

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

CHRISTOPHER SCOTT EMMETT)	
Plaintiff/Appellant,)	
)	
v.)	No. 07-18
)	
GENE M. JOHNSON, et al.,)	
Defendants/Appellees)	

**APPELLANT’S MOTION TO HOLD PROCEEDINGS IN ABEYANCE
AND ENJOIN DEFENDANTS FROM EXECUTING EMMETT ON
OCTOBER 17, 2007**

Pursuant to 28 U.S.C. § 1651, the All Writs Acts, Plaintiff/Appellant Christopher Scott Emmett respectfully requests that this Court hold proceedings in abeyance pending the United States Supreme Court’s decision in *Baze v. Rees*, No. 07-5439, and enjoin Defendants from executing Emmett until the Court, following the decision in *Baze*, adjudicates Emmett’s appeal from district court’s grant of summary judgment for the Defendants.

This Court recognized the need to stay proceedings in similar circumstances in *Reid v. Johnson, et al.*, No. 03-7916 (Order of December 17, 2003). In that case, the district court had dismissed Reid’s § 1983 lethal injection complaint on the ground that such a claim must be brought in a petition for a writ of habeas corpus. Reid appealed that decision, and this Court granted Reid’s motion for a preliminary injunction to stay his execution and to hold his appeal in abeyance

pending the United States Supreme Court's decision in *Nelson v. Campbell*, No. 03-6821) (Attachment 1). There is no principled basis for this Court to take a different position in Emmett's case.

Introduction

On April 19, 2007, after exhausting his administrative remedies within the Department of Corrections, Emmett filed a Complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Virginia, seeking equitable and injunctive relief because the current Virginia execution protocol violates the Eighth Amendment. Emmett alleged that lethal injection as currently administered in Virginia violates the Eighth Amendment prohibition against cruel and unusual punishment because (i) Virginia's protocol fails to account for foreseeable risks of unnecessary pain and suffering, (ii) the protocol does not require training or equipment to resuscitate the condemned inmate in the event that a stay of execution, commutation, or reprieve is granted after the administration of lethal chemicals has commenced, (iii) the protocol contains no enforcement mechanism and is, in fact, routinely ignored and/or violated during the execution process, and (iv) Virginia fails to conduct post-mortem examinations that may reveal whether inmates are adequately sedated during their executions by lethal injection.

“Many people assume that execution by lethal injection is simple and gentle. It’s neither. An inmate is given three drugs to do three things: (1) Knock him out. (2) Paralyze him so he doesn’t flop around or gasp in a way that upsets witnesses. (3) Kill him. If a step goes awry, an inmate can be paralyzed, inadequately sedated or unable to move or cry out as the poisons do their agonizing work.” New York Times Editorial, August 6, 2007.

In Virginia there can be *no doubt* that steps have gone awry, as recently as the last execution in November of 2006. Significant, foreseeable, and preventable errors have been made in the administration of the lethal chemicals by Defendants – errors that most likely caused inmates to suffer an excruciating and agonizing death. Unless and until Defendants are forced to take measures to reduce the margin of error in the application of lethal injection, and accommodate the remaining margin of error by monitoring anesthetic depth, there remains a substantial risk that Emmett and other inmates will endure needless pain. The measures the Defendants refuse to take are well known and are employed routinely in medical settings for the exact purpose of avoiding this foreseeable and needless pain.

In Virginia, just as in 36 other jurisdictions including the Kentucky protocol at issue in *Baze*, the Department of Corrections utilizes a three-chemical sequence in executions by lethal injection. The first chemical, sodium thiopental, is an ultra

short-acting barbiturate that, in an ordinary clinical dose, is typically administered only during the preliminary phase of anesthesia administration; it is not a primary form of anesthesia. There is a reasonable likelihood that sodium thiopental, if ineffectively delivered (which is particularly likely given the inadequacy of the administration procedures uncovered during discovery in this case), will not provide a sedative effect for the duration of the execution process. The risk of inadequate sedation is heightened in Virginia because the dose of thiopental (2 grams) is less than half that used in states such as California (5 grams), Tennessee (5 grams), and Missouri (5 grams). Without adequate depth of sedation, an inmate will experience unnecessary and avoidable pain and terror as a result of the conscious asphyxiation caused by the administration of the second chemical, pancuronium bromide (brand name Pavulon) (50 mg), and excruciating agony from the searing burn and cardiac arrest caused by the third chemical, potassium chloride (240 MEQ).

In his initial complaint, Emmett alleged several deficiencies with the current chemical combination. For instance, the second chemical, pancuronium bromide, paralyzes all voluntary muscles, including the diaphragm, but it does not affect consciousness or the perception of pain. Pancuronium bromide, administered by itself in a quantity sufficient to qualify as a “lethal dose,” would not result in a quick death; instead, it would cause someone to suffocate to death while still

conscious. For an individual who has a degree of awareness but is unable to make his lungs work in order to breathe, this is a terrifying experience. Pancuronium bromide could not lawfully be used alone as the fatal agent for an execution because causing death by suffocation violates the Eighth Amendment's prohibition against cruel and unusual punishment.

As used in Virginia's lethal injection process, pancuronium bromide is not administered in order to cause death. Its function in the execution process is solely cosmetic. It makes an inmate appear serene and tranquil because it masks all voluntary muscle movements he otherwise might make.

Even though employed for cosmetic purposes, the use of pancuronium is not benign. Once this neuromuscular blocking agent is administered, it perversely prevents the Defendants and the public witnesses at the execution from determining whether the Plaintiff is fully awake, only lightly sedated (and therefore still able to feel pain), or at a surgical plane of anesthesia. Because it paralyzes the muscles, it prevents the inmate from lifting a finger, crying out, grimacing, or communicating distress in any other way. In these circumstances, only an individual who is at "bedside," who has adequate training in anesthesiology, and who is in tactile contact with the inmate can determine when the prisoner reaches a surgical plane of anesthesia and remains in that state. To

every other participant in the execution and every witness to the execution, the inmate will appear (falsely) to be serene and pain-free.

The third chemical, potassium chloride, causes death by inducing cardiac arrest. Potassium chloride sears the nerve fibers lining the inside of the veins as it travels to the heart, and it is indescribably painful to an inmate who has any degree of consciousness. This is not the pain of ordinary cardiac arrest; it is a pain that precedes cardiac arrest and results immediately when potassium chloride comes in contact with the interior of the veins. For an inmate who has retained or regained consciousness but is paralyzed and hence unable to communicate, it is agonizing torture.

Procedural History

In a briefing schedule ordered on April 30, 2007, the district court directed Emmett to file his opening brief “for Plaintiff’s motion for a preliminary injunction” on May 9, 2007. However, Emmett had not requested a preliminary injunction at that time and instead had advised the court of his intent to fully litigate the merits of lethal injection prior to his then-scheduled execution date of June 13, 2007. The lower court insisted on converting Emmett’s opening brief into a request for a preliminary injunction, which it denied on June 1, 2007.

Attachment 2. By that date, there was inadequate time to litigate the merits.

On June 13, 2007, the United States Supreme Court denied Emmett's request for a stay of execution on his underlying habeas claim by a vote of 5-4, and it took the unusual step of issuing no decision on Emmett's petition for writ of certiorari. The Honorable Governor Kaine promptly issued a reprieve and delayed Emmett's execution until October 17, 2007, by which date it is expected that the Supreme Court will have ruled on Emmett's petition for certiorari. Following issuance of the reprieve, Emmett promptly resumed litigation of his lethal injection complaint. On June 22, 2007, three days after Emmett had noticed additional depositions in the case, Defendants filed a Motion for Summary Judgment. The district court conducted a status conference and entered an order permitting additional limited discovery and scheduling a trial for September 26, 2007. On August 20, 2007, after the conclusion of the additional discovery, Emmett filed his Opposition to Defendants' Motion for Summary Judgment.

In his Opposition Emmett made additional allegations regarding the last execution by lethal injection in Virginia – that of John Yancey Schmitt. Schmitt's execution lasted 13 minutes; not since the very first lethal injection in Virginia had it taken an inmate so long to flat-line. Schmitt's execution was the first in four-and-a-half years where a second set of lethal chemicals was administered to the inmate. A second set of chemicals was delivered to Schmitt three minutes after the first set was administered. The protocol requires that this second set be delivered

through the alternate IV line. Presumably,¹ this is because there is a likelihood or risk that when a second set of chemicals is needed, it is because the first IV line or the site where the first needle was inserted is faulty and the full dose of each chemical delivered through the first IV line did not reach the inmate's blood stream.

In Schmitt's case, the executioner failed to use the alternate IV line; instead, he administered the second set of chemicals through the same IV line as the first set. Attachment 3 (Deposition of Secret Witness 2) at 34:24-35:1 (filed under seal). Not surprisingly, it took an additional six minutes for Schmitt to die – *longer than it has taken any other inmate to flat-line after the administration of the first or second set of lethal chemicals*. The fact that Schmitt had not flat-lined within ten minutes of the administration of the first set of lethal chemicals strongly suggests that he did not receive the full dose of those chemicals. See Attachment 4 (Affidavit of Stuart M. Lawson, M.D.) at ¶ 21 (execution records indicating that the “overwhelming majority” of lethal injections produce death in less than five minutes suggest that “something has gone wrong” in executions taking 13 minutes to produce death).

¹ Pursuant to the lower court's Order, Emmett was only able to depose witnesses involved in lethal injections during the past five years and only those witnesses who may be involved in the execution of Emmett. Thus, Emmett was unable to question individuals who drafted the protocol. Physician No. 2 testified that he did not know why the protocol called for use of the alternate line in such instances. Attachment 5 (Deposition of Physician No. 2) (filed under seal).

The only reason that this error in Schmitt's execution was discovered was because during his deposition of the executioner, Secret Witness 2, Emmett happened to ask this witness whether he administered the second set through the alternate IV line. The executioner acknowledged that he had not. Attachment 3 at 34:24-35:13 (filed under seal). In a separate deposition, the Director of the Department of Corrections, Gene Johnson, acknowledged that the executioner's failure to utilize the alternate IV line when administering the second set of chemicals was a deviation from Virginia's protocol. Attachment 9 at 35:23-36:4 (filed under seal).² Despite this failure to adhere to the protocol, Defendants had no records of this violation; the deviation from the protocol was not discovered by any member of the execution team, nor addressed by any DOC official prior to Emmett's deposition of the executioner.

In his Opposition to Defendants' Motion for Summary Judgment, Emmett also made additional allegations regarding the training and qualifications of those involved in the lethal injection process. For instance, during the recent deposition of Physician No. 2 (the current attending physician at executions), the physician openly acknowledged that he lacks the training and expertise to fulfill the

² Director Johnson also admitted that a failure to administer a second dose of Pavulon as part of the second set of lethal chemicals would "not follow the letter of the law for the protocol." Attachment 9 at 35:16-22 (filed under seal). According to execution records, in eight of the ten executions during which a second set of chemicals was administered, the Pavulon was omitted in violation of the protocol.

responsibility delegated to him by the protocol. According to the protocol, it is the responsibility of this physician to consult with members of the execution team regarding adjustments of dosages for inmates based on their physical size.

Attachment 6 (June 22, 2007, Affidavit of Anthony Parker, ¶ 13); Attachment 7 (June 21, 2007, Affidavit of Gene Johnson, ¶ 3). However, Physician No. 2 – who has been the attending executioner for over 3 years – only became aware of this responsibility when talking with his attorneys in preparation for his deposition.

Attachment 5 at 26 (“I don’t recall being aware of that until a couple of days ago.”) (filed under seal). The physician then noted, “for the record, I would say that would be beyond my expertise, or even my involvement at this point, whatsoever.”

Id. He also testified that he did not believe that he should take any part in discussions concerning potential revisions to the protocol. *Id.* at 27.³ Finally, the physician explained that if he were asked to adjust the dosage based on the inmate’s size, he “would suggest that they consult someone who has the expertise,” (*Id.* at 35), and added that he does not know what type of doctor or official would possess such expertise. *Id.* at 37.

Emmett further alleged that the execution checklist, which Defendants claim is used a guide during executions, is meaningless because DOC officials and those involved the execution process “interpret” the checklist in myriad (and

³ The physician did note that he attended a “meeting about a cut-down.” Attachment 5 at 28 (filed under seal).

grammatically bizarre) ways. In fact, no two members of the execution team seem to agree on exactly what the protocol requires with respect to administering a second set of chemicals, and there was considerable confusion among the DOC officials and execution team members regarding who had the authority to order a second set to be administered.

Despite the new information uncovered during the course of discovery, the lower court entered an Order on September 18, 2007, granting Defendants' Motion for Summary Judgment. On September 20, 2007, it issued an explanatory Memorandum Opinion. Attachment 8. The district court acknowledged that "the inconsistencies demonstrated by the evidence are disturbing," (Mem. Op. at 14, n.7) and that Emmett presented "evidence that warrants some concern with aspects of Virginia's execution procedures. . . ." *Id.* at 6. The district court concluded, however, that to satisfy the Eighth Amendment in this context, the Plaintiff had to demonstrate deliberate indifference on the part of Defendants. *Id.* at 11, n.5. Finding that Emmett failed to satisfy this high hurdle, the court granted summary judgment to the Defendants.

Argument

On September 25, 2007, the United States Supreme Court granted a writ of certiorari to the Kentucky Supreme Court in *Baze v. Rees*, No. 07-5439. The questions presented in *Baze* (excluding a rather lengthy preamble) are as follows:

- I. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?
- II. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?
- III. Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?
- IV. When it is known that the effects of the chemicals could be reversed if the proper actions are taken, does substantive due process require a state to be prepared to maintain life in case a stay of execution is granted after the lethal injection chemicals are injected?

Attachment 10.

The protocol at issue in *Baze* involves the same three-chemical protocol at issue in Emmett's case. Moreover, the standard required by the Eighth Amendment for adjudication of the lethal injection claims is at issue – and may be

dispositive – in both cases.⁴ Thus, the Supreme Court’s decision in *Baze* will be directly relevant to this Court’s adjudication of Emmett’s appeal. Indeed, this Court cannot competently adjudicate Emmett’s appeal until the Supreme Court identifies the governing legal standard, and it would be a waste of judicial resources for the Court to attempt to do so. Emmett therefore asks this Court to hold further proceedings in abeyance pending the Supreme Court’s decision in *Baze*.

In order to preserve the Court’s ability to adjudicate the merits of Emmett’s timely appeal following the decision in *Baze*, Emmett also seeks a preliminary injunction preventing Defendants from carrying out Emmett’s execution, which is now scheduled for October 17, 2007. In assessing whether a preliminary injunction is appropriate, this Court has employed a balance of hardships test, weighing (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of irreparable harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest. *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189, 193-96 (4th Cir. 1977). In assessing the likelihood of success on the merits, it is important to keep in mind that Emmett “need not show a mathematical probability of success at trial before a stay can be granted. It

⁴ Emmett’s Complaint also raised the fourth issue on which the Court granted certiorari. See Attachment 8 at 16 n.8.

is enough to show that [Emmett] has raised serious questions that call for deliberate investigation.” *Nooner and Davis v. Norris*, Case No. 5:06CV00110 (E.D. Ark. 2006) at 6-7.

In balancing the equities, the most important factors are the likelihood of harm to the parties. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991). In *Rum Creek*, this Court explained that

because current Supreme Court cases suggest that the only remedy available to a plaintiff who alleges that a State or State official has violated rights under § 1983 is an injunction and declaration against the State, the showing necessary to meet the irreparable harm requirement for a preliminary injunction should be less strict than in other instances where future monetary remedies are available.

Rum Creek, 926 F.2d at 360, 362).

Balancing the Harships

Looking at the potential for irreparable harm, there can be no doubt that if Emmett is not sufficiently anesthetized at the time that the second and third chemicals are administered, he will suffer excruciating pain – pain that is unnecessary in accomplishing his death. The risk of this happening is foreseeable and largely avoidable. Additionally, if the Supreme Court reverses the judgment of the Kentucky Supreme Court and Emmett is executed in the meantime, Emmett will have been subjected to cruel and unusual punishment in violation of the Eighth Amendment.

On the other hand, Defendants will incur minimal harm if they are enjoined from conducting Emmett's execution on October 17, 2007. The only possible harm is a short delay in Emmett's execution. Because the Supreme Court has ordered expedited briefing in *Baze*, which is expected to be argued in January 2008, and because the Supreme Court knows the importance of carrying out executions in a timely manner, this Court can have confidence that the delay in Emmett's execution will be for the shortest time that is consistent with competent adjudication in *Baze*. If, in light of *Baze*, Emmett's appeal turns out to lack merit, the Defendants can carry out Emmett's execution without the concern that their conduct carries an unreasonable risk of inflicting unnecessary pain. Emmett seeks only to enjoin Defendants from doing what they have no right or need to do – to employ a protocol that involves the wanton infliction of unnecessary pain. If this Court concludes on the other hand that Virginia's protocol does not pass constitutional muster, Emmett's execution will be delayed only until the Defendants can revise their lethal injection protocol to comport with the Eighth Amendment. Emmett emphasizes that he does not seek to prevent Defendants from carrying out his execution.

Likelihood of Success on the Merits

Emmett's likelihood of success on the merits appears to depend in large part on the Supreme Court's decision in *Baze*. As the Petitioner in *Baze* points out in his certiorari petition, courts across the country are applying different standards to similar claims. In Emmett's case, the district court employed a standard that is at the most onerous end of the scale. The Eighth Amendment standard employed by the lower court is inconsistent with Supreme Court precedent, as well as other lower court opinions. Furthermore, the district court applied an erroneous summary judgment standing by failing to address genuine and material factual disputes created by the evidence in the case.

Finally, there is a growing national trend toward re-examination of lethal injection protocols. Numerous states have suspended executions while courts and administrative bodies review current protocols. Further, upon such review, states have modified their protocols in order to reduce the foreseeable risk that inmates will suffer unnecessary and avoidable pain and terror associated with the administration of the three-drug combination. Given the growing consensus that protocols similar, if not identical, to those employed by Virginia require modification in order to decrease the risk of undue infliction of pain, there is a likelihood that Emmett's appeal, based in large part on the Court's anticipated decision in *Baze*, will succeed on the merits.

Public Interest

Finally, the Court must consider the public interest at issue. As Emmett noted above, “Crime victims and the general public have an important interest in the timely enforcement of criminal sentences. However, “failure to consider [Emmett’s] allegations would ignore the *equally important* public interest in the humane and constitutional application of the State’s lethal injection statute.” *Nooner and Davis v. Norris*, Case No. 5:06CV00110 (E.D. Ark. 2006) at 7.

Emmett’s conduct demonstrates that his goal in bringing the instant suit was to ensure that he is executed in a humane manner, not to delay his execution. Emmett repeatedly informed the district court and Defendants that he did not wish to proceed on a Motion for a Preliminary Injunction in the court below, and that he intended to try the case on its merits prior to his original June 13 execution date. He was prevented from doing so by the district court’s insistence on *sua sponte* raising, and then rejecting, an unwanted motion for a preliminary injunction. The fact that Emmett vigorously pursued this litigation once the Governor issued a reprieve is further evidence of Emmett’s true motive in this case. Emmett seeks a preliminary injunction now in light of the Supreme Court’s grant of certiorari in a case that will *directly* affect this Court’s adjudication of Emmett’s appeal of the district court’s dismissal.

WHEREFORE, Emmett respectfully request that this Court hold the proceedings in abeyance pending the Supreme Court's decision in *Baze v. Rees*, and enjoin Defendants from executing Emmett prior to this Court adjudication of Emmett's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2007, I caused the foregoing to be served by hand-delivery on Richard C. Vorhis and Banci Tewelde, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219.
