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

TERRICK TERRELL NOONER, **Plaintiff**

v. **Civil Action No. 5:06-cv-00110-SWW**

LARRY NORRIS, et al., **Defendants**

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

On May 1, 2006, Plaintiff, Terrick Terrell Nooner, initiated the instant action pursuant to 42 U.S.C. § 1983, challenging the constitutionality of the lethal injection protocol selected and used by Defendants for executions in the State of Arkansas. On May 19, 2006, Defendants filed their Motion to Dismiss, [Document 13], and Brief in Support thereof, [Document 14], wherein they urge this Court to dismiss the action under Fed. R. Civ. P. 12(b). None of the four grounds upon which Defendants urge dismissal has merit, and the Motion should accordingly be denied.

A motion to dismiss under Fed. R. Civ. P. 12(b) should be denied "unless it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Schmedding v. Tnemec Co.*, 187 F.3d 862, 864 (8th Cir. 1999). *See also Mattes v. ABC Plastics Inc.*, 323 F.3d 695 (8th Cir. 2003). A complaint is to be construed liberally and in the light most favorable to the plaintiff, thereby rendering dismissal appropriate only "in the unusual case in which a plaintiff includes allegations that show

on the face of the complaint that there is some insuperable bar to relief." *Schmedding,* 187 F.3d at 864, (citing *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974)). Accordingly, a party seeking to dismiss a complaint under Fed. R. Civ. P. 12(b) bears a heavy burden, one that the Defendants here have failed to meet.

I. DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN OF PLEADING AND PROVING THE AFFIRMATIVE DEFENSE OF FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

A. Defendants Have Failed To Plead, Much Less Prove, Facts Sufficient To Establish A Failure To Exhaust

In their Motion and Brief in Support, Defendants first assert that Mr. Nooner's Complaint should be dismissed based on an alleged failure to comply with the requirement of the Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(a), that a prisoner exhaust available administrative remedies before filing suit in federal court. (Motion at 2; Brief at 1-3.) Defendants urge the Court to grant the Motion on this ground because Mr. Nooner "is required to provide proof [sic] that he exhausted all administrative remedies before he can bring a § 1983 action," and has not done so. (Motion at 2.)

To the contrary, failure to exhaust available administrative remedies under the PLRA is an affirmative defense under Fed.R.Civ.P. 8(c), and *Defendants* have the burden of pleading and proving it. *Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001)(citing *Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 1999)).[1] *See also Nerness v. Johnson*, 401

[1] Since the Eighth Circuit followed the Seventh Circuit in its decision in *Foulk* in 2001, its position has been adopted by a majority of the circuit courts of appeal who have

F.3d 874, 876 (8th Cir. 2005)(same). Bare and conclusory allegations of lack of exhaustion are insufficient to meet this burden. *Wheeler v. Prince*, 318 F.Supp.2d 767, 771 (E.D.Ark. 2004).

Defendants' submissions contain nothing but the broad, conclusory allegation that Mr. Nooner has failed to commence or complete proceedings under the Arkansas Department of Correction's grievance procedure. (Brief at 2.) It is important to note that the PLRA requires exhaustion of only those administrative remedies that are "available" to the plaintiff. *See Porter v. Nussle*, 534 U.S. 516, 524 (2002)("No such action shall be brought . . . until such administrative remedies *as are available* are exhausted")(quoting 42 U.S.C. § 1997e(a)((emphasis added)). Defendants fail to plead any facts whatsoever to establish that there was an administrative remedy available to Mr. Nooner, either under the prison grievance procedure or otherwise, or to show the steps that Mr. Nooner was required, and supposedly failed, to take. *See, e.g., Freeman v. Snyder*, 2001 WL 515258 (D.Del.)(denying motion for summary judgment on grounds of alleged non-exhaustion where defendants failed to show that there was an actual administrative remedy available for plaintiff to exhaust).

This glaring omission is undoubtedly attributable to the fact that there indeed was

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addressed the question. *See Anderson v. XYZ Correctional Health Services Inc.*, 407 F.3d 674, 677 (4th Cir. 2005); *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003); *Casanova v. DuBois*, 289 F.3d 142, 147 (1st Cir. 2002); *Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir. 2002). Only the Tenth and Sixth Circuits have held that the plaintiff is responsible for pleading exhaustion. *See Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1209 (10th Cir. 2003); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998)(per curiam).

no administrative procedure available to Mr. Nooner to seek redress of the claims that form the basis for the instant action. *See* Section I. B, *infra*. Regardless of the reason for the inadequacy of the pleading, however, the deficiency precludes this Court from granting the Motion to Dismiss on the ground of failure to exhaust administrative remedies under the PLRA.

B. There Was No Administrative Remedy Available to Mr. Nooner Because The ADC Inmate Grievance Procedure Lacks Authority To Provide Any Relief Or Take Any Action On His Claims

a. Only the Director of the ADC Has the Authority to Change the Lethal Injection Protocol and He Has No Role in the ADC's Administrative Grievance Process

There was in fact no administrative remedy available for Mr. Nooner's claims because the only individual who has the authority to alter the lethal injection protocol, the Director of the Department of Corrections, takes no part in the ADC Inmate Grievance Procedure. As noted above, the PLRA requires exhaustion of such administrative remedies as are available to the prisoner. 42 U.S.C. § 1997e(a) (1994 ed., Supp. V). The United States Supreme Court addressed the meaning of the phrase "as are available" under the PLRA in *Booth v. Churner*, 532 U.S. 731, 736 (2001). Mr. Booth, a Pennsylvania prison inmate, filed a claim for relief under 42 U.S.C. § 1983 seeking monetary damages for an incident involving excessive force by corrections officers. *Id.* at 734. The Pennsylvania prison's grievance procedure provided for review of claims of excessive force, but it had no policy for recovery of money damages. *Id.* Mr. Booth argued that, because the grievance procedure was incapable of providing the monetary

damages he sought, there was no administrative remedy available to exhaust. *Id.* at 735.

Before interpreting the meaning of availability in this context, the Court carefully framed the issue before it:

> The meaning of the phrase "administrative remedies . . . available" is the crux of the case, and up to a point the parties approach it with agreement. Neither of them denies that some redress for a wrong is presupposed by the statute's requirement of an "available" "remedy"; neither argues that exhaustion is required where the relevant administrative procedure lacks authority to provide any relief or to take any action whatsoever in response to a complaint. The dispute here, then, comes down to whether or not a remedial scheme is "available" where, as in Pennsylvania, the administrative process has authority to take some action in response to a complaint, but not the remedies action an inmate demands to the exclusion of all other forms of redress.

Id. at 736. The Court recognized that a grievance system that affords the inmate no possibility of relief leaves the administrative officers with "no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust." *Id.* at n.4. *See also Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004)("To be 'available' under the PLRA, a remedy must afford 'the possibility of some relief for the action complained of'")(citing *Booth*, 532 U.S. at 738). Because the Pennsylvania prison's administrative process had authority to take at least some action in response to Mr. Booth's complaint, the Court held that a grievance procedure was, in fact, "available" to Mr. Booth for purposes of the PLRA's exhaustion requirement. *Id.* at 739.

Quite the opposite is true for Mr. Nooner. The essence of Mr. Nooner's claims is that the particular method of execution by lethal injection that Defendants have adopted and propose to employ subjects him to a substantial risk of suffering excruciating pain

and torture during his execution that is gratuitous and unnecessary in violation of the Constitution. Under Arkansas law, the only person who has the authority to act on a complaint about the protocol and to order that changes be made to it is Defendant Larry Norris, Director of the Arkansas Department of Correction. *See* Ark. Code Ann. § 5-4-617(a)(2)("The Director of the Department of Correction shall determine the substances to be uniformly administered and the procedures to be used in any execution"). The statute is unequivocal, and does not even permit the Director to delegate this function to a subordinate under his supervision.

However, the Director has no role in the ADC Inmate Grievance Procedure, which is administered entirely by other ADC staff who have no such authority. The procedure, which is set forth in ADC Administrative Directive 04-01, has three steps: informal resolution, grievance to warden and finally appeal to the deputy/assistant director of ADC. According to the Administrative Directive, "[t]he Deputy/Assistant Director will respond in writing to the inmate concerning the decision within 30 working days. **This is the final level for the appeal process.**" *Id.* at § IV.G.5. (emphasis added). The Directive goes on to state explicitly: "The Director of the Department of Correction is not routinely involved in the Inmate Grievance Procedure. **No appeals should be sent to the Director**." *Id.* (emphasis added).

The Administrative Directive notes that the Director may choose to intervene in the grievance process at his discretion, *id.*, but there is no procedure for seeking redress from the Director for any complaints of any nature. Because there is *no* individual

involved in *any* stage of the grievance process who has the lawful authority to respond to or provide any relief for his challenge to the ADC's lethal injection protocol, Mr. Nooner had no administrative remedy to exhaust. *Booth*, 532 U.S. at 736 n.4. *See also Brown v. Crawford*, 408 F.3d 1072, 1030-31 (8th Cir. 2005)(Bye, J., dissenting from denial of motion for stay of execution)(noting that plaintiff had no administrative remedy available to exhaust because director of department of corrections, the only person empowered to change lethal injection protocol, played only limited appellate role in prison grievance process).

b. Mr. Nooner's execution under the lethal injection protocol chosen by the Director is an anticipated event and therefore is non-grievable by the ADC's Administrative Grievance Process

If a plaintiff's complaint is deemed "non-grievable" and excluded from the administrative grievance process on that basis, the plaintiff has no administrative remedy for the complaint and therefore nothing to exhaust under the PLRA. *See, e.g., Freeman v. Snyder*, 2001 WL 515258 (D.Del.)(finding no administrative remedy available to plaintiff because his claims were non-grievable under the prison system); *Mullins v. Smith*, 14 F.Supp.2d 1009, 1012 (E.D.Mich. 1998)(same); *Torrence v. Pesanti*, 239 F.Supp.2d 230, 234 n.4 (D.Conn. 2003)(ordering further briefing and evidence on question of whether plaintiff's claim is a non-grievable issue under applicable Administrative Directive and thus had no remedies which may be exhausted); *Martin v. Crall*, 2006 WL 515530 at *9 (W.D.Ky.)(noting that if issues are designated non-grievable, no grievance mechanism is available and there is no exhaustion barrier to filing suit). Mr. Nooner's objection to the

Defendant's lethal injection protocol is just such a claim.

The ADC Inmate Grievance Procedure provides inmates in its custody with a procedure for the resolution of "complaints, needs, and other problems." Ark. Dep't of Corr. Admin. Directive 04-01 § I. (Feb. 1, 2004). The procedure is available to address a variety of prisoner complaints, but expressly excludes those issues designated as "non-grievable matters" from administrative review. *Id.* at § III.E. One of the categories of claims that are considered non-grievable is "[a]nticipated events (i.e. scheduled events or activities which may occur in the future)." *Id.* at § III.E.6.

Mr. Nooner's claim, that his execution in accordance with the unconstitutional lethal injection protocol selected by the Director will likely subject him to gratuitous pain and suffering, is a quintessential example of an "anticipated event." Mr. Nooner has not suffered any harm yet; rather, he seeks to prevent that harm before it occurs because he will obviously have no remedy or redress once his execution is underway. Thus there can be little question that Mr. Nooner's claim falls squarely into the category of anticipated events, thereby rendering his complaint a non-grievable matter under Ark. Dep't of Corr. Admin. Directive 04-01 § III.E.6. The Department of Correction's grievance procedure is therefore unavailable to him for this reason, also, and so there is no requirement under the PLRA that he attempt to exhaust the procedure.

C. There Was No Administrative Remedy Available to Mr. Nooner Because He Is Prevented From Appropriate Use of the Grievance Process By His Debilitating Mental Illness

Even if the Inmate Grievance Procedure was generally available to ADC inmates

to seek redress of claims regarding the lethal injection protocol, the Procedure is not available to Mr. Nooner because he is prevented from effectively utilizing the process by his severe mental illness and incompetence. One of the prominent symptoms of Mr. Nooner's mental illness is a fixed delusional system that prevents him from recognizing the reality of his own impending execution, much less comprehending that filing a prison grievance could be necessary to avoid a tortuous and agonizing death. Mr. Nooner's incompetence would thus excuse him from exhausting any otherwise available administrative mechanism .

The PLRA's phrase "such administrative remedies as are available" means those administrative remedies that are "immediately utilizable" by and "accessible" to the inmate. *Days v. Johnson*, 322 F.3d 863, 867 (5th Cir. 2003); *accord Miller v. Norris*, 247 F3d 736, 740 (8th Cir. 2001)(applying the same dictionary definition of the term "available" to interpret the PLRA's language "as are available")(citations omitted). In *Days*, a Texas prison inmate filed suit against prison officials under 42 U.S.C. § 1983 prior to submitting a written complaint to the prison's grievance officer. *Days*, 322 F.3d at 866. The court found that a wrist injury prevented Mr. Days from filing a timely grievance request, and grievance officers were inattentive to his oral requests for relief, thereby rendering any grievance procedure inaccessible to him. *Id.* at 866-867. The Fifth Circuit recognized that "one's personal inability to access the grievance system could render the system unavailable" for purposes of the PLRA's exhaustion requirement. *Id.* at 867 (citing *Ferrington v. Louisiana Dep't of Corrections*, 315 F.3d 529 (5th Cir. 2002)).

Given his injury and his subsequent attempts to access the grievance process, the court held that Mr. Days had exhausted the administrative remedies that were available to him. *Id.* at 868. *See also Pavey v. Conley*, No. 05-2004, slip op. at 15-17 (7th Cir. Feb. 1, 2006)(where inmate's broken arm prevented him from completing grievance form and grievance officers were unwilling to provide assistance in the matter, administrative remedies were unavailable to the inmate and exhaustion was excused).

Here, Mr. Nooner suffers from an disability much more severe than a broken wrist. Mr. Nooner suffers from schizophrenia. Dr. Xavier Amador, Ph.D, an adjunct professor of Clinical Psychology at Columbia University with extensive experience with individuals with schizophrenia, has concluded that Mr. Nooner meets the criteria for a diagnosis of Schizophrenia, Disorganized Type. Mr. Nooner's most prominent symptoms are disordered thought and speech, and bizarre, fixed delusions. In 2002, at a hearing on Mr. Nooner's competency to waive his rights to federal habeas corpus review, Dr. Richart DeMeir, clinical psychologist at the Federal Bureau of Prisons Medical Center in Springfield, testified that Mr. Nooner was mentally ill to the point of incompetency.[2] According to Dr. DeMeir, Mr. Nooner's disorder is characterized by severe thought disorder and fixed, long-standing delusions. He manifested severe disorganization of speech, which was rambling and illogical. His thoughts were irrational, rarely tied together in a way that could be understood. He was unable to provide any logical or

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[2]Dr. DeMeir felt that he had insufficient information to enable him to diagnose the specific disorder with which Mr. Nooner suffers and therefore entered a provisional Axis I diagnosis of Psychosis NOS.

rational explanation for his desire to waive his appeals, insisting that he does not want to die but wants to have his execution scheduled because he believes that this will lead to his exoneration by the clemency board. He exhibited numerous delusions that were so convoluted that Dr. DeMeir was unable to explain them. Dr. DeMeir explained that it is extremely difficult, if not impossible, to feign such disordered speech; he did not know of anyone, even psychologists, who could successfully do so.

Mr. Nooner's delusions prevent him from understanding that his execution is imminent. They prevent him from realizing that he will die according to the Arkansas Department of Correction's lethal injection protocol, which creates a substantial and unnecessary risk that he will be fully conscious and in agonizing pain for the duration of the execution process. Sadly, the delusions prevent him from knowing that the Constitution provides a remedy for such cruel and unusual punishment. Accordingly, Mr. Nooner is unable to utilize the prison's grievance procedure to seek redress of his claims, and no administrative remedy is available to him. *Cf. Miller*, 247 F.3d at 740. (where the allegations contained in prisoner's complaint averred that prison officials prevented him from utilizing the grievance process, administrative remedies were unavailable for purposes of the PLRA). Therefore, the PLRA's exhaustion requirement is inapplicable to Mr. Nooner.

D. Mr. Nooner Has Substantially Complied With The PLRA's Exhaustion Requirement

In light of the inability of anyone other than the Director of the ADC to provide redress for Mr. Nooner's claim, and Mr. Nooner's own inability to pursue the established

Inmate Grievance Process, undersigned counsel undertook to inform the Director of Mr. Nooner's claim and provide him with an opportunity to respond by contacting the Director on Mr. Nooner's behalf. These efforts have resulted in substantial compliance with the PLRA's administrative exhaustion requirement sufficient to satisfy the statutory provision. *See Nyhuis v. Reno*, 204 F.3d 65, 77-78 (3rd Cir. 2000)("we note our understanding that compliance with the administrative remedy scheme will be satisfactory if it is substantial")(citing *Miller v. Tanner*, 196 F.3d 1190, 1194 (11th Cir. 1999)); *Freeman v. Snyder*, 2001 WL 515258 at *8 (D.Del.)(finding that plaintiff substantially complied with PLRA's exhaustion requirement where he made repeated oral requests to be moved to a different cell prior to assault, received conflicting information about the proper procedure, and was unable to timely file a grievance after the assault due to injury).

On April 21, 2006, undersigned counsel wrote to the Defendant Larry Norris, Director of the Arkansas Department of Correction, informing him of Mr. Nooner's incompetence and his inability to use the inmate grievance procedure as a means of protecting his legal interests. Counsel's letter advised the Director of Mr. Nooner's claim that the current procedure for executions by lethal injection creates a substantial risk that Mr. Nooner will not be properly anesthetized for the duration of his impending execution, thereby subjecting him to an arbitrary, capricious, and irrational method of execution in violation of the United States Constitution. At the conclusion of the letter, counsel requested that the Director modify the execution process to comply with accepted

standards of medical care and relevant provisions of the Arkansas state statute. Counsel also provided a phone number and address and invited Mr. Norris to call with any questions or requests for further information. Mr. Norris accepted delivery of the letter from the Federal Express carrier on April 24, 2006.

In keeping with the Department of Correction's Administrative Directive, counsel should have received a response within three working days of receipt of the letter. Ark. Dep't of Corr. Admin. Directive 04-01 § IV.E.5.(declaring that inmates will receive a response to informal grievance requests within 3 working days or within 24 hours if the request qualifies as an emergency). However, after five working days had passed from Mr. Norris's receipt of the letter, undersigned counsel had still received no response. Counsel thereafter filed the instant action on May 1, 2006.

In this manner, undersigned counsel attempted to resolve the issues presented in this Complaint with the Defendant Director of the Department of Correction prior to filing suit under 42. U.S.C. § 1983. Undersigned counsel's effort satisfied the concerns that lead to the enactment of the PLRA, for the Director, the only person with authority to act on the complaint, was "afforded ... time and opportunity to address [the] complaint[] internally before ... the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 525 (2002).

Additionally, on May 26, 2006, following commencement of the instant action, undersigned counsel finally received a response to her letter to Defendant Norris, in the form of a letter from Assistant Attorney General Joseph V. Svoboda, indicating that

Defendant Director Norris received counsel's letter and asked the Attorney General to respond. The letter reads in relevant part:

> While Mr. Norris is aware that several states' protocol has been, and some currently are, the subject of litigation, he believes the protocol used currently insures the necessary anesthetization for the duration of the execution procedure and satisfies Constitutional requirements.

(Letter from Joseph Svoboda to Julie Brain, Dated May 25, 2006.) The quoted passage indicates that Defendant Director Norris has considered the merits of Mr. Nooner's claim and resolved the issue adversely to Mr. Nooner. The only conceivable avenue for redress of the claim has therefore been exhausted.

II. BECAUSE MR. NOONER'S EXECUTION HAS ONLY RECENTLY BECOME IMMINENT, NEITHER THE STATUTE OF LIMITATIONS NOR THE DOCTRINE OF LACHES BARS THIS ACTION

Contrary to Defendants' assertions, (Brief at 3-4), Mr. Nooner's claim is not subject to a statute of limitation because his Complaint seeks only declarative and injunctive relief. It is well settled that where, as here, a plaintiff seeks only equitable remedies, the plaintiff's claim is subject only to the doctrine of laches and not to a statute of limitations. *Goodman v. McDonnell Douglas*, 606 F.2d 800, 805 (8th Cir. 1979)(citing *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)). In order for the doctrine of laches to bar a plaintiff from seeking equitable relief, "the plaintiff must be guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant." *Id.* The existence and length of any analogous statutes of limitation is but one element of the factors to be considered in determining whether any delay that may have occurred should be deemed

unreasonable. *Id.* In any event, it is clear under either a laches or a statute of limitations analysis that Mr. Nooner diligently and timely prosecuted the instant action as soon as it became ripe for review.

In his Complaint, Mr. Nooner does not attack the constitutionality of execution by lethal injection in general, but rather objects to the specific procedure that the Defendant Director of the Department of Correction currently uses to carry out executions by lethal injection. Mr. Nooner could not know with any degree of confidence exactly which procedure he would be subject to until his execution became imminent, at which time the likelihood that the Defendants would suddenly change their procedure and render his challenge moot became de minimis. Under a statutory scheme such as that in place in Arkansas, which places the entire authority for determining the details of the lethal injection protocol in the Director of the Department of Correction as an administrative matter, the precise drugs, dosages, combinations and procedures are subject to change at the whim of the Director at any time. *See* Ark. Code Ann. § 5-4-617(a)(2)("The Director of the Department of Correction shall determine the substances to be uniformly administered and the procedures to be used in any execution").

Not only is the protocol subject to change administratively, judicial action may potentially lead to dramatic changes in the procedures to which a condemned person is subject. *See, e.g., Morales v. Hickman*, 415 F.Supp.2d 1037, 1047 (N.D. Cal. 2006) (conditionally denying preliminary injunction if State will agree to change lethal injection protocol to one that uses barbiturates only or one that includes monitoring by person

trained in general anesthesia); *Brown v. Beck,* 445 F.3d 752, 753-54 (4th Cir. 2006)(Michael, J., dissenting)(describing district court's approval of change in North Carolina's lethal injection protocol to include use of bispectral index monitor to monitor consciousness).

Indeed, Arkansas's statute provides for automatic substitution of electrocution as the manner of execution in the event that lethal injection is deemed unconstitutional per se, *see* Ark. Code Ann. § 5-4-617(b), and so not only the specific procedures but even the overall means of causing death is potentially subject to change. *See also Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996)(holding that California's practice of conducting executions by lethal gas violates Constitution; method of execution thereafter changed to lethal injection, *see* Cal. Penal Code Ann. §3604(b)(West Supp. 1996)).

Under such circumstances, a challenge to a particular execution protocol cannot be deemed ripe for adjudication until the plaintiff's execution is imminent. *Cooey v. Taft*, 2006 WL 1207982 (S.D.Ohio)("'[T]he statute of limitations on claims raising specific challenges to a method of execution, but otherwise conceding that the execution can be carried out in a constitutional manner if the specific challenges are addressed, begins to run when the execution becomes imminent and the plaintiff knows or has reason to know of the facts giving rise to his specific challenges.' ... This Court has reasoned that those two conditions are met when the plaintiff has exhausted all of his state and federal avenues of relief, i.e., when the United States Supreme Court denies certiorari in the plaintiff's habeas corpus proceedings")(quoting previous order of court).

Such a rule is consistent with established federal law governing accrual of claims for relief. *See, e.g., Slaaten v. United States*, 990 F.2d 1038 (8th Cir. 1993)("A claim 'accrues' when the plaintiff knows or reasonably should know both the existence and cause of the injury")(citing *United States v. Kubrick*, 444 U.S. 111, 121-23 (1979)). Indeed, a contrary rule would potentially lead to multiple challenges to multiple methods and procedures over many years, none of which the plaintiff would ultimately be subjected to, in order to ensure that the true claim is timely. Such unnecessary and pointless consumption of judicial resources is contrary to ends of justice.

The imminence of Mr. Nooner's execution was realized April 26, 2006, when Mr. Nooner's petition for writ of certiorari was scheduled for conference by the United States Supreme Court for May 11, 2006. Counsel for Mr. Nooner reasonably predicted that the writ of certiorari would be denied May 15, 2006, and as a result, counsel immediately began final preparation of the Complaint in the instant case. On May 1, 2006, counsel filed the instant suit to prevent Mr. Nooner from being subject to the unconstitutional execution procedures currently in place at the Arkansas Department of Correction. The action was thus initiated even before certiorari was actually denied, which occurred as anticipated on May 15, 2006. Far from an 11th hour attempt to manipulate and abuse the system, then, the instant action is a good-faith effort to move as promptly and expeditiously as possible to protect Mr. Nooner's constitutional rights

III. MR. NOONER'S CLAIM IS PROPERLY BROUGHT UNDER 42 U.S.C. § 1983 AND IS NOT THE EQUIVALENT OF A PETITION FOR WRIT OF HABEAS CORPUS

Mr. Nooner's Complaint does not challenge the legality of his conviction or sentence, nor does it seek to prevent the state from executing him in a lawful manner. Mr. Nooner's challenge to the method of execution to which the Defendants' intend to subject him is thus indistinguishable from the challenge that the Supreme Court deemed to be proper under 42 U.S.C. § 1983 in *Nelson v. Campbell*, 541 U.S. 637 (2004). In *Nelson*, the Court distinguished between a challenge to the fact of a conviction or the duration of a sentence, which properly sounds in habeas corpus, and a claim relating solely to conditions of confinement, which is an appropriate basis for a § 1983 action. *Id.* at 643. Mr. Nelson's claim fell into the latter category, the Court found, because it challenged the particular execution procedure chosen by the defendants, namely a "cut-down." *Id.* at 644.[3] That particular method was unnecessary, for it was not mandated by the applicable state statute and, as Mr. Nelson conceded, other, constitutional methods were available. *Id.* at 645. Because the Defendants could go forward with the execution notwithstanding the plaintiff's claim simply by altering their method of causing death, the suit did not necessarily imply the invalidity of the plaintiff's sentence and was therefore

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[3] The Supreme Court was thus not required to decide the broader question of whether a challenge to a particular category of execution methods, such as lethal injection per se or electrocution, similarly was available under § 1983 and not required to be brought in habeas. *Id.* at 644. That question need not detain this Court either, given that Mr. Nooner's claim also challenges only the particular procedure chosen and does not allege that lethal injection per se is unconstitutional. However, if the Court were inclined to rule adversely to Mr. Nooner on this point it would be appropriate to first await the issuance of the Supreme Court's opinion in *Hill v. Crosby*, 126 S.Ct. 1189 (2006), due to be decided prior to the conclusion of the Term on June 30, 2006, in which the Supreme Court is expected to decide the larger issue. *See Taylor*, 2006 WL 1098173 at * 3 (permitting challenge to lethal injection protocol to continue as § 1983 action unless forthcoming decision in *Hill* mandates different decision).

proper under § 1983. *Id.* at 644-647.

Likewise, Mr. Nooner's claim that the particular combination of drugs, dosages and conditions of administration prescribed or overlooked by the protocol chosen by Defendants and set forth in Administrative Directive 96-06 is properly brought under § 1983. The Arkansas state statute requires only that death be caused by "a continuous intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent." Ark. Code Ann. § 5-4-617(a)(1). All decisions regarding the particular drugs that will be chosen, the dosages in which they will be administered and the procedures and conditions under which they will be introduced into the prisoner's vein are expressly the responsibility of Defendant Norris. Ark. Code Ann. § 5-4-617(a)(2)("The Director of the Department of Correction shall determine the substances to be uniformly administered and the procedures to be used in any execution").

Plaintiff has expressly alleged that alternative methods of causing death by lethal injection, which do not engender foreseeable, utterly unnecessary risks of gratuitous pain and suffering, are available. Accordingly, Defendants remain able to proceed with the execution by alternative, humane means. The instant action seeks only to prohibit the execution of Mr. Nooner in accordance with the current protocol, under which he is subject to exactly those unconstitutional risks. The action is thus properly brought under § 1983.

WHEREFORE, for the foregoing reasons, Plaintiff Terrick Terrell Nooner respectfully requests that this Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of June, 2006, the foregoing Response in Opposition to Motion was filed using this Court's EF/CMS electronic filing system and thereby automatically delivered electronically to Assistant Attorney General Mark Hagemeier, Catlett-Prien Tower Bldg., 323 Center Street, Suite 200, Little Rock, AR 72201-2610.

/s/ Julie Brain
Julie Brain