2018 WL 6191350
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United States Court of Appeals, Sixth Circuit.

David E. MILLER; Nicholas Todd Sutton; Stephen Michael West; Terry Lynn King, Plaintiffs-Appellants,

v.

Tony PARKER, Commissioner, Riverbend Maximum Security Institution, in his official capacity; Tony Mays, Warden, Riverbend Maximum Security Institution, in his official capacity, Defendants-Appellees.

No. 18-6222
|
Decided and Filed: November 28, 2018

Synopsis

Background: After death row prisoner's state-court conviction for first-degree murder and death sentence were affirmed on direct appeal, 674 S.W.2d 279 and 771 S.W.2d 401, denial of post-conviction relief was affirmed, 54 S.W.3d 743, and denial of federal habeas petition was affirmed on appeal in the Court of Appeals, Julia Smith Gibbons, Circuit Judge, 694 F.3d 691, prisoner brought action against prison officials seeking injunctive relief preventing implementation of a recently-adopted lethal-injection protocol for execution. The United States District Court for the Middle District of Tennessee, William Lynn Campbell, Jr., District Judge, 2018 WL 6003123, denied request for a preliminary injunction to the extent that it sought to prevent use of the lethal-injection protocol, and, 2018 WL 6069181, denied prisoner's motion for reconsideration. Prisoner moved for a stay enjoining his execution.

Holdings: The Court of Appeals held that:

prisoner failed to establish a likelihood of success on the merits of ex post facto violation claim;

prisoner failed to show likelihood of success on the merits of Eighth Amendment claim that state's three-drug lethal injection protocol presented a constitutionally unacceptable risk of pain and suffering; and

prisoner failed to show likelihood of success on the merits of claim that electrocution as a method of execution violated the Eighth Amendment.

Motion denied.

Helene N. White, Circuit Judge, filed dissenting opinion.

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 3:18-cv-01234—William Lynn Campbell, Jr., District Judge.

Attorneys and Law Firms

ON MOTION AND REPLY: Stephen M. Kissinger, FEDERAL PUBLIC DEFENDER, Knoxville, Tennessee, for Appellants. ON RESPONSE: Jennifer L. Smith, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellees.

Before: SILER, GIBBONS, and WHITE, Circuit Judges.

The court delivered an order. WHITE, J. (pp. —— – ——), delivered a separate dissenting opinion.

ORDER

***1** David Miller, a Tennessee death penalty prisoner, moves this court for a stay enjoining the defendants from carrying out his execution. For the reasons set forth below, we deny his motion.

In 1982, a Tennessee jury convicted Miller of first-degree murder, and the trial court sentenced him to death. This court previously affirmed the denial of Miller's federal habeas petition. *Miller v. Colson*, 694 F.3d 691 (6th Cir. 2012).

On November 2, 2018, Miller and other Tennessee capital prisoners sued Tony Parker, Commissioner of the Riverbend Maximum Security Institution, and Tony Mays, Warden of the Riverbend Maximum Security Institution, seeking injunctive relief preventing the defendants from implementing a recently-adopted lethal-injection protocol. On the same date, Miller moved for a preliminary injunction enjoining the defendants from carrying out his execution, currently scheduled for December 6, 2018. The district court subsequently denied the request for a preliminary injunction to the extent that it sought to prevent use of the lethal-injection protocol, *Miller v. Parker*, No. 3:18-CV-01234, 2018 WL 6003123 (M.D. Tenn. Nov. 15, 2018), and the court denied the plaintiffs' motion for reconsideration. *Miller v. Parker*, No. 3:18-CV-01234, 2018 WL 6069181 (M.D. Tenn. Nov. 20, 2018). The plaintiffs appealed this decision, and Miller now moves for a stay while the appeal is pending. The defendants have filed a partial response opposing Miller's motion for a stay, and Miller has filed a reply to this response. Further, while this motion has been pending, the court was notified that Miller has elected to be executed by electrocution.

In considering whether to grant a stay, we balance the following factors: (1) whether the movant has demonstrated a strong likelihood of success on the merits; (2) whether he will suffer irreparable injury in the absence of equitable relief; (3) whether the stay will cause substantial harm to others; and (4) whether the public interest is best served by granting the stay. *In re Garner*, 612 F.3d 533, 536 (6th Cir. 2010). As this court recently noted in another capital case, "[w]hile the obvious harm weighs in [the movant's] favor, it is not dispositive when there is no likelihood of success on the merits of the challenge, and in execution protocol challenges, likelihood of success is often the determinative factor." *Zagorski v. Haslam*, 741 Fed.Appx. 320, 320 (6th Cir. 2018), *petition for cert. filed* (No. 18-6530) (U.S. Nov. 1, 2018). In order to challenge successfully the State's chosen method of execution, Miller must "establish that the method presents a risk that is *sure or very likely* to cause" serious pain and needless suffering. *In re Ohio Execution Protocol*, 860 F.3d 881, 886 (6th Cir.) (en banc) (emphasis in original), *cert. denied*, —— U.S. ——, 137 S.Ct. 2238, 198 L.Ed.2d 761 (2017).

Miller has not shown a likelihood of success on the merits. Electrocution was the method of execution that existed at the time of Miller's crime, and he contends that the switch to the current three-drug protocol violates his rights under the Ex Post Facto Clause. A change in a State's method of execution will not constitute an ex post facto violation if the evidence shows the new method to be more humane. *Weaver v. Graham*, 450 U.S. 24, 32 n.17, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); *Malloy v. South Carolina*, 237 U.S. 180, 185, 35 S.Ct. 507, 59 L.Ed. 905 (1915). This court has recognized that some risk of pain is inherent in any method of execution, no matter how humane, and the Constitution does not guarantee a pain-free execution. *In re Ohio Execution Protocol*, 860 F.3d at 890. Miller maintains that electrocution is more humane than the new drug protocol, and his basis for this argument appears largely to rest on the length of time each method of execution requires. However, this contention is debatable, and Miller has not shown that the new protocol is "sure or very likely" to be less humane than electrocution.

***2** Miller also argues that Tennessee is improperly compelling him to choose between two unconstitutional methods of execution, electrocution and the three-drug protocol. However, this court has concluded that neither of these methods violates the Constitution. We recently rejected a challenge to a similar Ohio lethal-injection protocol that, like the current Tennessee protocol, utilizes a large dose of the sedative midazolam as the first drug to render the prisoner unconscious. *See In re Ohio Execution Protocol Litig.*, 881 F.3d 447, 449-53 (6th Cir. 2018), *cert. denied*, —— U.S. ——, 139 S.Ct. 216, —— L.Ed.2d —— (2018); *In re Ohio Execution Protocol*, 860 F.3d at 887-90.

Because Miller has elected to be executed by electrocution, he has waived any challenge to his execution by that method. *See Zagorski*, 741 Fed.Appx. at 320. Regardless of that waiver, this court repeatedly has upheld the constitutionality of electrocution as a method of execution. *See Williams v. Bagley*, 380 F.3d 932, 965 (6th Cir. 2004); *Smith v. Mitchell*, 348 F.3d 177, 214 (6th Cir. 2003); *Buell v. Mitchell*, 274 F.3d 337, 370 (6th Cir. 2001).

Accordingly, we **DENY** Miller's motion for a stay.

DISSENT

HELENE N. WHITE, Circuit Judge, dissenting.

Because Miller has shown a substantial likelihood of success on the merits of his claims and it is beyond doubt that the other three injunction factors weigh strongly in his favor, I would grant the stay of execution to allow the district court to conduct an evidentiary hearing on the merits of Miller's claims prior to his execution date, now set for December 6.

This appeal concerns the two alternative methods of execution currently used by the State of Tennessee: (1) lethal injection by a three-drug protocol using midazolam (a benzodiazepine sedative) followed by vecuronium bromide (a paralytic agent) and potassium chloride (a heart-stopping agent); and (2) electrocution. Under Tennessee law, "[f]or any person who commits an offense for which the person is sentenced to the punishment of death, the method for carrying out this sentence shall be by lethal injection." Tenn. Code Ann. § 40-23-114(a). But persons (like Miller) sentenced to death for offenses committed before January 1, 1999, may elect to be executed by electrocution. Tenn. Code Ann. § 40-23-114(b). Electrocution will also be utilized if lethal injection is held unconstitutional or if a drug essential to carrying out execution by lethal injection is unavailable. Tenn. Code Ann. § 40-23-114(e).

Miller's 125-page complaint alleges and provides facts supporting that both electrocution and lethal injection using the three-drug protocol violate the Constitution *and* that the three-drug protocol is the harsher and less humane of the two methods of execution. Because, according to Miller, electrocution is cruel and unusual punishment, and execution using the three-drug protocol would cause even more suffering than electrocution, forcing him to choose between the two methods, as Tennessee has here, leaves him only a choice between two unconstitutional alternatives: be executed by electrocution in violation of the Eighth Amendment, or be executed by lethal injection in violation of the Ex Post Facto clause and the Eighth Amendment. [1] Assuming that electrocution violates the Eighth Amendment, and that lethal injection violates either the Ex Post Facto clause or the Eighth Amendment, Miller has a strong likelihood of success on his claim that Tennessee violated the Constitution by forcing him to choose between two unconstitutional alternatives. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 288, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (holding that a confession is coerced when the defendant was presented with a credible threat of legally unjustified violence from a government agent).

1 The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" (Emphasis added.) Article I, § 9, clause 3 of the Constitution provides that Congress shall not pass any "ex post facto Law." Another provision, Article I, § 10, directs that "No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts...."

***3** Thus, Miller's likelihood of success on his coerced-waiver claim also depends on the likelihood of success on his claims that (1) electrocution is unconstitutional; and (2) lethal injection using the three-drug protocol violates either the Eighth Amendment or the Ex Post Facto clause.

Miller has shown a substantial likelihood of success on his claim that electrocution violates the Constitution as a cruel and unusual punishment. It is true that our earlier cases, as recently as 2004, have held that electrocution is constitutional. *See Williams v. Bagley*, 380 F.3d 932, 965 (6th Cir. 2004); *Smith v. Mitchell*, 348 F.3d 177, 214 (6th Cir. 2003) (same); *Buell v. Mitchell*, 274 F.3d 337, 370 (6th Cir. 2001) (same). But in each of those cases, we simply cite back to a prior case without any analysis, and the line of summary rejections of challenges to the constitutionality of electrocution ultimately leads back to the Supreme Court's 1890 decision in *In re Kemmler*, 136 U.S. 436, 449, 10 S.Ct. 930, 34 L.Ed. 519 (1890). A lot has changed since the late-nineteenth century, however. [2] In typical cases, the passage of time is not enough to find that a Supreme Court case no longer controls. But the Supreme Court itself has made clear that the Eighth Amendment's prohibition against cruel and unusual punishments demands that we revisit from time to time past judgments of what methods are acceptable to accomplish the ultimate punishment of death. Indeed, the meaning of the Eighth Amendment's prohibition on cruel and unusual punishments is derived from "the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (internal quotation marks and citations omitted).

2 Justice Brennan, joined by Justice Marshall, forcefully made this point in 1985 in his dissent from denial of certiorari in *Glass v. Louisiana*, where he noted the trend of courts summarily rejecting challenges to electrocution "typically on the strength of th[e Supreme] Court's opinion in *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890), which ... was grounded on a number of constitutional premises that have long since been rejected and on factual assumptions that appear not to have withstood the test of experience." 471 U.S. 1080, 1081, 105 S.Ct. 2159, 85 L.Ed.2d 514 (1985).

Notwithstanding our prior cases summarily rejecting challenges to the constitutionality of electrocution, this court noted in 2007 that "modern sensibilities have moved away from hanging, the firing squad, the gas chamber and electrocution as methods of carrying out a death sentence," and that "[t]he method of execution in 37 of the 38 States that authorize capital sentences has evolved to make lethal injection the preferred method of carrying out a death sentence with only Nebraska clinging to electrocution." *Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007).

The Georgia Supreme Court, *Dawson v. State*, 274 Ga. 327, 554 S.E.2d 137 (2001), and the Nebraska Supreme Court, *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008), have declared electrocution to be cruel and unusual punishment in violation of their analogous state constitutional provisions. The Nebraska Supreme Court noted that the "U.S. Supreme Court has never reviewed objective evidence regarding electrocution's constitutionality," but rather has "based its holdings on state courts' factual assumptions, which, in turn, relied on untested science from 1890." *Id.* at 257. It then examined, in fairly exhaustive detail, evidence that has surfaced since that time, including expert testimony and first-hand observations of past electrocutions. *Id.* It concluded: "[T]he evidence clearly proves that unconsciousness and death are not instantaneous for many condemned prisoners. These prisoners will, when electrocuted, consciously suffer the torture that high voltage electric current inflicts on the human body. The evidence shows that electrocution inflicts intense pain and agonizing suffering. Therefore, electrocution as a method of execution is cruel and unusual punishment...." *Id.* at 279.

***4** Miller's lengthy and detailed complaint presents similar evidence, and, tellingly, the state does not respond to Miller's evidence or arguments on the merits. Thus, Miller has shown a substantial likelihood of success on this claim, and I would remand for a hearing on the merits.

Further, I do not agree that Miller waived his challenge to the constitutionality of electrocution simply because he chose to be electrocuted. He made this election on the eve of the deadline imposed upon him, under circumstances where he believed that the alternative and default method of lethal injection is a far more inhumane and painful way to die. He

has consistently challenged the three-drug protocol as unconstitutional. The timing of his election and his consistent challenge to the constitutionality of the three-drug protocol distinguish his circumstances from other cases where we found waiver. *See, e.g.*, *Stanford v. Parker*, 266 F.3d 442, 462 (6th Cir. 2001) (explaining that the plaintiff would waive his challenge to electrocution if he chose electrocution over lethal injection, but noting that the plaintiff did not challenge the constitutionality of lethal injection). Although *Zagorski v. Haslam*, 741 Fed.Appx. 320, 320 (6th Cir. 2018), found such a waiver, it is an unpublished order and therefore not binding on this court.

Miller has also established a substantial likelihood of success on his claim that the three-drug protocol violates the Ex Post Facto clause by creating a significant risk of pain and suffering beyond that involved in electrocution. "An ex post facto law possesses two elements: (1) 'it must apply to events occurring before its enactment,' and (2) 'it must disadvantage the offender affected by it.' " *Dyer v. Bowlen*, 465 F.3d 280, 285 (6th Cir. 2006) (quoting *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997)). As the district court acknowledged, there is authority for finding that changes in execution protocols are subject to ex post facto challenges. R. 20, PID 1699 n.4; *see also Zink v. Lombardi*, No. 2:12-CV-4209-NKL, 2012 WL 12828155, at *4-*5 (W.D. Mo. Nov. 16, 2012) (holding that the plaintiffs alleged a viable ex post facto claim where they alleged that a change to the execution protocol would result in a significant risk of increased pain compared to the prior method of execution); *cf. Weaver v. Graham*, 450 U.S. 24, 32 n.17, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) (noting that the "critical question ... is whether the new provision imposes greater punishment after the commission of the offense," and explaining that the Supreme Court had previously held "that a change in the method of execution was not *ex post facto* because evidence showed the new method to be more humane, not because the change in the execution method was not retrospective" (citing *Malloy v. South Carolina*, 237 U.S. 180, 185, 35 S.Ct. 507, 59 L.Ed. 905 (1915))). Miller has presented plausible and yet-unrebutted assertions that the three-drug protocol causes 18–20 minutes of pain and suffering, substantially longer than the six minutes of pain and suffering caused by electrocution. The state has not addressed the merits of this new evidence, other than to point to recent decisions finding that similar lethal-injection protocols did not inflict cruel and unusual punishment. *See, e.g.*, *In re Ohio Execution Protocol*, 860 F.3d 881, 884 (6th Cir. 2017) (en banc), *cert. denied sub nom. Otte v. Morgan*, —— U.S. ——, 137 S.Ct. 2238, 198 L.Ed.2d 761 (2017). Those holdings, of course, were based on the evidence presented in those cases, and in any event do not address whether the three-drug protocol constitutes an ex post facto violation. Further, the district court in this case cited another district court's recent finding that there were "serious questions ... concerning whether the lethal injection protocol with which the state intends to execute the plaintiff is more or less humane than electrocution." R. 4, PID 1699 (citing *Zagorski v. Haslam*, No. 3:18-1035, 2018 WL 4931939 (M.D. Tenn. Oct. 11, 2018)). The district court did not contest this finding from *Zagorski* but instead reasoned that it did not matter in this case because the plaintiff in *Zagorski*, unlike in this case, was insisting on electrocution and the state was refusing his request. Nonetheless, based on Miller's unrebutted evidence, the state's failure to respond to that evidence, and the district court's recognition of serious questions concerning whether the three-drug protocol is less humane than execution, Miller has presented a substantial likelihood of success on his ex post facto claim.

***5** Miller's allegations also establish a substantial likelihood of success on his claim that the three-drug protocol constitutes a cruel and unusual punishment, which requires him to show "that the method presents a risk that is *sure or very likely* to cause serious pain and needless suffering" and to identify "a known and available alternative method of execution that entails a lesser risk of pain." *Glossip v. Gross*, —— U.S. ——, 135 S.Ct. 2726, 2731, 2737, 192 L.Ed.2d 761 (2015) (internal quotation marks and citation omitted). Miller contends that evidentiary findings made by a trial court in a case in which Defendants were parties establish that Midazolam (the first drug in the three-drug protocol) will not prevent the pain sure to result from the second and third drugs in the protocol, and that the findings relied on by the Supreme Court when it upheld the constitutionality of a similar three-drug protocol in *Glossip*, —— U.S. ——, 135 S.Ct. 2726, have been undermined by subsequent developments. The state did not address the merits of these arguments, either. Nor did the state dispute that Miller has identified several feasible and readily available alternative methods of execution that would substantially reduce the risk of pain. Thus, Miller's allegations and supporting documentation establish a likelihood of success on the merits of this claim.

For these reasons, I would grant Miller's motion for stay of execution until the merits of his challenges can be decided, reverse the denial of preliminary injunctive relief, and remand to the district court for further proceedings.

All Citations

--- F.3d ----, 2018 WL 6191350

2018 WL 6003123
Only the Westlaw citation is currently available.
United States District Court, M.D. Tennessee, Nashville Division.

DAVID EARL MILLER, et al., Plaintiffs,
v.
TONY PARKER, et al., Defendants.

NO. 3:18-cv-01234
|
11/15/2018

WILLIAM L. CAMPBELL, JR., UNITED STATES DISTRICT JUDGE

CAPITAL CASE

MEMORANDUM AND ORDER

***1** Plaintiffs David Earl Miller, Nicholas Todd Sutton, Stephen Michael West, and Terry Lynn King, all inmates of Tennessee's death row at Riverbend Maximum Security Institution, have filed a Motion for Temporary Restraining Order And/Or Preliminary Injunction. (Doc. No. 7.) Plaintiffs ask the Court to enjoin Defendants and their agents from: (1) executing Plaintiff Miller as scheduled on December 6, 2018; (2) presenting Plaintiff Miller with the form to elect between lethal injection and electrocution; (3) setting execution dates for Plaintiffs Sutton, West, and King; and (4) denying telephone access to Plaintiffs' attorney-witnesses during executions. (*Id.* at 1, 42.) For the reasons that follow, Plaintiffs' motion is **GRANTED** in part, and Defendants and anyone acting on their behalf are **ENJOINED** from denying Plaintiffs' attorney-witnesses access to a telephone during their executions. In all other respects, Plaintiffs' motion is **DENIED**.

I. STANDARD FOR PRELIMINARY INJUNCTION

The same standard generally applies to the issuance of temporary restraining orders and preliminary injunctions. *Northeast Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). The court must assess four factors to determine whether a plaintiff is entitled to a preliminary injunction: "(1) whether [a movant] has demonstrated a strong likelihood of success on the merits; (2) whether he will suffer irreparable injury in the absence of equitable relief; (3) whether the stay will cause substantial harm to others; and (4) whether the public interest is best served by granting the stay." *Cooey v. Strickland*, 589 F.3d 210, 218 (6th Cir. 2009). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Id.* (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)).

The potential harm arising from a court's ruling on a motion to enjoin an inmate's execution weighs heavily on both sides. The irreparable injury inflicted by an execution in violation of the Constitution is too obvious to require discussion. And "it is always in the public interest to prevent violation of a party's constitutional rights." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 274 F.3d 377, 400 (6th Cir. 2001). But, on the other hand, courts must weigh the State's interest in carrying out a lawful death sentence and in the finality of criminal judgments, *Workman v. Bredesen*, 486 F.3d 896, 912–13 (6th Cir. 2007), and the fact that "the public interest is not served by ordering a stay of execution for claims that are unlikely to prevail." *Bedford v. Kasich*, No. 2:11-CV-351, 2011 WL 1691823, at *15 (S.D. Ohio May 4, 2011). That interest in finality grows weightier as an execution date approaches, and both the Supreme

Court and the Sixth Circuit have counseled against last-minute stays that interfere with the state's ability to carry out its sentences. *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004); *Bedford v. Bobby*, 645 F.3d 372, 375 (6th Cir. 2011).

***2** Because of the strong and universal competing interests surrounding an impending execution, these cases tend to turn on the inmate's ability to establish a likelihood of success on the merits of his challenge. *Glossip*, 135 S. Ct. at 2737 ("The parties agree that this case turns on whether petitioners are able to establish a likelihood of success on the merits."); *In re Ohio Execution Protocol Litig. (Campbell v. Kasich)*, 881 F.3d 447, 449 (6th Cir. 2018) (observing that "the 'likelihood of success on the merits' factor is determinative here").

II. PLAINTIFFS' LIKELIHOOD OF SUCCESS

To satisfy this prong, "[i]t is not enough that the chance of success on the merits be 'better than negligible.' " *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999)). "More than a mere 'possibility' of relief is required." *Id.* The level of likelihood of success required depends on the injury at stake:

> The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other. This relationship, however, is not without its limits; the movant is always required to demonstrate more than the mere "possibility" of success on the merits. For example, even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is granted, he is still required to show, at a minimum, "serious questions going to the merits."

Griepentrog, 945 F.2d at 153–54 (citations omitted). The Court examines Plaintiffs' arguments regarding each Count of the Complaint in order to assess their likelihood of success on the merits.

A. Count 1 — Ex Post Facto

Plaintiffs assert that because Tennessee's current lethal injection protocol will cause them to "experience severe pain and suffering...many times longer" than they would during the method of execution that existed at the time of their crimes—namely, electrocution—the lethal injection protocol violates the Ex Post Facto Clause of the United States Constitution. (Doc. No 1 at 21; Doc. No. 7 at 20.) The Constitution prohibits states from "pass[ing] any...ex post facto Law." U.S. Const. art. I, § 10, cl. 1. The Supreme Court has explained that the Ex Post Facto Clause prohibits "any statute which...makes more burdensome the punishment for a crime, after its commission." *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (quoting *Beazell v. Ohio* 269 U.S. 167, 169–70 (1925)). "An ex post facto law possesses two elements: (1) 'it must apply to events occurring before its enactment,' and (2) 'it must disadvantage the offender affected by it.' " *Dyer v. Bowlen*, 465 F.3d 280, 285 (6th Cir. 2006) (quoting *Lynce v. Mathis*, 519 U.S. 433, 441 (1997)). A change in a state's method of execution is subject to that analysis. "In *Malloy v. South Carolina*, 237 U.S. 180 (1915), [the Supreme Court] concluded that a change in the method of execution was not ex post facto because evidence showed the new method to be more humane." *Weaver v. Graham*, 450 U.S. 24, 32 n. 17 (1981). [1]

1 Defendants argue that the Ex Post Facto Clause does not apply to any changes in the Tennessee Department of Correction's execution protocol because they are not enacted by the state legislature in the form of a statute. (Doc. No. 19 at 9–12.) They acknowledge, however, that the Supreme Court has applied the Ex Post Facto prohibition to state and federal regulations that increase the severity of a criminal sentence. (*Id.* at 10 (citing *Peugh v. United States*, 569 U.S. 530 (2013), and *Garner v. Jones*, 529 U.S. 244 (2000).) Moreover, other federal courts have considered Ex Post Facto claims in connection with execution protocols promulgated as corrections department policies. *See, e.g., In re Ohio Execution Protocol Litig.*, No. 2:11-CV-1016, 2018 WL 1033486, at *27 (S.D. Ohio Feb. 22, 2018), *adhered to on reconsideration*, No. 2:11-CV-1016, 2018 WL 2118817 (S.D. Ohio May 8, 2018). Accordingly, while Defendants may yet prevail on this argument upon further development, the Court has not applied any weight to it for the purpose of ruling on the present motion.

***3** This Court recently found in granting a preliminary injunction to another death row inmate on the day of his scheduled execution that there were "serious questions...concerning whether the lethal injection protocol with which the

state intends to execute the plaintiff is more or less humane than electrocution, which is his preferred method and which was the statutory method of execution at the time he was sentenced and still seems to be available to him as a matter of state law." Memorandum and Order at 8, *Zagorski v. Haslam*, No. 3:18-1035 (M.D. Tenn. Oct. 11, 2018) (Trauger, J.). It was critical to the *Zagorski* decision, however, that state officials had refused to comply with Mr. Zagorski's request, pursuant to Tennessee Code Annotated § 40-23-114(b), and were insisting on proceeding with his execution under the relatively new lethal injection protocol. *Id.* at 2–4. Accordingly, Zagorski was arguably being compelled to suffer an execution that amounted to a more burdensome punishment than that imposed at the time of his crimes.

Plaintiffs in this case do not allege similar facts. They do not allege that they have elected electrocution under the statute permitting them to do so, or that Defendants have refused to honor that election. In fact, the pending motion seeks to prevent Defendants from even presenting Plaintiff Miller with the opportunity to make that election. (Doc. No. 7 at 1.) When Tennessee law retains Plaintiffs' right to demand the same method of execution that existed at the time of their crimes, their chance of prevailing on an Ex Post Facto claim seems negligible, at best.

B. Count 2 — Electrocution is Unconstitutional

Plaintiffs claim that electrocution is cruel and unusual punishment in violation of the Constitution. (Doc. No. 1 at 20; Doc. No. 7 at 35.) Defendants assert that this claim is not ripe for adjudication because state law provides that Plaintiffs will be executed by the default method of lethal injection unless they choose electrocution, which none of them have done. (Doc. No. 19 at 12–14, citing Tenn. Code Ann. § 40-23-114(a).)

Plaintiffs acknowledge that their "claim against execution by electrocution not only was not, but could not have been, raised" during their litigation in state court earlier this year of the state's method of execution. (Doc. No. 7 at 35.) They quote the Tennessee Supreme Court's previous ruling that "[t]he Electrocution Causes of Action depend entirely on future and contingent events that have not occurred and may never occur, and as a result, are unripe and nonjusticiable." (*Id.* at 35–36 (quoting *West v. Schofield*, 468 S.W.3d 482, 494 (Tenn. 2015).) According to Plaintiffs, it therefore follows that their "likelihood of success must be determined solely based upon the merits of their claim," but they do not offer any reason for this Court to find that it is any more able to reach the merits of this unripe claim than the state court was. (Doc. No. 7 at 36.)

This Court rejected a challenge to the constitutionality of electrocution under similar circumstances several years ago:

> Petitioner does not have a current claim with regard to electrocution, because current Tennessee law provides for execution of the death sentence by lethal injection. Tenn. Code Ann. § 40–23–114(a) (2000). Because he committed his offense prior to January 1, 1999, Petitioner may elect by written waiver to be executed by electrocution instead of lethal injection. Tenn. Code Ann. § 40–23– 114(b). Should he choose to make such a waiver, Petitioner would waive any claim that electrocution is unconstitutional. *See Stewart v. LaGrand*, 526 U.S. 115, 119 (1999). A recent amendment to the controlling statute provides that execution by electrocution is otherwise authorized only in the event that lethal injection is held to be unconstitutional by a court of competent jurisdiction or the Commissioner of the Tennessee Department of Correction certifies to the governor that an essential lethal injection ingredient is unavailable. Tenn. Code Ann. § 40–23–114(d). In the absence of any allegation that either of those triggering events has happened, any challenge to the constitutionality of electrocution is not ripe for review.
>
> ***4** Moreover, the Supreme Court found execution of the death penalty by electrocution to be constitutional in 1890, *see In re Kemmler*, 136 U.S. 436, 449 (1890), and no federal court since that time has held it to be unconstitutional. *But see State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (Neb. 2008) (finding electrocution unconstitutional under Nebraska constitution). The Sixth Circuit has reiterated its rejection of such a claim as recently as 2004, *see Williams v. Bagley*, 380 F.3d 932, 965 (6th Cir. 2004), and at least one district court in Tennessee has rejected such a challenge within the last three years, *see Morris v. Bell*, No. 07–1084–JDB, 2011 WL 7758570, at *68 (W.D. Tenn. Sept. 29, 2011).

Duncan v. Carpenter, No. 3:88-00992, 2014 WL 3905440, at *42–43 (M.D. Tenn. Aug. 11, 2014) (Nixon, S.J.); *see also Stanford v. Parker*, 266 F.3d 442, 462 (6th Cir. 2001) (rejecting Eighth Amendment challenge to electrocution by inmate who had not elected it because the plaintiff's "argument ignores the fact that he need not be electrocuted" and because by choosing electrocution he would "waive any objection" to it). For those same reasons, Plaintiffs do not have a substantial likelihood of prevailing on this claim.

C. Count 3 — Tennessee's Lethal Injection Protocol is Unconstitutional

Plaintiffs claim that the Tennessee Department of Correction's July 5, 2018 lethal injection protocol constitutes cruel and unusual punishment in violation of the Constitution. (Doc. No. 1 at 61.) Defendants correctly point out that any facial challenge to the protocol is barred by res judicata in light of the Tennessee Supreme Court's recent ruling that the July 5 protocol is constitutional. *Abdur'Rahman v. Parker*, No. M201801385SCRDOCV, 2018 WL 4858002, at *7, 13 (Tenn. Oct. 8, 2018), *cert. denied sub nom. Zagorski v. Parker*, No. 18-6238, 2018 WL 4900813 (U.S. Oct. 11, 2018) (holding that the trial court properly focused litigation on the July 5 protocol because it did not present "a substantial change to the lethal injection protocol for purposes of this facial challenge" and that "Plaintiffs failed to carry their burden to establish that Tennessee's current three-drug lethal injection protocol constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution"). However, they do not address the fact that Plaintiffs in this case raise as-applied challenges to the protocol based on their "individual characteristics," the merits of which were not decided in *Abdur'Rahman*. *Id.* at *10 (affirming denial of a motion to amend to add such claims because "Mr. Miller had notice and opportunity to assert [his] proposed as-applied claims long before the June 28, 2018 motion to amend the complaint.") Accordingly, neither party has briefed the issue of whether Plaintiffs' as-applied claims in particular are barred by res judicata.

Assuming for the purpose of the pending motion that the Court is able to reach the merits of Plaintiffs' as-applied claims, Plaintiffs have not offered any evidence or case-law to support them. They allege that they "present[ ] with individual characteristics" ranging from obesity and diabetes to enlarged prostate, but they do not allege or provide evidence of actual diagnoses of their conditions or their severity, nor have they provided any evidence supporting their allegations about how those conditions would detrimentally affect them during lethal injection. For example, Plaintiff Miller alleges that he has a history of tuberculosis infection and that deep vein thrombosis, which he alleges would make it "significantly more difficult to achieve and/or maintain peripheral IV access on Plaintiff," is "associated with" tuberculosis. (Doc. No. 1 at 96.) But he does not demonstrate that he has ever actually experienced or even been diagnosed as being at high risk for deep vein thrombosis. And Plaintiffs do not cite any court opinions that have upheld as-applied challenges based on their conditions. The United States Court of Appeals for the Eighth Circuit last year observed a " 'paucity of reliable scientific evidence' on the impact of the lethal-injection protocol" on an inmate suffering from conditions including morbid obesity, diabetes, neuropathy, hypertension, and sleep apnea. *Williams v. Kelley*, 854 F.3d 998, 1000–01 (8th Cir. 2017) (denying motion for stay of execution). Plaintiffs' unsupported allegations may give them a "mere possibility" of relief on this count, but that alone is not enough to warrant the extreme action of staying an execution.

***5** Moreover, Plaintiffs do not allege that the conditions in question were recently diagnosed or otherwise explain why these claims could not have been brought before less than five weeks remained before Plaintiff Miller's scheduled execution. Plaintiff Miller's failure to raise his as-applied claims before the point at which the state court found them untimely weighs against enjoining his execution to allow their litigation now. As the Eighth Circuit has explained, when a claim brought in federal court could have been raised at the same time as the plaintiff's previous claim in state court, "[w]hether or not the claim technically is barred by doctrine of res judicata or collateral estoppel, the prisoners' use of 'piecemeal litigation' and dilatory tactics is sufficient reason by itself to deny a stay." *McGehee v. Hutchinson*, 854 F.3d 488, 491–92 (8th Cir. 2017) (citing *Hill v. McDonough*, 547 U.S. 573, 584–85 (2006)).

D. Count 4 — Coerced Waiver

Plaintiffs allege that the pain and suffering caused by Tennessee's current lethal injection protocol unconstitutionally coerces them to elect the less onerous method of electrocution, thereby waiving their right to challenge the constitutionality of electrocution. (Doc. No. 1 at 124.) Stated differently, Plaintiffs essentially claim that Defendants violate their constitutional rights by allowing them the opportunity to choose a method of execution they find preferable to lethal injection.

In 1999, an Arizona inmate had a similar choice and elected to be executed with lethal gas—a method that had already actually been found to be unconstitutional by the Ninth Circuit. When he later filed suit to challenge the constitutionality of his execution with lethal gas, the Supreme Court held that "[b]y declaring his method of execution, picking lethal gas over the State's default form of execution—lethal injection—Walter LaGrand has waived any objection he might have to it." *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999). Plaintiffs do not allege anything that differentiates their circumstances from LaGrand's. They allege that Tennessee's current lethal injection protocol is worse than electrocution, but surely LaGrand and any other inmate who elects a secondary method of execution does so because he believes the other option worse. They lament the consequent loss of the right to challenge the constitutionality of electrocution, but that loss is not as great as LaGrand's lost opportunity to challenge a method of execution that had already been found unconstitutional. In materially indistinguishable circumstances, this Court is not in a position to hold that a waiver imposed by Supreme Court precedent is unconstitutional.

This Court recently rejected a similar argument by an inmate who had already elected electrocution, and the Sixth Circuit affirmed: "To prevail on his coercion claim (count I), Zagorski would have to show that he was coerced to waive *his constitutional right against electrocution*— and a challenge to the constitutionality of electrocution is precisely the one we are bound to conclude Zagorski waived." *Zagorski v. Haslam*, No. 18-6145, 2018 WL 5734458, at *1 (6th Cir. Oct. 31, 2018) (citing *Stanford v. Parker*, 266 F.3d 442, 462 (6th Cir. 2001)). Accordingly, Plaintiffs do not have a substantial likelihood of success on this claim.

E. Count 5 — Telephone Access

Plaintiffs allege that a state statute that limits them to one attorney-witness to an execution, combined with Defendants' refusal to allow that attorney-witness access to a telephone during an execution, violates their right to access the courts. (Doc. No. 1 at 127–28; Doc. No. 7 at 40.) Plaintiffs seek injunctive relief that bars Defendants from denying Plaintiffs' attorney-witness access to a telephone. (Doc. No. 7). They assert that they have a sufficient likelihood of success on this claim to warrant injunctive relief in light of this Court's recent grant of preliminary relief on the same claim by Mr. Zagorski. (Doc. No. 7 at 40.)

***6** Defendants' primary argument is that Plaintiffs' access-to-courts claim is filed too late because the relevant statutes have been on the books since 2000 and 2012. (Doc. No. 19 at 20–22.) Specifically, they assert that Tennessee Code Annotated § 40-23-116 has limited condemned inmates to one attorney-witness since May 2000 and that § 39-16-201 has prohibited cellular telephones in prisons since at least 2012. The Court is unpersuaded by this argument for the same reasons explained by Judge Trauger in *Zagorski*. *See* Memorandum and Order at 8–9, *Zagorski v. Haslam*, No. 3:18-1205 (M.D. Tenn. Oct. 29, 2018) (Trauger, J.). Neither of the statutes in question prevents an attorney-witness's access to a prison's telephone during an execution, and even the statutory prohibition on cellular telephones only prevents bringing such devices into a prison "with unlawful intent." Tenn. Code Ann. § 39-16-201(b)(3). Defendants' reliance on their own October 2001 policy prohibiting cell phones in prison is equally misplaced, because it governs "the visiting of inmates" according to "a routine schedule" in established "visitation areas" designated by the warden that "allow reasonable ease of communication between inmates and their visitors." (Doc. No. 19-5 at 1, 2, 5, 6, 9.) It also provides that "[a]ttorneys and inmate clients shall, upon request, be afforded privacy for their visits." (*Id.* at 10.) Defendants' suggestion that this policy in any way governs conduct during an execution is absurd; but even if the policy applied to an execution, it does not say anything about access to the prison's own telephone system.

Defendants also argue Plaintiffs' claim lacks merit because any injury that might arise is currently hypothetical or speculative. (Doc. No. 19 at 22–24.) But they have not asserted any burden to them at all in connection with providing access to a telephone during an execution. To the contrary, Defendant Parker testified during the state court litigation that he has no opposition to providing an attorney-witness with access to a telephone during an execution and that an attorney-witness's access to a "landline" would not pose any safety or security concerns to the institution. (Doc. No. 1-22 at 2–3; Doc. No. 1-23 at 271–74.) Moreover, the Court takes judicial notice that Defendants and their predecessors have permitted attorney-witnesses to executions to have access to a telephone during several previous executions, and that a functioning telephone was in the execution witness room as recently as November 1, when Mr. Zagorski was executed. [2] *See* Notice, *Zagorski v. Haslam*, No. 3:18-1205 (M.D. Tenn. Nov. 1, 2018) (describing Defendants' provision of a telephone for that execution); *Coe v. Bell*, 89 F. Supp. 2d 962 (M.D. Tenn.), *vacated on other grounds*, 230 F.3d 1357 (6th Cir. 2000) (ordering telephone access for attorney-witness during the execution of Robert Coe); *see also* Raybin, David, "Lawyer for the Condemned: I Witnessed What Should be the Last Electric Chair Execution," Raybin & Weissman, P.C., June 23, 2014, https://www.nashvilletnlaw.com/blog/the-last-electric-chair-execution/ (describing attorney-witness's "verif[ying] that I would have access to a telephone with a clear line when I was in the witness room with a view of my client in the electric chair" and later seeing "that promised phone with an outside line...there on the wall" during 2007 execution of Daryl Holton).

2 Given Defendants' providing of telephone access to an attorney-witness during Mr. Zagorski's recent execution, Defendant's argument against continuing that access during future executions is specious at best and vexatious at worst.

Weighed against the apparent ease with which Defendants can provide telephone access, even a slim chance of success on the merits warrants the preliminary injunction requested, especially when that slim chance is combined with the irreparable nature of any harm that might befall Plaintiff. Plaintiffs' chance of success on this claim is the same as when Robert Coe raised it in 2000, when this Court explained:

> A Plaintiff's right to access the courts to raise an Eighth Amendment claim of cruel and unusual punishment is decidedly not frivolous, and his interest in being free from cruel and unusual punishment is paramount. Plaintiff will be irreparably harmed if he is denied relief. The state certainly has no legitimate interest in depriving the Plaintiff of access to the courts to assert a claim of cruel and unusual treatment. Finally, the public interest is best served by insuring that executions are carried out in a constitutional manner.
>
> ***7** This court is skeptical about a prisoner's realistic ability to assert and get redress for a violation of his right to be free from cruel and unusual punishment during the execution itself. However, given society's (and the state's) interest in assuring that capital punishment is carried out in a humane manner and the minimal inconvenience to the state, this court finds the plaintiff's position well taken.

Coe, 89 F. Supp. 2d at 966; *see also* Memorandum and Order at 9, *Zagorski v. Haslam*, No. 3:18-1205 (M.D. Tenn. Oct. 29, 2018) (Trauger, J.) ("[T]he court finds that [the access-to-telephone claim] presents at least the minimum chance of success on the merits to warrant injunctive relief in light of the plaintiff's interest, the public interest, and the fact that the relief requested will not prevent the state from carrying out the plaintiff's sentence as scheduled.").

III. CONCLUSION

For the reasons explained above, Plaintiffs' motion for preliminary injunction is **GRANTED in part**, and Defendants and anyone acting on their behalf are hereby **ENJOINED**, pending a final judgment in this case, from proceeding with any Plaintiff's execution without providing his attorney-witness with access to a telephone. In all other respects, Plaintiffs' motion (Doc. No. 7) is **DENIED**. Because the Court finds further briefing and argument on the motion for injunctive relief is unnecessary, Plaintiffs' motion to set dates for a reply brief and oral argument (Doc. No. 18) is **DENIED**.

No bond will be required upon the issuance of this injunction. It is so **ORDERED**.

WILLIAM L. CAMPBELL, JR.

UNITED STATES DISTRICT JUDGE

All Citations

Slip Copy, 2018 WL 6003123

2018 WL 6069181
Only the Westlaw citation is currently available.
United States District Court, M.D. Tennessee, Nashville Division.

DAVID EARL MILLER, et al., Plaintiffs,
v.
TONY PARKER, et al., Defendants.

NO. 3:18-cv-01234
|
11/20/2018

WILLIAM L. CAMPBELL, JR., UNITED STATES DISTRICT JUDGE

CAPITAL CASE

MEMORANDUM AND ORDER

***1** On November 15, 2018, the Court largely denied Plaintiffs' Motion for Temporary Restraining Order And/Or Preliminary Injunction, granting it only with regard to their request that their attorney-witnesses be provided telephone access during their executions. (Doc. No. 20.) Plaintiff Miller has now filed a Motion for Reconsideration of that Order, along with a Memorandum in Support, and a Motion for Temporary Restraining Order pending a ruling on his Motion for Reconsideration. (Doc. Nos. 23–25.) In compliance with the Court's Order, Defendants filed an expeditious Response. (Doc. No. 27.)

"There is no explicit authority in the Federal Rules of Civil Procedure for a motion to reconsider, but courts generally construe such motions as motions to alter or amend pursuant to Fed. R. Civ. P. 59(e)." *Boynton v. Headwaters, Inc.*, 2009 WL 10664878, at *3 (W.D. Tenn. May 13, 2009). Accordingly, the Court applies the standard for reviewing motions brought under Rule 59(e), under which a district court may grant the motion if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice. *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005) (citing *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999)). This standard "vests significant discretion in district courts." *Rodriquez v. Tenn. Laborers Health & Welfare Fund*, 89 F. App'x 949, 959 n.7 (6th Cir. 2004). The movant, however, may not use such motions to re-argue the case or to present evidence that should have been before the court at the time the previous order was entered. *See Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 395 (6th Cir. 2007) (collecting cases).

In support of his motion to reconsider, Plaintiff Miller alleges "changing circumstances" and "new circumstances" in the form of "[i]nformation recently learned by Plaintiffs" that suggests Defendants do not have the drugs necessary to proceed with Plaintiff Miller's December 6 execution by lethal injection and will instead certify that the ingredients are unavailable and proceed with electrocution pursuant to Tennessee Code Annotated § 40-23-114(e)(2). (Doc. No. 24 at 4–12, 21–22.) Therefore, according to Plaintiff Miller, Defendants' requirement that he make his election between lethal injection and electrocution the day *before* Defendants intend to announce how they plan to execute him, requires him to potentially make a waiver of his rights that is not knowing and voluntary. He argues that those circumstances give rise to a sufficient likelihood of success on the merits of his due process claim to warrant a preliminary injunction. (*Id.*)

Defendants' Response, however, affirmatively states that the lethal injection "ingredients are available," and that they "will be prepared to carry out Miller's death sentence by lethal injection...or by electrocution." (Doc. No. 27 at 2–3.) Defendants also voluntarily agree to extend Plaintiff Miller's deadline to make his election until 5 p.m. Monday, November 26, 2018— five full days after the Tennessee Supreme Court has ordered Defendant Mays to notify Plaintiff Miller of the planned method of execution. (*Id.* at 3); *see* Amended Order, *State of Tennessee v. David Earl Miller*, No. E1982-00075-SC-DDT-DD (Tenn. Jul. 10, 2018) ("No later than November 21, 2018, the Warden or his designee shall notify Mr. Miller of the method that the Tennessee Department of Correction (TDOC) will use to carry out the executions and of any decision by the Commissioner or TDOC to rely upon the Capital Punishment Enforcement Act.").

***2** Accordingly, the Court finds that there are, in fact, no "new circumstances" that increase Plaintiff Miller's likelihood of success or otherwise alter the balance of factors relevant to the Court's previous ruling. In all other respects, Plaintiff Miller's motion to reconsider simply reargues issues that the Court already considered in ruling on the Plaintiffs' original motion for preliminary injunction.

Plaintiff Miller's Motion for Reconsideration (Doc. No. 23) is therefore **DENIED**. His Motion for Temporary Restraining Order pending a ruling on the Motion for Reconsideration (Doc. No. 25) is **DENIED** as moot.

It is so **ORDERED**.

WILLIAM L. CAMPBELL, JR.

UNITED STATES DISTRICT JUDGE

All Citations

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0260p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAVID E. MILLER; NICHOLAS TODD SUTTON; STEPHEN MICHAEL WEST; TERRY LYNN KING,
Plaintiffs-Appellants,

v.

TONY PARKER, Commissioner, Riverbend Maximum Security Institution, in his official capacity; TONY MAYS, Warden, Riverbend Maximum Security Institution, in his official capacity,
Defendants-Appellees.

No. 18-6222

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:18-cv-01234—William Lynn Campbell, Jr., District Judge.

Decided and Filed: December 3, 2018

Before: SILER, GIBBONS, and WHITE, Circuit Judges.

COUNSEL

ON BRIEF: Stephen M. Kissinger, FEDERAL PUBLIC DEFENDER, Knoxville, Tennessee, for Appellants. Jennifer L. Smith, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellees.

The court delivered an order. WHITE, J. (pp. 5–9), delivered a separate dissenting opinion.

ORDER

David Miller, a Tennessee death penalty prisoner, appeals from the district court's judgment denying his motion for a preliminary injunction. For the reasons set forth below, we affirm the district court's judgment.

On November 2, 2018, Miller and other Tennessee capital prisoners sued Tony Parker, Commissioner of the Riverbend Maximum Security Institution, and Tony Mays, Warden of the Riverbend Maximum Security Institution, seeking injunctive relief preventing the defendants from implementing a recently-adopted lethal-injection protocol. On the same date, Miller moved for a preliminary injunction enjoining the defendants from carrying out his execution, currently scheduled for December 6, 2018. The district court subsequently denied the request for a preliminary injunction to the extent that it sought to prevent use of the lethal-injection protocol, *Miller v. Parker*, No. 3:18-CV-01234, 2018 WL 6003123 (M.D. Tenn. Nov. 15, 2018), and the court denied the plaintiffs' motion for reconsideration. *Miller v. Parker*, No. 3:18-CV-01234, 2018 WL 6069181 (M.D. Tenn. Nov. 20, 2018). The plaintiffs appealed this decision, and Miller moved this court for a stay of his execution, which we denied. *Miller v. Parker*, No. 18-6222, 2018 WL 6191350 (6th Cir. Nov. 28, 2018) (order). Miller also requested an expedited briefing schedule, which we granted, and the parties have completed briefing. Further, while this appeal has been pending, Miller elected to be executed by electrocution.

Upon review, we conclude that the district court properly denied Miller's motion for a preliminary injunction. We review the district court's denial of a preliminary injunction for an abuse of discretion. *McGirr v. Rehme*, 891 F.3d 603, 610 (6th Cir. 2018). In considering whether to issue a preliminary injunction, courts balance four factors: (1) whether the movant has demonstrated a strong likelihood of success on the merits; (2) whether he will suffer irreparable injury in the absence of equitable relief; (3) whether the injunction will cause substantial harm to others; and (4) whether the public interest is best served by issuing the injunction. *Jolivette v. Husted*, 694 F.3d 760, 765 (6th Cir. 2012); *Cooey v. Strickland*, 604 F.3d 939, 943 (6th Cir. 2010). This standard is the same one that we used in reviewing Miller's

motion for a stay. *See Miller*, 2018 WL 6191350, at *1. As this court recently noted in another capital case, "[w]hile the obvious harm weighs in [the movant's] favor, it is not dispositive when there is no likelihood of success on the merits of the challenge, and in execution protocol challenges, likelihood of success is often the determinative factor." *Zagorski v. Haslam*, 741 F. App'x 320, 321 (6th Cir. 2018), *petition for cert. filed* (No. 18-6530) (U.S. Nov. 1, 2018). We review Miller's likelihood of success on the merits de novo. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014). In order to challenge successfully the State's chosen method of execution, Miller must "establish that the method presents a risk that is *sure or very likely* to cause" serious pain and needless suffering. *In re Ohio Execution Protocol*, 860 F.3d 881, 886 (6th Cir.) (en banc) (emphasis in original), *cert. denied*, 137 S. Ct. 2238 (2017).

In arguing that the district court erred in denying his motion for a preliminary injunction, Miller essentially raises the same arguments that he presented in his motion seeking a stay of execution. As with that motion, Miller has not shown a likelihood of success on the merits. Miller first contends that the State's switch of its method of execution from electrocution to the current three-drug protocol violates his rights under the Ex Post Facto Clause. A change in a State's method of execution will not constitute an ex post facto violation if the evidence shows the new method to be more humane. *Weaver v. Graham*, 450 U.S. 24, 32 n.17 (1981); *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915). While Miller argues that Tennessee's change in its method of execution potentially results in greater harm, we rejected this argument in our previous order and concluded that Miller had not shown that the new protocol is "sure or very likely" to be less humane than electrocution. *See Miller*, 2018 WL 6191350, at *1.

Miller next argues that Tennessee improperly compelled him to choose between two unconstitutional methods of execution, electrocution and the three-drug protocol. However, we also rejected this argument because this court has concluded that neither of these methods violates the Constitution. *See id.* at *1-2. In his brief, Miller relies on evidence and testimony presented in a state Chancery Court proceeding regarding the alleged ineffectiveness of large doses of midazolam as part of the lethal-injection protocol. However, this court has rejected a challenge to a similar Ohio lethal-injection protocol that, like the current Tennessee protocol, utilizes a large dose of the sedative midazolam as the first drug to render the prisoner

unconscious. *See In re Ohio Execution Protocol Litig.*, 881 F.3d 447, 449-53 (6th Cir.), *cert. denied sub nom.*, *Tibbetts v. Kasich*, 139 S. Ct. 216 (2018); *In re Ohio Execution Protocol*, 860 F.3d at 887-90.

Lastly, because Miller has elected to be executed by electrocution, he has waived any challenge to his execution by that method. *See Zagorski*, 741 F. App'x at 321. Regardless of that waiver, this court repeatedly has upheld the constitutionality of electrocution as a method of execution. *See Williams v. Bagley*, 380 F.3d 932, 965 (6th Cir. 2004); *Smith v. Mitchell*, 348 F.3d 177, 214 (6th Cir. 2003); *Buell v. Mitchell*, 274 F.3d 337, 370 (6th Cir. 2001).

Accordingly, we **AFFIRM** the district court's judgment.

DISSENT

HELENE N. WHITE, Circuit Judge, dissenting. I dissent for the same reasons set forth in the order denying Miller's motion for stay of execution, 2018 WL 6193150, at *2-5 (6th Cir. Nov. 28, 2018) (White, J., dissenting). That dissenting statement is set forth below:

> Because Miller has shown a substantial likelihood of success on the merits of his claims and it is beyond doubt that the other three injunction factors weigh strongly in his favor, I would grant the stay of execution to allow the district court to conduct an evidentiary hearing on the merits of Miller's claims prior to his execution date, now set for December 6.
>
> This appeal concerns the two alternative methods of execution currently used by the State of Tennessee: (1) lethal injection by a three-drug protocol using midazolam (a benzodiazepine sedative) followed by vecuronium bromide (a paralytic agent) and potassium chloride (a heart-stopping agent); and (2) electrocution. Under Tennessee law, "[f]or any person who commits an offense for which the person is sentenced to the punishment of death, the method for carrying out this sentence shall be by lethal injection." Tenn. Code Ann. § 40-23-114(a). But persons (like Miller) sentenced to death for offenses committed before January 1, 1999, may elect to be executed by electrocution. Tenn. Code Ann. § 40-23-114(b). Electrocution will also be utilized if lethal injection is held unconstitutional or if a drug essential to carrying out execution by lethal injection is unavailable. Tenn. Code Ann. § 40-23-114(e).
>
> Miller's 125-page complaint alleges and provides facts supporting that both electrocution and lethal injection using the three-drug protocol violate the Constitution *and* that the three-drug protocol is the harsher and less humane of the two methods of execution. Because, according to Miller, electrocution is cruel and unusual punishment, and execution using the three-drug protocol would cause even more suffering than electrocution, forcing him to choose between the two methods, as Tennessee has here, leaves him only a choice between two unconstitutional alternatives: be executed by electrocution in violation of the Eighth Amendment, or be executed by lethal injection in violation of the Ex Post Facto clause and the Eighth Amendment.[1] Assuming that electrocution violates the Eighth Amendment, and that lethal injection violates either the Ex Post Facto

[1]The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." (Emphasis added.) Article I, § 9, clause 3 of the Constitution provides that Congress shall not pass any "ex post facto Law." Another provision, Article I, § 10, directs that "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."

clause or the Eighth Amendment, Miller has a strong likelihood of success on his claim that Tennessee violated the Constitution by forcing him to choose between two unconstitutional alternatives. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991) (holding that a confession is coerced when the defendant was presented with a credible threat of legally unjustified violence from a government agent).

Thus, Miller's likelihood of success on his coerced-waiver claim also depends on the likelihood of success on his claims that (1) electrocution is unconstitutional; and (2) lethal injection using the three-drug protocol violates either the Eighth Amendment or the Ex Post Facto clause.

Miller has shown a substantial likelihood of success on his claim that electrocution violates the Constitution as a cruel and unusual punishment. It is true that our earlier cases, as recently as 2004, have held that electrocution is constitutional. *See Williams v. Bagley*, 380 F.3d 932, 965 (6th Cir. 2004); *Smith v. Mitchell*, 348 F.3d 177, 214 (6th Cir. 2003) (same); *Buell v. Mitchell*, 274 F.3d 337, 370 (6th Cir. 2001) (same). But in each of those cases, we simply cite back to a prior case without any analysis, and the line of summary rejections of challenges to the constitutionality of electrocution ultimately leads back to the Supreme Court's 1890 decision in *In re Kemmler*, 136 U.S. 436, 449 (1890). A lot has changed since the late-nineteenth century, however.[2] In typical cases, the passage of time is not enough to find that a Supreme Court case no longer controls. But the Supreme Court itself has made clear that the Eighth Amendment's prohibition against cruel and unusual punishments demands that we revisit from time to time past judgments of what methods are acceptable to accomplish the ultimate punishment of death. Indeed, the meaning of the Eighth Amendment's prohibition on cruel and unusual punishments is derived from "the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (internal quotation marks and citations omitted).

Notwithstanding our prior cases summarily rejecting challenges to the constitutionality of electrocution, this court noted in 2007 that "modern sensibilities have moved away from hanging, the firing squad, the gas chamber and electrocution as methods of carrying out a death sentence," and that "[t]he method of execution in 37 of the 38 States that authorize capital sentences has

[2]Justice Brennan, joined by Justice Marshall, forcefully made this point in 1985 in his dissent from denial of certiorari in *Glass v. Louisiana*, where he noted the trend of courts summarily rejecting challenges to electrocution "typically on the strength of th[e Supreme] Court's opinion in *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890), which . . . was grounded on a number of constitutional premises that have long since been rejected and on factual assumptions that appear not to have withstood the test of experience." 471 U.S. 1080, 1081 (1985).

evolved to make lethal injection the preferred method of carrying out a death sentence with only Nebraska clinging to electrocution." *Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007).

The Georgia Supreme Court, *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001), and the Nebraska Supreme Court, *State v. Mata*, 745 N.W.2d 229 (Neb. 2008), have declared electrocution to be cruel and unusual punishment in violation of their analogous state constitutional provisions. The Nebraska Supreme Court noted that the "U.S. Supreme Court has never reviewed objective evidence regarding electrocution's constitutionality," but rather has "based its holdings on state courts' factual assumptions, which, in turn, relied on untested science from 1890." *Id.* at 257. It then examined, in fairly exhaustive detail, evidence that has surfaced since that time, including expert testimony and first-hand observations of past electrocutions. *Id.* It concluded: "[T]he evidence clearly proves that unconsciousness and death are not instantaneous for many condemned prisoners. These prisoners will, when electrocuted, consciously suffer the torture that high voltage electric current inflicts on the human body. The evidence shows that electrocution inflicts intense pain and agonizing suffering. Therefore, electrocution as a method of execution is cruel and unusual punishment . . . ." *Id.* at 279.

Miller's lengthy and detailed complaint presents similar evidence, and, tellingly, the state does not respond to Miller's evidence or arguments on the merits. Thus, Miller has shown a substantial likelihood of success on this claim, and I would remand for a hearing on the merits.

Further, I do not agree that Miller waived his challenge to the constitutionality of electrocution simply because he chose to be electrocuted. He made this election on the eve of the deadline imposed upon him, under circumstances where he believed that the alternative and default method of lethal injection is a far more inhumane and painful way to die. He has consistently challenged the three-drug protocol as unconstitutional. The timing of his election and his consistent challenge to the constitutionality of the three-drug protocol distinguish his circumstances from other cases where we found waiver. *See, e.g.*, *Stanford v. Parker*, 266 F.3d 442, 462 (6th Cir. 2001) (explaining that the plaintiff would waive his challenge to electrocution if he chose electrocution over lethal injection, but noting that the plaintiff did not challenge the constitutionality of lethal injection). Although *Zagorski v. Haslam*, No. 18-6145, 2018 WL 5734458, at *1 (6th Cir. Oct. 31, 2018), found such a waiver, it is an unpublished order and therefore not binding on this court.

Miller has also established a substantial likelihood of success on his claim that the three-drug protocol violates the Ex Post Facto clause by creating a significant risk of pain and suffering beyond that involved in electrocution. "An ex post facto law possesses two elements: (1) 'it must apply to events occurring before its enactment,' and (2) 'it must disadvantage the offender affected by it.'" *Dyer v. Bowlen*, 465 F.3d 280, 285 (6th Cir. 2006) (quoting *Lynce v. Mathis*, 519

U.S. 433, 441 (1997)). As the district court acknowledged, there is authority for finding that changes in execution protocols are subject to ex post facto challenges. R. 20, PID 1699 n.4; *see also Zink v. Lombardi*, No. 2:12-CV-4209-NKL, 2012 WL 12828155, at *4-*5 (W.D. Mo. Nov. 16, 2012) (holding that the plaintiffs alleged a viable ex post facto claim where they alleged that a change to the execution protocol would result in a significant risk of increased pain compared to the prior method of execution); *cf. Weaver v. Graham*, 450 U.S. 24, 32 n.17 (1981) (noting that the "critical question . . . is whether the new provision imposes greater punishment after the commission of the offense," and explaining that the Supreme Court had previously held "that a change in the method of execution was not *ex post facto* because evidence showed the new method to be more humane, not because the change in the execution method was not retrospective" (citing *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915))). Miller has presented plausible and yet-unrebutted assertions that the three-drug protocol causes 18–20 minutes of pain and suffering, substantially longer than the six minutes of pain and suffering caused by electrocution. The state has not addressed the merits of this new evidence, other than to point to recent decisions finding that similar lethal-injection protocols did not inflict cruel and unusual punishment. *See, e.g.*, *In re Ohio Execution Protocol*, 860 F.3d 881, 884 (6th Cir. 2017) (en banc), *cert. denied sub nom. Otte v. Morgan*, 137 S. Ct. 2238 (2017). Those holdings, of course, were based on the evidence presented in those cases, and in any event do not address whether the three-drug protocol constitutes an ex post facto violation. Further, the district court in this case cited another district court's recent finding that there were "serious questions . . . concerning whether the lethal injection protocol with which the state intends to execute the plaintiff is more or less humane than electrocution." R. 4, PID 1699 (citing *Zagorski v. Haslam*, No. 3:18-1035 (M.D. Tenn. Oct. 11, 2018)). The district court did not contest this finding from *Zagorksi* but instead reasoned that it did not matter in this case because the plaintiff in *Zagorski*, unlike in this case, was insisting on electrocution and the state was refusing his request. Nonetheless, based on Miller's unrebutted evidence, the state's failure to respond to that evidence, and the district court's recognition of serious questions concerning whether the three-drug protocol is less humane than execution, Miller has presented a substantial likelihood of success on his ex post facto claim.

Miller's allegations also establish a substantial likelihood of success on his claim that the three-drug protocol constitutes a cruel and unusual punishment, which requires him to show "that the method presents a risk that is *sure or very likely* to cause serious pain and needless suffering" and to identify "a known and available alternative method of execution that entails a lesser risk of pain." *Glossip v. Gross*, __ U.S. __, 135 S. Ct. 2726, 2731, 2737 (2015) (internal quotation marks and citation omitted). Miller contends that evidentiary findings made by a trial court in a case in which Defendants were parties establish that Midazolam (the first drug in the three-drug protocol) will not prevent the pain sure to result from the second and third drugs in the protocol, and that the findings

relied on by the Supreme Court when it upheld the constitutionality of a similar three-drug protocol in *Glossip*, 135 S. Ct. 2726, have been undermined by subsequent developments. The state did not address the merits of these arguments, either. Nor did the state dispute that Miller has identified several feasible and readily available alternative methods of execution that would substantially reduce the risk of pain. Thus, Miller's allegations and supporting documentation establish a likelihood of success on the merits of this claim.

For these reasons, I would grant Miller's motion for stay of execution until the merits of his challenges can be decided, reverse the denial of preliminary injunctive relief, and remand to the district court for further proceedings.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk