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

STEPHEN WEST,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 3:10-cv-01016**
	)	**JUDGE CAMPBELL**
GAYLE RAY, in her official capacity as Tennessee's Commissioner of Correction, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ON BEHALF OF GAYLE RAY, RICKY BELL, DAVID MILLS, AND REUBEN HODGE

Defendants Gayle Ray, Ricky Bell, Reuben Hodge, and David Mills, appearing in their official capacities only, have filed their Motion to Dismiss pursuant to Fed. R. Civ. Pro. 12(b)(6). The defendants submit this Memorandum in Support of their Motion to Dismiss.

PRELIMINARY STATEMENT

The plaintiff in this action, Stephen West, is a condemned inmate residing at Riverbend Maximum Security Institution, (Riverbend), in Nashville, Davidson County, Tennessee. Gayle Ray is the commissioner of the Tennessee Department of Correction (TDOC). Ricky Bell is the warden of Riverbend Maximum Security Institution. David Mills is the deputy commissioner for the TDOC. Reuben Hodge is the assistant commissioner of operations.

West alleges that he is scheduled to be executed by lethal injection on November 9, 2010. (Docket Entry 1, Complaint, p. 1). He contends that the lethal injection protocol to be used in his execution and its manner of administration is unconstitutional. (Docket Entry 1, Complaint, p. 5). Specifically, West contends that the sodium thiopental will not sufficiently

anesthetize him, the potassium chloride will cause excruciating pain and will not stop his heart, and the use of pancuronium bromide is arbitrary and serves no legitimate interest. *Id*

West requests injunctive relief enjoining the use of sodium thiopental, pancuronium bromide and/or potassium chloride.

PROCEDURAL HISTORY

Criminal Proceedings

The Tennessee Supreme Court affirmed West's conviction on two counts of first-degree murder, two counts of aggravated kidnapping and one count of aggravated rape, and affirmed imposition of the death sentence on April 10, 1989. *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). On November 7, 2000, the Tennessee Supreme Court entered an order setting March 1, 2001, as his 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*. See Exhibit 1, Affidavit to Elect Method of Execution. On February 20, 2001, West filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Middle District of Tennessee. *See West v. Bell*, 550 F.3d 542, 549-50 (6th Cir. 2008). The district court transferred the case to the Eastern District of Tennessee, which granted a stay of execution on February 23, 2001. *West v. Bell*, No. 3:0l-cv-00091 (E.D. Tenn.). The district court granted summary judgment in favor of the respondent on September 30, 2004. The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment denying habeas corpus relief on December 18, 2008. *West v. Bell*, 550 F.3d 542 (6th Cir. 2008), *reh'g and sug. for reh'g en banc denied* (May 20, 2009). On March 1, 2010, the United States Supreme Court denied certiorari. *West v. Bell*, 130 S.Ct. 1687 (2010). On July 15, 2010, the Tennessee Supreme Court set West's execution for

November 9, 2010. *State v. West*, No. M1987-00130-SC-DPE-DD (Tenn. July 15, 2010) (order setting date of execution).

Section 1983 Proceedings

On August 19, 2010, West filed a complaint under 42 U.S.C. § 1983 against defendants Ray, Bell, Mills and Hodge alleging that the lethal injection protocol to be used in his execution and its manner of administration is unconstitutional. *West v. Ray*, No. 3:10-cv-0778, Docket Entry 1, Complaint (M.D. Tenn. 2010). The defendants moved to dismiss and filed a copy of an "Affidavit to Elect Method of Execution" executed by West on February 13, 2001, in support of their argument that West's challenge to Tennessee's lethal injection protocol did not present a justiciable case or controversy because West elected electrocution as his method of execution. *West v. Ray*, No. 3:10-cv-0778, Docket Entry 24, Memorandum, p. 3 (M.D. Tenn. 2010). Because considering the "Affidavit to Elect Method of Execution" would require the Court to convert the motion to dismiss into a motion for summary judgment, this Court chose not to do so. *West v. Ray*, No. 3:10-cv-0778, Docket Entry 28, Order (M.D. Tenn. 2010).

On September 24, 2010, this Court entered an Order granting the motion to dismiss on behalf of the defendants in *West v. Ray*, No. 3:10-cv-0778 (M.D. Tenn.). This Court ruled that its decision was controlled by the Sixth Circuit precedent of *Cooey v. Strickland* (*Cooey II*), 479 F.3d 412 (6th Cir. 2007), and it rejected West's argument that the decision in *Cooey II* does not control the resolution of the statute of limitations issue because the Sixth Circuit's analysis was undermined by the United States Supreme Court's subsequent decision in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). *West v. Ray*, No. 3:10-cv-0778, Docket Entry 33, Memorandum, pp. 2-5, Sept. 24, 2010 (M.D. Tenn.). This Court further ruled that because no private right of action existed under either the Controlled Substances Act or the Food, Drug, and Cosmetic Act, any injury cannot be redressed through a declaratory

action. *West v. Ray*, No. 3:10-cv-0778, Docket Entry 33, Memorandum, pp. 5-7, Sept. 24, 2010 (M.D. Tenn.). 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 under 42 U.S.C. § 1983 in Davidson County Chancery Court alleging that execution of his sentence under the current electrocution protocol violated his rights and that his February 13, 2001, Affidavit to Elect Method of Execution, in which he chose electrocution, was of no force and effect. *West v. Ray*, No. 10-1675-I (Davidson Chancery). 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 in order to avoid further litigation. Based on the defendants' response, West withdrew his motion for temporary injunction on October 25, 2010. On October 28, 2010, West filed an Amended Complaint in the chancery court case challenging the constitutionality of the Tennessee lethal injection protocol.

Also on October 18, 2010, West filed a Motion to Stay and Abey Proceedings in *West v. Ray*, No. 10-6196 (6th Cir.), until a threshold jurisdictional issue was resolved in the proceedings pending in the Davidson County Chancery Court. After West withdrew his motion for temporary injunction in the Chancery Court, West filed a Withdrawal of Appellant's Motion to Stay and Abey Proceedings and Motion to Vacate District Court Order and Remand to District Court for Order Dismissing Complaint without Prejudice in the Sixth Circuit, asserting that this

[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

Court lacked subject matter jurisdiction over the lethal injection challenge in *West v. Ray*, No. 3:10-0778, because the defendants had argued that West had elected execution by electrocution. On October 28, 2010, West, without waiting on a ruling from the Sixth Circuit on his Motion to Vacate District Court Order, filed this second section 1983 challenge to the lethal injection protocol virtually identical to the complaint *West v. Ray*, No. 3:10-cv-0778 (M.D. Tenn. 2010).

ARGUMENTS

I. WEST WAIVED HIS CONSTITUTIONAL CLAIMS BY EFFECTIVELY CHOOSING LETHAL INJECTION AS HIS METHOD OF EXECUTION.

On February 13, 2001, West signed an "Affidavit to Elect method of Execution" in which he chose electrocution as the method by which he would be executed. (Docket Entry 1, Complaint, p. 3, ¶ 9). *See also West v. Bell*, 242 F.3d 338, 339 (6th Cir. 2001) ("West elected electrocution as the method of his execution."). On September 30, 2010, West executed a rescission of his prior affidavit and presented it to defendant Bell on October 12, 2010. (Docket Entry 1, Complaint, p. 5, ¶ 15). In his rescission, West affirmatively declared that he would make no election of a method of execution to be used to carry out his sentence. (Docket Entry 1, Complaint, Attachment H).

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.*

II. WEST'S COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS.

In *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007)[2], 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. *Cooey*, 479 F.3d at 422. Cooey concluded the direct appeal of his conviction on April 1, 1991. *Cooey*, 479 F.3d at 414. Lethal injection became available as a means of execution in Ohio in 1993 and the sole method of execution in Ohio in 2001. *Cooey*, 479 F.3d at 417. Cooey's original execution date was July 24, 2003. *Cooey*, 479 F.3d at 414. Cooey filed suit challenging Ohio's lethal injection protocol on December 8, 2004. *Cooey*, 479 F.3d at 415. Based on these facts, the Sixth Circuit concluded:

> [U]nder this standard, Cooey's claim would have accrued in 1991, after the United States Supreme Court denied direct review. However, Ohio did not adopt lethal injection until 1993, or make it the exclusive method of execution until 2001, so the accrual date must be adjusted because Cooey obviously could not have discovered the "injury" until one of those two dates. We need not pinpoint the accrual date in this case, however, because even under the later date, 2001, Cooey's claim exceeds the two-year statute of limitations deadline because his claim was not filed until December 8, 2004.

Cooey, 479 F.3d at 422. Thus, the accrual date for a challenge to a state's lethal injection procedures is no later than the date on which state law provided that the prisoner be executed by lethal injection. *Cooey*, 479 F.3d at 422 ("[t]he test is whether he knew or should have known based upon reasonable inquiry, and could have filed suit and obtained relief").

The holding in *Cooey* was confirmed in *Cooey v Strickland*, 544 F.3d 588, (6th Cir.), *cert. denied*, 129 S.Ct. 394 (2008), wherein Cooey filed a second § 1983 action purportedly

[2] A Petition for Rehearing en banc was denied by the Sixth Circuit on June 1, 2007. *Cooey v. Strickland*, 489 F.3d 775 (6th Cir. 2007). Certiorari was denied by the United States Supreme Court on April 21, 2008. *Biros v. Strickland*, 553 U.S. 1006, 128 S.Ct. 2047, 170 L.Ed.2d 796 (2008).

raising "new" claims regarding his execution under Ohio's lethal injection protocol. The Sixth Circuit found that the district court properly dismissed Cooey's second challenge as time-barred under its construction of the statute of limitations for such § 1983 claims established in "*Cooey II*, 479 F.3d 412." *Cooey*, 544 F.3d at 589.

Here, twenty years have passed since the Tennessee Supreme Court and the United States Supreme Court affirmed West's conviction for two counts of first degree murder, two counts of aggravated kidnapping, and one count of aggravated rape, and his consequent death sentence. *See State v. West,* 767 S.W.2d 387 (Tenn. 1989)*, cert denied, West v. Tennessee,* 497 U.S. 1010, 110 S.Ct. 3254, 111 L.Ed.2d 764 (1990). Ten years have passed since the state law was enacted providing for West's sentence to be carried out by lethal injection. The applicable statute of limitations period for suits like West's is one year. Tenn. Code Ann. § 28-3-104(a)(3); *Cox v. Shelby State Community College*, 48 Fed.Appx. 500, 507, 2002 WL 31119695 (6th Cir. 2002). Accordingly, West's suit is time-barred. This is underscored by the fact that two other circuits have followed the Sixth Circuit's reasoning in *Cooey. See Walker v. Epps*, 550 F.3d 407, 411-412 (5th Cir. 2008), and *McNair v. Allen*, 515 F.3d 1168 (11th Cir. 2008). *See also Wilson v. Rees*, 2010 WL 3450078 (6th Cir. 2010) (Kentucky Supreme Court decision that the state lethal injection protocol had to comply with the Kentucky Administrative Procedure Act and be issued as a valid regulation did not constitute a change in circumstances that would reset the statute of limitations for § 1983 challenges); and *Broom v. Strickland*, 579 F.3d 553 (6th Cir. 2009) (continuing-violations doctrine did not toll the statute of limitations after *Cooey II*).

In May 1998, lethal injection became available as a method of execution in Tennessee, and on March 30, 2000, lethal injection became Tennessee's presumptive method of execution. *See* Tenn. Code Ann. § 40-23-114; 2000 Tenn. Pub. Act, Ch 614, § 8. West's

convictions and sentences were affirmed on direct appeal by both the Tennessee Supreme Court and United States Supreme Court by June 28, 1990. West's "method-of-execution" challenge to lethal injection accrued, at the latest, on March 30, 2000**.** West filed his complaint challenging Tennessee's three-drug lethal injection protocol on October 28, 2010, more than ten years after his cause of action accrued. West's claim clearly fails on limitation grounds.

West argues that the analysis in *Cooey II* was changed by *Baze* which, according to West, requires a two-part analysis for evaluation of an Eighth Amendment challenge to a method of execution. West asserts that *Baze* requires the plaintiff to show (1) that the State's adoption of an execution protocol inflicts unnecessary pain and suffering; and (2) that the State had actual or implicit knowledge that such pain and suffering will result from carrying out its protocol and the State decided to go forward nonetheless. (Docket Entry No. 1, Complaint, p. 6, ¶ 20. But in *Getsy v. Strickland*, 577 F.3d 309 (6th Cir. 2009), the Sixth Circuit addressed the issue of whether *Baze* changed the statute of limitations analysis of *Cooey II* and effectively rejected West's argument:

> This raises the question of whether Baze's freshly clarified standards trigger a new accrual date. We do not believe that they do. As previously noted, '[i]n determining when the cause of action accrues in § 1983 cases, we look to the event that *should have alerted the typical lay person* to protect his or her rights.' *Trzebuckowski* [*v. City of Cleveland*], 319 F.3d at 856 (emphasis added). *Cooey II* held, rightly or wrongly, that the relevant event is the later of either (1) the 'conclusion of direct review in the state court or the expiration of time for seeking such review,' or (2) the year 2001, when Ohio adopted lethal injection as the sole method of execution. *Cooey II*, 479 F.3d at 422. Nothing in *Baze* gives us cause to question *Cooey II*'s determination of when the statute of limitations clock begins to tick.

Getsy, 577 F.3d at 312. Contrary to West's assertions, *Baze* did not establish any "deliberate indifference component" to an Eighth Amendment method-of-execution challenge, or require a court to consider what State officials knew or had reason to know as part of the statute of

limitations analysis.. *See Emmett v. Johnson*, 532 F.3d 291, 298 n. 5 (4th Cir. 2008); *see also Jackson v. Danberg*, 594 F.3d 210, 223 n. 16 (3rd Cir. 2010). Moreover, *Cooey II* and *Getsy* clearly show that it is not the alleged "wrongful acts" of the defendants in preparing to execute West by lethal injection which determine "when the statute of limitations clock begins to tick."

One month ago this Court reviewed the case law and agreed that a lethal injection challenge brought more than one year after the plaintiff's direct review process became final, lethal injection became the presumptive method of execution, and the lethal injection protocol was revised in 2007, was barred by the statute of limitations. *West v. Ray*, No. 3:10-cv-00778, 2010 WL 3825672 at *2-*3 (M.D. Tenn. September 24, 2010). The decisions in *Cooey II*, 479 F.3d 412, in *Cooey*, 544 F.3d 588, in *Getsy*, 577 F.3d 309, and in *West*, No. 3:10-cv-00778, compel the conclusion that West's challenge to Tennessee's three-drug protocol is barred by the statute of limitations.

III. WEST WAS DILATORY IN FILING HIS COMPLAINT FOR EQUITABLE RELIEF.

West filed his complaint on October 28, 2010 — a mere 12 days prior to his scheduled execution and 117 days after his execution was set. He had abundant opportunities to challenge his 2001 election of electrocution and 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*, 173 Fed. Appx. 341 (5th Cir. 2006) (twenty-seven days before the execution); *Hughes v. Johnson*, 170 Fed. Appx. 878 (5th Cir. 2006) (fourteen days before the execution).

More recently, in *Workman v. Bredesen*, 486 F.3d 896 (6th Cir. 2007), the Sixth Circuit 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), *cert. denied* 126 S.Ct. 2288, 164 L.Ed.2d 813 (2006). *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.*

A year before deciding *Workman*, in the case of *Alley v. Little,* 181 Fed. Appx. 509 (6th Cir. 2006), *cert. denied*, 126 S.Ct. 2973, 165 L.Ed.2d 982 (2006), the Sixth Circuit likewise vacated an injunction and stay entered by the United States District Court against the execution of the death sentence 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. Thus, the Sixth Circuit has ruled that challenges to the Tennessee lethal-injection protocol were filed in a dilatory manner on both occasions it has been asked to consider this issue.

Here, West filed the instant complaint on October 28, 2010. (Docket Entry 1, Complaint). He had abundant opportunities to challenge his election of electrocution and the lethal-injection protocol well before that date. Prior to 1998, electrocution was the sole method of execution in Tennessee. 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. Acts, Ch 614, § 8. 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) Thus, West's "method-of-execution" challenge accrued as to lethal injection on March 30, 2000, at the latest. On July 15, 2010, the Tennessee Supreme Court entered an order setting November 9, 2010, as his execution date. *State v West*, M1987-00130-SC-DPE-DD (July 15, 2010).

The defendants have been prejudiced by the delay. In the normal course of events, the defendants would have much longer than 12 days in which to prepare a case of this constitutional magnitude for trial on the merits. As the Sixth Circuit noted in *Workman*:

> Even had Workman filed this challenge on January 17, 2007, that still would have been "too late in the day," *Hill v. McDonough* , ___ U.S. ___ , 126 S.Ct. 2096, 2104, 165 L.Ed.2d 44 (2006), to allow the trial and appellate courts to reach the merits of any subsequent challenge. *See Jones,* 485 F.3d at 639-40 n. 2 ("[A]djudicating Jones's [lethal-injection-protocol] claim would take much more than three months and ... a subsequent appeal would add months, if not years, to this litigation.") (internal quotation marks omitted); *Harris v. Johnson,* 376 F.3d 414, 417 (5th Cir.2004) (*"The brief window of time between the denial of certiorari and the state's chosen execution date - in this case, four months - is an insufficient period in which to serve a complaint, conduct discovery, depose experts, and litigate the issue on the merits."*). He thus cannot revive a dilatory action when the only concrete challenges to the new procedure were features of the old procedure.

486 F.3d at 911 (emphasis added). 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 (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).

Under the authority of *Workman* and *Alley*, West has been dilatory in filing his complaint without any justification other than delaying his execution; therefore, his action should be dismissed.

IV. CONTROLLING AUTHORITY MANDATES DISMISSAL OF WEST'S CLAIMS.

The Sixth Circuit Court of Appeals has already considered and disposed of West's allegations against the Tennessee lethal injection protocol. Accordingly, the defendants are entitled to judgment in their favor as a matter of law.

In *Harbison v. Little*, 571 F.3d 531 (6th Cir. 2009), *cert denied*, 130 S.Ct. 1689 (2010), the Sixth Circuit considered a challenge to Tennessee's lethal injection protocol. In *Harbison*, the district court granted judgment in favor of the plaintiff, holding that the protocol violated the Eighth Amendment. *Harbison v. Little*, 511 F.Supp.2d 872 (M.D. Tenn. 2007). The defendants appealed and relied on appeal on the Supreme Court's decision in *Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008),which upheld Kentucky's lethal injection

protocol and was decided after the district court decision in *Harbison*.

Initially, the Sixth Circuit determined that the plurality opinion of Chief Justice Roberts was controlling. *Harbison*, 571 F.3d at 535. The Court then identified the controlling legal standard:

> A prisoner cannot successfully challenge a method of execution merely by showing that the method may result in pain, . . . or that a slightly safer alternative is available. In order for a lethal injection protocol to violate the Eighth Amendment, the inmate must show it "creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives."

Id. (citing *Baze*, 128 S.Ct. at 1531, 1537) (internal citation omitted). Recognizing that the ultimate question was whether Tennessee's lethal injection protocol exposes the inmate to a substantial risk of serious harm, *Harbison*, 571 F3d at 535-36, the panel majority 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." *Harbison*, 571 F.3d at 535.

> The district court invalidated the Tennessee protocol on several bases: failure to check for consciousness before the pancuronium bromide is administered, inadequate selection and training of personnel, and failure to provide for tactile monitoring of the IV lines during the administration of the drugs. The Supreme Court, however, considered these risks under the Kentucky protocol, and found they did not constitute a substantial risk of serious harm. In addition, the Court rejected the failure to adopt a one-drug protocol as a basis for finding the current protocol unconstitutional.

Harbison, 571 F.3d at 536 (internal citations omitted). "Finding Tennessee's protocol substantially similar [to the one at issue in *Baze*]," the Sixth Circuit vacated the district court judgment and remanded with instructions to vacate the injunction entered against the defendants. *Harbison*, 571 F.3d at 533, 539.

The Sixth Circuit also considered *Baze* to be dispositive of future challenges to

state lethal injection protocols.

> With respect to the disposition of future challenges to state protocols, the plurality opinion stated: "A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard."

Harbison, 571 F.3d at 535 (quoting *Baze*, 128 S.Ct. at 1537). Thus, the Sixth Circuit understood the intent of the *Baze* plurality that a lethal injection protocol substantially similar to the one upheld in *Baze* should not be subjected to continuous legal challenges. *See also Raby v. Livingston*, 600 F.3d 552, 562 (5th Cir. 2010) ("We read *Baze* to foreclose exactly the type of further litigation [the plaintiff] seeks to continue. The safe harbor established by *Baze* would hardly be safe if states following a substantially similar protocol nonetheless had to engage in prolonged litigation defending their method of lethal injection.").

The lethal injection protocol challenged by West is the same protocol held in *Harbison* to be substantially similar to the protocol upheld in *Baze*. *Harbison*, 571 F.3d at 533. Therefore, Tennessee's lethal injection protocol does not create a substantial risk of serious harm.

The Sixth Circuit has already thoroughly considered Tennessee's lethal injection protocol and found it to meet constitutional muster. All of the claims presented by West are subject to the controlling authority of the Sixth Circuit. There is nothing left to litigate. The defendants are entitled to judgment as a matter of law.

V. WEST'S COMPLAINT FAILS TO STATE ANY VIABLE LEGAL GROUND FOR DECLARATORY JUDGMENT AS TO THE APPLICABILITY OF THE CONTROLLED SUBSTANCES ACT AND THE FEDERAL FOOD, DRUG AND COSMETIC ACT.

A. West's complaint for declaratory judgment fails to allege any facts which establish a "case or controversy" over which this Court has jurisdiction.

Article III, § 2, of the Constitution limits federal jurisdiction to the resolution of

"Cases" and "Controversies." The case-or-controversy requirement is satisfied only where a plaintiff has standing. *Sprint Communications Co., L.P. v. APCC Services, Inc.*, 554 U.S. 269, 128 S. Ct. 2531, 2535 (2008). "And in order to have Article III standing, a plaintiff must adequately establish: (1) an injury in fact (i.e., a concrete and particularized invasion of a legally protected interest); (2) causation (i.e., a fairly . . . trace[able] connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit)." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)) (internal quotation marks omitted). A plaintiff does not have standing "to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens." *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 598 (2007) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989)). "This is because '[t]he judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts.'" *Id.* (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982)).

By the plain terms of his complaint, West "only seeks a declaration that the Defendants' intended actions under the Tennessee Protocol, as applied to him, will violate the [Controlled Substances Act] and the [Federal Food, Drug & Cosmetic] Act." (Docket Entry No. 1, Complaint, p. 99, ¶ 279. West has not alleged any concrete and particularized injury in fact traceable to defendants' allegedly unlawful conduct, and which would likely be redressed by declaratory relief. West avers that defendants intend to extinguish his life by administering drugs which he alleges fall within the scope of federal regulatory statutes. However, West's death is not an injury upon which he can seek redress, because he is subject to a lawfully imposed sentence

of death. In short, West simply asks this Court to render an advisory opinion on the question of whether the federal statutes he cites are applicable to defendants' procedures for conducting court-ordered executions by lethal injection. West's request for declaratory judgment fails to allege any facts which establish a "case or controversy" over which this Court has jurisdiction.

B. West's complaint for declaratory judgment otherwise fails to state any claim upon which relief may be granted.

The Supreme Court of the United States has described as follows the limited procedural nature of the Declaratory Judgment Act:

> "The operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240. Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. When concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the Constitution and Acts of Congress confine them, *"jurisdiction" means the kinds of issues which give right of entrance to federal courts*. Jurisdiction in this sense was not altered by the Declaratory Judgment Act.

Skelly Ohio Co. v. Phillips Petroleum, 339 U.S. 667, 671 (1950) (emphasis added). In other words, declaratory judgment is simply an additional remedy made available where a right or cause of action already exists.

It is well-established that the Federal Food, Drug and Cosmetic Act (FDCA) does not provide a private litigant with an express cause of action for violation of its provisions, and that no such cause of action should be implied:

> The FDCA provides that "[a]ll such proceedings for the enforcement, or to restrain violations of [the FDCA] shall be by and in the name of the United States." 21 U.S.C. §337(a). Every federal court that has addressed the issue has held that the FDCA does not create a private right of action to enforce or restrain violations of its provisions and accompanying regulations. *See Gile v. Optical Radiation Corp.*, 22 F.3d 540, 544 (3d Cir. 1994); *Sandoz [Pharmaceuticals Corp. v. Richardson-Vicks, Inc.]*, 902 F.2d [222] at 231; [3rd Cir. 1990]. PDK Labs, Inc. v. Friedlander, 103 F.3d 1105 (2d Cir. 1997); *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1139 (4th Cir.1993). Only the federal government, by way of

> either the FDA or the Department of Justice, has exclusive jurisdiction to enforce violations of the FDCA. *See Summit Tech. Inc. v. High-Line Medical Instruments Co.*, 922 F.Supp. 299, 305 (C.D.Cal.1996).

Eli Lilly & Co. v. Roussel Corp., 23 F.Supp.2d 460, 476 (D.N.J. 1998); *see also Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 811-12 (1986) (where there is no express private right of action for violation of FDCA, "it would flout congressional intent to provide a private federal remedy for the violation of the federal statute."). The same can be said for the Controlled Substances Act. *See Purdue v. McCallister*, 164 F. Supp.2d 783, 793 (S.D.W.Va. 2001) (agreeing that a careful review of the Act reveals no Congressional intent to create a private, civil right of action).

Because the statutes relied upon by West do not establish a private right of enforcement, his request for declaratory judgment relief on its face fails to state a claim upon which relief can be granted. *See Durr v. Strickland*, 602 F.3d 788 (6th Cir. 2010). In *Durr*, the plaintiff appealed the dismissal of his action seeking a declaration that Ohio's lethal injection protocol violated Federal Controlled Substances Act and Federal Food, Drug and Cosmetic Act by using sodium thiopental or, alternatively, midazolam and hydromorphone without prescriptions from licensed medical practitioners and distributed without proper authorization. The Sixth Circuit agreed with the reasoning of the district court and affirmed.

> Judge Frost ruled held that declaratory relief was unavailable to Durr because no private right of action exists under either act. Further, even assuming that Durr could pursue such a cause of action, he failed to allege any facts to support his claim that Defendants' failure to adhere to federal law subjects him to a risk of inhumane execution or to suggest that the declaratory judgment that he seeks would deter the State from proceeding with his execution.
>
> [W]e agree with Judge Frost that this action for declaratory relief is not the proper mechanism for seeking injunctive relief from execution.

Id.

Likewise, in *Thompson v. Thompson*, 484 U.S. 174 (1988), the Supreme Court affirmed the dismissal of a suit seeking declaratory relief in the form of an order that a state custody decree violated federal law, because the federal statute in question did not confer a private right of action to enforce its provisions. "[W]e 'will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.'" *Id*. 484 U.S. at 187 (quoting *California v. Sierra Club*, 451 U.S. 287, 297 (1981)). Notably absent is any suggestion that West could obtain declaratory relief even if the statute did expressly or impliedly authorize such relief. *See also Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982) ("Section 2201 does not provide an independent cause of action for determination of the constitutionality of a statute, but rather is only an avenue for relief in a 'case of actual controversy within (the court's) jurisdiction.'"); *Nissan of Slidell, L.L.C. v. Nissan of North America, Inc.*, 2008 U.S. Dist. LEXIS 91940 (E. D. La 2008) ("Because plaintiff has no private cause of action under the LMVA, it has failed to state a claim for declaratory judgment as well.").

On September 24, 2010, this Court agreed that because no private right of action exists under either the Controlled Substances Act or the Federal Food, Drug and Cosmetic Act, any injury cannot be redressed through a declaratory action. *West v. Ray*, No. 3:10-cv-00778, 2010 WL 3825672 at *4 (M.D. Tenn. September 24, 2010). This Court dismissed the request for a declaratory judgment that the Tennessee lethal injection protocol violates the Controlled Substances Act and the Federal Food, Drug and Cosmetic Act.

Any argument that the United States Constitution might require court-ordered executions to comply with the food and drug laws is far-fetched, to say the least. In *Heckler v. Chaney*, 470 U.S. 821 (1985), a number of condemned inmates argued that the states were violating federal law in using drugs to execute them, and that the Food and Drug Administration (FDA) should

prohibit the use of the drugs until the FDA certified that the drugs were "safe and effective" for execution. The FDA unsurprisingly rejected the prisoners' arguments, reasoning that it was primarily concerned with serious dangers to the public, and that such dangers were not posed by the states' procedures for lawfully executing condemned prisoners. Although its decision in *Heckler* is couched in terms of "agency discretion" and "administrative law," the Supreme Court ultimately agreed with the FDA's decision not to interfere with the states' conduct of executions. Accordingly, West's complaint fails to state a claim for declaratory judgment relief.

VI. THE ONLY PROPER DEFENDANT IS COMMISSIONER RAY IN HER OFFICIAL CAPACITY ONLY.

West contends that the use of the lethal injection protocol in his execution is unconstitutional. As a result, he is seeking injunctive relief to prevent his execution by lethal injection. However, TDOC Commissioner Gayle Ray, in her official capacity only, is the only proper defendant regarding West's assertion that the lethal injection protocol is unconstitutional.

The State has Eleventh Amendment immunity from suit. Tennessee has not waived its immunity under the Eleventh Amendment with respect to suits for relief under 42 U.S.C. § 1983. *American Civil Liberties Union v. Tennessee*, 496 F. Supp. 218 (M.D. Tenn. 1980). A suit against a state official, in his official capacity, is a suit against the State. "Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985) (citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 (1978)). *See Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994). "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky*, *supra*. at 166 (citation omitted). "It is not a suit against the official personally, for the real party in interest is the entity." *Id*. (emphasis in original).

The *Ex Parte Young* doctrine allows a plaintiff to sue a state official in his official capacity for injunctive relief only when the official is the enforcer of the alleged unconstitutional statute:

> [I]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.
>
> . . . .
>
> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act . . . .

Ex Parte Young, 209 U.S. 123, 155-157, 28 S.Ct. 441, 452-453, 52 L.Ed 714 (1908).

The TDOC's chief official, Commissioner Ray, in her official capacity only, is the only appropriate representative of the Department in a §1983 claim for injunctive relief based on the lethal injection protocol. The TDOC is the entity responsible for creating and implementing the lethal injection protocol. Tenn. Code Ann. §40-23-114; *See Workman v. Bredesen*, 486 F.3d at 900. "The department of correction is under the charge and general supervision of the commissioner of correction." Tenn. Code Ann. § 4-3-602(a). "The commissioner is the executive officer of the department of correction and has the immediate charge of the management and government of the institutions of the department . . . ." Tenn. Code Ann. § 4-3-603(a). "The chief officer for the government and control of the institutions and personnel of the department of correction shall be the commissioner of that department . . . ." Tenn. Code Ann. § 41-1-102(a).

But in addition to Commissioner Ray, West names as defendants Ricky Bell, Warden of Riverbend; Reuben Hodge, Deputy Commissioner of the TDOC; and the John Doe defendant physicians, pharmacists, medical personnel, executioners, and any and all other

persons involved in the plaintiff's execution as defendants. All are sued in their official capacity only. West seeks to enjoin these defendants from executing him by lethal injection using the Tennessee lethal injection protocol. Defendants Bell and Hodge, as well as the John Doe defendant physicians, pharmacists, medical personnel, and executioners are under the charge and general supervision of Commissioner Ray, the executive officer of the TDOC who has "the immediate charge of the management and government of the institutions of the department." Tenn. Code Ann. §§ 4-3-602(a), 603(a). If Commissioner Ray is enjoined as to any aspect of the protocol, all persons participating at the direction or request of the TDOC are effectively enjoined as well. Thus, there exists no basis for naming anyone other than Commissioner Ray in her official capacity as a defendant for purposes of seeking injunctive relief. Pursuant to *Ex Parte Young*, the Court has subject matter jurisdiction only over Commissioner Ray, in her official capacity only. All defendants therefore except Commissioner Gayle Ray in her official capacity should be dismissed from this lawsuit.

CONCLUSION

For the foregoing reasons, defendants Ray, Bell, and Hodge move that the complaint dismissed for failure to state a claim for which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2010, a copy of the foregoing 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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