No. 05A695

In The
SUPREME COURT OF THE UNITED STATES

LARRY CRAWFORD, et al.,

Petitioners,

v.

MICHAEL ANTHONY TAYLOR,

Respondent.

SUPPLEMENTAL SUGGESTIONS IN OPPOSITION TO APPLICATION TO VACATE STAY OF EXECUTION

As set forth in his preliminary suggestions, the respondent, Michael Anthony Taylor, opposes the state petitioners' application to vacate the stay of execution which the United States Court of Appeals for the Eighth Circuit entered in its Appeal No. 06-1278-WMJC on Sunday, January 29, 2006. He prays the Court for its order that the pending application to vacate be denied.

At various points the state officials who are petitioners here will be referred to by their procedural posture in the district court, *i.e.*, defendants. Michael Taylor, plaintiff below, is the respondent in this Court as to the state officials' application to vacate the Eighth Circuit's stay of execution.

Petitioners would rather hurry along the execution because it is administratively convenient for them rather than to ensure that justice is served. Here, the United States Court of Appeals for the Eighth Circuit has already cut back radically on the preliminary injunction an experienced district judge granted after he had denied the petitioners' motion to dismiss. It has exercised its discretion to set a schedule that seeks to balance the interests of the parties as it sees them. Without a stay at least through February 3, 2006, the courts would effectively be divested of jurisdiction to resolve the claims. The district court held the claims have legal merit pending development of a record. The Eighth Circuit panel exceeded its discretion in ousting the district judge and committing the cause to a district judge to whom the case was new and ordering him to conduct a hearing immediately and render judgment by noon on February 1, 2006. The least Taylor is entitled to is the opportunity to seek relief should the new district judge deny relief—as the circumstances made virtually certain.

Statement of the Case

Since Timothy Johnston filed an action under 42 U.S.C. § 1983 in August 2004, Missouri prisoners under sentence of death have been attempting to litigate claims that the state's method of conducting lethal injections violates the Eighth Amendment and other federal constitutional provisions. Agents of the State of Missouri have manipulated the judicial process to avoid any resolution on the merits by delaying discovery and other information until the Missouri Supreme Court had set an execution date. These state agents have then gotten the plaintiffs' claims denied on the basis of defenses other than the merits of their case or in a hearing for which the plaintiff's

counsel was unable to marshal their evidence because of the late disclosure of the state's position.

Plaintiff Taylor filed this action on June 3, 2005. At that time, he was within the ninety days in which he could seek certiorari after the Missouri Supreme Court denied his motion to recall the mandate touching his conviction and sentence. He filed a timely petition for writ of certiorari, which was not denied until November 28, 2005.

In this case, the parties have litigated for months over discovery issues. When the defendants sprang radically new information about their execution practices on Timothy Johnson's counsel a week after the Missouri Supreme Court had set an execution date, counsel in this case incorporated this information into an amended complaint (Attachment 1): in order to attempt to avoid some of the constitutional infirmities in the way everyone had thought Missouri lethal injections had proceeded, the defendants introduced new constitutional violations including a central-line access when it is not medically indicated and a violation of the Hippocratic Oath and AMA Code of Ethics when the state is supposed to be enforcing rather than violating medical ethics. Defendants' counsel filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). (Attachment 2) Plaintiffs filed a response, and the defendants filed a reply.

On December 28, 2005, the district court issued an order rejecting the defenses the defendants had raised in their motion to dismiss, and holding that the case presented factual issues which had to be resolved in a hearing or, at least, on summary judgment. (Attachment 3.) The undersigned counsel for Michael Taylor was out-of-state for Christmas with his family on the day the district court issued this order. The

very next day, he faxed a copy of the order, with a cover letter, to Bill Thompson, Staff Attorney (a/k/a Death Clerk), at the Missouri Supreme Court. (Attachment 4.)

On January 3, 2006—the second business day after the undersigned counsel for Michael Taylor faxed the Missouri Supreme Court a copy of this district court's order holding that the action needed to go forward—the Missouri Supreme Court set a February 1, 2006, execution date.

The next day, counsel filed an application for stay of execution with the Missouri Supreme Court, attaching a copy of the district court's order. (Attachment 5.) Several days later, counsel received a response from the defendants' co-counsel. (Attachment 6.) The next day, January 13, 2005, the undersigned counsel for Michael Taylor filed a reply. (Attachment 7.)

In a telephone conference beginning at 9:51 a.m. on Wednesday, January 18, 2006, the district court informed counsel for all parties that it would set an evidentiary hearing in this matter for February 21, 2006, with the hearing to extend to February 22, 2006, should the district court need a second day to complete taking the evidence in the matter. Counsel were informed that the district court had attempted to schedule the hearing in time to decide the case before February 1, 2006, but that it would have been impossible to do so. Counsel for the defendants presented neither argument or evidence against the district court's entering the order under discussion, but instead informed the district court that they would seek to overturn any order that their clients' execution of plaintiff Taylor not proceed according to their schedule.

At 10:34 on January 18, the undersigned counsel for Michael Taylor faxed to the Missouri Supreme Court a supplemental notice in support of his pending application

for a stay from that court. (Attachment 8.) In a subsequent fax to that court, he requested a call on his cellular phone if the clerk had any information to convey in the matter. (Attachment 9.) By the end of the afternoon, he had received no response. Only after giving the Missouri Supreme Court an opportunity to stay its ordered execution or to vacate its execution warrant without prejudice to setting another execution date if the district court ruled against the plaintiffs.

Throughout this litigation and the previous litigation over the Missouri lethal injection procedure, the defendants have asserted in pleadings and affidavits or declarations, and admitted in the discovery they have chosen to respond to, that they use the three-chemical sequence to which the original complaint was directed and that they also use a central-line access and a licensed physician, to which the amended complaint was also directed. (*E.g.*, Application to Vacate [filed by defendants in this Court January 20, 2006] Exhibit F at 1-2 (no change from procedure and practices used to execute Timothy Johnston planned for executions of these plaintiffs) & 6-7 (use of central-line access and licensed physician).)

The same day that the district court entered its order requiring the defendants not to execute plaintiff Taylor until further order of the court, with any such order to be issued within a reasonable time after the hearing on February 21 or February 21-22, the defendants filed a notice of appeal to this Court. (Attachment 10.) On Friday, January 20, 2006, they faxed the Eighth Circuit an "application" to vacate the district court's preliminary injunction.

On Sunday, January 29, 2006, a panel of the Eighth Circuit issued an order vacating the district judge's preliminary injunction, a panel of the Eighth Circuit

ordered that the Chief Judge of the district court reassign the section 1983 action to another district judge, and that the latter district judge conduct a hearing immediately and render judgment by noon on Wednesday, February 1, 2006. It issued a stay of execution through 11:59 p.m. on Friday, February 3, 2006.

Respondents, represented by the hundreds of attorneys in the Office of the Attorney General, have ***both*** conducted their end of the immediate "hearing," which was entirely by telephone and excluded over objection several witnesses that the petitioner's counsel sought to present, ***and*** filed an application to vacate the three-day stay by the Eighth Circuit. Because the Eighth Circuit truncated the section 1983 action beyond recognition, the plaintiff-intervenor dismissed without prejudice and the intervenor-application withdrew his application to intervene, leaving the undersigned sole practitioner to handle the immediate hearing in the truncated section 1983 action alone. He has been unable to seek relief from the Eighth Circuit's defenestration of the experienced district judge who had denied the motion to dismiss and had scheduled a hearing for February 21.

Discussion

I. Under the applicable standard of review, Taylor was entitled to have the Eighth Circuit uphold the preliminary injunction which the district court entered in order to allow it to hear the case adequately.

In reliance on the defense which is before this Court on certiorari in *Hill v. Crosby*, No. 05-8794, the state petitioners here argue that the standard of review is the same as it would be if Taylor had filed a second or successive federal habeas corpus petition. Application at 5-6. Nothing could be further from the truth.

A district court's decision to order parties to maintain the status quo in order to give it a chance to decide a matter within its jurisdiction is reviewable only for abuse of discretion. *Bell v. Sellevold*, 713 F.2d 1396, 1399 (8th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984). The standard of review of a district court's entry of a preliminary injunction is abuse of discretion. *Ashcroft v. Amer. Civil Liberties Union*, 542 U.S. 656, 664 (2004). In *Emerson Elec. Co. v. Rogers*, 418 F.3d 841, 844 (8th Cir. 2005), the Eighth Circuit explained: "A district court has broad discretion when ruling on preliminary injunction requests, and we will reverse only for clearly erroneous factual determinations, an error of law, or an abuse of discretion. *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir.1998)." It has amplified on this standard of review, collecting cases, in *Aaron v. Target Corp.*, 357 F.3d 768, 773-74 (8th Cir. 2004):

> A district court has broad discretion when ruling on a request for preliminary injunction, and it will be reversed only for clearly erroneous factual determinations, an error of law, or an abuse of its discretion. *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir.1998). . . . The abuse of discretion standard means that a court has a "range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." *Verizon Communications, Inc. v. Inverizon Int'l, Inc.*, 295 F.3d 870, 873 (8th Cir.2002) (citing *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir.1984)). An abuse of discretion occurs if a relevant factor that should have been given significant weight is not considered, if an irrelevant or improper factor is considered and given significant weight, or if a court commits a clear error of judgment in the course of weighing proper factors. *Id.*

Because appellate review of a district court's issuance of a preliminary injunction is only for abuse of discretion, an appellate could which might have handled the matter differently in the first instance "should uphold the injunction" and remand for a hearing on the merits ***even*** '[i]f the underlying constitutional question is close.'" *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428

F.3d 1139, 1145 (8th Cir. 2004), quoting *Ashcroft v. Amer. Civil Liberties Union*, 542 U.S. at 664-65.

II. The district courts' order—which the defendants and their privies made necessary by seeking and setting an execution date while the case was pending—did not turn this section 1983 complaint into a successive section 2254 petition.

Defendants attempt to shoehorn the district court's preliminary injunction into 28 U.S.C. § 2254 by arguing that the district court did not specify by what means the defendants could not execute plaintiff Taylor. (AVDCOPE:4-5.)[1] They argue that because the district court forbade them to execute plaintiff Taylor until after its hearing in the case without specifying that the execution would be the kind of execution which they have pleaded and given affidavits that they would use, the whole action ceased to be a civil case under 42 U.S.C. § 1983 and became, instead, a petition under 28 U.S.C. § 2254. That makes no sense, but if it were accepted, the plaintiff could not have brought the action in the first place based on the district court's response, seven months later, to the defendants' privy's setting an execution date immediately after the district court denied a motion to dismiss.

Defendants could have raised this objection in the district court, either in the telephone conference in which all counsel were informed of the district court's hearing on February 21, or in response to the district court's solicitation the defendants' counsel's review of the order the district court intended to issue. The court's

[1]The state officials (petitioners here, defendants in the district court) make mostly the same arguments in this Court for vacating the Eighth Circuit's stay that they made for vacating the district court's preliminary injunction. Taylor cites to their pleading in the Eighth Circuit by its initials, "AVDCOPE."

information was clear that it was not attempting to fine-tune the state's execution plans without the benefit of a hearing, and the court indicated that the defendants' counsel should advise it of any problem they had with the order it directed plaintiff Taylor's counsel to draft. He, in turn, e-mailed the draft to counsel for the defendants hours before the district court entered its order. If the defendants thought the order swept beyond the section 1983 action in which the district court issued it, they should have brought this to the attention of the district court rather than sandbagging in the hope that some other body would buy their theory that a court's action in response to the action by their privy, the Missouri Supreme Court, would recast the entire litigation in order to bring about its dismissal.

The district court's order makes clear that the order became necessary to resolve the merits of the "pending" litigation, not some other litigation that it was creating in spite of the plaintiffs' care in pleading their case under section 1983 rather than under section 2254. Plaintiffs are the masters of the action at this level, and have never sought, in this action, relief from their convictions and sentences—or even from execution by lethal injection per se—but only from a form of lethal injection which violates the Constitution of the United States. Not only did the district court make its decision within the context of the action the plaintiffs filed—not the action the defendants wish the plaintiffs had filed—but it could not denature that action if it had tried.

In the context of this case and of the need for preliminary injunctive relief to hold a hearing on the merits, it would have made no sense to have requested, or ordered, preliminary injunctive relief other than the defendants' simply refraining from executing plaintiff Taylor until after the hearing, scheduled for only a few weeks after

the district court's denial of the motion to dismiss and only three weeks after the execution date the Missouri Supreme Court set after it had been notified of the dismissal. The alternative would have been for the district court to have ordered the defendants not to execute him using the three-chemical sequence, the central-line access, and the licensed physician. Defendants have repeatedly filed pleadings and affidavits and—when they got around to it—discovery responses, indicating that they intend to perform all executions in this manner. (*E.g.*, Exhibit F at 1-2 & 6-7, *supra*.) It would require a hearing to establish that any new form of lethal injection the district court might have ordered rather than simply telling them to hold off on the execution until it could conduct a hearing. If the district court could have held a hearing by February 1, 2006, it would have held the one it has scheduled for February 21. Given the defendants' unconstitutional response to critiques of their former botched executions, they would most likely have come up with some other alternative to the three-chemical sequence, central-line access, and licensed physician which would have been even worse that the status quo from a constitutional and treaty point of view. A federal court order to come up with a new form of lethal injection would actually have been intrusive into the defendants' activities—whereas corrections personnel in death-penalty states know, going in, that there will be times when courts or executives tell them to keep an execution on hold: obeying such orders is part of their expected duties, whereas changing execution protocols and procedures and the substance of the lethal acts themselves at the last minute would be highly unusual. Such an order would not have respected the rights and responsibilities of ***either*** the plaintiffs ***or*** the defendants,

and no one should be criticized for the fact that the district court's order proceeded on the more parsimonious path.

In this respect, the defendants are attempting to relitigate the denial of their motion to dismiss about the nature of the action ab initio. It would stand the judicial process on its head to hold that after they have lost on a motion in which they argued that this litigation was "really" a federal habeas corpus action, any court would agree with them because the district court took a modest, limited action which it found necessary to resolve the case on the merits.

Although the plaintiffs do not regard the district court's order as overbroad, if this Court were to disagree, the remedy would be to remand with instructions rather than to reach back in time and grant, at the appellate level, the motion to dismiss insofar as it pleaded the case was "really" a successive federal habeas corpus action. *See, e.g.*, *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d at 1145-46. Defendants and their privies should not be allowed to take an interlocutory appeal on the motion to dismiss by setting an execution date in order to force the district court to issue preliminary relief. They do not like the fact that they are losing in the district court, and by setting an execution date after it denied the defendants' motion to dismiss but before the district court can adjudicate the case on its merits, they are attempting an illegitimate end run.

Although the Court should reject the defendants' attempt to denature this 1983 action on grounds common to all litigation, in this special area it bears remarking that the plaintiffs ***could not*** have raised lethal injection claims in their habeas corpus petitions. Defendants have not disclosed their modus operandi until the discovery in

the Timothy Johnston case—even then, only weeks after the district court issued an order compelling discovery and, to a large extent, after their privies in the Missouri Supreme Court had set an execution date. That court has held a Missouri prisoner cannot litigate claims regarding lethal injection methods and personnel in the forms of state-court litigation which would be a prerequisite for raising such claims under section 2254. In *Worthington v. State*, 166 S.W.3d 566, 583 n.3 (Mo. 2005) (en banc), a Missouri condemned person attempted to raise such a claim in his state post-conviction relief appeal; the state court which sets execution dates held the challenge 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.

Not only would the plaintiffs have had no opportunity to raise these claims in the state courts, but at the time they filed their habeas corpus petitions there would be no way of saying what the state's practices for lethal injection would be. Defendants and their privies have shown time and again that they will not disclose a syllable that would support even a doubt about the efficacy of their procedures and personnel for bringing about a speedy, painless death unless they are under the gun of a federal court and opposing counsel is laboring under an execution warrant, and only then, when broad areas of their belated responses are subject to gag orders which hobble the plaintiffs' counsel in preparation for hearings. Only through offensive affidavits which the defendants submitted in the Timothy Johnston case did these plaintiffs' counsel learn that the state uses central-line access via the femoral vein, and a licensed physician. These facts are key elements of two of the plaintiffs's causes of action. They

appear to be reactions to botched executions which occurred after or at about the same time that the plaintiffs' habeas corpus petitions were due; they did not ***exist*** within the limitations period for a section 2254 petition, yet the defendants say they are the relevant facts for these plaintiffs' projected executions.

Unless this Court wishes to make the novel holding that there is no legal or equitable remedy of any kind for a specific execution procedure which violates the Eighth Amendment and other constitutional guaranties, therefore, it follows that because habeas corpus cannot provide a remedy, section 1983 does.

III. Plaintiffs do not challenge lethal injection broadly, but only a narrow band of behavior analogous to the "cut-down" procedure at issue in *Nelson v. Campbell* and authoritatively held to sound in section 1983.

What the defendants say they are going to do to the plaintiffs subjects the condemned person to a femoral central line access—an invasive and painful and complicated precursor to execution that is not medically accepted as the first form of IV access. What Missouri does is as invasive as what the Alabama defendants wanted to do to Mr. Nelson—but with less justification, as Mr. Nelson had a bona fide venous-access issue, whereas these Missouri defendants have decided that all condemned persons, regardless of their health, will be subjected to the femoral central-line surgical procedure as a precursor to execution.

IV. The district court's order acted within its discretion in holding that the *Dataphase* standard supported the limited preliminary relief which it granted.

A. Defendants' assertion that the plaintiffs are unlikely to prevail on the merits is an attempt to circumvent the district court's denial of their motion to dismiss, which pleaded the same premises, and on which the district court found it necessary to set a hearing.

1. Defendants are estopped to argue unlikelihood of prevailing on the merits in light of the fact that they have litigated and lost on their motion to dismiss for failure to state a claim.

From the defendants' motion to dismiss, the district court was well aware of the history of their treatment of Timothy Johnston's constitutional grievances. That is undoubtedly one reason it denied the motion to dismiss, scheduled a hearing, and issued a preliminary injunction to permit the hearing to proceed.

Defendants' reliance on the courts' actions in the Timothy Johnston case is unsound because this Court did not reach the merits of that plaintiff's claims and the stay was issued over the district court's refusal to grant such relief rather than at the district court's instance. Defendants rely, as well, on a grant of summary judgment against plaintiff Timothy Johnston for their assertion that their method of lethal injections is constitutional. (AVDCOPE:8.) In that case, their counsel withheld discovery in the face of an order compelling it until the Missouri Supreme Court had set an execution date, then sprang new data on Mr. Johnston's counsel and filed motions for summary judgment and for an expedited hearing. Defendants did not complete their responses to discovery until this Court denied rehearing on the denial of their

petition for a writ of prohibition to keep the district court from requiring them to provide the discovery they had agreed to provide subject to a protective order before the Missouri Supreme Court set an execution date. Mr. Johnston's counsel was forced to litigate the case with one and a half hands tied behind their backs. It should come as no surprise that they received an adverse holding.

There is no reason why the district court in this case should have deferred to another district court holding rendered under the circumstances of the *Johnston* holding, instead of setting the case for a hearing at which the defendants would not enjoy the element of surprise which they created by defying a sister court's order until their privies in the Missouri Supreme Court had set an execution date.

Defendants protestations that the sodium pentothal couldn't possibly fail to anesthetize the condemned person throughout the execution are belied by their insistence on using pancuronium bromide to mask the symptoms of inadequate or inefficient administration of sodium pentothal.

2. Defendants have failed to show that the state's use of a licensed physician in violation of medical ethics is constitutionally permissible when the state has undertaken to enforce medical ethics.

In an attempt to obviate the constitutional deficiencies in their lethal-injection procedure, the defendants have committed yet another constitutional violation. In their application to proceed with an execution before the district court can take evidence on this issue, they make various legal arguments and some amateur medical-ethics arguments. Far from making it appear that the plaintiff has no likelihood of succeeding on the merits, the defendants' arguments are practically contradictory in typical "guilty

client" fashion—for example, that a physician can care for a person and kill them at the same time (AVDCOPE:14), and that if this were a prison disciplinary proceeding, the plaintiff would have to show "atypical and significant hardship," whereas being executed by a physician is neither atypical nor a hardship (AVDCOPE:15-16). Stating what one does not know (AVDCOPE:14) about medical ethics does not demonstrate that one's opponent is unlikely to succeed on the merits if one can't kill the opponent before he gets a hearing.

3. Defendants attempt to recycle the same arguments they used, without effect, in their motion to dismiss to the effect that the use of an unnecessarily painful form of execution is not a badge of slavery.

Once more, the defendants attempt to use the pending "application" as an end run around the district court's denial of their motion to dismiss.

In this action, the plaintiffs do not claim that the death penalty is a badge of slavery—only that the use of a form of execution which causes unnecessary pain and suffering is a badge of slavery. Defendants to not question the historical evidence the defendants submitted with their original and amended complaints, but argue that if a practice isn't a carbon copy of chattel slavery, the plaintiffs have no likelihood of prevailing on the merits. That is why we have hearings. The only question is whether this one will go on when the lead plaintiff is six feet under.

B. Defendants beg the question of irreparable harm to plaintiff Taylor by asserting the very propositions of fact and law on which they have lost in the denial of their motion to dismiss and on which the district court has set a hearing for February 21.

Defendants cannot seriously contend that being put to death by a means society does not tolerate for euthanizing animals would be an "irreparable injury." Because they cannot bring themselves to acknowledge any claim that would cast doubt on their actions, they attempt to meet this point in the *Dataphase* analysis by asserting that their case is so strong on the merits that an execution by their chosen means couldn't possibly work an irreparable harm on anyone. That would have been a good argument if the district court had agreed with their motion to dismiss; it is another attempt at an end run in light of the district court's rejection of it.

Our law is repelled by the notion of hanging in the morning and trying in the afternoon. In light of the fact that the plaintiffs have prevailed on the motion to dismiss, the district court did not abuse its discretion in issuing an order that they may present their case before one of them is rendered unable to proceed with the case because the very means he challenged in it have been used to kill him.

C. Defendants fail to establish that "the harm to other interested parties if the relief is granted" rises to the level to make the district court's decision an abuse of discretion.

Defendants assert that the decedent's family will suffer harm if plaintiff Taylor is executed on February 22 or March 1 rather than February 1. (AVDCOPE:18 (talismanic invocation of "closure").) Assuming the defendant's suppressed and dubious premise

that the decedent's want plaintiff Taylor executed at all, the defendants do not suggest that the decedent's family wants him executed in a manner that will create unnecessary pain and suffering. There is no difference in principle between allowing the district court the minimal amount of time it found that it needs to conduct a hearing on the action filed June 3, 2006, and forbidding the defendants to execute plaintiff Taylor in a way the district court had already found to be unconstitutional. If denying condemned persons a day in court were an acceptable price for "closure," then no constitutional rights of persons convicted of capital offenses (including those implicating their guilt of the underlying offense) would be safe from the political branches.

D. Defendants' vague allegations of "the effect on the public interest" of holding a hearing on their method of lethal injection before using in on a litigant who filed his action months before they and their privies set an execution date less than a week after the district denied their motion to dismiss do not rise to the level to make the district court's decision an abuse of discretion.

Defendants attempt to inject the facts of the underlying offenses as if that justified their infliction of gratuitous pain and suffering on plaintiff Taylor. (AVDCOPE:18 n.8.) They would thereby have this Court sanction a reversal of thousands of years of progress in the criminal law. Although the Supreme Court has allowed the states and the federal government to extract the "mere extinguishment of life," the presence of unsavory facts in the underlying case is no more a defense to using unnecessarily painful forms of execution than it would be to denying trials altogether because the condemned person did not give the decedent a fair trial.

Boilerplate about the state's interest in seeing that sentenced be carried out proves too much, in that this Court sees them even when there is absolutely no doubt that an execution cannot go forward according to the executioners' timetable. In this procedural context, the question is not whether there is absolutely no doubt, but only whether the district court abused its discretion in granting the limited relief it granted.

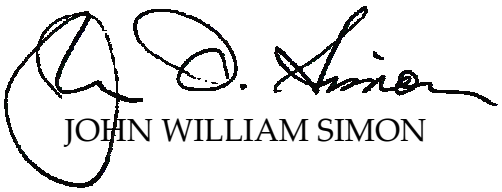
Recent months have seen a heightened awareness of the issue of torture. In the amended complaint, the plaintiffs invoke the jurisdiction of the district court in part on the basis of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment—art. I, ¶ 1, of which defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed . . . or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." (Attachment 1 at 15-16.) Because the defendants' use of a form of lethal injection which causes the certainty (at least in respect to the central-line procedure) or known risk of unnecessary pain and suffering is an official act done for the purpose of punishment, it falls within the definition of "torture" which is most relevant to assessing the harm to the public interest of denying plaintiff Taylor a day in court on his constitutional claims.

In the district court, the plaintiffs pleaded that the public interest militates heavily in favor of an adjudication on the merits of this claim, rather than on letting the defendants avoid it by torturing the plaintiff to death under a chemical veil. Plaintiffs'

action is absolutely neutral about the death penalty, and if the country wants to keep it for the time being, it is most likely to do so if the boil with the habitual three-chemical sequence is lanced in this action. At the same time, it is not in the public interest for the citizens of all but two lethal-injection jurisdictions to be implicated in torture when the ostensible purpose of lethal injection is to bring about the "mere extinguishment of life." The place of the United States in an increasingly interdependent world—in which its mere practice of the death penalty has pro tanto alienated it from all but a few mostly repressive, backward countries including two which our fathers (including the district judge who entered the order here challenged) have fought seriatim throughout the Pacific and then in Korea. It is reasonable to anticipate that when the LANCET article (Lubarsky Exhibit 2 to Plaintiff's Exhibit 2) has had the effect in Western Europe that it ought to have here, the United States will be substantially impaired in its ability to obtain extradition of those charged with crimes against the United States. That, and not respecting the prerogative of the district court to hold a hearing before signing off on yet another execution, is the appropriate focus of the public interest inquiry.

WHEREFORE, for the foregoing reasons, respondent Taylor prays the Court for its order that the pending application to vacate stay of execution be denied.

Respectfully submitted,



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