UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NORMAN TIMBERLAKE	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CAUSE NO. 1:06-cv-1859-RLY-WTL**
	)	
ED BUSS,	)	
	)	
Defendants.	)	

RESPONSE IN OPPOSITION TO PLAINTIFF'S
APPLICATION FOR PRELIMINARY INJUNCTION

Defendant Ed Buss, by Steve Carter, Attorney General of Indiana, by his deputy, Thomas D. Quigley, Deputy Attorney General, submits his Response in Opposition to Plaintiff's Application for Preliminary Injunction. For the reasons set forth below, the defendant respectfully requests that this Court deny the plaintiff's Application for Preliminary Injunction.

The primary reason to deny that application is that it was not properly filed, as the defendant points out in his motion to strike that application, which is being filed separately from the instant response. But even if the application were properly before this Court, it should be denied.

INTRODUCTION

Plaintiff has moved for a preliminary injunction to stay his execution currently scheduled for January 19, 2007. He claims the current lethal injection protocol in place within Indiana is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Plaintiff asserts there is a "substantial and unnecessary risk that [he] will be fully conscious and in agonizing pain for the duration of the execution process." (Application for Preliminary Injunction, p.

1.) The Indiana lethal injection protocol allegedly will result in an inadequate amount of anesthesia wherein the plaintiff will be conscious during the administration of the additional drugs.

STANDARD FOR PRELIMINARY INJUNCTION

"In order to obtain a preliminary injunction, the moving party must show that: (1) they are reasonably likely to succeed on the merits; (2) no adequate remedy at law exists; (3) they will suffer irreparable harm which, absent injunctive relief, outweighs the irreparable harm the respondent will suffer if the injunction is granted; and (4) the injunction will not harm the public interest." *Joelner v. Village of Washington Park, Illinois*, 378 F.3d 613, 619 (7th Cir. 2004). If the moving party can meet this threshold burden, then the inquiry becomes a "sliding scale" analysis where the factors are weighed against one another. *Id. See also AM General Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002).

When a stay of execution is sought, the Court must be "sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 126 S. Ct. 2096, 2104 (2006). *See Nelson v. Campbell*, 541 U.S. 637, 649-650 (2004). Moreover, a court must apply "a strong equitable presumption" against the entry of a stay of execution where the claim could have been brought to allow a review of the merits without the entry of a stay. *Id.*

ARGUMENT

1. The plaintiff has delayed unnecessarily.

In its ruling in the companion habeas case, *Timberlake v. Buss*, No. 1:06-cv-01841 (S.D. Ind. Jan. 9, 2007), this Court set out the procedural history of the case at bar and the habeas action. As noted there, the plaintiff was convicted and sentenced to death in 1995. The date of his execution was set on December 15, 2006. But the plaintiff waited to file the case at bar until Fri-

day, December 29, 2006, the day before a three-day weekend and 14 business days before the date of his scheduled execution (January 15, 2007, is a holiday).

The plaintiff has known since 1995 that his execution would be by lethal injection[1]. He bases his arguments on issues raised at least as early as February 2004 by Amnesty International, *see* http://web.amnesty.org/library/print/ENGAMR510242004. His application for a preliminary stay is all but identical to an application filed June 12, 2006, in *Nooner v. Norris*, No. 5:06-cv-110-SWW-JFF (E.D. Ark.), and even appears to include a copy of a doctor's declaration, which addresses the distinctly different aspects of Arkansas' death penalty protocol and appears to have been filed in that case[2].

In sum, the plaintiff could have brought this challenge more than ten years ago. The crux of his arguments were developed three years ago and could easily have been raised in the case at bar that long ago. Finally, the precise claims he makes here have existed, in virtually the same language he uses now, since June 12, 2006. But the plaintiff delayed until only 14 business days remained before his execution.

It is significant, in this regard, that the plaintiff professes, in his application at 3, that he does not attack lethal injection as a method of execution that is unconstitutional per se. Rather, his argument is that the particular mixture of drugs employed in Indiana (or, perhaps, the different mixture that is used in Arkansas) is unconstitutional and that there are no safeguards in place to avoid error. These arguments bring into focus the nature and result of the plaintiff's election to delay bringing this suit.

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[1] The State of Indiana changed its method of execution from electrocution to lethal injection by legislation adopted in 1995, see P.L. 294-1995, although the plaintiff incorrectly states in his application that this occurred in 1983.

[2] The defendant notes the materials at the top of the plaintiff's exhibit, which bear the Arkansas court's cause number and the date June 12, 2006.

If Indiana's protocol is to be changed, it will take time. If the mixture or timing of the drugs is to be changed, it will take time to investigate alternatives. But the plaintiff has not allowed the Court or the defendant reasonable time to investigate these possibilities, possibilities that flow naturally and necessarily from the issues as he frames them. His unnecessary delay puts the Court to a choice between two alternatives: either to deny the motion for a preliminary injunction, or to delay the execution in order to generate time to consider alternative methods of execution that could, with reasonable notice, have been proposed, evaluated, and adopted in a considered manner without frustrating the State's interest in seeing its laws carried out.

As the Supreme Court recognized in *Hill*, there is "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." 126 S. Ct. at 2104 (quoting I)(internal quotation marks deleted). The *Hill* Court reminded the lower courts that they "can and should protect States from dilatory or speculative suits." *Id*. The case at bar is patently both dilatory and speculative. The application should be denied. *See Alley v. Little*, No. 06-5650, 2006 WL 1313365 (6th Cir.)(reversing stay of execution by lethal injection because it was filed 36 days before execution date), cert. denied, 126 S. Ct. 2975 (2006).

2. The plaintiff is not reasonably likely to succeed on the merits.

In any event, the plaintiff has not shown that he is reasonably likely to succeed on the merits. His application is flatly deficient.

The plaintiff's primary evidentiary weight-bearer is what purports to be a declaration of a doctor that apparently was filed in an Arkansas federal court seven months ago. It is doubtful

that the plaintiff possesses the original of that document, and he has not authenticated it in any other way. It is, therefore, inadequate to prove anything.

Equally telling is the fact that that document, even if properly before the Court, does not deal with Indiana's death penalty procedures. The amounts of drugs it contemplates are half of the amounts used in Indiana, except that Arkansas uses only 40% of the sodium thiopental used in Indiana, and it is that drug upon which the doctor focuses. The doctor's declaration does not consider the qualifications of the people who will be responsible for implementing the death penalty against the plaintiff or their many years' experience[3]. As a result, even if it were properly authenticated, it would be probative of nothing relevant.

The purported declaration provides no showing that the plaintiff might succeed.

The plaintiff has relied upon an assertion that the American Veterinary Medical Association bans the use of percuronium bromide in the euthanasia of animals. That statement is false. The AVMA's report, which can be found at http://www.avma.org/issues/animal_welfare/euthanasia.pdf, begins with a one-page warning against making the very use of the report that the plaintiff undertakes in the case at bar. Remarkably, the veterinarian association expressly includes sodium thiopental and potassium chloride among its recommended methods (along with microwaving, "penetrating captive bolt," and other methods).

The AVMA's literature does not support the plaintiff.

The plaintiff also refers in his application to several exhibits. He has not filed those exhibits, however, and they do not support him either.

That leaves only the plaintiff's hypothesis that something might go wrong with the procedure. There is no evidence of the existence here of any of the possible sources of error he cata-

[3] These data are in the plaintiff's Exhibit 3 at 4-5.

logs, so the most that can be said about the plaintiff's argument is that it points out a number of things that could go wrong. A possibility of error, however, is no reason to stay an execution, as is shown by the quote from *Hill, supra*. The supreme courts of Tennessee and Connecticut, in fact, have recently rejected the very speculative arguments advanced here. *See, e.g., Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 308 (Tenn. 2005)(approving execution by injection of 5 g. sodium thiopental, 100 mg. percuronium bromide, and 200 mg. potassium chloride)

The plaintiff has not shown any likelihood of success on the merits.

CONCLUSION

The plaintiff has not overcome the "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of he merits without requiring entry of a stay," *see Nelson*, 541 U.S. at 650. Given his claim that his challenge is not to execution by lethal injection as a concept but, rather, to the method by which the sentence will be carried out in his case, he has waited so long that the defendants and the Court cannot make an informed decision as to how to shape a remedy that will address his concerns while respecting the strong interest of the State of Indiana in implementing its criminal law.

A preliminary injunction, like a stay, is an equitable remedy. As a matter of equitable balancing, the plaintiff has delayed too long to be entitled to that remedy in the case at bar.

This Court should deny the plaintiff's application for a preliminary injunction and, for that matter, his prayer for a stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2007, a copy of the foregoing response to discovery was filed electronically. Notice of this filing will be sent to the following persons by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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I hereby certify that on January 10, 2007, a copy of the foregoing response to discovery was mailed, by email pursuant to agreement, to the following:

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