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

TERRICK TERRELL NOONER PLAINTIFF

No. 5:06CV00110 SWW

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

**ORDER**

Terrick Terrell Nooner ("Nooner"), a death row inmate, commenced this action pursuant to 42 U.S.C. § 1983, claiming that the chemical protocol and procedures used for carrying out execution by lethal injection in Arkansas amount to cruel and unusual punishment and an arbitrary, capricious, and irrational method of execution that violates the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution. Nooner seeks a declaration that the State's lethal injection procedure is unconstitutional an injunction enjoining Defendants from carrying out the procedure in the future. On May 4, 2006, Arkansas death row inmate Don William Davis ("Davis"), who is scheduled to be executed on July 5, 2006,[1] filed a motion to intervene. The Court permitted Davis to intervene as a party-plaintiff pursuant to Fed. R. Civ. P. 24(b)(2), with the understanding that he asserts the same claims and seeks the same relief as

[1]Nooner's execution date has not been set.

set forth in the complaint. Before the Court is Defendants' motion to dismiss for failure to state a claim for which relief can be granted (docket entry #13) and Plaintiffs' responses in objection (docket entries #20, #23). After careful consideration, and for the reasons that follow, the motion will be denied.

I.

In deciding a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, all facts alleged in the complaint are assumed to be true. *Doe v. Northwest Bank Minn., N.A.*, 107 F.3d 1297, 1303-04 (8th Cir. 1997). The complaint must be reviewed in the light most favorable to the plaintiff, *McMorrow v. Little*, 109 F.3d 432, 434 (8th Cir. 1997), and should not be dismissed unless it is clear beyond doubt that the plaintiff can prove no set of facts thereunder which would entitle him or her to relief. *Hafley v. Lohman,* 90 F.3d 264, 266 (8th Cir. 1996). The Court may grant a motion to dismiss on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

A motion to dismiss is not a device for testing the truth of what is asserted or for determining whether the plaintiff has any evidence to back up what is in the complaint. *ACLU Foundation v. Barr*, 952 F.2d 457, 467 (D.C. Cir. 1991). The issue is not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims. *Id.* Thus, a motion to dismiss should be granted "as a practical matter . . . 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." *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

II.

Arkansas' lethal injection statute provides:

> The punishment of death is to be administered by a continuous intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant's death is pronounced according to accepted standards of medical practice.

Ark. Code Ann. 5-4-717(a)(1). The statute gives the Director of the Arkansas Department of Correction ("ADC") the responsibility to determine the substances to be uniformly administered and the procedures to be used in any execution. *See* Ark. Code Ann. § 5-4-617(a)(2).

According to allegations in the complaint, executions by lethal injection in Arkansas are carried out as follows. First, the condemned prisoner is placed on a gurney in the execution chamber, and his head and appendages are immobilized. Next, ADC employees insert IV lines into the prisoner and attach an electrocardiogram monitor. Two lay-executioners begin "attaching and plunging" up to eight syringes in a complicated sequence prescribed by ADC protocol. First one drug, then a saline flush, then two syringes of the next drug, another saline flush, and then up to three syringes of a third drug. The drugs administered are: Thiopental, administered to cause unconsciousness; Pancuronium bromide, administered to cause paralysis and stop all movement including respiration; and Potassium chloride, to stop the heart. When the prisoner exhibits no sign of life, the warden summons the coroner to pronounce death.

Potassium chloride burns intensely as it travels through the veins to the heart. Plaintiffs claim, for reasons set forth in the complaint, the foregoing procedure creates a risk of gratuitous infliction of unnecessary pain. According to Plaintiffs, it is possible to conduct execution by lethal injection in a humane manner that complies with Arkansas' lethal injection statute.

III.

In support of their motion to dismiss, Defendants assert that Plaintiff Nooner[2] has failed

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[2]Defendants filed their motion to dismiss before Plaintiff Davis intervened in this case. Defendants have not amended their motion to make specific allegations with respect to Davis's

to exhaust his administrative remedies, his complaint must be dismissed as a unauthorized, successive petition for habeas corpus, and his claims are barred under the applicable statute of limitations and pursuant to the equitable laches doctrine. The Court will consider each argument.

Exhaustion

The Prison Litigation Reform Act ("PLRA") provides that, "[n]o action shall be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA's exhaustion requirement applies to all suits about prison life,[3] and it requires prisoners to exhaust administrative processes before commencing suit in federal court. *See Porter v. Nussle*, 122 S. Ct. 983, 988, 992 (2002).

Defendants assert that Nooner is required to "provide proof that he exhausted all administrative remedies before he can bring a § 1983 action." The Court disagrees. The PLRA's exhaustion requirement is not a heightened pleading requirement–a prisoner's failure to exhaust is an affirmative defense that the defendant has the burden to plead and to prove. *See Nerness v. Johnson,* 401 F.3d 874, 876 (8th Cir. 2005)(citing *Foulk v.harrier,* 262 F.3d 687, 697 (8th Cir. 2001)).

Administrative exhaustion is required even where a prison grievance process will not provide the type of relief sought by a prisoner. *See Booth v. Churner*, 121 S. Ct. 1818, (2001).

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claims.

[3]The Court assumes, without deciding, that Nooner's constitutional challenge to Arkansas' chosen process for carrying out his death sentence as an "inmate suit about prison life."

However, a prisoner need only exhaust "such administrative remedies as are available" and exhaustion is not required when grievance officers have no authority to act on the subject of the complaint. *See id.* at 1823 n.4("Without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust."). Arkansas law gives the Director of the ADC sole responsibility and authority for determining the substances to be administered and the procedures to be used in any execution. *See* Ark. Code Ann. § 5-4-617(a)(2).

Nooner asserts that the ADC's inmate grievance process offers no available remedy because the grievance tribunal, which does not include the Director of the ADC, has no authority to take action with regard to his complaint. Nooner states that before he commenced this lawsuit his attorney wrote Larry Norris, Director of the ADC, and advised him of the claims presented in this lawsuit. Nooner states that, on behalf of Director Norris, the Arkansas Attorney General responded as follows: "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." Docket entry #20(citing May 25, 2006 letter from Joseph Svoboda). Based on the evidence presently before the Court, the Court finds that Defendants have failed to show that Nooner has failed to exhaust his available administrative remedies.

Habeas Corpus

On June 12, 2006, the Supreme Court issued a unanimous decision in *Hill v. McDonough*, 2006 WL 1584710 (U.S. June 12, 2006) ruling that a Florida death row inmate, Clarence Hill, may use 42 U.S.C. § 1983 as a vehicle to challenge the constitutionality of Florida's lethal injection protocol, which is similar to the three-drug injection protocol

challenged in this lawsuit. Like Plaintiffs, Hill seeks to enjoin the State from executing him according to the three-drug protocol, and he claims that the Florida Department of Corrections could choose other means of lethal injection that would meet constitutional standards.

The Supreme Court reversed the Eleventh Circuit's determination that Hill's civil rights challenge to Florida's lethal injection protocol is the functional equivalent of an unauthorized, successive habeas petition. The Court noted that *if* the relief sought would foreclose Hill's execution, it might be proper to recharacterize his complaint as an action for habeas corpus. *Id.* at *7. However, like Arkansas' lethal injection statute, Florida law prescribes lethal injection as the State's method of execution, but it does not specify a specific protocol for lethal injection and leaves those details to the Florida Department of Corrections. *See* Fla. Stat. § 922.105(1)(stating that a death sentence "shall be executed under the direction of the Secretary of Corrections or the secretary's designee"). Because Florida law does not specify a particular lethal injection protocol, the Supreme Court concluded that Hill's lawsuit left the State free to use an alternative lethal injection procedure. Thus, granting Hill injunctive relief could not be seen as barring execution of his sentence. *Hill*, 2006 WL 1584710 at *5. The same is true in this case, and

§ 1983 is a proper vehicle for Plaintiffs' claims.

Laches

Dismissal of a claim on the ground of laches, an affirmative defense, requires a showing of unreasonable and unjustified delay in bringing a claim, and material prejudice to the defendant as a result of the delay. *See Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems*, Inc. 988 F.2d 1157, 1161 (8th Cir. 1993). Defendants assert the defense in the context of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Rule 12(b)(6) confines a

court's inquiry to allegations set forth in the complaint, unless matters outside the pleadings are presented to and not excluded by the court, in which case the motion is treated as one for summary judgment. *See id.* ("The strictures of Rule 12(b)(6), wherein dismissal of the claim is based solely on the complainant's pleading, are not readily applicable to a determination of laches."). In this case, the allegations in the complaint do not confirm the existence of an unreasonable, inexcusable delay on the part of Nooner or Davis in commencing suit, or resulting prejudice to Defendants. Furthermore, Defendants provide no additional evidence to support their defense. The Court has no means, at this time, to determine whether Plaintiffs' claims are barred by laches.

Statute of Limitations

The statute of limitations for § 1983 actions is the forum state's statute of limitations for personal injury actions, which in Arkansas is three years. *See Morton v. City of Little Rock*, 934 F.2d 180, 182 (8th Cir. 1991). Although state law determines the limitations period for filing § 1983 claims, federal law determines when a cause of action accrues. *See White v. Garrison*, 70 F.3d 1276 (8th Cir. 1995) (unpublished table opinion). Under federal common law, a cause of action accrues when a plaintiff "discovers, or with due diligence should have discovered, the injury that is the basis of the litigation." *Union Pacific R. Co. v. Beckham*, 138 F.3d 325, 330 (8th Cir. 1998).

Defendants propose that Nooner's cause of action accrued on the date his death sentence was imposed. Defendants state that Nooner was sentenced in 1996, but Nooner alleges, in the

complaint, that his sentence was imposed in 1993. Regardless of the actual sentencing date, the Court finds that the date Nooner was sentenced does not necessarily mark the date he discovered or should have discovered the State's specific lethal injection protocol and whether it carries a risk of unnecessary pain. The complaint does not show, on its face, when Plaintiffs' cause of action accrued or whether their claims are time-barred under the applicable statute of limitations. Accordingly, dismissal on such grounds is not possible.

For the reasons stated, Defendants motion to dismiss (docket entry #13) is DENIED.

IT IS SO ORDERED THIS 19TH DAY OF JUNE, 2006.

/s/Susan Webber Wright
UNITED STATES DISTRICT JUDGE