

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TIMOTHY JOHNSTON,)	
)	
Plaintiff,)	Case No. 4:04CV1075 DJS
)	
vs.)	THIS IS A CAPITAL CASE
)	
LARRY CRAWFORD, et al.,)	PLAINTIFF’S EXECUTION IS SET
)	FOR AUGUST 31, 2005
Defendants.)	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S
MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

COMES NOW plaintiff, Timothy Johnston, by and through counsel, Michael J. Gorla and Christopher E. McGraugh, and submits the following memorandum of law in support of plaintiff’s motion for temporary restraining order and preliminary injunction.

Procedural History

Petitioner filed the instant claim under 42 U.S.C. § 1983 on August 16, 2004, alleging that Missouri’s specific method of lethal injection under which he is going to be executed would violate his Eighth Amendment right to be free from cruel and unusual punishment. More specifically, plaintiff alleged that Missouri’s current three chemical lethal injection procedure and the methods employed by the defendants to implement the same, including the use of unqualified and untrained personnel, would subject him to a painful and protracted death.¹

The case was originally assigned to United States District Judge Stephen N. Limbaugh. Shortly after receiving this assignment, Judge Limbaugh recused himself from the case and the matter was reassigned to United States District Court Judge Donald J. Stohr. This matter has been

¹Doc. #1.

pending before Judge Stohr since October 5, 2004, winding it's way through his Court on the normal path of a Track 3 - complex case.

In June of 2005, Judge Stohr made significant rulings in the case. On June 13, 2005, Judge Stohr denied defendants' motion to dismiss.² Subsequently on June 23, 2005, Judge Stohr sustained, for the most part, plaintiff's motions to compel defendants' answers to his first set of interrogatories.³ He also ordered the parties to confer and attempt to craft a protective order limiting the use and disclosure of the identities of corrections personnel involved in the execution process. He directed that the defendants' answer plaintiff's first set of interrogatories within twenty (20) days after the Court's entry of a protective order.⁴ On June 22, 2005, Judge Stohr assigned the case to a Track 3 - complex schedule, and ordered the parties to prepare a joint proposed scheduling plan.

On August 1, 2005, the Missouri Supreme Court set plaintiff's execution for August 31, 2005. On that same date, the parties filed an agreed protective order limiting the use and disclosure of the identities of corrections personnel involved in executions, and a joint proposed scheduling plan. The protective order was approved by the Court on August 3, 2005,⁵ making defendants' answers to plaintiff's first set of interrogatories due on August 23, 2005.

Because of the scheduled execution date, plaintiff filed a motion on August 5, 2005 seeking an order expediting discovery in this case and ordering defendants to answer plaintiff's

²Doc. #33.

³Doc. #37.

⁴*Id.*

⁵Doc. #45.

interrogatories within five (5) days.⁶ In said motion, plaintiff informed the Court that he was planning on filing an application for temporary restraining order and preliminary injunction, and needed the answers to the interrogatories in order to prepare the same. The defendants responded by filing on August 8, 2005, a motion to expedite the hearing on the merits seeking a hearing on August 10, 11 or 12, 2005.⁷ On August 8, 2005, the Court issued its order expediting discovery and ordering defendants to answer plaintiff's interrogatories no later than August 13, 2005.⁸ In that same order, the Court denied defendants' motion to expedite the hearing. Defendants provided plaintiff with their answers to his first set of interrogatories on August 12, 2005.

On August 16, 2005, defendants filed a motion for summary judgment along with a memorandum in support thereof.⁹ On that same day, defendants also filed a motion seeking to shrink plaintiff's time to respond to said motion from twenty (20) days to five (5) days, and sought a hearing on their motion for summary judgment on August 23, 2005.¹⁰ On August 18, 2005, plaintiff filed his motion in opposition to defendants' motion to expedite.¹¹ Said matter is currently under submission to the Court.

On this day, plaintiff has filed his motion for temporary restraining order and preliminary injunction, and submits this memorandum in support of his position that this Court should enjoin

⁶Doc. #46.

⁷Doc. #47.

⁸Doc. #49.

⁹Docs. #58, 59.

¹⁰Doc. #60.

¹¹Doc. #61.

the state from executing him under its current lethal injection protocol so as to give him the opportunity to litigate the merits of his constitutional claim.

Standard for Granting a Preliminary Injunction

The standard for granting a preliminary injunction is set out in *Dataphase Systems, Inc. v. CL Systems, Inc.*¹² The base question is “Whether the balance of equities so favors the movant that justice requires the Court to intervene to preserve the status quo until the merits are determined.”¹³ In balancing the equities, the relevant factors to be considered are: “(1) [T]he threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.”¹⁴ Neither of these factors, including the probability of success, is determinative in and of itself as to whether a preliminary injunction should issue. The probability of success on the merits must be viewed in “context with the relative injuries to the parties and the public.”¹⁵ Where the balance of other factors “tips decidedly” toward the movant “a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation.”¹⁶

Consideration of the relevant factors set out in the *Dataphase* case show that plaintiff is entitled to the issuance of a temporary restraining order and preliminary injunction because the

¹²640 F.2d 109 (8th Cir. en banc 1982).

¹³*Id.* at 113.

¹⁴*Id.* at 114.

¹⁵*Id.* at 113.

¹⁶*Id.*

balance of factors tip decidedly in his favor, and he has raised questions so serious and difficult as to call for more deliberate investigation.

The Threat of Irreparable Harm to the Plaintiff Is Grave

In the absence of a temporary restraining order and preliminary injunction staying his execution, movant will be irreparably harmed in that he will be executed under Missouri's current lethal injection protocol, one that creates an unjustifiable risk that he will suffer a painful and protracted death. Movant will be subjected to a three chemical sequence using unnecessarily painful methods administered by unqualified personnel who lack the ability to monitor and insure that his execution will meet constitutional standards. A description of Missouri's current method of execution under which they intend to execute Mr. Johnston, as well as the lack of qualifications of the personnel implementing the same, is fully described in the section of this memorandum dealing with the probability of success on the merits.¹⁷ In an effort to avoid duplication, plaintiff refers the Court to that section of his memorandum.

The Irreparable Harm Resulting to Plaintiff is Significantly Greater than the Harm Resulting to Defendants from the Issuance of the Injunction

Granting the preliminary injunction will have little or no effect on the defendants. The defendants will still get to execute plaintiff if the defendants ultimately prevail on the merits of this case. The disadvantage to defendants is that plaintiff's execution will be delayed. This pales in comparison to the harm that plaintiff will sustain absent the issuance of a temporary restraining order and preliminary injunction - a painful and protracted death.

¹⁷*Infra* p. 6-13.

There is a Reasonable Probability of that Plaintiff Will Prevail on the Merits

As stated in the complaint, defendants intend to execute Mr. Johnston with unreliable and arbitrary drugs, administered by inadequately trained personnel using inappropriate equipment and arbitrary methods to cause him a pain and protracted death. The limited discovery that has been provided to plaintiff shows that these allegations will likely find their mark.

Defendants intend to execute plaintiff by using a three chemical sequence involving sodium pentothal (thiopental), pancuronium bromide, and potassium chloride. The procedure is designed to work as follows: the thiopental, an ultra-short acting barbiturate, will render the prisoner unconscious, the pancuronium bromide will stop his lungs, and the potassium chloride will stop his heart. The humane aspect of this procedure will necessarily fail if the thiopental - whatever the dosage - is not properly delivered to the prisoner. Neither the pancuronium bromide nor the potassium chloride has anesthetic or sedative properties while both will cause the prisoner to suffer excruciating pain.¹⁸

Pancuronium bromide is a neuromuscular blocking agent which has the effect of paralyzing all voluntary motions but does not effect sensation, consciousness, or the ability to feel pain and suffocation. Pancuronium bromide renders a person completely paralyzed so that no voluntary movement of any kind can be achieved. Pancuronium bromide will paralyze the muscles that will enable an individual to breath, and will cause a person to slowly suffocate. Due to it's blocking effect, pancuronium bromide will prevent the prisoner from expressing that he was conscious and suffering.¹⁹ In fact, the 2000 report of the American Veterinary Medical Association opines that the

¹⁸See Aff. Mark Heath, M.D., ¶¶ 29, 40, 42.

¹⁹*Id.* at ¶¶ 27-29.

combination of a barbiturate with a neuromuscular blocking agent is not an acceptable euthanasia agent.²⁰

The intravenous administration of the third drug in Missouri's chemical sequence, concentrated potassium chloride, is extremely painful absent proper anesthetic sedation. It activates the sensory nerve endings in the veins as it travels to the heart, causing an excruciating burning sensation.²¹ There are many possible alternative drugs that are equally effective in causing cardiac arrest but do not cause such pain.²² The administration of potassium chloride will activate the nerve endings of his veins causing intense pain as it travels to his heart will cause him a massive and painful heart attack.²³

Missouri's Use of the Femoral Vein to Gain IV Access is Unnecessary and Painful

Beginning with the procedure used to gain intravenous access, the methods employed by Missouri to implement its three chemical sequence do not contain proper safeguards to insure that the prisoner is properly anesthetized prior to the administration of pancuronium bromide and potassium chloride first. The drugs will be administered intravenously through an IV started in his femoral vein using a device called a triple lumen catheter. Insertion of this device in his femoral vein is a sophisticated surgical procedure which will cause Johnston unnecessary pain and suffering and will, in and of itself, violate his right to be free from cruel and unusual punishment.

²⁰*Id.* at ¶¶ 36, 38.

²¹*Id.* at ¶¶ 41, 42.

²²*Id.* at ¶ 43.

²³*Id.* at ¶¶ 41, 42.

As detailed in the affidavit of Jonathan I. Groner, M.D., a board-certified general surgeon who is the Trauma Medical Director of Children's Hospital in Columbus, Ohio and a Clinical Associate Professor of Surgery at the Ohio State University College of Medicine and Public Health, the insertion of femoral central lines to gain IV access can be extremely painful. Specifically, the technique "involves inserting a large needle directed to an anatomic landmark in order to puncture the vein. Once the vein is punctured, a wire is passed into the vein, then a scalpel is used to make a small incision where the guidewire enters the skin, then the catheter is passed over the guidewire and into the vein."²⁴ The defendants' use of a triple lumen catheter exacerbates matters.

Triple lumen catheters are highly sophisticated metal devices and has three separate channels, approximately 15 cm longer than a standard peripheral IV.²⁵ According to Dr. Groner, the use of a femoral central lumen catheter creates a substantial risk of inflicting severe and unnecessary pain and suffering.²⁶ The femoral vein lies close in proximity to the femoral artery and femoral nerve. Even if local anesthesia is used in the skin at the puncture site, accidental puncture of the artery and/or accidental puncture of the femoral nerve would be excruciatingly painful. The same will hold true "if the needle passes through the vein and strikes the bones in the pelvis which lie below the vein."²⁷ In paragraph 16 of his affidavit, Dr. Groner lists numerous complications involved in obtaining IV access through the femoral vein. Said complications include "severe pain; hemorrhage/hematoma at the catheter site; unrecognized arterial catheter placement; catheter tip

²⁴Aff. Jonathan I. Groner, ¶ 13 (August 18, 2005).

²⁵*Id.* at ¶ 21.

²⁶*Id.* at ¶ 22.

²⁷*Id.* at ¶ 13.

malposition, in which case the catheter tip lies outside the vein; air embolism resulting in sudden death; hemorrhage into the abdomen; and femoral arterial inclusions, causing severe leg pain; and perforation of the heart by the medical guidewire used in the catheter insertion procedure.” Two of the above-described complications - unrecognized arterial catheter placement and catheter tip malposition - make Missouri’s lethal injection process exceedingly painful because the drugs would flow down the leg instead of the heart and brain, and be absorbed slowly, causing a slow, tortuous death.

Defendants’ proffer no reason for establishing IV access through a femoral vein and using a triple lumen catheter to deliver the drugs. Access can be gained by the insertion of the standard peripheral IV. According to Dr. Groner, a peripheral IV is the preferred procedure unless “the patient has absolutely no visible veins; the patient is in shock and the peripheral veins are collapsed or inaccessible; or the patient needs venous pressure monitoring during an operation.”²⁸ Femoral line insertions are dangerous and uncomfortable procedures to be performed only in dire situations and in a rare case where there are absolutely no veins for the standard peripheral IV.²⁹ The use a femoral central line and the insertion of a triple lumen central catheter at said site will subject plaintiff to unnecessary pain and suffering in violation of his Eighth Amendment rights.³⁰

²⁸*Id.* at ¶ 17.

²⁹*Id.* at 18.

³⁰*See, e.g., Nelson v. Campbell*, ____ U.S. ____, 124 S.Ct. 2117 (2004).

Missouri's Protocol Does Not Provide for any Monitoring of IV Site

Under Missouri's execution protocol, the executioners are in an adjacent room during the execution. While they can see the prisoner, they can't see the IV site.³¹ Most likely, the IV site is hidden by the prisoner's pants. As a result, the executioners have no way of knowing whether or not the IV is leaking or whether there are any developing complications at the IV site. A leaking or malfunctioning IV which fails to properly dispense the thiopental creates a reasonable likelihood that the prisoner will conscious during the painful administration of pancuronium bromide and potassium chloride.³²

Missouri's Protocol Does Not Provide Any Monitoring of the Level of Anesthesia

Whenever a medical professional uses a barbiturate with a neuromuscular blocking agent, such as pancuronium bromide, it is essential that a qualified medical person monitor anesthetic depth prior to the administration of the blocking agent. The reason for this is that the blocker places a chemical veil over the individual, paralyzing him and making it impossible for a witness to make a meaningful determination as to whether or not the execution is being conducted without the infliction of pain.³³

Missouri's current lethal injection protocol contains no provision for the monitoring of a prisoner's level of anesthesia prior to the administration of pancuronium bromide. Because of the paralyzing effect of pancuronium bromide, the prisoner's anesthetic depth cannot be verified by the eye alone. Necessary monitoring equipment, such as an EKG and blood pressure cuff, would have

³¹See deft. Purkett's interrog. ans. No. 6.

³²Aff. Heath ¶ 23.

³³*Id.* at ¶ 32.

to be present and used under the supervision of an individual trained to assess anesthetic depth in order to be effective. The failure of the defendants to verify “anesthetic depth prior to the administration of pancuronium bromide and later prior the administration of potassium chloride constitutes an unacceptable risk that the inmate will be conscious during the execution, and will experience excruciating torments of conscious paralysis and intravenous concentrated potassium chloride.”³⁴

The Qualifications of Involved Corrections Personnel is Highly Suspect

The qualification and training of the corrections personnel involved in the execution process is critical to insure that the prisoner’s execution is within the confines of the Eighth Amendment. Preparation of drugs, particularly for intravenous use, is a technical task requiring significant training in pharmaceutical concepts and calculation.³⁵ According to Larry Crawford, the Director of the Missouri Department of Corrections in charge of executions, the drugs used for execution are prepared and mixed by a physician and a nurse approximately one hour before the execution. The great majority of nurses are not trained in the use and preparation of ultra-short acting barbiturates such as thiopental. This class of drugs is traditionally used only by nurses who have significant experience in intensive care units and by nurse anesthetists.³⁶ The scant information disclosed by the defendants about the qualifications, training, and experience of the nurse and doctor involved in the execution process is insufficient to insure that they are qualified to work with the chemicals used in the lethal injection process. Further investigation is necessary regarding their training,

³⁴*Id.* at ¶ 49.

³⁵*Id.* at ¶ 53.

³⁶Heath Aff, ¶ 55.

credentials, and experience to see if, in fact, they are properly qualified to work with anesthetizing drugs.

According to defendant Crawford's answers to plaintiff's interrogatories, the last three corrections employees who acted as executioners had degrees, respectively, in mathematics, criminal justice administration, and a masters in criminal justice with an undergraduate in management.³⁷ Although plaintiff has learned through interrogatories that a doctor provides direction to the executioners during the execution process, plaintiff has not been told the nature of said directions.

The information about the doctor is just as vague as the information given about the executioners. Other than where he graduated from college, attended medical school, and completed is residency, all plaintiff knows is that he is a board-certified surgeon. Plaintiff was not told what type of surgery the doctor is certified to perform. In addition, plaintiff has not been provided with any information regarding the doctor's experience in the placement of femoral central lines. According to Dr. Groner, placement of a femoral venous central line and the insertion of a triple lumen venous catheter is a sophisticated operation that is performed by specialists and that many surgeons would not know how to do this procedure.³⁸

Given the affidavits of Drs. Heath and Groner, and Missouri's current lethal injection procedure, specifically, it's unnecessary and painful use of the femoral vein to gain IV access, the failure of corrections personnel to monitor the level of anesthesia prior to the administration of pancuronium bromide and potassium chloride, their failure to monitor the IV site, and the total lack of medical training or qualifications of the executioners, a reasonable probability exists that plaintiff

³⁷See deft. Crawford's interrog. ans., No. 3(f).

³⁸Groner Aff. ¶¶ 14-15.

will prevail on the merits of this case. At the very least, plaintiff has raised serious, substantial, and difficult questions which call for a more deliberate and extensive investigation. Plaintiff should be allowed to avail himself of the normal avenues of discovery normally available to a § 1983 plaintiff who raises a justiciable claim, and allowed to prosecute his case.

The Public Interest

The state concededly has a public interest in proceeding with its criminal judgments, including sentences of death, in a timely manner. Besides the likelihood of success on the merits and the relative harms to the parties, the Court also considers whether the prisoner has delayed unnecessarily in bringing his claim in making its determination of whether or not to enjoin an execution. It is clear that petitioner's § 1983 action does not fall into that category of cases.

This was not a last minute filing. Petitioner filed this instant action on August 16, 2004, when it became apparent that his other state and federal remedies had been or were about to be exhausted. It was only at that time that a challenge to Missouri's specific method of execution was ripe.³⁹ Up to that point, the state was free to alter or modify its execution protocol.

Additionally, this case was filed within months of the United States Supreme Court decision in *Nelson v. Campbell*.⁴⁰ The *Nelson* decision, issued on May 24, 2004, was the first case which suggested that suits challenging specific methods of execution as being cruel and unusual in violation of the Eighth Amendment could be brought in a civil rights action under § 1983. Petitioner filed his claim within three months of the *Nelson* decision

³⁹See *Worthington v. Missouri*, 2005 WL 274385 *13, n.3 (Mo.banc Aug. 2, 2005).

⁴⁰124 S.Ct. 2117 (2004).

Further, the public has an interest in determining whether lethal injections are fairly and humanely administered.⁴¹ Given the fact that plaintiff filed this action a year ago at a time when it became apparent that his state and federal habeas remedies were exhausted, and within less than three (3) months of the Supreme Court's issuance of the *Nelson* decision, the public's interest in insuring that executions are humanely administered trumps the interest of the state. The public interest favors the issuance of a preliminary injunction enjoining the defendants from executing plaintiff under its current specific method of execution.

Conclusion

As explained by the Eighth Circuit in the *Dataphase* case, a movant seeking preliminary relief does not have to show “greater than a 50 percent likelihood that he will prevail on the merits.”⁴² A preliminary injunction may issue where the balance of the other equities tips decidedly in favor of a movant in a situation where movant has raised questions so serious and difficult as to call for more deliberate investigation. Plaintiff has clearly met the standard and, accordingly, is entitled to a temporary restraining order and preliminary injunction enjoining the defendants from executing him under Missouri's current lethal injection protocol until the resolution of his constitutional claims.

⁴¹See *California First Amendment v. Woodford*, 299 F.3d 868, 876 (9th Cir 2002).

⁴²*Dataphase*, 640 F.2d at 113.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2005, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following: Ms. Denise G. McElvein, Assistant Attorney General, Attorney for Defendants Crawford, Roper, and Purkett, Wainwright State Office Building, 111 N. 7th Street, Suite 934, St. Louis, Missouri 63101;

I hereby certify that on August 18, 2005, the foregoing was served via facsimile at (573) 751-5391 and United States Postal Service to the following non-participants in Electronic Case Filing: Mr. Stephen D. Hawke, Assistant Attorney General, 1530 Rax Court, Jefferson City, Missouri 65109.

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