IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILLY RAY IRICK Plaintiff/Appellant v. GAYLE RAY, in her official capacity as Tennessee's Commissioner of Correction; RICKY BELL, in his official capacity as Warden of Riverbend Maximum Security Institution; REUBEN HODGE, in his official capacity as Deputy Commissioner of Tennessee Department of Correction; MARK LUTTRELL, in his official capacity as Assistant Commissioner of Operations; JOHN DOE PHYSICIANS 1-100; JOHN DOE PHARMACISTS 1-100; JOHN DOE MEDICAL PERSONNEL 1-100; JOHN DOE EXECUTIONERS 1-100; and JOHN DOES 1-100 Defendants/Appellees	*	NO. 10-6436 District Court No. 03:10-1004 DEATH PENALTY CASE EXECUTION SCHEDULED: December 7, 2010

On Appeal from the United States District Court
for the Middle District of Tennessee at Chattanooga

APPELLANT'S BRIEF APPEALING DISMISSAL OF 1983 ACTION

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILLY RAY IRICK	*	NO. _____
	*	
Plaintiff	*	District Court No. 03:10-1004
	*	
v.	*	
	*	
GAYLE RAY, in her official capacity as Tennessee's Commissioner of Correction; RICKY BELL, in his official capacity as Warden of Riverbend Maximum Security Institution; REUBEN HODGE, in his official capacity as Deputy Commissioner of Tennessee Department of Correction; MARK LUTTRELL, in his official capacity as Assistant Commissioner of Operations; JOHN DOE PHYSICIANS 1-100; JOHN DOE PHARMACISTS 1-100; JOHN DOE MEDICAL PERSONNEL 1-100; JOHN DOE EXECUTIONERS 1-100; and JOHN DOES 1-100	*	DEATH PENALTY CASE EXECUTION SCHEDULED: December 7, 2010
Defendants		

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 25, Billy Ray Irick makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation? **No**

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No**

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

s/C. Eugene Shiles Date: 11-24-10

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STATEMENT DENYING NEED FOR ORAL ARGUMENT

Plaintiff denies that oral argument in this case is necessary and therefore requests that the court render a decision based on the parties' briefs alone.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Defendant-appellant states that:

The district court below had jurisdiction over plaintiff's cause of action pursuant to 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights), 2201 (declaratory relief), and 2202 (further relief). Further, plaintiff's cause of action arose under the Eighth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983. Appellate jurisdiction vested upon the filing of plaintiff's notice of appeal on November 22, 2010 (R. 19) by virtue of Title 28 U.S.C. §1291, which grants the Circuit Court of Appeals jurisdiction to review all final decisions of the district courts. This appeal is from a final and appealable order entered November 19, 2010. (R. 16, Order).

STATEMENT OF THE ISSUES

1. Whether the district court erred in dismissing as time-barred plaintiff's §1983 cause of action claiming Tennessee's three drug execution protocol, as currently formulated, violates his Eighth and Fourteenth Amendments right to be free from cruel and unusual punishment.

STATEMENT OF THE CASE

Nature of the Case

Plaintiff filed a nine count cause of action with all but Counts One and Eight stating causes of action under 42 U.S.C. §1983. In general, these 1983 counts claimed that the sodium thiopental used in Tennessee's three drug execution protocol had been shown in previous cases not to sufficiently anesthesize Death Row inmates prior to death and further that the potassium chloride component had been shown in previous cases not to reach an inmate's heart in sufficient concentration to cause his death. Instead, evidence showed that inmates, using the same three drug protocol, were suffering paralysis and asphyxiation from the pancuronium bromide, an admittedly unconstitutional means of execution.

Course of Proceedings and Disposition in the Court Below

Plaintiff's underlying conviction was from a state court jury verdict of felony murder and two counts of rape of a minor, resulting in a sentence of death and two concurrent sentences of 40 years rendered on November 3, 1986. On November 7, 1988, the Tennessee Supreme Court affirmed his conviction in State v. Irick, 762 SW2d 121 (Tenn. 1988). Plaintiff sought review in the United States Supreme Court, but his application for certiorari was denied on March 6, 1989. (109 S.Ct. 1357).

On May 3, 1989, plaintiff filed a post-conviction petition in the Knox County

Criminal Court (Case No. 36992). On April 1, 1996, the Knox County Criminal Court denied post-conviction relief to the plaintiff on all issues. The Tennessee Court of Appeals denied appellate relief in Irick v. State, 973 SW2d 643 (Tenn.Crim.App. 1998). Subsequently, plaintiff filed a petition for review with the Tennessee Supreme Court. However, the court denied review and later that year, the United States Supreme Court denied certiorari in Irick v. Tennessee, 525 U.S. 895, 1195 S.Ct. 219, 142 L.Ed. 180 (1998).

On January 22, 1999, the Federal District Court for the Eastern District of Tennessee appointed Howell G. Clements and subsequently C. Eugene Shiles to represent Billy Ray Irick in his federal *habeas* proceedings, Case No, 3:98-cr-666. The district court granted the State of Tennessee's two motions for summary judgment and dismissed the habeas petition without an evidentiary hearing while further denying a certificate of appealability and pauper's oath status in its order of March 30, 2001. Plaintiff appealed to the Sixth Circuit Court of Appeals and, on February 1, 2008, was granted a partial certificate of appealability on two issues. Subsequently, on May 12, 2009, the Sixth Circuit denied relief upholding the district court's granting of summary dismissal. See Irick v. Bell, 565 F.3d 315 (6th Cir. 2009). Defendant then sought certiorari review by the United States Supreme Court, which was denied on February

22, 2010 (Irick v. Bell, 2010 WL 596620), as well as petitioner's motion to rehear on April 19, 2010.

On May 10, 2010, the State of Tennessee moved to set an execution date with the Tennessee Supreme Court. Subsequently, on May 27, 2010, the plaintiff filed a response seeking commutation of his death sentence and claiming incompetency to be executed. On July 19, 2010, the Tennessee Supreme Court denied plaintiff's request for commutation and set an execution date of December 7, 2010.

On October 25, 2010, plaintiff filed the complaint from which this appeal is taken. (Complaint, R. 1). Subsequently, on November 19, 2010, the district court dismissed his cause of action finding it to be time-barred.[1] (Order, R. 16).

[1]Irick has other cases before this and other courts. However, since these other cases do not impact the underlying case, they have not been described.

STATEMENT OF FACTS

Tennessee's three-drug protocol consists of using sequential bolus injections of sodium thiopental, pancuronium bromide and potassium chloride. The stated explanation for the use of sodium thiopental is that "[i]t works by depressing the central nervous system, causing sedation or sleep, depending on the dose. (R. 1, Attachment B, *Tennessee's Execution Procedures for Lethal Injection*, 4/30/2007, p. 35). The stated explanation for the use of pancuronium bromide is that "[i]t will assist in the suppression of breathing and ensure death." (Id.). The stated explanation for the use of potassium chloride is that "[a] high dose of potassium chloride administered intravenously causes cardiac arrest and rapid death." (Id.).

Execution Procedures

The Current Protocol prescribes the sequence of events surrounding an execution as follows: On day one, the condemned inmate is moved to Death Watch and designated personnel check execution-related equipment (closed-circuit TV, telephones, intercom, etc.); on day two, the condemned inmate chooses his last meal, and on day three, the lethal injection chemicals are delivered to the Lethal Injection Room (R. 1, Attachment B p.60-62).

According to the Current Protocol, on day four, the Warden or Deputy Warden directs the Extraction Team to remove the inmate from the holding cell, place him on

the gurney and secure him in restraints. The inmate is then moved to the Execution Chamber. The IV Team establishes IV lines into both arms (R. 1, Attachment B p.64). The Warden gives the signal to proceed and the Executioner begins to administer the first chemical. Following the completion of the lethal injection process, and a five-minute waiting period, the Warden asks the Physician to enter the room to conduct an examination. The Physician reports his findings to the Warden or his designee (R. 1, Attachment B p. 65).

The Current Protocol directs the Execution Team to bring the Lethal Injection Chemicals to the Lethal Injection Room three hours before an execution. Each chemical is prepared for being drawn into syringes. Two sets of eleven syringes are made. (R. 1, Attachment B p. 38).

Under the Current Protocol, the drugs to be used are:

a.	Syringes 1-4	Sodium thiopental (5 grams: 5000 mg diluted by 200 cc sterile water)
b.	Syringe 5	Saline (50 cc)
c.	Syringes 6 & 7	Pancuronium bromide (50 cc each of 100 mg/mL)
d.	Syringe 8	Saline (50 cc)
e.	Syringes 9 & 10	Potassium chloride (50 cc each of 100 mg/mL of 2 mEq/mL)
f.	Syringe 11	Saline (50 cc)

(R. 1, Attachment B p.38-39).

Under the Current Protocol, the drugs are administered in eleven syringes. Id. No time frame is given regarding administration of the drugs (R. 1, Attachment B p. 43). Ten boxes of 500 mg sodium thiopental are used to make 5 grams. A member of the Execution Team injects 20 cc of sterile water into the powder. The powder is dissolved into the water. He repeats the process nine more times, using the remaining nine boxes. He then draws the solution into four syringes. (R. 1, Attachment B p.38).

Under the Current Protocol, the Execution Team Member draws 50 cc of saline solution into a syringe. Then, the Execution Team Member draws 50 cc of pancuronium bromide (100 mg/mL) in each of two syringes. Next, he draws 50 cc of saline solution into a syringe. Then, he draws 50 cc of potassium chloride (100 mL of 2 mEq/mL) into each of two syringes. Next, he draws 50 cc of saline solution into a syringe. The labeled, numbered and color coded syringes are on a tray on the workstation in the Lethal Injection Room. This process is repeated for the second set of eleven syringes (R. 1, Attachment B p.38-39).

Two IV lines are prepared for simultaneous use. First, the prisoner's arms are securely restrained to the gurney. A tourniquet is placed around the limb or body part above the vein to be used. The Current Protocol does not instruct or designate a person to remove the tourniquet. The IV Team inserts a catheter into the right arm, in the anticubital fossa area, and attaches a Solution Set line from a sodium chloride bag (located in the lethal injection room) to the catheter (R. 1, Attachment B p.41-42).

Under the Current Protocol, the process is repeated for the left arm (R. 1, Attachment B p.41-42). Then the inmate's hands are taped in place, palms up, and the IV Team Members leave the Execution Chamber (R. 1, Attachment B p.43). Under the Current Protocol, the Warden is the only person in the Execution Chamber with the condemned prisoner and gives the signal to proceed with the execution. The Executioner chooses the right or left IV line. The Executioner inserts and twists each syringe into the extension line, until all eleven syringes are injected (R. 1, Attachment B p.43-44).The Current Protocol does not provide for a test of the inmate's level of consciousness after the sodium thiopental is injected.

The Current Protocol includes a diagram of the "Capital Punishment Unit" (R. 1, Attachment B p.9). The diagram shows the Lethal Injection Executioner's Room is separate from the Execution Chamber. Id. The window is not as wide as the length of the gurney. Id. It appears that the window does not have a direct view of the head and face of the condemned inmate. Id.

Under the Current Protocol, after a five minute waiting period, the Warden summons the Physician to determine if the prisoner is dead (R. 1, Attachment B p.65). If not, the process is repeated (R. 1, Attachment B p.6-7). No one except defendant Bell is present in the Execution Chamber during the administration of the three

chemicals. No one is at bedside monitoring the IV lines, the IV drip or the prisoner's vital signs or level of consciousness.

Under the Current Protocol, there is no procedure for ensuring that the anesthetic agent is properly flowing into the prisoner, nor any procedures for ensuring that the prisoner is properly sedated prior to the administration of the second and third chemicals (as would be required in any medical or veterinary procedure before the administration of a neuromuscular blocking agent, such as pancuronium bromide, or the administration of a painful, burning potassium chloride overdose).

Demonstrated Risks of Unnecessary Pain and Suffering

Defendants have come to know about the substantial risks involved in execution by the current thee drug lethal injection protocol but have nevertheless disregarded those risks and failed to make changes and incorporate safeguards. In developing the Current Protocol, Defendants consulted "corrections professionals," "legal experts," and "court opinions in execution protocol cases" from other jurisdictions such as Missouri, Oklahoma, and Virginia (R. 1, Attachment A p.1, 4-5, 12). Defendants referenced Florida's protocol and a law journal article which describes problems with current protocols around the country and thirty-one botched executions (R. 1, Attachment A p.13).

Executions in other states with lethal injection protocols which sometimes afford greater protections than the Current Protocols, have resulted in the unnecessary infliction of pain and suffering, even in jurisdictions where the executioners were far more experienced and/or skilled than those described in the Current Protocols:

a. Charles Brooks, Jr., December 7, 1982, Texas: In what was the first execution by lethal injection, an overdose of sodium thiopental took seven minutes to kill Brooks. Witnesses stated that Brooks "had not died easily."

b. James D. Autry, March 14, 1984, Texas: Autry took ten minutes to die, complaining of pain throughout. Officials suggested that faulty equipment or inexperienced personnel were to blame.

c. Thomas Andy Barefoot, October 30, 1984, Texas: A witness stated that after emitting a "terrible gasp," Barefoot's heart was still beating after the prison medical examiner had declared him dead.

d. Stephen Peter Morin, March 13, 1985, Texas: It took technicians over forty minutes to locate a suitable vein to insert the lethal injection needle, and another eleven minutes for Morin to die.

e. Randy Woolls, August 20, 1986, Texas: Because of his history of drug addiction, Woolls had to assist execution technicians in finding an adequate vein for insertion.

f. Elliot Rod Johnson, June 24, 1987, Texas: Johnson's execution was plagued by repetitive needle punctures and took executioners approximately thirty-five minutes to find a vein.

g. Raymond Landry, December 13, 1988, Texas: Two minutes into the execution, after a lengthy search for an adequate vein, the syringe came out of Landry's vein, "spewing deadly chemicals toward startled witnesses."

h. Stephen McCoy, May 24, 1989, Texas: In a violent reaction to the drugs, which experts attributed to a weak dosage, McCoy "choked and heaved" during his execution.

i. George "Tiny" Mercer, January 6, 1990, Missouri: A medical doctor was required to perform a cutdown on Mercer's groin. The Tennessee Committee purported to review lethal injection litigation in Missouri (R. 1, Attachment A p.12), but the Report fails to indicate what, if any guidance it obtained and why it rejected safer, less painful alternatives to a cut-down.

j. Ronald Gene Simmons, June 25, 1990, Arkansas[2]: The administration of the lethal chemicals began at 9:02 p.m. Between 9:02 and 9:04 p.m., according to an eyewitness, Mr. Simmons appeared to nod off into unconsciousness. However, "at 9:05 p.m. he called out 'Oh! Oh!' and began to cough sporadically as though he might be having difficulty breathing. During the next two minutes, he coughed slightly, approximately 20 times, each cough heaving his stomach slightly and causing the gurney to shake a little." See R. 1, Bill Simmons, *Stoic Murderer Meets His Fate By Quiet Means*, Arkansas Democrat Gazette, June 26, 1990 at 9A, Attachment G. Mr. Simmons became still at 9:07 p.m. after which his face and arm turned first blue and then purple. An ADC employee twice appeared to adjust the IV tube in Mr. Simmons' arm, and not until 9:19 p.m. was Mr. Simmons pronounced dead by the coroner. Id.

k. George Gilmore, August 31, 1990, Missouri: According to a witnessing doctor, force was used to stick the needle into Gilmore's arm.

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[2]The Arkansas lethal injection protocol calls for a 2 gram dose of sodium thiopental, followed by pancuronium bromide and potassium chloride. Using this protocol, the Department of Corrections there has presided over several executions where "inmates remained conscious and suffered pain during their executions." See Nooner v. Norris, No. 06-00110 (E.D. Ark.), June 26, 2006 Order (granting a preliminary injunction), R. 1, Attachment F p. 4. The United States District Court for the Eastern District of Arkansas, stayed executions to allow further investigation into the constitutionality of the lethal injection protocol. See Nooner, et al. v. Norris, No. 06-00110 (E.D.Ark.).

1. Charles Troy Coleman, September 10, 1990, Oklahoma: Technicians had difficulty finding a vein and the execution was delayed by ten minutes. The Tennessee Committee purported to review lethal injection litigation in Oklahoma (R. 1, Attachment A p.12) but the Report does not indicate what, if any guidance, was obtained and why the Current Protocol does not provide a pre-execution examination of the prisoner to ameliorate problems associated with locating adequate veins which results in a painful and prolonged execution.

m. Charles Walker, September 12, 1990, Illinois: There was some indication that, while appearing calm on the outside due to the paralyzing drugs, Walker suffered excruciating pain. There were reports of faulty equipment and inexperienced personnel.

n. Maurice Byrd, August 23, 1991, Missouri: The machine used to inject the lethal dosage malfunctioned. The Tennessee Committee purported to review lethal injection litigation in Missouri (R. 1, Attachment A p.12), but the Report fails to indicate what, if any guidance it obtained and why the Current Protocol fails to anticipate and provide contingencies for malfunctioning equipment.

o. Ricky Ray Rector, January 24, 1992, Arkansas: The execution took 1 hour and 9 minutes. Mr. Rector's hands and arms were punctured no less than 10 separate times searching for a suitable vein. Ultimately, someone on the execution team did

a cut-down into his aim. Witnesses could hear his moans as they looked for a vein. See R. 1, Sonja Clinesmith, *Moans Pierced Silence During Wait*, Arkansas Democrat Gazette, January 26, 1992, at 1B, Attachment H; R. 1, Ron Fournier, *Outsiders View Death Of Rector, Witnesses Listen, Wait Beyond Curtain*, Arkansas Democrat Gazette, January 26, 1992, at 4B, Attachment I. Rector talked after 2 minutes and then after 5 minutes his lips were still moving rapidly - as if he was trying to draw shallow breaths. He was not pronounced dead until 10:09 p.m. See R. 1, Joe Farmer, *Rector, 40, Executed for Officer's Slaying*, Arkansas Democrat Gazette, January 25, 1992, at 9A, Attachment J; R. 1, Fournier, Attachment I.

p. Robyn Lee Parks, March 10, 1992, Oklahoma: Parks had a violent reaction to the drugs used in his execution. Two minutes after the drugs were dispensed the muscles in his jaw, neck, and abdomen began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag until death came, eleven minutes after the drugs were first administered. A Tulsa World reporter wrote that the execution looked "painful and ugly," and "scary." One witness said that his death looked "painful and inhumane." The Tennessee Committee purported to review lethal injection litigation in Oklahoma (R. 1, Attachment A p.12), but the Report fails to indicate what, if any guidance it obtained and why the Current Protocol

does not anticipate a violent reaction to the three drugs and provide procedures to avoid such a reaction.

q. Billy Wayne White, April 23, 1992, Texas: White's death required forty-seven minutes because executioners had difficulty finding a vein that was not severely damaged from years of heroin abuse.

r. Justin Lee May, May 7, 1992, Texas: According to a witness, May gasped and reared against his restraints during his nine-minute death.

s. Steven Douglas Hill, May 7, 1992, Arkansas: His execution began at 9:02 p.m. His eyes closed one minute later, but shortly afterwards he had what witnesses described as "a 'seizure' arching his back with his cheeks popping." See R. 1, Andy Gotlieb and Linda Satter, *Hill Dies By Injection for '84 Police Killing*, Arkansas Democrat Gazette, May 8, 1992, at 17A, Attachment K. He was visibly gasping for air, and even though he was strapped down to the gurney, his chest was heaving against the wide belt that covered his chest. The seizure ended at 9:04 p.m. and Mr. Hill was pronounced dead at 9:10 p.m.

t. John Wayne Gacy, May 10, 1994, Illinois: Complications caused by a faulty delivery tube resulted in Gacy's execution lasting eighteen minutes.

u. Emmitt Foster, May 3, 1995, Missouri: Foster took twenty-nine minutes to die. Seven minutes after the lethal chemicals began to flow into Emmitt Foster's

arm, the execution was halted when the chemicals stopped circulating. With Foster gasping and convulsing, the blinds were drawn so that witnesses could not view the scene. According to the Washington County Coroner who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney; they were so tight that the flow of chemicals into the veins was restricted. Foster did not die until several minutes after a prison worker finally loosened the straps.

v. Ronald Allridge, June 8, 1995, Texas: Allridge's execution was conducted with only one needle, rather than the standard two, because a suitable vein could not be found in his left arm.

w. Richard Townes, Jr., January 23, 1996, Virginia: It took twenty-two minutes for medical personnel to find an adequate vein. After unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Mr. Townes' right foot. The Tennessee Committee purported to review lethal injection litigation in Virginia (R. 1, Attachment A p.12), but the Report fails to indicate what, if any, guidance it obtained and why the Current Protocol does not provide for a pre-execution examination of the prisoner to ameliorate problems associated with locating adequate veins which results in a painful prolonged execution.

x. William Bonin, February 23, 1996, California: The execution logs of William Bonin's execution also reflect irregularities that may have caused Bonin to die in excruciating pain. Mr. Bonin was given a second dose of pancuronium bromide for reasons that remain unclear, even though a properly administered initial dose would paralyze an inmate for several hours. See R. 1, Execution Log of William Bonin, Attachment L.

y. Tommie J. Smith, July 18, 1996, Indiana: The execution team required a total of thirty-six minutes to find a vein. Officials acknowledged that they had known beforehand that Smith's unusually small veins might cause problems.

z. Luis M. Mata, August 22, 1996, Arizona: Mata remained strapped to a gurney with the needle in his arm for one hour and ten minutes while his attorneys argued his case. When injected,. his head jerked, his face contorted, and his chest and stomach sharply heaved.

aa. Scott Dawn Carpenter, May 8, 1997, Oklahoma: Carpenter gasped and shook for three minutes following the injection. He was pronounced dead eight minutes later. The Tennessee Committee purported to review lethal injection litigation in Oklahoma (R. 1, Attachment A p.12), but the Report fails to indicate what, if any, guidance it obtained and why the Current Protocol does not include provisions designed to ameliorate a prolonged execution.

bb. Michael Eugene Elkins, June 13, 1997, South Carolina: Liver and spleen problems had caused Elkins' body to swell, requiring executioners to search almost an hour--and seek assistance from Alkanes--to find a suitable vein.

cc. Joseph Cannon, April 23, 1998, Texas: Cannon's vein collapsed and the needle popped out after the first injection. These events caused him to make a second final statement and be injected a second time behind a closed curtain.

dd. Gainer Ruiz Camacho, August 26, 1998, Texas: Camacho's execution was delayed approximately two hours due to last-minute appeals and problems finding suitable veins in Camacho's arms, which had been damaged by his drug problem.

ee. Roderick Abate, October 5, 1998, Nevada: The execution team took twenty-five minutes to find a vein suitable for the lethal injection.

ff. Manuel Babbitt, May 4, 1999, California: A minute after the pancuronium bromide was administered, Mr. Babbitt had shallow respirations and brief spasms in his upper abdomen suggesting an attempt to fight against the effects of the pancuronium bromide. Execution Log of Manuel Babbitt, Attachment M. Tennessee's Current Protocol does not differ in any material respect from that used in the California executions, including 5 grams of thiopental.

gg. Bennie Damps, June 8, 2000, Florida: The execution team had to forfeit the second injection (Florida protocol demands two injections) after a thirty-three

minute search failed to locate a suitable-second vein. Damps complained of pain and bleeding in his final statement. The Tennessee Committee purported to review the lethal injection process in Florida (R. 1, Attachment A p.13) but the report fails to indicate what, if any, guidance it obtained and why the Current Protocol does not minimize the pain and suffering and prolonged death by providing a physical of the condemned and identification of suitable veins before the execution process begins.

hh. Bert Leroy Hunter, June 28, 2000, Missouri: In a violent reaction to the drugs, Hunter repeatedly coughed and gasped for air after the lethal chemicals were injected and before he lapsed into unconsciousness. A witness reported that Hunter had "violent convulsions. His head and chest jerked rapidly upward as far as the gurney restraints would allow, and then he fell quickly down upon the gurney. His body convulsed back and forth ...repeatedly...He suffered a violent and agonizing death." The Tennessee Committee purported to review the lethal injection process in Missouri (R. 1, Attachment A p.12), but the Report fails to indicate what, if any, guidance it obtained and why the Current Protocol does not anticipate a violent reaction to the three drugs and provide procedures to avoid such a reaction.

ii. Willie Fisher, March 9, 2001, North Carolina[3]: During the lethal injection of Willie Fisher, "Mr. Fisher appeared to lose consciousness around 9:00 p.m. but subsequently began convulsing . . . he looked as though he was trying to catch his breath but could not and his eyes were open as his chest heaved repeatedly." He was not pronounced dead until 9:21 p.m. See Brown, *supra* at *17. The Tennessee Committee purported to review lethal injection litigation in North Carolina (R. 1, Attachment A p.12) but the Report fails to indicate what guidance, if any, it obtained and why the Current Protocol does not contain procedures to determine the condemned is unconscious before administration of the second and third drugs.

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[3]In Brown v. Beck, No. 06-3018, the District Court of the Eastern District of North Carolina, Irickern Division, had before it toxicology data following four executions in North Carolina showing low post-mortem levels of sodium thiopental. North Carolina's protocol calls for a 3 gram dosage of the drug, to be followed by pancuronium bromide and potassium chloride. The toxicology data contradicted the opinion of the State's experts as to the expected concentration that would be present in a man of average size after having been given a dose of 3000 mg of sodium thiopental. See Brown v. Beck, 2006 U.S. Dist. LEXIS 60084 (E.D.N.C. April 7, 2006) (denying preliminary injunction, but conditioning future executions on presence of an anesthesiologist).

Also in Brown, the District Court had before it affidavits from attorneys present at recent executions who had witnessed the condemned inmates writhing, convulsing, and gagging when executed. Again, such witness accounts were inconsistent with a sufficient dose of sodium thiopental having been successfully delivered to the brain such that the condemned inmate would not feel pain.

jj. Joseph Martinez High, November 7, 2001, Georgia: For twenty minutes, prison technicians attempted unsuccessfully to locate a vein in High's arms. Eventually, they inserted a needle in High's chest, after a doctor cut an incision there, while they inserted the other needle in one of High's hands.

kk. Stephen Wayne Anderson, January 29, 2002, California[4]: Witness accounts suggest that Mr. Anderson was not properly anesthetized when he died. The execution took over 30 minutes, and during that time Mr. Anderson's chest and stomach "heaved more than 30 times." See R. 1, Declaration of Mango Raccoon, Attachment N, ¶ 6. The Tennessee Committee purported to review lethal injection litigation in California (R. 1, Attachment A p.12) but the Report fails to indicate what guidance, if any, it obtained and why the Current Protocol does not contain procedures to determine the condemned is unconscious before administration of the second and third drugs.

ll. Eddie Hartman, October 3, 2003, North Carolina: During the lethal injection of Eddie Ernest Hartman, he appeared to suffer for at least five minutes after the lethal injection. "Eddie's throat began thrusting outward and collapsing inward.

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[4]The state of California released new execution protocols on May 15, 2007. These have not yet been implemented as California officials have failed to comply with administrative procedures under California law. Those administrative processes are currently pending.

His neck pulsed, protruded, and shook repeatedly. Eddie's chest at first pulsated frequently, then intermittently, and at least twice I saw Eddie's chest heave violently. Throughout the execution, Eddie's eyes were partly open while his body relentlessly convulsed and contorted." See Brown, supra at *16. The Tennessee Committee purported to review lethal injection litigation in North Carolina (R. 1, Attachment A p.12) but the Report fails to indicate what guidance, if any, it obtained and why the Current Protocol does not contain procedures to determine the condemned is unconscious before administration of the second and third drugs.

mm. Timmy Keel, November 7, 2003, North Carolina: During the lethal injection of Timmy Keel, his body was "twitching and moving about for approximately ten minutes" after the injection of the chemical cocktail. Id.

nn. John Daniels; November 14, 2003, North Carolina: During the lethal injection of John Daniels, Mr. Daniels convulsed violently after the administration of the chemical cocktail. "He sat up and gagged." Witnesses "could hear him through the glass." "A short time later, [Mr. Daniels] sat up and gagged and choked again, and struggled with his arms under the sheet. He appeared to [witnesses] to be in pain. He finally lay back down and was still." Id.

As the District Court there found, "evidence of the problems associated with these executions while, perhaps, not clearly indicative of the protocol, does raise some

concerns about the effect of North Carolina's protocol." See Brown, *supra* at *18 (concluding "it would be inappropriate to allow Defendants to proceed with Mr. Brown's execution under the current protocol considering the substantial questions raised"). The Tennessee Committee purported to review lethal injection litigation in North Carolina (Attachment A p.12) but the Report fails to indicate what guidance, if any, it obtained and why the Current Protocol does not contain procedures to determine the condemned is unconscious before administration of the second and third drugs.

oo. Joseph Lewis Clark, May 2006, Ohio: Execution team members took over twenty minutes to insert one IV catheter into Mr. Clark's arm. According to Ohio protocol two catheters were necessary, but the team proceeded with only one. After the single IV was inserted and the chemicals began to flow, Mr. Clark remained breathing, legs moving, arms strapped down. After minutes, he raised. up several times and told executioners, "It's not working, it's not working." Minutes later, Mr. Clark raised up again and said, "can't you just give me something by mouth to end this?" At that point, the team closed the curtain, and witnesses heard groans and moans from Mr. Clark as if he was in agony. Witnesses reported that the cries of pain lasted for about five or ten minutes and were followed by snores from Mr. Clark. Obviously, if the sodium thiopental had worked properly, Mr. Clark would not have been able

to cry out in pain, feel pain, or sit up during the execution. See R. 1, Adam Liptak, *Trouble Finding Inmate's Vein Slows Lethal Injection in Ohio*, New York Times, May 3, 2006, Attachment O. Defendants failed to indicate why they chose not to include a procedure in the Current Protocol to insure the condemned is adequately anesthetized before administration of the second and third drugs. At the time of Clark's execution, Ohio was using a lethal injection protocol that used three drugs. It has since adopted a one-drug protocol. *New Execution Method is Used in Ohio*, New York Times, December 9, 2009.[5]

The botched execution of Mr. Clark demonstrates graphically and horrifically how an execution that appeared completely normal and routine at the outset can rapidly go horribly wrong. Ohio's previous protocol called for 2 grams of sodium thiopental, followed by pancuronium bromide and potassium chloride. The federal District Court for the Southern District of Ohio found that "evidence raises grave concerns about whether a condemned inmate would be sufficiently anesthetized under Ohio's lethal injection protocol prior to and while being executed." See Cooey v. Taft, 430 F. Supp. 2d 702, 707 (S.D. Ohio April 28, 2006)(granting preliminary injunction).

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[5] The State of Washington has also adopted a one-drug lethal injection protocol. *Washington Changes Execution Method*, Seattle Times, March 2, 2010.

pp. Angel Diaz, December 13, 2006, Florida: Using a three-drug protocol, Mr. Angel Diaz did not get an effective amount of sodium thiopental because the IV lines were improperly seated in his veins with through and through punctures. As a result, none of the materials injected went to the right place. Instead, the drugs entered his bloodstream first through his flesh and muscle tissue. This process caused foot-long chemical burns on both arms from the sodium thiopental. During the execution, observers reported that Mr. Diaz moved and tried to mouth words. It took 34 minutes and 14 syringes of chemicals for Mr. Diaz to die, during which he was clearly in pain, struggling for breath and grimacing. See R. 1, Attachment P, Chris Tisch, *Executed Man Takes 34 Minutes To Die*, www.Tampabay.com, December 13, 2006; R. 1, Attachment Q, Chris Tisch, *Second Dose Needed To Kill Inmate*, www.Tampabay.com, December 14, 2006; R. 1, Attachment R, Florida Commission Report, p.8-9.

Following the Diaz execution, Governor Bush ordered that all executions be stayed while a committee undertook a review of the Diaz execution and of lethal injection protocols in Florida in general. (Executions remain stayed in Florida under that order. See Florida Commission Report, R. 1, Attachment R, p.2). The Tennessee Committee purported to review the Florida Commission Report (R. 1, Attachment A

p.13) but failed to indicate what, if any, guidance it obtained and why any proposal in the Florida Report were rejected and not included in the Current Protocol.

Demonstrated Risks of Unnecessary Pain and Suffering in Tennessee Executions

The State of Tennessee has been through a number of executions using methods similar to those referenced above. Autopsies and eye-witness observations from these executions show that the protocols create a demonstrated risk of severe pain. Unlike the evidence reviewed by the Supreme Court in Baze v. Rees, 553 U.S. 35, 108-10 (2008), where some of the justices concluded that the controversy surrounding the methodology of the Lancet study rendered it inadequate to justify judicial intervention in a state's administration of the three-drug protocol, Mr. Irick is offering evidence of cruel and unusual punishment based on information about Tennessee inmates obtained from autopsies that followed Tennessee's executions. The variables that may have underlined the findings of the Lancet article are simply not present here.

Coe Execution

Robert Coe was executed by suffocation while inadequately anesthetized. His toxicology report indicated a serum sodium thiopental level of 10.2 mg/1. (Harbison v. Little, *et al*, M.D. Tenn., No. 3:06-cv-1206, DE.170-1 p.82, #5022). Assuming that Dr. Levy, who conducted the autopsy, correctly recalled that the blood sample was obtained from a peripheral location, i.e., one of his femoral vessels, there is no

substantial question but that the toxicology report accurately reflects his serum thiopental level at the time of death.

Mr. Coe's autopsy report reveals that the intravenous catheters used for his execution remained properly placed in accordance with the Tennessee Protocol in the superficial blood vessels of the antecubital fossa of both of Mr. Coe's arms (R. 1, Attachment E, Coe Autopsy Bates p.05). Mr. Coe's autopsy did not describe any signs of infiltration at the injection site. See also Dr. Levy testimony, Harbison v. Little, *et al*, M.D. Tenn., No. 3:06-cv-01206, DE 142,TR725-26, DE 143, TR903-04.

Workman Execution

Philip Workman was executed on May 9, 2007, under the current Tennessee Protocol. The autopsy report was completed on October 24, 2007. (R. 1, Attachment S, Workman Autopsy). Mr. Workman's post-mortem thiopental level was 18.9 mg/L, (R. 1, Attachment S, Workman Autopsy), which means he was not fully anesthetized during his execution (R. 1, Attachment T, 2010 Affidavit of Dr. Lubarsky p.5).

Mr. Workman's autopsy was not performed, and blood was not drawn, until ten days after his execution (R. 1, Attachment S, Workman Autopsy Report p. 1/4). The blood sample used to determine Mr. Workman's level of thiopental was taken from his heart (Id. at Aegis, p2/2). Dr. Levy, who performed Mr. Workman's autopsy, testified that thiopental redistributes from the extremities back to the heart following

death, making those levels higher than would be found at the time of death (Harbison v. Little, *et al*, M.D.Tenn., No. 3:06-cv-1206,DE 142, TR733-34; see also R. 1, Attachment T, 2010 Affidavit of Dr. Lubarsky p.5).

Due to the time lapse and post-mortem distribution, there is an even greater probability that the level of thiopental in Mr. Workman at the time of his death was less than 18.9 mg/L found in the heart blood drawn ten days after his death (R. 1, Attachment T, 2010 Affidavit of Dr. Lubarsky p.5-6). The post-mortem drug level of thiopental measured in Mr. Workman would not be sufficient to produce unconsciousness or anesthesia. This means that during the execution procedure, Mr. Workman was probably awake, suffocating in silence, and feeling the searing pain caused by the intravenous injection of potassium chloride (Id. p.6). The reported level of pancuronium bromide in Mr. Workman's blood would be sufficient to cause full paralysis and death by suffocation (Id.). Mr. Workman was executed by suffocation while inadequately anesthetized.

Mr. Workman's autopsy report reveals that the intravenous catheters used for his execution remained properly placed in accordance with the Tennessee Protocol in the superficial blood vessels of the antecubital fossa of both of Mr. Workman's arms (R. 1, Attachment S, Workman Autopsy Report, p.3/4). Mr. Workman's autopsy did not describe any signs of infiltration at the injection site. See also Dr. Levy testimony,

Harbison v. Little, *et al*, M.D. Tenn., No. 3 :06-cv1206, DE 142, TR725-26, DE 143, TR903-04.

Henley Execution

Steve Henley was executed on February 4, 2009, under the current Tennessee Protocol. The autopsy report on Mr. Henley was finalized more than a year later on February 17,2010 and released on March 10, 2010. (R. 1, Attachment U, Henley Autopsy Cover Page, p. 6/6). Witnesses observed Mr. Henley turn blue to purple in color during the execution process (R. 1, Attachment V, Affidavit of Stacy Rector & exhibits attached thereto).

Mr. Henley's autopsy report reveals his sodium thiopental level was 8.31 mg/L; an amount inadequate to cause Mr. Henley to be unconscious during his execution (R. 1, Attachment U, Henley Autopsy Report, p. 1, 5, Aegis Report; R. 1, Attachment T, 2010 Affidavit of Dr. Lubarsky p.6). Mr. Henley's potassium level was not elevated and would have had no effect on his heart (R. 1, Attachment U, Henley Autopsy Report, p. 1, 5; R. 1, Attachment T, 2010 Affidavit of Dr. Lubarsky p.6-7). This is consistent with the observations of witnesses to Mr. Henley's execution that his face began to turn blue to purple approximately seven minutes after the execution because a change of color occurs when non-oxygenated blood is pumped to the extremities by a beating heart (R. 1, Attachment T, 2010 Affidavit of Dr. Lubarsky p.7). Mr.

Henley's pancuronium bromide level was far above the level required to cause Mr. Henley's death through suffocation (R. 1, Attachment U, Henley Autopsy Report, 1, 5; R. 1, Attachment T, 2010 Affidavit of Dr. Lubarsky p.7).

Mr. Henley's autopsy report reveals that the intravenous catheters used for his execution remained properly placed in accordance with the Tennessee Protocol in the superficial blood vessels of the antecubital fossa of both of Mr. Henley's arms, (R. 1, Attachment U, Henley Autopsy Report, p. 3/6), and that all drugs had been fully dispensed in accordance with the Tennessee Protocol (Id.). Mr. Henley's autopsy did not describe any signs of infiltration at the injection site.

Sodium thiopental, as used in the Tennessee Protocol, does not effectively establish unconsciousness.

Sodium thiopental is an ultra-short acting barbiturate wherein the induction of anesthesia occurs quickly, but its effect wears off in a matter of minutes. There are differing levels of anesthesia, and thus consciousness. The way the human body reacts to various stimuli differs depending upon the level of anesthesia. For example, when a person is administered sodium thiopental, a person will continue to have the following states of consciousness at the following serum levels of pentothal:

a. 0-13 mg/l: Consciousness

b. 13-18 mg/1: Loss of purposeful movement in response to verbal stimulation

c. 23-28 mg/1: Loss of purposeful movement in response to tetanic nerve stimulation

d. 33-46 mg/l: Loss of purposeful movement in response to trapezius muscle squeeze

e. 45-57 mg/l: Loss of movement in response to larangoscopy

f. 63 mg/l >: Loss of movement in response to intubation

R. 1, *Thiopental Pharmacodynamics*, Hung, *et al*, 77:234-244, August, 1992, *Anesthesiology*, Attachment W.

Upon administration of sodium thiopental, EEG brain activity peaks at 13.3 mg/1, after which it drops back to normal activity at 31.2 mg/1, and zero brain waves per second occurs only with serum levels above 50 mg/1.

The thiopental level for Mr. Coe was 10.2 mg/L; for Mr. Workman it was 18.9 mg/L; and for Mr. Henley it was 8.31 (R. 1, Attachment E, Coe Autopsy Bates p.13; R. 1, Attachment S, Workman Autopsy Report, p.2; R. 1, Attachment U, Henley Autopsy, p. 1).

Every autopsy performed following an execution under the Tennessee Protocol reveals levels of thiopental below those required to induce unconsciousness that would prevent serious harm from the administration of pancuronium bromide and potassium chloride (R. 1, Attachment T, 2010 Affidavit of Dr. Lubarsky p.7-8).

Pancuronium bromide (Pavulon), when administered as intended, is the fatal agent under the Tennessee Protocol.

Pancuronium bromide, marketed under the name Pavulon, is a neuromuscular blocking agent which causes paralysis of the skeletal muscles of an individual. While pancuronium bromide paralyzes the diaphragm to prevent breathing, it does not affect the heart muscle. Pancuronium bromide does not affect the brain or nervous system, nor does it block the actual reception of nerve impulses in the brain or the passage of such impulses within the brain. Pancuronium bromide does not affect consciousness or the sensation of pain or suffering. An individual under the influence of pancuronium bromide, though paralyzed, still has the ability to think, to be oriented to where he is, to experience fear or terror, to feel pain, and to hear (See Commissioner Little testimony, Harbison v. Little, *et al*, M.D.Tenn., No. 3:06-cv-01206, DE138, TR50; Levy testimony, DE 142, TR718; Higgins testimony, DE 143. TR953). See also, Harbison, 511 F.Supp.2d 872, 883-84 (2007).

A lethal level of pancuronium is 0.16 mg/L (R. 1, Attachment X, Winek Drug & Chemical Blood-Level Data 2001 p.12). Pancuronium bromide, administered by itself as a "lethal dose" will ultimately cause someone to asphyxiate or suffocate to death while still conscious. If an individual is not properly anesthetized when injected with pancuronium bromide, he will consciously experience extreme pain and terror while being completely paralyzed. In this state, the person will undergo the terrorizing and excruciating experience of suffocation without the ability to move or to express

the pain and suffering which he is experiencing as he is being suffocated. Harbison, 511 F.Supp.2d at 883-84.

Because pancuronium bromide paralyzes all skeletal muscles including facial muscles and those used to speak or communicate through noises, an observer cannot detect, from outward appearance, any expression of pain, horror, or suffering experienced because of the use of pancuronium bromide or suffering from any other source, such as potassium chloride which will activate the nerves of the venous system causing an extreme burning pain.

The pancuronium bromide levels in Mr. Coe (4.7 mg/L), Mr. Workman (.630 mg/L), and Mr. Henley (1.6 mg/L), were sufficient to cause paralysis and death by suffocation (R. 1, Attachment E, Coe Autopsy; R. 1, Attachment S, Workman Autopsy; R. 1, Attachment U, Henley Autopsy; R. 1, Attachment T, 2010 Affidavit of Dr. Lubarsky, p.4-5, 6, 7).

Potassium chloride, when administered as intended, by the Tennessee Protocol does not induce cardiac arrest.

In the Tennessee Protocol, potassium chloride is the stated means for "cardiac arrest and rapid death" (R. 1, Attachment B, Tennessee Protocol p.35). The administration of potassium chloride activates all the nerve fibers inside the venous system. Because veins are replete with nerve fibers, the administration of potassium chloride into the veins creates extreme pain. It takes a serum concentration of more than 16 mEq/l (16mmol/1) of potassium to arrest the heart (R. 1, Attachment Y,

Affidavit of James Ramsey p.6-7 ¶¶xxv & xxvir; See Ramsey testimony, Harbison v. Little, *et al*, M.D. Tenn., No. 3:06-cv-1206, DE 139, TR262-64; TR27278).

The autopsy report of Robert Coe demonstrates that his vitreous potassium was 9 mEq/L (9 mmol/L), far short of the required minimum 16.4 mEq/l to cause electro mechanical arrest of the heart (R. 1, Attachment Y, Affidavit of James Ramsey p.8-9 ¶xxx-xxxi; See Ramsey testimony, Harbison v. Little, *et al*, M.D. Tenn., No. 3:06-cv-1206, DE 139, TR262-63). Dr. Higgins testified that a potassium level of nine milliequivalents might not be fatal and a person like Mr. Coe could survive (Harbison v. Little, *et al*, M.D. Tenn., No. 3:06-cv-1206, DE 143, TR950-51). Dr. Levy testified that the only drug level in Mr. Coe's blood to completely reach a lethal level was the pancuronium bromide (Id., TR920).

The autopsy report of Philip Workman indicates his vitreous potassium level was 9 mEq/l (9 mmol/1) (R. 1, Attachment S, Workman Autopsy). This level is far short of the required minimum 16.4 mEq/l to cause electro mechanical arrest of the heart.

The autopsy report of Steve Henley demonstrates that his vitreous potassium was 6 mEq/L (6mmol/L) (R. 1, Attachment U, Henley Autopsy). The vitreous potassium level was normal, not elevated, and far short of the required minimum 16.4 mEq/L to cause electromechanical arrest of the heart (R. 1, Attachment Y, Ramsey Affidavit p.7¶xxviu; See Ramsey testimony, Harbison v. Little, *et al*, M.D. Tenn., No. 3:06-cv-1206, DE 139, TR262-64).

Witnesses to the Henley execution observed his skin color turn blue to purple during his execution (R. 1, Attachment V, Affidavit of Stacy Rector & exhibits attached thereto). Mr. Henley's change in skin color is consistent with death by suffocation while his heart continued to beat (R. 1, Attachment T, 2010 Affidavit of Dr. Lubarsky p.7).

One of the main contributing factors to low potassium concentration solutions reaching the heart would be that, given an intravenous injection, the solution would necessarily have to pass through the lungs (which have the surface area of approximately that of a tennis court) during which the potassium concentrations would fall dramatically (R. 1, Attachment Y, Affidavit of James Ramsey p.8 ¶xxix; See Ramsey testimony, Harbison v. Little, *et al*, M.D. Tenn., No. 3:06-cv-1206, DE 139, TR257-58).

Using an amount of, and a method of administering, potassium chloride which does not arrest the heart is meaningless and arbitrary and without a legitimate or compelling purpose. It will not hasten or effect death. It will only inflict excruciating pain if the condemned is not properly anesthetized. Instead, the killing agent will be the pancuronium bromide meaning death by suffocation or asphyxiation.

Summary

The person being lethally injected under the Current Protocol actually dies from the suffocation caused by the pancuronium bromide and the resulting anoxic state, and not from cardiac arrest due to the administration of potassium chloride. Because the

person being lethally injected under the Current Protocol is likely inadequately anesthetized, he experiences the sensation and horror of suffocation from the pancuronium bromide, as well the excruciating pain associated with the introduction of potassium chloride.

Tennessee has conducted five executions by lethal injection. Of these, no autopsy was done on Sedley Alley or Cecil Johnson. The autopsies of the other three, Coe, Workman and Henley, all show that person was executed in a cruel and inhumane way. All three died by suffocation while likely conscious. This shows that Tennessee's protocols, even if properly administered, "create a demonstrated risk of severe pain." See Baze v. Rees, 553 U.S. 35, 61 (2008).

SUMMARY OF THE ARGUMENT

The district court erred in dismissing as time-barred plaintiff's §1983 cause of action claiming that Tennessee's three-drug protocol, as currently formulated, has resulted in deaths by suffocation in all three of the autopsied inmates executed in Tennessee and therefore represents an intolerable risk of cruel and unusual punishment, especially when available evidence shows that all three were insufficiently anesthetized at the time of their death. The statute of limitations for plaintiff's cause of action began to run on March 10, 2010 when the Steve Henley autopsy, along with eyewitness accounts, confirmed (1) that Henley died of asphyxiation without being properly anesthetized; and (2) that the similar results found as to Coe and Workman were not isolated events or mishaps but predictable consequences of the three-drug protocol. As a matter of due process, the statute of limitations could not begin to run prior to the consequences of using the three-drug protocol could be understood by either the plaintiff or defendants based on scientific analysis.

STANDARD OF REVIEW

This court reviews *de novo* the district's court's conclusion as to whether plaintiff's complaint was filed within the applicable statutory period. Cooey v. Strickland, 479 F3d 412, 416 (6th Cir. 2007), reh'g denied *en banc*, 489 F.3d 775 (6th Cir. 2007); Kelly v. Burks, 415 F.3d 558, 560 (6th Cir. 2005).

ARGUMENT

The district court erred in dismissing as time-barred plaintiff's §1983 cause of action claiming Tennessee's three drug execution protocol, as currently formulated, violates his Eighth and Fourteenth Amendments right to be free from cruel and unusual punishment.

The statute of limitations began to run on March 10, 2010, the date of Steve Henley's autopsy.

In dismissing plaintiff's cause of action, the district court found plaintiff's cause of action to be barred by the applicable statute of limitations, relying primarily on this court's decision in Cooey v. Strickland (Cooey II), 479 F.3d 412 (6th Cir.), reh'g denied *en banc*, 489 F.3d 775 (6th Cir. 2007). In rendering its decision, the district court found that the statute of limitations began to run either in 1989 at the conclusion of plaintiff's direct review process or March 30, 2000 when lethal injection became the presumptive method of execution in the state of Tennessee. (R. 15, Memorandum at 3).

In addition to Cooey, the district court also looked to other decisions from this court, including Getsy v. Strickland, 577 F.3d 309 (6th Cir. 2009) and Trzebuckowski v. City of Cleveland, 319 F.3d 853 (6th Cir. 2003). In Trzebuckowski, this court held "in 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." Id. at 856. While admittedly this court has previously held that the statute of limitations in lethal

injection cases begins either at the conclusion of direct state court review or expiration of time for seeking such review or the date the state adopted lethal injection as its presumptive method of execution, nevertheless, plaintiff respectfully submits that such a categorical approach violates the spirit, if not the letter, of Trzebuckowski as well as the holding of the United States Supreme Court in Baze v. Rees, 553 U.S. 35 (2008).

Plaintiff argues that Cooey's categorical approach violates the holding in Trzebuckowski because what alerts the typical lay person that his rights are being violated is not the use of a lethal injection protocol *per se* but the facts which support a finding that the result of the three drug protocol is not a humane quick death but instead death by suffocation brought on by paralysis and the use of pancuronium bromide. Therefore, the question is not when the lethal injection protocol was promulgated but when did it become sufficiently known that Death Row inmates were being suffocated by its use without sufficient anesthesia.

Furthermore, plaintiff's position on this matter is consistent with the United States Supreme Court holding in Baze. In Baze, the United States Supreme Court delineated the elements which must exist to make out a *prima facie* case in lethal injections cases. It stated, in part:

> Our cases recognize that subjecting individuals to a risk of future harm - not simply actually inflicting pain - can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be "sure or very likely to cause serious illness and needless suffering" and give rise to "sufficiently imminent dangers." (Cites omitted). We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment." (Cites omitted).

553 U.S. 35, 49-50 (2008).

Therefore, in order to make out a *prima facie* case under §1983, the plaintiff must first demonstrate a "substantial risk of serious harm" or an "objectively intolerable risk of harm" and second, knowledge on the part of the prison officials of that harm which would prevent them from claiming that they were "subjectively blameless for purposes of the Eighth Amendment." However, risks associated with simple mistakes or an "isolated mishap" do not give rise to an Eighth Amendment violation. Id. at p. 50.

Given the parameters established by the Supreme Court for a *prima facie* case and the complicated physiological aspects of the effects of the three drug protocol on executed prisoners, proof of an unconstitutional lethal injection protocol will not be immediately obvious to even the experts nor necessarily discernible from a single execution. Certainly experts in the field, to say nothing of the "typical layperson," were not alerted to the dangers of the protocol at its promulgation. It has only been

from the results of autopsies and eyewitness accounts of executions gone wrong, including death by suffocation, that experts and lay persons have started to become aware of the unconstitutional aspects of the three drug protocol. Therefore, the argument that the statute of limitations categorically began to run from the date of the protocol's promulgation or the conclusion of state review contradicts Baze's holdings if for no other reason than the weight of evidence required to challenge a "widely tolerated" practice (see Baze, 553 U.S. at 53) must be accumulated over time in order to show that the unconscionable results of the protocol are inherent (not the result of mere mistake or isolated mishap) and that prison officials are on notice of such an intolerable risk of harm.

In the protocol litigation filed in the state and federal courts within the state of Tennessee, the state has denied that its protocol violates the Eighth Amendment. However, after the Steve Henley autopsy, which became available on March 10, 2010, there is now strong evidence that he and other Death Row inmates in Tennessee died from suffocation. (The autopsy is further buttressed by eyewitness accounts of Henley turning blue - gross evidence of his suffocation). Steve Henley's autopsy also demonstrates that the similar findings as to Workman and Coe were not isolated events or mishaps, thereby putting the state of Tennessee on notice of the Eighth Amendment violations.

Therefore, plaintiff asserts that the statute of limitations began to run no earlier than March 10, 2010 when the Steve Henley autopsy was made available to the state.

Tennessee's Lethal Injection Protocol Is Not Constitutional

The State argues that the cases of Harbison v. Little, 571 F.3d 532 (6th Cir. 2009), cert denied, 130 S.Ct. 1689 (2010) and Baze v. Rees, 553 U.S. 35 (2008) foreclose Irick's argument as to the illegality of Tennessee's protocol. The plaintiff respectfully argues that the State's interpretation of these cases is too broad. As stated in a recent case out of the Middle District of Pennsylvania,

> Upon consideration, although Defendants are no doubt correct that the plurality in Baze said a number of important things regarding capital punishment and the Eighth Amendment, the decision is not as sweeping as Defendants' interpretation suggests - and it does not foreclose Plaintiff's claims as pleaded in this case. Indeed, the precedential holding in Baze can be read quite narrowly, with the plurality doing little more than "concluding that Kentucky's procedure is consistent with the Eighth Amendment." 553 U.S. 35, 128 S.Ct. 1520, 1538, 170 L.Ed.2d 420 (2008). (Emphasis added). See also Emmett v. Johnson, 532 F.3d 291, 309 (4th Cir. 2008) (Gregory, J., dissenting) (Finding the capital court's holding in Baze to be "extremely narrow" and noting that the court's decision was rendered upon a full record of facts regarding the administration of Kentucky's protocol that were developed in the state trial court).

Chester v. Beard, 657 F.Supp.2d 534, 542-543 (M.D. Pa. 2009).

What distinguishes this case from Harbison is that the Sixth Circuit did not have a fully developed factual record which included the autopsy of Steven Henley. The

importance of the Henley autopsy, as stated above, is that it demonstrates not only that Mr. Henley died an excruciating death from suffocation, but that his case was not an isolated event. It is also extremely important to note that in Baze, Justice Roberts could report that the plaintiff had raised no reported problems in Kentucky's only previous execution. Baze, 553 U.S. at 46. Certainly that is *not* the case before this court in that plaintiff has cited to numerous instances of reported problems and likely suffocation even when the protocol was apparently followed.

In all three autopsies performed on Tennessee Death Row inmates, the evidence establishes that the sodium thiopental levels were inadequate to induce unconsciousness. (See R. 1, p. 31, ¶¶ 73 and 75; and p. 33, ¶ 86). Furthermore, the autopsy reports in all three cases do not indicate any technical or administrative problems that would explain or give rise to the implication that the low sodium thiopental levels were the result of a mistake or mishap. (See R. 1, Complaint p. 31, ¶ 74; p. 32, ¶83; and p. 33, ¶ 91). On the other hand, the reported levels of pancuronium bromide in Workman and Henley exceeded the amounts necessary to paralyze them and cause suffocation. (See R. 1, Complaint p. 32, ¶ 81 and p. 33, ¶88). Further evidence of suffocation comes from eyewitnesses of the Henley execution who stated that he turned blue before his death. (See R. 1, Complaint p. 32, ¶ 85). The complaint also discusses testimony from Dr. Levy which explains that sodium

thiopental after death migrates from the extremities back to the heart. He explains that with a lapse of time between the taking of serum samples and the prisoner's death, this redistribution back to the heart would have the effect of increasing the sodium thiopental levels in the blood serum and therefore *overstating* its level. (See, e.g., R. 1, Complaint pp. 31-32, ¶¶ 78 and 79).

This same evidence has recently been reviewed by the Tennessee Supreme Court in the case of Stephen Michael West v. Gayle Ray, *et al*, a case filed in the Chancery Court for Davidson County. On November 6, 2010, the court entered an order resetting West's execution date to November 30, 2010 and remanding the case for further factual findings in the Chancery Court. On November 19, 2010, the Davidson County Chancery Court found that Tennessee's protocol violated both state and federal constitutions because, as alleged herein, prisoners were being suffocated to death without being properly anesthetized. The court stated, in part:

> ...the court finds and declares that Tennessee's three-drug protocol violates the prohibition against cruel and unusual punishment contained in Article 1, §16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.[6]

Stephen Michael West and Billy Ray Irick v. Gayle Ray, et al, No. 10-1675-1, Order Granting Declaratory Judgment, Chancery Court of Davidson County, Tenn., Nov. 11, 2010.

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[6]An appeal to the Tennessee Supreme Court is expected.

The Chancery Court of Davidson County based its decision on a finding that the sodium thiopental as prepared and administered fails to produce unconsciousness or anesthesia prior to the administration of the other two drugs. Furthermore, Tennessee's protocol is substantially different from the Kentucky protocol approved by the Supreme Court in Baze. The primary difference between the two protocols is that Tennessee's does not require the warden or deputy warden to check the prisoner's state of consciousness before the delivery of the two other protocol drugs.[7] However, the Supreme Court found that Kentucky's protocol specifically requires the warden to check for consciousness and if the prisoner is not unconscious within 60 seconds following the delivery of sodium thiopental to redirect the flow of chemicals to the backup IV site. Baze, 553 U.S. at 45 and 56. It is constitutionally imperative that the executed be properly anesthetized because as Chief Justice Roberts observed, it was uncontested that "suffocation from the administration of pancuronium and pain from the injection of potassium chloride" in the absence of a "proper dose of sodium thiopental" would constitute a "constitutionally unacceptable risk." Id. at p. 53. Furthermore, and unlike Baze, Irick does not admit that the proper administration of

[7]In Baze, the plaintiff, unlike Irick, did not dispute that if properly administered, the three drug protocol did not constitute cruel or unusual punishment.

the sodium thiopental and the other protocol drugs would eliminate the unconstitutional risk of suffocation.

Therefore, the evidence establishes a pattern showing that the cause of death under Tennessee's protocol is suffocation induced by pancuronium bromide without sufficient anesthesia - a clear violation of the Eighth Amendment. The facts further show the State is now aware that during Irick's execution he will very likely experience needless suffering from suffocation.

CONCLUSION

Plaintiff requests that his §1983 cause of action be found not to be time-barred and that his counts seeking relief pursuant to §1983 be remanded for further proceedings in the district court.

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2010, the foregoing **brief appealing dismissal of 1983 action** 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.

s/C. Eugene Shiles

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILLY RAY IRICK	*	
	*	NO. 10-6436
Plaintiff/Appellant	*	
	*	**District Court No. 03:10-1004**
v.	*	
	*	
GAYLE RAY, in her official capacity as Tennessee's Commissioner of Correction; RICKY BELL, in his official capacity as Warden of Riverbend Maximum Security Institution; REUBEN HODGE, in his official capacity as Deputy Commissioner of Tennessee Department of Correction; MARK LUTTRELL, in his official capacity as Assistant Commissioner of Operations; JOHN DOE PHYSICIANS 1-100; JOHN DOE PHARMACISTS 1-100; JOHN DOE MEDICAL PERSONNEL 1-100; JOHN DOE EXECUTIONERS 1-100; and JOHN DOES 1-100	*	**DEATH PENALTY CASE**
	*	
	*	**EXECUTION SCHEDULED: December 7, 2010**
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Defendants/Appellees		

APPELLANT'S ADDENDUM OF RELEVANT DISTRICT COURT DOCUMENTS

Appellant, pursuant to **Sixth Circuit Rule 30(b)**, hereby designates the following as relevant documents within the district court's record.

Description of Entry	Filing Date	Record Entry
Complaint and attachments	10/25/10	1
Order	11/19/10	16
Notice of Appeal	11/22/10	19

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IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,

Plaintiff

BILLY RAY IRICK,

Plaintiff/Intervener

v.

GAYLE RAY, in her official capacity as Tennessee's Commissioner of Correction, et al,

Defendants

No. 10-1675-I
DEATH PENALTY CASE

Chancellor Bonnyman
EXECUTION SCHEDULED:
November 30, 2010

ORDER GRANTING DECLARATORY JUDGMENT

This matter comes before the Court upon the Plaintiff's Amended Complaint for Declaratory Judgment and Injunctive Relief; his Motion for Temporary Injunction; and pursuant to the November 6, 2010, order of the Supreme Court of Tennessee in Case No. M2010-02275-SC-R11-CV, to, "tak[e] proof and issu[e] a declaratory judgment on the issue of whether Tennessee's three-drug protocol constitutes cruel and unusual punishment because the manner in which the sodium thiopental is prepared and administered fails to produce unconsciousness or anesthesia prior to the administration of the other two drugs." The Court subsequently granted without objection the motion to intervene of Plaintiff/Intervener Billy Ray Irick.

On November 19-20, 2010, an evidentiary hearing was held in this matter. After weighing the evidence presented therein and considering the arguments of counsel, the Court

issued its bench ruling, a certified copy of which is attached hereto. For the reasons stated in its bench ruling, which are hereby fully incorporated herein, the Court finds and declares that Tennessee's three-drug protocol violates the prohibition against cruel and unusual punishment contained in Article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.

Pursuant to TENN. R. APP. P. 9(b), the Court finds that this matter is of great public importance and that review upon final judgment will be ineffective.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Tennessee's three-drug protocol violates the prohibition against cruel and unusual punishment contained in Article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.

CLAUDIA C. BONNYMAN,
Chancellor, Part I

Entered: _____

APPROVED FOR ENTRY:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via email and facsimile to:

Mark A. Hudson
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this 22nd day of November, 2010.

Stephen M. Kissinger

for execution under the 2007 protocol is cruel and unusual punishment.

The plaintiff argues that all three drugs are separately intended to kill the condemned man. The plaintiff asserts that the first drug is to render the person unconscious. The second drug is to paralyze the lungs, diaphragm, and the entire body, and the third drug is to stop the heart. According to the plaintiff, the first drug, sodium thiopental, does not function as represented by the State. Instead, says the plaintiff, sodium thiopental is an ultra fast acting drug, which cannot be relied upon to keep the condemned man fully unconscious or to render him dead before the second drug, a paralyzing drug, begins its effect of suffocation.

The plaintiff asserts that although the second drug, pancuronium bromide, is administered to prevent the condemned man from moving or breathing or calling out, it is actually the fatal element under the Tennessee protocol and death is therefore by suffocation. The plaintiff argues that the autopsy reports and toxicology reports show postmortem serum

mandated in the protocol, which is 5 grams creates an objectively intolerable risk of harm or suffering, and this the plaintiff cannot show. The State reasons that the expert medical examiner, Dr. Li, is an autopsy expert and knows better than the plaintiff's expert what occurs in the blood after death.

The issues for the Court to decide are: One, whether the current amount and concentration of sodium thiopental mandated by Tennessee's 2007 lethal injection protocol are insufficient to insure unconsciousness so as to create an objectively intolerable risk of severe suffering or pain during the execution. Two, as a factual matter, the Court is to decide at what level -- what level of sodium thiopental is sufficient to insure unconsciousness so as to negate any objectively intolerable risk of severe suffering or pain during the execution? (CD) Number three, is there a feasible and readily available alternative procedure which could be supplied at execution to insure unconsciousness and negate any objectively intolerable risk of severe suffering or pain? (CD) And, Four, did the State refuse to adopt or adapt to this

alternative, and without justification adhere to its current method? CO.

And as for the summary -- a very brief summary of the decision, the Court find the current protocol for execution by lethal injection execution is cruel and usual because the plaintiff has carried its burden to show that the protocol allows suffocation -- death by suffocation while the prisoner is conscious.

And as for the facts that the Court is finding as a result of the evidentiary hearing, Number 1, Tennessee's 2007 lethal injection protocol. Tennessee's 2007 protocol requires the administration of three drugs; sodium thiopental, pancuronium bromide, and potassium chloride through an intravenous catheter in a rapid -- by use of 11 large and rapid bolus injections. Before the injection process begins, according to the protocol, catheters are inserted in both of the inmate's arms by two technicians. Once the lines have been established, the technicians leave the execution chamber and remain in an area where they cannot see the inmate.

The only person with the inmate in

the execution chamber at the time the drugs are administered is the warden of River Bend Maximum Security Institution, the site of the execution apparatus. The -- the need for two catheters is that the first catheter is used for the injection, and the second catheter is a backup in case the first one fails. The executioner first injects 5 grams of sodium thiopental, which the protocol states is disbursed into four syringes at a concentration of 2.5 percent with 1.25 grams of the drug in each syringe. Sodium thiopental is a rapid acting barbiturate commonly used in anesthesia. In the past, sodium thiopental was administered in small amounts during surgery, before surgery to induce unconsciousness rapidly while other measures were then used to deepen the level of unconsciousness. Sodium thiopental is now used -- is not commonly used in surgery at this time.

Continuing on with the protocol, following a saline flush, the executioner injects 100 milligrams of pancuronium bromide into the IV lines. Pancuronium bromide is a muscle paralytic. The drug completely paralyzes

Court than an expert anesthesiologist who is also a teacher is an ideal expert for the evaluation of consciousness and unconsciousness.

Dr. Li, a senior assistant medical examiner contracted in Metro Government has also been a teacher in the past. He began his medical education in his native China and then continued with his residency in this country. There is no reason to doubt his expertise based upon his education and background. It appears to the Court that a medical examiner has experience and knowledge about ~~toxicality~~, toxicology, pathology, pharmacology and other matters in order to opine about the cause of death and the manner of death.

And as for the medical proof, the plaintiff carried his burden to show that the Tennessee protocol does not insure that the prisoner is unconscious before the paralyzing drug; that is, the second becomes active -- is injected and becomes active in the body. The petitioner, or plaintiff, has never conceded that 5 grams of sodium thiopental ensures unconsciousness or ensures unconsciousness by death for any particular person because there

are many variables which prevent such a safe prediction which would prevent conscious death of suffocation.

Dr. Lubarsky first explained that breathing is a primary survival impetus for humans. It is extremely disturbing to a patient when the patient is unable to get air. Not to be too simplistic, but life is about getting a breath of air. The body is tuned to need and get air. It is a primary survival issue. There is great suffering and pain if a patient were to suffocate from lack of air. Through Dr. Lubarsky, the plaintiff was able to show that because a paralyzing drug is used soon after sodium thiopental is injected, no one can tell if the prisoner is conscious or unconscious and this is a tragedy given execution by injection.

These factual statements made by Dr. Lubarsky and found to be accurate by the Court have increased the Court's comprehension of the anticipated severity of the suffering. Dr. Lubarsky explained the study that he authored, which was published in the British journal Lancet. The study exam[illegible] the level of

sodium thiopental in the blood serum through autopsy, which of course, is after the prisoner has been executed. Dr. Lubarsky explained that he and his co-authors had a difficult time getting data on executed prisoners. But they did get data and they did explain -- they did explain through their data and the study that the level of sodium thiopental in the blood serum, postmortem sometimes measures higher than expected and somewhat lower but is fairly equivalent to the level of sodium thiopental at death; that is, at execution because this kind of chemical is stable in the blood and does not naturally increase or decrease much.

He admits that his study published in the Lancet is not perfect, and he concedes they could have used more data but they could not get the data. Dr. Lubarsky makes the very good point that after this article was peer reviewed and published, it was challenged. But following the author's response to the challenges, the critics backed off and have not countered with further criticism, nor have there been other studies.

The Court finds that Dr. Lubarsky's

member such as the one -- no single number such as the one used in Winek's can be used to explain or calculate what the drug level would have been at the time of the inmate's death. Dr. Li stated that according to general theory, levels of medication found in the blood decreased postmortem but that this would depend upon the medication. The two experts agree -- appear to agree that the levels of sodium thiopental will be used in the body depending upon many variables. This is a complex study, and Dr. Li conceded or stated that he would need to draw upon many disciplines and have many factors to analyze before concluding how a particular medication would act in the body predeath and postdeath.

Now, the State called Mr. Voorhies as a witness. He is a department of corrections experienced administrator from the State of Ohio. He testified about nine executions at which he had been present, where 5 grams of sodium thiopental were injected. The fact that 5 grams of sodium thiopental is fatal or appear to be fatal when allowed to work over 11 minutes, however, is not dispositive of the

three-drug protocol issue which is presented here.

And as for facts regarding the failure to check for consciousness, the Florida Department of Corrections which adopted new lethal injection procedure effective for executions after May 9, 2007 included the following procedure to immediately follow the sodium thiopental injections: ~~In quotes at this point~~, "At this point a member of the execution team will assess whether the inmate is unconscious. The warden must determine after consultation that the inmate is indeed unconscious. Until the inmate is unconscious and the warden has ordered the executioners to continue, the executioner shall not proceed to Step 5, ~~close quote~~." And this is from Florida protocol hearing exhibit -- hearing and this is exhibit -- Trial Exhibit 24 Page 8.

Proceeding on with the facts findings of fact under the subject, Failure to check for consciousness, the Court finds that in California's lethal injection protocol and review, which was issued on May 15, 2007, the California Department of Corrections review team

for checking consciousness under the three-drug protocol option. In a document prepared by the chair of the committee, Julian Davis, that listed the pros and cons of the various options considered by the committee, the following phrase appears as "con" under the three-drug protocol: Would likely need to add a method of ascertaining consciousness after sodium thiopental. Hearing collective Exhibit Number 3 former trial Exhibit Number 7. The April 19, 2007, minutes of the Tennessee Protocol Committee state that Deputy Commissioner Ray also mentioned having something that would assure the unconsciousness of the inmate during the execution procedure. In addition, those minutes reflect a conversation between Warden Bell and Physician A in which Warden Bell inquired about what would indicate the inmate is unconscious after the first drug and a saline flush are given, ~~in paren,~~ (three drug protocol,) ~~close paren,~~ so we can give the signal to go ahead with the other drugs. The physician suggested looking at the inmate's eyes but also stated that constricted pupils are not a definitive sign of unconsciousness. Therefore,

consciousness.

Question: You said before that experts -- that you had experts who told you that assessing anesthetic depth wasn't necessary, but those same experts did advise you of the critical importance of the inmate being unconscious before the administration of the second two drugs, did they?

Answer: They certainly, yes, indicated that that was the purpose of the first drug and that that was important.

And that completes at this time the findings of fact. I'm going to move to the principles of law. And first the Court is looking at Rule 702, testimony about experts. If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify in the form of an opinion or otherwise.

Rule 703, basis of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an

it is a principle of law from the Harbison case. As in Baze, the inmate in Harbison concedes that if the protocol were followed perfectly it would not pose an unconstitutional risk of pain and argues instead that maladministration of the sodium thiopental would result in a severe risk of pain from the subsequent drugs that could go undetected. Further -- and this is also from Harbison, which I distinguish, but I still think there is some principles (a) (B) of law here that will both illuminate the distinguishing character of Baze and Harbison and also will establish some principles of law. The District Court first concluded that the amended protocol was deficient because it did not provide a proper procedure for insuring that the inmate was unconscious before administering the pancuronium bromide. The Court noted that other states required the execution team to determine if the inmate is still conscious before proceeding with this step.

The Tennessee protocol review committee also have recommended that procedures be put in place to insure that the inmate was unconscious at this step. Possible methods for

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(B)(C) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type limitations of these Rules.

A. Exclusive of the exempted portions in FRAP 32(a)(7)(B)(I) and (iii), the brief contains no more than 11,353 in its entirety.

2. The brief has been prepared in 14-point Times New Roman typeface using WordPerfect for Windows.

3. If the Court so requests, the undersigned will provide a copy of the word or line printout.

4. The undersigned understands a material representation in completing this certificate of the FRAP 32(a)(7)(B)(C) and Sixth Circuit Rule 32(a), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

s/ C. Eugene Shiles

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