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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

ABU-ALI-ABDUR'RAHMAN, LEE HALL, a/k/a LEROY HALL, BILLY RAY IRICK, DONNIE JOHNSON, DAVID EARL MILLER, NICHOLAS TODD SUTTON, STEPHEN MICHAEL WEST, CHARLES WALTON WRIGHT, EDMUND ZAGORSKI, JOHN MICHAEL BANE, BYRON BLACK, ANDRE BLAND, KEVIN BURNS, TONY CARRUTHERS, TYRONE CHALMERS, JAMES DELLINGER, DAVID DUNCAN, KENNATH HENDERSON, ANTHONY DARRELL HINES, HENRY HODGES, STEPHEN HUGUELEY, DAVID IVY, AKIL JAHI, DAVID JORDAN, DAVID KEEN, LARRY MCKAY, DONALD MIDDLEBROOKS, FARRIS MORRIS, PERVIS PAYNE, GERALD POWERS, WILLIAM GLENN ROGERS, MICHAEL SAMPLE, OSCAR SMITH,	)	
Plaintiffs,	)	
vs.	)	**No. 18-183-II(III)**
TONY PARKER, in his official capacity as Tennessee Commissioner of Correction, TONY MAYS, in his official capacity as Warden of Riverbend Maximum Security Institution, JOHN/JANE DOE EXECUTIONERS 1-100, JOHN/JANE DOE MEDICAL EXAMINER(S) 1-100, JOHN/JANE DOE PHARMACISTS 1-100, JOHN/JANE DOE PHYSICIANS 1-100, JOHN/JANE DOES 1-100,	)	
Defendants.		

MEMORANDUM AND ORDER DENYING MOTION OF PLAINTIFFS DAVID EARL MILLER, NICHOLAS TODD SUTTON, STEPHEN MICHAEL WEST, AND LARRY MCKAY TO RECONSIDER ORDER APPLYING TENNESSEE CIVIL PROCEDURE RULE 15.02

Following the close of Plaintiffs' proof in this case, the Plaintiffs made a Tennessee Civil Procedure Rule 15.02 motion to amend the pleadings to conform to the proof. The Court denied Plaintiffs amending the pleadings to assert removal of vecuronium bromide from the Tennessee three-drug July 5, 2018 lethal injection protocol as a known, feasible and available alternative, because this potential cause of action was known or could have been known by the Plaintiffs upon the filing of the lawsuit, and this cause of action was not tried by express or implied consent during the Plaintiffs' proof at trial.

Additionally, the Court also ruled that "[d]enial of the Plaintiffs' Rule 15.02 motion to amend on the *Glossip* alternative, however, is separate from and does not affect that by express consent of the parties, *see Defendants' Notice Of Filing-Lethal Injection Execution Manual Revised July 5, 2018*, the pleadings have been amended to conform to the filing on July 5, 2018 and the proof at trial that the protocol in issue and on which declaratory judgment is sought is the Lethal Injection Execution Manual, Execution Procedures For Lethal Injection, Revised July 5, 2018." *Order Applying Tennessee Civil Procedure Rule 15.02*, pp. 2-3 (July 19, 2018).

Following this ruling, on July 20, 2018, individual Plaintiffs David Earl Miller, Nicholas Todd Sutton, Stephen Michael West and Larry McKay (the "Miller Plaintiffs")

filed a *Motion To Reconsider Order Applying Tennessee Civil Procedure Rule 15.02* to allow these individual Plaintiffs "to amend their complaint to add separate causes of action challenging the July 5th Protocol" and for "this Court to bifurcate consideration of all claims arising out of the July 5th Protocol except such of those claims as have been specifically raised by the pleadings or explicitly raised through the evidence presented at trial (*e.g.*, the ineffectiveness/futility of the July 5th Protocol additions to the consciousness check)."

In the *Motion*, the Miller Plaintiffs argue that the July 5, 2018 revision to the January Lethal Injection Execution Manual constituted a substantial change to the January 8, 2018 protocol pursuant to *Cooey v. Strickland*, 604 F.3d 939 (6th Cir. 2010) and that any claims against the July 5, 2018 protocol did not accrue until the date upon which that protocol was adopted on July 5, 2018. Furthermore, failure to allow the Miller Plaintiffs to amend their complaint to add any new claims to the July 5, 2018 Protocol that were not raised by the pleading or explicitly raised through evidence presented at this trial would violate their due process rights.

> [C]laims against the July 5th Protocol and/or the manner in which Defendants will apply said protocol to the Miller Plaintiffs did not accrue until the date upon which that protocol was adopted. Such claims include, but are not limited to, those claims Plaintiffs raised in their June 28, 2018 Plaintiffs Motion for Leave To Amend Complaint (as they would be applied to the July 5th Protocol), as well as in their July 18, 2018 oral motion to amend to conform to the evidence (as they would be applied to the July 5th Protocol). They also include other claims arising under Tennessee Constitution Article 1, §§ 2, 8, 16, 17, and Article VI, § 2 of the United States Constitution, and the First, Eighth, and Fourteenth

> Amendments to the United States Constitution, 42 U.S.C. § 1983, and state and federal law.
>
> Regardless of whether such claims were, or would be, untimely if they were raised against the January 8, 2018 protocol (hereinafter January 8th Protocol), they are not untimely when raised against the July 5th Protocol. Causes of action against the July 5th Protocol did not accrue until Defendants adopted the July 5th Protocol. Plaintiffs are entitled to an adjudication of such claims and all other claims arising out of the July 5th Protocol, not merely such of those claims were [sic] timely raised against Tennessee's January 8th Protocol.
>
> The Miller Plaintiffs respectfully move this Court to allow them to amend their complaint to add separate causes of action challenging the July 5th Protocol. Further, they move this Court to bifurcate consideration of all claims arising out of the July 5th Protocol except such of those claims as have been specifically raised by the pleadings or explicitly raised through the evidence presented at trial (*e.g.*, the ineffectiveness/futility of the July 5th Protocol additions to the consciousness check).

Motion Of Plaintiffs David Earl Miller, Nicholas Todd Sutton, Stephen Michael West, And Larry McKay To Reconsider Order Applying Tennessee Civil Procedure Rule 15.02, pp. 2-3 (July 20, 2018) (footnotes omitted).

After studying the arguments of counsel and the applicable law, it is ORDERED that the July 20, 2018 *Motion Of Plaintiffs David Earl Miller, Nicholas Todd Sutton, Stephen Michael West, And Larry McKay To Reconsider Order Applying Tennessee Civil Procedure Rule 15.02* is denied.

The basis for denying the *Motion* is that July 5, 2018 revision to the January 8, 2018 Lethal Injection Execution Manual did not constitute a substantial change to which new causes of action accrued.

As stated by the Defendants, the July 5, 2018 revision included the following changes from the January 8, 2018 Lethal Injection Execution Manual.

> Principal changes include the following: (1) Deletion of Protocol A, (2) Clarifying the use of commercially manufactured drugs or compounded preparations, (3) A two minute wait time following administration of midazolam prior to conducing a consciousness check is expressly provided, and (4) The consciousness check procedure following the administration of midazolam will include brushing the back of his hand over the condemned inmate's eyelashes, calling the condemned inmate's name loudly two times, and grabbing the trapezius muscle of the shoulder with the thumb and two fingers and twisting.

Defendants' Notice Of Filing-Lethal Injection Execution Manual Revised July 5, 2018, p. 1 (July 5, 2018).

In *Cooey v. Strickland*, the Sixth Circuit did not define what constitutes a "substantial change" to a lethal injection protocol for purposes of determining whether new causes of action may be asserted after a revision is made. The citation to *Cooey* simply mentions the potential effect of a new protocol on the statute of limitations. In *Cooey*, under the facts of that case and the substantial changes to the protocol at that time, the Court held that "the statute of limitation to challenge the new procedure began to run anew."

Furthermore, *Harbison v. Little*, is also not dispositive of the Miller Plaintiffs' position because in that case, the Court denied the Department of Correction's motion to dismiss, finding the Tennessee Protocol was a new protocol, not just a revision to a previous protocol with minor changes. No. 3:06-CV-01206, 2007 WL 6887553, at *6 (M.D. Tenn. July 12, 2007) (footnote omitted) ("Unlike the Ohio protocol at issue

in *Cooey,* to which some minor changes were made, the Tennessee protocol at issue here is a *new* protocol, published after the revocation of the existing one and a period of no protocol whatsoever being in place.").

The July 5, 2018 revision in this case presents different facts than *Cooey* and *Harbison*. At the core of the Miller Plaintiffs' *Motion* in this case is whether the July 5, 2018 revision to the January 8, 2018 Lethal Injection Execution Manual constitutes a substantial or significant change. Considering all of the facts and circumstances leading up to the July 5, 2018 revision, the Court concludes that the July 5, 2018 revision is not a substantial or significant change to the January 8, 2018 Lethal Injection Execution Manual.

"'[A] method of execution claim accrues on the later of the date on which state review is complete, or the date on which the capital litigant becomes subject to a new or substantially changed execution protocol." *Mann v. Palmer*, 713 F.3d 1306, 1312 (11th Cir. 2013) (quoting *McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir.2008)). "'[W]hether a significant change has occurred in a state's method of execution is a fact dependent inquiry.'" *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 873–74 (11th Cir. 2017), *cert. denied sub nom. Boyd v. Dunn*, 138 S. Ct. 1286 (2018) (citations omitted). In making this determination, the Court is also required to take into account that "[t]here is, however, no right, substantive or procedural, to have every question about executions answered ahead of time." *First Amendment Coal. of Arizona, Inc. v. Ryan*, 188 F. Supp. 3d 940, 952 (D. Ariz. 2016); *see also Sepulvado v. Jindal*, 729 F.3d 413, 420 (5th Cir.

2013) (footnotes omitted) ("There is no violation of the Due Process Clause from the uncertainty that Louisiana has imposed on Sepulvado by withholding the details of its execution protocol. Perhaps the state's secrecy masks 'a substantial risk of serious harm,' but it does not create one.").

In *First Amendment Coal. of Arizona, Inc. v. Ryan*, the Court discussed the balancing of interests in determining whether a State's change to its protocol is so substantial as to trigger an inmates' due process rights.

> A pre-execution challenge to an execution method is meaningful only if the inmate knows what he is challenging. An inmate cannot be expected to raise challenges to the electric chair, for example, if he is told he will face a firing squad. Basic fairness should not allow a state to evade Eighth Amendment scrutiny by misdirecting an inmate into challenging an execution protocol that will not, in fact, be used. A death row inmate has a due process interest in notice of critical changes to his method of execution in time to raise applicable Eighth Amendment challenges.
>
> The strength of the inmate's due process interest depends on the magnitude of the change at issue and the imminence of the execution. Fundamental changes to an execution process are more likely to have far-reaching or unintended consequences and, thus, more likely to trigger new Eighth Amendment concerns. Similarly, last-minute changes afford less opportunity for critical investigation and therefore present a greater risk of introducing preventable harm.
>
> Against the inmate's interest in predictability must be weighed the State's interest in flexibility. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (weighing individual's interest in additional procedures against government's contrary interest). The strength of the State's interest depends on the circumstances. The State has a strong interest in being able to change inherently variable aspects of the execution process, such as the placement of an IV line, immediately before or during an execution. Ordinary medical contingencies may demand it. The State may also have a strong interest in being able to change major aspects of the

> process, such as the type of drugs used, in advance of an execution. Market forces or medical advances may warrant it.
>
> In some cases, the State's change to an inmate's execution method may be so significant, so near the date of execution, and so unsupported by state interests, that it denies the inmate the process he is due in order to raise an Eighth Amendment challenge.

188 F. Supp. 3d 940, 953 (D. Ariz. 2016).

Additionally, in *Wellons v. Comm'r, Ga. Dep't of Corr.*, the Eleventh Circuit discussed the "significant change" requirement as it related to the statute of limitations and held that changing from manufactured pentobarbital to compounded pentobarbital did not constitute a significant change.

> As a preliminary matter, we note that the district court did not address whether Wellons's § 1983 claims were time barred. Claims brought pursuant to 42 U.S.C. § 1983 are subject to the statute of limitations period governing personal injury actions in the state where the action is brought. *Crowe v. Donald,* 528 F.3d 1290, 1292 (11th Cir.2008). In Georgia, the statute of limitations for tort actions is two years. *DeYoung v. Owens,* 646 F.3d 1319, 1324 (11th Cir.2011). This court has explained that a petitioner's "method of execution claim accrues on the later of the date on which state review is complete, or the date on which the capital litigant becomes subject to a new or substantially changes execution protocol." *McNair v. Allen,* 515 F.3d 1168, 1174 (11th Cir.2008). In *Arthur v. Thomas,* we held that whether a significant change has occurred in a state's method of execution is a fact dependent inquiry. 674 F.3d 1257, 1260 (11th Cir.2012) (remanding for a hearing to fully consider whether the change in Alabama's execution protocol constituted a "significant change" which would reset petitioner's statute of limitations).
>
> Wellons argues that the Eighth Amendment entitles him to the information necessary to determine whether Georgia's method of execution is cruel and unusual. Defendants gave Wellons the 2012 Georgia Department of Correction Lethal Injection Protocol in May 2014, and Wellons concedes that Defendants have indicated that they have obtained pentobarbital for his execution. This 2012 protocol sets forth the state's one-

> drug lethal injection protocol of using five grams of pentobarbital administered by trained medical personnel, including a physician and an IV nurse. However, because Defendants have not had any FDA-approved pentobarbital in their possession since March of 2013, Wellons believes that they will inject him with a compounded pentobarbital from an unknown manufacturer. Wellons appears to be arguing that Defendants will not follow their Legal Injection Protocol, or alternatively that changing from pentobarbital to a compound pentobarbital could constitute a "significant change" restarting the statute of limitations. *Arthur,* 674 F.3d at 1260. However, the Georgia Department of Corrections' anticipated use of an adulterated pentobarbital does not establish a "significant alteration in the method of execution." *See Mann v. Palmer,* 713 F.3d at 1314 (11th Cir.2014) ("Because Mann cannot establish that the substitution of pentobarbital constituted a significant alteration to the method of execution in Florida, all of his claims not barred by res judicata are untimely."). Nor has Wellons alleged facts sufficient to show that Georgia's legal injection procedure has "substantially changed" based on the lethal injection secrecy act adopted by the Georgia legislature in March of 2013, which the Georgia Supreme Court has determined is constitutional. O.C.G.A. § 42–5–36; *see Owens v. Hill,* No. S14A0092, 2014 Ga. LEXIS 400 (Ga. May 19, 2014).

Wellons v. Comm'r, Ga. Dep't of Corr., 754 F.3d 1260, 1263–64 (11th Cir. 2014) (footnote omitted); *see also Powell v. Thomas,* 643 F.3d 1300, 1304–05 (11th Cir.2011) (discussing changes in protocol with regard to a statute of limitations bar for Eighth Amendment claims and concluding that substituting the lethal injection drug did not constitute a significant change in the execution protocol).

In this case, none of the changes summarized above constitute a "substantial" or "significant" change to the January 8, 2018 Lethal Injection Execution Manual. The above case law is instructive because the facts and circumstances leading to the July 5, 2018 revision reveal that they are not substantial or significant changes from the January

8, 2018 Lethal Injection Execution Manual to create whole new causes of action through an amendment.

First, the removal of Protocol A is not significant because it merely eliminated one of the two options in the January 8, 2018 protocol. The Plaintiffs are incorrect in arguing that Protocol A was the default method of execution in the January 8, 2018 protocol and therefore "[r]emoval of the default method – Protocol A (one-drug pentobarbital) – also substantially affected Plaintiffs' position in the current litigation of the January 2018 protocol." *Reply To Defendants' Response In Opposition To Plaintiffs David Earl Miller, Nicholas Todd Sutton, Stephen Michael West, And Larry McKay Motion To Reconsider*, p. 2 (July 25, 2018). The January 8, 2018 Lethal Injection Execution Manual does not label "Protocol A" as the default method of execution but rather states that "[t]he Department will use one of the following protocols as determined by the Commissioner." The fact that Commissioner Parker may have testified that Protocol A would be used whenever pentobarbital could be obtained, does not change the plain language of the January 8, 2018 Lethal Injection Execution Manual that Protocol A <u>or</u> Protocol B could be selected for use in lethal injections. By revising the January 8, 2018 Protocol to simply remove Protocol A as an option or choice, no significant right of the Plaintiffs has been affected, but rather this revision eliminated some of the Plaintiffs concerns regarding lack of notice of which method of execution would be chosen under the January 8, 2018 Lethal Injection Execution Manual and the standard the Commissioner was to apply in choosing between Protocol A or Protocol B.

As to the second change – clarifying the use of commercially manufactured drugs or compounded preparations – in the July 5, 2018 revision, this change as well is not substantial. This revision is simply a clarification of what the Court has already ruled in this case. On June 29, 2018, the Court denied the Plaintiffs *Motion To Amend* with regard to the use of compounded chemicals concluding that "the use of one or more compounded formulations of the lethal injection chemicals is a part of and explicitly provided for in the [January 8, 2018] Lethal Injection Protocol on which the Plaintiffs have brought a facial challenge." Because the use of compounded chemicals was always a possibility, even under the January 8, 2018 Lethal Injection Execution Manual, the Defendants July 5, 2018 revision to clarify this in more explicit terms can not as a matter of law constitute a substantial change. In addition to the foregoing, the Eleventh Circuit has explicitly held that there is no "substantial change" in the switch between two forms of the same drug. *Gissendaner v. Comm'r, Georgia Dep't of Corr.*, 779 F.3d 1275, 1282 (11th Cir. 2015) ("The switch from FDA-approved pentobarbital to compounded pentobarbital is not a substantial change because the switch between two forms of the same drug does not significantly alter the method of execution."); *Pardo v. Palmer*, 500 Fed. Appx. 901, 904 (11th Cir. 2012) (citations omitted) ("[W]e have explicitly held that changes to the first and second drugs in the three-drug sequence do 'not constitute a substantial change…'").

As to the revisions to add specific consciousness checks, these too, are insignificant and not substantial for purposes of creating new causes of action. These

revisions were added by the Defendants in response to the Plaintiffs position in this lawsuit that consciousness checks were needed. Moreover, there is no prejudice because during the Plaintiffs' proof at trial, these July 5, 2018 consciousness check modifications were litigated by the Plaintiffs' through (1) specific questioning of their expert witnesses on these revised procedures and their efficacy and (2) questioning of Department of Correction Commissioner Tony Parker and Deputy Commissioner of Administration and Chief General Counsel Debbie Inglis. The proof adduced at trial on these July 5, 2018 consciousness checks was fulsome and in line with the statement in Tennessee Rule of Civil Procedure 15.02 that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Because the Plaintiffs were able to effectively present proof on these modifications during the recent trial, any cause of action related to the consciousness revisions has already been tried by express or implied consent pursuant to Rule 15.02 of the Tennessee Rules of Civil Procedure.

For all these reasons, the *Motion Of Plaintiffs David Earl Miller, Nicholas Todd Sutton, Stephen Michael West, And Larry McKay To Reconsider Order Applying Tennessee Civil Procedure Rule 15.02* is denied.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
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