Instead, a lethal injection is a method of punishment for Taylor's crime of first degree murder. "Medical standard of care" does not have meaning in this context.

The district court's findings rejecting Taylor's factual assertions that Missouri's lethal injection procedure will likely cause undue pain are very well supported and not clearly erroneous. The district court's legal conclusion that Missouri's execution process does not inflict cruel and unusual punishment is cogent and well reasoned and should be upheld by this Court as correct as a matter of law.

Taylor has abandoned Counts III and IV in his brief to this Court by not addressing them. Even if had not abandoned them, the district court's judgment against Taylor as to these two claims is well-supported both factually and legally.

As to Taylor's Count III claim that the presence of a doctor at his execution would violate his due process rights because that would be a breach of the doctor's ethical

obligations, the district court correctly determined that claim to be meritless. The district court concluded that a doctor's participation in the execution process does not violate the doctor's code of ethics and does not violate a condemned prisoner's due process rights. Order of January 31, 2006 (Doc. No, 76), at pp. 7 & 9. The court supported this conclusion both logically and on the basis of the existing case law on this point. *Id.*, at 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)).

The district court also found Taylor's Thirteenth Amendment claim in Count IV to be meritless 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 of January 31, 2006 (Doc. No, 76), at 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)).[5]

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[5]Petitioners do not concede here that the action is properly one under § 1983. Taylor does not claim an individualized harm from the planned means of execution. Rather, his challenge is to Missouri's method of execution as a general matter (as illustrated by Taylor's former co-plaintiff Clay joining Taylor's case and raising the identical challenges to Missouri's lethal injection process). Even in *Nelson v. Campbell*, 541 U.S. 637, 644, 124 S. Ct. 2117, 2123 (2004), the United States Supreme Court did not hold that all method-of-execution claims could be pursued as ordinary civil litigation under § 1983. Regardless of whether this case is a suit under 42 U.S.C. § 1983, or a habeas action, the district court judgment rejecting Taylor's claims should be affirmed. If this case is 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 is under § 1983, then the district court's judgment should also be affirmed based on its well-supported findings of fact and its cogent application of the law to those facts.

II.

The district court did not abuse its discretion (1) in refusing to permit plaintiff-appellant Taylor to call the doctor and nurse involved in Missouri executions as witnesses where the testimony Taylor proposed to elicit from them would have added little or nothing of relevance or could have been provided by other witnesses available to Taylor, or (2) in holding the hearing in a time frame that may have prevented Taylor from presenting testimony from an expert witness where the expert's testimony would not have been of critical import and where Taylor neither articulated the substance of the expert's expected testimony nor unequivocally asked for a continuance of any length for the purpose of obtaining the expert as a witness.

Contrary to Taylor's assertion, the hearing in this case was neither truncated nor otherwise unfair. Taylor has had ample time and ability (and has made good use of it) to pursue his claims since his conviction. Likewise, he had ample opportunity to address his claims in this case with regard to the constitutionality of Missouri's lethal injection procedure. Following a trial at which both sides were provided a thorough and fair opportunity to litigate the matter, the district court here correctly concluded that Missouri's lethal injection procedure is constitutional. Order of January 31, 2006, at p. 9 (Doc. No. 76). *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).

The parties here presented scientific evidence in support of and in opposition to Taylor's claims. The court's recognition of the invalidity of these claims was not the result of undue haste or inability to present critical evidence, but rather of the court's careful and reasoned analysis of the evidence.

Taylor had sufficient time to prepare his case. 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. This suit has been on file since June 2005. Taylor had over six months to prepare for the hearing he sought and which he knew would need to occur before an expected execution date at a time in the not-too-distant future. He also had nearly a month after the January 3, 2006, issuance of the execution warrant in this case to prepare his case. This warrant placed him on notice that to raise his claims in a meaningful manner, he would need to have his evidence prepared for a trial by his scheduled February 1 execution date. This preparation could easily have included the taking of discovery and preservation depositions of necessary expert and fact witnesses. The choice not to engage in such preparation was Taylor's own.

Proposed testimony of Dr. Melethil. In particular, Taylor complains of an inability to present evidence from Dr. Srikumaran Melethil, a pharmacokineticist. But Taylor admits both that "counsel for [his] team" had been in consultation with this doctor previously and that the doctor had returned from "out of town" by the morning of January 31. Taylor's Brief, at p. 14. Because Taylor's lawyers had been consulting with the doctor for a time before the trial in this case,[6] they had the opportunity to work with the doctor to prepare testimony regarding the effects of the drugs used in Missouri's execution process for use at trial. Taylor also had the opportunity to call Dr. Melethil to testify at the trial because it reconvened at 9:30 a.m. on the morning the doctor returned to town 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 both that Dr. Dershwitz would be the defense expert from early in this suit and of his opinions regarding Missouri's lethal injection procedure. *See* Defendants' Motion to Dismiss (Doc. No. 38) and Exhibit D to that motion (copy of district court Memorandum and

[6]A lawyer on Taylor's team (counsel to former co-plaintiff Richard D. Clay) has been in contact with Dr. Melethil since mid-September. *See* Declaration of Srikumaran (Sri) K. Melethil, Ph.D., J.D., at ¶ 2. The ability of this Court to consider this Declaration, which has been filed with this Court, but was not part of the record before the district court, is discussed below.

Order entered in *Johnston v. Crawford*, No. 4:04-CV-1075 CAS (E.D. Mo. Aug. 26, 2005), which discussed opinions of Dr. Dershwitz).[7] (As public records, Taylor would also have had access to a transcript of Dr. Dershwitz's testimony from *Johnston v. Crawford* and his affidavit submitted in that case.)

Leaving these foregone litigation 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, at p. 14, that Dr. Dershwitz's analysis was flawed because his conclusions were based on drug levels in the blood instead of drug levels in the brain.

Taylor, at page 16 of his Brief, compares his position here regarding his purported inability to develop and provide testimony from Dr. Melethil to a denial of a continuance. But, while Taylor did object to the timing of the trial in this case in general, he did not request a continuance in the close of evidence to permit him to obtain testimony from his third expert. Even though Taylor admitted the return to town of Dr. Melethil on the morning of January 31, and had received a stay of execution until 5 p.m. on February 1, he did not move for a brief continuance in the close of evidence until later that day or early the next morning to procure the testimony of Dr. Melethil. Given Taylor's failure to make such a motion, he cannot now claim error in this regard on the part of the district court.

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[7]It is also apparent that Taylor was in possession of a transcript of Dr. Dershwitz's testimony from *Johnston v. Crawford* and his affidavit submitted in that case. *See* Declaration of Srikumaran (Sri) K. Melethil, Ph.D., J.D., at ¶ 7.

In any event, Taylor had already presented testimony from two other experts, a trauma specialist and anaesthesiologist and he did not explain to the court how additional evidence from Dr. Melethil would have added anything probative to his claims. Even if Taylor's statements regarding Dr. Melethil could be construed as an implicit motion for continuing the close of evidence for a time, the district court would not have abused its discretion in denying the motion. *See Beard v. Flying J, Inc.*, 266 F.3d 792, 802 (8th Cir. 2001) (no abuse of discretion in denial of continuance where proposed additional witness did not prejudice movant's case).

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.

Taylor has now submitted to this Court a "Declaration of Srikumaran (Sri) K. Melethil, Ph.D., J.D." Because this Declaration is not part of the record before the district court, this Court would not normally consider it. *Dakota Indus., Inc., v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993). Even if this Court determines that the Declaration of Dr. Melethil fits within that rarely applied narrow exception to the general rule that an appellate court may consider only the record made before the district court, *see id.*, the Declaration shows that testimony from Dr. Melethil would have added little to the trial. Nothing in the Declaration calls the district court's judgment into doubt.

The district court, based on the testimony of Dr. Dershwitz, found the 5 gram dose of Thiopental that is administered as the first drug in the lethal injection process to be sufficient to render the condemned unconscious throughout the administration and lethal effect of the second two drugs. Order of January 31, 2006 (Doc. No. 76), at pp. 5-6. *See also* Defendants' Trial Exhibits 1, 3, 4, and 5. Dr. Melethil's speculation in the Declaration about the concentration of Thiopental in the brain over time, based on animal studies and lower dosages of Thiopental than used in Missouri executions, does not undermine the district court's conclusion that Missouri's lethal injection process does not cause wanton pain to condemned prisoners. This is true especially because he does not contradict the evidence that the dose of Thiopental at issue here is not a marginal one, but one that both of Taylor's testifying experts state was lethal in itself. *See* Order of January 31, 2006 (Doc. No. 76), at p. 4.

The Declaration of Dr. Melethil provides no suggestion that a dose of Thiopental sufficient to result in death could permit any return to consciousness between the initial administration of the drug and its lethal effect, much less between the initial administration of the first drug and the administration of the second and third drugs. Any suggestion of a possibility of a return to consciousness that could have been testified to by Dr. Melethil pales to insignificance in light of Dr. Dershwitz's testimony that the 5 gram dose of Thiopental administered as part of Missouri's lethal injection procedure

would, with as near certainty as statistics can determine, render a person unconscious and insensate to pain for hours. The absence of evidence from Dr. Melethil in this case was not prejudicial to Taylor. Even if he had testified, the result would have been the same.

District Court's refusal to permit testimony from medical personnel involved in Missouri's executions. 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 no 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 the Missouri Department of Corrections assigns in any given instance to prepare the drugs and set the IV.

Taylor's contention that the testimony of these witnesses is relevant as to their alertness as to the possibility of pain experienced by the condemned and for their observations at executions, Taylor's Brief, at p. 12, is also of no avail. The alertness of medical personnel to the possibility of pain is not relevant because Taylor's claim here is not inadequate monitoring of executions for distress on the part of the condemned, but whether there is any actual infliction of undue pain by the execution procedure. Considering the thrust of Taylor's claim being that execution by means of the procedure

used in Missouri will mask pain experienced by the condemned, the observations of persons present at executions is not a fruitful or relevant area of inquiry. Even if testimony from persons present at executions is considered at all relevant, it is still properly excludable if its minimal probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

The unfair prejudice at issue here is the risk to the security and privacy of whatever doctor and nurse may be involved in an execution should their testimony in a case lead to notice to the general public of their involvement in executions. If the participating doctor and nurse are identified, this could well lead to them being targeted for harassment or even physical retaliation by offenders, their families, their friends, or others opposed to the death penalty. The district court, in recognition of these important security and privacy interests, declined to require the prison official defendants to disclose the identities of persons directly involved in executions in discovery. Protective Order of October 31, 2005 (Doc. No. 46), at p. 2.

The real possibility that disclosure of the identities of persons directly involved in the execution process may result in harassment and possible physical retaliation may also cause trained medical staff and correctional staff to be hesitant, or to decline, to participate

in the execution process. That would hamper the ability of the State of Missouri to find personnel to carry out state-imposed, constitutionally-authorized, and meticulously-reviewed state death sentences.[8]

Another factor to be considered in weighing process required by Rule 403 is whether the same evidence can be provided by other witnesses. *Mercurio v. Nissan Motor Corp.*, 81 F. Supp. 2d 859, 861 (N.D. Ohio 2000). *See also Woods v. Lecureux*, 110 F.3d 1215, 1219 (6th Cir. 1997) (preclusion of confusing and unfairly prejudicial evidence upheld where district court did not restrict other relevant evidence). The district court here did not restrict Taylor's ability to call other witnesses who have viewed executions in Missouri. There are, in fact, other witnesses to executions who could provide testimony as to their observations of executions, *see* § 546.740, RSMo. Taylor does not claim to have made any effort to obtain such alternative testimony. Further, Terry Moore, Director of the Division of Adult Institutions of the Missouri Department of Corrections, was a witness at the trial in this case. Despite Director Moore's testimony that he had been involved in recent executions, Taylor made no inquiry as to his observations at those executions.

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[8]The prison official defendants also note that Dr. Groner, one of Taylor's experts, conceded during his testimony that he reports physicians with any role in executions to their local licensing authorities for breach of their ethical duties. *See* testimony of Dr. Groner. This kind of threat to a professional's license would impede the ability of a state to obtain the services of medical personnel in the execution process should their identities become known.

Taylor next asserts that he needed to call the medical personnel present at executions to explore their qualifications to perform the activities they engage in at executions. While the qualifications of the doctor and nurse to be assigned by the Department may have some relevance here, Taylor has been provided with that information. The district court assessed Taylor's need for information as to the qualifications of the medical personnel and instructed the prison official defendants to provide him with the information that is reasonably necessary – "information as to the general training, credentials, and qualifications of persons (i.e.: Registered Nurses in the State of Missouri or Licensed Medical Doctors identifying any certified or specialized training) involved in executions in the State of Missouri." Protective Order of October 31, 2005 (Doc. No. 46), at pp. 1-2. Pursuant to this order the prison official defendants have, subject to the protective order, provided Taylor with the qualifications of the doctor and nurse expected to be assigned to his execution, including the information that the doctor is a Missouri licensed physician and a board certified surgeon and that the nurse is a licensed practical nurse. This licensing and certification evidence was also placed into the record at the trial in this case through the testimony of Director Moore.

This evidence of qualifications of the medical personnel was sufficient for Taylor to make his points at trial considering the testimony from his experts that a board certified surgeon was not necessarily qualified to set a femoral vein IV and that neither a board

certified surgeon nor a licensed practical nurse were necessarily qualified to mix Thiopental. Taylor's expert's opinions on these points was contradicted by the prison officials' expert, who testified that a board certified surgeon was well-qualified to set a femoral vein IV and that mixing Thiopental was a simple process of mixing two containers prepackaged by the manufacturer that could be easily learned through demonstration and some practice.

The district court's decisions regarding the need for testimony from, and about, the doctor and nurse struck the proper balance between Taylor's need for information and the prison officials defendants' (and the medical personnel's) concern that identifying the doctor and nurse would result in their safety and security being put at risk from strident death penalty opponents. These decisions did not unduly restrict Taylor's ability to establish his claims. Whatever marginal relevance testimony from the medical personnel may have had here, it was outweighed by the unfair prejudice to the defendants that would have resulted and the ability of Taylor to provide comparable evidence from other witnesses.

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

CONCLUSION

As shown above, the evidence in this case was more than sufficient to support the judgment of the district court and the district court's evidentiary rulings were well-reasoned and well within its discretion. Therefore, the prison official defendants urge this Court to affirm the district court's judgment that Missouri's lethal injection procedure is constitutional. Taylor's execution should also be allowed to proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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 6th day of February, 2006, to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the text of the foregoing document, excluding the Summary and Request for Oral Argument, the Table of Contents, the Table of Authorities, the Certificate of Service, the Certificate of Compliance, and the Addendum, contains 8727 words of proportional spacing as determined by the automated word count of the WordPerfect 9 word processing system used and has 14-point print size, and that the diskette submitted with the instant brief has been scanned for viruses and is virus-free.

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Assistant Attorney General

Addendum

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