

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

DAVID LARRY NELSON,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 2:03cv1008-T
)	
RICHARD ALLEN, et al.,)	
)	
Defendants.)	

**DEFENDANTS' BRIEF ON THE FINDINGS OF THE COURT'S
INDEPENDENT MEDICAL EXPERT AND MOTION FOR SUMMARY JUDGMENT**

This Court, after receiving this case on remand from the United States Supreme Court, recognized that it needed assistance in answering relevant medical questions. See Oct. 6, 2004, status conference transcript, at pp. 19-20. At the next status conference, this Court reiterated its need for an independent court expert. Specifically, the Court stated: "I'm ready to find out exactly what the peripheral vein access procedure is, what the percutaneous subclavian line procedure is so that I can dispose of this case." See April 12, 2005, status conference, p. 12.

This Court subsequently entered an order that accepted the report and recommendation of Special Master Dave Boyd regarding the physical examination of Nelson to be performed by Dr. Warren Bagley, the Court's own chosen

independent medical expert. See Doc. 83. In that order, the Court stated that Dr. Bagley is to "assist the Court in understanding outstanding issues of fact." Doc. 83 at 1. The order listed the issues of fact that, in the Court's view, were outstanding. The order concluded by stating that Dr. Bagley "will do a physical examination of Plaintiff David Nelson and produce a written report to the Court in order to assist it in understanding the questions and issues raised in this case as specified in this order." Doc. 83 at 5.

On October 11, 2006, Dr. Bagley "examined Mr. Nelson with regards to obtaining venous access, visually and with palpation, and sonographically." Doc. 110, Ex. 1, p. 2. Dr. Bagley, in compliance with this Court's order, see Doc. 83 at 5, has filed a written report answering the Court's questions on the relevant issues of fact. Based upon Dr. Bagley's report, which expressly concludes there are several locations upon which peripheral venous access can be achieved, the State respectfully requests this Court enter an order denying relief to Nelson.

This Court previously denied, without prejudice, two motions for summary judgment filed by the State. Docs. 42, 63, and 102. Now that the Court's independent medical expert has filed his report regarding Nelson's physical condition as it pertains to the issue of gaining venous access for the purposes of carrying out an execution by lethal injection, the State again respectfully requests that this Court issue an appropriate order granting summary judgment.

In his report, Dr. Bagley concludes that Nelson "has readily accessible peripheral veins" and that access to "central veins will not be necessary to obtain venous access on David Larry Nelson." Doc. 110, Ex. 1, p. 13. Dr. Bagley's report lists three locations on Nelson's body where peripheral veins can be accessed by "most persons with basic intravenous skills."¹ Doc. 110, Ex. 1, p. 13. (emphasis added.) These sites include the saphenous vein near the left ankle, the saphenous vein near the right ankle, and the basilica vein found on the inside part of

¹ Dr. Bagley also found that the left and right external jugular veins are accessible peripheral veins but further stated that cannulation is "difficult ...unless the operator has had some experience in cannulating it specifically." Doc. 110, Ex. 1, p. 9. Dr. Bagley noted that medical doctors and military combat medics are experienced at accessing this vein along with "some EMT/paramedics." Id.

the right arm.² Doc. 110, Ex. 1, p. 13. These three sites provide sufficient access to allow the State to take the necessary steps for carrying out Nelson's sentence, without resort to any additional procedures. Importantly, Dr. Bagley has determined that they do not require highly trained specialists, as Nelson has alleged.³ Doc. 110, Ex. 1, p. 13.

This Court has already enjoined the State of Alabama from using the "cut down" procedure, which formed the basis of Nelson's original complaint. To the extent Nelson's second amended complaint also challenges the use of a "cut down" procedure as a predicate to gaining venous access, this Court's order has mooted this issue and sufficiently protected Nelson's alleged interest.

Furthermore, based on Dr. Bagley's findings, the remainder of Nelson's second amended complaint is moot. Nelson's second amended complaint challenges the use of predicate procedures in cases where peripheral intravenous access is not possible. Doc. 60, p. 16, para. 75. ("For

² It should be noted that Dr. Bagley's report indicated he examined six places on Nelson's body and found that five of those places could accommodate peripheral vein access. Doc. 110, Ex. 1, p. 13.

³ Nelson's counsel, without any supporting documentation, has described central line placement as a "surgical procedure", see Oct. 6, 2004, status conference at p. 14, which is a "specialty." Id. at p. 17.

this Court and for the public to determine whether lethal injection execution in the State of Alabama is being humanely administered in cases where peripheral intravenous access is not possible, the State of Alabama must disclose reliable information about its lethal injection protocol and the mandated medical procedures that will be employed to gain venous access in condemned prisoners.”) (emphasis added) Based on Dr. Bagley’s express findings, Nelson’s execution may be carried out through standard peripheral intravenous access, using personnel with basic intravenous skills.⁴ Notably, the fact that Dr. Bagley’s findings could effectively moot this case was previously foreseen by the Court. See April 12, 2005, status conference transcript at p. 14, lines 8-11 (“...I thought that if Nelson is accessible through the traditional procedure, then perhaps this case is moot.”)

⁴ Nelson’s second amended complaint is replete with assertions that he does not contest the ordinary peripheral intravenous access method for carrying out a lethal injection. Doc. 60, pp. 16-17, 26, 32 paras. 79, 82, 111, 135. (“...the Plaintiff’s execution will mark the first instance of the State of Alabama having to first perform an invasive medical procedure on a condemned inmate to gain venous access...”; “Failure to provide injunctive relief will result in irreparable harm in that the Defendants will perform the above-described cut-down procedure on the Plaintiff...”; “If the Defendants intend to perform a percutaneous central line placement procedure...”; “If the percutaneous central line placement procedure performed on the Plaintiff is not performed by a qualified physician...”).

Accordingly, there is nothing in the second amended complaint attacking the State of Alabama's ability to carry out Nelson's lethal injection using one of the three aforementioned sites disclosed by Dr. Bagley. Cf. Nelson v. Campbell, 541 U.S. 637, 648 (2004) (citing 18 U.S.C. § 3626(a)(2)) ("Preliminary injunctive relief [in prison conditions cases] must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm."). The existence of these three sites provides the State primary, secondary, and tertiary sites. Because Nelson's execution may proceed without the need for any so-called "medical procedure," there is no basis, or cause of action, before the Court to prevent the State from proceeding with ordinary peripheral venous access.

Thus, the time has come for this Court to end the present litigation. The State should be allowed to carry out Nelson's execution using the three aforementioned peripheral venous access sites.

It is only if the defendants must proceed beyond the sites identified by Dr. Bagley that any of the plaintiff's causes of action are even implicated. Plaintiff's allegations regarding the qualifications and experience of personnel cannulating percutaneous central line placements are simply not implicated where such a procedure is not needed and, thus, not employed. Further, based on previous positions adopted by Nelson during this case, he should be judicially estopped from asserting his causes of action regarding percutaneous central line placements.

Plaintiff's position before the Supreme Court was limited to challenging procedures that were gratuitous and unnecessary to gaining venous access. Nelson, 541 U.S. at 645-646 ("But petitioner has been careful throughout these proceedings, in his complaint and at oral argument, to assert that the cut-down...are wholly unnecessary to gaining venous access. Petitioner has alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled."). To the extent that Nelson has previously defined his position in these proceedings as objecting to the use of the cut-down procedure, claiming it is wholly unnecessary to gaining

venous access, he is now judicially estopped from contesting the use of peripheral venous access – areas deemed “readily accessible” by this Court’s independent expert – as well as percutaneous central line placement. See Palmer & Cay, Inc. v. Marsh & McLennan Companies, Inc., 404 F.3d 1297, 1307 n.16 (11th Cir. 2005); Burnes v. Pemco Aeroplex Inc., 291 F.3d 1282, 1285 (11th Cir. 2002).

In an October 7, 2003, telephone conference with this Court, counsel for Nelson stated “...we are truly trying to get an honest assessment of Mr. Nelson’s venous situation, and we just want to do what we can do so that the procedure before they lethally inject him so that that procedure is as humane as it can be under current medical procedures.” Oct. 7, 2003, telephone conference transcript, p. 35, lines 13-18. The Court now has the “honest assessment” that Nelson sought, and Dr. Bagley has found that venous access can be achieved through the use of the least invasive procedure possible, that being via peripheral venous access. Counsel’s earlier assurances to this Court would be rendered meaningless if Nelson were now allowed to object to the use of peripheral access to carry out his lethal injection.

Nelson's conduct before the Supreme Court of the United States should likewise trigger judicial estoppel. As then noted by counsel for Nelson, "A percutaneous insertion would be very easy to accomplish." Transcript of Oral Argument, Nelson v. Campbell, No. 03-6821, March 29, 2004, p. 17, lines 1-2. Shortly thereafter, counsel for Nelson asserted, "Mr. Nelson doesn't even object to venous access. What he objects to is some kind of inhumane cutting by people who are not qualified or competent to do that." Transcript of Oral Argument, Nelson v. Campbell, No. 03-6821, March 29, 2004, p. 18, lines 16-18. (emphasis added) In his rebuttal, counsel candidly conceded: "Well, if-if the State had then and now would concede that percutaneous line placement would be an acceptable method, then yes. That's all we were seeking." Transcript of Oral Argument, Nelson v. Campbell, No. 03-6821, March 29, 2004, p. 60, lines 6-9. Counsel summarized Nelson's case by stating, "Until we can go to the district court, go to a court, and enforce any of these representations [that a cut-down would not be used and that a percutaneous line placement would be used], we are at risk. And that is all we are asking. That's all Mr. Nelson asked in the first instance. And the

irony, of course, is if it had been permitted to proceed, I think we would have resolved this. He'd already be executed." Transcript of Oral Argument, Nelson v. Campbell, No. 03-6821, March 29, 2004, p. 60, lines 12-19)⁵

Finally, but perhaps most starkly, counsel for Nelson has represented to this Court that "there is no way this lawsuit would still be alive if it was reasonable to believe that you could gain peripheral access on Mr. Nelson." Oct. 6, 2004, status conference transcript, p. 7, lines 22-25. Counsel for Nelson has expressly conceded that his cause of action is dependent upon the assumption that "there is going to have to be central access." Oct. 6, 2004, status conference transcript, p. 8. Now that this assumption has been totally undermined by the Court's own independent expert, Nelson's counsel's concession calls for an end to this case. Cf. County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383 (1979) (holding that the case had become moot during pendency of the litigation where there was no reasonable expectation that the county would use invalidated written civil service exam and

⁵ It is beyond question that the Court relied upon this statement by counsel in its opinion. Nelson, 541 U.S. at 646.

interim relief and events had irrevocably eradicated the affects of the alleged violation). Further, there is nothing in the prayer for relief for a Court to provide for Nelson.

In sum, this Court's independent medical expert has found that Nelson's execution can be carried out through readily accessible veins, requiring only a peripheral stick. There will be no "cut down" employed on Nelson at any time in the future. There is no indication that "there is going to have to be central access." Pursuant to Nelson's own representations and in the light of the independent expert's report this lawsuit is moot. Accordingly, summary judgment is appropriate. See U.S. v. Soriede, 461 F.3d 1351, 1354 (11th Cir. Aug. 24, 2006) (Summary judgment appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law).

The State of Alabama will have present at Nelson's execution an emergency medical technician (paramedic level)⁶ and a medical doctor. An emergency medical technician fits within the category of personnel described by Dr. Bagley as having the necessary skills to gain venous access through a peripheral stick.

Summary judgment is appropriate in this case. The evidence before the Court establishes that the State will be able to gain venous access through Nelson's "readily accessible" peripheral veins as indicated in Dr. Bagley's report. There is no genuine question of material fact remaining as to whether Nelson must fear the employment of any predicate act to gain venous access other than through a peripheral stick. Doc. 110, Ex. 1, p. 13. ("However, given the accessibility of the peripheral veins listed

⁶ Paramedic certification is the highest level of emergency medical technician certification in Alabama. Ala. Admin. Code R. 420-2-1-.14(1) ("An actively licensed EMT-Paramedic is an individual who has met all requirements for licensure as an EMT-Intermediate and who has also been trained in additional emergency medical procedures through the EMT-Paramedic course of instruction, or its equivalent, as approved by the State Board of Health, and who, after having passed the approved EMT-Paramedic examination and completed the appropriate credentialing requirements, has been granted a license by the State Board of Health to regularly perform emergency medical procedures at the basic, intermediate, and paramedic levels."). See also, Ala. Admin. Code R. 420-2-1-.14(a) and (b) ("...Drugs may be administered via the intravenous, subcutaneous, intramuscular, oral, sublingual, rectal routes, and through inhalers and endotracheal tubes if approved for such administration by the State Board of Health; and (b) Within the constraints specified in section 420-2-1-.07 of these rules, administration of drugs and maintenance of I.V. drips for inter-hospital transfer patients.").

above, it is my medical opinion that cannulation of central veins will not be necessary to obtain venous access on David Larry Nelson.")⁷ There is no evidence before this Court to suggest that Nelson's execution will be any different from the 11 previous lethal injections administered through peripheral venous access.

Finally, as this Court has already ruled, see Nelson v. Campbell, 286 F.Supp.2d 1321, 1323 (M.D. Ala. 2003), defendants are entitled to summary judgment as to Nelson's state law cause of action as alleged in the complaint. Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89 (1984). Accordingly, this aspect of Nelson's second amended complaint cannot form the basis for further proceedings before this Court.

⁷ Although it does not appear that a percutaneous central line placement will be required, Dr. Bagley also resolved the dispute as to the qualifications needed to perform such a procedure. It was this question that the Court expressed a desire to resolve during the October 6, 2004 status conference. Contrary to Nelson's characterization of this procedure as a specialized surgical procedure requiring a physician specialist, Dr. Bagley has indicated that an "MD" would suffice, as would a physician's assistant (non-medical doctor) or a certified registered nurse anesthetist. This is consistent with the State's position that an MD is qualified to perform this procedure. This also refutes counsel for Nelson's previous assertion that doctors must have a certification before being able to perform this procedure.

CONCLUSION

For these reasons, defendants request this Court to enter an order dismissing Nelson's second amended complaint, recognizing that it is moot and that no genuine question of material fact or law remains before the Court.

Respectfully submitted,

TROY KING
ATTORNEY GENERAL

/s/ J. Clayton Crenshaw
J. CLAYTON CRENSHAW
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: **David R. Boyd, Michael Kennedy McIntyre, and H. Victoria Smith.**

I also certify that this date I served a copy of the foregoing on the following attorney by placing a copy of the same in the United States mail, first class postage prepaid and addressed as follows:

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