

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

BILLY RAY IRICK]	
]	
V.]	NO. 3:18-cv-0737
]	
TONY MAYS, in official capacity as,]	DEATH PENALTY CASE
Warden of Riverbend Maximum]	EXECUTION SET AUGUST 9, 2018
Security Institution.]	

MOTION FOR LEAVE TO SERVE SUBPOENA *DUCES TECUM INSTANTER*

Billy Ray Irick, by counsel, moves this Honorable Court for leave to serve a subpoena *duces tecum instanter* to Warden Tony Mays directing him to produce the test results that were performed on the two high-risk sterile injectables which have been compounded by an anonymous out-of-state pharmacy for his execution. In support of this motion, Mr. Irick states the following:

1. Mr. Irick is a death row inmate whose execution is scheduled for August 9, 2018 at 7:00 PM.
2. The State of Tennessee has changed its lethal injection protocol five times since the last execution in 2009.
3. The latest in the series of changes came on July 5, 2018, when the state added the use of compounded midazolam and potassium chloride to its list of possible drugs to execute inmates.
4. The State of Tennessee has informed Mr. Irick that it will use compounded midazolam and potassium chloride in his execution.

5. The July 5, 2018 Protocol requires the compounder of the drugs to “arrange for independent testing of the compound for potency, sterility, and endotoxins.” Moreover the Protocol provides that “compounded preparations shall be transferred, stored and maintained in accordance with the directions of the Pharmacy with which the Department has a Pharmacy Services Agreement which shall be in compliance with pharmaceutical standards and consistent with United States Pharmacopeia guidelines.” *See Protocol, attached, p. 35.*
6. High-risk sterile injectables are highly unstable.
7. Mr. Irick has a right to know if the testing has been performed and the results of the testing.
8. If the testing has not been performed then Mr. Irick intends to challenge the constitutionality of the State’s use of the drugs in his execution. Although at present (and subject to pending appeal) the July 5, 2018 Protocol has been found to be facially constitutional by the Chancery Court for Davidson County, deviations from this Protocol will be actionable.
9. If the testing shows that the drugs are not sterile, not potent, or have an improper pH then Mr. Irick intends to challenge the constitutionality of the State’s use of the drugs in his execution.
10. If compounded midazolam is dissolved in a solution with an incorrect pH, it will (a) if too acidic, cause greater pulmonary edema, filling his lungs with greater quantities of fluid and blood, causing a more torturous death, or (b) if

too basic, not properly dissolve, reducing midazolam's already limited (and inadequate) sedative effect.

11. If compounded potassium chloride is not properly prepared, so that it lacks potency, then Mr. Irick' will not die relatively quickly after injection of the potassium chloride (which will be injected, per the most recent revision to the protocol, after (a) two 250 ml doses of acidic midazolam, (b) a 50 ml dose of saline, (c) a two-minute wait, (d) a consciousness check, (e) two 100 ml doses of vecuronium bromide, and (f) another 50 ml dose of saline)—but instead will die slowly and torturously from pulmonary edema caused by the acidic solution containing the midazolam, and/or from suffocation brought on by commercially-prepared vecuronium bromide. Only properly prepared potassium chloride can stop Mr. Irick's heart (in roughly 30-45 seconds following injection).

12. Mr. Irick has made repeated requests that the State produce the results of the testing to his attorneys. Those requests have been ignored. *See attached emails.*

13. Upon information and belief, the compounding pharmacy that intends to prepare the midazolam and potassium chloride has only recently been licensed by its governing jurisdiction, and to this day in its public announcements claims NOT to have an operational clean room for the compounding of sterile pharmaceuticals.¹ Thus, Mr. Irick has particular concern that the

¹ As the result of the Chancery Court's interpretation of Tennessee secrecy laws, which culminated in a protective order in the lethal injection litigation, , counsel cannot further

compounding pharmacy does not have the experience, competency and equipment to properly compound the drugs that will be used to kill him. Thus, the Protocol's binding requirement that proper testing be performed is of crucial importance to him.

14. This motion is made pursuant to the First, Eighth, and Fourteenth Amendments to the United States Constitution, as well as 28 U.S.C. 1651 (All Writs Act); 28 U.S.C. Section 2241 (Habeas Corpus), and 42 U.S.C. 1983 (Civil Rights); *McFarland v. Scott*, 512 U.S. 849, 114 S.Ct. 2568, 2571 (1994) (“On its face, this statute grants indigent capital defendants a mandatory right to qualified counsel and related services ‘in any federal post conviction proceeding.’”); and Habeas Rule 6.

WHEREFORE, Mr. Irick requests leave of this Court to issue a subpoena *duces tecum* to Warden Mays, who is the custodian of the drugs to be used in his execution, to immediately produce the results of the testing.

Respectfully submitted,

Kelley J. Henry
Amy D. Harwell
Jerome Del Pino
Richard L. Tennent

Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200

develop the factual basis of this specific paragraph on the record, thought counsel do know who the pharmacist is.

Nashville, Tennessee 37203
(615) 736-5047
Kelley_Henry@fd.org

By: /s/ Kelley J. Henry

CERTIFICATE OF SERVICE

I, Kelley J. Henry, hereby certify that a true and correct copy of the foregoing document was filed using the Court's CM/ECF filing system which served a copy of this pleading on opposing counsel, Mr. John Bledsoe, Asst. Attorney General, Tennessee Attorney General's Office on this the 8th day of August, 2018. A copy of this motion has also been emailed to Mr. Bledsoe.

/s/ Kelley J. Henry
Kelley J. Henry
Supervisory Asst.

From: [Kelley Henry](#)
To: [Dwight Tarwater](#)
Bcc: [CES_SMRW.com](#); [Amy Harwell](#); [Jerome Delpino](#); [Richard Tennent](#); [Katherine Dix](#)
Subject: Fwd: Billy Ray Irick, Request for Results of Independent Testing
Date: Wednesday, August 8, 2018 8:13:22 AM

Dwight,

This email is to follow up on the voicemail I just left for you. Please see below. We would very much appreciate it if you would assist us in obtaining the results of the testing performed on the compounded chemicals to be used in Mr. Irick's execution. Thank you.

Kelley Henry
Supervisory Asst. Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37203
615-736-5047 (office)
615-736-5265 (fax)
615-695-6906 (direct)
615-337-0469 (cell)
Kelley_Henry@fd.org

----- Forwarded message -----

From: "Kelley Henry" <Kelley_Henry@fd.org>
Date: Tue, Aug 7, 2018 at 12:35 PM -0500
Subject: Billy Ray Irick, Request for Results of Independent Testing
To: "Debbie Inglis" <Debbie.Inglis@tn.gov>, "Kelly.Young@tn.gov" <Kelly.Young@tn.gov>, "Scott C. Sutherland" <Scott.Sutherland@ag.tn.gov>
Cc: "CES_SMRW.com" <CES@SMRW.com>

Ms. Inglis and Mr. Young,

I have been appointed to assist Mr. Shiles in his representation of Mr. Irick. This email is to follow up on the email Mr. Shiles sent last evening in which he wrote:

please immediately provide me with the complete test results including any formal or informal reports regarding the compounded drugs to be used in Mr. Irick's execution on August 9. As you know the sterility and quality of those drugs is paramount in ensuring a constitutional execution. If you or someone on your behalf cannot fulfill this request by Tuesday August 7 at 9:00 AM, please notify me of the reason why you are unable to do so. Your immediate attention to this matter is appreciated.

As I understand it, Mr. Shiles has yet to receive a response. Kindly provide your response to Mr. Shiles and me by return email no later than 3:00 PM Central time today. If you are unable to provide the results of the independent testing of the compounded drugs required by the July 5, 2018 protocol by that time, please describe why you are unable to do so.

Your cooperation is appreciated.

Thank you.

Kelley J. Henry
Supervisory Asst. Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37203
Office: 615-736-5047
Fax: 615-736-5265
Direct:615-695-6906
Cell: 615-337-0469
Email: Kelley_Henry@fd.org

"...AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE."