No. 24-_____

IN THE SUPREME COURT OF THE UNITED STATES

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WILLIE JAMES PYE,

*Petitioner,*

v.

TYRONE OLIVER, Commissioner, Georgia Department of Corrections, CHRISTOPHER CARR, in his official capacity as the Attorney General of the State of Georgia, STATE BOARD OF PARDONS AND PAROLES, SHAWN EMMONS, Warden, Georgia Diagnostic & Classification Prison

*Respondents.*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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# APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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## INDEX TO APPENDIX

# EXHIBIT A

In the

# United States Court of Appeals

## For the Eleventh Circuit

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No. 24-10793

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WILLIE JAMES PYE,

Plaintiff-Appellant,

*versus*

COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF GEORGIA,
STATE BOARD OF PARDONS AND PAROLES,
WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON

Defendants-Appellees.

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Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 3:24-cv-00048-TCB

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Before WILLIAM PRYOR, Chief Judge, and Wilson and JILL PRYOR, Circuit Judges.

BY THE COURT:

Appellant's motion for panel reconsideration of the Court's March 19, 2024, order denying appellant's motion for a stay of execution is DENIED.

# EXHIBIT B

In the

# United States Court of Appeals

## For the Eleventh Circuit

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No. 24-10793

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WILLIE JAMES PYE,

Plaintiff-Appellant,

*versus*

COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF GEORGIA,
STATE BOARD OF PARDONS AND PAROLES,
WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON

Defendants-Appellees.

---

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 3:24-cv-00048-TCB

---

Before WILLIAM PRYOR, Chief Judge, and WILSON and JILL PRYOR, Circuit Judges.

BY THE COURT:

Willie James Pye is incarcerated in Georgia under a death sentence; the State of Georgia has scheduled his execution for March 20, 2024, at 7:00 p.m. He has moved in this Court for a stay of his execution, which we deny for the reasons below.

On March 11, 2024, Mr. Pye brought this action under 42 U.S.C. § 1983, arguing that the State violated his rights to due process and equal protection. His claims stem from the fact that the State scheduled his execution despite an agreement between the Attorney General and the state's capital defense bar, including his lawyers, not to execute a class of death-row prisoners while certain conditions related to the COVID-19 pandemic remained.[1] Alongside his complaint, Mr. Pye moved for a stay of execution. The

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[1] Mr. Pye sued the Commissioner of the Georgia Department of Corrections, Tyrone Oliver; the Attorney General of the State of Georgia, Christopher Carr; and the Warden of the Georgia Diagnostic and Classification Prison, Shawn Emmons, all in their official capacities. He also sued the State Board of Pardons and Paroles. For ease of reference, we call these parties collectively "the State."

State moved to dismiss the complaint for failure to state a claim. On March 15, 2024, the district court denied Mr. Pye's motion for a stay and granted the State's motion to dismiss. He has appealed and moved this Court for a stay of execution pending appeal.

This action is not, however, the only challenge Mr. Pye has lodged to his execution warrant based on the agreement between the Attorney General and the capital defense bar. On March 5, 2024, before he filed his federal complaint, Mr. Pye filed a breach of contract action in the Superior Court of Fulton County, Georgia. In his complaint, he alleged that he is a third-party beneficiary of the agreement and that the State's procurement of a warrant for his execution before certain conditions set forth in the agreement were satisfied constituted a breach. Alongside his complaint Mr. Pye filed a motion for an interlocutory injunction and temporary restraining order. The State moved to dismiss the action. After a hearing, on March 13, 2024, the superior court granted the State's motion and denied Mr. Pye's. Mr. Pye also sought review of that order, and on March 18, 2024—while Mr. Pye's § 1983 appeal was pending in this Court—the Georgia Supreme Court denied his application for discretionary appeal.

After the Georgia Supreme Court denied Pye's application for discretionary review, we requested supplemental letter briefs from the parties on whether the doctrine of res judicata barred his claims.

Mr. Pye is entitled to a stay of his execution only if he can show that (1) he has a "substantial likelihood of success on the

merits" of his appeal; (2) he "will suffer irreparable injury" absent a stay; (3) the stay "would not substantially harm" the State; and (4) the stay "would not be adverse to the public interest." *Barwick v. Governor of Florida*, 66 F.4th 896, 900 (11th Cir. 2023) (citing *Bowles v. DeSantis*, 934 F.3d 1230, 1238 (11th Cir. 2019)). The first of these is the most critical, and if he cannot make the substantial-likelihood-of-success showing, it is unnecessary to proceed through the remainder of the analysis. *Barber v. Governor of Alabama*, 73 F.4th 1306, 1317 (11th Cir. 2023).

We conclude that Mr. Pye cannot demonstrate that he is substantially likely to prevail on the meris of his appeal because he has previously litigated a claim arising out of the agreement in state court, and res judicata likely bars his federal complaint.

When we consider "whether to give *res judicata* effect to a state court judgment, we must apply the res judicata principles of the law of the state whose decision is set up as a bar to further litigation." *Muhammad v. Sec'y, Fla. Dep't of Corr.*, 739 F.3d 683, 688 (11th Cir. 2014) (internal quotation marks omitted). Here, that law is Georgia's. Georgia law provides that that "[a] judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law *might have been put in issue* in the cause wherein the judgment was rendered." O.C.G.A. § 9-12-40 (emphasis added). In Georgia, res judicata bars a subsequent action when three prerequisites are satisfied: "(1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous

adjudication on the merits by a court of competent jurisdiction." *Coen v. CDC Software Corp.*, 816 S.E.2d 670, 675 (Ga. 2018).

Here, there is no doubt that the two lawsuits involved the same parties or their privies. And the superior court order dismissing Mr. Pye's complaint, which the Georgia Supreme Court declined to review, qualifies as an adjudication on the merits by a court of competent jurisdiction. We thus focus our attention on whether the two lawsuits involved identical causes of action.

Under Georgia law, for res judicata, "cause of action" refers to the "entire set of facts which give rise to an enforceable claim" with a "focus on the wrong that is asserted." *Id.* at 671 (internal quotation marks omitted). The Georgia Supreme Court has cautioned that "'causes of action' should not be conflated with theories of recovery," and "just because the theory of recovery is different in consecutive lawsuits does not automatically mean that there is no identity of cause of action." *Id.* at 674 n.7; *see also Dashtpeyma v. Walker*, 859 S.E.2d 799, 801–02 (Ga. Ct. App. 2021) (concluding that res judicata barred a second action, even though the first action alleged defamation and libel and the second action also alleged fraud, because "the same set of facts gave rise to the wrong asserted in both causes of action").

Here, Mr. Pye's federal and state lawsuits both arise out of the same operative facts and the same alleged wrong. In his state-court complaint, the wrong asserted was the State's issuance of a warrant for his execution. The operative facts that gave rise to this claim were that the State entered into an agreement with other

death-row prisoners identifying conditions that had to be satisfied before the State could resume executions and then sought a warrant for Mr. Pye before all the conditions had been met. In this case, Mr. Pye's complaint identifies the same operative facts as giving rise to his constitutional claims and seeks relief for the same wrongful act.

It is true that Mr. Pye has relied on different theories for why he is entitled to relief—bringing a breach of contract claim as a third-party beneficiary in state court and constitutional equal protection and due process claims in this action. In the breach of contract action, Mr. Pye's theory was that under state contract law he should be treated as party to the agreement. Here, by contrast, Mr. Pye's theories hinge on the fact that he is not a party to the agreement. But just because he has relied on different theories of relief "does not automatically mean that there is no identity of cause of action." *Coen*, 816 S.E.2d at 674 n.7. After carefully considering Georgia law, we conclude that it is substantially likely that the lawsuits involved the same cause of action.

In his supplemental brief, Mr. Pye argues that res judicata does not apply because his § 1983 claims "could not have been adjudicated in his state-court action." He says that the state courts would have lacked jurisdiction over his federal constitutional claims due to sovereign immunity. He contends that he was able to bring his breach-of-contract claim against the state Attorney General because Georgia has waived its sovereign immunity for breach-of-contract claims. *See* Ga. Const. art. I, § 2, ¶ 9(c). He

asserts that the state court would have lacked jurisdiction over his § 1983 claims, however, because Georgia has not waived its sovereign immunity for these claims. *See* Ga. Const. art. I, § 2 ¶ 5.

We reject Mr. Pye's argument. It is well-established that a litigant may bring a § 1983 claim against a state officer in state court. *See Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 358 (1990). Moreover, as the United States Supreme Court has recognized, in such actions a state-law defense of sovereign immunity is available to a defendant only when such a defense would have been available if the action had been brought in a federal forum. *See id.* at 359, 369–72. And an immunity defense was unavailable to the Attorney General in Mr. Pye's § 1983 action for injunctive relief in federal court. *See Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1336 (11th Cir. 1999) ("Under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), . . . there is a long and well-recognized exception to [Eleventh Amendment immunity for claims against state officials] for suits . . . seeking prospective equitable relief to end continuing violations of federal law." (emphasis omitted)).

Because res judicata likely bars Mr. Pye's claim in this action, we cannot say that he is substantially likely to succeed on the merits of this appeal, and thus he is not entitled to a stay of his execution.

The motion for a stay of execution is DENIED.

# EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

WILLIE JAMES PYE,

Plaintiff,

v.

TYRONE OLIVER, Commissioner, Georgia Department of Corrections; CHRISTOPHER CARR, in his official capacity as the Attorney General of the State of Georgia; STATE BOARD OF PARDONS AND PAROLES; and SHAWN EMMONS, Warden, Georgia Diagnostic & Classification Prison,

Defendants.

CIVIL ACTION FILE

NO. 3:24-cv-48-TCB

**O R D E R**

Willie James Pye, an inmate currently under sentence of death at the Georgia Diagnostic and Classification Prison in Jackson, Georgia, has filed the instant 42 U.S.C. § 1983 civil rights action seeking an order enjoining his pending execution. He has also filed a motion for a

temporary restraining order [3] ("TRO") seeking the same relief on an interim basis. The Defendants (collectively referred to as the State) have filed an amended motion to dismiss [8] in which they also argue that the TRO should be denied.

## I. Background

On June 4, 1996, in Spalding County Superior Court, a jury convicted Pye of malice murder, kidnapping with bodily injury, armed robbery, burglary, and rape. On June 7, 1996, the jury sentenced Pye to death. Pye has now exhausted his appeals and petitions for collateral relief in both state and federal court. He is thus, in the parlance of the State, death eligible, and the State has obtained a death warrant for Pye's execution between the dates of March 20, 2024, and March 27, 2024. The Georgia Department of Corrections has scheduled his execution for March 20, 2024.

### A. The Agreement[1]

The COVID-19 pandemic resulted in a pause in executions and some capital-related litigation in Georgia because court proceedings

[1] The facts related to the adoption of the Agreement, as defined in the text, are discussed in much greater detail in *State v. Fed. Def. Program, Inc.*, 882 S.E.2d 257 (Ga. 2022).

could not be held, and the Georgia Department of Corrections prohibited death row prisoners from meeting with their attorneys, rendering it purportedly impossible for the inmates' lawyers to prepare their cases. As a result, there is a significant backlog in the number of death-eligible prisoners (i.e., prisoners whose appeals and habeas cases have concluded), and the capital defense bar was concerned that, once the COVID-19 restrictions relaxed, the state would schedule executions in rapid sequence, overwhelming the lawyers' ability to adequately prepare for clemency and other pre-execution proceedings.

At one point, a task force created by Georgia Supreme Court then-Chief Justice Harold Melton considered crafting legislation to address the lawyers' concerns, but, ultimately, counsel for the Georgia Attorney General (the "AG") and the Georgia Resource Center worked together to forge an agreement (the "Agreement"). The Agreement was memorialized in an email that an AG attorney sent to various interested parties. The text of that email is as follows:

> [The AG's] office will not pursue an execution warrant from the District Attorney in the below defined cases before: 1) the final COVID19 judicial emergency order entered by the Chief Justice of the Supreme Court of Georgia expires; 2) the Georgia Department of Corrections lifts its suspension of legal visitation, and normal visitation resumes; and [3)] a

vaccination against COVID19 is readily available to all members of the public.

After these Conditions are met, and no earlier than August 1, 2021, [the AG's] office intends to request an execution warrant for Billy Raulerson. We will provide Raulerson's counsel with notice of at least three months after the three-above conditions are met before pursuing an execution warrant. [The AG's] office will also ask the District Attorney to seek the maximum warrant period of 20 days for the warrant. [The AG's] office will not pursue an execution warrant of any prisoner other than Mr. Raulerson before a total of at least six months after the time the above-three conditions are met. Upon the expiration of this six-month period, we will ask each District Attorney to seek the maximum warrant period of 20 days and will wait no less than 30 days before pursuing each subsequent warrant.

This agreement applies only to death-sentenced prisoners whose petition for rehearing or rehearing en banc was denied by the Eleventh Circuit while the State of Georgia remained under judicial emergency order, and will remain in effect only through August 1, 2022, or one year from the date on which the above-three conditions are met, whichever is later.

Also, we will not seek to obtain a warrant for Michael Nance from the District Attorney until the United States Supreme Court has denied a request of certiorari from the Eleventh Circuit Court of Appeals of his § 1983 litigation (originating in the United States District Court for the Northern District of Georgia, USDC-NDGA Case No. 20-cv-107) concerning an as-applied challenge to his execution by lethal injection.

This agreement is made with the understanding that the District Attorney maintains the sole authority to obtain an execution warrant.

[1-1] at 4–5.

As indicated, the Agreement generally states that the AG would forbear from seeking death warrants while the COVID crisis continued, and that once certain conditions were met, the AG (and the local concerned district attorneys) would seek death warrants on a set schedule with notice to the lawyers and time to prepare for clemency hearings and any other pre-execution litigation.

In apparent violation of the terms of the Agreement, on April 27, 2022, the State obtained a death warrant for Virgil Presnell and scheduled his execution for May 17, 2022. *State v. Fed. Def. Program, Inc.*, 882 S.E.2d 257, 266 (Ga. 2022). The Federal Defender as a party to the Agreement filed a breach of contract action in state court. The trial court held that the contract was enforceable against the state and that two of the three conditions for restarting executions—(1) resumption of normal visitation at the prison, and (2) widely available COVID vaccines—had not been met. *Id.* at 267. As a result, the court found the State in breach and enjoined the state from executing Presnell other than under the terms of the Agreement. *Id.* In *State v. Federal Defender Program, Inc.*, the Georgia Supreme Court affirmed, holding that the

Agreement is a valid contract, enforceable against the state, and that the trial court did not err in granting equitable relief. *Id.* at *passim*.

Significant to this matter, the Agreement "applies only to death-sentenced prisoners whose petition for rehearing or rehearing en banc was denied by the Eleventh Circuit while the State of Georgia remained under judicial emergency order . . . ." [1-1] at 4–5. The Georgia Supreme Court's statewide judicial emergency order expired on July 1, 2021, and the Eleventh Circuit issued its en banc decision in Pye's habeas corpus case on October 4, 2022, *Pye v. Warden*, 50 F.4th 1025 (11th Cir. 2022), and the Eleventh Circuit's mandate arrived in this Court on March 27, 2023, such that the language of the Agreement expressly excludes Pye from its coverage. In late February of this year (and more than a year after the Georgia Supreme Court affirmed the contract case), Pye attempted to intervene in the breach of contract case brought by the Federal Defender, and the trial court denied the motion after finding that Pye is not covered by the Agreement. [8-3]. Pye next filed a complaint in state court contending he is a third-party beneficiary to the Agreement. [8-5]. On March 13, 2024, the state court granted the State's motion to dismiss that complaint after finding that "Mr. Pye

does not fall within the group intended to be covered by the Agreement." [8-8] at 7. Also significant is the fact that, of the forty-one prisoners on Georgia's death row, the Agreement covers only seven of them, and Pye is the only death-eligible prisoner on death row.[2]

**B. Pye's Claims Before the Court**

Having failed to demonstrate that he is covered by the Agreement, Pye filed this case raising (1) a "class-of-one" equal protection claim,[3] arguing that the state has, for purely arbitrary reasons, chosen to seek a death warrant against him when it has agreed to wait to obtain a death warrant for the seven prisoners on death row covered by the Agreement and then only under a schedule that will provide the lawyers substantially more time to prepare for clemency proceedings, and (2) a substantive due process claim in which he argues that because

[2] Pye contended at the hearing that there are eight or nine inmates covered by the Agreement. This Court acknowledges the contention but will continue to use the number seven as the difference is immaterial.

[3] Counsel for Pye informed the Court that he intends to seek equal protection relief on behalf of all death-row inmates not covered by the Agreement based on disparate treatment. Assuming that counsel for Pye does not represent all of the other thirty-three inmates not covered by the Agreement, and Pye has not sought class certification (nor, it appears, would he be able to), this Court is not convinced that he can pursue such relief. In any event, Pye has not amended his complaint to raise those claims.

the State chose to wait to seek a death warrant for some death row prisoners, it cannot arbitrarily exclude him from those protections by effectively deciding that he is not entitled to adequate representation in his clemency proceedings. According to Pye, by entering into the Agreement, the State essentially created a new procedure for clemency and has excluded him from that new procedure.

As discussed in greater detail below, the State argues that Pye has failed to state a claim with respect to both his equal protection and due process claims. The State also argues that this case should be dismissed because Pye has failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act.[4]

On March 15, 2024, this Court held a hearing at which the parties presented their arguments. Having heard that argument and carefully reviewed the parties' submissions, this Court is prepared to rule on the issues presented.

[4] At the hearing, this Court overruled the State's argument regarding exhaustion.

## II. Discussion

### A. Pye's Entitlement to a TRO

As noted above, Pye seeks a TRO. In order to obtain a TRO, Pye must establish all of the following elements: (1) a substantial likelihood of success on the merits of his claims; (2) that the TRO is necessary to prevent irreparable injury; (3) that the threatened injury outweighs the harm the TRO would cause the other litigant; and (4) that the TRO would not be adverse to the public interest. *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 779 F.3d 1275, 1280 (11th Cir. 2015) (per curiam).

#### 1. Substantial Likelihood for Success

##### a. Pye's Equal Protection Claim

> When presenting a class of one equal protection claim, a plaintiff alleges that it is the only entity being treated differently from all other similarly situated entities, even though it does not belong to a suspect classification. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). In order to prevail, a plaintiff must show that it "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir. 2006) (quoting *Olech*, 528 U.S. at 564).
>
> [The Eleventh Circuit] appl[ies] the "similarly situated" requirement "with rigor." *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1207 (11th Cir. 2007). "[T]he [entities] being compared 'must be *prima facie identical in all relevant respects*.'" *Irvin*, 496 F.3d at 1204 (emphasis in original)

> (quoting *Campbell*, 434 F.3d at 1314). Put another way, "[d]ifferent treatment of dissimilarly situated persons does not violate the equal protection clause." *Campbell*, 434 F.3d at 1314 (quoting *E&T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987)). A plaintiff must ultimately show that it and any comparators are "similarly situated 'in light of all the factors that would be relevant to an objectively reasonable governmental decisionmaker.'" *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1275 (11th Cir. 2008) (quoting *Griffin Indus.*, 496 F.3d at 1207).

*PBT Real Est., LLC v. Town of Palm Beach*, 988 F.3d 1274, 1285 (11th Cir. 2021) (cleaned up).

> Under rational basis review, a classification does not violate the Equal Protection Clause so long as "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." [*Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012)] (quoting *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)). "[A] classification 'must be upheld against equal protection challenge if there is *any* reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Heller*, 509 U.S. at 320 (emphasis added) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). [Courts must] assume the classification is constitutional, and the [plaintiff]s—as the challengers—must "'negative every conceivable basis which might support'" the classification. *See id.* (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

*Estrada v. Becker*, 917 F.3d 1298, 1310–11 (11th Cir. 2019).

Pye argues that rather than rational basis review, his equal protection claim should be analyzed under strict scrutiny because, in

intending to take his life, the State is violating his fundamental right to life, and the State cannot demonstrate a compelling government interest to exclude him from the terms of the Agreement. [1] ¶ 37. In this context, equal protection claims require strict scrutiny analysis "only when the classification impermissibly interferes with the exercise of a fundamental right." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). While this Court acknowledges that the right to continue living is fundamental, in this case Pye is already subject to the death penalty and is due to be executed at some point, and nothing that the State has done in relation to securing a death warrant or refusing to provide him the benefits of the Agreement has increased the likelihood that he will be executed eventually.

In her concurrence in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), which carries precedential weight because it provided the deciding vote to a plurality opinion, *see Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1268, 1269 n.2 (11th Cir. 2014), Justice O'Connor noted that "[a] prisoner under a death sentence remains a living person and consequently has an interest in his life." *Woodard*, 523 U.S. at 288 (O'Connor, J., concurring). However, as discussed below

in connection with Pye's due process claim (and as admitted by Pye's counsel at the hearing) that interest is minimal. *See id.* ("[O]nce society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." (quoting *Ford v. Wainwright*, 477 U.S. 399, 429 (1986) (O'Connor, J., concurring in result in part and dissenting in part))). As the State pointed out at the hearing, Pye couches his claims for relief in relation to his time for preparation for a clemency hearing and his entitlement to "adequate representation," both of which only tangentially, if at all, implicate his fundamental right to live.

Pye has not alleged that his impending execution will result in his not being able to present a full clemency case before the State Board of Pardons and Paroles, but even if he did, that would not interfere with his exercise of a fundamental right. Indeed, as also discussed below in relation to Pye's due process claim, his liberty interest in a clemency proceeding is also minimal. Having already lost his right to live, Pye cannot complain that every change related to the schedule of his execution impinges on a fundamental right. This Court thus concludes

that Pye is not entitled to strict scrutiny review of his equal protection claim.[5]

The State argues that Pye cannot establish his class-of-one equal protection claim because he cannot demonstrate that he is "similarly situated" in all material respects to the seven inmates that are covered by the Agreement, mainly because he is expressly excluded from the Agreement, leaving him as the sole death-eligible prisoner in the state. The State points out that Pye's then-lawyer, Jill Benton, was heavily involved in negotiating the Agreement such that his interests were well represented,[6] and the lawyer never sought to include special language

[5] Pye also asserts that he does not raise a "class-of-one" claim insofar as he claims that the State has created two classes of death-row inmates—one class protected under the terms of the Agreement and one not—which he asserts is a "standard Equal Protection claim [and] not a class-of-one claim." [10] at 7. However, his claim is not standard because the disparate treatment he alleges is not based on a suspect classification. Rather, his asserted claim is perhaps the equivalent of a "class-of-several" equal protection claim that, as Pye acknowledges, *see id.* at 7–9, requires him to demonstrate both the similarly situated and rational basis prongs in the same manner as with a class-of-one claim. Put simply, Pye raises a distinction without a difference. "Whether the complaint alleges a class of one or of five is of no consequence because we conclude that the number of individuals in a class is immaterial for equal protection analysis." *Olech*, 528 U.S. at 564 n.1.

[6] *See* [1-1] (exhibit to complaint containing email thread negotiating terms of Agreement and including meaningful input from Attorney Benton). *See Hoefling v. City of Miami*, 811 F.3d 1271, 1277 (11th Cir. 2016) ("A district court can generally consider exhibits attached to a complaint in ruling on a motion to dismiss." (citations omitted)).

about Pye, while there is special language about two other death-row inmates, Billy Raulerson and Michael Nance. [1-1] at 4. The State further argues that there clearly is a rational basis for the state to seek Pye's execution: Pye is the only death-eligible prisoner in the state, he is expressly excluded from the agreement, and the State has a clear interest in carrying out the sentences imposed by the courts.

In his complaint and his motion for a TRO, Pye generally fails to make any allegation to demonstrate that he is similarly situated to the seven inmates covered by the Agreement beyond his implication that they are all subject to a death sentence and should thus enjoy the benefits of the Agreement equally. In his response to the State's motion to dismiss, Pye contends that he is similarly situated "in all material respects to the class of prisoners who received the benefits of the Agreement and that there is no constitutionally sufficient reason for depriving him of that protection," [10] at 8, which is entirely conclusory. He then contends that he is "also similarly situated to the comparator class because the concerns animating the Agreement—in particular, difficulty in preparing for clemency because of [prison] visitation restrictions—still exist today. *Id.* Pye's argument relies heavily on his

contention that the inmates who are covered by the Agreement are afforded "adequate representation," apparently seeking to imply, but failing to specifically allege, that he and the other inmates not so covered do not have adequate representation.

Admittedly, the parties' similarly-situated arguments are somewhat circular: Pye is not similarly situated because he is not covered by the Agreement versus Pye should not be left out of the Agreement because he is similarly situated. The answer, however, lies in the fact that the parties negotiated the parameters of the Agreement—specifically identifying the inmates to whom it should apply—and everyone agreed to the terms, including Pye's then-lawyer. Pye is not similarly situated because the parties to the Agreement (including his own lawyer) determined that he did not need to be covered by its terms. Pye is also not similarly situated because the exigencies related to COVID-19 that required the adoption of the Agreement did not apply as strongly to him. Moreover, the fact that there are only seven inmates covered by the Agreement substantially weakens Pye's argument. The other thirty-three death-row inmates also fail to receive the benefits of extra warning in the agreement, which

raises the question of why Pye is not similarly situated to them. Indeed, if this Court determines that Pye is entitled to relief, it may imply that all death-row inmates should be covered by the Agreement, but the State and the capital defense bar lawyers did not make that bargain, and the Georgia courts have ruled repeatedly that the language excluding those inmates is valid and enforceable.

In his complaint, [1] ¶ 1, Pye acknowledges that the Agreement was intended to give the lawyers space to prepare for clemency proceedings and pre-execution litigation, not to provide a time windfall to death row inmates. Moreover, the single death warrant issued for Pye would not overwhelm the capital defense bar such that it would violate the spirit of the Agreement.

Pye's assertions of inadequate representation because he is not included under the terms of the Agreement are unconvincing. Pye clearly has competent counsel, and, as Pye admits, "[t]he total ban on legal visitation was lifted on April 7, 2021." [10] at 9 n.1. While the prison's visitation available today may not provide as much access as before the pandemic, Pye has made no allegation that current circumstances render it impossible (or even difficult) for his counsel to

provide him with adequate representation, and, as the State points out, Pye's counsel has known that he was death eligible, and he has not claimed that he has been prevented from preparing for his inevitable execution for the past year since the Eleventh Circuit denied his last petition or the approximately four or five months since the Supreme Court denied certiorari in his habeas corpus case. The Court thus concludes that Pye has not shown a substantial likelihood that he will be able to establish that he is similarly situated to those death-row inmates covered by the Agreement.

On the issue of whether the State has a rational basis for failing to cover Pye under the Agreement, the State clearly has a valid basis for drawing a line between the inmates covered and not covered by the Agreement. The pandemic was an extraordinary event, and it arguably required some form of accommodation for capital defense lawyers worried about numerous death warrants possibly being issued in rapid succession. The parties negotiated the Agreement, and that Agreement included a few, but not all, death row inmates. While Pye argues that all death-row inmates should be afforded the same benefit, the exigencies caused by the pandemic certainly do not require that, and a

stop-gap measure taken in response to a global crisis should not result in a *de facto* change to Georgia law regarding when and how death warrants are issued. The state courts have already ruled that Pye is not covered by the Agreement, and he should not be permitted to write his name into it under the guise of equal protection. A ruling in his favor would certainly have a chilling effect on the State's willingness to enter into such agreements in the future, and certainly, the State should not be penalized for attempting to accommodate the capital defense bar by entering into the Agreement. The Court concludes that Pye has not shown a substantial likelihood that he will be able to establish that the State has no rational basis for refusing to apply the terms of the Agreement to him, and he thus cannot show a substantial likelihood of success on his equal protection claim.

**b. Pye's Due Process Claim**

The State argues that Pye's due process claim fails because there is only a minimal liberty interest in clemency, and Pye has known that his execution was imminent since this past October when he exhausted his appeals, and he has had ample time to prepare for his clemency proceeding. Pye counters that he does not challenge Georgia's clemency

procedures. Rather, he asserts an entitlement to "a baseline guarantee of adequate representation for clemency proceedings" and pre-execution litigation. [10] at 12. According to Pye, once the State has agreed to confer a benefit, "it must do so in compliance with the Due Process Clause." *Id.*

Substantive due process is an inexact method of policing certain types of government misconduct. *See Daves v. Dallas Cnty., Tex.*, 984 F.3d 381, 411 (5th Cir. 2020) ("[T]he caselaw in this area is contradictory, imprecise, and, well, messy." (internal quotation marks and citation omitted)). Under that messy case law, there are two ways to analyze Pye's claim. The first is to determine whether the State has committed an arbitrary or capricious abuse of power by excluding him from coverage under the Agreement. However, the Supreme Court has "emphasized that only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quotations and citations omitted). "To this end, for half a century now [the Court has] spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Id.*; *see, e.g.*, *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (reiterating

that conduct that "'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency" would violate substantive due process).

While one might characterize Pye's plight as unfair in relation to the few death row inmates covered by the Agreement, it does not shock the conscience, especially when considering that Pye would be in the same situation regardless of whether the pandemic had occurred. As discussed above in relation to Pye's equal protection claim, the State entered into the Agreement as a benefit granted to certain death row inmates (or more accurately, to their lawyers) because of extraordinary circumstances, and for that, the State should be commended and not labelled as arbitrary and capricious. Pye has made no allegation that the State "is out to get him" or that it is retaliating against him. The State is simply acting in accord with the plain terms of the Agreement, and Pye has been well aware of those terms for some time. Because Pye is expressly excluded from coverage under the Agreement, he has no legitimate claim of entitlement to be included under its terms, and the Court is not shocked by his exclusion.

The second way to view Pye's substantive due process claim is as an allegation of the denial of a fundamental right. *See McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc). Fundamental rights are those "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quotations and citations omitted). Pye has not alleged the denial of a fundamental right—as indicated above, his fundamental right to life is not implicated. Indeed, he has not properly alleged the denial of a protected liberty interest.[7] Liberty interests/property interests "*are not created by the Constitution*. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as *state law*." *The Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (emphasis added). The Georgia courts have ruled repeatedly that Pye has no interest in the Agreement even as a third-party beneficiary, and

[7] While liberty/property interests are not at issue in the substantive due process analysis, this Court discusses them to the degree that Pye's claim could be interpreted as a procedural due process claim.

he can thus claim no due process violation by the State's refusal to apply its terms to him.

Moreover, to the degree that Pye's due process claim is couched in terms of the denial of sufficient time or adequate representation to prepare for his clemency proceedings,[8] clemency is an act of grace, and "[t]he Supreme Court has recognized a very limited due process interest in clemency proceedings." *Wellons*, 754 F.3d at 1269 (citing *Woodard*, 523 U.S. at 283–85).

> The holding in [*Woodard*] was provided by Justice O'Connor's concurring opinion. *Wellons*[, 754 F.3d at 1269 n.2] (recognizing Justice O'Connor's concurring opinion as "set[ting] binding precedent"). Her opinion acknowledges that the "life" interest protected by the Due Process Clause itself guarantees "some *minimal* procedural safeguards" for state clemency proceedings involving death row inmates. *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring).
>
> The key word here is "minimal." Justice O'Connor's opinion concludes that the prisoner in *Woodard* had received adequate process despite the fact that he was given only a few days notice of his hearing, that he was interviewed by the parole board without his attorney present, that his

[8] Pye contends that he does not challenge Georgia's clemency procedures, [10] at 12, but his entitlement to adequate representation cannot exist in a vacuum—it must attach to a right or liberty interest that he possesses. For example, he could not claim a due process violation for the denial of process in a prison disciplinary proceeding where the worst sanction he faces is loss of telephone privileges because he has no liberty interest in telephone privileges. *See Sandin v. Conner*, 515 U.S. 472 (1995).

> attorney was "permitted to participate in the hearing only at the discretion of the parole board chair," and that the prisoner "was precluded from testifying or submitting documentary evidence at the hearing." *Id.* at 289–90. That procedure, it was held, satisfied "*whatever* limitations the Due Process Clause may impose on clemency proceedings." *Id.* at 290 (emphasis added). The only circumstances that Justice O'Connor's opinion identifies in which due process would be offended are truly outrageous ones, such as (1) "a scheme whereby a state official flipped a coin to determine whether to grant clemency," or (2) "a case where the State arbitrarily denied a prisoner *any* access to its clemency process." *Id.* at 289 (emphasis added).

*Gissendaner*, 794 F.3d at 1331.

Pye has not alleged that he will be entirely denied access to clemency, and his claim that he will have limited time to prepare for clemency or inadequate representation does not implicate a fundamental right or recognized liberty interest. As discussed above, Pye's counsel knew that he was death eligible and fell outside of the terms of the Agreement, and he has not claimed that he has been prevented from preparing for proceedings related to his inevitable execution since his habeas corpus proceedings wound down.

Addressing one other assertion by Pye both in his response and at the hearing, his contention that the State and the Georgia Supreme Court "recognized that the conditions in the Agreement represent a

baseline guarantee of adequate representation for clemency proceedings and post-warrant litigation," [10] at 12, is, at best, a gross exaggeration. Nothing that the Georgia Supreme Court or the State has said even slightly indicates that the State sought to guarantee adequate representation through the Agreement, and the Agreement certainly does not make any such guarantees. The Agreement simply provides a timeline for the resumption of executions for a limited group of death-row inmates, and such a schedule cannot be read to create standards for legal representation.

In summary, the Court concludes that Pye has not shown a likelihood of success on the merits of his equal protection or his due process claim.

### 2. Irreparable Injury, Balance of Harms, and the Public Interest

As Pye has not shown a likelihood of success on the merits, he is not entitled to a TRO. However, to complete the record, this Court addresses the remaining elements in the TRO test. Pye argues that he should prevail on the second (irreparable injury) prong of the TRO test because without relief, he will be executed. However, he almost

certainly will be executed in any event. Additionally, as the State points out,

> Pye's arguments for relief are premised on the allegation that he should be given more time to prepare for clemency and last-minute execution litigation. Thus, the actual injury Pye is asserting he will suffer is limited time to prepare for his execution. But Pye has not shown that he has not had adequate time to prepare for these known eventualities or that there is any law that affords him more time than he has been given. He knew when his rehearing was denied he was not a party to the COVID-19 agreement.

[8] at 34.

There have been no executions in Georgia for an extended time such that Pye's counsel were well aware that he was very likely next on the list as soon as his federal habeas corpus proceedings ended, and they have had ample opportunity to prepare for clemency and whatever other proceedings they intend to initiate, and Pye has made no claim that his counsel is unprepared or unable to present a case in the clemency proceeding. Moreover, to the degree that he does have a valid basis to assert that his representation has been somehow hampered, as the State mentioned at the hearing, there are procedural vehicles in the clemency proceedings to obtain more time. In the absence of any showing of actual harm in relation to Pye's preparation for clemency

proceedings, the Court agrees with the State that Pye has not shown irreparable injury.

The State's argument on the balance of harms (the third TRO element) is that granting a stay to Pye would, in effect, require it to apply the terms of the Agreement to all death-row inmates, leaving the State unable to enforce death sentences while Pye can claim injury only in the form of limited time to prepare (which he may not actually need). As noted at the hearing, this Court will not base its decision upon the effect that a ruling in this case would have on other cases. However, as indicated above, a ruling in Pye's favor would certainly have a chilling effect on the State's willingness to make such agreements in the future, and the State obviously has an important interest in imposing sentences imposed by its courts. Given that Pye has not shown an irreparable injury, the Court concludes that the balance of harms weighs in the State's favor.

Finally, as to the public interest, while the public has an interest in justice and the punishment of convicted criminals, it also has an interest in seeing that those convicts' constitutional rights are upheld. In short, the public interest is generally subsumed by the first

element—whether Pye has demonstrated a substantial likelihood of success on the merits of his claims. As Pye has not demonstrated a substantial likelihood of success and has not shown that the State has violated his constitutional rights, the Court concludes that the public interest also weighs in favor of the State.

Accordingly, the Court concludes that Pye has not demonstrated that he is entitled to the issuance of a TRO.

**B. The State's Motion to Dismiss**

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" This pleading standard does not require "detailed factual allegations," but it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Chandler v. Sec'y of Fla. Dep't of Transp.*, 695

F.3d 1194, 1199 (11th Cir. 2012) (quoting *id.*). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

*Iqbal*, 556 U.S. at 678 (citation omitted) (quoting *Twombly*, 550 U.S. at 556); *see also Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324–25 (11th Cir. 2012).

Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555–56 (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citation omitted). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true the plaintiff's legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Thus, evaluation of a motion to dismiss requires two steps: (1) eliminate any allegations in the pleading that are merely legal

conclusions, and (2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.

The above discussion regarding Pye's failure to establish a substantial likelihood of success on the merits of his claim so as to entitle him to a TRO also demonstrates that Pye has failed to state a claim for relief. As this Court found above, Pye has not alleged that the State did not have a rational basis for excluding him from the terms of the Agreement, and his equal protection claim fails. Further, Pye has not alleged government action which shocks the conscience, that the State has impinged on Pye's fundamental right, or that he has been improperly denied a liberty interest, and his due process claim fails.

The Court also emphasizes that while Pye's equal protection and due process claims are premised on his ability to prepare for, and his adequate representation in, clemency and other pre-execution proceedings, he has not made any allegation in his complaint that he is not prepared to present his case in those proceedings, that he (or his counsel) has been hampered in any significant way, or that he has not had enough time to prepare. Nor has he asserted that, with the

additional time that he would get if he were covered by the terms of the Agreement, he would benefit in any particular way. Instead, he simply argues that he should be included under the Agreement because he is part of a "disfavored class."

Generally, a plaintiff must allege that he "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.]" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). Also, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (quotation omitted). This Court finds that the facts of this case do not show that State made improper classifications in applying the Agreement to some inmates and not others. However, even if it did, Pye has not alleged facts to show that he was injured thereby, *cf. Carroll v. Nakatani*, 342 F.3d 934, 946 (9th Cir. 2003) ("Being subjected to a racial classification differs materially from having personally been denied equal treatment . . . . [Plaintiff] does not cite, and we do not find, any authority supporting the proposition that racial classification alone amounts to a showing of

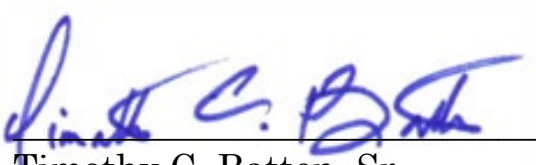
individualized harm."), and he has not shown an injury that would be redressed if he were granted relief.

This Court thus agrees with the State that Pye has failed to state a claim for relief.

## III. Conclusion

For the reasons discussed, the Court concludes that Pye has failed to demonstrate that he is entitled to a TRO, and his motion seeking one [3] is denied. The Court further concludes that Pye has failed state a viable claim for relief, and the State's motion to dismiss [8] is granted pursuant to Fed. R. Civ. P. 12(b)(6), and the instant action is dismissed. The first motion [7] to dismiss is moot, and the Clerk is directed to close this case.

IT IS SO ORDERED this 15th day of March, 2024.



Timothy C. Batten, Sr.
Chief United States District Judge