

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION**

RICHARD COOEY,

Plaintiff,

MICHAEL BEUKE,

Plaintiff-Intervenor,

v.

TED STRICKLAND, et al.,

Defendants.

Case No. 2:04-cv-1156

District Judge Gregory L. Frost

Magistrate Judge Mark R. Abel

Execution Scheduled May 13, 2010

Beuke's Motion for a Temporary Restraining Order or a Preliminary Injunction and
Request for a Hearing

Michael Beuke moves this Court, pursuant to Federal Rule of Civil Procedure 65(a) or 65(b), for a temporary restraining order or preliminary injunction barring his May 13, 2010 execution under the Ohio Department of Rehabilitation and Corrections alternative execution plan, or "Plan B," adopted on November 30, 2009. Beuke details his requests in the attached memorandum in support.

Respectfully submitted,

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By: /s/Dale A. Baich
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MEMORANDUM IN SUPPORT

Beuke has real concerns that his execution if carried out under the alternative execution plan or “Plan B” adopted by the Ohio Department of Rehabilitation and Correction (“ODRC”) on November 30, 2009,¹ will not result in the dignified, humane, quick, and painless death that is required by the federal and state constitutions and by ORC § 2949.22(A). Beuke’s allegations in his amended complaint² and in support of his request for an injunction are based on facts unique to him, and a hearing is required to prove his claims. Granting a temporary restraining order or a preliminary injunction is proper and necessary so that Beuke may fully litigate his claims, including presenting evidence to this Court at a hearing, before they are rendered moot by his execution, an execution that may well be cruel and unusual in violation of the Eighth Amendment.

I. Procedural History.

An action challenging the lethal injection procedures in Ohio was initiated before this Court in *Cooley v. Strickland*, Case No. 2:04cv1156 (S.D. Ohio). On November 6, 2007, Beuke filed a motion to intervene in the pending *Cooley* action (Doc. No. 240); and on February 15, 2008, this Court granted the motion, and his complaint was filed (Doc. Nos. 261, 265). His action was later dismissed by the Court on August 25, 2008, based on a statute of limitations defense. (Doc. No. 355.) Beuke did not appeal this finding to the Sixth Circuit.

In the interim, extensive litigation was ongoing in this Court concerning the lethal injection process, of which Beuke was not a party. On September 15, 2009, the State’s attempt to execute

¹See ODRC Execution Protocol Effective November 30, 2009. (Doc. No. 607-1.)

²Simultaneous to this motion, Beuke is filing with this Court a motion for leave to amend his complaint. (Doc. No. 751.)

Romell Broom went very wrong, and that execution was halted.

On November 4, 2009, the State of Ohio scheduled Beuke's execution for May 13, 2010. On November 30, 2009, Terry Collins, a named defendant in the lawsuit and the former Director of ODRC, issued a new policy that changed the way that lethal injections are carried out in Ohio. (Doc. No. 607-1.) Because this change was so dramatic, the statute of limitations to challenge the new procedure began to run anew.

On March 17, 2010, Beuke filed a Motion to Intervene in the pending lawsuit. (Doc. No. 699.) On March 23, 2010, the Court granted the motion to intervene, and Beuke's complaint was filed. (Doc. Nos. 702, 705.) On April 6, 2010, the Defendants filed a Motion to Dismiss the Complaint. (Doc. No. 719.) On May 3, 2010, Beuke filed a Motion for Leave to Untimely File a Response in Opposition to the Motion to Dismiss his Complaint (Doc. No. 748), which this Court granted (Doc. No. 749).

II. Relevant Factual Background.

Michael Beuke suffers from a seizure disorder and, as a result, he has been taking phenobarbital daily for at least five years. (Excerpts of Michael Beuke's Medical Records, attached herein as Ex. 1; Declaration of Mark J.S. Heath, M.D. dated May 4, 2010, attached herein as Ex. 2.) Phenobarbital is a barbiturate that acts as an anticonvulsant to depress the central nervous system. (Ex. 2 at 3.) Beuke also takes a medication called phenytoin. (Ex. 1.)

ODRC has an alternative execution plan, or "Plan B," which purports to kill a prisoner using intramuscular injection of two drugs — hydromorphone and midazolam. (Doc. No. 607-1 at 10.) Midazolam is a drug that produces effects of sedation, anti-anxiety, and unconsciousness. (Ex. 2 at 3.) *See also Cooley v. Strickland*, 589 F.3d 210, 230 (6th Cir. 2009) ("Midazolam, the second drug

used in the intramusculatory injection procedure, is commonly used to sedate and relieve the anxiety of patients undergoing uncomfortable procedures or anesthetization before surgery.”) Because Beuke has been prescribed phenobarbital chronically and most recently has been taking 120 milligrams per day, there is a high likelihood that Beuke will have a resistance or tolerance to the small amount of midazolam if his execution is carried out under Ohio’s Plan B. (Ex. 2 at 4; Declaration of Edward D. French, Ph.D. dated May 6, 2010, attached herein as Ex. 3.) Moreover, due to his intake of phenobarbital, the activity of Beuke’s liver enzymes are increased and will metabolize medication, such as midazolam, more quickly. (Ex. 3 ¶ 4.) Likewise, studies show that phenytoin and mizadolam together decrease peak plasma concentration. (Ex. 3 ¶ 5.) When peak plasma concentration is reduced, the effect of mizadolam will be reduced. (Ex. 3 ¶ 5.)

As a result of Beuke’s intake of both phenobarbital and phenytoin, the effects of midazolam will be significantly reduced, and the rate at which Beuke descends into unconsciousness will be substantially prolonged. (Ex. 2 at 4; Ex. 3 ¶ 7.)³ Because of the medication he takes for his seizure disorder, Beuke will likely consciously experience the massive dose of hydromorphone, the side effects of which can include: nausea, vomiting, combativeness, disinhibited speech, delirium, anxiety, fear, euphoria, dysphoria, delusional ideation, hallucinations, sensory distortions, or disorientation. (Ex. 2 at 4.) Notably, during this time, Beuke could be rendered “incompetent to comprehend or understand what is transpiring or why it is transpiring, and he will remain in this state for many minutes.” (Ex. 2 at 4.)

³Beuke’s use of phenobarbital would also likely decrease the effect of hydromorphone. (Ex. 3 ¶¶ 6-7.)

III. This Court Should Grant Beuke A Temporary Restraining Order or Preliminary Injunction.

Beuke seeks a temporary restraining order (TRO) or preliminary injunction barring Defendants from executing him by means of Plan B. *See* Fed. R. Civ. P. 65. The purpose of a TRO is to preserve the status quo until the rights of the parties can be fully and fairly litigated. *Performance Unlimited v. Questar Publishers*, 52 F.3d 1373, 1378 (6th Cir. 1995) (citing *American Federation of Musicians v. Stein*, 213 F.2d 679, 682 (6th Cir. 1954) (quoting *Blount v. Societe Anonyme*, 53 F. 98, 101 (6th Cir. 1892)).⁴

In determining whether to grant a preliminary injunction, this Court “must consider and 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.” *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004) (citing *Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield Ass’n*, 110 F.3d 318, 322 (6th Cir. 1997) (citations omitted)). The four factors are to be balanced; they are not prerequisites to be met. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (citing *Jones v. City of Monroe*, 341 F.3d

⁴Beuke is asking for a TRO or preliminary injunction at this time, but in his amended complaint, Beuke also seeks a permanent injunction to prevent ODRC from ever using Plan B as a method of carrying out his sentence. While a hearing is not required for this Court to grant a TRO, Fed. R. Civ. P. 65(b), one is required before a preliminary or permanent injunction can be issued. *See* Fed. R. Civ. P. 65(a)(2); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998) (“Where the plaintiff establishes a constitutional violation *after a trial on the merits*, the plaintiff will be entitled to permanent injunctive relief upon showing 1) a continuing irreparable injury if the court fails to issue the injunction, and 2) the lack of an adequate remedy at law.”) (emphasis added).

474, 476 (6th Cir. 2003) and *In re De Lorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985)).

Accordingly, the degree of likelihood of success required to obtain a preliminary injunction may depend on the strength of the other three factors. *De Lorean Motor Co.*, 755 F.2d at 1229.

A. *Beuke has a strong likelihood of success on the merits.*

In *Cooley v. Strickland*, the Sixth Circuit recently determined on a very limited record that the “two-drug intramuscular back-up injection . . . is not likely ‘cruelly inhumane’ and does not ‘create[] a demonstrated risk of severe pain.’” 589 F.3d at 221 (*quoting Baze v. Rees*, 128 S. Ct. 1520, 1533 (2008) (plurality)) (alterations in original). In reaching that conclusion, the Court explained that the State had demonstrated that a prisoner will lose consciousness within two minutes, and “[e]ven if death does not occur until several minutes later, the [unconscious] inmate will not be aware of the delay.” 589 F.3d at 230. In particular, that Court determined that Kenneth Biros, the petitioner-appellant, “presented no evidence that the pharmacological effect of the two-drugs would be otherwise.” *Id.*

Likewise, in affirming this Court’s denial of an Ohio death-sentenced prisoner’s most recent request for a TRO, the Sixth Circuit reiterated that “[s]peculation is not evidence.” *Durr v. Strickland*, 2010 WL 1539740, at *1 (6th Cir. Apr. 18, 2010). Because Durr had not shown that his allergy was likely to affect the execution process, both this Court and the Sixth Circuit found that he could not demonstrate a likelihood of success on the merits of his claim. *Id.*; (Doc. No. 731).

Unlike Biros or Durr, Beuke has provided evidence that phenobarbital, a drug which he has been taking for his seizure disorder for at least five years, is highly likely to significantly reduce the effects of one of the drugs used in Ohio’s Plan B. Beuke has presented this Court with more than mere speculation. He has attached a declaration from Professor Edward French, Ph.D., a

pharmacologist who explained that “for an individual who takes phenobarbital and phenytoin, it would be likely that his response to midazolam would be a reduced sedative effect.” (Ex. 3 ¶ 7.) Dr. French also opined that the effect of phenobarbital on liver enzymes would likely result in a reduced effect of hydromorphone. (Ex. 3 ¶¶ 6-7.) Beuke has also attached a declaration from Dr. Heath that states that “Beuke’s resistance to midazolam is, to a high degree of medical certainty, highly likely to reduce the anxiolytic and sedative effects of midazolam if Plan B is used.” (Ex. 2 at 4.) Unlike Biros, Beuke has demonstrated that the pharmacological effect of the two-drugs will be decreased due to the medication he takes for his seizure disorder.

Moreover, the risk is increased “when compared to the known and available alternatives.” *Cooley*, 589 F.3d at 215 (*quoting Baze*, 128 S. Ct. at 1531). As Dr. Heath indicated in his declaration, Beuke’s history of taking phenobarbital will have no effect on Plan A. Using a one-drug protocol is an available alternative, indeed it is the default method, and should be the *only* method that ODRC is allowed to use in executing Beuke. For these reasons, Beuke has demonstrated a likelihood of success on the merits in obtaining injunctive relief related to Plan B.

B. Beuke would suffer irreparable injury without the injunction.

Beuke has demonstrated that if ODRC uses Plan B to carry out his execution, there is a high likelihood that he will have a resistance or tolerance to the small amount of midazolam. As a result, the effects of midazolam will be significantly reduced, and the rate at which Beuke descends into unconsciousness will be substantially prolonged. Beuke will consciously experience the massive dose of hydromorphone, the side effects of which can include: nausea, vomiting, combativeness, disinhibited speech, delirium, anxiety, fear, euphoria, dysphoria, delusional ideation, hallucinations, sensory distortions, or disorientation. Notably, during this time, Beuke could be rendered

incompetent to comprehend or understand what is transpiring or why it is transpiring, and he will remain in this state for many minutes.

This Court should “not allow a state to use an execution procedure that creates an ‘objectively intolerable risk of harm’ or a ‘demonstrated risk of severe pain’ that is ‘substantial when compared to the known and available alternatives.’” *Cooley*, 589 F.3d at 215 (*quoting Baze*, 128 S. Ct. at 1531). If Beuke were executed under Plan B, he would suffer irreparable injury that could easily be eliminated by using the default plan, Plan A.

C. *The injunction will not cause substantial harm to others.*

While recognizing that State of Ohio has an interest in seeing finality by imposing the sentence of death, substantial harm will not ensue from this injunction. Beuke is not seeking an injunction to prevent the State from carrying out his sentence. Rather, Beuke is only seeking to enjoin ODRC from using Plan B as a means to execute him. Beuke has demonstrated specific facts unique to him that require judicial action — specifically that his phenobarbital intake will decrease the effectiveness of one of Plan B’s drugs. The granting of a preliminary injunction preventing ODRC from using Plan B to carry out Beuke’s execution will cause no harm to others.

D. *An injunction would serve the public interest.*

The public interest is served by enforcing constitutional rights. *Chabad*, 363 F.3d at 436 (*citing Chabad of S. Ohio v. City of Cincinnati*, 233 F. Supp. 2d 975, 987 (S.D. Ohio 2002)); *Deja Vu of Nashville, Inc. v. Metro. Gov’t of Nashville & Davidson County, Tennessee*, 274 F.3d 377, 400 (6th Cir. 2001)). The public has no interest in seeing its citizens be tortured or suffer a lingering death. *See In re Kemmler*, 136 U.S. 436, 447 (1890). In fact, while ultimately rejecting the petitioner’s claims, the Supreme Court continued to adhere to its case law that the Eighth

Amendment prohibits cruel and inhumane executions. *See Baze*, 128 S. Ct. at 48-49.

Moreover, the public has no interest in executing Beuke with Plan B. No State has ever used the proposed method and means in Plan B to execute a human being. Given that Beuke has demonstrated the high likelihood that the effects of one of the drugs in Plan B will be decreased, the public interest would be better served by issuing an injunction preventing ODRC's use of Plan B to carry out Beuke's sentence.

IV. Conclusion

For the reasons outlined in this Memorandum, this Court should:

- (1) grant Beuke a temporary restraining order to prevent ODRC from using Plan B to carry out his sentence;
- (2) grant him an evidentiary hearing on his request for a preliminary and permanent injunction;
- (3) permanently enjoin Defendants from executing him using Plan B; and
- (4) grant any other relief as this Court deems appropriate.

Respectfully submitted,

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By: /s/Dale A. Baich
Counsel for Plaintiff-Intervenor

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2010, the foregoing Motion for a Temporary Restraining Order or a Preliminary Injunction and Request for a Hearing was filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties.

By: /s/ Michelle Young
Legal Secretary
Capital Habeas Unit

CERTIFICATE PURSUANT TO LOCAL RULE 65.1(B)

I, Dale A. Baich, hereby certify pursuant to Local Rule 65.1(b)(1) that all pleadings filed in this action related to the instant motion for temporary restraining order or preliminary injunction have been served upon the adverse party via ECF filing. I also certify that I have faxed a copy of this motion to Charles Wille, lead counsel for Defendants, at 614-728-8600 on May 6, 2010.

By: /s/ Dale A. Baich
Counsel for Plaintiff-Intervenor