

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

NORMAN TIMBERLAKE,
Plaintiff,

v.

ED BUSS, Superintendent
Indiana State Prison,
Defendant.

No. 1:06-cv-1859-RLY-WTL

DEATH SENTENCED PETITIONER -
EXECUTION DATE 1/19/2007 @ 12:01am

APPLICATION FOR PRELIMINARY INJUNCTION

Plaintiff, Norman Timberlake, is under a sentence of death. On December 15, 2006, the Indiana Supreme Court ordered Mr. Timberlake's execution to take place on January 19, 2007. Mr. Timberlake seeks preliminary injunctive relief to prevent Defendants from executing him by their proposed means of lethal injection pending the resolution of this action. Mr. Timberlake alleges that the Indiana Department of Correction's lethal injection protocol, as described in both Operation Directive ISP 06-26¹, which is attached hereto as Exhibit 1, and Operation Directive ISP 02-04, which is attached hereto as Exhibit 2, and Defendant's Response to Discovery filed 1/8/2007, which is attached hereto as Exhibit 3, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because it creates a substantial and unnecessary risk that Mr. Timberlake will be fully conscious and in agonizing pain for the duration of the execution process.

¹According to Defendant's Response to Discovery filed 1/8/20207, Exhibit 3, Operation Directive ISP 02-04 is currently in place. Operation Directive ISP 06-26 is "a revised death penalty protocol" which has been "very recently submitted for approval by the administration of the Department of Correction but has not yet been approved." Exhibit 3, paragraphs 2 & 3.

This application for a preliminary injunction is made pursuant to Federal Rule of Civil Procedure 65, and Mr. Timberlake is entitled to the relief he seeks under Eighth Circuit precedent. Mr. Timberlake will sustain irreparable harm if injunctive relief is not granted preventing the Defendant having the (1) execution team members listed in Exhibit 3, paragraph 4 insert catheters; (2) in accordance with either ISP 02-04 or ISP 06-26, (3) using the drugs and quantities listed in Exhibit 3, paragraph 3. Mr. Timberlake is likely to prevail on the merits of the underlying action and the balance of hardships weighs decidedly in his favor. This application is based on the Complaint, the following memorandum of points and authorities and the attached exhibits, including the declaration of Dr. Mark Heath which sets forth the specific deficiencies in the Defendants' lethal injection protocol.

I. INTRODUCTION

Norman Timberlake, a death row inmate, is scheduled to be executed by Indiana State Prison Superintendent, Ed Buss by means of lethal injection. A rapidly growing body of evidence, including medical evidence, eyewitness observation and veterinary studies, persuasively demonstrates that the particular lethal injection protocol chosen by Defendant Buss risks, and has repeatedly resulted in, inmates failing to receive adequate anesthesia and remaining conscious during the administration of lethal drugs. Without adequate anesthesia, the inmate experiences first slow suffocation and then the extraordinarily painful activation of the sensory nerve fibers in the walls of the veins that is caused by potassium chloride. Likewise, when individuals not appropriately trained in anesthesia are responsible for placement of the catheters for injection of the described drugs, unconscionable delays result in the execution preparation. Given the significant danger under the current protocol that Mr. Timberlake will

be subjected to this excruciating mental and physical pain and torture, he seeks to prevent the Defendant from executing him in this manner.

According to Exhibit 3, paragraph 3, the Defendant will use three drugs in succession to cause Mr. Timberlake's death: First, Sodium Pentothal, an ultra-short-acting barbiturate that under ideal conditions will cause the inmate to lose consciousness; second, Pancurorium Bromide, a neuromuscular blocking agent that paralyzes the muscles and has no apparent purpose other than to make the execution appear peaceful to witnesses; and finally, Potassium Chloride, which induces cardiac arrest. ISP Directive 06-26 and ISP Directive 02-04 establishes the conditions under which these drugs are administered. It directs that the drugs be administered remotely, in the absence of trained personnel and with no monitoring of the inmate's condition once the procedure is underway. The combination of using these particular drugs, in the dosages described in Exhibit 3, under these conditions creates a serious risk that the drugs, particularly the critically important Sodium Pentothal, will not be properly administered. Administration errors could result, and demonstrably have resulted, in inmates retaining consciousness and suffering severe pain and torture during their executions.

Thus, Mr. Timberlake's suit is not premised on the possibility that some unforeseen error or unavoidable accident might cause him to be aware and in excruciating pain during his execution. Nor does he claim that execution by lethal injection is unconstitutional per se, regardless of the manner in which it is accomplished. On the contrary, he alleges that the significant risk of a botched and inhumane execution is an entirely foreseeable consequence of the particular conditions unnecessarily imposed by, and the failings of, ISP Directives 06-26 and/or 02-04. It is surely unconstitutional for the State to choose an execution protocol that

creates a significant risk of inflicting gratuitous suffering and excruciating pain. Mr. Timberlake therefore requests that the Court enjoin the Defendant from executing him by means of lethal injection as it is currently administered under ISP Directives 06-26 and/or 02-04.

II. FACTUAL BACKGROUND

On August 11, 1995, Mr. Timberlake was convicted and sentenced to death in the Marion Superior Court II, Criminal Division, located at City County Building, 200 East Washington Street, Indianapolis, Indiana, 46204.

Mr. Timberlake appealed his conviction and sentence of death to the Indiana Supreme Court who affirmed his conviction and sentence by a published opinion on December 30, 1997. Timberlake v. State, 690 N.E.2d 243 (Ind. 1997). Mr. Timberlake's petition for rehearing before the Indiana Supreme Court was denied April 30, 1998. A Petition for Writ of Certiorari with the United States Supreme Court was denied January 11, 1999. Timberlake v. Indiana, 525 U.S. 1073 (1999).

On December 7, 1998, Mr. Timberlake filed a petition for post-conviction relief in the trial court, Marion Superior Court II, Criminal Division, Indianapolis, Indiana. The petition was denied on December 27, 1999 after an evidentiary hearing. Mr. Timberlake appealed the denial of his state petition for post-conviction to the Indiana Supreme Court. On August 20, 2001, the Indiana Supreme Court affirmed the denial. Timberlake v. State, 753 N.E.2d 591 (Ind. 2001). The Indiana Supreme Court denied rehearing on December 6, 2001. Mr. Timberlake's Petition for Writ of Certiorari with the United States Supreme Court was denied October 7, 2002. Timberlake v. Indiana, 537 U.S. 839 (2002).

Mr. Timberlake filed a petition for writ of habeas corpus under 28 U.S.C. §2254 on November 8, 2002 in the United States District Court, Southern District of Indiana. This petition was denied March 24, 2004. Mr. Timberlake appealed the denial of his petition to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed the district court's denial of the petition on June 20, 2005. Timberlake v. Davis, 409 F.3d 819 (7th Cir. 2005). A Petition for Rehearing and Rehearing En Banc of Denial Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254 was filed in the United States Court of Appeals for the Seventh Circuit. The petition was denied on August 1, 2005. Timberlake v. Davis, 418 F.3d 702 (7th Cir. 2005). Mr. Timberlake filed a Petition for Writ of Certiorari in the United States Supreme Court which was denied May 1, 2006. Timberlake v. Buss, 126 S.Ct. 430 (2006).

On June 28, 2006, Mr. Timberlake filed a petition for leave to file successive petition for post-conviction relief in the Indiana Supreme Court, Indianapolis, Indiana. No evidentiary hearing was conducted. On December 15, 2006, Mr. Timberlake's petition was denied. The Indiana Supreme Court

On December 27, 2006, Mr. Timberlake filed a Petition for Writ of Habeas Corpus in the United States District Court, Southern District of Indiana to complete litigation of the original petition filed on November 8, 2002. That petition is still pending.

III. ARGUMENT

In moving for a preliminary injunction, Mr. Timberlake seeks only to preserve the status quo while he litigates his constitutional claims. Mr. Timberlake will likely success on the merits of this action, and will suffer irreparable harm in the absence of temporary relief. It is also in the public interest to grant temporary relief because doing so will allow the important question of the

constitutionality of ISP Directive 06-26 or 02-04 to be fully and accurately resolved on the merits and will avoid inhumane, unconstitutional execution. This action was timely brought and the balance of the equities so favors Mr. Timberlake that both justice and controlling precedent require that the Court preserve the status quo until the merits of the matter can be determined.

A. THE LEGAL STANDARD

In order to decide whether a preliminary injunction is appropriate, the Court “must exercise its discretion to determine whether the balance of harms weighs in favor of the moving party or whether the unmoving party or public interest will be harmed sufficiently that the injunction should be denied.” Christian Legal Soc’y v. Walker, 453 F.3d 853, 859 (7th Cir. 2006). In the context of a capital case, where the movant is under a death sentence and the issuance of a preliminary injunction will have the effect of delaying a scheduled execution, the Court must also take into account any unnecessary delay on the part of the prisoner in bringing his claim. Nelson v. Campbell, 541 U.S. 637, 649-650 (2004); Hill v. McDonough, 547 U.S. (2006).

The Eighth Circuit Court of Appeals performed this weighing of the equities in Taylor v. Crawford, 445 F.3d 1095, 1097 (8th Cir. 2006). See also, Taylor v. Crawford, No. 06-1397 (8th Cir. February 1, 2006)(en banc)(Order granting stay of execution). Plaintiff Taylor filed an action pursuant to 42 U.S.C. § 1983 challenging Missouri’s lethal injection protocol on substantially the same grounds that Mr. Timberlake has challenged Indiana’s procedure. See, Taylor, 445 F.3d at 1096. While the action was pending the state scheduled Mr. Taylor’s execution. Id. at 1097. The district court granted a preliminary injunction preventing the execution from proceeding before the merits of the action had been determined. Id. A panel of

the Eighth Circuit initially reversed and ordered that an immediate, truncated hearing be conducted to allow the execution to proceed on schedule, id., but on the subsequent appeal the en banc court granted rehearing and stayed Mr. Taylor's execution, id. at 1098.

Upon reconsideration the panel affirmatively acknowledged that the plaintiff's interest in having an evidentiary hearing on the merits of his claims prior to his execution was "equally [as] strong" as the State's interest in the prompt execution of its judgment. Id. at 1096. The court inquired of the parties how much time they would need to complete the discovery and evidentiary

hearing that had previously begun, and ultimately granted the 60 days that plaintiff's counsel requested. Id. at 1098. This decision, then, stands for the proposition that a plaintiff who timely files a properly-pled 8th and 14th Amendment challenge to a state's lethal injection procedure under 42 U.S.C. § 1983 is entitled to an evidentiary hearing on the merits of his claims and, if the

State schedules his execution in the interim, a preliminary injunction to prevent the State from proceeding with the execution before the hearing can be completed. See also, Cooney v. Taft, 2006 WL 1207982 (S.D.Ohio); Jackson v. Taylor, 2006 WL 1237044 (D.Del.).

B. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

1. Plaintiff's Claim is Cognizable Under 42 U.S.C. §1983

The Complaint does not challenge the legality of Mr. Timberlake's conviction or sentence, nor does it seek to prevent the state from executing him by lethal injection in a lawful manner. Mr. Timberlake's claim is therefore properly brought under 42 U.S.C. § 1983. Hill v. McDonough, 547 U.S. ___, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006). In accordance with its

previous opinion in Nelson v. Campbell, 541 U.S. 637 (2004), the Court held that a claim challenging a method of execution as cruel and unusual punishment that “would not necessarily prevent the State from executing him by lethal injection,” is proper under § 1983 and need not be brought in habeas. Hill, 165 L.Ed.2d 44, 45. As is clear from the Complaint, the instant lawsuit is just such an action. Mr. Timberlake has specifically alleged that there are readily available alternative methods of execution by lethal injection that would both comport with state law and pass constitutional muster. They bring this action simply to ensure that they are put to death in a humane manner.

2. Indiana’s Lethal Injection Protocol Violates the Eighth and Fourteenth Amendments Because it Carries a Tremendous Risk of Unnecessary Pain During Executions

The Eighth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the imposition of cruel and unusual punishments. U.S. Const. Amend. VIII. The prohibition includes the “infliction of unnecessary pain in the execution of the death sentence.” Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1974); see also, Gregg v. Georgia, 428 U.S. 153, 173 (1976)(holding that the Eighth Amendment prohibits the “unnecessary and wanton infliction of pain”).

Because it is impossible to determine with certainty before the fact whether a particular inmate will suffer unnecessary pain during his execution, the question of whether a particular execution procedure will inflict unnecessary pain is fundamentally an inquiry as to whether the inmate is “subject to an unnecessary *risk* of unconstitutional pain or suffering.” Cooper v. Rimmer, 379 F.3d 1029, 1033 (9th Cir. 2004)(emphasis added); Fierro v. Gomez, 77 F. 3d 301, 307 (9 Cir. 1996) (“Campbell also made clear that the method of execution must be considered th

in terms of the *risk* of pain.” (emphasis in original)); Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994). “For any individual challenging a death sentence, evidence of botched executions can only be put in terms of probability.” J.D. Mortenson, *Earning the Right to be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, 88 Iowa L. Rev. 1099, 1118-20 (2003).

Of course, any medical or quasi-medical procedure inherently carries a risk that a mistake or accident might cause unforeseen pain. Thus, the Eighth Amendment does not require executioners to eliminate all possible risk of pain or accident from their execution protocols. See, Resweber, 329 U.S. at 464; Campbell, 18 F.3d at 687. A risk of pain becomes *unnecessary*, however - and unconstitutional - when experience with the execution procedure demonstrates that there are foreseeable problems that will result in the inmate suffering intense pain that alternative procedures do not engender.

The assessment of the risks associated with a particular procedure is not static. Over time, our knowledge of the workings of the human body increases, technology advances, new information comes to light and old information is more thoroughly understood and interpreted. Accordingly, methods of execution are developed, refined and abandoned. Execution by hanging, firing squad, gas chamber and electric chair, once standard, have all become virtually obsolete with the passage of time. If a State opts to utilize capital punishment, the 8th Amendment imposes an obligation upon it to keep up with and respond to new developments and information and to ensure that they are using the most humane, least painful procedure available.

Evidence is now overwhelming that the particular lethal injection protocol chosen and currently in use by the ADC is far from the most humane available; rather, it engenders serious risks of causing excruciating pain and torture that other available methods simply do not. See, Cooley v. Taft, No. 2:04-cv-1156, 2006 WL 1207982 * 5 (S.D.Ohio April 28)(noting “mounting evidence calling Ohio’s lethal injection protocol, and the same or similar protocols employed by other states, increasingly into question”).

a. The Protocol Is Old And Was Ill-Conceived At The Outset

Legislation directing a change in the method of execution from electrocution to lethal injection was passed in Indiana in 1983. As it does to this day, the statute left all decisions regarding the particular chemicals to be injected and the administration procedures to be employed to the discretion of the Department of Correction. See, Ind. Code§ 35-38-6-1 (1983). From discovery provided by the Defendant, it appear that the protocol was designed with no input or advice from medically trained personnel.

The Texas protocol, upon which the Indiana procedure was apparently modeled was designed by lay corrections officials with no medical knowledge. Louisiana is another state that looked to Texas when it came time to figure out how to execute someone by lethal injection. When the chief legal counsel of the Louisiana Department of Corrections consulted with the warden of the Texas Department of Corrections responsible for executions about the “medical portion” of the Texas protocol, she was told:

[T]hat the only thing that mattered was that the guy ended up dead and that he wasn’t worried too much about the amount of medicine. He had certainly used the same types of medicine, but that he wasn’t totally concerned about the amounts or what it may or may not do. They ended up dead, and that’s all he was worried about. The rest of our conversation with him tracked that same

thing. He was not terribly concerned about policy, procedure, or who did what, when, where. Just so the right result happened.’

So Long as They Die: Lethal Injections in the United States, 18 Human Rights Watch 1(G) at 16-17 (2006)(Exhibit 5).

The Defendant has used the protocol adopted in this ad hoc, unscientific manner for all executions by lethal injection conducted in Indiana, and still uses that same procedure.

b. The Protocol Arbitrarily Selects Painful Drugs And Fails To Ensure Adequate Anesthesia During Their Administration

The Defendant does not provide the authority by which he uses the drugs and drug dosages listed in Exhibit 3, paragraph 3. The first drug, Sodium Pentothal, is an anesthetic, intended to rapidly induce unconsciousness. The second active drug, Pancurorium Bromide, is a neuromuscular blocking agent that causes complete paralysis. Finally, Potassium Chloride is introduced to cause cardiac arrest.

Potassium Chloride is a salt that naturally occurs in trace amounts in the human body. In large quantities, however, such as the 100 milligrams listed in Exhibit 3 at ¶ 3, it not only causes the heart to stop beating but also causes excruciating pain as it travels through the circulatory system. The drug activates the sensory nerve fibers of the insides of the veins as it courses through the body from the injection site to the heart, causing a sensation that has been likened to fire scorching along the vessels. See, Exhibit 4 at ¶12 (Declaration of Dr. Mark Heath).

The neuromuscular blocking agent Pancurorium Bromide stops all movement, including that necessary to breathe. The drug has no effect, however, on consciousness or the ability to perceive pain. If a prisoner is conscious when this drug is administered, he will feel the visceral

pain and distress of slow suffocation, much like as if he were drowning or being crushed to death. Id. at ¶15.

Having made the choice to administer two drugs that cause excruciating pain and agony, a choice that was not required by either statute or practical considerations, the Defendant can only fulfill its responsibility under the 8th Amendment to avoid gratuitous and unnecessary pain and torture only if it ensures that the prisoner is adequately anesthetized at the time that those drugs are administered. In order to ensure that the prisoner does not feel pain a surgical plane of anesthesia, or that level of anesthesia that prevents conscious perception of noxious stimuli of the magnitude of surgical procedures, must be achieved and maintained throughout the execution procedure. However, the drug that is used induce anesthesia, administered in accordance with the procedures listed in Exhibit 3 ¶ 3, is an exceedingly inferior choice for the task and fails to provide the necessary assurance of adequate anesthesia.

(1) Sodium Pentothal is an Ultra-Short-Acting Barbiturate Unsuitable for use as Sole Anesthetic Agent for Executions, Especially in the Dose the Defendant Plans to Use

Sodium Pentothal is an ultra-short-acting barbiturate that is used for certain specific purposes in surgical anesthesia. Its effect has a rapid onset and then a rapid recovery; the patient becomes unconscious very quickly after the drug is introduced, and the effects begin to wear off very soon thereafter. Sodium Pentothal is therefore ideal for the provision of anesthesia during intubation at the beginning of surgery, for example, because it induces deep anesthesia rapidly but if there are problems with the intubation the patient will regain consciousness and the ability to breathe independently very quickly. See, Exhibit 4 at ¶ 24-25 (Declaration of Dr. Heath).

The reasons for the drug's utility in certain surgical contexts, however, are also reasons why Sodium Pentothal is decidedly *inappropriate* for use as the sole anesthetic agent during a lethal injection procedure. *Id.* at ¶ 26-27. Although the Indiana protocol calls for a dose of the drug that is large enough to be lethal if properly administered, any problems with the delivery of the full dose engender the serious risk that the inmate will receive an insufficient amount of the drug to induce a deep enough plane of anesthesia, or to maintain that degree of anesthesia throughout the execution process. In short, if the inmate does not receive the full amount of Sodium Pentothal, and there are many reasons why that can and apparently does happen, the anesthetic effect may wear off too quickly and the inmate may be conscious and suffering during the remainder of the procedure.

The Defendant's protocol unnecessarily enhances these risks by its arbitrary and unnecessary adoption of 5 grams as the dose of Sodium Pentothal to be administered. The level of anesthesia, if any, achieved in each individual inmate depends on the amount that is successfully administered, although other factors such as the inmate's weight and sensitivity/resistance to barbiturates are also important. Many foreseeable situations exist in which human or technical errors could result in the failure to successfully administer the intended dose. If error occurs that results in the prisoner receiving less than the 5 gram dose, the prisoner be inadequately anaesthetized and therefore conscious and suffering. Exhibit 4 at ¶ 27 (Declaration of Dr. Heath).

Additionally, the Defendant's protocol fails to even require that additional Sodium Pentothal be available in the execution chamber in the event that problems with delivery of the dose are detected and more of the anesthetic agent is determined to be necessary. Because of its instability, the drug is distributed in powder form and must be placed into solution before it may be injected. *Id.*, at ¶ 27 (a). There is no directive that requires even that extra Sodium Pentothal powder be on hand, much less extra syringes of the drug already mixed into solution, and so in the event that execution personnel were to detect signs of inadequate anesthetic depth or possible consciousness once the execution process was under way, the protocol ensures that there is nothing they could do about it. As noted, the circumstances under which a failure to achieve and maintain adequate anesthesia may occur are many, varied and common.

(2) Obtaining IV Access for Execution Purposes Requires Training and Skill that the Defendant's Execution Personnel Lack

Establishing peripheral intravenous access to an inmate to facilitate the administration of the lethal drugs called for by Exhibits 1 (ISP 06-24) 2 (ISP 02-04) is a complex and risky medical procedure that should only be performed by properly medically trained and qualified personnel. The process is fraught with the potential for error. Under the best of circumstances, it is vital that the IV set-up be assembled properly and securely. The set-up consists of multiple parts and pieces of tubing, which may leak or otherwise fail to permit the unobstructed flow of chemicals into the inmate's circulatory system if not correctly attached. *See* Exhibit 4 at ¶ 27(e) (Declaration of Dr. Heath).

The tourniquet that is applied to facilitate access to the peripheral vein must be removed

once IV access is achieved; failure to do so will obstruct the flow of the anesthetic agent into the inmate's body. See, Id. at ¶ 27(k). Placement of the extensive restraining straps that the Defendant uses to tie the inmate down to the gurney may cause the same problem. *See* Exhibit 7 at ¶ 27(l)(Declaration of Dr. Heath).

It is critical that the catheter be inserted into the vein in a precisely correct fashion in order to ensure that the full dose of the anesthetic drug is delivered into the inmate's circulatory system. If the catheter is inserted incorrectly, the drug will go into the tissue surrounding the vein rather than into the vein itself. See, Id. at ¶ 27(f). This condition, known as infiltration, is not uncommon. Id. Uncorrected, it will result in a failure of the anesthetic to reach the central nervous system and a failure to render the inmate unconscious. Id. Once properly inserted, the catheter must be adequately secured with tape or by other means, or else it may shift and result in infiltration. Id. at ¶ 27(j).

Even finding a suitable peripheral vein into which the catheter may be placed can be a medically complex and difficult endeavor. See, Exhibit 6 (News Rpt of Marvin Bieghler Execution), Exhibit 7 (News Rpt of Tommy Smith Execution). Due to a variety of conditions, including obesity, prior intravenous drug use, corticosteroid treatment and even just naturally small or deep veins, obtaining peripheral IV access may be difficult or even impossible. Id. at ¶ 36. The very nature of the execution process may exacerbate this problem, because the autonomic manifestations of the anxiety associated with impending death include constriction or narrowing of the veins. Id. at ¶ 41.

In the event that peripheral IV access proves impossible to obtain, Indiana's protocol calls for the use of dramatically more medically complex, risky and invasive procedure of a cut-down, which entails making a deep incision into the inmate's skin in order to access a vein that is not accessible from the surface, or a central line, which requires insertion of the catheter into a large vein such as the subclavian vein in the chest or the femoral vein in the groin. See, Exhibit 8 (Cut-down photos).

Both procedures have been conducted in Indiana by the Defendant and his predecessors. *See* Exhibits 9 (Post mortem photos of Tommy Smith). Despite the complexity of and risks associated with these types of procedures neither Exhibit 1 or 2 set forth any procedures governing the use of these techniques. The protocol fails to specify how they are to be conducted or to set forth the qualifications required of the personnel who will actually perform them. Given the nature of the procedures it is unacceptable that they be performed by anyone except for medically trained personnel possessed of adequate skill and experience, but the protocol fails to require any particular knowledge or ability at all. Emergency medical training is insufficient for the performance of such medical procedures.

(3) Maintenance of Adequate Anesthesia Throughout the Execution Process Requires Training and Skill that the Defendant's Execution Team Lacks

Even once peripheral IV access has been established and the catheters are properly inserted, there are still a large number of problems that may arise which can interfere with the proper delivery of anesthesia. It is critical, therefore, that the inmate be closely monitored by medically trained and experienced personnel throughout the execution process in order to detect problems as they occur and ensure that the inmate is maintained on a sufficiently deep plane of

anesthesia. See, Exhibit 4 at ¶¶ 31-32 (Declaration of Dr. Heath). Even most qualified nurses and paramedics are not trained in the use of ultra-short-acting barbiturates; these drugs are used only by anesthesiologists and a very select group of nurse who have obtained significant experience in intensive care units and as nurse anesthetists. Id. at ¶ 30. Training equivalent to that of an anesthesiologist or a CRNA is minimally required in order to ensure that an execution using the drugs and procedure set out humane. Id. However, Indiana's protocol fails to provide for any monitoring of the inmate during the execution process, much less monitoring by individuals competent in the provision of general anesthesia.

Errors and problems are potentially rife beginning at the stage of preparation of the lethal drugs. Sodium Thiopental is unstable in solution, and is therefore distributed by the manufacturer in powder form. Before it may be injected intravenously, the powder must be mixed with liquid, a process that requires knowledge of pharmaceuticals and familiarity with terminology and abbreviations. Id. at ¶ 27(a). The Defendant apparently provides no guidance to execution personnel on the this issue.

Indiana's protocol sets out that the "injection team prepares two (2) sets of seven (7) syringes to be used during the execution." Exhibit 1 (ISP 06-24). There is no indication that the contents of the syringes be marked on the syringes, which means that if a drug is erroneously placed in a syringe, the error is likely to go undetected and the drugs will be administered in the wrong order. Such lack of labeling is far below the appropriate medical standard of care and would never be permitted in the clinical context. Administration of the drugs in the wrong order may also result from the fact that each syringe is a separate until that must be attached in series to the IV set up by hand. The protocol fails to guard against the possibility that the executioner

might select the incorrect syringe, or to provide for monitoring of the inmate to ensure that such an error is immediately detected if it occurs, or to prescribe the steps to be taken if such a situation is detected.

If the lethal drugs are administered in the wrong order a range of negative consequences may ensue. Several of the syringes are supposed to contain saline solution to be administered between drugs in order to flush the IV lines of all traces of the preceding agent. Of primary importance is the fact that, if mixed with Pancurorium Bromide outside of the body, Sodium Pentothal will precipitate, i.e. solids will form in the solution, impairing or preventing delivery of the full dose of anesthetic agent. Hence, if error in the selection of syringes results in the introduction of Pancurorium Bromide before the line has been flushed with saline solution, inadequate anesthesia may result.

Indiana's lethal injection protocol requires that the executioners who inject the lethal drugs into the IV set up be located in a room that is apart from the execution chamber where the inmate is placed on the gurney, separated by a window with a hole in it for the IV lines to pass through. Because of the distance between the inmate and the executioners that this procedure necessitates, extended IV tubing is required. The introduction of extra length and components to the iv set-up not only increases the number of sites where leakage may occur, see, Exhibit 4 at ¶ 27(e)(Declaration of Dr. Heath), but also increases the risk that the tubing may coil or kink.

Even when properly placed initially, the tip of an IV catheter may migrate during the course of the execution so that it is outside of the vein at the time of the introduction of the anesthetic agent and infiltration occurs. See, Exhibit 4 at ¶ 27(g)(Declaration of Dr. Heath). Although the catheter appears to be securely and properly placed, too, the process of inserting it

may weaken or damage the vein wall such that the vein ruptures when the administration of the lethal drugs begins. Id. at ¶ 27(h). This risk is increased by the fact that inexperienced, untrained personnel may exert excessive pressure on the syringe plungers, increasing the velocity of the administration of the drug and consequently the pressure that is placed on the vein walls. Id. Indeed, excessive pressure on the plunger can lead to tearing or rupture of the vein even in the absence of damage caused by the initial insertion of the catheter. Id. at ¶ 27(I).

Because of each of these potential problems and more, constant, close monitoring of the inmate's plane of anesthesia throughout the execution process by individuals who are properly trained and skilled in anesthesiology is indispensable. And yet, the Defendants' protocol fails to provide for any monitoring at all once the execution is underway, much less monitoring by personnel who have the requisite knowledge and experience to detect and rectify any problems that may arise them.

(4) Even if Defendant's Execution Team Were Qualified to Administer IV Anesthesia, the Use of Pancurorium Bromide and the Physical Arrangement of the Execution Chamber Preclude Effective Monitoring

Not only does Indiana's lethal injection protocol fail to provide for monitoring of the inmate by persons qualified in assessing anesthetic depth, it calls for a physical arrangement of inmate and executioners that would unnecessarily hinder effective monitoring even if it were attempted. As noted, the protocol requires that the executioners who inject the lethal drugs into the iv set-up be located in a room that is apart from the execution chamber where the inmate is placed on the gurney, separated by a window with a hole in it for the iv lines to pass through. The persons who control the administration of the drugs, then, are the furthest away of any execution chamber personnel and their line of sight to the inmate is impeded. The distance

entirely precludes the close monitoring of the diagnostic signs of anesthetic depth that are constantly checked during surgical procedures.

c. The Risk of Torture and Pain Created by Indiana's Execution Protocol Has been Realized in Indiana and Elsewhere

There is now ample evidence that Indiana's execution procedure has caused some inmates executed by the Defendant and his predecessors to experience unnecessary pain and suffering during their executions. Both execution records and witnesses' accounts of these executions provide evidence that is indicative of continued consciousness following the purported administration of the sodium pentothal. A dose of Sodium Pentothal of 2mg or more, properly administered, will cause unconsciousness within one minute or less. Exhibit 4 at ¶ 42 (Declaration of Mark Heath). However, in several executions that have been performed in Arkansas, the inmate displayed signs of consciousness for considerably longer than the one minute maximum that is indicative of successful administration of the anesthetic.

C. The Serious Risks Engendered by Indiana's Lethal Injection Protocol are Unnecessary and Unconstitutional

Exhibit 1 (ISP 06-24) and Exhibit 3 (Discovery Response) creates an unacceptable and unnecessary quantum of Administrative Directive 96-06 both creates an unacceptable and unnecessary quantum of risk that Mr. Timberlake will not be adequately anesthetized and therefore will suffer excruciating pain during his execution, and also fails utterly to account for these obvious contingencies and instruct personnel on how to react to or prevent them. In this respect, the lethal injection protocol is starkly different from the judicial hanging protocol that the Ninth Circuit Court of Appeals upheld in Campbell v. Wood, 18 F.3d 662, 683 (9th Cir. 1994). Analogous to the risk that an inmate will be conscious and in excruciating pain during the

lethal injection process, the State of Washington's judicial hanging procedure carried the risk that an inmate would die of asphyxiation, which is slow and painful, or decapitation, which mutilates the inmate's body, rather than dying within seconds as intended. See id. at 683.

Unlike the Indiana's lethal injection protocol, however, Washington's protocol carefully acknowledged the risks that it engendered and provided detailed procedures specifically designed to minimize them. Thus, as the court noted, Washington's protocol reflected medical opinions as to the manner in which different methods of hanging would kill inmates and which modes of causing death were the most humane. *Id.* In order to avoid death by asphyxiation or decapitation, the protocol included detailed instructions on numerous factors that could affect the manner of death, including the diameter of the rope; the method of tying the knot; treating the rope with wax and boiling it to reduce elasticity; and the length of the drop in relation to body weight and the manner in which that length should be calculated. Id. at 683-85. All of these instructions were the result of careful consideration of the available scientific and medical evidence. In light of the Washington protocol's ample provision for the risks of an inhumane death, the Ninth Circuit concluded that the risk of a botched execution was "slight," and had been "minimized as much as possible." Id. at 687 & n.17.

In contrast to Washington's protocol, it is impossible to detect in the version of Exhibit 1 (ISP 06-24) any attempt on the Defendant's part to account for the problems that can and do arise during an execution by lethal injection. This failure is particularly egregious in light of the fact that simply having a qualified person verify, visually and tactically, that the inmate is indeed anesthetized following the administration of the sodium pentothal, would go a long way towards

mitigating the risk of unnecessary pain. See, Exhibit 4 at ¶ 32 (Declaration of Mark Heath M.D.) Moreover, the necessity for such monitoring may be obviated by the selection of alternative, equally effective anesthetic agents and by the use of one of the drugs capable of causing cardiac arrest that does not cause excruciating pain. Id. at 13. Yet it does not appear that the Defendant has even considered these or any other means of lessening the gratuitous dangers created by its protocol. This egregious failure renders the significant risk of error truly unnecessary and unconstitutional. Cf. Campbell, 18 F.3d at 687 & n.17.

D. MR. TIMBERLAKE WILL SUFFER IRREPARABLE HARM IF A PRELIMINARY INJUNCTION IS NOT GRANTED

If the Defendant is not enjoined from executing him in accordance with Exhibit 1(ISP 06-24), Mr. Timberlake will likely suffer irreparable harm. Being forced to endure excruciating pain during the execution process clearly constitutes irreparable harm. See, Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996)(holding that continued pain and suffering resulting from deliberate medical indifference is irreparable harm). As is clear from the foregoing, there is ample evidence that Defendants' proposed method of execution carries a significant and unacceptable risk that Mr. Timberlake will indeed suffer that harm. The threat of harm is both "real and immediate," and thus the situation is one that is "ripe for injunctive relief." See, Goff v. Harper, 60 F.3d 518, 521 (8th Cir. 1995). Moreover, Mr. Timberlake will have no retrospective remedy for the constitutional violation, as he will no longer be alive.

E. THE BALANCE OF HARMS STRONGLY FAVORS MR. TIMBERLAKE

In contrast, the harm to the State and the Defendant that will result from the entry of a preliminary injunction is slight. The State undoubtedly has a strong interest in the prompt execution of its judgments. The delay resulting from granting the temporary relief sought

herein, however, will have little adverse effect upon that interest. See Gomez v. US. Dist. Ct. for Northern Dist. of Cal., 966 F.2d 460,462 (9th Cir. 1992) (Noonan, J., dissenting from grant of writ of mandate) (“The state will get its man in the end. In contrast, if persons are put to death in a manner that is determined to be cruel, they suffer injury that can never be undone, and the Constitution suffers an injury that can never be repaired.”). The balance of harms tips sharply in favor of entering a preliminary injunction.

F. GRANTING TEMPORARY RELIEF IIS IN THE PUBLIC INTEREST

Whether the State is executing its prisoners in a way that subjects them to an excruciatingly painful, torturous death is clearly a matter of vital public interest. The standards of decency and humanity in a society such as ours are gravely offended by such practices, and so it is affirmatively in the public interest to address and resolve the merits of the Mr. Timberlake’s claim in order to identify and put an end to unnecessary procedures that pose a risk of causing gratuitous suffering. Indeed, the citizens of the State of Indiana, through their elected representatives, have expressly acknowledged the importance of conducting executions as humanely as possible by changing the method from electrocution to lethal injection as a result of the belief that the latter reduces unnecessary suffering.

There is now compelling evidence that Indiana’s lethal injection protocol creates a significant and unacceptable risk of, and on multiple occasions has actually resulted in, the infliction of unnecessary pain. As noted above, the claim does not become ripe for resolution until an execution is imminent but, if a preliminary injunction is not granted, the execution will necessarily take place before the issues can be adjudicated. In light of the importance of the questions involved, it is clearly in the public interest that temporary relief be granted in the

instant case to solve this dilemma and permit a definitive determination of the merits to be made. “[T]he 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 and could never be served by rushing to judgment at the expense of a condemned inmate’s constitutional rights.” Cooey v. Taft, 2006 WL 1207982 at *6 (S.D.Ohio).

G. CONCLUSION

The purpose of this lawsuit is not to prevent the State from executing Mr. Timberlake. It is to prevent it from executing him in a manner that subjects him to excruciating pain and torture that is gratuitous and unnecessary and in violation of the Constitution. To avoid the risk that his execution will be performed in such a manner, Mr. Timberlake is entitled to relief under 42 U.S.C. § 1983. In order to allow him an opportunity to prove that entitlement, and to obtain an adjudication of the merits of his claim Mr. Timberlake respectfully requests that the Court issue a preliminary injunction preventing the Defendant from executing him by means of lethal injection under the protocol currently in effect in the State of Indiana.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically and served upon the Thomas D. Quigley, Stephen R. Creason, and Betsy M Isenberg through the Court's CM/ECF system and by separate electronic mail transmission to thomas.quigley@atg.in.gov, betsy.isenberg@atg.in.gov, and stephen.creason@atg.in.gov on January 9, 2007.

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