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

TERRICK TERRELL NOONER PLAINTIFF

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;
JOHN BYUS; Administrator, Correctional
Medical Services, Arkansas Department of Correction; and
OTHER UNKNOWN EMPLOYEES,
Arkansas Department of Correction DEFENDANTS

ORDER

Plaintiff Terrick Terrell Nooner ("Nooner"), a death row inmate, brings this action under 42 U.S.C. § 1983, claiming that Arkansas' lethal injection procedure and protocol amounts 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. Before the Court is a motion to intervene by Arkansas death row inmate Don William Davis ("Davis"). Nooner has no objection to intervention, *see* docket entry #3, ¶9, and Defendants have responded in objection to intervention (docket entry #9). After careful consideration, and for the reasons that follow, Davis will be permitted to intervene pursuant to Fed. R. Civ. P. 24(b)(2).

Davis, who is scheduled to be executed on July 5, 2006, seeks to intervene as of right, pursuant to Fed. R. Civ. P. 24(a)(2) or, in the alternative, by permissive intervention under Fed. R. Civ. P. 24(b)(2). Pursuant to Fed. R. Civ. P. 24(c), a motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." No such pleading accompanies Davis's motion. However, Davis states that if he is permitted to intervene in this case, rather than file a separate action, it will promote judicial economy. Based on this statement, the Court understands that Davis wishes to intervene as a party plaintiff and assert the same claims and seek the same relief as set forth in Plaintiff Nooner's complaint.

A party seeking intervention of right under Rule 24(a)(2) must establish (1) a recognized interest in the subject matter of the litigation, (2) the interest might be impaired by the disposition of the case, and (3) the interest will not be adequately protected by the existing parties. *See* Fed. R. Civ. P. 24(a)(2)*; see also South Dakota ex rel Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 785 (8th Cir. 2003).

In support of his application, Davis states that his interests will not be adequately represented by the existing parties because, unless he is permitted to intervene, his execution will go forward without regard to this proceeding. Defendants point out that Davis can protect his interest in the subject matter of this litigation by filing a separate lawsuit, which would warrant expedited treatment in light of his July 5 execution date. The Court agrees that, because Davis can protect his interest by way of a separate lawsuit, he is unable to establish that the disposition of this case will impair his interest. Accordingly, Davis is not entitled to intervention of right under Rule 24(a)(2).

Under Fed. Rule Civ. P. 24(b)(2), upon timely application,[1] anyone may be permitted to intervene "when an applicant's claim or defense and the main action have a question of law or fact in common." Davis meets this criterion. Additionally, the Court finds that Davis's intervention will neither unduly delay nor prejudice the adjudication of the rights of the original parties. Accordingly, the Court will permit Davis to intervene pursuant to Rule 24(b)(2).[2]

IT IS THEREFORE ORDERED that the motion to intervene (docket entry #3) is GRANTED. Don William Davis is granted leave to intervene as a plaintiff in this action.

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

/s/Susan Webber Wright
UNITED STATES DISTRICT JUDGE

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[1]Nooner filed his complaint on May 1, 2006, and Davis filed his motion to intervene on May 4, 2006. The Court finds that the motion to intervene is timely.

[2]Defendants note that before the close of its current term on June 26, 2006, the United States Supreme Court will decide whether a Florida death row inmate's claim brought under § 1983 challenging that state's lethal injection procedure must be brought as a habeas corpus petition under § 2254. *See Hill v. Crosby,* 126 S. Ct. 1189, 1190 (2006). Defendants assert that if the Supreme Court answers yes to the foregoing question, this case "will have two defendants seeking habeas relief from their distinct sentences and convictions and subject, on the unique facts of their individual cases, to different procedural bars." Docket entry #9, at 5. However, if the Supreme Court's decision in *Hill* requires that Nooner and Davis pursue their claims by way of petitions for habeas corpus, any such petitions will proceed separately.