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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AMERICAN CIVIL LIBERTIES UNION OF MONTANA; MONTANA ASSOCIATION OF CHURCHES; MONTANA CATHOLIC CONFERENCE; GORDON BENNETT; JOHN C. SHEEHY; SENATORS BRENT CROMLEY, STEVE GALLUS, DAN HARRINGTON, DON RYAN AND DAN WEINBERG; REPRESENTATIVES NORMA BIXBY; PAUL CLARK, GAIL GUTSCHE, JOEY JAYNE, AND JEANNE WINDHAM; MARIETTA JAEGAR LANE; EVE MALO Plaintiffs. v. STATE OF MONTANA; DEPARTMENT OF CORRECTIONS; DIRECTOR MIKE FERRITER; WARDEN MIKE MAHONEY; ATTORNEY GENERAL MIKE McGRATH; JOHN DOES 1-10, Defendants	Civil No. CV-06-35-H-DWM MOTION AND INCORPORATED MEMORANDUM FOR TEMPORARY INJUNCTION BARRING ALL DEATH PENALTY EXECUTIONS BY THE STATE OF MONTANA

MOTION

COME NOW Plaintiffs and by this motion respectfully request that the Court bar the State of Montana through its agents and assigns named herein as defendants from executing any person under color of law until such time as the Court has had an opportunity to determine the merits of plaintiffs' complaint for relief which has been filed concurrently with this motion.

MEMORANDUM

Under our system of government, the balance of power between the state and the federal sovereignty is delicate. Therefore special rules apply when a plaintiffs come to federal court seeking to enjoin state court proceedings. *See e.g. Sandpiper Village Condo. Ass'n, Inc. v. Louisiana Pacific Corp.,* 428 F.3d 831 (9th Cir. 2005) (request for injunction barred by Anti-Injunction Act). The Supreme Court has held, however, that 42 U.S.C. Section 1983 expressly authorizes federal courts to enjoin state proceedings. *See Mitchum v Foster,* 407 U.S. 225, 242 (1972). Since plaintiffs herein bring their claim, in part, for relief under the aegis of Section 1983 the Anti-Injunction Act poses no barrier to the Court entering a temporary and/or a permanent Injunction in this case.

Nevertheless, Plaintiffs are mindful that the abstention doctrine set forth in *Younger v. Harris,* 401 U.S. 37 (1971), requires federal courts to abstain from interfering in pending state court prosecutions unless the party seeking the injunction can demonstrate that the danger of irreparable loss is both great and immediate. A plaintiff can satisfy the irreparable injury requirement by showing that 1) the state law being enforced is flagrantly and patently violative of express constitutional provisions; 2) the prosecution is being undertaken in bad faith; or 3) other "extraordinary circumstances" exist that justify granting injunctive relief. *Mitchum,* 407 U.S. at

230 (citing *Younger,* 401 U.S. at 46, 53-54 and *Perez v Ledesma,* 401 U.S. 82, 85 (1971).

The Montana Supreme Court, in denying to exercise original jurisdiction over Plaintiffs' petition, considered the wishes of David Dawson, a volunteer capital inmate whose execution is scheduled for August 11, 2006, stating:

> In the present case, of course, Mr. Dawson's rights must be weighed into our determination of whether to exercise original jurisdiction. We conclude that we will not "undo" years of effort by Mr. Dawson in attempting to stop further delays in the imposition of his death sentence. . . .

In essence, the Montana Supreme Court ruling has allowed Mr. Dawson to waive his Eighth Amendment right to be free from cruel and unusual punishment. The Court presupposed that Mr. Dawson has the personal "right" to submit to an unconstitutional method of execution; however, the Eighth Amendment to the United States Constitution does not support the view that unconstitutional state action can be condoned by an individual citizen defendant.

Under our democratic forms of government, state and federal constitutions fulfill two essential and related purposes, protecting the rights of the individual and protecting the integrity of the government against unlawful state action. Often these purposes, and the interests they serve, are indivisible and therefore indistinguishable. However, in rare situations, the rights of the individual and the people's right to good government are not identical.

Petitioners acknowledge that certain rights, such as personal trial and appellate rights of the accused, can be waived by the individual defendant, certain fundamental rights cannot. *See e.g., Wheat v. United States*, 486 U.S. 153, 162 (1988) (stating that a court may decline a defendant's waiver of his right to conflict free counsel). *See also, Bustamante v. Eyman*, 456 F.2d 269, 274 (9th Cir. 1972) (concluding that a capital defendant could not waive his right to be

present in the courtroom at trial inasmuch as the defendant's right to be present at trial also rests upon society's interest in due process).

The Supreme Court's decision in *Hopt v. Utah*, 110 U.S. 574 (1884) demonstrates that certain rights cannot be waived. In *Hopt* (which has since been abrogated on grounds not pertinent here, *see e.g. Campbell v. Blodgett*, 978 F.2d 1502, 1509, (9th Cir. 1992[1])) the Court addressed topically the subject of non-waivable rights:

> We are of opinion that it was not within the power of the accused or his counsel to dispense with statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by an individual, neither by the person himself, nor by any other of his fellow creatures merely upon their own authority.' 1 Bl. Comm. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law.

Hopt v. Utah, *supra*, 110 U.S. at 579.

The principle that some rights cannot be waived has also been colorfully illustrated in *United States v. Josefik*, 753 F.2d 585 (7th Cir. 1985). In *Josefik*, a juror member sent a note to the judge requesting to be excused after the jury had retired to deliberate. *Id.* After questioning the juror, the judge determined that the juror had had trouble hearing during the trial and excused her. *Id.* Rather than call a mistrial, the judge, with the consent of counsel, replaced the excused

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[1] *Campbell, infra,* like *Hopt*, addressed a defendant's right of confrontation. *Campbell* properly noted that subsequent decisions have found a waiver of this right can occur by consent or misconduct. However, the broader holding of *Hopt*, that an individual's life cannot be taken, except as prescribed by law and limited by the Constitutions has never been rejected by any Court.

juror with an alternate who had previously been discharged. *Id.*

On appeal, the Court ruled that a single defendant could not waive statutory rights governing the use of alternate jurors, explaining:

> No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept. But nothing in the procedure used in this case shocks our consciences.

United States v. Josefik, 753 F.2d at 588 (emphasis added).

Clearly, some rights are simply non-waivable because the right in question is not an individual one subject to waiver by a single litigant. This is especially true in circumstances where the public interest in the outcome of the litigation is compelling. Citizens of every political stripe have an unqualified right to executions that satisfy the Eighth Amendment of the United States Constitution which in part provides that no "cruel and unusual punishment [shall be] inflicted." This restraint on state power does not inure to the benefit of any defendant particularly such that he can waive its protections.

The Montana Supreme Court's Order, which apparently vindicated Mr. Dawson's right to submit to an unconstitutional execution, comes at the expense of the right of ***every*** Montana citizen to have ***every*** execution carried out in a constitutional manner. The Montana Supreme Court utilized a balancing test and ultimately deferred to Mr. Dawson's desire to waive his Eighth Amendment rights, over the public's Eighth Amendment right to have state government act in conformity with the applicable provisions of the United States Constitution, in this case Amendments Eight and Fourteen. In fact, Justice Nelson in his opinion *concurring* in the

dismissal of Plaintiffs' petition in the Montana Supreme Court recognized this important point:

> . . . .any implication that capital execution and the manner in which it is conducted is simply the particular defendant's problem is misplaced. The people of this State, acting through their elected representatives in the Legislature, have willed that capital executions take place in some cases. The manner of execution is not purely the capital defendant's issue. it is an issue that is owned by every adult in this State. Indeed, by law, capital executions in Montana must be witnessed by members of the media and the public. Section 46-19-103(6)(b), MCA . . . . .the public and media witness executions, not only to determine that the public's will and the peoples' sentence of death was carried out as ordered, but also that the execution was done in a manner consistent with the values of a civilized society.
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> Order, Montana Supreme Court dismissing Plaintiffs' petition dated July 25th, 2006 at 6-7

This core idea expressed by Justice Nelson in his concurrence was born in *Trop v. Dulles,* 356 U.S. 86 (1958) where the Supreme Court declared that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. Although *Trop v. Dulles* was not itself a capital case, this principle of constitutional law has become an enduring and critical element of capital punishment jurisprudence. *See e.g. Atkins v. Virginia,* 536 U.S. 304 (2002). Moreover, *Trop v. Dulles* explains in no uncertain terms that although the State has the power to punish, "the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.* at 100.

Thus, the issue squarely raised in the instant case is whether the Montana Supreme Court erred by allowing Mr. Dawson's waiver of his Eighth Amendment rights and demands for execution to trump society's right to have all executions carried out in conformity with the

Eighth Amendment. The wider implications of the Montana Supreme Court's ruling justify an immediate halt to all executions in Montana, including Mr. Dawson's. First, although Mr. Dawson has waived his personal constitutional rights (appeal, habeas corpus etc.), Mr. Dawson has no authority to waive the Eighth Amendment protections discussed herein inasmuch as they inure not only to the benefit of Mr. Dawson, but to the benefit of the public generally. Second, failure to immediately halt all executions in the State of Montana could lead to the macabre result that Mr. Dawson will be executed in an unconstitutional manner and then the State will determine that its Lethal Injection Protocol is not constitutional. A careful reading of the Montana Supreme Court's July 25, 2006 order denying Plaintiffs' petition for relief leaves little doubt that the Court was aware that Plaintiffs raised substantial issues worthy of consideration in court and the 2007 Montana Legislative Session.

Furthermore, every Montana citizen has the right to constitutional service from its public officials. Under the existing circumstances, if Mr. Dawson is executed in an unconstitutional manner in the name of the people, there will be no after-the-fact remedy applicable to that situation to vindicate the peoples' rights. Here, it's worth pointing out that Plaintiffs fully expect that defendants will argue that Plaintiffs' interests in the Eighth Amendment protection outlined herein are far too speculative to enforce in court. In anticipation of this argument, Plaintiffs state that in the prosecution of the law it is not uncommon for the federal government to prosecute individuals and public officials for denying the citizenry the right to good government. *See e.g. United States v. Williams,* 441 F.3d 716 (9th Cir. 2006) (individuals and public officials alike can be prosecuted for denying public good government). The instant lawsuit and request for stay is simply a minor variation on that theme.

The Eighth Amendment cruel and unusual clause is a restraint on State action As such, an individual defendant has no right to waive Eighth Amendment protections. Furthermore, the duty to enforce Eighth Amendment principles falls to the federal courts when the state government intends to act in an unconstitutional manner.

CONCLUSION

WHEREFORE, Plaintiffs pray that the Court will enjoin all executions until the merits of this lawsuit have been determined.

Respectfully submitted this 4TH day of August 2006.

Gough, Shanahan, Johnson and Waterman

/s/ Ronald F. Waterman
Ronald F. Waterman, Esq.
Julie A. Johnson, Esq.

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August 2006, the foregoing with attachment was duly served upon counsel via hand-delivery:

Mike McGrath
Attorney General
Montana Attorney General's Office
P.O. Box 201401
Helena, MT 59620-1401

Diana Koch
Chief Legal Counsel
Montana Department of Corrections
P.O. Box 201301
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The foregoing with attachment was also duly served upon the following by mailing a true and correct copy, U.S. Mail, first class and postage prepaid, and addressed as follows:

David Dawson
A.O. #25284
700 Conley Lake Road
Deer Lodge, MT 59722

Edmund F. Sheehy
Cannon and Sheehy
P.O. Box 5717
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/s/ Ronald F. Waterman