No. _____

In the Supreme Court of the United States
October Term 2010

STEPHEN MICHAEL WEST,
Petitioner,

v.

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

On Petition for a Writ of Certiorari
to the Sixth Circuit United States Court of Appeals

TO: THE HONORABLE JUSTICE KAGAN

MOTION FOR STAY OF EXECUTION

Execution Scheduled for 10 p.m. CST on November 9, 2010

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Pursuant to SUP. CT. R. 22, Petitioner is seeking a stay of execution from this Court because his request to the district court for "[t]emporary, preliminary and permanent injunctive relief to enjoin the Defendants, ... from executing Mr. West by lethal injection using Tennessee three drug lethal injecting protocol" (R.1, Complaint, p.104 of 106)[1] was denied and his action was dismissed. (R.33, Memo. Opinion; R.34, Order) (Attached as Attachment A, App-002 and Attachment B, App-010, respectively). The district court's decision was affirmed by the Sixth Circuit Court of Appeals on November 4, 2010. (Attached as Attachment C, App-012).

To the extent that any court had jurisdiction to enter a stay in this case, to date all of Mr. West's requests have been denied.

INTRODUCTION

A stay of execution is justified because the Sixth Circuit's decision reaching the merits of a contested legal issue without resolving a challenge to the court's subject matter jurisdiction issue radically departs from this Court's authority, raises grave issues of the constitutional limitations on the jurisdiction of Article III courts, and prevents meaningful review of the court's unjustifiable extensions of the Sixth Circuit's already controversial decision in *Cooey v. Strickland*, 479 F.3d 412

[1]Mr. West filed his first complaint in the United States District Court for the Middle District of Tennessee on August 19, 2010, bearing Case No. 3:10-cv-0778, which was dismissed on September 24, 2010. Cites to the record in that case will be "R.__" On October 4, 2010, his appeal of that decision was docketed in the United States District Court for the Sixth Circuit as Case No. 10-6196, and their opinion on November 4, 2010, is the underlying subject of this appeal to the United States Supreme Court. Mr. West filed his second complaint in the district court on October 28, 2010, which was assigned Case No. 3:10-cv-01016, and that case was dismissed as barred by the doctrine of *res judicata* on November 5, 2010. Cites to that record will be preceded by "Second Complaint."

(6th Cir. 2007)(*Cooey* II), and the court's expansive view of this Court's decision in *Baze v. Rees*, 553 U.S. 35 (2008).

Given the importance of the constitutional issues presented in this case, at a minimum, a stay of execution is justified while this Court is considering the petition for *writ of certiorari*, also filed on this day.

On November 4, 2010, the court below issued a 2-1 opinion affirming the district court's decision on statute of limitations grounds. To justify reaching the merits of this contested issue, the majority held that the district court did not need to resolve Defendants' challenge to subject matter jurisdiction before reaching the merits of Defendants' statute of limitations defense, it need only look to whether the Plaintiff had alleged that the district court had jurisdiction.

The majority then proceeded to hold that its decision in *Cooey* II stands for the proposition that the accrual date for an inmate's Eighth Amendment claim is unrelated to when the facts become known which establish the inmate's cause of action. Rather, it is either the date upon which the inmate's conviction becomes final on direct review, or the date upon which the state adopts the method of execution as the primary method of execution. As a result, the majority considered it of no consequence that in March of 2010, well within the statute of limitations, the State of Tennessee released the third of the three autopsy reports which established a series of executions which, though carried out perfectly, accomplished death by the suffocation of a conscious inmate.

Neither the majority's gross departure from well-established law, nor the fact

that such a series of unnecessarily painful executions clearly established a cause of action under *Baze* was not lost on the dissenting judge:

> West has accomplished what Getsy did not. After Tennessee's protocol change, the autopsy of Phillip Workman revealed inadequate post-mortem sodium thiopental levels. This single occurrence might have been "an isolated mishap alone," which "does not give rise to an Eighth Amendment violation." *Baze v. Rees*, 553 U.S. 35, 50 (2008) (Roberts, J., plurality op.). But on March 10, 2010, the state released the autopsy results for its next-executed inmate, Steven Henley. Henley, too, had deficient sodium thiopental levels, giving West a basis to allege that, as implemented, the lethal-injection protocol violates the Eighth Amendment. Until Henley's autopsy confirmed the problem, West did not have a cause of action because "the conditions presenting the risk" of suffocation were not "sure or very likely to cause serious illness and needless suffering." *Baze*, 553 U.S. at 50. And prior to the autopsy, "the typical lay person," *Getsy*, 577 F.3d at 312, could not have been alerted that the standard three-drug cocktail would suffocate its recipients. The key feature of this case is that West has alleged new evidence showing that the practice of the lethal injection method in Tennessee has caused extreme pain and suffering, constituting a violation of the Eighth Amendment.

West v. Ray, No. 10-6196, slip opinion at *11-12 (6th Cir.)(Nov. 4, 2010) (Moore, J., dissenting).

PROCEDURAL HISTORY

On March 10, 2010, Tennessee officials released the autopsy report of Steve Henley. Mr. Henley was executed on February 4, 2009, pursuant to Tennessee's current three-drug lethal injection protocol. Information in Mr. Henley's autopsy report reveals that his death was caused by suffocation induced by pancuronium bromide at a time when he was not adequately anesthetized. (R.1-21, 2010 Lubarsky Affidavit, p.8 of 65).

The Henley autopsy report is the third report (out of three) indicating that Tennessee inmates are executed by means of conscious suffocation. The State of

Tennessee has done nothing to alter its protocol in response to this information.

The results from the Henley autopsy show that his sodium thiopental level was 8.31 mg/L, an amount inadequate to cause Mr. Henley to be unconscious during his execution. (R.1-23, Henley Autopsy, p.3, 7 of 20; R.1-21, 2010 Lubarsky Affidavit, p.7 of 65). Mr. Henley's potassium level was not elevated and would have had no effect on his heart. (R.1-23, Henley Autopsy p.3, 7 of 20; R.1-21, 2010 Lubarsky Affidavit, p.7-8 of 65). Mr. Henley's pancuronium bromide level was far above the level required to cause Mr. Henley's death through suffocation. (R.1-23, Henley Autopsy, p.3, 7 of 20; R.1-21, 2010 Lubarsky Affidavit, p.8 of 65). This is consistent with the observations of witnesses to Mr. Henley's execution that his face turned blue and purple approximately seven minutes after the execution began. (R.1-24, Rector Affidavit, p.2 of 10). He turned blue because this change of color occurs when non-oxygenated blood is pumped to the extremities by a beating heart. (R.1-21, 2010 Lubarsky Affidavit, p.8 of 65).

This horrific death occurred despite the fact that Mr. Henley's execution was properly carried out under Tennessee's lethal injection protocol. 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 arms and all drugs had been fully dispensed in accordance with the protocol. (R.1-23, Henley Autopsy, p.5 of 20). The autopsy report does not describe any signs of infiltration at the injection site. No state official has ever claimed that any error or mishap occurred during the execution.

On July 15, 2010, the Tennessee Supreme Court scheduled Stephen West's execution for November 9, 2010. On August 19, 2010, Mr. West filed a complaint seeking to enjoin Defendants from executing him under Tennessee's unconstitutional lethal injection protocol. (R.1,Complaint). 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 a then-pending execution (that was not carried out). Both the document itself and the act of presenting that document to Mr. West were 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. (R.23, Motion to Dismiss, p.1 of 3; R.24, Mem. in Support, p.3-4 of 23). On September 10, 2010, Defendants repeated that claim, again asserting that Mr. West's complaint be dismissed for want of jurisdiction. (R.26, Brief of Defendants).

Mr. West argued that the District Court had jurisdiction because the nine-year-old form choosing electrocution is no longer valid. (R.27, Resp. to Order for Briefing, p.6 of 8). The District Court specifically refused to address the issue 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.

(R.28, Order).

Without resolving the question of subject matter jurisdiction, the Court dismissed Mr. West's complaint on statute of limitations grounds. (R.34, Order, App-010; R.35, Judgment). 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. (R.33, Mem., p.3, p.4 n.2, App-004-App-005). 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 (2007)(*Cooey* II), had not in any way altered the basic rule that accrual cannot occur until all facts necessary to establish a cause of action exists. Because Mr. West's causes of action did not exist until, at the earliest, February 17, 2010, upon completion of the Henley autopsy report that demonstrates that the conscious suffocation 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.

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 one of 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. (Attached as Attachment D, App-025). 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.[2] On October 13, 2010, Mr. West's counsel sent a letter via facsimile transmission to counsel for the Tennessee Department of Correction (TDOC) seeking official confirmation of Defendant Bell's representations. (Attached as Attachment E, App-027). TDOC Counsel did not immediately respond.

On the same date, however, Defendants filed their answer brief in the court of appeals, 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*, 6th Cir. Case No. 10-6196, Brief of Defendants-Appellees, p.16-18).

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[2]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. (R.24, Mem. in Supp. of Motion to Dismiss, p.4-5 of 23).

On October 15, 2010, TDOC Counsel responded:

> 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."

(Attached as Attachment F, App-030) (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. (R.1, Complaint, p.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 on October 18, 2010, to electrocute Mr. West, 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.[3]

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[3]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

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

(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

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Amendments to the United States Constitution and Art. 1, § 14 of the Tennessee Constitution.

requiring resolution before further review because neither the District Court, nor the Court of Appeals, could render a decision in a case over which they lacked subject matter jurisdiction. (*West v. Ray*, 6th Cir. Case No. 10-6196, Appellant's Reply Brief, p.1). He further argued, just as the District Court had recognized earlier, (*see generally*, R.28, Order), 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, on October 18, 2010, Mr. West filed a separate motion asking the appellate court to stay and abey further proceedings. (*West v. Ray*, 6th Cir. Case No. 10-6196, Motion to Stay and Abey Proceedings).

Two days later, on October 20, 2010, Defendants responded to Mr. West's state court motion to enjoin any attempt to execute him by means of electrocution. Defendants did not 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. Instead, after expressly acknowledging that they had fully intended to execute Mr. West by electrocution up until that date,[4] Defendants suddenly reversed their prior position and stated that now they would honor Mr. West's recision:

> Nevertheless, the defendants have no desire to litigate this issue. Defendants will therefore accept plaintiff's October 12, 2010, rescission

[4] *West v. Ray*, Davidson County Chancery Court, Tenn., No. 10-1675-I, 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."). (Attached as Attachment G, App-032).

> 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. 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*, Davidson County Chancery Court, Tenn., No. 10-1675-I, 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 electrocution 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.").

Defendants' continued insistence that the election form was valid, but their new position regarding the method by which Mr. West would be executed, 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 triggered the statute of limitations on a cause of action based on

lethal injection.

On October 21, 2010, a short state court hearing was held during which Mr. West acknowledged that his motion to temporarily enjoin Defendants from executing him by electrocution in violation of Tennessee's and the United States' constitutional prohibitions against cruel and unusual punishment had been rendered moot by the Defendants' sudden shift in position regarding Mr. West's recision. Mr. West also stated that, because his standing to challenge lethal injection was no longer in question, he would amend his pending state court complaint to allege the state and federal unconstitutionality of Tennessee's method of carrying out lethal injections. He stated further that he would withdraw his motion for temporary injunction regarding electrocution.

On October 25, 2010, the Chancery Court entered its order. (Order, Oct. 25, 2010, *West v. Ray*, No. 10-1675-I, Chancery Court for Davidson County, Tennessee. (Attached as Attachment H, App-037). Also on October 25, 2010, immediately upon the filing of the court's order, Mr. West filed an amended complaint alleging seven claims challenging the constitutionality of lethal injection as administered by the Defendants and a motion for temporary injunction.

On October 26, 2010, Mr. West withdrew his Motion to Stay and Abey Proceedings, that was still pending in the Sixth Circuit, because the issue of the validity of the election form was no longer before the state courts of Tennessee.[5]

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[5]Between October 18, 2010, when they were served, and October 26, 2010, Defendants had not responded in any way to Mr. West's Motion to Stay and Abey Proceedings.

Mr. West further submitted that Defendants had clearly represented in the state courts of Tennessee that Mr. West was going to be executed by electrocution until, at the earliest, October 20, 2010, a time period which included the entire time during which Mr. West's complaint was before the Federal District Court for the Middle District of Tennessee. Accordingly, Mr. West conceded that Defendants' argument that the District Court lacked subject matter jurisdiction was well-taken, even if their assertion of the continued validity of the nine-year-old election form was without any basis.

> Regardless of whether the February 13, 2001, election form was valid, Appellees admit that they had no intention to carry out Mr. West's execution by lethal injection until October 20, 2010. The district court was without jurisdiction to render any judgment in this matter and, accordingly, its case must be remanded with instructions that Appellant's complaint be dismissed without prejudice. *U.S. ex rel. Poteet v. Bahler Medical, Inc.*, ___ F.3d ___, 2010 WL 3491159 (1st Cir. September 08, 2010).

(*West v. Ray*, 6th Cir. Case No. 10-6196, 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, p.7-8).

On October 27, 2010, the state court began a hearing on Mr. West's Motion for Temporary Injunction. After allowing the Defendants to file a written response and Mr. West to file a reply to that response, the court continued that hearing to October 28, 2010. At the conclusion of the hearing, the state court ruled from the bench that Mr. West had shown that the balance of the four factors to be considered in determining whether a temporary injunction should be entered weighed in favor of granting the injunction. Included within that finding, the court determined that

Mr. West's action "has merit as regards the Tennessee Constitution and the specific facts which have so far not been evaluated in State Court." (*West v. Ray*, Davidson County Chancery Court, Tenn., No. 10-1675-I, Memorandum Opinion, p.9 (Nov. 1, 2010)(Attached as Attachment I, App-040). The court found, however, that it lacked the authority to enjoin Defendants from violating the constitution of the State of Tennessee by executing Mr. West according to the Tennessee lethal injection protocol because such an injunction would have "the effect" of staying the Tennessee Supreme Court's order setting Mr. West's execution date. (*Id.*, p.7, App-046). The Tennessee Court of Appeals also ruled it lacked jurisdiction to grant injunctive relief. The case remains pending in the Tennessee Supreme Court, awaiting permission to appeal.

On October 28, 2010, subject matter jurisdiction being clearly established by Defendants' October 20, 2010, representation in state court that they would accept the recision Mr. West had given them and that he would now be executed by lethal injection, Mr. West filed a new complaint before the District Court. (Second Complaint R.1, Complaint). On November 1, Defendants filed a motion to dismiss that complaint and supporting memorandum. (Second Complaint R.10, Motion to Dismiss; Second Complaint R.11, Mem. in Support).

Also on November 1, 2010, Defendants filed an opposition to Mr. West's Withdrawal of Appellant's Motion to Stay and Abey Proceedings and Motion to Vacate District Court Order and Remand to District Court for Order Dismissing Complaint Without Prejudice in the court below. They continued to maintain from

February of 2001 through October 20, 2010, that Mr. West's was going to be executed by electrocution (thus confessing that the District Court lacked subject matter jurisdiction when it entered its order in M.D. Tenn. Case No 3:10-cv-0778). They asserted, however, that the Sixth Circuit should still review the District Court's decision because Mr. West was allegedly judicially estopped from agreeing with Defendants that the decision was entered at a time when the District Court was without jurisdiction.

On November 3, 2010, Mr. West filed a reply to Defendants' opposition, citing controlling authority from this Court on the question of whether the question of subject matter jurisdiction must be resolved prior to reaching a decision on any disputed legal issue and addressing Defendants' questionable invocation of the doctrine of judicial estoppel. (*West v. Ray*, 6th Cir. No. 10-6196, Reply to Defendants/Appellees' Response to Plaintiff/Appellant's Motion to Vacate District Court Order and Remand to District Court for Order Dismissing Complaint Without Prejudice). The Sixth Circuit then issued its 2-1 opinion at issue here.

REASONS FOR STAYING MR. WEST'S EXECUTION

The issue presented in this case involves more than just a blatant disregard for this Court's precedent and the legal and constitutional limitations of the federal courts. It illustrates the danger such judicial adventurism poses to the administration of justice. Regardless of whether the respective opinions of the majority and the dissent correctly frame the legal issues controlling the proper disposition of Mr. West's claims (and Mr. West submits they are useful in that

regard), they do not adjudicate his rights. He is less than a week from what the evidence shows will be his suffocation while conscious and has never had his day in court. He deserves that opportunity.

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits; that he is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his favor; and, that an injunction is in the public interest. *Munaf v. Geren*, 553 U.S. 674, 688-91(2008). Because these factors are to be balanced, a strong showing on one factor may outweigh a weaker showing on another. *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

1. Mr. West has shown a likelihood of success on the merits.

Mr. West's likelihood of success on the merits of the question presented is not just likely, it is virtually certain. This Court's decision in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) is dispositive. As the Court stated:

> While some [ ] cases must be acknowledged to have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question, none of them even approaches approval of a doctrine of "hypothetical jurisdiction" that enables a court to resolve contested questions of law when its jurisdiction is in doubt. Hypothetical jurisdiction produces nothing more than a hypothetical judgment-which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 Dall. 409 (1792). Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. *See United States v.*

Richardson, 418 U.S. 166 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227(1974).

Steel Co., 523 U.S. at 101.

Clearly, the lower court did not have subject matter jurisdiction over Mr. West's lethal injection challenge when he was going to be executed in the electric chair. The first factor warranting a stay of execution is satisfied.

Even if the Court expands the definition of "merits" to include Mr. West's underlying causes of action, he has still shown a likelihood of success.

First, he has proffered sufficient evidence to entitle him to relief. Mr. West provided the court with records obtained from agents of the State of Tennessee, specifically, Dr. Bruce Levy, the then-Chief Medical Examiner for the State of Tennessee, in the form of the autopsy reports from every autopsy conducted on a Tennessee inmate following Tennessee lethal injections, *i.e.*, the autopsies of Robert Coe, Phillip Workman, and Steve Henley. He provided the court with an affidavit containing the expert opinion of Dr. David Lubarsky that the reports revealed that none of these inmates were unconscious at the time they were injected with the paralytic drug pancuronium bromide and that they died by suffocation while conscious.

Defendants provided 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 by Mr. West.

The use of an execution protocol that causes death by conscious suffocation

violates the Eighth and Fourteenth Amendments and Article 1, §16 of the Tennessee Constitution. *Compare Baze v. Rees*, 553 U.S. 35, 49 (2008) (a protocol would be constitutional if it eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections of pancuronium and potassium chloride). 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.

This 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. at 49-50.

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.

Second, Mr. West's claims are not barred by the statute of limitations. In *Wallace v. Kato*, 549 U.S. 384, 388 (2007), the Court stated:

> [i]t is "the standard rule that [accrual occurs] when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)), that is, when "the plaintiff can file suit and obtain relief," *Bay Area Laundry*, *supra*, at 201.

549 U.S. at 388.

Indeed, the Sixth Circuit's *Cooey* decision repeated this rule:

> 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).

Cooey v. Strickland, 479 F.3d 412, 416 (6th Cir. 2007)

Nothing in *Kato* suggests that Mr. West's causes of action accrued before Defendants announced on October 20, 2010, that Mr. West will be executed by lethal injection. *See, Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 850 (7th Cir. 2007) (It is "obvious" that the statute of limitations does not begin to run until the plaintiff has standing.)

Moreover, Mr. West had no cause of action against Defendants until the release of the Henley autopsy in March of 2010. 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. It is only upon the accumulation of all of the evidence from recent executions, including, specifically the evidence contained in the autopsy report of Steven Henley that Defendants knew, or had reason to know, that Tennessee's lethal injection protocol, even when administered correctly, accomplished death by

paralyzing and suffocating conscious inmates. The Henley autopsy results combined with similar information in Defendants' possession regarding the executions of Mr. Workman and Mr. Coe showed the cruel and unusual effects of the protocol do not result from an isolated event or mistake.

Because both March 10, 2010 (the date upon which the Henley autopsy report was released and Defendants had reason to know that their lethal injection protocol suffocated conscious and paralyzed inmates), and October 20, 2010 (the first date that Defendants proceeded to execute Mr. West by means of lethal injection) occurred within one-year of the filing of Mr. West's complaint on October 25, the statute of limitations has not been violated. Accordingly, Mr. West has demonstrated a likelihood of success on the merits.

2. Mr. West will suffer irreparable harm.

Mr. West's imminent death by execution is irreparable, even under constitutional circumstances. *See In re Holladay*, 331 F.3d 1169, 1176-77 (11th Cir. 2003) (where a prisoner is scheduled to be executed, irreparable harm is deemed "to be self-evident."); *In re Morris*, 328 F.3d 739, 741 (5th Cir. 2003). This is even more true here, where the evidence of the torturous death Mr. West will suffer if injunctive relief is not granted remains un-rebutted.

3. The equities lie squarely in Mr. West's favor.

The procedural history set forth above reveals here the equities lie in this matter. On April 30, 2010, when the State filed its motion for an execution date, it knew or should have known, that all autopsy reports for inmates executed under

Tennessee's lethal injection protocol indicates that the inmates were not sufficiently anesthetized and that the only drug to reach lethal levels is pancuronium bromide.[6] On July 15, 2010, the Tennessee Supreme Court ordered Defendants to "execute the sentence of death" upon Mr. West "as provided by law." Up until October 20, 2010, Defendants asserted they were going to electrocute Mr. West. It was on that date when the Defendants announced their intent to execute Mr. West by lethal injection. Mr. West has sought to obtain a review of the merits of his lethal injection claims without the need to come to the courts for a stay. His lawsuit did not seek to prevent his execution; it requested only that his execution be conducted in a constitutional manner, specifically, that it not be a cruel and unusual punishment. The necessity for a stay of execution at this point is not the fault of Mr. West. The fact which may necessitate a brief stay of the execution date is the protocol Defendants now intend to use for Mr. West's execution;[7] not Mr. West's invocation of his constitutional right preventing such a cruel and unusual death. Despite having knowledge for over eight months that the protocol likely causes

[6]The facts supporting Mr. West's claims were known to the Defendants in February 2010, when Mr. Henley's autopsy report was finalized and revealed a pattern of unconstitutional executions.

[7]Defendants announced on October 20, 2010, that Mr. West would be executed by lethal injection. Mr. West's complaint was filed on October 25th.

conscious suffocation,[8] Defendants have not taken corrective action.[9] Thus, it is Defendants' actions and/or interactions that will have created the need to postpone the execution if they are unable to proceed with a constitutional punishment. Whether a constitutional execution can be carried out on November 9th has always been within the Defendants' control. At every turn, Mr. West has faced a litigation strategy seemingly bent on delay as his execution date draws ever nearer. Mr. West has spent from September 3, 2010, until the present day, attempting to obtain a ruling on Defendants's claim of the continued validity of his 2001 election form. Without such a ruling, no court has the power to resolve the merits of the grave issues raised in his complaint. Defendants have parlayed the unresolved subject matter jurisdiction issue 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 channel Mr. West's complaint to this Court before any court has had the jurisdiction to address the merits of his claim or of their defenses. Mr. West is no closer to a fair adjudication of the issues he presents here than he was when he filed his original complaint two and one-half months ago. Mr. West does not deny that there are equities which lie

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[8]The third autopsy report demonstrating a pattern of conscious suffocation as a result of the execution protocol was completed on February 17, 2010. On June 1, 2010, Defendants were served with a complaint containing substantially the same allegations as Mr. West's complaint. *Harbison v. Ray*, No. 3:06-cv-01206, R.169-1 (M.D. Tenn.).

[9]Tennessee's current lethal injection protocol was created within three months, from February 1, 2007 - April 30, 2007. There is no reason why a revised protocol would take a longer amount of time.

with a prompt adjudication of claims. *See Nelson v. Campbell*, 541 U.S. 637, 650 (2004). Here, however, it is Defendants who have delayed that adjudication. They cannot be heard to complain now. *United States v. Weintraub*, 613 F.2d 612, 619 (6th Cir. 1979) (applying the "unclean hands" doctrine to claims of unnecessary delay).

4. The public interest lies with granting a stay.

Of course, the public interest is served *a fortiori* upon these circumstances. Notwithstanding the public interest in seeing its criminal laws enforced, the public has no interest in seeing them enforced through violations of the highest laws of this Country. *Planned Parenthood Ass'n. of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987). *See also Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010) ("[T]he public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law."). The evidence proffered by Mr. West, if proven, establishes a violation of the Eighth and Fourteenth Amendments. The public interest lies with a full resolution of Mr. West's claims.

Defendants have long been on notice of evidence tending to prove that the lethal injection protocol has inflicted unnecessary pain and suffering. They could have rectified this situation before November 9, 2010, but chose instead to litigate and assert legal precedent that does not foreclose Mr. West's cause of action because of the unique facts of his case. Justice is served when the United States Constitution is enforced, particularly where violations thereof would indisputably

result in extreme and unnecessary pain. *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati, supra.*

The dissenting judge below would have granted a stay of execution because she found that Mr. West timely "alleged new evidence showing that the practice of the lethal injection method of Tennessee has caused extreme pain and suffering, constituting a violation of the Eighth Amendment." (*West v. Ray*, No. 10-6196, slip opinion, at *11-12 (6th Cir. Nov. 4, 2010)(Moore, J., dissenting).

For all these reasons, an order staying Mr. West's execution is justified.

CONCLUSION

For all these reasons, Mr. West prays this Honorable Court enter an order staying his execution, pending resolution of Mr. West's petition for writ of *certiorari*.

Respectfully submitted,

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