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

DON JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 3:06-0946**
	)	**JUDGE CAMPBELL**
GEORGE LITTLE, in his official capacity as Tennessee's Commissioner of Correction;	)	
	)	
RICKY BELL, in his official capacity as Warden, Riverbend Maximum Security Institution,	)	
	)	
JOHN DOE EXECUTIONERS 1-100,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS
OF DEFENDANTS LITTLE AND BELL

Defendants George Little and Ricky Bell, appearing in their official capacities only, have moved, pursuant to Fed. R. Civ. P. 12(b)(6), for this Court to dismiss this case for failure to state a claim for which relief can be granted.

The defendants submit the following in support of this motion.

PRELIMINARY STATEMENT

The plaintiff in this action is a death-sentenced inmate residing at Riverbend Maximum Security Institution, (Riverbend), in Nashville, Davidson County, Tennessee. (Complaint, ¶ 2). The defendants in this action are George Little, Commissioner of the Tennessee Department of Correction (TDOC), in his official capacity, and Ricky Bell, Warden

of Riverbend, in his official capacity. (Complaint, ¶¶ 3-4). The plaintiff also sues John Doe Executioners 1-100, who the plaintiff alleges are employed by the TDOC. The plaintiff also alleges that the defendants refuse to reveal their identity. (Complaint, ¶ 5).

The plaintiff alleges that he has been on death row since 1985. He alleges that, since he was sentenced to death prior to January 1, 2000, pursuant to Tenn. Code Ann. § 40-23-114, defendant Bell or his agent must give him the option to select either lethal injection or electrocution as his method of execution. If the death-sentenced inmate fails to make a choice, Tenn. Code Ann. § 40-23-114 mandates that he will be executed by lethal injection. (Complaint, ¶¶ 8-9).

The plaintiff contends that on June 20, 2006, the Tennessee Supreme Court set his execution for October 25, 2006. On June 1, 2006, the plaintiff, through counsel, sent a letter to defendant Little objecting to both methods of execution on the grounds that they violate the Eighth and Fourteenth Amendments to the United States Constitution. He also sought information about the two methods, including a request to have an independent expert test the electric chair. He alleges that defendant Little overruled his objections and declined to provide him with additional information. (Complaint, ¶¶ 10-11). He alleges that on or about September 19, 2006, he learned, through counsel, that the primary engineer of the Tennessee electric chair stated that an execution in it would be a "torture session." The plaintiff renewed his objection citing this statement. (Complaint, ¶ 12).

The plaintiff alleges that on September 28, 2006, defendant Bell presented him with an "Affidavit Concerning Method of Execution," which he had no choice but to sign. He placed a checkmark by, "I waive the right to have my execution carried out by lethal injection and choose to be executed by electrocution." The plaintiff's counsel attached a Notice of Objection to the waiver, the body of which is set out in the complaint. By doing so, the plaintiff

contends that he expressly informed the defendants that he does not consent to "be tortured" by any method of execution. (Complaint, ¶¶ 14-19).

The plaintiff sets forth his allegations objecting to the use of the electric chair as cruel and unusual punishment on pages 7 through 10 of the complaint. (Complaint, ¶¶ 20-39). The plaintiff sets forth his objections to the lethal injection protocol, the procurement of drugs for the lethal injection protocol, and the drugs used during the lethal injection protocol on pages 10 through 19 of the complaint. (Complaint, ¶¶ 40-104). The plaintiff contends that he has exhausted his administrative remedies as to electrocution and lethal injection. (Complaint, ¶ 104).

The plaintiff contends that his electrocution would violate the Eighth and Fourteenth Amendments as cruel and unusual punishment and would violate substantive due process. (Complaint, ¶¶ 105-108). He contends that the use of pancuronium bromide violates substantive due process. (Complaint, ¶¶ 109-113). He contends that the use of pancuronium bromide violates the Eighth and Fourteenth Amendments as cruel and unusual punishment. (Complaint, ¶¶ 114-119). He contends that the use of pancuronium bromide violates the Fourteenth Amendment by denying him equal protection. (Complaint, ¶¶ 120-122). He contends that the use of sodium thiopental, pancuronium bromide, and potassium chloride under the lethal injection protocol violates the Eighth and Fourteenth Amendments as cruel and unusual punishment. (Complaint, ¶¶ 123-125). He contends that inadequate procedures in the lethal injection protocol violate the Eighth and Fourteenth Amendments as cruel and unusual punishment. (Complaint, ¶¶ 126-128).

The plaintiff prays for an order declaring the use of the electric chair unconstitutional and enjoining its use; an order declaring the use of pancuronium bromide unconstitutional and enjoining its use; an order declaring the lethal injection protocol

unconstitutional as to the use of sodium thiopental and enjoining its use; an order declaring the lethal injection protocol unconstitutional and enjoining its use; and for other relief as the Court finds just. (Complaint, ¶¶ 129-134).

ARGUMENTS

I. THE PLAINTIFF HAS BEEN DILATORY IN FILING HIS COMPLAINT SEEKING EQUITABLE RELIEF.

The plaintiff filed his complaint on October 4, 2006 — a mere twenty-one days prior to his scheduled execution, and more than two years after the Supreme Court denied the plaintiff's petition for writ of certiorari on his federal habeas corpus case. *See Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003), *cert. denied*, 541 U.S. 1010, 124 S.Ct. 2074, 158 L.Ed.2d 621 (2004) (denying certiorari on April 26, 2004). The plaintiff could have, and should have, presented his challenges to the method of execution well before now.

Delays in bringing challenges to execution protocols are inexcusable. In *McQueen v. Patton*, 118 F.3d 460, 464 (6th Cir. 1997), the Sixth Circuit addressed the equity of allowing a dilatory challenge:

> Even were we to consider the merits of McQueen's claim, we would not permit his claim that death by electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Petitioner has known of the possibility of execution for over fifteen years. It has been ten years since a Kentucky governor first signed a death warrant for his electrocution. The legal bases of such a challenge have been apparent for many years. Indeed, petitioner's claims on the merits are replete with supporting arguments based on events and reasoning from every decade from the 1910s to the 1990s, even discounting the material cited to "Startling Detective" and "News of the Weird" (Memo in Support of Motion for Temporary Restraining Order and Preliminary Injunction, at 31, n.87 and App. 2, n.6.). Even though, in petitioner's mind, every year or every day may bring new support for his arguments, the claims themselves have long been available, and have needlessly and inexcusably been withheld. Thus, equity would not permit the consideration of this claim for that reason alone, even if jurisdiction were otherwise

proper.

(Citations omitted). Likewise, in *Hicks v. Taft*, 431 F.3d 916 (6th Cir. 2005), the Court concluded that a stay of execution was not warranted where an inmate, on the eve of his execution, moved to intervene in another inmate's challenge to the constitutionality of Ohio's lethal injection protocol. *See also Smith v. Johnson*, 440 F.3d 262, 263 (5th Cir. 2006) (affirming dismissal of § 1983 action challenging lethal injection procedures due to plaintiff's dilatory filing, *i.e.*, five days before the execution); *accord Kincy v. Livingston*, 2006 WL 775126 (5th Cir. Mar. 27, 2006) (copy attached) (twenty-seven days before the execution); *Hughes v. Johnson*, 2006 WL 637906 (5th Cir. Mar. 14, 2006) (copy attached) (fourteen days before the execution).

More recently, in *Alley v. Little*, 181 Fed. Appx. 509 (6th Cir. 2006), *cert. denied*, 126 S.Ct. 2975 (2006) (copy attached), the Sixth Circuit Court of Appeals vacated an injunction and stay of execution entered by the United States District Court barring the execution of Sedley Alley, a condemned Tennessee inmate. Among other things, the Sixth Circuit based its decision on Alley's unnecessary delay in bringing his challenge to the lethal injection protocol.

> Fourth, we take note of the unnecessary delay with which Alley brought his challenge to Tennessee's lethal injection protocol. He was on notice as to both the particulars of the protocol and the availability of making a claim such as the one he now raises for several years before he filed his last minute complaint. Another Tennessee death row inmate, Abu-Ali Abdur'Rahman, petitioned the state Commissioner of Correction to declare the lethal injection protocol unconstitutional in April 2002. *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 299-300 (Tenn. 2005). Alley's execution date was set on January 16, 2004, for June 3rd of that year, following the Supreme Court's denial of a writ of certiorari to review our court's decision not to grant habeas relief. *Alley v. Bell*, 540 U.S. 839, 124 S.Ct. 99, 157 L.Ed.2d 72 (2003); *State v. Alley*, No. M1991-00019-SC-DPE-DD (Tenn. Jan. 16, 2004). Lethal injection has been the only method of execution in Tennessee since 2000 for all death row inmates save those who affirmatively express a preference for

> electrocution. Tenn. Code Ann. § 40-23-114. Alley had ample time in which to express such a preference and/or file his current grievance. Instead he waited until thirty-six days before his currently scheduled execution date.

Id. at 513.[1]

"[W]aiting to file such a challenge [to the method of execution] just days before a scheduled execution constitutes unnecessary delay." *Smith*, 440 F.3d at 263 (*citing Harris v. Johnson*, 376 F.3d 414, 417-419 (5th Cir. 2004)). "'Given the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against' last-minute equitable requests." *White v. Johnson*, 429 F.3d 572, 574 (5th Cir. 2005) (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). "This presumption occurs because the inmate could have brought the action at an earlier time, which would have allowed the court to consider the merits without having to utilize last-minute equitable remedies." *Id.* Here, plaintiff could easily have filed his lawsuit years ago; "[b]y waiting as long as he did, [plaintiff] leaves little doubt that the real purpose behind his claim is to seek delay of his execution. . . . " *Harris*, 376 F.3d at 418. A Court of equity must not countenance such dilatory tactics; particularly so here, since at this juncture, with plaintiff having long since been denied federal habeas corpus relief from his conviction and sentence, "the State's interests in finality are all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). "Finality serves . . . to preserve the federal balance. . . . [The] federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot

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[1] After the Sixth Circuit vacated the stay the Governor of Tennessee granted Alley a fifteen-day reprieve on unrelated grounds. On June 2, 2006, upon the expiration of that reprieve, the Tennessee Supreme Court re-set the execution of Alley's sentence for June 28, 2006. *State v. Alley*, No. M1991-00019-SC-DPE-DD (Tenn. June 2, 2006). On June 14, 2006, the district court dismissed Alley's complaint on the basis of the Sixth Circuit's prior holding that he had unnecessarily delayed bringing his claims. *Alley v. Little*, 2006 WL 1697207 (M.D. Tenn), affirmed, 2006 WL 1736345 (6th Cir. 2006), *cert. denied*, 126 S.Ct. 2975 (2006).

enforce them.'" *Id.*, 523 U.S. at 556 (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)) .

The plaintiff had abundant opportunities to make his challenges well before October 4, 2006. The plaintiff has been sentenced to death since 1985. By amendments to Tenn. Code Ann. § 40-23-114 that occurred in 1998 and 2000, the plaintiff was given the choice of death by lethal injection. At a minimum, he could have filed his action on August 10, 2004, when the Tennessee Supreme Court first set the execution of his sentence for November 16, 2004. *See State v. Donnie Johnson*, No. M1987-00072-SC-DPE-DD (Tenn. June 20, 2006) (order setting date of execution) (copy attached as Exhibit A). Furthermore, the current execution date was set on June 20, 2006; thus he waited over three months from that date to file his action. *Id.*

The plaintiff's complaint is due to be dismissed on the basis of unnecessary delay.

II. THE STATUTE OF LIMITATIONS BARS THE PLAINTIFF'S ACTION.

There is no specific statute of limitations for actions arising under 42 U.S.C. § 1983. When Congress has not established a time limitation for a federal cause of action, the settled practice by federal courts has been to adopt a local time limitation if it is not inconsistent with the federal law or policy to do so. *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). More specifically, federal courts should look to the most analogous state statute of limitations to apply to a claim for personal injury under 42 U.S.C. § 1983. *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980).

Tenn. Code Ann. § 28-3-104(3) provides that civil actions for compensatory or punitive damages, or both, under the federal civil rights statutes must be brought within one year after the cause of action accrues. This statutory provision has been held by the Sixth Circuit to be the applicable statute of limitation with respect to section 1983 actions brought in the State of

Tennessee. *Berndt v. State of Tennessee*, 796 F.2d 879 (6th Cir. 1986).[2] Therefore, the plaintiff in this case is limited to one year after the accrual of his claim within which to bring an action under 42 U.S.C. § 1983.

Although the duration of the statute of limitations for actions under 42 U.S.C. § 1983 is governed by state law, federal law governs when the statute begins to run. *Sharpe v. Cureto*n, 319 F.2d 259, 266 (6th Cir. 2003). Under federal law, the "discovery rule" applies to establish the date on which the statute of limitations begins to run, i.e., when the plaintiff knew or in the exercise of due diligence should have known of the injury that forms the basis of his or her action. *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984). The test is an objective one. The Court must determine "what event should have alerted the typical lay person to protect his or her rights." *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991).

According to the plaintiff's own complaint, he has been a death-row inmate in Tennessee since October of 1985. (Complaint, ¶ 2). On May 18, 1998, the Tennessee General Assembly amended Tenn. Code Ann. § 40-23-114 to provide that an inmate sentenced to death by electrocution could be executed by lethal injection if the inmate waived his right to die by electrocution and affirmatively chose to die by lethal injection. Chap. 982 of the Public Acts of 1998. On March 30, 2000, the Tennessee General Assembly amended Tenn. Code Ann. § 40-23-114 to provide that an inmate sentenced to death by electrocution would be executed by lethal injection unless the inmate affirmatively chose to die by electrocution. Chap. 214 of the Public Acts of 2000. Thus, the plaintiff knew or in the exercise of due diligence should have known about the amendments to Tenn. Code Ann. § 40-23-114 as early as May of 1998 and March of

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[2] This one year statute of limitation has been extended to suits for injunctive relief under 42 U.S.C. § 1983. *See Cox v. Shelby State Community College*, 48 Fed.Appx. 500, 507 (6th Cir. 2002) (copy attached).

2000.

The plaintiff's complaint herein was filed on October 4, 2006. The plaintiff's complaint is barred by the statute of limitations.

III. THE PLAINTIFF HAS WAIVED HIS CONSTITUTIONAL CLAIMS BY AFFIRMATIVELY ELECTING ELECTROCUTION, AND ELECTROCUTION DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

The plaintiff's choice of electrocution constitutes a waiver of any claim that such a method of execution is unconstitutional. *Stewart v. LaGrand*, 526 U.S. 115, 119 S.Ct. 1018, 143 L.Ed.2d 196 (1999). In that case, the Supreme Court held that a condemned inmate who chose lethal gas as his method of execution rather than lethal injection waived his claim that execution by lethal gas was unconstitutional. *Id.*

The plaintiff's attorney has signed a Notice of Objection asserting that the plaintiff's choice of electrocution was not "free, knowing, voluntary, or intelligent." (Complaint, ¶ 18). However, under the authority of *White v. Gerbitz*, 860 F.2d 661 (6th Cir. 1988), and *Leaman v. Ohio Department of Mental Retardation & Developmental Disabilities*, 825 F.2d 946 (6th Cir. 1987), the fact that the plaintiff was represented by competent counsel when he chose electrocution demonstrates that his choice was free, knowing, voluntary, and intelligent.

If the plaintiff had done nothing, the method of execution would have been death by lethal injection. This method of execution has been held constitutional by the Tennessee Supreme Court. *See Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005), *cert. denied*, 126 S.Ct. 2288, 164 L.Ed.2d 813 (2006). Additionally, the Sixth Circuit Court of Appeals declined to find the lethal injection protocol unconstitutional in *Alley v. Little*, 181 Fed.Appx. 509, 512 (6th. Cir. 2006), *cert. denied*, 126 S.Ct. 2795 (2006) ("No federal court has found the lethal injection protocol as such to be unconstitutional. We will not do so today.").

Additionally, the Sixth Circuit has declined to hold that electrocution is cruel and unusual punishment. *McQueen v. Patton*, 118 F.3d 460, 464 (6th Cir. 1997). As recently as 2001, the Sixth Circuit held electrocution to be constitutional in *Buell v. Mitchell*, 274 F.3d 337, 370 (6th Cir. 2001). The Court stated:

> Finally, Buell asserts that death by electrocution , as required under Ohio Rev. Code § 2949.22, violates the constitutional prohibition of cruel and unusual punishment. Courts have consistently upheld the constitutionality of the imposition of the death penalty in general, s*ee Gregg*, 428 U.S. at 187, 96 S.Ct. 2909, and by electrocution in particular. See *In re Kemmler*, 136 U.S. 436, 449, 10 S.Ct. 930, 34 L.Ed. 519 (1890); *Sullivan v. Dugger*, 721 F.2d 719, 720 (11th Cir. 1983); *Spinkellink v. Wainwright*, 578 F.2d 582, 616 (5th Cir. 1978). This court recently concluded that a petitioner attacking the constitutionality of death by electrocution failed even to present an indication of a likelihood of success on the merits. *See In re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997). Moreover, we note that the Ohio statute allows Buell the option of choosing between death by electrocution or death by lethal injection, a form of execution that Buell does not argue is cruel and unusual. Ohio Rev. Code § 2949.22(B); see also *Smith v. Anderson*, 104 F. Supp.2d 773,848 (S.D. Ohio 2000). Electrocution has yet to be found cruel and unusual punishment by any American court. *See Sapp*, 118 F.3d at 464. We decline to be the first.

Id.

Accordingly, the plaintiff waived his constitutional claim when he chose electrocution. Even if he had not waived his claim, electrocution has been upheld as constitutional by the Sixth Circuit.

IV. PLAINTIFF'S CHALLENGE TO TENNESSEE'S LETHAL INJECTION PROTOCOL IS MOOT.

The plaintiff has filed a suit challenging, among other things, Tennessee's lethal injection protocol. However, on September 28, 2006, the plaintiff chose electrocution as the method of execution. Consequently, his challenge to the Tennessee lethal injection protocol is hypothetical and does not present a justiciable case or controversy.

Federal Courts are limited by Art. III of the Constitution to deciding cases and controversies. *DeFunis v. Odegaard,* 416 U.S. 312, 317, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). For this Court to have jurisdiction over the plaintiff's claims for injunctive relief, an actual controversy must exist at all stages of the litigation. *Id.* at 319. Where intervening events occur during the pendency of a lawsuit which render injunctive relief moot, those claims for relief must be dismissed for lack of subject matter jurisdiction. *Mosley v. Hairston,* 920 F.2d 409, 414 (6th Cir. 1990), (enactment of the Family Support Act of 1998 rendered moot the plaintiff's injunctive claims for compliance with the former version of the statute); *see also Univ. of Texas v. Camenisch*, 451 U.S. 390, 396, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981), (when injunctive aspects of a case become moot during the course of an appeal from a preliminary injunction, those issues cannot be resolved on appeal). Since the plaintiff has chosen electrocution, his challenge to the lethal injection protocol is irrelevant. *See, e.g. Bell v. True,* 413 F.Supp.2d 657 at 737 (W.D. Va. 2006), ("For Bell's lethal injection claim to be relevant, he would first have to choose it over electrocution, the constitutionality of which has been established by existing precedent.").

V. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR VIOLATION OF THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause of the Fourteenth Amendment is "essentially a direction that all persons similarly situated be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). The Equal Protection Clause is violated when a state actor intentionally discriminates against a member of a protected class because of the person's membership in such class. *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 341 (6th Cir. 1990).

In this case the plaintiff asserts an equal protection claim because he is subject to execution through the use of pancuronium bromide while under the Nonlivestock Animal Humane Death Act, Tenn. Code Ann. §§ 44-17-301 et seq., the State protects pets including dogs, cats, rabbits, chicks, ducks, and pot-bellied pigs from the use of pancuronium bromide when being euthanized. This claim is hypothetical, as previously discussed; but even if it were not, the claim should fail. The Equal Protection Clause prohibits disparate treatment of those similarly situated. The plaintiff is a human being and, therefore, is not similarly situated with a pet. Also, execution by lethal injection is not by definition equivalent to "euthanasia" as that word is commonly applied to human beings. The circumstances under which pets may be euthanized and those attendant to the execution of a human being are so wholly different as to render any comparison pointless. *See Darick Demorris Walker v. Gene M. Johnson, et al*., No. 05-0934, p.11 memorandum, (U.S.D.C., W.D., Va., 2006) (copy of order and memorandum attached), ("Finally, any discussion by Plaintiff about the standards of animal euthanasia has no bearing on death penalty matters and is rejected by this Court.").

CONCLUSION

In light of the above, defendants Little and Bell, appearing in their official capacity only, move that the plaintiff's complaint be dismissed for failure to state a claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2006, a copy of the foregoing memorandum was filed electronically. Notice of this filing will be sent to the parties listed below by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt or by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

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