IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MISSISSIPPIANS EDUCATING FOR SMART JUSTICE, INC., MISSISSIPPI CURE, INC., ROBERT SIMON, RODNEY GRAY AND BENNY STEVENS — *APPELLANT*

v. — **No. 2011-CA-00632**

MISSISSIPPI DEPARTMENT OF CORRECTIONS, an agency of THE STATE OF MISSISSIPPI — *APPELLEE*

BRIEF OF APPELLEE

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JASON L. DAVIS
SPECIAL ASSISTANT ATTORNEY GENERAL
Miss. Bar. No. [redacted]
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone:(601) 359-3680
Telefax: (601) 359-3796

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES

Cases *page*

FEDERAL CASES

STATE CASES

STATE STATUTES

STATEMENT REGARDING ORAL ARGUMENT

The appellee submits this case is not one for which oral argument should be granted. The issue at bar is clearly settled by statute and is free from any ambiguity whatsoever. The plain language of Miss. Code. Ann. § 25-43-1.101 *et seq*, specifically exempts from the Mississippi Administrative Procedures Law, any regulation which is "directly related only to inmates of a correctional or detention facility." The lethal injection protocol clearly relates only to inmates.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MISSISSIPPIANS EDUCATING FOR SMART JUSTICE, INC., MISSISSIPPI CURE, INC., ROBERT SIMON, RODNEY GRAY AND BENNY STEVENS — *APPELLANT*

v. — **No. 2011-CA-00632**

MISSISSIPPI DEPARTMENT OF CORRECTIONS, an agency of THE STATE OF MISSISSIPPI — *APPELLEE*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appeal at bar comes from the Circuit Court of the First Judicial District of Hinds County. Three offenders who were under sentence of death for murder, along with their dubious supporting cause organizations, had sought an extraordinary order from the court staying their executions. They sought injunctive relief, a writ of mandamus, and a declaration that MDOC's lethal injection protocol was actually

a "Rule" and thus, subject to the time and resource consuming notice and comment procedures of the Mississippi Administrative Procedures Law (MAPL), Miss. Code Ann. § 25-43-1.101 *et seq*. The circuit court agreed with the appellee in that such an argument was legally wrong and further agreed that the legislature, in drafting the MAPL, specifically exempted from the definition of a Rule covered by the MAPL, any regulation which is "directly related only to inmates of a correctional or detention facility." *See* Miss. Code Ann. § 25-43-1.102(I)(ii)(6). The circuit court, after considering the briefs and oral arguments of both parties, in an order on April 21, 2011, granted the motion to dismiss, holding that MDOC's lethal injection protocol was not a Rule as contemplated by the provisions of MAPL because the protocol was "directly related only to inmates of a correctional or detention facility." See Appellant's Record Excerpts, 3.

SUMMARY OF THE ARGUMENT

MDOC procedures regarding inmates are not required to meet the procedural and other requirements of the MAPL as MDOC regulations are not "rules" as that term is defined pursuant to the MAPL. The protocol governing lethal injection addresses the very specific issue of the manner in which an **inmate** under a criminal death sentence will be executed and bears none of the hallmarks of a statement of general applicability necessitating promulgation as a rule. Further, the offender appellant's claims were barred due to their failure to follow the requisite grievance procedures found in Miss. Code Ann. § 47-5-803. The appellee further submits that the non-offender appellants lack standing and that any claims challenging the protocol and the applicability of the MAPL to it, in regards to witnesses to executions, are also barred by the statue of limitations found in Miss. Code Ann. § 25-43-3.111(2).

The decision of the circuit court was proper as the appellants' claims are legally incorrect and

otherwise fatally flawed. Accordingly, this Court should affirm the decision of the circuit court which denied the appellants' motion for preliminary injunction, declaratory relief, and writ of mandamus and granted MDOC's motion to dismiss.

ARGUMENT

Claim I. MDOC'S EXECUTION PROTOCOL IS NOT SUBJECT TO THE ADMINISTRATIVE PROCEDURES LAW

The circuit court correctly held that the MAPL contains explicit exemptions from its provisions for MDOC inmate regulations including the lethal injection protocol. The appellants had sought to delay their executions by arguing that the MPAL required MDOC to promulgate its lethal injection protocol as a "Rule" before the protocol could be used in executions. Were the lethal injection protocol to be construed as a "Rule", thus requiring adoption pursuant to the MAPL, MDOC would then be required to, among other acts, provide twenty-five days notice to the public of any pending change to the rule, conduct a public hearing, and undertake other time and resource-consuming acts whenever the existing protocol is changed. *See, e.g.,* Miss. Code Ann. §§ 25-43-3.103; 25-43-3.104 (setting out public notice and hearing requirements). The appellants sought an order staying their executions until such time as the MDOC followed the notice and comment requirements and – presumably – until such time as the inmates under a sentence of death finish with their planned series of lawsuits challenging MDOC's "Rule" under the MAPL. Then, with any change in MDOC's protocol, the entire litigation and requests for stays of executions would restart anew. As the Fifth Circuit has recognized, "most convicted Appellees sentenced to death covet delay, if nothing better can be had; . . . ."). *Bass v. Estelle*, 696 F.2d 1154, 1159 (5th Cir. 1983).

The MAPL is a statutory creature created, defined, and limited by the legislature. The appellants focus exclusively on Section 25-43-3.111, which provides that a "*rule* adopted after July 1, 2005, is invalid unless adopted in substantial compliance with the provisions of Sections 25-43-3.102 through 25-43-3.110." Appellants then contend that the lethal injection protocol is a "rule" and, since the protocol has not been adopted pursuant to the MPAL, the protocol is "invalid" and they cannot be executed via an "invalid" protocol. However, the legislature explicitly exempted regulations applying to inmates from the MPAL when the legislature defined the all-important term, "Rule." Section 25-43-102(i) of the MPAL defines a Rule as follows:

> "Rule" means the whole or a part of an agency regulation or other statement of general applicability that implements, interprets or prescribes:
>
> (i) Law or policy, or
>
> (ii) The organization, procedure or practice requirements of an agency. The term includes the amendment, repeal or suspension of an existing rule. *"Rule" does not include:*
>
> * * *
>
> (6) *A regulation or statement directly related only to inmates of a correctional or detention facility*, students enrolled in an educational institution or patients admitted to a hospital, if adopted by that facility, institution or hospital;

Miss. Code Ann. § 25-43-1.102(i)(ii)(6) (emphasis supplied).

The "protocol" at issue governs the method and procedures *by which an inmate is executed. See* Complaint at ¶¶ 14-18; Exhibit A to the Complaint. Obviously, MDOC only executes "inmates" and the lethal injection protocol for inmates falls squarely within the "regulation or statement directly related

to inmates" exemption set forth in Section 25-43-1.102(i)(ii)(6). Clearly, in drafting the MAPL the legislature chose to create a very broad exception ensuring that MDOC inmate policies, including the lethal injection protocol would not be subject to the time and resource consuming delays of the MAPL. That the Mississippi legislature chose to explicitly exempt MDOC's lethal injection protocol from administrative rule adoption requirements is consistent with the decisions of a number of other states. *See L'Heureux v. State Dep't of Corr.*, 708 A.2d 549, 553 (R.I. 1998) (holding that "[n]umerous other jurisdictions that have considered the application of their administrative-procedure statutes to correctional institutions [and] have rejected their applicability"); *see also Middleton, et al., v. Missouri Department of Corrections*, 278 S.W. 3d 193 (Mo. 2009) (holding that the lethal injection protocol was not a "rule" within the scope of the administrative- procedure statutes); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 311-12 (Tenn. 2005) (same); *Arkansas Dept. of Correction v. Williams*, 2009 WL 4545103 (Ark. 2009) (same).

Moreover, those states that have excluded prison regulations from administrative procedure requirements have adopted, what the Tennessee Supreme Court has described as the general policy, that "promulgation requirements of public notice, public hearing, attorney general approval, and filing with the state are simply not realistic requirements for implementing procedures that concern the intricacies and complexities of a prison environment." *Abdur'Rahman*, 181 S.W.3d at 312; *see also Middleton,* 278 S.W.3d at 195 (discussing the historical deference to prison officials and exclusion of prison regulations from administrative procedure requirements). In this respect, the prison environments in Tennessee and Missouri are no more complex or intricate than that of Mississippi. Accordingly, our prison officials have been afforded that same deference through the legislature's exclusion of inmate policies from the MAPL. The appellants argue that because the lethal injection protocol also references handling of witnesses, the media, and others, that the protocol does not pertain "only to inmates" and, therefore, the inclusion of non-

inmates means the protocol must be adopted as a Rule. This is not a novel claim as other courts have considered and rejected such arguments. Specifically, the Missouri version of the MAPL contains an exemption materially identical to that found in the MAPL: a "rule" does not include any "statement concerning only inmates of an institution under the control of the department of corrections ... when issued by such an agency." *Middleton,* 278 S.W.3d at 195. The appellants in *Middleton* argued that because the protocol also addressed execution witnesses, the protocol was not "concerning only inmates" and was, in fact, a "rule." The Missouri Supreme Court firmly rejected that argument, noting that:

> . . . this protocol does not affect the rights of persons allowed to be witnesses under section 546.740, RSMo 2000. Section 546.740 specifically sets out the number and types of people who are allowed to attend executions, and the execution protocol does not alter this criteria. Section 546.740 criteria also highlight that an execution is not a public event. Further, the witnesses who are present do not participate in the procedural directives outlined in the protocol: preparing chemicals, using intravenous lines, medically monitoring the prisoner, and administrating and documenting chemicals. As such, no direct connection exists between witnesses and the protocol beyond that of individual interest. And, merely because an event or topic is interesting or important does not make it subject to rulemaking given that there is a specific statutory exemption, "concerning only inmates." Any other conclusion would impute an irrational legislative intent.[6]
>
> ---
>
> Fn6. To hold otherwise would construe the language to reflect one of the following irrational intents: (1) to exempt protocols when a medical professional happens to be directly employed by DOC, but to require rulemaking when the medical professional is not so employed; (2) to apply the language "concerning only inmates" to mean that no one can be involved in implementing a protocol, which renders the exemption meaningless; or (3) to apply the language to all matters about which some member of the public feels strongly, which renders the exemption meaningless because every aspect of prison life is of concern to someone.

Id. at 197. As referenced in *Middleton*, Missouri has a statute governing the type and number of witnesses to an execution. *See* 278 S.W.3d at 197 (citing V.A.M.S. 546.740). Similarly, the legislature has enacted a statute in Mississippi governing the type and number of witnesses to an execution. *See* Miss. Code Ann. § 99-19-55(1). The protocol, to that extent, does not alter or change any provision of Section 99-19-55(1)

governing witnesses. The reasoning behind the Supreme Court of Missouri's rejection of the argument that an execution protocol that references witnesses is a "Rule" is sound and persuasive. Moreover, the Mississippi legislature has exempted from the MAPL, any "regulation or statement concerning only the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public." Miss. Code Ann. § 25-43-1.102(ii)(i)(1). MDOC's lethal injection protocol also meets that general exception as inmates are not members of the public.

Neither the Mississippi execution statutes (Miss. Code Ann. §§ 99-19-51-53, -55, -57), the Tennessee execution statute (40-23-114(c)), nor the Missouri execution statute (§546.720, discussed in *Middleton, supra*), contain references to the MAPL or the MAPL equivalent in those states. Considering that the execution statutes, the most relevant to the execution protocol, contain no reference to the MAPL, further evidences the legislature's express intent to exclude policies enacted to further those statutory mandates from the definition of a "Rule." Another more recent Texas case is also instructive on this issue. In *Foster v. Texas Dept. of Criminal Justice*, 344 S.W.3d 543 (Tex. App. 2011), the court was faced with exactly the same type of claims raised in the case *sub judice.* There the court held that the Texas version of the MAPL:

> . . . unambiguously exempts from the APA "a rule ... of the Texas Department of Criminal Justice ... that applies to an inmate or any other person under the custody or control of the department," not just TDCJ's rules relating to inmate grievances. See Tex. Gov't Code Ann. § 2001.226. Appellants can achieve the construction they desire only by adding words to the statute that the Legislature did not itself choose to include. *See Texas Lottery Comm'n*, 325 S.W.3d at 637 (we presume that the Legislature selected statutory words, phrases, and expressions deliberately and purposefully). We are not free to rewrite the statute in the guise of construing it. *Stockton v. Offenbach*, 336 S.W.3d 610, 619 (Tex.2011). Accordingly, we overrule appellants' first issue.

In their second issue, presented as an alternative to their first, appellants argue that "a rule ... of the Texas Department of Criminal Justice ... that applies to an inmate or any other person under the custody or control of the department," as provided in APA section 2001.226, applies solely to the portions of the March 2011 Execution Procedure that "require some active participation by an inmate" or at least "involve an inmate." The central premise of both arguments is that some provisions of the Procedure are addressed to the conduct or procedures of TDCJ–CID or its staff and therefore, appellants reason, cannot "appl[y] to an inmate" under the meaning of section 2001.226. In appellants' view, furthermore, the new drug protocol, as well as provisions relating to the training and qualifications of the TDCJ–CID "Drug Team" that administers the lethal injection, are among the portions of the Procedure that govern TDCJ–CID rather than inmates and, accordingly, fall outside section 2001.226. Relatedly, in their third issue, appellants urge that because these two sets of provisions are essential elements of the March 2011 Execution Procedure as a whole, they cannot be severed from other provisions that fall within APA section 2001.226, rendering the entirety of the Procedure subject to challenge under APA section 2001.038 and invalid. *See Texas Dep't of Banking v. Restland Funeral Home, Inc.*, 847 S.W.2d 680, 682 (Tex.App.-Austin 1993, no writ). We need go no further than to hold that the March 2011 Execution Procedure—including its provisions relating to the drug protocol and the qualifications and training of the personnel administering the lethal injection—are "applied" to a death-row inmate, under any ordinary meaning of the term, by implementing the process by which he or she will be executed.[10] Appellants' arguments to the contrary seek, again, to rewrite APA section 2001.226 in the guise of construing it. *See Offenbach*, 336 S.W.3d at 619; *see also Texas Lottery Comm'n*, 325 S.W.3d at 640 ("when the language of a statute is clear, it is not the judicial prerogative to go behind or around that language through the guise of construing it to reach what the parties or we might believe is a better result"). We overrule appellants' second and third issues.

344 S.W.3d at 548-9.

Fn.10. See Webster's Third New International Dictionary 105 (2002) (defining "apply" as "to have a valid connection, agreement, or analogy: have a bearing: be pertinent").

The Texas version of the APA, like the MAPL, "does not apply to a rule or internal procedure of the Texas Department of Criminal Justice or Texas Board of Criminal Justice that applies to an inmate or any other person under the custody or control of the department or to an action taken under that rule or procedure." See V.T.C.A., Government Code § 2001.226. As the court in *Foster* held, the protocol applies

solely to death row inmates and is thus, not a rule as contemplated by Texas' version of the MAPL. The operative Mississippi statute, which is essentially the same as Texas, is also just as clear and specifically exempts "[a] regulation or statement directly related only to inmates of a correctional or detention facility." See Miss. Code Ann. § 25-43-1.102(i)(ii)(6). The MDOC protocol's many aspects ranging from witnesses to the handling of the media and so on, all are "'applied' to a death row inmate under any ordinary meaning of the term, by implementing the process by which he or she will be executed." *Foster*, 344 S.W.3d 543, 549. In the recent case of *Conner v. North Carolina Council of State*, 716 S.E.2d 836 (N.C. 2011) the North Carolina Supreme Court, analyzed those states which had similar exemptions as the MAPL, holding:

> In other states in which the APA includes an exemption similar to this State's DOC exemption "with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees," N.C.G.S. § 150B–1(d)(6), courts have held that the APA does not apply to the protocols adopted. *See Middleton v. Mo. Dep't of Corr.*, 278 S.W.3d 193, 197 (Mo.) (holding that the legislature intended "that execution protocols would not be subject to rulemaking" and that "merely because an event or topic is interesting or important does not make it subject to rulemaking given that there is a specific statutory exemption, 'concerning only inmates' "), cert. denied, ___U.S.___, 129 S.Ct. 2430, 173 L.Ed.2d 1331 (2009); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 311–12 (Tenn.2005) ("[T]he lethal injection protocol is not a rule as defined by the UAPA. The protocol instead fits squarely within two exceptions to the meaning of 'rule': statements concerning only the internal management of state government and not affecting private rights privileges or procedures available to the public, and statements concerning inmates of a correctional or detention facility." (internal citations omitted)), cert. denied, 547 U.S. 1147, 126 S.Ct. 2288, 164 L.Ed.2d 813 (2006); *Porter v. Commonwealth*, 276 Va. 203, 239, 661 S.E.2d 415, 432–33 (2008) (holding that the Virginia APA "exempts actions of agencies relating to '[i]nmates of prisons or other such facilities or parolees therefrom,' " that "the Virginia Department of Corrections is an agency whose sole purpose is related to inmates of prisons," and that the Department "is thus exempt from the strictures of the APA" (internal citation omitted)), cert. denied,___U.S.___, 129 S.Ct. 1999, 173 L.Ed.2d 1097 (2009). In the case sub judice, neither party disputes that the DOC's APA exemption "with respect to matters relating solely to persons in its custody or under its supervision," N.C.G.S. § 150B–1(d)(6), applies to the lethal injection protocol.
>
> 716 S.E.2d at 843.

Clearly, MDOC's lethal injection protocol is not a rule which must submit to the requirements of the MAPL, as the circuit court correctly held. *Id; see also Beaty v. Brewer*, 791 F.Supp.2d 678 (D. Ariz. 2011). The Appellants have failed to show otherwise, neither by their arguments nor by their cited authority.

Additionally, the appellants' reliance on *Evans v. State*, 914 A.2d 25 (Md. Ct. App. 2006), *Morales v. California Dept. of Corr. and Rehab.*, No. CV061436 (California Superior Ct., Oct. 31 2007) and *Bowling v. Kentucky Department of Corrections*, 301 S.W. 3d 478 (KY. 2009) fail to bolster their claims. These cases are distinguishable in that both the Maryland and California definitions of the term "regulation" (the equivalent term to "rule" used in those states) **lack** the exceptions provided for inmates in § 25-43-1.102(i)(ii.)(6.). *See* Maryland Code, State Government §10-101(g)(1) (defining "regulation") and §10-101(g)(2) (setting out the exceptions to that definition); West's Ann. Cal. Gov. Code §11342.600(broadly defining the term "regulation" in a manner that contains no exceptions to the broad definition). Indeed, the California definition has no exceptions at all. Likewise, the Kentucky statutes do not provide for "the exception for 'statements concerning inmates of a correctional or detention facility.'" *Bowling*, 301 S.W. 3d 378 at 490. The Mississippi legislature's clear intent to exclude MDOC inmate policies from the MAPL means that these cases and the others cited to, arising in states with no statutory exception, are irrelevant.

The injection protocol is a "regulation or statement" related only to inmates of the MDOC and is therefore exempt from the provisions of the MAPL. The protocol is an internal policy concerning lethal injections and the manner in which executions are carried out and is therefore, not subject to the notice and comment requirements of the MAPL. This exemption reflects other states' exclusion of lethal injection protocols from the requirements of the APA. The appellants are therefore entitled to no relief on this

assignment of error for the reasons stated. Alternatively, the appellants arguments fail on procedural grounds as well.

A. Any Claims Regarding Whether a Witness Provision of the Lethal Injunction Procedure is a Rule that Must be Promulgated is Barred by the MAPL's One Year Statute of Limitations.

A party alleging that a "rule" has been adopted in a manner contrary to the MAPL must bring that challenge within one year after the effective date of the allegedly invalid rule. *See* Miss. Code Ann. § 25-43-3.111(2). The appellants argued that a shortage in a drug previously used by MDOC in connection with the execution, Sodium Pentothal, caused MDOC to replace Sodium Pentothal with another drug. *See* Complaint at ¶¶ 13-19. Specifically, the Complaint alleged that MDOC "will likely use Pentobarbital as a replacement drug in lieu of Sodium Pentothal." *Id.* at ¶ 17. This change in drugs, the appellants wrongly asserted, was a change in the protocol that constituted a new "rule" under the MAPL. However, the Complaint contained **no allegation** that MDOC had changed the witness portion of the lethal injection protocol. In fact, the Complaint stated that the lethal injection protocol, except for the substitution of Pentobarbital for Sodium Pentothal, has been in existence since at least 2004. *See* C.P. 3., Complaint at ¶ 13. Thus, even assuming that references to witnesses in the lethal injection protocol would take the protocol out of the legislature's explicit exemption of inmate rules from the MAPL, which it clearly does not, references to witnesses have existed in the protocol since at least 2004 and appellants have certainly waited more than a year to bring a challenge based on this witness portion of the lethal injection protocol. They are therefore, barred from asserting such a claim. See Miss. Code Ann. § 25-43-3.111(2)

B. Mississippians Educating for Smart Justice and Mississippi CURE, Inc. Lack Standing and Failed to Pursue Their Administrative Remedies.

The appellee asserts, as it did in the circuit court, that the appellants failed to explain how

Mississippians Educating for Smart Justice, Inc. and Mississippi CURE, Inc. had/have standing to assert the claims raised in their lawsuit. The Complaint merely alleged that these groups have "an interest in seeing that State officials operate within the boundaries of the law." *See* C.P. 3. Complaint at ¶¶ 1, 2, 4. This type of generalized allegation (which could not even be characterized as an alleged injury) is insufficient to establish standing. *See Bennett v. Board of Sup'rs of Pearl River County*, 987 So.2d 984, 987 (Miss. 2008) (finding no standing where "Appellants failed even to allege that they had any interest at all that would set them apart from the general public.").

Furthermore, in *Evans v. State*, 396 Md. 256, 914 A.2d 25 (Md. 2006), a case relied upon by the appellants,[1] the Maryland court found such organizational appellants lacked standing.

> . . . under Maryland common law principles, "for an organization to have standing to bring a judicial action, it must ordinarily have a 'property interest of its own-separate and distinct from that of its individual members' " and that "an individual or an organization 'has no standing in court unless he has also suffered some kind of special damage from such wrong differing in character and kind from that suffered by the general public.' " *Medical Waste v. Maryland Waste*, 327 Md. 596, 612-13, 612 A.2d 241, 249 (1992), quoting in part from *Citizens P. & H. Ass'n v. County Exec.*, 273 Md. 333, 345, 329 A.2d 681, 687 (1974) and *Rogers v. Md.-Nat'l Cap. P. & P. Comm'n*, 253 Md. 687, 691, 253 A.2d 713, 715 (1969). See, more recently, *Duckworth v. Deane*, 393 Md. 524, 903 A.2d 883 (2006), and compare *Teachers Union v. State Board of Education*, 379 Md. 192, 199, 840 A.2d 728, 732 (2004), confirming that principle but finding that the organization in question did suffer that special damage necessary to provide standing.
>
> In this case, the only asserted basis for standing on the part of the three organizations is that they all oppose capital punishment and desire to see that the death penalty is not carried out-at all, but especially in violation of law. In the complaint, the NAACP asserted that it works to eliminate racial prejudice and has long opposed the death penalty and, in particular, the disproportionate impact of the death penalty on African-American criminal Appellees. The ACLU averred that it works to ensure that all people in the State of Maryland are free to think and speak as they choose and that it continues to oppose capital punishment on

[1] *See* App. at 6, 13. See also C.P. 72., Preliminary Injunction Memo at 4 ("The situation at hand mirrors the Maryland case of *Evans* exactly.")

> moral, practical, and constitutional grounds. The third organization, CASE, posited that it is a coalition of groups and individuals united to end the death penalty in Maryland. All three organizations claimed that they had an interest in seeing that State officials operate within the boundaries of the law and ensuring that executions are not carried out in violation of the Constitution and Maryland law.
>
> The mere fact that an individual or group is opposed to a particular public policy does not confer standing to challenge that policy in court. If it were otherwise-if any person or group disenchanted with some public policy but not adversely affected by it in some special way were free to seek a judicial declaration that the policy is invalid-the courts, rather than the legislative branch, would end up setting public policy, and that is not the proper role of the Judiciary. The interest asserted by the organizations-ensuring that State officials operate legally and that executions are not carried out unlawfully-is no different than the interest of all Maryland citizens. The three organizations have not alleged, and presumably cannot legitimately allege, that they will suffer any special damage or injury if the current execution protocols adopted by the DOC are implemented, and, consequently, they have no standing on their own to challenge those protocols.

396 Md. at 328-30. If this case "mirrors" *Evans*,[2] then Mississippians Educating for Smart Justice, Inc. and Mississippi CURE, Inc. lack standing.

Additionally, the named inmates failed to pursue their administrative remedies as required by Miss. Code Ann. § 47-5-803 which states:

> (1) Upon approval of the administrative review procedure by a federal court as authorized and required by the Civil Rights of Institutionalized Persons Act, and the implementation of the procedure within the department, this procedure shall constitute the administrative remedies available to offenders for the purpose of preserving any cause of action such offenders may claim to have against the State of Mississippi, the Department of Corrections or its officials or employees.
>
> (2) *No state court shall entertain an offender's grievance or complaint which falls under the purview of the administrative review procedure unless and until such offender shall have exhausted the remedies as provided in such procedure. If at the time the petition is filed the*

[2] As set forth above in Section I(A), the case at bar does not mirror *Evans* because, unlike in Maryland from where *Evans* arose, the Mississippi legislature has explicitly exempted inmate policies from the administrative-procedures act.

administrative review process has not yet been completed, the court shall stay the proceedings for a period not to exceed ninety (90) days to allow for completion of the procedure and exhaustion of the remedies thereunder.

(emphasis added). The named inmates[3] failed to pursue their available administrative remedies with regards to the claims *sub judice*, resulting in a failure to comply with the provisions of Miss. Code Ann. § 47-5-803. In *Putnam v. Epps*, 63 So.3d 547, (Miss. 2011), the Court recently reiterated this requirement holding, "[t]he administrative-review procedure 'constitute[s] the administrative remedies available to offenders for the purpose of preserving any cause of action such offenders may claim to have against the State of Mississippi, the Department of Corrections or its officials or employees.' Miss.Code Ann. § 47–5–803(1) (Rev.2004)". *Id.* at 549. "Judicial review is available after an offender has exhausted all administrative remedies." *Id.* Consequently, the offender Appellants' claims were thus fatally flawed. Moreover, the appellants failed to allege that if MDOC was required to undertake the time and resource consuming act of promulgating the lethal injection protocol as a rule under the MAPL that the protocol would be changed in any material manner. Neither do the appellants argue a denial of due process nor do they assert cruel and unusual punishment from implementation of the amended execution procedure pursuant to *Baze v Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008).

As set forth above, the MAPL expressly exempts from its scope any "regulation or statement directly related only to inmates of a correctional or detention facility." The Appellants' contention that the lethal injection protocol somehow constitutes a rule subject to the MAPL is fatally flawed and unquestionably devoid of legal merit. Moreover, some or all of Appellants' claims regarding the lethal injection protocol exhibit a lack of standing , were barred by the statute of limitations, or barred for a failure

[3]Offender Stevens was executed on May 10, 2011, and offender Gray on May 17, 2011. Offender Simon's execution was stayed by the Fifth Circuit.

to exhaust administrative remedies.

Claim II. THE APPELLANTS' CLAIM THAT ANY AMBIGUITY IN THE ADMINISTRATIVE PROCEDURES LAW MUST BE RESOLVED IN FAVOR OF PUBLIC NOTICE AND COMMENT IS WITHOUT LEGAL MERIT

The appellant's second argument is that the circuit court erred in not finding that any ambiguity in the MAPL must be resolved in their favor. See App. at 10. Specifically, the appellants argue that "[n]arrowly construing the facility-specific exception comports with the APL's dual purpose: legislative oversight and public participation." App. at 11. The appellee submits there is no ambiguity in the operative statute, as set forth above. The exception within the MAPL is clear and express. The lethal injection protocol relates only to death row inmates and concerns only the processes and procedures needed to effect an inmate's execution. This claim is devoid of legal merit for the reasons stated in the preceding argument and the appellants are entitled to no relief on this assignment of error.

CONCLUSION

For the reasons set forth above, the appellee respectfully asks the Court to affirm the decision of the circuit court which held the lethal injection protocol was not a rule as contemplated by the Mississippi Administrative Procedures Law and in so doing eliminate any possibility of future claims of this nature.

Respectfully submitted,

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JASON L. DAVIS
SPECIAL ASSISTANT ATTORNEY GENERAL
Miss. Bar No. [redacted]
(Counsel of Record)

BY: 
JASON L. DAVIS

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680
Facsimile: (601) 359-3796

CERTIFICATE OF SERVICE

I, Jason L. Davis, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, first-class postage prepaid, a true and correct copy of the foregoing BRIEF OF APPELLEE to the following:

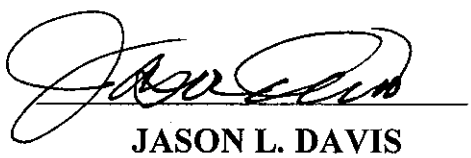
Honorable William A. Gowan
Hinds County Circuit Judge
Post Office Box 22711
Jackson, MS 39225

Michael Bentley
One Jackson Place, Suite 400
188 East Capitol Street
Jackson, MS 39201-1789

David Neil McCarty
416 East Amite Street
Jackson, MS 39201

James M. Priest, Jr.
403 South State Street
Jackson, MS 39201

This the 18th day of January, 2012.



JASON L. DAVIS