

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIV. I

RALPH BAZE)

and,)

THOMAS C. BOWLING,)

Plaintiffs,)

v.)

JONATHAN D. REES,)

Commissioner,)

Kentucky Department of Corrections,)

Frankfort, Kentucky)

GLENN HAEBERLIN,)

Warden, Kentucky State)

Penitentiary, Eddyville Kentucky,)

and,)

HON. ERNIE FLETCHER,)

Governor of Kentucky)

Defendants.)

CIV. ACTION # 04-CI-1094

EMERGENCY MOTION

EXECUTION IMMINENT

**EXECUTION SCHEDULED
FOR NOVEMBER 30, 2004
TUESDAY**

REPLY TO RESPONSE TO
MOTION FOR A TEMPORARY INJUNCTION
BARRING DEFENDANTS
FROM EXECUTING THOMAS C. BOWLING ON NOVEMBER 30, 2004
UNDER THE CURRENT EXECUTION PROCEDURES
AND DURING THE PENDENCY OF THE ADJUDICATION
OF THE MERITS OF CHALLENGE TO
DEFENDANTS' LETHAL INJECTION PROCEDURES.

Thomas C. Bowling files this reply to briefly address points raised in Defendants' Response in Opposition to Bowling's Motion for a Temporary Injunction.

I. BOWLING HAS PRESENTED AMPLE EVIDENCE SUPPORTING HIS CLAIMS.

Defendants have presented no expert testimony or other affidavits in support of their position. In contrast, Bowling has presented numerous exhibits, deposition testimony, graphs, post-mortem examinations, toxicology results, and three expert affidavits, all in support of his claim that particular aspects of Defendants' execution procedures pose an intolerable risk of unnecessary pain and suffering.

II. THIOPIENTAL LEVELS.

Defendants have presented fuzzy mathematical equations dealing with the probability of consciousness when two grams of thiopental are administered. Their numbers were created by themselves, based on their own analysis of a Virginia case. Defendants present no expert testimony supporting their mathematical equations or conclusions. Bowling, on the other hand, has presented affidavits contradicting Defendants' numbers.

The quantity of thiopental administered, however, is not the crucial issue. Defendants' numbers assume that the full dose of thiopental reaches the inmate's veins. Bowling has presented evidence that 2 grams of thiopental are not reaching veins not only in numerous cases in North Carolina and South Carolina, but also here during Kentucky's only lethal injection. The concentration of thiopental in Harper's body (and numerous death row inmates in other states) shows that only a small amount of thiopental is reaching the inmate. According to Dr. Dershwitz, the amount of thiopental in Harper's body shows that he, like many other death row

inmates, was conscious during their executions. Bowling probably also will be conscious. Defendants have presented no expert testimony showing otherwise.

III. DEFENDANTS MAY USE A CUT DOWN.

Defendants incorrectly claim that Warden Haeberlin stated in his deposition that a cut down procedure will not be used during Bowling's execution. *Response* at 4. Haeberlin only said that they are not in a position to perform a cut down. That does mean that a cut down will not be performed. Defendants have anticipated the necessity of a cut down in the past - - it is listed in the three page Harper execution document that was recently disclosed. And, Defendants have no alternative procedure for obtaining venous access. In fact, Defendants affirmatively stated in their answer that they may used a cut down to access Bowling's veins. Thus, whether a cut down will be used remains in dispute.

IV. IRREPARABLE HARM.

Defendants cite *Nelson* for the proposition that "irreparable harm does not include the fact of Bowling's imminent death." *Response* at 3. *Nelson*, however, never says that. Instead, the irreparable harm caused by death by execution is considered to be self evident. *See, e.g., In re Holladay*, 331 F.3d 1169 (11th Cir. 2003).

V. DEFENDANTS' DELAY.

Bowling filed his claim two months before his petition for certiorari was denied not at the eleventh hour as Defendants allege. The claim would have been filed earlier if Defendants had not impeded Bowling's ability to obtain information by refusing to disclose any information when an open records act request concerning the lethal injection chemicals and procedures was made, only to disclose a limited amount of information when another request was filed a few months later. And, when a limited amount of information about Kentucky's lethal injections was

disclosed, Defendants misrepresented that no changes in the protocol had been made. This Court ordered disclosure of the protocols, which revealed that changes were made in 2002 and after this litigation began. Thus, Bowling did not have enough information concerning lethal injections in Kentucky to file suit earlier.

VI. MISSTATEMENTS OF LAW.

The fact that other states use lethal injection and have found lethal injection constitutional is irrelevant because Bowling has not raised a facial challenge to lethal injection. In addition, Defendants have misrepresented cases. They rely on federal stay of execution case law that is irrelevant here because: 1) this is a state court action, so state law on granting injunctive relief (not federal law) applies; and, 2) Bowling's claim is not a successor habeas petition so the higher standard for successor habeas stays does not apply. Instead, this Court should apply the standard discussed in detail in Bowling's motion for a temporary injunction. One of the cases Defendants rely on involved a stay of execution that was vacated solely because the lower court failed to articulate a basis for granting the stay of execution. Finally, Defendants cite *Moore* in support of their delay argument. What they fail to note is that the portion they cite is the dissenting opinion where the majority granted a stay of execution.

CONCLUSION.

Bowling respectfully requests that this Court grant a temporary injunction barring Defendants from carrying out his execution under their current execution procedures.

RESPECTFULLY SUBMITTED,

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November 18, 2004.

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing

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to be served VIA PERSONAL DELIVERY on the following individuals:

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November 18, 2004.

