

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

RICHARD JORDAN AND RICKY CHASE

PLAINTIFFS

THOMAS EDWIN LODEN, JR.

PUTATIVE INTERVENOR

VS.

CIVIL ACTION NO. 3:15cv295-HTW-LRA

**COMMISSIONER MARSHALL L. FISHER,
Commissioner, Mississippi Department
of Corrections, in his Official Capacity;
SUPERINTENDENT EARNEST LEE,
Superintendent, Mississippi State Penitentiary,
in his Official Capacity; THE MISSISSIPPI
STATE EXECUTIONER, in his Official Capacity;
AND UNKNOWN EXECUTIONERS, in their
Official Capacities**

DEFENDANTS

ORDER

I. Background

This lawsuit involves a challenge to Mississippi's current iteration of its three-drug lethal injection protocol. On April 16, 2015, plaintiffs Richard Jordan and Ricky Chase filed this action for declaratory and injunctive relief under 42 U.S.C. § 1983¹ in this federal forum for alleged violations and threatened violations of plaintiffs' rights to due process and to be free from cruel and unusual punishment under the First², Eighth³,

¹ Title 42 U.S.C. § 1983, in pertinent part, states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

² U.S. Const. amend. I states:

and Fourteenth⁴ Amendments to the United States Constitution and Article 3, Sections 14⁵, 24⁶, and 28⁷ of the Mississippi Constitution. Plaintiffs' forty-two page complaint objects to the use of compounded drugs, including but not limited to compounded pentobarbital⁸, in lethal injections conducted by MDOC.

Named as defendants are: Marshall Fisher, Commissioner of the Mississippi Department of Corrections ("MDOC"); Earnest Lee, Superintendent of the Mississippi State Penitentiary; the Mississippi State Executioner; and other Unknown Executioners.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Count V of plaintiffs' complaint alleges that the defendants have violated plaintiffs' First Amendment right to have a reasonable opportunity to present legal claims implicating constitutional rights to the courts.

³ U.S. Const. amend. VIII states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

⁴ U.S. Const. amend. XIV, § 1 states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

⁵ Miss. Const., Art.3, § 14 states: "No person shall be deprived of life, liberty, or property except by due process of law."

⁶ Miss. Const., Art. 3, § 24 states:" All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."

⁷ Miss. Const., Art. 3, § 28 states: "Cruel or unusual punishment shall not be inflicted, nor excessive fines be imposed."

⁸ It is agreed here that Mississippi has never before used compounded pentobarbital to execute a death row inmate.

Each of these defendants is being sued in his official capacity. In this order, the court shall refer to them as “defendants” or as the “State”, since they propose to conduct executions on behalf of the State of Mississippi.

The State of Mississippi has asked the Mississippi Supreme Court to set an execution date of August 27, 2015, for plaintiff Richard Jordan. As of today, August 25, 2015, the Mississippi Supreme Court has not acted on the State’s request to execute Jordan on August 27, 2015. Convicted of capital murder committed in the course of a kidnapping, Jordan is to die by lethal injection, a procedure approved by Miss. Code. Ann. § 99-19-51⁹. Mississippi currently employs a three-drug approach in performing this procedure. The condemnee first is provided an anesthetic drug, and then a second drug, vecuronium bromide which is a chemical paralytic agent. The third drug administered is potassium chloride, a chemical that disrupts the electrical signals in the heart, paralyzes the cardiac muscle, and kills the condemnee by cardiac arrest.

Pursuant to Federal Rule of Civil Procedure 65(b)¹⁰, plaintiffs have moved for a preliminary injunction to enjoin the State defendants from performing the following acts during the execution of plaintiffs: (1) administering any anesthetic that is not in the statutorily-mandated class of “ultra short-acting barbiturates”; (2) administering any drug

⁹ Miss. Code. Ann. § 99-19-51 states:

The manner of inflicting the punishment of death shall be by continuous intravenous administration of a lethal quantity of an ultra short-acting barbiturate or other similar drug in combination with a chemical paralytic agent until death is pronounced by the county coroner where the execution takes place or by a licensed physician according to accepted standards of medical practice.

¹⁰ Rule 65(b) of the Federal Rules of Civil Procedure states: “The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: . . . the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.”

that is not manufactured under the regulation of the Food and Drug Administration (“FDA”); (3) administering any drug that is produced by means of “non-traditional pharmacy compounding” as that term is used by the FDA; (4) administering any drug which has passed its expiration date; and (5) administering any chemical paralytic agent and any drug for stopping the heart, including but not limited to potassium chloride.

Plaintiffs urge this court to halt the execution of Jordan, and all future-planned executions that would be plagued by the same concerns here raised. Plaintiffs’ sub judice are not raising questions about their guilt, or even the trial rulings and procedures which led to their convictions. Plaintiffs instead focus their energies on the method of execution, whether this method is an unlawful deviation from § 99-19-51 of the Mississippi Code, and whether this method will occasion pain and suffering the law forbids.

Subsequent to the filing of the complaint, the defendants filed a motion to dismiss the complaint, arguing that this court does not have subject matter jurisdiction over this matter. On June 8, 2015, say the defendants, MDOC destroyed its entire supply of pentobarbital, which had expired on May 20, 2015. Defendants claim that MDOC has not been successful in its efforts to obtain a new supply of this drug. The defense argues that the unavailability of pentobarbital, the drug directly assailed here by plaintiffs, renders this case moot and unripe for adjudication. Because no live case or controversy exists here, as required by Article III of the United States Constitution¹¹, say the defendants, this court must dismiss this action.

¹¹ United States Constitution Article III, § 2, Clause 1, states:

In support of their motion, defendants submitted to the court Commissioner Marshall Fisher's affidavit, wherein he avers, "MDOC has made numerous attempts to secure a new supply of pentobarbital from multiple sources. Defendants insist that all of MDOC's efforts to obtain a new supply of pentobarbital have been wholly unsuccessful." Doc. 25-1, Declaration of Commissioner Marshall Fisher at ¶ 8. Commissioner Fisher further states: "MDOC has been unable to obtain a new supply of pentobarbital, in any form whatsoever, for use in executions, and MDOC does not anticipate being able to obtain a new supply of pentobarbital, in any form whatsoever." *Id.* at ¶ 9.

On July 28, 2015, the day before the motion hearing held on these matters, defendants filed a notice informing the court that MDOC, on that same day, had amended its lethal injection protocol to include an anesthetic drug other than sodium thiopental or pentobarbital. This new protocol allows for the administration of 500 milligrams of midazolam as the first drug administered in the protocol.

Upon approving this new protocol, the State filed a motion with the Mississippi Supreme Court to re-set the execution of plaintiff Richard Jordan. The State hopes to execute Jordan with midazolam on August 27, 2015.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

II. Discussion

Before addressing the arguments embedded in plaintiffs' motion for preliminary injunction, the court, first, must evaluate its basis for exercising subject matter jurisdiction over this action. The defense contends that jurisdiction does not exist here due to the allegedly moot and unripe nature of the claims alleged herein.

The court, however, is satisfied that it has subject matter jurisdiction over this litigation under Title 28 U.S.C. § 1331¹², which provides federal district courts with subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." The court finds that a live controversy exists here because pentobarbital, which is still used by other states to execute inmates, continues to be an option for use by the State of Mississippi. Furthermore, plaintiffs challenge the use of midazolam in the three-drug protocol on similar bases as well. Defendants' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is, therefore, denied.

The court now addresses plaintiff's motion for temporary injunctive relief.

When considering a motion for injunctive relief, courts must study the pleadings and apply the standard enunciated in *Canal Auth. v. Callaway*, 489 F.2d 567 (5th Cir. 1974), and its progeny. As directed by these legion of cases, the court contemplates the following: whether the movants, plaintiffs Jordan and Chase, have shown a substantial likelihood of prevailing on the merits; whether the movants will suffer substantial and irreparable harm if their requested relief is not granted; whether a preliminary injunction would injure the defendant, here the State defendants; and whether an injunction would further the public interest.

¹² Title 28 U.S.C. § 1331 states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

After reviewing the pleadings and the arguments presented to the court by the parties after the State's amendment to the protocol, the court finds that plaintiffs have satisfied their burden of persuasion here. First, the court finds that plaintiffs have shown a substantial likelihood in prevailing, at least, on their claim that Mississippi's failure to use a drug which qualifies as an "ultra short-acting barbiturate or other similar drug" as required by Miss. Code Ann. §99-19-51 violates Mississippi statutory law and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

Moreover, the court finds that plaintiffs are threatened with substantial and irreparable harm here, especially considering that the State seeks to execute plaintiff Jordan on August 27, 2015. Third, the court agrees with plaintiffs that the threatened harm to the plaintiffs outweighs the same to the defendants. Lastly, the court is not persuaded that granting the preliminary injunction will disserve the interest of the public of Mississippi.

Therefore, plaintiffs' motion for temporary injunctive relief is granted. In granting plaintiffs' motion for temporary injunctive relief, this court is not forecasting any ultimate ruling on the merits. At this juncture, the court merely is persuaded to preserve the status quo until a final ruling is reached in this case. This order, in its abbreviated form, enjoins the State from using pentobarbital, specifically in its compounded form, or midazolam, from executing any death row inmate at this time. The court's full reasoning on this matter is forthcoming.

The court is unaware of any other method of execution that the State now contemplates, but should the State contemplate any other method of execution, the

State first must submit said procedure to this court before executing with any other drug, or combination of drugs, any inmate.

SO ORDERED this 25th day of August, 2015.

/s/ Henry T. Wingate
UNITED STATES DISTRICT COURT JUDGE