

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EDMOND ZAGORSKI,)	
Plaintiff,)	No. 3:18-cv-01035
)	
v.)	DEATH PENALTY CASE
)	EXECUTION DATE:
BILL HASLAM, et al.)	OCTOBER 11, 2018 7:00 PM
Defendants)	

REPLY TO RESPONSE TO EMERGENCY MOTION FOR TEMPORARY
RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Defendants motion does not deny any of the core facts pled by Zagorski. The State has zero interest in the way in which Mr. Zagorski is executed. Defendants do not identify a single thing that could not be done prior to 7:00 PM on October 11, 2018. In fact, a review of the protocol reveals that each and every task necessary has been done, or could be done.

The special training is done on an ongoing quarterly basis, according to the protocol. Ex. A at 21. The Chair is tested on an ongoing quarterly basis according to the protocol. Ex. A at 33. The Warden is a 34 year veteran of the Department and is well trained. The only thing that may not have happened is that the chair may not have been tested two weeks ago. But it can be tested now. And the Department maintains 2 qualified back-up electricians and a reserve manual transformer. Ex. A at 68. All other tasks are performed on the day of the execution. Defendants have

not shown anything to the contrary. Mr. Zagorski provided his waiver in sufficient time for the Department to carry out any special duties required under the protocol.

Defendants' reliance on the right of the inmates to fourteen days notice of the way the department intends to execute them does not support their position here. The inmates' right to receive notice is beside the point. Defendants do not deny that they were on notice from August 30, 2018 and certainly from September 27, 2018 that Mr. Zagorski had a heavy burden to weight two unconstitutional methods of execution.

Defendants ignore that the reason that the statute provides the right to elect electrocution to inmates sentenced prior to 1999 is to avoid an argument that the change in the statute violates the ex post facto clause of the United States Constitution. Their position in this court, one which they have never taken in any other litigation, lends support to Zagorski's argument.

Defendants' dismissive response to Mr. Zagorski's eighth amendment claim fails to appreciate that Zagorski's as-applied Eighth Amendment claim here is quite different from the facial challenge in State court.

Finally, Defendants utterly fail to address the fact that Mr. Zagorski will be subject to 10-18 minutes of suffering under their NEW lethal injection protocol instead of 15-30 seconds with electrocution. The lethal injection protocol at issue in *Johnson v. Bell*, 457 F. Supp. 2d 839 (M.D.Tenn. 2006) is entirely different.. This is plainly an increase in punishment.

CONCLUSION

Zagorski has demonstrated a likelihood of success on the merits and will suffer irreparable harm without the injunction he seeks. No one will suffer any harm by the imposing the injunction. Finally, the public interest is not harmed by the injunction which will result in Mr. Zagorki's execution.

Wherefore, the motion should be granted.

Respectfully submitted,

OFFICE OF THE FEDERAL PUBLIC
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CERTIFICATE OF SERVICE

I, Kelley J. Henry, hereby certify that a true and correct copy of the foregoing document was electronically filed and sent to the following via email on this the 10th day of October, 2018, to:

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