IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RICHARD COOEY, et al.

Plaintiff,

v.

ROBERT TAFT, Governor, et al.

Defendants.

Case No. 2:04-cv-01156

Judge Frost

Magistrate Judge Abel

Jeffrey D. Hill's Emergency Motion for Preliminary Injunction

GARY W. CRIM (0020252)
943 Manhattan Avenue
Dayton, Ohio 45406-5141
(937) 276-5770
Trial Attorney for Jeffrey D. Hill

and

DAVID BODIKER (0016590)
Ohio Public Defender

TIMOTHY R. PAYNE (0069329)
Assistant State Public Defender
Office of the Ohio Public Defender
8 East Long Street
Columbus, Ohio 43215-2998

Table of Contents

Table of Authorities

FEDERAL CASES

DOCKETED CASES

FEDERAL STATUTES

Jeffrey D. Hill's Emergency Motion for Preliminary Injunction

Pursuant to FED R. CIV. P. 65(a), Jeffrey D. Hill moves this Court for a preliminary injunction barring his June 15, 2006 execution by the defendants. Or, in the alternative, Mr. Hill moves this Court for an order lifting the Government-sought stay and setting an expedited discovery schedule and a trial date prior to the execution date.

Jeffrey D. Hill's Memorandum in Support of Emergency Motion for Preliminary Injunction

I. Introduction

Jeffrey Hill is before this Court upon the Court's order in December 2005 allowing him to intervene in this litigation under 42 U.S.C. § 1983 challenging the method chosen by the state to execute him. At the Government's request,[1] this litigation has been stayed for a year.[2] Mr. Hill received an execution date for June 15, 2006, from the Ohio Supreme Court, faxed to counsel on April 12, 2006.

With an eminent execution date, the Ohio Parole Commission will begin the clemency process when a person is within 45 days of an execution date. Once begun, the Ohio Parole Commission will continue the clemency process to its conclusion.

[1] Defendant's Motion to Certify for Appeal Pursuant to 28 U.S.C. § 1292(b) the Denial of Defendant's Motion to Dismiss, p. 3, Dkt. 16, March 30, 2005.
[2] Order Certifying Interlocutory Appeal, p. 9, Dkt. XX, April 13, 2005.

II. Background

Jeff Hill is a death row inmate. Mr. Hill was convicted and sentenced to death in Hamilton County, Ohio in June 1992, for killing his mother. After exhausting state court appeals, Mr. Hill initiated habeas proceedings in the U.S. District Court for the Southern District of Ohio in the late 1990's.[3] As in Mr. Cooey's case, Mr. Hill did not raise an Eighth Amendment challenge to death by lethal injection in his habeas petition. The District Court denied Mr. Hill's petition in 2003. Mr. Hill appealed to the Sixth Circuit, which affirmed in a panel decision in March 2005.

This litigation began in December 2004. The Government has delayed the resolution of this matter by seeking an interlocutory appeal.[4] This Court has stayed the proceedings.[5] But for this appeal the factual development similar to what has occurred in other states would have occurred. Mr. Hill joined this litigation soon after his Petition for a Writ of Certiorari was denied, and he has no further legal challenges to his death sentence.

After this Court allowed Mr. Hill's intervention in this litigation, an Assistant Attorney General from the Capital Crimes Unit signed, filed and served a motion on behalf of the Hamilton County Prosecutor to set an execution date. The Ohio Supreme Court granted the government's motion yesterday, setting an execution for Mr. Hill in approximately 60 days.

[3] *Hill v. Mitchell*, Case No. 1:99-cv-00382.
[4] Motion for Certificate of Appealability, Dkt. 16, April 4, 2005.
[5] Order granting in part and denying in part, etc., Dkt 21, April 14, 2005.

III. Discussion or Preliminary Injunction

Mr. Hill seeks a preliminary injunction barring the defendants from executing him, while this action remains unresolved.

The object and purpose of a preliminary injunction is to preserve the existing state of things until the rights of the parties can be fairly and fully investigated.[6] In order to grant an injunction, this Court must balance four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.[7] The four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met. Accordingly, the

[6] *Blount v. Societe Anonyme du Filtre Chamberland Systeme Pasteur*, 53 F. 98, 101 (6th Cir.1892); *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1378 (6th Cir. 1995) (reversing denial of preliminary injunction even when there was a mandatory arbitration clause in the agreement); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) (holding that the other three factors outweighed the limited showing of likelihood to succeed).

[7] *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 431 (6th Cir. 2004) (upholding a preliminary injunction preventing the defendant from enforcing a statute violating the Plaintiffs' First Amendment rights); *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross and Blue Shield Ass'n*, 110 F.3d 318, 322 (6th Cir. 1997) (upholding a preliminary injunction preventing the defendants from using the Blue Cross and Blue Shield service marks); *Sandison v. Michigan High School Athletic Ass'n, Inc.*, 64 F.3d 1026, 1030 (6th Cir. 1995) (upholding a preliminary injunction preventing the high school from sanctioning plaintiff for allowing a player who did not meet defendant's criteria to run in races); *Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994) (upholding an injunction banning non-statutorily approved expenditures from a fund and dissolving the order regarding telephone system); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 98 (6th Cir. 1982) (upholding a preliminary injunction preventing the defendants from transferring assets).

degree of likelihood of success required to support a grant of a preliminary injunction may depend on the strength of the other factors considered.[8]

A. Mr. Hill has a strong likelihood of success on the merits.

This litigation has been in hiatus since, and because, the Government initiated the interlocutory appeal about a year ago. The issue of lethal injection has not been in hiatus in other states, particularly California but also Florida, North Carolina, and Tennessee.

The concern centers on the method of execution chosen. We expect the government to follow the same process that it has used in earlier executions. Three drugs will be administered: two grams of thiopental sodium in a normal saline concentration, 100 hundred milligrams of pancuronium bromide in normal saline solution, and 100 milliequivalents of potassium chloride in normal saline concentration.[9] The first drug anesthetizes the person, the second drug paralyzes the person, and the third drug causes a heart attack. After being paralyzed there is way for non-medically trained to person to tell if the person is anesthetized or is in excruciating pain. This three-drug cocktail is used in various state execution protocols. It is the implementation of this three-drug cocktail that has attracted attention, particularly the discrepancy between the descriptions of how it is supposed to work and how it actually works. Troubling is that the three-drug cocktail is administered by non-medical personnel.

[8] *Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994): *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir.1985).
[9] Cooey Complaint, ¶ 20, Dkt. 2, December 8, 2004; admitted Answer, ¶ 14, Dkt. 20, April 11, 2005.

This discrepancy between the way things were supposed to work and the way they actually work was apparent in the California litigation. There Judge Fogel noted that the record before him was very different from what had been before the courts in earlier cases.[10] There the declaration by the government medical expert opined that over 99.999999999999% of the population would be unconscious within 60 seconds of the administration of the thiopental sodium and that virtually all persons would stop breathing within a minute of drug administration.[11] The judge examined the details of a number of executions:

- **Jaturun Siripongs**: administration of sodium thiopental began at 12:04 a.m. and the administration of pancuronium bromide began at 12:08 a.m., yet respirations did not cease until 12:09 a.m., four minutes after the administration of sodium thiopental began and one minute after the administration of pancuronium bromide began.
- **Manuel Babbitt**: administration of sodium thiopental began at 12:28 a.m. and the administration of pancuronium bromide began at 12:31 a.m., yet respirations did not cease until 12:33 a.m., five minutes after the administration of sodium thiopental began and two minutes after the administration of pancuronium bromide began, and brief spasmodic movements were observed in the upper chest at 12:32 a.m. He maintained a steady heart rate of 95 or 96 beats per minute for seven minutes after he was injected with sodium thiopental. Dr. Heath states that this fact raises concerns about whether Babbitt was properly sedated.
- **Darrell Keith Rich**: administration of sodium thiopental began at 12:06 a.m. and the administration of pancuronium bromide began at 12:08 a.m., yet respirations did not cease until 12:08 a.m., when pancuronium bromide was injected, two minutes after the administration of sodium thiopental began. Chest movements were observed from 12:09 a.m. to 12:10 a.m. According to Dr. Heath, this evidence is consistent with a conscious attempt to fight the paralytic effect of the pancuronium bromide rather than with unconsciousness due to the successful administration of the sodium thiopental, particularly in light of Rich's apparently iatrogenic rapid heart rate of 110 beats per minute as the chest movements were occurring. Rich's heart rate was 130 beats per minute when the administration of potassium chloride began.

[10] *Morales v. Hickman*, 415 F.Supp.2d 1037, 1042 (N.D. Cal. 2006).
[11] *Id.* 415 F.Supp.2d at 1043-44.

- **Stephen Wayne Anderson**: administration of sodium thiopental began at 12:17 a.m. and the administration of pancuronium bromide began at 12:19 a.m., yet respirations did not cease until 12:22 a.m., five minutes after the administration of sodium thiopental began and three minutes after the administration of pancuronium bromide began.
- **Stanley Tookie Williams**: administration of sodium thiopental began at 12:22 a.m., the administration of pancuronium bromide began at 12:28 a.m., and the administration of potassium chloride began at 12:32 a.m. or 12:34 a.m., yet respirations did not cease until either 12:28 a.m. or 12:34 a.m.—that is, either six or twelve minutes after the administration of sodium thiopental began, either when or six minutes after the administration of pancuronium bromide began, and either four minutes before or when the administration of potassium chloride began. Defendants' records are inconsistent in this regard: the formal execution log suggests that Williams stopped breathing at 12:28 a.m. and indicates that potassium chloride was injected at 12:32 a.m. whereas the execution team's log states that Williams stopped breathing at 12:34 a.m. when the potassium chloride was injected. It appeared that the formal log had been altered without any indication as to who made the alteration. Similarly to Rich, Williams apparently experienced an iatrogenic rapid heart rate of 115 beats per minute when he was injected with pancuronium bromide.
- **Clarence Ray Allen**: administration of sodium thiopental began at 12:18 a.m., yet respirations did not cease until 12:27 a.m., when pancuronium bromide was injected, nine minutes after the administration of sodium thiopental began. In a new declaration filed in the that action on February 6, 2006, Dr. Dershwitz, the government expert, opined that the "respirations" reported in the execution logs may be not be respirations at all, hypothesizing that they are no more than "chest wall movements." However, he proposed this hypothesis with considerably less certainty than was evident in his discussion of the pharmacokinetics and pharmacodynamics of sodium thiopental, which are his principal areas of expertise. While Dr. Dershwitz's explanation may be correct, evidence from eyewitnesses tending to show that many inmates continue to breathe long after they should have ceased to do so cannot simply be disregarded on its face. In rejecting the plaintiffs' claims on the merits in Cooper and Beardslee, the California Court relied on Dr. Dershwitz's opinion that the amount of sodium thiopental used in California's lethal-injection protocol should both stop breathing and cause unconsciousness within a minute after administration begins. While there is no direct evidence that any condemned inmate actually was conscious when pancuronium bromide was injected, evidence from Defendants' own execution logs that the inmates' breathing may not have ceased as expected in at least six out of thirteen executions by lethal injection in California raises at least some doubt as to whether the protocol actually is functioning as intended, and because of the paralytic effect of pancuronium bromide, evidence that an inmate was conscious at some point after that drug was injected would be imperceptible to anyone other than a person with training and experience in anesthesia.

These details from the government records contradicted the government medical expert's opinion that the three-drug cocktail was a painless way to execute someone.[12]

These same concerns were apparent to Judge Howard in North Carolina when he issued a preliminary injunction barring an execution in North Carolina. On April 7, 2006, he issued a preliminary injunction barring a scheduled April 21 execution unless there were personnel with sufficient medical training to ensure that the Plaintiff would be unconscious prior to and during the administration of pancuronium bromide or potassium chloride. In North Carolina the government had done blood tests after execution which contradicted the government's expert assertions:

> While the Court does not fashion its order based solely on Morales, the Court does find the Morales decision persuasive. As in Morales, Plaintiff here has presented evidence of a kind that is different from that presented in the cases previously considered by this and other courts. Among this evidence is toxicology data from four recent North Carolina executions showing post-mortem levels of sodium pentothal ranging from 1.5 mg/L to 42 mg/L. At the very least, this evidence appears contrary to Dr. Dershwitz's opinion that a man of average size injected with 3000 mg of sodium pentothal would have an expected concentration of 40 mg/L ten minutes later and a concentration of 33 mg/L twenty minutes later. In response, Defendants have filed an affidavit of Dr. Dershwitz in which it is stated that the discrepancies between the post-mortem toxicology results and his predictions may be explained by a number of factors, including the following: (i) that his predictions are based on arterial blood concentrations, whereas the post-mortem samples may not have been arterial blood samples; (ii) that sodium pentothal is subject to postmortem redistribution, causing a decrease in the blood concentration with time lapse; (iii) that due to the administration of the potassium chloride, blood circulation may have stopped prior to equilibration of the sodium pentothal concentrations between the arterial and venous circulatory systems; and (iv) there would be a systematic decrease in the reported concentrations due to delays in obtaining and shipping the samples and improper storage of the samples. While Dr. Dershwitz's explanation may be correct, the Court cannot ignore the serious questions raised by this

[12] *Morales v. Hickman*, 415 F.Supp.2d 1037, 1044-46 (N.D. Cal. 2006) (The specific descriptions are not quotes but paraphrases from the opinion.)

> data. This is especially true considering that the blood samples of which Dr. Dershwitz complains were collected, shipped, stored and analyzed at Defendants' direction by agents of the State for the express purpose of determining whether inmates executed under Defendants' protocol are receiving sufficient anesthesia prior to the administration of the pancuronium bromide and potassium chloride.[13]

In addition to the medical evidence contradicting the expert assertions, the Court relied on anecdotal evidence from witnesses to North Carolina executions.[14]

In denying a motion for preliminary injunction in 2004, this Court discussed Dr. Dershwitz's affidavit addressing the Ohio protocol. There he made assertions similar to his assertions in California and North Carolina.[15] The affidavit was filed in a case that was dismissed because of a failure to exhaust administrative remedies.[16] The difference now is that Dr. Dershwitz's assertions, as noted above, have been contradicted by the factual development in two states—California and North Carolina.

B. Mr. Hill would suffer irreparable injury without the injunction.

Mr. Hill will be dead—possibly dying in excruciating agony. Given the factual development that has occurred in other states concerning the actual administration of the three-drug cocktail, Mr. Hill could easily suffer an agonizing and torturous death without anyone knowing.

---

[13] *Brown v. Beck, et al.*, No. 5:06-CT-3018-H, slip opinion at 8-9 (W.D. N.C. April 7, 2006) (footnotes omitted).
[14] *Id.*, at 9-10.
[15] *Dennis v. Taft, et al.*, No. 2:04-cv-00920, slip opinion at 8 (S.D. Ohio September 29, 2004).
[16] *Dennis v. Taft, et al.*, No. 2:04-cv-00532, slip opinion at 14 (S.D. Ohio September 16, 2004).

The inability to obtain damages from the State in a § 1983 action reduces the showing necessary to establish irreparable harm.[17]

C. Issuing an injunction would not cause substantial harm to others.

No one will be harmed by delaying this execution.

D. The public interest would be served by issuance of the injunction.

The public interest is served by enforcing constitutional rights. The unnecessary and wanton infliction of pain constitutes cruel and unusual punishment.[18]

> In the earliest cases raising Eighth Amendment claims, the Court focused on particular methods of execution to determine whether they were too cruel to pass constitutional muster. The constitutionality of the sentence of death itself was not at issue, and the criterion used to evaluate the mode of execution was its similarity to "torture" and other "barbarous" methods. *See Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) ("(I)t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment . . ."); *In re Kemmler*, 136 U.S. 436, 447, 10 S.Ct. 930, 933, 34 L.Ed.2d 519 (1890) ("Punishments are cruel when they involve torture or a lingering death . . ."). *See also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464, 67 S.Ct. 374, 376, 91 L.Ed. 422 (1947) (second attempt at electrocution found not to violate Eighth Amendment, since failure of initial execution attempt was "an unforeseeable accident" and "(t)here (was no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution").[19]

The public interest is also served by a prompt resolution of these rights. This case began over a year ago. This Court set a discovery completion date for May 6, 2005 and a trial date for August 1, 2005. These dates were stricken because the Government sought a stay of all proceedings in this case while seek-

---

[17] *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 360 (4th Cir. 1991); *St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Government of U.S. St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Government of U.S. Virgin Islands ex rel. Virgin Islands Dept. of Labor*, 1999 WL 376873, p. 10 (D.Virgin Islands).
[18] *Hope v. Pelzer*, 536 U.S. 730, 737 (2002).
[19] *Gregg v. Georgia*, 428 U.S. 153, 170-71 (1976).

ing an interlocutory review.[20] Had the Government not delayed the case, Mr. Hill would be able to rely upon the facts developed in the last year. The Government cannot ask the Court to delay the factual development and at the same time continue to seek execution of defendants using the three-drug cocktail. The factual development regarding the actual implementation of the three-drug cocktail in other states shows the problems of this protocol. The Government sought this delay and now seeks to take advantage of that delay to execute Mr. Hill.

Because these four factors are not prerequisites, the stronger likelihood of success changes the balance of the weighing from what may have occurred in earlier cases.[21] The change in the factual development over the last year changes this balancing that the Court must do.

IV. Discussion of Schedule

There is time to litigate this matter before the Government executes Mr. Hill; however, it will require an expedited discovery and a hearing date in late-May or early-June.

[20] Defendant's Motion to Certify for Appeal Pursuant to 28 U.S.C. § 1292(b) the Denial of Defendant's Motion to Dismiss, p. 3, Dkt. 16, March 30, 2005.
[21] *Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir.1985); *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 537-38 (6th Cir. 1978).

Conclusion

For all of the foregoing reasons, the Court should grant emergency motion for a preliminary injunction barring defendants from executing Mr. Hill until the conclusion of this litigation.

s/Gary W. Crim
GARY W. CRIM (0020252)
Trial Attorney for Jeffrey D. Hill
943 Manhattan Avenue
Dayton, Ohio 45406-5141
(937) 276-5770

DAVID BODIKER (0016590)
Ohio Public Defender

TIMOTHY R. PAYNE (0069329)
Assistant State Public Defender
Office of the Ohio Public Defender
8 East Long Street
Columbus, Ohio 43215-2998

Certificate of Service

I, Gary W. Crim, counsel for Jeffrey D. Hill, certify that on April 14, 2006, I served a copy of this Emergency Motion for Preliminary Injunction by emailing it to the following email addresses:

Michael L Collyer
Assistant Attorney General
615 W Superior Avenue
11th Floor
Cleveland, OH 44113
216-787-3030
Fax: 216-787-3480
Email: mcollyer@ag.state.oh.us

Kelley Ann Sweeney
Assistant Attorney General
615 W Superior Avenue
11th Floor
Cleveland, OH 44113-1899
216-787-3030
Fax: 216-787-3480
Email: ksweeney@ag.state.oh.us

s/Gary W. Crim
GARY W. CRIM