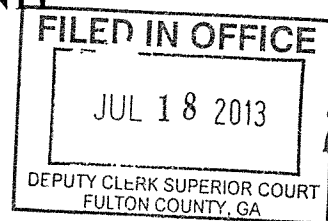


IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



WARREN LEE HILL,

Plaintiff,

v.

BRIAN OWENS, in his capacity as
Commissioner of the Georgia Department of
Corrections,

BRUCE CHATMAN, in his capacity as
Warden of the Georgia Diagnostic Prison,

SAM OLENS, in his capacity as Attorney
General of the State of Georgia.

Defendants.

CIVIL ACTION FILE NO:
2013-CV-233771

COPY

ORDER

This matter came before the Court on Plaintiff's Emergency Motion for Preliminary Injunction ("Motion") filed July 12, 2013 and Defendants' Response in the form of their Special Appearance Motion to Dismiss filed July 15, 2013. Parties appeared for an Emergency Hearing July 15, 2013 at which time the Court continued the hearing for July 18, 2013. The parties were both present and represented for the July 18, 2013 hearing. After consideration of the case, the parties' pleadings, oral argument, and the applicable law, the Court hereby **GRANTS** Plaintiff's Motion.

Procedural History

Plaintiff was convicted of the murder of his girlfriend and subsequently, while incarcerated, the murder of a fellow inmate. In 1991 a jury sentenced Plaintiff to death for the second murder. The State initially set Plaintiff's execution for July 18, 2012 at 7:00 p.m., but rescheduled it for July 23, 2012 at 7:00 p.m. During July 2012, Plaintiff filed a civil action challenging the lethal injection method on various grounds, which the state trial court denied.¹ Plaintiff appealed to the Georgia Supreme Court, and on the date of execution, that Court granted a discretionary appeal and entered a stay of execution. The Georgia Supreme Court ultimately rejected Plaintiff's claims on the merits and vacated the stay. Hill v. Owens, No. S12A1819 (Ga. Feb.4, 2013). The State then set Plaintiff's execution for February 19, 2013 at 7:00 p.m.

¹Throughout this time, Plaintiff also filed habeas petitions relating to his mental capacity.

On February 15, 2013, Plaintiff filed another state habeas petition asserting claims with regard to his mental capacity, which the state habeas court denied on February 18, 2013. Plaintiff then sought a stay of execution and filed an application for a certificate of probable cause to appeal to the Georgia Supreme Court, which denied his application. On the second date set for execution, Plaintiff filed an application for leave to file a federal habeas petition in the 11th Circuit Court of Appeals, who then, in an unpublished order, granted a conditional stay of execution to permit further briefing by Plaintiff and the State. On April 22, 2013, after such briefing was completed, the 11th Circuit denied Plaintiff's application and vacated the conditional stay. In re: Warren Lee Hill, Jr., No. 13-10702 (11th Cir. April 22, 2013). The third execution date was set by the State for July 15, 2013, through an execution warrant issued on July 3, 2013 by Lee County Superior Court Judge George M. Peagler, Jr. Plaintiff then filed the present action asserting that new Georgia statute O.C.G.A. § 42-5-36 (d) is unconstitutional.

Standard for Injunctive Relief

Under Georgia law, in order to prevail on a motion for preliminary injunction, a moving party must establish that “(1) there is substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; (3) there is a substantial likelihood that the moving party will prevail on the merits of his claims at trial; and (4) granting the interlocutory injunction will not disserve the public interest.” SRB Investment Services v. BB&T Co., 289 Ga. 1, 5 (2011). The burden of persuasion as to each of the factors falls on the movant. Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000).

Irreparable Harm

In order to establish an irreparable injury sufficient to sustain the grant of injunctive relief, a party may not rely on “mere apprehension of injury and general conclusions without alleging facts to show irreparable injury.” Insurance Ctr., Inc., v. Hamilton, 218 Ga. 597, 600 (1963). An asserted irreparable injury “must be neither remote or speculative, but actual and imminent.” Siegel v. Lepore, 234 F.3d 1163, 1176-1177. With regard to irreparable injury in the context of lethal injection claims, an irreparable injury is not an execution itself, but instead an unconstitutional execution. See Baze v. Rees, 553 U.S. 35 (2008). While subjecting individuals to a risk of future harm can qualify as cruel and unusual punishment, in order to establish that such exposure to risk rises to such a level so as to violate the protections of the Eighth Amendment, one must show that ‘the conditions presenting the risk must be ‘sure or very likely to cause serious illness and needless suffering,’ and gives rise to ‘sufficiently imminent dangers.’” Id. at 49-50. The United States Supreme Court has held that “speculation cannot substitute for evidence that the use of the drug is ‘sure or very likely to cause serious illness and needless suffering.’” Brewer v. Landrigan, 131 S. Ct. 445 (2010), citing Baze v. Rees, 553 U.S. 35, 49-50.

To be executed without being aware of basic information regarding the protocols the State will use to carry out such an execution is surely an irreparable harm. If Plaintiff's execution had proceeded as scheduled on July 15, 2013, such an irreparable harm would have befallen him. Moreover, the fact

that Plaintiff now has access to some additional knowledge does not dispel the irreparable harm that he would suffer if he were executed today or even at the July 19, 2013, 7 pm time announced by the Defendants' attorney at the end of her argument. This became clear to the Court during the hearing when neither expert could testify to certain basic information regarding the particular drug that would be used to execute Plaintiff. Without more information, the Court finds that Plaintiff still, today, cannot possibly determine whether or not the pentobarbital in question was somehow contaminated or otherwise improperly compounded.

Defendants argue that any risk to Plaintiff is merely speculative, and thus does not meet the burden established in *Baze v. Rees* and *Brewer v. Landrigan* that the conditions presenting the risk must be sure or very likely to cause serious illness and needless suffering, and gives rise to sufficiently imminent dangers. 553 U.S. 35 (2008); 131 S. Ct. 445 (2010). However, the Court finds that the present case is distinguishable from *Baze* as well as *Brewer*. In *Baze*, the condemned inmates argued that there was a possibility that the manner in which their execution was carried out could have caused them unnecessary suffering. The Court in *Baze* found that these worries were merely speculative as the execution protocols were regular and known. In *Landrigan*, the question was only whether or not the drug in question was unlawfully obtained. The Supreme Court found that there was no question as to the drug's safety. Here, neither the Plaintiff, nor the general public, has sufficient information with which to measure the safety of the drug that would be used to execute Plaintiff, as there is insufficient information regarding how it was compounded. The complete lack of information available to Plaintiff and the public itself signifies such an irreparable harm.

Balance of the Injuries to the Parties

“Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Conversely, the Eighth Amendment to the Constitution, applicable to the States through the Due Process Clause of the Fourteenth Amendment, affords an individual the right to be free from “cruel and unusual punishments inflicted.” U.S. Const. amend. VIII. While this does not foreclose the State's right to execute certain criminal offenders, it does protect those offenders from a risk of unnecessary pain and unnecessary suffering. See *Baze v. Rees*, 553 U.S. 35 (2008).²

The Court finds that while Defendants do indeed have an interest in carrying out a sentence timely, the injury that would be sustained by Plaintiff if he were to be executed in such a way that violated his Eighth Amendment right would far surpass that of Defendants having to put off Plaintiff's execution another time.

² The State maintains that Plaintiff's Motion should be denied in part based on the fact that it was filed on the eve of the execution. In so doing, Defendants rely on the 11th Circuit's decision in *Crowe v. Donald*, which holds that “given the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” 528 F.3d 1290 (11th Cir. 2008). However, the statute upon which Plaintiff's claims are based in the present case did not go into effect until July 1, 2013, and was not enforced by the State until after the July 3, 2013 execution warrant was issued. That being the case, the Court finds that this action is not dilatory, and should not be denied based on this argument.

The Public Interest

Defendants maintain that granting Plaintiff's Motion would disserve the public interest in that it "would encourage the use of dilatory tactics to avoid the execution of a lawfully imposed sentence that has received years of review by numerous courts and has been affirmed by those courts as being constitutionally imposed." (Defendants' Motion to Dismiss p. 15). However, Plaintiff's current action is based on a statute that only went into effect on July 1, 2013. This issue has not been reviewed or affirmed by any courts as it is a case of first impression. Therefore, the Court finds that it is not a dilatory tactic, but instead a legitimate and substantive question of law, and thus would not disserve the public interest in the way asserted by Defendants.

Conversely, the public has a clear interest in ensuring that the Constitutions, both Federal and State, are followed by Defendants with regard to protections afforded individuals against cruel and unusual punishment. For that reason, the Court finds that the Plaintiff has met his burden in showing that granting the injunction would not disserve the public interest.

Likelihood of Success on the Merits

When determining whether an injunction is proper relief, "[a]lthough the merits of the case are not controlling, they nevertheless are proper criteria for the trial court to consider in balancing the equities." Garden Hills Civic Ass'n, Inc. v. MARTA, 273 Ga. 280, 281 (2000). In making such a determination, if the Court finds that the "law and facts are so adverse to a plaintiff's position that a final order in his favor is unlikely, it may be justified in denying the temporary injunction because of the inconvenience and harm to the defendant if the injunction were granted." *Id.* (quoting Lee v. Environmental Pest & Termite Control, 271 Ga. 371 (1999)). In the present case, Plaintiff must establish that he is likely to prevail on his claim that O.C.G.A. § 42-5-36(d) is unconstitutional.

O.C.G.A. § 42-5-36(d) denies Plaintiff his State and Federal Constitutional Rights to Meaningful Access to the Courts.

The Supreme Court has recognized that the right of access to the courts is a "fundamental constitutional right" that states must ensure as being adequate, effective, and meaningful. Bounds v. Smith, 430 U.S. 817, 828,822 (1977). "Meaningful access means that state authorities must ensure that inmates have 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" Gibson v. Turpin, 270 Ga. 855, 858 (1999) (quoting Lewis v. Casey, 518 U.S. 343 (1996)). While meaningful access "does not mean that a state must help inmates discover grievances, or litigate effectively when in court," it does mean that an inmate has a right to "raise his claims and be heard." *Id.*

In Baze v. Rees, the Supreme Court recognized that an execution method which presents a "substantial risk of serious harm" or an "objectively intolerable risk of harm" may violate the Eighth Amendment. 553 U.S. at 50. Accordingly, a condemned inmate may file suit in state or federal court to enjoin his execution on the basis of an Eighth Amendment challenge. *See Hill v. McDonough*, 547 U.S. 573 (2006).

It is Plaintiff's contention that information regarding the source of the drugs is critical to an assessment of the likelihood that Plaintiff's execution will present a substantial risk of serious harm, or an objectively intolerable risk of harm. Plaintiff further contends that by classifying such information as a "confidential state secret," O.C.G.A. § 42-5-36(d) forecloses his opportunity to bring a claim under the Eighth Amendment relating to a possible risk of harm, and thus unconstitutionally undermines his due process by limiting his access to the courts. The Court agrees. By making information about the source of the drugs to be used for Plaintiff's execution, as well as professional qualifications of those involved in its manufacture or compound inaccessible to Plaintiff, O.C.G.A. § 42-5-36(d) makes it impossible for Plaintiff to craft a meaningful Eighth Amendment claim, and thus forecloses his right to raise his constitutionally afforded claims and be heard.

Defendants maintain that O.C.G.A. § 42-5-36(d) does not bar Plaintiff's access to the courts because the information it protects as confidential state secrets is irrelevant to Plaintiff's Eighth Amendment claims. Interestingly, although the statute specifically prohibits the disclosure of the identification and qualifications of the source of the pentobarbital, Defendants make much of the fact that they have disclosed certain information notwithstanding their newly established statutory right not to do so. Specifically, Defendants assert that because they elected to furnish Plaintiff with a Product Release Report, Plaintiff now has proof that the drug intended to be used in his execution is in fact unadulterated pentobarbital, and furthermore, where the drug came from and who manufactured or compounded it does not have a bearing on whether or not it will present an unconstitutional risk of harm. However, the information contained in the heavily redacted Product Release Report from a purported independent lab did not contain information regarding that lab's qualifications, or the qualifications of those individuals working within it, which could have an effect on the maintainability of an Eighth Amendment claim. Further, even if sufficient information had been provided within those certificates, or through witness testimony, receiving such information within mere days or hours before an execution is scheduled does not afford Plaintiff a meaningful opportunity to assess the maintainability of an Eighth Amendment claim, and thus unconstitutionally limits his access to the courts.

Defendants further assert that Plaintiff has had the opportunity to challenge the one-drug protocol method of execution for approximately one year, since Georgia switched from the three-drug method. While Plaintiff may have had the ability to generally challenge Georgia's method at an earlier time, it was not until after O.C.G.A. § 42-5-36(d) was put into effect and enforced following the July 3, 2013, execution warrant, that Plaintiff could bring a challenge to the effect the restrictions on information imposed under that statute had on his constitutional right to due process by way of access to the courts. That is, Plaintiff's claim that O.C.G.A. § 42-5-36(d) prohibits information necessary for him to assert his Eighth Amendment right only recently became available.

Defendants finally contend that the right to access to the courts does not include the right to receive discovery of information in the State's possession. While Plaintiff is indeed not entitled to criminal discovery, his right to due process through access to the courts does entitle him to basic information that allows him to bring claims afforded him under the Constitution.

Based on the foregoing, the Court finds that Plaintiff has a substantial likelihood of success with his claim that by withholding information regarding the source of drugs to be used in executions, as well as the qualifications of those individuals responsible for the drugs' creation, O.C.G.A. § 42-5-36(d) unconstitutionally limits Plaintiff's access to the courts and therefore his due process rights by foreclosing any Eighth Amendment claim he may otherwise be able to maintain.³

O.C.G.A. § 42-5-36(d) is unconstitutional under Georgia's State Separation of Powers Doctrine.

The Separation of Powers Clause in the Georgia Constitution provides that [t]he legislative, judicial, and executive powers shall forever remain separate and distinct..." Ga. Const., Ar. I, Sec. II, Par. III. Under this separation of powers, "[t]he legislative branch enacts the law, the judiciary interprets those laws and the executive branch enforces those laws until they are amended or held to be unconstitutional." Harbuck v. State, 280 Ga. 775 (2006).

Pursuant to O.C.G.A. § 42-5-36(d), various identifying information pertaining to the drugs used in lethal injection executions is classified as "confidential state secrets," and shielded from any disclosure pursuant to "judicial process." Based on that provision, O.C.G.A. § 42-5-36(d) explicitly exempts from judicial review the very information that would be necessary for a court to determine the constitutionality of an inmate's execution.⁴ Such a determination is precisely the role of the judiciary under the Georgia Constitution. By removing the courts' independent interpretative authority regarding the constitutionality of aspects of the execution process, the General Assembly has impermissibly denied the judiciary its constitutionally guaranteed position as "the final and common arbiter." Beall v. Beall, 8 Ga. 210 at 15 (1850).⁵

Based on the foregoing, the Court finds that Plaintiff has a substantial likelihood of success with his claim that O.C.G.A. § 42-5-36(d) is unconstitutional under Georgia's State Separation of Powers doctrine.⁶

O.C.G.A. § 42-5-36(d) is unconstitutionally overbroad.

³ Because the Court finds that Plaintiff's claim regarding his due process rights under the Federal Constitution has a substantial likelihood of success on the merits, the question of his rights under the Georgia Constitution is not reached in this Order.

⁴ Defendants argue that O.C.G.A. § 42-5-36(d) does not encroach on the court's role of interpreting the laws as a court could still ascertain the constitutionality of an inmate's execution without the identifying information withheld under the statute. However, as discussed above, the Court finds that this information is indeed necessary in making a determination of an execution's constitutionality with regard to the Eighth Amendment, and thus rejects this argument.

⁵ Defendants also contend that the question of the constitutionality of Georgia's execution procedures is not properly and timely before the Court because Plaintiff has waited until the eve of his execution, and this action is merely a dilatory tactic. As discussed above, based on the fact that O.C.G.A. § 42-5-36(d) is a newly enacted statute, the Court rejects any argument that Plaintiff's claims are untimely. (FN 2).

⁶ While Defendants argue that Morris v. State establishes that statutes can include information cast as confidential state secrets without violating the Constitution, the Court finds that Morris is distinguishable from the case at bar. 246 Ga. 510 (1980). Specifically, in Morris, the statute in question contains mechanisms through which the information identified as confidential state secrets could become declassified or otherwise made known to the public. O.C.G.A. § 42-5-36(d) contains no such mechanism.

“The constitutional guarantee of free speech ‘serves significant societal interests’ wholly apart from the speaker’s interest in self-expression. By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public’s interest in receiving information. Pacific Gas and Elec. Co. v. Public Utilities Com’n of California, 475 US 1, 8 (1986) (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 776, (1978)). Here, the public assuredly has an interest in receiving the information dealt with in the statute, namely information regarding the execution of Georgia citizens. Thus, the First Amendment is implicated. Under the Georgia Constitution, in order to enforce a content-based restriction, such as enforced by O.C.G.A. § 42-5-36(d), the Government must show that “the regulation [is] the ‘least restrictive means’ of furthering the government’s significant interests, while still leaving open ample alternatives to communicate.” Grady v. Unified Government of Athens-Clarke County, 289 Ga. 726 (2011).

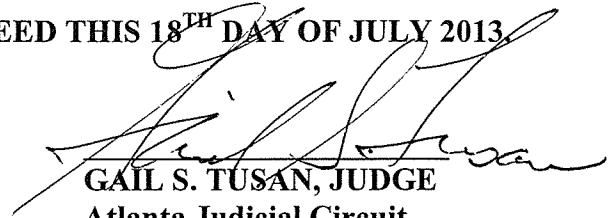
Here, Defendants claim that the protection offered under O.C.G.A. § 42-5-36(d) is necessary to guard individuals or entities who manufacture, supply, compound, or prescribe the drugs used in executions against harassment from anti-death penalty activists. In support of this need, Defendants point to the growing shortage of lethal injection drugs available to states based on companies and employees being pressured by such activists. While it is the case that such individuals should be free from harassment, the Court must weigh the rights of those individuals against the rights of the condemned inmate as well as the public to know where and how these drugs are produced. While Defendants claim that O.C.G.A. § 42-5-36(d) is narrowly drafted to protect only the identifying information of individuals involved with the lethal injection drugs, a plain language reading of the statute shows that more than the mere identifying identification is protected, for example, “personal qualifications.” It is clear to the Court that such information is essential to the determination of the efficacy and potency of lethal injection drugs, and has no place in a statute drafted for the express purpose of keeping private citizen’s personal information safe, and a less restrictive means of furthering the Government’s interest in protecting the citizens’ information is available. Further, by foreclosing any way for an inmate or the public to obtain the restricted information, O.C.G.A. § 42-5-36(d) impermissibly leaves no alternatives for the public to receive such information. At the very least, based on the foregoing, the Court finds that Plaintiff has a substantial likelihood of success on his claim that O.C.G.A. § 42-5-36(d) is unconstitutionally broad.⁷

Conclusion

Based on the foregoing, the Court has found that Plaintiff has satisfied his burden with regard to each factor necessary for a grant of injunctive relief to maintain the status quo. Thus the Court hereby **GRANTS** Plaintiff’s Motion and **STAYS** the execution of Plaintiff, Mr. Warren Lee Hill, until such time as this Court can rule on the merits of Plaintiff’s Verified Complaint seeking Declaratory Judgment.

⁷ Because the Court has found that Plaintiff has a substantial likelihood of success on the merits of his first three claims, his arguments for the unconstitutionality of O.C.G.A. § 42-5-36(d) based on the Supremacy Clause as well as the contention that Due Process prohibits the execution before a determination of its constitutionality exist are not reached by the Court.

SO ORDERED, ADJUDGED AND DECREED THIS 18TH DAY OF JULY 2013



GAIL S. TUSAN, JUDGE
Atlanta Judicial Circuit

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