

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 14-1388

David Zink, et al.

Michael Anthony Taylor

Appellant

Leon Taylor, et al.

v.

George A. Lombardi, et al.

Appellees

No: 14-1403

Michael Anthony Taylor

Appellant

v.

Michael Bowersox and Jeremiah Nixon

Appellees

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(2:12-cv-04209BP)
(4:97-cv-04055-BP)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Benton did not participate in the consideration or decision of this matter.

Judges Murphy, Bye and Kelly would grant the petition for rehearing en banc.

BYE, Circuit Judge, with whom MURPHY and KELLY, Circuit Judges, join.

I would grant the petition for rehearing en banc in this case in order to grant a stay of execution to Michael Anthony Taylor.

My dissent in *In re Lombardi*, No. 13-3699, 2014 WL 288937, at *8 (8th Cir. Jan. 24, 2014) (Bye, J., dissenting) reh'g denied, 2014 WL 308055 (8th Cir. Jan. 27, 2014), expresses my view on the need to provide adequate information to death row inmates in order that they may determine whether or not their Eighth Amendment rights are being violated. The Eighth Amendment "prohibits the unnecessary and wanton infliction of pain through torture, barbarous methods, or methods resulting in a lingering death." *Taylor v. Crawford*, 487 F.3d 1072, 1082 (8th Cir. 2007). Because Taylor seeks to determine whether the drug to be used in his execution will result in pain or in a lingering death, it bears repeating the importance of the identities of the pharmacists, laboratories, and drug suppliers in determining whether Missouri's execution of death row inmates is constitutional.

In this litigation, Missouri simply argues that even if they were obligated to provide any access of information to death row inmates awaiting execution, Taylor is in the same position as Joseph Franklin, Allen Nicklasson, and Herbert Smulls who were denied stays of execution by this court while litigation challenging Missouri's protocol was pending. But Taylor is in an obviously disadvantaged position because Missouri has, perhaps drastically, changed how Taylor will be executed by substituting any number of new components and actors within the last week. Missouri is unable to execute death row inmates with an FDA-approved form of injectable pentobarbital and thus uses compounding pharmacies to replicate the drug. Yet, with only one week before Taylor's scheduled execution, Missouri has changed compounding pharmacies.

One must wonder at the skills of the compounding pharmacist. In fact, from the absolute dearth of information Missouri has disclosed to this court, the "pharmacy" on which Missouri relies could be nothing more than a high school chemistry class. Even if Missouri had provided basic guarantees of a regulated lab and licensed pharmacists, the skill-level and experience in compounding of the pharmacist in question is vital to ensuring Taylor is executed in a way which comports with the Eighth Amendment. Missouri has no qualms announcing a new pharmacy will provide the alleged pentobarbital, yet that pharmacy and its pharmacists presumably have no

experience compounding injectable pentobarbital for executions. It is conceivable this lack of experience and knowledge would lead to Taylor's death being excruciatingly painful. See, e.g., Rick Lyman, *Ohio Execution Using Untested Drug Cocktail Renews the Debate Over Lethal Injections*, N.Y. Times, Jan. 16, 2014, at A15 ("Michael Lee Wilson . . . was executed in Oklahoma using a cocktail of pentobarbital from a compounding pharmacy; vecuronium bromide, a paralytic; and potassium chloride, which stops the heart. His last words, coming about 12 seconds after the injections were administered, were, 'I feel my whole body burning.'). If through lack of experience or lack of time to do adequate testing, the pharmacy has manufactured something which is quite painful, Taylor's constitutional rights would be violated.

Over the past several months, Missouri executed Franklin, Nicklasson, and Smulls using a drug which had been tested and apparently contained preservatives which guaranteed its use for thirty days. At this point, Taylor and the courts have been provided no information on the shelf-life of the alleged pentobarbital nor whether the new pharmacy has used preservatives at all. One should be suspicious of any pharmacy compounding a drug presumably for the first time, particularly when the pharmacy received Missouri's request just a week before the scheduled execution.

Pain to Taylor may not be the fault of the compounding pharmacist, but could also be laid at the feet of suppliers who have failed to provide proper ingredients. Missouri has yet to provide information on the source of any drugs to be used to execute Taylor, leaving open the possibilities the ingredients do not meet legal or medical standards. See, e.g., Pls.' Br. Exh. F, ECF ID 4126699 (*Gardiner Harris, Medicines Made in India Set Off Safety Worries*, N.Y. Times, Feb. 14, 2014, at A1 (discussing "lapses in quality" at foreign pharmaceutical firms importing to the United States)). Because Missouri has again changed its procedure for executions, even the most well-trained and well-intentioned pharmacist may be unable to properly test compounded pentobarbital in such a short amount of time. Missouri is actively seeking to avoid adequate testing of the alleged pentobarbital, which raises substantial questions about the drug's safety and effectiveness. Although there were concerns with previous laboratory testing, at least some laboratory testing was conducted. Now, Missouri has provided no indication any testing of the new product has occurred.

Nothing Taylor asks for would place an undue burden on Missouri. He simply seeks transparency concerning the manufacturer of the chemical used to execute a death sentence and testing of the chemical for identity, potency, purity, and contamination. Considering the

enormity of the issues at stake, this is a burden which is entirely due. The Supreme Court "has long acknowledged that death is fundamentally different from any other punishment." *Woodward v. Alabama*, 134 S.Ct. 405, 406 (2013). In fact, it is the most severe penalty permitted by law. See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability."); see also *Furman v. Georgia*, 408 U.S. 238, 284 (1972) (Brennan, J., concurring) ("The unusual severity of death is manifested most clearly in its finality and enormity."). Missouri has again, at the eleventh hour, amended its procedure and again is "using [a] shadow pharmac[y] hidden behind the hangman's hood" and "copycat pharmaceuticals" to execute another death row inmate. *Zink v. Lombardi*, No. 13-3664, ECF ID 4108311, at 15 (8th Cir. Dec. 23, 2013) (en banc) (Bye, J., dissenting). Because the Eighth Amendment compels an execution free from an "objectively intolerable risk of harm," Missouri should not object to Taylor's modest requests now. *Baze v. Rees*, 553 U.S. 35, 50 (2008). Indeed, it is surprising Missouri has not been more transparent during this process, as it, too, has a strong interest in ensuring its executions conform with constitutional requirements. Thus, since Taylor asks for nothing more than information about the chemicals set to be injected into his own body, no undue burden has been placed on Missouri.

Pentobarbital is a known poison with painful side effects, yet Missouri may be correct that compounded pentobarbital is a constitutional way in which to implement the death penalty. However, Missouri has a storied history of ignoring death row inmates' constitutional rights to federal review of their executions. *Zink*, No. 13-3664, ECF ID 4108311, at 2 (en banc) (Bye, J., dissenting). I once again fear Missouri elevates the ends over the means in its rush to execute Taylor. Thus, I would stay Taylor's execution in order that he be allowed access to information and testing so he could determine whether or not his constitutional rights were to be violated at the time of his death.

February 25, 2014

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans