

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,)
)
 Plaintiff,)
)
 v.)
)
 GAYLE RAY, in her official)
 capacity as Tennessee Commissioner)
 of Correction, et al.,)
)
 Defendants.)

No. 10-1675-1

FILED
2010 OCT 28 AM 11:01
DAVIDSON COUNTY, TENNESSEE
CLERK OF COURT
K. R. B.

DEFENDANTS' RESPONSE TO MOTION FOR TEMPORARY INJUNCTION

Stephen West is a condemned inmate residing at Riverbend Maximum Security Institution, in Nashville, Davidson County, Tennessee. On February 13, 2001, West executed an Affidavit to Elect Method of Execution in which he chose electrocution as the method of the execution of his sentence and waived his right to be executed by lethal injection. Attachment C to Motion for Temporary Injunction filed October 18, 2010. On August 19, 2010, West filed a complaint under 42 U.S.C. § 1983 against Gayle Ray, the commissioner of the Tennessee Department of Correction (TDOC); Ricky Bell, the warden of Riverbend Maximum Security Institution; David Mills, deputy commissioner for the TDOC; and Reuben Hodge, assistant commissioner of operations for the TDOC, in the United States District Court in Nashville. *West v. Ray*, No. 3:10-cv-0778. West's contention was that the Tennessee lethal injection protocol and its manner of administration was unconstitutional. Specifically, West argued that the sodium thiopental would not sufficiently anesthetize him, the potassium chloride would cause excruciating pain and would not stop his heart, and the use of pancuronium bromide was arbitrary and served no legitimate interest. *Id.* The defendants' moved to dismiss on various

grounds. On September 24, 2010, the district court granted the motion to dismiss, finding that West's complaint was barred by the statute of limitations. *West v. Ray*, No. 3:10-cv-0778, Memorandum (M.D. Tenn. Sept. 24, 2010). West appealed, and the case is pending in the United States Court of Appeals for the Sixth Circuit. *West v. Ray*, No. 10-6196 (6th Cir.).

On October 18, 2010, West filed a complaint in this Court alleging that execution of his sentence under the current electrocution protocol violated his rights and that his Affidavit to Elect Method of Execution, in which he chose electrocution, was of no force and effect. West also moved for a temporary injunction that he not be executed by electrocution and that the defendants be required to present him with another opportunity to elect his method of execution at least thirty days prior to his execution.¹ The defendants responded that, while they considered the February 13, 2001, Election Affidavit to be valid and still effective, they would accept West's October 12, 2010, rescission of his previous election of electrocution. Based on the defendants' response, West withdrew his motion for temporary injunction.

On October 25, 2010, West filed an amended complaint alleging that the execution of his sentence by lethal injection is unconstitutional and a motion for temporary injunction to: (1) enjoin the defendants to carry out his execution "only in a manner which does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments and Tennessee Constitution Article 1, § 16, as does the Current Protocol"; (2) enjoin the defendants from carrying out his execution "in a manner which constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution and Tennessee Constitution Article 1, § 16, as does the Current Protocol"; (3) enjoin the defendants to carry out

¹ On October 12, 2010, West presented the defendants with a letter in which he purported to rescind his previous election of electrocution; he did not, however, elect lethal injection as his method of execution. Instead, he informed the defendants that he was making no election of the method of execution (see Motion for Temporary Injunction filed October 18, 2010, Attachment F).

his execution only after giving him an opportunity to select electrocution or lethal injection as a means of execution at least thirty days prior to the execution; and (4) enjoin the defendants from carrying out his execution without giving him an opportunity to select electrocution or lethal injection as a means of execution at least thirty days prior to the execution. Motion for Temporary Injunction filed October 25, 2010, pp. 1-4.

West's motion should be denied. As an initial matter, this Court is without jurisdiction to enjoin or restrain the July 15, 2010, order of the Tennessee Supreme Court that West's sentence of death be executed on November 9, 2010. *See Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (Tenn. 2000). Regardless of whether West couches his request for injunctive relief in affirmative or prohibitive language, the ultimate effect is to encumber, enjoin, or stay enforcement of the order of the Tennessee Supreme Court that West's sentence be executed on November 9, 2010. This Court has no authority or jurisdiction to supersede a valid order of the Tennessee Supreme Court.

Furthermore, West has failed to satisfy the requirements for issuance of an injunction. When considering a motion for preliminary injunctive relief, courts must balance: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Tumblebus Inc. v. Cramer*, 399 F.3d 754, 760 (6th Cir.), *cert. denied*, 126 S.Ct. 361, 163 L.Ed.2d 68 (2005) (citing *PACCAR Inc. v. TeleScan Techs., L.L.C.*, 319 F.3d 243, 249 (6th Cir. 2003)). West has no likelihood of success, much less a strong one.

West's complaint is barred by the statute of limitations. *See West v. Ray*, No. 3:10-cv-0778 (M.D. Tenn.) (Sept. 24, 2010, order dismissing complaint as untimely). In *Cooley v.*

Strickland, 479 F.3d 412 (6th Cir. 2007), the United States Court of Appeals for the Sixth Circuit held that § 1983 “method-of-execution” challenges are subject to the applicable statute of limitations and that the appropriate accrual date is upon conclusion of direct review of a conviction in the state court or the expiration of time for seeking such review, including review by the United States Supreme Court, and no later than the date on which state law required that the prisoner be executed by lethal injection. *Cooley*, 479 F.3d at 422.

Under Tennessee law, 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. Tenn. Code Ann. § 28-3-104(3). The Sixth Circuit has held that this one-year statute of limitation applies to suits for injunctive relief under § 1983. *See Cox v. Shelby State Community College*, 48 Fed. Appx. 500, 507 (6th Cir. 2002).

West's convictions and sentences were affirmed on direct appeal by the Tennessee Supreme Court and United States Supreme Court by June 28, 1990. *State v. West*, 767 S.W.2d 387 (Tenn. 1989); *West v. Tennessee*, 497 U.S. 1010, 110 S.Ct. 3254, 111 L.Ed.2d 764 (1990). In May 1998, lethal injection became available as a method of execution in Tennessee, and on March 30, 2000, lethal injection became Tennessee's primary method of execution. *See* Tenn. Code Ann. § 40-23-114; 2000 Tenn. Pub. Act, Ch 614, § 8. West's “method-of-execution” challenge to lethal injection accrued, at the latest, on March 30, 2000. West filed his amended complaint challenging Tennessee's lethal injection protocol on October 25, 2010, more than ten years after his cause of action accrued. West's claim clearly fails on limitation grounds.

West also has no likelihood of success because of the inexcusable delay in filing his complaint. *See Hicks v. Taft*, 431 F.3d 916, 917 (6th Cir. 2005) (citing *Nelson v. Campbell*, 541

U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004)) (denying request for stay of execution “primarily because the motion was untimely,” where inmate intervened in § 1983 action challenging lethal injection protocol six months after denial of certiorari in his habeas case and six days before scheduled execution).

More recently, in *Workman v. Bredesen*, 486 F.3d 896 (6th Cir. 2007), the Sixth Circuit Court of Appeals addressed the issue of dilatory challenges to the State's “new” lethal-injection protocol. The Court held that Workman had been dilatory in filing his complaint for injunctive relief even though he had filed it four days after receiving the revised Tennessee lethal-injection protocol. “Having refused to challenge the old procedure on a timely basis, he gets no purchase in claiming a right to challenge a *better* procedure on the eve of his execution.” 486 F.3d at 911 (emphasis in original). The Court noted that Workman's conviction became final on direct review in 1984 and that the state court denied his petition for post-conviction relief in 1993. The Tennessee legislature enacted the lethal injection protocol as a method of execution in 1998, and in 2000 deemed it the presumptive method for all executions. The Tennessee Supreme Court upheld the lethal injection protocol in *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005). *Workman*, 486 F.3d at 912. “By 2000, Workman had completed his state and federal direct and (initial) collateral attacks on his sentence, and he faced the prospect of imminent execution by lethal injection.” *Id.* “By any measurable standard, Workman has had ample time to challenge the procedure.” *Id.*

In this case, West filed his amended complaint challenging the constitutionality of lethal injection on October 25, 2010 — a mere 15 days prior to his scheduled execution.² He had

²The current execution date was set on July 15, 2010; thus, West waited three months from that date to file his action.

abundant opportunities to challenge the lethal injection protocol well before that date.³ West's convictions and sentences were affirmed on direct appeal. *See State v. West*, 767 S.W.2d 387 (Tenn. 1989). The United States Supreme Court denied his petition for writ of certiorari on June 28, 1990. *West v. Tennessee*, 497 U.S. 1010, 110 S.Ct. 3254, 111 L.Ed.2d 764 (1990). West's "method-of-execution" challenge accrued as to lethal injection on March 30, 2000, at the latest. On November 7, 2000, the Tennessee Supreme Court entered an order setting March 1, 2001, as West's execution date. *See West v. Bell*, 242 F.3d 338, 339 (6th Cir. 2001). On February 13, 2001, West elected electrocution as the method of his execution. *Id.* After West filed for habeas corpus relief, the district court granted a stay of execution on February 23, 2001. *West v. Bell*, No. 3:01-cv-00091 (E.D. Tenn.).

The defendants have been prejudiced by the delay. In the normal course of events, the defendants would have much longer than 15 days in which to prepare a case of this constitutional magnitude for trial on the merits. More importantly, the ultimate prejudice resulting from the West's dilatoriness is the harm to the State's interest in finality and its corresponding interest in enforcing its criminal judgments. Indeed, "both the state *and the public* have an interest in finality." *Workman v. Bell*, 484 F.3d 837, 842 (6th Cir. 2007) (emphasis added). Furthermore, "the *victims of crime* have an important interest in the timely enforcement of a sentence," *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096, 2104, 165 L.Ed.2d 44 (2006) (emphasis added). The surviving victims of this crime are fully entitled to expect that West's sentence will finally be carried out. "To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims of crime alike." *Calderon v. Thompson*, 523 U.S. 538, 556, 118 S.Ct. 1489, 1501, 140 L.Ed.2d 728

³ West filed his federal action challenging lethal injection on August 19, 2010. *West v. Ray*, No. 3:10-cv-0778 (M.D. Tenn.).

(1998). “The State and the surviving victims have waited long enough for some closure.” *Jones v. Allen*, 485 F.3d 635, 641 (11th Cir. 2007).

Even on the underlying merits of his complaint, West utterly fails to show how he will likely prevail. The Tennessee Supreme Court has concluded that Tennessee’s lethal injection protocol is consistent with contemporary standards of decency and with the overwhelming majority of lethal injection protocols used by other states and the federal government. *Abdur’ Rahman v. Bredesen*, 181 S.W.3d 292, 306-07 (Tenn.2005). Moreover, the United States Supreme Court has held that Kentucky’s three-drug lethal injection protocol does not violate the Eighth Amendment, *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), and Tennessee’s lethal injection protocol has been found to be substantially similar to the protocol upheld in *Baze*. See *State v. Schmeiderer*, 319 S.W.3d 607, 637 (Tenn. 2010); *Harbison v. Little*, 571 F.3d 531, 533 (6th Cir. 2009), *cert. denied*, 130 S.Ct. 1689 (2010). A lethal injection protocol that is substantially similar to the one upheld in *Baze* will likewise pass constitutional muster. *Baze*, 535 U.S. at 60.

In *Harbison*, the Sixth Circuit concluded that “Tennessee’s protocol must be upheld because *Baze* addressed the same risks identified by the trial court, but reached the conclusion that they did not rise to the level of a constitutional violation.” 571 F.3d at 535. Therefore, as a matter of law, Tennessee’s lethal injection protocol does not create a substantial risk of serious harm in violation of the Eighth Amendment to the United States Constitution.

Finally, the lethal injection protocol does not create an enforceable right for the inmate to be presented by the warden with a specific form to select a method of execution thirty days before the execution. The protocol is a statement concerning only the internal management of

state government; it is not a rule or regulation. *Abdur 'Rahman v. Bredesen*, 181 S.W.3d 292, 311 (Tenn. 2005). The provisions of the protocol do not create statutory or constitutional rights, nor do they create a private right of action for their alleged violation. The language in the protocol relied upon by the plaintiff is directory, not mandatory. Furthermore, it exists for the benefit of the Department of Correction – not the inmate.

In any event, even if this “30-day” provision in the protocol did create such a right, it would simply not now apply to West, because West previously made a method-of-execution election, on February 13, 2001. And on October 12, 2010 – 28 days before the scheduled execution of his sentence – he rescinded that election. The effect of that rescission is twofold: first, the execution of his sentence will now proceed by means of lethal injection. *See* Tenn. Code Ann. § 40-23-114 (a). It is therefore entirely unnecessary (and would make no sense whatsoever, particularly where West has already declared that he will make no election) to present West with yet another opportunity to elect a method of execution.⁴ In short, West “is no longer required to elect the method of his execution.” *West v. Ray*, No. 10-1675-1 (Tenn.Chanc.Ct. Oct. 25, 2010) (order withdrawing temporary injunction).

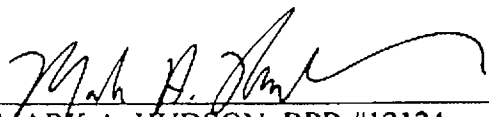
Second, by rescinding his election of electrocution when the only remaining method of execution is lethal injection, West has effectively chosen lethal injection and thus waived any challenge to the lethal injection protocol. *See Stewart v. LaGrand*, 526 U.S. 115, 119 S.Ct. 1018, 143 L.Ed.2d 196 (1999). In *Stewart*, the Supreme Court held that a condemned inmate who chose lethal gas as his method of execution rather than lethal injection waived his claim that execution by lethal gas was unconstitutional. *Id.*

⁴ That West continues to insist on being presented with a new election affidavit after having rescinded his previous election and signaled that he will make *no* election demonstrates that his true intent here is merely to delay the lawful execution of his sentence.

Because this Court lacks jurisdiction to order the injunctive relief sought and because West has no likelihood of success on the merits, the motion for temporary injunction should be denied.

Respectfully submitted,

ROBERT E. COOPER, JR., BPR #010934
Attorney General and Reporter



MARK A. HUDSON, BPR #12124

Senior Counsel
Office of the Attorney General
Civil Rights and Claims Division
P. O. Box 20207
Nashville, TN 37202-0207
(615) 741-7401

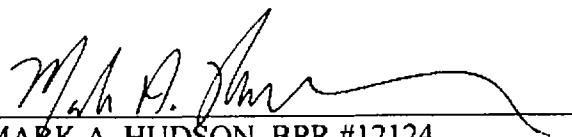
CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2010, a copy of the foregoing was forwarded

by facsimile and U.S. Mail to:

Stephen A. Ferrell
Stephen M. Kissinger
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
800 S Gay Street
Suite 2400
Knoxville, TN 37929

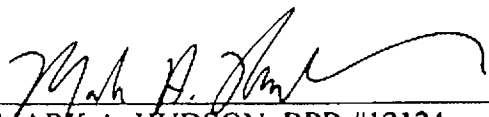
Roger W. Dickson
MILLER & MARTIN
Volunteer Building
832 Georgia Avenue
Suite 1000
Chattanooga, TN 37402


MARK A. HUDSON, BPR #12124
Senior Counsel
Office of the Attorney General
P. O. Box 20207
Nashville, TN 37202-0207
(615) 741-7401

Because this Court lacks jurisdiction to order the injunctive relief sought and because West has no likelihood of success on the merits, the motion for temporary injunction should be denied.

Respectfully submitted,

ROBERT E. COOPER, JR., BPR #010934
Attorney General and Reporter



MARK A. HUDSON, BPR #12124
Senior Counsel
Office of the Attorney General
Civil Rights and Claims Division
P. O. Box 20207
Nashville, TN 37202-0207
(615) 741-7401