IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

BILLY RAY IRICK,	)	
	)	
Petitioner,	)	
	)	
	)	**No. 3:18-cv-0737**
v.	)	**Judge Campbell**
	)	
TONY MAYS, Warden,	)	
	)	
Respondent.	)	

RESPONSE TO MOTION FOR LEAVE TO SERVE SUBPOENA *DUCES TECUM INSTANTER*

Billy Ray Irick, through appointed counsel, has filed a motion for leave to serve a subpoena *duces tecum instanter* upon Tony Mays, Warden of Riverbend Maximum Security Institution, to obtain certain documents that counsel asserts are related to Irick's upcoming execution. But there is no legal basis for the relief Irick seeks from this Court, and his request should be denied.

Petitioner seeks "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." (D.E. 6, PageID# 14.) He represents that "[i]f the testing shows that the drugs are not sterile, not potent, or have an improper pH then [he] intends to challenge the constitutionality of the State's use of the drugs in his execution." (D.E. 6, PageID# 15.)

Under Fed. R. Civ. P. 45(a)(2), "[a] subpoena must issue from the court where the action is pending." And, there is no "action" in this Court from which a subpoena may issue under Fed. R.

Civ. P. 45. Irick invoked this Court's jurisdiction to obtain appointment of counsel to assist him in "preparing a petition for writ of habeas corpus under 28 U.S.C. § 2241 and/or any other ancillary matters pursuant to 18 U.S.C. § 3599." (D.E. 1, PageID# 1.) But he has filed no complaint or petition establishing a cause of action cognizable in this Court, and there is no basis to permit the discovery he seeks.

Irick cites 28 U.S.C. § 1651(a) as authority for the relief he seeks, but that statute provides no relief either. Federal courts are permitted to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. But issuance of a subpoena will not aid this Court's jurisdiction because, as stated above, Irick has initiated no action in this Court.

Irick also cites the general federal habeas corpus statute, 28 U.S.C. § 2241, and Habeas Rule 6 as bases for issuance of a subpoena. But Irick's application for federal habeas corpus relief was denied by the United States District Court long ago, s*ee Irick v. Colson*, 3:98-cv-00666 (E.D. Tenn.), and the Sixth Circuit affirmed that judgment. *Irick v. Bell*, 565 F.3d 315 (6th Cir. 2009), *cert. denied*, 559 U.S. 942 (2010). Before a second or successive habeas application may be filed in a federal district court, "the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3). Irick has obtained no such order. And even if he were to file a habeas corpus petition under 28 U.S.C. § 2254 at this late date, it would be subject to transfer to the Sixth Circuit for authorization under 28 U.S.C. § 2244(b), given Irick's previous habeas action.

Beyond that, discovery in habeas corpus proceedings is only permitted on a showing of good cause for the request under Rule 6, Rules Governing Section 2254 Cases in the United States District

Courts. Good cause exists under Rule 6(a) only when "specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997). There can be no "good cause" for discovery when the action would fail to state a claim upon which relief may be granted.

Moreover, 28 U.S.C. § 2241 provides no basis to challenge the manner by which the State will carry out his execution in any event. *Hill v. McDonough*, 547 U.S. 573, 579 (2006); *see also In re Campbell*, 874 F.3d 454, 461-62 (6th Cir. 2017) ("No one here disputes that a death-penalty challenge is not cognizable in habeas unless a defect impairs the very fact of the death sentence itself."). A habeas corpus proceeding does not extend to issues regarding the conditions of an inmate's confinement. *See also Nelson v. Campbell*, 541 U.S. 637, 643 (2004) ("[C]onstitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core [of habeas corpus] and may be brought pursuant to § 1983."); *Muhammed v. Close*, 540 U.S. 749, 750 (2004) ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus; requests for relief turning on circumstances of confinement may be presented in a § 1983 action.").

Irick next cites 42 U.S.C. § 1983 as a basis for relief, but that statute also provides no independent basis for relief in absence of a pending action, along with its administrative strictures.

Finally, Irick cites *McFarland v. Scott*, 512 U.S. 849 (1994), but that case is not on point. *McFarland* simply held that a capital defendant need not file a formal habeas corpus petition in order to invoke his right to court-appointed counsel under 21 U.S.C. § 848(q)(4)(B) and to establish a federal court's jurisdiction to enter a stay of execution. But the Sixth Circuit has made clear that a

case is only pending when a complaint or petition is filed. *Williams v. Coyle*, 167 F.3d 1036, 1037-38 (6th Cir. 1999) (a habeas corpus case is not pending until the application for the writ is filed).

None of the authorities Irick cites support his contention that this Court direct issuance of a subpoena outside of a pending action. Indeed, Irick's motion is little more than an attempt to circumvent the provisions of Tennessee Public Records Act. And this Court should decline to inject itself into that process, which is currently ongoing.[1]

This Court has no jurisdiction to issue a subpoena under Fed. R. Civ. P. 45 outside of any pending "action" before it; Irick's motion should be denied.

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[1] Tennessee's Public Records Act provides that "[a]ll state, county and municipal records shall, at all times during business hours, . . . be open for personal inspection by any citizen of this state . . . *unless otherwise provided by state law*." Tenn. Code Ann. § 10-7-503(a)(2)(a) (emphasis added). Tennessee appellate courts have recognized that, in responding to a request for public records under the Act, "it takes time to understand the nature of the request and the breadth of documents that may be included, *research applicable law on exceptions to the Act, make judgments often on questionable legal issues* and then articulate an accurate response to the request." *Nashville Post Co. v. Tennessee Educ. Lottery Corp*., No M2006-01863-COA-R3-CV, 2007 WL 3072778, at *4 (Tenn. Ct. App. Apr. 14, 2008) (emphasis added).

On the evening of August 7, 2018, the Tennessee Department of Correction received a public records request from counsel for Billy Ray Irick requesting a copy of 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." Counsel for Mr. Irick subsequently made the same public records request to the Office of the Tennessee Attorney General and to the Governor's Legal Counsel on August 8, 2018. After being informed that the Attorney General's Office would be responding to their public records request, counsel filed the instant motion seeking issuance of a federal subpoena.

The records Irick seeks contain information that is confidential pursuant to Tenn. Code Ann. § 10-7-504(h)(1). Given the State's strong public policy favoring the anonymity of those involved in carrying out capital punishment, *see West v. Schofield*, 460 S.W.2d 113, 122 (Tenn. 2015), the State is currently reviewing Irick's request to determine whether and to what extent appropriate redactions can be made under Tenn. Code Ann. § 10-7-504(h)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 8, 2018, the foregoing document was served on the following counsel of record through the CM/ECF system:

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