

OCT 25 2005

Michael N. Milby, Clerk of Court

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

| | | |
|---|---|----------------------|
| MELVIN WAYNE WHITE, | X | |
| | X | |
| Plaintiff, | X | |
| | X | |
| v. | X | Civil Action 05-3648 |
| | X | |
| GARY JOHNSON, Executive Director | X | |
| Texas Department of Criminal | X | |
| Justice, DOUG DRETKE, Director, Correctional | X | |
| Institutions Division, Texas Department of Criminal | X | |
| Justice, CHARLES O'REILLY, Senior Warden, | X | |
| Huntsville Unit, Huntsville, Texas, and | X | |
| UNKNOWN EXECUTIONERS, | X | |
| | X | |
| Defendants. | X | |

MEMORANDUM AND ORDER

Plaintiff Melvin Wayne White ("White") is a Texas death row inmate. He has filed an action seeking injunctive relief under 42 U.S.C. § 1983 to bar his execution by means of the execution protocol currently employed by the State of Texas. For the reasons stated below, the Court *sua sponte* dismisses the complaint with prejudice.

I. Background

White was convicted of capital murder and sentenced to death, and the Texas Court of Criminal Appeals affirmed his conviction and sentence. White unsuccessfully petitioned for state and federal habeas corpus relief. On October 11, 2005, following denial of federal habeas corpus relief, the Supreme Court denied White's petition for a writ of certiorari.

On October 21, 2005, White filed his complaint initiating this action under 42 U.S.C. § 1983. In his complaint, White asserts that the combination of drugs used by the State of Texas in

administering lethal injections may have the effect of paralyzing the prisoner while leaving him fully conscious to experience excruciating pain as the drug cocktail renders him unable to breathe and causes cardiac arrest. He further alleges that, due to his medical condition, the State will use unnecessarily invasive procedures to obtain access to his veins. He seeks injunctive relief barring the use of Texas' execution protocol and barring the use of invasive procedures for venous access unless the State can prove that such procedures are medically necessary.

Because White's execution is scheduled for November 3, 2005, and, under controlling law, he is not entitled to relief, this Court will not wait for the defendants to answer the complaint.

II. Analysis

A. Standard of Review

A court may *sua sponte* dismiss a prisoner's complaint when the complaint fails to state a claim upon which relief can be granted. *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir.), *cert. denied*, 525 U.S. 865 (1998). In determining whether to so dismiss a complaint the court must apply the same standard as it would in ruling on a motion to dismiss under Fed.R.Civ.P. 12(b)(6). *Id.* Under that standard, the complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true. *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442 (5th Cir.), *cert. denied*, 476 U.S. 1159 (1986). A district court may not dismiss a complaint under rule 12(b)(6) "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). This strict standard of review under rule 12(b)(6) has been summarized as follows: "The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5 Charles A. Wright & Arthur R. Miller,

Federal Practice and Procedure § 1357, at 601 (1969).

B. White's Complaint

White seeks temporary and permanent injunctive relief barring Texas' use of its execution protocol and certain medical procedures. Equitable relief should be denied, however, when the plaintiff is dilatory in bringing his action so as to delay execution of his sentence. "Equity must take into consideration the State's strong interest in proceeding with its judgment . . . A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez v. United States District Ct.*, 503 U.S.653, 654 (1992) (per curiam). By the time he filed his complaint, White has been under a sentence of death for at least six years.¹

White filed his complaint only ten days after the Supreme Court denied certiorari on his federal habeas corpus petition. *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) makes clear, however, that White nonetheless waited too long.

Harris, like White had spent years on Texas' death row and filed his § 1983 complaint shortly after the Supreme Court denied certiorari on his federal habeas corpus petition. The Fifth Circuit, over a dissent by Judge Dennis, nonetheless concluded that Harris was dilatory. "Harris cannot excuse his delaying until the eleventh hour on the ground that he was unaware of the state's intention to execute him by injecting the three chemicals he now challenges." *Id.* at 417. The Fifth Circuit noted that the denial of certiorari may have increased the urgency for the plaintiff, "but it also entitled the state to set a date for, and proceed with, his execution." *Id.*

¹ The complaint does not give the date of White's conviction. The Texas Department of Criminal Justice Death Row website, however, notes that White entered death row on June 21, 1999. See <http://www.tdcj.state.tx.us/stat/whitemelvin.htm>.

The Fifth Circuit also rejected Harris' argument that the claim was previously unavailable because society's standards of decency had not yet evolved to the point where the execution protocol violated the Eighth Amendment. The court observed that a condemned inmate always has the incentive to wait and see if there is such an evolution in societal standards, but that this incentive does not entitle him to file so near his execution date that the adjudication of his claims, regardless of the outcome, will inevitably delay the execution.

The facts, as related in White's complaint, are not distinguishable in any significant way from the facts of *Harris*. Therefore, Fifth Circuit precedent requires dismissal of White's complaint.

III. Order

For the foregoing reasons, it is ORDERED that the Complaint (Docket Entry 1) is **Dismissed With Prejudice**.

The Clerk shall notify all parties and provide them with a true copy of this Order.



KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

Houston, Texas
October 25, 2005