THIS IS A CAPITAL CASE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

TERRICK TERRELL NOONER **PLAINTIFF**

VS. **No. 5:06CV00110 SWW/JFF**

LARRY NORRIS, Director,
Arkansas Department of Correction;
GAYLON LAY, Warden,
Arkansas Department of Correction;
WENDY KELLY, Deputy Director for Health
and Correctional Programs,
Arkansas Department of Correction;
JOHN BYUS, Administrator, Correctional
Medical Services, Arkansas Department of Correction; and
OTHER UNKNOWN EMPLOYEES, Arkansas Department
of Correction **DEFENDANTS**

MOTION TO DISMISS

Come now the defendants, Larry Norris, Gaylon Lay, Wendy Kelly, John Byus, and all other unnamed employees and agents of the Arkansas Department of Correction, by and through counsel, Mike Beebe, Attorney General, Joseph V. Svoboda, Assistant Attorney General, and Mark Hagemeier, Senior Assistant Attorney General, and for their Motion to Dismiss, state:

(1) Plaintiff, Terrick Nooner, is an inmate in the Arkansas Department of Correction under a sentence of death by virtue of his 1996 conviction of capital murder in the Circuit Court of Pulaski County, Arkansas.

(2) Nooner filed a direct appeal from his conviction and sentence to the Arkansas Supreme Court. Finding no error, the Arkansas Supreme Court affirmed in *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995).

(3) Nooner filed for post-conviction relief in the trial court which, following four hearings, denied relief. Finding no error, the Arkansas Supreme Court affirmed the denial of post-conviction relief in *Nooner v. State*, 339 Ark. 253, 4 S.W.3d 497 (1999).

(4) Nooner filed a habeas corpus petition under 28 U.S.C. § 2254 in the United States District Court, *Nooner v. Norris*, case number 5:96CV00495. Judge Stephen Reasoner denied relief and the Eighth Circuit Court of Appeals affirmed in *Nooner v. Norris*, 402 F.3d 801 (8th Cir. 2005). Nooner's subsequent petition for rehearing and rehearing *en banc* was also denied by the Eighth Circuit. Nooner filed a petition for writ of certiorari which was denied on May 15, 2006 by the United States Supreme Court, in *Nooner v. Norris*, case number 05-9830.

(5) Nooner has filed a complaint under 42 U.S.C. § 1983, in which he contends that the defendants' protocols, policies, and practices for executions violate his rights to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments, that the defendant's procedures and policies are arbitrary and capricious under the Fifth and Fourteenth Amendments, and that defendants are deliberately indifferent to his health and safety under the Eighth and Fourteenth Amendments to the United States Constitution.

(6) The compliant should be dismissed because Nooner failed to comply with and exhaust his state administrative remedy under the Department of Correction's grievance policy therefore, is prohibited from filing a complaint under 42 U.S.C. § 1983 in

accordance with the Prison Litigation Reform Act of 1995. 110 Stat. 1321-71, 42 U.S.C. § 1997e(a).

(7) The complaint should be dismissed as it is filed outside the statute of limitation for filing under 42 U.S.C § 1983.

(8) The complaint should be dismissed because it violates the doctrine of laches.

(9) The complaint should be dismissed as a successive application under 28 U.S.C. § 2244(b)(3)(a), which requires authorization from the appropriate court of appeals before a district court can entertain the application.

(10) This motion is accompanied by a brief in support thereof pursuant to Local Rule 7.2 of the Rules of the United States District Court for the Eastern and Western Districts of Arkansas.

(11) For the foregoing reasons, the complaint should be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of jurisdiction over the subject matter by this Court, and under Rule 12(b)(6), for Nooner's failure to state a claim upon which relief can be granted.

WHEREFORE, defendants pray that their Motion to Dismiss be granted and for all other proper relief to which they are entitled.

Respectfully submitted,

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/s/ Mark Hagemeier
MARK HAGEMEIER
Arkansas Bar No. 94127

Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Joseph V. Svoboda, hereby certify that on this 19th day of May, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following parties:

Jenniffer Horan &
Julie Brain
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/s/ Joseph V. Svoboda
JOSEPH V. Svoboda

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BRIEF IN SUPPORT OF MOTION TO DISMISS

A. Exhaustion

Terrick Nooner, filed his complaint under 42 U.S.C. § 1983, and he challenges the protocol used in Arkansas executions. Even if this is a cognizable claim under §1983, which defendants deny,[1] Nooner's complaint nevertheless must still be dismissed for the

[1] There is currently pending before the United States Supreme Court, in the case of *Hill v. McDonough*, USSC # 05-8794, the issue whether, under *Nelson v. Campbell*, 541 U.S. 637 (2004), a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983. The resolution of this issue will have an immediate and potentially conclusive effect on the pending proceedings. *Hill* was orally argued on April 26, 2006, and, given the Supreme Court's usual practice and procedure, a decision will likely be rendered no later than June 26, 2006, the final day of the Court's current term.

simple reason that he has not exhausted his available state administrative remedies under the Arkansas Department of Correction's grievance procedure. In fact, he has not only failed to exhaust, he has also failed to even commence such proceedings.

The Prison Litigation Reform Act of 1995 (Act) imposes limits on the scope and duration of preliminary and permanent injunctive relief, including a requirement that, before issuing such relief, an inmate must exhaust available state administrative remedies before bringing a § 1983 action challenging the conditions of his confinement. 101 Stat. 1321-74, 42 U.S.C. § 1997e(a) (No action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.). Although the Act provides for injunctive relief, it also includes a requirement that, before issuing such relief, "[a] court shall give substantial weight to any adverse impact on...the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1); accord, § 3626(a)(2). In fact, the Act mandates that a district court "shall," on its own motion, dismiss "any action brought with respect to prison conditions under section 1983 of this title...if the court is satisfied that the action is frivolous, malicious, or fails to state a claim upon which relief can be granted." § 1997e(c)(1). *See also, Nelson v. Campbell*, 541 U.S. 637 (2004).

Nooner is required to provide proof that he exhausted all administrative remedies before he can bring a § 1983 action. "Congress has mandated exhaustion," eliminating the courts' discretion to excuse exhaustion. *Booth v. Churner*, 532 U.S. 731 739, 741 (2001). *See also Porter v. Nussle*, 534 U.S. 516 (2002) (prisoners who claim denial of their federal rights while incarcerated must meet Section 1997e(a)'s exhaustion

requirement before commencing a civil rights action.) Likewise, the Eighth Circuit, discussing *Booth* and *Porter*, has held that administrative remedies must be exhausted before an inmate files a § 1983 action. *Johnson v. Jones*, 340 F.3d 624, 627-628 (8th Cir. 2003). "If exhaustion was not completed at the time of filing, dismissal is mandatory." *Id.* at 627. Further, the plaintiff is required to file "a proper grievance against **all** defendants." *Jones v. Norris*, 310 F.3d 610, 612 (8th Cir. 2002) (emphasis added).

It is clear that the United States Supreme Court has determined that a prisoner must exhaust his claims before filing a § 1983 lawsuit. As the Supreme Court explained in *Porter*, *supra*, the rationale for the exhaustion requirement is to allow prison officials the time and opportunity to review and address complaints internally before the prisoner is allowed to initiate a federal § 1983 claim. *Porter* at 524-25. In addition, the Eighth Circuit has held that when there is a failure to exhaust as to any claim set out in the complaint, the entire action must be dismissed. *Graves v. Norris*, 218 F.3d 884 (8th Cir. 2000). "When multiple prison condition claims have been joined, as in this case, the plain language of § 1997e(a) requires that all available prison grievance remedies must be exhausted as to all of the claims." *Id.* at 884. "The statute's [42 U.S.C. § 1997e(a)] requirements are clear: If administrative remedies are available, the prisoner must exhaust them." *Chelette v. Harris*, et al., 229 F.3d 684, 688 (8th Cir. 2000). Because Nooner has failed to exhaust his remedies, his complaint must be dismissed.

B. Statute of Limitation

Nooner was convicted and sentenced to die by lethal injection in 1996. His direct appeal and post-conviction proceedings in state court were all concluded in 1999, and whatever stays of executions were entered in connection with those proceedings

automatically terminated then. Rule 10(c) of the Arkansas Rules of Appellate Procedure – Criminal provides for the dissolution of any stay upon affirmance on direct or post-conviction review. No stay of execution was ever entered in connection with Nooner's federal habeas corpus proceedings, so Nooner has been the potential subject of execution since 1999. Lastly, the Arkansas Department of Correction has used lethal injection in all executions performed since 1983 by law. *See* Ark. Code Ann. § 5-4-617.

Congress did not prescribe a specific statute of limitation for actions brought under 42 U.S.C. § 1983. The controlling limitation period for such an action is, therefore, the most appropriate one provided by state law. *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975). In Arkansas, § 1983 claims are subject to the 3-year limitation found in Ark. Code Ann. § 16-56-105. *See Weston v. Bachman*, 282 F.2d 202 (8th Cir. 1982), *cert. denied*, 464 U.S. 824 (1983); *Whittle v. Wiseman*, 463 F.2d 1128 (8th Cir. 1982). Since Nooner has know from the date of his death sentence in 1996 that he would be executed by lethal injection, defendants contend this current action is time barred by § 1983's 3-year statute of limitations.

Even if Arkansas' 5-year statute of limitations under Ark. Code Ann. § 16-56-115 applied to Nooner's current action, that limitations period, too, had run long before Nooner filed his current § 1983 action. *See Glasscoe v. Howell*, 431 F.2d 863 (8th Cir. 1970) (action against Arkansas State Police officers for alleged deprivation of civil rights could be covered by either Arkansas' 3-year or 5-year statute of limitation).

C. Laches

As previously stated, lethal injection has been the method of execution in Arkansas since 1983. Since 1983, the protocol used for executions has basically remained unchanged. Nooner has been under a sentence of death by lethal injection since

his conviction ten years ago, and a total of sixteen executions have been carried out during those ten years. Nevertheless, Nooner waited until he had exhausted his state challenges to his sentence, including his post-conviction challenges, and one complete round of federal habeas[2] before challenging the State's execution protocol.

The doctrine of laches precludes a lawsuit when a plaintiff is responsible for a unreasonable and unexcused delay in asserting his claim, resulting in prejudice to the defendant. *Baker v. Baker*, 951 F.2d 922, 980 (8th Cir. 1991); *Goodman v. McDonnell Douglass Corporation*, 606 F.2d 800, 804 (8th Cir. 1979); *cert. denied*, 446 U.S. 913 (1980). Whether the doctrine of laches should apply in a particular cause of action is a matter within the sound discretion of the trial court. *Goodman*, 606 F.2d at 840. The equitable doctrine of laches should be used to reach "a just result." *EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 856 (8th Cir. 1978), - (citing *Albemarle Paper Company v. Moody*, 422 U.S. 405, 424-25 (1975)). In examining the unreasonable and unexcused delay prong of the laches standard, the court considers "both the length of the delay and the plaintiff's reasons for the delay." *Whitfield v. Anheuser-Busch, Inc.*, 820 F.2d 243, 253 (8th Cir. 1987).

Nooner's delay in challenging the State's protocol is both unreasonable and unexcused. He had the means and reason to make this challenge ten years ago. The delay has also prejudiced the defendants in responding to various allegations. Nooner has provided select quotes from newspaper articles from alleged eyewitnesses to past executions as a means to support an otherwise unsupported opinion that the present

[2] Nooner's petition for certiorari was pending before the United States Supreme Court when the current complaint was filed but certiorari has since been denied.

protocol **might** cause undo pain and suffering. Even if defendants could locate and produce eyewitnesses[3] to and/or participants in past executions, the passage of time would make such testimony less than reliable, and therefore, less helpful to the court. "[T]he 'eleventh hour' tactic used by counsel in this matter is not consistent with a search for truth and justice." *Bolder v. Delo*, 985 F.2d 941 (8th Cir. 1993).

D. Successive Habeas Corpus Petition

Nooner's complaint is a habeas corpus petition in every sense but name. This Court should dismiss the § 1983 complaint on the grounds that Nooner is attempting to circumvent the prohibition against successive habeas corpus petitions under *Gomez v. United States District Court*, 503 U.S. 653 (1992); *Lomchar v. Thomas*, 517 U.S. 314 (1996) (interpreting *Gomez* to mean that "habeas rules would apply even if a § 1983 [was] also a proper vehicle [for the] claim."). "Section 1983 must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction." *Nelson*, 541 U.S. at 643. Such claims fall within the "core" of habeas corpus and are, thus, not cognizable when brought pursuant to § 1983. *Id.*

Federal courts cannot allow prisoners to circumvent the limitation of 28 U.S.C. § 2244(b) by attaching labels other than "successive application" to their pleadings. *See Gonzalez v. Crosby*, ____ U.S. ____, 125 S.Ct. 2641, 2647-48 (2005); *Williams v. Hopkins*, 135 F.3d 333, 336 (8th Cir. 1997) (relying on *McCleskey v. Zant*, 499 U.S. 467 (1991) in holding that, regardless of this label, a last minute request for equitable relief is

[3] Willis Sergeant and M. D. Reed, the wardens who had direct supervision and responsibility for all but the two most recent executions in the past ten years, have both retired and are no longer employed by the Arkansas Department of Correction.

the functional equivalent of a habeas application. Challenges that have as their express goal to delay execution of that sentence, are in fact challenges that seek to interfere with the sentence itself, and thus, are properly construed as a petition for habeas corpus). *In re Sapp*, 118 F.3d 460, 462 (8th Cir. 1997); *Williams V. Hopkins*, 130 F.3d at 336; *Felker v. Turpin*, 101 F.3d 95, 96 (11th Cir. 1996). The law is clear on this point; a district court simply cannot entertain a second or successive habeas petition in the first instant - no matter how the petition may be styled. *See Norris v. Nance*, 429 F.3d 1194 (8th Cir. 2005) (order vacating a stay of execution and dismissing § 1983 application that constituted functional equivalent of a second or a successive habeas petition).

Respectfully submitted,

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