

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In Re:)	
)	
LARRY CRAWFORD, DON ROPER, and JAMES PURKETT,)	
)	
Petitioners,)	No. 05-3228
)	
vs.)	CAPITAL CASE
)	
TIMOTHY JOHNSTON,)	EXECUTION SCHEDULED
)	AUGUST 31, 2005
)	
Respondent.)	
)	

**ANSWER TO PETITION FOR
IMMEDIATE WRIT OF PROHIBITION**

COMES NOW respondent, Timothy Johnston, by and through counsel, Michael J. Gorla and Christopher E. McGraugh, and prays that the Court deny petitioners' petition for immediate writ of prohibition. In support of his position, respondent states as follows:

Petitioners filed a petition for immediate writ of prohibition seeking an order directing the Honorable Donald J. Stohr, United States District Court Judge, to vacate it's discovery order issued in Case No. 4:04CV1075 DJS insomuch as said order requires the disclosure of the names of corrections personnel who are to be involved in Mr. Johnston's scheduled execution. Judge Stohr previously ordered the disclosure

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U. S. COURT OF APPEALS
EIGHTH CIRCUIT

of said information pursuant to the terms of an agreed protective order crafted and agreed to by the parties in the case below.¹

The Standard for Issuance of a Writ of Prohibition

As recognized by this Court, a writ of prohibition is a drastic remedy, one that is “to be invoked only in extraordinary situations.”² This same consideration applies whether the writ seeks to mandate action, or like in the present case, to prohibit action.³ The Supreme Court has held that an issuance of a writ of mandamus is only justified in circumstances amounting to “a judicial usurpation of power.”⁴ “The writ is usually denied unless the applicant . . . can establish ‘an unquestioned legal right to have the performance of particular duties sought to be enforced or enjoined.’”⁵ The party seeking the writ has the burden of showing that it’s right to issuance of the same

¹A copy of the agreed protective order is attached hereto and incorporated herein as respondent’s Exhibit 1.

²See *In re Jackson County, Missouri*, 834 F.2d 150, 151 (8th Cir. 1987) (quoting *Allie Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980)).

³*Id.* at 151.

⁴*Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988).

⁵See *Lofton v. United States District Court for the Eastern District of Arkansas*, 882 F.2d 300 (8th Cir. 1989) (quoting *In re Missouri*, 664 F.2d 178, 180 (8th Cir. 1981)).

is clear and indisputable.⁶ Such extraordinary relief is not warranted here for a variety of reasons.

**Judge Stohr Was Within His Discretion
to Compel Disclosure of the Information**

The district court has substantial discretion in controlling the discovery phase of litigation.⁷ A quick review of the proceedings below shows that the district court decision compelling discovery of the identities of corrections personnel to be involved in plaintiff's execution was within Judge Stohr's discretion.

On November 24, 2004, respondent propounded his first set of interrogatories to petitioners. Petitioners objected to providing most of the information sought, and after counsel were unable to work out their differences, respondent filed motions to compel with the district court. Judge Stohr sustained respondent's motions to compel, and ordered petitioners to answer the same; however, in doing so, the district court acknowledged that parts of the discovery answers could be sensitive, and ordered the parties to confer and attempt to draft a agreed protective order limiting the use and disclosure of corrections personnel involved in executions. Counsel for the parties did so and were able to reach an agreement on the terms of a protective order.⁸ A motion

⁶*See Bankers Life & Casualty Company v. Holland*, 346 U.S. 379, 384 (1953).

⁷*See Hickman v. Taylor*, 328 U.S. 475, 507 (1947).

⁸*See* respondent's Exhibit 1.

for entry of this protective order accompanied by an agreed protective order was filed in the district court on August 1, 2005 at 4:57 p.m. Central Daylight Time. The agreed protective order was approved by the court on August 3, 2005.⁹

The petitioners assert in their petition that the protective order and joint proposed scheduling plan “were prepared and filed in the § 1983 case with a backdrop of no execution date.”¹⁰ Petitioners’ assertion is a blatant misstatement.

The parties filed their joint proposed scheduling plan¹¹ with the district court on August 1, 2005 at 4:26 p.m. CDT. The agreed protective order was filed at 4:57 p.m. on the same date. Footnote 1 to the joint proposed scheduling plan reads as follows:

“The dates reflected in this scheduling plan are for the trial of the merits of this case. In light of the Missouri Supreme Court’s setting of August 31, 2005 as plaintiff’s execution date, the selection of these dates does not foreclose plaintiff’s request for a temporary restraining order.”

The footnote is absolute proof that the parties were aware of Mr. Johnston’s execution date prior to the filing of the joint proposed scheduling plan and agreed protective order. Petitioners’ contrary statement is simply not true.

⁹Doc. #45.

¹⁰See Petition for Immediate Writ of Prohibition, p. 7.

¹¹A copy of the joint proposed scheduling plan is attached hereto and incorporated herein as respondent’s Exhibit 2.

It is clear that Judge Stohr has not usurped his authority by ordering disclosure of the names of corrections and medical personnel involved in the execution process. In fact, he has taken steps to protect and limit the use and disclosure of said information. Federal rules confer broad discretion on the district court to decide when a protective order is appropriate and what degree of protection is required.¹² What petitioners want the Eighth Circuit to do is to substitute its judgment for that of Judge Stohr on the issue as to whether or not the disclosure of the names of corrections personnel involved in the discovery process is reasonably calculated to lead to the discovery of admissible evidence. Judge Stohr has decided this issue in favor of respondent, a decision well within his discretion. Prohibition does not lie to enjoin Judge Stohr from doing so.

**This Matter is Moot - The Names and Addresses of
Corrections and Medical Personnel Have Already Been Disclosed**

On Friday, August 12, 2005, the discovery which the petitioners seek to prohibit the district court from ordering them to release was, in fact, delivered to counsel for petitioner. The delivery was made at the direction of counsel for

¹²See *Miscellaneous Docket Matter #1 v. Miscellaneous Docket Matter #2*, 197 F.3d 922, 925 (8th Cir. 1999) (quoting *Seattle Times Company v. Rhinehart*, 467 U.S. 20, 36 (1984)).

petitioners after she received notice that her motion asking Judge Stohr to reconsider his earlier order ordering such disclosure was overruled.

Counsel for respondent currently possess the information subject to the protective order approved by the district court. They are handling said information with extreme care, taking every precaution to insure that said information is protected from disclosure as limited by the district court's protective order. Since the names of corrections and medical personnel who will conduct respondent's execution have already been disclosed, this matter is moot.

**Additional Relief Requested by Petitioners
Is Not Subject to a Writ of Prohibition**

In addition to requesting that this Court direct Judge Stohr to vacate his discovery order requiring the disclosure of the names of corrections personnel involved in the execution process, petitioners also move the Court to direct the district court to resolve respondent's claim on the merits before August 24, 2005, or alternatively, order Mr. Johnston to file his motion for stay before August 19, 2005, and direct the district court to hold an evidentiary hearing and resolve said motion on or before August 24, 2005.

As discussed earlier, the ability of a district court judge to manage his caseload is subject to his discretion. Given the fact that his management ability is

discretionary, it is not subject to a writ of prohibition. As stated earlier, the issuance of a writ is justified “only in exceptional circumstances amounting to a judicial usurpation of power.”¹³ Such exceptional circumstances do not exist in this case.

Judge Stohr has properly assigned this case as a Track 3 complex case. The parties have agreed with this classification and have filed a joint proposed scheduling plan submitting a proposed discovery plan culminating in a projected trial date of June 26, 2006.¹⁴ Petitioners have agreed to this, doing so at a time when they were well aware of Mr. Johnston’s execution date. Now they are seeking to renege on their previous agreement and ask this Court to order Judge Stohr to proceed otherwise when they have no unquestioned legal right to have him do so.

Petitioners are also seeking an order from this Court ordering respondent to file his motion for stay of execution no later than August 19, 2005. Again, this is a decision that is completely within the discretion of Judge Stohr. As this Court surely realizes, respondent will, in fact, file a motion seeking a stay of execution in the district court.¹⁵

¹³See *Gulfstream Aerospace Corp.*, 485 U.S. at 289.

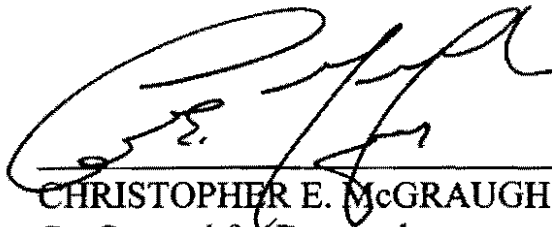
¹⁴See respondent’s Exhibit 2.

¹⁵For the Court’s information, respondent’s counsel received petitioners’ answers to his first set of interrogatories on the afternoon of Friday, August 12, 2005. They have been working diligently to complete their motion for TRO/preliminary injunction, and anticipate, barring unforeseen circumstances, filing the same on

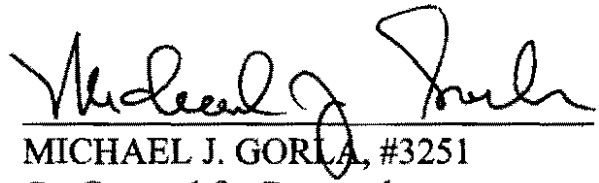
Conclusion

Prohibition is an extraordinary remedy that should be sparingly exercised. It is confined to cases where the applicant has an unquestionable legal right to have the performance of a particular act enjoined. Given the fact that Judge Storh's order compelling the identity of the corrections personnel involved in Mr. Johnston's execution was well within his discretion, and that said information was disclosed to respondent's counsel prior to the filing of this writ, respondent prays that this Court issue an order denying petitioners' petition for immediate writ of prohibition.

Respectfully Submitted,



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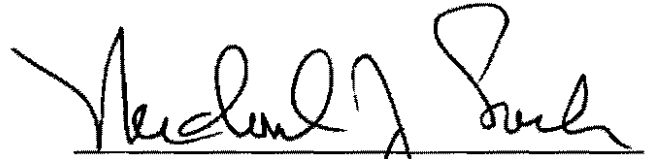


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August 18, 2005.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing sent via facsimile, and United States Postal Service, first-class postage prepaid, this 17th of August, 2005 to: Ms. Gail Vasterling, Assistant Attorney General, 6th Floor, Broadway Building, P.O. Box 899, Jefferson City, Missouri 65102, at facsimile number (573) 751-9456, and Ms. Denise G. McElvein, Assistant Attorney General, Wainwright State Office Building, 111 N. 7th Street, Suite 934, St. Louis, Missouri 63101, at facsimile number (314) 340-7029.

A handwritten signature in black ink, appearing to read "Michael J. Gorla", written over a horizontal line.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TIMOTHY JOHNSTON,)	
)	
Plaintiff,)	
)	
v.)	Cause No. 4:04CV1075 DJS
)	
LARRY CRAWFORD, et al.,)	
)	
Defendants.)	

AGREED PROTECTIVE ORDER

WHEAREAS, this having previously ordered that defendants answer “Interrogatory 1; Interrogatory 2, except as to subpart (k); Interrogatory 3, limited to the last four Missouri executions; Interrogatory 4, except as to subpart (h) and limited to the last ten Missouri executions; Interrogatory 5, limited to the time period from 2000 to present; and Interrogatory 6, limited to the last four Missouri executions” and that said parties “confer forthwith and employ their best efforts to formulate a mutually acceptable proposed protective order appropriately limiting the use and disclosure of the identities of corrections personnel involved in executions,” it is hereby ordered as follows:

1. Defendants’ responses to the aforementioned interrogatories concerning the identities, training, credentials, qualifications, and experience of corrections personnel involved in executions are deemed to be confidential information. As used herein, the term “corrections personnel” shall mean employees, independent contractors, or agents of

the Missouri Department of Corrections.

2. Said confidential information shall not be made available to plaintiff but only to this Court for in camera review, to the party producing the responses, and to counsel of record for all parties and their staff who are bound by the terms of this Agreed Protective Order. With the exception of those person mentioned in paragraph 3, no other person shall have access to confidential information without the written approval of the party producing such confidential information or without an order from the Court. As used herein, the phrase "staff" shall mean clerks, paralegals, and secretaries in the regular employ of the parties' counsel.

3. The party producing the confidential information contained in the interrogatory responses and the counsel of record for all parties and their staff will not, directly or indirectly, disclose or permit the disclosure of the confidential information contained in defendants' interrogatory responses, or any portion thereof, to anyone else other than any expert or experts the parties retain in connection with this case. In the case of disclosure to an expert or experts, counsel of record for such parties shall first furnish a copy of the Court's Agreed Protective Order to such person and obtain their agreement in writing that they will abide by this Order and that such information will not be disclosed, directly or indirectly, to any person other than those qualified under the Agreed Protective Order.

4. The confidential information produced pursuant to this Agreed Protective Order shall be used by plaintiff's counsel of record, including their respective staffs, for

the sole purpose of representing the interest of plaintiff Timothy Johnston in this litigation and for no other purposes. Confidential information shall not be given, shown, made available, discussed or otherwise communicated for any purpose other than the litigation of this action, and then only in accordance with the terms and conditions of this Agreed Protective Order.

5. All confidential information and copies or extracts thereof shall be maintained in the custody of counsel of record for the parties in a manner that limits access to qualified persons.

6. If any portion of a submission to the Court contains confidential information, the portion containing the confidential information shall be filed under seal in a sealed envelope on which shall be affixed the caption of this case, a general description of the nature of the contents that does not disclose any confidential information, the word "CONFIDENTIAL," and a statement substantially in the following form:

THIS ENVELOPE CONTAINS MATERIALS SUBJECT
TO A AGREED PROTECTIVE ORDER ENTERED IN THIS CASE.
IT IS NOT TO BE OPENED, NOR ARE ITS CONTENTS TO
BE DISPLAYED, REVEALED OR MADE PUBLIC, EXCEPT
BY ORDER OF THE COURT.

A copy of this Agreed Protective Order shall be submitted to the Clerk of the Court with the materials filed under seal. Unless otherwise ordered by the Court, appropriate steps shall be taken to preserve the confidentiality of confidential information during this action and at any hearing or other proceedings at which confidential

information may be referred to or disclosed.

7. Any person in possession of confidential information who receives a request or a subpoena or other process for confidential information from any non-party to this action shall promptly give notice by telephone and written notice by overnight delivery and/or telecopier to counsel for the parties in this case, enclosing a copy of the request, subpoena or other process. In no event shall production or other disclosure pursuant to the request, subpoena or other process be made except upon order of this Court after notice and hearing.

8. Nothing in this order shall preclude any party from seeking and obtaining a modification of the Agreed Protective Order, or additional or different protection with respect to information which it believes is confidential.

9. This Agreed Protective Order is intended to provide a mechanism for the handling of confidential information. It shall not be deemed to be a waiver by any of the parties of any objections as to admissibility, relevancy, materiality, or discoverability, nor a waiver of any right or protection otherwise afforded by the Federal Rules of Civil Procedure relating to discovery, or of the Federal Rules of Evidence.

10. This Court shall retain jurisdiction for the purpose of resolving any dispute that may arise in relation to this Agreed Protective Order.

11. Within ten(10) days of the final termination of this case, whether by settlement or at the end of trial or hearing and/or any appeals, all confidential information which is

in the custody or control of plaintiff's counsel and counsels' staff shall be returned to the counsel for the producing party.

12. This Agreed Protective Order shall survive termination of this case.

Respectfully submitted,

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Attorney General

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Attorneys for plaintiff

SO ORDERED this ____ day of _____, 2005.

Donald J. Stohr
District Judge
United States District Court
Eastern District of Missouri

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TIMOTHY JOHNSTON,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 4:04CV1075 DJS
)	
LARRY CRAWFORD, et al.,)	
)	
Defendants.)	

JOINT PROPOSED SCHEDULING PLAN¹

COMES NOW plaintiff Timothy Johnston and defendants Larry Crawford, Donald P. Roper, and James Purkett, by and through counsel, and hereby submit their joint proposed scheduling plan in response to the Order of this Court dated June 22, 2005:

- (a) The track assignment (Track 3) is appropriate.
- (b) The joinder of additional parties or amendment of pleadings shall be completed by November 14, 2005.
- (c) The parties propose the following discovery plan:
 - (i) The parties will provide initial disclosure pursuant to Rule 26(a)(1), Fed.R.Civ.P., by October 17, 2005.
 - (ii) Discovery shall not be conducted in phases or limited to certain issues.
 - (iii) Plaintiff shall disclose his expert witnesses' identities and reports by December 5, 2005, and shall make available said experts for deposition by January 3, 2006. Defendants shall disclose any expert witnesses and reports

¹The dates reflected in this scheduling plan are for the trial of the merits of this case. In light of the Missouri Supreme Court's setting of August 31, 2005 as plaintiff's execution date, the selection of these dates does not foreclose plaintiff's request for a temporary restraining order.

by February 6, 2006, and shall make said experts available for deposition by March 6, 2006.

- (iv) The presumptive limits of ten (10) depositions per side and twenty-five (25) interrogatories shall apply in this case.
 - (v) The parties do not anticipate that any physical or mental examination of the parties will be requested pursuant to Rule 35, Fed.R.Civ.P.
 - (vi) All discovery in this case will be completed by April 3, 2006.
 - (vii) The parties are not aware of any other matters pertinent to the completion of discovery in this case.
- (d) The parties do not believe that the referral of the action to mediation or early neutral evaluation will be productive.
 - (e) All dispositive motions, including motions for summary judgment, shall be filed no later than April 17, 2006. Briefs in opposition shall be filed within twenty-five (25) days, and any reply briefs shall be filed within seven (7) days thereafter.
 - (f) The earliest date by which this case should be ready for trial is June 26, 2006.
 - (g) The parties anticipate 3 to 4 days to try this case to verdict.
 - (h) The parties are not aware of any other matters deemed appropriate for inclusion in this Joint Scheduling Plan.

Respectfully submitted,

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