

**IN THE CIRCUIT COURTY
FOR FRANKLIN COUNTY
COMMONWEALTH OF KENTUCKY**

RALPH BAZE,)
)
and,)
)
THOMAS C. BOWLING,)
)
Plaintiffs,)
)
v.)
)
JONATHAN D. REES,)
Commissioner,)
KentuckyDepartment of Corrections,)
Frankfort, Kentucky)
)
GLENN HAEBERLIN,)
Warden, Kentucky State)
Penitentiary, Eddyville Kentucky,)
)
UNKNOWN EXECUTIONERS,)
)
and,)
)
HON. ERNIE FLETCHER,)
Governor of Kentucky)
)
Defendants.)
_____)

CIV. ACTION # 04-CI-1094

MOTION FOR A TEMPORARY RESTRAINING ORDER
BARRING DEFENDANTS
FROM SCHEDULING PLAINTIFFS' EXECUTION
DURING THE PENDENCY OF THIS LITIGATION

NOTICE

Please, take notice that this Motion has been docketed for consideration in the above referenced Court on Wednesday, September 8, 2004 at 9:00 a.m.

MOTION

Pursuant to the Kentucky Rules of Civil Procedure, CR 65, Plaintiffs, Ralph Baze and Thomas C. Bowling, respectfully request a temporary restraining order barring Defendants from scheduling their execution during the pendency of this litigation challenging the means of effectuating Plaintiffs' sentence of death by lethal injection (Plaintiffs' do not challenge lethal injection on its face, but rather the specific chemicals and procedures Defendants plan to use in carrying out Plaintiffs' death sentences).¹

CR 65.04 (temporary injunction and temporary restraining order) authorizes this Court to grant a temporary restraining order if "the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual." This action falls directly within the meaning of CR 65.04.

Plaintiff Thomas C. Bowling's petition for a writ of certiorari to the Sixth Circuit Court of Appeals is scheduled to be conferenced by the United States Supreme Court on September 27, 2004. If the United States Supreme Court denies the petition for certiorari, Mr. Bowling could receive an execution warrant as early as the first week of October. Mr. Baze's last appeal, a petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is due at the end of November. Mr. Baze could receive an execution warrant within a few months of

Mr. Bowling. Defendants are quite aware of the current time constraints. But, rather than litigate the merits of the claim, Defendants are attempting to delay the litigation for they know that the standard for granting injunctive relief is not synonymous with the merits of the claim, i.e., a person can have a meritorious claim but not satisfy the stricter requirements for injunctive relief that exist once a warrant has been issued. *See Nelson v. Campbell*, 124 S.Ct. 2117. Therefore, issuing a warrant turns litigation over the merits of Plaintiffs' claim into a tussle over whether the requirements for a temporary restraining order have been satisfied, potentially delaying or preventing a court from reaching the merits of a cognizable claim while a Plaintiff is alive.

Plaintiffs' execution likely will be scheduled during this litigation unless this Court orders otherwise. During prior arguments in this case, Defendants argued that a restraining order is premature because Plaintiffs have not exhausted their appeals. This is not accurate---as Defendants admit in their motion to dismiss. They assert that Mr. Bowling has exhausted his appeals and that a pending petition for a writ of certiorari or the opportunity to file a certiorari petition does not prevent the scheduling of an execution or even stay an execution already scheduled. *See Motion to Dismiss* at 11. As Defendants admit, there is nothing stopping them from scheduling Plaintiffs' execution today, tomorrow, or at any other time during the pendency of this litigation. In fact, undersigned counsel have been informed by General Counsel for Defendant Fletcher that Defendants do not feel bound to wait for the conclusion of this litigation to schedule Plaintiffs' execution. Consequently, in order to preserve the ability to reach the merits of this claim without a pending execution lurking in the background, and to ensure that any final judgment is not rendered ineffectual by the irreparable injury of Plaintiffs' execution,

¹ Plaintiffs incorporate by reference the Complaint for Injunctive and Declaratory Relief, and the memoranda of law

this Court must grant Plaintiffs a temporary restraining order barring the scheduling of their execution date.²

This Court has an obligation to give careful scrutiny to colorable claims of violations of federal and state law. *See Barefoot v. Estelle*, 463 U.S. 880 (1983); *Zant v. Stephens*, 462 U.S. 862, 885 (1983). The Kentucky Supreme Court has created a three factor test for determining whether a colorable claim has been presented when injunctive relief is sought. These factors are: 1) whether the plaintiff will suffer irreparable injury if the injunction is not granted; 2) whether “the equities [are] in plaintiff’s favor, considering the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo;” and, 3) whether a substantial question is at issue. *Commonwealth, et al. v. Picklesimer*, Ky., 879 S.W.2d 482, 484 (1994); *accord, Sturgeon Mining Company, Inc. v. Whymore Coal Company, Inc.*, Ky., 892 S.W.2d 591, 592 (1995). Each of these factors establishes a colorable claim of a violation of constitutional rights, and, therefore, favors granting Plaintiffs injunctive relief pending the final outcome of the instant litigation.

in support thereof with its accompanying exhibits.

² Litigation in other states demonstrate that scheduling an execution date is a strategic government decision to shift the focus away from the merits of the claim; a strategy that seems to be occurring in the instant litigation as Defendants, fully aware of when Mr. Bowling likely will receive an execution warrant and their ability to schedule an execution date immediately, are aggressively attempting to prevent this Court from reaching the substantial issues presented in this case. On at least two occasions, executions have been scheduled during litigation concerning the particular means of effectuating a sentence of death In South Carolina, this occurred despite the fact that the litigation challenging the execution procedures was filed prior to a scheduling of an execution. Despite notice of the South Carolina litigation, David Clayton Hill’s execution date was set only days after the litigation was filed. This forced the merits of the claim to proceed in a brutally expedited fashion. Mr. Hill was executed despite ongoing litigation surrounding the execution procedures utilized in South Carolina. There is no reason to believe that a similar situation would not occur in Kentucky if this Court does not grant an injunction barring Defendants from scheduling an execution during the pendency of this litigation. In Ohio, litigation challenging lethal injection procedures was filed on June 10, 2004. During the pendency of the litigation, in August of 2004, Ohio scheduled the execution of one of the Plaintiffs, Adremy Dennis for October 2004.

1. Irreparable injury ---first factor

The first factor clearly favors granting a temporary restraining order. If the restraining order is not granted, Plaintiffs will suffer irreparable injury, because they will be executed before the merits of their cogent claim is addressed. *See Wainwright v. Booker*, 473 U.S. 935 n. 1 (1985) (Powell, J., concurring) (recognizing that there is little doubt that a prisoner facing execution will suffer irreparable injury if the stay is not granted); *Harris v. Johnson*, No. H-04-CV-1514 (S.D. Tex. June 29, 2004 (exhibit 1)); *Oken v. Sizer*, 2004 WL 1334521 (D. Md. June 14, 2004) (exhibit 2); *Hill v. Ozmint*, No. 2:04-0489-18AJ (D. S.C. March 4, 2004) (exhibit 3).

2. Whether the equities are in Plaintiffs' favor---the second factor

The second factor for granting a temporary restraining order, whether the equities are in the Plaintiffs' favor, requires this Court to consider three subfactors: the public interest; whether the harm will merely preserve the status quo; and the harm to Defendants. Each of these subfactors manifestly favors Plaintiffs.

a. The public interest.

“Executions are unquestionably matters of great public importance.” *California First Amendment Coalition v. Calderon*, 150 F.3d 976, 981 (9th Cir. 1998). The public interest, will be served, rather than disserved, by providing “reasonable assurance that [Plaintiff’s execution] will be carried out humanely.” *Hill v. Ozmint, et al.*, No. 2:04-0489-18AJ (D. S.C. March 4, 2004) (exhibit 3). Under such circumstances, “[it] is . . . beyond [] comprehension that a temporary restraining order in this case, that [might] delay, but not halt the execution, could disserve the public interest.” *Harris v. Johnson*, No. H-04-CV-1514 (S.D. Tex. June 29, 2004 (exhibit 2). Furthermore, it is in the public’s interest for this Court to determine whether the public has a right to observe the effects of the chemicals on the condemned inmate’s body, and,

if so, whether pavulon can be administered in light of its intended purpose to prevent the witnesses from observing the convulsions and seizures caused by potassium chloride.

b. Preserving the status quo.

Granting Plaintiffs a temporary restraining order barring the Commonwealth from scheduling their execution during the pendency of this litigation merely preserves the status quo. At the moment, Plaintiffs do not have a scheduled execution date. In fact, Defendants are currently unable to schedule an execution date for any of the Plaintiffs because appeals are still pending. But, within the next few weeks, Plaintiffs will have exhausted their appeals, allowing Defendants to schedule Plaintiffs' execution despite the instant litigation. Granting a temporary restraining order would serve to maintain the present status for only as long as necessary to litigate the merits of Plaintiffs' substantial claims. Accordingly, it would not require any changes to be made or prevent Defendants from doing anything they currently are permitted to do.

c. Harm to Defendants.

The temporary restraining order will do no harm to Defendants because they currently are unable to schedule an execution date for Plaintiffs, and if they prevail on the merits of the litigation, they will be able to execute Plaintiffs as soon as they wish. "There is no fear here of the state's judgment being avoided or denied; in fact, plaintiff does not seek such relief. All [they] seeks is a death in 'accord with the dignity of man, which is the basic concept underlying the Eighth Amendment.'" *Hill v. Ozmint*, No. 2:04-0489-18AJ (D. S.C. March 4, 2004) (*quoting*, *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (exhibit 3); *accord*, *Harris v. Johnson*, No. H-04-CV-1514 (S.D. Tex. June 29, 2004 (exhibit 1); *Oken v. Sizer*, 2004 WL 1334521 (June 14, 2004) (exhibit 2).

3. Whether a substantial question is at issue --- the third factor.

The issues this case present are substantial questions of law - - 1) whether the current chemicals utilized during lethal injections, and/or Defendants' procedures for carrying out lethal injections violate K.R.S. section 431.220 or any one of the prongs of the cruel and unusual punishment test under section 17 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution, and, 2) whether Defendants refusal to disclose a full copy of the execution protocols so that Plaintiffs can make a knowing and intelligent choice between electrocution and lethal injection, and determine whether an Eighth Amendment violation will occur during their execution, violates due process and fundamental notions of fairness.

Plaintiffs have presented substantial evidence that Defendants' procedures for carrying out lethal injection (not lethal injection on its face) violates the cruel and unusual punishment clause, or, at the least, poses a risk of unnecessary pain and suffering that is more than the state and federal constitutions tolerate. In addition, Plaintiffs have presented evidence that pavulon, a chemical that is unnecessary in the execution process and only serves to mask the effects of potassium chloride, causes extreme pain and suffering in a conscious person. As the toxicology results from the execution of Edward Harper, in Kentucky, and numerous toxicology results from North Carolina and South Carolina demonstrate, a substantial probability exists that Plaintiffs will be conscious during their execution; thereby suffering intense pain caused by both pavulon and potassium chloride. That is assuming that the usage of a "cut down" procedure, an unnecessary and painful procedure, to access veins, does not kill Plaintiffs first. Under these circumstances, it is clear that Plaintiffs have presented a substantial issue raising concerns about the constitutionality of Defendants' means of effectuating a sentence of death by lethal injection.

Conclusion.

In order to give careful scrutiny to the colorable claims Plaintiffs present, this Court must grant a temporary restraining order to ensure that an execution does not happen in the meantime. Even four months may be insufficient time to conduct discovery, depose experts, and litigate these issues, and therefore would make any final judgment ineffectual. *See Harris v. Johnson*, No. 04-70028 (5th Cir. June 30, 2004) (recognizing that a challenge to the chemicals used in lethal injections and procedures used to effectuate a sentence of death by lethal injection is meritorious, but that four months was not a sufficient amount of time to adequately address the merits of the claim) (exhibit 4). It is only by granting a temporary restraining order that the effective presentation and resolution of Plaintiffs' colorable claims can be ensured. *See In re Hearn*, 2004 WL 1497552 (5th Cir. July 6, 2004).

REQUEST FOR RELIEF

Plaintiffs respectfully request that this Court grant a temporary restraining order barring Defendants from scheduling their execution during the pendency of this litigation.

In the alternative, Plaintiffs request that this Court grant oral argument on this motion, and, to the extent this Court finds that further factual development of the claim would be helpful, Plaintiffs request that this Court hold an evidentiary hearing on this motion where Plaintiffs can present testimony in support of the underlying claim and the need for a temporary restraining order.

As a further alternative, Plaintiffs request that this Court grant a temporary restraining order barring Defendants from scheduling their execution date until all discovery issues have been resolved and Plaintiffs have had adequate time to review all materials obtained through the discovery process.

RESPECTFULLY SUBMITTED,

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September 3, 2004.

³ Admitted *pro hac vice*.

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing *Motion for a Temporary Restraining Order Barring Defendants from Scheduling Plaintiffs' Execution During the Pendency of this Litigation*, and its accompanying exhibits to be served VIA PERSONAL DELIVERY on the following individuals:

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September 3, 2004.

