

Raid
8-15-05

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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| <i>IN RE</i> |) | No. _____, from |
| LARRY CRAWFORD, DON ROPER, |) | |
| AND JAMES PURKETT |) | Dist. Ct. No. 4:04CV1075 DJS |
| Petitioners |) | |
| v. |) | |
| |) | |
| TIMOTHY JOHNSTON, |) | |
| Respondent. |) | |

PETITION FOR IMMEDIATE WRIT OF PROHIBITION

Timothy Johnston is to be executed on August 31, 2005. In the present action, he is seeking a declaration that Missouri's lethal injection protocol is unconstitutional. The State has produced all of the evidence sought by Mr. Johnston, with the exception of the individual names of the corrections officers and medical personnel who will conduct the execution. The District Court has ruled that these names must also be produced. That information is of absolutely no value to Johnston's ability to prove his claims. But, if the State discloses those names as the District Court ordered and those names end up public – either through an intentional or inadvertent violation of the protective order entered below – the State's ability to conduct orderly and constitutional executions will be compromised and the individuals named would be at great risk of harassment and potentially even physical harm. Accordingly, the State requests immediate relief from this order.

Introduction:

The underlying suit is one of many brought by opponents of capital punishment, challenging the methods of lethal injection. As noted at p. 11, *infra*, in every such challenge to date, the constitutionality of the method used by Missouri has been upheld.

Petitioners do not here dispute the right of the plaintiffs below to litigate the constitutionality of Missouri's chosen method. Thus, petitioners have produced considerable information in response to Johnston's discovery requests. Indeed, they have produced essentially everything that the plaintiffs sought – *except* the identity of those who, to use a metaphor from a method still authorized in at least one state, pull the trigger.

The plaintiff's right to litigate the constitutional question cannot interfere with the rights of the States to impose that method, if it is constitutional. Nor can it interfere with the lives and livelihood of those who perform the task of administering that method. If the names are not protected, even inadvertent disclosure would open those individuals to harassment – harassment that is assured by the zeal of capital punishment opponents and the immediacy of the internet. The only way that such harassment even *might* be avoided would be to assign those tasks to someone else. But under the district court's approach, the names of those next assigned would also

then have to be disclosed. The State could never avoid the interference that plaintiff insists – incorrectly – is his right.

The underlying suit can proceed without this information. Both sides know what drugs are used, in what amounts, and the training, qualifications and experience of the corrections officers and medical personnel executing Johnston's sentence. Based on that information, both sides can litigate the constitutionality of the Missouri approach. The cost that would be incurred by adding the disclosure of the names of the technicians is one that cannot be justified, and that this Court should order the district court not to require the State and the technicians to pay.

I. The relief sought

Petitioners Crawford, Roper, and Purkett request that the Court issue an immediate writ prohibiting the Honorable Donald J. Stohr, U.S. District Judge, United States District Court for the Eastern District of Missouri, Eastern Division, from requiring disclosure of the names of the persons who will mix the drugs, start the IV and push the syringe plunger to carry out Timothy Johnston's lethal injection on August 31, 2005.

At 4:40 p.m. on August 12, 2005, the district court¹ denied petitioners'

¹U.S. District Court Judge E. Richard Webber signed the order, however, the case is assigned to Donald J. Stohr.

motion to reconsider the district court's order that required the above disclosures. Petitioners bring this petition for writ of prohibition because the district court has no discretion to order production of information, even under a protective order, that is not relevant nor likely to lead to the discovery of admissible evidence, particularly where the disclosure is injurious to the disclosing party because it will jeopardize the safety of those disclosed and lead to harassment and annoyance of the innocent third parties.

A writ of prohibition is appropriate also because petitioner has no other adequate legal remedy. See Ex parte New York, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921). In this case, there is no other adequate legal remedy because, once the names are disclosed, any appeal rights over the issue are meaningless.

II. The issue presented.

Whether the district court has discretion to order petitioners to disclose, even under a protective order, the names of the medical professionals who will mix the three drugs used for lethal injection, the medical professionals who will insert the IV for administration of the three drugs, and the corrections persons who will push the syringe plunger to administer the drugs to Johnston for his lethal injection on August 31, when these individuals' credentials and qualifications have already been disclosed to Johnston's attorneys and they do not need these

names to support their claim that the three drugs used for lethal injection will subject Johnston to an “unnecessary risk of unconstitutional pain and suffering” (Order, Doc. #37 quoting Complaint, Doc. #1, ¶ 2, p. 1), nor to support their claim that the three drugs are administered by “inadequately trained personnel.” (Order, Doc. #37 quoting Complaint, Doc. # 1, ¶ 3). In light of the information that has been provided to Johnston’s attorneys, the names of the individuals will not lead to the discovery of admissible evidence.

III. The facts necessary to understand the petition.

A jury convicted Johnston of capital murder for brutally beating his wife to death in 1989.² The jury sentenced him to death. The rest of the facts underlying his conviction are set forth in State v. Johnston, 957 S.W.2d 734, 739 (Mo. en banc 1997), cert. denied, 522 U.S. 1150 (1998). Johnston sought and was denied relief both on direct appeal and in his state post conviction proceedings. Id. Next, Johnston sought and was denied federal habeas corpus relief challenging his conviction and resulting death sentence. Johnston v. Bowersox, 119 F.Supp.2d

²The medical examiner determined the cause of death as the collapse of the support structure around the heart and lungs, rendering those organs unable to function because they could not bear the weight of the muscle, tissue and bone pressing on them. Bleeding under the skin confirmed that the victim had remained alive through most of the beating. Johnston, 957 S.W.2d at 740.

971 (E.D.Mo 2000). After the district court denied Johnston's petition for writ of habeas corpus relief, plaintiff sought and was granted from the Eighth Circuit a certificate of appealability. This Court affirmed the district court's denial of the habeas petition. Johnston v. Luebbers, 288 F.3d 1048 (8th Cir. 2002).

While awaiting the Missouri Supreme Court's order setting a date for his execution, Johnston filed suit under 42 U.S.C. § 1983 seeking declaratory relief that Missouri's method of lethal injection violates the Eighth Amendment and seeking a permanent injunction barring his execution. (Complaint ¶¶ 25, 26).

Briefly stated, the substance of Johnston's claim is that the first drug injected will be "an unreliable ultra short-acting anesthetic that can and will leave [Johnston] conscious but trapped in a paralyzed body racked with pain, suffocation and a heart attack." (Complaint, Doc. #1, ¶ 3).

During the pendency of the section 1983 action, the parties engaged in discovery. In response to Johnston's interrogatories, petitioners provided the names of the three drugs to be utilized in effecting his death sentence, but objected to providing the names of those who mix the drugs, the names of those who insert the IV, and the names of those who push the syringe plunger to administer the lethal dose of drugs. Johnston filed a motion to compel responses and the district court granted in part the motion to compel. (Order, Doc. # 37). The district court

ordered the disclosure of the identities under a protective order. On August 1, 2005, the parties filed their protective order and their Joint Proposed Scheduling Plan. On that same day, the Missouri Supreme Court issued an order setting Johnston's execution for August 31, 2005. The Joint Proposed Scheduling Plan and the protective order were prepared and filed in the section 1983 case with a backdrop of no execution date and with the assumption that the case was proceeding as an unexpedited civil rights action. On the very day these two pleadings were filed, Johnston's execution date was set and this changed those assumptions. The Missouri Supreme Court set the execution date with full knowledge of the pendency of Johnston's federal claims and has denied his motion for stay of execution based on the pendency of his federal claims.

With the setting of Johnston's August 31 execution date, petitioners moved immediately to resolve Johnston's claims on the merits. On August 8, 2005, petitioners filed their motion to expedite with memorandum in support and addressed Johnston's claim that the three drugs used for lethal injection will subject him to an "unnecessary risk of unconstitutional pain and suffering." (Order, Doc. # 37 quoting Complaint Doc. #1, ¶ 2, p. 1). Petitioners filed, along with their motion, Director Crawford's affidavit providing the dosage of each drug, the timing, sequence and flow rates of the drugs, and the procedures used to

carry out Missouri's method of lethal injection (Crawford Affidavit, attached), and their expert's affidavit with attached graphs explaining why, to a reasonable degree of medical certainty, Johnston will not regain consciousness during his execution (Dershwitz Affidavit, attached).

That same day, Johnston filed a motion to expedite answers to interrogatories, including the interrogatory requesting the names. The district court denied petitioners' motion and granted Johnston's motion. Petitioners filed a motion for reconsideration with regard to the disclosure of the names, and answered the remaining discovery, including information about the qualification of the individuals. The motion for reconsideration was denied.

IV. The reason why the writ should issue.

The disclosure of the identities is not reasonably likely to lead to the discovery of admissible evidence given Johnston's claims that improper training is at fault, not a particular individual. In their interrogatory answers petitioners disclosed 99.9% of all the information sought. Thus, the need for protecting the safety of those involved in directly administering the drugs to Johnston outweighs any possible speculative use Johnston could make out of these individuals' names.

At stake in this writ action is the Department of Corrections' ability to carry out Johnston's execution on August 31, 2005. The Director of the Department of

Corrections, Larry Crawford, avers that if the names are released it will hamper his ability to use good practices to carry out Johnston's lethal injection in sixteen days. (Crawford Affidavit, ¶ 4, attached as Exhibit A). Any error of disclosure has far graver consequences in a case where execution is at hand because the disclosure of the names will jeopardize the safety and security of innocent third parties.

Even with a protective order in place, people make mistakes and an inadvertent slip of the tongue or an accidental mention in a hastily e-filed pleading or attached documents places at risk of physical harm or harassment to the doctor, nurse, and the corrections personnel who physically carry out plaintiff's lethal injection. And once disclosed, their names can never be recalled. Their names would circulate via the Internet and be published on Web pages that routinely advocate against the death penalty. This places those individuals and their families at risk of physical harm or harassment from those opposed to capital punishment generally or from those family members or comrades of Johnston opposed only to his execution on August 31.

Significantly, any public disclosure of these names means that the names would also become available to Missouri's 5,000 plus inmate population. Johnston has been moved to Eastern Reception Diagnostic Center for his execution and at

Potosi there are 54 offenders awaiting their execution. Director Crawford and Superintendents Roper and Purkett have a compelling interest in maintaining order in their correctional facilities and in maintaining the safety and security of the inmates and staff at those facilities. To maintain that order they need to prevent the disclosure of these names.

In contrast to these overwhelming safety and security concerns for correction's personnel and innocent third parties, is the absolute absence of need for these names in order for Johnston to proceed with his case. The names are not necessary to his claim that the drugs used will subject him to unconstitutional pain and suffering.

Twenty-seven of the thirty-seven states that use lethal injection use the challenged three drug combination of chemicals. Beardslee v. Woodford, 395 F.3d 1064, 1072 (9th Cir. 2005). And every court addressing the issue of sodium pentathol (thiopental sodium) has held that its use is not unconstitutional, at least where the quantity is two grams or above. Missouri has taken reasonable precautions to ensure that Johnston will experience nothing other than the insertion of the intravenous catheter. Because Missouri uses 5 grams of thiopental sodium as the initial drug, plaintiff will be unconscious and unable to feel any pain. In Beardslee, the Ninth Circuit noted that the state's expert, Missouri's

expert here, Dr. Mark Dershwitz, determined that with a dosage of 5 grams, “over 99.999999999999% of the population would be unconscious within sixty seconds from the start of the administration of this dosage of thiopental sodium and [most people would remain] unconscious for a period in excess of 13 hours.” *Id.* at 1075. In Cooper v. Rimmer, 379 F.3d 1029 (9th Cir. 2004), Dr. Dershwitz opined that every person given 5 grams of thiopental sodium [sodium pentathol] will have stopped breathing prior to the subsequent administration of the second drug, pancuronium bromide. *Id.* at 1032. Significantly, in Beardslee, the Ninth Circuit found that “even [plaintiff’s expert [Heath]] concedes that the amount of sodium pentathol [5 grams] given under Procedure 770, if properly administered, would likely be sufficient to cause loss of consciousness and probable death prior to the administration of pancuronium bromide [the second drug].” *Id.* at 1075. Any finding that the use of the two remaining drugs is unconstitutional would necessarily have to be premised on a finding that the use of the first drug, 5 grams of sodium pentathol, did not render the inmate unconscious. Beardslee, 395 F.3d at 1076. This has not been the holding of any court to date.

Petitioners have produced the information necessary to resolve Johnston’s Section 1983 claim on the merits; Missouri’s method of execution is in full compliance with humane execution protocols as reviewed by other courts; and

petitioners requested an expedited hearing on the merits to prove that Johnston's claims were unfounded, but that request was denied. Petitioner Crawford is required by law to execute Johnston on August 31, 2005. Disclosing the names of the individuals who will perform that execution puts those individuals and Crawford's ability to perform his duties in jeopardy.

WHEREFORE, for the foregoing reasons, petitioners respectfully request this Court grant the petition for immediate writ of prohibition and direct the Honorable Donald J. Stohr, United States District Judge for the Eastern District of Missouri, to vacate its discovery orders, insofar as such orders require the disclosure of the names of person directly involved in carrying out Johnston's lethal injection on August 31, 2005. Petitioners also move this Court to direct the district court to resolve Johnston's claims on the merits before August 24, 2005, or failing that, to order Johnston to file his motion for a stay, if any, before August 19, 2005, and to direct the district court to hold an evidentiary hearing on and resolve such motion for a stay on or before August 24, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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