UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 13-3664

David Zink, et al.

Allen L. Nicklasson

Appellant

John C. Middleton, et al.

v.

George A. Lombardi, et al.

Appellees

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:12-cv-04209-NKL)

ORDER

The petition for rehearing en banc, the petition for rehearing by panel and the motion for stay of execution are denied as moot. Judge Duane Benton did not participate in the consideration or decision of this matter.

BYE, Circuit Judge, dissenting.

At approximately 10:52 p.m. on December 11, 2013, Missouri executed Allen Nicklasson before this court had completed its review of Nicklasson's

request for a stay of his execution, a request he brought in a pending action challenging the constitutionality of Missouri's execution protocol. That bears repeating. Missouri put Nicklasson to death before the federal courts had a final say on whether doing so violated the federal constitution.

Missouri has a well-documented history of attempting to execute death row inmates before the federal courts can determine the constitutionality of the executions. In 1983, Missouri set an execution date for Doyle Williams before the time had run for Williams to petition the Supreme Court for direct review of his conviction and death sentence. Supreme Court Justice Harry Blackmun stayed the execution, specifically advising Missouri that a "defendant must have at least one opportunity to present to the [Supreme Court] his claims that his death sentence has been imposed unconstitutionally." Williams v. Missouri, 463 U.S. 1301, 1301-02 (1983).

Just a few months later, however, Missouri set the execution dates of four death row inmates – Samuel Lee McDonald, Leonard Marvin Laws, Thomas Henry Battle, and George Clifton Gilmore – before the time had run for the filing and disposition of a petition for certiorari on direct review of the men's convictions and death sentences. In the order entering a stay of the executions, Justice Blackmun unequivocally stated that

> [e]very defendant in a state court of this Nation who has a right of direct review from a sentence of death, no matter how heinous his offense may appear to be, is entitled to have that review before paying the ultimate penalty. The right of review otherwise is rendered utterly meaningless. It makes no sense to have the execution set on a date . . . before [judicial] review is completed.

McDonald v. Missouri, 464 U.S. 1306, 1307 (1984).

Additionally, Justice Blackmun reminded Missouri of what he said in Williams:

> I thought I had advised the Supreme Court of Missouri once before, in Williams, that, as Circuit Justice of the Circuit in which the State of Missouri is located, I, upon proper application, shall stay the execution of any Missouri applicant whose direct review of his conviction and death sentence is being sought and has not been completed. I repeat the admonition to the Supreme Court of Missouri, and to any official within the State's chain of responsibility, that I shall continue that practice. *The stay, of course, ought to be granted by the state tribunal in the first instance, but, if it fails to fulfill its responsibility, I shall fulfill mine*.

Id. (emphasis added).

Thirteen months after Justice Blackmun's admonition, Missouri set an execution date for Walter Junior Blair. Prior to his execution date, Blair had filed a petition for writ of habeas corpus in federal district court. Blair then filed a motion with the Missouri Supreme Court requesting a stay of his execution to give him a meaningful opportunity to exercise his constitutional right of federal habeas review. The Missouri Supreme Court nonetheless summarily denied the request for a stay. A federal district court was thus required to step in and stay the

execution. See Blair v. Armontrout, 604 F. Supp. 723, 723 (W.D. Mo. 1985). In so doing, the court noted that

> [b]y refusing the petitioner's request for a stay of execution, the Missouri Supreme Court has in effect authorized the execution of a condemned prisoner without affording him the opportunity to exercise his constitutional right of federal habeas corpus review. In so doing, the Missouri Supreme Court ignored its responsibility to stay executions while federal judicial review is pending.

Id. at 724. The district court reiterated the admonitions Justice Blackmun had given Missouri in Williams and McDonald, and expressly held "[a] state prisoner sentenced to death is constitutionally entitled to habeas corpus review," id. at 725, adding that the principle of comity (i.e., federal courts first affording states the opportunity to perform their constitutional duties) "will be jeopardized if the Missouri Supreme Court continues to ignore its well-defined responsibility concerning requests for stays of execution due to pending federal review. Since the Missouri Supreme Court has failed to accept its responsibility, I shall accept mine." Id.

Less than a year after Blair, Missouri set January 6, 1986, as the execution date for Gerald M. Smith. At the time, Smith was a death row inmate whose competency was in question based upon his indecision about whether to pursue available state and federal remedies attacking his conviction and death sentence, or abandon his legal proceedings and proceed with his execution. Smith's brother, Eugene Smith, filed a next-friend petition in a Missouri state court seeking a

determination of his brother's competency before Missouri proceeded with the execution; Eugene also filed a motion in the Missouri Supreme Court to stay the execution until his brother's competency could be determined. The Missouri Supreme Court summarily denied the request for a stay "in one line and without any explanation." Smith By and Through Smith v. Armontrout, 626 F. Supp. 936, 938 (W.D. Mo. 1986). After Eugene obtained a ruling in the state trial court that his next-friend petition was a valid action under Missouri law, the Missouri Supreme Court postponed the execution for nine days, but ultimately "issued an order which, in effect, stated that the next-friend [proceeding] . . . was a legal nullity and that no further extensions of Gerald Smith's execution date would be granted." Id.

Once again, a Missouri litigant was required to turn to the federal courts to ensure that Missouri complied with constitutional requirements mandated by the United States Supreme Court before carrying out an execution. See Rees v. Peyton, 384 U.S. 312, 313-14 (1966) (explaining the competency procedures which any court of this nation, state or federal, must follow when a death row inmate announces an intention to abandon further appeals and proceed with an execution). In staying Missouri's execution of Gerald Smith until his competency could be determined, the federal district court stated "it becomes painfully obvious that the Missouri Supreme Court's refusal to stay Gerald Smith's execution pending

a competency determination . . . had no basis in fact nor in law, but was merely an expedient way of washing its hands of the matter and passing the buck to the Federal courts." Smith, 626 F. Supp. at 940. The district court further noted "[t]his is not the first time that the Missouri Supreme Court has passed the buck to the Federal courts by refusing to perform its legal obligation to stay an execution . . . when the law required a stay to permit post-conviction appeals to be heard in an orderly manner," id., and referred to the prior Williams, McDonald, and Blair cases.

The district court also commented on the necessary and inevitable tension which exists between a state's choice to utilize death as a penalty on one hand, and the safeguards our Founding Fathers saw fit to include in our federal constitution on the other:

> This Court is aware that many members of the public are frustrated with what seems to be inordinate delay in the processing of appeals by death row inmates. Indeed, many people believe that there should be no appeals whatsoever following the jury's imposition of the death sentence. *The law, on the other hand, provides that certain procedures must be followed before a death sentence may be carried out*. Although it may not win a popularity contest in any given case, this scheme was adopted to ensure that *every individual would be accorded due process of law.*

Id. at 940 n.3 (emphasis added).

In May 2005, Missouri death row inmate Vernon Brown challenged the three-chemical protocol Missouri used in its executions at the time. Brown was

one of the first death row inmates to participate in what subsequently became a multi-state challenge to this three-chemical protocol, incited in large part by the publication of an April 2005 article in the medical journal *The Lancet*. The article analyzyed autopsy toxicology results from forty-nine executions where the three-chemical sequence of sodium pentothal[1] (a sedative), pancuronium bromide (a paralytic), and potassium chloride (a very painful drug which induces a heart attack) was used to carry out the executions. The article's authors essentially concluded that in almost half of the autopsies examined (43%), the amount of sedative used in the executions would have been insufficient to render the inmate unconscious. "In other words, the use of this three-chemical sequence results in a possibility the person to whom it is administered will be conscious when the inherently painful potassium chloride takes effect, yet no one will know because of the paralytic effects of the pancuronium bromide." Brown v. Crawford, 408 F.3d 1027, 1028 (8th Cir. 2005) (Bye, J., dissenting). The evidence Brown asked us to consider included the fact that nineteen states had passed laws banning the use of a similar protocol to euthanize animals. Brown alleged Missouri is "using a combination of chemicals they knew or should have known would cause an excruciating death when they were telling the public it was like putting a dog to sleep, when their own veterinarians would lose their licenses for using the same

[1]Sodium pentothal is sometimes referred to as thiopental.

chemicals on a stray." Id. (quoting Brown v. Crawford, No. 4:05-VV-746-CEJ, Motions for Temporary Restraining Order at 19).

The article in *The Lancet* had been published just a month before Brown's execution date. He relied upon it to bring an eleventh-hour challenge to his execution, merely asking Missouri to disclose the level of sodium pentothal it would use in his execution before executing him – hardly an onerous request. In refusing to disclose information about the dosage levels used in its execution protocol, Missouri trumpeted the need to proceed with Brown's execution post haste in order to provide the families of the victims of his crimes with closure. Against my dissent, the Eighth Circuit said Missouri could execute Brown without first disclosing whether its protocol utilized an adequate dosage of sodium pentothal. Brown was strapped to a gurney at 11:30 p.m., and left there for three hours before a divided Supreme Court finally denied his request for a stay and allowed Missouri to proceed with his execution.

Missouri death row inmate Michael Anthony Taylor also challenged Missouri's use of the three-chemical protocol. In more reflective deliberations not burdened by the eleventh-hour nature of Vernon Brown's challenge, the federal courts handling Taylor's suit understandably recognized he, along with other Missouri death row inmates, were entitled to know the dosage levels Missouri used in its execution protocol before Missouri could execute them.

Taylor discovered numerous and significant problems with Missouri's execution protocol, including inconsistencies between the amounts of sodium pentothal Missouri claimed to be using in every execution, and chemical dispensary logs which showed much lower amounts of the sedative actually being used in several executions. See Taylor v. Crawford, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at *3 (W.D. Mo. June 26, 2006). Incredibly, Missouri had not adopted a written protocol for its executions. Even more incredibly, Missouri gave unfettered discretion to an ***admittedly dyslexic physician*** to implement the state's unwritten protocol, ***including the responsibility of correctly mixing the drugs used in executions***. Id. at *4-8. The district court's observations bear repeating here:

> After learning more about how executions are carried out in Missouri, through the interrogatories submitted to the John Doe defendants, reviewing the chemical dispensary logs, reviewing the videotape of the execution chamber and listening to the testimony of John Doe I, and to the testimony of the other expert witnesses at the June 12-13, 2006 hearing, it is apparent that there are numerous problems. For example, there is no written protocol which describes which drugs will be administered, in what amounts and defines how they will be administered. John Doe I testified that he came up with the current protocol. John Doe I also testified that he felt that he had the authority to change or modify the formula as he saw fit. It is apparent that he has changed and modified the protocol on several occasions in the past. He has reduced the amount of thiopental given from 5.0 grams to 2.5 grams and has also changed the location on the inmate's body where the drugs were administered. It is obvious that the

protocol as it currently exists is not carried out consistently and is subject to change at a moment's notice.
The Court is also concerned that John Doe I possesses total discretion for the execution protocol. Currently, there are no checks and balances or oversight, either before, during or after the lethal injection occurs. No one monitors the changes or modifications that John Doe I makes. John Doe I even testified that the Director of the Department of Corrections, Mr. Crawford, has no medical or corrections background, and that he is "totally dependent on me advising him." (John Doe Depo. p. 64).

In addition to the fact that there is no oversight and the responsibility for making changes or adjustments is completely vested in one individual, the Court also has concerns about John Doe I's qualifications. John Doe I readily admitted that he is dyslexic and that he has difficulty with numbers and oftentimes transposes numbers. John Doe I testified "it's not unusual for me to make mistakes. . . . But I am dyslexic and that is the reason why there are inconsistencies in my testimony. That's why there are inconsistencies in what I call drugs. I can make these mistakes, but it's not medically crucial in the type of work I do as a surgeon." (John Doe Depo. p. 25). The Court disagrees and is gravely concerned that a physician who is solely responsible for correctly mixing the drugs which will be responsible for humanely ending the life of condemned inmates has a condition which causes him confusion with regard to numbers. As the Court has learned, the process of mixing the three different drugs and knowing the correct amount of the drugs to dissolve in the correct amount of solution involves precise measurements and the ability to use, decipher, and not confuse numbers. Although John Doe I does not feel this is crucial in the type of work he does as a surgeon, it is critical when one is mixing and dissolving chemicals for a lethal injection.

In addition, John Doe I testified that although he is not an anesthesiologist, he monitors the anesthetic depth of an inmate by observing the inmate's facial expression. However, as can be seen from the videotape of the execution chamber, when the inmate is lying on the gurney in the execution room, the inmate is facing away from the Operations room where John Doe I is located. Additionally, it is dark in the Operations room and there are blinds on the window which

> are partially closed and obstruct the view. This would make it almost impossible for John Doe I to observe the inmate's facial expression. This leads the Court to conclude that there is little or no monitoring of the inmate to ensure that he has received an adequate dose of anesthesia before the other two chemicals are administered.

Id. at *7-8. The district court ultimately concluded "Missouri's lethal injection procedure subjects condemned inmates to an unnecessary [and unacceptable] risk that they will be subject to unconstitutional pain and suffering when the lethal injection drugs are administered." Id. at *8. The district court ordered Missouri to prepare a new written protocol for the implementation of lethal injections to ensure compliance with the federal constitution. Id. The Eighth Circuit vacated the injunction entered by the district court to prevent Missouri from proceeding with any executions only after Missouri adopted a detailed written execution protocol, and indicated it would no longer use the services of the dyslexic physician. See Taylor v. Crawford, 487 F.3d 1072, 1077 n.3, 1082-85 (8th Cir. 2007).

II

With this history of Missouri's implementation of the death penalty in mind, I turn to Allen Nicklasson's now-moot challenge to Missouri's more recent, ever-changing execution protocol. Allen Nicklasson was one of a number of Missouri death row inmates who filed suit raising constitutional challenges against an execution protocol Missouri announced on May 15, 2012. The new protocol would utilize just a single drug, propofol, to carry out executions. The inmates

filed their lawsuit in Missouri state court, but Missouri's choice to remove it triggered our federal review.

The inmates' challenge to Missouri's execution protocol is no longer about the use of propofol because Missouri has changed the protocol numerous times since May 2012, while still actively scheduling new executions. Joseph Franklin was also one of the death row inmates participating in this constitutional challenge to Missouri's execution protocol. Missouri scheduled, and completed, Franklin's execution on November 20, 2013, notwithstanding the fact it changed the execution protocol no less than five times between August 1, 2013, and November 20, 2103, with the last protocol change occurring just five days before Franklin was executed.

The issues currently involved in this protocol litigation include the fact that Missouri is resorting to secret compounding pharmacies to concoct copycat versions of the drug pentobarbital to carry out its executions. Applying Hill v. McDonough, 547 U.S. 573 (2006), the district court presiding over the protocol litigation entered a stay of Franklin's execution after concluding the inmates showed "a significant likelihood of success on the merits, a showing of irreparable harm in contrast to relatively little harm to [Missouri], and no fault in the delay of their current case pending before this Court." Zink v. Lombardi, No. 2:12-CV-4209-NKL, 2013 WL 6080358, at *8 (W.D. Mo. Nov. 19, 2013).

With respect to the moving target Missouri kept presenting to the inmates by constantly changing its execution protocol while still going forward with Franklin's execution (and now Nicklasson's), the district court said

> [death penalty] litigation is not a game of chess. Hill was intended to be a shield to protect defendants from abusive litigation practices by death row inmates. But it was never intended to be used as a sword permitting defendants to disrupt and delay the litigation process and then complain that time is up. Neither the Plaintiffs nor the Court have been able to address the merits of Plaintiffs' claim that the Defendants have adopted an execution protocol that violates the U.S. Constitution, because the Defendants keep changing the protocol that they intend to use. It would be a substantial departure from the way in which law suits are generally handled by this Court, to allow Defendants to succeed with this strategy. Rather, the pending dispute between the parties should be resolved on the merits after a reasonable opportunity for both sides to be heard, followed by a prompt, final order resolving the dispute. That is how it is normally done in America and it is a system that has worked quite well.

Id. at *6.

I agreed with the district court's analysis and voted to stay Franklin's execution. Although a majority of my colleagues disagreed, and Franklin was allowed to be executed, I still agree with the district court's analysis, which is why I voted to stay Nicklasson's execution as well.

My point, however, in this dissent from the denial of the petition for rehearing en banc of Nicklasson's request for a stay, is not to discuss or rehash the merits of the current protocol litigation. Rather, I feel obliged to say something

because I am alarmed that Missouri proceeded with its execution of Allen Nicklasson before this court had even finished voting on Nicklasson's request for a stay. In my near fourteen years on the bench, this is the first time I can recall this happening. In litigation raising a constitutional challenge to his execution, a death row inmate sought a stay of his execution under Hill, and before the federal courts had issued a final decision on the pending request for a stay, Missouri carried out the execution.

While the current protocol litigation is not among the category of cases for which Nicklasson was entitled to an automatic stay of his execution, it was nonetheless a claim that Missouri would violate the federal constitution by executing him. As a result, Nicklasson was entitled to have this court complete its equitable review under Hill to determine whether he was entitled to a stay before Missouri actually executed him. By proceeding with Nicklasson's execution before our court had completed voting on his petition for rehearing en banc, Missouri violated the spirit, if not the letter, of the long litany of cases warning Missouri to stay executions while federal review of an inmate's constitutional challenge is still pending.

III

Missouri's past history of scheduling executions before a death row inmate has exhausted his constitutional rights of review, using unwritten execution protocols, misrepresenting dosage levels for drugs used in lethal injections, and providing unfettered discretion to a dyslexic physician to mix the drugs and oversee its executions, has earned from this federal judge more than just a healthy judicial skepticism regarding Missouri's implementation of the death penalty. Its current practice of using shadow pharmacies hidden behind the hangman's hood, copycat pharmaceuticals, numerous last-minute changes to its execution protocol, and finally, its act of proceeding with an execution before the federal courts had completed their review of an active request for a stay, has committed this judge to subjecting the state's future implementation of the penalty of death to intense judicial scrutiny, for the sake of the death row inmates involved as well as adversaries and advocates of capital punishment alike.

December 20, 2013

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

/s/Michael E. Gans