IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

GLENN ANDERSON, et. al.)
)
Plaintiffs,)
)
)
v.) **Case No. CIV-05-825-F**
)
EDWARD L. EVANS, in his capacity)
as Interim Director Oklahoma Department)
of Corrections, et. al.)
)
Defendants.)

DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

Defendants, Edward L. Evans, in his capacity as Interim Director - Oklahoma Department of Corrections, ("Evans") and Mike Mullin, in his capacity as Warden of Oklahoma State Penitentiary, ("Mullin") (collectively "Defendants") respectfully move the Court to dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. In support, Defendants submit the following Brief.

BRIEF IN SUPPORT

STATEMENT OF THE CASE

Plaintiffs, Glenn Anderson and Charles Taylor (collectively "Plaintiffs") are inmates confined to the custody of the Oklahoma Department of Corrections. (Complaint, ¶ 1). Each of the Plaintiffs has been sentenced to death by a state district court of competent jurisdiction. (Complaint, ¶ 1). Specifically, Plaintiff Anderson was convicted on July 28, 1997, of three counts of first degree murder in case number CRF-96-240, in the District Court of Grady County, for which he was sentenced to death.[1] Plaintiff Taylor was convicted on September 6, 1996, of one count of first

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[1] See the Department of Corrections website at http://docapp8.doc.state.ok.us/servlet/page?_pageid=394&_dad=portal30&_schema=PORTAL30&doc_num=256332&offender_book_id=147004

degree murder in case number CRF-95-570, in the District Court of Pittsburg County, for which he was sentenced to death.[2]

The State of Oklahoma, pursuant to state law, requires the death sentence to be carried out by "continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice." *See*, 22 O.S. § 1014(A). Pursuant to this statute, medical procedures have been prescribed for carrying out the death sentence in accordance with the Legislature's mandate.

According to Plaintiffs' Complaint, the protocol followed by the Department of Corrections for execution by lethal injection consists of the following steps:

- The condemned is strapped to a gurney (Complaint, ¶25);
- An intravenous line is inserted into each arm of the condemned (Complaint, ¶26);
- 1200 milligrams of Thiopental are injected into the left arm (Complaint, ¶30);
- The left intravenous line is flushed with saline (Complaint, ¶30);
- 20 milligrams of Vecuronium Bromide are injected into the left arm (Complaint, ¶30);
- The left intravenous line is flushed with saline (Complaint, ¶30);
- 100 milliequivalents of Potassium Chloride is injected into the left arm (Complaint, ¶30);
- The left intravenous line is flushed with saline (Complaint, ¶30);
- 100 milliequivalents of Potassium Chloride is injected into the right arm (Complaint, ¶31);
- The right intravenous line is flushed with saline (Complaint, ¶31);
- 20 milligrams of Vecuronium Bromide are injected into the right arm (Complaint, ¶31);
- The right intravenous line is flushed with saline (Complaint, ¶31);

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[2] See the Department of Corrections website at http://docapp8.doc.state.ok.us/servlet/page?_pageid=394&_dad=portal30&_schema=PORTAL30&doc_num=211013&offender_book_id=103247

- 1200 milligrams of Thiopental are injected into the right arm (Complaint, ¶31);[3]

After the listed drugs are injected, a physician monitors the condemned and pronounces death at the appropriate time. From the initial injection of Thiopental, the entire process takes but a few minutes.

Plaintiffs bring the present case under 42 U.S.C. § 1983, asserting violations of their right to be free from cruel and unusual punishment under the Eighth Amendment, and their right to be free from arbitrary and capricious procedures under the Fifth Amendment. (Complaint, ¶2). However, Plaintiffs' Complaint is insufficient to state a claim under 42 U.S.C. §1 983, and should be dismissed in its entirety insofar as it relates to Defendants Evans and Mullin.

ARGUMENT AND AUTHORITY

LEGAL STANDARD

A motion to dismiss is properly granted when it appears from the face of the Complaint, that the plaintiff can prove no set of facts entitling it to relief. All material allegations are taken as true when ruling on a motion to dismiss. *Ash Creek Mining Co. v. Lujan*, 969 F.2d 868, 870 (10th Cir. 1992).

I. PLAINTIFFS MAY NOT PURSUE A CLAIM UNDER 42 U.S.C. § 1983 WHICH REPRESENTS MERELY A DIFFERENCE OF MEDICAL OPINION.

Stripped of its emotional and ideological context, execution by lethal injection is a medical procedure. It is a medical procedure consisting of anesthetizing an individual, and injecting chemical agents into his/her body to achieve a desired effect; in this case the death of the individual. It is required to be carried out in accordance within recognized standards of medical practice. *See*, 22

[3] Paragraph 31 of Plaintiffs' Complaint reverses the order of the second round of drugs injected into condemned. In actuality the order of the second round of drugs is the same as the first.

O.S. § 1014(A). All phases of the execution are presided over by an attending physician. Seemingly, Plaintiffs concede that execution by lethal injection is a medical procedure when employing phrases such as "surgical plane of anesthesia".

As such, Plaintiffs are alleging treatment prescribed by a physician is inadequate. Plaintiffs assert that it is possible that executed inmates run the risk of not being anesthetized to the point of unconsciousness prior to receiving injections of lethal drugs. (Complaint, ¶¶ 35-57). Specifically, Plaintiffs contend:

- Those individuals maintaining intravenous access are unqualified to do so (Complaint, ¶¶36-41);
- The chemical agents, in the dosages prescribed, are possibly insufficient to anesthetize those facing execution to the point of unconsciousness prior to the injection of the lethal agents (Complaint, ¶¶ 42-54).
- The order of the chemical agents possibly causes pain to the individual sentenced to death (Complaint, ¶ 55);
- The use of redundant intravenous lines possibly increases the risk that something will go wrong during the execution of an individual sentenced to death (Complaint, ¶¶ 56-57).

Plaintiffs are challenging the medical opinion that the current procedure is acceptable for delivering a lethal dose of prescribed medication, with a minimum of suffering. A different question would be before the Court if Plaintiffs were alleging Defendants deliberately withheld anesthesia that was prescribed to individuals sentenced to death. However, that question is not presented in this case. Essentially, Plaintiffs claims represent a difference of opinion with the considered medical opinion of the medical staff of the Oklahoma Department of Corrections. For example, Plaintiffs disagree with the *prescribed* method of maintaining intravenous access, the *prescribed* dosage of thiopental, and the *prescribed* order of the injection of the anesthesia and lethal agents. As such, Plaintiffs claims assert that the medical opinion of the medical personnel overseeing executions in

the State of Oklahoma is possibly flawed. This is simply insufficient to state a claim under 42 U.S.C. § 1983. Consequently, Plaintiffs' claims under the Eighth Amendment should be dismissed in their entirety.

The legal standard for the review of Plaintiffs' claims was established in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), in which the Supreme Court concluded that the Eight Amendment prevents the deliberate indifference by prison officials to the serious medical needs of prisoners. *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981). The Supreme Court in *Estelle* explained its standard as including the indifference manifested by prison officials "in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle, supra*, at 104-105.

In this Circuit, deliberate indifference is shown when an inmate is prevented from receiving recommended treatment or denied access to personnel capable of evaluating the need for treatment. *Garcia v. Salt Lake Community Action Program*, 768 F.2d 303, 307-308, fn. 3 (10th Cir. 1985). To demonstrate an Eighth Amendment violation cognizable under § 1983, Plaintiff must establish a deliberate interference with prescribed medical treatment. *Twyman v. Crisp*, 584 F.2d 352, 355 (10th Cir. 1978).

The cases dealing with prisoner medical care hold that a difference of medical opinion between the prisoner and medical personnel of a prison does not give rise to a cause of action under § 1983. In *Smart v. Villar*, 547 F.2d 112 (10th Cir. 1976), the Tenth Circuit stated:

> As to the procedures and treatment, we must refer to our decisions which consider a difference of opinion as to treatment or diagnosis between the prisoner and the medical staff of the prison, as in *Estelle*. We have consistently held that the existence of such a difference

> cannot alone give rise to a cause of such action, and if the complaint indicates that such is the case, it must be dismissed.

547 F.2d at 114. *See also*, *Ledoux v. Davies*, 961 F.2d 1536, 1537 (10th Cir. 1992) (Inmate's belief that he needed additional medication, other than that prescribed by the treating physician was insufficient to establish a constitutional violation).

Plaintiffs have not alleged that *any* medical professional has prescribed *any* different procedures for execution by lethal injection to the State of Oklahoma, or more specifically, to the Plaintiffs. Rather, Plaintiff's Complaint merely sets forth their non-medical opinion that the Department of Corrections' policy is wrong. According to the Tenth Circuit, a disagreement such as this should be dismissed.

II. PLAINTIFF'S COMPLAINT IS BARRED BY THE LIMITATIONS PERIOD APPLICABLE TO ACTIONS UNDER 42 U.S.C. § 1983.

The limitations period for actions under 42 U.S.C. § 1983 is the limitations period for personal injuries in the state where the action accrues. *Wilson v. Garcia,* 471 U.S. 261 (1985). Under Oklahoma law, the applicable state statute is two years. *See Abbitt v. Franklin*, 731 F.2d 661 (10th Cir. 1984) (holding that in determining the statute of limitations for § 1983 action in Oklahoma, the most analogous state statute is Okla. Stat. tit. 12, § 95 (3), which contains a two-year limitations period); *see also, Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1988).

While state law controls the limitations periods and tolling issues of § 1983 cases, federal law governs the accrual of such causes of action. *Smith v. City of Enid*, 149 F.3d 1151, 1154 (10th Cir. 1998); *see also, Fratus v. DeLand*, 49 F.3d 673, 675 (10th Cir. 1994). In that regard, a cause of action under § 1983 accrues and the statute of limitations begins to run "when the plaintiff knows

or has reason to know of the injury which is the basis of the action". *Smith*, 149 F.3d at 1154. (Citing *Fratus* at 675, and *Baker v. Board of Regents*, 991 F.2d 628, 632 (10th Cir. 1993)).

In the present case, Plaintiff Anderson was sentenced to death in 1997. Plaintiff Taylor was sentenced to death in 1996. At the time both Plaintiffs were sentenced to be executed, Oklahoma employed lethal injection as the means for carrying out the death sentence. (Complaint, ¶ 22). As such, Plaintiffs' cause of action accrued at the time of their sentencing. Since more than two years has expired since that time, Plaintiffs' Complaint should be dismissed.

III. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM FOR ANY VIOLATION OF THE EIGHTH AMENDMENT.

The Supreme Court in *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811 (1994), noted that a prison official violates the Eighth Amendment when two requirements have been met:

> First, the deprivation alleged must be, objectively, "sufficiently serious," . . . the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.
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> * * *
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> The second requirement follows from the principle that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." . . . . In prison-conditions cases that state of mind is one of "deliberate indifference" to inmate health or safety.

Farmer, 511 U.S. at 834, 114 S.Ct. at 1977. (Citations omitted).

In defining the contours of the "deliberate indifference" standard, the Court in *Farmer* spent considerable time discussing the history of the standard. The Court noted that the phrase first appeared in *Estelle,* 429 U.S. at 104, in which it was described as "a state of mind more blameworthy

than negligence." *Farmer*, 511 U.S. at 835, 114 S. Ct. at 1978. Additionally, the Court in *Farmer* stated, "We have since read *Estelle* for the proposition that Eighth Amendment liability requires 'more than ordinary lack of due care for the prisoner's interests or safety.'" *Id.*, quoting *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986). Furthermore, in acknowledging various Courts of Appeals' treatment of the standard, the Court provided, "It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Id.*, 511 U.S. at 836, 114 S.Ct. at 1978. After addressing the history and treatment of the standard, the Court finally held:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official **knows of and disregards** an excessive risk to inmate health or safety; **the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference**.

Id., 511 U.S. at 837, 114 S.Ct. at 1979. (Emphasis added).

In the present case, Plaintiffs allege Defendants should know that the method prescribed for execution by lethal injection is likely to cause suffering to the condemned prisoner. However, there is no allegation that Defendants have made any inference that the protocol causes suffering and have disregarded such inference. Neither does Plaintiffs' Complaint raise such an inference.

Nevertheless, Plaintiffs attempt to raise this inference, without success. Specifically, Plaintiffs contend that phlebotomists are incapable of maintaining a patent intravenous line, but ignore the fact that an attending physician is present. Likewise, Plaintiffs assert that a 1200 milligram dose of Thiopental to a 100 pound man is the same as a 600 milligram dose to a 200 pound man, but don't allege that Defendants know that a 600 milligram dose is insufficient to render

the hypothetical 200 pound man unconscious. (Complaint, ¶46). Likewise, Plaintiffs ignore the fact that condemned prisoners are injected with *two* 1200 milligram doses of Thiopental. Plaintiffs seemingly concede the point that no inference of the alleged pain and suffering has arisen when they state "[h]owever, the ODOC **does not appear to know** that the second dose of anesthetic in its process comes to late to alleviate the pain and suffering of the condemned prisoner." (Complaint, ¶ 55). Beyond Plaintiffs' failure to sufficiently plead allegations of their Eighth Amendment rights, further authority supports Defendants position that no Eighth Amendment violation has occurred.

The court in *Reid v. Johnson*, 333 F.Supp. 2d 543 (E.D. Va. 2004) examined the lethal injection process for the State of Virginia, which is similar to that of Oklahoma. The court stated:

> Two grams [2000 milligrams] of sodium thiopental is approximately **five to eight times** the dosage that would be used to render a 176 pound individual unconscious for general surgery. Within moments after the injection of the sodium thiopental, the inmate will be rendered unconscious. The condemned inmate will slip into unconsciousness in the same manner as that experienced by a general surgery patient. The probability of the inmate regaining consciousness within the ensuing ten minutes is 3/1000 of one percent. The probability of the inmate regaining consciousness by minute fifteen is 6/1000 of one percent. The probability of the inmate regaining consciousness within twenty minutes never rises above 1/100 of one percent. In light of the inordinately high dosage, the weight or other physical attributes peculiar to a particular inmate will have a negligible impact on these probabilities. Flushing of the IV line prevents the sodium thiopental and the second and third drugs from interacting outside of the body of the inmate.
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> Pancuronium suppresses involuntary seizures or motor manifestations that may occur during the execution process. **These motor manifestations could give witnesses the false perception that the condemned inmate was experiencing pain. In light of the large dose of sodium thiopental, the inmate does not experience any pain associated with any potential involuntary motor reactions.** Fifty milligrams of pancuronium bromide is a lethal dosage and will cause death by the cessation of respiration within two minutes. In this protocol, the probability that the inmate would be conscious of the physical effects of pancuronium is less than 1/100 of one percent.

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> The third injection, at least 120 milliequivalents of potassium chloride, causes the condemned inmate's heart to stop. One hundred milliequivalents of potassium chloride is a lethal dose. Within moments after the potassium chloride has been injected, the heart of the inmate will stop beating. Shortly thereafter, brain activity will cease. Within three minutes after the injection of the potassium chloride, the inmate will be brain dead.

Reid 333 F.Supp. 546-47. (citations omitted)(emphasis added).

It is worth noting that Virginia's lethal injection protocol calls for even less Thiopental than Oklahoma's. Nevertheless, using the calculations provided by the court in that case, Oklahoma anesthetizes the condemned with a minimum of six times the amount of Thiopental used to anesthetize a patient for surgery. As such, Plaintiffs' Complaint fails to allege any violation of their Eighth Amendment rights, and should be dismissed in its entirety.

IV. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM FOR VIOLATION OF THE FIFTH AMENDMENT.

Plaintiffs' claims under the Due Process clause are less than clear. However, it appears Plaintiffs contend that prison regulations arbitrarily and capriciously impose a lethal injection regime that causes prolonged and significant pain. (Complaint, ¶¶2, 68-71). However, the DOC operations memoranda are not designed to, and do not, confer any additional rights unto any prisoner. *Sandin v. Conner*, 515 U.S. 472, 481-482, 115 S.Ct. 2293, 2299, 132 L.Ed.2d 418 (1995). Instead those procedures are implemented to "aspire to instruct subordinate employees how to exercise discretion vested by the state in the [director], and to confine the authority of [department] personnel in order to avoid widely different treatment of similar incidents." *Id.*

Furthermore, the United States Supreme Court has found disfavor in scrutinizing policy adoption in lieu of addressing the issues at bar.

> [In the past] by shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges.
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> [Such an approach] has produced at least two undesirable effects. First, it creates disincentives for States to codify prison management procedures in the interest of uniform treatment.
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> Second, [this] approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone. In so doing, it has run counter to the view expressed in several of our cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.

Sandin, 515 U.S. at 481-482.

It is clear from Plaintiffs' Complaint that both of the "undesirable effects" enunciated in *Sandin* are implicated in the present case. Applying *Sandin* it is clear Plaintiffs' due process claims are untenable and should be dismissed in their entirety.

Respectfully submitted,

s/ J. Kevin Behrens

J. KEVIN BEHRENS, OBA #19046
Assistant Attorney General
Oklahoma Attorney General's Office
Litigation Section
4545 N. Lincoln Blvd., Suite 260
Oklahoma City, OK 73105-3498
Tele: (405) 521-4274 Fax: (405) 521-1867
Kevin_Behrens@oag.state.ok.us

Attorney for Defendants Edwards and Mullin

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2005, I electronically transmitted the attached document to the Clerk of the Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

Lisa S. McCalmont
215 Dean A. McGee, Suite 109
Oklahoma City, OK 73102
Attorney for Plaintiffs

s/ J. Kevin Behrens
J. Kevin Behrens