IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WESLEY EUGENE BAKER	*	
Plaintiff	*	
v.	*	Civil Action No. 1:05-cv-03207
MARY ANN SAAR, SECRETARY, et al	*	
Defendants	*	

MOTION TO REMAND

Plaintiff, Wesley Eugene Baker, hereby moves this Honorable Court, pursuant to 28 U.S.C. § 1367(c), to remand this action to the Circuit Court for Baltimore City, Maryland, for a determination as to whether the claims already presented in that forum merit relief under state court statutes and caselaw. Plaintiff states the following in support thereof:

INTRODUCTION

1. Before turning to the specific provisions of law which the Defendants cite in support of their contention that Plaintiff's action should be heard by this Honorable Court, it should first be bourne in mind that:

> [b]ecause removal jurisdiction raises significant federalism concerns, federal courts are directed to construe removal statutes strictly. See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09, 61 S. Ct. 868, 872, 85 L. Ed. 1214 (1941). Indeed, all doubts about jurisdiction should be resolved in favor of remand to state court. See *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994) (citing *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108 (3d Cir. 1990); *Coker v. Amoco Oil Co.*, 709 F.2d 1433 (11th Cir. 1983)). A presumption in favor of remand is necessary because if a federal court reaches the merits of a pending motion in a removed case where

> subject matter jurisdiction may be lacking it deprives a state court of its right under the Constitution to resolve controversies in its own courts.

University of S. Alabama v. American Tobacco Co., 168 F.3d 405, 411 (11th Cir. 1999). Or, to put it another way, "By narrowly construing removal statutes, federal courts preserve the independence of state governments." *Somlyo v. J. Lu-Rob Enterprises, Inc.*, 932 F.2d 1043, 1045 (2d Cir. 1991).

2. Against this general backdrop, in "determin[ing] whether the case should be remanded [to state court], the district court must evaluate the factual allegations in the light most favorable to the plaintiff and must resolve any uncertainties about state substantive law in favor of the plaintiff." *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997) (accord *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981)).

3. Plaintiff's state court motion "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy." *Railroad Com. of Texas v. Pullman Co.*, 312 U.S. 496, 498 (1941).

4. It should also be remembered that in the death penalty context, the United States Supreme Court has said time-and-time again that the implementation is to be left to the states. This is, at least in part, due to the fact that each state does it differently. Utah retains the possibility of a firing squad, and Alabama has the electric chair. The highest court in the land has made it clear that so long as the process falls within the broad parameters it has laid down, the death penalty is primarily a state issue. The enactment by Congress of the AEDPA in 1996 significantly curtailed the review conducted by Federal courts in the death penalty context again, presumably, because it is an issue that should primarily left up to the states - - and the state courts. At the habeas level the

Federal courts consider only whether a state court's action is "contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States." The march, therefore, is towards allowing the state to determine which of its citizenry is eligible for death, and the manner in which the penalty should be effected.

5. It would be a reversal of this trend for this Court to pass judgment on state law claims, particularly in light of the fact that Defendants have not suggested that an adequate state forum exists. This issue is premature until such times as the courts of Maryland have determined the laws of Maryland. Comity dictates that this Court show restraint.

6. The Defendants claim that jurisdiction vests in this Honorable Court "pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). This action is therefore subject to removal to this Court pursuant to 28 U.S.C. §§ 1441(b) and (c). This Court has supplemental jurisdiction of the state law claims pursuant to 28 U.S.C. § 1367(a)."

7. Taking each component of the Defendant's statements in turn:

28 U.S.C. § 1331

8. This provision states that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 Certainly the Plaintiff has no quarrel with this: it is the federal courts that should decide Federal questions of law. The problem, however, is that only a small portion of Plaintiff's case rests on the Constitution, and not even a smidgeon of it relies on the laws or treaties of the United States. As Defendants acknowledge, the only conceivable Federal basis upon which Plaintiff's claim rests is "cruel and unusual" under the Eighth Amendment and it's applicability to the states through the Fourteenth Amendment.

9. A closer look at Plaintiff's state court complaint, however, evinces that his Eight Amendment claim is only one facet of Plaintiff's case. Indeed, it is noteworthy that the first substantive area of law briefed by Plaintiff is that

> administrative regulations cannot contradict state statutes nor can administrative agencies disregard a statute. Further, an executive agency may not adopt regulations without following the strict procedures prescribed by this State's Administrative Procedure Act (APA). Prior to adopting the Execution Protocol utilized by the Division of Correction (DOC) to carry out the legislative mandate contained in Md. Code Ann., Corr. Serv. §3-905, the Department of Public Safety and Correctional Services (DPSCS), the umbrella agency covering the DOC, was required to submit the protocol to the Attorney General or unit counsel for approval as to its legality, submit the proposed regulation to the General Assembly's Joint Committee on Administrative, Executive, and Legislative Review (AELR Committee) at least 60 days prior to its adoption, publish the proposed regulation in the Maryland Register at least 45 days prior to its adoption, and, after adopting the Execution Protocol, submit the full text of the regulation to the Administrator of the Division of State Documents for publication in the Maryland Register and the Code of Maryland Regulations (COMAR). Defendants did none of these things. Instead, the document utilized to take human life was drafted in complete secrecy.
>
> Also, by failing to abide by Md Code Ann., Correctional Services § 3-905 in carrying out executions, the Department of Corrections is in violation of state law, and also in violation of the doctrine of separation of powers as the "Execution Procedures" constitute an illegal exercise of administrative authority. Quite naturally, and per the APA, an executive agency may not regulate beyond their legislative grant of authority.

Plaintiff led off with his strongest argument, and it did not in any way, shape, or form include a claim of Constitutional proportions. Similarly when the reader gets to the section entitled argument there, front and center, is the APA argument.

10. On the first occasion that Plaintiff does discuss the Eighth Amendment he includes a footnote which states that " The portions of the Maryland Declaration of Rights dealing with cruel and unusual punishment have been interpreted to mean the same as the Eighth Amendment prohibition of cruel and unusual punishment. *Aravanis v. Somerset County,* 339 Md. 644, 656, 664

A.2d 888, 894 (1995)." Clearly, therefore, Plaintiff makes no claim specific to the rights afforded him by the United States but, rather, he makes a claim that sits equally well in state or federal court.

28 U.S.C. § 1343(a)(3)

11. This section is entitled "Civil Rights and Elected Franchise," and it states, in relevant part that "[t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." This section is manifestly inapposite to the Maryland Administrative Procedures Act, upon which a substantial part of Plaintiff's claim rests.

12. Further, there is no conceivable basis upon which Defendants can maintain that there is somehow a common nucleus of operative fact. Plaintiff's APA claim rests on whether a state regulation was correctly enacted, and whether it is correctly followed as it pertains to the number of drugs and the continuous nature of their administration. It is plainly a matter of state law. Plaintiff's Eighth Amendment claim concerns whether he will be tortured to death. In Maryland, its Declaration of Rights provisions as they pertain to cruel and unusual have been determined to mirror the Eighth Amendment. As such, Plaintiff's complaint primarily concerns matters of state law.

28 U.S.C. § 1367(a)

13. This statute states, in relevant part, that:

> except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of

the United States Constitution.

While sub-paragraph (b) is not directly on point, sub-paragraph (c) requires that:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if–
>
> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

What the U.S. Supreme Court interprets this to mean is that "the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

14. An interesting parallel is *Doe v. Sundquist*, 106 F.3d 702 (6th Cir. 1997). In that case the court declined to exercise supplemental jurisdiction, holding that it "decline[d] to exercise supplemental jurisdiction, finding that at least one of the § 1367(c) factors applies, namely, subsection (c)(1)." Id. at 708. In determining that a novel issue of state law was involved, the court considered a statute enacted six months prior in the state which "[t]he plaintiffs allege that the statute violates **both the** U.S. Constitution and the Tennessee Constitution." Id. at 704. (Emphasis supplied). The appellate court frankly observed that "[t]his case would have been better brought in state court in the first place, and we deem it prudent to allow the Tennessee courts to decide the purely state law issues." Id. at 708.

15. As stated in Plaintiff's Memorandum of Law at the state court, *Massey v. Secretary*, is but nine (9) days old. There are few, if any, practitioners before the courts of Maryland that have

yet to fully comprehend its import. In short: Plaintiff's claim foresquarely "raises a novel [and] complex issue of state law." Moreover, Plaintiff's argument at the state court was that "[t]he Execution Protocol is a regulation that must be adopted per the APA. As it was not, a declaratory judgment should be entered in Plaintiff's favor." This is purely a question of state law. Accordingly, the first prong of Plaintiff's argument predominates (the APA claim) and if he is successfully the adjudicator never gets to the second prong. Plaintiff's'cruel and unusual punishment' claim rests on *terra firma* whether it is couched in terms of the U.S. Constitution, or the Maryland declaration of rights.

16. Plaintiff also reminds this Honorable Court that it is his position that the Department of Corrections has created legislation, thereby violating the separation of powers. While Federal courts should always be wary of invading the provinces of the states, this is never more true than when referring to state intergovernment conflicts. As one court put it:

> Counts Six and Seven of the Sixth Amended Complaint charge violations of State law. Hallco charges that the County is usurping the legitimate authority of the [Texas National Resource Counsel] and also violating a provision of the Texas Government Code. Even if the Court retains any federal claim, a federal court should be slow to entertain state claims of this kind. See *Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993) (affirming dismissal of pendent state law claim involving state election laws). **They raise the question of intergovernmental state conflicts and novel questions of state law that are much more appropriately addressed by a state court. Guided by 28 U.S.C. § 1367(c)(1), the Court is inclined to decline supplemental jurisdiction over these state court claims, especially since a parallel state court suit exists.**"

Hallco Tex. v. McMullen County, 934 F. Supp. 238, 242 (D. Tex. 1996); *affd without op.*, 109 F3d 768 (5th Cir. 1997) (emphasis supplied).

CONCLUSION

17. "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Railroad Com. of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941).

18. A compelling reason exists to allow the state court to hear this matter, and it would be manifestly unjust if this Honorable Court told the State of Maryland how to interpret its laws before giving it a chance to do so. Comity dictates that Plaintiff be allowed to exhaust his state court claims prior to any hearing by the Courts of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November, 2005, a copy of the foregoing Motion was mailed, first-class postage prepaid, to Scott S. Oakley Esq., Assistant Attorney General, Maryland Department of Safety and Correctional Services, 6776 Reiserstown Road, Suite 313, Baltimore MD 21215.

s/s
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