IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN BATTAGLIA Plaintiff,	§ § §	
v.	§	CIVIL ACTION NO. H-18-301
	§	
BRYAN COLLIER, *et al.* Defendants.	§ §	

MEMORANDUM AND ORDER

The State of Texas plans on executing John David Battaglia tonight for the 2001 murder of his two young daughters. Hours ago, Battaglia filed an application to proceed *in forma pauperis* and a civil rights complaint under 42 U.S.C. § 1983 challenging Texas' method of carrying out his otherwise-constitutional death sentence [Doc. # 1]. Battaglia's complaint raises three claims: (1) a substantial risk exists that he will suffer severe pain during the execution in violation of the Eighth and Fourteenth Amendments; (2) Texas has exposed him to a substantial risk of severe pain by failing to conduct adequate testing; and (3) the Eighth and Fourteenth Amendments should require Texas to notify an inmate of any changes in the lethal substance to be used to carry out executions, or changes to their lethal injection protocol. Battaglia has filed a Motion for Preliminary Injunction Or in the Alternative, a Temporary Restraining Order [Doc. # 2].

Battaglia's arguments come before the Court against a long background of lethal-injection challenges. In 1982, the State of Texas adopted lethal injection as its sole method of execution. While Texas law does not specify what substance will be used in carrying out

lethal injections, Texas has used pentobarbital since July 9, 2012. After manufactured pentobarbital became unavailable, Texas began purchasing pentobarbital from compounding pharmacies. Compounded drugs have a beyond use date ("BUD") after which a drug might not be reliable. At the core of his complaint, Battaglia argues that Texas plans on using compounded pentobarbital tonight that is past its originally established BUD of January 22, 2018.[1] Battaglia argues that he has only learned within the last 36 hours[2] that Texas intends to use a drug with a BUD well beyond anything scientifically acceptable. Battaglia's concerns are heightened by comments Anthony Shore made as Texas executed him on January 18, 2018, and conduct during the execution of William Rayford on January 20, 2018.

I. Stay of Execution

The Court must first decide whether to issue a preliminary injunction or temporary restraining order. Battaglia's civil-rights complaint can only proceed if the Court issues a stay of execution. A federal court has inherent discretion when deciding whether to stay an execution. *See Nken v. Holder*, 556 U.S. 418, 434 (2009); 28 U.S.C. § 2251(a)(1). In deciding whether to issue a stay of execution, a court must consider: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether

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[1] Battaglia alleges shorter periods for expiration: "Absent extended sterility testing, USP <797> sets the BUD for high-risk compounded sterile preparations such as compounded pentobarbital as follows: 24 hours, if stored at room temperature; 72 hours, if kept refrigerated, or 45 days, if kept in a solid, frozen state," but provides no citation that supports this information. *See* Complaint, at 7.

[2] This allegation is contrary to his exhibit showing that the response to his Public Information Request was sent January 26, 2018 at 9:48 pm. *See* Complaint, Exhibit B, ECF 15 to 40.

the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other party interested in the proceeding; and (4) where the public interest lies. *See Nken*, 556 U.S. at 425-26.

"In a capital case, the possibility of irreparable injury weighs heavily in the movant's favor." *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (per curiam). But the United States Supreme Court has ruled that an applicant is not entitled to a stay "[as] a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427 (internal quotation marks omitted). The death penalty is irreversible, but there must come a time when the legal issues "have been sufficiently litigated and re-litigated so that the law must be allowed to run its course." *O'Bryan*, 691 F.2d at 708 (quoting *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979)). Though the movant in a capital case "need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of equities [*i.e.*, the other three factors] weigh heavily in favor of granting the stay." *Celestine v. Butler*, 823 F.2d 74, 77 (5th Cir. 1987) (per curiam).

The other factors weight heavily against staying Battaglia's execution. Importantly, Battaglia's claims are substantially similar to those raised, and rejected, in other cases. While relying on various constitutional provisions, the core of Battaglia's complaint is a challenge to lethal injection. In *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015), the Supreme Court adopted two elements for a method-of-execution claim: (1) the method of execution must first "present[ ] a risk that is sure or very likely to cause serious illness and needless

suffering, and give rise to sufficiently imminent dangers" and (2) the plaintiff "must identify an alternative that is feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *See also Baze v. Rees*, 553 U.S. 35, 46-47 (2008). From the onset, Battaglia's complaint is deficient for not proposing an alternative feasible method of execution. Battaglia says that "a single dose of an FDA-approved barbiturate" would be acceptable, but does not identify what substance would meet that requirement. Also, while he does mention that he would approve of compounded pentobarbital that meets some standards, he has not shown that Texas has such a drug readily available (beyond his assertion that the supply on hand does not meet those standards). [3]

Importantly, the Fifth Circuit has routinely denied relief in substantially similar cases. *See Whitaker v. Collier*, 862 F.3d 490, 501 (5th Cir. 2017); *Wood v. Collier*, 836 F.3d 534, 540 (5th Cir. 2016); *Ladd v. Livingston*, 777 F.3d 286, 289 (5th Cir. 2015); *Trottie v. Livingston*, 766 F.3d 450, 452 (5th Cir. 2014); *Campbell v. Livingston*, 567 F. App'x 287 (5th Cir. 2014); *Sells v. Livingston*, 750 F.3d 478, 481 (5th Cir. 2014); *Raby v. Livingston*, 600 F.3d 552 (5th Cir. 2010).[4] Specifically, the *Whitaker* court addressed almost identical

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[3] It is noted that the execution is schedule for 10 days after expiration of the original BUD.

[4] Federal courts have repeatedly found that an execution protocol using pentobarbital complies with Eighth Amendment requirements. *See Sepulvado v. Jindal*, ___ F.3d ___, 2013 WL 4711679, at *2 (5th Cir. Aug. 30, 2013) ("[F]ederal courts of appeals agree that pentobarbital-only protocols comport with the Eighth Amendment's prohibition against cruel and unusual punishment."); *Thorson v. Epps*, 701 F.3d 444, 447 n. 3 (5th Cir.2012) ("[A one drug protocol [is] also acceptable[.]"); *Towery v. Brewer*, 672 F.3d 650, 659 (9th Cir. 2012) (finding a single dose of pentobarbital acceptable); *Valle v. Singer*, 655 F.3d 1223, 1233 -38 (11th Cir. 2011) (rejecting the inmate's allegations that pentobarbital is "untested and unsafe for use in judicial lethal injections).

claims and found that raising similar concerns about degraded pentobarbital amounted to pleading hypothetical risks. *Whitaker*, 862 F.3d at 501.[5] The District Court in *Whitaker* considered various arguments about the possibility of degradation in pentobarbital and found as follows:

> The plaintiffs made some assertions about the therapeutic use of old pentobarbital but did not plead any facts about the rate of degradation of compounded pentobarbital. . . . Texas administers two and a half times the amount of the drug needed to kill a person. Alleged complications that develop days or years after a therapeutic dose does not establish that Williams or Whitaker will face an intolerable risk of pain during the score of minutes it takes for the lethal dose to kill them.
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> Williams and Whitaker seem to claim that there is something inherently wrong with using compounded pentobarbital after the BUD. The BUD merely approximates how long a drug is guaranteed to be reliable; its passage does not necessitate a change in the drug's reliability nor does it establish that the pain plaintiffs will suffer will be more cruel in character or intensity.

Whitaker v. Livingston, 2016 WL 3199532, at *8 (S.D. Tex. 2016). The Fifth Circuit affirmed and found that the inmate's "assertion fail[ed] to reach the Eighth Amendment bar on unnecessarily severe pain that is sure, very likely, and imminent." *Whitaker*, 862 F.3d at 498. Here, Battaglia assumes that the pentobarbital that has very recently passed its BUD is degraded, and while the State has not had to opportunity to refute that accusation, Battaglia has still not shown that the risk of severe pain is very likely or imminent.

Fifth Circuit authority has routinely and regularly rejected arguments similar to those

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[5] The *Whitaker* court also addressed concerns about the testing, storage, and use of pentobarbital. Other cases have rejected concerns about the lack of notice to an inmate before changing policy or procedure in lethal injections. *See Whitaker*, 862 F.3d at 501.

raised in the instant complaint. *See Whitaker*, 862 F.3d at 501; *see, e.g., Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015); *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 779 F.3d 1275, 1280 (11th Cir. 2015). Battaglia's recent arguments do not call that precedent into question. Given that law, Battaglia's claim does not show that the anticipated protocol for his execution involves "wanton exposure to objectively intolerable risk, not simply the possibility of pain." *Baze*, 553 U.S. at 61-62. Battaglia has not alleged facts that will succeed on the merits.

As to the public interest, granting a stay would inhibit the State's ability to carry out an otherwise valid sentence and impair the finality of state criminal judgments. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006) (stating that a stay of execution "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts"). "Equity must take into consideration the State's strong interest in proceeding with its judgment . . . A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 653-54 (1992) ("Whether his claim is framed as a habeas petition or as a § 1983 action, [the petitioner] seeks an equitable remedy."). Accordingly, the *Nken* factors weigh against granting Battaglia's Motion for Stay of Execution.

II. The Complaint

Section 1915A of title 28 of the United States Code requires a federal district court to "review . . . a complaint in a civil action in which a prisoner seeks redress from a

governmental entity or officer or employee of a governmental entity." The Court must dismiss the complaint if it is frivolous, malicious, or fails to state a claim upon which relief can be granted. 28 U.S.C. § 1915A(b)(1). For the same reasons for which Battaglia is not entitled to a stay, the Court finds that he complaint fails to state a claim on which relief can be granted. Therefore, it must be dismissed under 28 U.S.C. § 1915A.

III. Order

It is **ORDERED** that:

1. The plaintiff's motion to proceed *in forma pauperis* is **GRANTED**;

2. The plaintiff's motion for a temporary restraining order or preliminary injunction is **DENIED**; and

3. The complaint (Docket Entry No. 1) is **DISMISSED WITH PREJUDICE**.

SIGNED at Houston, Texas, on this1st day of February, 2018.

NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE