IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DAVID LARRY NELSON,	}	
Plaintiff,	}	
v.	}	**Civil Action No. 2:03cv1008-MHT**
RICHARD F. ALLEN and GRANTT CULLIVER,	}	
Defendants.	}	

PLAINTIFF'S RESPONSE TO THE DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

NOW COMES Plaintiff David Larry Nelson, by and through undersigned counsel, who files this Response to the Defendants' Renewed Motion for Summary Judgment which was filed on May 15, 2008 and shows the following:

I. Introduction.

The Defendants have filed a Renewed Motion for Summary Judgment. The sole basis for the Defendants' Renewed Motion for Summary Judgment is the Supreme Court's decision in Baze v. Rees, 553 U. S. ___, 128 S.Ct. 1520 (2008). The Defendants' Renewed Motion for Summary Judgment must be denied because their reliance upon Baze is misplaced. As will be discussed below, the decision in Baze supports the Plaintiff's claims and is consistent with the Plaintiff's contention that his §1983 action

requires full development of the facts connected with that action.

The Defendants' Renewed Motion for Summary Judgment must also be denied because genuine issues of material fact exist as to the claims raised in the Plaintiff's Second Amended Complaint.

Most strikingly, the Defendants in their May 15, 2008 Renewed Motion for Summary judgment state:

> As this Court remembers, Dr. Bagley, the Court's independent medical expert, concluded that Nelson "has readily accessible peripheral veins" and that access to "central veins will not be necessary to obtain venous access on David Larry Nelson." Doc. 110, Ex. 1, p. 13. Based on Dr. Bagley's findings, Nelson's execution may be carried out through standard peripheral intravenous access, using personnel with basic intravenous skills.

(Doc. 159 at Page 5, footnotes omitted). The Defendants' assertion in their Renewed Motion for Summary Judgment is inconsistent with the record in a multitude of ways, including (1) Defendant Culliver's October 6, 2003 Affidavit, in which Defendant Culliver attests to information which demonstrates that medical personnel under the direction of the Defendants have been unable in the past to find the peripheral venous access sites identified by Dr. Bagley in his report and to cannulate the veins which Dr. Bagley describes as being "easily cannulated by most persons with basic intravenous skills"; (2)

Dr. Delano Benjamin's August 23, 2004 "Report on Venous Access for David Larry Nelson Conducted August 23, 2004" in which Dr. Benjamin, who examined the Plaintiff on behalf of the Defendants, reports that he is "unable to offer a definite opinion regarding whether peripheral access will be achievable" during the Plaintiff's execution and allows for the alternative that if "such attempts are unsuccessful, a central line can be utilized to obtain access"; Dr. Delano Benjamin's August 23, 2004 and August 26, 2004 notations in the Plaintiff's medical records in which he respectively states "Pt may need central line for IV access" and "Spoke with Mr. Billingsly from Attorney General's Office about veinous (sic) access for David Nelson, see above note. Pt. may need central line done for veinous (sic) access"; and (3) <u>the December 10, 2007 report from the Atmore Community Hospital which is part of the Plaintiff's medical records and which includes such remarks as, "IV access could not be obtained in this patient"; "IV contrast could not be done…"; and "Suboptimal study since no IV contrast could be obtained in this patient</u>…". Furthermore, the Defendants' assertion in their Renewed Motion for Summary Judgment is inconsistent with <u>the June 9, 2008 report from the Atmore Community Hospital regarding the recent Magnetic Resonance</u>

Imaging (MRI) of the Plaintiff's abdomen, that report explicitly stating, "Unable to get IV access".[1]

Additionally, the Plaintiff notes that (1) no discovery has been conducted in the Plaintiff's case and (2) the Defendants have never filed an answer to the Plaintiff's initial Complaint, Amended Complaint, or Second Amended Complaint. Precedent from the Supreme Court of the United States and the United States Court of Appeals for the Eleventh Circuit (hereinafter referred to as "the Eleventh Circuit") clearly dictates that a motion for summary judgment should be considered by a court only after discovery has been conducted and an adequate record has been made.

II. The Defendant's Reliance on Baze v. Rees is Misplaced

A. Baze v. Rees Supports the Plaintiff's Claims

Baze v. Rees determined whether Kentucky's protocols for lethal injection violated the Eighth Amendment. Indeed Baze is the first time that the Supreme Court had considered the constitutionality of a method of execution since it upheld the use of the electric chair in In re Kemmler, 136 U.S. 436 (1890). See Denno, Deborah W., "Death Bed," Tri Quarterly Journal, Vol. 124, pp. 141-68, 2006. While upholding Kentucky's lethal injection procedure, Baze unequivocally holds that the Eighth Amendment is violated when a condemned establishes that his

[1] This report is attached hereto as Exhibit 1.

execution will involve a "substantial risk of serious harm" or an "objectively intolerable risk of harm…" based on how it is to be carried out. 128 S.Ct. at 1531 (plurality opinion). The harm to be avoided is the conscious and needless suffering of pain. 128 S.Ct. at 1537-38 (plurality opinion).

Complainants in Baze contended that Kentucky's three chemical sequential protocol relying on a barbiturate (sodium thiopental), followed by a paralyzing agent (pancuronium bromide), and concluding with a drug that would induce cardiac arrest (potassium chloride) posed such a risk primarily due to the danger that the barbiturate dose would be too low to effectively sedate the condemned. 128 S.Ct. at 1530. Without adequate sedation, according to the complainants, the induced heart attack would result in unconscionable pain which the paralyzing agent would mask. After weighing evidence produced at "extensive hearings" and considering detailed lower court fact findings, 128 S.Ct. at 1526, 1529, the Supreme Court concluded that complainants' proof did not make out the risk of harm necessary to show an Eight Amendment violation.

As in Baze, the Plaintiff in the present case contends that his execution would constitute cruel and unusual punishment because it would subject him to an unconstitutional degree of pain. Unlike Baze, the Plaintiff does not maintain that the risk of pain stems from the use of the Alabama's lethal

injection protocol per se and the adverse effect of the three chemical mix to cause death. Instead, the Plaintiff asserts that the administration of the protocol to the Plaintiff will result in a substantial and objectively intolerable risk of serious harm due to the Plaintiff's medical condition and severely compromised peripheral veins. The Plaintiff's lawsuit hinges on facts which he contends show that, given his condition, intravenous access via the techniques that the Defendants intend to use pose unacceptable risks of pain and injury and that readily available medical procedures other than those contemplated by the Defendants are far less intrusive and involve substantially less risk. As a consequence, unlike Baze, the Plaintiff's "suit [does] not challenge an execution procedure required by law, so granting relief would not imply the unlawfulness of the lethal injection sentence." Hill v. McDonough, 547 U.S. 573, 580 (2006), citing and relying on Nelson v. Campbell, 541 U.S. 637, 647 (2004).

B. Baze v. Rees Is Consistent With The Plaintiff's Contention That His §1983 Action Requires Full Development Of The Facts

A majority in Baze rejected any reading of the Eighth Amendment that would require courts to parse out and micro manage execution protocols. 128 S.Ct. at 1537-38. Nonetheless, the Supreme Court was only able to make the judgment it did after considering a fully developed record. The Supreme Court

concluded that the complainants did not make out the requisite risk of pain after a full and complete review of Kentucky's lethal injection protocol and practice and consideration of the operation of that protocol in light of expert and lay testimony. Thus, the full scope of the procedures Kentucky used to carry out sentences of death was a part of the record before the trial court, the state supreme court, and the Supreme Court of the United States. 128 S.Ct. at 1527-29. The record of proceedings from a seven day full trial was used to establish what chemicals Kentucky would use, the dosages, the sequence of administration, the means of administration, the personnel who would carry out the process, the personnel who would oversee how the process was carried out, the steps that would be taken to make sure that the condemned was not alert or otherwise conscious, the staffing background requirements and training that would be used to ensure that practice conformed to regulations. Back up and emergency contingencies were considered. Lethal injection as designed and practiced was subjected to the scrutiny of an evidentiary trial. Then, and only then, was the Supreme Court in a position to make the judgment that the complainants had not demonstrated the requisite risk of pain.

In contrast to the breadth and substance of the material before the courts in Baze, the Defendants in the present case have sought from the outset to limit access to evidence to the

Plaintiff that would make it possible to rationally assess the risks the Plaintiff will face when the Defendants attempt to execute him. It is only in their renewed motion for summary judgment that the Defendants are willing to disclose what chemicals Alabama uses in its lethal injection protocol. Notably, the disclosure is not based on references to the record in this case, but to citation references to other cases that are themselves under protective order. Defendants' Renewed Motion for Summary Judgment at 2. Unlike in Baze, the Defendants in the present case have opposed disclosure of the protocol Alabama uses to carry out death sentences.[2] Indeed, the Defendants have even impaired the Plaintiff's access to his own medical records.[3] Here, unlike in Baze, the Defendants assert that the Plaintiff should be denied relief without going through the thorough

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[2] Notwithstanding its refusal to make the execution protocols a part of the record in this case, in its motion the Defendants make the assertion that for purposes of assessing Baze, "Alabama's execution protocol . . . is substantially similar to Kentucky's." Defendants' Renewed Motion for Summary Judgment at 3. Surely that is not the sort of conclusion or inference that should be drawn ex parte in any litigation, much less in litigation centered on the constitutional right to be free from cruel and unusual punishment. Whether Alabama's protocol is similar to the one Kentucky used is a question of fact that can only be determined after Alabama's protocol is subjected to the give and take of full adversarial process.

[3] In fact, the Defendants refused to provide the Plaintiff with his own medical records until ordered to do so by this Court. These records clearly contain information that is relevant to the issues raised in the Plaintiff's action. For example, for the past two years, the Plaintiff systematically has been evaluated for suspicion of liver cancer, that evaluation including imaging studies being performed at the Atmore Community Hospital. Medical personnel at that hospital on multiple occasions encountered difficulty in their attempts to gain venous access to the Plaintiff and were unable, due to the condition of the Plaintiff's veins, to administer contrasting dyes to the Plaintiff intravenously for a CAT scan and a MRI. See Exhibits 1 and 3 attached hereto.

litigation that preceded the Supreme Court's decision in Baze. The Defendants' assertion is not consistent with Baze.

III. Based Upon The Current State Of The Record, The Defendants' Renewed Motion For Summary Judgment Should Be Denied Because There Exist Genuine Issues Of Material Facts To Be Tried.

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). An issue is material if it "might affect the outcome of the suit under the governing law." Id. The Court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. Anderson v. Liberty Lobby, Inc., 477 U.S. at 257 (1986).

The Defendants' Motion for Summary Judgment should be denied because there exist genuine issues of material facts to be tried[4], including but not limited to the following:

Issue No. 1: Whether Plaintiff David Nelson's veins are accessible though the "traditional" procedure, called by the parties "peripheral vein access." (See Paragraphs 4, 5, 17, and 22 of the Affidavit of Mark Heath, M.D., attached hereto as Exhibit 2, hereinafter, "Exhibit 2: ¶¶ 4, 5, 17, 22; See also the December 10, 2007 report from the Atmore Community Hospital, attached hereto as Exhibit 3 and the June 9, 2008 report from the Atmore Community Hospital, attached hereto as Exhibit 1)[5].

Issue No. 2: If Plaintiff's veins are not accessible through the peripheral vein access procedure, whether a "percutaneous central line procedure" is appropriate. (See Exhibit 2: ¶¶15, 16, 28, 29, 31, 42, 43; Dr. Delano R. Benjamin's Report on Venous Access for David Larry Nelson Conducted August 23, 2004, Docket Entry No. 34; Medical record of the Plaintiff, attached hereto as Exhibit 4[6]).

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[4] The first seven genuine issues of material fact were set forth by this Court in its July 28, 2006 Order.

[5] Exhibit 3 when provided to the Plaintiff by the Defendants was not certified. The Plaintiff is serving on the Defendants, on this date, a request for admission regarding Exhibit 3. Exhibit 1 will be the subject of a request for admission after it is incorporated into the Plaintiff's medical records.

[6] This medical record, when provided to the Plaintiff by the Defendants, was not certified. The Plaintiff served on the Defendants on December 1, 2006 a request for admission regarding this medical record. The Defendants have never filed a response to said request.

Issue No. 3: If a percutaneous central line procedure is appropriate, through which of Plaintiff's veins such access may be obtained, including but not limited to the subclavian vein, the internal jugular vein, the external jugular vein, and the femoral vein, and what advantages and/or complications may accompany the process of access through each type of vein. (See Exhibit 2: ¶30, 31, 32, 33, 34, 52).

Issue No. 4: What protocol(s) will be required for obtaining access to Plaintiff's veins through the percutaneous central line procedure(s). (See Exhibit 2: ¶35, 36).

Issue No. 5: What facilities and equipment will be required for obtaining access to Plaintiff's veins through the percutaneous central line procedure(s). (See Exhibit 2: ¶37, 38, 53).

Issue No. 6: What types of professionals and personnel will be required for obtaining access to Plaintiff's veins through the percutaneous central line procedure(s). (See Exhibit 2: ¶39, 40, 55, 61).

Issue No. 7: Other means, if any, that may exist by which venous access may be gained on Plaintiff, and what protocols, facilities, equipment, professionals, and personnel would generally be required for each. (See Exhibit 2: ¶ 41, 42, 43).

Issue No. 8: Whether the Plaintiff has significantly compromised peripheral access. (See Exhibit 2:¶6).

Issue No. 9: Whether the peripheral vein in the Plaintiff's right arm is "easily cannulated by most persons with basic intravenous skills (i.e. emergency medical technicians/paramedics who are so certified, military combat medics, nurses, CRNAs (certified registered nurse anesthetists), PAs (physician's assistants), and physicians". (See Exhibit 2: ¶¶7, 8, 9, 11, 12, 17; Warden Culliver's Affidavit dated October 6, 2003, Docket Entry No. 4; Exhibit 3, the December 10, 2007 report from the Atmore Community Hospital; and Exhibit 1, the June 9, 2008 report from the Atmore Community Hospital).

Issue No. 10: Whether the medical personnel which the Defendants plan to utilize to gain venous access to the Plaintiff are competent to do so. (See Exhibit 2: ¶¶8, 9, 10, 11, 12, 13, 14, 17, 23, 24, 26, 27, 29, 40, 43, 56, 61).

Issue No. 11: Whether fluids that are administered to the Plaintiff intravenously through the peripheral vein will flow properly through the Plaintiff's veins, particularly through any scarred areas and with rapid pushes of fluid. (See Exhibit 2: ¶¶19, 20, 21, 23).

Issue No. 12: Whether the Defendants' protocol, including the one paragraph already disclosed to the Plaintiff, describes in any meaningful manner a process for gaining venous access to the Plaintiff. (Exhibit 2: ¶¶44, 45, 46, 47, 48, 49, 62).

Issue No. 13: Whether the Defendants' protocol and their conduct in gaining venous access to the Plaintiff will comport with evolving standards of decency or will be deliberately indifferent towards contemporary standards of medical care. (See Exhibit 2: ¶¶27, 40, 43, 44, 45, 46, 47, 48, 49, 50, 51, 57, 59, 60, 61, 62).

IV. The Defendants' Renewed Motion For Summary Judgment Is Premature Given The Fact That Discovery Has Not Been Conducted In The Plaintiff's Case.

Since the Defendants have never filed an answer, to date discovery has not been conducted in the Plaintiff's case.

Precedent from the Supreme Court and the Eleventh Circuit clearly dictates that a motion for summary judgment should be considered by a court only after discovery has been conducted and an adequate record has been made.

Specifically, in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Court stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Id. at 322 (emphasis added). The Court further found that:

> The parties had conducted discovery, so no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule

> 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

Id. at 326 (emphasis added).

In WSB-TV v. Lee, 842 F.2d 1266 (11th Cir.1988), the Eleventh Circuit reviewed the Supreme Court's decisions in Celotex Corp., supra., Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electric Industrial Co. v. Zenith Radio Corporation, 475 U.S. 574 (1986) and concluded that the "common denominator" of those three cases "is the Court's caveat that summary judgment may only be decided upon an adequate record". WSB-TV, 842 F.2d at 1269. The Eleventh Circuit in WSB-TV found that the lower court's consideration of the motion for summary judgment was erroneous, since "the plaintiffs had been afforded no opportunity for discovery". Id.

Similarly, in Snook v. Trust Company of Georgia Bank of Savannah, N.A., 859 F.2d 865 (11th Cir.1988), the Eleventh Circuit explicitly stated, "This court has often noted that summary judgment should not be granted until the party opposing the motion has had an adequate opportunity for discovery." Id. at 870.

Since no discovery has been conducted in the Plaintiff's case, the record in the Plaintiff's case is incomplete and the Defendants' Renewed Motion for Summary Judgment is premature. As

such, the Defendants' Renewed Motion for Summary Judgment should be denied at this time by this Court.

V. The Defendants' Renewed Motion For Summary Judgment Is Premature Given The Fact That The Defendants Have Not Filed An Answer To The Plaintiff's Second Amended Complaint.

The Defendants have never filed an answer to the Plaintiff's initial Complaint, the Plaintiff's Amended Complaint, or the Plaintiff's Second Amended Complaint. As such, the record is incomplete as to the Defendants' position regarding the claims raised in the Plaintiff's Second Amended Complaint. Consequently, the Defendants' Renewed Motion for Summary Judgment is premature and should be denied at this time by this Court.

VI. Conclusion

For the reasons stated herein, it is respectfully submitted that this Court should deny the Defendants' Renewed Motion for Summary Judgment. In the alternative, it is respectfully submitted that this Court should postpone ruling on the Defendants' Renewed Motion for Summary Judgment until the Defendants have filed an answer, the parties have had an adequate opportunity to conduct discovery, and the Plaintiff has had an opportunity to supplement this Response based upon the evidence adduced during discovery.

This 21st day of July, 2008.

Respectfully submitted,

/s/ Michael Kennedy McIntyre
MICHAEL KENNEDY McINTYRE
Georgia Bar No. 494075
Attorney for Plaintiff

965 Virginia Avenue, NE
Atlanta, Georgia 30306
Telephone (404) 879-1515

/s/ H. Victoria Smith
H. VICTORIA SMITH
Georgia Bar No. 658605
Attorney for Plaintiff

965 Virginia Avenue, NE
Atlanta, Georgia 30306
Telephone (404) 879-1515

/s/ Joe W. Morgan, III
JOE W. MORGAN, III
Alabama Bar No. MOR093
Attorney for Plaintiff

Suite B
600 Robert Jemison Road
Birmingham, Alabama 35209
Telephone (205) 945-8550
Fax No. (205) 945-9005

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2008, I electronically filed the foregoing PLAINTIFF'S RESPONSE TO THE DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF with the Clerk of Court using the CM/ECF system which will send notification of such filing to Assistant Attorney General J. Clay Crenshaw.

/s/ Michael Kennedy McIntyre
MICHAEL KENNEDY McINTYRE