Attachment A

to

Motion for Stay of Execution

West v. Ray, et al., 3:10-0778, MEMORANDUM OPINION (R.33)

Filed September 24, 2010

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

STEPHEN MICHAEL WEST	)	
	)	
v.	)	No. 3:10-0778
	)	JUDGE CAMPBELL
GAYLE RAY, et al.	)	

MEMORANDUM

I. Introduction

Pending before the Court is a Motion To Dismiss On Behalf Of Gayle Ray, Ricky Bell, David Mills, and Reuben Hodge (Docket No. 23). The Plaintiff has filed a Response (Docket No. 31) to the Motion, and the Defendants have filed a Reply (Docket No. 32). For the reasons set forth herein, the Motion To Dismiss is GRANTED.

II. Factual and Procedural Background

Plaintiff, who is scheduled to be executed on November 9, 2010, has filed a Complaint under 42 U.S.C. Section 1983 alleging that Tennessee's lethal injection method of execution violates his right to be free from cruel and unusual punishment guaranteed by the Eighth and Fourteenth Amendments to the Constitution. (Complaint (Docket No. 1)). Plaintiff also requests a declaratory judgment that the lethal injection protocol used by the Defendants violates the Federal Controlled Substances Act, 21 U.S.C. §§ 801, et seq., and the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301, et seq. (Id.)

III. Analysis

A. The Standards for Considering a Motion to Dismiss

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must take "all well-pleaded material allegations of the pleadings" as true. Fritz v. Charter Township of Comstock, 592 F.3d 718, 722 (6th Cir. 2010). The factual allegations in the complaint "need to be sufficient to give notice to the defendant as to what claims are alleged, and the plaintiff must plead 'sufficient factual matter' to render the legal claim plausible, i.e., more than merely possible." Id. (quoting Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1949-50 (2009)). "'A legal conclusion couched as a factual allegation,'" however, "need not be accepted as true on a motion to dismiss, nor are recitations of the elements of a cause of action sufficient." Id. (quoting Hensley Mfg. v. ProPride, Inc., 579 F.3d 603, 609 (6th Cir. 2009) and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).[1]

B. Section 1983 Claims

The Defendants argue that the Plaintiff's claims are subject to dismissal because they are barred by the applicable statute of limitations, primarily relying on the Sixth Circuit's decision in Cooey v. Strickland (Cooey II), 479 F.3d 412, 421-22 (6th Cir.), *reh'g denied en banc*, 489 F.3d 775 (6th Cir. 2007). In Cooey II, the court held that the statute of limitations for a constitutional challenge to the method of execution, brought under 42 U.S.C. § 1983, begins to run upon the conclusion of direct review in the state court or the expiration of time for seeking such review, or

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[1] In an earlier Order (Docket No. 28), the Court indicated that it would only consider matters appropriate for motions to dismiss in ruling on the pending motion. Thus, the Court will not consider Defendants' Article III standing and waiver arguments, which rely on the "Affidavit To Elect Method Of Execution" (Docket No. 24-1), attached as an exhibit to Defendants' Motion To Dismiss.

when the particular method of execution is adopted by the state. Applying that holding to the petitioner in Cooey II, the court held that the statute of limitations began to run in 2001 when Ohio adopted lethal injunction as the exclusive method of execution, or in 1991 when the Supreme Court denied direct review of petitioner's claims. 479 F.3d at 422. Under either date, the court explained, petitioner's Section 1983 claims were barred by the two-year Ohio statute of limitations as they were not filed until December 8, 2004. Id.

In Tennessee, civil actions for compensatory damages or injunctive relief brought under the federal civil rights statutes must be commenced within one year of the accrual of the cause of action. Tenn. Code Ann. § 28-3-104(a)(3); Cox v. Shelby State Community College, 48 Fed. Appx. 500, 506-07, 2002 WL 31119695 (6th Cir. Sept. 24, 2002).

On February 6, 1989, the Tennessee Supreme Court affirmed Plaintiff's convictions on two counts of first-degree premeditated murder, two counts of aggravated kidnapping and one count of aggravated rape, as well as his death sentence. State v. West, 767 S.W.2d 387 (1989). On March 27, 1989, the court denied the Plaintiff's motion for rehearing. Id. The United States Supreme Court denied direct review of the Plaintiff's claims on June 25, 1990. West v. Tennessee, 497 U.S. 1010, 110 S.Ct. 3254, 111 L.Ed.2d 764 (1990).

Tennessee adopted lethal injection as its presumptive method of execution on March 30, 2000. Tenn. Code Ann. § 40-23-114; 2000 Tenn. Pub. Acts 614.

Applying the analysis in Cooey II to this case, the statute of limitations began to run either in 1990 when Plaintiff's direct review process was final, or in 2000 when lethal injection became the presumptive method of execution. Plaintiff brought the current action on August 19, 2010 (Docket No. 1), more than one year later than either of these dates. Accordingly, the statute

of limitations bars review of Plaintiff's Section 1983 claims.[2]

Plaintiff argues that the decision in Cooey II does not control the resolution of the statute of limitations issue because the Sixth Circuit's analysis was undermined by the United States Supreme Court's subsequent decision in Baze v. Rees, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). Plaintiff contends that Baze introduced a two-part analysis for evaluation of an Eighth Amendment challenge to a method of execution. According to the Plaintiff, the plaintiff must show (1) that the State's adoption of an execution protocol inflicts unnecessary pain and suffering; and (2) that the State had actual or implicit knowledge that such pain and suffering will result from carrying out its protocol and the State decided to go forward nonetheless. The Plaintiff argues that Cooey II does not consider the second condition, and therefore, it does not apply here.

Plaintiff's argument that Baze affected the viability of the analysis in Cooey II is undermined by the Sixth Circuit's continued application of Cooey II after the Baze decision was issued. See Wilson v. Rees, 2010 WL 3450078 (6th Cir. Sept. 3, 2010); Getsy v. Strickland, 577 F.3d 309 (6th Cir. 2009); Cooey II v. Strickland, 544 F.3d 588 (6th Cir. 2008). In Getsy, the court specifically addressed the issue of whether Baze changed the statute of limitations analysis of Cooey II:

> This raises the question of whether Baze's freshly clarified standards trigger a new accrual date. We do not believe that they do. As previously noted, '[i]n determining when the cause of action accrues in § 1983 cases, we look to the

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[2] Even if the Court assumes that the statute of limitations began to run when Tennessee revised its lethal injection protocol on April 30, 2007 see Harbison v. Little, 511 F.Supp.2d 872 (M.D. Tenn. 2007), rev'd 571 F.3d 531 (6th Cir. 2009), the Plaintiff's Complaint is still time barred as having been filed over a year later.

> event that *should have alerted the typical lay person* to protect his or her rights.' Trzebuckowski [v. City of Cleveland], 319 F.3d at 856 (emphasis added). Cooey II held, rightly or wrongly, that the relevant event is the later of either (1) the 'conclusion of direct review in the state court or the expiration of time for seeking such review,' or (2) the year 2001, when Ohio adopted lethal injection as the sole method of execution. Cooey II, 479 F.3d at 422. Nothing in Baze gives us cause to question Cooey II's determination of when the statute of limitations clock begins to tick.

577 F.3d at 312. The reasoning of Getsy is an effective rejection of Plaintiff's argument that Baze requires the court to consider what State officials knew or had reason to know as part of the statute of limitations analysis.

The Plaintiff alternatively argues that Cooey II was wrongly decided, and that the statute of limitations should not accrue until the State requested that the Tennessee Supreme Court set his execution date. This Court, however, is bound by the decision in Cooey II.

Because Plaintiff's Section 1983 claims are barred by the statute of limitations, the Court declines to address the other grounds for dismissal of those claims raised by the Defendants.

C. Declaratory Judgment Claims

The Defendants argue that Plaintiff's request for a declaratory judgment that the lethal injection protocol used by the Defendants violates the Federal Controlled Substances Act, 21 U.S.C. §§ 801, et seq. ("CSA"), and the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301, et seq. ("FDCA"), should be dismissed because there is no private right of action under those statutes. Defendants primarily rely on the recent Sixth Circuit decision in Durr v. Strickland, 602 F.3d 788 (6th Cir. 2010), in which the court affirmed a district court's dismissal of similar claims because no private right of action exists under either act.

To support his argument that the claims should not be dismissed, Plaintiff cites Ringo v. Lombardi, 2010 WL 1610592 (W.D. Mo. March 2, 2010), in which a district court in Missouri

held that inmates facing death by lethal injection had standing to bring a declaratory judgment action under the CSA and FDCA; that it was appropriate for the court to issue a declaratory judgment; and that it was premature to dismiss plaintiff's claim that the Missouri lethal injunction statutes and regulations were preempted by the FDCA and the CSA. The Court notes that approximately five months later, the same court, citing the appeals court opinion in Durr, dismissed plaintiffs' claim for a declaration that the state's lethal injection procedure would violate the CSA and the FDCA because those statutes do not provide for a private right of action. Ringo v. Lombardi, 2010 WL 3310240 (W.D. Mo. Aug. 19, 2010). The court went on to hold, however, that plaintiff's preemption claim would not be dismissed because it "hinge[s] on the supremacy of federal law, rather than individual rights," and therefore, the absence of a private right of action did not defeat that claim. Id., at *5.

The distinction made by the Missouri court is not one that was made by the district court in Durr, or by the Sixth Circuit in affirming that decision. In analyzing this same issue, a district court in Arkansas agreed with the result reached by the Durr courts, and rejected the reasoning of the Ringo court. Jones v. Hobbs, 2010 WL 2985502 (E.D. Ark. July 26, 2010). In reaching its decision, the court explained:

> To entertain, under the auspices of the Declaratory Judgment Act, a cause of action brought by private parties seeking a declaration that the FDCA or the CSA has been violated would, in effect, evade the intent of Congress not to create private rights of action under those statutes and would circumvent the discretion entrusted to the executive branch in deciding how and when to enforce those statutes.
>
> * * *
>
> Congress committed complete discretion to the executive branch to decide when and how to enforce those statutes and authorized no private right of action for the enforcement of those statutes. The Declaratory Judgment Act does not authorize a bypass of that enforcement scheme.

Id., at *6.

Plaintiff attempts to distinguish the Durr opinion by noting that the plaintiff in Durr failed to allege an Eighth Amendment violation under Section 1983. In considering whether the plaintiff had alleged sufficient injury to establish standing, the district court in Durr explained that the plaintiff had failed to allege that a violation of federal law would lead to an inhumane execution, or any violation of his civil rights. 2010 WL 1610592, at *3. Plaintiff argues that because he has alleged such an injury to himself, the Durr reasoning does not apply.

The Court disagrees. The failure to allege sufficient injury was only one basis for the district court's dismissal in Durr. Both the district court and the Sixth Circuit in Durr, as well as the court in Jones, held that because no private right of action exists under either the CSA or the FDCA, any injury can not be redressed through a declaratory action. Thus, the Plaintiff's request for a declaratory judgment that the lethal injunction protocol violates the CSA and the FDCA is dismissed.

IV. Conclusion

For the reasons set forth herein, Defendant's motion to dismiss is granted, and this action is dismissed.

It is so ORDERED.

Todd Campbell

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

Attachment B

to

Motion for Stay of Execution

West v. Ray, et al., 3:10-0778
ORDER (R.34)
Filed September 24, 2010

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

STEPHEN MICHAEL WEST	)	
	)	
v.	)	No. 3:10-0778
	)	JUDGE CAMPBELL
GAYLE RAY, et al.	)	

ORDER

Pending before the Court is a Motion To Dismiss On Behalf Of Gayle Ray, Ricky Bell, David Mills, and Reuben Hodge (Docket No. 23). The Plaintiff has filed a Response (Docket No. 31) to the Motion, and the Defendants have filed a Reply (Docket No. 32). For the reasons set forth in the accompanying Memorandum, the Motion To Dismiss is GRANTED.

This Order shall constitute the judgment in this case pursuant to Fed. R. Civ. P. 58. The hearing scheduled for October 25, 2010 is CANCELLED.

It is so ORDERED.

Todd Campbell

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

Attachment C

to

Motion for Stay of Execution

West v. Ray, et al., 10-6196
SIXTH CIRCUIT
COURT OF APPEALS OPINION
Filed November 4, 2010

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 10a0688n.06

No. 10-6196

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 04, 2010
LEONARD GREEN, Clerk

STEPHEN MICHAEL WEST,

Petitioner-Appellant,

v.

GAYLE RAY, in her official capacity as Tennessee's Commissioner of Correction; RICKY BELL, Warden, in his official capacity as Warden of Riverbend Maximum Security Institution; DAVID MILLS, in his official capacity as Deputy Commission of Tennessee Department of Correction; MARK LUTTRELL, Director, in his official capacity as Assistant Commissioner of Operations; JOHN DOE, Physicians 1-100; JOHN DOE, Pharmacists 1-100; JOHN DOE, Medical Personnel 1-100; JOHN DOE, Executioners 1-100; JOHN DOES, 1-100; REUBEN HODGE, Warden,

Respondents-Appellees.

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

Before: BOGGS, NORRIS, and MOORE, Circuit Judges.

BOGGS, Circuit Judge. Stephen Michael West is scheduled to be executed by the State of Tennessee on November 9, 2010. West challenged the state's lethal injection protocol in district court, and we affirm the district court's dismissal of his complaint.

I

On August 19, 2010, West filed a complaint in district court and made two categories of claims. First, West brought a number of specific claims under 42 U.S.C. § 1983, all alleging that

Tennessee's lethal injection protocol violates his rights under the Eighth and Fourteenth Amendments. Second, West requested a declaratory judgment that the state's lethal injection protocol violates the Federal Controlled Substances Act and the Federal Food, Drug, and Cosmetic Act.

On September 23, 2010, Defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendants argued that West lacked standing to challenge Tennessee's lethal injection protocol because, on February 21, 2001, he signed an affidavit in which he chose to be executed by electrocution. Defendants also argued that West's complaint was barred by the statute of limitations.

On September 24, 2010, the district court dismissed West's § 1983 claim. In reaching its conclusion, the court did not consider Defendants' standing argument because that argument relied on the existence of an affidavit which was not part of the complaint. Instead, the court considered only the statute-of-limitations issue in disposing of the claim. Tennessee has a one-year statute of limitations for civil actions brought under federal civil-rights statutes and the district court applied this court's decision in *Cooey II* to hold that West's petition was time-barred by the Tennessee statute. *See Cooey v. Strickland (Cooey II)*, 479 F.3d 412 (6th Cir. 2007); TENN. CODE § 28-3-104(a)(3).

West made two arguments against this conclusion. First, West argued that the Supreme Court's decision in *Baze v. Rees*, 553 U.S. 35 (2008), abrogated *Cooey II*. The district court rejected this argument, noting that this court has continued to apply *Cooey II* after *Baze*, and that in *Getsy v. Strickland*, this court rejected the argument that *Baze* affects *Cooey II*. *See Getsy*, 577 F.3d 309, 312

(6th Cir. 2009. Second, West argued that *Cooey II* was wrongly decided. The district court rejected this argument as well, noting that it was bound by *Cooey II.*

The district court also dismissed West's declaratory judgment claim and, accordingly, dismissed the case. West filed this timely appeal on September 29, 2010. In his brief, West argues only that the district court erred in dismissing his § 1983 claim. Appellant's Br. at 2. The dismissal of West's declaratory judgment claim is therefore not at issue in this appeal. *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 462 (6th Cir. 2003) ("An appellant waives an issue when he fails to present it in his initial briefs before this court.").

Since West filed his appeal, the parties have taken a number of steps that have combined to complicate the procedural history of this case. Accordingly, a step-by-step summary of those steps is necessary.

On October 6, 2010, West filed his opening appellate brief, in which he argued that *Cooey II* was not good law.

On October 12, West executed a rescission of his 2001 affidavit and presented that rescission to the prison warden. The warden apparently did not accept the validity of West's rescission.

The next day, Defendants filed their appellate brief, in which they responded to West's *Cooey II* arguments and also raised two alternate grounds for dismissal, that West lacks standing to challenge the lethal injection protocol because he chose to be electrocuted, and that binding precedent has established the constitutionality of Tennessee's lethal injection protocol.

That same day, West requested that the Tennessee Department of Corrections ("TDOC") confirm that West's execution was to be carried out by electrocution.

On October 15, TDOC confirmed that it considered his 2001 affidavit to be in full effect.

On October 18, West filed suit in state court, challenging the validity of the 2001 affidavit.

That same day, West filed his reply brief, in which he argued that this appeal must be held in abeyance until the state court resolved the affidavit issue, that the last-minute confusion demonstrates that *Cooey II* was wrongly decided, and that this case is distinguishable from the cases that Defendants rely on. West also filed a motion in this court, requesting that we hold this case in abeyance and stay his execution, pending the resolution of the state court proceedings.

On October 20, Defendants reversed course and accepted West's rescission of the affidavit and stated that, because of West's rescission, his execution will be carried out by lethal injection. As a result, West withdrew his state court challenge to the validity of the affidavit.

On October 26, West filed another motion in this court. West moved to withdraw his previous motion and, more significantly, requested that we vacate the district court's order for lack of jurisdiction and remand with instructions to dismiss without prejudice so that he can file his claim again.

West's briefs and motions suggest that he relies on the following multi-step argument. First, because the state intended to electrocute him, in compliance with his 2001 affidavit, West lacked standing to bring his challenge to the state's lethal injection protocol. Second, because he lacked standing, the district court lacked jurisdiction to dismiss his complaint on statute-of-limitations grounds. And because the district court lacked jurisdiction to dismiss his complaint, this court must vacate that dismissal. Third, because Defendants accepted his rescission of the 2001 affidavit on October 20, he now–for the first time–has standing to challenge the state's lethal injection protocol.

And fourth, because he now has standing, this court should order the district court to dismiss his claim without prejudice so that he can refile the same claim now that he has standing to do so and, presumably, *Cooey II* will no longer bar his complaint. We disagree with this theory of the case and affirm the decision of the district court.

II

We hold that the district court properly exercised its jurisdiction to dismiss West's complaint. Although a district court–like all federal courts–must first determine its own jurisdiction before proceeding to the merits, the scope of the required jurisdictional inquiry may be limited by the procedural posture of the case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). When deciding a 12(b)(6) motion to dismiss, the court must accept all allegations in the pleadings as true, and in this case, West's pleading–which repeatedly alleges that Defendants plan to execute him by lethal injection– clearly supports a finding that he had standing to challenge the protocol. *Ibid.*; *Kardules v. City of Columbus*, 95 F.3d 1335, 1346-47 (6th Cir. 1996) (holding that, when determining whether standing exists when considering a 12(b)(6) motion to dismiss, the court "must accept as true all material allegations of the complaint") (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); Complaint, R. 1 at 1 ("Stephen Michael West is a condemned inmate scheduled to be executed by lethal injection . . . ."); *id.* at 10 ("The State of Tennessee . . . seeks to execute Mr. West . . . by lethal injection."). Accordingly, the district court properly exercised its jurisdiction to dismiss West's complaint pursuant to Rule 12(b)(6). If the law were otherwise–that a district court were required to resolve conflicting outside evidence to ensure that it had jurisdiction every time it ruled on a Rule 12(b)(6) motion–then the economy provided by Rule 12(b)(6) would be entirely lost.

Further, even if the district court should have considered the entire record, there was–and remains–insufficient evidence in the record to conclude that West lacked standing to challenge the lethal injection protocol. Although Defendants maintained that West's 2001 affidavit was valid, West argued otherwise. Although the point is now moot as Defendants have since accepted West's rescission, the state court never had the opportunity to determine whether the affidavit did, in fact, remain valid. Accordingly, there is no factual basis to support a conclusion that, even considering the entire record, the district court was without jurisdiction to dismiss West's complaint. And significantly, there is also no clear legal basis to support such a conclusion, as this circuit has never held that a death row inmate lacks Article III standing to challenge a particular method of execution where he has chosen an alternative method. It is not obvious that such a holding would be correct, and in any case, we need not decide that issue here. *But see Fierro v. C.A. Terhune*, 147 F.3d 1158, 1160 (9th Cir. 1998) (holding that an inmate lacks standing to challenge a method of execution if he has elected to be executed by another method).

III

The district court properly applied *Cooey II* to dismiss West's complaint. *Cooey II* ruled that the accrual date for method-of-execution claims is when the inmate "knew or should have known [of the method of execution] based upon a reasonable inquiry, and could have filed suit and obtained relief," which will ordinarily be the date of conclusion of direct review. 479 F.3d at 421-22. Because Cooey's direct review had concluded before the method of execution was established, the court held that an alternative accrual date was required, and that the alternative date could have been either the date the method of execution was established or the date that the method of execution

became the sole method. *Id.* at 422. The court did not decide which of these two possibilities was the correct alternative accrual date because Cooey's complaint would have been time-barred either way. *Ibid.*

Here, direct review of West's death sentence and underlying conviction concluded on June 25, 1990, when the Supreme Court denied West's petition for a writ of certiorari. *West v. Tennessee*, 497 U.S. 1010 (1990). Tennessee adopted lethal injection as a method of execution on May 18, 1998. TENN. CODE § 40-23-114; 1998 TENN. PUB. ACTS 982. Two years later, Tennessee adopted lethal injection as the presumptive method of execution, on March 30, 2000. TENN. CODE § 40-23-114; 2000 TENN. PUB. ACTS 614. *See Henley v. Little*, 308 F. App'x 989 (6th Cir. 2009).

Applying *Cooey II*, the district court correctly concluded that West's complaint was time-barred. Because West's direct review concluded before Tennessee established lethal injection as a method of execution, that date can not be the accrual date. *Cooey II*, 479 F.3d at 422. Here, the two alternative accrual dates are May 18, 1998, when Tennessee established lethal injection as a method of execution, and March 30, 2000, when Tennessee established lethal injection as its presumptive method of execution. *Henley*, 308 F. App'x at 989. And, as was the case in *Cooey II*, this panel need not decide which of these possible alternative dates was the accrual date here, as either way, West's complaint is time-barred by Tennessee's one-year statute of limitations.[1]

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[1]The dissent's timeliness analysis, whatever its wisdom, is simply not that established by *Cooey II*. Although *Cooey II* and *Getsy* both acknowledge the possibility that a revised protocol could reset the accrual date, both held that–at the very least–the plaintiff must make some showing that the "protocol *modifications* might create undue suffering." *Getsy*, 577 F.3d at 313; *Cooey II*, 479 F.3d at 424. West made no claim that the 2007 modifications–or any other change in practice–somehow related to his "core complaints" and is therefore in the exact same position as

The district court also correctly concluded that *Baze* did not abrogate *Cooey II*, as this court has already rejected that argument. In *Getsy v. Strickland*, this court held that "*Baze*'s freshly clarified standards" do not trigger a new accrual date because

> in determining when the cause of action accrues in § 1983 cases, we look to the event that should have alerted the typical lay person to protect his or her rights. *Cooey II* held, rightly or wrongly, that the relevant date is the later of either (1) the conclusion of direct review . . . , or (2) . . . when Ohio adopted lethal injection as the sole method of execution. Nothing in *Baze* gives us cause to question *Cooey II*'s determination of when the statute-of-limitations clock begins to tick.

577 F.3d at 312 (internal quotations and citations omitted). In his brief, West argues that the district court's reliance on *Getsy* was misplaced. West notes that, in *Getsy*, the court rejected the appellant's argument that *Baze* created a new cause of action, and that here, West does not make that same argument. Appellant's Br. at 13-14. True enough. But the *Getsy* court also held that *Baze* did not disrupt *Cooey II*'s accrual test. 577 F.3d at 312. West makes no attempt to address this aspect of the *Getsy* decision–upon which the district court explicitly relied–and, like the district court, we are

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were Cooey and Getsy. *See Cooey II*, 479 F.3d at 424. And, of course, even if he had made such a showing and we were to hold that the accrual date reset to the date of the modifications, then the one-year statute of limitations would have still expired. *Cf. Workman v. Bredesen*, 486 F.3d 896, 899 (6th Cir. 2007) (holding that Tennessee's 2007 protocol modifications were not material and do not reset the statute of limitations). The dissent goes much further than the possibility suggested by *Cooey II* and *Getsy*, however, and argues that the accrual date should reset not to the date of the revisions, and not even to the date of the first troubling autopsy, but to the date of the *second* troubling autopsy. This approach looks to the strength of the evidence in support of a claim, and not when direct review concluded or the method was established–thereby forming the claim–which was this court's holding in *Cooey II*. 479 F.3d at 421-22. Further, the "death by suffocution" claim is not new. *See Workman*, 486 F.3d at 925-26. Because a plaintiff may always be able to point to a new piece of evidence in support of a preexisting claim, as West does here, the dissent's attempted distinction would seriously undermine *Cooey II*'s holding in most cases.

bound by the *Getsy* panel's decision. Similarly, we can not consider West's argument that *Cooey II* was wrongly decided. *Getsy*, 577 F.3d at 314; *Wilson v. Rees*, 620 F.3d 699, 701 (6th Cir. 2010).

IV

We further hold that a dismissal without prejudice would serve no purpose here, as even if West could demonstrate that he lacked standing to challenge the protocol from the time he executed his affidavit on February 21, 2001, until October 20, 2010, when Defendants accepted his rescission of the affidavit, the statute of limitations would still bar his complaint. Whether or not West lacked standing–due to his own actions–simply does not speak to the question of when the statute of limitations accrued, or once it accrued, when time expired.

West argues that he lost his standing to challenge the lethal injection protocol when he chose to be executed by electrocution in 2001, and, when he revoked that selection less than three weeks before his execution date, his standing sprang back to life. We need not decide whether this theory of springing standing accurately reflects this law in the circuit, but we do hold that any related theory of a springing statute of limitations is foreclosed by *Cooey II.*

Cooey II held that the statute of limitations clock begins ticking on the date of conclusion of direct review or, if later, when the method of execution is established. 479 F.3d at 422. An inmate cannot stop or reset that clock by later choosing an alternate method of execution, as such a choice does not impact the question of whether, on the accrual date, he knew or should have known whether the method of execution was in existence and could have chosen to seek relief.[2] *See ibid.* Here, the

[2]Even if West's choice in 2001 stripped him of standing to challenge lethal injection, had he wished to challenge the constitutionality of lethal injection, he could have simply not chosen to be executed by electrocution and proceeded with his suit. Therefore, West "could have filed suit and

statute of limitations on a § 1983 challenge to Tennessee's lethal injection protocol began to accrue either on May 18, 1998–in which case West's claim became time-barred nearly two years before he selected electrocution as his method of execution–or on March 30, 2000, when lethal injection became Tennessee's presumptive method of execution. As in *Cooey II*, we need not decide which is the correct accrual date, as even if the later date is used, then whatever choices West made *subsequent* to that date cannot change the fact that the statute of limitations had already begun to accrue. *See Getsy*, 577 F.3d at 313-14 (holding that post-accrual vacation and reinstatement of conviction "is irrelevant to the accrual of Getsy's § 1983 claim"). Therefore, West's suit became time-barred no later than March 30, 2001, five weeks after West elected to be executed by electrocution. Because West's complaint is time-barred even if his theory of standing is accepted, his request for a dismissal without prejudice would serve no purpose.

V

For the foregoing reasons, we AFFIRM the district court's dismissal of West's complaint and DENY West's request for a dismissal without prejudice.

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obtained relief" within one year of the accrual date. *Ibid.* That he instead chose a path that may have stripped him of standing to challenge the protocol does not speak to the question of whether he could have–had he chosen to do so–filed suit and obtained relief.

KAREN NELSON MOORE, Circuit Judge, dissenting. Until this year, it was impossible for West to have learned that Tennessee's lethal-injection protocol has become, in practice, death by suffocation. His claim is timely even under the unduly restrictive standard articulated in *Cooey II v. Strickland*, 479 F.3d 412 (6th Cir. 2007). Because West's claim is timely, I respectfully dissent.

After holding that the *Cooey II* time bar remained in effect following the Supreme Court's decision in *Baze*, this court in *Getsy* proceeded to analyze the Ohio "protocol modifications" that Getsy alleged would "create undue suffering." *Getsy v. Strickland*, 577 F.3d 309, 313 (6th Cir. 2009). That analysis was not superfluous. Developments in execution protocol or practice after the *Cooey II* dates can be the basis for later method-of-execution claims. We held for the Ohio warden because "Getsy [did] not ma[k]e a prima facie showing that the . . . modifications will likely subject him to extreme pain based on . . . new evidence." *Id.*

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.

That *Getsy* left the *Cooey II* accrual test intact is of no consequence to this case. Even under *Cooey II*, West's challenge is timely because he could not have challenged the practice of the lethal-injection method until evidence became available that it constituted cruel and unusual punishment. This approach is fully consistent with *Cooey II* and, indeed, is required by the Eighth Amendment.

West should prevail under *Cooey II*. He has challenged the constitutionality of death by suffocation, the possibility of which was unknown both at the close of direct review and when lethal injection became the presumptive method of execution in Tennessee. The majority improperly requires death-row inmates to challenge the constitutionality of every method of execution that the state may use—far in advance of newly developing evidence that the method of execution in practice results in cruel and unusual punishment in violation of the Eighth Amendment. I respectfully dissent from this incorrect application and extension of *Cooey II*.

For these reasons, I would grant a stay of execution and also dissent from the majority's denial of a stay.

Attachment D

to

Motion for Stay of Execution

WEST'S RESCISSION LETTER SUBMITTED TO WARDEN BELL 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 E

to

Motion for Stay of Execution

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 F

to

Motion for Stay of Execution

LETTER FROM DEBRA INGLIS, 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 G

to

Motion for Stay of Execution

DEFENDANTS' RESPONSE TO MOTION FOR TEMPORARY INJUNCTION

West v. Ray, et al

Chancery Court of Davidson County, Tennessee

No. 10-1675-I

October 20, 2010

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

MARK A. HUDSON, BPR #12124
Senior Counsel
Office of the Attorney General
Civil Rights and Claims Division
P. O. Box 20207
Nashville, TN 37202-0207
(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:

Stephen A. Ferrell
Stephen M. Kissinger
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
800 S Gay Street
Suite 2400
Knoxville, TN 37929

Roger W. Dickson
William A. Harris , III
MILLER & MARTIN
Volunteer Building
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MARK A. HUDSON, BPR #12124
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Attachment H

to

Motion for Stay of Execution

ORDER

West v. Ray, et al

Chancery Court of Davidson County, Tennessee

No. 10-1675-I

October 25, 2010

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,

Plaintiff,

v.

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

Defendants.

No. 10-1675-I

ORDER

This case is before the Court upon the Plaintiff's motion for temporary injunction. The Defendants filed a response to the motion. At the hearing on the motion, held on October 21, 2010, the Plaintiff indicated that, based on the Defendants' response, he would withdraw his motion. The Plaintiff is no longer bound by the 2001 affidavit he signed, choosing electrocution as the method of death. He is no longer required to elect the method of his execution. CC

Accordingly, it is therefore **ORDERED** that the Plaintiff's motion for temporary injunction is withdrawn.

Claudia C. Bonnyman, Part I Chancellor

APPROVED FOR ENTRY:

Stephen A. Ferrell

Stephen A. Ferrell (#25170)
Federal Defender Services of Eastern Tennessee, Inc.
800 South Gay Street
Suite 2400
Knoxville, TN 37929
Tel: (865) 637-7979
Fax: (865) 637-7999

CERTIFICATE OF SERVICE

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

Mark A. Hudson
Senior Counsel
Office of Attorney General
425 Fifth Avenue North
P. O. Box 20207
Nashville, TN 37243
Fax number: 615-532-2541

Stephen A. Ferrell

Attachment I

to

Motion for Stay of Execution

MEMORANDUM OPINION

West v. Ray, et al

Chancery Court of Davidson County, Tennessee

No. 10-1675-I

Filed November 1, 2010

ALLIED COURT REPORTING SERVICE

Missy Davis
2934 Rennoc Road
Knoxville, Tennessee 37918
Phone (865) 687-8981

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,

Plaintiff,

Vs.

GAYLE RAY, in her official capacity as Tennessee Commissioner of Corrections, et al.,

Defendants.

NF

No. 10-1675-I

APPEARANCES:

Attorney for Plaintiff

Stephen M. Kissinger
Federal Defender Services of Eastern Tennessee
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929

Attorney for Defendant

Mark A. Hudson
Office of Tennessee Attorney General
425 5th Avenue North
Nashville, Tennessee 37243

MEMORANDUM OPINION

OCTOBER 28, 2010

MEMORANDUM OPINION

The following memorandum opinion, findings of fact, and conclusions of law were rendered by the Honorable Claudia C. Bonnyman, Chancellor, holding the Chancery Court for Davidson County, Tennessee, on this the 28th day of October 2010.

* * * * * *

THE COURT: This is, of course, a bench ruling as opposed to taking the issues under advisement and writing a long and detailed decision which usually cannot be done in a temporary injunction setting.

This is a complaint for declaratory judgment and injunctive relief brought by Stephen West, who has been sentenced to execution for a capital crime. The plaintiff filed a second motion for a temporary injunction on October 25, 2010, along with an amended complaint and a memorandum of law. The Court convened the parties for a hearing by telephone on October 27, 2010 at 11:30 a.m. to examine the specific relief which the plaintiff sought through his motion for extraordinary relief. The Court then had planned to address the merits of the plaintiff's amended complaint, one of the factors to be considered in deciding the motion. A court reporter was present to record the proceeding on October 27.

The parties agree that the Supreme

Court, Tennessee Supreme Court ordered the execution of Mr. West, the plaintiff, to take place on November 9, 2010. On October 27, the Court heard the plaintiff's arguments in support of his motion and the State's response on October 27 and then reconvened the parties so that they could add any argument after the State had filed its written response. The parties have now fully argued their theories of the case and their positions in this motion for a temporary injunction. The Court has reviewed all the papers which have been mentioned or addressed in the briefs and arguments, including the affidavits of the expert witnesses, the two physicians.

And the Court notes as for all temporary injunction proceedings in civil court, the purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily heard and heard based upon procedures that are less formal and evidence that is less complete than in a trial of the merits. A party is thus not required to prove its case in full at a preliminary injunction hearing and findings of fact and conclusions of law made by a court either granting or denying a preliminary injunction are not binding at a trial on the merits.

As for the issues in the case, the plaintiff argues that his request for emergency relief does not run afoul of the ruling by the Supreme Court in Coe vs. Sundquist, number M2000-00897-SE-R9-CD. And here, Mr. Kissinger, I'll confirm that we do have a court reporter still?

MR. KISSINGER: We do, Your Honor.

THE COURT: All right. After that break. In a declaratory judgment action, the trial court is without power or jurisdiction to supersede a valid order of the Tennessee Supreme Court. Instead, claims the plaintiff, the relief he seeks in the temporary injunction is to cause compliance with the Tennessee Supreme Court order that officials shall execute the sentence of death as provided by law on the 9th day of November 2010, and the emphasis is on the provided by law. The plaintiff contends that this Court should enforce the Tennessee and U.S. Constitutions and enjoin Tennessee officials to provide the plaintiff in compliance with Tennessee protocol an affidavit concerning the method of execution at least 30 days before November 9, the execution date. The purpose for the protocol requirement is for the plaintiff's benefit, says the plaintiff, that 30 days was designed to focus the plaintiff on his method of death and the fact of his death. The plaintiff seeks further extraordinary relief that this Court

enjoin State officials from carrying out his execution on November 9 using the three drug protocol since it accomplishes the plaintiff's death by suffocation while he is conscious and paralyzed.

And as for the merits issues raised by the motion, the plaintiff contends that his amended complaint raises facts and claims different from the facts and claims of Baze vs. Rees. According to the plaintiff, absent from other death penalty cruel and unusual punishment cases is the proof he presents through expert affidavit at the preliminary injunction stage that as a matter of fact and not merely as a matter of risk, when Tennessee officials carry out Tennessee's lethal injection protocol, inmates are conscious and paralyzed, and this plaintiff in particular will experience unnecessary pain and suffering by suffocation and other avoidable death throes. The plaintiff reasons this from autopsies of three inmates, and these are Steve Henley, Philip Workman, and Robert Glen Coe, who were executed pursuant to the protocol showing that these three inmates were not adequately anesthetized from suffocation and extreme pain expected and planned through the drug -- Tennessee's lethal drug protocol.

The State contends that this Court is without jurisdiction to enjoin, or supersede, or retain the July 15 order of the Tennessee Supreme Court -- I'm sorry,

that's restrain the Tennessee -- July 15 order of the Tennessee Supreme Court. The ultimate effect of Mr. West's position and motion, says the State, is to encumber, enjoin, or stay enforcement of the Tennessee Supreme Court order. The State also argues that the statute of limitations of one year applies to suits for injunctive relief under Section 1983. According to the State, the plaintiff's method of execution challenges lethal injection -- the plaintiff's claim that the method of execution challenge to lethal injection accrued at the latest on March 30, 2000, and this complaint arrives too late.

The State also claims the plaintiff has no likelihood of success on the merits because of the great delay in its filing. The State and the public and the victims of crime and their families have an interest in finality and in the timely enforcement of sentence. The State asserts that the plaintiff does not show how he will likely prevail because the Tennessee Supreme Court has concluded that Tennessee's lethal injection protocol is consistent with the majority of other states' methods and protocols and the Tennessee protocol was upheld by the Tennessee -- was held by the Tennessee Supreme Court to be substantially similar.

According to the State, in the Harbison lawsuit, the Sixth Circuit upheld the Tennessee protocol and

found it does not create a substantial risk of serious harm in violation of the U.S. Constitution. The State contends the form to be presented to inmates 30 days before execution is to take place does not create a right. The language is not mandatory and it exists -- and it does not exist for the benefit of the inmate.

And the issues for the Court to decide in this motion for preliminary injunction are, one, is this Court empowered to address, affect, or supersede the Tennessee Supreme Court order that the plaintiff be executed on November 9, 2010? The Court finds, no, this Court, this trial Court does not have the power to enjoin or supersede the Tennessee Supreme Court order, which the parties agree sets the execution of this plaintiff, Mr. West, on November 9, 2010.

The effect of a temporary injunction, which the plaintiff seeks, does require this Court to stay the execution. And the Court is looking here at Robert Glen Coe vs. Don Sundquist, and I've already given the cite in the case. In that case, the Tennessee Supreme Court held that while a trial judge may be authorized to issue a stay of execution under certain circumstances upon the filing of a proper petition for post-conviction relief or a petition for habeas corpus, it says that where an action for declaratory judgment is brought, no jurisdiction exists

under the declaratory judgment statute to supersede a valid order of the Tennessee Supreme Court. It says, the Supreme Court goes on to say that in those cases where a trial court has exceeded its jurisdiction, the Tennessee Supreme Court has the right, power, and duty to protect its decree and to recognize that the trial Court has exceeded its jurisdiction. And where the trial Court does exceed its jurisdiction in this way, the Tennessee Supreme Court will vacate its order.

And this Court must find that the relief the petitioner seeks in its motion for temporary injunction requires both due to the issues surrounding the method of execution and due to the 30-day protocol requirement that -- upon which the plaintiff relies would definitely require ~~the effect on the Supreme Court order -- would~~ the trial Court ~~order be valid of a~~ to stay ~~on~~ the execution date. And this trial Court does not have authority to stay the Tennessee Supreme Court order of execution. That having been said, the Court, in the alternative, did plan and is going to rule on the four factors because it may be helpful to the Appellate Court, and at the end of the day, this Court plans to grant a Rule 9 application for appeal if the plaintiff plans such a process, the plaintiff does plan to do that, the Court in advance is going to grant that motion or request for a Rule 9 application, because, first of all, that seems to be the custom in such a situation. It seems to be a wise thing to

do in advance.

Now, as for the preliminary injunction, assuming only hypothetically that this Court does have the jurisdiction and power to affect the Tennessee Supreme Court's order of execution, the question is, has the plaintiff, Mr. West, demonstrated the four factors which the Court must balance in deciding a motion for temporary injunction. The first one, here are the four, and these four are from a federal case adopted by -- in this state, of PACCAR, Inc. vs. Telescan Techs, LLC, at 319 F3d 243, 249 (6th Cir. 2003), Federal Court case. And the four factors to be examined are -- if I can find my notes here -- is there a substantial likelihood of success on the merits; is there irreparable and immediate harm; number three, the relative harm that will result to each party as a result of the disposition of the application for injunction; and four, is the public interest served by issuance of the injunction.

And as for the merit, the Court does not find that there is a substantial likelihood of success on the merits. But the Court finds at this early stage of a declaratory judgment action, that the plaintiff's position has merits as regards the Tennessee Constitution and the specific facts which so far have not been evaluated in the State Court. The Court's reasoning is that the Harbison case dealt with the U.S. Constitution, although the District

Court in Harbison on remand looked at the affidavit surrounding or addressing the autopsies. Sorry, gentlemen, I'm still looking for my notes here so I can complete this thought. The Harbison case did not deal with the State Constitution and it was not a State Court addressing that issue. And I have the -- I'm sorry. The affidavit surrounding the autopsies were not -- were analyzed in light of the U.S. Supreme Court in Baze vs. Rees.

And the Court has done some independent research into the cases surrounding lethal injection and the Court thinks that the arguments and the analysis of both parties in this case are not -- certainly not dead wrong, because each of these cases dealt with different facts. The Tennessee Supreme Court first held that the State's lethal injection protocol did not violate the cruel and unusual punishment protection provided in the Eighth Amendment to the U.S. Constitution and Article 1, Section 16 of the Tennessee Constitution.

In Abdur'Rahman vs. Bredesen, the Court based its conclusion that the petitioner failed to establish cruel and unusual punishment on two factors. First, given that only two of the approximately 37 states authorizing lethal injection as a method of execution did not provide for some combination of sodium pentothal and potassium chloride in their lethal injection protocols, the Court

concluded the lethal injection protocol does not violate contemporary standards of decency. Second, the Tennessee Supreme Court rejected the petitioner's assertion, that is the petitioner in that case, that the use of pancuronium bromide and potassium chloride would create a risk of unnecessary pain and suffering because the petitioner's arguments were not supported by the evidence in the record. The Court said, we cannot judge the lethal injection protocol based solely on speculation as to problems or mistakes that might occur, although Abdur'Rahman was decided before both 2007 revisions to Tennessee's lethal injection protocol and the Tennessee -- and the U.S. Supreme Court's 2008 decision in Baze vs. Rees. At least one post-Baze opinion has cited to Abdur'Rahman with approval, and that's the case of State vs. Banks, which is at 371 SW3d 90, and that's a 2008 Tennessee Supreme Court case.

I could then go on and analyze Baze vs. Rees. The parties have done that. The seven justices rejected the petitioner's claims. There was none of the plurality claims garnered a majority of justices. The plurality opinion authored by Chief Justice Roberts, joined by Justices Kennedy and Alito have been cited extensively by Tennessee's Appellate Courts and also by the plaintiff in his brief. The Baze petitioners argued there is a significant risk that sodium thiopental will not be properly

administered to achieve its intended effect of rendering an inmate unconscious resulting in severe pain when other chemicals are administered. And the plurality opinion recognized that subjecting individuals to a risk of future harm can qualify as cruel and unusual punishment. But to establish that such exposure violates the Eighth Amendment conditions presenting the risk must be sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers. In other words, cruel and unusual punishment occurs when lethal injection as an execution method presents a substantial or objectively intolerable risk of serious harm in light of feasible, readily implemented alternative procedures. Simply because an execution method may result in pain either by accident or the inescapable consequence of death does not establish this sort of objectively intolerable risk of harm that qualifies the cruel and unusual.

The Chief Justice observed -- the Chief Justice talked about Kentucky's method of execution. It was believed to be the most humane available. It shares its protocol with 35 other states. And if it were administered as intended would result in a painless death. The Chief Justice observed that a state with a lethal injection protocol substantially similar to the protocol we uphold today would not create a demonstrative risk of severe pain

that would render the protocol violative of the Eighth Amendment. The Tennessee Supreme Court has determined that Tennessee's three drug protocol for lethal injection is substantially similar to that employed by Kentucky. And the Tennessee Supreme Court decided this in State vs. David Jordan, 2010 West Law 3668513 at page 75. And this was a decision that came out December 22nd, 2010. And also in Workman vs. Bredesen, which is -- I'm sorry, and Abdur'Rahman, which the Court has already discussed. The Sixth Circuit reached a summary decision or conclusion in Harbison vs. Little, the Sixth Circuit 2009 case, which the Court, I understand, is on appeal.

And so the Tennessee Supreme Court has said that Tennessee's lethal injection protocol in itself does not constitute cruel and unusual punishment. We know that Baze vs. Rees discussed the British Medical Journal, the Lancet, that reviewed the autopsy results of 49 inmates executed using lethal injection. And the U.S. Supreme Court -- the Baze petitioners raised the issue of the Lancet findings in their arguments as did the appellant HR Hester in the Tennessee Supreme Court. As our Supreme Court stated in its Hester opinion, the U.S. Supreme Court has declined to give constitutional weight to the study's findings. In his separate concurring opinion, Justice Alito noted that the evidence cited in the study regarding alleged defects in

these protocols and the supposed advantages is frighteningly haphazard and unreliable. Similarly, Justice Breyer noted in his opinion that the Lancet study may be seriously flawed. A non-expert judge cannot give the Lancet study significant weight. And in the Hester case, the Tennessee Supreme Court concluded that Mr. Hester has not offered a persuasive argument for revisiting this Court's previous decisions upholding the constitutionality of the protocol itself.

And I have more to say here. I appreciate your patience.

In September 2007, the District Court granted Mr. Harbison injunctive relief finding that Tennessee's lethal injection protocol constituted cruel and unusual punishment because there was that substantial risk, the District Court found. And the Sixth Circuit disagreed, holding that the basic findings of the District Court issuing the injunction were inadequate findings, that the failure to provide procedures for adequately monitoring the administration of drugs, the allegations that those were inadequate procedures, and failure to adopt an alternative one drug protocol were without merit. On remand, Mr. Harbison attempted to raise the issue regarding the autopsy results as a matter of fact of three inmates who were executed and he presented an affidavit from the physician

retained as an expert who, I believe, was a co-author in the Lancet matter. Dr. Bruce Levy also participated in that case. And the District Court did not address the facts or the merits of the autopsy picture or the affidavits presented by the two physicians, one on one side and one on the other, on remand, (CJ) because Mr. Harbison failed to raise these issues in the Sixth Circuit.

And as of this writing, this Court did not find post-Abdur'Rahman opinions issued by Tennessee's Appellate Court that addressed directly the cruel and unusual punishment issues that is the factors, the fact of the three autopsies and what the three autopsies mean that the plaintiff is raising in this petition, those have not been directly addressed by any State Court as regards the Tennessee Constitution. And this Court finds that every case is different and that there may be at this early part of the litigation, the Court would not and cannot conclude that there is no merit to the examination that the plaintiff has made of its -- as a matter of fact, that based upon these autopsies, that he will also be paralyzed and conscious and will experience unnecessary pain and suffering by suffocation and other avoidable death throes. So this Court cannot find that there is substantial merit, but the Court finds that there is some merit.

And so going on to the second factor,

irreparable and immediate harm. And I'll ask you gentlemen to hang in there with me just for a minute while I find my notes on these issues. I've got too many papers in front of me and I know you all do, too.

This is a civil Court, which exists in part to resolve ~~the states~~ disputes (as) of fact and resolve challenges to the law. This is a very early stage of the civil suit. The civil Court, at least the Chancery Court, rarely deals with a danger to a person's physical well-being. This civil Court rarely deals with the exhibition and fact of the suffering of victims of terrible crime. These are not usually exhibited in civil cases, at least civil cases in the Chancery Court. That having been remarked upon, the irreparable harm in this litigation is grave and it concerns the plaintiff's death by a certain method and it also concerns whether the Tennessee Supreme Court could decide that the merits in this lawsuit should be examined before the execution occurs. And the harm to the plaintiff is irreparable. It would be death by a particular method, which he asserts he may suffer in a brutal way. The harm to the State, I'm going to examine the harm to the State in a few moments, because I have to look at the harm to all parties. But all of that having been said, in a normal civil case, the opportunity for death, the fact of death, certainly establishes grave irreparable harm. It's

certainly not a money case.

As to the third category, the relative harm that will result to each party as a result of the disposition of the application for the injunction, the harm to the State is further delay, a lack of finality, a possible eroding of the power of the Criminal Court in that there's just a lot of delay that will be built in if the injunction is granted because the injunction would in most probability last until the end of the litigation, and the litigation, according to the plaintiff, would involve testimony of parties, the testimony of expert witnesses who would probably -- most probably be physicians, and the examination of scientific proof that this Court would definitely need help in. So the damage to the State and to the public interest is really one and the same and that is that delay in litigation is always harmful and not a positive thing and that finality is a high value which plays a serious and significant part in the administration of justice and that should be taken very seriously by every trial or other judge. And so the harm to the State, the Court has addressed.

It's in the public interest that each individual person's case be addressed independently and separately where the law dictates. The public is probably served, best served by careful review of each case, which is

not to say that this case hasn't already been carefully reviewed. I'm certainly not implying that. But this declaratory judgment action is a new lawsuit. The public has an interest, as I said, the public has an interest in finality and freedom from second guessing without good cause.

I want to go on and talk about the merits of -- the other merits beyond and aside from the lethal injection issues, and those two are statute of limitations and the 30-day -- the absence of the 30-day protocol process. First of all, as for the statute of limitations, a statute of limitations issue, I've never seen that addressed in a motion for a temporary injunction. That's usually addressed in a motion to dismiss, which the State has not had an opportunity or time to file. If a motion to dismiss had been proposed, if it could have been -- it could not have been in this case. We've got things going too fast. But if the State had had time, if this were an ordinary civil case, the State would have had time to file a motion to dismiss and there are protocols or processes through which the trial Court would look at the statute of limitations and the affidavits and try to determine when the cause accrued and make rulings on that. It is very difficult to evaluate a statute of limitations claim in a motion for temporary injunction, so I decline to

review those issues as a defense -- as the State's -- in the State's response, because I just cannot analyze them.

This Court does not find that there is merit to the idea that the plaintiff should be given 30 days to contemplate the method of his death when, under the facts of this case, the plaintiff has contemplated the exact methods available to him and has litigated over whether he would be forced to choose the method of his death or whether -- and whether he would choose electrocution or be required to make any choice at all. And these very issues have been litigated in this very lawsuit. And the Court finds that probably the 30-day protocol is to benefit both the inmate and the State, but the plaintiff has already received the benefit of that 30-day contemplation as a matter of fact. And so although I don't find that as a matter of fact in this because I can't do that yet, this is just a motion for temporary injunction, I do find that that particular claim does not have merit.

So to go back, I've already found there's irreparable and immediate harm, there's a risk of irreparable and immediate harm, which is the most significant factor to be balanced. I have found that the plaintiff has some merit and when he address whether the lethal injection protocol challenge has been fully litigated in the State Court, I don't think it has, and so I would

find that there is some -- some possibility of success on the merits, but I cannot find that there is a substantial likelihood of success on the merits.

I've already addressed the relative harm that would result to each party. I'm finding that irreparable and immediate harm possibilities trump the other four issues. And if this -- if there were not a Supreme Court order down setting the execution date, this Court would issue an injunction solely to preserve the status quo and to allow this Court to seriously address a lawsuit. A serious addressing of the lawsuit could result in dismissal of the case. It could result -- it could go the other way. And so, as I said before, irreparable harm trumps the situation.

And, lawyers, I have denied the motion for an injunction based upon the reasoning in Coe, which seems to be on all fours with this situation. I have gone on to say that in the alternative, if this were something about which the Tennessee Supreme Court had not ordered or opined, then I would issue the injunction solely for the purpose of preserving the status quo while the Court examined the claims and the law, facts and the law.

And is there anything, lawyers, that this Court should do besides reminding the parties that I have -- I am granting an application for a Rule 9 appeal if

that's what Mr. West's plan was.

MR. KISSINGER: Thank you, Your Honor.

THE COURT: All right. Now, is there anything -- I would like to have the bench ruling ordered and filed. Who do you think should order that? Should the State do that? The State has prevailed. What do you think, Mr. Hudson?

MR. HUDSON: I have not been subject to very many bench rulings, Your Honor, so I do not know.

MR. KISSINGER: Your Honor, we'll take care of it.

THE COURT: Well, I hate to throw a monkey wrench in there, but, again, I just want to be sure that it does get ordered and get filed so that you lawyers can -- maybe you'll get a day of rest, maybe you won't.

MR. KISSINGER: We hired the reporter, Your Honor, it will be easier for us.

THE COURT: Okay. Well, I appreciate that. Are there any housekeeping issues that this Court or any issues that this Court failed to address?

MR. KISSINGER: Not that the plaintiff is aware of, Your Honor.

THE COURT: Mr. Hudson?

MR. HUDSON: No, Your Honor.

THE COURT: So, the lawyers, I think

that's it.

MR. KISSINGER: Thank you, Your Honor.

THE COURT: Thank you for agreeing to address the motion for temporary injunction as soon as we have. So, we're now adjourned.

Thereupon, Court Adjourned.

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Chancellor Claudia C. Bonnyman