

Exhibit 9

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

PERVIS PAYNE,)
)
Plaintiff,)
)
vs.)
)
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.)

No. 3:06-0825
JUDGE HAYNES

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 date has been set in April 2007. 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)

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

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

ARGUMENTS

I. PLAINIFF’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. 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

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).

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 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.*

The evidence, as summarized by the Tennessee Supreme Court, is that the method of lethal injection in Tennessee consists of the injection of three drugs: sodium Pentothal, Pavulon, and potassium chloride. *Abdur’Rahman v. Bredesen*, 181 S.W.3d at 300. Two sets of seven syringes are prepared: one syringe of Pentothal, two syringes of Pavulon, two syringes of potassium chloride, and two syringes of saline. *Id.*, 181 S.W.3d at 301. The second set of these syringes are prepared as backup if there is a problem with the first set of syringes. *Id.* The syringes are numbered 1 through 7 and are also color-coded based on the contents of the syringe. *Id.*

After the inmate is transported to the execution chamber, IV catheters are placed in both of the inmate’s arms by an IV team consisting of two paramedics and one correctional officer. *Id.* After the catheters are inserted, the paramedics leave the execution chamber. *Id.* The executioner is located in a room next to the execution chamber, but behind a window with a portal for the IV lines. *Id.* There is also a camera above the gurney in the execution chamber and a monitor in the executioner’s room. *Id.* 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. *Id.* The camera and monitor allow the executioner to observe the flow of the drugs to the IV. *Id.*

The Supreme Court noted that the trial court found that the lethal injection process was "reliable in rendering an inmate unconscious, if not dead, before the paralytical and lethal painful drugs take effect." *Id.* 181 S.W.3d at 304. This conclusion was bolstered by the testimony of the parties' experts:

[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. Dr. Levy testified that such a dose would cause an inmate to be unconscious in about five seconds and that the inmate would never regain consciousness and would feel no pain prior to dying. Dr. Heath similarly testified that a lesser dosage of two grams of sodium Pentothal would cause unconsciousness in all but "very rare" cases and that a dosage of five grams would "almost certainly cause death."

The evidence regarding the lethal injection execution of Robert Coe in 2000 supported this medical testimony. Dr. Levy testified, for instance, that the cause of Coe's death was an "acute intoxication" by sodium Pentothal, Pavulon, and potassium chloride. He further stated that, based on the levels of the drugs found in Coe's body, Coe would have been unconscious within seconds of being injected with sodium Pentothal and would have died within five minutes. Coe would not have regained consciousness and would not have experienced any pain or discomfort as a result of the three drugs. There was no proof to the contrary.

Id. 181 S.W.3d at 307-08. Thus, the Court rejected the argument that the use of Pavulon in the lethal injection protocol in combination with sodium Pentothal and potassium chloride creates a risk of unnecessary physical and psychological suffering.

The Supreme Court found that the evidence 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. And though the trial court observed that the State failed to show a legitimate reason for the use of Pavulon in the lethal injection protocol, the undisputed evidence before the court was that only two states do not use some combination of sodium Pentothal, Pavulon, and potassium chloride. *Id.*

The Supreme Court also credited "the undisputed evidence ... that the sole lethal injection carried out in Tennessee, i.e., Robert Coe in 2000, had revealed 'no significant difficulties with the process.'" *Id.* 181 S.W.3d at 307. Accordingly, the Tennessee Supreme Court ultimately found that the Tennessee lethal injection protocol, which utilizes intravenous injections of sodium Pentothal, pancuronium bromide, and potassium chloride, does not violate the Eighth Amendment or the due process provisions of the United States Constitution. *Id.* 181 S.W.3d at 314.

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.² The defendants submit that this Tennessee Supreme Court precedent is persuasive authority upon which this Court may dismiss the plaintiff's complaint for failure to state a claim upon which relief can be granted. *See RAR, Incorporated v Turner Diesel, Limited*, 107 F.3d 1272, 1276 (7th Cir. 1997).³

² Defendants acknowledge that, in addition to his Eighth Amendment and Due Process claims, plaintiff brings an Equal Protection claim. But this claim is likewise subject to summary disposition on the merits.

³ State court precedent is binding 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

II. 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 prohibits its use when euthanizing nonlivestock animals. 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 nonlivestock animal. 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 nonlivestock may be euthanized and those attendant to the execution of a human being are so wholly different as to render any comparison pointless.

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

Protection claim, Complaint, ¶¶ 81-82, as this claim is predicated on the application of this statute

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 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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