Attachment 5

to

Application for Interlocutory Appeal By Permission
Pursuant to Rule 9, T.R.A.P.

Memorandum in Opposition to Defendants' Response to Motion for Temporary Injunction Filed October 28, 2010

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST, Plaintiff v. **GAYLE RAY, in her official capacity as Tennessee's Commissioner of Correction,** **RICKY BELL, in his official capacity as Warden of Riverbend Maximum Security Institution,** **DAVID MILLS, in his official capacity as Deputy Commissioner of Tennessee Department of Correction,** **REUBEN HODGE, in his official capacity as Assistant Commissioner of Operations,** **JOHN DOE EXECUTIONERS 1-100,** **JOHN DOES 1-100,** Defendants	No.10-1675-I **DEATH PENALTY CASE** **EXECUTION SCHEDULED:** **November 9, 2010**

MEMORANDUM IN OPPOSITION TO DEFENDANTS' RESPONSE TO MOTION FOR TEMPORARY INJUNCTION[1]

Comes the Plaintiff, Stephen Michael West, and in opposition to Defendants' response to his Motion for Temporary Injunction submits the following memorandum of law:

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[1]Mr. West has already submitted all exhibits to this memorandum as exhibits to his Complaint for Declaratory Judgment and Injunctive Relief. Because these exhibits are voluminous, they will not be submitted again as attachments to this memorandum. In addition, for the sake of clarity, they are designated by the same exhibit number used in his Complaint for Declaratory Judgment and Injunctive Relief, *e.g.*, "Complaint Exhibit ___."

I. Introduction

Defendants erroneously suggest that *Baze v. Rees*, 553 U.S. 35 (2009) forecloses any claim which is supported by evidence of post-mortem thiopental levels. This narrow interpretation overlooks the central holding in *Baze* which follows long-standing Eighth Amendment precedent in suits challenging state actions regarding matters requiring scientific expertise. A plaintiff establishes an Eighth Amendment violation when he alleges facts and/or presents expert testimony demonstrating that a state intends to act in a manner that poses a substantial risk of serious harm. The Court in *Baze* did not discuss whether this standard may be met, in part, on a showing that post-mortem thiopental levels (revealed in data contained in state-conducted autopsy reports) puts a state on notice of a pattern of substantial risk of serious harm during executions.

Defendants further argue that they need only the slightest dispute in scientific opinion to foreclose any cause of action challenging a state's method of execution. The Supreme Court's Eighth Amendment jurisprudence underlying the *Baze* decision does not require one-hundred percent unanimity of scientific opinion regarding a risk of serious pain. Instead, it requires a substantial risk of serious pain. Again, an overly restrictive reading of the *Lancet* article footnote in *Baze*, 553 U.S. at 51, n.2, causes Defendants to overlook the proper Eighth Amendment standard and not address the proffered evidence placing state actors on notice that execution of Mr. West under the Tennessee protocol presents a substantial risk of serious harm that cannot be ignored.

The evidence alleged by Mr. West is unlike the evidence discussed in the *Lancet* article footnote. It contains all of the information which the *Lancet* article critics allege was lacking in

the study. The evidence before this Court reveals how much time elapsed between the inmates' executions and the collection of blood samples. It reveals the site from their bodies where those samples were drawn. It contains testimony from the State's expert describing the phenomena of "post-mortem" redistribution as an event which occurs only after the lapse of a substantial period of time (as opposed to just a few hours) and, even then, only gradually. It contains testimony from the State's expert that the only thiopental level obtained from a Tennessee inmate which even begins to approach (yet *still* does not reach) a level inconsistent with consciousness, was obtained from a site where "post-mortem redistribution" would have caused the level to be up to *twice* as high as it would have been at the time of death. In short, Mr. West's claims rely upon *the evidence regarding Tennessee executions* that he has presented to this Court, not what may or may not have happened in the executions covered by the *Lancet* study.

For these reasons, Defendants' opposition is without merit and this Court should enjoin Defendants from violating the federal and state constitutions in the course of Mr. West's November 9, 2010 execution, particularly when the Tennessee Supreme Court has directed Defendants' to carry out West's execution in accordance with the law.

II. The un-rebutted evidence submitted by Mr. West clearly establishes violations of the Eighth and Fourteenth Amendments of the United States Constitution and Art. I § 16 of the Tennessee Constitution.

The 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 West's execution he will very likely experience needless suffering.

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

> Our cases recognize that subjecting individuals to a risk of future harm--not simply actually inflicting pain--can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be "*sure or very likely* to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers." *Helling v. McKinney*, 509 U.S. 25, 33, 34-35, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993) (emphasis added). We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n. 9, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).
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> 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.
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> 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's evidence does not present an "accident" or "innocent misadventure" resulting in conscious suffocation. Rather, it proves a pattern or "series" of cruel executions where all autopsied inmates were not sufficiently anesthetized; something state officials may not ignore.

Accordingly, Defendants' argument misconstrues *Baze v. Rees*, *supra*, in a manner inconsistent with decades of precedent.

A. *Baze v. Rees* and the *Lancet* article footnote do not detract from Mr. West's likelihood of success on the legal merits of his claims.

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

Unlike West's claims, in *Baze,* the "[p]etitioners d[id] not claim that lethal injection or the proper administration of the particular protocol adopted by Kentucky by themselves constitute the cruel or wanton infliction of pain." 553 U.S. at 49. "Instead, petitioners claim[ed] that there is a significant risk that the procedures will not be properly followed--in particular, that the sodium thiopental will not be properly administered to achieve its intended effect--resulting in severe pain when the other chemicals are administered." *Id.* The Court affirmed that "subjecting individuals to a risk of future harm--not simply actually inflicting pain--can qualify as cruel and unusual punishment, however, it noted that the risk had to be more than the risk of an "accident" or "isolated mishap." *Id.* at 50.

The *Baze* Court rejected the petitioners' proposal to adopt a new standard, one which prohibits a protocol containing "unnecessary," or avoidable, risks. *Id.* at 47. The Court observed that this test would be problematic because the existence of any slightly safer alternative would

create an "unnecessary" risk if the alternative wasn't adopted. Thus, such a standard would render unconstitutional *any* risk of harm that could be mitigated by an alternative, *id.* at 51, and this could not be reconciled with existing precedent requiring a "*substantial* risk of serious harm." *Id.* at 50, quoting, *Farmer v. Brennan*, 511 U.S. 825, 846, & n.9 (1994) (emphasis added).

The Court said, "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." *Id.* at 51. This is because a new test that relies upon a marginally safer alternative to elevate an "unnecessary" risk to an unconstitutional, "substantial" risk, "would threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." *Id.* The Court said, "[s]uch an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures--a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death." *Id.* Thus, the Court upheld the "substantial" risk element of an Eighth Amendment claim as an element to be established independent of the existence of an alternative. *Id.* at 52.[2]

It was in this context that the Court dropped a footnote *sua sponte* discussing[3] a study on

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

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

thiopental concentrations in blood samples drawn from 49 executed inmates in order to illustrate why the "unnecessary" risk or "best practices" approach would be an improper standard. *Id.* at 51, n.2. The study appeared in the *Lancet* medical journal and concluded that most of the executed inmates had thiopental concentrations that would not be expected to produce a surgical plane of anesthesia and 43% had concentrations consistent with consciousness. *Id.* The study received some criticism of its methodology due to the fact that the blood samples were taken "several hours to days after" the inmates' deaths, which may affect the concentration levels of thiopental. *Id.* The original authors responded to the criticism and defended their methodology. *Id.*[4] The Supreme Court said:

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

Id.

The *Lancet* article footnote discussion must be read in the context of rejecting a "best practices" or "unnecessary" risk standard. The Court did not apply its discussion to the Eighth

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

Amendment standard upheld in *Baze*, which requires a threshold showing of a substantial risk of serious harm. *Id.* at 52, n.3. Thus, this discussion does not reduce the likelihood of success on the merits of Mr. West's claims because he has always asserted the proper legal standard and has presented facts meeting that standard.

B. The facts presented by Mr. West indicate a likelihood of success and have not been rejected by the United States Supreme Court.

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

First, *Baze* did not state or indicate that evidence of postmortem thiopental levels is insufficient to invalidate a lethal injection protocol. This is true because the *Baze* petitioners did not present evidence on thiopental levels, nor the *Lancet* article, to challenge Kentucky's protocol. *See Baze*, 553 U.S. at 110 Breyer, J. Dissenting)("neither the petition for certiorari nor any of the briefs filed in this Court . . . make any mention of the Lancet Study."). Thus, the Court did not render such a conclusion. This is also true because the *Lancet* article footnote illustrated why the "best practices" or "unnecessary" risk standard proposed by the *Baze* petitioners was not the proper Eighth Amendment standard. The Court was not speaking to the relevance of the *Lancet* article *vis-a-vis* the proper constitutional standard of a "substantial risk of unnecessary harm" as applied to a method of execution challenge. Thus, there could be no conclusion or indication that evidence of postmortem thiopental levels can never establish an Eighth Amendment claim.

Second, *Baze* did not state or indicate that a cause of action cannot be supported by

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

The Supreme Court stated in *Helling v. McKinney*, 509 U.S. 25 (1993), that there may be times where there exists a "sufficiently broad consensus" that a harm will occur and a state may not ignore it under the Eighth Amendment. *Id.* at 34. Rejecting the argument that the lack of such a consensus can be determined as a matter of law, the Court stated:

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

> rule at this juncture that it will be impossible for McKinney, on remand, to prove an Eighth Amendment violation based on exposure to ETS.
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> *Helling*, 509 U.S. at 34-35.

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

Third, the *Lancet* article footnote does undermine West's likelihood of success because it does not require not mean that unanimous expert opinion in order to prevail on an Eighth Amendment claim. Here, the evidence establishes that the State should know from every autopsy report of executed Tennessee inmates that a pattern of cruel and unusual punishment has resulted from use of the Tennessee protocol.[5] *Williams v. Mehra*, 186 F.3d 685, 692 (6th Cir. 1999) citing *Farmer*, 511 U.S. at 837. (Stating that the question, in the context of the policies or lack of policies is, "whether they kn[ew] of and disregard[ed] an *excessive* risk to inmate health or safety"). This evidence need not be unanimous or even rise to the level of a probability. *See Helling*, 509 U.S. at 34-35. A "broad consensus" does not equal unanimity and state action is not immune from an Eighth Amendment challenge simply because the State can produce an expert who adheres to a contrary position.

> While it is true that courts hesitate to find an Eighth Amendment violation when a prison inmate has received medical care, *Hamm v. Dekalb County*, 774 F.2d 1567, 1575 (11th Cir.1985), *cert. denied*, 475 U.S. 1096, 106 S.Ct. 1492, 89 L.Ed.2d 894 (1986), that "[h]esitation does not mean ... that the course of a physician's

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

> treatment of a prison inmate's medical or psychiatric problems can never manifest the physician's deliberate indifference to the inmate's medical needs." *Waldrop* [*v. Evans*, 871 F.2d 1030 (11th Cir.1989)] at 1035; *see also Murrell v. Bennett*, 615 F.2d 306, 310 n. 4 (5th Cir.1980) (treatment may violate Eighth Amendment if it involves "something more than a medical judgment call, an accident, or an inadvertent failure"). Thus, the district court erred as a matter of law in ruling that mere proof of medical care by a doctor consisting of diagnosis only sufficed to disprove deliberate indifference.

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

Where unanimity does not exist, a court has an obligation to hear the evidence, to weigh it, and to determine whether the science underlying an opinion is established to such a degree that a state may not claim it is subjectively blameless for ignoring it. *Baze*, 553 U.S. at 47, *citing Farmer*, 511 U.S. at 842, 846, & n.9 (1994). Thus, to prove an Eighth Amendment violation, a plaintiff need not show a risk by unanimous, uncontested evidence; but by substantial evidence. West has proffered substantial evidence worthy of further factual development and has demonstrated a likelihood of success on the merits.

III. Statute of Limitations

Asking this Court to adopt the federal court's view of when Mr. West's claims arose, Defendants claim for the first time that Mr. West's claims are barred by the statute of limitations. Defendants misread both federal and state law.

Under Tennessee law, a cause of action accrues, and the statute of limitations begins to run, at the earliest, when the defendant has committed a wrongful or tortious act. *Carvell v. Bottoms*, 900 S.W.2d 23, 28, 30 (Tenn. 1995); *Caldonia Leasing v. Armstrong, Allen, Braden, Goodman, McBride & Prewitt*, 865 S.W.2d 10, 13 (Tenn.Ct.App. 1992); *Ameraccount Club, Inc. v. Hill*, 617 S.W.2d 876, 878-79 (Tenn. 1981). It is simply axiomatic that a cause of action

accrues when the defendants have committed wrong and the defendant's wrongful act has, or will,[6] cause harm to the plaintiff. *Id.*

The Sixth Circuit's decision in *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), does not hold otherwise. In *Cooey*, the court stated:

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

479 F.3d at 416.

Nothing in *Cooey* suggests that Mr. West's causes of action accrued before Defendants' recent actions that established a cause of action. The United States Supreme Court's decision in *Baze v. Rees* 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 proved that the State had actual or implicit knowledge that such pain and suffering will result from carrying out its protocol and the State decided to go forward nonetheless, *i.e.*, the risk must be obvious.

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[6]The question of the immediacy of future harm (*i.e.*, at what point does a condemned inmate know, or should know, that the defendant's conduct in carrying out his execution will result in harm to the inmate), has been heavily litigated in the federal courts, *see, e.g., Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), but is largely irrelevant in this case. Here, Defendants' conduct did not become wrongful until they stated that Mr. West would be suffocated while conscious and paralyzed, *i.e.* that he would be executed by lethal injection. This statement sufficiently demonstrated an "'objectively intolerable risk of harm' that officials may not ignore." *Baze*, 553 U.S. at 50. That event did not occur until recently and Mr. West's lawsuit was filed well within Tennessee's one-year statute of limitations.

Mr. West's claims arose only when both conditions were satisfied. In *Baze*, the Supreme Court found that Kentucky had not committed the constitutional violations alleged because there was no showing that State officials knew, or had reason to know, that the execution protocol failed to properly anaesthetize condemned inmates. *Baze,* 553 U.S. at 50. Mr. West alleges that it is only upon the accumulation of all of the evidence from recent executions, including, specifically the evidence contained in the autopsy of Steven Henley that Defendants knew, or had reason to know, that Tennessee's lethal injection protocol, even when administered correctly, accomplished death by paralyzing ans suffocating conscious inmates. That evidence became available on March 10, 2010, when the State released the Henley autopsy report.

The risk alleged in Mr. West's Complaint did not become arise until the State received the information on March 10, 2010, which showed both: (a) that Mr. Henley was suffocated while conscious; and, (b) that the similar information in their possession regarding the executions of Mr. Workman and Mr. Coe were not an isolated events.

On July 15, 2010, when the Tennessee Supreme Court set November 9, 2010, as the date for Mr. West's proposed execution, Defendants had no intention to conduct, took no steps toward conducting, and did not take any of the wrongful acts alleged herein against Mr. West. During that entire period of time, from February 18, 2001, through October 20, 2010, Defendants were proceeding toward executing Mr. West by means of electrocution, Defendants' Response to Motion for Temporary Injunction, at p.2 ("The defendants maintain that the February 13, 2001 Election Affidavit [choosing electrocution as a means of execution] is valid and still effective."). Those actions alleged herein which occurred within that period of time, including those acts alleged relative to the revocation of all existing protocols and related procedures and the creation

of a completely new protocol in 2007, did not become wrongful as to Mr. West until Defendants sought to apply those acts to him on October 20, 2010. *Id.*

Because both October 20, 2010 (the first date that Defendants proceeded to execute Mr. West by means of lethal injection), and March 10, 2010 (the date upon which Defendants had reason to know that their lethal injection protocol suffocated conscious and paralyzed inmates and, accordingly, inflicted unnecessary pain and suffering occurred within one-year of the filing of Mr. West's complaint, the statute of limitations has not been violated.

IV. This Court should facilitate the expeditious resolution of this matter by reaching the merits of Mr. West's Motion for Temporary Injunction.

During the telephone hearing held on September 27, 2010, the Court expressed concern that, if it were to determine that it is powerless to enjoin Defendants and deny Mr. West's motion for want of jurisdiction, but then be reversed by the appellate court, it might not have sufficient time to consider the merits of Mr. West's Motion for Temporary Injunction or his complaint. That concern can be alleviated.

Even should this Court determine that it lacks jurisdiction, it may, and should, render an alternative decision on whether Mr. West has met the requirements for the issuance of the temporary injunctive relief he seeks. If the appellate court then determines that this Court had jurisdiction to make such a finding, the injunction could issue immediately upon remand and eliminate the danger that Mr. West might be executed before the Court could consider the merits of his complaint.

Furthermore, Defendants will not be unfairly prejudiced by such an approach. They have been on notice of Mr. West's arguments and they have been privy to the evidence he has

submitted in support of those arguments for over two months because it was contained in the pleadings he served upon these same Defendants in federal court. They have had ample time to obtain evidence in rebuttal and have chosen instead to rely upon legal argument against entering an injunction.

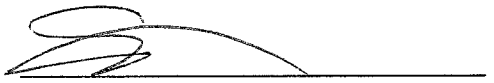
V. Conclusion

Defendants' claim that *Baze*, *Harbison*, *State v. Jordan*, 2010 WL 366853 (Tenn. September 22, 2010), or any other case where there has been no consideration of the evidence presented by Mr. West, controls the outcome of his case as a matter of law, is without any basis. Their suggestion that the *Baze* court made any "finding" about the reliability of the *Lancet* study, much less the underlying science, when no evidence was presented to the court on either subject and neither party even addressed the issue, is equally erroneous. In the face of an uninterrupted series of executions where the lethal injection protocol has suffocated conscious inmates, Defendants can no longer claim ignorance of the substantial risk of harm its protocol will inflict upon Mr. West. The Supreme Court's order of July 15, 2010, authorized Mr.. West's execution in accordance with the law. This Court has the power to require Defendants to follow the law. It should do so here.

Mr. West respectfully requests that his Motion for Temporary Injunction be granted.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

BY: 

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CERTIFICATE OF SERVICE

I, Stephen M. Kissinger, hereby certify that a true and correct copy of the foregoing document was sent via facsimile to:

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this the 28th day of October, 2010.

Stephen M. Kissinger