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United States District Court,
S.D. Ohio, Eastern Division.

Richard COOEY, Plaintiff,
v.
Robert TAFT, Governor, Reginald Wilkinson, Director, and James Haviland, Warden, Defendants.

No. 2:04 CV 1156. | March 28, 2005.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER

FROST, J.

***1** Plaintiff, Richard Cooey, a state prisoner sentenced to death by the State of Ohio, has pending before this Court a civil rights action pursuant to 42 U.S.C. § 1983 challenging multiple facets of the lethal injection protocol used by Ohio. This matter is before the Court on defendants' motion to dismiss, (doc.no.8), plaintiff's response, (doc.no.12), and defendants' reply, (doc.no.13).

I. Overview

The complaint alleges that Ohio's lethal injection protocol risks torturing a conscious inmate to death by suffocation. Defendants move, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss the complaint on grounds that the complaint is barred by the statute of limitations, barred by *res judicata,* and/or constitutes an unauthorized successive habeas corpus petition in violation of 28 U.S.C. § 2244(b).

II. Background

In his complaint, plaintiff seeks preliminary and permanent injunctive relief barring defendants from executing him in the manner by which defendants plan to execute him, as well as a declaratory judgment that the current means by which defendants carry out executions violate the Eighth and Fourteenth Amendments. Specifically, plaintiff contends that defendants intend to violate plaintiff's constitutional rights because the current method of execution used by defendants-a lethal injection protocol that includes a short-acting anesthetic that will leave plaintiff paralyzed but conscious during suffocation and death-will cause plaintiff to be tortured to death. Plaintiff also raises challenges about alleged failures on the part of defendants 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, plaintiff also seeks preliminary and permanent injunctive relief barring defendants from executing him

unless defendants first give plaintiff the right to choose to have one of his attorneys witness his execution 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).

According to defendants, Plaintiff Cooey was convicted and sentenced to death by a three-judge panel in Summit County on December 9, 1986. (Defendants' Motion to Dismiss, doc.no. 8, at 2). Defendants further state that, in 1993, lethal injection was adopted by Ohio as a method of execution, and that, in 2001, lethal injection became the sole method of execution in Ohio. (*Id.*). According to defendants, plaintiff filed his habeas corpus petition on October 2, 1996, which petition was denied by the district court on September 4, 1997. (*Id.*). The Court of Appeals for the Sixth Circuit affirmed that decision on April 16, 2002 and, on March 31, 2003, the Supreme Court of the United States denied plaintiff's petition for a writ of *certiorari.* (*Id.*).

Plaintiff, along with another death-sentenced inmate, Adremy Dennis, initially filed a complaint under § 1983 challenging aspects of Ohio's lethal injection protocol on June 10, 2004. (Case No. 2:04cv532). On September 16, 2004, this Court denied plaintiffs' motion for a preliminary injunction but otherwise found that their claims had been properly raised in a § 1983 action. On September 24, 2004, this Court dismissed plaintiffs' complaint without prejudice for the failure to exhaust administrative remedies.[1]

***2** Subsequently, on September 27, 2004, Adremy Dennis filed another § 1983 complaint in this Court raising the same challenges that he and Cooey had raised in their initial complaint. (Case No. 2:04cv920). Plaintiff Cooey did not join in that action. On October 6, 2004, this Court issued a decision denying the defendants' motion, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss the complaint. (Case No. 2:04cv920, doc.no. 18). Ultimately, Dennis's § 1983 complaint was dismissed as moot, following his execution.

III. Analysis

In their motion to dismiss filed on January 4, 2005, defendants argue, pursuant to Fed.R.Civ.P. 12(b)(6), that this complaint must be dismissed because the statute of limitations has expired, the claims are barred by *res judicata,* and/or the complaint constitutes an unauthorized successive habeas corpus petition in violation of 28 U.S.C. § 2244(b). Defendants argue that this Court's decisions on the motions for a preliminary injunction in *Dennis, et al. v. Taft, et al.,* 2:04cv532, and *Dennis v. Taft, et al.,* 2:04cv920 produced two definitive bars to plaintiff's instant action. First, according to defendants, this Court's determination that Dennis was actually aware of the facts giving rise to his claims, at the latest, in May of 2002, means that plaintiff, who is similarly situated, is time-barred from filing the instant complaint. Second, this Court's determination that Dennis could have included these specific claims in his federal habeas corpus petition means that plaintiff is barred by *res judicata* from raising his claims in the instant action because he, too, raised them or could have raised them in his federal habeas corpus petition.

Dismissal is warranted under Fed.R.Civ.P. 12(b)(6) " 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." ' *Sistrunk v. City of Strongsville,* 99 F.3d 194, 197 (6th Cir.1996)(quoting *Hishon v. King & Spaulding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)), *cert. denied,* 520 U.S. 1251 (1997). The focus is not on whether plaintiff will ultimately prevail, but rather on whether he has offered " 'either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." ' *Rippy ex rel. Rippy v. Hattaway,* 270 F.3d 416, 419 (6th Cir.2001)(quoting *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434, 436 (6th Cir.1988)). In making such a determination, the Court must " 'construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." ' *Sistrunk,* 99 F.3d at 197 (quoting *Gazette v. City of Pontiac,* 41 F.3d 1061, 1064 (6th Cir.1994)). The Court need not, however, accept conclusions of law or unwarranted inferences of fact. *Perry v. American Tobacco Co., Inc.,* 324 F.3d 845, 848 (6th Cir.2003). The Court may also consider matters of public record, orders, items appearing in the record of the case, and exhibits attached to the Complaint. *Amini v. Oberlin Coll.,* 259 F.3d 493, 502 (6th Cir.2001). With these principles in mind, the Court will consider each of defendants' arguments as to why plaintiff's complaint should be dismissed.

A. Statute of Limitations

***3** Defendants argue that plaintiff has failed to assert his § 1983 claim within the two-year statute of limitations applicable to such claims. *See Trzebuckowski v. City of Cleveland,* 319 F.3d 853, 855-56 (6th Cir.2003)(two-year statute of limitations period found in O.R.C. § 2305.10 applies to § 1983 actions). Citing *Dixon v. Anderson,* 928 F.2d 212, 215 (6th Cir.1991), defendants argue that, "In determining when the cause of action accrues in section 1983 actions, we have looked to what event should have alerted the typical lay person to protect his or her rights." Defendants insist that under the law in the Sixth Circuit, it is the issuance of the government order in question-not the carrying out of that order-that starts the statute of limitations. *See Tolbert v. Ohio D.O.T.,* 172 F.3d 934, 939 (6th Cir.1999). Under this reasoning, defendants argue that plaintiff was required to file his § 1983 action at the earliest in 1993, when lethal injection was first authorized as a method of execution in Ohio. In the alternative, defendants argue that plaintiff was required to file his action certainly in 2001, when lethal injection became the sole method of execution in Ohio. For reasons discussed in this Court's *Opinion and Order* of December 6, 2004 in *Dennis v. Taft, et al.,* Case No. 2:04cv920, doc.no. 18, as well as plaintiff's Memorandum Contra, (doc.no.12), this Court rejects both arguments.

In its *Opinion and Order* of December 6, 2004, this Court concluded that *Tolbert* "provides little support for [defendants'] argument." (*Opinion and Order,* Case No. 2:04cv920, doc.no. 18, at 4). Specifically, this Court noted that while the plaintiffs in *Tolbert* suffered their injury when the government denied their request for the erection of sound barriers, no constitutional injury had yet occurred in Plaintiff Dennis's case. (*Id.*). The Court based its holding on the "unique context of the § 1983 action at issue here: a method-of-execution case in which the complainant concedes that execution by other means would be constitutional." (*Id.* at 5). The Court noted that *Nelson v. Campbell,* 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004) arguably opened the door to death-sentenced inmates filing § 1983 actions to raise method-of-execution challenges before the actual violation, *i.e.,* execution by the means they challenge, takes place, and that under such reasoning, it would defy common sense to bar on the basis of statute of limitations the assertion of a claim challenging the future infliction of injury. (*Id.* at 5-6).

Defendants herein challenge the aspect of this Court's decision in *Dennis* distinguishing the Sixth Circuit's *Tolbert* decision. Specifically, defendants challenge this Court's reasons for rejecting *Tolbert'* s reach in Dennis's case-namely, that (1) the *Nelson v. Campbell* decision indicated a belief on the part of the Supreme Court that method-of-execution claims raised in § 1983 actions ought to be heard on the merits; and that (2) logic and common sense dictated that the statute of limitations should not run on claims challenging a constitutional injury that has not occurred yet. First, defendants argue that the *Nelson* decision did not give death-sentenced inmates carte blanche to use § 1983 actions for raising method-of-execution challenges. Defendants argue that the facts in the *Nelson* case are distinguishable from the facts in Dennis's case and plaintiff's case herein, insofar as Nelson was precluded from filing his method-of-execution challenge in his habeas corpus petition because lethal injection was not authorized as a method of execution at the time he filed his habeas corpus petition. Defendants' argument is not well taken because, in this Court's view, Plaintiff Cooey was similarly prevented from raising in his habeas corpus petition the precise method-of-execution challenge he presents in the instant § 1983 action. The record before this Court does not support defendants' assumption that the facts giving rise to plaintiff's claim were known to him when he filed his habeas corpus petition in 1996. Although Ohio first authorized lethal injection as a method of execution in 1993, and made it the sole method of execution in 2001, it appears from the limited record before this Court, *i.e.,* exhibits attached in support of the complaint, that the exact procedures to be utilized by defendants in executing Plaintiff Cooey were not known to him until May of 2002. *See also Opinion and Order* of September 16, 2004 in *Dennis, et al. v. Taft, et al.,* Case No. 2:04cv532, doc.no. 14, at 9-10. Thus, for purposes of the only inquiry stemming from a statute of limitations challenge, *i.e.,* when was plaintiff *required* to raise his claim-this Court is constrained to reject defendants' suggestion that Plaintiff Cooey, unlike the plaintiff in *Nelson,* could have raised his method-of-execution challenge in his 1996 habeas corpus petition.

***4** Defendants also argue that the Supreme Court's actions in vacating stays of execution issued in numerous post-*Nelson* cases undermine this Court's assumption that the Supreme Court in *Nelson* conveyed a belief that method-of-execution claims raised in § 1983 actions ought to be heard on the merits.[2] Defendants' argument in this regard misses the mark. As plaintiff notes in his memorandum contra, legal principles governing the equitable relief of a preliminary injunction differ from legal principles governing the propriety of a cause of action. Thus, a court's rationale for rejecting a preliminary injunction cannot be construed necessarily to convey anything with respect to the underlying propriety of the cause of action in connection with which the preliminary injunction was sought. Nothing illustrates that point more vividly than the fact that this Court, in *Dennis, et al. v. Taft, et al.,* Case No. 2:04cv532, and *Dennis v. Taft, et al.,* Case No. 2:04cv920, was constrained under the legal principles governing the equitable relief of preliminary injunctions to deny the plaintiffs' motions for a preliminary injunction. However, the Court otherwise concluded that the plaintiffs had properly raised their method-of-execution challenges in a § 1983 action. Thus, the Court's rationale in rejecting their motions for a preliminary injunction conveyed nothing about the Court's view of the propriety of the plaintiffs' underlying cause of action.

Defendants also take issue with the Court's conclusion in *Dennis v. Taft, et al.,* Case No. 2:04cv920, (*Opinion and Order* of

October 6, 2004, doc.no. 18), that the plaintiff had not yet suffered the constitutional injury forming the basis of his § 1983 action. Under that reasoning, defendants argue, the plaintiff's claim would not be ripe until after he was executed, in which case he would never be able to raise his claim because it would be moot. Defendants argue that the principles and facts for raising the method-of-execution challenge raised by plaintiff herein arguably have been available for years. This Court, based on the record as it exists, has already rejected that argument. This Court continues to adhere to its view that *Nelson* implicitly teaches that a party such as plaintiff is not precluded from raising in a § 1983 action a specific method-of-execution challenge as a potential violation of constitutional rights *before* the actual violation, *i.e.,* execution by the means challenged by plaintiff, takes place. That is, a plaintiff so situated should not be precluded on statute of limitations grounds from asserting a claim to prevent *future* injury.

Defendants further argue that plaintiff cannot continue to assert that he was prevented by Sixth Circuit precedent, *i.e., In re Sapp,* 118 F.3d 460 (6th Cir.1997)(holding that a method-of-execution challenge raised in a § 1983 action was properly construed as a habeas corpus action), from filing his § 1983 action until after the Supreme Court cleared the way for such actions with its *Nelson v. Campbell* decision. Defendants reason that the plaintiff in *Nelson,* who was similarly barred by circuit precedent, successfully filed a § 1983 action, and that so long as there remains the possibility of en banc reconsideration and Supreme Court review, circuit precedent cannot be construed as foreclosing an avenue for relief. (Defendants' Motion to Dismiss, doc.no. 8, at 9). To illustrate their point, defendants note that two inmates on Ohio's death row, Lewis Williams and John Glenn Roe, defied *In re Sapp* and filed their § 1983 actions before the Supreme Court issued its *Nelson v. Campbell* decision. Defendants' argument is not well taken. In fact, their illustration lends more support to Plaintiff Cooey's argument that, prior to the Supreme Court's *Nelson* decision, death-sentenced inmates in the Sixth Circuit effectively were precluded from raising method-of-execution challenges in § 1983 actions. Defendants are correct that Williams and Roe tried. Defendants neglect to point out, however, that Williams and Roe failed. Their § 1983 action, consistent with *In re Sapp,* was construed as an unauthorized successive habeas corpus petition and was never fully heard on the merits. *In re Williams,* 359 F.3d 811 (6th Cir.2004). Thus, even assuming the Court were willing to assume that plaintiff *could* have tried to file his § 1983 action prior to the Supreme Court's *Nelson* decision, the Court is not willing to hold, for statute of limitations purposes, that plaintiff was *required* to try to file his § 1983 action prior to the Supreme Court's *Nelson* decision.

***5** In sum, the Court rejects defendants' arguments that the statute of limitations on the method-of-execution challenge raised by plaintiff in this § 1983 action began to run either in 1993, when Ohio first adopted lethal injection as a method of execution, or in 2001, when Ohio made lethal injection the sole method of execution. That is not to say, however, that the Court accepts plaintiff's assertion that because execution is a unique circumstance, a complaint of the nature he has raised can never be time-barred. The Court is persuaded that the correct answer lies somewhere in between, and that the key factors in the accrual of this cause of action are the imminency of the plaintiff's execution combined with knowledge of the facts giving rise to his specific method-of-execution challenge.

Defendants complain that plaintiff ignores controlling Sixth Circuit case law, *Dixon v. Anderson,* 928 F.2d 212, 215 (6th Cir.1991)("in determining when the cause of action accrues in section 1983 actions, we have looked to what event should have alerted the typical lay person to protect his or her rights."), insofar as plaintiff "points to no certain event that has now alerted him to protect his rights." (Defendants' Reply, doc.no. 13, at 2). The Court does not agree. Plaintiff has suggested that it would be nonsensical and wasteful to require those recently sentenced to death to immediately file § 1983 actions raising a method-of-execution challenge, when such inmates could see their convictions or death sentences reversed eight or ten years down the road or the defendants could change the execution protocol that was in place when the inmates filed their § 1983 actions. Thus, plaintiff appears to be suggesting that the limitations period begins to run on a § 1983 action raising a method-of-execution claim when the execution becomes imminent. The Court is inclined to agree, and there is some authority lending support to that position.

Logically, and consistent with Sixth Circuit precedent holding that the cause of action accrues in § 1983 actions at the occurrence of an event that would alert the typical lay person to protect his or her rights, the statute of limitations begins to run on method-of-execution challenges raised in a § 1983 action when two conditions are met: the execution becomes imminent and the plaintiff knows or has reason to know of the facts giving rise to his specific method-of-execution challenge. In terms of defining when an execution becomes imminent, this Court is of the view that an execution becomes imminent not necessarily when an execution date is set, but when all other legal challenges to the validity of a death sentence come to an end, *i.e.,* when the plaintiff has exhausted all of his state and federal avenues of relief. In this Court's view, that occurs when the United States Supreme Court denies *certiorari* in the plaintiff's habeas corpus proceeding or otherwise issues a decision foreclosing federal habeas corpus relief. As for when a plaintiff knows or has reason to know the facts giving rise to his specific method-of-execution claim, the limited record before the Court suggests that the specific protocol challenged by Plaintiff Cooey herein, and thus the facts giving rise to his claim, derived not from a statute or administrative regulation, but

from officials with the Ohio Department of Rehabilitation and Correction. (Complaint, doc.no. 3, at Exhs. 9, 10A, and 10B). That being so, it appears that the protocol is subject to alteration until the time of execution. Accordingly, requiring a death-sentenced plaintiff to file his method-of-execution challenge any sooner strikes this Court as potentially wasteful and possibly absurd, given the possibility that, prior to his execution becoming imminent, a plaintiff could see his conviction or death sentence reversed, or the alteration of the precise execution protocol that plaintiff might seek to challenge as unconstitutional.

***6** The Court's position finds some support in recent and analogous case law. In *Beardslee v. Woodford,* 395 F.3d 1064, 1069 (9th Cir.), *cert. denied,* 543 U.S. 1096, 125 S.Ct. 982, 160 L.Ed.2d 910 (2005), the Court of Appeals for the Ninth Circuit, in discussing whether the plaintiff therein had acted promptly in raising his method-of-execution claim, seemed to endorse imminency of execution as a key factor in determining when a method-of-execution claim ought to be filed, remarking, "Beardslee correctly points out that the precise execution protocol is subject to alteration until the time of execution." The Court went on to note that it had not yet resolved the question of when method-of-execution challenges become ripe, but again discussed cases endorsing imminency of execution as a key factor in resolving that question.

> To date, we have not resolved the question of when challenges to execution methods are ripe. In *Stewart v. Martinez-Villareal,* 523 U.S. 637, 644-45, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998), the Supreme Court held that an inmate's competency challenge was properly dismissed as unripe because "his execution was not imminent and therefore his competency to be executed could not be determined at that time." The Court held that the inmate's claim was "unquestionably ripe" only after it was clear that he "would have no federal habeas relief for his conviction or his death sentence, and the Arizona Supreme Court issued a warrant for his execution." *Id.* at 643, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849. We have suggested that a constitutional challenge to an execution method becomes ripe when the execution method is chosen. *LaGrand v. Stewart,* 170 F.3d 1158, 1159 (9th Cir.1999). However, because the execution protocol is subject to change, Beardslee argues that his challenge to the protocol, as opposed to a generic challenge to the statutorily specified method, did not become ripe until his execution was imminent as described in *Martinez-Villareal.* We need not, and do not resolve this question.

Beardslee, 395 F.3d at 1069, n. 6.

For the foregoing reasons, this Court is of the view that the statute of limitations on claims raising specific challenges to a method of execution, but otherwise conceding that the execution can be carried out in a constitutional manner if the specific challenges are addressed, begins to run when the execution becomes imminent and the plaintiff knows or has reason to know of the facts giving rise to his specific challenges. When these two conditions have been met, a death-sentenced inmate is on notice of the need to protect his or her rights. *Dixon v. Anderson, supra,* 928 F.2d at 215 ("in determining when the cause of action accrues in section 1983 actions, we have looked to what event should have alerted the typical lay person to protect his or her rights."). In the instant case, Plaintiff Cooey knew or had reason to know of the facts giving rise to the specific allegations he has presented in the instant complaint in May 2002. Plaintiff Cooey's execution became imminent when the United States Supreme Court denied *certiorari* as to his habeas corpus proceedings on March 31, 2003. (Defendants' Motion to Dismiss, doc.no. 8, at 2). Thus, on March 31, 2003, plaintiff's execution was imminent and he knew or had reason to know of the facts giving rise to his claim; plaintiff had two years from that date to file his method-of-execution claim. Plaintiff filed the instant action on December 8, 2004, three months before the expiration of the statute of limitations.

***7** Having determined when method-of-execution claims must be raised for statute of limitations purposes, this Court cautions plaintiffs that nothing about the Court's determination in this regard should be construed as guaranteeing or even suggesting that a plaintiff who waits too long to file his § 1983 action raising a method-of-execution claim will be entitled to a preliminary injunction. As the Court noted in its *Opinion and Order* of October 6, 2004 in *Dennis v. Taft, et al.,* Case No. 2:04cv920, doc.no. 18, at 6, "common sense also dictates vigilance on the part of a plaintiff. A plaintiff who waits too long to assert his or her claim-such as here-risks possessing a potentially valid claim while lacking any right to a stay." This Court has explained that legal principles governing the equitable relief of a preliminary injunction differ from legal principles governing the propriety of a cause of action. As noted *supra,* in *Dennis, et al. v. Taft, et al.,* Case No. 2:04cv532, and *Dennis v. Taft, et al.,* Case No. 2:04cv920, this Court concluded that the plaintiffs had properly raised their method-of-execution challenges in a § 1983 action, but was constrained under the legal principles governing the equitable relief of preliminary injunctions to deny the plaintiffs' motions for a preliminary injunction. Plaintiff Dennis was executed before the merits of his otherwise valid § 1983 action could be heard. Similarly situated plaintiffs are duly warned.

In sum, having squarely rejected the only two arguments raised by defendants, *i.e.,* that plaintiff's cause of action began to accrue in 1993 or 2001 at the latest, and determining that plaintiff's cause of action began to accrue when the United States Supreme Court denied *certiorari, i.e.,* March 31, 2003, the Court denies defendants' motion, pursuant to Fed.R.Civ.P.

12(b)(6), to dismiss the instant complaint as time-barred.

B. Res Judicata

Defendants argue in their second ground for dismissal that plaintiff's § 1983 action is barred by the doctrine of *res judicata.* This doctrine would bar re-litigation in this § 1983 action of those claims that plaintiff raised or could have raised in his prior habeas corpus petition. *See Jackson v. Kinkela,* 187 F.3d 636, 1999 WL 623672, at *2 (6th Cir.1999) (unpublished table decision).

As in *Dennis,* this Court concludes that *res judicata* is inapplicable to the instant complaint for two reasons. First, contrary to defendants' assertion, plaintiff did *not* raise in his 1996 habeas corpus petition the specific arguments he raises herein challenging the lethal injection protocol by which defendants intend to execute him. According to defendants, the following claim raised by plaintiff in his habeas corpus petition constitutes the same claim he raises herein:

> Based on the evidence of the cruelty and barbarism involved in executions, Petitioner Cooey's rights as guaranteed to him by the Due Process Clause of the Fifth Amendment to the United States Constitution, the prohibition against Cruel and Unusual Punishment as guaranteed by the Eighth Amendment to the United States Constitution, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution will be violated if he is executed by electrocution *or any other means.*

***8** (Defendants' Motion to Dismiss, doc.no. 8, at 10). Defendants argue that the "any other means" refers to lethal injection and that plaintiff therefore raised in his habeas corpus petition the challenge he seeks to raise in the instant § 1983 action. Since the argument raised by plaintiff in his habeas corpus petition was addressed and rejected, defendants argue that plaintiff is barred by *res judicata* from re-litigating the claim now. In short, it tests the limits of credulity to suggest that the general argument plaintiff raised in his habeas corpus petition and the specific arguments he raises herein are one and the same. *See, e.g, Beardslee v. Woodford, supra,* 395 F.3d at 1068 (holding that generic challenge to California's statutory methods of execution raised in earlier habeas corpus petition did not preclude plaintiff from raising specific challenge to lethal injection protocol in § 1983 action). Defendants' argument in this regard must be rejected.

Second, defendants have not persuaded this Court that plaintiff could have raised in his habeas corpus petition the specific arguments he raises herein challenging the lethal injection protocol by which defendants intend to execute him. Citing *Heckler v. Chaney,* 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), and a 1993 book by Dr. Jack Kevorkian titled *Prescription: Medicide,* defendants argue that there are reasons to believe that both the standards of decency and the scientific knowledge were in place for the litigation of plaintiff's specific challenge by 1996, when he filed his habeas corpus petition. The Court disagrees. As the Court noted in *Dennis,* "The limited record before the Court indicates that Plaintiff could have and should have challenged the specific lethal injection protocol involved shortly after May 2002-a fact that precluded the preliminary injunctions sought in both this action and the earlier § 1983 case-but not that Plaintiff knew or had reason to know that his specific constitutional claim existed at the time of the filing of his habeas petition in 1998." *Opinion and Order* of October 6, 2004, Case No. 2:04cv920, doc.no. 18, at 7. That is, the facts giving rise to Plaintiff Dennis's specific challenge were not known to him prior to May 2002; Plaintiff Cooey is similarly situated in that regard. Defendants have asserted nothing new in the instant motion to dismiss to persuade the Court otherwise. Construing the complaint liberally in plaintiff's favor and accepting as true all factual allegations and permissible inferences therein, this Court cannot conclude that plaintiff could have raised in his 1996 habeas corpus petition the specific arguments he raises herein challenging the lethal injection protocol by which defendants intend to execute him.

Nor could plaintiff, given the constraints on filing successive habeas corpus petitions set forth in 28 U.S.C. § 2244(b)(2), have been expected to raise these allegations in a successive habeas corpus petition once he became aware of them. Defendants, while seeming to concede that plaintiff would have had trouble satisfying all of the conditions in § 2244(b)(2), assert nonetheless that plaintiff could have tried. The Court disagrees and is not persuaded that the theoretical existence of such a longshot is sufficient to justify a holding that plaintiff could have raised his allegations in a successive habeas corpus petition and, therefore, that plaintiff is barred by *res judicata* from raising his allegations in the instant § 1983 action. For the foregoing reasons and consistent with this Court's *Opinion and Order* of October 6, 2004 in *Dennis v. Taft, et al.,* Case No. 2:04cv920, doc.no. 18, the Court denies defendants' motion, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss the instant complaint on the basis of *res judicata.*

C. Successive Habeas Corpus Petition

***9** Finally, defendants assert that plaintiff's § 1983 action must fail because it is an unauthorized second or successive habeas corpus petition in violation of 28 U.S.C. § 2244(b). This Court rejected that argument in *Dennis, et al. v. Taft, et al.,* Case No. 2:04cv532, doc.no. 14, and in *Dennis v. Taft, et al.,* 2:04cv920, doc.no. 10. For the reasons that follow, this Court concludes that defendants have presented no new rationale for disturbing those prior decisions.

Defendants argue that the two factors cited by the Supreme Court for concluding in *Nelson v. Campbell* that the plaintiff's method-of-execution challenge was properly construed as a § 1983 action instead of a habeas corpus petition-*i.e.,* (1) the severability of the "cut-down" procedure challenged by Nelson from the execution itself; and (2) Nelson's explicit concession that a specifically identified alternative would remedy his complaint-are absent from Plaintiff Cooey's case. The Court disagrees. A careful reading of the complaint reveals that Plaintiff Cooey challenges specific facets of the lethal injection protocol by which defendants intend to execute him, but does not challenge lethal injection itself or his execution in general. Defendants' argument to the contrary is belied by the face of the complaint. Defendants further argue that plaintiff has offered no alternative for how his execution can be carried out. Again, the Court disagrees. Plaintiff has conceded that an alternative is possible, even if he has neglected at this point to offer specifics. (Complaint, doc.no. 3, at p. 4, ¶ 6). Further, the expert upon which plaintiff relies, Dr. Mark J.S. Heath, has offered alternatives in his affidavit. (Complaint, doc.no. 3, at Exhibit 11). The Court is not persuaded that plaintiff's failure to offer a specific alternative to the lethal injection protocol established by defendants requires the Court to construe the instant § 1983 action as a second or successive habeas corpus petition.

Finally, defendants argue that habeas corpus is the more likely label for the instant suit because the relief plaintiff requests, *i.e.,* an order enjoining his execution as opposed to an order enjoining just the allegedly unconstitutional facets of his execution, is overbroad for § 1983 purposes. Again, a careful reading of the complaint belies defendants' argument. None of plaintiff's requests for declaratory or injunctive relief seek to bar defendants from executing him in general; rather, they seek to prevent defendants from executing him "in the manner by which Defendants currently intend to execute" him. (Complaint, doc.no. 3, at ¶ 56A). That being so, the Court is not willing to construe the relief requested by plaintiff as overbroad for § 1983 purposes sufficient to compel this Court to construe the instant suit as a habeas corpus petition.

For the foregoing reasons, this Court again concludes that plaintiff properly filed his action pursuant to § 1983 and rejects defendants' contention that the complaint must be construed as a second or successive habeas corpus petition.

IV. Conclusion

***10** For the foregoing reasons, defendants' motion to dismiss the complaint, pursuant to Fed.R.Civ.P. 12(b)(6), is DENIED.

Footnotes

[1] Plaintiff avers that he has exhausted his administrative remedies. Exhibits 1-7 attached to his complaint support his assertion and defendants do not argue otherwise.

[2] "In vacating the stays of execution issued by the lower courts subsequent to its decision in *Nelson,* the Supreme Court did not rule on the 'merits' of the prisoners' Eighth Amendment claims where the lower courts granting stays had not ruled on the 'merits.' *Seee.g.,Johnson v. Reid,* 2004 U.S. LEXIS 4914 (Sept. 9, 2004); *Sizer v. Oken,* 542 U.S.916, 124 S.Ct. 2868, 159 L.Ed.2d 290, 2004 U.S. LEXIS 4381 (U.S.2004)(vacating stay of execution). * * * This leaves no doubt whatsoever that the Supreme Court did not intend its *Nelson* decision to be interpreted as establishing an absolute right for death row prisoners to litigate the 'merits' of challenges to the methods of their executions via actions under Section 1983." (Defendant's Motion to Dismiss, doc.no. 8, at 7-8).