medical community as these standards continue to evolve? Only time will tell.

Ohio Execution Protocol: A Risk of Serious Pain and Needless Suffering, but Not to a Constitutionally Unacceptable Level of Certainty

Drew Calhoun, MD
Fellow in Forensic Psychiatry

Department of Psychiatry
University Hospitals, Cleveland Medical Center
Cleveland, OH

Adrienne Saxton, MD
Assistant Professor of Psychiatry

Department of Psychiatry
Case Western Reserve University School of Medicine
Cleveland, OH

Sixth Circuit Holds That Appellants Did Not Establish "Likelihood of Success on the Merits" of Their Claim That Ohio's Midazolam-Based, Three-Drug Execution Protocol Presents a Constitutionally Unacceptable Risk of Pain and Suffering

DOI:10.29158/JAAPL.3797L9-18

In *In re Ohio Execution Protocol Litigation (Campbell v. Kasich)* 881 F.3d 447 (6th Cir. 2018), the U.S. Court of Appeals for the Sixth Circuit considered whether Ohio's execution protocol presented a constitutionally unacceptable risk of pain and suffering, both physical and psychological, as alleged by two Ohio death-row inmates. Holding that the inmates did not show likelihood of success on the merits of their claims, the Sixth Circuit affirmed the decision of the U.S. District Court for the Southern District of Ohio, denying the requested injunctions.

Facts of the Case

The litigation that produced this appeal began in 2004, when death-row inmates challenged Ohio's then-existing three-drug protocol under 42 U.S.C. § 1983 (1996). In 2011, after many more method-of-execution claims, all execution protocol cases in the Southern District of Ohio were consolidated under Case No. 2:11-cv-1016, aptly named *In re Ohio Execution Protocol Litigation*.

In 2016, Ohio adopted an execution protocol consisting of an initial 500-milligram dose of midazolam, followed by a paralytic agent and potassium chloride. In *In re Ohio Execution Protocol (Fears v. Morgan)*, 860 F.3d 881 (6th Cir. 2017), death-row inmates (including Mr. Raymond Tibbetts) subsequently filed suit, claiming that midazolam would not prevent them from the pain caused by the latter drugs, and that Ohio's protocol thus violated the Eighth Amendment. The district court granted preliminary injunctions; however, the Sixth Circuit disagreed that plaintiffs had met their burden and reversed the district court's decision. The Sixth Circuit held that the district court had erred by addressing "only whether Ohio's procedure presents a 'substantial risk of serious harm'" without also showing that the execution method "is sure or very likely to cause serious pain" (*Fears*, p 886). While agreeing that the second and third drugs "would cause severe pain to a person who is fully conscious," the Sixth Circuit found that plaintiffs had not shown that an inmate receiving "a 500-milligram dose of midazolam is 'sure or very likely' to be conscious enough to experience serious pain" (*Fears*, p 886).

In 2017, after the *Fears* remand, Mr. Campbell and Mr. Tibbetts sought to enjoin their pending executions, similarly alleging that Ohio's protocol presented a constitutionally unacceptable risk of serious pain and suffering, but now claiming a "substantial risk of serious harm" in the form of "severe, needless physical pain and suffering" and "severe mental or psychological pain, suffering, and torturous agony" (*In re Ohio Execution Protocol ("Campbell")*, No. 2:11-CV-1016, 2017 WL 5020138 at *8).

The district court thus considered whether Mr. Tibbetts and Mr. Campbell had "added sufficient evidence" to show, with a "sure or very likely" level of certainty, that Ohio's execution protocol caused serious pain. After considering the proffered evidence, the district court determined that the plaintiffs had not met their burden and denied their motions for preliminary injunctions and execution stays.

Mr. Campbell and Mr. Tibbets appealed to the Sixth Circuit, claiming that the district court had "refused to consider the significant evidence of mental and psychological suffering" (*Campbell*, p 450) and that the court was mistaken in finding they had not sufficiently proved their claims.

Ruling and Reasoning

The Sixth Circuit affirmed the district court's decision to deny the requested injunctions.

In its opinion, the Sixth Circuit referred to the four-factor test for obtaining a preliminary injunction, explaining that the "likelihood of success on the merits" was the determinative factor in the present case, citing *Glossip v. Gross*, 135 S. Ct. 2726, 2736 (2015). The court said the merits determination itself was a two-part test, in which plaintiffs had to show that the protocol "presents a risk that is sure or very likely to cause serious pain and needless suffering" and, if satisfied, then "prove that an alternative method of execution is available, feasible, and can be readily implemented" and "significantly reduces a substantial risk of severe pain" (*Campbell*, p 449) (citations omitted).

The Sixth Circuit then addressed the claim that the district court had failed to consider evidence of psychological suffering. First, the Sixth Circuit pointed out the district court's consideration of "psychological pain unaccompanied by physical pain" (*Campbell*, p 450). The district court had presumed that all death-row inmates faced psychological pain when sentenced and anticipating execution, noting that because executions were not *per se* unconstitutional, it was unclear "how a plaintiff could segregate anxiety from anticipated execution in general from anxiety about execution by a particular method," and adding, "in any event, no evidence was offered to support a claim that either Campbell or Tibbets suffers particular psychological pain associated with the Execution Protocol" (*Campbell*, p 450) (citing *Campbell*, 2017 WL 5020138 at *9).

The appellants argued "this suffering is not mere generalized anxiety in the face of impending death; it is the specific and acute suffering arising from the choking . . . attendant to the administration of Ohio's Execution Protocol [due] to an inmate['s] [being] insufficiently rendered unconscious, unaware, and insensate to pain," which the Sixth Circuit viewed as a request "to consider more pain, physical and psychological" (*Campbell*, p 450). The Sixth Circuit explained that additional psychological pain was "immaterial, given that we had already accepted that the physical pain alone was sufficiently serious" and reiterating the relevant issue as being "the likelihood" that the inmate would be conscious enough to experience the pain (*Campbell*, p 450).

Discussion

The litigation of the execution protocol in Ohio (and other states) began after a Supreme Court decision in 2004, which allowed method-of-execution claims to be brought under 42 U.S.C. § 1983, *Nelson v. Campbell* 541 U.S. 637 (2004). The predecessors of *In re Ohio Execution Protocol Litigation* and the many parallel § 1983 claims (and precedent-setting court decisions) in other states provide context for the Sixth Circuit's reasoning in *Campbell v. Kasich*, which relied heavily on U.S. Supreme Court precedent set by *Baze v. Rees*, 553 U.S. 35 (2008), and, later, *Glossip v. Gross*.

In *Baze*, the U.S. Supreme Court addressed whether the three-drug execution protocol (a barbiturate followed by a paralytic agent and potassium chloride) used by Kentucky (and many other states including Ohio at the time), violated the Eighth Amendment's ban on cruel and unusual punishments. In a 7-2 decision, the Court upheld Kentucky's execution protocol. The Court conceded, "Some risk of pain is inherent in even the most humane execution method," but "the Constitution does not demand the avoidance of all risk of pain" (*Baze*, p 36). The Court rejected the proposed "unnecessary risk" standard, favoring the "substantial risk of serious harm" test, which it said could be met "if the conditions presenting the risk are sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers" (*Baze*, p 36) (quotations omitted). The Court said a proposed alternative procedure "must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain," adding that it was not enough for a prisoner to challenge an execution method "merely by showing a slightly or marginally safer alternative" (*Baze*, p 37).

In the years thereafter, death penalty opponents successfully pressured pharmaceutical companies to stop selling barbiturates to states for use in executions, nullifying the feasibility of execution methods using barbiturates and prompting some states to substitute midazolam for the barbiturate in three-drug protocols (*Glossip*, p 2733).

In *Glossip*, the U.S. Supreme Court addressed whether Oklahoma's use of a 500-milligram dose of midazolam as the first drug in its three-drug protocol violated the Eighth Amendment, in part arguing that midazolam would not adequately protect an inmate from the pain caused by the protocol's latter drugs,

citing medical literature of midazolam's ineffectiveness (at clinical doses). In a 5-4 decision, the Court affirmed the denial of preliminary injunctions, holding that the petitioners had not met their burden to "show Oklahoma's use of a massive dose of midazolam" entailed a "substantial risk of severe pain" (*Glossip*, p 2731) or that the "risk of harm was substantial when compared with a known and available" alternative (*Glossip*, p 2727). The Court remarked, "The fact that a low dose of midazolam is not the best drug for maintaining unconsciousness during surgery says little about whether a 500-milligram dose of midazolam is constitutionally adequate for purposes of conducting an execution" (*Glossip*, p 2742).

In summary, the Sixth Circuit's ruling in *In re Ohio Execution Protocol Litigation (Campbell v. Kasich*) emphasized that the seriousness of pain involved in execution protocols using a paralytic drug and potassium chloride was already sufficiently established, so that the only remaining issue is the actual likelihood that the protocol as a whole will cause such serious pain. While psychological pain was considered immaterial in the present case, the door was left open for future claims of psychological suffering if that "sure or very likely" level of certainty (of serious pain and needless suffering) could be proved. Forensic psychiatrists may be asked to assist in the determination of the severity of psychological pain and the risk an inmate would experience it due to a particular execution method.

Duty to Protect Students from Foreseeable Violence During Curricular Activities

Ian C. Lamoureux, MD
Fellow in Forensic Psychiatry

Ashley VanDercar, MD, JD
Resident in Psychiatry

Phillip J. Resnick, MD
Professor of Psychiatry
Program Director, Forensic Psychiatry Fellowship

Division of Forensic Psychiatry
University Hospitals Cleveland Medical Center
Case Western Reserve University School of Medicine
Cleveland, OH

The California Supreme Court Holds That Colleges Have a Special Relationship with Their Students and a Resultant Duty to Protect Students, During Curricular Activities, from Foreseeable Violence

DOI:10.29158/JAAPL.3797L10-18

In *Regents of the University of California v. Superior Court of Los Angeles County (Rosen)*, S230568, 2018 WL 1415703, (Cal. March 22, 2018), the California Supreme Court considered whether universities have a duty of care to protect their students from foreseeable violence.

Facts of the Case

On October 8, 2009, Damon Thompson stabbed classmate Karen Rosen during chemistry lab at University of California Los Angeles (UCLA). Karen Rosen was severely injured.

Shortly after transferring to UCLA in the fall of 2008, Damon Thompson started having problems in class and the dormitory. He thought other students were harassing him, talking about him behind his back, calling him names, and listening in on his phone calls. He complained to his professors and the Dean of Students. He said that if the school didn't handle the situation, he would act "in a manner that [would] incur undesirable consequences" (*Rosen*, p 3). The school moved Mr. Thompson to a different dormitory.

Mr. Thompson continued to believe that other students were harassing him. In January 2009, he complained to several professors and a teaching assistant. The teaching assistant told her supervising professor that she had not seen anyone harassing Mr. Thompson, but had noticed him acting oddly and thought he was showing signs of schizophrenia. The teaching assistant, supervising professor, and then the Assistant Dean of Students, met separately with Mr. Thompson. They referred him to UCLA's Counseling and Psychological Services (CAPS). The Assistant Dean contacted the school's "Response Team."

In February 2009, Mr. Thompson told his dormitory director that he was hearing "'voices coming through the walls calling him an idiot' . . . a clicking noise . . . that sounded like a gun, and he believed the other residents were planning to shoot him" (*Rosen*, p 3). He said he had "telephoned his father and was advised to 'hurt the other residents'" (*Rosen*, p 3). The campus police were called. They searched Mr. Thompson's dormitory but did not find a weapon.