

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

MAR 10 2006

Michael N. Milby, Clerk of Court

Carlos González Magallón,)
Consul General of Mexico and Next Friend of)
Angel Maturino Resendiz,)
Plaintiff,)
)
v.)
)
Brad Livingston,)
Executive Director,)
Texas Department of Criminal Justice,)
)
Doug Dretke)
Director, Correctional Institutions Division)
Texas Department of Criminal Justice,)
)
Charles O'Reilly,)
Senior Warden, Huntsville Unit)
Huntsville, Texas,)
)
and,)
)
Unknown Executioners;)
)
Defendants.)

H 06 0818

No. _____
(death-penalty case)

PLAINTIFF'S ORIGINAL COMPLAINT

I.

Nature of Action

1. This action is brought pursuant to 42 U.S.C. § 1983 for violations and threatened violations of the right of Plaintiff to be free from cruel and usual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. Plaintiff seeks equitable relief.

II.
Plaintiff

2. Carlos González Magallón is the Consul General of Mexico in Houston, Texas and Next Friend of Angel Maturino Resendiz. He appears in that capacity pursuant to FRCP 17(c) because Mr. Maturino Resendiz is incompetent to proceed in this action on his own behalf. Mr. Maturino Resendiz is a Mexican national and is a person within the jurisdiction of the State of Texas. He is currently a death-sentenced inmate under the supervision of the Texas Department of Criminal Justice, TDCJ # 999356. He is currently being held in the Harris County jail in Houston, Texas, awaiting execution of that sentence. The sentence is scheduled to be carried out on May 10, 2006.

III.
Defendants

3. Defendant Brad Livingston is the Executive Director of the Texas Department of Criminal Justice. Doug Dretke is the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice (TDCJ). Charles O'Reilly is the Senior Warden of the Huntsville Unit where the execution will occur. Defendants Unknown Executioners are employed by the Texas Department of Criminal Justice and will carry out the scheduled execution of Mr. Maturino Resendiz. Mr. Maturino Resendiz does not yet know their identities because the TDCJ conceals them.
4. The Defendants are all state officials acting, in all respects relevant to this action, under color of state law. They are all sued in their official capacities.

IV.
Jurisdiction and Venue

5. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights violations), 2201 (declaratory relief), and 2202 (further relief). This action arises under the Eighth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. § 1983.
6. Venue in this Court is proper under 28 U.S.C. § 1391, and this Court has personal jurisdiction over the defendants in this matter because the events giving rise to this claim will occur in Huntsville, Texas.

V.
Facts

7. Angel Maturino Resendiz was sentenced to death following his conviction for capital murder in the 178th Judicial District Court of Harris County, Texas. Through court appointed counsel, Mr. Maturino Resendiz challenged his conviction and sentence on direct appeal and in state and federal post-conviction proceedings. On September 7, 2005, the United States

District Court for the Southern District of Texas dismissed Mr. Maturino Resendiz's federal habeas petition. The Fifth Circuit Court of Appeals is currently reviewing the federal district court's decision to deny Mr. Maturino Resendiz the opportunity to appeal the dismissal of his federal habeas corpus petition.

8. On January 6, 2006, the 178th Judicial District Court of Harris County, Texas set a date of May 10, 2006, for Mr. Maturino Resendiz to be executed by the Defendants. In its sentencing order, the Court specified that an executioner designated by the Director of the Institutional Division of the TDCJ "shall cause a substance or substances in a lethal quantity to be intravenously injected into [his] body sufficient to cause [his] death and until [his] death: such execution procedure to be determined and supervised by the said Director" *See Ex Parte Angel Maturino Resendiz*, Sentence of Death, Cause No. 818903, Jan. 6, 2006.
9. Under Texas law, the Defendants are given discretion to design the protocol for the administration of a death sentence by lethal injection, including which drugs will be injected to execute the sentence. The precise lethal injection protocol designed by Defendants is kept secret.
10. On information and belief, Plaintiff alleges that Defendants intend to administer the death sentence to Mr. Maturino Resendiz by injecting him with a combination of three chemical substances: sodium thiopental, or sodium pentothal (an ultrashort-acting barbiturate); pancuronium bromide, or Pavulon; and potassium chloride.
11. Sodium thiopental, or sodium pentothal, is an ultrashort-acting barbiturate which is ordinarily used to render a surgical patient unconscious for mere minutes, only in the induction phase of anesthesia, specifically so that the patient may re-awaken and breathe on his own power if any complications arise in inserting a breathing tube pre-surgery.
12. Because of its brief duration, sodium thiopental may not provide a sedative effect throughout the entire execution process. Other longer-acting barbiturates are available to the Defendants which would eliminate that risk. There is no legitimate penological purpose for using sodium thiopental instead of those longer acting sedatives.
13. Pavulon or pancuronium bromide is a curare-derived agent which when administered intravenously paralyzes all skeletal or voluntary muscles, but which has no effect whatsoever on awareness, cognition or sensation.
14. Pancuronium bromide can neutralize the sedative effect of sodium thiopental.
15. Because the inmate is restrained during the execution, the use of Pavulon in the administration of Mr. Maturino Resendiz's death sentence by lethal injection serves no legitimate penological purpose and unnecessarily creates a risk of suffering.
16. Because Pavulon is a paralytic it prevents the inmate from expressing or showing any pain he is consciously experiencing during the execution process.

17. Potassium chloride is a chemical which when administered intravenously interferes with the rhythmic contractions of the heart and causes cardiac arrest. It also activates the nerve fibers lining the veins and thus causes excruciating pain.
18. Because death can be caused by administration of barbiturates and other means that do not cause or risk pain, the use of potassium chloride is wholly unnecessary to the administration of the death sentence and serves no legitimate penological purpose.
19. According to admissions by a TDCJ spokesperson made on or about February 20, 2006, the unknown executioners who will perform the lethal injection procedure on Mr. Maturino Resendiz are not doctors and plaintiff alleges on information and belief that they are not trained in anesthesia. After placement of one or two intravenous lines, unknown executioners will step behind a wall or curtain and remotely administer drugs to Mr. Maturino Resendiz. At the point at which unknown executioners will step behind the partition, Mr. Maturino Resendiz will still be conscious. Unknown executioners will not undertake direct observation, physical examination, or electronic monitoring for anesthesia. In short, Defendants will not take any of the known, available measures that could ensure or verify that Mr. Maturino Resendiz will not suffer conscious pain as a result of the combination of chemicals Texas proposes to utilize. *See Morales v. Hickman*, __ F. Supp. 2d __, 2006 WL 335427, at 8 (N.D. Cal. Feb. 14, 2006). (describing and ordering alternative procedures).
20. The particular combination of chemicals Defendants intend to administer to Mr. Maturino Resendiz will cause an intolerable risk that he will consciously suffer an excruciatingly painful and protracted death. Creating this risk serves no penological purposes and is wholly unnecessary to the execution process.
21. By implementing these protocols, the Defendants have demonstrated deliberate indifference to the basic human right of condemned individuals not to be subject to a torturous and unnecessarily painful death without the ability to communicate the fact that they are in pain.
22. Texas law and prevailing standards of decency throughout the United States, evidenced in the enactment of laws in many states, prohibit the use of the execution methods proposed by the defendants on animals. In fact, Texas recently passed legislation criminalizing inhumane methods of euthanizing animals, including the use of neuromuscular blocking agents such as pancuronium bromide. *See* Tex. Health & Safety Code, § 821.052(a) (Vernon Supp. 2004-2005). With this legislation, Texas has joined numerous states with laws recognizing that use of these chemicals would be inhumane in the euthanasia of dogs or cats. *See* Fla. Stat. Ann. §§ 828.058, 828.065 (West 2000 & Supp. 2005); Ga. Code Ann. § 4-11-5.1 (1995); Me. Rev. Stat. Ann. tit. 17, § 1044 (West Supp. 2004); Md. Code Ann., Criminal Law, § 10-611 (2002); Mass. Gen. Laws ch. 140 § 151A (2002); N.J. Stat. Ann. § 4:22-19.3 (West 1998); N.Y. Agric. & Mkts. § 374 (McKinney 2004); Okla. Stat. Ann. tit. 4, § 501 (West 2003); Tenn. Code Ann. § 44-17-303 (Supp. 2004). Other States have implicitly prohibited such practices. *See* Colo. Rev. Stat. Ann. §§ 18-9-201(2.7), 35-80-102(7) (West 2004);

Conn. Gen. Stat. § 22-344a (2001); Del. Code Ann. tit. 3, § 8001 (2001); 510 Ill. Comp. Stat. Ann. 70/2.09 (Supp. 2003); Kan. Stat. Ann. § 47-1718(a) (2000); Ky. Rev. Stat. Ann. § 321.181(17) (Michie Supp. 2004); 201 Ky. Admin. Regs. 16:090, § 5(1) (2005); La. Rev. Stat. Ann. § 3:2465 (West 2003); Mo. Rev. Stat. §§ 578.005, 578.007 (2003); Mo. Code Regs. Ann. tit. 2, § 30-9.020(F)(5) (2005); R.I. Gen. Laws § 4-1-34 (1998); S.C. Code Ann. § 47-3-420 (Law Co-op Supp. 2004).

23. It is well known that the risk of suffering caused by the use of methods and chemicals such as those the Defendants use can easily and economically be eliminated. *See e.g., 2000 Report of the American Veterinary Medical Association Panel on Euthanasia*, 218 *Journal of the American Veterinary Medical Association*, 669, 681 (2001).
24. The risk of inflicting severe and unnecessary pain and suffering upon Mr. Maturino Resendiz in the lethal injection process is particularly grave in Texas because the procedures and protocols designed by defendants, to the extent known, do not include safeguards regarding the manner in which the execution is to be carried out, do not establish the minimum qualifications and expertise required of the personnel performing the critical tasks in the lethal injection procedure, and do not establish appropriate criteria and standards that these personnel must rely upon in exercising their discretion during the lethal injection procedures. According to Michelle Lyons, spokeswoman for the Texas Department of Criminal Justice, Texas has used volunteers or “execution specialists”, many of whom have military training, for the 359 executions it has conducted since 1982. In fact, doctors are not present when a person is put to death, and they are involved “very, very little” and only to pronounce the prisoner’s death. *See Marilynn Marchione, Delay Spotlights the Role of Doctors in Executions*, SACRAMENTO BEE, Feb. 21, 2006, at <http://www.sacbee.com>.
25. There are alternative methods of execution by lethal injection that are less torturous and inhumane by which the defendants could avoid this unconstitutional cruelty. For example, the defendants could omit pancuronium bromide and use a longer-acting sedative administered by a trained anesthesiologist to eliminate or substantially reduce the risk of consciously suffered pain caused by slow suffocation or the effects of potassium chloride. *See Morales v. Hickman*, __ F. Supp. 2d __, 2006 WL 335427, at 8 (N.D. Cal. Feb. 14, 2006). There is no legitimate reason the defendants could not modify the protocol for the administration of a death sentence by lethal injection in this manner, and their failure to do so evidences deliberate indifference to the substantial and unnecessary risk of extreme suffering that results from their current practice.
26. Defendants have not informed Mr. Maturino Resendiz what medical procedures it intends to use to obtain venous access prior to administering the lethal injection. Defendants have keep their pre-injection protocol describing what medical procedures they will perform on Mr. Maturino Resendiz to prepare him for lethal injection, if any.
27. According to the Defendants’ recent admissions in the *Hughes* case, the chemical methods of execution they use are similar to those that have been enjoined by other courts in response to constitutional arguments similar to those made here. *See Morales v. Hickman*, __ F. Supp.

2d ___, 2006 WL 335427, at 8 (N.D. Cal. Feb. 14, 2006); *Crawford v. Taylor*, 546 U.S. ___, No. 05A705 (Feb. 1, 2006); *Rutherford v. Crosby*, ___ S.Ct. ___, 2006 WL 229013 (Jan. 31, 2006); *Hill v. Crosby*, ___ S.Ct. ___, 2006 WL 171583 (Jan. 25, 2006).

28. On February 8, 2006, Mr. Maturino Resendiz submitted to the TDCJ a grievance form prepared and filled in by counsel protesting the suspected proposed execution methods and procedures and the secrecy surrounding them. On February 21, 2006, the TDCJ issued an official response indicating that Mr. Maturino Resendiz could not utilize the TDCJ grievance system because he is currently incarcerated in the Harris County jail.
29. Mr. Maturino Resendiz has not been dilatory in filing his § 1983 action. As noted above, the protocols for execution by lethal injection in Texas are not fixed by court order or statute but left to the discretion of the Defendant TDCJ officials. Until very recently those protocols and procedures have been kept secret and the subject of speculation. Less than two weeks ago, on February 21, 2006, TDCJ publicly acknowledged that neither physicians nor other trained health care professionals are involved in the administration of the chemicals it utilizes in executions by lethal injection. Less than one week ago, on March 6, 2006, the Texas Attorney General admitted that the chemicals used in Texas lethal injections are the chemicals described above, the very chemicals identified on information and belief in the grievance submitted last month on Mr. Maturino Resendiz' behalf.
30. The facts regarding the unnecessary and real risk of suffering caused by the use on humans of execution protocols such as those the Defendants use became generally known only when, in 2005, Dr. David A. Lubarsky and three co-authors published in the world-renowned medical journal *The Lancet* the results of their research on the effects of chemicals in lethal injections. See Koniaris L.G., Zimmers T.A., Lubarsky D.A., Sheldon J.P., *Inadequate Anesthesia in Lethal Injection for Execution*, Vol. 365, THE LANCET 1412-14 (Apr. 16, 2005). *The Lancet* scholars found that, in the autopsies and toxicology reports provided by lethal-injection jurisdictions, 43% of the executed inmates had concentrations consistent with awareness. In response to similar concerns, the U.S. District Court for the Northern District of California recently ordered that an anesthesiologist independently verify, through direct observation and examination, that the plaintiff in fact is unconscious before either pancuronium bromide or potassium chloride is injected. See *Morales v. Hickman*, ___ F. Supp. 2d ___, 2006 WL 335427, at 8 (N.D. Cal. Feb. 14, 2006).
31. Mr. Maturino Resendiz presents this complaint at an earlier stage in the appellate process than any petitioner in the lethal injection cases considered by the Fifth Circuit to date. He was sentenced to death less than six years ago. His first federal habeas corpus petition was dismissed in September 2005. His appeal regarding that decision is currently pending in the Fifth Circuit Court of Appeals. Nonetheless, the Harris County district court prematurely scheduled his execution for May 10, 2006, over objection.
32. Moreover, Mr. Maturino Resendiz's challenge does "not unduly threaten the state's ability to carry out the scheduled execution[.]" *Harris v. Johnson*, 376 F.3d 414, 416 (5th Cir. 2004) (citing *Nelson v. Campbell*, 541 U.S. 637, 645-48 (2004)), because he proposes

alternative methods of execution by lethal injection that the Defendants can readily implement before May 10, 2006.

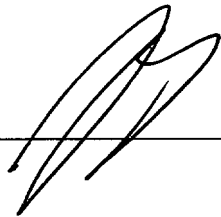
**VI.
Claims**

33. By virtue of the above stated facts, Defendants Brad Livingston, Doug Dretke, Charles O'Reilly, and Unknown Executioners are about to deprive Mr. Maturino Resendiz of his rights under the Eighth and Fourteenth Amendments to be free from cruel and unusual punishment, in violation of 42 U.S.C. § 1983.
34. Mr. Maturino Resendiz has no adequate remedy at law for the constitutional violations above-described.

**VII.
Prayer for Relief**

35. Plaintiff, on behalf of Mr. Maturino Resendiz, requests that this Court grant a permanent injunction barring Defendants from executing him in the unnecessarily cruel manner described above, or in any manner that presents similar, wholly unnecessary risks he will experience extreme and purposeless pain.
36. Plaintiff requests that this Court grant reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and the laws of the United States, as well as for costs of suit and any further relief that this Court deems just and proper.

Respectfully submitted,



Jared Tyler
Texas Bar No. 24042073
TEXAS INNOCENCE NETWORK
University of Houston Law Center
100 Law Center
Houston, Texas 77204-6060
TEL: (713) 743-8592
FAX: (713) 743-2131