**IN THE UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

| | | |
|---|---|---|
| JACK E. ALDERMAN,<br><br>Plaintiff,<br><br>v.<br><br>JAMES E. DONALD, in his capacity as Commissioner of the Georgia Department of Corrections; HILTON HALL, in his capacity as Warden, Georgia Diagnostic and Classification Prison; DOES 1-50, UNKNOWN EXECUTIONERS, in their capacities as employees and/or agents of the Georgia Department of Corrections.<br><br>Defendants. | ) | Civil Action No. 1:07-CV-0896 |

**PLAINTIFF'S RESPONSE TO**
**DEFENDANTS' PRE-ANSWER MOTION TO DISMISS**

COMES NOW Plaintiff, Jack E. Alderman, by and through counsel, and submits *Plaintiff's Response to Defendants' Pre-Answer Motion to Dismiss* seeking an order denying *Defendants' Pre-Answer Motion to Dismiss* filed on May

21, 2007 and requiring Defendants to provide a substantive Answer to Mr. Alderman's Complaint filed on April 20, 2007.

## I. STATEMENT OF THE CASE

On April 20, 2007, Plaintiff Jack E. Alderman, initiated the instant action pursuant to 42 U.S.C. § 1983, challenging, *inter alia*, the constitutionality of the lethal injection protocol selected and used by Defendants for executions in the State of Georgia. On May 21, 2007, Defendants filed *Defendants' Pre-Answer Motion to Dismiss*, wherein they seek dismissal of Mr. Alderman's Complaint for allegedly failing to exhaust his administrative remedies as required under 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act (PLRA).[1] *See* D.I. 13-2 at 5.

*Defendants' Pre-Answer Motion to Dismiss* is improperly cast as a motion to dismiss as it relied upon information outside of the pleadings. Because failure to exhaust under 42 U.S.C. § 1997e(a) of the PLRA is an affirmative defense, Defendants must first file an Answer and thereafter, raise the allegations of failure

[1] Defendants have failed to cite a Rule that they are moving under. However, as they have asked for the Complaint to be dismissed, it appears they are moving pursuant to Fed. R. Civ. P. 12(b)(6) and Plaintiff has responded accordingly.

to exhaust in a motion for summary judgment. In an apparent attempt to delay the taking of discovery in this litigation, Plaintiffs have taken the position that discovery is premature until this Court makes a determination on *Defendants' Pre-Answer Motion to Dismiss*. Further, if the Court finds this motion to be proper, the motion must also fail because Mr. Alderman has sufficiently pled in his Complaint at ¶¶9-10 that this issue is non-grievable. Therefore, no administrative remedy is available to exhaust under 42 U.S.C. § 1997e(a) of the PLRA.

## II. STATEMENT OF RELEVANT FACTS

The issue in this litigation is whether the method of execution as outlined in *Administrative and Execution Procedures, Lethal Injection, Under Death Sentence*, effective May 1, 2000, which were superseded on September 9, 2002, ("Procedures") is constitutional. Rather than address the allegations outlined in Mr. Alderman's Complaint, Defendants have instead repeated the facts and allegations against Mr. Alderman made throughout his criminal proceedings. *See* D.I. 13-2 at 2. Regardless of what Mr. Alderman may have done, no action by him allows the state to execute him in an unconstitutional matter.

In support of *Defendants' Pre-Answer Motion to Dismiss* (D.I. 13-2), Plaintiffs rely upon several documents, including the Affidavit of John T. Harper[2] (D.I. 13-3 at 2-21), to assert that Mr. Alderman has failed to exhaust his administrative remedies under 42 U.S.C. § 1997e(a) of the PLRA. Because Defendants have presented information to the Court outside of the pleadings, Defendants' motion is improperly cast as a motion to dismiss. As such, this Court should treat this motion as a motion for summary judgment and therefore, deny the motion as there are genuine issues of material fact regarding exhaustion.

If the Court considers the merits of Defendants arguments, the Court should deny the motion because the issues raised in Mr. Alderman's Complaint are non-grievable under the Georgia Department of Corrections procedures. Defendants have failed to address in their motion and the supporting papers.

Prior to filing the Complaint, counsel for Mr. Alderman reviewed the Georgia Department of Corrections (GDC) grievance procedures and determined that Mr. Alderman's grievance regarding the manner in which the state intended to

[2] As Plaintiff has not had an opportunity to test the veracity of the Affidavit, if the Court relies on this Affidavit for its decision, Mr. Alderman would ask for the opportunity to depose Mr. Harper.

execute him was non-grievable. This determination was based on at least Grievance Procedure Section VI.A.4.a. Also supporting this determination, is the prospective nature of the grievance (as the act Mr. Alderman is complaining of will occur in the future). These allegations were stated in ¶¶9-10 of the Complaint. Based on the lack of an available administrative remedy, Mr. Alderman had exhausted all "available" administrative remedies as required by 42 U.S.C. § 1997e(a) of the PLRA.

Despite concluding that the method of Mr. Alderman's execution was non-grievable, as a courtesy to the state, counsel for Mr. Alderman, contacted the GDC on several occasions to provide notice of Mr. Alderman's objection to the method of execution and to allow the GDC the opportunity to make its own determination as to whether there was an administrative remedy. The state did not respond to these requests. Therefore, in an abundance of caution, Mr. Alderman filed an informal grievance on April 12, 2007 and a formal grievance on April 26, 2007, both of which the GDC determined to be "not subject to the grievance procedure." In fact, the formal grievance determination was made by Defendant Hilton Hall on May 16, 2007, five days before the filing of the state's motion to dismiss. Attached as Exhibit A. Therefore, not only has counsel for Mr. Alderman

independently determined that this is a non-grievable issue and there is no administrative remedy available, but the state has made the same determination.

## III. ARGUMENTS AND CITATION OF AUTHORITIES

### A. Defendants' Motion Should be Treated as Motion for Summary Judgment

Under Fed. R. Civ. P. Rule 12(b) if a party moving under Rule 12(b)(6) presents information outside the pleadings, the Court shall treat this as a motion for summary judgment under Fed. R. Civ. P. Rule 56. *See Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir.2003), *citing Trustmark Ins. Co. v. ESLU, Inc.*, 299 F.3d 1265, 1267 (11th Cir.2002) ("Whenever a judge considers matters outside the pleadings in a 12(b)(6) motion, that motion is thereby converted into a Rule 56 Summary Judgment motion."). Included in *Defendants' Pre-Answer Motion to Dismiss* are four exhibits that Defendants' rely upon in an attempt to establish that Mr. Alderman has failed to exhaust his administrative remedies under 42 U.S.C. § 1997e(a) of the PLRA.

Because Defendants have presented information to the Court outside of the pleadings, this motion should be treated as a motion for summary judgment.[3] As a

[3] Defendants' motion is premature under Local Rule 56.1D.

motion for summary judgment, Defendants' motion should be dismissed because Defendants have failed to carry the burden of proving the absence of a genuine issue as to any material fact. *See Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir.2002) *citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), ("the moving party, has the burden of showing the absence of a genuine issue as to any material fact.").

Therefore, Mr. Alderman requests that this Court deny *Defendants' Motion to Dismiss* without prejudice to re-file as a motion for summary judgment 20 days after the close of discovery, pursuant to Local Rule 56.1D. As Defendants have refused to provide even a schedule for discovery until the Court rules on their motion, Mr. Alderman also requests the Court order discovery to begin immediately.

**B. Defendants' Motion to Dismiss Should be Denied**

If this Court considers the merits of *Defendants' Pre-Answer Motion to Dismiss* under Fed. R. Civ. P. Rule 12(b)(6), the Court should strike the exhibits and deny the Motion. Because Mr. Alderman has sufficiently pled exhaustion under 42 U.S.C. § 1997e(a) of the PLRA, Defendants motion must fail. Under Fed. R. Civ. P. Rule 12(b)(6) a motion to dismiss should be granted ***only*** when the

movant demonstrates beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See Spain v. Brown & Williamson Tobacco Corp*., 363 F.3d 1183, 1187 (11th Cir.2004)(emphasis added). A complaint is to be construed liberally and in the light most favorable to the plaintiff, therefore "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Marsh v. Butler County, Ala.*, 268 F.3d 1014 (11th Cir. 2001) *quoting Conley v. Gibson*, 355 U.S. 41 (1957). 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.

**1. Plaintiff Has Exhausted All Available Administrative Remedies**

In *Defendants' Pre-Answer Motion to Dismiss*, Defendants assert that Mr. Alderman's Complaint should be dismissed because he failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a) of the PLRA. D.I. 13-2 at 7-8. The exhaustion requirement is intended to give jail and prison

authorities an opportunity to address grievable issues before they become federal lawsuits. *See Porter v. Nussle*, 534 U.S. 516, 524-24 (2002).[4]

The question in this case is whether Defendants have or can show that the grievance procedure was "available" to Mr. Alderman. In this case, under no set of facts can the state show that Mr. Alderman has failed to exhaust all ***available*** administrative remedies. As outlined above, both Mr. Alderman and the state determined that this issue is non-grievable and as such, Mr. Alderman has no administrative remedy available to exhaust. *Id*. at 524 ("No such action shall be brought…until such administrative remedies ***as are available*** are exhausted.") (emphasis added), *see also Terrick Terrel Nooner* and *Don Williams Davis* v. *Larry Norris, et. Al.*, No.5:06-cv-00110-SWW, slip op. at p. 7 (E.D. Ark. June 26, 2006) (Judge Wright Order enjoining the State of Arkansas from implementing an order for the execution of Don William Davis) (Attached as Exhibit B).

While the exhaustion requirement serves legitimate purposes, it is not intended to give authorities the opportunity to create insurmountable obstacles to

[4] As outlined above, the jail and prison authorities were given several opportunities to address the issues raised in Mr. Alderman's Complaint prior to it's filing.

lawsuits that may be essential to protect constitutional and other legal rights. *See Woodford v. Ngo*, 126 S. Ct. 2378, 2385 (2006). Nor is the standard that Defendants assert supported by the law. Defendants, cite *Irwin v. Hawk*, 40 F.3d 347, 349 n.2 (11th Cir. 1994) and *Moore v. CO2 Smith*, 18 F. Supp.2d 1360, 1363 (N.D. Ga. 1998) for the proposition that an inmate pursue all administrative remedies, whether the issue is grievable or non-grievable, including appeals prior to filing the Complaint. (D.I. 13-2 at 7). However, neither of these cases support the proposition as asserted by Defendants. In fact, both cases require that an inmate must pursue all ***available*** administrative remedies, which Mr. Alderman has done. *See Irwin*, 40 F.3d at 349 n.2 (11th Cir. 1994) and *Moore*, 18 F. Supp.2d at 1363 (N.D. Ga. 1998).

Because Mr. Alderman and the state have determined that this issue is "non-grievable," no administrative remedy is available.[5] Therefore, this Court should deny *Defendants' Pre-Answer Motion to Dismiss.*

---

[5] Defendants argue in their motion that in order for Mr. Alderman to exhaust his administrative remedies, he must be forced to appeal a decision with which he and the state agree with (*i.e.*, that the method of execution is a non-grievable issue). This illogical request raises the concern that the filing of the motion was intended to delay the case and force Mr. Alderman to seek a stay of execution.

### 2. Defendants Have Failed To Meet Their Burden To Establish Failure To Exhaust

In addition to the reasons set forth above, Defendants have failed to meet their burden of proving the affirmative defense that Mr. Alderman has failed to exhaust his administrative remedies under 42 U.S.C. § 1997e(a) of the PLRA. *See* Fed.R.Civ.P. 8(c); *Jones v. Bock*, 127 S.Ct. 910, 921 (U.S., 2007) ("We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints").[6] Because Defendants have failed to discuss, allege or provide any support that Mr. Alderman's objection to his method of execution is grievable and that an administrative remedy is available, they have failed to carry this burden. *See Wheeler v. Prince*, 3 18 F.Supp.2d 767, 771 (E.D. Ark. 2004)(stating that bare and conclusory allegations of lack of exhaustion are insufficient to meet this burden), *see also Freeman v. Snyder*, 2001 WL 515258 (D. Del.) (denying motion

[6] Recently Judge Richard L. Young of the United States District Court for the Southern District of Indiana, dealing with a similar motion by the state, denied the states motion for summary judgment stating that it had failed to carry the burden of proving the affirmative defense of exhaustion. Judge Young determined that the state failed to show that there was an available remedy to the Plaintiff. *Norman Timberlake, et al.* v. *Ed Buss,*, No.1:06-cv-1859-RLY-WTL, slip op. at p.6 (S.D. Ind.. May 1, 2007) (Attached as Exhibit C).

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) (Attached as Exhibit D).

This omission can only be explained by the fact that there indeed was no administrative procedure available to Mr. Alderman, as shown by the Response to the Formal Grievance. *See* Exhibit A. Because Defendants have failed to meet their burden of proof regarding this affirmative defense, *Defendants' Pre-Answer Motion to Dismiss* should be denied.

## IV. CONCLUSION

Defendants' motion presents information outside of the pleadings, and should be treated as a motion for summary judgment. Therefore, this motion is premature under Local Rule 56.1 and should be denied. If the Court substantively addresses Defendants' motion, it should be denied because there are no available administrative remedy for Mr. Alderman to exhaust, he has met all the requirements of 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act. And therefore, for the reasons outlined above, *Defendants' Pre-Answer Motion to Dismiss* should be denied and the state should be required to answer Mr. Alderman's Complaint that was filed on April 20, 2007 without delay.

Submitted this 31st day of May, 2007.

Jack E. Alderman

By: /s/ Jason R. Edgecombe

William E. Hoffmann, Jr.
Georgia Bar No: 359825
Phone: (404) 572-3383
Fax: (404) 572-5136
bhoffmann@kslaw.com
Jason R. Edgecombe
Georgia Bar No. 239606
Phone: (404) 572-2740
Fax: (404) 572-5139
JEdgecombe@KSLAW.com
KING & SPALDING LLP
1180 Peachtree Street
Atlanta, Georgia 30309

James Ringer
Michael A. Siem
CLIFFORD CHANCE US LLP
31 West 52nd Street
New York, NY 10019-6131
Phone: (212) 878-8000
Fax: (212) 878-8375

Thomas H. Dunn
GEORGIA RESOURCE CENTER
303 Elizabeth Street
Atlanta, Georgia 30309
Phone: (404) 222-9202
Fax: (404) 222-9212

**CERTIFICATION AS TO FONT**

Pursuant to N.D. Ga. Local Rule 7.1 D, I hereby certify that this document is submitted in Times New Roman 14 point type as required by N.D. Ga. Local Rule 5.1(b).

By: /s/ Jason R. Edgecombe
William E. Hoffmann, Jr.
Georgia Bar No: 359825
Phone: (404) 572-3383
Fax: (404) 572-5136
bhoffmann@kslaw.com
Jason R. Edgecombe
Georgia Bar No. 239606
Phone: (404) 572-2740
Fax: (404) 572-5139
JEdgecombe@KSLAW.com
KING & SPALDING LLP
1180 Peachtree Street
Atlanta, Georgia 30309

James Ringer
Michael A. Siem
CLIFFORD CHANCE US LLP
31 West 52nd Street
New York, NY 10019-6131
Phone: (212) 878-8000
Fax: (212) 878-8375

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of May, 2007, the foregoing was served upon to the following attorney of record via HAND DELIVERY:

EDDIE SNELLING, JR.
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300

**/s/ Jason R. Edgecombe**
Jason R. Edgecombe

# EXHIBIT A

541308

**CONFIDENTIAL**
**INMATE GRIEVANCE FORM**
Georgia Department of Corrections

Attachment 1
SOP IIB05-0001
(Rev. 5/01/03)

INSTITUTIONAL STAFF ONLY

INMATE NAME Aldermann, Jack INMATE NUMBER 385463

INSTITUTION GDCP GRIEVANCE NUMBER GR-0522-07-0046

DATE FORM ISSUED TO INMATE 04/26/07 BY [signature]

DATE COMPLETED FORM RECEIVED FROM INMATE 4/26/07 BY [signature]

DATE APPEAL RECEIVED ____/____/____ BY ____

**THIS FORM MUST BE COMPLETED IN BLUE OR BLACK INK. YOU MUST INCLUDE SPECIFIC INFORMATION CONCERNING YOUR GRIEVANCE TO INCLUDE DATES, NAMES OF PERSONS INVOLVED, AND WITNESSES.**

DESCRIPTION OF INCIDENT:

I believe the use of chemical poisons – lethal injection – will cause undue pain and suffering which is prohibited by the 8th and 14th Amendments, thereby compounding the torture to which I am currently subjected.

RESOLUTION REQUESTED: To not be executed or the method be constitutional.

Jack E Aldermann
INMATE'S SIGNATURE

04/26/07
DATE

Is this grievance being filed within the 5 day time limit? Please answer (Yes) or No. If the answer is No, please explain why.

**WARDEN'S / SUPERINTENDENT'S RESPONSE**

05/16/07
WARDEN RECEIVED DATE

Your sentence of execution is not subject to the grievance procedure. There is a protocol established for carrying out court ordered executions that has been deemed constitutional that will be followed in the event of your execution. This grievance is denied at the institutional level.

[signature]
WARDEN'S / SUPERINTENDENT'S SIGNATURE

05/16/07
DATE FORWARDED TO INMATE

*I ACKNOWLEDGE RECEIPT OF THE ABOVE RESPONSE ON THIS DATE.*

[signature]
INMATE'S SIGNATURE

05/18/07
DATE

*IF YOU APPEAL, RETURN THIS FORM AND THE APPEAL FORM TO YOUR COUNSELOR OR GRIEVANCE COORDINATOR, WITHIN FOUR (4) CALENDAR DAYS OF RECEIPT OF THE WARDEN'S / SUPERINTENDENT'S RESPONSE.*

541308

**CONFIDENTIAL**
**INMATE GRIEVANCE FORM**
Georgia Department of Corrections

Attachment I
SOP IIB05-0001
(Rev. 5/01/03)

INSTITUTIONAL STATE ONLY

INMATE NAME Alderman, Jack INMATE NUMBER 541308

INSTITUTION GDCP GRIEVANCE NUMBER GR-0522-07-0046

DATE FORM ISSUED TO INMATE 04/26/07 BY [signature]

DATE COMPLETED FORM RECEIVED FROM INMATE 4/26/07 BY [signature]

DATE APPEAL RECEIVED ____/____/____ BY _____

THIS FORM MUST BE COMPLETED IN BLUE OR BLACK INK. YOU MUST INCLUDE SPECIFIC INFORMATION CONCERNING YOUR GRIEVANCE TO INCLUDE DATES, NAMES OF PERSONS INVOLVED, AND WITNESSES.

DESCRIPTION OF INCIDENT:

I believe the use of chemical poisons — lethal injection — will cause undue pain and suffering which is prohibited by the 8th and 14th Amendments, thereby compounding the torture to which I am currently subjected.

RESOLUTION REQUESTED: To not be executed or the method be constitutional.

[signature]
INMATE'S SIGNATURE

04/26/07
DATE

Is this grievance being filed within the 5 day time limit? Please answer Yes or No. If the answer is No, please explain why.

**WARDEN'S / SUPERINTENDENT'S RESPONSE**

05/16/07
WARDEN RECEIVED DATE

Your sentence of execution is not subject to the grievance procedure. There is a protocol established for carrying out court ordered executions that has been deemed constitutional that will be followed in the event of your execution. This grievance is denied at the institutional level.

[signature]
WARDEN'S / SUPERINTENDENT'S SIGNATURE

05/16/07
DATE FORWARDED TO INMATE

*I ACKNOWLEDGE RECEIPT OF THE ABOVE RESPONSE ON THIS DATE.*

[signature]
INMATE'S SIGNATURE

05/18/07
DATE

*IF YOU APPEAL, RETURN THIS FORM AND THE APPEAL FORM TO YOUR COUNSELOR OR GRIEVANCE COORDINATOR, WITHIN FOUR (4) CALENDAR DAYS OF RECEIPT OF THE WARDEN'S / SUPERINTENDENT'S RESPONSE.*

**COMMISSIONER'S OFFICE, EXECUTIVE ASSISTANT'S RESPONSE**

____/____/____
EXECUTIVE ASSISTANT RECEIVED DATE

_____
EXECUTIVE ASSISTANT'S SIGNATURE

____/____/____
DATE FORWARDED TO INMATE

**WHITE COPY** - RETAINED BY INMATE AT COMPLETION OF PROCESS **CANARY COPY** - RETURNED TO INMATE AT TIME OF APPEAL
**PINK COPY** - RETAINED BY WARDEN / SUPERINTENDENT AFTER RESPONSE

**RECEIPT FOR GRIEVANCE AT COUNSELOR'S LEVEL**

INMATE'S NAME _____ I.D.#_____

I ACKNOWLEDGE RECEIPT OF GRIEVANCE FORM FROM THE ABOVE INMATE. FORM NUMBER _____

DATE ____/____/____ COUNSELOR'S SIGNATURE _____

PI-2001 (REV. 5/01/03)

RETENTION SCHEDULE: - Upon completion of this form, it will be placed in a file in the Grievance Coordinator's office.

# EXHIBIT B

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

---

[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

---

[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

---

[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

# EXHIBIT C

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**

| | | |
|---|---|---|
| NORMAN TIMBERLAKE,<br><br>Plaintiff,<br><br>MICHAEL ALLEN LAMBERT,<br>DAVID LEON WOODS,<br><br>Intervenor Plaintiffs,<br>vs.<br><br>ED BUSS, Superintendent,<br>Indiana State Prison,<br><br>Defendant. | ) | No. 1:06-cv-1859-RLY-WTL |

**Entry Discussing Motion for Summary Judgment as to Defendant's Defense of Failure to Exhaust Administrative Remedies**

Plaintiff David Leon Woods is on death row at the Indiana State Prison in Michigan City. He joined this action as an intervenor plaintiff on April 10, 2007. He alleges in this civil rights action under 42 U.S.C. § 1983 that the combination of drugs to be used by the Superintendent, in the absence of trained personnel and with inadequate monitoring of Woods' condition once the procedure is underway, creates a serious risk that the drugs will not be properly administered and that errors in these steps will likely cause Woods to suffer excruciating pain in violation of his rights under the Eighth Amendment to the United States Constitution. The defendant in this action is the Superintendent of the Indiana State Prison.

The defendant has filed a motion for summary judgment on the ground, in part, that Woods failed to exhaust his available administrative remedies, as required by 42 U.S.C. § 1997e(a).[1]

"Summary judgment is appropriate where the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Westra v. Credit Control of Pinellas,* 409 F.3d 825, 827 (7th Cir. 2005)(quoting Rule 56(c) of the *Federal Rules of Civil Procedure).* A "material fact" is one that "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A dispute is genuine only if a reasonable jury could find for the non-moving party. *Id.*

The Superintendent argues that Woods failed to comply with the exhaustion of administrative remedies requirement of the Prison Litigation Reform Act ("PLRA"). The PLRA provides:

> 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.

42 U.S.C. § 1997e(a); *Porter v. Nussle,* 534 U.S. 516, 524-25 (2002).

---

[1]The court is obligated to address the failure to exhaust argument before reaching the merits of the claim. *Perez v. Wis. Dep't of Corr.,* 182 F.3d 532, 536 (7th Cir. 1999)("The statute [requiring administrative exhaustion] can function properly only if the judge resolves disputes about its application before turning to any other issue in the suit."). It does so through this Entry. The remaining argument in the Superintendent's motion for summary judgment is that Woods' claim is barred by the applicable 2-year statute of limitations. That portion of the motion for summary judgment remains under advisement.

Construed in a manner reasonably most favorable to Woods as the non-moving party, the evidence here shows that: (1) at all relevant times during Woods' confinement, the State Prison has had a grievance procedure for inmates; (2) he was aware of the grievance process and has used it on many occasions for a variety of subjects; (3) he will be executed, as required by state law, through lethal injection; (4) the execution will be governed by certain written protocols; (5) the execution protocols are deemed "confidential" and would not have been released or disclosed to Woods, although the Superintendent would discuss the execution process with Woods if Woods sought to have such a discussion; (6) if Woods filed a grievance regarding the execution protocol prior to the filing of this suit or his joinder as an intervenor plaintiff, the person responsible for handling that grievance would have deviated from the grievance procedure because of the serious subject matter of the grievance; and (7) Woods did not file a grievance to the execution protocol prior to the filing of this suit or his joinder as an intervenor plaintiff.

The exhaustion requirement is intended to give jail and prison authorities an opportunity to address issues before they become federal lawsuits. See *Porter v. Nussle*, 534 U.S. at 524-25. The undisputed facts show that Woods did not file a grievance regarding the execution protocol prior to joining in this lawsuit. "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Woodford v. Ngo,*

126 S. Ct. 2378, 2385 (2006) (footnote omitted); see also *Riccardo v. Rausch,* 375 F.3d 521, 524 (7th Cir. 2004) ("Failure to [follow state rules about the time and content of grievances] means failure to use (and thus to exhaust) available remedies.").

The question here is whether the defendant has shown that the grievance procedure was "available" to Woods. The exhaustion requirement serves legitimate purposes, but it is not intended to give authorities the opportunity to create insurmountable obstacles to lawsuits that may be essential to protect constitutional and other legal rights. The Supreme Court in *Woodford* indicated that grievance systems would still need to provide a "meaningful opportunity for prisoners to raise meritorious grievances." 126 S. Ct. at 2392; see also *id.* at 2403-04 (Stevens, J., dissenting) (noting problems such a standard poses). The Court in *Woodford* also noted that it had no occasion in that case to decide how best to address procedural requirements created "for the purpose of tripping up all but the most skillful prisoners." *Id.* at 2392. An administrative remedy may become "unavailable," in terms of § 1997e(a), if prison officials prevent a prisoner from complying with its requirements. *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006) (holding that prisoner complied with exhaustion requirement by submitting grievance that was later lost).

The Seventh Circuit's decision in *Conyers v. Abitz*, 416 F.3d 580 (7th Cir. 2005), is instructive here. The plaintiff in Conyers was a Muslim who was not permitted to participate in the Muslim fast of Ramadan. He sued for denial of his

right to exercise his religion. Prison officials denied his request to participate because he had not signed up in time to request participation. The Seventh Circuit reversed summary judgment for defendants on the free exercise of religion claim. The evidence showed that prison officials had planned for Ramadan by posting a bulletin telling Muslim prisoners they would need to sign up for special meals no later than a specified date before Ramadan began. *Id.* at 582. The plaintiff in fact missed the deadline for signing up, but the evidence also showed that he did not know about the posted deadline because he was in disciplinary segregation and could not see it. *Id.* at 582-83. Based on these facts, the Seventh Circuit saw no basis for enforcing the unknown deadline against the plaintiff. *Id.* at 585-86.

This approach in *Conyers* is consistent with *Dole* and other Seventh Circuit decisions under the PLRA recognizing that jail and prison officials can act so as to make an administrative remedy "unavailable." *E.g.*, *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) (officials' failure to respond to grievances may render remedy unavailable: "we refuse to interpret the PLRA 'so narrowly as to . . . permit [prison officials] to exploit the exhaustion requirement through indefinite delay in responding to grievances'"); *Dale v. Lappin*, 376 F.3d 652, 656 (7th Cir. 2004) (grievance procedure was unavailable where prison officials refused prisoner's request for required grievance forms).

The PLRA's exhaustion requirement is an affirmative defense as to which defendants bear the burden of proof. *Dole,* 438 F.3d at 809. Prison and jail officials may not take unfair advantage of the exhaustion requirement. The evidence in this

case does not show that the defense has been satisfied because there is no evidence that Woods was aware, or even that he should have been aware, of the execution protocols.

Accordingly, the defendant has not met his burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. The defendant's motion for summary judgment (Docket # 74) is therefore **denied** insofar as it rests on the argument that Woods failed to comply with the exhaustion of administrative remedies requirement of 42 U.S.C. § 1997e(a) prior to joining in this lawsuit.

**IT IS SO ORDERED.**

Date: May 1, 2007

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Alan M. Freedman
MIDWEST CENTER FOR JUSTICE LTD
fbpc@aol.com

Carol Rose Heise
MIDWEST CENTER FOR JUSTICE LTD
fbpc@aol.com

Betsy M. Isenberg
INDIANA STATE ATTORNEY GENERAL
Betsy.Isenberg@atg.in.gov

Laurence E. Komp
lekomp@swbell.net

Thomas D. Quigley
INDIANA STATE ATTORNEY GENERAL
thomas.quigley@atg.in.gov

William Van Der Pol Jr.
bvander3@insightbb.com

Linda M. Wagoner
lmwagoner@mchsi.com

Richard A. Waples
WAPLES & HANGER
richwaples@aol.com

Brent Westerfeld
bwesterfeld@wkelaw.com

Lorinda Meier Youngcourt
EVANS & YOUNGCOURT
lmyoungcourt@hughes.net