

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.]	

REPLY TO RESPONSE TO MOTION

Warden Mays' response is to claim that this Court does not have jurisdiction to grant Irick leave to serve a subpoena. He is in error.

1. As Irick pointed out in his motion, *McFarland v. Scott*, gives this Court jurisdiction to appoint counsel and provide process for pre-petition investigation and discovery.

2. Moreover, support for Irick's position is found in *Tennison v. Henry*, 203 F.R.D. 435, 440 (N.D. Cal. 2001).

Rule 27(a) allows parties to obtain discovery before litigation has commenced where the Court is "satisfied that the perpetuation of testimony may prevent a failure or delay of justice." Fed.R.Civ.P. 27(a)(3). A party seeking discovery under Rule 27(a) must show:

- 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses

so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

Fed.R.Civ.P. 27(a)(1). Courts have held that the requirements of Rule 27(a) have been met where an individual seeking discovery: 1) shows he is acting in “anticipation of litigation in federal court”; 2) “adequately explain[s]” the substance of the testimony he seeks to obtain; and 3) presents evidence that there is a “significant risk” that the evidence will be lost if it is not perpetuated. *Thomas*, 144 F.3d 618, 621-622. The scope of the inquiry that may be permitted under Rule 27 is narrower than that which is permissible under the more general rule governing discovery, Fed.R.Civ.P. 26(b). *Nevada v. O’Leary*, 63 F.3d 932, 936 (9th Cir.1995). In particular, Rule 27 may be used only to perpetuate important “known testimony” that might otherwise be lost. *Id.*

Tennison v. Henry, 203 F.R.D. 435, 440 (N.D. Cal. 2001).

3. Newly appointed counsel are investigating legal claims which are exigent. The State’s unwillingness to provide a copy of the testing results leads counsel to conclude that there is an irregularity with the testing. Mr. Irick has an absolute right to know if this is indeed true. Rule 27 is plainly on point.

WHEREFORE, the motion should be granted.

Respectfully submitted,

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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.