

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

EDWARD JEROME HARBISON,)
)
 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-cv-01206
JUDGE TRAUGER**

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS
OF DEFENDANTS LITTLE, BELL AND TDOC EMPLOYEE JOHN DOES**

Defendants George Little, Ricky Bell, and the TDOC employee John Does, appearing in their official capacities only, have moved to dismiss this action as moot, in that there is no longer an actual case or controversy, and, therefore, this Court lacks jurisdiction under Article III of the United States Constitution.

Additionally, based upon the following, the defendants assume, unless instructed otherwise, that the documents required to be exchanged or filed by the Court's orders of January 24, 2007, and January 30, 2007, are no longer relevant and need not be provided.¹

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 was scheduled for February 22, 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 the protocol is unconstitutional under the Eighth, Ninth, and Fourteenth Amendments. (Complaint, ¶¶ 1-2). The plaintiff also contends that the Department of Correction's (TDOC) failure to require sufficient training, credentials, certification, experience, or proficiency of the personnel involved in the administration of the lethal injection procedure greatly increases the risk that a conscious prisoner will experience excruciating pain. (Complaint, ¶ 118).

On February 1, 2007, Governor Bredesen signed the State of Tennessee Executive Order Number 43. (Copy attached as Exhibit). The Executive Order revokes all current Department of Correction protocols and any related procedures, whether written or otherwise, related to the administration of death sentences in Tennessee, both by lethal injection and by

¹ Due to the revocation of the current execution protocols by Executive Order of the Governor of Tennessee, the protocol that will be utilized in executing the plaintiff does not yet exist. Additionally, the composition of the personnel involved in carrying out executions is unknown at this time. The training records of the personnel under the revoked protocol are irrelevant.

electrocution. Additionally, that Executive Order stays the executions of all condemned Tennessee inmates presently scheduled for execution, including the plaintiff herein. (State of Tennessee Executive Order Number 43).

ARGUMENT

THIS ACTION SHOULD BE DISMISSED AS MOOT BECAUSE THERE IS NO LONGER A CASE OR CONTROVERSY, THEREFORE THIS COURT NO LONGER HAS SUBJECT MATTER JURISDICTION.

Under Article III of the United States Constitution, this Court has jurisdiction only over “actual cases and controversies.” *McPherson v. Mich. High Sch. Athletic Ass’n*, 119 F.3d 453, 458 (6th Cir. 1997); U.S. Const., Art. III, § 2. “It has long been settled that a federal court has no authority ‘to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.’” *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992).

For this Court to have jurisdiction over the injunctive relief prayed for in this action, an actual controversy must exist at all stages of the litigation. *DeFunis v. Odegaard*, 416 U.S. 312, 317, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). 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. *Mosely v. Hairston*, 920 F.2d 409, 414 (6th Cir. 1990) (enactment of the Family Support Act of 1998 rendered moot 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).

The issues presented by the present action are the constitutionality of the current lethal injection protocol in Tennessee and the constitutionality of the administration of that protocol. State of Tennessee Executive Order Number 43 revokes that protocol, as well as the electrocution protocol and any related procedures, whether written or otherwise, and stays the plaintiff's execution. There is no lethal injection protocol currently in effect; thus, there is nothing to litigate. In light of this, the issues presented by the present action are moot, as there is no actual case or controversy, and this Court lacks jurisdiction under Article III of the United States Constitution.

CONCLUSION

In light of the above, defendants Little, Bell, and the state-employee John Does, appearing in their official capacity only, move that the plaintiff's complaint be dismissed as moot. Additionally, based upon the foregoing, the defendants assume, unless instructed otherwise, that the documents required to be exchanged or filed by the Court's orders of January 24, 2007, and January 30, 2007, are no longer relevant and need not be provided.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2007, a copy of the foregoing 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.

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