

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

VERNON BROWN,)	
)	
Plaintiff,)	
)	
v.)	No. 4:05-CV-746 (CEJ)
)	ECF
LARRY CRAWFORD, et al.,)	
)	
Respondents.)	

**MOTION TO DISMISS/SUGGESTIONS IN OPPOSITION
TO MOTION FOR TEMPORARY RESTRAINING ORDER**

This court should dismiss this action under Federal Rule of Civil Procedure 12(b)(1) and (6) because the court lacks jurisdiction and because the complaint fails to state a claim for which relief should be granted in that Brown's claims are proper only in a federal habeas corpus proceeding under 28 U.S.C. §2254. Further, this court should deny the motion for a temporary restraining order as Plaintiff Brown has unnecessarily delayed presenting his claim to this court.

Procedural History

On October 24, 1986, Brown strangled nine-year-old Janet Perkins to death with a rope. State v. Brown, 902 S.W.2d 278 (Mo. banc 1995). Brown was convicted in the Circuit Court of the City of St. Louis of first degree murder, §565.020, RSMo. 1994 and sentenced to death. The Missouri Supreme Court affirmed the conviction and sentence and affirmed the denial of post-conviction relief. State v. Brown, 902 S.W.2d 278, 283-84 (Mo. banc 1995), cert. denied, 516 U.S. 1031 (1995).

Plaintiff then filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Missouri. That court denied habeas relief on July 5, 2000. Vernon Brown v. Michael Bowersox, No. 4:95-CV-2326 (CEJ) (E.D. Mo.). The court of appeals affirmed. Vernon Brown v. Michael Bowersox, No. 00-3903 (8th Cir. Feb. 23, 2001), cert. denied sub nom. Brown v. Luebbers, 534 U.S. 1135 (2002). Plaintiff is also under a second death sentence. State v. Brown, 998 S.W.2d 531 (Mo. banc 1999).

On April 15, 2005 the Missouri Supreme Court issued an order setting Brown's execution date for May 18, 2005 for the Janet Perkins murder conviction.

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 sentence of death and plaintiff could have litigated the issue of lethal injection in his earlier federal habeas corpus action.¹ This §1983 challenge to lethal injection is the "functional equivalent of a successive habeas petition." Fugate v. Department of Corrections, 301 F.3d 1287, 1288 (11th Cir. 2002). Plaintiff makes

¹Plaintiff seems to have implicitly recognized this fact in that he filed a Rule 91 state habeas corpus petition in the Missouri Supreme Court. State ex rel. Brown v. Roper, No. 86762 (Mo. banc, May 3, 2005). The Missouri Supreme Court summarily denied the petition.

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 claim.

A state prisoner may not obtain equitable relief under §1983 when the federal habeas corpus statute is the exclusive remedial mechanism for obtaining the relief requested. Prieser v. Rodriguez, 411 U.S. 475, 487-90 (1973). When a §1983 action involves a challenge to an inmate's sentence, it must be raised by a habeas action. Heck v. Humphrey, 512 U.S. 477 (1994). The court of appeals has held that "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." William v. Hopkins, 130 F.3d 333, 336 (8th Cir. 1997) (challenge to electrocution), cert. denied, 522 U.S. 1010 (1997) quoting In Re Sapp, 118 F.3d 460, 462 (6th Cir. 1997), cert. denied sub nom. McQueen v. Sapp, 521 U.S. 1130 (1997); accord Felker v. Turpin, 101 F.3d 95, 96 (11th Cir. 1996), cert. denied, 519 U.S. 989 (1996); Hill v. Hopper, 112 F.3d 1088 (11th Cir. 1997); (§1983 challenge to constitutionality of electrocution "functional equivalent" of habeas petition, subject to procedural requirements governing second or successive habeas petition); but see Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996), vacated, Gomez v. Fierro, 519 U.S. 918 (1996). A challenge to the method of the imposition of sentence 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).

Plaintiff contends that he is not challenging the fact or duration of his confinement; thus, his case should not be deemed a federal habeas corpus petition (Complaint, page 23, paragraph 71). Plaintiff's assertion, however, is undercut by his prayer for relief seeking preliminary and permanent injunctive relief against the "current means, methods, practice, procedures and customs regarding execution by lethal injection." Not only does plaintiff request a permanent injunction as his objective, but also, he provides no "acceptable alternatives to the chemical used for injection." In Nelson v. Campbell, 541 U.S. 637 (2004), the offender offered acceptable alternatives to a "cut-down" procedure. 124 S.Ct. 2117, 2124 (2004). "Nelson's holding clearly requires that a capital defendant in order to assert a §1983 method-of-execution claim, must allege that, because there are alternative methods of execution, the challenged protocol is wholly unnecessary to proceeding with the execution." Aldrich v. Johnson, 388 F.3d 159 (5th Cir. 2004).

Plaintiff also refers to Dickinson v. Dotson, 125 S.Ct. 1242 (2005) (Memorandum of Law in Support of Complaint, page 6, paragraph 8). That decision concerned whether a modification to a parole file sounds in §1983 and did not address whether a method-of-execution claim is properly brought in a §1983 suit. Dotson is inapposite to the case at bar.

II. Brown is not entitled a temporary restraining order.

A. Standard of Review

The United States Court of Appeals for the Eighth Circuit has set out four factors for evaluating motions for a temporary restraining order:

(1) the probability of the movant's success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the issuance of the preliminary injunction is in the public interest. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc).

Coca-Cola Co. v. Purdy, 382 F.3d 774, 782 (8th Cir. 2004).

Although 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 (1998).

B. Brown failed to present timely his claim to this court.

As this traditional standard for interim injunctive relief must be viewed in light of AEDPA, the temporary restraining order (TRO) should not issue. Plaintiff's guilt and punishment have been the subject of litigation since the October 24, 1986 murder of nine-year-old Janet Perkins. Plaintiff's attempts to bring this §1983 claim would create further delay and subvert Congress' efforts to achieve meaningful reform of the process by which federal courts review the states' criminal justice systems.

Legal challenges to lethal injection are not new. Plaintiff could have brought his challenge long before now. Challenges to lethal injections have been raised and rejected for

two decades. See Heckler v. Chaney, 470 U.S. 821, 823 (1985) (claim in civil suit that drugs used for execution by lethal injection not properly tested and likely to be administered by untrained personnel); Woolls v. McCotter, 798 F.2d 695, 697-98, cert. denied, 478 U.S. 1032 (1986) (claims administration of sodium thiopental by untrained personnel in improper dosage violates the Eighth Amendment); State v. Moen, 786 P.2d 111, 143 (Ore. 1990) (claim chemicals used by state violated 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, 750 A.2d 448, 453-54 (Conn.), cert. denied, 531 U.S. 835 (2000) (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.), cert. denied, 528 U.S. 1183 (2000) (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 federal court until now.

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 has 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. In cases in which an inmate has attempted to use a §1983 action to halt his execution, the Supreme Court has held that “equity must take into consideration the State’s strong interest in proceeding with its judgment” and that “a court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.” Gomez v. U.S. Dist. Court for the N. Dist. of California, 503 U.S. 653, 654, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992). The Supreme Court further has held that “before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim” and “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.” Nelson v. Campbell, 541 U.S. 637, 124 S.Ct. 2117, 2126, 158 L.Ed.2d 924 (2004). In Harris v. Johnson, 376 F.3d 414 (5th

Cir. 2004), the court of appeals denied a TRO on the basis that the inmate delayed filing his request of a TRO until the “eve of execution,” six weeks before the execution.

Plaintiff brutally strangled nine-year-old Janet Perkins eighteen years ago, and his rights have been the focus of litigation since. The fairness of his trial and validity of his conviction and sentence have been examined and repeatedly upheld in state and federal courts. Plaintiff Brown could have raised his complaint concerning the method of execution long before now. Plaintiff has been on notice that he would be executed by lethal injection since his sentencing by the St. Louis City Circuit Court. If plaintiff had genuine issues concerning lethal injection, he could have sought relief from this court long before a week before his scheduled execution. The filing of this lawsuit is merely an attempt to delay the carrying out of his execution. The court should deny the motion for a temporary restraining order.

III. Plaintiff has not exhausted administrative remedies.

The complaint also may be dismissed because plaintiff fails to allege sufficiently that he has exhausted administrative remedies as required by 42 U.S. C. §1197(e)(a). This circuit has held that in the absence of proof of exhaustion of administrative remedies, dismissal is appropriate. McAlphin v. Morgan, 216 F.3d 680, 682 (8th Cir. 2000). Inmates are required to abide by the exhaustion requirements, even in capital cases. Nelson v. Campbell, 541 U.S. at 637.

Plaintiff has filed an “Informal Resolution Request,” an IRR, requesting postponement of all executions until “other remedies have been looked over” and “retesting of these chemicals” occurs. Plaintiff has been informed that the issue cannot be resolved at the institution level. He also was informed of his ability to appeal (Exhibit A).

The steps for exhausting administrative remedies are not complex. First, an inmate must file an Informal Resolution Request (IRR). Second, the inmate must file an Inmate Grievance form. Third, if the inmate is not satisfied with the grievance response, he or she may file an appeal within five working days of the response. Smith v. Stubblefield, 30 F.Supp. 2d 1168, 1174 (E.D. Mo. 1998). Plaintiff has not completed this process.

Plaintiff argues that defendants are inconsistent in asserting the administrative remedy requirement (Complaint, Para. 44, 54). He asks this Court to infer that because the state did not challenge in pre-trial motions the assertion that Johnston’s IRR was “non-grieveable.” that there are no administrative remedies for inmates to exhaust. However, in his IRR Johnston asked the local institution to change Department of Corrections policy with regard to lethal injection. This change in policy could not be made by the institution and Johnston did not appeal to a higher level, as he could have done. Because Johnston failed to appeal, he did not exhaust his administrative remedies. While the district court in Johnston will have to resolve the legal and factual issues, the state has consistently maintained in that case and this case that an inmate must exhaust administrative remedies.

In both the Jones litigation and the now-pending Johnston litigation, defendants asserted the exhaustion defense. In Jones, the offender had made no effort to exhaust administrative remedies (Complaint, para 54). In Johnston, the document showed the offender filed an IRR, but pursued no administrative appeal of the IRR's resolution, as required in the Smith decision. Given the nature of Johnston's IRR, it would require a change in Department of Corrections' policy to postpone his execution, not the policy of the local institution. Accordingly, an appeal by him to the Department level would be necessary of exhaustion of administrative remedies. Moreover, Mr. Johnston requested relief in the IRR was that he not be executed, a request that plaintiff attempts to distance himself from in his complaint (Complaint). The Department of Corrections is not inconsistent in its position. The facts of the specific cases are different.

Conclusion

Wherefore, for the reasons herein stated, respondents pray that the Court dismiss the petition for lack of jurisdiction and failure to state a claim for which relief could be granted under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Further, defendants pray the court deny the motion for a temporary restraining order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a
true and correct copy of
the foregoing was sent via
this court's ECF service
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