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 APPLICATION FOR PRELIMINARY INJUNCTION FILED BY DAVID WOODS

David Woods has moved for a preliminary injunction to stay his execution under the existing protocol. If the Court were to grant the stay, it would not bar the execution of Mr. Woods. It would, however, require State officials to consider whether it is possible to modify the protocol in time to comply with the execution order of the Indiana Supreme Court.

The standards for entry of a preliminary injunction are well settled:

> 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 "slid-

ing 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).

But cases challenging the method of lethal injection involve unique considerations. The Supreme Court recognized these considerations, and recited the extraordinarily high threshold that a plaintiff must meet in such cases, in this passage:

> We state again, as we did in *Nelson* [*v. Campbell*, 541 U.S. 637 (2004)], that a stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts. [Citations.] Thus, like other stay applicants, inmates seeking time to challenge the manner in which the state plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits. [Citation.] See also *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997)(*per curiam*)(preliminary injunction not granted unless the movant, by a clear showing, carries the burden of persuasion).
>
> A court considering a stay must also apply "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." [Citations.]
>
> . . . . The federal courts can and should protect States from dilatory or speculative suits . . . .

Hill v. McDonough, 126 S. Ct. 2096, 2104 (2006).

1. The plaintiff has delayed unnecessarily.

As the defendant has shown in his motion for summary judgment, lethal injection became the method of execution in Indiana in 1995, and Mr. Woods has known since then that his execution would be by lethal injection. The defendant has shown, in his motion for summary judgment, that the execution procedures Mr. Woods is attacking have been used for at least eight years. Further, Mr. Woods's arguments are not new. They were raised at least as early as February 2004 by Amnesty International, *see* http://web.amnesty.org/library/print/ENGAMR 510242004. 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.).

Mr. Woods delayed filing his claims in this Court until his death was imminent. That delay requires the Court to apply 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 the merits without requiring entry of a stay," *Nelson*, 541 U.S. at 650, 124 S. Ct. at 2126.

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

Mr. Woods has not shown that he is reasonably likely to succeed on the merits. He must first overcome the preliminary question of exhaustion.

In that respect, it appears that his delay in filing his claims here is leading this Court to commit the error the Seventh Circuit identified, and soundly criticized, in *Perez v. Wisconsin Department of Corrections*, 182 F.3d 532 (7th Cir. 1999). In

the case at bar, the Court has indicated that it will consider Mr. Woods's motion for preliminary injunction, and will receive evidence relevant to that motion, before it decides the exhaustion question. The reason appears to be that there remains insufficient time before the scheduled execution to permit the Court to rule on exhaustion and then, if Mr. Woods prevails, to hear evidence on the preliminary injunction.

But the timing of this case is attributable to Mr. Woods. As shown above, he could have, and should have, filed the case at a time that would leave more than adequate time to address the issues in the proper order. He should not now benefit from his delay by causing this Court to ignore the controlling statute.

In *Perez*, as the Court contemplates in the case at bar, the court took the issue of exhaustion under advisement while it received evidence on the merits of the case. The Seventh Circuit condemned that decision:

> Section 1997e(a) does not say that exhaustion of administrative remedies is required before a case may be decided. It says, rather, that "*[n]o action shall be brought* with respect to prison conditions . . . until such administrative remedies as are available are exhausted." Perez violated § 1997e(a) by filing his action. Congress could have written a statute making exhaustion a precondition to judgment, but it did not . The actual statute makes exhaustion a precondition to *suit*. . . . "[N]o action shall be *brought* cannot mean "no action will be decided on the merits."

Id. at 534-35. The defendant has not added the italics to the Seventh Circuit's opinion. The court of appeals put them there.

The upshot of this is that this Court cannot properly address the merits of the case until it resolves the exhaustion issue. This Court "must address the subject

immediately." *Perez*, 182 F.3d at 536. The defendant's evidence on that issue is compelling. It is highly unlikely, therefore, that the plaintiff will be able to proceed on the merits of his claim and, accordingly, that he can succeed on them.

So, too, for the other procedural impediment, the time bar caused by the plaintiff's failure to bring this action within the two-year period set by statute. If the plaintiff were to prevail upon the exhaustion issue, the statute of limitations would require the Court to enter judgment in favor of the defendant. For that reason, the plaintiff's likelihood of success is remote.

The plaintiff fares no better as to the merits. The procedure to be used on May 4, 2007, is sound and reduces to a constitutionally acceptable level any possibility that the plaintiff will face the unnecessary and wanton infliction of pain. Indiana's procedures are at least as sound as the procedures found proper by the Supreme Court of Tennessee in *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005), and, much more recently, by the district court in *Walker v. Johnson*, 448 F. Supp. 2d 719 (E.D. Va. 2006). If this Court does proceed to hear evidence, the defendant's testimony will convince the Court of that fact.

Thus, the plaintiff has no real likelihood of success on the merits.

3. The public interest

In addition to the likelihood that the plaintiff will not succeed on the merits, the Court must consider the public interest. The Supreme Court recognized in *Hill*, that the State's interest in enforcing its criminal judgments without undue interfer-

ence from the federal courts is strong. That interest is heightened when lengthy state and federal proceedings for reviewing the conviction have run their course. *Calderon v. Thompson*, 523 U.S. 538, 555-56, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998). Mr. Woods's motion, in paragraphs 6 through 11, demonstrates that he has engaged in lengthy state and federal proceedings, which have run their course, and therefore that the already-strong interest is heightened in his case.

Mr. Woods's arguments and evidence do not overcome that heightened interest.

4. Summary

In *Mazurek*, upon which the Supreme Court relied in *Hill*, the Court noted the extremely heavy burden borne by a plaintiff seeking a preliminary injunction. The Court quoted with approval this passage from a leading treatise on federal practice and procedure: "It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." 520 U.S. at 968, 117 S. Ct. at 1867.

In the case at bar, Mr. Woods's evidence and argument do not clearly show that he is entitled to the extraordinary and drastic remedy he seeks. His motion must be denied.

CONCLUSION

Mr. Woods 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 the merits without requiring entry of a stay," *see Nelson*, 541 U.S. at 650, that is heightened in the case at bar by the lengthy process of seeking federal and state review that he has followed. He has no real likelihood of success on the merits.

This Court should deny the plaintiff's application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2007, a copy of the foregoing response 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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