

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

TOMMY LYNN SELLS &	§	
RAMIRO HERNANDEZ LLANAS	§	
Plaintiffs,	§	
	§	
versus	§	CIVIL ACTION NO. H-14-832
	§	
BRAD LIVINGSTON <i>et al</i> ,	§	
Defendants.	§	

**ORDER GRANTING PRELIMINARY INJUNCTION**

Tommy Sells and Ramiro Hernandez-Llanas have been sentenced to death by lethal injection and have filed this civil rights complaint under 42 U.S.C. § 1983. (Instrument No. 1). Their complaint alleges that the State of Texas has withheld information they need to assess the potential that they will be subjected to unconstitutional suffering during their executions. Tommy Sells is scheduled to be executed on April 3, 2014, and Ramiro Hernandez-Llanas is scheduled to be executed on April 9, 2014. The State of Texas has indicated that the executions will involve the administration of a lethal injection of pentobarbital. Pending before the Court are Plaintiffs' Motion for Leave to Proceed *In Forma Pauperis* (Instrument No. 2) and Motion for Temporary Injunction or in the Alternative Temporary Restraining Order. (Instrument No. 4).

"Texas adopted lethal injection as a means of execution in 1982." *Raby v. Livingston*, 600 F.3d 552, 555 (5th Cir. 2010). Since that time, Texas has conducted 512 executions. Texas Dept. of Crim. Just., *Executed Offenders*, [http://www.tdcj.state.tx.us/death\\_row/dr\\_executed\\_offenders.html](http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html) (last visited April 2, 2014). Texas law does not specify what substance will be used in carrying out lethal injections, but federal law requires that any protocol or method used cannot violate the constitutional prohibition on cruel and unusual punishment. *See Baze v. Rees*, 553 U.S. 35, 46-47

(2008). In 2009, several states including Texas changed their drug protocols for executions from a three drug protocol to a one drug protocol of pentobarbital, which is an “intermediate-acting barbiturate.” *Arthur v. Thomas*, 2013 WL 5434694, at \*3 (M.D. Ala. 2013). Texas has disclosed that it anticipates administering five grams of pentobarbital to execute Plaintiffs.

States have recently had difficulty finding a source for the lethal injection drugs. Texas has turned to compounding pharmacies to acquire the necessary pentobarbital. Plaintiffs claim that compounding pharmacies are not subject to stringent Food and Drug Administration regulations, raising important questions about contamination, purity, or dilution of the chemicals.

Texas’ prior supply of compounded pentobarbital expired on April 1, 2014. Plaintiffs brought this action after suing in state court to have Texas disclose the source, efficacy, and potency of their new supply of pentobarbital. Plaintiffs allege that “[i]nformation about the source of the drugs, the manner in which they have been kept and transferred, and the laboratory and the people who have tested them is essential for Plaintiffs to assess whether the drugs are safe and will reliably perform their function, or whether they are tainted, counterfeited, expired, or compromised in some other way.” (Instrument No. 1 at 9). Plaintiffs allege a potential violation of their constitutional rights by pointing to recent cases in which inmates experienced severe physiological reactions when administered a lethal dose of compounded pentobarbital. (Instrument No. 2 at 11-12). Additionally, Plaintiffs provide affidavits from qualified experts describing the potential for error in using adulterated drugs from a compounding pharmacy and the pain that could potentially be caused by the use of those drugs in an execution. (Instrument No. 1, Exhibits L, K). Plaintiffs ask this Court to issue a preliminary injunction enjoining their executions until such time as Defendants disclose

all necessary information about the drugs that they intend to use when performing the lethal injections, including information about procurement, suppliers, and testing.

To obtain a preliminary injunction, Plaintiffs must show:

(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

*Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009) (quoting *Speaks v. Kruse*, 445 F.3d 396, 399-400 (5th Cir. 2006)). The Eighth Amendment concerns itself with whether an execution “inherently imposes a constitutionally significant risk of pain.” *Raby*, 600 F.3d at 562. Plaintiffs argue that, without full disclosure regarding the source, nature, and efficacy of the compounded pentobarbital, they will be unable to show a potential constitutional violation regarding the intended means of execution.

Defendants counter that Texas has repeatedly used the same method to execute inmates, emphasizing media reports that do not describe the observation of any obvious pain. Further, Defendants have “informed Plaintiffs that the pentobarbital to be used has been tested by an independent laboratory and found to be 108% potent and free from contaminants.” (Docket Entry No. 6 at 19). In support, Defendants have, in response to this motion for preliminary injunction, provided a redacted laboratory report apparently verifying the potency of the compounded pentobarbital. (Docket Entry No. 6, Exhibit B).

Even though the report is dated March 20, 2014, Defendants have delayed the production of the report until just two days before the first scheduled execution. That copy, however, has been redacted to exclude important information, presumably including the source of the drugs, who

performed the testing, and where it was performed. While the State has provided Plaintiffs information about the process by which they will be executed, it has masked information about the product that will kill them. The redacted report does not provide Plaintiffs important details allowing an assessment of the drug's efficacy: "It does not include information about the source of the drug, the nature of the test, who did the testing, or numerous other details essential to assessing the quality and efficacy of the drug with which TDCJ intends to carry out plaintiffs' execution." (Instrument No. 1 at 5). As a result, the State's secrecy regarding the product to be used for lethal injection has precluded Plaintiffs from evaluating or challenging the constitutionality of the method of execution.

In that regard, the Fifth Circuit's decision in *Whitaker v. Livingston*, 732 F.3d 465 (5th Cir. 2013), is instructive. In *Whitaker*, the Fifth Circuit held that there was no basis for enjoining the inmate's execution using the now expired batch of pentobarbital. Defendants in that case, however, had provided specific information about the source, testing, and efficacy of the drug. *Whitaker* found that, while the plaintiffs were entitled to information about the product, they would not be "permitted to supervise every step of the execution process" without demonstrating that there was a substantial risk of severe pain. *Id.* at 468. Once information about the drugs and the execution protocol is provided, the Fifth Circuit outlined what information a plaintiff must provide to obtain a preliminary injunction on a lethal injection challenge: "[T]hey must offer some proof that the state's own process—that its choice of pharmacy, that its lab results, that the training of its executioners, and so forth, are suspect." *Id.*

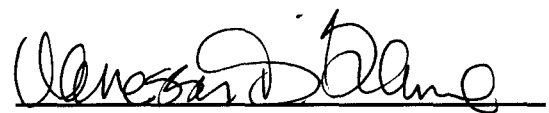
Here, Defendants have not provided Plaintiffs with sufficient information to make the showing required under *Whitaker*. Plaintiffs correctly argue: "the identity of the supplier and the laboratory doing the testing is pivotal to an assessment of the adequacy of the lethal drugs

Defendants intend to administer to Plaintiffs.” (Docket Entry No. 7 at 3). Without some detail about the source of the drugs and the integrity of the testing, Plaintiffs are prevented from raising a specific Eighth Amendment challenge to their executions. Until Plaintiffs have full disclosure of the product with which Texas will cause their death, they cannot fully develop a challenge to its process. The question is not whether some error may cause a significant chance of pain in the execution procedure, *see Baze v. Rees*, 553 U.S. 35 (2008), but whether even a properly conducted execution will result in intolerable pain because of the substance used. The last minute disclosure of the redacted laboratory report has precluded Plaintiffs “from being able to litigate or assess whether or not their execution will comply with the Eighth Amendment.” (Instrument No. 2 at 8).

Accordingly, Plaintiffs’ Motion for Temporary Injunction is **GRANTED**. It is further ordered that: (1) the parties provide the Court with an acceptable protective order no later than **April 3, 2014**; and (2) Defendants disclose under seal all information regarding the procurement of the drugs Defendants intend to use to carry out Plaintiffs’ executions, including information about the supplier or suppliers, any testing that has been conducted, what kind, by whom, and the unredacted results of such testing. The Court **STAYS** Plaintiffs’ scheduled executions until the information identified is produced. Additionally, the Court **GRANTS** Plaintiffs’ motion to proceed *in forma pauperis*.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 2nd day of April, 2014, at Houston, Texas.

  
VANESSA D. GILMORE  
UNITED STATES DISTRICT JUDGE