

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

MICHAEL ANTHONY TAYLOR, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 05-4173-CV-C-SOW
)	
LARRY CRAWFORD, Director,)	
Missouri Department of Corrections, et al.,)	
)	
Defendants.)	

ORDER

Plaintiffs, inmates confined in a Missouri penal institution, brought this case under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and its corresponding jurisdictional statute, 28 U.S.C. § 1343.

On September 26, 2005, defendants filed a motion to dismiss for failure to exhaust administrative remedies and for failure to state claim upon which relief can be granted. Plaintiffs responded on October 12, 2005, and defendants have replied.

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). When applying this standard, the court accepts as true the factual allegations in the complaint and views them in the light most favorable to the plaintiff. *Hishon v. King and Spalding*, 467 U.S. 69, 73 (1984); *Kohl v. Casson*, 5 F.3d 1141, 1148 (8th Cir. 1993).

Defendants first state that the claims raised by plaintiffs should be brought pursuant to habeas corpus, 28 U.S.C. § 2254. However, in this case, plaintiffs do not ask to have their sentences set aside, shortened or changed; they merely challenge the method of execution on the grounds, among others, that it is cruel and unusual, in violation of the Eighth Amendment to the United States Constitution because it inflicts unnecessary pain. Because it is a challenge to the method of execution, not the fact or timing of execution, it is not a habeas claim; rather,

a claim under the Eighth Amendment, which can properly be brought under 42 U.S.C. § 1983. *See, e.g., Nelson v. Campbell*, ___ U.S. ___, 124 S. Ct. 2117 (2004); *Wilkinson v. Dotson*, ___ U.S. ___, 125 S. Ct. 1242 (2005).

Defendants next challenge this case, brought under 42 U.S.C. § 1983, on the grounds that plaintiffs have failed to exhaust their administrative remedies, as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997(e)(a). Although defendants submit documentation that suggests this issue can be grieved to the Department of Corrections' grievance procedure, the failure to exhaust the grievance procedure is not jurisdictional. Furthermore, the issues in this case are similar, if not identical, to those raised in *Johnson v. Crawford*, No. 04-1075 (E.D. Mo. 2005), which was resolved in favor of defendants. If defendants had any willingness or desire to change the method of execution because of the pain inflicted, they would have done so in that case, and can do so anytime they see fit. Forcing plaintiffs to file a grievance would be a futile act. This court will not dismiss for failure to exhaust futile grievance procedures.

Defendants also claim that the method of execution is not cruel and unusual. That claim goes to the merits and will likely be decided on a motion for summary judgment or after a hearing, but is premature on a motion to dismiss, given the allegations in plaintiffs' complaint.

Defendants' other allegations of why this case should be dismissed lack merit.

IT IS, THEREFORE, ORDERED that defendants' motion to dismiss is denied [38].

/s/Scott O. Wright

SCOTT O. WRIGHT

Senior United States District Judge

Dated: 12-28-05