

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY  
FRANKFORT DIVISION

Eastern District of Kentucky  
**FILED**  
APR 19 2006  
AT FRANKFORT  
LESLIE G WHITMER  
CLERK U S DISTRICT COURT

\_\_\_\_\_  
BRIAN KEITH MOORE, )

v. )

JOHN D. REES, )  
Commissioner, )  
Kentucky Department of Corrections, )  
Frankfort, Kentucky )

CIVIL ACTION # 3:06-cv-22  
KCC

THOMAS SIMPSON, )  
Warden, Kentucky State )  
Penitentiary, Eddyville Kentucky, )

CAPITAL CASE

SCOTT HAAS )  
Medical Director for the )  
Kentucky Department of Corrections )

ERNIE FLETCHER, )  
Governor of the Commonwealth )  
of Kentucky )

and, )

UNKNOWN EXECUTIONERS, )  
Defendants. )  
\_\_\_\_\_

**MOTION FOR A TEMPORARY RESTRAINING ORDER**  
**AND PRELIMINARY INJUNCTION**  
**BARRING DEFENDANTS**  
**FROM SCHEDULING AND CARRYING OUT PLAINTIFFS' EXECUTION**  
**DURING THE PENDENCY OF THIS LITIGATION**  
**AND CONSOLIDATED MEMORANDUM IN SUPPORT**

1. Pursuant to Rule 65 of the Federal Rules of Civil Procedure, and the All Writs Act, 28 U.S.C. § 1651, Plaintiff Moore respectfully requests a temporary restraining order and preliminary injunction barring Defendants from scheduling and/or carrying out his execution during the pendency of this litigation challenging the means of effectuating Moore's sentence of death by lethal injection.<sup>1</sup>

2. Moore is neither seeking to prevent his execution nor to prevent Defendants from executing him by lethal injection.

3. Moore requests oral argument on this motion.

4. Plaintiff Moore has not yet completed his federal challenge to his conviction and sentence. Plaintiff Moore's petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is not due until late May. Defendants have signaled their intent to execute Moore before he can finish litigating his federal habeas corpus proceedings, let alone this challenge to Kentucky's lethal injection chemicals and procedures. Unless the Supreme Court of the United States or this Court intervenes, Defendants could execute Moore in a few months or less. Defendants are aware of the current time constraints, and are acting deliberately.

5. Moore has severely damaged veins. In his complaint,<sup>2</sup> Moore argues 1) that the means for inserting an I.V., particularly in light of his damaged veins, creates an unnecessary risk of pain and suffering; 2) that the use of the second chemical, pancuronium bromide, violates evolving standards of decency; 3) that the failure to

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<sup>1</sup> For purposes of this litigation, Moore concedes that lethal injection is constitutional. He only challenges particular aspects of Defendants' procedures for carrying out lethal injections.

<sup>2</sup> Plaintiff incorporates by reference the Complaint for Injunctive and Declaratory Relief, and the memoranda of law in support thereof with its accompanying exhibits.

administer an analgesic creates an unnecessary risk of pain and suffering; 4) that each of Kentucky's lethal injection chemicals creates an unnecessary risk of pain and suffering because the chemicals could be replaced by chemicals that pose less risk; 5) that the manner of injecting the chemicals and the lack of training and credentials of the execution team creates an unnecessary risk of pain and suffering; 6) that the failure to adequately monitor for consciousness after the first and second chemicals have been administered creates an unnecessary risk of pain and suffering; 7) that the failure to maintain the proper equipment to render life-preserving medical treatment if a stay of execution is granted after the first and second chemical have been administered deprives Plaintiff of due process; 8) that Defendants' failure to take corrective measures despite being aware of the risks associated with their chemicals and procedures constitutes deliberate indifference, in violation of the Eighth Amendment to the United States Constitution; and, 9) that Moore's physical condition, including his bad veins heightens the risk of pain and suffering that will result from one through eight above. Each of these weighty issues deserves full consideration by this Court. Full consideration will be difficult if not impossible if Defendants attempt to carry out Moore's execution during this litigation.

6. Defendants are aware that the standard for granting injunctive relief is not synonymous with the standard for determining 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*, 541 U.S. 637 (2004). Therefore, Defendants will seek an execution warrant to try to avoid the merits of Moore's claim, and drag this Court into a fight over whether Moore can satisfy the

requirements for a temporary restraining order or preliminary injunction. They will try to kill Moore to prevent this Court from reaching the merits of this litigation.

7. As they did in similar state court litigation, Defendants will attempt to schedule Moore's execution during this litigation to prevent this Court from deciding the merits of this 42 U.S.C. § 1983 lawsuit. Thomas Clyde Bowling filed a challenge to lethal injection in state court in August of 2004, while his federal habeas petition for a writ of certiorari was pending in the Supreme Court of the United States. In October 2004, despite the fact that lethal injection litigation had progressed for more than two months, Defendants requested an execution date for Bowling. His execution was scheduled for November 30, 2004. Once the execution was scheduled, the Defendants in Bowling's case argued that they could not continue the discovery process in the lethal injection litigation because they were too busy preparing to execute Bowling. Thus, the litigation over the chemicals and procedures used in Kentucky lethal injections turned into a battle over whether Bowling would be alive long enough for the court to decide the weighty issues before it. Defendants will do the same thing in Moore's case.

8. 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. Defendants could schedule Moore's execution today, tomorrow, or at any other time during the pendency of this litigation.

9. 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 Moore's execution, this Court must grant

Moore a temporary restraining order and preliminary injunction barring the scheduling and/or carrying out of Moore's execution during the pendency of this lawsuit.<sup>3</sup>

### SUPPORTING MEMORANDUM

This Court should enjoin Defendants from scheduling and/or carrying out Moore's execution during the pendency of this litigation, because the failure to do so would allow Defendants to attempt to moot out this litigation by executing Moore, and because the failure to do so would allow Defendants to make a strategic decision to attempt to execute Moore solely for the purpose of forcing this Court to decide the merits of this case in an expedited fashion. Authority to issue an injunction is founded in Rule 65 of the Federal Rules of Civil Procedure and the All Writs Act, 28 U.S.C. 1651, which allows this Court to issue all writs in aid of its jurisdiction. Barring an execution while this Court considers the merits of Moore's challenge to the chemicals and procedures used in Kentucky lethal injections surely is in aid of this Court's jurisdiction. Moore is ready, willing, and able to proceed expeditiously to the merits of this case.

"A death sentence cannot be carried out by the State while substantial legal issues remain outstanding." *Barefoot v. Estelle*, 463 U.S. 880, 883 (1983). As discussed in Moore's complaint and the supporting memorandum of law, substantial legal issues have been raised in a timely manner. This Court has an obligation to give careful scrutiny to

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<sup>3</sup> Litigation in other states also demonstrates that scheduling an execution date is a strategic government tactic to shift the focus away from the merits of the claim. On at least two occasions, executions have been scheduled during litigation concerning the 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. A similar situation will 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. Dennis was executed.

these 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). “Approving the execution of [Moore] before his [claim] is decided on the merits would clearly be improper.” *Barefoot*, 463 U.S. at 889. Thus, Moore is “entitled to a[n] injunction to permit due consideration on the merits.” *Id.*

In addition to the *Barefoot* basis for granting an injunction, the traditional factors for determining whether to grant an injunction favor enjoining Defendants from scheduling and/or carrying out Moore’s execution until the merits of this litigation have been resolved. The United States Court of Appeals for the Sixth Circuit has articulated four factors that this Court must balance in determining whether to grant an injunction: 1) whether the movant would suffer irreparable injury without the injunction; 2) whether the public interest would be served by issuance of the injunction; 3) whether the issuance of the injunction would cause substantial harm to others; and, 4) whether the movant has a strong likelihood of success on the merits. *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2006). In addition, when the movant seeks an injunction barring carrying out a death sentence, this Court must consider the extent to which the inmate has delayed unnecessarily in bringing the claim. *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004).

These factors are not weighed equally. “Simply stated, more of one excuses less of the other.” *Michigan Coalition of Radioactive Materials Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). In other words, “the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay.” *Id.* If the movant demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is granted, the movant

only needs to establish “serious questions going to the merits.” *Id.* at 153-54. Balancing these factors establishes that Moore is entitled to injunctive relief pending the final outcome of this litigation.

**1. Moore will suffer irreparable injury if an injunction is not granted.**

The first factor clearly favors granting a temporary restraining order and preliminary injunction. In evaluating the harm that will occur if a stay is not granted, this Court must consider: 1) the substantiality of the injury alleged; 2) the likelihood of its occurrence; and, 3) the adequacy of the proof provided. *Michigan Coalition of Radioactive Materials Users*, 945 F.2d at 154; *Celebrezze v. Nuclear Regulatory Commission*, 812 F.2d 288, 290 (6th Cir. 1987). These factors clearly establish that Moore will suffer irreparable injury if an injunction is not granted.

Moore has severely damaged veins, and faces an elevated risk of pain and suffering from Defendants’ lethal injection chemicals and procedures. There is no remedy for harm caused by problems inserting an I.V. into Moore or injecting chemicals that pose an unnecessary risk of pain and suffering. Without intervention by this Court, the injection of the lethal injection chemicals will cause Moore pain, suffering, and death. There is little doubt that a prisoner facing execution will suffer irreparable injury if an injunction barring the execution is not granted. *See, e.g., 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*, 323 F.Supp.2d 797 (S.D. Tex. 2004), *overruled on other grounds by, Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) (“The potential harm to Plaintiff, on the other hand, is clear, potent, and irreversible. If Plaintiff’s contentions are correct, the denial of a

TRO will subject Plaintiff to an excruciating death, which certainly qualifies as irreparable harm.”). Without an injunction, Defendants will inflict on Moore not only the most substantial injury known to mankind - - the taking of his life - - but also extreme pain and suffering due to Moore’s peculiar physical condition, including his bad veins, diabetes, and arteriosclerosis. Without injunctive relief, Moore will not just die; he will be tortured to death. Thus, the irreparable injury prong is satisfied.

**2. The public interest favors granting an injunction.**

Granting Moore an injunction will serve 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), for the public has an interest in the finality of a judgment and the carrying out of a legally imposed sentence. The public also has an interest in receiving reasonable assurances that sentences carried out in the public’s name are carried out in a constitutional manner that ensures a death in accord with the dignity of man - - a basic premise underlying the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). This interest favors granting Moore an injunction. *See, Harris v. Johnson*, 323 F.Supp.2d 797 (S.D. Tex. 2004), *overruled on other grounds by, Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) (“It is, on the other hand, beyond the Court's comprehension that a temporary restraining order in this case, that would delay but not halt the execution, could disserve the public interest. While the Court understands that it has been 18 years since Mr. Harris' conviction, no significant harm to the public interest could arise from the proper, informed, deliberate adjudication of this claim.”).



**3. Granting Moore an injunction will cause no harm to Defendants.**

Granting Moore an injunction barring Defendants from scheduling and/or carrying out Moore's execution during the pendency of this litigation preserves the status quo. At the moment, Moore does not have a scheduled execution date. Thus, granting an injunction causes no harm to Defendants and will only serve to prevent them from attempting to short-circuit this Court's ability to reach the merits of his claims.

In addition if Defendants prevail on the merits of the litigation (or change the chemicals and procedures used in lethal injections so that they do not violate the Eighth Amendment), they will quickly be able to execute Moore. Defendants are not harmed by the granting of an injunction, and any residual harm by a possible short delay in carrying out the execution is outweighed by the irreparable injury that Moore will suffer and the public's interest in ensuring that Defendants' execution protocol conforms with the Eighth Amendment. *See Harris v. Johnson*, 323 F.Supp.2d 797 (S.D. Tex. 2004), *overruled on other grounds by, Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) ("If Plaintiff's contentions are incorrect, however, the grant of a TRO may quickly be remedied and the State's interest in enforcing its death sentence may be expeditiously satisfied.").

**4. "Serious questions going to the merits" exist.**

Because the irreparable injury prong and the public interest prong of the injunction standard weigh heavily in favor of Moore, he needs not establish a strong likelihood of success on the merits. Rather, he needs to establish only that serious questions going to the merits exist. That is easily accomplished.

The issues this case present are serious legal questions - - 1) does Defendants' means for inserting an I.V. pose an unnecessary risk of pain and suffering, particularly in light of Moore's damaged veins; 2) does the use of pancuronium bromide in lethal injections violate evolving standards of decency; 3) does the use of sodium thiopental, pancuronium bromide, and potassium chloride, combined and individually, pose an unnecessary risk of pain and suffering; 4) does Defendants' failure to administer an analgesic during the lethal injection process create an unnecessary risk of pain and suffering; 5) does Defendants' failure to monitor adequately for the ability to feel pain after the first and second chemical have been administered create an unnecessary risk of pain and suffering; 6) does Defendants' manner of injecting the chemicals and the lack of training of the execution team create an unnecessary risk of pain and suffering; 7) does Defendants' failure to have the necessary equipment available to maintain life after the first and second chemical are administered deprive Moore of the right to life if a stay of execution is granted after the first or second chemical is administered; 8) do all the factors listed above pose a heightened risk of pain and suffering to Moore because of his physical condition; and, 9) does Defendants' failure to take action to rectify any of the above issues constitute deliberate indifference towards known medical conditions.

Medical and scientific evidence, including testimony from a prior trial, support Moore's claims. As discussed in detail in Moore's Memorandum of Law in Support of his Complaint,<sup>4</sup> each of the lethal injection chemicals could be replaced by other chemicals that would cause death with a much lower risk of pain and suffering. In addition, it would be relatively easy for Defendants to monitor for consciousness after the first and second chemical have been administered. It would be just as easy for them to

add an analgesic to the lethal injection chemicals. They also are aware that Moore has compromised veins and that inserting an I.V. during his execution will be difficult if not impossible. Yet, they have taken no action to remedy this. As undisputed testimony from a prior lethal injection trial has established, Defendants do not have the necessary equipment to maintain life after the first or second chemical is administered. This information establishes a substantial likelihood of success, or at least, that serious questions going to the merits exist. Thus, this factor favors granting Moore an injunction.

**5. Moore has not unduly delayed in filing his lethal injection challenge.**

Moore has not delayed in filing this suit. Moore is not currently under an execution warrant, and Defendants have yet to seek one. In addition, this litigation has been filed prior to Moore filing his Petition for a Writ of Certiorari off of the denial of federal habeas relief. The pre-warrant nature of this litigation and the fact that his federal habeas appeal is still pending establish that Moore has not delayed in filing this action and that Defendants will not be harmed by having to litigate this issue before Moore can be executed. *See, e.g., Morales v. Hickman*, 415 F.Supp.2d 1037, 1042 (N.D. Cal. 2006) (holding that because Morales filed his lethal injection suit when his execution was imminent but prior to the scheduling of an execution date, he did not unduly delay in filing suit).

In addition, Defendants have steadfastly refused to disclose their execution protocol. In fact, they got the execution protocol sealed during litigation on behalf of other death-sentenced inmates. As a result, on March 8, 2006, Moore filed an Open Records Request with Defendants seeking information on its lethal injection process, including a copy of Defendants' execution protocol. On March 16, Defendants notified

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<sup>4</sup> Moore incorporates his Complaint and Memorandum of Law in Support of his Complaint.

Moore that a response will be received on or before March 31, 2006. But instead of a response, Moore received notification on March 31, 2006 that a final response can be expected on or before April 7, 2006. No response was received on April 7, 2006. Instead, on April 10<sup>th</sup>, Defendants notified Moore that they will not comply with his Open Records Request. Thus, any delay in filing this action is attributable to Defendants.

### **CONCLUSION**

In order to give careful scrutiny to the colorable claims Moore presents, this Court must grant a temporary restraining order and injunction to ensure that an execution does not happen in the meantime. It is only by doing so that Moore, this Court, and the public can be ensured that the chemicals and procedures Defendants use for carrying out lethal injections comport with the Eighth Amendment.

### **REQUEST FOR RELIEF**

Moore respectfully request that this Court grant a temporary restraining order barring Defendants from scheduling and/or carrying out his execution during the pendency of this litigation.

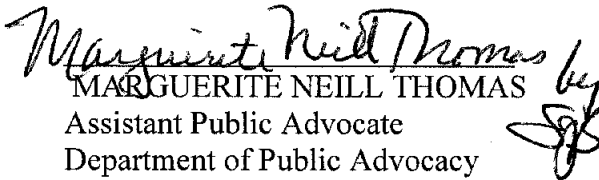
RESPECTFULLY SUBMITTED,



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April 19, 2006.

**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**  
**AND PRELIMINARY INJUNCTION**  
**BARRING DEFENDANTS**  
**FROM SCHEDULING AND CARRYING OUT PLAINTIFFS' EXECUTION**  
**DURING THE PENDENCY OF THIS LITIGATION**  
**AND CONSOLIDATED MEMORANDUM IN SUPPORT**

and its accompanying proposed order to be served via first class mail, postage prepaid on the following individuals:

Hon. Jeff Middendorf  
General Counsel  
Department of Corrections  
2439 Lawrenceburg Road  
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Frankfort, Kentucky 40602

Hon. David Smith  
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1024 Capital Center Drive  
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Hon. Jim Deckard  
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\_\_\_\_\_  
COUNSEL FOR PLAINTIFFS

April 18, 2006.