

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

WARREN LEE HILL, JR.,)	
)	
v.)	Civil Action
)	Case No.
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.)	

VERIFIED COMPLAINT

**THIS IS A CAPITAL CASE
EXECUTION SCHEDULED FOR MONDAY,
JULY 15, 2013 at 7:00 PM**

In the Spring of 2013, the Georgia Attorney General and Georgia Department of Corrections procured from the Georgia legislature O.C.G.A. § 42-5-36, a statute that prohibits the Georgia judiciary from ever learning who makes (and how they make) the drugs used to execute Georgia citizens. That is now a state secret to which only the executive branch may now be privy.

There has never been, in Georgia's history, such a court-blinding state secret — not even for treason.

Mere months ago the Georgia Supreme Court promised constitutional executions in Georgia based in large measure on the important role played by Georgia courts:

The particular issue of lethal injection procedures is heavily litigated and closely scrutinized by state and federal courts throughout the nation, including this Court. . . . “In light of the exigencies inherent in the execution process, judicial review and oversight of the D[e]partment of Corrections’] procedures is preferable to [APA] administrative proceedings.”

Hill v. Owens, 292 Ga. 380, 387 (2013) (quoting Diaz v. State of Florida, 945 So.2d 1136, 1143 (Fla. 2006)).

Though the state’s Lethal Injection Secrecy Act purports to strip the judiciary of its critical oversight of executions, the Georgia legislative and executive branches of government cannot order the judicial branch not to adjudicate matters of life and liberty.

JURISDICTION AND VENUE

1. This action is a declaratory judgment action brought under O.C.G.A. § 9-4-1 *et seq.* to challenge the Constitutionality of O.C.G.A. § 42-5-36(d) and clarify the rights of Mr. Hill to obtain information about the origins and manufacture of the drug with which he will be executed, and – by extension – its safety and likely efficacy, under O.C.G.A. § 42-5-36(d). This suit also seeks to

allow Mr. Hill access to the courts of this state and nation to enforce his due process rights conferred by the United States and Georgia Constitutions and other applicable laws. Ga. Const. Art. 1, § 1, ¶ I; U.S. Const. amend. V, XIV. This suit is further brought under the authority vested in this Court pursuant to O.C.G.A. §§ 9-5-1, 9-6-20 *et seq.* to grant injunctive relief and writs of mandamus. Finally, this suit seeks to enforce the prohibitions against cruel and unusual punishment under Georgia and Federal Law. Ga. Const. Art. 1, § 1, ¶XVII; U.S. Const. amend. VIII; see also Baze v. Rees, 553 U.S. 50 (2008).

2. Venue is proper in Fulton County as substantial equitable relief is sought against at least one Defendant residing in Fulton County. See O.C.G.A. §9-10-30.

3. All actions, and refusals to act, of the Defendants are under color of state law and with deliberate indifference to Plaintiff's rights.

PARTIES

4. Plaintiff WARREN LEE HILL, JR., is a death row inmate who is being housed at the Georgia Diagnostic Prison in Jackson, GA. Plaintiff Hill is a United States citizen and a resident of the State of Georgia. He is scheduled to be executed by lethal injection on July 15, 2013.

5. Defendant BRIAN OWENS is the Commissioner of Corrections for the State of Georgia and is the chief administrative officer of the Georgia Department of Corrections. He is authorized by statute to supervise, direct and execute the functions vested in the Georgia Department of Corrections, including the administration and execution of the death penalty. See O.C.G.A. §42-2-6(b). He is being served in his official capacity for prospective relief.

6. Defendant BRUCE CHATMAN is the Warden of the Georgia Diagnostic Prison in Jackson, Georgia, where Plaintiff is confined. His duties include physically carrying out executions by injection of lethal drugs. He is being served in his official capacity for prospective relief.

7. Attorney General SAM OLENS is the Attorney General of the State of Georgia. Members of his office have participated in helping the Department of Corrections to locate and obtain lethal injection drugs for the execution of Mr. Hill. He is being served in his official capacity for prospective relief. All of the Defendants are citizens of the United States and of Georgia.

EXHAUSTION OF REMEDIES

8. Exhaustion of administrative remedies is not required as there is no administrative procedure available to grant Plaintiff the relief requested. See Conklin v. Zant, 202 Ga. App. 528 (1992); Wilson v. Ledbetter, 260 Ga. 180

(1990). Moreover, as explained below, Defendants refuse to disclose the identity of the supplier of the lethal injection drugs in question. Because of the actions of Defendants, Plaintiff was denied the information necessary to enable him to pursue any administrative remedies. Despite the actions of Defendants, Plaintiff has attempted to exhaust remedies by filing an informal grievance on July 8, 2013. See App. E.

FACTUAL ALLEGATIONS

9. On July 3, 2013, Judge George M. Peagler, Jr. of the Superior Court of Lee County, Georgia, issued an execution warrant in the case of State v. Hill, Case No. 91-R-14. App. F. In response to the warrant, the Georgia Department of Corrections has set Mr. Hill's execution date for July 15, 2013 at 7:00 p.m.

10. On July 5, 2013, a spokesman for the Georgia Department of Corrections informed the press that the Department of Corrections was not yet in possession of lethal injection drugs, though it expected to be by July 15, 2013. App. G.¹

¹ Rose Scott, "State Sets Execution Date Despite No Supply of Lethal Injection Drug," WABE News, July 5, 2013, 5:46 p.m. Available online at: <http://wabe.org/post/state-sets-execution-date-despite-no-supply-lethal-injection-drug>.

11. On July 10, 2013, the Georgia Department of Corrections responded to requests made on Mr. Hill's behalf to divulge information regarding its efforts to obtain lethal injection drugs with redacted documents that failed to disclose the identities of the manufacturer, individuals or entities in the chain of supply, prescriber, compounding pharmacy, or pharmacist responsible for making the drugs available to the Department of Corrections for Mr. Hill's execution. App. D. The Department of Corrections expressly relied on O.C.G.A. § 42-5-36 as the justification for its refusal to disclose this information. Without this information, it is impossible for Mr. Hill to determine whether the drugs that will be used by the Department of Corrections to execute him are counterfeit, expired, or tainted in some way likely to cause him grave harm or suffering during his execution.

12. Mr. Hill has reasonable cause for concern in this regard. Since 2010, there has been an increasingly short supply of lethal injection drugs available to Departments of Corrections in the United States. This is due to the creation of end-user agreements by major drug manufacturers in Europe, who do not want to participate, through the use of their drugs, in capital punishment in the U.S. App.

H.² To address this shortage in 2010 and 2011, the state of Georgia obtained illegally imported, expired, sub-potent drugs from a “pharmacy” operating in the out of the back room of a run-down driving school in London, England, for use in the states’ now-defunct three-drug lethal injection protocol. Apps. I,³ J (Redacted DOC files pertaining to import of sodium thiopental without FDA approval from England), K (Redacted FDA files pertaining to importation of sodium thiopental from Dream Pharma), L (Aff. of Daniel Kracov, Attorney for Archimedes Pharma, UK), M (Aff. of Maya Foa). The state of Georgia used these drugs in two executions before the Drug Enforcement Agency (“DEA”) raided Georgia’s lethal injection drug supply and confiscated Georgia’s illegally imported cache of drugs. App. I. Both executions that used this supply of illegally imported, compromised drugs resulted in significant pain and suffering for the individuals executed. In Brandon Rhodes’ case, his eyes remained open for the entirety of his execution, indicating that the illegally imported sodium thiopental used in his execution was

² Andrew Welsh-Huggins, “States: Death penalty drug scramble, higher cost” The Associated Press for Bloomberg Business Week, July 9, 2011 at 2:14 P.M. ET. (also available online at: <http://www.businessweek.com/ap/financialnews/D9OC9L100.htm>).

³ Kathy Lohr, “Georgia May Have Broken Law By Importing Drug.” National Public Radio: Morning Edition, March 17, 2011 at 12:01 A.M. (also available online at: <http://www.npr.org/2011/03/17/134604308/dea-georgia-may-have-broken-law-by-importing-lethal-injection-drug>).

sub-potent, leading to an “agonizing” execution for Mr. Rhode. Apps. N,⁴ O (Aff. of Dr. Mark Heath). In the case of Emmanuel Hammond, Mr. Hammond’s eyes also remained open, and appeared to be trying to communicate throughout during the first part of his execution. App. P.⁵

13. In the summer of 2011, Georgia switched its protocol from a three-drug protocol using sodium thiopenthal as the first drug in that protocol to a three-drug protocol utilizing pentobarbital as the first drug in the injection cocktail. App. Q (Georgia Department of Corrections’ Revised Lethal Injection Procedure, May 2011). The first execution to take place with this protocol was widely reported by objective, third-party sources to have caused tremendous suffering for Mr. Blankenship, the person executed. The media reports of Mr. Blankenship’s execution note that he grimaced, appeared to gasp for air, convulsed, and like Mr. Hammond and Mr. Rhode, remained with his eyes open. App. R.⁶

⁴ Celeste Smith, “Brandon Rhode Executed for 1998 Jones County Killings,” Fox 24 News Central, September 27, 2010 at 7:03 a.m. (also available online at: <http://www.newscentralga.com/news/local/Brandon-Rhode-Execution-Delayed-Until-Thursday.html>), and transcript of interview between Fox News Reporters Portia Lake and Adam Hammond.

⁵ Josh Green, “Witness to death: Reporter’s Account of Hammond’s Execution” *Gwinnett Daily Post*, January 29, 2011, 6:37 P.M. (also available online at: <http://deathpenaltynews.blogspot.com/2011/01/georgia-executes-emmanuel-hammond.html>).

⁶ Greg Bluestein, “Ga. executes inmate convicted of Savannah Slaying,” *Associated Press*, June 23, 2011.

14. Responding to further drug shortages, the Georgia Department of Corrections changed its lethal injection drug protocol again on July 17, 2012—the day before the first scheduled execution of Mr. Hill. See App. C. This time, the change was from a three-drug protocol, to a single-drug protocol employing only pentobarbital. Id.

15. Based on its unseemly efforts in the past to get lethal injection drugs at any cost—even through illegal means—and its willingness to use patently expired drugs of unknown safety and origin on human beings, it is evident that the Georgia Department of Corrections has developed a culture of shoddiness and unprofessional conduct surrounding executions in this state and cannot prudently be trusted to obtain and use lethal injection drugs without any oversight. Moreover, the history of the Department of Corrections’ changing its entire drug protocol on the eve of Mr. Hill’s first scheduled execution, combined with the state secrecy statute, gives Mr. Hill no ability to predict what the Department of Corrections may do and what drugs they may use to execute him, should their recently stated plans to use compounded pentobarbital fall through. Hill v. Owens, 292 Ga. 380, 381 (2013).

16. The 2011 confiscation of its lethal injection drugs by the DEA was an embarrassment for the Department of Corrections, as well as for the office of the

Attorney General, who defended the Department of Corrections’ unconventional methods for procuring lethal injection drugs in litigation before the courts of this state. In order to prevent another such embarrassment and, in an attempt to further address the shrinking supply of drugs available for lethal injection on the conventional, FDA-regulated drug market, senior personnel from both the Department of Corrections and the Georgia Attorney General’s office lobbied the Georgia Assembly aggressively for passage of HB 122 (also referred to, herein, as the “Lethal Injection Secrecy Law”). App. S (Aff. of Sara Totonchi, ¶¶4-5). That bill amended O.C.G.A. § 42-5-36 by adding clause (d), which provides:

(1) As used in this subsection, the term ‘identifying information’ means any records or information that reveals a name, residential or business address, residential or business telephone number, day and month of birth, social security number, or professional qualifications.

(2) The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence *shall be confidential and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50 or under judicial process*. Such information shall be classified as a confidential state secret.

O.C.G.A. § 42-5-36 (d) (emphasis added).

17. Shortly after the passage of the Lethal Injection Secrecy Law and one week after the Eleventh Circuit’s stay of execution was lifted in Mr. Hill’s case,

personnel from the Georgia Attorney General's office contacted other states to learn if it would be possible to buy or otherwise obtain lethal injection drugs from or through them. App. T (April 29, 2013 email correspondence between Senior Assistant Attorney General Sabrina Graham and Sonny White). However, the state notably did not seek a warrant to execute Mr. Hill until July 3, 2013—2 days after HB 122 took effect. App. F.

18. On July 10, 2013, the Georgia Department of Corrections responded to an Open Records Act request made on behalf of Mr. Hill with a series of redacted documents revealing that the Department of Corrections had entered into agreements with an unknown compounding pharmacy and an unknown prescriber of drugs in order to procure pentobarbital for the execution of Mr. Hill. Pursuant to the Lethal Injection Secrecy Law (codified at O.C.G.A. § 42-5-36(d)), all information pertaining to the identities (including professional qualifications) or the location of the parties and/or entities involved in this transaction were redacted and remain unknown to Mr. Hill. App. D.

19. Without any information regarding the origin or makers of the drug the Department of Corrections is planning to use to execute him, Mr. Hill is left with no means for determining whether the drugs for his lethal injection are safe and will reliably perform their function, or if they are tainted, counterfeited,

expired, or compromised in some other way. App. V at 48. The Department of Corrections' switch from the use of FDA-approved pentobarbital to compounded pentobarbital constitutes a significant change in the DOC's lethal injection protocol, and it is one that adds an unacceptable risk of pain, suffering and harm to Mr. Hill to the process of lethal injection.

20. Compounding pharmacies are not subject to stringent FDA regulations and the sources from which they obtain the active pharmaceutical ingredients ("APIs") for their drug concoctions are often part of the global "grey market," which is one of the leading sources for counterfeit drugs entering the United States. Even if the API obtained and used by the compounding pharmacy is not counterfeit, there is a significant chance that it could be contaminated with bacteria, fungus, or particulate matter such as dirt and dust, all of which create grave likelihood that the lethal injection process could be extremely painful for Mr. Hill, that he could suffer a severe allergic reaction and anaphylactic shock, that he would suffer and have a lingering death, or that the drugs would be sub-potent and harm or handicap him without actually killing him.

21. The production of sterile injectable drugs, such as the pentobarbital that the Department of Corrections currently plans to use in the execution of Warren Hill, is one of the most complex, risk-fraught operations of the modern

pharmaceutical industry. Yet, the great majority of compounding pharmacies who supply “sterile” injectibles have no way to test or assure the purity of the APIs they obtain for use in compounding and it is often difficult for a compounding pharmacist to know where the drug was manufactured, or under what conditions. App. V at 49. Most compounding pharmacies further lack the capability to purify the API or to sterilize the end compounded product to ensure that it is free from fungus, bacteria, or other endotoxins and particulate matter. Even with the best compounding techniques, it is not possible to produce a sterile injectable suitable for use in humans from contaminated materials. Indeed, recent, voluntary surveys of several compounding pharmacies by the FDA,⁷ found that a large percentage of the products sampled from these organizations were contaminated, sub-potent, or unsuitable for pharmaceutical use in some way. App. U at 7; App. V at 49-50.

22. Without information from the Georgia Department of Corrections regarding the identities and qualifications of suppliers, compounders, and prescribers of the lethal injection drugs that will be prepared for Mr. Hill’s scheduled execution on July 15, 2013, Mr. Hill cannot know whether the

⁷ Compounding pharmacies are largely outside the purview of the FDA and are regulated by the states. App. U, *generally*.

pentobarbital with which the DOC intends to execute him is appropriate for this purpose, or whether it is likely to cause him suffering and harm.

23. This uncertainty and the unnecessary suffering and mental anguish it creates is an Eighth Amendment violation, and the fact that the state, through the Lethal Injection Secrecy Law, is keeping this information from him also violates his right to due process by denying him meaningful access to the courts to challenge the process by which he will be executed. The law is also unconstitutional because it precludes judicial review of the Department of Corrections' lethal injection procedure and violates the Supremacy Clause of the United States Constitution by blocking Mr. Hill's ability to vindicate his Eighth Amendment right against cruel and unusual punishment.

LEGAL CLAIMS

I. The State's Lethal Injection Secrecy Law and Its Reliance on the Statute to Withhold Information Regarding the Source and Procurement of the Lethal Injection Drugs It Intends to Use to Kill Mr. Hill Is Denying Mr. Hill His State and Federal Constitutional Rights to Meaningful Access to the Courts.

24. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 23.

25. "The constitution of this state guarantees to all persons due process of law and unfettered access to the courts of this state." Cousins v. Macedonia

Baptist Church of Atlanta, 283 Ga. 570, 573 (2008) (quoting Morrow v. Vineville United Methodist Church, 227 Ga. App. 313, 316(1) (1997)). See Georgia Constitution, Article I, ¶¶ I, XII. The United States Constitution guarantees no less. As the United States Supreme Court has recognized, the right of access to the courts is a “fundamental constitutional right” that states are bound “to insure . . . is 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, 351 (1996) (internal citation omitted)).

26. “[R]egulations and restrictions which bar adequate, effective and meaningful access to the courts are unconstitutional.” Howard v. Sharpe, 266 Ga. 771, 772 (1996) (citing Bounds, 430 U.S. 817; Procunier v. Martinez, 416 U.S. 396, 419 (1974); Johnson v. Avery, 393 U.S. 483, 490 (1969)).

27. The United States Supreme Court in Baze v. Rees, 553 U.S. 35 (2008), recognized that an execution method that presents a “substantial risk of serious harm” or an “objectively intolerable risk of harm” may violate the Eighth Amendment. 553 U.S. at 50 (citation omitted). Moreover, “subjecting individuals

to a risk of future harm – not simply actually inflicting pain – can qualify as cruel and unusual punishment.” Id. at 49. Accordingly, a condemned inmate may file suit in state or federal court to enjoin his execution on the basis of such an Eighth Amendment challenge. See, e.g., Baze v. Rees, supra; Hill v. McDonough, 547 U.S. 573 (2006) (holding that Eighth Amendment challenge to lethal injection may be brought pursuant to 42 U.S.S. § 1983).

28. The Lethal Injection Secrecy Law, O.C.G.A. § 42-5-36(d) and, in this case, the State’s reliance on that statute to withhold critical information regarding the drugs it intends to use to execute Mr. Hill, erect a virtually insurmountable barrier to the filing and prosecution of a colorable Eighth Amendment claim. Although the State has disclosed that it intends to use pentobarbital to kill Mr. Hill, it has refused to identify the source of the drugs, both in terms of the pharmacy from which it will be secured and the source of the Active Pharmaceutical Ingredient (“API”) from which the injectable form of the drug will be made. Nor has it provided any information regarding the professional qualifications of the participants.

29. Information regarding the source of the drugs is critical to an assessment of the likelihood that Mr. Hill’s execution will be botched and/or that it will inflict unnecessary and excruciating pain and suffering, and is at odds with the

“concepts of dignity, civilized standards, humanity, and decency” that animate the Eighth Amendment.” Hudson v. McMillian, 503 U.S. 1, 11 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).⁸ See Brewer v. Landrigan, 131 S. Ct. 445 (2010) (vacating stay on grounds that “speculation [regarding the effect of obtaining lethal injection drugs from a foreign source] cannot substitute for evidence that the use of the drug is ‘sure or very likely to cause serious illness and needless suffering.’”) (citing Baze, 553 U.S. at 50). See also Hoffman v. Jindal, F. Supp.2d ____ (M.D.La. 2013) (denying motion to dismiss § 1983 action and observing that “Hoffman and Sepulvado cannot even begin to challenge the protocol without knowing what it is. . . . ‘Fundamental fairness[] requires that the inmate be given meaningful and adequate notice of how his rights have been affected by the changes in the execution protocol.’”) (citation omitted).

30. The information that is shielded from disclosure under O.C.G.A. § 42-5-36(d) is indispensably relevant to an understanding of whether the execution the State of Georgia intends to perform will violate Mr. Hill’s Eighth Amendment

⁸ The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Atkins v. Virginia, 536 U.S. 304, 311-12 (2002) (quoting Trop v. Dulles, 356 U.S. 86, 100-101 (1958)).

right not to be subjected to cruel and unusual punishment. The use of a compounding pharmacy to make an injectable compounded form of pentobarbital is fraught with substantial risks that Mr. Hill is incapable of assessing without information.

31. As an initial matter, Mr. Hill has no means to determine the purity of the API from which the injectable form of pentobarbital has been or is to be made; whether the API has been cut (i.e. diluted) with any substances (which would impact the potency of the final product); whether the API is contaminated with either particulate foreign matter or a microbial biohazard that could lead to a severe allergic reaction upon injection.

32. Moreover, Mr. Hill has no means to assess the qualifications *vel non* of the compounding pharmacy and its agents; the adequacy of its quality assurance, if any; whether the facilities are equipped to make sterile products or to test both the identity and purity of the API; and a host of other potential problems. He accordingly has no means to determine the risk that, for instance, the lethal injection drug that is manufactured for his execution will or will not actually consist of pentobarbital; if so, that it will contain a dose necessary to kill him, rather than simply to injure and maim him, possibly irreparably; that it will have the proper pH so that it does not burn or possibly decimate the veins at the

injection site; or that it will not be filled with particulate or biological matter that may lead to a painful allergic reaction to fungus or toxins that have no place in a lethal injection drug.

33. It is “relatively immutable in our jurisprudence . . . that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.” Greene v. McElroy, 360 U.S. 474, 496 (1959). See, e.g., United States v. Nixon, 418 U.S. 683, 712-13 (1974) (“the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President’s acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of justice. Without access to specific facts a criminal prosecution may be totally frustrated.”).⁹

⁹ Cf. Bowen v. City of New York, 476 U.S. 467, 481 (1986) (“Where the Government’s secretive conduct prevents plaintiffs from knowing of a violation of rights, statutes of limitations have been tolled until such time as plaintiffs had a reasonable opportunity to learn the facts concerning the cause of action.” (quoting

II. The State’s Lethal Injection Secrecy Law Is Unconstitutional Under Georgia’s State Separation of Powers Doctrine As It Permits the General Assembly To Strip the Judiciary of Its Power to Review The Most Extreme Use of State Power—The Taking of a Citizen’s Life.

34. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 33.

35. In contravention of the separation of powers provision of the Georgia Constitution, art. I, § 2, ¶ III, the General Assembly usurped the power of the judiciary when it fully shielded from judicial scrutiny information pertaining to the execution of Georgia’s citizens when it enacted O.C.G.A. § 42-5-36(d)(2). The statute classifies as a “confidential state secret” various identifying information pertaining to, *inter alia*, the drugs used in lethal injection executions, and shields that information from any disclosure pursuant to “judicial process.” In so doing, O.C.G.A. § 42-5-36(d)(2) explicitly exempts from judicial review the very

with approval City of New York v. Heckler, 742 F.2d 729, 738 (2d Cir. 1984)); Arthur v. Thomas, 674 F.3d 1257, 1263 (11th Cir. 2012) (reversing district court’s dismissal on statute of limitations grounds and noting that “[i]n light of Arthur’s other allegations regarding the veil of secrecy that surrounds Alabama’s execution protocol, it is certainly not speculative and indeed plausible that Alabama will disparately treat Arthur because the protocol is not certain and could be unexpectedly changed for his execution.”).

information necessary to determine whether Mr. Hill’s execution is in violation of his Eighth Amendment right to be free from cruel and unusual punishment. See O.C.G.A. § 42-5-36(d)(2); U.S. Const. amend VIII; Ga. Const. art. I, § 1, ¶ XVII.

36. The Georgia Supreme Court has long deemed this type of power grab an impermissible end run around the checks and balances required by the Georgia Constitution. See Grimsley v. Twiggs, 249 Ga. 632, 634 (1982); see also Johnson v. Eisentrager, 339 U.S. 763, 791 (1950). “The doctrine of separation of powers is an immutable constitutional principle which must be strictly enforced.” Mason v. Home Depot, U.S.A., Inc., 283 Ga. 271, 276 (quoting Allen v. Wright, 282 Ga. 9, 12 (2007)). Indeed, the Georgia Constitution “commands” that the legislative power vested in the General Assembly “remain forever separate and distinct” from the judicial power vested in the courts. Thompson v. Talmadge, 201 Ga. 867, 872 (1947).

37. In enacting O.C.G.A. § 42-5-36(d)(2), the General Assembly unilaterally determined that certain information regarding the execution of Georgia citizens is no longer “subject to disclosure under [Georgia’s Open Records Act] or under judicial process.” Yet, it is well-established in Georgia “that issues of privilege even as to matters of department policies and procedures are not for the executive to determine, but are for the court to decide upon a balancing of the

fundamental demands of due process against the executive interest in withholding the information.” Buford v. State, 158 Ga. App. 763, 767 (1981); see also Thornton v. State, 238 Ga. 160, 163-63 (1977); Nixon, 418 U.S. at 712.

38. Where, as here, “there exists a conflict between the statutory authority vested in [an executive agency], and the authority vested in the superior court to enforce the Constitution, the former must yield to the latter.” James v. Hight, 251 Ga. 563, 563 (1983); see also Stripling v. State, 261 Ga. 1, 6 (1991). Accordingly, “[i]t is the duty of this court to reject legislative attempts to interfere with the exercise of its judicial powers [P]rovisions . . . attempting to limit this court in the exercise of its judicial function . . . are void.” Sams v. Olah, 225 Ga. 497, 501-502 (1969).

39. To determine the lawfulness and constitutionality of various aspects of an execution, the judiciary must have access to detailed information about, inter alia, the source and purity of the drugs and the qualifications of the compounding pharmacy and its agents. Citing the lethal injection secrecy law, however, the State has concealed from the courts the only universe of documents that could engender meaningful review.

40. By removing the courts’ independent interpretive authority regarding the constitutionality of critical aspects of the execution process, the General

Assembly denied the judiciary its constitutionally guaranteed position as “the final and common arbiter.” Beall v. Beall, 8 Ga. 210, at *15 (1850). Such encroachments on core judicial functions threaten to “destroy the Constitution” and “render the judiciary impotent.” Calhoun v. State Highway Dept., 223 Ga. 65, 68 (1967); see also Talmadge, 201 Ga. at 874.

41. “[I]ndeed, there is no liberty, if the power of *judging* be not separated from the *legislative* and *executive* powers.” Beall, 8 Ga. at *15 (emphasis in original). “It is [for the courts] alone to determine whether legislation enacted by the General Assembly is inconsistent with the Constitution and where, as here, such an inconsistency [exists], it is irrelevant whether any rational basis exists for the legislation.” Gwinnett County School Dist. v. Cox, 289 Ga. 265, 272 (2011).

III. The State’s Lethal Injection Secrecy Law Is Overbroad in Its Assertion of a “Confidential State Secret” and Is the Only Georgia Confidential State Secret Statute That Provides No Mechanism For Declassification.

42. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 41.

43. “[T]he strong public policy of this state is in favor of open government; that open government is essential to a free, open, and democratic society; and that public access to public records should be encouraged to foster

confidence in government and so that the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions.” O.C.G.A. § 50-18-70(a).

44. Exceptions limiting such public access and open government “shall be interpreted narrowly,” as “there is a strong presumption that public records should be made available for public inspection without delay.” O.C.G.A. § 50-18-70(a); see also City of Atlanta v. Corey Entertainment, Inc., 278 Ga. 474, 476 (2004). The General Assembly’s mere invocation of the term “confidential state secret” in O.C.G.A. § 42-5-36(d)(2) cannot alone “effect[] a[wholesale] exemption from the Open Records Act,” because so “construing the term . . . would be unresponsive to the legislative intent underlying the Open Records Act.” Hardaway Co. v. Rives, 262 Ga. 631, 633-34.

45. The phrase “confidential state secret” appears in only three places in the Georgia code, and only five categories of information fall under its protection. See O.C.G.A. § § 16-11-19, 42-5-36, and 42-9-53. Two sub-sections of O.C.G.A. § 42-5-36 expressly provide for declassification of confidential state secrets. Under § 42-5-36(b), “[i]nvestigation reports and intelligence data . . . shall be classified as confidential state secrets and privileged under law, *unless declassified in writing by the commissioner.*” § 42-5-36(b) (emphasis added). Similarly,

O.C.G.A. § 42-5-36(c) states that “[a]ll institutional inmate files and central office inmate files . . . shall be classified as confidential state secrets and privileged under the law, *unless declassified in writing by the commissioner; provided, however, these records shall be subject to subpoena by a court of competent jurisdiction of this state.*” § 42-5-36(c) (emphasis added).

46. The section of O.C.G.A. § 42-5-36 shielding lethal injection-related disclosures, however, is the *only* confidential state secret statute that does not expressly allow for declassification of protected information. O.C.G.A. § 42-5-36(d)(2). By failing to include a declassification procedure, the General Assembly created a statute uniquely and unduly cloaked in secrecy “in derogation of the general policy in favor of the discovery and admissibility of probative evidence.” Hollowell v. Jove, 247 Ga. 678, 681 (1981); see also O.C.G.A. § 50-18-70(a); Corey Entertainment, Inc., 278 Ga. at 476.

47. Courts “must not blindly accept” claims of confidentiality. Porter v. Ray, 461 F.3d 1315, 1324 (11th Cir. 2006). Instead, courts must assess the legitimacy of the privilege asserted. Robertson v. Bryant, 2006 WL 2982828, at *1-2 (N.D. Ga. 2006). Here, the absence of a mechanism to declassify the relevant privileged information should not trump Mr. Hill’s right to discovery, as Mr. Hill

faces the virtually impossible task of challenging the method of his execution with almost no information about that method.

48. The State “should not be able to hide behind the wall of privilege to keep [] relevant and material information from a plaintiff.” Robertson, 2006 WL 2982828, at *2. Although the burden on the State to produce “confidential state secrets” is “quite great,” the burden on Mr. Hill to prove the unconstitutionality of the circumstances surrounding his impending execution – without access to any information about those circumstances – is far greater. See McGoy v. Ray, 164 Fed. Appx. 876, 878 (11th Cir. 2006) (subsequently relied on in Porter, 461 F.3d at 1324) (articulating balancing test for determining whether a request for discovery of confidential state secrets will be granted).

IV. Georgia’s Lethal Injection Secrecy Act Abridges Mr. Hill’s Rights Pursuant to the Eighth and Fourteenth Amendments, in Violation of the Supremacy Clause.

49. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 48.

50. Article VI of the Constitution establishes that the Constitution is the “supreme Law of the Land.” As the Constitution is “the fundamental and paramount law of the nation . . . an act of the legislature [that is] repugnant to the constitution, is void.” Marbury v. Madison, 5 U.S. 137, 177 (1803). As the

Supreme Court has observed, every state legislator and executive and judicial officer takes an oath pursuant to Article VI to support the Constitution and cannot “war against the Constitution without violating his undertaking to support it.” Cooper v. Aaron, 358 U.S. 1, 18 (1958), citing Ableman v. Booth, 62 U.S. 506, 524-25 (1858) (oath reflects framers’ ‘anxiety to preserve the Constitution “in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State”).

51. Accordingly, the Supreme Court has held that “constitutional right . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor *nullified indirectly by them through evasive schemes* . . . whether attempted ‘ingeniously or ingenuously.’” Smith v. Texas, 311 U.S. 128, 132 (1940) (emphasis added); see also Cooper, supra, accord. Indeed, the Supreme Court has held that it will find preemption wherever the challenged state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Crosby v. National Foreign Trade Council, 530 U.S. 363, 372-373 (2000), quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 (1941).

52. Further, the Fourteenth Amendment directs that “[n]o State shall make or enforce any law which shall *abridge* the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal

protection of the laws.” U.S. Const. amend. XIV (emphasis added). The supremacy of this edict is unchallengeable. Accordingly, the Supremacy Clause will not tolerate any legislative act that infringes upon the protections provided by constitutional rights.

A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, or whatever the guise in which it is taken.

Cooper, 358 U.S. at 16-17 (internal quotations and citations omitted).

53. As discussed *supra*, the secrecy act that Mr. Hill challenges in this action conceals from judicial process the origin and, therefore, the true nature of the substances used to execute him. It accordingly has the effect of preventing him, the public, and the Court from determining whether his execution by lethal injection comports with the Eighth Amendment's prohibition against cruel and unusual punishment. By depriving Mr. Hill of the means to determine whether his rights will be violated, this act – regardless of motive, and however indirectly – has

the effect of nullifying those rights. As the Constitution will not abide any state law or actions by state officials that abridge the protections that it provides, the act is and must be void.

V. Due Process Forbids Mr. Hill's Execution While the State of Georgia Withholds Information Critical to a Determination of Whether Its Intended Method of Execution Violates the Prohibition Against Cruel and Unusual Punishment.

54. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 53.

55. It would be a grotesque injustice to permit the State of Georgia to proceed with Mr. Hill's execution while refusing to disclose the very information that could demonstrate that its intended manner of killing him will violate the state and federal constitutions.

56. "The core of due process is the right to notice and a meaningful opportunity to be heard." LaChance v. Erickson, 522 U.S. 262, 266 (1998). The State's refusal to disclose the source of its compounded pentobarbital and the manner in which it was made is an outright denial of these most basic components of due process. Accordingly, the state should be enjoined from proceeding with Mr. Hill's execution until such time as it has revealed the source of its drugs and

Mr. Hill has been provided a reasonable opportunity to be heard on any Eighth Amendment challenge to their use.

57. In Hoffman v. Jindal, __ F. Supp. __, 2013 WL 489809, M.D. La. No. 12-796 (2/7/13), the Middle District of Louisiana recently granted a stay of execution to intervening plaintiff Christopher Sepulvado precisely because the State of Louisiana was refusing to disclose critical information regarding the protocol it planned to use in his impending execution. As the court observed:

“Fundamental fairness, if not due process, requires that the execution protocol that will regulate an inmate’s death be forwarded to him in prompt and timely fashion.” . . . Fundamental fairness requires that the inmate be given meaningful and adequate notice of how his rights have been affected by the changes in the execution protocol. Sepulvado is entitled to review the full protocol itself.

Id. at * 2 (quoting Oken v. Sizer, 321 F. Supp. 2d 658, 664 (D. Md. 2004). The court specifically found that “Sepulvado will suffer irreparable injury if the stay is not granted because otherwise, he may be executed in an unconstitutional manner” and observed that “[t]he intransigence of the State Defendants in failing to produce the protocol requires the Court to issue this order.” Id.¹⁰

¹⁰ See also Arthur v. Thomas, 674 F.3d 1257 (11th Cir. 2012) (vacating district court’s dismissal of lethal injection challenge and noting that, in light of “the veil of secrecy that surrounds Alabama’s execution protocol, it is certainly not speculative and indeed plausible that Alabama will disparately treat Arthur because the protocol is not certain and could be unexpectedly changed for his execution”). In Arthur, the Eleventh Circuit granted a stay of execution in advance of its decision on the merits of the appeal. See Order dated 3/23/2012 in Arthur v. Thomas, 11th Cir. No. 11-15548.

58. Due process demands that the State be enjoined from carrying out Mr. Hill's execution while it refuses to disclose information critical to a determination of the constitutionality of its intended actions. Enjoining Mr. Hill's execution fully comports with precedent from the United States Supreme Court recognizing that due process does not permit the government to benefit from its suppression of information that might undermine the legality of its intended actions.

59. In criminal cases, for instance, "[i]f the Government refuses to provide state-secret information that the accused reasonably asserts is necessary to his defense, the prosecution must be dismissed." General Dynamics Corp. v. United States, 131 S. Ct. 1900, 1905-06 (2011). See, e.g., Jencks v. United States, 353 U.S. 657, 672 (1957) (holding that a "criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at trial"); cf. Roviaro v. United States, 353 U.S. 53, 60-61 (1957) (holding that "[w]here disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give

way. In these situations, the trial court may require disclosure and, if the Government withholds the information, dismiss the action”).

60. Although Mr. Hill’s criminal litigation has ended, the rationale underlying these decisions fully applies here. As the High Court has explained: “The rationale of the criminal cases that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accuse of anything which might be material to his defense.” United States v. Reynolds, 345 U.S. 1, 11 (1953).¹¹ Here, the State of Georgia has “the duty to see that justice is done,” which must perforce include the duty to avoid a cruel and unusual execution and to provide the process due even a condemned man.

¹¹ While this rule was not applied in Reynolds, a civil tort action against the government, as a basis to compel the production of documents the government claimed were privileged military secrets, this has no particular bearing here. In Reynolds, the Court explained that the criminal rule “has no application in a civil forum where the Government is not the moving party, but is a defendant only terms to which it has consented.” While the state is not the “moving party” to this lawsuit, it is clearly the moving party for the execution Mr. Hill seeks to enjoin. Moreover, as the Supreme Court has since explained, Reynolds “decided a purely evidentiary dispute by applying evidentiary rules: The privileged information is excluded and the trial goes on without it.” General Dynamics Corp., 131 S. Ct. at 1906. Here, by contrast, the State’s non-disclosure “obscure[s] too many of the facts relevant to [a lethal injection challenge, rendering that challenge] nonjusticiable” Id. In General Dynamics, the Court ruled that, because the state secrets privilege would not permit the development of a valid affirmative defense, neither the government, nor the contractor could proceed and that the parties would remain in the position in which they were the day suit was filed. Id. at 1906-07.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Warren Hill prays for:

61. Temporary, preliminary, and permanent injunctive relief to enjoin the Defendants, their officers, agents, servants, employees, and all persons acting in concert with them from executing Plaintiff until such time as Defendants can demonstrate that all controlled substances used for Plaintiff's execution are not counterfeit, compromised, tainted by fungus, bacteria, endotoxins, or other particulate matter, sub-potent, super-potent, expired, or illegally obtained;

62. Temporary, preliminary, and permanent injunctive relief to enjoin the Defendants, their officers, agents, servants, employees, and all persons acting in concert with them from executing Plaintiff until such time as Defendants can demonstrate that measures are in place to allow for Plaintiff's execution in a manner that complies with the Eighth Amendment to the United States Constitution and Article 1, Section I, Paragraph VII of the Georgia Constitution;

63. Sealed discovery of the identity of the compounding pharmacy and the supply chain and manufacturer(s) of any and all ingredients used to produce the lethal drug compound to be injected into Warren Hill;

64. Any such relief as the Court deems just and proper.

Dated this 12th day of July, 2013.

Respectfully submitted,



Brian Kammer (Ga. 406322)
Robyn A. Painter (Ga. 110108)
Georgia Resource Center
303 Elizabeth Street, NE
Atlanta, GA 30307
404-222-9202

COUNSEL FOR MR. HILL

VERIFICATION

STATE OF GEORGIA

COUNTY OF BUTTS

Before me, the undersigned authority, personally appeared WARREN LEE HILL, who, being first duly sworn, says that he has personal knowledge of the allegations in the foregoing Complaint, and that the allegations and statements contained therein are true and correct to the best of his knowledge.

Dated this 8 day of July, 2013.

Warren Lee Hill
WARREN LEE HILL

Sworn to and subscribed before me
this 8th day of July, 2013.

Heidi Reiner
NOTARY PUBLIC

Heidi Reiner
NOTARY PUBLIC
Fulton County, GEORGIA
My Commission Expires 1/1/17

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

WARREN LEE HILL,)	
)	
v.)	Civil Action
)	Case No.
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,)	

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served a copy of the foregoing document this day by electronic mail in pdf format on counsel for Defendants at the email addresses below, and have served another copy by FedEx on counsel for Defendants at the addresses below:

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This the 12th day of July, 2013.

A handwritten signature in black ink, appearing to be "N. J. R.", written in a cursive style.

Attorney