

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

<b>PERVIS PAYNE,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>No. 3:06-0825</b>
	)	<b>JUDGE HAYNES</b>
<b>GEORGE LITTLE, in his official capacity as Tennessee's Commissioner of Correction;</b>	)	
	)	
<b>RICKY BELL, in his official capacity as Warden, Riverbend Maximum Security Institution,</b>	)	
	)	
<b>JOHN DOE PHYSICIANS 1-100;</b>	)	
	)	
<b>JOHN DOE PHARMACISTS 1-100;</b>	)	
	)	
<b>JOHN DOE MEDICAL PERSONNEL 1-100;</b>	)	
	)	
<b>JOHN DOE EXECUTIONERS 1-100;</b>	)	
	)	
<b>JOHN DOES 1-100,</b>	)	
	)	
<b>Defendants.</b>	)	

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**MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS  
OF DEFENDANTS LITTLE AND BELL**

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Defendants George Little and Ricky Bell, appearing in their official capacities only, have moved to dismiss this action as moot, in that there is no longer an actual case or controversy, and, therefore, this Court lacks jurisdiction under Article III of the United States Constitution.

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 date was set for April 11, 2007. The essence of the plaintiff's complaint is that the State intended 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 contended that the use of this protocol and the manner in which it is administered is unconstitutional under the Eighth, Ninth, and Fourteenth Amendments.

On February 1, 2007, Governor Phil Bredesen signed the State of Tennessee Executive Order Number 43. (Copy attached as Exhibit). The Executive Order revoked all current Department of Correction protocols and any related procedures, whether written or otherwise, related to the administration of death sentences in Tennessee, both by lethal injection and by electrocution. Additionally, according to the Executive Order, reprieves were granted to four condemned Tennessee inmates scheduled for execution within ninety days of the Executive Order, including the plaintiff herein.

### **ARGUMENT**

**THIS ACTION SHOULD BE DISMISSED AS MOOT  
BECAUSE THERE IS NO LONGER A CASE OR CONTROVERSY,  
THEREFORE THIS COURT NO LONGER HAS SUBJECT MATTER JURISDICTION.**

Under Article III of the United States Constitution, this Court has jurisdiction only over "actual cases and controversies." *McPherson v. Mich. High Sch. Athletic Ass'n.*, 119 F.3d 453, 458 (6th Cir. 1997); U.S. Const., Art. III, § 2. "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'"

*Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992).

For this Court to have jurisdiction over the injunctive relief prayed for in this action, an actual controversy must exist at all stages of the litigation. *DeFunis v. Odegaard*, 416 U.S. 312, 317, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). Where intervening events occur during the pendency of a lawsuit which render injunctive relief moot, those claims for relief must be dismissed for lack of subject matter jurisdiction. *Mosely v. Hairston*, 920 F.2d 409, 414 (6th Cir. 1990) (enactment of the Family Support Act of 1998 rendered moot plaintiff's injunctive claims for compliance with the former version of the statute); see also *Univ. Of Texas v. Camenisch*, 451 U.S. 390, 396, 101 S.Ct. 1830, 68 L.Ed 2d 175 (1981) (when injunctive aspects of a case become moot during the course of an appeal from a preliminary injunction, those issues cannot be resolved on appeal).

The issues presented in this action are the constitutionality of the then current lethal injection protocol in Tennessee and the manner of administration of that protocol. State of Tennessee Executive Order Number 43 revoked that protocol, as well as the electrocution protocol and any related procedures, whether written or otherwise, and the plaintiff was granted a reprieve. There is no lethal injection protocol currently in effect; thus, there is nothing to litigate. In light of this, the issues presented by the present action are moot, as there is no actual case or controversy, and this Court lacks jurisdiction under Article III of the United States Constitution.

### CONCLUSION

In light of the above, defendants Little and Bell move that the plaintiff's complaint be dismissed as moot.

Respectfully submitted,

ROBERT E. COOPER, JR.  
Attorney General

s/Mark A. Hudson

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 6, 2007, a copy of the foregoing memorandum was filed electronically. Notice of this filing will be sent to the parties listed below by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt or by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

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