In the Supreme Court of the United States
October Term, 2010

STEPHEN MICHAEL WEST,
Petitioner,

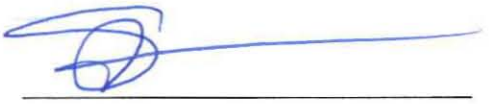
v.

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

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

CERTIFICATE OF SERVICE

I, Stephen M. Kissinger, a member of the Bar of this Court, hereby certify that on this 5th day of November 2010, a copy of the Petition for Writ of Certiorari in the above-entitled case was emailed and sent Fed Ex overnight to: Mark Hudson, Office of the Attorney General, 425 Fifth Ave. North, Nashville, TN 37243, counsel for the respondent herein. I further certify that all parties required to be served have been served.



Stephen M. Kissinger
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street Suite 2400
Knoxville, TN 37929
(865) 637-7979
Stephen_Kissinger@fd.org

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Stephen_Kissinger@fd.org

Counsel for Petitioner West

November 5, 2010

CAPITAL CASE

Execution Scheduled for November 9, 2010

at 10:00 pm, Central Standard Time

QUESTIONS PRESENTED

This Court has held sacrosanct "the absolute purity of the rule that Article III jurisdiction is always an antecedent question ... [There is no] doctrine of 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998), citing *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 Dall. 409 (1792).

1. Does an Article III court have subject matter jurisdiction over an inmate's challenge to a method of execution to which he will not be subjected?

If the courts below did have subject matter jurisdiction:

2. Does the Sixth Circuit's bright-line statute of limitations rule, that fails to account for new evidence proving that a state knows its execution protocol has produced a series of torturous executions, violate a condemned inmate's First Amendment right to access the courts to exercise his Eighth Amendment right to be free from death by conscious suffocation?

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Stephen Michael West, a Tennessee prisoner under sentence of death, seeks a writ of certiorari to review the final judgment of the United States Court of Appeals for the Sixth Circuit, in which it affirmed by a vote of 2 to 1 the District Court's dismissal of Mr. West's Eighth Amendment claims as time-barred, although both parties agreed the court lacked subject matter jurisdiction.

OPINIONS BELOW

The 2 to 1 decision of the Sixth Circuit Court of Appeals' was rendered on November 4, 2010, and is attached as Pet. App. A. The United States District Court for the Middle District of Tennessee's opinion dismissing Mr. West's 42 U.S.C. §1983 complaint was rendered on September 24, 2010, and is attached as Pet. App. B.

JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment (Pet. App. A) on November 4, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Eighth and Fourteenth Amendments to the Constitution. The *First Amendment* provides, in relevant part:

"Congress shall make no law ... abridging ... the right of the people peaceably ... to petition the Government for a redress of grievances."

The *Eighth Amendment* provides:

> "Excessive bail shall not be required, nor excessive fines, nor cruel and unusual punishments inflicted."

The *Fourteenth Amendment* provides, in relevant part:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law ... ."

STATEMENT OF THE CASE

On March 10, 2010, Tennessee officials released the report from the autopsy of Steven 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 Affidavit of Dr. Lubarsky p.8 of 65).[1]

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 Report p.3, 7 of 20; R.1-21, 2010 Affidavit of Dr. Lubarsky 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 Report p.3, 7 of 20; R.1-21,

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[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 as usual - "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. He filed his second complaint in the district court on October 25, 2010, which was assigned Case No. 3:10-cv-01016, and that case was dismissed November 5, 2010. Cites to that record will be preceded by "Second Complaint."

2010 Affidavit of Dr. Lubarsky, 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 Report p.3, 7 of 20; R.1-21, 2010 Affidavit of Dr. Lubarsky 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). 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 Affidavit of Dr. Lubarsky 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 Report, 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.

1. Mr. West files a lethal injection lawsuit in federal court.

In July 2010, the Tennessee Supreme Court scheduled Stephen West's execution for November 9, 2010. In August 2010, Mr. West filed a §1983 suit in federal court alleging that there is a pattern or "series" of unconstitutional executions in Tennessee. *West v. Ray*, No. 3:10-cv-0778,(M.D.Tenn.) (R.1) . Mr. West alleged that the State knew or should have known that, even if the execution

is carried out properly under the protocol, there is a substantial risk that Mr. West will suffocate from the pancuronium bromide injection at a time when he is not adequately anesthetized. He requested injunctive relief so as not to be subjected to the same lethal injection protocol that will cause him serious and unnecessary suffering.

2. The Defendants assert a lack of subject matter jurisdiction because they intended (since 2001) to execute Mr. West using the electric chair.

On September 3, 2010, Defendants filed a motion to dismiss claiming that Mr. West remained bound by a document he signed nine years prior which chose electrocution for a then-pending execution in 2001. (R.1). That document was part of an execution protocol that was specifically revoked by Tennessee's Governor 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 p.1 and R. 24 p.3-4).[2] .

The District Court requested that the parties brief whether the Defendants' motion to dismiss should be converted to a motion for summary judgment since Defendants had raised facts beyond the complaint, namely the election form. (R.25). Mr. West argued it should so that the contested validity of the election form could

[2]On September 10, 2010, Defendants repeated that claim, again asserting that Mr. West's complaint be dismissed for want of jurisdiction. (R. 26).

be settled. (*Id.*, p. 5-7 of 8). Defendants argued the District Court could find Mr. West had chosen electrocution even without relying on the election form by looking to other court records. (R.26, p. 2-3 of 4). The District Court held:

> 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). Without resolving the question of subject matter jurisdiction, the Court dismissed Mr. West's complaint on statute of limitations grounds. (R.34 and R.35)

On September 14, 2010, the District 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 p.3, 4 n.2). All of these dates are more than one year from August 19, 2010, when Mr. West's lawsuit was filed.

Mr. West appealed. He argued that the decision in *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007)(discussing the statute of limitations applicable to method of execution cases), had not altered the basic rule that accrual cannot occur until a cause of action exists. Mr. West's cause of action did not exist until, at the earliest, February 17, 2010, when the Henley autopsy was completed and demonstrated 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. *See Baze v. Rees*, 553 U.S. 35, 50 (2008). *West v. Ray*, No. 10-6196, Brief of Appellant (6th Cir.).

3. Defendants' continued intent to electrocute Mr. West.

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 the Warden with a letter setting out the reasons why Mr. West's nine year old election form was not valid. Out of an abundance of caution, however, he also informed the Warden that he was rescinding the 2001 form and that he was not making any election regarding the method of execution for the execution scheduled in November. (*West v.Ray,* No. 10-6196 (6th Cir.) Withdrawal of Appellant's Motion to Stay and Abey, Attachment A, Recision)

After consulting with Department of Correction counsel, the Warden orally informed Mr. West's counsel that the Department still considered the nine-year-old form to be binding, that he would not recognize Mr. West's recision, and that the State of Tennessee would subject him to death by electrocution unless he affirmatively chose lethal injection as the method of execution.[3] On October 13, 2010, Mr. West's counsel sought from counsel for the Department of Correction official confirmation of the Warden's representations., *Id.*, Attachment B, Ferrell letter to Inglis). An immediate response was not forthcoming.

On the same date, however, Defendants filed their appellate brief, again

[3]According to Defendants, acceding to the Department's demand would require Mr. West to forfeit his right to ask that Tennessee carry out his execution by lethal injection in a manner which did not constitute cruel and unusual punishment. (R.24, p. 4-5).

asserting that Mr. West had presented no case or controversy regarding the unconstitutionality of lethal injection because he was to be executed by electrocution. *West v. Ray*, No. 10-6196, (6th Cir.) Brief of Defendants-Appellees, p.16-18.

On October 15, 2010, Department of Correction's 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."

(*West v. Ray*, No. 10-6196 (6th Cir.), Withdrawal of Appellant's Motion to Stay and Abey, Attachment C, Inglis letter to Ferrell). 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.

4. Mr. West files suit in state court to enjoin his electrocution.

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 Eighth and Fourteenth Amendments to United States Constitution. Given Defendants' clearly stated

intention to electrocute Mr. West, Mr. West filed suit on October 18, 2010, in the Chancery Court for Davidson County, Tennessee. He sought an adjudication on the efficacy of the nine year old election form, argued that electrocution constitutes cruel and unusual punishment, and requested a temporary injunction.[4]

5. Defendants abandon electrocution and announce Mr. West will be executed by lethal injection.

Two days later, on October 20, 2010, Defendants responded to Mr. West's state court motion for temporary injunction. They 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 nine-year-old election form. Instead, Defendants (while expressly acknowledging that they had fully intended to execute Mr. West by electrocution from 2001 up until that date), stated that now they would honor the recision that had been previously rejected:

> 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, *plaintiffs sentence of death will now he executed by means of lethal injection, by operation of law.* See Tenn. Code Ann. § 40-23-114(a). Consequently, there is simply no need for plaintiff to be presented with a new election affidavit, as he insists. In addition, the plaintiff has affirmatively declared that he would make no election of a method of execution, further obviating any need to present him with a new election affidavit.

(*West v. Ray*, No. 10-6196 (6th Cir.) Defendants' Response to Motion for Temporary

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

Injunction, p. 4, Attachment D to Withdrawal of Appellant's Motion to stay and abey .) (emphasis added).

Defendants then demanded that, because Mr. West would now be executed by lethal injection, his state court complaint should be dismissed as moot. *Id.* ("Furthermore, because the defendants have accepted plaintiff's 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.").

6. Standing to challenge execution by Tennessee's lethal injection protocol.

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

a. 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,

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

c. 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 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.

On October 25, 2010, Mr. West filed an amended complaint alleging seven claims challenging the constitutionality of lethal injection as administered by the Defendants, along with a motion for temporary injunction. *West v. Ray*, No. 10-1675-I, Amended Complaint (Chancery Ct. for Davidson Co., Tenn.).

The state court ruled 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*, No. 10-1675-I, Memorandum Opinion, p.9 (Chancery Ct. for Davidson Co., Tenn. Nov. 1, 2010). The court found, however, that it lacked the authority to enjoin Defendants because such an injunction would have "the effect" of staying the Tennessee Supreme Court's order setting Mr. West's execution date. *Id.* at p.7. The Tennessee Court of Appeals also determined it lacked jurisdiction to enter injunctive relief. *West v. Ray*, No. M2010-02275-COA-R9-CV, slip opinion (Tenn.Ct.App. Nov. 3, 2010. Mr. West's request for review from the Tennessee Supreme Court remains pending. *West v. Ray*, No. M2010-02276-SC-RDM-CV (Tenn.).

7. **Effect of the State's decision to execute Mr. West by lethal injection on the federal court appeal.**

On October 26, 2010, Mr. West withdrew his motion asking the Sixth Circuit to stay and abey proceedings while the validity of the election form was determined in state court. Mr. West further submitted that Defendants had clearly represented 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 lethal injection complaint was before the federal district court. Accordingly, he conceded that Defendants' argument that the District Court lacked subject matter jurisdiction was well-taken. (*West v. Ray*, 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 (6th Cir.)) ("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).").

On November 1, 2010, Defendants filed an opposition to Mr. West's motion to vacate the District Court order and remand. They continued to maintain that Mr. West was going to be executed by electrocution from February of 2001 through

October 20, 2010 (thus confessing that the District Court lacked subject matter jurisdiction when it entered its order). But Defendants asserted the court of appeals should still review the District Court's decision on the theory that Mr. West was judicially estopped from agreeing with Defendants that the decision was entered at a time when the District Court was without jurisdiction.

8. A second lethal injection complaint is filed in the federal district court.

On October 28, 2010, subject matter jurisdiction being clearly established by Defendants' October 20, 2010, representation in state court that they would accept Mr. West's recision and that he would now be executed by lethal injection as an operation of law, Mr. West filed a § 1983 complaint in the District Court. (Second Complaint R.1). On November 1, Defendants filed a motion to dismiss asserting, among other grounds, that the lawsuit was time-barred. (Second Complaint R.10 and R.11). The district court agreed and held that the second action was barred by the statute of limitations.

9. The court of appeals' decision.

On November 4, 2010, the court of appeals affirmed by a 2-1 vote. *West v. Ray*, No. 10-6196 (6th Cir.) (Pet. App.A). The court held that subject matter jurisdiction was to be determined on the face of the complaint and by accepting all facts in the complaint as true. Because Mr. West had alleged that the Defendants were going to execute him by lethal injection, the court of appeals found the District Court had jurisdiction. (*Id.* at p.5). The court found there was "no factual basis to support a conclusion ... that the district court was without jurisdiction to dismiss

West's complaint." (*Id.* at p.6).

The court then affirmed the holding that Mr. West's lawsuit was time-barred. It applied the bright-line rule established in *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007) ("*Cooey II*"). That rigid rule states: "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." (*West v. Ray*, No. 10-6196, p.6 (6th Cir. Nov. 4, 2010)), quoting, *Cooey II*, 479 F.3d at 421-22. "The alternative date could [] be[] either the date the method of execution was established or the date that the method of execution became the sole method." (*Id.* at p.6-7, citing *Cooey II*, 479 F.3d at 422). Since Mr. West's lawsuit was filed beyond one year of any of those dates, the court determined it was time-barred.

The dissenting judge found that, "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." *West v. Ray*, No. 10-6196, slip opinion, p.12 (6th Cir. Nov.4, 2010) (Moore, J., dissenting). The judge voted to grant a stay of execution. On the same day, Mr. West moved to stay the mandate pending consideration of the case by this Court. The court granted a stay of the mandate on November 5, 2010.

STATEMENT OF FACTS

"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 p.12 (6th Cir. Nov. 4, 2010)) (Moore, J., dissenting). And "[u]ntil this year, it was impossible for Mr. West to have learned that Tennessee's lethal-injection protocol has become, in practice, death by suffocation." (*Id.* p.11 (6th Cir. Nov. 4, 2010)) (Moore, J., dissenting).

Robert Coe was the first person executed in recent Tennessee history on April 19, 2000. Mr. Coe was executed by suffocation while inadequately anesthetized. His toxicology report indicated a serum sodium thiopental level of 10.2 mg/L. Given this level, Mr. Coe would have been conscious when the second drug - Pancuronium Bromide - was administered to him. (R.1-6, Coe Autopsy report; R.1-28, 2007 Affidavit of Dr. Lubarsky, p.6-7 of 53).

After Tennessee's protocol change in 2007, the autopsy of Phillip Workman revealed inadequate post-mortem sodium thiopental levels. Philip Workman was executed on May 9, 2007, under the current Tennessee Protocol. The autopsy report was completed on October 24, 2007. Mr. Workman's post-mortem thiopental level was 18.9 mg/L, which means he was not fully anesthetized during his execution. (R.1-21, 2010 Affidavit of Dr. Lubarsky p.6 of 65; R.1-20, Workman autopsy report). 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.).

Steve Henley was executed on February 4, 2009, under the current Tennessee Protocol. On March 10, 2010, the State released the autopsy results for its next-executed inmate, Steven Henley. Mr. Henley, too, had deficient sodium thiopental levels, giving Mr. West a basis to allege that, as implemented, the lethal-injection protocol violates the Eighth Amendment. Mr. Henley's autopsy report reveals his sodium thiopental level was 8.31 mg/L; an amount inadequate to cause Mr. Henley to be unconscious during his execution. (R.1-21, 2010 Affidavit of Dr. Lubarsky, p.7 of 65; R.1-22, Henley autopsy report, p.34 of 35). Witnesses observed Mr. Henley turn blue to purple in color during the execution process. This means he suffocated. (R.1-21, Affidavit of Dr. Lubarasky, p.7 of 65.

Until Mr. 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 v. Strickland*, 577 F.3d 309, 312 (6th Cir. 2009), could not have been alerted that the standard three-drug cocktail would suffocate its recipients. *West v. Ray*, No. 10-6196, slip opinion p.11-12 (6th Cir. Nov. 4, 2010) (Moore, J., dissenting).

According to expert testimony, the way the human body reacts to various stimuli differs depending upon the level of anesthesia. For example, when a person is administered sodium thiopental, a person will continue to have generally the following states of consciousness at the following serum levels of pentothal:

0-13 mg/l: Consciousness

13-18 mg/l: Loss of purposeful movement in response to verbal stimulation

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

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

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

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

The cumulative evidence of three out of the three inmates upon whom autopsy evaluations were performed showed they were conscious and paralyzed as they suffocated to death and that under Tennessee's three-drug protocol Mr. West is likely to be killed in the same painful manner, by asphyxiation.

From 2001 to October 20, 2010, Defendants' intended to execute Mr. West using the electric chair. On October 20th, Defendants abandoned their attempt to electrocute Mr. West and announced their intent to subject him to Tennessee's lethal injection protocol.

Mr. West filed a civil rights suit challenging Tennessee's lethal injection protocol as a cruel and unusual punishment in that it causes a paralyzed inmate to die through conscious asphyxiation.

SUMMARY OF ARGUMENT

As this Court said in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) [m]uch more than legal niceties are at stake here." The constitutional

elements of jurisdiction are essential to restrain courts from acting permanently regarding certain subjects. *Id.*

In this case, both parties agreed there was no case or controversy properly before the courts. The District Court failed to decide the question of subject matter jurisdiction. The court of appeals determined that subject matter jurisdiction rests on the face of the complaint so all that is required is a plaintiff's allegation of facts to establish the power of a court to act. This determination is akin to invoking "a doctrine of hypothetical jurisdiction." *Steele Co.*, 523 U.S. at 101.

That hypothetical jurisdiction enabled the court below to resolve the contested issue regarding the statute of limitations even when both parties agreed that jurisdiction was absent. The rule advanced to time-bar Mr. West's constitutional claim is a rule that has acted permanently to close the courthouse doors throughout the Sixth Circuit on condemned inmates challenging the constitutionality of an execution protocol. The doors won't even budge when, as in this case, new evidence comes to light demonstrating that the "*practice* of the lethal-injection method in Tennessee has caused extreme pain and suffering" through suffocation. *West v. Ray*, No. 10-6196, slip opinion p.12 (6th Cir. Nov. 4, 2010) (Moore, J., dissenting) (emphasis supplied).

Certiorari review is warranted because in this case the parties agree, and there can be no reasonable question that, the District Court did not have jurisdiction over Mr. West's lethal injection lawsuit because the Defendants planned to electrocute him throughout the time it was pending. Without the fact

that Defendants intended to go forward with lethal injection as the means of execution, Mr. West lacked standing to challenge his execution by lethal injection. The lower courts' exercise of "hypothetical jurisdiction" calls for this Court's intervention.

Certiorari review is also warranted because even if the lower courts had jurisdiction, the statute of limitations rule utilized to keep Mr. West's constitutional claim from receiving merits consideration effectively precludes any lawsuit invoking the protections of the Eighth Amendment, as set forth in *Baze v. Rees*. It was only upon the accumulation of all of the evidence from recent executions, including, specifically the autopsy report of Steven Henley, that the evidence demonstrated that Tennessee's unnecessarily painful executions of Mr. Coe and Mr. Workman were not just "isolated mishaps." Instead, they were part of the series of failed attempts to abide by the Constitution that the *Baze* decision specifically held were necessary to state a cause of action. *Baze v. Rees*, 553 U.S. at 50. Mr. West's cause of action could not have arisen before March, 2010, the release date of the Henley autopsy.

Though the Henley autopsy report was finalized in February of this year, and released in March of this year, Mr. West could not have pursued those claims until October 20, 2010, a mere five days before he filed suit. October 20th is the day the Defendants' abandoned their attempt to electrocute Mr. West and announced, instead, they would submit him to Tennessee's lethal injection protocol.

Under *Baze*, 553 U.S. at 50, a State violates the Constitution not just when it

enacts a method of execution which causes unnecessary pain and suffering, but when it knows or should have known that its method inflicts the same and decides to go forward nonetheless. In fact, when Mr. West initially filed his complaint in August, 2010, one month after his execution was scheduled, Defendants asserted that he did not have standing because they were going to electrocute him.

In stark contrast to the rule applied below by the Sixth Circuit, the Seventh Circuit stated in *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 850 (7th Cir. 2007) (citation omitted):

> Indeed, before there is an injury, there is no standing to sue for damages because no damages have accrued, and obviously a statute of limitations cannot begin to run before the prospective plaintiff could sue.

Since Mr. West's complaint was filed five days after all the elements of his cause of action accrued, it was timely.

ARGUMENT

I. The lower courts were without jurisdiction over Mr. West's lethal injection lawsuit because he lacked standing when the District Court issued its decision; from 2001 up until October 20, 2010, the Defendants intended to electrocute Mr. West.

Mr. West did not have standing to challenge Tennessee's lethal injection protocol until Defendants sought to execute him under that protocol. Subject matter jurisdiction is always a threshold determination. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. at 101(there is no "doctrine of 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in

doubt").[5] In this case, the District Court did not decide the question of subject matter jurisdiction although the issue was immediately raised by Defendants. (R.23 and R.24).

Also in this case, the parties agree upon the determinative fact that Defendants did not intend to execute Mr. West by means of lethal injection from February of 2001 until October 20, 2010. This fact means Mr. West lacked standing to challenge the use of Tennessee's lethal injection protocol during the entire time his complaint was pending in the District Court; from August 19, 2010 - September 24, 2010. This also means the District Court lacked subject matter jurisdiction to enter an order dismissing the complaint as time-barred. And it means the court of appeals lacked jurisdiction to issue a decision affirming that the complaint was time-barred.

A. The lower court's unauthorized exercise of jurisdiction deprived Mr. West of judicial review of a meritorious claim.

When Defendants abandoned their attempt to electrocute Mr. West and announced they would instead use lethal injection, Mr. West instantly obtained

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[5]It is axiomatic that a lack of subject matter jurisdiction may be raised at any time "'even by a party who originally asserted jurisdiction.'" *United States v. Leon*, 203 F.3d 162, 164 n. 2 (2d Cir. 2000) (quoting *United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1080 (2d Cir. 1970)). Indeed, arguments for or against standing may not be waived. *See Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994)(citing *National Wildlife Fed'n v. United States*, 626 F.2d 917, 924 n. 13 (D.C.Cir. 1980) (voluntary waiver of challenge to prudential standing is necessarily ineffective because standing implicates federal jurisdiction)). Irrespective of how the parties conduct their case, the courts have an independent obligation to ensure that federal jurisdiction is not extended beyond its proper limits. *See Thompson*, 15 F.3d at 248. *See also Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 14 (1stCir.1999) "[C]ourts have been cautioned to give careful consideration to the application of judicial estoppel when subject matter jurisdiction is at stake.")

standing to challenge lethal injection under Tennessee's protocol based on facts arising less than one year ago. Accordingly, he filed his second suit in the District Court. The merits of Mr. West's constitutional claim should have been heard. The court of appeals' improper entry of a decision in this case, however, would require dismissal of Mr. West's lawsuit under the doctrine of *res judicata*. On November 5, 2010, the district court so held. (Second Complaint, R.15). Thus, the merits of Mr. West's constitutional claim will never receive review.

This is an especial miscarriage of justice where two jurists have found Mr. West's claim to have merit, and, both indicated they would enter a stay of execution if empowered to. *West v. Ray*, No. 10-6196 (6th Cir. Nov. 4, 2010) (Moore, J., dissenting); *West v. Ray*, No. 10-1675-I (Chancery Ct. for Davidson Co., Tenn.) (Chancellor Bonnyman indicating an injunction would issue if the court had jurisdiction). Even if the District Court re-entered its original decision dismissing the lethal injection suit as time-barred, this order would be valid and reviewable on appeal.

B. The lower court's unauthorized exercise of jurisdiction deprived Mr. West of judicial review of a statute of limitations ruling that contradicts Supreme Court law and violates the right of access to the courts.

Additionally, the court of appeals' improper exercise of jurisdiction renders unreviewable its erroneous decision regarding the statute of limitations for a method of execution claim. A statute of limitations decision as important as the one issued below, which effectively precludes any challenge to Tennessee's lethal

injection protocol, could ordinarily be reviewed and reversed by this Court. The fact that the lower court lacked jurisdiction means the decision below is void and unreviewable. Yet, without a grant of *certiorari* review, the decision below will become circuit precedent to be applied to time-bar any future, similar cases.

Again, this would be a grave miscarriage of justice. A statute of limitations rule that fails to account for all the elements of a cause of action or fails to provide an opportunity to litigate a cause of action recently arising upon new facts contradicts this Court's precedent and the First Amendment. Judges on the court of appeals have called for reversal of the statute of limitations rule applied in this case. *See, Cooey v. Strickland*, 604 F.3d 939, 947-48 (6th Cir. 2010) (Martin, J., dissenting); *Getsy v. Strickland*, 577 F.3d 320, 321 (6th Cir. 2010) (Moore, Martin, Cole, and White, JJ. dissenting from denial of rehearing *en banc*); *id.* at 321-22 (Merritt, J., dissenting); *Getsy v. Strickland*, 577 F.3d 309, 314-16 (Moore, J. concurring); *id.* at 317-20 (Merritt, J. dissenting).

II. The Sixth Circuit's bright-line statute of limitations rule which fails to allow for new evidence that a State knows its execution protocol has produced a series of torturous executions violates a condemned inmate's First Amendment right to access the courts to exercise his Eighth Amendment right to be free from death by conscious suffocation.

Under *Baze v. Rees*, Mr. West's claims alleging that Tennessee's lethal injection protocol violates the Eighth Amendment, even when administered correctly, did not arise until the State knew or should have known that the protocol fails to produce sodium thiopental levels sufficient to render a condemned inmate unconscious.

The court of appeals erred in holding that Mr. West's § 1983 action was barred on statute of limitations grounds. The court applied the statute of limitations analysis contained in *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007). Nevertheless, *Cooey* does not control the issue of when the Eighth Amendment claim accrued in this particular case. The *Cooey* analysis was undermined by the decision in *Baze v. Rees,* 553 U.S. 35 (2008).

Baze held that the Eighth Amendment is violated upon two conditions. First, there must be a showing that a State's execution protocol inflicts unnecessary pain and suffering. Second, it must be proven that the pain and suffering which will result from carrying out its protocol is so apparent that state officials cannot claim that they were unaware and the State decided to go forward nonetheless. A valid cause of action arises only when both conditions are satisfied. In *Baze*, this Court found that Kentucky had not committed the constitutional violations alleged, in part, 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. This second condition was not considered by the *Cooey* Court and therefore makes *Cooey's* statute of limitations analysis inapplicable here.

Cooey simply does not answer the question of how to determine when the State knew or should have known that the protocol creates a substantial risk of serious harm. Mr. West alleged that the State knew or should have known that Tennessee's lethal injection protocol, when carried out properly, suffocates conscious

inmates after Steven Henley's autopsy report was finalized and released on March 10, 2010. The autopsy report not only establishes an element of the cause of action but it further proves serious and unnecessary harm. Mr. West filed his lawsuit well within one year of the release of the Henley autopsy report and five days after the Defendants abandoned attempts to electrocute him in favor of executing him by lethal injection. Mr. West's complaint was therefore timely and the court below erred in dismissing it.

A. Under *Baze,* Mr. West's cause of action did not accrue until the State had actual or implicit knowledge that Tennessee's execution protocol fails to adequately anesthetize condemned inmates.

A cause of action under § 1983 accrues, and the statute of limitations begins to run, only when a person acting under color of state law violates the Constitution. *Wallace v. Kato*, 549 U.S. 384, 388 (2007). 42 U.S.C. § 1983, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Under the statute's express language, the first question becomes, "When did the State violate the Constitution?" In other words, "When did the State of Tennessee complete every action necessary to violate the Constitution, with the exception of the actual carrying out of Mr. West's execution?" On that issue, the decision in *Baze v. Rees*, controls. Under *Baze*, a state violates the Constitution not

just when it enacts a method of execution which causes unnecessary pain and suffering, but when it knows or should have known that its method inflicts the same. Justice Roberts' plurality opinion, which the Sixth Circuit treats as controlling, *see e.g., Harbison v. Little*, 571 F.3d 531, 535 (6th Cir. 2009), states:

> 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 50.

Mr. West alleged that the Henley autopsy demonstrates the Tennessee protocol 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

official may not ignore. In turn, this proof gives rise to a cause of action under § 1983 and, coupled with the State's announced intention to use the same protocol for Mr. West's execution, triggers the statute of limitations. *Wallace v. Kato, supra* (the statute of limitations begins to run only when a person acting under color of state law violates the Constitution).

The court below misconstrued Mr. West's statute of limitations argument by relying on its precedent in *Getsy v. Strickland*, 577 F.3d 309 (6th Cir. 2009)[6] to reject it. In *Getsy*, the plaintiff argued that *Baze* created a new cause of action, thus re-setting the clock on the statute of limitations. *Getsy*, 577 F.3d at 311. The Court recognized that *Baze* did not create a new cause of action, but merely clarified the standards that should apply to the merits of Eighth Amendment protocol challenges. *Id.* at 312. The *Baze* Court clarified the standards by recognizing that to establish an Eighth Amendment violation the "conditions presenting the risk must be 'sure or very likely to cause serious illness and needless suffering.'" *Baze*, 553 U.S. at 49-50 (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993)). Thus, in order to prevail under *Baze*, Mr. West needed facts to show "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.'" *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

The lower court's reliance on *Getsy* to time-bar this case was misplaced

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[6]Although the majority of the *Getsy* panel felt it was bound by the Court's decision in *Cooey*, all three judges called for *Cooey* to be overruled. *Getsy*, 577 F.3d at 314-15, 317.

because Mr. West never argued that the decision in *Baze* created a new cause of action, or in any way re-set the statute of limitations for bringing such a cause of action. Rather, Mr. West agrees, as the *Getsy* Court found, that *Baze* merely clarified standards for deciding a cause of action that had existed long before lethal injection challenges were ever being brought.

In this vein, *Baze* undermines the *Cooey* approach to analyzing the statute of limitations because it shows that the Eighth Amendment cause of action does not necessarily exist at the time *Cooey* says the statute begins to run. *Cooey* held that the statute of limitations begins to run, either at the conclusion of the plaintiff's direct appeal, or when the state adopts the method of execution that is being challenged. *Cooey*, 479 F.3d at 422. This holding is inconsistent with *Baze*, because it ignores the deliberate indifference and/or intolerable risk component of the cause of action. Further, *Baze* shows that later-rising events can give cause to a challenge to a particular method of execution. As shown above, *Baze* holds that there is no cause of action where prison officials implement an execution protocol that they believe, in good faith, to be consistent with the Eighth Amendment. However, *Baze* makes clear that once officials intend to use a protocol that they know is "sure or very likely to cause . . . needless suffering," there is a cause of action against them. *Baze*, 553 U.S. at 49-50. This objectively intolerable risk of harm such that prison officials are no longer blameless must exist before a cause of action arises. *Id.* at 50.

The fact that the *Baze* decision focused on the possible "blameworthiness"

and "malevolence" of prison officials demonstrates the necessity of proving an element of foreseeability and knowledge on the part of the State here. Plaintiffs cannot obtain relief because accidents may cause unintended suffering, but must rather "demonstrate an objectively intolerable risk of harm that officials may not ignore." *Id.*

Mr. West alleged that the release of the Henley autopsy on March 10, 2010, is the event after which the risks under the Tennessee protocol could no longer be ignored. When the State established its plan to execute him under the current lethal injection protocol despite these risks, his cause of action accrued and the statute of limitations began to run.

B. Mr. West demonstrated the State obtained the required *scienter* and the cause of action accrued after February, 2010, the date upon which the autopsy report of Steven Henley was finalized.

Thiopental induces unconsciousness and the depth of unconsciousness depends upon the amount of thiopental introduced into the blood stream. Thiopental induced unconsciousness is measured as follows:

13 to 18 mg/L	loss of verbal response
23 to 28 mg/L	loss of tetanic nerve response
33 to 46 mg/L	loss of trapezius muscle response

(R.1, p.35 of 106; R.1-25, *Thiopental Pharmacodynamics*).

Prior to the release of the Henley autopsy, the State had obtained a post-mortem serum thiopental level from Robert Coe who was executed under a prior version of the three-drug protocol. Mr. Coe's thiopental level was 10.2 mg/L. (*Id.*,

(R.1-6, Coe Autopsy, p.14 of 15).

Prior to the release of the Henley autopsy, the State also had obtained a post-mortem serum thiopental level from one other inmate executed under its current protocol, Phillip Workman. Mr. Workman's blood samples, however, were not obtained until ten days after his autopsy and, would not have established a cause of action under *Baze* because: (1) standing alone, it could be considered no more than "an isolated mishap" inadequate to "suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm,'" *Baze. v. Rees*, 553 U.S. at 50, *citing Farmer v. Brennan*, 511 U.S. 825, 842 (1994); and (2) the blood sample was obtained at such a time after Mr. Workman's death that (absent the context provided by the Henley autopsy results) the State's knowledge of Workman's thiopental level would not have given rise to a risk which could not be ignored.

It was only after the Henley autopsy report was finalized in February, 2010, that the State knew or should have known that Tennessee's lethal injection protocol, even when carried out properly, produced thiopental levels consistent with *consciousness*. This is because Henley's blood was drawn at a time near enough to his death that there is no material scientific controversy which would absolve the State for Eighth Amendment purposes for disregarding the substantial likeliness of consciousness. When the State decided to proceed with the execution of Mr. West using the same protocol, its actions violated the Eighth Amendment and Mr. West's cause of action accrued. *Wallace v. Kato, supra.* Because Mr. West filed his complaint within one year of these events, his case was timely. Given these facts,

the court of appeals' application of the inflexible, bright-line rule in *Cooey* infringed upon Mr. West's First Amendment right of access to the Courts by denying him judicial review of his Eighth Amendment claim. Its decision should be reversed.

C. The statute of limitations rule applied by the Sixth Circuit (and the 5th and 11th Circuits)[7] contravenes law of this Court and wrongly denies condemned inmates access to the courts.

Cooey v. Strickland, 479 F.3d 412 (6th Cir. 2007),[8] was wrongly decided. After *Baze*, its reasoning can no longer be defended. This is for good reason, first expressed in the *Cooey* dissent. *Cooey*, 479 F.3d at 424-31 (Gilman, J., *dissenting*).

Judge Gilman stated:

> The majority defends its adoption of the Neville accrual point as "the most logical," but I consider even more logical the analysis of the district court in the present case that fixes the statute of limitations accrual date at the point when a petitioner's execution becomes imminent and he has reason to know of the facts giving rise to his claim.
>
> This accrual date provides clarity and certainty to both the death-sentenced inmate and the State that the sentence is final and not susceptible to attack, that the execution date is set, and that the protocol for that execution is likely fixed. Such clarity also aids the judicial process and increases the efficiency of judicial proceedings by ensuring that the federal courts are not overseeing simultaneous but contradictory arguments from the parties.

Cooey, 479 F.3d at 429.

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[7] *Walker v. Epps*, 550 F.3d 407, 414-15 (5th Cir. 2008); *McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008).

[8] *See also Cooey v Strickland*, 544 F.3d 588 (6th Cir. 2008), *cert. denied* 129 S.Ct. 394 (2008).

It is only upon the setting of a real execution date that an inmate will know with certainty the method and the protocol to be used for his execution. It is only at this point, that the inmate can know whether that protocol contains a substantial risk of inflicting unnecessary pain and suffering, *and*, whether the State knows or should know of such a risk.

Mr. West's case is no exception. Since his direct appeal became final, Tennessee has changed its execution protocol from: (1) electrocution; to, (2) electrocution or lethal injection, but defaulting to electrocution; to, (3) electrocution or lethal injection, but defaulting to lethal injection; to, (4) a period where it had no protocol to carry out either method of execution; and now, (5) Tennessee has a new lethal injection (and electrocution) protocol. Had Mr. West followed the rule in *Cooey*, requiring him to challenge the protocol at the conclusion of direct review and within one year of every significant change of Tennessee's execution protocols, Mr. West would have had been required to file suit, and the State would have had to go through the expense of defending such a suit, as many of five times. All other individuals sentenced to death would also be required to file similar suits each time their direct appeal became final or the protocol was changed.

The concept of "imminence" underlying *Cooey's* statute of limitations analysis flies in the face of the way that term is defined in every other type of "prospective harm" case. It suggests that capital defendants are deserving of *less* protection, and/or must show greater diligence with fewer resources than other litigants. These inconsistencies engender disrespect for the law. Moreover, equity

adequately protects a state's interests where last minute litigation seeks to prevent a state from carrying out a *lawful* execution so there is no basis for creating such disparate treatment for condemned inmates. Finally, *Cooey's* concept of "imminence" cannot be reconciled with the cause of action established in *Baze*.

D. Mr. West's underlying constitutional claim has merit and deserves judicial review, thus the rigid approach of the Sixth Circuit to the statute of limitations that denies him even the opportunity to be heard violates the First Amendment.

Mr. West alleged that use of an execution protocol that causes death by conscious suffocation violates the Eighth and Fourteenth Amendments. Evidence proffered in support of this claim included autopsy reports with toxicological findings, eyewitness statements regarding the executions of Robert Coe and Steve Henley, expert testimony and scientific evidence. This evidence 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 the State is aware that during Mr. West's execution he will very likely experience needless suffering.

This Court in *Baze v. Rees*, said 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, 553 U.S. at 49-50.

Mr. West alleged a valid cause of action that the new facts demonstrate the Tennessee protocol, when implemented as designed, does not present an "accident" or "innocent misadventure" resulting in conscious suffocation. Rather, they prove a pattern or "series" of cruel executions where all autopsied inmates were not

sufficiently anesthetized; something state officials may not ignore. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable... . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that the defendant has acted unlawfully.") (internal citations omitted).

As described by Judge Moore in her dissenting opinion, "West has alleged new evidence showing that the *practice* of the lethal-injection method in Tennessee has cause extreme pain and suffering, constituting a violation of the Eighth Amendment." *West v. Ray*, No. 10-6196, slip opinion p.12 (6th Cir. Nov. 4, 2010) (Moore, J., dissenting). Accordingly, Mr. West has set forth a valid cause of action deserving of full merits review.

CONCLUSION

For the reasons set forth above, Mr. West prays the Court grant *certiorari* review, or alternatively, grant a temporary stay of execution pending this Court's decision on the instant petition for *certiorari* review.

Respectfully submitted,

Stephen M. Kissinger
Federal Defender Services
Of Eastern Tennessee, Inc.
800 South Gay Street Suite 2400
Knoxville, TN 37929
(865) 637-7979
Stephen_Kissinger@fd.org

Counsel of record for Petitioner

LIST OF APPENDICES

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.

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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.

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

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