IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANDREMY DENNIS,

and

RICHARD COOEY, II,

Petitioners,

v. **Case No. C-2-04-532**
JUDGE FROST
ROBERT TAFT, Governor, **Magistrate Judge Abel**

REGINALD WILKINSON, Director,

and

JAMES HAVILAND, Warden,

Respondents.

OPINION AND ORDER

Petitioners, Andremy Dennis and Richard Cooey, have been sentenced to death by the State of Ohio. Petitioner Dennis faces an execution date of October 13, 2004. This matter is before the Court on petitioners' original complaint for injunctive relief, declaratory relief, and reasonable attorneys fees pursuant to 42 U.S.C. §1983, (doc.no. 3), as well as petitioners' motion for a preliminary injunction, (doc.no. 9).

In their complaint, petitioners seek preliminary and permanent injunctive relief barring respondents from executing them in the manner by which respondents plan to execute them, as well as a declaratory judgment that the current means by which respondents carry out executions violate the Eighth and Fourteenth Amendments. Specifically, petitioners contend that respondents intend to violate petitioners' constitutional rights because the current method of

execution used by respondents -- a lethal injection protocol that includes a short-acting anesthetic that will leave petitioners paralyzed but conscious during suffocation and death -- will cause petitioners to be tortured to death. Petitioners also raise challenges about alleged failures on the part of respondents to disclose sufficient details about the lethal injection protocol and certification of the equipment and chemicals to be used, and to ensure that properly trained medical personnel are on hand with appropriate cardiac monitoring equipment. Finally, petitioners also seek preliminary and permanent injunctive relief barring respondents from executing them unless respondents first give petitioners the right to choose to have one of their attorneys witness their executions without being forced to choose counsel at the cost of one of the three witnesses condemned inmates are permitted to choose under R.C. §2949.25(A)(5).

I.

In *In re Sapp*, 118 F.3d 460 (6th Cir.), *cert. denied, McQueen v. Sapp*, 521 U.S. 1130 (1997), *and cert. denied, McQueen v. Patton*, 521 U.S. 1130 (1997), the Sixth Circuit held that a challenge to the method of execution brought as a civil rights claim under 42 U.S.C. §1983 was properly construed as a habeas corpus petition, and was therefore subject to the rules governing second or successive habeas corpus petitions. Citing *Gomez v. District Court*, 503 U.S. 653 (1992), the Sixth Circuit explained that petitioner could not circumvent the requirements for a successive petition by styling his challenge as a §1983 action. *In re Sapp*, 118 F.3d at 462-63.

In *In re Williams*, 359 F.3d 811, 813 (6th Cir. 2004), the Sixth Circuit relied on *In re Sapp* in affirming the district court's conclusion that a similar claim challenging Ohio's lethal injection protocol set forth in a §1983 action was actually an unauthorized second or successive habeas corpus action. In so holding, the Sixth Circuit noted that Petitioner Williams had conceded that

his action was a second habeas corpus action. *Id*. at 812. Although the Sixth Circuit also took into consideration that the United States Supreme Court had granted certiorari in *Nelson v. Campbell*, 124 S.Ct. 835 (2003), to consider the question of whether a complaint brought under 42 U.S.C. §1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out his execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. §2254, the Sixth Circuit concluded, based on actions taken by the United States Supreme Court in other similar cases[1] while *Nelson* was still pending, "that this Circuit is free to follow its prior precedent with regard to this question until the Supreme Court issues its decision in *Nelson*." *Williams*, 359 F.3d at 813.

In *Nelson v. Campbell*, 124 S.Ct. 2117 (2004), decided on May 24, 2004, the Supreme Court noted that "We have not yet had occasion to consider whether civil rights suits seeking to enjoin the use of a particular method of execution – *e.g.*, lethal injection or electrocution – fall within the core of federal habeas corpus or, rather, whether they are properly viewed as challenges to the conditions of a condemned inmate's death sentence." *Nelson*, 124 S.Ct. at t 2122. Nevertheless, the Supreme Court left open "the difficult question of how to categorize method-of-execution claims generally." *Id*., at 2123. The Supreme Court later remarked that, "because we do not here resolve the question of how to treat method-of-execution claims generally, our holding is extremely limited." *Id*. at 2125.

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[1] The Sixth Circuit cited *Rowsey v. Beck*, No. 04-6073 (4th Cir. Jan. 8, 2004), motion to vacate granted, *Beck v. Rowsey*, — U.S. — , 124 S.Ct. 980, 157 L.Ed.2d 811 (2004)(Supreme Court vacated the stay granted by the Fourth Circuit); *Reid v.Johnson*, No. 03-7916 (4th cir. Dec. 17, 2003), motion to vacate stay denied, *Johnson v. Reid*, — U.S. — , 124 S.Ct. 980, 157 L.Ed.2d 810 (2003)(Supreme Court denied state's motion to vacate stay granted by the district court and affirmed by the Fourth Circuit); *Zimmerman v. Johnson*, — U.S. — , 124 S.Ct. 979, 157 L.Ed.2d 792 (2003)((Supreme Court denied stay in case where district court had dismissed claim challenging execution protocol on procedural ground that §1983 was not appropriate vehicle for challenges to the method of execution).

The Supreme Court found that Petitioner Nelson's method-of-execution challenge, alleging that the use of a "cut-down" procedure to access his depleted veins would violate the Eighth Amendment, was properly raised in a §1983 action. Noting that respondents had conceded at oral argument that §1983 would be an appropriate vehicle for an inmate not facing a death sentence to challenge the "cut-down" procedure if used for purposes of medical treatment, the Supreme Court observed, "We see no reason on the face of the complaint to treat petitioner's claim differently solely because he has been condemned to die." *Id*.. The Supreme Court further clarified, with respect to respondents' argument that petitioner's challenge was a challenge to the *fact* of his execution for the reason that the cut-down was part of the execution procedure, that "Merely labeling something as part of an execution procedure is insufficient to insulate it from a §1983 attack." *Id*. Specifically, the Supreme Court rejected respondents' argument that a victory by petitioner would call into question the death sentence itself because as a legal matter, the cut-down procedure was not a statutorily mandated part of the lethal injection protocol, and as a factual matter, petitioner had not demonstrated an inability or indicated an unwillingness to accept alternatives for gaining access to his veins. *Id*. at 2123-24.

Petitioners question the validity of *In re Sapp*, and insist this action should be construed not as an unauthorized successive habeas corpus petition, but as a properly filed civil rights action pursuant to 42 U.S.C. §1983, on the basis of the United States Supreme Court's recent decision of *Nelson v. Campbell*. Petitioners' question is not easily dismissed. On the one hand, the Supreme Court declined to resolve the broad question of how to characterize method-of-execution claims generally, and characterized its holding as "extremely limited." *Nelson*, 124 S.Ct. at 2125. On the other hand, under the language throughout *Nelson*, it is reasonable to construe the instant

challenge as indistinguishable from the challenge raised by Petitioner Nelson – namely, a challenge to only a particular aspect of Ohio's lethal injection protocol, which aspect does not appear either to be mandated by statute or regulation or to be without alternatives, as opposed to a challenge to lethal injection generally or to the fact of the death sentence itself.

Were this Court to construe *Nelson* in the most conservative and limited light, this Court would be forced to conclude that petitioners' action, as one seeking to interfere with their sentences, must be construed as a habeas corpus petition pursuant to *In re Sapp*. So construed, the action would be an unauthorized second or successive habeas corpus petition over which this Court would have no jurisdiction, *see* 28 U.S.C. §2244(b)(3), and would have to be transferred to the Sixth Circuit pursuant to *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997)("when a second or successive petition for habeas corpus or §2255 motion is filed in the district court without §2244(b)(3) authorization from this Court, the district court shall transfer the document to this Court pursuant to 28 U.S.C. §1631."). This Court would be without jurisdiction to determine whether petitioners could satisfy the conditions set forth in 28 U.S.C. §2244(b)(2) for filing a second or successive petition. That determination would have to be made by the Sixth Circuit.

Under a more liberal interpretation of *Nelson*, it would be difficult for this Court to conclude that *In re Sapp* is still controlling or that petitioners' instant action is anything but a properly filed civil rights action pursuant to 42 U.S.C. §1983. Four decisions issued after *Nelson* are instructive.

In *Harris v. Johnson*, 376 F.3d 414, (5th Cir 2004)(per curiam), the Fifth Circuit recently declined to determine whether the petitioner, whose method-of-execution claim was virtually indistinguishable from petitioners' primary claim herein, had properly stated a claim under §1983,

"because even if he does, he is not entitled to the equitable relief [of a stay of execution] he seeks." *Id*. at 417.

In *Bryan v. Mullin*, 100 Fed.Appx. 801, 2004 WL 1249856 (10th Cir. Jun. 8, 2004), the Tenth Circuit construed the petitioner's §1983 action challenging his execution on the basis that he was incompetent as an unauthorized second or successive habeas corpus petition. *Id*. at 802, **1. That court concluded that *Nelson* was not applicable since the petitioner was challenging the *fact* of his execution – on the ground that he was incompetent – as opposed to a narrow method in which the execution was to be carried out. *Id*. at 803, **1. The Supreme Court denied certiorari on June 8, 2004 following the court of appeals' decision denying a stay. *Bryan v. Mullin*, 124 S.Ct. 2834 (2004).

In *Reid v. Johnson*, 2004 WL 1730317 (4th Cir. Aug. 2, 2004), the Fourth Circuit recently concluded that under *Nelson*, petitioner's method-of-execution claim, also virtually indistinguishable from petitioners' primary claim herein, was properly raised in a §1983 action because the petitioner in *Reid* was not challenging lethal injection generally, but rather, was asserting only that the particular protocol that the state planned to use, which protocol was not required by statute and was not without alternatives, was constitutionally impermissible. *Id*. at *2. On August 11, 2004, the United States Supreme Court vacated the stay entered by the Fourth Circuit. *Johnson v. Reid*, — S.Ct. — , 2004 WL 1784349 (U.S. Aug. 11, 2004).

Finally, in *Oken v. Sizer*, 321 F.Supp.2d 658, 661-62 (D. Maryland 2004), the district court, faced with a method-of-execution claim challenging the recently-altered manner in which the IV protocol was to be administered, concluded that *Nelson* was dispositive and that the petitioner's claim was properly brought in a §1983 action. Like the Supreme Court in *Nelson*, the

district court concluded that there was little difference between a challenge to the planned administration of the IV in a death setting and such a challenge in a non-death setting. *Id*. On June 16, 2004, the United States Supreme Court vacated the stay of execution that had been granted. *Sizer v. Oken*, 124 S.Ct. 2868 (2004).

Of the four decisions cited above, only one construed the §1983 action before it as an unauthorized second or successive habeas corpus petition, and that decision did so on the basis that the petitioner was challenging the fact of his execution on the ground of his alleged incompetency, as opposed to a particular aspect of the manner in which he was to be executed. *See Bryan v. Mullin supra*. After careful consideration, this Court concludes that the method-of-execution claim raised by petitioners herein is properly before this Court in the instant §1983 action.

Like the petitioners' challenges in *Harris v. Johnson*, *Reid v. Johnson*, and *Oken v. Sizer*, petitioners' herein seek to challenge not lethal injection generally, nor the validity of their death sentences, but only particular aspects of the lethal injection protocol, which aspects do no appear to be required either by statute or by administrative regulation, but rather, are a matter of policy on the part of the Department of Rehabilitation and Correction. (Complaint, doc.no. 3, Exhibits 2A, B). Petitioners' central complaint is that respondents' protocol includes a paralyzing agent that will cast a chemical veil over the painful effects of death by suffocation and heart attack, and that there is a substantial risk that petitioners will experience those effects because of the use of an unreliable ultra short-acting anesthetic that can and will leave petitioners conscious but trapped in a paralyzed body. (Complaint, doc.no. 3, at ¶ 3; Exh. 3, at ¶¶ 8-11, 15-18). As noted above, petitioners also raise challenges about alleged failures on the part of respondents to disclose

sufficient details about the lethal injection protocol and certification of the equipment and chemicals to be used, and to ensure that properly trained medical personnel are on hand with appropriate cardiac monitoring equipment.

As evidence that petitioners challenge only particular aspects of the lethal injection protocol, as opposed to lethal injection in general, petitioners appear to acknowledge that there are alternatives to the aspects of the protocol they challenge – namely, a continuous administration of the short-acting barbiturate, as opposed to a single, two-gram dose; cessation of the use of pancuronium bromide to veil the involuntary reflexes associated with death by suffocation and heart attack; disclosure by respondents of more details about the lethal injection protocol and certification of the equipment and chemicals to be used; and assurance that properly trained medical personnel will be on hand with appropriate cardiac monitoring equipment – by which the execution could be carried out in a constitutional manner. (Complaint, doc.no. 3, at Exh. 3, at ¶¶ 17, 34). Petitioners expressly do not contend that respondents could never execute them. (Complaint, doc.no. 3, at ¶¶ 4, 48).

For all of these reasons, the Court is satisfied that the instant action was properly filed as a §1983 action, and should not be construed as a second or successive habeas corpus action. Regrettably, the inquiry does not end here.

II.

The Supreme Court in *Nelson* noted that, "the mere fact that an inmate states a cognizable §1983 claim does not warrant the entry of a stay as a matter of right." *Nelson*, 124 S.Ct. At 2125-26 (citing *Gomez v. United States Dist. Court for Northern Dist. Of Cal.*, 503 U.S. 653 (1992)(*per curiam*)). Petitioner Dennis, who faces an execution date of October 13, 2004, has filed a motion

for a preliminary injunction to stay his execution pending the adjudication of the merits of his §1983 challenge to respondents' execution procedures. The following facts are relevant to Petitioner Dennis's request.

Petitioner Dennis was convicted and sentenced to death in 1994. (Petitioner's motion for preliminary injunction, doc.no. 9, at Exh. 7, "Motion to Set Execution Date"). Mr. Dennis unsuccessfully appealed this judgment through the state courts and, on June 30, 1998, filed a habeas corpus petition in the district court for the Northern District of Ohio. The district court denied Mr. Dennis's petition on September 29, 1999, and the Sixth Circuit affirmed that decision on December 29, 2003. Mr. Dennis's habeas corpus proceedings concluded on May 24, 2004, when the United States Supreme Court denied his request for certiorari. *Dennis v. Mitchell*, 124 S.Ct. 2400 (2004). On June 10, 2004, the Sixth Circuit issued its mandate and the state filed a motion requesting the Ohio Supreme Court to set an execution date. On that same day, Petitioners Dennis and Cooey filed this §1983 action. On August 13, 2004, the Ohio Supreme Court set Petitioner Dennis's execution date for October 13, 2004, prompting Petitioner Dennis, on August 24, 2004, to file the instant motion for a preliminary injunction to stay his execution. (Motion for preliminary injunction, doc.no. 9, at 2).

In 1993, Ohio adopted lethal injection as a method of execution. In 2001, the Ohio legislature designated lethal injection as the sole method of execution. Based on exhibits attached to Petitioners' complaint, the exact procedures, including procedures and details petitioners were unable to glean, that petitioners challenge herein were known to them at the very latest in May, 2002. Exhibit 1 to the complaint is a letter dated April 19, 2002 from Warden James Haviland purporting to enclose DRC Policy 001-09, "Executions," and providing information regarding the

gurney/bed and restraints, the IV equipment, the generic names of the drugs, and information about the absence of any cardiac monitoring equipment other than a stethoscope. Exhibit 2A to the complaint is a letter dated May 30, 2002 from DRC staff counsel Vincent Lagana setting forth information that the DRC believed to fall outside the scope of a public records request; setting forth generally the execution team practice schedule and more specifically the execution day procedures; and setting forth the dosages of the drugs to be administered. Exhibit 2B to the complaint is a letter dated January 30, 2004 from Mr. Lagana setting forth information that was included in his letter of May 30, 2002 regarding the saline locks, tubing, and the administration and dosages of the drugs. Exhibit 3 is a photocopy of an undated December 2003 affidavit by Mark J.S. Heath, M.D., the board certified anesthesiologist upon whose observations petitioners based their complaint. In his affidavit, Dr. Heath averred that the materials he reviewed regarding the lethal injection protocol that petitioners challenge were the letter dated April 19, 2002 from warden James Haviland and the letter dated May 30, 2002 from DRC staff counsel Vincent Lagana. Although the exhibits establish that the information forming the basis of petitioners' complaint was known to them at the very latest in May 2002, there is no reason to believe that this information was not available to them as early as 1994, when Petitioner Dennis was sentenced to death and one year after Ohio adopted lethal injection as a method of execution.

In support of his motion for a preliminary injunction to stay his execution, Petitioner Dennis cites *Nelson v. Campbell, supra*, 124 S.Ct. 2117 in arguing that he "filed his complaint as promptly as possible after the United States Supreme Court cleared the way for using 42 U.S.C. § 1983 to challenge a state's execution methods without having the complaint treated as a successor habeas petition, and then dismissed for failing to satisfy the conditions for filing a successor

habeas petition under 28 U.S.C. §2244(b)." (Motion for preliminary injunction, doc.no. 9, at 2). Petitioner argues that he is entitled to the equitable relief he seeks, *i.e.*, a stay of execution, because his claims are cognizable under 42 U.S.C. §1983 and because he satisfies the four-part test set forth in *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1108-09 (6th Cir. 1995). Petitioner argues that (1) his claims are weighty and he has demonstrated a likelihood of succeeding on the merits; (2) he will be irreparably harmed absent the injunction; (3) respondents will not be substantially harmed by an injunction because they will be free to carry out his execution if they prevail on the merits or if they bring their execution methods into compliance with petitioner's complaint; and (4) the public has an interest in punishments being meted out in a constitutional manner. (Motion for preliminary injunction, doc.no. 9, at 4-5). Petitioner insists that controlling case law, *i.e.*, *In re Sapp, supra*, prevented him from filing this complaint sooner, and that he and Petitioner Cooey have made every effort expedite this complaint, only to be met with resistance from respondents. (Motion for preliminary injunction, doc.no. 9, at 6).

Respondents argue that *Nelson v. Campbell* does not open the door to injunctive relief because that holding was limited to its facts and because the United States Supreme Court continues to deny or vacate stays even for inmates with otherwise properly-filed §1983 actions. Respondents insist that Sixth Circuit precedent still dictates that injunctive relief is not warranted because, under *In re Sapp, supra*, petitioners' claims cannot be viewed as cognizable, and because, under *In re Williams and Roe, supra*, petitioners' claims are weak on the merits. Respondents further argue that Petitioner Dennis could have raised these challenges years ago, either in a §1983 action between 1994 and 1997, or in his 1998 habeas corpus action, after the Sixth Circuit set forth in *In re Sapp* in 1997 that such challenges should be raised in habeas

corpus. Finally, respondents argue that Petitioner Dennis's request is overbroad, insofar as he does not specify lethal injection procedures that would pass constitutional muster.

As noted above, the Supreme Court in *Nelson* remarked, "the mere fact that an inmate states a cognizable § 1983 claim does not warrant the entry of a stay as a matter of right." *Nelson, supra*, 124 S.Ct. at 2125-26. The Supreme Court pointed to its decision in *Gomez v. United States Dist. Court for Northern Dist. Of Cal., supra*, 503 U.S. 653, where it left open the question of whether the inmate's claim was cognizable under § 1983, but vacated the stay of execution nonetheless because the inmate "waited until the 11th hour to file his challenge despite the fact that California's method of execution had been in place for years." *Nelson*, 124 S.Ct. at 2126, discussing *Gomez, supra*, 503 U.S. at 654. The Supreme Court emphasized:

> Thus, before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, see *Blodgett*, 502 U.S., at 239, 112 S.Ct. 674; *McCleskey*, 499 U.S., at 491, 111 S.Ct. 1454, there is 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 entry of a stay.

Nelson, 124 S.Ct. at 2126.

In the instant case, the Court is constrained, based on the facts before it and the language in *Nelson*, to deny Petitioner Dennis's motion for a preliminary injunction. If the instant action cannot be characterized as an 11th hour challenge, given the fact that Petitioner Dennis was not facing an execution date when he filed his complaint, it can certainly be characterized as a 9th or 10th hour challenge, given the fact that he had exhausted all of his other available remedies and the State had requested an execution date to be set.

Petitioner Dennis was sentenced to death in 1994, one year after Ohio adopted lethal

injection as a method of execution. Petitioner could have challenged Ohio's procedure at any time after being sentenced to death, arguably in a § 1983 action between 1994 and 1997 or in his habeas corpus petition in 1998, as respondents argue in their memorandum in opposition. Even assuming that information concerning Ohio's lethal injection procedures was unavailable to petitioner prior to May, 2002 – an assumption that seems highly unlikely – when letters from warden James Haviland and staff counsel Vincent Lagana set forth in detail the procedures that Petitioner Dennis now seeks to challenge, the facts establish that Petitioner Dennis was aware at least as of May, 2002 of the facts underlying his complaint and yet, he failed to raise this challenge until June 10, 2004 – the date on which all of his other legal challenges came to an end and his execution seemed imminent.

To the extent petitioner argues that he was prevented from filing his complaint until the *Nelson* decision opened the door and that he filed his complaint as soon as possible after the *Nelson* decision was issued, his argument must fail. The Fifth Circuit considered and rejected similar arguments in *Harris v. Johnson, supra*, 376 F.3d 414. Specifically, the Fifth Circuit noted not only that the petitioner in *Nelson*, like Petitioner Dennis herein, appeared to have been foreclosed by Fifth Circuit precedent from presenting his method-of-execution claim in a §1983 action, but that "[s]o long as there remains the possibility of en banc consideration and Supreme Court review, circuit law does not completely foreclose all avenues of relief." *Harris*, 376 F.3d at 419. The Court agrees with the Fifth Circuit's reasoning, and finds it all the more persuasive when one considers the Sixth Circuit's decision in *In re Williams, supra*, 359 F.3d 811. In that decision, the majority affirmed the district court's decision construing the §1983 action as a successive habeas corpus action and transferring it to the Sixth Circuit for authorization, but did

so by the slimmest of margins – one judge filed a concurring opinion recommending that the alternatives recommended by petitioners' experts simply be utilized and another judge filed a dissenting opinion – and with considerable debate among the judges about whether en banc review and a stay of execution should have been granted. *Williams*, 359 F.3d at 817-820.

Considering the four-part test set forth in *Vittitow* for whether a preliminary injunction is warranted, the Court can only conclude that Petitioner Dennis is not entitled to a preliminary injunction. Although the observations voiced by petitioners' expert, Dr. Heath, in his affidavit give cause for concern, they are disputed virtually point-for-point by respondents' experts in their affidavits. (Memorandum in Opposition, doc.no. 11, "Affidavit of Dr. Mark Dershwitz, M.D., PH.D"; "Affidavit of Dr. Carl Rosow, M.D., PH.D."). Thus, it is somewhat difficult to say that Petitioner Dennis has demonstrated a likelihood of success on the merits. Although Petitioner Dennis will be irreparably harmed absent the injunction, the third and fourth parts of the *Vittitow* test fall in respondents' favor for the reasons emphasized by the Supreme Court in *Nelson*. Petitioner reasons that respondents will not be substantially harmed by the issuance of the injunction because they will be able to execute him if they prevail on the merits or if they bring their procedures into compliance with his complaint. Petitioner further reasons that the public has an interest in punishments being meted out in a constitutional manner. Petitioner's arguments ignore the admonition by the Supreme Court in *Nelson* that the State has a significant interest in enforcing its criminal judgments and that "there is 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 entry of a stay." *Nelson*, 124 S.Ct. at 2126.

For the foregoing reasons, Petitioner Dennis's motion for a preliminary injunction must be

DENIED on grounds that this claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay. *See Nelson v. Campbell*, 124 S.Ct. at 2126.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
United States District Judge