

cruel and usual punishment, right of access to the courts, right to counsel, and right to due process of law.

On January 30, 2018, prisoner William Rayford was executed by the State of Texas. During Mr. Rayford's execution, after the lethal injection drugs had been administered, he attempted to sit up, lifted his head, jerked his head back multiple times, grimaced, and shook. On January 18, 2018, Texas executed Anthony Shore. At the end of Mr. Shore's final statement, he began to tremble, appeared agitated, and said "I can feel that it does burn. Burning!"

According to the information supplied by defendants, the State of Texas intends to use the same drugs administered to Mr. Rayford and Mr. Shore to carry out Mr. Battaglia's execution. According to the information supplied by defendants, those drugs have been assigned a "Beyond Use Date" (BUD) well beyond anything that is considered acceptable by the relevant scientific treatises or by experts in the field. According to the relevant experts, compounded drugs that are beyond their use date are unstable, and are at risk of sub-potency, a lack of integrity, and contamination. Experts also aver that there is a substantial risk that administration of drugs that are unstable, subpotent, or contaminated can cause severe pain. These facts – fully revealed in only the past 36 hours – compel Mr. Battaglia to file this action to protect his constitutional rights.

NATURE OF ACTION

1. This action is brought pursuant to 42 U.S.C. § 1983 for violations and threatened violations of Plaintiff's rights under the First, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution to be free from cruel and usual punishment, right of access to the courts, right to counsel, and right to due process of law. Plaintiff seeks injunctive relief.

PLAINTIFF

2. Plaintiff John Battaglia is a person within the jurisdiction of the State of Texas. He is currently a death-sentenced inmate under the supervision of the Texas Department of Criminal Justice, TDCJ #999412. He is confined at the Polunsky Unit in Livingston, Texas. His initial state and federal appeals have been completed.

3. Plaintiff is not challenging his conviction or sentence of death in this action. He is challenging the manner and means by which Defendants will carry out his sentence of death.

DEFENDANTS

4. Defendant Bryan Collier is the Executive Director of the Texas Department of Criminal Justice.

5. Defendant Lorie Davis is the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice ("TDCJ"), and holds the

power, by statute, to determine and supervise the manner by which death sentenced inmates are executed. Tex. Code Crim. Proc. art. 43.14.

6. Defendant James Jones is the Senior Warden of the Huntsville Unit, where executions take place.

7. Defendants Unknown Executioners are employed by the Texas Department of Criminal Justice and carry out executions in Texas. Plaintiff does not yet know their identities because the TDCJ conceals them.

8. The Defendants are all state officials acting, in all respects relevant to this action, under color of state law. They are all sued in their official capacities.

JURISDICTION & VENUE

9. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights violations), 2201 (declaratory relief), and 2202 (further relief). This action arises under the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. § 1983.

10. Venue in this Court is proper under 28 U.S.C. § 1391, and this Court has personal jurisdiction over the defendants in this matter because the events giving rise to this claim – both executions and the procurement and maintenance of drugs used in the lethal injection process – occur in Huntsville, Texas.

EXHAUSTION OF REMEDIES

11. Plaintiff need not exhaust administrative remedies under 42 U.S.C. § 1997(a) because he is not challenging his conditions of confinement, and because no administrative remedies exist that could address his claims.

FACTUAL ALLEGATIONS

12. Under Texas law, Defendants have the statutory authority and duty to establish and administer a lethal injection protocol. The Texas Code of Criminal Procedure provides:

Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time after the hour of 6 p.m. on the day set for the execution, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the Director of the Institutional Division of the Texas Department of Criminal Justice.

Tex. Code Crim. Proc. art. 43.14 (Vernon Supp. 2004–2005). “No torture, or ill treatment, or unnecessary pain, shall be inflicted upon a prisoner to be executed under the sentence of the law.” *Id.* art. 43.24.

13. This statute requires the director of the Division to determine and supervise Texas’s lethal-injection protocol. *Id.*

14. The statute does not require specific drugs, dosages, or drug combinations, and does not require a specific manner of intravenous access for the execution. *Id.*

15. The current execution protocol was written and adopted in June, 2012, and designates that 5 grams of pentobarbital shall be used to carry out executions. *See Exhibit A at 8.*

16. Pentobarbital is a barbiturate, and is classified by the Drug Enforcement Administration (DEA) as a Schedule II controlled substance. It has few authorized uses in humans – primarily (and rarely) used for anesthesia, and for the euthanasia of animals.

17. TDCJ's Director has the unilateral power to change the protocol at any moment. Tex. Code Crim. Proc. art. 43.14.

18. In September 2013 Texas began purchasing and using compounded – rather than manufactured - pentobarbital to carry out executions. Upon information and belief, Texas continues only to use compounded pentobarbital to this day.

19. Pharmacy compounding is a practice by which a pharmacist combines, mixes, or alters ingredients in response to a prescription to create a medication tailored to the medical needs of an individual patient. Independent laboratories can test compounded drugs for a variety of measures, including identity, strength, and contaminants.

20. The United States Pharmacopeia (“USP”) classifies compounded pentobarbital as a high-risk sterile injectable. *See* USP General Chapter <797>, Pharmaceutical Compounding – Sterile Preparations.¹

21. Pentobarbital is especially risky in its compounded form, both because of the unregulated nature of the compounding industry, and because there is no scientific description of, or formula for, the process of compounding pentobarbital for use in executions.

22. Compounded preparations have a much shorter “shelf life” than manufactured drugs, and are assigned a “beyond use date,” (BUD) intended to prevent degradation of a compound that the USP has calculated is likely to occur after a set time frame. 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

20. Commercial (manufactured) pharmaceutical products require compliance with a rigorous licensing process and are the result of substantial scientific research and development programs.

21. Pharmaceutical compounded preparations have numerous exemptions

¹ The USP is the seminal scientific advisory publication concerning the compounding of sterile injectables.

from the licensing process and accordingly, do not require established scientific investigations (“proof”) for specific formulations.

22. Compounding pharmacies often lack the infrastructure needed to make sterile, potent, and safe injectable pentobarbital.

23. FDA inspections routinely uncover compounding pharmacies that have not followed procedures designed to prevent drug contamination.

25. The integrity, potency, and sterility of compounded pentobarbital are affected by, among other things: the quality of the active pharmaceutical ingredient (“API”) used to make the drug; the quality of the compounder and the conditions of the laboratory in which the drug is compounded; the time between compounding and use; the conditions and manner of storage between compounding and use; the assigned beyond use date (“BUD”) and the qualifications of and method used by the person assigning the same.

27. Upon information and belief, Defendants keep the lethal injection drugs at room temperature or refrigerated, but not frozen.

28. Compounded pentobarbital that has surpassed its recommended BUD has a high risk of improper potency, composition, contaminants, impurities, and degradation. These risks grow as the length of time beyond the BUD increases.

29. There is a substantial risk that drugs that are not the appropriate potency or composition, or are contaminated, degraded, or contain impurities, will cause excruciating pain at the time of their administration

30. Plaintiff Battaglia sent Defendants a Public Information Act request on January 24, 2018, requesting information about the drugs that will be used to carry out his execution. In response, he received the documents contained in Exhibit B. Counsel for Mr. Rayford and for Mr. Shore also submitted PIA requests; the responses received are contained in Exhibit C (Rayford), Exhibit E (Shore's first request, in October 2017) and Exhibit D (Shore's second request, in January 2018).

31. The essential facts in the responses to the four Public Information Act requests relevant to Mr. Battaglia's claims are set out in the table below:

Prisoner	Scheduled Execution	Responsive Storage Log	Responsive DEA 222	Responsive Lab Report	Assigned BUD
Anthony Shore (Ex. G)	10/18/17	50mg/ml / 2.5 gr. Log	11 vials 2/2/17	Rec'd: 2/8/17 Tests: 2/9-10/17	1/22/18
Anthony Shore (Ex. F)	1/18/18	100mg/ml / 5 gr. Log	11 vials 2/2/17	Rec'd: 2/8/17 Tests: 2/9-10/17	1/22/18
William Rayford (Ex. E)	1/30/18	100mg/ml / 5 gr. Log	11 vials 2/2/17	Rec'd : 12/22/17 Tests: 12/26/17; 12/27/17; 1/9/18	11/9/18
John Battaglia (Ex. D)	2/1/18	100mg/ml / 5 gr. Log	11 vials 2/2/17	Rec'd : 12/22/17 Tests: 12/26/17; 12/27/17; 1/9/18	11/9/18

32. As the Table makes clear, Defendants provided the same DEA Form 222 each time, reflecting that the drugs used to carry out the executions of Mr. Shore and Mr. Rayford – and intended for use in Mr. Battaglia’s execution - were received on 2/22/17. However, testing of those drugs was conducted at two different times, each resulting in the assignment of a new expiration date. Thus, the same set of drugs were simply subjected to a new round of tests to extend a one-year BUD (1/22/18) to one that is a full twenty-two months from the time of compounding (11/9/18).

33. Mr. Shore’s and Mr. Rayford’s actions and behavior at the time of their executions reflect the severe pain they suffered, pain that results from the use of the same drugs that Defendants intend to use to carry out Mr. Battaglia’s execution.

LEGAL CLAIMS

34. Plaintiff incorporates by reference each and every statement and allegation set forth throughout this Original Complaint as if fully set forth herein.

COUNT 1

There is a Substantial Risk that Plaintiff Battaglia Will Suffer Severe Pain at The Time of his Scheduled Execution, in Violation of His Right to be Free From Cruel And Unusual Punishment Under The Eighth and Fourteenth Amendments.

35. As a result of the facts set forth above and those enumerated herein,

there is a substantial risk that Plaintiff will suffer severe pain at the time of his execution. That risk is “‘substantial when compared to the known and available alternatives.’” *Glossip v. Gross*, 135 S.Ct. 2726, 2737 (2015) (citing *Baze v. Rees*, 553 U.S. 36, 61 (2008)); *see also Louisiana ex. rel. Francis v. Resweber*, 329 U.S. 459 (1984); *Gregg v. Georgia*, 428 U.S. 153 (1976); *LaChance v. Erickson*, 522 U.S. 262 (1998); *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950). *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

36. Carrying out Mr. Battaglia’s execution with the current drug supply presents an “‘objectively intolerable risk of harm’ that prevents prison officials from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’” *Glossip*, 135 S.Ct at 2737 (citing *Baze*, 553 U.S. at 50). “[S]ubjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment.” *Baze*, 553 U.S. at 49.

37. The relevant literature and experts reveal that compounded drugs that are consumed beyond the use by date set out by USP <797> raise a substantial risk that there will be problems with sterility and potency that could cause excruciating pain at the time of injection for purposes of execution.

38. The drugs Defendants have stated will be used to carry out the scheduled execution of Plaintiff Battaglia were initially given a BUD one year from the time of compounding; then tested again to obtain a BUD 22 months from

the date of compounding. Both are well beyond any scientifically acceptable BUD. *See* ¶22, *supra*.

38. There is a substantial risk that injection of drugs that are impotent, contaminated, or impure will cause severe pain at the time of injection and during the course of an execution. Among other things, contaminated, degraded, or impure pentobarbital risks subjecting the inmate to the sensation, during the execution, that sandpaper is scraping the inside of his veins.

39. The drugs Defendants intend to use to carry out Mr. Battaglia's execution are the same as those used to carry out the executions of Mr. Shore, on January 18, 2018, and Mr. Rayford, on January 30, 2018.

40. During Mr. Rayford's execution, he attempted to raise his body, was shaking, grimaced, breathed in a strained and heavy manner, and jerked his head into the gurney multiple times.

41. During Mr. Shore's execution, his body shook, he appeared to be struggling to breathe, and he cried out "I can feel that it does burn. Burning!"

42. Mr. Rayford's and Mr. Shore's behavior and actions during their executions reveal that they were suffering extreme pain.

43. As Defendants intend to execute Mr. Battaglia with the same drugs used to execute Mr. Rayford and Mr. Shore, there is a substantial risk that Plaintiff will suffer torturous pain during his execution, as did Mr. Rayford and Mr.

Battaglia.

44. There are two known and available alternatives to Texas' current execution method exists. The first is a single dose of an FDA-approved barbiturate, applied with appropriate safeguards and transparency that apply to both the execution process and the manner in which the drugs are selected, purchased, stored, and tested. The second known and available alternative is the use of compounded pentobarbital that is compounded in a competent facility, tested for sterility and potency and contaminants by a competent laboratory, and used within the BUD the United States Pharmacopeia has designated as scientifically appropriate. Both alternatives are "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Glossip*, 135 S. Ct. at 2737.

COUNT II

Defendants' Failure to Conduct Adequate or Competent Testing, subjects Plaintiff to a Substantial Risk of Severe Pain at the Time of his Execution.

The testing conducted on the drugs Defendants intend to use in Mr. Battaglia's execution resulted in the setting of two different use-by dates, both far beyond any scientifically acceptable or defensible standard.

The failure to conduct adequate testing, the use of a laboratory that assigns a use -by-date months beyond what is scientifically acceptable, questionable storage

conditions, questionable sources for the drugs and the API, suspicious practices in the purchase and return of the lethal injection drugs, among other things, individually and combined, subjects Plaintiff to a substantial risk of suffering severe pain at the time of his execution.

These failures preclude Defendants from pleading that they were ““subjectively blameless for purposes of the Eighth Amendment.”” *Glossip*, slip op. at 12 (citing *Baze*, 553 U.S. at 50).

COUNT III:

The absence of any requirement that Defendants notify Plaintiff of any changes in the lethal substance to be used to carry out executions, or changes to their lethal injection protocol, deprives Plaintiff of his ability to protect his right to not be subject to cruel and unusual punishment, and violates his right to due process, notice, an opportunity to be heard, and access to courts in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Under the Texas Code of Criminal Procedure, the TDCJ’s Director has the unilateral power to change the existing Execution Protocol at any moment. Tex. Code Crim. Proc. art. 43.14. For example, although the TDCJ has represented that it currently uses compounded pentobarbital to carry out the executions, the Code does not require it to give Plaintiffs any notice at all if the Director chooses to change the drug used to carry out Plaintiffs’ executions.

This lack of a notice requirement means that Plaintiffs will not have sufficient time to litigate whether their executions will be carried out lawfully by

Defendants. Without timely and meaningful notice, Plaintiffs will be unable to bring an effective legal challenge to any unlawful aspects of their proposed execution, which violates the Due Process Clause of the Fourteenth Amendment.

Further, the fact that the TDCJ can change its execution protocol at any time prevents Plaintiffs from having meaningful access to courts because they cannot litigate the means of their execution if they do not know what the means will be.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff ask this Court to:

- A. Enjoin Defendants from executing Plaintiff with the execution drugs currently in their possession;
- B. Order Defendants to provide, in a timely fashion, notice to Plaintiff of the drug or drugs to be used at any time Plaintiff is scheduled for execution in the future;
- C. Order Defendants to provide to Plaintiff all information about the lethal injection drugs necessary to a determination that any future scheduled execution will not subject Plaintiff to severe pain;
- D. A declaration that Defendants' actions violate Plaintiff' First, Sixth, Eighth and Fourteenth Amendment rights; and
- E. Any other such relief as this Court deems just and proper.

Plaintiff also request that this Court grant reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and the laws of the United States, as well as for costs of suit.

Dated this 1st day of February, 2018.

Respectfully Submitted,

/s/ Gregory W. Gardner

Gregory W. Gardner
Bar ID No. 2707338
P.O. Box 2366
Boulder, Colorado 80306
(303) 990-5910
ggardner@gwgardnerlaw.com
gardnerlegal@gmail.com (PACER)

/s/ Maurie Levin

Maurie Levin
Attorney at Law
Texas Bar No. 00789452
614 South 4th Street #346
Philadelphia PA 19147
Tel: (512) 294-1540
Fax: (215) 733-9225
maurielevin@gmail.com

Patrick F. McCann
Law Offices of Patrick F. McCann
Texas Bar No. 00792680
700 Louisiana Street
Suite 3950
Houston, TX 77002
Tel: 713-223-3805
writlawyer@justice.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February 2018, counsel of record for Defendants, listed below, who have consented to accept this Notice as service by electronic means, were served via the electronic filing system.

Sharon Howell
General Counsel
Texas Department of Criminal Justice
Sharon.howell@tdcj.state.tx.us

W. Eric Dryden
Assistant Attorney General
Office of the Texas Attorney General
Erich.dryden@oag.texas.gov

/s/ Maurie Levin
