

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

LOUIS HENDERSON, et al.,

Plaintiffs,

v.

**KIM THOMAS, Commissioner, Alabama
Department of Corrections, et al.,**

Defendants.

Civil Case No. 2:11cv224-MHT

MOTION TO APPEAL MAGISTRATE JUDGE'S ORDER

During the pretrial hearing on August 17, Plaintiffs gave verbal notice that the Plaintiffs intended to call Plaintiff Albert Knox remotely by videoconferencing. Defendants made no objection at the time, and the Court instructed Plaintiffs to confer with the courtroom deputy regarding the technological issues involved. On August 27, 2012, Plaintiffs filed an Application for Assistance in Facilitating Plaintiffs' Attendance at Trial (Doc. No. 184). The application requested assistance regarding the attendance of the incarcerated Plaintiffs (not at issue in this appeal) and also requested that the Court permit Plaintiff Albert Knox remotely by videoconferencing. On August 29, Defendants filed an opposition that, in relevant part, argued that allowing Mr. Knox to testify remotely by videoconferencing would "materially limit the State's ability to cross examine him given the extensive amount of documents which may be utilized in cross examination." Defendants' Response to Plaintiffs' Motion (Doc. No. 185). On August 30, Magistrate Judge Capel denied Plaintiffs' request to allow Mr. Knox to testify via videoconference on the ground that "Plaintiffs have made no showing that a request for a

modification of the terms of Knox's parole, to allow him to travel to the Middle District of Alabama for this trial, has been made and denied." Order, Aug. 30, 2012 (Doc. No. 189).

The standard applied by the Magistrate Judge was excessively stringent. Mr. Knox's situation is unusual in that he is presently on parole in his home state of Illinois, not in Alabama. Thus, although his conditions of parole are set by the Alabama Board of Pardons and Paroles, he is actually under the supervision of the Illinois Department of Corrections. This arrangement took months of communication between the relevant Alabama and Illinois parole authorities to set up, and it is Plaintiffs' counsels' understanding that multiple miscommunications between the two authorities occurred before the arrangement was finalized. Attempting to renegotiate Mr. Knox's conditions of parole less than two weeks before the trial, and then seeking to ensure that all relevant officials in both the Alabama Board of Pardons and Paroles and the Illinois Department of Corrections are fully informed of those changes, would be excessively burdensome and create a high risk of further miscommunications that may carry serious implications for Mr. Knox's parole status. For these reasons alone, Plaintiffs' request to allow Mr. Knox to testify via videoconference should be granted.¹

Defendants' concerns regarding their ability to cross-examine Mr. Knox by video should not be given significant weight. Defendants deposed Mr. Knox in Illinois on May 16, 2012. In that deposition, Defendants had a full and fair opportunity to explore the nature of Mr. Knox's

¹ Additionally, requiring Mr. Knox to travel from Illinois to Alabama for the trial would be excessively burdensome even if it did not endanger his parole status. Following his release from ADOC custody, Mr. Knox was diagnosed with amyotrophic lateral sclerosis (ALS, more commonly known as Lou Gehrig's Disease), which causes a progressive decline in muscle strength and coordination. Only about 25% of ALS patients survive more than five years after diagnosis. If his condition deteriorates by the time of the trial, Mr. Knox may lack sufficient physical coordination to travel by airplane unassisted. The cost of travel would also be significant for Mr. Knox, as disability payments have been his sole source of income since his ALS diagnosis.

claims and to probe areas of potential cross-examination. Additionally, Plaintiffs' counsel are willing to work with Defendants to facilitate the transport or electronic transmission of exhibits to a videoconferencing facility in Illinois.

For the foregoing reasons, the Magistrate Judge's Order of August 30, 2012 should be reversed insofar as it denied Plaintiffs' request to allow Mr. Knox to testify via videoconference.

Dated: September 5, 2012

Respectfully submitted,

/s/ Carl Takei

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2012, I electronically filed a true copy of the foregoing with the Court using the CM/ECF system, which automatically served the same upon Defendants' counsel of record via electronic mail.

/s/ Carl Takei

CARL TAKEI