

**IN THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF TEXAS**

JASON McGEHEE, STACEY JOHNSON,
BRUCE WARD, TERRICK NOONER, and
DON DAVIS,

Plaintiffs,

v.

Texas Department of Criminal Justice,

Defendants.

Case No. X:18-mc-XXXX

Related: 4:17-cv-00179-KGB
(E.D. Ark.)

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MOTION TO COMPEL COMPLIANCE WITH SUBPOENA

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Through their subpoena on the Texas Department of Criminal Justice (the “TDCJ”), Plaintiffs—several death row inmates in Arkansas—seek disclosure of narrow, specific, and nonprivileged information that is essential to proving their Eighth Amendment claims and to ensuring Plaintiffs are not subjected to cruel and unusual punishment during their executions. Specifically, Plaintiffs seek information regarding the TDCJ’s knowledge of suppliers of pentobarbital—a drug used as part of the TDCJ’s lethal injection protocol. Available information shows that pentobarbital is a more humane alternative to Arkansas’ current use of midazolam, which has been associated with several executions in which inmates suffered prolonged, tortured deaths. The information in the TDCJ’s possession is necessary to determine whether pentobarbital could be made available to Arkansas for use in its executions, which is a required element of Plaintiffs’ claims.

Despite the importance of the requested information and Plaintiffs’ efforts to narrow their requests to minimize the burden on the TDCJ, the TDCJ has refused to provide any of the requested information. Thus, Plaintiffs seek an order compelling the TDCJ to comply with their obligations pursuant to Plaintiffs’ valid subpoena issued by the United States District Court for the Eastern District of Arkansas. As further explained herein, the TDCJ’s attempts to avoid their obligations under the subpoena do not justify their refusal to produce the requested information.

I. BACKGROUND

Arkansas currently proposes to execute Plaintiffs Stacey Johnson, Bruce Ward, Terrick Nooner, and Don Davis¹ by the serial intravenous injection of three drugs: (1) midazolam, (2)

¹ Jason McGehee, the first named plaintiff in this case, was granted clemency in September 2017, but remains named in the case caption. Eleven other inmates have since intervened in this case: Justin Anderson, Ray Dansby, Gregory Decay, Kenneth Isom, Latavicus Johnson, Tim Kemp, Brandon Lacy, Zachariah Marcyniuk, Andrew Sasser, Thomas Springs, and Mickey Thomas.

vecuronium bromide, and (3) potassium chloride. Plaintiffs have brought a civil action challenging the use of midazolam as unconstitutional under the Eighth Amendment's prohibition against cruel and unusual punishment. Midazolam is intended to anesthetize the condemned prior to the injection of the second and third drugs, but scientific evidence and past experience show that it is inadequate for this purpose. Under the Constitution, as a central part of their Eighth Amendment claim, Plaintiffs must establish the existence of a "known, available alternative" to midazolam. *Glossip v. Gross*, 135 S. Ct. 2726, 2737-38 (2015). Based on currently available evidence, Plaintiffs contend that the protocol currently administered by the State of Texas, which uses a single injection of pentobarbital instead of a three-drug cocktail which includes midazolam, is one such alternative.² To establish that pentobarbital is available to Arkansas for use in its execution protocol, Plaintiffs have sought discovery from the TDCJ relating to the TDCJ's knowledge of, and communications with, any supplier of pentobarbital.

On February 22, 2018, Plaintiffs, through counsel, served on the TDCJ a subpoena *duces tecum* to produce documents related, in part, to when, how, and from whom Texas has secured or attempted to secure lethal injection drugs, including pentobarbital. (Ex. 1). Despite serving 24 pages of objections on March 7, 2018 (Ex. 2), the TDCJ produced a limited set of redacted responsive documents on March 28, 2018. Plaintiffs subsequently notified the TDCJ that the production was deficient, in part because it failed to disclose Texas' suppliers, and requested a complete production. During the meet-and-confer process Plaintiffs agreed to further narrow the

² According to public sources, Texas has used pentobarbital in its current lethal injection protocol in sixty-seven executions to date. Ex. 3 at 9; *see also* Texas Department of Criminal Justice: Death Row Information, Executed Offenders, http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html (last visited May 16, 2018) (Exhibit 4).

scope of the subpoena. The two requests for which Plaintiffs now seek an Order from this Court are Document Requests Nos. 1 and 4:

1. All Documents, Communications, and Things arising from or related in any way to Texas's efforts to obtain pentobarbital for use in Executions in Texas, including but not limited to information about Texas's current supply of pentobarbital, when Texas expects to obtain additional pentobarbital, and the source(s) of pentobarbital.
4. All Documents, Communications, and Things Related to any Supplier of pentobarbital, including but not limited to Communications Related to the availability of pentobarbital for use in Executions; Documents; Communications, or Things identifying Suppliers of pentobarbital; Documents, Communications, or Things Related to any Supplier's present, past, or future willingness to supply pentobarbital to any State for use in any Execution.

Ex. 1 at 5, 7.

The TDCJ has refused to produce unredacted documents responsive to these subpoena requests on three grounds³: (i) that the subpoenaed items are “privileged and confidential under Texas law” and would “likely result in the cessation of executions in Texas, as its supplier may cease supplying Texas”; (ii) that the documents are not relevant to the Arkansas litigation; and (iii)

³ The TDCJ has also objected on the grounds of defective service. In particular, the TDCJ has objected that the employee at the TDCJ who physically accepted service of the subpoena does not have the authority to retrieve the documents sought. This objection rings hollow. The Federal Rules of Civil Procedure require “delivering a copy to the named person.” Fed. R. Civ. P. 45(b)(1). The TDCJ is named on the subpoena. The subpoena was served in person at the TDCJ headquarters. Ex. 1 at 12. The TDCJ has already produced some documents in response to the subpoena, including redacted versions of the documents sought through this motion. Service was effected properly. See *Powell v. Time Warner Cable, Inc.*, 2010 U.S. Dist. LEXIS 138883, at *5-9 (S.D. Ohio Dec. 30, 2010) (collecting cases and holding that “service of a subpoena is effective so long as it reasonably insures actual receipt). Further, by producing documents in response to the subpoena, the TDCJ has waived any service objection it may have had.

that the subpoena is “unduly burdensome, overbroad and speculative.”⁴ Ex. 2 at 4, 12, 17, and 22. On the basis of these objections, the TDCJ refused to produce any unredacted documents or an accompanying privilege log detailing the documents it is withholding.

After reviewing the TDCJ’s objections, counsel for Plaintiffs significantly narrowed their requests by letter in an attempt to reach agreement, and reiterated a willingness to maintain confidentiality under the terms of the protective order already in place. Ex. 5; Ex. 6. Having subsequently met and conferred in good faith with counsel for the TDCJ, resolution could not be achieved. Because the TDCJ’s objections do not obviate their requirement to disclose non-privileged, relevant information, Plaintiffs now move this Court pursuant to Fed. R. Civ. P. 45 to compel the TDCJ’s compliance with Document Requests 1 and 4 of Plaintiffs’ subpoena.

II. ARGUMENT

In this action, Plaintiffs seek disclosure of specific, nonprivileged information that directly relates to one of the central tenets of their Eighth Amendment claim—the identity of Texas’ current suppliers, any previous suppliers, and any suppliers whom Texas has contacted about obtaining pentobarbital. This information is necessary to determine whether pentobarbital is available to Arkansas for use in its executions. This limited disclosure could prove critical to ensuring that at least four men are executed without suffering the unconstitutional cruel and unusual punishment awaiting them under Arkansas’ current lethal injection protocol. The requested information falls squarely within the scope of permissible discovery under Rule 26(b)—it is both relevant and proportional to the needs of this case. The TDCJ’s attempt to hide behind the shield of Texas’ confidentiality laws fails.

⁴ The TDCJ also asserted the deliberative process privilege. Ex. 2 at 22. Because Plaintiffs’ narrowed subpoena requests do not seek the internal deliberations of agencies, this privilege does not apply.

A. Discovery is appropriate under Rule 26(b)

1. Texas' current, former, or contemplated pentobarbital suppliers are relevant to Plaintiffs' claim of the availability of a "known, feasible alternative"

Plaintiffs here challenge Arkansas' use of midazolam as an anesthetic in its lethal injection protocol as unconstitutional. Midazolam was adopted by several states as a replacement for pentobarbital as the known suppliers of pentobarbital have become less willing to supply it to states for use in executions. Since its implementation, midazolam has been associated with several botched executions, where the inmates suffered prolonged, tortured deaths.⁵ In *Glossip*, 135 S.Ct. at 2738, the Supreme Court made clear that death-sentenced prisoners can challenge their jurisdiction's method of execution in a Section 1983 civil action, but have a "burden of establishing that any risk of harm [is] substantial when compared to a known and available alternative method of execution." In other words, Plaintiffs here must show that an alternative to midazolam is known and available. Texas began using pentobarbital in May 2011 as the FDA began restricting the entry of sodium thiopental into interstate commerce. Texas has since used pentobarbital in its current lethal injection protocol to carry out sixty-seven successful executions. Texas' procurement and use of pentobarbital is thus directly relevant to proving Plaintiffs' claim that known alternatives to midazolam exist and are available to Arkansas. Texas' ability to acquire

⁵ See, e.g., Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC (June 2015), <https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/> (last visited May 10, 2018) (Ex. 7); Bill Chappell, *Arizona Execution of Inmate Takes Nearly 2 Hours*, NPR: THE TWO-WAY (July 23, 2014), <https://www.npr.org/sections/thetwoway/2014/07/23/334632862/arizona-execution-of-inmate-takes-nearly-two-hours> (last visited May 10, 2018) (Ex. 8); The Associated Press, *Witnessing Death: AP Reporters Describe Problem Executions*, AP NEWS (Apr. 29, 2017), <https://www.apnews.com/bd583ccb99544d9cbe45a60f0afeed55> (last visited May 10, 2018) (Ex. 10).

pentobarbital demonstrates a strong likelihood that Arkansas could likewise acquire pentobarbital. Thus, the TDCJ's information regarding its pentobarbital suppliers is highly relevant to a central issue in this case—the availability of a feasible, known alternative lethal injection drug.

2. The disclosure of Texas' suppliers under a protective order is proportional to the needs of this case

Under the Federal Rules of Civil Procedure, discovery is permitted for any relevant, nonprivileged matter that is proportional to the needs of the case, taking into consideration “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). Each of these considerations weighs in favor of compelling the TDCJ to disclose its suppliers. At stake in this litigation is the right of at least four men to not be subjected to cruel and unusual punishment during their executions—a right enshrined in the United States Constitution and of unquantifiable value. Plaintiffs have few resources and no alternative way to obtain information about Texas’ pentobarbital suppliers. Evidence of a known, available alternative to midazolam is not only important to resolving the issues in this case, it is a vital element which *must* be proven for Plaintiffs’ Eighth Amendment challenge to succeed. Finally, because a protective order is in place to maintain confidentiality, any burden to the TDCJ is minimal. To the extent the TDCJ is concerned that the current protective order provides insufficient protection of its information, Plaintiffs have offered to enter into a supplemental protective order addressing any such concerns, and remain willing to do so.

Here, Plaintiffs seek disclosure of a limited amount of information that is directly relevant to their claim—the identity of Texas’ suppliers. There is no burden to the TDCJ in producing documents disclosing this information. The only potential burden identified by the TDCJ is

speculative: the TDCJ contends that it may lose its pentobarbital supplier if required to produce documents for use in the Arkansas litigation.

The TDCJ argues that any disclosure of its suppliers is an undue burden because the information is “irrelevant to any issue in the above styled litigation” and confidential. Ex. 2 at 22. As discussed above, the identity of Texas’ pentobarbital suppliers is *central* to Plaintiffs’ claim. The TDCJ further argues that there is a “reasonable belief that providing such documentation could lead to the termination of services necessary to carry out lawful sentences even with a protective order.” Ex. 2 at 14. However, the TDCJ does not cite to any binding precedent on this point; instead, it cites unrelated opinions from outside the Fifth Circuit.

The TDCJ bears the burden to show that “compliance with the subpoena would be unreasonable and oppressive.” *In re Subpoenas to Plains All American Pipeline, L.P.*, Misc. No. H-13-2975, 2014 WL 204447, *3 (S.D. Tex. Jan. 17, 2014) (Miller, J.) (citing *Wiwa v. Royal Dutch Petroleum Co.*, 392 F. 3d 812, 818 (5th Cir. 2004) To determine if a subpoena imposes an undue burden, the Court may consider the following factors: “(1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed.” *Id.* For a non-party, the Court may also consider the expense and inconvenience of compliance. *Id.* Here, Plaintiffs have a clear need for this information, compliance is of minimal burden to the TDCJ, and Plaintiffs and the TDCJ have negotiated a narrow scope for responsive documents.⁶

⁶ In fact, TDCJ itself has manufactured a good part of any alleged burden in complying with Plaintiffs’ subpoena by its choice to redact from the handful of documents it produced any information about the state’s pentobarbital suppliers: the exact information that Plaintiffs made clear was the core reason for their subpoena.

That this information is confidential is not enough to justify withholding it, particularly in light of Plaintiffs' willingness to enter into a supplemental protective order, if needed. If a subpoena seeks confidential information, "the court has discretion whether to allow the disclosure, and if so, under what conditions." *Id.* at *4. However, once again the TDCJ "bears the burden to demonstrate that the subpoena seeks trade secrets or confidential information, and that the disclosure would be harmful to its interests." *Id.* This the TDCJ cannot do. First, a protective order is already in place that will protect any and all confidential information produced by the TDCJ in this action. Ex. 10. Second, the TDCJ has not pointed to any evidence that limited disclosure of its current or contemplated suppliers in this litigation would affect Texas' ability to obtain pentobarbital in the future. Rather, the TDCJ offers only the conclusory allegations that disclosure "*would likely result* in the cessation of executions in Texas, as its supplier *may cease* supplying Texas" and that "Texas' drug source *will likely refuse* to provide Texas a way to conduct its lawful executions." Ex. 2 at 4, 20 (emphasis added).

Even if the TDCJ were to make this showing, the Court must balance the alleged potential harm against the relevance and necessity of the information to Plaintiffs' case. *In re Subpoenas*, 2014 WL 204447 at *4. As explained above, this information is central to Plaintiffs' constitutional claims. Therefore, Plaintiffs' demonstrated need outweighs any speculative harm to the TDCJ.

B. Texas' secrecy statute does not apply to this subpoena

Texas' secrecy statutes do not rescue it from being susceptible to third-party discovery. Texas relies upon two statutes. First, the statute titled "Exception: Confidentiality of Certain Information Regarding Execution of Convict" states:

Information is excepted from the requirements of Section 552.021 if it contains identifying information under Article 43.14, Code of Criminal Procedure, including that of:

(1) any person who participates in an execution procedure, including a person who uses, supplies, or administers a substance during the execution; and

(2) any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution.

Tex. Gov't Code Sec. 552.1081. Second, the statute titled "Execution of Convict: Confidential Information" states:

(b) The name, address, and other identifying information of the following is confidential and excepted from disclosure under Section 552.021, Government Code:

(1) any person who participates in an execution procedure described by Subsection (a), including a person who uses, supplies, or administers a substance during the execution; and

(2) any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution.

Tex. Code of Crim. Proc. Art. 43.14(b)

However, these statutes do not prevent the TDCJ from disclosing its pentobarbital supplier in this case, because the confidentiality under each of these statutes is achieved by exempting the identifying information from Section 552.021, which is titled "Availability of Public Information" and states: "Public information is available to the public at a minimum during the normal business hours of the governmental body." Tex. Gov't Code Sec. 552.021. These statutes are not applicable because "[a] subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure is not considered to be a request for information under [Chapter 552]." Tex. Gov't Code Sec. 552.0055. Further, even if Plaintiffs' subpoena were a request under Chapter 552, Plaintiffs do not seek to make the requested information available to *the public*. Rather, Plaintiffs seek only limited disclosure pursuant to a subpoena under a protective order. *See* Ex. 10. And if the TDCJ does not feel the protections under the current protective order

are sufficient, Plaintiffs have offered to enter into a supplemental protective order to address these concerns.

Thus, because these secrecy statutes are inapplicable, and in any event are in place only to protect this information from *public* disclosure, the TDCJ cannot rely on them to withhold relevant information pursuant to a valid subpoena issued under a protective order.

III. CONCLUSION

Plaintiffs respectfully move this Court for an order compelling the TDCJ to make a complete and thorough response to Plaintiffs' subpoena request numbers 1 and 4, with unredacted information and documents identifying Texas' current or past suppliers of pentobarbital, as well as any potential suppliers whom Texas contacted about obtaining pentobarbital. Plaintiffs request oral argument on this motion.

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