

CAUSE NO. D-1-GN-22-007149

WESLEY RUIZ, ET AL.	§	IN THE DISTRICT COURTS FOR
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL.	§	345TH DISTRICT COURT

TEMPORARY INJUNCTION

On Tuesday, January 10, 2022, the Court considered the Application for Temporary Injunction sought by Plaintiffs Wesley Ruiz, John Lezell Balentine, Robert Allen Fratta, and Arthur Brown, Jr., (collectively, “Plaintiffs”). Plaintiffs appeared through counsel. Defendants the Texas Department of Criminal Justice, Bryan Collier, Bobby Lumpkin, and Kelly Strong appeared through counsel. The Court finds that proper notice of the hearing was given on January 5, 2022.

The Court grants the plea to the jurisdiction brought by the Texas Department of Criminal Justice because a government entity, as opposed to a government actor, cannot commit an *ultra vires* act. The Court finds that it has jurisdiction over Plaintiffs claims brought against the government actors in their official capacities: remaining Defendants Bryan Collier, Bobby Lumpkin, and Kelly Strong (collectively, “Defendants”).

The Court is cognizant of the fact that it is under an order issued by the Texas Court of Criminal Appeals mandating that this court “refrain from issuing any order purporting to stay the January and February executions of Harris County death row inmate Robert Alan Fratta, Dallas County death row inmate Wesley Ruiz, or Potter County death row inmate John Lezell Balentine.” As noted below, this Court is not issuing a stay of execution for any of the four Plaintiffs in this case, nor could it. Instead, the Defendants

are enjoined only from committing certain acts while conducting the executions of Plaintiffs.¹

Defendants objected to the hearing claiming that only Plaintiff Fratta's application for temporary injunction was noticed for hearing, but not the application of the other Plaintiffs. Defendants did not explain the basis of their belief that only one application was noticed for hearing but not another. Further Defendants did not allege or attempt to show any prejudice by hearing the applications together and could not have done so because the applications are seeking identical relief, Defendants filed briefs in response to Plaintiffs' applications for relief, and Defendants received adequate notice of the hearing. The Court overruled that objection because the original and amended notices of hearing together with the applications for temporary injunction made clear that all applications for temporary injunction would be heard together.

Plaintiffs have demonstrated probable irreparable injury for which there is no adequate remedy at law and a likelihood of success on the merits of declaratory judgment actions against the remaining Defendants.

The evidence presented shows that Pentobarbital is a Schedule II controlled substance. Tex. Health & Safety Code § 481.032; Schedule of Controlled Substances, 45 Tex. Reg. 2249 (March 27, 2020).

Defendants' actions in procuring, selecting, storing, and administering Pentobarbital mean that Defendants must comply with the Texas Pharmacy Act under Tex. Occ. Code § 551.003(33). Defendants are not exempted from complying with the Texas

¹ The Court takes judicial notice that Defendants have previously asserted that challenges to an execution protocol are a "civil, not a criminal law matter." *See, e.g., In Re Patrick Henry Murphy, Jr.*, Resps.' Opp. To Relator's Mot. For Leave, No. WR-63,549-02 (Mar. 22, 2019).

Pharmacy Act by Tex. Occ. Code § 551.004 or through Tex. Code Crim. Proc. Art. 43.14.

The Court finds that The Texas Code of Criminal Procedure granting the Defendants discretion does not conflict with the statutes raised by the Plaintiffs. Any discretion granted to Defendants does not mean that Defendants may violate other statutes. Defendants have not shown, nor have they attempted to show, that they cannot comply with the Texas Code of Criminal Procedure without violating the Texas Pharmacy Act, the Texas Health and Safety Code, the Texas Controlled Substances Act, and other statutes. Tex. Code Crim. Proc. Art. 43.14 does not specify what substance or substances that Defendants must use when carrying out an execution. By electing to use a Schedule II controlled substance, Defendants placed themselves under the requirements and regulations of other Texas laws.

Further, the Texas Code of Criminal Procedure Article 43.24 requires that Defendants carry out this duty in such a way that “[n]o torture, or ill treatment, or unnecessary pain, shall be inflicted upon a prisoner to be executed under the sentence of law.” Defendants failed to provide evidence or testimony to contradict Plaintiffs’ evidence that the expired Pentobarbital will likely cause such torture, ill treatment, or unnecessary pain.

Defendants must also comply with the Texas Controlled Substances Act, the Texas Food, Drug, and Cosmetic Act, and the Texas Penal Code for similar reasons.

Plaintiffs offered un rebutted evidence that the Defendants have not properly stored Pentobarbital in their possession, and that Defendants have not properly disposed of expired Pentobarbital in their possession. Plaintiffs offered un rebutted evidence that all of the Pentobarbital in Defendants’ possession is expired and has substantial risk of inflicting

Plaintiffs with harm and unpredictable results. That the Plaintiffs may be lawfully killed by the Defendants soon after suffering this unnecessary and unlawful harm does not negate the appropriateness of this relief.

Defendants did not offer any evidence or witnesses to dispute Plaintiffs' assertions regarding Defendants practices regarding the legality, purity, stability, or microbiology of the Pentobarbital in Defendants' possession. Defendants did not offer any evidence or witnesses to dispute Plaintiffs' assertion that Defendants obtained Pentobarbital without a prescription. Defendants did not offer any evidence or witnesses at all.

The Court finds that the Pentobarbital in Defendants' possession is probably illegal to possess or administer because it is more likely than not expired. The Plaintiffs offered un rebutted evidence that expired Pentobarbital can cause severe harm or unpredictable drug actions. Plaintiffs offered un rebutted evidence that legally compounded Pentobarbital that has been stored for the following time periods since its compounding may be legally administered to them under the Texas Pharmacy Act (the "Storage Conditions"):

- 24 hours, if stored at room temperature between 20° and 25°C;
- 72 hours, if kept refrigerated at temperature range between 2° and 8°C, or
- 45 days, if kept in a solid, frozen state at temperature range -25° and -10°C.

The Court finds that the Plaintiffs' un rebutted evidence shows the following:

1. Expired drugs fall out of solution. That means they become grainy, not liquid. Those crystals, when injected into a vein, cause burning pain in and of themselves. In addition, they can cause blockages in the blood vessels and those blockages are painful.
2. Expired drugs contain degradants. Even if, as Defendants suggest but did not demonstrate with evidence, there remains potent pentobarbital

in the vials, the remaining pentobarbital will not act like pentobarbital in the presence of the degradants.

3. Respondents have handled their pentobarbital with disregard for its purity, stability, and activity in the body in the presence of degradants and contaminants.
4. Degradants form with time, and that Respondent does not test for them. Defendants have reintroduced tested vials into their stocks. Defendants have no way to know whether the testing process introduced organic or other contaminants. That is, Defendants' procedures create a risk of unnecessary pain and unpredictable activity in the body of condemned people.

The Court finds that, unless Defendants are restrained now, Defendants will continue to store and administer expired Pentobarbital that is beyond its use date and that has not had scientifically validated stability and microbiology testing. Defendants would engage in this conduct before the Court can render judgment in this Cause. This storage and administration would cause imminent and irreparable harm to Plaintiffs who have no adequate remedy at law and who would suffer incalculable damage. The Court also finds that Plaintiffs have sought relief expeditiously and have each exhausted their administrative remedies in accordance with Texas Government Code § 501.008(d)(1) or meet an exception to the requirement.

Defendants did not offer any evidence regarding whether they possess any unexpired Pentobarbital in their possession that would meet the Storage Conditions.

The Court further finds that under the circumstances, the balance of equities between Plaintiffs and the Defendants favors the issuance of immediate injunctive relief as it protects Plaintiffs' right to avoid being injected with expired drugs that are likely to cause pain and harm.² Accordingly, the Court finds that a temporary injunction is necessary to preserve the status quo between the parties. The Court defines the status quo as a state where the Defendants and those acting in concert with them have not injected the Plaintiffs with Pentobarbital that does not satisfy the Storage Conditions.

IT IS, THEREFORE, ORDERED that, until final judgment is issued by this Court, Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them and who receive actual notice of this order by personal service or otherwise are commanded forthwith to desist and refrain from administering or injecting Plaintiffs with Pentobarbital unless that Pentobarbital is within the number of days specified in the Storage Conditions since the date of its compounding by a pharmacy licensed to compound it.

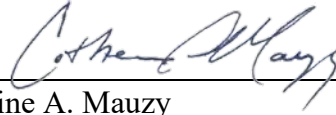
IT IS FURTHER ORDERED that trial on the merits of this cause is ordered set for March 20, 2023 at 9:00 a.m..

This order shall not be effective unless and until Plaintiffs execute and file with the clerk a bond, in conformity with the law, in the amount of \$250.00 dollars.

² The Court notes that, independently of this order, Defendants are prohibited from subjecting the Plaintiffs to torture, ill treatment, or unnecessary pain under Tex. Code Crim. Proc. Art. 43.24. The Court finds that continued use of the Pentobarbital in its possession would further violate Defendants' duty to comply with Tex. Code Crim. Proc. Art. 43.24.

The clerk shall forthwith, on the filing by Plaintiffs of the bond, and on approving the bond according to the law, issue a temporary injunction in conformity with the law and the terms of this order.

Signed this 10th day of January 2023.

A handwritten signature in black ink, appearing to read "Catherine A. Mauzy", written over a horizontal line.

Catherine A. Mauzy
Presiding Judge

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