Exhibit 10

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EDWARD JEROME HARBISON, Plaintiff, vs. GEORGE LITTLE, in his official capacity as Tennessee's Commissioner of Correction; RICKY BELL, in his official capacity as Warden, Riverbend Maximum Security Institution, JOHN DOE PHYSICIANS 1-100; JOHN DOE PHARMACISTS 1-100; JOHN DOE MEDICAL PERSONNEL 1-100; JOHN DOE EXECUTIONERS 1-100; JOHN DOES 1-100, Defendants.	)	No. 3:06-cv-01206 JUDGE TRAUGER

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS
OF DEFENDANTS LITTLE, BELL AND TDOC EMPLOYEE JOHN DOES

Defendants George Little, Ricky Bell, and the TDOC employee John Does, appearing in their official capacities only, have moved, pursuant to Fed. R. Civ. P. 12(b)(6), for this Court to dismiss this case for failure to state a claim for which relief can be granted.

The defendants submit the following in support of this motion

PRELIMINARY STATEMENT

The plaintiff in this action is a condemned inmate residing at Riverbend Maximum Security Institution, (Riverbend), in Nashville, Davidson County, Tennessee. His execution by lethal injection is scheduled for February 22, 2007.[1] The essence of the plaintiff's complaint is that the State intends to use a protocol whereby he would be injected with a dose of sodium thiopental, then with a dose of pancuronium bromide (Pavulon), and then with a dose of potassium chloride. The plaintiff contends that the use of this protocol is unconstitutional. He contends that the sodium thiopental does not sufficiently anesthetize any individual. He contends that the use of pancuronium bromide is arbitrary, serves no legitimate interest, unreasonably risks the infliction of torture, and offends the dignity of humanity. He contends that its use violates equal protection. He contends that the potassium chloride causes excruciating pain and does not stop the heart. He contends that the use of this mixture of chemicals causes an unnecessarily painful and prolonged death experienced without total unconsciousness. He contends that this Court should enter a judgment declaring the use of pancuronium bromide unconstitutional and enjoining its use. He contends that this Court should declare the protocol unconstitutional and enjoin its use under the Eighth, Ninth, and Fourteenth Amendments. (Complaint, ¶¶ 1-2) The plaintiff also contends that the Department of Correction's (TDOC) failure to require sufficient training, credentials, certification, experience, or proficiency of the personnel involved in the administration of the lethal injection procedure

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[1] The plaintiff is represented by Federal Defender Services of Eastern Tennessee, Incorporated. This Community Defender Organization has been authorized by the Criminal Justice Act Plan of the Eastern District of Tennessee to provide representation and related defense services to eligible persons pursuant to the Criminal Justice Act, as amended, 18 U.S.C. § 3006A(g)(2)(B). It is unclear what authority they have to bring this civil action in the Middle District on behalf of the plaintiff.

greatly increases the risk that a conscious prisoner will experience excruciating pain (Complaint, ¶ 118). The defendants in this action are George Little, TDOC Commissioner of the Tennessee Department of Correction, in his official capacity, and Ricky Bell, Warden of Riverbend, in his official capacity. (Complaint, ¶¶ 3-4). The plaintiff also names John Doe defendant physicians, pharmacists, medical personnel, executioners, and any and all other persons involved in the plaintiff's execution. (Complaint, ¶¶ 5-9) [2] The Office of Attorney General and Reporter has only accepted service of the John Doe defendants who are actually TDOC employees in their official capacity only.

The Tennessee Supreme Court affirmed the plaintiff's conviction of first-degree murder and imposition of the death sentence on February 3, 1986. *State v. Harbison*, 704 S.W.2d 314 (Tenn. 1986). The Sixth Circuit Court of Appeals affirmed the Eastern District's denial of his petition for *habeas corpus* relief on April 29, 2005. *Harbison v. Bell*, 408 F.3d 823 (6th Cir. 2005). On April 26, 2006, the United States Supreme Court denied certiorari. On July 17, 2006, the Tennessee Supreme Court set the plaintiff's execution for October 11, 2006. *State v. Edward Jerome Harbison*, No. M1986-00093-SC-OT-DD (Tenn. July 17, 2006) (order setting date of execution) (copy attached). In that order, the Tennessee Supreme Court also appointed the state Post-Conviction Defender to represent the plaintiff. *Id.* The Post-Conviction Defender moved to withdraw as counsel but offered to help the Court find substitute counsel. The Court denied that motion. However, on August 15, 2006, the Tennessee Supreme Court *sua sponte* re-set the plaintiff's execution for February 22, 2007. *State v. Edward Jerome Harbison*, No.

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[2] The filing of a complaint against "John Doe" defendants does not toll the running of the statute of limitations against those parties. *See Cox v. Treadway*, 75 F.3d 230 (6th Cir. 1996); *Bufalino v. Michigan Bell Telephone Co.*, 404 F.2d 1023, 1028 (6th Cir. 1968). Thus, to the extent the plaintiff seeks to bring any complaint against any other individual or entity, he must identify the defendant and file a lawsuit within the one-year statute of limitations applicable to § 1983 actions. Tenn. Code Ann. § 28-3-104(a).

M1986-00093-SC-OT-DD (Tenn. August 25, 2006) (order resetting date of execution) (copy attached)

ARGUMENTS

I. THE PLAINTIFF HAS BEEN DILATORY IN FILING HIS COMPLAINT SEEKING EQUITABLE RELIEF.

The plaintiff filed his complaint on December 19, 2006 — a mere sixty-five days prior to his scheduled execution. The plaintiff had abundant opportunities to challenge the lethal injection protocol well before that. Delays in bringing challenges to execution protocols are inexcusable. In *McQueen v. Patton*, 118 F.3d 460, 464 (6th Cir. 1997), the Sixth Circuit addressed the equity of allowing a dilatory challenge:

> Even were we to consider the merits of McQueen's claim, we would not permit his claim that death by electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Petitioner has known of the possibility of execution for over fifteen years. It has been ten years since a Kentucky governor first signed a death warrant for his electrocution. The legal bases of such a challenge have been apparent for many years. Indeed, petitioner's claims on the merits are replete with supporting arguments based on events and reasoning from every decade from the 1910s to the 1990s, even discounting the material cited to "Startling Detective" and "News of the Weird" (Memo in Support of Motion for Temporary Restraining Order and Preliminary Injunction, at 31, n. 87 and App. 2, n.6.) Even though, in petitioner's mind, every year or every day may bring new support for his arguments, the claims themselves have long been available, and have needlessly and inexcusably been withheld. Thus, equity would not permit the consideration of this claim for that reason alone, even if jurisdiction were otherwise proper.

(Citations omitted). Likewise, in *Hicks v. Taft*, 431 F.3d 916 (6th Cir. 2005), the Court concluded that a stay of execution was not warranted where an inmate, on the eve of his execution, moved to intervene in another inmate's challenge to the constitutionality of Ohio's lethal injection protocol. *See also Smith v. Johnson*, 440 F.3d 262, 263 (5th Cir. 2006)

(affirming dismissal of § 1983 action challenging lethal injection procedures due to plaintiff's dilatory filing, *i e* , five days before the execution); *accord Kincy v Livingston*, 2006 WL 775126 (5th Cir Mar 27, 2006) (copy attached) (twenty-seven days before the execution); *Hughes v Johnson*, 2006 WL 637906 (5th Cir Mar 14, 2006) (copy attached) (fourteen days before the execution)

More recently, in the case of *Alley v Little*, 181 Fed Appx 509 (6th Cir 2006), *cert denied*, 126 S Ct 2973 (2006) (copy attached), the Sixth Circuit Court of Appeals vacated an injunction and stay entered by the United States District Court against the execution of Sedley Alley, a condemned Tennessee inmate Among other things, the Sixth Circuit based its decision on the unnecessary delay with which Alley had brought his challenge to the lethal injection protocol

> Fourth, we take note of the unnecessary delay with which Alley brought his challenge to Tennessee's lethal injection protocol He was on notice as to both the particulars of the protocol and the availability of making a claim such as the one he now raises for several years before he filed his last minute complaint Another Tennessee death row inmate, Abu-Ali Abdur'Rahman, petitioned the state Commissioner of Correction to declare the lethal injection protocol unconstitutional in April 2002 *Abdur'Rahman v Bredesen*, 181 S W 3d 292, 299-300 (Tenn 2005) Alley's execution date was set on January 16, 2004, for June 3rd of that year, following the Supreme Court's denial of a writ of certiorari to review our court's decision not to grant habeas relief *Alley v Bell*, 540 U S 839, 124 S Ct 99, 157 L Ed 2d 72 (2003); *State v Alley*, No M1991-00019-SC-DPE-DD (Tenn Jan 16, 2004) Lethal injection has been the only method of execution in Tennessee since 2000 for all death row inmates save those who affirmatively express a preference for electrocution Tenn Code Ann § 40-23-114 Alley had ample time in which to express such a preference and/or file his current grievance Instead he waited until thirty-six days before his currently scheduled execution date

Id at 513

"[W]aiting to file such a challenge [to the method of execution] just days before a scheduled execution constitutes unnecessary delay." *Smith*, 440 F.3d at 263 (*citing Harris v. Johnson*, 376 F.3d 414, 417-419 (5th Cir. 2004)). "'Given the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against' last-minute equitable requests." *White v. Johnson*, 429 F.3d 572, 574 (5th Cir. 2005) (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). "This presumption occurs because the inmate could have brought the action at an earlier time, which would have allowed the court to consider the merits without having to utilize last-minute equitable remedies." *Id.* Here, plaintiff could easily have filed his lawsuit years ago; "[b]y waiting as long as he did, [plaintiff] leaves little doubt that the real purpose behind his claim is to seek delay of his execution . . ." *Harris*, 376 F.3d at 418. A Court of equity must not countenance such dilatory tactics; particularly so here, since at this juncture, with plaintiff having long since been denied federal habeas corpus relief from his conviction and sentence, "the State's interests in finality are all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). "Finality serves . . . to preserve the federal balance . . . [The] federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." *Id.*, 523 U.S. at 556 (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)).

The plaintiff has known about his affirmed death sentence conviction since 1986. He has known about the denial of his petition for *habeas corpus* relief since April of 2005. Certiorari was denied in April 2006. The plaintiff's execution was first set in July of 2006. Yet the plaintiff waited until seven months after the denial of certiorari, five months after his execution was set, and sixty-five days prior to his scheduled execution to file his complaint. This brief window of time is an insufficient period in which to serve a complaint, conduct discovery, depose experts, and litigate the issues on the merits. Only a stay of execution would

permit the issues to be fully litigated. The plaintiff delayed filing his complaint until the eleventh hour in hopes of obtaining a stay of his execution. The plaintiff has been dilatory in filing his complaint without any justification other than delaying his own execution; therefore, his action should be dismissed.

II. THE STATUTE OF LIMITATIONS BARS THE PLAINTIFF'S ACTION.

There is no specific statute of limitations for actions arising under 42 U.S.C. § 1983. When Congress has not established a time limitation for a federal cause of action, the settled practice by federal courts has been to adopt a local time limitation as federal law if it is not inconsistent with the federal law or policy to do so. *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). More specifically, federal courts should look to the most analogous state statute of limitations to apply to a claim for personal injury under 42 U.S.C. § 1983. *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980).

Tenn. Code Ann. § 28-3-104(3) provides that civil actions for compensatory or punitive damages, or both, under the federal civil rights statutes must be brought within one year after the cause of action accrues. This statutory provision has been held by the Sixth Circuit to be the applicable statute of limitation with respect to section 1983 actions brought in the State of Tennessee. *Berndt v. State of Tennessee*, 796 F.2d 879 (6th Cir. 1986).[3] Therefore, the plaintiff in this case is limited to one year after the accrual of his claim within which to bring an action under 42 U.S.C. § 1983.

Although the duration of the statute of limitations for actions under 42 U.S.C. § 1983 is governed by state law, federal law governs when the statute begins to run. *Sharpe v.*

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[3] This one year statute of limitation has been extended to suits for injunctive relief under 42 U.S.C. § 1983. *See Cox v. Shelby State Community College*, 48 Fed.Appx. 500, 507 (6th Cir. 2002) (copy attached).

Cureton, 319 F 2d 259, 266 (6th Cir 2003), *cert denied*, 540 U S 876, 124 S Ct 228, 157 L Ed 2 138 (2003). Under federal law, the "discovery rule" applies to establish the date on which the statute of limitations begins to run, i e , when the plaintiff knew or in the exercise of due diligence should have known of the injury that forms the basis of his or her action. *Sevier v Turner*, 742 F 2d 262, 273 (6th Cir 1984). The test is an objective one. The Court must determine "what event should have alerted the typical lay person to protect his or her rights." *Dixon v Anderson*, 928 F 2d 212, 215 (6th Cir 1991)

The plaintiff herein has been a death-row inmate in Tennessee since before 1986. His death sentence and conviction were affirmed by the Supreme Court of Tennessee on February 3, 1986 *State v Harbison*, 704 S W 2d 314 (Tenn 1986) In June of 1998, shortly after the legislature enacted lethal injection as a means of execution, the TDOC Commissioner appointed a committee to establish a lethal injection protocol. *Abdur'Rahman v Bredesen*, 181 S W 3d 292, 300 (Tenn 2005). On May 18, 1998, the Tennessee General Assembly amended Tenn Code Ann § 40-23-114 to provide that an inmate sentenced to death by electrocution could be executed by lethal injection if the inmate waived his right to die by electrocution and affirmatively chose to die by lethal injection. Chap 982 of the Public Acts of 1998. On March 30, 2000, the Tennessee General Assembly amended Tenn Code Ann § 40-23-114 to provide that an inmate sentenced to death by electrocution would be executed by lethal injection unless the inmate affirmatively chose to die by electrocution Chap 214 of the Public Acts of 2000. Thus, the plaintiff knew or in the exercise of due diligence should have known about the amendments to Tenn Code Ann § 40-23-114 as early as May of 1998 and March of 2000. And, this lethal injection protocol was used in the execution of Robert Glen Coe in April of 2000 *Id* at 301. Thus, the plaintiff knew or in the exercise of due diligence should have known about the lethal injection protocol as early as April of 2000.

On June 1, 2003, Chancellor Ellen Hobbs Lyle of the Chancery Court for the State of Tennessee, Twentieth Judicial District, Davidson County, Part III, issued her Memorandum and Order in which she held that the TDOC lethal injection protocol does not violate the United States Constitution or the Tennessee Constitution. *Abu-Ali Abdur'Rahman v Don Sundquist, et al.*, In the Chancery Court for the State of Tennessee, Twentieth Judicial District, Davidson County, Memorandum and Order (copy attached). Thus, without question, the plaintiff knew or in the exercise of due diligence should have known about the lethal injection protocol and that it had been upheld as constitutional in June of 2003.

The plaintiff's complaint herein was filed on December 19, 2006. The statute of limitations on his cause expired in June of 2004, at the latest. The plaintiff's complaint is barred by the statute of limitations.

III. PLAINTIFF'S CHALLENGE TO TENNESSEE'S LETHAL INJECTION PROTOCOL HAS ALREADY BEEN ADJUDICATED AND REJECTED; HIS CLAIMS SHOULD BE SUMMARILY DISMISSED ON THE MERITS, AS THE FACTS ARE INSUFFICIENT TO WARRANT RELIEF.

The challenge that the plaintiff presents to Tennessee's lethal injection protocol has already been fully litigated and adjudicated in state court. In *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005), *cert. denied* (2006), the Tennessee Supreme Court rejected an Eighth Amendment challenge to the protocol, holding that the prisoner there had "failed to establish that the lethal injection protocol is cruel and unusual punishment under the United States or Tennessee constitutions." 181 S.W.3d at 309. The court also rejected a Due Process challenge to the protocol, holding that the prisoner had "failed to demonstrate a violation of either procedural or substantive due process under the United States or Tennessee constitutions." *Id.*, 181 S.W.3d at 310.

In so holding, the court concluded that Tennessee's lethal injection protocol was consistent with contemporary standards of decency, finding that "the evidence in this case has established that Tennessee's lethal injection protocol is consistent with the overwhelming majority of lethal injection protocols used by other states and the federal government." *Id.*, 181 S.W.3d at 307.[4] The court further concluded that the protocol did not "offend[] either society or the inmate by the infliction of unnecessary physical or psychological pain and suffering." *Id.* "[A]lthough it was undisputed that the injection of Pavulon and potassium chloride would alone cause extreme pain and suffering, all of the medical experts who testified before the Chancellor agreed that a dosage of five grams of sodium Pentothal as required under Tennessee's lethal injection protocol causes nearly immediate unconsciousness and eventually death." *Id.*, 181 S.W.3d at 307-308. The court also rejected arguments for how perceived deficiencies in the protocol's procedures heighten the risk, finding that such arguments "simply are not supported by the evidence in the record." *Id.*, 181 S.W.3d at 308. The court went on to conclude, with respect to the Due Process challenge, that "there is nothing arbitrary, irrational, improper or egregious in the manner in which the Department implemented a lethal injection protocol, i.e., by studying the lethal injection protocols of other states and the federal government and by using those protocols as models for the creation of Tennessee's protocol." *Id.*, 181 S.W.3d at 310. And it reiterated in this context that "there is no evidence that the Tennessee lethal injection protocol creates an unreasonable risk of unnecessary pain and suffering." *Id.*

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[4] Recently, lethal injection protocols similar to Tennessee's were deemed not to be unconstitutional. In *Walker v. Johnson*, 448 F.Supp.2d 719 (E.D. Va. 2006), the district court concluded that Virginia's three-drug protocol did not create a substantial risk of harm and that adherence to the protocol would not cause the plaintiff to suffer torture or lingering death. In *Baze v. Rees*, 2006 WL 33586544 (Ky. 2006)(copy attached), the Kentucky Supreme Court held that Kentucky's lethal injection method did not violate the Eighth Amendment's ban on cruel and unusual punishment

Tennessee's highest court has thus already squarely addressed and rejected the same constitutional challenges to the state's lethal injection protocol that the plaintiff now presents to this Court.[5] Notwithstanding this fact, the plaintiff will no doubt contend that this state court precedent is merely persuasive authority and, thus, not binding on this Court. *See RAR, Incorporated v. Turner Diesel, Limited*, 107 F.3d 1272, 1276 (7th Cir. 1997).[6]

As found by the state trial court after an evidentiary hearing, the method of lethal injection in Tennessee consists of the injection of three drugs: sodium thiopental (Pentothal), pancuronium bromide (Pavulon), and potassium chloride. Seven syringes are prepared: one syringe of Pentothal, two syringes of Pavulon, two syringes of potassium chloride, and two syringes of saline.[7] Then seven exact replicas of these syringes are prepared as backups. The syringes are labeled 1 through 7 in the sequence that they are to be injected, namely, Pentothal, saline, Pavulon, saline, and potassium chloride. They are also color-coded based on the contents of the syringe. Abdur'*Rahman*, No. 02-2236-III, Order, pp. 3-4.

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[5] Defendants acknowledge that, in addition to his Eighth Amendment and Due Process claims, plaintiff brings an Equal Protection claim and a Ninth Amendment claim. But for the reasons discussed below, these claims are likewise subject to summary disposition on the merits.

[6] State court precedent is binding, however, as to issues of state law. *See id.* And the Tennessee Supreme Court also held in *Abdur 'Rahman* that the Tennessee Nonlivestock Humane Death Act, Tenn. Code Ann. § 44-17-301 *et seq*, had no application to the capital punishment context. 181 S.W.3d at 313. This holding alone warrants the dismissal of plaintiff's Equal Protection claim, Complaint, ¶¶ 88-90, as well as part of his Eighth Amendment claim, Complaint, ¶¶ 82-87, as these claims are predicated on the application of this statute.

[7] "The Pentothal comes in a powder form which [the warden] is required to mix with sterile water with the use of syringes. He sticks a needle into the sterile water vial, withdraws the necessary amount to mix with the Pentothal powder. He then shakes the mixture and draws it into a big syringe with sterile water. The shelf life of the Pentothal mixture is very short, 24 hours or less. The shelf life of the powder is much longer, in the range of six months. That is why the Pentothal is not converted to a liquid state until just before the execution." *Id.*, p. 3.

After the inmate is transported to the execution chamber, IV catheters are placed in both of the inmate's arms by certified EMT paramedics. After the flow of normal saline is begun, the paramedics leave the execution chamber. The warden, deputy warden, and a chaplain remain. The executioner is located in a room next to the execution chamber, but behind a window with a portal for the IV lines. There is also a camera above the gurney in the execution chamber and a monitor in the executioner's room. *Id.*, p. 4.

At the appropriate time, the warden signals the executioner to begin the sequential injection of the three drugs into the IV tubing connected to the catheter in the inmate's arm. The camera and monitor allow the executioner to observe the flow of the drugs to the IV; the warden, who is located approximately a foot from the inmate's head, can also see the flow of the drugs through the tubing and can notify the executioner if problems are encountered. Following the injection of the drugs and a five-minute waiting period, the inmate is examined by a physician, who pronounces death. *Id.*, pp. 4-5.

The state court found that "[this] method was shown by the proof to be reliable in rendering an inmate unconscious, if not dead, before the paralytical and lethal painful drugs take effect." *Id.*, p. 2. "[S]ome 30 states use the same lethal injection method as Tennessee, including use of Pavulon. Tennessee copied other states in developing its method." *Id.*, pp. 8-9. While the court did find, as plaintiff says, "that the State failed to provide any proof of the reasons for [the use of Pavulon] in the lethal injection method" and, thus, that it was "unnecessary" *id.*, pp. 12, 13, it nevertheless also found that "there is less than a remote chance that the condemned would ever be conscious by the time the Pavulon was administered." *Id.*, p. 13.

> All of the experts testified that if the lethal injection method proceeds as planned it will not result in physical or psychological suffering: the five grams of Pentothal will render the prisoner

> unconscious or dead, Pavulon is injected and paralyzes the prisoner, and the sodium (sic) chloride stops the heart.

Id., p. 14.[8]

The plaintiff in the present action also alleges that the TDOC's failure to require sufficient training, credentials, certification, experience, or proficiency of the personnel involved in the administration of the lethal injection procedure greatly increases the risk that a conscious prisoner will experience pain (Complaint, ¶ 118). However, the state court rejected arguments based on perceived deficiencies in the protocol's procedures, *i.e.*, the use of Pentothal, the lack of physical proximity between the inmate and the executioner, color-coding of the syringes, and the lack of physician involvement. *Id.*, pp. 9-11. It found that procedures followed in a medical, surgical setting are "distinguishable from an execution," where "[a] paramount concern . . . is security." *Id.*, p. 9. The court also found that "[t]he warden has been trained on detecting problems such as crimping of the IV line, or failure of the injection to go into the vein." *Id.*, p. 10. The court credited the testimony of Warden Bell regarding "precautions taken and training engaged in to minimize error". *Id.*, p. 16. The court also credited "the direct evidence of the effects of the Tennessee lethal injection method in question," namely, the autopsy results of a previously executed Tennessee inmate, Robert Glenn Coe. *Id.*, p. 15.

> The autopsy revealed that the level of Pentothal remaining in the body after prisoner Coe's execution was not only therapeutic, i.e. the prisoner lost consciousness before the effects of the Pavulon, but it was at a lethal level. The therapeutic, lethal level of Pentothal in the body following execution demonstrates that *the potency of the Pentothal was in no way compromised and that there was no problem with the IV injection and intake.*

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[8] "A large dose of Pentothal is applied in the Tennessee lethal injection method — five grams. The testimony from the experts was that a dosage in this amount in and of itself should result in death." *Id.*, p. 10.

Id. (emphasis added) Accordingly, the court ultimately found "that there is less than a remote chance that the prisoner will be subjected to unnecessary physical pain or psychological suffering under Tennessee's lethal injection method." *Id.*, p. 17

In *Abdur'Rahman v. Bredesen, supra,* the Tennessee Supreme Court stated as follows:

> In addition, we agree with the Court of Appeals' observation that we cannot judge the lethal injection protocol based solely on speculation as to problems or mistakes that *might* occur. We must instead examine the lethal injection protocol as it exists today. The Supreme Court of Connecticut has reached the same conclusion:
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> > The defendant's argument is premised on a series of presumptions: that the personnel will not be trained adequately; that the dosage of thiopental sodium ten times the surgical dose will not be sufficient to render the inmate unconscious; and that the agents will not be administered in the proper time and sequence. The evidence, however, supports a conclusion that reasonable steps have been taken to eliminate human error. . . We conclude . . . that the agents may be administered correctly and effectively, and that the possibility of a 'botched' execution is extremely remote under the protocol. *Webb*, 750 A.2d at 456.

Id. at 308.

Thus, the Chancery Court and Tennessee Supreme Court have already considered allegations relating to the training of the TDOC personnel who implement the protocol and found the protocol to be constitutional.[9]

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[9] It should be noted that a failure to train claim is only actionable under 42 U.S.C. § 1983 when the failure to train amounts to "deliberate indifference." *Gregory v. City of Louisville*, 444 F.3d 725, 753 (6th Cir. 2006). Additionally, the allegations of failure to train are conclusory. It is well settled that a complaint is not sufficient to state a cause of action for violations of constitutional or civil rights if its allegations are conclusory. *Smith v. Rose*, 760 F.2d 102 (6th Cir. 1985).

In light of the above, the defendants contend that the plaintiff's challenges to Tennessee's lethal injection protocol has already been fully litigated and adjudicated in state court, and his action is due to be dismissed.

IV. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR VIOLATION OF THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause of the Fourteenth Amendment is "essentially a direction that all persons similarly situated be treated alike." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985). The Equal Protection Clause is violated when a state actor intentionally discriminates against a member of a protected class because of the person's membership in such class. *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 341 (6th Cir. 1990).

In this case the plaintiff asserts an equal protection claim because he is subject to execution through the use of pancuronium bromide while under the Nonlivestock Animal Humane Death Act, Tenn. Code Ann. §§ 44-17-301 et seq., the State protects pets including dogs, cats, rabbits, chicks, ducks, and pot-bellied pigs from the use of pancuronium bromide when being euthanized. This argument must fail for obvious reasons. The Equal Protection Clause prohibits disparate treatment of those similarly situated. The plaintiff is a human being and, therefore, is not similarly situated with a pet. Also, execution by lethal injection is not by definition equivalent to "euthanasia" as that word is commonly applied to human beings. The circumstances under which pets may be euthanized and those attendant to the execution of a human being are so wholly different as to render any comparison pointless.

CONCLUSION

In light of the above, defendants Little, Bell, and the state-employee John Does, appearing in their official capacity only, move that the plaintiff's complaint be dismissed for failure to state a claim

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2007, a copy of the foregoing response was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

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