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

TERRICK TERRELL NOONER, PLAINTIFF

and

DON WILLIAMS DAVIS INTERVENOR PLAINTIFF

No. 5:06CV00110 SWW

VS.

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") and Don Williams Davis ("Davis"), Arkansas death-row inmates, bring this action pursuant to 42 U.S.C. § 1983 claiming that the protocol for carrying out execution by lethal injection in Arkansas violates the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution. Plaintiffs seek a declaration that the protocol is unconstitutional, and an injunction enjoining Defendants from carrying out future executions in accordance with the protocol.

Before the Court is Plaintiff Davis's motion for a preliminary injunction (docket entry #21) asking the Court to stay his July 5, 2006 execution and permit him to litigate his constitutional claims. Defendants have responded (docket entry #28), and the matter is ready for

decision. After careful consideration, and for the reason that follow, the Court concludes that the motion for a preliminary injunction should be granted.

I.

In 1992, Davis was convicted of capital murder, burglary, and theft of property and sentenced to death. His conviction and sentence were affirmed on direct appeal,[1] and his petition for post-conviction relief in state court was denied.[2] On September 14, 2005, the Eighth Circuit affirmed denial of Davis's petition for habeas relief,[3] and on April 17, 2006, the United States Supreme Court denied Davis's petition for a writ of certiorari.[4] Plaintiff Nooner initiated this § 1983 action on May 1, 2006, and on May 4, 2006, Davis filed a motion to intervene as a party plaintiff. On May 11, 2006, Governor Mike Huckabee scheduled Davis's execution for July 5, 2006. On May 26, 2006, the Court granted Davis's motion to intervene, and on June 16, 2006, Davis filed the present motion for a preliminary injunction.

Arkansas' lethal injection statute provides that 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. 5-4-17(a)(1). Arkansas law gives the Director of the Arkansas Department of Correction ("ADC") the responsibility to determine the substances to be administered and the procedures to be used in

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[1]*Davis v. State*, 314 Ark. 257 (1993), *cert. denied*, 511 U.S. 1026 (1994).

[2]*Davis v. State*, 354 Ark. 161 (2001).

[3]*Davis v. Norris*. 423 F.3d 868 (8th Cir. 2005).

[4]*Davis v. Norris*, 126 S. Ct. 1826 (2006).

any execution. *See* Ark. Code Ann. § 5-4-617(a)(2). The Director's protocol for execution by lethal injection, set forth in ADC Administrative Directive 96-06 ("AD 96-06"), calls for the administration of three chemicals in the following order: (1) a 2-gram injection of sodium pentothal (also known as thiopental), administered to cause unconsciousness; (2) 2, 50-milligram injections of pancuronium bromide, administered to cause paralysis; and (3) up to 3, 50-milliequivalent injections of potassium chloride, to stop the heart.[5] Each injection is followed by a saline flush. According to AD 96-06, the injections are administered by way of control devices located in a control room, separate from the execution chamber. The control devices are connected, by extension tubing, to IV catheters inserted into each arm of the condemned inmate. The catheters are inserted by an "IV team" and the injections are administered by executioners, whose identities are kept secret. AD 96-06 contains no provision requiring that the IV team or executioners have any type of medical training or certification.[6]

Davis alleges that the State's protocol creates a substantial risk that the first injection (2 grams of sodium pentothal) will fail to render him unconscious to the point that he will not experience intense pain and agony after the administration of pancuronium bromide and potassium chloride.

Davis's medical expert, Mark J. S. Heath, M.D., a board-certified anesthesiologist and the Assistant Professor of Clinical Anesthesiology at Columbia University in New York City, states that the ADC's lethal injection procedure creates medically unacceptable risks of inflicting

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[5]Docket entry #21, Ex. 1 (ADC Administrative Directive 96-06).

[6]The State asserts that the protocol requires the use of trained individuals for both the placement of the IV lines and the administration of chemicals. Docket entry #28, at 9. The Court has carefully reviewed ADC 96-06 and finds no such provision.

excruciating pain and suffering. *See* docket entry #21, Ex. 1 (Heath Decl.), ¶ 51. In his declaration, Dr. Heath explains that pancuronium bromide stops all movement, including that necessary to breathe, but it has no effect on the ability to feel pain, and potassium chloride burns intensely as it travels through the veins to the heart. Thus, if a condemned inmate is conscious when the pancuronium bromide and potassium chloride are administered, he or she will feel the sensations of slow suffocation and excruciating pain.

Dr. Heath maintains that the ADC's protocol creates an unacceptable risk that condemned inmates will be conscious for the duration of the execution procedure. He states that the protocol fails to comply with medical standards of care for inducing and maintaining anesthesia and the American Veterinary Medical Association's standards for the euthanasia of animals. Dr. Heath finds that the protocol fails to address several foreseeable situations in which human or technical error could result in the failure to successfully administer the 2-gram dose of sodium pentothal. Further, Dr. Heath opines that the protocol creates a substantial risk of unnecessary pain which is easily remedied.

In addition to Dr. Heath's declaration, Davis submits the declaration of a witness to the 1992 execution of Steven Hill. The witness states: "Approximately 3-5 minutes after the IV fluid began to flow, I noticed Steven struggling to breathe. He was strapped down, but his chest was heaving . . . . He appeared to be gasping for air. Within another minute, he turned a bright red color and then lay completely still." Docket entry #21, Ex. 38. Davis also submits several newspaper articles containing eye-witness accounts of ADC executions which, according to Davis, indicate that inmates remained conscious and suffered pain during their executions. *See* docket entry #21, Exs. 28, 34, 37, 42, 45, 49.

II.

The factors to consider when deciding whether to grant or deny motions for preliminary injunctions include (1) the threat of irreparable harm to the movant; (2) the state of the balance between his harm and the injury that granting the injunction will inflict on other parties involved in the litigation; (3) the probability the movant will succeed on the merits; and (4) the public interest. *See Dataphase Sys., Inc. v. CL Sys.*, 640 F.2d 109, 113 (8th Cir. 1981). Additionally, a court considering a stay of execution must apply "'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring an entry of a stay.'" *Hill v. McDonough*, 2006 WL 1584710, at *8 (U.S. June 12, 2006)(quoting *Nelson v. Campbell*, 124 S. Ct. 2117, 2126 (2004)).

The Court finds that Davis has shown that he is personally under a threat of irreparable harm. If Davis remains or becomes conscious during the execution, he will suffer intense pain that will never be rectified. The Court further finds that the balance of potential harms favors Davis. If a stay is granted and Davis's allegations prove true, he and others will be spared subjection to an unconstitutional execution procedure, and the State's interest in enforcing death penalties in compliance with constitutional standards will be served. If, on the other hand, a stay is granted and Davis's allegations are without merit, the State can carry out Davis's execution without the specter that the ADC's protocol carries an unreasonable risk of inflicting unnecessary pain.

The State argues that the equities favor the State because Davis unjustifiably delayed bringing his claims. However, Davis moved to intervene in this case before the State set his execution date and shortly after he exhausted all means for challenging his conviction. The

Court disagrees that Davis delayed pursuing his claims.[7]

Next, the Court must consider the probability that Davis will succeed on the merits. The Eighth Amendment prohibits punishments repugnant to "'the evolving standards of decency that mark the progress of a maturing society'" or those involving "'unnecessary and wanton infliction of pain.'" *Estelle v. Gamble*, 97 S. Ct. 285, 290, 290 (1976) (quoting *Trop v. Dulles*, 78 S. Ct. 590, 598 (1958)(first quote); *Gregg v. Georgia*, 96 S. Ct. 2909, 2925 (1976) (second quote)).

The State contends that Davis has not shown that he might succeed on the merits because Dr. Heath's declaration offers no information about the probability that Davis might experience unnecessary pain. However, Davis need not show a mathematical probability of success at trial

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[7]The Eighth Circuit's opinion in *Taylor v. Crawford*, 445 F.3d 1095 (8th Cir. 2006), indicates that the Court of Appeals would agree that Davis did not delay bringing his claims. In *Taylor*, Larry Crawford, sentenced to death in 1991, brought claims under § 1983, challenging Missouri's three-chemical protocol for executions by lethal injection. Like Davis, Taylor initiated his lawsuit after he exhausted his state post-conviction remedies and after his petitions for habeas relief were denied in federal court. Also similar to this case, the State of Missouri set Taylor's execution date after he commenced suit under § 1983. The district court stayed Taylor's execution, but gave no reasons for the stay, other than the court's inability to hold an evidentiary hearing before the scheduled execution date.

The Eighth Circuit reversed the stay after concluding that the State's interest in prompt execution of its judgment was not outweighed by the district court's scheduling difficulties. The Eighth Circuit ordered that the case be reassigned to a district judge who could hear the case immediately "[i]n recognition of Mr. Taylor's equally strong interest in having an evidentiary hearing on his claims prior to his execution." *Taylor*, 445 F.3d at 1098-99. The district court followed the Eighth Circuit's instructions and determined that Taylor's claims had no merit. Taylor appealed, arguing that the district court, in its haste to make a decision before Taylor's execution date, prevented him from calling medical witnesses. On appeal, the Eighth Circuit stayed Taylor's execution, concluding that it asked the district court to do too much in too little time. The Court of Appeals stated, "In view of the existing record, the importance of the issue to this plaintiff as well as others, and the likelihood of recurrence of these identical issues in future Missouri death penalty cases, we remand for . . . a continuation of the hearing . . . ." *Taylor*, 445 F.3d at 1099.

before a stay can be granted. It is enough that Davis has raised serious questions that call for deliberate investigation. *See Dataphase*, 640 F.2d at 113 ("But where the balance of other factors tip decidedly toward movant a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation.").

Finally, the Court finds that the public interest will be served if the Court holds an evidentiary hearing on Plaintiffs' claims. Crime victims and the general public have an important interest in the timely enforcement of criminal sentences. However, failure to consider Davis's allegations would ignore the equally important public interest in the humane and constitutional application of the State's lethal injection statute.

III.

For the reasons stated, Plaintiff Davis's motion for a preliminary injunction (docket entry #21) is GRANTED. IT IS HEREBY ORDERED that the State of Arkansas is STAYED from implementing an order for the execution of Don William Davis until further notice from this Court.

The Court will attempt to schedule an expedited hearing. The time of the hearing will depend on the Court's schedule as well as the schedules of others involved.

IT IS SO ORDERED THIS 26TH DAY OF JUNE, 2006.

/s/Susan Webber Wright

UNITED STATES DISTRICT JUDGE