IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARLOS GONZALEZ MAGALLON, Consul General of Mexico and Next Friend of Angel Maturino Resendiz, Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-06-818
BRAD LIVINGSTON, Executive Director, Texas Department of Criminal Justice,	§	
DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
CHARLES O'REILLY, Senior Warden, Huntsville Unit,	§	
and	§	
UNKNOWN EXECUTIONERS, Defendants.	§	

DEFENDANTS' MOTION TO DISMISS WITH BRIEF IN SUPPORT

This is a federal civil rights proceeding initiated by Plaintiff Carlos Gonzalez Magallon on behalf of Angel Maturino Resendiz, a death-sentenced Texas inmate, pursuant to 42 U.S.C. § 1983. Resendiz is scheduled for execution on May 10, 2006 for the 1998 capital murder of Claudia Benton during the course of committing or attempting to commit burglary, aggravated sexual assault, and robbery. Resdendiz previously and unsuccessfully challenged the constitutionality of his conviction and death sentence in both state and federal courts. Magallon now alleges that the method of Resendiz's execution violates his right to be free from cruel and unusual punishment as defined by the Eighth and Fourteenth

Amendments and Articles Six and Seven of the International Covenant on Civil and Political Rights (ICCPR). Amended Complaint at ¶1. He requests a permanent injunction and a stay of execution. *Id.* at ¶38-39. However, this Court lacks jurisdiction to consider Magallon's "next friend" complaint. Alternatively, because Fifth Circuit precedent forecloses the requested relief, Magallon's complaint must be dismissed with prejudice under FED. R. CIV. P. 12(b).

I. Magallon Lacks Standing to Pursue this Lawsuit as "Next Friend"; Thus, the Court Should Dismiss for Lack of Jurisdiction.

Circuit precedent is clear that "'[n]ext friend' petitions are permitted only if it is clearly demonstrated that the individual is unable to seek relief on his own behalf or is mentally incompetent to do so." *Lovelace v. Lyanaugh,* 809 F.2d 1136, 1137 (5th Cir. 1987) (citing *Gilmore v. Utah,* 429 U.S. 1012, 1014 (1976)). The burden of showing that a death-sentenced inmate is incompetent is on the person seeking to act on his behalf. *Rumbaugh v. Procunier,* 753 F.2d 395, 398-99 (5th Cir. 1985); *Weber v. Garza,* 570 F.2d 511, 513-14 (5th Cir. 1978). The failure to make such a showing deprives this Court of jurisdiction to consider Magallon's complaint. *Hamilton v. Collins,* 905 F.2d 825, 828–29 (5th Cir. 1990); *Lovelace,* 809 F.2d at 1138 (citing *Rumbaugh,* 753 F.2d at 398).

Magallon merely alleges — without one iota of evidence — that Resendiz is incompetent due to mental illness. Amended Complaint at ¶2. This is not enough and, as a result, this Court has no jurisdiction whatsoever in this matter. Magallon's complaint must be dismissed.

II. Nevertheless, Magallon Is Not Entitled to Relief Because He Delayed Unnecessarily in Bringing His Complaint.

Neither is Magallon entitled to equitable relief because his complaint is dilatory.

Because Magallon waited until eight weeks before Resendiz's scheduled execution to seek relief, Fifth Circuit precedent compels that his suit be dismissed. *See Harris v. Johnson,* 376 F.3d 414, 417 (5th Cir. 2004) (noting that where prisoner waited years on death row but sought relief ten weeks before execution, prisoner's real goal was not to change method of execution but to delay execution). Magallon argues that he could not have filed it sooner. Amended Complaint at ¶¶29-31. But where a prisoner challenges the method of execution on grounds that it will subject him to cruel and unusual punishment and he waits until his execution is imminent before seeking a remedy, relief is precluded. *See Gomez v. U.S. Dist. Ct. for the N.D. Calif.,* 503 U.S. 653, 654 (1992) (precluding equitable relief for inmate who waited until his execution was imminent before suing to enjoin the State's method of carrying it out); *Harris,* 376 F.3d at 417.

In deciding whether to grant equitable relief, a court may consider the last-minute nature of an application. *Gomez,* 503 U.S. at 654. A prisoner need not — indeed *cannot* — wait until his execution is scheduled or until his federal habeas corpus appeals are exhausted before challenging the method of execution. *See Harris,* 376 F.3d at 417. The prisoner may challenge the method of execution as soon as his sentence becomes final at the expiration of direct review. *Neville v. Johnson,* — F.3d —, 2006 WL 291292, *1 (5th Cir. Feb. 8, 2006) (citing *White v. Johnson,* 429 F.3d 572, 574 (5th Cir. 2005)).

Magallon implies that Texas is free to unilaterally alter its lethal injection protocol. Amended Complaint at ¶¶9, 26, 29. But the lethal injection protocol used by the State has remained largely unchanged since it was first used in 1982, and Magallon has provided nothing to show that the protocol will change within the next several weeks. More importantly, Magallon has been on notice of the combination of chemical agents used in executions since Resendiz's death sentence was first imposed in May 2000, and at least since

his death sentence became final on May 3, 2004.[1] *Resendiz v. State,* 112 S.W.3d 541 (Tex. Crim. App. 2003), *cert. denied,* 541 U.S. 1032 (2004). Moreover, Resendiz's federal habeas corpus petition was denied by this Court on September 7, 2005. *Resendiz v. Dretke,* No. H-05-1604 (S.D. Tex. 2005). Thus, even assuming *arguendo* that Magallon was required to wait until Resendiz's execution was imminent to file this complaint, his execution has been, for all intents and purposes, imminent for more than six months.[2]

In short, Magallon could have raised the instant challenge long ago. *See, e.g., Woolls v. McCotter,* 798 F.2d 695, 697-98 (5th Cir. 1986); *Ex parte Granviel,* 561 S.W.2d 503, 508 (Tex. Crim. App. 1978); *State v. Webb,* 750 A.2d 448, 451 (Conn. 2000) (all discussing expert testimony regarding the effect of each chemical agent – coinciding with those used in Texas – and the result of introducing those agents in a similarly coinciding specific dosage and order). Magallon offers no legitimate reason for delaying this suit. *See Gomez,* 503 U.S. at 653-54 ("[Gomez] has made no convincing showing of cause for his failure to raise this claim in his prior petitions. ... Equity must take into consideration the State's strong interest in proceeding with its judgment and [petitioner's] obvious attempt at manipulation"); *Harris,*

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[1] Magallon erroneously suggests that the lethal injection protocols were kept secret until March 2006. Amended Complaint at ¶¶9-10, 26, 29. Yet even cursory legal research reveals significant details concerning that protocol in published opinions as early as June 29, 2004. *See, e.g., Harris v. Johnson,* 323 F.Supp.2d 797, 800 (S.D. Tex. 2004).

[2] Magallon argues that he "presents this complaint an earlier stage in the appellate process than any petitioner in the lethal injection cases considered by the Fifth Circuit to date." Amended Complaint at ¶31. This is not entirely true. Resendiz defaulted his appeal to the Fifth Circuit by not filing a timely notice of appeal. In fact, his motion to reopen the time for filing a notice of appeal pursuant to FED. R. APP. P. 4(a)(6) was denied by this Court more than four months ago. At a minimum, Magallon was aware the Fifth Circuit would lack jurisdiction to hear Resendiz's appeal — and that his habeas corpus proceeding was effectively concluded — at that time.

376 F.3d at 418 ("For the entirety of his eighteen years on death row, Harris knew of the state's intention to execute him in this manner. It was during that period ... that he needed to file this challenge").

To hold otherwise would allow prisoners to delay their executions indefinitely by filing a succession of state and federal appeals. *Cf. Kutzner v. Cockrell,* 303 F.3d 333, 338 (5th Cir. 2002) ("Allowance of a stay of execution under these circumstances would signal tacit approval of endless stays for the preparation of endless successive petitions"). Before enjoining an execution, a federal court must "give substantial weight to any adverse impact" such an injunction would have on the "operation of a criminal justice system." 18 U.S.C. § 3626(a)(1) (quoted in *Nelson v. Campbell,* 541 U.S. 637, 649 (2004)). This Court must consider the impact on not only the State's interest in this particular case, but on the criminal justice system as a whole. To entertain Magallon's complaint would reward late filers and give rise to yet another round of appeals for all death-sentenced inmates who have exhausted their state and federal habeas appeals. This result does not accord with the intent of Congress as reflected by the passage of the Antiterrorism and Effective Death Penalty Act of 1996: to stop decades-long litigation in death penalty cases. *See Harris,* 376 F.3d at 416 (precluding injunctive relief for inmate who had been on notice of execution procedure for duration of confinement on death row). Hence, Magallon is not entitled to relief, and his complaint should be dismissed.

III. In Any Event, Magallon's Complaint Is Frivolous.

Magallon's complaint faces not only procedural and equitable bars; it also may be dismissed on the merits. *See Nelson,* 541 U.S. at 649 (quoting 42 U.S.C. § 1997e(c)(1): "The Act mandates that a district court 'shall,' on its own motion, dismiss 'any action brought with respect to prison conditions under section 1983 of this title ... if the court is satisfied that the

action is frivolous, malicious, [or] fails to state a claim upon which relief can be granted ...").

The government may not impose "cruel and unusual punishments," U.S. CONST., amend. VIII,[3] and in the execution of a death sentence it may not inflict "unnecessary pain." *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 464 (1947). A method of execution amounts to cruel and unusual punishment where it creates a substantial risk of wanton and unnecessary infliction of pain, torture, or lingering death. *Webb,* 750 A.2d at 455 (citing *Campbell v. Wood,* 18 F.3d 662, 683 (9th Cir. 1994); *Resweber,* 329 U.S. at 464; *Gregg v. Georgia,* 428 U.S. 153, 173 (1976)).

Based on the rejection of this identical claim in sister courts, both state and federal, Magallon's complaint is insufficient on its face to show an Eighth Amendment violation. He does not allege that the chemicals used in lethal injection will cause suffering; he only argues suffering is a *possibility.* Such a showing is not sufficient. *See, e.g., Cooper v. Rimmer,* 379 F.3d 1029, 1031-33 (9th Cir. 2004) (concluding that inmate fell short of showing unnecessary risk of unconstitutional pain or suffering and quoting district court's determination based on expert testimony that inmate "has done no more than raise the possibility that California's lethal-injection protocol risks an unconstitutional level of pain and suffering"); *Reid v. Johnson,* 333 F. Supp. 2d 543, 551 (E.D. Va. 2004) ("the probability that the inmate would be conscious of the physical effects of pancuronium is less than 1/100 of one percent" and finding that the risk of pain is "so remote as to be nonexistent"); *Webb,*

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[3] Magallon also bases his complaint on the Articles Six and Seven of the ICCPR. Amended Complaint at ¶¶1, 5, 35. However, "the Senate has declared Articles 1-27 of the ICCPR not self-executing, meaning that they cannot be in effect as law in the United States without action by Congress incorporating the provisions into domestic law." *Lagrone v. Cockrell,* No. 02-10976, 2003 WL 22327519, *13 (5th Cir. 2003) (citing *Beazley v. Johnson,* 242 F.3d 248, 267-68 (5th Cir. 2001)) (unpublished opinion). Thus, Magallon's ICCPR arguments should be disregarded.

750 A.2d at 455 (concluding based on expert testimony that there is no reason to believe that under routine execution inmate would experience anything more than insertion of intravenous injection followed by unconsciousness); *Ex parte Granviel,* 561 S.W.2d at 508 (rejecting challenge to state's use of sodium thiopental and discussing expert testimony that drug takes effect within moments); *see also Kelly v. Lynaugh,* 862 F.2d 1126, 1135 (5th Cir. 1988); *Woolls,* 798 F.2d at 697-98; *Sims v. State,* 754 So.2d 657 (Fla. 2000).

Nor should the Supreme Court's grant of certiorari review in *Hill v. Crosby,* 126 S. Ct. 1189 (Jan. 25, 2006), influence this Court's decision. Fifth Circuit precedent remains binding until the Supreme Court gives contrary guidance. *Smith v. Johnson,* — F.3d —, 2006 WL 330114, *1 (5th Cir. Feb. 14, 2006) (citing *Neville,* 2006 WL 291292, *1)).

Furthermore, the grant of certiorari does not support Magallon's claim. The Court's order shows that it granted review not on substantive but on procedural grounds. The order specifies the questions presented as follows: (1) 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 chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254; and (2) whether, under the Court's decision in Nelson, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983. *See* http://www.supremecourtus.gov/qp/05-08794qp.pdf.

The procedural nature of the certiorari grant in *Hill* is illustrated also by the Supreme Court's recent order vacating a stay of execution granted by the Seventh Circuit in an Indiana case. *See Donahue v. Bieghler,* 126 S. Ct. 1190 (Jan. 27, 2006). The dissent in the Seventh Circuit explained why the Supreme Court's grant of certiorari review in *Hill* should not undermine Fifth Circuit precedent requiring dismissal by this Court:

> The Supreme Court's grant of a stay and certiorari in *Hill v. Crosby* [] will allow it to answer the question left open in *Nelson v. Campbell*; namely, "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." 541 U.S. [at] 643-44 []. The answer to this question is important, because if the claim is viewed as one of habeas, as the Eleventh Circuit did in *Hill,* then the result is denial of the application because such a claim cannot be redressed under 28 U.S.C. § 2254. *See Hill v. Crosby,* No. 06-10621, 2006 WL 163607, *1 (11th Cir. Jan. 24, 2006). In this case, the parties and the district court have assumed that the answer to the question posed in *Hill* is favorable to Bieghler, meaning it is proper to consider Bieghler's claims under § 1983. Therefore, we need not wait for the Supreme Court's decision in *Hill*. The district court considered Bieghler's request for equitable relief and found it lacking, largely because Bieghler waited until the day before his execution to make the request. This ruling is consistent with the guidance provided by the Supreme Court in *Nelson,* and I see no reason to disturb it. *Nelson,* 541 U.S. at 650 ("Given the State's significant interest in enforcing its criminal judgments, ... 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").

Bieghler v. Donahue, No. 06-1300, 2006 WL 229027, *1-2 (Jan. 26, 2006) (Kanne, J., dissenting) (unpublished order).

Further, the Supreme Court, both before and after *Nelson,* has consistently rejected similar complaints. After granting certiorari review in *Nelson* but before issuing its opinion, the Court denied stays in the following Texas cases challenging the state's method of lethal injection: *Bruce v. Johnson,* 540 U.S. 1146 (Jan. 14, 2004); *Zimmerman v. Johnson,* 540 U.S. 1159 (Jan. 21, 2004); and *Vickers v. Johnson,* 540 U.S. 1170 (Jan. 28, 2004).

During that same period, the Supreme Court also (1) vacated a stay from the Tenth Circuit Court of Appeals on a similar challenge to Oklahoma's method of lethal injection, *Ward v. Darks,* 540 U.S. 1146 (Jan. 13, 2004); (2) denied an application for a stay on a

similar challenge to Ohio's method of lethal injection, *Williams v. Taft,* 540 U.S. 1146 (Jan. 13, 2004); and (3) vacated a stay entered by the United States District Court for the Eastern District of North Carolina on a similar challenge to North Carolina's method of lethal injection. *Beck v. Rowsey,* 540 U.S. 1098 (Jan. 8, 2004).

After *Nelson,* the Supreme Court (1) vacated a stay entered by the United States District Court for the District of Maryland on a similar challenge to Maryland's method of execution in *Sizer v. Oken,* 542 U.S. 916 (June 16, 2004); (2) denied an application to stay or vacate the Fifth Circuit's order rejecting an identical claim in *Harris v. Johnson,* 542 U.S. 952 (June 30, 2004); and (3) most recently, in *Reid v. Johnson,* 542 U.S. 963 (Sept. 9, 2004), denied the application for preliminary injunction that had been rejected by the United States District Court for the Eastern District of Virginia and the Fourth Circuit Court of Appeals in a challenge to Virginia's method of execution.

Finally, since the Supreme Court granted certiorari review in *Hill,* the Court has repeatedly turned back challenges to lethal injection protocol used by Texas. *See, e.g., Hughes v. Livingston,* — S. Ct. —, 2006 WL 637122 (Mar. 15, 2006); *Smith v. Livingston,* 126 S. Ct. 1294 (Feb. 15, 2006); *Neville v. Livingston,* 126 S. Ct. 1192 (Feb. 8, 2006); *Elizalde v. Livingston,* 126 S. Ct. 1191 (Jan. 31, 2006).

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that the Court dismiss Magallon's complaint for lack of jurisdiction. Alternatively, the Defendants ask that the Court dismiss the complaint because it is both dilatory and frivolous.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served electronically, on the 28th day of March, 2006, to Jared Philip Tyler at jptyler@central.uh.edu and to Tim Ford at TimF@MHB.com.

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