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 Reply Memorandum in Support of Emergency Motion for Preliminary Injunction

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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 recently received an execution date for June 15, 2006, from the Ohio Supreme Court, which prompted this Motion for Preliminary Injunction.

II. Argument

To determine whether to issue a preliminary injunction, this Court must balance four factors: the strong likelihood of success on the merits; irreparable injury to moving party without the injunction; substantial harm to others; and the public interest served by issuance of the injunction.[3] These are not prerequisites and must be balanced.[4]

The likelihood of success has increased since the cases cited by the Government. Litigation in other states has shown discrepancies between the theoretical explanations of the Government expert in this case, Dr. Dershwitz, and the actual practice of executing prisoners. The harm to Mr. Hill is of the most

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[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. 21, April 13, 2005.
[3] *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 431 (6th Cir. 2004).
[4] *Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994): *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir.1985).

extreme—death in possibly a most painful manner. The Government's asserted interest in a quick execution did not prevent it from delaying Mr. Cooey's case by taking an interlocutory appeal. No public interest is served by a quick execution that violates Mr. Hill's right to be free from cruel and unusual punishment.

We will address two matters in more detail: the discrepancy between the theoretical assertions about how prisoners should die and the facts of how they actually die and the position of the United States Supreme Court on allowing delay where the complaint about lethal injection is filed after completion of the federal habeas process.

The Government does not address the discrepancies between what should occur, according to their expert's theoretical explanations, and what has actually occurred in California and North Carolina. In both of these states, Dr. Dershwitz's expert opinion that the three-drug cocktail would work painlessly has been shown to be highly suspect. Yet the Government merely proffers a two-year-old affidavit from Dr. Dershwitz discussing Ohio procedures, a discussion that does not mention the discrepancies. In federal litigation in California and North Carolina, the courts were presented with the government records about the details of executions. In California the logs maintained by the prison authorities contradicted the theoretical explanations offered; prisoners were breathing when theoretically they should have been paralyzed by the anesthesia.[5] And in North Carolina the blood analysis showed lower post-mortem levels of sodium pentothal than the theoretical amounts suggested by the Gov-

[5] *Morales v. Hickman*, 415 F.Supp.2d 1037, 1044-46 (N.D. Cal. 2006).

ernment's expert.[6] In North Carolina the blood analysis was done specifically to determine the level of anesthesia of those executed.

The Government's Brief in Opposition does not address any of the problems of proof coming from the discrepancies between the theoretical explanations offered by its experts and the actual experiences from executions in California and North Carolina. Things do not work out in practice as clearly as they do in theory. Prisoners are breathing when theoretically they should not be breathing. And executed prisoners are showing lower levels of sodium pentothal than Dr. Dershwitz's theory provides. These discrepancies between the theoretical explanations and the actual experiences change the balancing that this Court must follow in evaluation of Mr. Hill's Motion for a Preliminary Injunction.

The United States Supreme Court has not taken the extreme position suggested by the Government about when a prisoner can raise the issue of lethal injection and has allowed delays in executions.

The Government relies heavily on *Nelson v. Campbell*, 541 U.S. 637 (2004), to support its argument that this Court should not issue a preliminary injunction. Justice O'Connor begins that opinion saying, "Three days before his scheduled execution by lethal injection, petitioner David Nelson filed a civil rights action in District Court . . . ."[7] *Nelson* does not prevent this Court from acting. In fact, since *Nelson*, the Supreme Court has granted a certiorari peti-

[6] *Brown v. Beck, et al.*, No. 5:06-CT-3018-H, slip opinion at 8-9 (W.D. N.C. April 7, 2006).
[7] *Nelson*, 541 U.S. at 639.

tion by Clarence Hill of Florida, a prisoner who began his litigation after receiving an execution date, later than Jeffrey Hill.

If the Government's logic held, Clarence Hill's petition would have been denied because the Petitioner had not filed his 42 U.S.C. § 1983 action soon enough. Instead the Supreme Court will be hearing argument later this month. Clarence Hill's petition for certiorari from the habeas proceeding was dismissed in 2000.[8] In November 2005, Clarence Hill received an execution date for January 24, 2006. He then began his litigation on lethal injection in state court. The state court disposed of the matter on January 17, 2006.[9] Clarence Hill began his federal litigation based on 42 U.S.C. § 1983 on January 20, 2006.[10] The Eleventh Circuit had rejected his case on the theory that his civil complaint under 42 U.S.C. § 1983 was the functional equivalent of a successor habeas petition and that the claim did not meet the requirements for a successor habeas petition.[11]

The Supreme Court has also refused to interfere with the delaying of an execution in the Missouri lethal-injection litigation.[12] There the federal litigation began long before an execution date was set. But very soon after the government lost its motion to dismiss in federal court,[13] Mr. Taylor received an execu-

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[8] *Hill v. Florida*, 528 U.S. 1087 (2000). *See also Hill v. Moore*, 175 F.3d 915 (11th Cir. 1999).
[9] *Hill v. State*, 921 So. 2d 579 (Fla. 2006).
[10] *Hill v. Cosby*, 437 F.3d 1084, 1085 (11th Cir. 2006).
[11] *Id.*
[12] *Crawford v. Taylor*, 126 S. Ct. 1192 (2006).
[13] *Taylor, el al. v. Crawford, et al.*, Case No. 2:05-cv-04173, Dkts. 54, 55 (W.D. Mo, December 28, 2005 & January 3, 2006). This litigation has not resulted in any reported decisions, so we attach the Docket of the underlying District Court case, Appendix A; the Eighth Circuit panel decision in the government's

tion date from the state supreme court. On January 19, 2006, the District Judge set the matter for a hearing in February and entered an order prohibiting Mr. Taylor's execution.[14] The Government immediately appealed.[15] On January 29, 2006—**a Sunday—**the panel lifted the stay and ordered a new judge to complete a hearing by noon on Friday, February 3, 2006. The new judge completed the hearing by Wednesday, February 1, 2006.[16] Mr. Taylor lost this truncated hearing and appealed.[17] The Eighth Circuit, *en banc* with a single dissent, delayed the execution, allowing a more orderly resolution, and the Supreme Court denied the Government's application to vacate the stay.[18] The matter has been briefed and was argued on April 19. It is now waiting a decision of an Eighth Circuit panel.

In two other cases, federal district courts have set conditions on the use of the three-drug cocktail. In *Brown*, the execution went forward and in *Morales* the matter awaits a hearing.

Thus the Supreme Court has rejected the extreme view of the Government. The Supreme Court permits federal courts to delay state-scheduled executions. These delays are allowed where the prisoner has timely filed his lethal-injection action, so that the issue of the three-drug cocktail can be litigated in an orderly manner.

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initial appeal, Appendix B; and the docket in the pending Eighth Circuit case, Appendix C.

[14] *Id.* Dkt. 62 (January 19, 2006)

[15] *Id.* Dkt. 63 (January 19, 2006); Eighth Circuit Case No. 06-1278.

[16] Appendix B.

[17] *Id.* Dkt. 76 (February 1, 2006); Eighth Circuit Case No. 06-1397.

[18] *Taylor v. Crawford, et al.*, Case No. 06-1397, Docket.

Conclusion

Mr. Hill's motion requires a balancing of factors. Two key developments change the way this Court should balance his motion from the way this Court has struck that balance in the past. The first difference is the discrepancy between the theory relied on by the Government of how prisoners die and the now-developed facts of how they actually die. The second difference is the United States Supreme Court allowing execution dates to be delayed because of the lethal injection issue.

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

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Certificate of Service

I, Gary W. Crim, counsel for Jeffrey D. Hill, certify that on April 25, 2006, I served a copy of this Reply Memorandum in Support of Emergency Motion for Preliminary Injunction by e-mailing it to the following email addresses:

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