

“fense” as well as the “history and characteristics of the defendant.” *See* 18 U.S.C. § 3553(a)(1). Nonetheless, it was for the court to determine the appropriate weight of this evidence in the overall sentencing balance. In doing so, the court expressed doubts about the credibility of appellant’s claims of duress, recognizing the lack of corroborating evidence, his failure to apply for asylum upon re-entry, and the fact that appellant’s family, as American citizens, could travel freely into the United States to avoid any danger in Colombia. However, the court went on to conclude that, even if all of appellant’s evidence of duress were true, it would not warrant a sentence below the guidelines range because appellant’s separation from his family was not “an uncommon situation.” Such a conclusion was reasonable and within the sentencing court’s discretion.

Next, appellant argues that his willingness to stipulate to deportation demonstrated his “respect for the law,” *see* 18 U.S.C. § 3553(a)(2)(A), and thereby justified a sentence below the applicable guideline range. The district court specifically considered appellant’s offer to stipulate at sentencing. However, it recognized that the stipulation would be largely redundant as removal was “a foregone conclusion under the facts of this case.” While the court could have concluded that his offer to stipulate to deportation warranted a sentence below the guidelines range, *see United States v. Jauregui*, 314 F.3d 961, 963–64 (8th Cir.2003) (holding, pre-*Booker*, that departure for waiving resistance to deportation is within sentencing court’s discretion), it was not unreasonable for it to decline to do so.

Lastly, appellant argues that the record is unclear as to the manner in which the district court weighed the remaining § 3553(a) factors in determining his sentence. While not making explicit findings with respect to each, the record reflects

that the district court recognized its obligation to consider the § 3553(a) factors and did actually consider them in determining the appropriate sentence. *See Walker*, 439 F.3d at 892. The district court stated on several occasions during the hearing that its sentencing determination would be guided by the advisory guidelines and “all other factors set forth at 18 United States Code Section 3553(a)(1) through (7).” Indeed, the court permitted defense counsel to summarize the evidence relevant to each applicable factor before reaching its conclusion that none of the “facts or circumstances” presented justified a sentence below the applicable guidelines range. From this record, we are satisfied that the district court actually considered each factor in determining an appropriate sentence.

The judgment of the district court is affirmed.



Michael Anthony TAYLOR, Appellant,

v.

Larry CRAWFORD, Director, MO Dept. of Corrections; James D. Purkett, Superintendent, Eastern Reception Diagnostic & Correctional Center, Appellees.

No. 06–1397.

United States Court of Appeals,
Eighth Circuit.

Submitted: April 18, 2006.

Filed: April 27, 2006.

Background: Death row prisoner brought § 1983 claim challenging state’s lethal in-

jection protocol as violative of the Eighth Amendment ban on cruel and unusual punishment. The United States District Court for the Western District of Missouri, Fernando J. Gaitan, Jr., J., denied claim. Prisoner appealed.

Holding: The Court of Appeals held that remand to the District Court for continuation of evidentiary hearing to be completed within 60 days was warranted.

Remanded with instructions.

1. Sentencing and Punishment ◊1798

State has a significant interest in the prompt execution of its judgments, which must be considered in determining whether stay of execution is warranted.

2. Federal Courts ◊947

Remand to the District Court for continuation of evidentiary hearing to be completed within 60 days was warranted in death row prisoner's § 1983 claim challenging state's lethal injection protocol as violative of the Eighth Amendment ban on cruel and unusual punishment; in order to comply with time frame for evidentiary hearing set by Court of Appeals, the District Court did not permit prisoner to call pharmacokineticist to rebut state's expert witness, as pharmacokineticist was not available on date of hearing, prisoner's counsel was unable to make offer of proof due to scientific nature of testimony and limited time frame, Eighth Amendment issue was serious one, which was likely to recur in other cases, and 60-day time frame was based on representations of counsel that additional discovery and continued hearing could be conducted within that period. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

Donald B. Verrilli, Jr., argued, Washington DC, for appellant.

James R. Layton, argued, Missouri Attorney General, Jefferson City, MO, for appellee.

Before RILEY, BEAM, and HANSEN, Circuit Judges.

PER CURIAM.

Michael Anthony Taylor appeals the district court's judgment denying his claim, brought pursuant to 42 U.S.C. § 1983, that the State of Missouri's current lethal injection protocol violates the Eighth Amendment's ban on cruel and unusual punishment. We remand for further proceedings consistent with this opinion but retain appellate jurisdiction.

I.

[1] Michael Taylor was sentenced to death after pleading guilty to first degree murder, armed criminal action, kidnapping, and forcible rape for the abduction, abuse and brutal murder of 15-year-old Ann Harrison. *See State v. Taylor*, 929 S.W.2d 209 (Mo.1996) (en banc), *cert. denied*, 519 U.S. 1152, 117 S.Ct. 1088, 137 L.Ed.2d 222 (1997). The United States District Court for the Western District of Missouri denied his petition for a writ of habeas corpus, and we affirmed. *See Taylor v. Bowersox*, 329 F.3d 963 (8th Cir. 2003), *cert. denied*, 541 U.S. 947, 124 S.Ct. 1681, 158 L.Ed.2d 375 (2004). There is no question that Taylor's convictions and sentence of death are valid, and the State has a significant interest in the prompt execution of its judgments. *See Nelson v. Campbell*, 541 U.S. 637, 644, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004) ("[A] State retains a significant interest in meting out a sentence of death in a timely fashion").

No death warrant had yet been issued on June 3, 2005, when Taylor filed the instant § 1983 action in the district court challenging the method of his execution.

Taylor sought a declaratory judgment that the State's existing lethal injection procedure violates the Eighth and Fourteenth Amendments to the United States Constitution by creating a substantial and unnecessary risk that Taylor will suffer the wanton infliction of gratuitous pain.¹ Another Missouri death row inmate, Richard D. Clay, intervened in the lawsuit asserting the same claim. The State's lethal injection protocol, which is not mandated by statute, involves administering (1) a 5-gram injection of sodium pentothal (also known as thiopental), (2) a 60-milligram injection of pancuronium bromide, and (3) a 240-milliequivalent injection of potassium chloride, with each injection separated by a saline flush. The injections are administered by an IV catheter that a board-certified surgeon has inserted into the femoral vein. Taylor alleges that the State's three-chemical protocol creates a foreseeable likelihood that he might be conscious but paralyzed and unable to indicate that he is suffering gratuitous and torturous pain before death, and that the placement and use of the femoral vein access causes the gratuitous infliction of pain.

Taylor moved for expedited discovery on August 1, 2005. The court denied the motion but assured Taylor that he would be given sufficient time for discovery and a decision prior to his execution. (*See* App. at A-52.) Discovery went forward, but the State objected to certain interrogatories that sought the identity of the doctor and nurse who had attended previous executions. Magistrate Judge Knox issued a protective order requiring the State to

provide responses concerning its practices and the qualifications of any medical personnel who have participated in executions, without disclosing their identities or any confidential information.

The State filed a motion to dismiss the action for failure to state a claim and alternatively argued that the case should be recharacterized as a habeas petition and dismissed as second or successive. On December 28, 2005, the district court² denied the motion to dismiss. On January 3, 2006, the Supreme Court of Missouri set the date for Taylor's execution as February 1, 2006, providing nearly a month within which the district court could and should have held an evidentiary hearing in this case, resolved the issues and entered a judgment, and we could have entertained any appeal.

Not until January 18, 2006, did the district court set a date for an evidentiary hearing. The court set the hearing for February 21, 2006, and ordered a temporary injunction staying the February 1 execution until further order of the court after the hearing. Judge Wright gave no reason to justify the injunction other than that his calendar was unable to accommodate an evidentiary hearing prior to February 21. The State appealed the injunction on January 23, 2006. We reversed the stay (*see* Order, No. 06-1278, Jan. 29, 2006) after concluding that the State's strong interest in the prompt execution of its judgment was not outweighed by the district court's scheduling difficulty. In recognition of Mr. Taylor's equally strong interest in having an evidentiary hearing

1. Taylor's complaint also included claims that the lethal injection protocol violates the Thirteenth Amendment as a badge of slavery and that the State unlawfully uses physicians to carry out essential steps in an execution in violation of medical ethics. At oral argument before this court, Taylor's attorneys explicitly abandoned those claims. We therefore will

not address them in this opinion, and they may not be reasserted before the district court on remand.

2. The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

on his claims prior to his execution, we ordered that the case be reassigned to a district court judge who could immediately hold an evidentiary hearing and issue a ruling prior to 12:00 noon on February 1. Our order also stayed the execution until 11:59 p.m. on Friday, February 3, 2006, which provided a window of time for an appeal of the merits to this court prior to execution.

On remand, the chief judge of the United States District Court for the Western District of Missouri reassigned the case to the Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri, who promptly held a telephonic evidentiary hearing on January 30 and 31, 2006. Judge Gaitan made it clear to the parties that the hearing would be concluded within the time frame set by this court, and the intervenor withdrew from the case. At the hearing, Taylor presented the expert opinion testimony of Dr. Mark J.S. Heath, an anesthesiologist, and Dr. Jonathan Groner, a pediatric surgeon. Taylor requested the State to produce John Doe Numbers One and Two (the doctor and nurse who participated in the most recent execution), but the district court denied this request. The State presented the testimony of Dr. Mark Dershwitz, an anesthesiologist, and Terry Moore, the Director of the Adult Institutions Division of the Missouri Department of Corrections. At the close of the hearing, Taylor sought to present the expert testimony of Dr. Sri Melethil, a pharmacokineticist, to rebut the State's expert witness, but Dr. Melethil had been out of town and was unable to appear until the morning of February 1. The district court did not permit this delay, and Taylor's attorney was unable to make an offer of proof due to the scientific nature of the testimony and the limited time within which the district court was required to hold the hearing and make a decision. In good faith compliance with this court's or-

der, Judge Gaitan heard and considered the testimony presented on January 30 and 31 and issued an order denying all claims on the afternoon of January 31.

The State then moved to vacate the stay of execution issued by this panel on January 29, 2006. In recognition that the district court had completed the required hearing and entered an order denying Taylor's claims on the merits, our panel modified the stay to provide that it would expire at 5 p.m. on February 1, 2006, rather than on February 3, bringing it within the 24-hour window created by the Supreme Court of Missouri's death warrant. Judge Beam dissented on the ground that he would have vacated the stay in its entirety. (*See* Order, No. 06-1278, Jan. 31, 2006).

Taylor immediately appealed the district court's adverse order, asserting that the expedited and truncated hearing before the district court denied him of due process, that the district court abused its discretion by not permitting him to call medical witnesses John Doe Numbers One and Two or Dr. Melethil, and that the district court erred in denying his claims on the merits. Taylor also sought a stay of execution. The panel denied the stay. (*See* Order, No. 06-1397, Feb. 1, 2006) (Hansen, J. dissenting). The same day, the en banc court voted (9-1) to grant Taylor's petition for rehearing and application for a stay. (*See* Order, No. 06-1397, Feb. 1, 2006) (en banc) (Riley, J. dissenting). The en banc court then returned the case to this panel for disposition following briefing and oral argument.

II.

Having now thoroughly considered the arguments of the parties and having read the transcript of the record developed before the district court in the telephonic hearing, we conclude that we will be some-

what more comfortable as we consider and determine the merits of the case if the district court has had an opportunity to expand or supplement the record. We mean no criticism of Judge Gaitan; in fact, we commend him for his excellent management of the hearing and the issuance of an order on such short notice and within the extreme time constraints created by the first district judge's failure to give the matter the expedited consideration it required and by our attempt to accommodate both sides within the remaining time established by the expiration date of the state supreme court's death warrant. Having reviewed the record made before the district court, we now realize the burdensome strain that our order imposed upon the district court as well as upon the parties as they made extraordinary efforts to comply. We hereby offer our *mea culpa*—this panel attempted to accommodate two significant and important competing interests, but unfortunately failed in both respects. As a result, the enforcement of the State's judgment has been postponed, and Taylor was unable to make the record he felt necessary for the full and fair consideration of the merits of his case. We simply asked the district court and the parties to do too much in too little time.

[2] Several existing circumstances inform our decision to remand. The United States Supreme Court is presently considering the issue of whether a § 1983 complaint brought by an inmate sentenced to death and challenging a state's lethal injection procedure is properly recharacterized as a habeas corpus petition. *See Hill v. Crosby*, — U.S. —, 126 S.Ct. 1189, 163 L.Ed.2d 1144 (2006) (granting an application for a stay of execution and granting the petition for a writ of certiorari on this issue). Because the Supreme Court did not grant a stay in the present case (*see* — U.S. —, 126 S.Ct. 1191, 163 L.Ed.2d 1145 (2006)), we will permit the case to continue in its present form unless

the Court's forthcoming decision in *Hill* at some point mandates a different course of action.

Additionally, the en banc court of this circuit granted a stay. In view of the existing record, the importance of the issue to this plaintiff as well as others, and the likelihood of the recurrence of these identical issues in future Missouri death penalty cases, we remand for the limited purpose of permitting a continuation of the hearing held on January 30–31, 2006, before Judge Gaitan. While we conclude that some further opportunity for discovery may be warranted, we leave all matters of what further discovery may be warranted to Judge Gaitan, confident that if he feels it necessary he will employ the assistance of Magistrate Judge Knox, in light of Judge Knox's extensive prior experience with the pretrial issues in this case.

III.

Accordingly, we remand the case with instructions that the hearing be reconvened before Judge Gaitan. The parties shall have 30 days from this order to engage in any further discovery that the district court in its discretion deems warranted and an additional 30 days within which the hearing shall be completed and for the district court to enter its order amending, modifying, or restating its present judgment, and certifying the same to us. We will then establish an expedited briefing schedule and an expedited oral argument. We choose this 60-day time period based on the representations of counsel made at oral argument that such a period is sufficient to complete the task already begun, and we will strictly enforce it. We also choose it because we conclude such a period will accommodate the significant interests of both sides, which we have identified.

The case is remanded for further proceedings consistent with this opinion.



**STATE FARM FIRE AND CASUALTY
COMPANY, Appellee,**

v.

**NATIONAL RESEARCH CENTER
FOR COLLEGE AND UNIVERSITY
ADMISSIONS; Donald Munce, Appel-
lants.**

No. 05-1588.

United States Court of Appeals,
Eighth Circuit.

Submitted: April 21, 2006.

Filed: April 28, 2006.

Background: Business liability insurer sought declaratory judgment of no duty to defend or indemnify insured, a private research firm that conducted surveys of high school students for colleges and universities, against Federal Trade Commission's (FTC) investigation into insured's funding and use of its data, and against demands by state attorneys general for payments for "assurance of voluntary compliance" with state consumer protection laws. The United States District Court for the Western District of Missouri, Ortrie D. Smith, J., granted insurer summary judgment. Insured appealed.

Holdings: The Court of Appeals, Benton, Circuit Judge, held that:

- (1) complaints by FTC and attorneys general alleged personal injury for invasion of privacy;
- (2) relief sought by FTC was not damages;
- (3) sums which Missouri Attorney General demanded that insured pay to Missouri Merchandising Practices Revolving Fund were not damages;

- (4) payments which Iowa Attorney General demanded were not damages; but
- (5) payments which Missouri Attorney General demanded that insured make to "Custodian of the Public School Fund" were damages.

Affirmed in part, reversed in part, and remanded.

Opinion, 440 F.3d 964, superseded.

1. Federal Courts ⇨776

Court of Appeals reviews de novo district court's interpretation of provision in insurance policy.

2. Insurance ⇨2298, 2312

Under Missouri law, complaints by Federal Trade Commission (FTC) and state attorneys general against insured, a private research firm that conducted surveys of high school students for colleges and universities, alleging that insured shared information it gathered with commercial entities in addition to educational institutions, contrary to its representations to students, were potentially within "personal injury or advertising injury" coverage provision of business liability insurance policy; policy defined both terms to include oral or written publications violating "right of privacy," and insured's gathering and disseminating personal information beyond disclosed terms arguably violated students' privacy.

3. Insurance ⇨1832(1)

Under Missouri law, uncertainty about coverage is resolved in favor of insured.

4. Insurance ⇨2269

Under Missouri law, relief sought by Federal Trade Commission (FTC), an order that insured, a private research firm, stop making misrepresentations and make clear and conspicuous disclosures, was not