

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

NORMAN TIMBERLAKE,)	
)	
Plaintiff,)	
)	
)	
v.)	NO. 1:06-cv-1859-RLY-WTL
)	
ED BUSS, Superintendent)	
Indiana State Prison)	
Michigan City, Indiana,)	

**PLAINTIFF’S REPLY TO DEFENDANT’S RESPONSE IN OPPOSITION TO MOTION
FOR PRELIMINARY INJUNCTION**

Plaintiff, by counsel, Brent Westerfeld and Lorinda Meier Youngcourt, respectfully reply to Defendant’s Response in Opposition to Plaintiff’s Motion for Preliminary Injunction as follows:

Timeliness

Defendant’s assertion that equitable principles dictate that Timberlake’s action should be dismissed is built on the assumption that Timberlake is challenging lethal injection per se as the method of execution. He is not. Timberlake, consistent with Nelson v. Campbell, 541 U.S. 637 (2004) and Hill v. McConough, 126 S.Ct. 2096 (2006), is seeking to enjoin the manner Defendant apparently intends to use in executing his death sentence.

Apparently, the protocol Defendant intends to use was determined January 12, 2007, after Timberlake filed this action. All the information which prompted this case came to light on or after December 15, 2006. Timberlake cannot be held dilatory for challenging a protocol of which Defendant is even unaware.

Additionally, Defendant fails to disclose what occurred before Timberlake filed this action.

Undersigned counsel contact Defendant's counsel, Stephen Creason, on December 27 or 28, 2006 to determine whether any changes in Indiana's execution protocol were in the works given the December 13, 2006 Florida execution of Angel Nieves Diaz. Mr. Creason said he would check and thereafter advised Timberlake's counsel by telephone that no changes were in the works.

As set forth in the *Complaint*, Indiana's protocols are similar to Florida's. They use the same chemicals and similarly unqualified personnel in the execution process. Yet, Defendant was making no changes despite Timberlake's approaching execution. Given these facts and the information available about the Diaz execution, Timberlake's filing of this action cannot be considered dilatory.

Defendant has also taken a position at odds with one of his defenses. He asserts Timberlake's claims are "not ripe for adjudication" in his *Answer* at p. 5, but here argues it's too late. When will Timberlake's claim be ripe? It seems that Defendant takes the position that Timberlake can only bring this action after the constitutional violation occurs. *Nelson* and *Hill* clearly hold that this is not the law.

Defendant also disingenuously argues that the State of Indiana must be permitted to proceed because the changes to the protocol take too long. He contends it "take[s] time" to change the Indiana's protocol and that it takes a "reasonable time" to investigate alternatives.¹ *Response in Opposition to Plaintiff's Preliminary Injunction* p. 4. However, it is now clearly that change in protocol take a mere eight (8) days. Defendant proposed changing the protocol on January 4, 2007. Apparently, this protocol was approved on Friday January 12, 2007. Thus, while asserting Timberlake should be barred from proceeding because he has not given Defendant time to investigate, Defendant has apparently

¹ Defendant makes similar claims in refusing to do the simple act of disclosing documents requested in *Plaintiff's Request for Production*. Apparently, Defendant can investigate, study, review, assess, and formally change the protocol for executing a prisoner in 8 days, but he claims it would take 60 days to "assemble, compile, assess, review, and transmit" the documents Timberlake requested in discovery. *Plaintiff's Response to Request for Production* at 3.

investigated and made changes in its protocol.

The point from which the timeliness of Timberlake action should be measured is not the passage of lethal injection in 1995. Nor was it three years ago or six months ago. Timberlake's execution was not imminent until December 15, 2007. Timberlake had not exhausted federal habeas remedies available to him. Moreover, Timberlake still had not exhausted federal habeas when he filed this action since that action began on two days before this one.

Timberlake's claim became ripe on December 15, 2006. Before December 15, 2006, Timberlake's counsel reasonably believed he would be proceeding in state post-conviction proceedings and that he would be there today, not here. Despite this, counsel in good faith immediately filed this action once he confirmed Defendant intended to execute Timberlake using a protocol similar to that which was used by Florida in executing Mr. Diaz. A protocol which Florida's Governor determined needed to be reviewed based on "constitutional imperative." *Complaint* at Exhibit E p. 2. Given the circumstances, Timberlake has not been dilatory. The equities weigh in favor of allowing this action to proceed.

Likelihood of Success

Defendant's contention that Plaintiff has not shown a reasonable likelihood of success is built on challenges to the form of the information Plaintiff presented, not its substance. That Dr. Heath's Affidavit was submitted in an Arkansas case does not change the substance of the information presented. As to the assertion that Arkansas uses 40% of the thiopental that Indiana uses, Florida uses double the amount of thiopental (10 grams) that Indiana intends to use. See, Florida Department of Corrections, "Execution by Lethal Injection Procedures," Effective for executions after August 16, 2006, p. 3. Given that Mr. Diaz lay conscious even after 10 grams of thiopental was injected by his

executioners, it is reasonable to infer the amount of thiopental does not diminish the substance of Dr. Heath's opinions. See, *Complaint* Exhibit E p. 2.

Defendant makes much of the qualification of the persons under Indiana's protocol, but there has been no disclosure of their qualification in the areas of pharmacology and "medical methods and procedures." *Response to Request for Production* p. 4-5. Significantly, Defendant has not disclosed "licensure or certification" for the members of the execution team in the field of emergency medical services. He has disclosed "backgrounds" as EMT's, emergency medical services, Red Cross First Responder, and home hospice. That does not qualify them to make judgments about medical matters. See, Ind.Code §16-31-3-1 et seq.

What happened in Florida with the Diaz execution and the actions Florida's Governor has taken contradicts Defendant assertion that Timberlake has presented only a "hypothesis that something might go wrong." *Response* p. 5. More importantly, Defendant admits in his *Answer* Timberlake's *Complaint* that "[t]he risk of inflicting severe and unnecessary pain and suffering in the lethal injection process is particularly grave in the execution of Plaintiff." *Complaint* p. 6; *Answer* p. 3. Timberlake has shown a likelihood of success.

Conclusion

This action was brought at timely and appropriate time. Defendant has hampered this Court's ability to consider fairly and fully the merits of this action. Defendant only challenges the form of the information presented, not its substance. He has provided no information contradicting the *Complaint* and *Motion for Preliminary Injunction*.

Respectfully submitted,

/s/ Brent Westerfeld

Brent Westerfeld

Lorinda Meier Youngcourt

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing will be filed electronically. Notice of this filing will be sent to the Counsel for Defendants, Thomas Quigley and Betsey Isenberg and Stephen Creason, Deputy Attorneys General, Indiana Government Center South, 402 West Washington Street, Indianapolis, Indiana, 46204. Parties may access this filing through the Court's system. Thomas Quigley thomas.quigley@atg.in.gov Betsey Isenberg betsy.isenberg@atg.in.gov, and Stephen Creason stephen.creason@atg.in.gov this 15th day of January, 2007.

/s/ Brent Westerfeld

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