IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-1397

MICHAEL ANTHONY TAYLOR,

Plaintiff-Appellant,

v.

LARRY CALDWELL et al.**,**

Defendants-Appellees.

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

BRIEF OF APPELLANT

Respectfully submitted,

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Summary of the Case and Statement Concerning Oral Argument

Plaintiff filed this action in plenty of time to litigate it fully, but the state and the defendants set up a situation where a panel of this Court felt obliged to require the reassignment of the case to a district judge new to the case and a "hearing" consisting of a few hours of phone conferences among several individuals in which the only people who could see each other were as many of the 200 plus lawyers in the Attorney General's Office as it chose to deploy after decimating the plaintiffs' team by incenting the plaintiff-intervenor and intevenor-applicant to withdraw from the matter.

The resulting, inevitable denial of relief was pushed forward by the new judge's refusal to consider a valuable witness even within the small time this Court's panel gave him.

This all violates the Due Process Clause of the Fifth Amendment. It is also just plain wrong.

This Court should set this case for oral argument, and should allow the parties twenty minutes per side.

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Table of Authorities

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Jurisdictional Statement

After this Court's panel caused the case to be taken away from the district judge assigned through the regular procedures of the district court, United States District Judge Fernando J Gaitan denied the appellant's complaint and rendered an adverse judgment on January 31, 2006. Counsel filed a notice of appeal on January 31, 2006. Jurisdiction of the trial court rested on 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. § 1291, in that the appellant is appealing the judgment entered in the district court.

Statement of Issues

I. Whether the plaintiff was precluded from presenting his case by the order of this Court and the additional decisions of the district court foreshortening the process established by the regularly assigned district judge and refusing to allow counsel to present evidence even within the short time this Court's panel allowed for the specially assigned district judge to render judgment?

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)

Beck v. Haik, 377 F.3d 624 (6th Cir. 2004).

Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987)

II. Whether the district court clearly erred in entering judgment against Taylor in that the evidence was not sufficient to support its findings?

First National Bank v. Benham, 423 F.3d 855, 861 (8th Cir. 2005)

Shelton v. Consumer Product Safety Commission, 277 F.3d 998, 1007 (8th Cir. 2002).

Statement of the Case

On June 3, 2006—actually ***before*** he had ascertained all of the specific means by which the State of Missouri intended to execute him—the petitioner filed an action under 42 U.S.C. § 1983, *Taylor v. Caldwell*, No. 05-CV-4173-SOW, seeking to raise federal constitutional grievances concerning the chemicals, personnel, and other incidents involved in the State of Missouri's practice of lethal injection. After the Missouri Supreme Court set an execution date in the previous leading case in this area, *Johnston v. Campbell*, Mr. Taylor's counsel learned that in its lethal injections, the state uses a precursor operation variously referred to as "central line access" or "femoral vein access" and that the state uses a licensed physician in the process in violation of the Hippocratic Oath and the AMA Code of Ethics. Richard D. Clay, another condemned person in the Missouri Department of Corrections, intervened in the action, represented by Elizabeth Unger Carlyle and Jennifer Herndon. Plaintiffs filed an amended complaint setting forth their claims about the precursor operation and the physician participation.

On December 28, 2005, the United States District Court for the Western District of Missouri issued an order denying the defendant's motion to dismiss for failure to state a claim, and holding that the case needed to go forward. The next business day, the undersigned counsel faxed a copy of this order to the Missouri Supreme Court with a cover letter advising it of the order. The second business day after counsel provided this notice, the Missouri Supreme Court set an execution date against Michael Taylor, the lead plaintiff in the federal action.

On January 19, 2006, the Hon. Scott O. Wright issued an order setting a hearing in the federal case for February 21, 2006, with the hearing to go over to February 22 if the Court needed a second day's worth of evidence. Through Magistrate Judge William A. Knox, Judge Wright had the previous day informed counsel that he had tried to set the hearing before February 1, 2006, but that he could not do so in light of pending matters on its calendar. Without giving a reason or offering any intermediate course of action, counsel for the defendants indicated they would seek relief from Judge Wright's order.

On January 20, 2006, the defendants filed an application to vacate Judge Wright's preliminary injunction, to which I prepared a response. On January 27, 2006, counsel for Reginard Clemons, another condemned

person in the Missouri Department of Corrections, filed a motion to intervene in the action. Mr. Clemons is represented by New York City law firm which would have provided substantial litigation firepower for the plaintiffs at the hearing on February 21, 2006.

On January 29, 2006, a panel of the United States Court of Appeals for the Eighth Circuit vacated Judge Wright's order, directed the Chief Judge of the district court to reassign the case to another district judge, and directed the new district judge to conduct a hearing immediately and to render judgment by noon on the date the Missouri Supreme Court had set for the execution. It also stayed the execution through 11:59 p.m. on Friday, February 3, 2006.

In light of the panel's mandating another snap hearing—as had occurred in the Donald Jones, Vernon Brown, and Timothy Johnston cases with which the undersigned was familiar—and the new district judge's refusal to let counsel call the physician who participates in Missouri's executions, counsel for Messrs. Clay and Clemmons, respectively, dismissed their claims without prejudice and withdrew their motion to intervene.

This left the undersigned sole practitioner alone to litigate a snap hearing in a capital case involving several experts. Simply procuring their

participation by phone took substantial time and effort. Counsel was not able to contact one of them, who had been out of town, until the morning of the second day (yesterday), and he could not be ready to testify until the next day, which the new district judge did not allow. As a result of these unusual and irregular demands, the undersigned was unable to do the kind of job on this capital case involving arcane scientific subjects that he would typically do on the ***least*** grave and sensitive matters in his practice.

Because he had to conduct a telephone hearing solo two days in a row, the undersigned counsel was unable to prepare a pleading in this Court to seek to have the very order requiring the hearing overturned, and had to suspend my activities in support of execution clemency, which the same court has authorized me to engage in under its appointment.

Defendants sought to have the Supreme Court vacate this Court's panel's stay in its entirety. That Court declined. After the district judge issued the order, rendered inevitable by the circumstances under which the lawyers tasked to handle the hearing while the undersigned handled clemency advocacy, were removed by the technical knock-out of December 29, 2006, the defendants filed a motion before this Court to vacate its three-day stay. The undersigned did not receive this motion by e-mail until a

few minutes before this Court acted on it; he did not receive it by fax at the number in his letterhead (or any other fax number) until (according to the readout on his fax machine) 9:26 p.m., or "21:26," *i.e.*, ***only three minutes*** before this Court e-mailed counsel its ***ruling*** on the motion.

Having received no response to the state's motion (for the reason just specified), the panel cut its stay back to 5:00 p.m. today. Defendants were not satisfied with that, and applied to the Supreme Court to vacate its stay in its entirety.

This appeal followed. Appellant e-mailed an application for a stay of execution from this Court to the Court, opposing counsel, and the Supreme Court at 9:58 a.m. today.

Summary of Argument

Michael Taylor has not had an opportunity to litigate the substance his claims fully and fairly since the removal of the district judge who had been handling the case by regular assignment from its inception. Over and above enforcing the constraints resulting from the panel's order, the new district judge precluded him from presenting evidence from the only witnesses qualified to give it. He refused to allow Mr. Taylor's counsel to prepare and present a witness within the time this Court's panel had allowed the sp to hear and rule on the case, when that witness was not prepared earlier because of his absence from the geographical area and the fact that no one could have foreseen the specific nature of the panel's order. These omissions are directly or indirectly the fruit of the defendants' and their privies' manipulation of the judicial process to prevent anyone from receiving an eff hearing on the merits of claims relating to their form of lethal injection. The Supreme Court of the United States has recently set its face against the broadside denial of review of federal constitutional claims relating to lethal injection where, as here, the executioners rely on the legal fiction that a section 1983 action is a successive section 2254 petition when

it stands a chance of winning relief, and where, as here, the claims involve a medically unnecessary precursor procedure such as a cut-down, central-line access, or femoral-vein access.

Standard of Review

Sufficiency of the evidence to support the judge's factual findings is reviewed under a clearly erroneous standard. *Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services*, 293 F.3d 472, 479 (8th Cir. 2002); *Camberos v. Branstead*, 73 F.3d 174, 177 (8th Cir. 1995).

The district court's action in excluding or admitting evidence is reviewed for abuse of discretion. *First National Bank v. Benham*, 423 F.3d 855, 861 (8th Cir. 2005). But the issue of whether these rulings denied the appellant due process of law is reviewed de novo. *Shelton v. Consumer Product Safety Commission*, 277 F.3d 998, 1007 (8th Cir. 2002).

Argument

I. Plaintiff Michael Taylor was precluded from presenting his case by the order of this Court and the additional decisions of the district court foreshortening the process established by the regularly assigned district judge and refusing to allow counsel to present evidence even within the short time this Court's panel allowed for the specially assigned district judge to render judgment.

Petitioner state officials and their privies have created the supposed time bind on the basis of which they persuaded this Court to order the district court to engage in the foreshortened consideration of a case in which the regularly assigned judge had denied a motion to dismiss and had set a hearing, resulting in a denial of relief. As privies of the State of Missouri, the defendants-appellees here are estopped to complain of any "delay" on the part of Mr. Taylor in bringing his section 1983 action, as their state supreme court (which sets Missouri execution dates) has held that a Missouri condemned person cannot seek relief from a method of execution until its specific modalities are ascertained, which cannot be until shortly before or after the execution. *See Worthington v. State*, 166 S.W.3d 566, 583 n.3 (Mo. 2005) (en banc), in which the Missouri Supreme Court

rejected a Missouri condemned person's challenge to the state's lethal-injection procedure by holding it premature:

> As it is unknown what method, if any, of lethal injection may be utilized by the State of Missouri at such future time, if any, as Mr. Worthington's right to seek relief in state and federal courts is concluded and his execution date and method are set, it is premature for this Court to consider whether a particular method of lethal injection violates the Eighth Amendment because it causes lingering, conscious infliction of unnecessary pain.

It is the strategy they have used in the Timothy Johnston case and here: if someone has a good challenge to their lethal-injection practices going in federal court, they set an execution date once the district court denies the motion to dismiss. ***Someone*** should be able to litigate these claims fairly: it should now be Michael Taylor after the Eighth Circuit or this Court reverses the judgment which the district court entered after a mere simulacrum of a "hearing."

In arguing to the Supreme Court that the action of the district court in conducting a truncated hearing on the merits of this case should affect the court's order staying Mr. Taylor's execution, the defendants omit significant facts relevant to that hearing.

Pursuant to this Court's order of Sunday, January 29, 2006, the district court attempted to conduct a hearing on the merits of this matter on Monday, January 30, 2006 and Tuesday, January 31, 2006. The new judge selected for the purpose began proceedings with a telephone conference at 10:00 a.m. This was approximately two hours after counsel for plaintiff learned of the order; he had been traveling on January 29, 2006 and did not check his e-mail until that morning. During the conference, the court expressed some concern about the logistics of such a rapid hearing. While the court concluded that it could conduct a fair hearing within the confines of the time provided by this Court, the district court allowed with the defendants' acquiescence, the intervenor to withdraw. The intervenor's motion to dismiss stated, as cause for the dismissal:

> Based on their evaluation of their ability to present adequately Mr. Clay's claims in the hearing contemplated by the court, Mr. Clay's counsel do not believe that his interests will be served by further participation in this case. He cannot fairly present his claims and evidence to the court in the limited time allowed for the hearing in this matter. Since he is not under execution warrant, he has no need to limit his presentation based on the constraints on Mr. Taylor. His interests are now divergent from those of Mr. Taylor, and he will be

> prejudiced if he is required to continue as a party to this action. [1]

By granting this motion, both the district court and the defendants implicitly conceded that a fair hearing was impossible. Further developments made that even clearer.

A. The district court abused its discretion and denied the plaintiff due process of law in that it precluded him from presenting the physician and nurse who participate in Missouri executions.

At the initial telephone conference, the district court denied the plaintiffs the right to call the doctor and nurse who have participated in multiple executions pursuant to the protocol proposed by the state in this case. At issue in this case is whether this protocol results in unnecessary and excessive pain and suffering. While not dispositive, it is at least relevant to this issue whether the medical professionals who conduct the execution are alert to the possibility of such pain and suffering during the procedure. It is also relevant whether they have observed symptoms in executed persons which indicate that these persons are suffering

[1]Motion To Dismiss Action Without Prejudice As To Intervenor, Dist. Ct. Doc. 71.

discomfort during the procedure. Plaintiff was unable to present this evidence because of the court's peremptory ruling excluding it. Nor was the plaintiff able to determine whether the qualifications of the medical professionals involved were in fact as the defendant Crawford said they were, because the court refused to provide the plaintiff with the identity of the medical professionals. The court below, in the case of *Timothy Johnston v. Larry Crawford et al*., denied a writ of prohibition sought by the state and required that the identities be provided to Johnston's counsel pursuant to a protective order. Mr. Taylor did not even have the benefit of that limited discovery before a final hearing on the merits of his case.

B. The district court abused its discretion and denied the plaintiff due process of law in that it refused to allow him to present the testimony of a pharmacokinetics expert whom the plaintiffs' counsel before the suit was truncated had arranged to testify on the regularly assigned judge's hearing date, but who was inaccessible until the second day of the "hearing" by telephone.

In addition to the inability to present evidence in support of his claim from crucial fact witnesses, the short period provided by the court below and its specially assigned judge prevented Mr. Taylor from presenting

evidence from Dr. Sri Melethil, Ph.D., J.D., a pharmacokineticist. Dr. Melethil had previously consulted with counsel for the plaintiffs' team and expressed concern about the data on which the opinions of Dr. Mark Dershwitz, the state's expert, were based. In particular, Dr. Melethil is aware that the rate at which sodium thiopental leaves the brain is greater than that at which it leaves the blood. Dr. Dershwitz's conclusions were based on blood levels, but it is the brain level which determines whether anesthesia has occurred. Dr. Melethil was out of town and out of touch until the morning of January 31, 2006. Because complete discovery had not been obtained from Dr. Dershwitz, and because of Dr. Melethil's previous commitments, counsel for Mr. Taylor were unable to provide him with the data he needed to form an expert opinion in this matter.

On appeal, it is likely that the judgment of the district court will be overturned. First, the exclusion of testimony from medical personnel who actually witness executions clearly violated Fed. R. Evid. 401. While a district court's rulings on exclusion of evidence are reviewed for abuse of discretion, such abuse occurs when the court bases "its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), cited in *Beck v. Haik*, 377 F.3d 624 (6th Cir. 2004). Under Fed. R. Evid. 401,

"'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, the issue is whether the mode of execution employed by the State of Missouri causes unconstitutional pain and suffering. To hold that testimony by medical personnel (trained observers of symptoms) who actually participate in the execution is irrelevant to this determination flies in the face of the expansive language of Rule 401. In *Beck v. Haik*, 377 F.3d 624 (6th Cir. 2004), the court reversed the judgment on the grounds that the trial court improperly excluded both expert evidence bearing on a contested issue, and a letter which the court held "would clearly support one of the plaintiffs' main theories of the case." *Beck v. Haik*, 377 F.3d at 637-38. The court held that the cumulative effect of these errors was prejudicial, and reversed the judgment.

This case is also similar to *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987), where the judgment was reversed after the trial court sustained the defendants' motions *in limine* and excluded much of the plaintiff's evidence. The court noted, "[A]s the judge's discretion was exercised on a wholesale basis before trial began, rather than in response to the developing course of the trial, careful appellate review is necessary to make

sure the judge did not truncate the trial prematurely." Since the state in this case presented no evidence as to the lack of pain and suffering during the execution process, and presented no witnesses who had personally observed the process in Missouri, the plaintiff's lack of opportunity to explore this area is even more serious.

The lack of notice of the hearing also deprived the plaintiff of the ability to prove his claim. The situation, while somewhat unique, is similar to the denial of a continuance, and can be examined using the same standards. At the close of the hearing, plaintiff's counsel attempted to make an offer of proof to the court of the information he was seeking from his expert, Dr. Melethil, but could not do so because of the time-pressure created by the January 29, 2006, order of the court below and Dr. Melethil's absence from the state. Because this expert has not yet been able to obtain this data, he is unable to be more specific about his opinion. It should be noted, however, that Dr. Dershwitz did not testify concerning this data, although his testimony was presented in support of the defendants' case.

See also *Gibson v. Weber*, 433 F.3d 642 on the prejudice from not allowing a party to call a witness.

II. The district court clearly erred in entering judgment against Taylor in that the evidence was not sufficient to support its findings.

The plaintiff's experts testified that the drug used to cause death, potassium chloride, is extremely painful when administered. They further testified that this drug caused a needless risk of pain, in that there were other drugs which would also cause death with less suffering. The district court refused to allow the presentation of evidence as to what actually happens during an execution, which the plaintiff proposed to present through the medical personnel who were actually present. The defendants presented evidence from a correctional official, but he testified only as to the protocol used, not to his personal knowledge of its practical application.

In its judgment, the district court relied on testimony from Dr. Dershwitz that the first drug administered, sodium thiopental, would render the executed person unconscious for a sufficient period that, ordinarily, the person would feel no pain. Dr. Dershwitz presented no testimony about the data he used to form this opinion, and had never witnessed a Missouri execution. The plaintiff's experts, on the other hand, testified that there *was* a risk of pain, and that it could easily be avoided by

the use of drugs other than those presently used in Missouri. This meets the standard of "cruelty inherent in the method of punishment," cited by the district court. Using a process that creates a known risk of pain when other procedures exist which minimize this risk is cruel and unusual punishment. We are not talking here about accidental errors in the administration of a proper protocol. There is evidence here that the protocol itself is unduly subject to risks which will cause unnecessary pain. For example, the Missouri protocol requires the use of femoral vein access whether or not such access is required in a particular patient. Uncontroverted evidence was offered that this procedure is *much* more complex and subject to error than the use of a regular intravenous line. The state presents no justification for exposing executed persons to this additional risk of discomfort.

The district court further cited *Johnston v. Crawford*, No. 4-04-CV-1075, CAS (E.D. Mo. August 26, 2005). That order was entered after a truncated summary judgment proceeding, not a trial on the merits. The proceedings in that case were even more limited than those in this case. Thus, the decision in *Johnston* is not precedent supporting the district court's judgment here.

Taylor offers to prove that the facts in a hearing free from the time-pressure that the defendants and their privies created by manipulating the judicial process would be as follows:

The district court wrote in the background (page 2) that the "the drugs are administered through the femoral artery." This is incorrect. In fact, the drugs are intended to be administered through the femoral vein. Administering these drugs via the femoral artery would cause immediate and excruciating pain. The point is not trivial in that Dr. Dershwitz himself acknowledged in his testimony that inadvertent placement of the catheter into the artery is not a rare occurrence. In Dr. Dershwitz's world (the operating room), this is not seen as a "mistake" since an arterial catheter can be used for blood pressure monitoring and blood samples. However, in the lethal injection world, this would guarantee an excruciating death.

According Mr. Moore's testimony, the drugs are administered by a physician. This activity, combined with the doctor placing the central line, provide an unpresedented level of physician participation in executions. There is simply no other parallel in modern history (outside of the killing

of German citizens in the Nazi "euthanasia program,") where doctors personally injected drugs into people in order to kill them.

The district court's opinion is that the inmate is unlikely to experience any pain with the femoral vein catheter insertion because the skin is numbed by local anesthetic. As Dr. Groner testified, the likelihood of severe pain is not due to the "seeker needle" piercing the skin, but rather due to the possibility of it striking nerves or bone (which is exquisitely sensitive). Dr. Dershwitz himself acknowledged that he would refuse placement of a femoral venous catheter if he required general anesthesia for an operation.

Dr. Dershwitz testified that the dose of thiopental 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. However, Dr. Dershwitz admitted that he has never administered 5 grams of thiopental. Furthermore, the usual safeguards that Dr. Dershwitz uses in the operating room, which are designed to make certain the patient is fully anesthetized and not suffering, are absent in lethal injection. These include: pulse oximeter, end tidal

carbon dioxide monitor, muscle twitch measurement, and physician examination of the "patient" under anesthesia.

While "the ever-present possibility of human error or accident is insufficient to establish a constitutional violation," this is not the standard by which medical procedures are judged. Since lethal injection is proposed as a medical procedure, a medical doctor is employed by the state to perform it, and medical experts testify as to its efficacy, the procedure must therefore meet the medical standard for safety, which is "medical standard of care." Medical standard of care is roughly defined as what a reasonable physician would do in a given clinical situation. The lethal injection protocol in Missouri does not meet the medical standard of care because:

The thiopental, which comes as a powder, is mixed and infused by someone with no specific training in sedation or anesthesia. Hospitals typically have a "credentialing process" for persons using anesthesia drugs

The use of a femoral central venous line in a person who did not require it clearly violates the medical standard of care. A patient/plaintiff in whom a femoral venous line was placed in this circumstance could

reasonably be expected to collect monetary damages for unnecessary surgery and pain and suffering.

The chemicals are pushed by someone with no training in anesthesia, who infuses the drugs through a long extension tubing and cannot actually monitor the inmate. The monitoring devices that safeguard anesthesia are not present. There is no formal record of monitoring, it no "anesthesia record" or the procedure. Thus there is no way to look back retrospectively at any execution to identify issues that may have cause suffering. Despite the lack of formal records, 22 botched lethal injections have been documented, including 12 cases in which there were problems with IV access and 3 cases of "unusual" reactions to drugs.

The judgment of the district court must be reversed.

Conclusion

WHEREFORE, the petitioner prays the Court for its order that the denial of his action under the foregoing circumstances be reversed, and the cause remanded with instructions that it be reassigned to the regularly selected district judge and that it proceed as it had been on January 28, 2006.

Respectfully submitted,

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Certificate of Compliance

The portions of this reply brief not excluded from volume limitation, *see* Fed. R. App. P. 32(a)(7)(B)(iii), contain no more than 4157 words, in 14-point proportionally-spaced type, prepared and measured using Microsoft Word 9.0/10.0 (Tools | Word Count).

I have scanned the computer diskettes submitted to the Court and to opposing counsel for viruses using Trend Micro (updated approximately daily at least), and the program reported that they were virus-free.

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JOHN WILLIAM SIMON

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was e-mailed, this first day of February 2006, to:

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