IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANGEL MATURINO RESENDIZ,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. H-06-818**
	§	
BRAD LIVINGSTON,	§	
Executive Director, Texas	§	
Department of Criminal Justice, *et al.*,	§	
	§	
Defendants.	§	

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION, TEMPORARY RESTRAINING ORDER, OR STAY OF EXECUTION, AND MEMORANDUM IN SUPPORT

On June 23, the Court filed an Order in this action observing that "[n]o motion to stay [Mr. Maturino's] execution has been filed," and directing that any "motion seeking a stay of execution" be filed "by 12:00 p.m. on June 25, 2006." Mr. Maturino files this Motion in response to the Court's order. We emphasize, as explained in greater detail below, that it may not be necessary for the Court to stay Mr. Maturino's execution, *i.e.*, to forbid Defendants from carrying out his death sentence by any means whatsoever pending further order of the Court. This civil rights lawsuit has never been directed at the *fact* of Mr. Maturino's pending execution, but instead at the needless risk of cruelty in the specific *manner* by which Defendants propose, expect and intend to carry it out. Accordingly, Mr. Maturino, consistent with the positions he has taken throughout this litigation, moves the Court to issue a preliminary injunction prohibiting Defendants from attempting to execute Mr. Maturino *according to the existing Texas lethal injection*

protocol which is the subject of this civil rights action and to enjoin Defendants from attempting to execute Mr. Maturino in any other manner which would pose a foreseeable risk of subjecting Mr. Maturino to gratuitous and unnecessary pain, until such time as the Court can resolve the merits of the case. As we explain below, however, if the short time remaining before Mr. Maturino's execution – a time pressure which is not due to any action on Mr. Maturino's part – makes it impossible for the Court to dispose of the issues necessary to support granting such injunctive relief, the Court should stay Mr. Maturino's execution under 28 U.S.C. § 1651 until it can do so. In support of which request, Mr. Maturino respectfully would show the Court as follows.

Generally, four conditions must exist before a preliminary injunction may issue. The movant plaintiff must demonstrate (1) a substantial likelihood that he will prevail on the merits and (2) a substantial threat that he will suffer irreparable injury if no injunction is granted. In addition, the Court must consider whether (3) the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant; and (4) granting the preliminary injunction will not disserve the public interest. *Lake Charles Diesel, Inc. v. General Motors Corp.*, 328 F.3d 192 (5th Cir. 2003). We address each consideration below.

I. Likelihood of success on the merits

The record establishes a substantial likelihood that Mr. Maturino will prevail on the merits of his claims. First, the legal basis for those claims is essentially undisputed. The Court cannot disagree that permitting Defendants to inflict unnecessary pain or suffering in carrying out Mr. Maturino's death sentence would mock the Eighth Amendment's prohibition on cruel and unusual punishments. *See, e.g., Hill v.*

McDonough, ___ U.S.___, 2006 WL 1584710 (June 12, 2006) (finding identical claim properly brought under 42 U.S.C. § 1983); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (opinion of Reed, J.); *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (failed execution in *Francis*, if intentional rather than unforeseen, would have been, like torture, "degrading and indecent"). Defendants, as state officials responsible for carrying out an execution, may not employ methods that display deliberate indifference toward violating rights secured to Mr. Maturino by the Eighth and Fourteenth Amendments. *Cf. Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) ("deliberate indifference to a prisoner's serious . . . injury states a cause of action under § 1983.")

The factual basis for Mr. Maturino's claims is equally strong, as a review of only a few relevant paragraphs of the Complaint makes clear:

> 20. The particular combination of chemicals Defendants intend to administer to Mr. Maturino Resendiz will cause an intolerable risk that he will consciously suffer an excruciatingly painful and protracted death. Creating this risk serves no penological purposes and is wholly unnecessary to the execution process.
>
> 21. By implementing these protocols, the Defendants have demonstrated deliberate indifference to the basic human right of condemned individuals not to be subject to a torturous and unnecessarily painful death without the ability to communicate the fact that they are in pain.
>
> 22. Texas law and prevailing standards of decency throughout the United States, evidenced in the enactment of laws in many states, prohibit the use of the execution methods proposed by the defendants on animals. In fact, Texas recently passed legislation criminalizing inhumane methods of euthanizing animals, including the use of neuromuscular blocking agents such as pancuronium bromide. *See* Tex. Health & Safety Code, § 821.052(a) (Vernon Supp. 2004-2005). With this legislation, Texas has joined numerous states with laws recognizing that use of these chemicals would be inhumane in the euthanasia of dogs or cats.…

> 23. It is well known that the risk of suffering caused by the use of methods and chemicals such as those the Defendants use can easily and economically be eliminated. *See e.g.*, 2000 Report of the American Veterinary Medical Association Panel on Euthanasia, 218 Journal of the American Veterinary Medical Association, 669, 681 (2001).
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> 24. The risk of inflicting severe and unnecessary pain and suffering upon Mr. Maturino Resendiz in the lethal injection process is particularly grave in Texas because the procedures and protocols designed by defendants, to the extent known, do not include safeguards regarding the manner in which the execution is to be carried out, do not establish the minimum qualifications and expertise required of the personnel performing the critical tasks in the lethal injection procedure, and do not establish appropriate criteria and standards that these personnel must rely upon in exercising their discretion during the lethal injection procedures. According to Michelle Lyons, spokeswoman for the Texas Department of Criminal Justice, Texas has used volunteers or "execution specialists", many of whom have military training, for the 359 executions it has conducted since 1982.…
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> 25. There are alternative methods of execution by lethal injection that are less torturous and inhumane by which the defendants could avoid this unconstitutional cruelty. For example, the defendants could omit pancuronium bromide and use a longer-acting sedative administered by a trained anaesthesiologist to eliminate or substantially reduce the risk of consciously suffered pain caused by slow suffocation or the effects of potassium chloride. *See Morales v. Hickman*, __ F. Supp. 2d __, 2006 WL 335427, at 8 (N.D. Cal. Feb. 14, 2006). There is no legitimate reason the defendants could not modify the protocol for the administration of a death sentence by lethal injection in this manner, and their failure to do so evidences deliberate indifference to the substantial and unnecessary risk of extreme suffering that results from their current practice.

Nor should this Court ignore the fact that other federal district courts around the country have, in recent weeks, acknowledged the strength of the evidence indicating that the conventional lethal injection protocol Defendants intend to employ in executing Mr. Maturino (the "three-drug cocktail") may inflict unwarranted and excruciating pain in the process of taking the life of the condemned. For example, on April 28, 2006 the Southern District of Ohio temporarily enjoined the execution of Ohio death row inmate

Jeffery Hill, who had joined a pending action challenging Ohio's use of the identical "three-drug cocktail" as cruel and unusual punishment. *Cooey and Hill v. Taft, et al*., No. 2:04-cv-1156 (S.D. Ohio, April 28, 2006) (attached hereto as Exhibit 1). Distinguishing Hill's case from earlier unsuccessful challenges, the District Court noted "the mounting evidence calling Ohio's lethal injection protocol, and the same or similar protocols employed by other states, increasingly into question." *Id.* at 6 (citing *Morales v. Hickman*, 415 F.Supp.2d 1037 (N.D. Cal. 2006), *aff'd,* 438 F.3d 926 (9th Cir. 2006) (execution halted after court imposed requirement that anesthesiologist monitor execution). The same view as to the substance of this claim motivated the Western District of North Carolina to issue a preliminary injunction on April 7, 2006, barring use of the identical lethal injection protocol unless the State guaranteed that the execution would be overseen by personnel with sufficient medical training to ensure that the condemned prisoner would be unconscious prior to and during the administration of pancuronium bromide or potassium chloride. *Brown v. Beck, et al.*, No. 5:06-CT-3018-H (W.D. N.C. April 7, 2006). The same growing evidence persuaded the United States District Court for the District of Columbia it was prudent to grant a preliminary injunction staying the execution of three prisoners on the federal Death Row, involving the same challenge to the "three-drug cocktail," pending the Supreme Court's decision in *Hill*, *supra*. *Roane et al. v. Gonzales, et al.*, No. 1:05-cv-02337-RWR (D. D.C., February 27, 2006) (attached as Exhibit 2). The Supreme Court itself, while considering *Hill*, stayed an execution in another case presenting the same challenge to the widespread lethal injection protocol, *Rutherford v. Crosby*, 126 S. Ct. 1191 (Jan. 31, 2006) (granting stay), and in yet another recent case declined to vacate a stay of execution entered by the

en banc Eighth Circuit in connection with a lethal-injection lawsuit. *Crawford v. Taylor*, 126 S. Ct. 1192 (2006) (Mem. Op.) (denying motion to vacate stay).[1]

As Mr. Maturino's complaint and supporting evidence and these opinions and orders make clear, Mr. Maturino has a real and substantial likelihood of prevailing on the merits of his claims if the case proceeds to judgment.[2]

Another element weighing in Mr. Maturino's favor is the fact that, unlike the death-sentenced plaintiffs in some cases, he cannot fairly be accused of having delayed prosecuting this lawsuit. In *Hill, supra*, the Supreme Court framed the equitable inquiry involved in deciding whether to grant a stay as follows: there exists an equitable presumption against a stay if the "claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill*, supra at * 8 (citing *Nelson v. Campbell*, 541 U.S. 637, 650 (2005)). Here, Mr. Maturino brought his

[1] As the Court will recall, another Judge of this Court granted a temporary restraining order on the merits of a comparable claim in 2004, although the Court of Appeals subsequently reversed on other grounds. *Harris v. Johnson*, 323 F. Supp. 2d 797 (S.D. Tex. 2004) (granting TRO on the merits), *rev'd,* 376 F.3d 414 (5th Cir. 2004) (denying relief on equitable grounds).

[2] Little Fifth Circuit authority on the merits question exists, and what exists is out-of-date and primarily concerns challenges to the general concept of execution by lethal injection. *See, e.g., Woolls v. McCotter*, 798 F.2d 695, 697-98 (5th Cir. 1986) (rejecting arguments against use of sodium thiopental because there was no evidence of improperly administered drugs and no evidence that Texas uses "anyone other than trained medical personnel to administer lethal injections."); *Kelly v. Lynaugh*, 862 F.2d 1126, 1135 (5th Cir. 1988) (dismissing challenge to lethal injection without discussion, citing *Woolls*). Such decisions predate the disclosure of substantial elements of Texas' lethal injection protocol. Moreover, Mr. Maturino is prepared to present evidence showing, among other things, actual instances of improperly administered drugs and that, contrary to what the Fifth Circuit was led to believe in *Woolls*, Texas has no "medically trained" individuals observe or participate in the actual administration of the lethal drugs.

case at a time when a stay would not have been necessarily required to adjudicate its merits.

This litigation was initiated by filing the grievance required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), on February 8, 2006, over twelve (12) weeks before Mr. Maturino's then-scheduled execution. The State of Texas made no effort to answer or resolve the issues the grievance raised, but simply rejected it. This civil suit was filed within days after that grievance was rejected, almost nine (9) weeks ahead of the then-scheduled execution date. Immediately after filing and serving it, counsel for Mexico, then proceeding as Mr. Maturino's next friend, contacted counsel for the Defendants to set a discovery conference; Defendants indicated that they would not participate in any conference or any discovery but instead would seek immediate dismissal of the suit. Defendants stuck to that position even as Mr. Maturino's execution date was pushed back to June 27, 2006, which would have afforded this Court seven *more* weeks to consider the merits of his case. As cases in other jurisdictions have shown, it would have been quite feasible to litigate the issues raised in this case in the time that remained before execution when this case was filed, especially once the execution date was extended by seven weeks. *See, e.g.,* Brown v. Beck and *Morales v. Hickman, supra*. If this Court ultimately proves unable to resolve Mr. Maturino's claims prior to June 27, it is not because Mr. Maturino dragged his feet in bringing the suit, but because once the suit was underway Defendants did everything they could to avoid addressing the merits.

Nor did the relief requested by Mr. Maturino – changes in Texas' lethal injection protocol – inherently require a stay of execution. This lawsuit sought to modify the

existing Texas execution protocol to provide adequate safeguards against unnecessary and excruciating pain during Mr. Maturino's execution. The execution did not need to be put on hold in order to accomplish this goal. The merits of the lawsuit could easily have been resolved, and any necessary changes implemented, in the months that have passed since this issue was first raised. For that reason, as this Court observed in its Order of June 23, Mr. Maturino never moved this Court to stay his execution, and this Court never intimated any view that a stay would be required. Accordingly, under the plain language of *Hill* and *Nelson*, there is no basis for finding that Mr. Maturino has unreasonably delayed seeking the requested relief.

Defendants may be expected to assert that under *Hill* and *Nelson*, Mr. Maturino's Eighth Amendment claims should be held forfeit simply because this lawsuit was filed after an execution date had been set. That is not, and cannot be, the law.[3] Such a blind refusal to consider other relevant factors before denying relief, of course, is not what equity is all about, and would collide with the equitable considerations set forth in those cases and in *Gomez v. District Court*, 503 U.S. 653 (1992) (cited in both *Hill* and *Nelson*).

In its earlier order, this Court appears to have recognized the problems that would arise in dismissing this case for inequitable delay. It noted that filing a challenge to the

[3] An extreme hypothetical demonstrates the flaw in this reasoning. Assume the State sets a prisoner's execution date for two years hence. If *Hill* and *Nelson* can be read to preclude equitable relief anytime a plaintiff files suit after an execution date has been set, the prisoner in that scenario would be unable to pursue equitable relief – even though, as a practical matter, there would exist ample time to litigate the issues prior to the scheduled execution. The reflexive conclusion that an execution date precludes relief, while easy to administer, cannot be the rule – as the Supreme Court's decisions in *Hill* and *Nelson* make clear. The question is whether the suit was brought early enough to have been resolved in due course notwithstanding any approaching execution date. That was the case here.

proposed method of execution after the setting of an execution date "may" be for the purposes of delaying the execution rather than achieving a result on the merits. If such a lawsuit were filed essentially on the eve of execution, that could be a plausible inference. *See, e.g., Reese v. Livingston*, ___F.3d___, 2006 WL 1681090 (5th Cir. 2006) (affirming denial of equitable relief in lawsuit filed less than 30 days prior to scheduled execution date) (suit filed May 25, 2006, by prisoner facing June 20, 2006 execution date). But the record of this case does not support any such finding against Mr. Maturino, and of course this Court made no such finding that any such dilatory motive or purpose in fact could be imputed to the Consul General of Mexico or to Mr. Maturino in this case. Moreover, this Court's own findings show that Mr. Maturino was previously represented by incompetent court-appointed counsel, depriving him of any reasonable means of filing this lawsuit before New Years, 2006.

Finally, Mr. Maturino must respectfully point out that the Fifth Circuit made a finding in its recent opinion in this case that weighs strongly in favor of finding that Mr. Maturino cannot fairly be blamed for the timing of this request for equitable relief. Pointing out that Mr. Maturino would only be entitled to substitute himself as plaintiff on remand (in the stead of the Consul General of Mexico) if he had a "reasonable basis" for naming the Consul General as plaintiff in the first place, the Court of Appeals expressly acknowledged that Mr. Maturino had not acted unreasonably, because there was some evidence to indicate Mr. Maturino was mentally incompetent. *Magallon v. Livingston*, __ F.3d___, 2006 WL 1660547 at * 3. Had Defendants joined in a focused effort to litigate the merits of Mr. Maturino's civil rights claims, rather than engaging in a scorched-earth strategy to see his case dismissed on legally incorrect grounds, *see id.*, this case might

well have been resolved by now. Given the Fifth Circuit's findings, the time lost since mid-April – attributable to Defendants' stubborn attempt to dismiss the complaint rather than defend Texas' lethal injection protocol on the merits – cannot form the basis for a finding that Mr. Maturino lacks clean hands in seeking equitable relief from the Court.

In sum, the equitable powers of the federal courts are are entrusted to the courts to be exercised according to their traditional purposes:

> The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. *Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision.*

Freeman v. Pitts, 503 U.S. 467, 487 (1992) (emphasis added). Here, those concepts of fairness and flexibility should lead the Court to grant the equitable relief requested. Equity requires a true examination of the circumstances; doing that here precludes any decision that there was a delay attributable to Mr. Maturino that hampered this Court's ability to resolve his legal claims in a timely way without the necessity of issuing injunctive relief.

II. Remaining factors

The next two factors in the temporary injunction analysis weigh in Mr. Maturino's favor as well. There exists a substantial threat that he will suffer irreparable injury if a preliminary injunction is denied. If the case is not resolved prior to his scheduled execution, Defendants will be free to inject Mr. Maturino with a combination of dangerous poisons using unqualified personnel in a manner and in an environment that unnecessarily and intolerably increases the risk that he will die in excruciating pain. Because those injuries will be inflicted on Mr. Maturino immediately prior to and in the

course of killing him, the injury is plainly irreparable. The unconstitutional harm need not occur before a court can act to enjoin it; this Court may do so if there exists "an unreasonable risk" that such harm will occur. *Helling v. McKinney*, 509 U.S. 25, 35 (1993).

Third, the threatened injury to Mr. Maturino outweighs the threatened harm the injunction may do to Defendants. Defendants possess no cognizable interest in employing a particular means of ending Mr. Maturino's life and thereby executing the jury's judgment that he should die for his crime, nor are Defendants constrained by any Texas law governing the protocol. Short of the cost of altering their own secret protocol, which cannot be great, Defendants have no interest that is impaired by the issuance of a preliminary injunction from this Court prohibiting them from injecting pancuronium bromide and potassium chloride into Mr. Maturino.

Were the Court to find it necessary or appropriate temporarily to enjoin Mr. Maturino's execution altogether during the pendency of this civil rights action, *see infra*, it would be appropriate to include in this balance "the important interest in the timely enforcement of a sentence" belonging to "the State and the victims of crime." *Hill*, *supra*, at *8. (citation omitted) (discussing considerations appropriate to the decision whether to grant a stay of execution in connection with a civil rights lawsuit challenging the method of execution). But adding that consideration to the mix here does not change the balance of interests. The interest in "timely enforcement" of Mr. Maturino's sentence will not be significantly harmed by a brief postponement of his execution in order fully and fairly to adjudicate his civil rights claims. Indeed, given the strength of the evidence indicating that execution according to the existing Texas protocol risks causing painful

suffering in addition to death, there is no reason to believe that the victims' survivors in this case would prefer a "timely" but excruciating execution to one conducted a few weeks later but carried out according to the Constitution and the law.[4]

Fourth, granting the preliminary injunction, far from disserving the public interest, will protect it. As a Maryland administrative judge acknowledged this week in the course of issuing a ruling on a pending lethal injection lawsuit filed by a condemned prisoner, "Ensuring that the State complies with the Constitution is an interest in which all Maryland citizens have a stake, not just those under a sentence of death." *See* Jennifer McMenamin, "Maryland Judge Casts Doubt On Execution Process," THE BALTIMORE SUN (June 22, 2006). The District Court in the Ohio case of Jeffrey Hill, *supra*, agrees: "[t]his Court is in agreement with Plaintiff Hill that the public interest only is served by enforcing constitutional rights and by the prompt and accurate resolution of disputes concerning those constitutional rights. By comparison, the public interest has never been

[4] While such comparisons are always inexact, it also bears observing that this case moved relatively rapidly through the post-conviction review process to the point at which an execution date *could* be set according to Texas' usual practice. Mr. Maturino arrived on Death Row just over five years ago, and his conviction became final on direct review just over two years ago. Ordinarily in Texas, an execution date is not set until after the conclusion of a death-sentenced prisoner's federal habeas appeal to the Fifth Circuit, and even then such dates are typically set to afford a 90-120 day "window" for seeking certiorari review of the Fifth Circuit's decision. But due to the supine nonfeasance of Mr. Maturino's original court-appointed habeas counsel Leslie Ribnik, who abandoned Mr. Maturino to his fate after filing the initial one-issue federal habeas petition, Mr. Maturino had no appeal in due course to the Fifth Circuit. Partly as a result, Mr. Maturino faces execution sooner than other similarly situated offenders – like the twelve other offenders executed in Texas since January 1 of this year, each of whom spent an average of *9.8 years* (nearly twice as long as Mr. Maturino) on Death Row before being executed. Under the unusual circumstances of Mr. Maturino's case, then, a brief postponement of the early-scheduled execution date will not unduly disadvantage anyone with a legitimate interest in the timely execution of the sentence.

and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights." *Hill and Cooey*, *supra*, slip op. at 10.

Moreover, as noted *supra*, the public's interest in enforcement of the sentence will not be affected by an injunction from this Court forbidding Defendants from proceeding to execute Mr. Maturino *in the unconstitutional manner they currently intend*. As discussed above, there is nothing that prohibits defendants from altering their protocol so as to comply with the Eighth Amendment, Texas law regarding the euthanasia of animals by intravenous chemical injection, and the standards of decency that exist in society in 2006. The public's interest lies not in execution by a particular means, but in having effective safeguards in place to ensure that the condemned experience a humane death without an unnecessary and intolerable risk of torture, whatever method of execution is employed. Such safeguards are absent in Texas today. This factor, like the others described above, weighs in Mr. Maturino's favor.

MOTION FOR ALTERNATIVE RELIEF

Through no fault of Mr. Maturino's, *see supra*, time has grown short for the Court to decide how to proceed in this factually complex matter. In order to preserve the *status quo ante* pending resolution of these issues, and to preserve this Court's jurisdiction over the subject matter of the litigation if it proves impossible to adjudicate these issues properly in the next seventy-two hours, Mr. Maturino out of an abundance of caution further moves the Court for an order staying his execution under 28 U.S.C. § 1651, the All Writs Act. Section 1651 "empowers a federal court – in a case in which it is already exercising subject matter jurisdiction – to enter such orders as are necessary to aid it in the exercise of such jurisdiction." *In re Hill*, 437 F.3d 1080, 1083 (11th Cir. 2006) (citing

Steffen v. Tate, 39 F.3d 622, 625 (6th Cir. 1994). If the Court cannot responsibly resolve the questions before it in the time remaining before Tuesday at 6:00 p.m., it should enter a stay under § 1651 to preserve its ability to do so.

CONCLUSION

For the foregoing reasons, Mr. Maturino respectfully requests that this Court grant a preliminary injunction or, in the alternative, a temporary restraining order,

- prohibiting Defendants and their agents from administrating a lethal injection to him under the protocol currently in effect in the State of Texas; and/or
- precluding Defendants or their agents from using Pavulon or pancuronium bromide or potassium chloride in the execution, and requiring that they use exclusively sodium thiopental to cause Mr. Maturino's death; and/or
- requiring Defendants and their agents to comply with AVMA by ensuring that appropriately qualified medical personnel assess and assure the surgical plane of anesthesia before proceeding to administer pancuronium bromide or potassium chloride, to insure Mr. Maturino's uninterrupted unconsciousness throughout the procedure, and, further, forbidding Defendants and their agents from use of a BIS (Bispectral index monitor) in this connection; and/or
- staying Mr. Maturino's execution under the All Writs Act until the merits of this case can be resolved; and /or
- granting such other relief as law and justice require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing document has been served on counsel for Respondent by facsimile transmission and e-mail on June 25, 2006, and by thereafter placing the same into the United States Mail, first-class postage prepaid, addressed to:

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Capital Litigation Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711

/s/ Robert C. Owen