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

STEPHEN MICHAEL WEST,	)	
	)	
Plaintiff,	)	
	)	
	)	No. 3:10-1016
v.	)	JUDGE CAMPBELL
	)	**EXECUTION DATE: Nov. 9, 2010**
GAYLE RAY, in her official capacity as Tennessee's Commissioner of Correction, et al.,	)	
	)	
Defendants.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

Now comes the Plaintiff, by and through undersigned counsel, and in response to Defendants' RULE 12(b)(6) Motion to Dismiss (Docket Entry 10) and memorandum in support thereof (Docket Entry 11), submits as follows:

I. Introduction

Defendants have moved to dismiss Mr. West's complaint seeking to enjoin them from executing him by a method of lethal injection which will effect his death by paralyzing and suffocating him while he remains conscious. As grounds, they claim: (1) Mr. West has waived any complaint he might have about that event by "effectively" choosing to die in this manner; (2) the statute of limitations required Mr. West to file his complaint 10 years before the facts establishing his cause of action arose; (3) Defendants incurred hardship when Mr. West did not file his lethal injection law suit during the period of time when they were proceeding headlong

toward unlawfully executing him by means of electrocution, another cruel and unusual form of punishment; and (4) the Supreme Court's decision in *Baze v. Rees*, 553 U.S. 35 (2008) should be construed as holding that any state whose execution protocol appears similar to Kentucky's protocol may execute inmates by any means.

The first and third of these defenses are outrageous, the second and fourth would have this Court construe precedent in a way which is not only illogical, but would lead to absurd results. Because the first and third defenses cast an unfair and deceptive shadow over Mr. West's plainly meritorious claims, Mr. West will address them first.[1] Because an accurate understanding of the nature of Mr. West's claims is necessary to determine when those claims accrued, Mr. West will next address the merits of his claims. Finally, Mr. West will explain the proper application of the Sixth Circuit's decision in *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007) to the facts presented in this case.

II. Defendants' claim that Mr. West has "effectively" chosen lethal injection as the means of his execution is without a basis in law or fact, or in any good faith argument for the extension or reversal of law. Mr. West and this Court should not have to expend time and effort addressing this frivolous defense when such time should be spent addressing the issues of grave constitutional significance raised in his complaint.

A. The circumstances of Mr. West's recision letter.

On August 19, 2010, Mr. West filed a complaint seeking to enjoin Defendants from executing him under Tennessee's unconstitutional lethal injection protocol. *West v. Ray*, No

[1]Mr. West addresses the first and third assertions solely because of the danger that they could unfairly influence the Court's resolution of the only two issues which can be decided at this stage of proceeding. The first and third issues involve the resolution of factual disputes and are not the proper subject of a RULE 12(b)(6) motion. *West v. Ray*, No 3:10-cv-0778 (M.D.Tenn.), Docket Entry 28.

3:10-cv-0778 (M.D.Tenn.) Docket Entry 1. On September 3, 2010, Defendants filed a motion to dismiss claiming that Mr. West remained bound by a nine-year-old document choosing electrocution for his then-pending execution in 2001. He had signed that document as part of an execution protocol that was specifically revoked by the Governor of the State of Tennessee in 2007. Arguing that Mr. West would be executed by means of electrocution, Defendants asserted that Mr. West had no standing to challenge Tennessee's lethal injection protocol, and therefore had presented no case or controversy by which to invoke the subject matter jurisdiction of the District Court. *Id.* at Docket Entry 23 at 1 and Docket Entry 24 at 3-4. On September 10, 2010, Defendants repeated that claim, again asserting that Mr. West's complaint be dismissed for want of jurisdiction. *Id.* at Docket Entry 26. In response, Mr. West challenged the continued validity of that document, explaining to the court:

> 4. . . . Here, the proper interpretation of Docket No. 24-1 is seriously in dispute. Plaintiff asserts the Affidavit was effective only for the execution date pending at the time the Affidavit was signed.
>
> 5. First, Defendants insist that the Affidavit remains binding notwithstanding: (1) the passage of his then scheduled March 1, 2001, execution date; (2) the State of Tennessee's revocation of the electrocution protocol under which he purportedly agreed to be executed; and, (3) Tennessee's adoption of a new execution protocol.
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> 6. Moreover, at the time it was executed in 2001, the Affidavit was merely a small piece of a much larger document which Defendants did not attach to their motion, *i.e.*, Tennessee's then-existing Execution Protocol. While that protocol contained the "permanent" language upon which Defendants rely in asserting that the Affidavit remains in full force and effect almost 10 years after it was executed, it also contained a set of duties the warden (Defendant Bell) must perform before each scheduled execution. Those duties included that the warden was "[t]o assure condemned inmates . . . are given opportunity to select electrocution or lethal injection . . . within 30 days immediately preceding the scheduled execution date." (*See* Attachment A). At the time the Affidavit was signed, the Execution Protocol required an election form for each and every

execution date. The form was specific to the execution date, not just to the inmate.

7. Finally, Defendants' conduct subsequent to Mr. West signing the Affidavit belies their argument. To wit, Plaintiff is informed and believes that in all other cases where an inmate has executed an Affidavit to Elect Method of Execution prior to a scheduled execution and that execution has been stayed by either court order or State action until after that date has expired, the State of Tennessee has provided each inmate with a new opportunity to elect, or refuse to elect, a method of execution. *Terry Barr Sales Agency, Inc. v. All-Lock Co., Inc.*, 96 F.3d 174 (6th Cir. 1996); *Lancaster Glass Corp. v. Philips ECG, Inc.*, 835 F.2d 652, 659 (6th Cir. 1987)(finding the parties' course of performance controlling because the parties themselves best know what they meant by the instrument which they executed).

Id., Docket Entry 27.

This Court specifically refused to resolve this dispute. *Id.* at Docket Entry 28. Though subject-matter jurisdiction presents a threshold issue precluding further action, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998)(there is no "doctrine of 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt"), Defendants continued to pursue their non-jurisdictional defenses despite Mr. West's objections.[2] On September 24, 2010, this Court dismissed Mr. West's complaint on statute of limitations grounds, *id.* at Docket Entry 34 and Docket Entry 35, and Mr. West appealed that decision to the Sixth Circuit Court of Appeals.

Because Defendants had sought and obtained the benefit of the district court's exercise of subject matter jurisdiction (a jurisdiction possible only if Defendants were no longer asserting the

[2]*See* Docket Entry 27 at ¶11 ("The resolution of this issue is of paramount importance. Defendants' assertion that the Affidavit remains valid, if correct, deprives this Court of subject matter jurisdiction. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). The Court would be powerless to resolve Defendants' remaining defenses. Defendants' assertion of this defense has thus created a threshold issue delaying further proceedings.")

continued validity of Mr. West's 2001 election of electrocution, *see Stewart v. LaGrand*, 526 U.S. 115 (1999)), Mr. West awaited the timely arrival of the new election form which Defendants were required to provide to him 30 days before his execution under Tennessee's current execution manual. Docket Entry 1-3, pages 13 of 127 and 89 of 127. Defendants, however, provided no such form.

On, October 12, 2010, the next business day following the expiration of the 30 day deadline, Mr. West's counsel presented Defendant Bell with a letter setting out the reasons why Mr. West's almost ten year old election form was not valid, but, out of an abundance of caution, informing Defendant Bell that he was rescinding that form and that he was not making any election regarding his method of execution. (Attachment A). That letter stated:

> The purpose of this letter is to officially rescind the Affidavit Concerning Method of Execution that I executed on February 13, 2001. That Affidavit no longer has full force and effect since the protocol under which it was signed is no longer in effect. However, you and the other Defendants in West v. Ray et al., case no. 3:10-cv-0778, United States District Court, Middle District of Tennessee, have affirmatively alleged that the Affidavit Concerning Method of Execution that I executed on February 13, 2001, remains in full force and effect in your Motion to Dismiss my complaint in that action. Therefore, in an abundance of caution, I hereby rescind that Affidavit.
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> You are specifically informed that I neither have made, nor am making, any election of the method of execution under the current execution protocol to be used to carry out the sentence(s) of death imposed upon me by the State of Tennessee on November 9, 2010.

(Attachment A) Emphasis added.

After consulting with Department of Correction counsel, Defendant Bell orally informed Mr. West's counsel that the Department still considered the nine-year-old form to be binding, that he would not recognize Mr. West's recision, and that the State of Tennessee would subject

him to death by electrocution unless he affirmatively chose lethal injection as the method of execution.[3]

On October 13, 2010, Mr. West's counsel, Mr. Stephen Ferrell, sent a letter *via* facsimile transmission to Ms. Debra Inglis, counsel for the Department of Correction, seeking official confirmation of Defendant Bell's representations. (Attachment B). Ms. Inglis did not immediately respond. On the same date, however, Defendants filed their brief in Mr. West's appeal. In that appeal, Defendants sought affirmation of the district court's favorable statute of limitations decision. *West v. Ray*, No. 10-6196 (6th Cir.), Brief of Defendants-Appellees, p. 11-16. Simultaneously, however, they sought to protect themselves from any adverse decision by the Court of Appeals by again asserting that Mr. West had presented no case and controversy regarding the unconstitutionality of lethal injection because he was to be executed by electrocution on the basis of the 2001 execution form even though the validity of that form was never determined by the district court. *Id.* at p.16-18.

On October 15, 2010, Ms. Inglis finally responded to counsel's letter, stating:

> It is the Department of Correction's position that Mr. West's affirmative election of electrocution as his method of execution continues to be in full force and effect. If Mr. West now wishes to choose lethal injection, the Department will allow him to do so by submitting a new affidavit to Warden Bell, no later than October 26, 2010 (14 days prior to the date of the execution) affirmatively stating that he "waives any right he might have to have his execution carried out by electrocution and instead chooses to be executed by lethal injection."

[3]According to Defendants, acceding to the Department's demand would require Mr. West to forfeit his right to ask that Tennessee carry out his execution by lethal injection in a manner which did not constitute cruel and unusual punishment. *West v. Ray*, No 3:10-cv-0778 (M.D. Tenn.) Docket Entry 24, p. 4-5.

(Attachment C). Emphasis added. Neither Tennessee's Current Execution manual, nor any other protocol known to Mr. West, requires a condemned inmate to affirmatively choose execution by lethal injection in order to rescind a prior election of electrocution. Docket Entry 1 at page 89 of 127.

Defendants' execution of Mr. West by electrocution on the basis of an invalid election violates TENN. CODE ANN. § 40-23-114 (a) and (b) (which requires the use of lethal injection unless the condemned inmate has affirmatively chosen electrocution). Defendants' non-consensual use of electrocution (which is itself cruel and unusual) to carry out Mr. West's execution also violates the Eighth and Fourteenth Amendments to the United States Constitution and Art. 1 § 14 of the Tennessee Constitution. Accordingly, on October 18, 2010, three days after receiving Ms. Inglis' letter and five days after Defendants filed their brief in the Sixth Circuit, Mr. West filed suit in the Chancery Court for Davidson County, Tennessee, seeking a judicial determination that Mr. West's 2001 election form was no longer valid and to permanently enjoin Defendants' illegal conduct. He also moved for a temporary injunction.[4]

Two days later, on October 20, 2010, Defendants responded to Mr. West's state court motion. Rather than defend the merits of either the constitutionality of Tennessee's use of electrocution as a means of execution, or the alleged validity of Mr. West's over nine-year-old election, Defendants (while expressly acknowledging that they had fully intended to execute Mr.

[4]Mr. West was unwilling to agree to be executed by Tennessee's cruel and unusual method of carrying out lethal injections in order to avoid Tennessee unlawfully executing him by electrocution which was itself cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Art. 1 § 14 of the Tennessee Constitution.

West by electrocution up until that date[5]), stated that now they would honor the recision they had up until then specifically refused to honor:

> Nevertheless, the defendants have no desire to litigate this issue. Defendants will therefore accept plaintiff's October 12, 2010, rescission of his previous election of electrocution. With the plaintiff having rescinded his previous election and waiver, plaintiff's sentence of death will now he executed by means of lethal injection, by operation of law. *See* Tenn. Code Ann. § 40-23-114(a). Consequently, there is simply no need for plaintiff to be presented with a new election affidavit, as he insists. In addition, the plaintiff has affirmatively declared that he would make no election of a method of execution, further obviating any need to present him with a new election affidavit.

West v. Ray, No. 10-1675-I, Defendants' Response to Motion for Temporary Injunction, p.3 (Chancery Court for Davidson Co., Tenn.). Emphasis added. Defendants then asserted that, because Mr. West would now be executed by lethal injection, his state court complaint should be dismissed as moot. *Id.* (" Furthermore, because the defendants have accepted plaintiff's rescission of his election of electrocution, and his execution will now proceed by means of lethal injection, plaintiff's complaint is rendered moot and should therefore be dismissed.").

B. The Defendants' argument in the face of the circumstances presented in this case.

Mr. West specifically did not agree to Ms. Inglis' demand that he waive his lethal injection challenge in exchange for Defendants' promise not to execute him by the cruel and unusual process of electrocution. Mr. West's recision specifically states that he is not electing any method of execution. Defendants specifically stated before the state courts of Tennessee that they were accepting that recision. Defendants specifically stated before the state courts of

[5]*West v. Ray*, No. 10-1675-I, Defendants' Response to Motion for Temporary Injunction, p.2 (Chancery Court for Davidson Co., Tenn.) ("The defendants maintain that the February 13, 2001 Election Affidavit [choosing electrocution as a means of execution] is valid and still effective."). (Attachment D).

Tennessee that Mr. West's pending execution by lethal injection would not take place as a result of his "choice," but rather "by operation of law." There is not a single case from any jurisdiction which holds that the refusal to elect a method of execution operates as a "choice" of the default method of execution. Defendants have not proffered an argument why the law should be changed to hold in such a matter. Indeed, any such argument would be frivolous.

Mr. West has spent over a month attempting to resolve the question raised by Defendants of the continued validity of his 2001 election form to resolve the standing issue so that a court, any court, can resolve the merits of the grave issues raised in his complaint. Defendants have parlayed the unresolved subject matter jurisdiction issue[6] to: (1) insulate themselves against any adverse ruling in Mr. West's first lethal injection case, (2) to obtain a dismissal of his suit challenging the also cruel and unusual use of electrocution, and, (3) to ultimately return to this Court with Mr. West no closer to a fair adjudication of the issues he presents than he was when he filed his original complaint two and one-half months ago.

III. The only unnecessary delay in Mr. West's pursuit of relief has been caused by the State of Tennessee's unlawful refusal to execute Mr. West by lethal injection as required by Tennessee law, Defendants' last minute acquiescence to the requirements of Tennessee law, and Defendants' dilatory use of a subject matter jurisdiction challenge in Mr. West's prior action.

The two elements of laches are: an unreasonable delay is asserting one's rights and prejudice to the opposing party. *Brown-Graves Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000). Insofar as laches is an affirmative defense, the burden is upon Defendants to provide proof of both elements. *E.E.O.C. v. Watkins*

[6]In fact, Defendants' last minute change of heart in state court allowed them to avoid, yet again, a judicial determination of whether there exists any merit in their argument that the 2001 election form was valid.

Motor Lines, Inc., 463 F.3d 436, 439 (6th Cir. 2006).[7] Because laches is an equitable doctrine, it may be invoked only by a party acting in good faith and cannot be raised by a party with unclean hands. *United States v. Weintraub*, 613 F.2d 612, 619 (6th Cir. 1979). As even the authority cited by Defendants acknowledge, delay is measured as of the date that the legal basis of the claim becomes known. *In re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997).[8]

A. Mr. West filed his lawsuit within one year of the facts supporting his cause of action.

The first question in a laches inquiry is, "When did the legal basis of Mr. West's claims become known?" Adopting what they maintain to be the date of accrual for the purposes of the statute of limitations, Defendants claim that it was March 30, 2000, when Tennessee adopted lethal injection as the default method of execution. Docket Entry 11 at 12. However, as Mr. West explains in ¶¶ IV and V below, the legal basis for Mr. West's claims did not become known until the release of the Henley autopsy report in March 2010, and Defendants' October 20, 2010, cessation of their unlawful efforts to execute him by means of electrocution. *In re Sapp*, 118 F.3d at 464. Postponing discussion of the question of when the legal basis for Mr. West's claims became known until ¶¶ IV and V, however does not prevent this Court from rejecting this alleged defense. Even had there been unreasonable delay attributable to Mr. West,

[7]This inquiry is an intensely factual one, rendering it inappropriate for RULE 12 consideration. *Italia Marittima, S.P.A. v. Seaside Transp. Services, LLC,* Slip Copy, 2010 WL 3504834 at *7 (N.D.Cal. Sept. 7, 2010). *See also Armco, Inc. v. Armco Burglar Alarm Co., Inc.*, 693 F.2d 1155, 1161 (5th Cir. 1982) (determination of prejudice for laches purposes is a fact dependent issue).

[8]Defendants designate the *Sapp* decision as "*McQueen v. Patton*" at Docket Entry 11 at 9.

Defendants have not and cannot show that they have been prejudiced and/or that any alleged prejudice was not the product of their own unclean hands.

A. Defendants have not shown that the timing of Mr. West's efforts to avoid an unconstitutionally cruel and unusual punishment has prejudiced them in any way.

Defendants appear to have forgotten that the instant suit is not Mr. West's first attempt to protect his right to be free from a cruel and unusual death. Mr. West originally came before this Court on August 19, 2010, almost two and one-half months ago. At that time, there was no question but that, even if Defendants were correct about when Mr. West's claims had become ripe for adjudication, Defendants had suffered no prejudice by the timing of that lawsuit.

Even were it appropriate to consider the defense of laches in the context of a 12(b) motion, *see, infra* at fn. 7, the district court in *Harbison v. Little*, No. 3:06-cv-01206 (M.D. Tenn.) properly found that Defendants were not prejudiced by the timing of a challenge to Tennessee's method of execution where the case could be litigated without the need for a preliminary injunction:

> As they did in their Memorandum in support of their prior Motion to Dismiss (Docket No. 16 at p. 4-7), the defendants again allege that the plaintiff's case must be dismissed due to unreasonable delay. In its January 29, 2007 Memorandum, the court rejected this argument as applied to the plaintiff's original Complaint and, at present, the court finds that its prior reasoning applies with equal force to the plaintiff's Amended Complaint. The plaintiff has not been dilatory in filing his Amended Complaint, and the court will not dismiss this case or grant summary judgment on those grounds.
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> The defendants cite the Sixth Circuit's recent decision in *Workman v. Bredesen*, 486 F.3d 896, 911 (6th Cir. 2007), as a basis for the court to revisit its holding. In *Workman*, the Sixth Circuit reversed a temporary restraining order suspending an execution, primarily on the basis that the plaintiff had little likelihood of success on the merits. *Id.* at 905-11. In addition, the Sixth Circuit noted that the temporary restraining order faced a second problem in that the

> plaintiff waited far too long to bring [his] challenge, noting that [t]here is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay. *Id*. at 911.
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> * * *
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> Further, the court finds that any delay on the part of the plaintiff has not prejudiced the defendants to this action in any way. As discussed above, the plaintiff has not moved for a stay of execution and, therefore, neither the defendants nor the public at large risk the prejudice of delaying the execution, provided that the defendants prevail on the merits. As argued by the plaintiff, it is not prejudice to suggest that the execution will be delayed, should the plaintiff prevail on the merits. Neither the state nor the public has a legitimate interest in a timely execution in accordance with protocols that have been found to violate the Eighth Amendment. *See Depew v. Anderson*, 311 F.3d 742, 748 (6th Cir. 2002) ("It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights") (*quoting Reid v. Covert*, 354 U.S. 1 at 45-46 (1957)). The possibility that the defendants might lose the case is not prejudice.
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> In addition, the defendants suggest that they have been prejudiced because the period of time leading up to the plaintiffs execution is too short, depriving the defendants of sufficient time "to prepare a case of this constitutional magnitude for trial on the merits."[9] (Docket No. 78 at p. 4) The court is not convinced that the defendants have suffered any such prejudice. In the past two years, the defendants have faced two challenges to a similar three-drug lethal injection protocol in the federal courts although the defendants have been able to defeat each of those cases on procedural grounds, *see Workman v. Bredesen*, 486 F.3d 896, 912 (6th Cir. 2007); *Alley v. Little*, 181 Fed. App'x 509, 513 (6th Cir. 2006), and one challenge to those protocols in the Tennessee state courts in 2005, which did proceed to the merits. See *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 305 (Tenn. 2005). Accordingly, the defendants have had ample opportunity to prepare a defense of any claims relating to the pre-revision protocols.

Harbison v. Little, No. 3:06-cv-1206, Slip Copy, 2007 WL 6887552 at *4, 7 (M.D. Tenn. July 19, 2007). This order was left undisturbed by the appellate court, *Harbison v. Little*, 571 F.3d

[9] *Compare* Docket No. 24 at 12.

531 (6th Cir. 2009), and applies with equal force to Mr. West's first attempt to protect his rights.[10]

Here, Defendants have not even made an attempt to demonstrate that they would have been prejudiced by the timing of Mr. West's efforts to prevent his unconstitutional execution. Had Mr. West's earlier action not been delayed and then dismissed this matter would be resolved today. Mr. West had not asked for preliminary injunctive relief, only that the State be enjoined should Mr. West prove his case. In short, Defendants are utterly unable to demonstrate prejudice.[11]

C. The delay since the initial filing of Mr. West's original challenge to Tennessee's method of execution is wholly attributable to Defendants.

Ignoring the fact that Mr. West had earlier sought relief, Defendants claim this Court should look to the fact that the instant complaint was filed 12 days before Mr. West's execution. Docket Entry 11 at 12. The delay between the filing of Mr. West's original complaint and the

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[10]While the district court in *Harbison* found an additional and independent basis to reject Defendants' claim of prejudice flowing from the accelerated litigation required in that action in that the Defendants had agreed to the Court's proposed discovery schedule, *Harbison*, 2007 WL 6887552, at *7-8, (an agreement they carefully avoided here) the record in *Harbison* reflects that the parties completed 17 depositions in 25 days. Plaintiff anticipates that significantly fewer depositions in this case will be required (perhaps as few as three). Since many of the issues concerning the adoption of the protocol were developed during the four-day hearing in *Harbison*, it is anticipated that any hearing would not be lengthy.

[11]Defendants allege at the time that expeditiously litigating that lawsuit would have been prejudicial. However, since they had recently defended a similar lawsuit, this allegation did not rise to the level of material prejudice required to support a defense of laches. *See Vineberg v. Bissonnette*, 529 F.Supp.2d 300, 311 (D.R.I. 2007), *citing Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800 (8th Cir. 1979) ("[W]e cannot say that the expense and inconvenience of further litigation, without more, rises to the level of prejudice contemplated by the doctrine of laches.").

instant complaint is wholly attributable to Defendants' manipulation of the question of subject matter jurisdiction.

It is not even necessary to decide whether Defendants ever had a good faith basis for claiming that Mr. West's 2001 affidavit was binding when he filed his earlier lawsuit to reach this conclusion. As set forth in ¶II.A., Defendants enticed this court into issuing a decision without even conceding that the court had jurisdiction to do so, thereby leaving them able to undo any decision which did not go their way. On appeal of that decision before the Sixth Circuit, they re-raised the unresolved jurisdictional issue, again leaving Defendants able to undo any decision that did not go their way. As Mr. West stood on the cusp of resolving this jurisdictional issue in state court as part of his challenge to Defendants' attempts to electrocute him, they quickly took steps to avoid any such a resolution by stating that they no longer had any intention of electrocuting him.[12] Even when Mr. West informed the Sixth Circuit that, since the end of initial district court proceedings, Defendants had repeatedly stated their intent to electrocute Mr. West up until October 20, 2010, Defendants still tried to delay the resolution of Mr. West's claims. More specifically, they attempted to argue that Mr. West was estopped from agreeing the courts lacked jurisdiction and that the Court of Appeals should affirm this Court's decision. This argument was pressed even though Defendants simultaneously argued that this Court had no jurisdiction to enter that decision. *West v. Ray*, No. 10-6196 (6th Cir.) Defendants/Appellees' Response to Plaintiff/Appellant's Motion to Vacate District Court Order and Remand to District Court for Order Dismissing Complaint Without Prejudice, p. 4.

[12]Defendants obtained the additional benefit of delaying Mr. West's state court attempts to avoid a constitutionally cruel and unusual punishment anew, by forcing him to amend his lawsuit to challenge Tennessee's also cruel and unusual lethal injection procedures.

Defendants, who benefit from this incessant delay by depriving Mr. West of the time needed to fully litigate his meritorious claims, cannot claim that they have been prejudiced by the time which has elapsed due completely to their stratagems. They come before theCourt with unclean hands, the victim of their own actions. *Weintraub*, 613 F.2d at 619.

Because they were not prejudiced at the time Mr. West filed his original complaint and they are responsible for the delay which occurred thereafter, Defendants' claim of laches must fail.

IV. Mr. West has pled claims which state a cause of action under *Baze v. Rees*, 553 U.S. 35 (2008).

A. Introduction

Mr. West has provided the court with autopsy reports obtained from Dr. Bruce Levy, the then-Chief Medical Examiner for the State of Tennessee, from every autopsy conducted on a Tennessee inmate following a Tennessee lethal injections, *i.e.*, the autopsies of Robert Coe, Phillip Workman, and Steven Henley. Mr. West has provided the court with an affidavit containing the expert opinion of Dr. David Lubarsky who states that none of these inmates were unconscious at the time they were injected with the paralytic drug pancuronium bromide and that they had died by suffocation while conscious. Defendants offered no evidence in response, electing instead to argue that the Court was bound by decisions from courts who had never seen the evidence which had been presented to this Court. Mr. West has stated valid claims for relief.

B. Under *Baze v. Rees*, evidence of a pattern of execution under Tennessee's method of carrying out lethal injections which accomplishes death by suffocating a conscious inmate establishes a violation of the Eighth and Fourteenth Amendments

The use of an execution protocol that causes death by conscious suffocation violates the Eighth and Fourteenth Amendments. The evidence presented establishes a pattern showing that all inmates executed under Tennessee's three-drug lethal injection protocol for whom autopsies were performed were not adequately anesthetized during the execution. The evidence establishes a pattern showing that the cause of death under Tennessee's protocol is suffocation induced by pancuronium bromide. The facts show Defendants are aware that during West's execution he will very likely experience needless suffering.

The Supreme Court says this establishes a valid cause of action:

> 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." *Helling v. McKinney*, 509 U.S. 25, 33, 34-35, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993) (emphasis added). 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." *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n. 9, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).
>
> Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual. In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), a plurality of the Court upheld a second attempt at executing a prisoner by electrocution after a mechanical malfunction had interfered with the first attempt. The principal opinion noted that "[a]ccidents happen for which no man is to blame," *id.*, at 462, and concluded that such "an accident, with no suggestion of malevolence," *id.*, at 463, did not give rise to an Eighth Amendment violation, *id.*, at 463-464.

> As Justice Frankfurter noted in a separate opinion based on the Due Process Clause, however, "a hypothetical situation" involving "a series of abortive attempts at electrocution" would present a different case. *Id.*, at 471(concurring opinion). In terms of our present Eighth Amendment analysis, such a situation-unlike an "innocent misadventure," *id.*, at 470, would demonstrate an "objectively intolerable risk of harm" that officials may not ignore. *See Farmer*, 511 U.S., at 846, and n. 9. In other words, an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a "substantial risk of serious harm." *Id.*, at 842.

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

Mr. West's evidence does not present an "accident" or "innocent misadventure" resulting in conscious suffocation. Rather, it proves a pattern or "series" of cruel executions where all autopsied inmates were not sufficiently anesthetized; something state officials may not ignore.

1. *Baze v. Rees* and the *Lancet* article footnote do not detract from the legal merits of Mr. West's claims.

Defendants, however, insist that the Court should ignore these facts. They claim that *Baze* should be read as holding that evidence derived from the autopsy reports of condemned inmates is *per se* unreliable and cannot support Mr. West's cause of action. Defendants are incorrect.

Baze v. Rees is an opinion representing fractured views of the Supreme Court justices. The courts have held that the plurality opinion written by Chief Justice Roberts is controlling. *See e.g.*, *Harbison v. Little*, 571 F.3d 531, 535 (6th Cir. 2009).

Unlike Mr. West, the "[p]etitioners [in *Baze*] d[id] not claim that lethal injection or the proper administration of the particular protocol adopted by Kentucky by themselves constitute the cruel or wanton infliction of pain." 553 U.S. at 49. "Instead, petitioners [in *Baze*] claim[ed] that there is a significant risk that the procedures will not be properly followed--in particular, that

the sodium thiopental will not be properly administered to achieve its intended effect--resulting in severe pain when the other chemicals are administered." *Id.* The Court affirmed that "subjecting individuals to a risk of future harm--not simply actually inflicting pain--can qualify as cruel and unusual punishment, however, it noted that the risk had to be more than the risk of an "accident" or "isolated mishap." *Id.* at 50.

The *Baze* Court rejected the petitioners' proposal to adopt a new standard, one which prohibits a protocol containing "unnecessary," or avoidable, risks. *Id.* at 47. The Court observed that this test would be problematic because the existence of any slightly safer alternative would create an "unnecessary" risk if the alternative wasn't adopted. Thus, such a standard would render unconstitutional *any* risk of harm that could be mitigated by an alternative, *id.* at 51, and this could not be reconciled with existing precedent requiring a "*substantial* risk of serious harm." *Id.* at 50, quoting, *Farmer v. Brennan*, 511 U.S. 825, 846, & n.9 (1994) Emphasis added.

The Court said, "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." *Id.* at 51. This is because a new test that relies upon a marginally safer alternative to elevate an "unnecessary" risk to an unconstitutional, "substantial" risk, "would threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." *Id.* The Court said, "[s]uch an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures--a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of

death." *Id.* Thus, the Court upheld the "substantial" risk element of an Eighth Amendment claim as an element to be established independent of the existence of an alternative. *Id.* at 52.[13]

It was in this context that the *Baze* Court dropped a footnote *sua sponte* discussing[14] a study on thiopental concentrations in blood samples drawn from 49 executed inmates in order to illustrate why the "unnecessary" risk or "best practices" approach would be an improper standard. *Id.* at 51, n.2. The study appeared in the *Lancet* medical journal and concluded that most of the executed inmates had thiopental concentrations that would not be expected to produce a surgical plane of anesthesia and 43% had concentrations consistent with consciousness. *Id.* The study received some criticism of its methodology due to the fact that the blood samples were taken "several hours to days after" the inmates' deaths, which may affect the concentration levels of thiopental. *Id.* The original authors responded to the criticism and defended their methodology. *Id.*[15] The Supreme Court said:

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[13]The Court declared that "proffered alternatives must effectively address a 'substantial risk of serious harm,'" and defined such alternatives as ones that are "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Baze*, 553 U.S. at 52.

[14]*Baze*, 553 U.S. at 110 (Breyer, J., dissenting) ("neither the petition for certiorari nor any of the briefs filed in this Court . . . make any mention of the Lancet Study.").

[15]The majority of samples were obtained within 12 hours as most states perform executions in the evening and the autopsies are done the next morning. *Inadequate anaesthesia in lethal injection for execution: Authors' reply*, 366 THE LANCET 1074-75 & Figures (Sept. 24, 2005). All blood samples from South Carolina, Arizona, Georgia and North Carolina were obtained within 18 hours except three, two of which were obtained within 24 hours and one which was obtained 3 ½ days later. Eighteen blood samples from Oklahoma were collected between 5 - 95 minutes after death. There was no significant relation between the times from death to collection and the concentration level of thiopental. The authors confirmed their previous statement that concentrations in blood did not fall with increased time between execution and blood sample collection. Regarding postmortem distribution, the authors stated that after death, concentrations of thiopental in blood have been shown to increase (not decrease)

> We do not purport to take sides in this dispute. We cite it only to confirm that a "best practices" approach, calling for the weighing of relative risks without some measure of deference to a State's choice of execution procedures, would involve the courts in debatable matters far exceeding their expertise.

Id.

The *Lancet* article footnote discussion must be read in the context of rejecting a "best practices" or "unnecessary" risk standard. The Court did not apply its discussion to the Eighth Amendment standard upheld in *Baze*, which requires a threshold showing of a substantial risk of serious harm. *Id.* at 52, n.3. Thus, this discussion does not reduce the likelihood of success on the merits of Mr. West's claims because he has always asserted the proper legal standard and has presented facts meeting that standard.

2. The facts presented by Mr. West have not been rejected by the United States Supreme Court.

Defendants suggest that *Baze* indicates that controversial serum-level evidence is not sufficient to overcome a state's choice of a lethal injection protocol. This argument is erroneous for three reasons.

First, *Baze* did not state or indicate that evidence of postmortem thiopental levels is insufficient to invalidate a lethal injection protocol. This is true because the *Baze* petitioners did not present evidence on thiopental levels, nor the *Lancet* article, to challenge Kentucky's protocol. *See Baze*, 553 U.S. at 110 Breyer, J. Dissenting)("neither the petition for certiorari nor any of the briefs filed in this Court . . . make any mention of the Lancet Study."). Thus, the Court

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in a similar way to virtually all other barbiturate drugs. *Id.* Indeed, out of the three blood samples available in Tennessee, the blood sample of Mr. Workman was obtained at the latest time and had the highest concentration level of thiopental. The other two samples were obtained within eight hours after death.

did not render such a conclusion. This is also true because the *Lancet* article footnote illustrated why the "best practices" or "unnecessary" risk standard proposed by the *Baze* petitioners was not the proper Eighth Amendment standard. The Court was not speaking to the relevance of the *Lancet* article *vis-a-vis* the proper constitutional standard of a "substantial risk of unnecessary harm" as applied to a method of execution challenge. Thus, there could be no conclusion or indication that evidence of postmortem thiopental levels can never establish an Eighth Amendment claim.

Second, *Baze* did not state or indicate that a cause of action cannot be supported by evidence of postmortem thiopental levels. The Court expressly stated it was not "taking sides" regarding the dispute over the *Lancet* article. *Baze*, 553 U.S. at 52, n.2. Defendants argue, however, that the *Lancet* article footnote operated as a "finding" on the reliability of post-mortem thiopental levels and that this "finding" is binding on any evaluation of Mr. West's proffered evidence. This is an astounding departure from well-established precedent that individual litigants are afforded an opportunity to present their particular cases to the courts. *See, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971) ("Some litigants-those who never appeared in a prior action-may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position."); *see also Hansbury v. Lee*, 311 U.S. 32, 40 (1940).

The Supreme Court stated in *Helling v. McKinney*, 509 U.S. 25 (1993), that there may be times where there exists a "sufficiently broad consensus" that a harm will occur and a state may

not ignore it under the Eighth Amendment. *Id.* at 34. Rejecting the argument that the lack of such a consensus can be determined as a matter of law, the Court stated:

> But the United States submits that the harm to any particular individual from exposure to ETS is speculative, that the risk is not sufficiently grave to implicate a "'serious medical nee[d],'" and that exposure to ETS is not contrary to current standards of decency. *Id.*, at 20-22. It would be premature for us, however, as a matter of law to reverse the Court of Appeals on the basis suggested by the United States. The Court of Appeals has ruled that McKinney's claim is that the level of ETS to which he has been involuntarily exposed is such that his future health is unreasonably endangered and has remanded to permit McKinney to attempt to prove his case. In the course of such proof, he must also establish that it is contrary to current standards of decency for anyone to be so exposed against his will and that prison officials are deliberately indifferent to his plight. We cannot rule at this juncture that it will be impossible for McKinney, on remand, to prove an Eighth Amendment violation based on exposure to ETS.

Helling, 509 U.S. at 34-35.

As in *Helling*, Defendants have erroneously suggested that, as a matter of law, evidence of post-mortem thiopental levels cannot support a cause of action. That is simply incorrect. Mr. West, like Mr. McKinney, presented substantial facts supporting a consensus of opinion that harm will occur and he should be provided an opportunity "to attempt to prove his case."

Third, the *Lancet* article footnote does not undermine Mr. West's likelihood of success because it does not require unanimous expert opinion in order to prevail on an Eighth Amendment claim. Here, the evidence establishes that the State should know from every autopsy report of executed Tennessee inmates that a pattern of cruel and unusual punishment has resulted from use of the Tennessee protocol.[16] *Williams v. Mehra*, 186 F.3d 685, 692 (6th Cir. 1999) citing *Farmer*, 511 U.S. at 837 (stating that the question, in the context of the policies or lack of

[16]Mr. West does not argue that Defendants are guilty of simple negligence or is acting with deliberate indifference due to an inadvertent failure to adhere to a scientifically proper course of action. *See Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976).

policies is, "whether they kn[ew] of and disregard[ed] an *excessive* risk to inmate health or safety"). This evidence need not be unanimous or even rise to the level of a probability. *See Helling*, 509 U.S. at 34-35. A "broad consensus" does not equal unanimity and state action is not immune from an Eighth Amendment challenge simply because the State can produce an expert who adheres to a contrary position.

> While it is true that courts hesitate to find an Eighth Amendment violation when a prison inmate has received medical care, *Hamm v. Dekalb County*, 774 F.2d 1567, 1575 (11th Cir.1985), *cert. denied*, 475 U.S. 1096, 106 S.Ct. 1492, 89 L.Ed.2d 894 (1986), that "[h]esitation does not mean ... that the course of a physician's treatment of a prison inmate's medical or psychiatric problems can never manifest the physician's deliberate indifference to the inmate's medical needs." *Waldrop* [*v. Evans*, 871 F.2d 1030 (11th Cir.1989)] at 1035; *see also Murrell v. Bennett*, 615 F.2d 306, 310 n. 4 (5th Cir.1980) (treatment may violate Eighth Amendment if it involves "something more than a medical judgment call, an accident, or an inadvertent failure"). Thus, the district court erred as a matter of law in ruling that mere proof of medical care by a doctor consisting of diagnosis only sufficed to disprove deliberate indifference.

Smith v. Jenkins, 919 F.2d 90, 93 (8th Cir. 1990).

Where unanimity does not exist, a court has an obligation to hear the evidence, to weigh it, and to determine whether the science underlying an opinion is established to such a degree that a state may not claim it is subjectively blameless for ignoring it. *Baze*, 553 U.S. at 47, citing *Farmer*, 511 U.S. at 842, 846, & n.9. Thus, to prove an Eighth Amendment violation, a plaintiff need not show a risk by unanimous, uncontested evidence; but by substantial evidence. At bottom, *Baze* held that

> "a series of [unnecessarily painful executions]" would present a different case [from the one presented by Kentucky]. In terms of our present Eighth Amendment analysis, such a situation-unlike an "innocent misadventure," would demonstrate an "objectively intolerable risk of harm" that officials may not ignore.

Baze, 553 U.S. at 50 (citations omitted). Mr. West has stated a cause of action under *Baze v. Rees*, proffered substantial evidence worthy of further factual development and has demonstrated a probability of success on the merits.

V. *Cooey v. Strickland* does not require that Mr. West's complaint be dismissed on statute of limitations grounds.

A. Mr. West's causes of action did not accrue until, at the earliest, when the autopsy report of Steven Henley was finalized in February, 2010, which provided evidence that the conscious suffocation of inmates Robert Coe and Phillip Workman were not "isolated mishaps" but rather the beginning of a "series" of lethal injections conducted by the State of Tennessee inflicting unnecessary pain and suffering even when carried out according to Tennessee protocols.

A cause of action accrues, and the statute of limitations begins to run, at the earliest, when the defendant has committed a wrongful or tortious act. The Sixth Circuit's decision in *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), does not hold otherwise.[17] In *Cooey*, the court stated:

> On the other hand, as the Supreme Court recently made clear, federal law determines when the statute of limitations for a civil rights action begins to run. *Wallace v. Kato*, [549 U.S. 384, 388 (2007)]. "Under those principles, it is 'the standard rule that [accrual occurs] when the plaintiff has complete and present cause of action.'" *Wallace*, [549 U.S. at 388] (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997)). This occurs "when 'the plaintiff can file suit and obtain relief.'" Id. (quoting *Bay Area Laundry*, 522 U.S. at 201, 118 S.Ct. 542).

479 F.3d at 416.

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[17]The question of the immediacy of future harm (*i.e.*, at what point does a condemned inmate know, or should know, that the defendant's conduct in carrying out his execution will result in harm to the inmate), has been heavily litigated in the federal courts, *see, e.g., Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), but is largely irrelevant in this case.

Here, Mr. West did not have a complete cause of action until, at the earliest, February 17, 2010, when the State finalized the autopsy report of Steven Henley.

Baze v. Rees reaffirmed prior Eighth Amendment precedent holding that the Eighth Amendment is violated upon two conditions. First, there must be a showing that a state's execution protocol inflicts unnecessary pain and suffering. Second, it must be proved that the state had actual or implicit knowledge that such pain and suffering will result from carrying out its protocol and the state decided to go forward nonetheless, *i.e.*, the risk must be obvious. Mr. West's claims arose only when both conditions were satisfied.

In *Baze*, the Supreme Court found that Kentucky had not committed the constitutional violations alleged because there was no showing that State officials knew, or had reason to know, that the execution protocol failed to properly anaesthetize condemned inmates. *Baze*, 553 U.S. at 50. Where a claim is based upon evidence of unnecessarily painful executions, as it is here, the Court noted:

> 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." *Helling v. McKinney*, 509 U.S. 25, 33, 34-35, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993) (emphasis added). 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." *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n. 9, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).
>
> Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual. In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), a plurality of the Court upheld a second attempt at executing a prisoner by electrocution after a mechanical

> malfunction had interfered with the first attempt. The principal opinion noted that "[a]ccidents happen for which no man is to blame," *id.*, at 462, and concluded that such "an accident, with no suggestion of malevolence," *id.*, at 463, did not give rise to an Eighth Amendment violation, *id.* at 463-464.
>
> As Justice Frankfurter noted in a separate opinion based on the Due Process Clause, however, "a hypothetical situation" involving "a series of abortive attempts at electrocution" would present a different case. *Id.*, at 471(concurring opinion). In terms of our present Eighth Amendment analysis, such a situation-unlike an "innocent misadventure," *id.*, at 470, would demonstrate an "objectively intolerable risk of harm" that officials may not ignore. *See Farmer*, 511 U.S., at 846, and n. 9. In other words, an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a "substantial risk of serious harm." *Id.* at 842.

Baze v. Rees, 553 U.S. at 49-50.

It was only upon the accumulation of all of the evidence from recent executions, including, specifically the autopsy report of Steven Henley, that the evidence demonstrated that Tennessee's unnecessarily painful executions of Mr. Coe and Mr. Workman were not just "isolated mishaps." Instead, they were part of the series of failed attempts to abide by the Constitution that the *Baze* court specifically held were necessary to state a cause of action. *Baze*, 553 U.S. at 50. Under *Cooey*, Mr. West's cause of action could not have arisen before March, 2010, and Mr. West filed his lawsuit in August, 2010, a date well within the one-year statute of limitations.

B. Because Defendants intended to unlawfully execute Mr. West by means of electrocution until October 20, 2010, thereby depriving him of standing to challenge Tennessee's method of carrying out executions by lethal injection until that date, all of the facts necessary to state his cause of action did not occur until October 20, 2010, the first date following the release of the Henley autopsy upon which he had standing.

1. Defendants deprived Mr. West standing to pursue his lethal injection complaint until October 20, 2010.

A more complete review of the Defendants' positions regarding the method by which they intend to execute Mr. West reveals that he had no standing to challenge Tennessee's lethal injection procedures until October 20, 2010. It was on that date that Defendants stated that Mr. West would now be executed by means of lethal injection. It was thus only on that date that Mr. West could pursue the claims arising from the release of the Henley autopsy.

On August 19, 2010, Mr. West filed a complaint seeking to enjoin Defendants from executing him under Tennessee's unconstitutional lethal injection protocol. *West v. Ray*, No. 3:10-cv-0778 (M.D.Tenn.) Docket Entry 1. On September 3, 2010, Defendants filed a motion to dismiss claiming that Mr. West remained bound by a nine-year-old document choosing electrocution for his then-pending execution in 2001. He had signed that document as part of an execution protocol that was specifically revoked by the Governor of the State of Tennessee in 2007. Arguing that Mr. West would be executed by means of electrocution, Defendants asserted that Mr. West had no standing to challenge Tennessee's lethal injection protocol, and therefore had presented no case or controversy by which to invoke the subject matter jurisdiction of the District Court. *Id.* at Docket Entry 23 at 1 and Docket Entry 24 at 3-4. On September 10, 2010, Defendants repeated that claim, again asserting that Mr. West's complaint be dismissed for want of jurisdiction. *Id.* at Docket Entry 26.

Mr. West argued that the District Court had jurisdiction because the nine-year-old form choosing electrocution is no longer valid. *Id.* Docket Entry 27. This Court specifically refused to address Defendants' claim of lack of subject matter jurisdiction, holding:

> The Court will not convert the Motion To Dismiss into a motion for summary judgment as this case is not in the right procedural posture for such a conversion. Nothing herein restricts the parties from filing motions for summary judgment.

Id. at Docket Entry 28. Without resolving the question of subject matter jurisdiction, the Court dismissed Mr. West's complaint on statute of limitations grounds. *Id.* at Docket Entry 34 and Docket Entry 35. The Court determined that the statute of limitations was triggered in 1990, when Mr. West's direct review process was final, in 2000, when lethal injection became the presumptive method of execution, or in 2007, when Tennessee implemented a new lethal injection protocol. Docket Entry 33 p.3, 4 n.2. All of these dates are more than one year from August 19, 2010, when Mr. West's lawsuit was filed.

Mr. West appealed. On October 6, 2010, Mr. West filed his brief in the Sixth Circuit Court of Appeals, arguing that the decision in *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), had not altered the basic rule that accrual cannot occur until a cause of action exists. Mr. West's causes of action did not exist, at the earliest, until February 17, 2010, when the autopsy report was finalized and demonstrated that the conscious suffocations of Phillip Workman and Robert Coe were not just "isolated mishaps," but rather the beginning of a "series of [unnecessarily painful]" lethal injections at the hands of Tennessee officials which could no longer be ignored by Defendants. *Baze v. Rees*, 553 U.S. at 50. *West v. Ray*, No. 10-6196 (6th Cir.) Brief of Appellant, Brief of Appellant.

On October 12, 2010, after Defendants had failed to provide Mr. West with a method of execution election form as required under Tennessee's current protocol, Mr. West's counsel presented Defendant Bell with a letter setting out the reasons why Mr. West's almost ten year old election form was not valid, but, out of an abundance of caution, informing Defendant Bell that he was rescinding that form and was not making any election regarding his method of execution. (Attachment A). After consulting with Department of Correction counsel, Defendant Bell orally informed Mr. West's counsel that the Department still considered the nine-year-old form to be binding, that he would not recognize Mr. West's recision, and that the State of Tennessee would subject him to death by electrocution unless he affirmatively chose lethal injection as the method of execution.[18] On October 13, 2010, Mr. West's counsel, Mr. Stephen Ferrell, sent a letter *via* facsimile transmission to Ms. Debra Inglis, counsel for the Department of Correction, seeking official confirmation of Defendant Bell's representations. (Attachment B). Ms. Inglis did not immediately respond.

On the same date, however, Defendants filed their brief in the Sixth Circuit, again asserting that Mr. West had presented no case and controversy regarding the unconstitutionality of lethal injection because he was to be executed by electrocution. *West v. Ray*, No. 10-6196 (6th Cir.) Brief of Defendants/Appellees, p.16-18.

On October 15, 2010, Ms. Inglis responded to counsel's letter, stating:

> It is the Department of Correction's position that Mr. West's affirmative election of electrocution as his method of execution continues to be in full force and effect.

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[18]According to Defendants, acceding to the Department's demand would require Mr. West to forfeit his right to ask that Tennessee carry out his execution by lethal injection in a manner which did not constitute cruel and unusual punishment. *West v. Ray*, No. 3:10-cv-0778 (M.D. Tenn.) Docket Entry 24, pages 4-5 .

> If Mr. West now wishes to choose lethal injection, the Department will allow him to do so by submitting a new affidavit to Warden Bell, no later than October 26, 2010 (14 days prior to the date of the execution) affirmatively stating that he "waives any right he might have to have his execution carried out by electrocution and instead chooses to be executed by lethal injection."

Attachment C. Emphasis added. Neither Tennessee's Current Execution manual, nor any other protocol known to Mr. West, requires a condemned inmate to affirmatively choose execution by lethal injection in order to rescind a prior election of electrocution. Docket Entry 1 at page 89 of 127.

Defendants' execution of Mr. West by electrocution on the basis of an invalid election violates TENN.CODE ANN. § 40-23-114 (a) and (b) (which requires the use of lethal injection unless the condemned inmate has affirmatively chosen electrocution). Defendants' non-consensual use of electrocution (which is itself cruel and unusual) to carry out Mr. West's execution also violates the Eighth and Fourteenth Amendments to the United States Constitution and Art. 1 § 14 of the Tennessee Constitution. Given Defendants' clearly stated intention to electrocute Mr. West, on October 18, 2010, Mr. West filed suit in the Chancery Court for Davidson County, Tennessee, seeking to permanently enjoin Defendants' illegal conduct and moved for a temporary injunction.[19]

After consideration of the following three factors, Mr. West filed his reply brief in the Sixth Circuit:

[19]Mr. West was unwilling to agree to be executed by Tennessee's cruel and unusual method of carrying out lethal injections in order to avoid Tennessee unlawfully executing him by electrocution which was itself cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Art. 1 § 14 of the Tennessee Constitution.

(1) Information relayed three days earlier by counsel for the Tennessee Department of Correction that (notwithstanding the fact that he had pointed out to the Department of Correction the many reasons why his almost ten year-old election form was no longer valid and had even, out of an abundance of caution, expressly rescinded that election) that Defendants still intended to execute him by means of electrocution;

(2) Defendants' Sixth Circuit brief received five days earlier, in which they again forwarded the fact-intensive claim that, because of the alleged validity of the election form, Mr. West had failed to present a case or controversy through which he could invoke the subject matter jurisdiction of the federal courts to pursue a lethal injection lawsuit; and,

(3) The filing of a lawsuit in state court which most properly should resolve the factual issues raised by Defendants' continued insistence of the validity of the election form.

In that brief, Mr. West submitted that Defendants' renewed challenge to the jurisdiction of the federal courts to hear Mr. West's lethal injection complaint (based upon the alleged validity of the election form) had created a threshold issue requiring resolution before further review because the courts could not render a decision in a case over which they lacked subject matter jurisdiction. *West v. Ray*, No. 10-6196 (6th Cir.) Appellant's Reply Brief, p. 1. He further argued, just as the District Court had recognized earlier, *see generally, West v. Ray*, No 3:10-cv-0778 (M.D. Tenn.) Docket Entry 28, that the need for further factual development regarding the election form dictated that the Sixth Circuit should hold the matter in abeyance while the state

law question could be resolved in the pending state court action. To that end, Mr. West filed a separate motion asking the Sixth Circuit to stay and abey further proceedings. *West v. Ray,* No. 10-6196 (6th Cir.) Motion to Stay and Abey Proceedings.

Two days later, on October 20, 2010, Defendants responded to Mr. West's state court motion. Rather than defend the merits of either the constitutionality of Tennessee's use of electrocution as a means of execution, or the alleged validity of Mr. West's over nine-year-old election, Defendants (while expressly acknowledging that they had fully intended to execute Mr. West by electrocution up until that date[20]), stated that now they would honor the recision they had up until then specifically refused to honor:

> Nevertheless, the defendants have no desire to litigate this issue. Defendants will therefore accept plaintiff's October 12, 2010, rescission of his previous election of electrocution. With the plaintiff having rescinded his previous election and waiver, plaintiff's sentence of death will now he executed by means of lethal injection, by operation of law. *See* Tenn. Code Ann. § 40-23-114(a). Consequently, there is simply no need for plaintiff to be presented with a new election affidavit, as he insists. In addition, the plaintiff has affirmatively declared that he would make no election of a method of execution, further obviating any need to present him with a new election affidavit.

West v. Ray, No. 10-1675-I (Chancery Court for Davidson Co. Tenn.) Defendants' Response to Motion for Temporary Injunction, p. 3. Emphasis added. Defendants then demanded that, because Mr. West would now be executed by lethal injection, his state court complaint should be dismissed as moot. *Id.* ("Furthermore, because the defendants have accepted plaintiff's

[20]*West v. Ray*, No. 10-1675-I (Chancery Court Davidson Co., Tenn.) Defendants' Response to Motion for Temporary Injunction, p. 2 ("The defendants maintain that the February 13, 2001 Election Affidavit [choosing electrocution as a means of execution] is valid and still effective."). Attachment D.

rescission of his election of electrocution, and his execution will now proceed by means of lethal injection, plaintiff's complaint is rendered moot and should therefore be dismissed.").

Defendants' insistence that the election form was valid but their change in position that the State would now use lethal injection had three effects:

(1) it solidly demonstrated that the district court did not have jurisdiction over Mr. West's lethal injection lawsuit when it entered its judgment because the State, at that time, never intended to use lethal injection,

(2) it mooted Mr. West's state lawsuit challenging electrocution because the State announced it would not use electrocution,

(3) it afforded Mr. West standing to pursue a cause of action based on lethal injection.

2. A cause of action is not complete until the Plaintiff is an aggrieved person. Accordingly, Mr. West's cause of action did not accrue until October 20, 2010.

Cooey continues to recognize that a cause of action does not accrue until the Plaintiff is able to bring suit. *Cooey*, 479 F.3d at 416. Though the Henley autopsy report was finalized in February of this year (also a date within a year of when Mr. West filed suit) Mr. West could not have pursued those claims until October 20, 2010, mere days before he filed suit. In fact, when he initially filed in August, Defendants claimed that he did not have standing. As the court stated in *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846 (7th Cir. 2007):

> Indeed, before there is an injury, there is no standing to sue for damages because no damages have accrued, *Love Church v. City of Evanston*, 896 F.2d 1082, 1085-86 (7th Cir. 1990), and obviously a statute of limitations cannot begin to run before the prospective plaintiff could sue.

489 F.3d at 850.

Mr. West's complaint was filed well within the statute of limitations.

VI. Conclusion

Despite all of the *dicta* they have provided from other cases with other facts, Defendants' arguments come down to two proposed rules of law. First, that under *Baze v. Rees*, a state with an execution protocol similar to Kentucky's protocol does not, as a matter of law, violate the Eighth and Fourteenth Amendments when they go forward with an execution which paralyzes and suffocates a conscious human being. Second, that *Cooey v. Strickland* establishes a bright line rule that lethal injection claims accrue on the date that an inmate's conviction becomes final on direct review or on the date that the state adopts lethal injection as its primary means of carrying out a sentence of death, regardless of when the facts necessary to state an Eighth Amendment claim even exist. Any other rules require that the Court deny their motion to dismiss.

If the Court accepts Defendants' arguments, Mr. West urges the court to enter an order to that effect, uncluttered by the volumes of *dicta* in which Defendants have cloaked them, so that Mr. West may seek expeditious appellate review. If the Court does not, it must deny Defendants' motion.

WHEREFORE Plaintiff submits that the Court should order that Defendants' motion to dismiss be denied, that Defendants be ordered to file their answer to Plaintiff's Complaint within seven days of the date of the Court's order, and that this matter be set for a status conference in order to set out dates for completing discovery and pretrial disclosures.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2010, Plaintiff's Response in Opposition to Defendants' Motion to Dismiss was filed electronically. Notice of this filing was sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt addressed to:

Mark A. Hudson
Senior Counsel
Office of Attorney General
425 Fifth Avenue North
P. O. Box 20207
Nashville, TN 37243
Mark.A.Hudson@state.tn.us

/s/ Stephen M. Kissinger
Stephen M. Kissinger

ATTACHMENT A

TO

WITHDRAWAL OF APPELLANT'S MOTION TO STAY AND ABEY PROCEEDINGS AND MOTION TO VACATE DISTRICT COURT ORDER AND REMAND TO DISTRICT COURT FOR ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

WEST RESCISSION OCTOBER 12, 2010

Mr. Stephen Michael West - 115717
Riverbend Maximum Security Institution
7475 Cockrill Bend Blvd.
Nashville, TN 37243

Mr. Ricky Bell, Warden
Riverbend Maximum Security Institution
7475 Cockrill Bend Blvd.
Nashville, TN 37243

Dear Warden Bell:

The purpose of this letter is to officially rescind the Affidavit Concerning Method of Execution that I executed on February 13, 2001. That Affidavit no longer has full force and effect since the protocol under which it was signed is no longer in effect. However, you and the other Defendants in *West v. Ray et al.*, case no. 3:10-cv-0778, United States District Court, Middle District of Tennessee, have affirmatively alleged that the Affidavit Concerning Method of Execution that I executed on February 13, 2001, remains in full force and effect in your Motion to Dismiss my complaint in that action. Therefore, in an abundance of caution, I hereby rescind that Affidavit.

You are specifically informed that I neither have made, nor am making, any election of the method of execution under the current execution protocol to be used to carry out the sentence(s) of death imposed upon me by the State of Tennessee on November 9, 2010.

Stephen West
Stephen Michael West

Date: 9/30/10

Jessica H. Johnson
Witness

Date: 9/30/10

ATTACHMENT B

TO

WITHDRAWAL OF APPELLANT'S MOTION TO STAY AND ABEY PROCEEDINGS AND MOTION TO VACATE DISTRICT COURT ORDER AND REMAND TO DISTRICT COURT FOR ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

LETTER FROM STEPHEN FERRELL
TO
DEBRA INGLIS, TDOC
OCTOBER 13, 2010

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INCORPORATED
800 S. Gay Street, Suite 2400
Knoxville, Tennessee 37929

Elizabeth B. Ford
Federal Community Defender

Phone: (865) 637-7979
Fax: (865) 637-7999

VIA FACSIMILE TRANSMISSION
(615) 741-9280

October 13, 2010

Ms. Debra K. Inglis
General Counsel
Tennessee Department of Corrections
320 6th Avenue North, 6th Floor
Nashville, TN 37243

RE: Stephen West, method of execution

Dear Ms. Inglis:

I am writing you this letter concerning my client, Stephen West, who is currently scheduled to be executed on November 9, 2010. I met yesterday with Warden Bell and learned that he is not presently intending to submit to West an election form concerning the method of execution to be used on November 9. According to Warden Bell, Mr. West will be executed by electrocution because, on February 13, 2001, almost ten years ago, Mr. West signed an affidavit to Elect Method of Execution and chose to be executed by electrocution. That Affidavit was submitted to Mr. West and signed by him, pursuant to an execution protocol which was revoked in its entirety by Governor Phil Bredesen on February 1, 2007.

At this meeting with Warden Bell, I submitted to him a letter in which Mr. West gave notice that his 2001 affidavit was no longer in effect since the protocol under which it was signed was no longer in effect. Furthermore, Mr. West gave notice that, in an abundance of caution, he was rescinding that affidavit at this time and that it was no longer his election for the currently scheduled execution date. He specifically gave notice to the Warden that he was making no election under the current execution protocol.

I need to hear from you, in your official capacity, whether you consider Mr. West's 2001 Affidavit to be in full force and effect. I believe that there can be no question that this Affidavit is no longer in effect because (1) the protocol under which it was executed has been revoked by the Governor; (2) out of an abundance of caution, Mr. West has officially rescinded his earlier Affidavit and the Warden was given notice of this more than fourteen (14) days before West's current execution date; (3) under the then-

existing protocol, properly construed, the 2001 Affidavit was effective solely as to his then-scheduled execution; and (4) the 2001 Affidavit was never valid because shortly after this date, Mr. West was diagnosed by prison staff with severe mental illness. Mr. West may well have been incompetent to make this election at that time. Furthermore, you are hereby notified that the Warden has not followed the current protocol which requires him to submit a current election form to condemned inmates within thirty days of any scheduled execution.

Please answer this letter as promptly as possible and inform me of your position on these matters. Time is obviously of the essence. Thank you.

Very truly yours,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

Stephen A. Ferrell
Asst. Federal Community Defender

cc: Warden Bell

ATTACHMENT C

TO

WITHDRAWAL OF APPELLANT'S MOTION TO STAY AND ABEY PROCEEDINGS AND MOTION TO VACATE DISTRICT COURT ORDER AND REMAND TO DISTRICT COURT FOR ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

LETTER FROM DEBRA INGLIS, TDOC
TO
STEPHEN FERRELL
OCTOBER 15, 2010

STATE OF TENNESSEE
DEPARTMENT OF CORRECTION
4TH FLOOR RACHEL JACKSON BLDG.
320 SIXTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243-0465

October 15, 2010

Stephen A. Ferrell
Assistant Federal Community Defender
Federal Defender Services of Eastern Tennessee, Inc.
800 S. Gay Street, Suite 2400
Knoxville, TN 37929

Dear Mr. Ferrell:

This is in response to your October 13, 2010 letter concerning the status of Stephen West's election of electrocution as his method of execution through an affidavit he executed on February 13, 2001.

It is the Department of Correction's position that Mr. West's affirmative election of electrocution as his method of execution continues to be in full force and effect. If Mr. West now wishes to choose lethal injection, the Department will allow him to do so by submitting a new affidavit to Warden Bell, no later than October 26, 2010 (14 days prior to the date of the execution) affirmatively stating that he "waives any right he might have to have his execution carried out by electrocution and instead chooses to be executed by lethal injection." To date, the Department has not received an affidavit meeting that requirement from Mr. West.

Sincerely,

Debra K. Inglis

Debra K. Inglis
General Counsel

ATTACHMENT D

TO

WITHDRAWAL OF APPELLANT'S MOTION TO STAY AND ABEY PROCEEDINGS AND MOTION TO VACATE DISTRICT COURT ORDER AND REMAND TO DISTRICT COURT FOR ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

DEFENDANTS' RESPONSE TO MOTION FOR TEMPORARY INJUNCTION

West v. Ray, et al
Chancery Court of Davidson County, Tennessee
No. 10-1675-I
October 20, 210

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 10-1675-I**
	)	
GAYLE RAY, in her official capacity as Tennessee Commissioner of Correction, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO MOTION FOR TEMPORARY INJUNCTION

The plaintiff, Stephen West, a condemned inmate residing at Riverbend Maximum Security Institution, in Nashville, Davidson County, Tennessee, filed this action seeking a temporary injunction effectively enjoining the defendants from carrying out his execution scheduled for November 9, 2010. Specifically, plaintiff contends that his February 2001 choice of electrocution as his method of execution is of no force and effect and that the defendants have not and cannot now present him with an Affidavit Concerning Method of Execution thirty days prior to his execution as outlined in the execution protocols. For the reasons stated below, the motion should be denied and this case dismissed.

On February 13, 2001, plaintiff executed an Affidavit to Elect Method of Execution in which he chose electrocution as the method of his execution and waived his right to be executed by lethal injection. Attachment C to Motion for Temporary Injunction. In response to a 42 U.S.C. § 1983 action in which plaintiff challenged the constitutionality of the Tennessee lethal injection protocol, the state defendants argued that plaintiff was bound by the election he made on

February 13, 2001; consequently, his challenge to the Tennessee lethal injection protocol was hypothetical and did not present a justiciable case or controversy. *West v. Ray*, No. 3:10-cv-0778, Memorandum in Support of Motion to Dismiss filed Sept 3, 2010 (M.D. Tenn. 2010). Plaintiff was also advised that the Tennessee Department of Correction would permit him to change his election by submitting a new affidavit, no later than 14 days prior to the date of the execution, affirmatively stating that he "waives any right he might have to have his execution carried out by electrocution and instead chooses to be executed by lethal injection." *Id.* On October 12, 2010, plaintiff presented the defendants with a letter in which he purported to rescind his previous election of electrocution; he did not, however, elect lethal injection as his method of execution. Instead, he informed the defendants that he was making no election of the method of execution (see Motion for Temporary Injunction, Attachment F).

This Court is without jurisdiction to enjoin or restrain the July 15, 2010, order of the Tennessee Supreme Court that plaintiff's sentence of death be executed on November 9, 2010. *See Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (Tenn. 2000). Nothing in *Coe v. Sundquist*, however, would appear to preclude this Court's jurisdiction to the extent that plaintiff seeks declaratory relief alone.

The defendants maintain that the February 13, 2001, Election Affidavit is valid and still effective. Plaintiff made that election pursuant to Tenn. Code Ann. § 40-23-114(a), which remains unchanged. Although revisions have since been made to the Tennessee Execution Protocol, that protocol also remains materially unchanged. *See Workman v. Bredesen*, 486 F.3d 896, 900-901 (6th Cir. 2007).

Nevertheless, the defendants have no desire to litigate this issue. Defendants will therefore accept plaintiff's October 12, 2010, rescission of his previous election of electrocution. With the plaintiff having rescinded his previous election and waiver, plaintiff's sentence of death will now be executed by means of lethal injection, by operation of law. *See* Tenn. Code Ann. § 40-23-114(a). Consequently, there is simply no need for plaintiff to be presented with a new election affidavit, as he insists.[1] In addition, the plaintiff has affirmatively declared that he would make no election of a method of execution, further obviating any need to present him with a new election affidavit.

Because this Court lacks jurisdiction to order the injunctive relief sought, plaintiff's motion for temporary injunction should be denied. Furthermore, because the defendants have accepted plaintiff's rescission of his election of electrocution, and his execution will now proceed by means of lethal injection, plaintiff's complaint is rendered moot and should therefore be dismissed.

[1] In any event, the plaintiff has no "right" under the Protocol to be presented with an affidavit of election within 30 days of the execution date. The Protocol is a statement concerning only the internal management of state government. Furthermore, the 30-day requirement is obviously for the benefit of the Department, so that it may have sufficient time to prepare for execution by means of the chosen method.

Respectfully submitted,

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

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Senior Counsel
Office of the Attorney General
Civil Rights and Claims Division
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(615) 741-7401

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2010, a copy of the foregoing was forwarded by facsimile and U.S. Mail to:

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Stephen M. Kissinger
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OF EASTERN TENNESSEE, INC.
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Knoxville, TN 37929

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