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

SEDLEY ALLEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 3:06-0340**
	)	**JUDGE TRAUGER**
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 PHYSICIANS 1-100;	)	
	)	
JOHN DOE PHARMACISTS 1-100;	)	
	)	
JOHN DOE MEDICAL PERSONNEL 1-100;	)	
	)	
JOHN DOE EXECUTIONERS 1-100;	)	
	)	
JOHN DOES 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 condemned inmate residing at Riverbend Maximum Security Institution, (Riverbend), in Nashville, Davidson County, Tennessee. His execution by lethal injection is scheduled for May 17, 2006, at 1:00 a.m. The essence of the plaintiff's complaint is that the State intends to use a protocol whereby he would be injected with a dose of sodium thiopental, then with a dose of pancuronium bromide (Pavulon), and then with a dose of potassium chloride. The plaintiff contends that the use of this protocol is unconstitutional. He contends that the sodium thiopental does not sufficiently anesthetize any individual. He contends that the use of pancuronium bromide is arbitrary, serves no legitimate interest, unreasonably risks the infliction of torture, and offends the dignity of humanity. He contends that its use violates equal protection. He contends that the potassium chloride does not stop the heart. He contends that the use of this mixture of chemicals causes a painful death experienced without total unconsciousness. He contends that this Court should enter a judgment declaring the use of pancuronium bromide unconstitutional and enjoining its use. He contends that this Court should declare the protocol unconstitutional and enjoin its use as unconstitutional under the Eighth, Ninth, and Fourteenth Amendments. (Complaint, ¶¶ 1-2).

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 names John Doe defendant physicians, pharmacists, medical personnel, executioners, and any and all other

persons involved in the plaintiff's execution. (Complaint, ¶¶ 5-9).[1]

ARGUMENTS

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

The plaintiff filed his complaint on April 11, 2006 — a mere thirty-six days prior to his scheduled execution. The plaintiff had abundant opportunities to challenge the lethal injection protocol well before that. 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.

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[1] Although the undersigned does not represent the John Doe defendants, the filing of a complaint against "John Doe" defendants does not toll the running of the statute of limitations against those parties. *See Cox v. Treadway*, 75 F.3d 230 (6th Cir. 1996); *Bufalino v. Michigan Bell Telephone Co.*, 404 F.2d 1023, 1028 (6th Cir. 1968). Thus, to the extent the plaintiff seeks to bring any complaint against any other individual or entity, he must identify the defendant and file a lawsuit within the one-year statute of limitations applicable to § 1983 actions. Tenn. Code Ann. § 28-3-104(a).

(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).

"[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;[2] "[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.[3] A

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[2] At a minimum, he could have filed it on January 16, 2004, when the Tennessee Supreme Court set the execution of his sentence for June 3, 2004. *See State v. Sedley Alley*, No. M1991-00019-SC-DPE-DD (Tenn. Jan. 16, 2004) (order setting date of execution).

[3] Plaintiff acted likewise in the face of his June 3, 2004, execution date. On May 12, 2004, just twenty-two days prior, plaintiff filed a motion under Fed.R.Civ.P. 60(b) to reopen his habeas corpus proceeding. The district court stayed the execution on May 19, 2004, on the basis of a then-pending question regarding the proper treatment of such motions in habeas cases.

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

Dismissal of plaintiff's late request for equitable relief is also particularly appropriate for yet another reason. On April 19, 2006, plaintiff refused to sign the "Affidavit to Elect Method of Execution" presented to him by the warden pursuant to Tenn. Code Ann. § 40-23-114. (copy attached) The consequence of his failure to choose a method, as the Affidavit indicates, results in his execution being carried out by lethal injection. Having failed to opt out of this method of execution, as is his right under the statute, plaintiff has brought about the condition from which he seeks equitable relief. Accordingly, he is not now entitled to such relief. *Cf. Stewart v. LaGrand*, 526 U.S. 115 (1999).

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.[4] 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 as federal law if it is not inconsistent with the federal law or policy to do so. *Wilson v. Garcia*, 471 U.S. 261, 105

See Alley v. Bell, 392 F.3d 822, 826-827 (6th Cir. 2004), *rehearing en banc granted*, 405 F.3d 371 (6th Cir. 2005).

[4] The United States Supreme Court has yet to settle the question whether § 1983 is a proper vehicle for bringing a method -of-execution claim like plaintiff's. *See Hill v. Crosby, cert. granted*, 126 S.Ct. 1189 (2006). Defendants, however, assume arguendo that it is.

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).[5] 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), *cert. denied*, 540 U.S. 876, 124 S.Ct. 228, 157 L.Ed.2 138 (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).

The plaintiff herein has been a death-row inmate in Tennessee since before 1989. His death sentence and conviction were affirmed by the Supreme Court of Tennessee on August

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[5] 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).

7, 1989. *State v. Alley*, 776 S.W.2d 506 (Tenn. 1989). In June of 1998, shortly after the legislature enacted lethal injection as a means of execution, the TDOC Commissioner appointed a committee to establish a lethal injection protocol. *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 300 (Tenn. 2005). This lethal injection protocol was used in the execution of Robert Glen Coe in April of 2000. *Id.* at 301. The plaintiff is familiar with the *Abdur'Rahman v. Bredesen* decision and the fact that it concerns the lethal injection protocol about which he complains as evidenced by his Complaint. (Complaint, p. 2, fn 1). In fact, his complaint evidences the fact that he was aware that this protocol was used in the execution of Robert Glen Coe in April of 2000. (Complaint, ¶¶ 46-48 and 74). Thus, the plaintiff knew or in the exercise of due diligence should have known about the lethal injection protocol as early as April of 2000.

On June 1, 2003, Chancellor Ellen Hobbs Lyle of the Chancery Court for the State of Tennessee, Twentieth Judicial District, Davidson County, Part III, issued her Memorandum and Order in which she held that the TDOC lethal injection protocol does not violate the United States Constitution or the Tennessee Constitution. *Abu-Ali Abdur'Rahman v. Don Sundquist, et al.*, In the Chancery Court for the State of Tennessee, Twentieth Judicial District, Davidson County, Memorandum and Order (certified copy attached). Thus, without question, the plaintiff knew or in the exercise of due diligence should have known about the lethal injection protocol and that it had been upheld as constitutional in June of 2003.

The plaintiff's complaint herein was filed on April 11, 2006. The statute of limitations on his cause expired in June of 2004, at the latest. The plaintiff's complaint is barred by the statute of limitations.

III. PLAINTIFF'S CHALLENGE TO TENNESSEE'S LETHAL INJECTION PROTOCOL HAS ALREADY BEEN ADJUDICATED AND REJECTED; HIS CLAIMS SHOULD BE SUMMARILY DISMISSED ON THE MERITS, AS THE FACTS ARE INSUFFICIENT TO WARRANT RELIEF.

The challenge that plaintiff presents to Tennessee's lethal injection protocol has already been fully litigated and adjudicated in state court. As plaintiff's complaint alludes,[6] in *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005), *petition for cert. filed (No. 05*-1036) (U.S.), the Tennessee Supreme Court rejected an Eighth Amendment challenge to the protocol, holding that the prisoner there had "failed to establish that the lethal injection protocol is cruel and unusual punishment under the United States or Tennessee constitutions." 181 S.W.3d at 309. The court also rejected a Due Process challenge to the protocol, holding that the prisoner had "failed to demonstrate a violation of either procedural or substantive due process under the United States or Tennessee constitutions." *Id.*, 181 S.W.3d at 310.

In so holding, the court concluded that Tennessee's lethal injection protocol was consistent with contemporary standards of decency, finding that "the evidence in this case has established that Tennessee's lethal injection protocol is consistent with the overwhelming majority of lethal injection protocols used by other states and the federal government." *Id*., 181 S.W.3d at 307. The court further concluded that the protocol did not "offend[] either society or the inmate by the infliction of unnecessary physical or psychological pain and suffering." *Id.* "[A]lthough it was undisputed that the injection of Pavulon and potassium chloride would alone cause extreme pain and suffering, all of the medical experts who testified before the Chancellor agreed that a dosage of five grams of sodium Pentothal as required under Tennessee's lethal injection protocol causes nearly immediate unconsciousness and eventually death." *Id*., 181 S.W.3d at 307-308. The court also rejected arguments for how perceived deficiencies in the

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[6] Complaint, ¶3 n.1.

protocol's procedures heighten the risk, finding that such arguments "simply are not supported by the evidence in the record." *Id.*, 181 S.W.3d at 308. The court went on to conclude, with respect to the Due Process challenge, that "there is nothing arbitrary, irrational, improper or egregious in the manner in which the Department implemented a lethal injection protocol, i.e., by studying the lethal injection protocols of other states and the federal government and by using those protocols as models for the creation of Tennessee's protocol" *Id*., 181 S.W.3d at 310. And it reiterated in this context that "there is no evidence that the Tennessee lethal injection protocol creates an unreasonable risk of unnecessary pain and suffering." *Id*.

Tennessee's highest court has thus already squarely addressed and rejected the same constitutional challenges to the state's lethal injection protocol that plaintiff now presents to this Court.[7] Notwithstanding this fact, Plaintiff will no doubt contend that this state court precedent is merely persuasive authority and, thus, not binding on this Court. Be that is it may, *see RAR, Incorporated v. Turner Diesel, Limited*, 107 F.3d 1272, 1276 (7th Cir. 1997),[8] here this precedent assumes special significance due to plaintiff's reliance in his complaint on the original trial court order issued in *Abdur'Rahman.*

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[7] Defendants acknowledge that, in addition to his Eighth Amendment and Due Process claims, plaintiff brings an Equal Protection claim and a Ninth Amendment claim. But for the reasons discussed below, these claims are likewise subject to summary disposition on the merits.

[8] State court precedent is binding, however, as to issues of state law. *See id*. And the Tennessee Supreme Court also held in *Abdur'Rahman* that the Tennessee Nonlivestock Humane Death Act, Tenn. Code Ann. § 44-17-301 *et seq*, had no application to the capital punishment context. 181 S.W.3d at 313. This holding alone warrants the dismissal of plaintiff's Equal Protection claim, Complaint, ¶¶ 88-90, as well as part of his Eighth Amendment claim, Complaint, ¶¶ 82-87, as these claims are predicated on the application of this statute.

Where, as here, a defendant moves to dismiss under Fed.R.Civ.P. 12(b)(6), the court, accepting the allegations of the complaint as true and drawing all inferences in favor of the nonmoving party, may dismiss the complaint if it is satisfied that the plaintiff can prove no set of facts in support of his claim that will entitle him to relief. *See Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). But in making this inquiry, the court is not obliged to ignore facts that undermine the plaintiff's claims. *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998). And while the court's inquiry on a motion to dismiss is limited to the pleadings, it may nevertheless consider facts stated both in the complaint and in documents alleged or referenced in the complaint. *See Young v. Lepone*, 305 F.3d 1, 11 (1st Cir. 2002) (documents from which complaint contained extensive excerpts and references may be considered by district court on motion to dismiss); *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (court may consider documents of which plaintiff had notice and on which he relied in bringing suit); see generally 2 James Wm. Moore, *Moores' Federal Practice* § 12.34[2] (3d ed. 2006).

Here, plaintiff excerpts from and references repeatedly in his complaint the order of the trial court in *Abdur'Rahman*: *Abdur'Rahman v. Sundquist*, No. 02-2236-III (Tenn.Chanc.Ct. June 2, 2003) (memorandum and order dismissing petition with prejudice) (copy attached). *See* Complaint, ¶¶ 65, 80; *see also* Complaint, ¶¶ 77, 82, 88, 91, 94, 97 (incorporating ¶ 65 by reference). The facts stated in that order — indeed, the factual *findings* made by the state court beyond the one singled out by plaintiff — are therefore properly considered by this Court in ruling on defendant's motion to dismiss.[9] These findings not only

[9] Logic and fairness dictate this conclusion as well. Since plaintiff has relied on Chancellor Lyle's finding that pancuronium bromide is unnecessary, he should also be held, at a minimum, to the chancellor's related finding that it ultimately mattered not, given the reliable administration of a lethal dose of a barbiturate sedative.

undermine the factual predicate for plaintiff's claims, they eliminate it. Consequently, plaintiff's claims should be summarily dismissed on the merits under Rule 12(b)(6).

As found by the state trial court after an evidentiary hearing, the method of lethal injection in Tennessee consists of the injection of three drugs: sodium thiopental (Pentothal), pancuronium bromide (Pavulon), and potassium chloride. Seven syringes are prepared: one syringe of Pentothal, two syringes of Pavulon, two syringes of potassium chloride, and two syringes of saline.[10] Then seven exact replicas of these syringes are prepared as backups. The syringes are labeled 1 through 7 in the sequence that they are to be injected, namely, Pentothal, saline, Pavulon, saline, and potassium chloride. They are also color-coded based on the contents of the syringe. Abdur'*Rahman*, No. 02-2236-III, Order, pp. 3-4.

After the inmate is transported to the execution chamber, IV catheters are placed in both of the inmate's arms by certified EMT paramedics. After the flow of normal saline is begun, the paramedics leave the execution chamber. The warden, deputy warden, and a chaplain remain. The executioner is located in a room next to the execution chamber, but behind a window with a portal for the IV lines. There is also a camera above the gurney in the execution chamber and a monitor in the executioner's room. *Id*., p. 4.

At the appropriate time, the warden signals the executioner to begin the sequential injection of the three drugs into the IV tubing connected to the catheter in the inmate's arm. The camera and monitor allow the executioner to observe the flow of the drugs to the IV; the warden,

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[10] "The Pentothal comes in a powder form which [the warden] is required to mix with sterile water with the use of syringes. He sticks a needle into the sterile water vial, withdraws the necessary amount to mix with the Pentothal powder. He then shakes the mixture and draws it into a big syringe with sterile water. The shelf life of the Pentothal mixture is very short, 24 hours or less. The shelf life of the powder is much longer, in the range of six months. That is why the Pentothal is not converted to a liquid state until just before the execution." *Id.*, p. 3.

who is located approximately a foot from the inmate's head, can also see the flow of the drugs through the tubing and can notify the executioner if problems are encountered. Following the injection of the drugs and a five-minute waiting period, the inmate is examined by a physician, who pronounces death. *Id.*, pp. 4-5.

The state court found that "[this] method was shown by the proof to be reliable in rendering in inmate unconscious, if not dead, before the paralytical and lethal painful drugs take effect." *Id.*, p. 2. "[S]ome 30 states use the same lethal injection method as Tennessee, including use of Pavulon. Tennessee copied other states in developing its method." *Id.*, pp. 8-9. While the court did find, as plaintiff says, "that the State failed to provide any proof of the reasons for [the use of Pavulon] in the lethal injection method" and, thus, that it was "unnecessary" *id*., pp. 12, 13, it nevertheless also found that "there is less than a remote chance that the condemned would ever be conscious by the time the Pavulon was administered." *Id.*, p. 13.

> All of the experts testified that if the lethal injection method proceeds as planned it will not result in physical or psychological suffering: the five grams of Pentothal will render the prisoner unconscious or dead, Pavulon is injected and paralyzes the prisoner, and the sodium (sic) chloride stops the heart.

Id., p. 14[11]

The state court rejected arguments based on perceived deficiencies in the protocol's procedures, *i.e.*, the use of Pentothal, the lack of physical proximity between the inmate and the executioner, color-coding of the syringes, and the lack of physician involvement.

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[11] "A large dose of Pentothal is applied in the Tennessee lethal injection method — five grams. The testimony from the experts was that a dosage in this amount in and of itself should result in death." *Id.*, p. 10.

Id., pp. 9-11. It found that procedures followed in a medical, surgical setting are "distinguishable from an execution," where "[a] paramount concern . . . is security." *Id*., p. 9. The court also found that "[t]he warden has been trained on detecting problems such as crimping of the IV line, or failure of the injection to go into the vein." *Id*., p. 10. *See also id.*, p. 16 (crediting testimony of warden regarding "precautions taken and training engaged in to minimize error"). The court also credited "the direct evidence of the effects of the Tennessee lethal injection method in question," namely, the autopsy results of a previously executed Tennessee inmate, Robert Glenn Coe. *Id*., p. 15.

> The autopsy revealed that the level of Pentothal remaining in the body after prisoner Coe's execution was not only therapeutic, i.e. the prisoner lost consciousness before the effects of the Pavulon, but it was at a lethal level. The therapeutic, lethal level of Pentothal in the body following execution demonstrates that *the potency of the Pentothal was in no way compromised and that there was no problem with the IV injection and intake*.

Id. (emphasis added). Accordingly, the court ultimately found "that there is less than a remote chance that the prisoner will be subjected to unnecessary physical pain or psychological suffering under Tennessee's lethal injection method." *Id*., p. 17.

IV. 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 argument must fail for obvious reasons. 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.

V. THE PUBLIC DEFENDER'S OFFICE IS BARRED FROM BRINGING A PRIVATE CIVIL ACTION. THEREFORE, THIS ACTION SHOULD BE DISMISSED AS THE UNAUTHORIZED PRIVATE PRACTICE OF LAW.[12]

The defendants further aver that this matter should be dismissed because the Federal Public Defender is not authorized to pursue a civil rights actions on behalf of the plaintiff or any other individual. There is no provision for the appointment of a Federal Public

[12] The defendants note that the Federal Public Defender's Office, which was appointed by U. S. District Judge Bernice Donald to represent the plaintiff in his 28 U.S.C. § 2254 action, was allowed to proceed on behalf of the plaintiff in *Alley v. Key*, No. 2:06-CV-2201, a 42 U.S.C. § 1983 action filed in the U. S. District Court for the Western District of Tennessee. The decision was based on 21 U.S.C. § 848(q)(8) which allows attorneys appointed in death penalty cases to "represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." The defendants disagree that § 848(q)(8) should be read so broadly as to permit the filing of a § 1983 action.

Defender in a civil action, and the office of Federal Public Defender is barred from instituting any action on its own. *See* 18 U.S.C. § 3006A(g)(2)(A) ("Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law"); Administrative Office of the U.S. Courts, *Guide to Judiciary Policies and Procedures*, Vol. II, Ch. VI. Moreover, Canon 5 of the Code of Conduct for Federal Public Defender Employees provides:

> A federal public defender employee should regulate extra-official activities to minimize the risk of conflict with official duties.
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> D. Practice of Law. A defender employee should not engage in the private practice of law. Notwithstanding this prohibition, a defender employee may act pro se and may and may, without compensation, give legal advice to and draft or review documents for a member of the defender employee's family, so long as such work does not present an appearance of impropriety and does not interfere with the defender employee's primary responsibility to the defendant office. Note: See 18 U.S.C. § 3006A(g)(2)(A) (prohibiting public defenders from engaging in the private practice of law). See also 18 U.S.C. § 203 (representation in matters involving the United States); 18 U.S.C. § 205 (claims against the United States).

In describing the unique — and limited — role of public defenders generally, one federal district court in Nevada aptly observed:

> The office of public defender is sui generis. Unlike other public offices, it is not established to serve the public generally. Such offices have been created in implementation of the obligations created by the Sixth and Fourteenth Amendments to the United States Constitution, to the end that every person charged with crime shall have an opportunity to be represented by counsel and to receive a fair trial. *Recipients of the services of a public defender's office are only those indigents in whose aid a court or magistrate appoints a public defender to render legal advice and assistance. As noted, the relationship thus created is a strictly professional one.*

Sanchez v. Murphy, 385 F.Supp. 1362, 1365 (D. Nev. 1974) (emphasis added).[13]

The plaintiff did not initiate this action *pro se*; rather, acting outside the scope of its enabling statute and/or any appointment order entered pursuant to that statute, the Federal Public Defender's Office, acting on its own initiative, filed this action on the plaintiff's behalf for the *sole* purpose of undermining the finality of a judgment of the State of Tennessee. But because a § 1983 action is outside the scope of permissible proceedings for which appointment is authorized under § 3006A(a) — and no appointment has been made in this case in any event — by initiating this proceeding, the attorneys in the Federal Public Defender's Office of the Middle District of Tennessee are engaging in the private practice of law in violation of 18 U.S.C. § 3006A(g)(2)(A) and the Code of Conduct for Federal Public Defender.[14] This unauthorized activity should not be condoned by the Court.[15] *See also United States v. Howard*, 429 F.3d 843,

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[13] Like the federal statute at issue here, the Nevada statute implicated in *Sanchez* expressly prohibited the private practice of law.

[14] Even beyond the obvious question of whether Federal Defender employees possess the requisite expertise to pursue civil rights actions on behalf of death-sentenced inmates in the specialized area of § 1983 litigation, one practical implication of the private-practice prohibition is that a Federal Public Defender appointed pursuant to 18 U.S.C. § 3006A(g)(2)(A) is deemed an "employee of the government" for purposes of 28 U.S.C. § 2671 (defining "federal employees" for purposes of the Federal Tort Claims Act) and acts within the scope of that employment when representing his clients. *See Sullivan v. United States*, 21 F.3d 198, 202 (7th Cir. 1994). Aside from being a clear violation of federal law, the private practice of law by a federal defender employee, even if limited to capital cases, undermines the rationale behind the extension of FTCA protections to Federal Defenders while "acting within the scope of his office or employment" and calls into question the existence of immunity in civil litigation initiated on behalf of state inmates.

[15] Nor may this matter be deemed an "ancillary matter" related to the plaintiff's federal habeas corpus action and/or some potential executive clemency proceeding. *See, e.g., Howard*, 429 F.3d at 849 (noting that a district-wide challenge to the requirement that pretrial detainees wear leg shackles should be made in the context of "actual prosecutions" and not in the civil context, because the Federal Public Defender - the only available attorney to represent the criminal defendants - "cannot pursue a civil class action on their behalf . . . and [indeed] is barred from instituting any action on its own.")

849 (9th Cir. 2005) ("The Federal Public Defender cannot pursue a civil class action . . . because there is no provision for the appointment of a Federal Public Defender in a civil action, and the office of Federal Public Defender is barred form instituting any action on its own.").

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,

PAUL G. SUMMERS
Attorney General

s, Joseph F. Whalen
JOSEPH F. WHALEN, BPR #19919
Associate Solicitor General
Office of the Attorney General
P. O. Box 20207
Nashville, TN 37202-0207
(615) 741-3499

s, Mark A. Hudson
MARK A. HUDSON, BPR #12124
Senior Counsel
Office of the Attorney General
P. O. Box 20207
Nashville, TN 37202-0207
(615) 741-7401

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2006, a copy of the foregoing response was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

s, Joseph F. Whalen
JOSEPH F. WHALEN, BPR #19919
Associate Solicitor General
Office of the Attorney General
P. O. Box 20207
Nashville, TN 37202-0207
(615) 741-3499