

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA

Plaintiff,

SC11-1387

vs.

CASE NO. F78-5281A

MANUEL VALLE

Defendant.

_____ /

ORDER DENYING MOTION TO VACATE DEATH PENALTY
FOLLOWING REMAND

This case having come before this court on July 28, 2011 and August 2, 2011 for an evidentiary hearing by order of the Florida Supreme Court issued July 25, 2011 and this court having considered the testimony of witnesses and evidence presented by the parties, as well as arguments and case law, this court finds as follows:

On June 30, 2011, the Governor signed a death warrant in the above case for defendant, Manuel Valle. Defendant's execution was set for August 2, 2011. Defendant's counsel filed a successive motion (then an amended successive motion) for post conviction relief pursuant to Florida Rule of Criminal Procedure 3.851 in the trial court. He sought post conviction relief, challenging the June 8,

2011 protocol for lethal injection promulgated by the Florida Department of Corrections (DOC). The new protocol called for the replacement of the first drug in its three-drug protocol, sodium thiopental, with pentobarbital sodium (pentobarbital). Defendant argued that pentobarbital was not effective as an anesthetic to induce unconsciousness.

On or about July 15, 2011, after motions and arguments, the trial court summarily denied the motion without an evidentiary hearing and entered its written order. The defendant appealed this summary denial.

On July 25, 2011, the Supreme Court of Florida ordered this court to conduct an evidentiary hearing for the limited purpose of allowing the defense to present evidence **“regarding the efficacy of pentobarbital as an anesthetic in the amount prescribed by Florida’s protocol”**. The question here is whether pentobarbital is an **effective** substitute for the sodium thiopental previously used. The Florida Supreme Court concluded that based on Dr. David Waisel’s expert report and affidavit, as well as Defendant’s allegations in his amended 3.851 motion, Defendant raised a factual dispute as to whether the use of pentobarbital will subject him to a **“substantial risk of serious harm.”** *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality opinion). Defendant’s motion for stay was granted, in part, and Defendant’s execution was stayed until 5:00 PM, September 1, 2011. Jurisdiction was relinquished to the Circuit Court of the Eleventh Judicial Circuit,

Miami-Dade County, until August 5, 2011, for the purpose of holding an evidentiary hearing on this claim. The Florida Supreme Court also directed the DOC to produce correspondence and documents it had received from the manufacturer of pentobarbital regarding usage of the drug in executions.

THE WITNESSES TESTIMONY

DEFENSE WITNESSES'

The hearing commenced at 10 a.m. on Thursday July 28, 2011 with the Defendant and all counsel present. After presentation by defense of one (1) witness by phone (Schulz) and state's presentation of two (2) witnesses: one (1) by phone and one (1) live, the hearing was recessed until 9:00 a.m. Tuesday August 2, 2011 due to the unavailability of the defense's expert until that time.

Matt Schulz

The first defense witness presented was Matt David Schulz ("Schulz"). By agreement of the parties he was sworn by the clerk of court for Miami- Dade County, Florida and testified by phone from Montgomery, Alabama.

Schulz testified that he is a three (3) year employee with the Federal Public Defender's Office in Montgomery, Alabama. On June 16, 2011, he witnessed the execution of his client, Eddie Powell, in Alabama. After visiting with Mr. Powell and his family and noting that Powell was in no visible distress, he was escorted by

the guards to a viewing room. There, he was seated, approximately 7-8 feet from Powell, who was covered with sheets except for his face and upper body and strapped down to the gurney. Schulz was facing Powell's left side and could see some of Powell's right arm also because the arms were outside of the sheets. The chaplain and warden then entered the room. The warden read the death order and asked Powell if he had any last words. The warden allowed Powell to make a last statement. The warden then walked behind Powell and made an announcement that the execution was to be carried out. The I.V. lines ran into the wall. Schulz was unable to see any activity behind that wall and unable to see when syringes were pushed. The chaplain approached Powell, spoke a few words to him, and nodded. Powell looked to the left, nodded, took a deep breath, and then put his head back down. The chaplain talked to him for 30-60 seconds. Powell lay there approximately one (1) minute then suddenly jerked his head and his upper and lower body appeared as if pressing against the restraints. Schulz believed that Powell was attempting to sit up. Powell, he said, had a look of confusion when he looked at the chaplain. Schulz asserted that Powell clenched his jaw, flexed his muscles, and his arteries bulged. His eyes rolled back in his head, he took a deep breath and closed his eyes. This lasted about one (1) minute. The guard approached and called his name ("Eddie, Eddie, Eddie") several times. He did not

respond. The guard did an “eyelash check” to which there was no response. After a few minutes or so, he noticed that Powell’s eyes were opened partly.

This was the first execution Schulz ever attended and it was very stressful for him.

The entire process that he observed seemed to last 20-25 minutes. He was able to see a clock directly but was not watching it. He did notice it but not until after the guard called Powell’s name during the consciousness check.

He is not sure what the lethal injection protocol is but *believes* that 2500 mg. of pentobarbital is administered.¹

This testimony is speculative and without more specific testimony or expert testimony it is of little value to the court in consideration of the question at hand. Even if the entire situation lasted one minute, it certainly does not establish that the Defendant suffered to establish an Eighth Amendment claim. *See Baze*.

Evidence admitted via Stipulation

After Schulz’ testimony, defense counsel entered into evidence their sole Exhibit #A. By stipulation of the parties #A is a collection of letters sent to both

¹In *Powell v. Thomas* 2011WL1843616 (M.D. Ala. May 16, 2011) the Alabama protocol, though confidential, was produced for *in camera* inspection of the Federal Court. It does include the same three (3) drug regimen as the Florida protocol. However, the Alabama DOC administers 2500 mg. of pentobarbital as opposed to the 5000 mg in the Florida protocol. After the consciousness check is done, if more is needed then a back-up syringe with an additional 2500 mg. is administered. p. 5, fn. 2.

the Governor of Florida and the Secretary of the Department of Corrections for Florida from the Manufacturer of pentobarbital. In these letters, Lundbeck, Inc., the manufacturer of pentobarbital, protests the use of their product in executions claiming that they (Lundbeck) are in the business of improving their customers' lives. There was no mention of medical evidence or anything relevant to the court's inquiry. This exhibit is of no legal value and carries no weight.

Dr. David Waisel

On Tuesday August 2, 2011 at 9:00 a.m. the defense presented Dr. David B. Waisel, M.D. who testified after being duly sworn by the Clerk of the Court as follows:

He is a practicing anesthesiologist at Children's Hospital Boston and an Associate Professor of Anesthesia, Harvard Medical School. He has been practicing clinical anesthesiology, primarily pediatric anesthesiology, for approximately 18 years. He has written numerous articles and teaches courses on anesthesiology at Harvard Medical School and presents to other physicians in his field both nation and worldwide.

He further has provided consultation for the death penalty clinic at University of California Berkeley and testimony on the Pavatt (Oklahoma) execution and DeYoung and Blankenship (Georgia) executions. He has also

provided consultations in written form for death penalty litigation in Delaware, Connecticut and Pennsylvania.

He has been asked by the attorneys who represent the Defendant to provide an expert medical and scientific opinion about observations of the execution of Roy Blankenship by lethal injection on June 23, 2011.

Dr. Waisel was not in attendance at the execution. His information about the execution comes from the affidavit and interview of an eyewitness, Greg Bluestein, a reporter, whose report is the type of information experts in his field normally and regularly rely on in forming expert opinions. He also reviewed the affidavits of other purported eye witnesses who are also reporters; i.e., Eddie Ledbetter and Mitchell Peace. He also reviewed and relied on the 2007 and 2011 Florida lethal injection protocol as well as defense Exhibit #A and other affidavits described as approximately twelve (12) DOC officials without further elaborating.

Waisel opined that Blankenship “suffered extremely” based on Waisel’s understanding of what took place; that is, that Blankenship looked at one arm with “discomfort”, looked at the other arm “with pain”, grimaced, jerked his head up, mouthed words and all of this lasted for three (3) minutes. He is also of the impression that pentobarbital was used and that had the pentobarbital worked properly Blankenship would have moved for only fifteen (15) seconds after the

drug was administered. Dr. Waisel never opined as to *what time* the pentobarbital was administered.

Waisel testified that he does not know the proper amount of pentobarbital necessary to anesthetize the patient; only to sedate them. He stated that sedation and anesthetizing can be viewed along a continuum. Sedation would be at one end where a sedated patient may still be responsive and the anesthetized patient may be unconscious enough to have open-heart surgery. The average patient he stated to be 150 pounds and the proper dosage for sedation with pentobarbital would be from 100 to 500 mg. The amount used by the state for anesthetizing the inmate, he acknowledged, to be 5000 mg. but claims that he *cannot say* that the dosage is actually 10 times the sedation dosage because *there has not been enough testing*. He calls this use of pentobarbital an off-label use. He acknowledges that there are legitimate off-label uses for drugs. That is, the use as an anesthetic in execution is not the “intended use” of the manufacturer. Only when a drug has been tested systematically can one begin to reliably assess how an untested use of a drug will affect human subjects, according to Dr. Waisel. Because *we do not have sufficient data, there is no way to know, in any given case, how an overdose of pentobarbital will affect basically healthy inmates*.

Waisel admitted that Blankenships movements could indicate discomfort or pain. He conceded that sodium thiopental, which he says was an ideal drug for use in executions, is an ultra short-acting barbiturate while pentobarbital is a short to intermediate-acting barbiturate.

This witnesses' testimony cannot and does not establish the necessary "substantial risk of serious harm". His testimony is based on speculation and, is therefore, inherently unreliable. At the very least, he does not establish a reasonable **effective, readily implemented alternative** to pentobarbital. *See Baze at 52.* Further he does not establish that pentobarbital will not work. He seriously doesn't know. His testimony falls far short of meeting the required standard of "demonstrating a substantial likelihood of serious harm."

STATE WITNESSES

John Harper

On July 28, 2011, the State presented witness John Harper, who being sworn by the Clerk of Court, stated the following:

He is a 23 year employee of the Georgia Department of Corrections ("GDC"). He has attended all 28 lethal injections in Georgia as part of his duties.

He witnessed the June 23, 2011 execution of Roy Blankenship at the Georgia Diagnostic and Classification Prison in Jackson, Georgia. He was in the

mechanical room which is physically behind the execution chamber during the execution. That area is separated from the execution chamber by a one-way mirror and the gurney on which Blankenship lay restrained is 86 inches from where Harper was located in the mechanical room. His view was mostly unobstructed; however, people did walk in front of him. He could see Blankenship's left side profile. Blankenship had an intravenous line into each of his arms. He saw Blankenship look around and look at his left arm about five (5) seconds after the start of the first syringe. However, the pentobarbital was first administered to Blankenship's right arm. He heard Blankenship make a "grunt" sound. Harper knew when the drugs were administered because he was given a signal and he was keeping a time log. About ten (10) seconds passed between the time the syringe was pushed and when Blankenship appeared to be unconscious. There was no flailing or thrashing. After the pentobarbital was administered a consciousness check was performed and Blankenship did not respond.

Of all the witnesses on the issue of the Blankenship execution, Harper is the most credible on this topic. He actually could hear and could see the pushing of the syringes and was keeping a time log. His testimony is in keeping, ironically, with the acceptable parameters testified to by Dr. Waisel. Waisel stated that if the pentobarbital were to work properly that it would take effect within fifteen (15)

seconds. That it did, according to the only witness able to testify with any degree of certainty as to the timing of the administration of the drugs and rendering of unconsciousness.

Jacqueline M. Martin, M.D.

On Thursday July 28, 2011 the State called Jacqueline M. Martin, M.D., as a witness. Without objection she was sworn by both the clerk of Courts in Miami-Dade County, Florida, and a court reporter authorized to give an oath in New York, N.Y. from where the witness testified by telephone.

She stated that she was a witness to the June 23, 2011 execution of Roy Blankenship in Georgia. She is a physician licensed to practice in Georgia and also the Deputy Chief Medical Examiner for the Georgia Bureau of Investigation. She obtained her medical degree from Ponce School of Medicine in Puerto Rico in 1985. She has also acted as Deputy Medical Examiner in Rochester, N.Y. and from 1997-1999 she was the Medical Examiner in Palm Beach County, Florida. Though she is not a clinical physician she was trained in medical school to administer anesthesia. This was the third execution that she attended.

According to Dr. Martin she sat on the front row in the witness viewing area. She could see clearly from where she was and could see into the execution chamber. She was about 5 feet away from the inmate. Blankenship was strapped

down with I.V. lines in each arm. There was a nurse on the right of the gurney and officers to the left and right. The warden read the execution order and left. Two (2) to three (3) minutes after the warden left, Blankenship looked to his left arm and moved his mouth-he had no teeth-and looked at his right arm, put his head down on the pillow and stayed put. She saw no obvious signs of distress or facial features indicating pain.

She did not consult with the Department of Corrections or the Georgia Bureau of Investigation afterward. It is part of her duties as M.E. to view the execution.

Dr. Martin's testimony is consistent with that of Mr. Harper. She is a medical professional who could see Blankenship's actions and facial features. Her interpretation of his reactions to the drugs substantiate that Blankenship in no way experienced pain or suffering.

Dr. David Dershwitz, M.D.

On Tuesday, August 2, 2011 the State presented the testimony of Martin Dershwitz, M.D., who testified that he is a physician who has also had a Ph.D. in Pharmacology since 1982. He has had his license and certification in anesthesiology since 1987. He has taught Medical Pharmacology since 2001 at the

University of Massachusetts Medical School and also teaches Medical Biochemistry. He has written numerous articles, books and contributed chapters to books on pharmacology. He is presently an anesthesiologist at UMass Memorial Medical Center in Worcester, Massachusetts.

Dershwitz testified that pentobarbital, also known as Nembutal, is used primarily to induce a barbiturate coma or as a sedative or to treat intractable seizures. He explained that the dose usually administered was established in the 1970's. It is based on a person's body weight, age, and sometimes genetic factors though this last factor is not well-understood. The range of doses is quite large. However, the effect of 5000 mg. of Nembutal (pentobarbital), as provided for in the Florida lethal injection protocol, is "far in excess of the dose that would be needed or used for a human". Two things would occur with the administering of this amount of drugs: first, the cardiovascular system and, second, the respiratory system would experience a shut-down. That is, the blood pressure would plummet and the circulatory system would cease to function. He distinguished the amount of the drug as well as the rate of administration of drugs given for hospital use versus that used in the execution protocol. The dose used in the lethal injection protocol at the rapid rate at which it is administered, would bring about a total flat line on the EEG in brain activity. Therefore, the person would have no perception of pain

or sensation. However, he did point out that unconscious patients, while under sedation, can still have active EEG's while remaining unconscious and being in an anesthetized state. It is even possible for anesthetized patients to move and/ or react to stimuli as a reflex at the spinal cord level. This reaction does not necessarily indicate consciousness. He also stated that it is possible, though it does not occur frequently that people's eyes remain open while unconscious. It would then be necessary to close their eyes to prevent corneal damage or drying out.

According to Dr. Dershwitz, Nembutal is not used as an anesthetic because it lasts longer and causes a longer "hangover" after medical procedures; doctors prefer their patients awake at the end of surgery. The FDA has not approved it for use in lethal injection. This is considered an "off label use". There are a number of drugs which are commonly used by doctors for an "off label use" . Interestingly, both Dr. Waisel and Dr. Dershwitz referred to Fentanyl as such a drug.

Dr. Dershwitz admitted that he had testified in the Dickens and Alderman cases about the efficacy of sodium thiopental. However, that drug is no longer available and has not been, to his knowledge, for some two (2) years or more.

Ultimately he testified that no one could survive 5000 mg of pentobarbital intravenously. The doses and rates of administering the drug for surgery are one tenth of what is used in the protocol.

Dr. Dershwitz' testimony was credible and persuasive. Further, he refuted any suggestion that the dose of pentobarbital in the Florida lethal injection protocol would leave an inmate conscious and able to experience pain and suffering during the lethal injection process. The court credits the testimony of Dr. Dershwitz over that of Dr. Waisel.

LEGAL ANALYSIS

Defendant has alleged an Eighth Amendment claim. In order to do so, in the lethal injection context, a defendant must show an objectively intolerable risk of harm which must be sure or very likely to cause needless suffering. *Baze v. Rees*, 553 U.S. 35, 50 (2008). Not only has the Defendant failed to meet this standard, he has failed to present any credible evidence of any risk of needless suffering.

The facts and testimony in this case are substantially similar to that in *DeYoung v. Owens*, 2011 WL 2899794 (11th Cir. 2011).

A significant part of DeYoung's Eighth Amendment claim in his §1983 complaint is based on the State of Georgia's execution of Roy Blankenship on June 23, 2011. DeYoung largely points to events surrounding the Blankenship execution as the basis for his Eighth Amendment claim. DeYoung attempts to use evidence of the Blankenship execution to show two things: (1) that administration of 5,000 milligrams of pentobarbital to an inmate causes needless suffering in and of itself, and (2) that the pentobarbital dose does not adequately render an inmate unconscious, thereby leading to needless suffering.

After hearing testimony by DeYoung's expert and reviewing multiple affidavits, the district court found (1) that DeYoung failed to establish that pentobarbital caused Blankenship any pain during his execution given that DeYoung's expert failed to provide a medical explanation for why pentobarbital might have caused Blankenship pain, or will cause pain in executions; and (2) that, in any event, DeYoung "has absolutely no likelihood of success on the merits" of his claims.

As the district court aptly found, DeYoung's medical expert, David B. Waisel, M.D., formulated his opinion based on witnesses' accounts of the execution and some movement by Blankenship during the initial three minutes at the start of the execution process. The witnesses disagree about two things: (1) the type of movement; and (2) whether it occurred before or during the administration of the pentobarbital.

As to the movement, witnesses describe it in very different ways. To some, Blankenship was just looking up and watching what was occurring, looked at his left arm (which had an IV saline drip) and then 30 to 60 seconds later looked toward his right arm where the administration of the pentobarbital was starting. To others, Blankenship appeared to grimace, or have a startled face, or jerked his arm twice, or had his mouth open and tried to mouth something.

As to timing, some believe all the movement occurred before the pentobarbital was started in the IV and others appear to think that it was after the pentobarbital was started in the IV. In any event, the movement occurred only a few times and all briefly during a total time period of three minutes. The evidence undisputedly shows that Blankenship became still and was unconscious before the second drug was administered.

Even assuming Blankenship's movement was during the administration of the pentobarbital or right after, the evidence in this record does not establish a substantial risk of serious harm from the pentobarbital, or even that Blankenship necessarily suffered any harm, much less serious harm. First, as the district court pointed out, "Dr. Waisel entirely failed to provide a medical explanation for why pentobarbital might have caused Blankenship pain. To the contrary, Dr. Waisel testified that a patient will not feel pain at the moment when a drug is introduced intravenously unless it is a drug, such as potassium chloride, which causes a burning sensation."

Second, the district court noted that Dr. Waisel admitted that “any ‘suffering’ was short lived as it clearly ended within a few minutes—three minutes at the most—after the pentobarbital was injected.” The Eighth Amendment does not protect against all harm, only serious harm; and it does not prohibit all risks, only substantial risks. “Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual.” *Baze*, 553 U.S. at 50, 128 S.Ct. at 1531 (plurality opinion). In any event, Dr. Waisel was not present at the Blankenship execution; rather, he opines from the witnesses' varied descriptions of Blankenship's movements that those movements were a sign of “discomfort,” which Dr. Waisel termed “suffering.” Dr. Waisel acknowledged that no one reported any movement by Blankenship after the nurse's consciousness check. Further, Blankenship's autopsy revealed no evidence of trauma. The catheters were inside Blankenship's veins and the veins were not burst or broken. There was no infiltration of fluid in the soft tissue of the right arm near the catheter site.

Notably too, DeYoung presented no evidence to show that unconsciousness is not achieved after the complete administration of a 5000-mg dose of pentobarbital.

DeYoung, at 4-5. (Footnotes omitted.)

The Eleventh Circuit Court of Appeals also rejected the claim that pentobarbital has not been sufficiently tested for ability to cause an anesthetic coma in fully conscious persons. The Court noted:

However, DeYoung's expert candidly admits he does not know how the State's dosage of pentobarbital will affect inmates because he claims there is no way to know. This asserted lack of knowledge obviously cannot satisfy DeYoung's burden of affirmatively showing that a substantial risk of serious harm exists. Thus, DeYoung's evidence focuses largely on the Blankenship execution.

DeYoung, at N.4.

In this case, the State presented two very credible witnesses, John Harper and Dr. Martin, both of whom witnessed the Blankenship execution personally. They viewed the execution from opposite sides of the execution chamber. Both testified consistently that Blankenship, looked at his left arm, he looked at his right arm. Harper stated he made a grunting sound. Dr. Martin testified his mouth moved, which would be consistent with the grunting sound. Both said he laid his head down and never moved again. Dr. Martin did not view any signs of distress.

Dr. Waisel was not present at the execution. He relied upon the affidavit of a reporter, who was not called to testify. Dr. Waisel did not testify or present any evidence to demonstrate that the usage of pentobarbital would create an objectively intolerable risk of harm which must be sure or very likely to cause needless suffering. Dr. Waisel testified that the effects of pentobarbital are unknown. The Eleventh Circuit Court of Appeals found in *DeYoung, supra*, this does not meet the requirements of *Baze, supra*. This court agrees. The Defendant must prove that there is a substantial risk, not that the risk is unknown.

The testimony of the witnesses to Blankenship's execution differed with regard to the amount and nature of the movement by Blankenship. No one could testify conclusively about the relationship between the reported movement and the administration of the pentobarbital with the exception of the state's witness, John

Harper. He reported only minimal movement and within seconds of the pushing of the syringe. There is no indication that the inmate was in any discomfort much less pain or suffering; only that he glanced at his arm and gave a grunt. Within ten (10) seconds the inmate was unconscious, according to Harper, who was not only in a more advantageous place to see and note what was taking place. He also kept a time log.

To the extent that the witnesses differed in their testimony, this court resolves credibility issues in favor of Mr. Harper who is accustomed to watching executions and thus, has a more objective view. He testified quite credibly and persuasively. Further, there was no movement of the inmate reported by any witnesses after the prison official's consciousness check.

The only witness testifying about the execution of Powell did not know when the pentobarbital was administered. The relationship between the supposed short term movements reported and the administration of pentobarbital is totally speculative. Nor was Schulz aware of the amount of drugs used in that instance. Schulz stated that the inmate did not move after the consciousness check was done by the prison officials. This same consciousness check is included in the Florida protocol. If after the initial administration of the pentobarbital the inmate shows any signs or responsiveness, more anesthetic (pentobarbital) is administered. No

additional drugs were necessary for Powell, according to the testimony, suggesting that the inmate was unconscious and the pentobarbital was effective in rendering him unconscious.

CONCLUSION

The defendant has failed to show that the substitution of pentobarbital as an anesthetic violated the Eighth Amendment's prohibition of cruel and unusual punishment. Defendant has attempted to use evidence of two (2) earlier executions (Powell and Blankenship) to show that the administration of 5,000 mg of pentobarbital causes needless suffering in and of itself, and that the pentobarbital dose does not adequately render an inmate unconscious, thereby leading to needless suffering. The evidence presented did not establish substantial risk of serious harm from pentobarbital, or even that inmates who were executed earlier necessarily suffered any harm, much less serious harm, from intravenous administration of pentobarbital.

Like the Federal District Courts in *Powell*, *DeYoung*, and *Pavatt*, this court finds that usage of pentobarbital does not create an objectively unreasonable risk of suffering.

WHEREFORE, it is ORDERED AND ADJUDGED that Defendant's Amended Motion to Vacate is DENIED.

DONE AND ORDERED in Miami-Dade County this day of August,
2011.

JACQUELINE HOGAN SCOLA
Circuit Court Judge

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