UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TIMOTHY JOHNSTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. 4:04CV1075 DJS
	)	
GARY B. KEMPKER, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

Defendants Kempker, Roper, and Purkett, by and through their attorneys, submit the following Memorandum of Law in support of their motion to dismiss.

Background

Plaintiff Timothy Johnston is a capital punishment inmate at the Potosi Correctional Center (PCC) in Mineral Point, Missouri. (Complaint (Cmpl) ¶ 5). Plaintiff was convicted of capital murder for the brutal beating death of his wife in 1989 and a jury sentenced him to death. The facts underlying his conviction are discussed in State v. Johnston, 957 S.W.2d 734, 739 (Mo. en banc 1997), cert. denied, 522 U.S. 1150 (1998). Plaintiff sought and was denied relief both on direct appeal and in his state postconviction proceedings. Id. Next, plaintiff sought and was denied federal habeas corpus relief challenging his conviction and resulting death sentence. Johnston v. Bowersox, 119

F.Supp.2d 971 (E.D.Mo 2000). After this Court denied plaintiff's petition for writ of habeas corpus relief, plaintiff sought and was granted from the Eighth Circuit a certificate of appealability. The Eighth Circuit affirmed this Court's denial of the habeas petition. Johnston v. Luebbers, 288 F.3d 1048 (8th Cir. 2002). Plaintiff awaits the Missouri Supreme Court's setting of his date for execution by lethal injection. (Cmpl. ¶ 14).

This suit is brought under 42 U.S.C. § 1983 seeking declaratory and injunctive relief that Missouri's method of lethal injection violates plaintiff's Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment. Plaintiff seeks permanent injunctive relief barring his execution. (Cmpl. ¶¶ 25, 26).

In addition to the "Unknown Executioners" named as defendants, plaintiff names the Director of the Missouri Department of Corrections, Gary Kempker, the Superintendent of PCC, Don Roper, and the Superintendent of the Eastern Reception and Diagnostic Center, James Purkett, as defendants alleging that they are responsible for the carrying out of his execution by lethal injection. Defendants assert that this Court lacks jurisdiction over plaintiff's § 1983 action and that plaintiff fails to state a claim for which relief can be granted.

LEGAL STANDARD

The Complaint has not established this Court's jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) nor does it state a claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6). The issue on a motion to dismiss for failure to state a claim is not whether a plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence in support of his or her claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1376 (8th Cir. 1989). In considering this motion to dismiss under Rule 12(b)(6), the court must assume that all facts alleged in the plaintiff's complaint are true, and must liberally construe those allegations. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Viewing the allegations in the light most favorable to plaintiff, this Court lacks jurisdiction to consider plaintiff's 42 U.S.C. § 1983 claims and the Complaint fails to state a claim for Eighth and Fourteenth Amendment rights violation.

ARGUMENT

I. This Court lacks jurisdiction over plaintiff's § 1983 claim challenging lethal injection because this type of claim should have been raised in his federal habeas petition.

The complaint should be dismissed for lack of jurisdiction because 42 U.S.C. § 1983 is not an appropriate vehicle to challenge the method of execution and plaintiff could have litigated this issue in his earlier habeas corpus action. This § 1983 challenge to lethal injection is the "functional equivalent" of a successive habeas petition. Fugate v.

Dep't of Corrections, 301 F.3d 1287, 1288 (11th Cir. 2002). Plaintiff makes no showing of cause for his failure to raise this issue in the prior habeas petition. Thus, 28 U.S.C. §2244(b)(2) bars habeas review of plaintiff's claims.

A state prisoner may not obtain equitable relief under section 1983 when the federal habeas corpus statute is the exclusive remedial mechanism for obtaining the relief requested. Preiser v. Rodriguez, 411 U.S. 475, 487-90, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). When a 1983 action involves a challenged to an inmate's sentence it must be raised by a habeas action. Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). A "challenge to the manner of execution is a challenge seeking to interfere with the sentence itself, and thus, is properly construed as a petition for habeas corpus." In re Sapp, 118 F.3d 460, 462 (6th Cir. 1997), cert. denied sub nom. McQueen v. Sapp, 521 U.S. 1130 (1997); accord William v. Hopkins, 130 F.3d 333, 336 (8th Cir. 1997), cert. denied, 522 U.S. 1010 (1997); Felker v. Turpin, 101 F.3d 95, 96 (12th Cir. 1996), cert. denied, 519 U.S. 989 (1996); Hill v. Hopper, 112 F.3d 1088 (11th Cir. 1997)(Section 1983 challenge to constitutionality of electrocution "functional equivalent" of habeas petition, subject to procedural requirements governing second or successive habeas petitions); but see Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996), vacated, Gomez v. Fierro, 519 U.S. 918, 112 S.Ct. 285, 136 L.Ed.2d 204 (1996)(permitting challenge to method of execution under § 1983). Challenging the method of the imposition of the sentence of death constitutes a successive application for habeas relief. See Harvey v. Horan, 278 F.3d 370,

374-80 (4th Cir. 2002); Buchanan v. Gilmore, 139 F.3d 982, 983-84 (4th Cir. 1998). The provisions in AEDPA limiting multiple rounds of post-conviction appeals by inmates sentenced to death in federal courts requires plaintiff to obtain the authorization of the Eighth Circuit Court of Appeals before a successive habeas petition could filed in this Court. 28 U.S.C. § 2244(b)(3)(A). The Court of Appeals performs the gatekeeper function in cases such as plaintiff's and would not under AEDPA, grant authorization for the filing a successive habeas petition challenging the implementation of a particular method of execution as successive petitions are limited to guilt phase issues. See 28 U.S.C. § 2254(b)(2)(B)(ii). Thus, plaintiff cannot bring a successive petition challenging the method of his execution. Greenawalt v. Stewart, 105 F.3d 1268, 1287 (9th Cir. 1997).

Even if AEDPA's restrictions on successive petitions do not strictly govern plaintiff's pending case, those provisions direct this Court's review of plaintiff's belated demand for extraordinary and equitable relief. Notably, the Supreme Court has held that even though a federal court considers a motion or action that is not subject to the restrictions of AEDPA, those provisions still "'certainly inform [its] consideration' of whether the Court of Appeals abused its discretion." Calderon v. Thompson, 523 U.S. 538, 558, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998).

As a successive habeas petition, plaintiff's request for injunctive relief may be granted only "when there are 'substantial grounds' upon which relief might be granted." Bowersox v. Williams, 517 U.S. 345, 346, 116 S.Ct. 1312, 1234 L.Ed. 2d 494 (1996).

Plaintiff's claims must be dismissed because it meets neither the requirement for a successive habeas or for declaratory injunctive relief under § 1983.

The traditional standard for injunctive relief places the burden on plaintiff to establish the threat of irreparable harm; the balance between the harm and the injury that granting the injunction will inflict on other parties; the probability of plaintiff's success on the merits and the public interest. Sandborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co., 997 F.2d 484, 485-86 (8th Cir. 1993); Dataphase Systems v. C.L. System, Inc., 640 F.2d 109, 113 (8th Cir. 1981). "[A] request for injunctive relief must always be viewed with great caution because 'judicial restraint is especially called for in dealing with the complex and intractable problems of prison administration.'" Goff v. Harper, 60 F.3d 518, 520 (8th Cir. 1995)(quoting Rogers v. Scurr, 676 F.2d 1211, 1214 (8th Cir. 1982)). Because this traditional standard for interim injunctive relief must be viewed in light of AEDPA, it is clear that the balance cannot tip on plaintiff's favor. Plaintiff's guilt and punishment have been the subject of years of litigation since the 1989 brutal murder of his wife. Permitting plaintiff to bring this § 1983 claim creates further delay and subverts Congress's efforts to achieve meaningful reform of the process by which federal courts review state capital judgments.

Legal challenges to lethal injection are not new so plaintiff could have brought his challenge long before now. For instance, challenges to lethal injections have been raised and rejected for almost two decades. See Heckler v. Chaney, 470 U.S. 821, 823, 105

S.Ct. 1649, 84 L.Ed.2d 714 (1985)(claim in civil suit that drugs used for execution by lethal injection not appropriately tested and likely to be administered by untrained personnel): Woolls v. McCotter, 798 F.2d 695, 697-698, cert. denied, 478 U.S. 1032, 107 S.Ct. 15, 92 L.Ed.2d 769 (1986) (5th Cir. 1986)(claims administration of sodium thiopental by untrained personnel in improper dosage violates the Eighth Amendment); State v. Moen, 309 Or. 45, 786 P.2d 111, 143 (1990)(claim chemicals used by state violate Eighth Amendment); Hill v. Lockhart, 791 F.Supp. 1388, 1394 (E.D. Ark. 1992)(possible difficulty locating a vein suitable for lethal injection claimed to be cruel and unusual punishment); State v. Deputy, 644 A.2d 411 (Del. 1994)(claim that state's procedures for lethal injection unconstitutional by failing to provide appropriate selection and training of person administering lethal injection); State v. Hinchey, 890 P.2d 602 (Ariz. 1995)(lethal injection allegedly unconstitutional because if carried out incorrectly it could be painful); State v. Webb., 252 Conn. 128, 138, 750 A.2d 448 (2000), cert. denied, 531 U.S. 835, 121 S.Ct. 93, 148 L.Ed.2d 53 (claim lethal injection creates a "high risk" inmate will experience "excruciating pain" because execution protocol does not ensure sufficient amount of thiopental sodium will be administered to render inmate unconscious); Sims v. State, 754 So.2d 657 (Fla. 2000), cert. denied, 528 U.S. 1183, 120 S.Ct. 1233, 145 L.Ed.2d 1112 (claim of lack of specific guidelines controlling the dosage, sequence, and delivery rates of lethal chemicals violates Eighth Amendment). Despite nearly two decades of legal precedent identifying challenges made to lethal injection,

plaintiff failed to raise any challenge to it in either state or federal court until now.

The equities in this case undeniably favor the State. Federal jurisprudence reflects an "enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'" Calderon v. Thompson, 523 U.S. at 555. In addressing the compelling state interest in finality, the Supreme Court said:

> Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. (citation omitted) To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' (citation omitted), an interest shared by the State and the victims of crime alike.

523 U.S. at 556.

Additionally, Nelson v. Campbell, ___ U.S. ___, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004), does not hold that claims such as plaintiff's may be brought as a § 1983 claim. In Nelson, the inmate suffered from a unique medical condition because Nelson's intravenous drug use had damaged his veins. Alabama officials proposed that a "cut-down" procedure would be necessary to carry out Nelson's execution. The "cut down" procedure required an incision into Nelson's arm or leg to access his veins. 124 S.Ct. at 2120. Thus, in his § 1983 action, Nelson was challenging the constitutionality of the procedure if it was used to gain access to his veins. 124 S.Ct. at 2123. In contrast, plaintiff makes a generic attack on Missouri's lethal injection of the kind that could be raised by any inmate awaiting execution in Missouri at any time. Plaintiff's very different

circumstances defeat any suggestion that the merits of his claim are affected by the decision in Nelson because the relief sought in Nelson was an alternative to the cut down procedure for Nelson's lethal injection. Here, plaintiff's relief is a bar to his execution. (Cmpl. ¶ ¶ 25-26). This interpretation is supported by the Tenth Circuit's decision in Bryan v. Mullin, 100 Fed.Appx. 801 (10th Cir. 2004). Bryan asserted that under Nelson he was entitled to seek an injunction barring his execution under 42 U.S.C. § 1983. The district court considered his case on the merits and dismissed it. The Tenth Circuit vacated the district court's order denying Bryan's complaint on the merits. The Tenth Circuit ruled that the district court lacked jurisdiction because the § 1983 complaint was a successive habeas petition. Id. at 802. The court stated that "[b]ecause Bryan is challenging the fact of his execution, as opposed to the narrow method in which is execution will be effecuated as in Nelson, he must proceed under § 2254. Id. at 803. See Robinson v. Crosby, 358 F.3d 1281, 1285 (11th Cir. 2004)(Robinson's complaint was functional equivalent of a successive habeas petition because Robinson's § 1983 complaint challenged the constitutionality of his execution by lethal injection and sought to avoid entirely execution by lethal injection).

Plaintiff brutally killed his wife fifteen years ago in 1989 and his rights have been the focus of litigation since then in which the fairness of his trial and validity of his conviction and sentence have been examined and repeatedly upheld in state and federal court. If plaintiff had genuine issues concerning lethal injection, he would have sought

relief from this Court long before 2004. The filing of this lawsuit is an attempt to delay the carrying out of his execution.

II. Lethal injection does not violate the Eighth Amendment.

Plaintiff's application for declaratory and injunctive relief should also be denied because his civil rights complaint is patently without merit. The assertion that plaintiff will suffer an excruciatingly painful death rests on plaintiff's own speculations.

The Eighth Amendment prohibits punishments that involve "'unnecessary and wanton inflictions of pain.'" Estelle v. Gamble, 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). It also prohibit those that are inconsistent with "evolving standards of decency that mark the progress of a maturing society" Estelle, 429 U.S. at 102 (quoting Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). Any punishment must be consistent with human dignity and comply with current civilized standards. Trop, 356 U.S. at 100-01.

Of the states that impose the death penalty, most use lethal injection either as the sole means of execution or as a possible option at the election of the inmate. Missouri is among 37 of the 38 states with the death penalty that use lethal injection as a method of execution. See Cooper v. Rimmer, 379 F.3d 1029, 1032 (9th Cir. 2004). "There is general agreement that lethal injection is at present the most humane type of execution available and many states have abandoned other forms of execution if favor of lethal

injection." Hill v. Lockhart, 791 F.Supp. 1388 (E.D. Ark. 1992). See LaGrand v. Lewis, 883 F.Supp. 469, 471 (D.Ariz. 1995)(citing cases that have affirmed the constitutionality of lethal injection.) Moreover, medical experts have urged that death by lethal injection is the most humane of any method of execution. See People v. Stewart, 520 N.E.2d 348, 358, cert. denied, 488 U.S. 900 (1988).

Finally, in Sims v. State of Florida, 754 S.2d 657 (Fla. 2000), the Florida Supreme Court considered an Eighth Amendment challenge to the use of sodium pentothal during the lethal injection. The court stated that the argument centered around "what may happen if something goes wrong," but the court concluded that "the list of horribles that could happen if a mishap occurs during the execution does not sufficiently demonstrate that the procedures currently in place are not adequate to accomplish the intended result in a painless manner . . . . Sims has not shown that the DOC procedures will subject him to pain or degradation if carried out as planned." Id. at 667-668. Thus, the court concluded that Florida's method of lethal injection did not violate the Eighth Amendment. Finally, like Missouri's method of lethal injection, the State of California uses two of the same chemicals: sodium pentothal and pancuronium bromide. The use of these chemicals has been upheld as constitutional. Cooper, 379 F.3d at 1032.

Thus, plaintiff's speculation concerning lethal injection fails to make the case that Missouri's method of lethal injection violates the Eighth Amendment.

III. Lethal injection does not violate due process.

Plaintiff claims that Missouri's lethal injection method violates his due process rights. (Cmpl. ¶ ¶ 4, 24-26). As the United States Supreme Court has held:

> [I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.

United States v. Lanier, 520 U.S. 259, 272, 117 S.Ct. 1219, 137 L.Ed.2d 432, n. 7 (1997).

Even if plaintiff's complaint is analyzed under Fourteenth Amendment principles, the result would not be different. While the Due Process Clause protects citizens against arbitrary government action, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" County of Sacramento v. Lewis, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). As the Supreme Court made clear: "[I]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officers is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." Id. at 847. Here, plaintiff fails to show conduct that shocks the conscience of contemporary society.

IV. Plaintiff fails to show exhaustion of administrative remedies.

The Complaint is also subject to dismissal because plaintiff failed to allege in his Complaint under 42 U.S.C. § 1983, that he has exhausted his administrative remedies as required by the Prison Litigation Reform Act (PLRA). 42 U.S.C. § 1997(e)(a). The

PLRA requires that "[n]o action shall be brought with respect to prison conditions under section 1983 . . . until such administrative remedies as are available are exhausted." § 1997e(a). This Circuit has held that in the absence of proof of exhaustion, dismissal is appropriate. McAlphin v. Morgan, 216 F.3d 680, 682 (8th Cir. 2000).

Conclusion

Plaintiff's Complaint has not established this Court's jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) nor does it state a claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants Kempker, Roper, and Purkett request that this Court dismiss each and every claim with prejudice, assess costs against plaintiff, and grant such other relief as the Court deems just and proper.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

/s/Denise G. McElvein
Denise G. McElvein
Assistant Attorney General
720 Olive Street, Suite 2150
St. Louis, MO 63101
(314) 340-7861 (telephone)
(314) 340-7029 (fax)

/s/Stephen D. Hawke
Stephen D. Hawke
Assistant Attorney General
1530 Rax Court
Jefferson City, MO 65109
(573) 751-3321 (telephone)
(573) 751-5391 (fax)

CERTIFICATE OF SERVICE

A copy of the foregoing was served in accordance with this Court's electronic filing procedures this 15th day of November, 2004 to:

Michael J. Gorla
720 Olive Street, Suite 1630
St. Louis, Missouri 63101

Christopher E. McGraugh
Leritz, Plunkert & Bruning, P.C.
One City Center, Suite 2001
St. Louis, Missouri 63101

/s/Denise G. McElvein