

**IN THE CIRCUIT COURT
FOR FRANKLIN COUNTY
COMMONWEALTH OF KENTUCKY**

RALPH BAZE,)
)
and,)
)
THOMAS C. BOWLING,)
)
Movant,)
)
v.)
)
JONATHAN D. REES,)
Commissioner,)
Kentucky Department of Corrections,)
Frankfort, Kentucky)
)
GLENN HAEBERLIN,)
Warden, Kentucky State)
Penitentiary, Eddyville Kentucky,)
)
UNKNOWN EXECUTIONERS,)
)
and,)
)
HON. ERNIE FLETCHER,)
Governor of Kentucky)
)
Respondents.)
_____)

CIV. ACTION # 04-CI-1094

MOTION FOR RELIEF FROM JUDGMENT
PURSUANT TO CR 60.02 (b), (c), and (d)

Ralph Baze and Thomas C. Bowling hereby move this Court to reopen the above-captioned matter because of false (or at least misleading) testimony and newly discovered evidence that could not have been discovered by due diligence in time to move for a new trial.

Because this motion is being filed within one year of this Court's judgment (July 8, 2005), this motion is timely. This Court has jurisdiction even though the underlying action is pending on appeal.¹

A substantial portion of the constitutional challenge to the chemicals and procedures Defendants intend to use to carry out Baze and Bowling's execution involved the likelihood that they would remain conscious enough to feel pain during their execution. At the bench trial, Baze and Bowling called twenty witnesses. Defendants presented only two witnesses: Defendant Rees, to discuss a settlement conference, and Dr. Mark Dershwitz, to testify about the probability that Baze and Bowling would feel pain during their executions and to testify about means for monitoring for consciousness. Presumably this Court found Dershwitz credible since his testimony was the only substantive evidence presented by Defendants to refute Baze and Bowling's case.

But recent events establish that Dershwitz did not testify truthfully, or at least presented materially misleading testimony, concerning the use of the BIS monitor. Also, newly discovered evidence shows that Dershwitz's predictions and conclusions on the likelihood of consciousness are inaccurate. Based on this evidence, which casts doubt on all aspects of Dershwitz's testimony, Baze and Bowling request relief from judgment under CR 60.02 (b), (c), and (d).

¹ See, e.g., *Wolfe v. Combs' Adm'r*, 273 S.W.2d 33 (Ky. 1954) (allowing the lower court to rule on CR 60.02 motion involving changed testimony, even though the case was pending on appeal); see also, *Stone v. I.N.S.*, 514 U.S. 386, 401 (1995) (holding that the "pendency of an appeal does not affect the district court's power to grant 60(b) relief." 60(b) is the federal equivalent of CR 60.02).

I. False testimony about the validity of the BIS monitor to determine the ability to feel pain during an execution necessitates relief from judgment.

The BIS monitor is a machine that measures the electrical activity of the brain to determine the response to stimuli and to determine if a person is conscious to the point where the person can feel pain. Baze and Bowling raised the possibility that a BIS Monitor could be used during Kentucky lethal injections to determine if a condemned inmate is able to feel pain during an execution. Defendants' expert, Dr. Mark Derschwitz, was involved in the clinical studies of the BIS Monitor and uses it regularly when administering anesthesia. Thus, he was asked about the viability of using the BIS Monitor for this purpose. He responded by saying,

since the BIS monitor is measuring very, very tiny voltages on the forehead that are coming from the brain, when the potassium chloride causes widespread stimulation of skeletal muscles, I expect that those voltages that will be produced will overwhelm the EEG voltage that the monitor is trying to measure and I would predict that a significant artifact will be introduced into the monitor's ability to a subconscious level.²

When asked to explain what this means in lay terms, Derschwitz testified that using the BIS Monitor to determine the ability to feel pain would be problematic because "once the potassium chloride caused skeletal muscle to be stimulated, the digital read out from the BIS monitor, I believe, will go blank."³

Less than a year later, Derschwitz testified to the opposite conclusion in a North Carolina case where the same question was posed. Derschwitz testified, via affidavit, that usage of a BIS monitor will work just fine to prevent the possibility of the inmate being awake during the administration of the pancuronium bromide or the potassium chloride.⁴ This statement contradicts Derschwitz's testimony before this Court.

² Tape 13; 5/2/05; 9:55:00 – 9:57:00 (Test. of Dr. Mark Derschwitz).

³ *Id.*

⁴ Exhibit 1 (Third Affidavit of Dr. Mark Derschwitz in *Brown v. Beck*, No. 5:06-ct-03018-H (E.D. N.C. 2006).

Either the BIS Monitor is useless for monitoring for consciousness because it will go blank when the potassium chloride is administered, or the BIS Monitor is a valuable tool for determining the ability of a condemned inmate to feel pain throughout an execution. Dershwitz has presented false, misleading, or inaccurate testimony either here or in North Carolina. Where is not important. What is important is that Dershwitz testified falsely in one of these cases, destroying his credibility on the use of the BIS Monitor and destroying his credibility in general. Thus, this Court should grant relief under CR 60.02 so that it can revisit the issues presented in Baze and Bowling's case, including monitoring for the ability to feel pain, in light of the fact that Dershwitz has been exposed as an individual whose testimony is at least contradictory if not deliberately inaccurate.

II. Newly discovered evidence establishes that Dershwitz's conclusions on likelihood of consciousness was inaccurate, and that an unnecessary risk exists that Baze and Bowling will feel pain during their execution.

Dershwitz testified in California that condemned inmates injected with thiopental should both stop breathing and lose consciousness of pain within about a minute of the injection. He urged the California court (just as he urged this Court) to disregard toxicology results that noted extremely low levels of sodium thiopental and indicated a likelihood of consciousness. Subsequent to the bench trial in the instant case, California and North Carolina set out to prove Dershwitz correct on his predictions regarding sodium thiopental. The data, however, has done the opposite.

Dershwitz swore that breathing and consciousness would stop within one minute, but on December 13, 2005 (over five months after this court rendered its findings of fact and conclusions of law), California executed Stanley Tookie Williams, and prison logs from the execution show that Williams was breathing for between six and twelve minutes after the sodium

thiopental was injected.⁵ Similarly, Clarence Ray Allen did not stop breathing until nine minutes after the sodium thiopental was injected into him on January 17, 2006.⁶ This evidence, which could not have been presented at trial since the executions had not occurred yet and which brings the total number of California executions with these results to six out of thirteen,⁷ shows that Dershwitz is wrong on how quickly a person will stop breathing when injected with a large dose of sodium thiopental.

North Carolina, like Kentucky, does not keep logs showing when respiration ceased. But they drew blood from the last four inmates they executed (between November 2005 and the end of January 2006),⁸ solely for the purpose of determining if the inmates were able to feel pain during their executions.⁹ The North Carolina Department of Corrections collected, shipped, stored and analyzed the blood samples for the express purpose of determining whether the condemned inmates were able to feel pain.¹⁰ Thus, it should be presumed that they tested the blood correctly and that the toxicology results accurately reflect the level of sodium thiopental in the body of the condemned inmate at the time of death.¹¹

The toxicology results on Steven Van McHone showed levels of 1.5 mg/L and 21 mg/L in his body.¹² The toxicology results on Elias Syriani showed 4.4 mg/L, 11 mg/L, and 12 mg/L of sodium thiopental in his body.¹³ The toxicology results on Kenneth Boyd showed 11mg/L and 29 mg/L of sodium thiopental.¹⁴ And, the toxicology results on Perrie Simpson show 8.7

⁵ Exhibit 2 (*Morales v. Hickman*, 415 F.Supp.2d 1037, 1045 (N.D. Cal. 2006).

⁶ *Id.*

⁷ *Id.*

⁸ North Carolina used to measure the amount of sodium thiopental in the body of executed inmates, but they stopped doing so when litigation challenging the use of sodium thiopental began. They recently began doing so again.

⁹ Exhibit 3 (*Brown v. Beck*, No. 5:06-ct-03018-H (E.D. N.C. 2006) (Order dated, April 7, 2006).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*; exhibit 4 (Toxicology results on Steven Van McHone, Elias Syriani, Kenneth Boyd, Perrie Simpson).

¹³ *Id.*

¹⁴ *Id.*

mg/L, 12 mg/L, and 42 mg/L of sodium thiopental.¹⁵ With the exception of the 42 mg/L, each of the levels of sodium thiopental from these toxicology results is below the amount of sodium thiopental that Dershwitz predicted would be in the body five minutes after injection, and each of these numbers is below the 39-42 mg/L of sodium thiopental in the body that is necessary to prevent a person from feeling pain.¹⁶ Thus, the recent data from North Carolina executions proves that Dr. Dershwitz's conclusions are inaccurate, in addition to being contradictory. Accordingly, this Court should grant relief from judgment.

CONCLUSION AND REQUEST FOR RELIEF

The false testimony by Dr. Dershwitz concerning the BIS Monitor and the recent toxicology data from North Carolina call into question the credibility of Dr. Dershwitz and the reliability of all statements he made in this case, including statements on the crucial issues of the likelihood that an inmate will feel pain during an execution and the means for monitoring for consciousness to ensure that the inmate does not feel pain during an execution. Not long after Dershwitz made his inconsistent statements on the BIS Monitor, the California Department of Corrections decided to stop using him as their expert in lethal injection litigation. The new evidence demonstrates that this Court should not have relied on Dershwitz and should have given no credence to statements and conclusions he has made on likelihood of consciousness and monitoring for consciousness. In light of the recent developments showing that Dershwitz has made materially false, contradictory statements in the instant case, and has been proven incorrect regarding his purported expertise and predictions of sodium thiopental in general, this Court should grant relief from judgment and revisit the issues presented in this case.

¹⁵ *Id.*

¹⁶ Exhibit 5 (Excerpt from Randall Baselt, Toxic Disposition of Drugs in Man (7th ed.)).

RESPECTFULLY SUBMITTED,

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April 24, 2006.

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing
MOTION FOR RELIEF FROM JUDGMENT
PURSUANT TO CR 60.02 (b), (c), and (d)

and its accompanying exhibits to be served via first class mail, postage prepaid on the following individuals:

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