

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 06-0492

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 JAEGER LANE; EVE MALO,)
))
Petitioners,)
))
v.)
))
STATE OF MONTANA; DEPARTMENT OF)
CORRECTIONS; DIRECTOR MIKE FERRITER;)
WARDEN MIKE MAHONEY; ATTORNEY)
GENERAL MIKE McGRATH; JOHN DOES 1-10,)
))
Respondents.)
))

ORDER

On July 11, 2006, Petitioners filed their Verified Petition for Injunctive Relief and Memorandum in Support with the Clerk of this Court. They seek the exercise of our original jurisdiction, injunctive relief enjoining all executions in Montana pending the outcome of this litigation and a “remand” to a district court for discovery and an evidentiary hearing. They also request oral argument. Petitioners seek original jurisdiction pursuant to § 3-2-202(1), MCA, which generally lists certain writs—including injunction—this Court is empowered to issue in the exercise of its original jurisdiction, and Rule 17(a), M.R.App.P., which implements our constitutional power to hear and determine such original writs as are

necessary and proper to the complete exercise of our jurisdiction.

Stated briefly, Petitioners contend that the Montana statute providing for execution of a death sentence by lethal injection—§ 46-19-103, MCA—does not prescribe any specific drug or drugs, dosages, or drug combinations; manner of intravenous line access; or certification, training or licensure required of those who participate in the execution process. Given the absence of statutory guidance, Petitioners seek a determination as to whether the Montana Department of Corrections has devised a constitutionally sound lethal injection protocol.

On July 12, 2006, we ordered the State of Montana to respond, addressing both the procedural and substantive issues in the Petition, on or before July 24, 2006, at 4:30 p.m. We also ordered that Mr. David Dawson—the only person currently facing an execution date in Montana, that date being August 11, 2006—and/or his stand-by counsel could respond to the Petition in the same time period.

On July 18, 2006, Mr. Dawson filed his response to the Petition and a motion to go forward with his execution as scheduled. His *pro se* response observes that he has been attempting to withdraw from further appeals and delays regarding his execution for two years and has been tested and interviewed by psychiatric personnel with regard to both his competency to make a decision regarding his own death and any outside coercion having been brought to bear on that decision. The Thirteenth Judicial District Court, Yellowstone County, the Montana Supreme Court, the United States District Court for the District of Montana and the United States Court of Appeals for the Ninth Circuit have all determined—

in their own form and fashion—that Mr. Dawson unequivocally, knowingly, competently and voluntarily waived his right to further appeals in his underlying death penalty case. Stated differently, Mr. Dawson has chosen to withdraw further resistance to the imposition of the death penalty and to proceed to his death as provided by law.

The State’s response was timely filed on the afternoon of July 24, 2006. Briefly stated, the response asserts that 1) we are without jurisdiction to address the Petition because Petitioners lack standing; 2) alternatively, we should refuse to accept original jurisdiction; and 3) Petitioners are not entitled to a preliminary injunction because they have not presented a case sufficient to warrant such an extraordinary remedy. One of the Exhibits to the State’s brief is a Declaration by Mark Dershwitz, M.D., PhD, which addresses the merits of portions of the Petition.

In response to the inclusion of Dr. Dershwitz’s Declaration, Petitioners moved to file an opposing Declaration by Dr. Mark Heath on July 25, 2006. Because of the manner of our resolution of this cause number, we need not concern ourselves with the Declarations.

It cannot be disputed that this Court may exercise jurisdiction over an original petition for injunctive relief. Both Article VII, Section 2, of the Montana Constitution and § 3-2-202(1), MCA, empower us to do so under certain circumstances. In addition, Rule 17(a), M.R.App.P., states that we may hear and determine original writs as necessary to the complete exercise of our jurisdiction when such an exercise of jurisdiction is

justified by circumstances of an emergency nature, as when a cause of action has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy[.]

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, as well as the work of many others and both state and federal courts. Moreover, the Montana Legislature will convene in regular session in January of 2007 and may choose to address these matters during the course of its work, with or without a court decision. Finally, since Petitioners herein seek "remand" to a district court for discovery and a hearing, and because no other executions are imminent in Montana, we decline to conclude that the circumstances surrounding this cause number are of an emergency nature making due consideration in the trial court and due appeal to this Court an inadequate remedy. Thus, we decline to exercise original jurisdiction.

The Court having fully considered these matters,

IT IS ORDERED that Petitioners' motion for leave to file the Declaration is DENIED;

IT IS FURTHER ORDERED that the Petition for Injunctive Relief is DISMISSED;

IT IS FURTHER ORDERED that Mr. Dawson's execution date remains in full force and effect;

IT IS FURTHER ORDERED that remittitur shall issue forthwith; and

IT IS FURTHER ORDERED that the Clerk shall give immediate electronic notice of this Order to Ronald F. Waterman and Julie A. Johnson, counsel for Petitioners; C. Mark Fowler and Pamela P. Collins, of the Office of the Attorney General; and Director Mike Ferriter, Warden Mike Mahoney and Chief Legal Counsel Diana Koch, of the Department of

Corrections; and

IT IS FURTHER ORDERED that one or more of the aforementioned representatives of the Department of Corrections shall provide personal notice of this Order to Mr. David Dawson no later than midnight, July 25, 2006.

The Clerk is directed to mail a true copy of this Order to the service list in this matter and to Ed Sheehy, Esq., and Mr. David Dawson.

DATED this 25th day of July, 2006.

/S/ KARLA M. GRAY
/S/ W. WILLIAM LEAPHART
/S/ JOHN WARNER
/S/ PATRICIA COTTER
/S/ BRIAN MORRIS
/S/ JIM RICE

Justice James C. Nelson concurs.

I concur in the result of our Order, but I am concerned that our decision not to accept jurisdiction gives rather short shrift to Petitioners' petition and to the important issue raised—that of the constitutionality of the Department of Corrections' (DOC) protocols for carrying out the death sentence.

At the outset, I must state that I have not formed any opinion as to the constitutionality of lethal injection as a method of carrying out capital executions in Montana. Petitioners' petition and the Attorney General's response are both compelling. Although I agree with the Court that there is no immediate emergency that would necessitate our accepting original

jurisdiction—given our decision as to David Thomas Dawson (Dawson)—that ignores the elephant in the room.

It is important that the issues raised in Petitioners' petition be addressed sooner as opposed to later. Waiting for the next execution will simply delay that execution. Furthermore, if a fact-finding court determines that the protocols and drugs used by the DOC violate Montana's Constitution, then the Legislature should be given the opportunity in its 2007 session to amend existing laws or enact new laws that will insure that Montana's capital execution statutes pass constitutional muster. This issue is simply not going to go away. Tangentially, this issue has been before the United States Supreme Court once already, and the issue has been and is being litigated in various federal and state courts around the country. *See Hill v. McDonough* (2006), ___ U.S. ___, 126 S.Ct. 2096, 165 L.Ed.2d 44, and Petitioners' petition at pages 21–23. Montana's courts and Legislature can be pro-active in this issue or we can wait for a federal court to instruct us what to do and what not to do. Indeed, it is almost assured that this issue is ultimately going to wind up in the courts no matter what course of action is followed. Since fact-finding must take place in the District Courts, Petitioners' petition should start there—presumably joined by a defendant or defendants presently awaiting capital execution, so as to address the sorts of standing issues raised by the Attorney General.

That said, however, I suggest that 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. Presumably, the public and the 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 Supreme Law of this State—Montana's Constitution—and in a manner consistent with the values of a civilized society. Montana's Constitution imposes the requirement that executions be accomplished in a manner that is not cruel and unusual. Capital defendants retain their right of inviolable, individual, human dignity and individual privacy. The public has, by law, a vitally important and personal stake in this matter. If the lethal injection protocols and cocktail used in this State constitute cruel and unusual punishment, then it is incumbent upon the criminal justice system and the people of this State, through the courts, to determine, as a factual matter, the appropriate protocols and drugs that will insure that capital executions by lethal injection are carried out humanely.

More importantly, if it is found that Montana's method of lethal injection violates one or more provisions of the Constitution, it is incumbent upon the Legislature to require protocols and drugs that will insure that capital executions are carried out so as not to violate the individual rights to human dignity and individual privacy of the capital defendant, and so as not to violate Article II, Section 22 of the Montana Constitution. In that regard, it is worth noting that, read together with the inviolable, individual right to human dignity (Article II,

Section 4), Montanans enjoy greater protections from cruel and unusual punishments under Article II, Section 22, than are provided under the Eighth Amendment to the federal Constitution. *Walker v. State*, 2003 MT 134, ¶ 73, 316 Mont. 103, ¶ 73, 68 P.3d 872, ¶ 73.

As to Petitioners' petition that Dawson's execution should be stayed, I, too, would deny the petition. I would do so for one, and only one, reason, however. Dawson—who has filed his own *pro se* response in this matter—has unequivocally, knowingly, and intelligently exercised one of the few rights he still retains as a capital defendant. He has exercised the one right that is most personal and most important to him—his right of individual privacy guaranteed under Article II, Section 10 of the Montana Constitution. Dawson has determined to die at the hands of the people of this State, despite any alleged affronts to his humanity and dignity and despite that he may be, according to Petitioners, subjected to pain and suffering during the administration of the lethal injection cocktail and his death. That is his choice, and it is his to make under the circumstances of this case, notwithstanding the issue raised by Petitioners.

We discussed, at length, the right of individual privacy as including the fundamental right of self-determination and personal autonomy in *Armstrong v. State*, 1999 MT 26, ¶¶ 29–38, 296 Mont. 361, ¶¶ 29–38, 989 P.2d 364, ¶¶ 29–38. Dawson has exercised what little right to self-determination and personal autonomy he has left. He has the right to go to his execution, Petitioners' concerns about the imposition of the death penalty by a means that Petitioners allege may be constitutionally flawed notwithstanding. Dawson's choice must be respected.

As we noted in *Armstrong*, the fundamental right of self-determination and personal autonomy acts both as a limitation on the power of government and as a principle of preeminent deference to the individual.

[T]he only purpose for which power can be rightfully exercised over any member of a civilised [sic] community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because, it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.

Armstrong, ¶ 31 (citation and authority omitted).

For these reasons, I concur.

/S/ JAMES C. NELSON

Justice Patricia Cotter joins in the foregoing concurrence.

/S/ PATRICIA COTTER

Justice W. William Leaphart specially concurring.

In my view, the citizens of Montana having, through their legislators, adopted lethal injection as the means of capital punishment, § 46-19-103, MCA, have a direct legal and ethical interest in seeing that executions are not carried out contrary to one of the most fundamental values of our society—that is, that punishments are not administered in a cruel and unusual manner. Eighth Amendment to the United States Constitution and Article II, Section 22 of the Montana Constitution. Accordingly, the petitioners, as “residents, citizens,

electors and taxpayers” of the State of Montana, have standing to challenge the lack of any provisions in Montana’s statutory scheme concerning the specific drugs, dosages, manner of intravenous line access, or certification or training required of those who administer the lethal injection. However, these alleged deficiencies are all matters of law which have been apparent since the adoption of the statutes on lethal injection in 1997. Accordingly, there is no reason petitioners had to wait until July 11, 2006, to ask this Court to exercise its original jurisdiction and issue an extraordinary writ when such a remedy would, of necessity, require that there be a stay of the August 11, 2006, scheduled execution of David Dawson. This is particularly true given that Mr. Dawson has successfully withdrawn all appeals on his behalf and has filed a response opposing the present petition.

For the above reason, I concur in the Court’s decision declining to exercise original jurisdiction and dismissing the request for injunctive relief.

/S/ W. WILLIAM LEAPHART