

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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STATE OF TENNESSEE

v.

BILLY RAY IRICK

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No. M1987-00131-SC-DPE-DD
DEATH PENALTY

APPELLATE COURT CLERK
NASHVILLE

**BILLY RAY IRICK’S REPLY REGARDING HIS MOTION
TO ALTER AND AMEND EXECUTION DATE**

Billy Ray Irick makes the following reply to the state’s response regarding his September 12, 2014 motion to alter and amend his execution date of October 7, 2014. The state attempts to recast Irick’s motion as a stand-alone motion for stay of execution. (State’s Response, p. 2). It is not, and the Court should reject the State’s arguments. Instead, the Court should, consistent with its previous order, set a new execution date contingent on the conclusion of the on-going challenge to the State of Tennessee’s methods of execution in Case No. 13-1627-I (“the protocol litigation”).

This Court’s last order of December 11, 2013 (“the December Order”) is the starting point for all discussion, as well as a clear understanding of the case’s current status. In that order, the Court granted Irick’s previous Tenn. R. Civ. P. 59.04 motion¹ to alter and amend his

¹ Prior to a judgment becoming final, a party may move pursuant to Tenn.R. of Civ. P. 59.04 to amend when controlling law changes, previously unavailable evidence becomes available, to correct a clear error of law or to prevent injustice. *U.S. Bank, N.A. v. Tennessee Farmers Mut. Ins. Co.*, 410 S.W.3d 820, 827, n.2 (Tenn.Ct.App. 2012). In this case, amendment is appropriate and necessary because of new, previously unavailable evidence in the form of delays incurred because of the State’s litigation tactics and the prevention of injustice – that being Irick’s execution prior to a full and fair hearing on a fully developed record on the protocol litigation. Appellate courts may also generally intervene to prevent injustice. See, *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 149 (Tenn.1991); see also *Higgins v. Steide*, 47 Tenn.App. 42, 335 S.W.2d 533, 535 (Tenn.Ct.App.1959).

execution date so that Irick might fully participate in the pending protocol litigation. In reviewing the protocol litigation, the Court recognized no less than six separate challenges to the State's lethal injection protocol and further found these challenges to be sufficiently meritorious to require that its previous execution order be vacated. Holding that there is no controlling law in Tennessee on the use of the single drug, Pentobarbital, the Court adopted language from a previous order in *State v. Stephen Michael West*, No. M1987-000130-SC-DPE-DD (Tenn. Nov. 29, 2010):

The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges to acts of the Executive and Legislative Branches be considered in light of a fully developed record addressing the specific merits of the challenge. The requirement of a fully developed record envisions a trial on the merits during which both sides have an opportunity to develop the facts that have a bearing on the constitutionality of the challenged provision.

In reliance on the December Order, the parties in the related protocol litigation appeared in Chancery Court and in good faith adopted a scheduling order that would allow for the full and fair litigation of the complaint. However all parties acknowledged, and the Chancellor agreed, that the schedule was very ambitious in light of the complexity of the claims and the considerable discovery necessary to bring the case to trial. After the parties had discussed the considerable demands that the case would place on them, the State agreed to provide the names of the John Doe Defendants subject to a protective order preventing public disclosure - even to the plaintiffs themselves.

Irick and the other plaintiffs proceeded to conduct discovery in full compliance with all applicable orders, but as explained in Irick's motion, the trial schedule was derailed by the State's refusal to provide the identities of the John Doe defendants contrary to its previous representations and the protective order it had drafted. (Exhibit 3 to Irick's September 2014 Motion to Alter). Plaintiffs sought and obtained an order compelling discovery, but the State

elected to seek an interlocutory appeal. Oral argument was held August 11, 2014, but no decision has been announced.

Despite the centrality of the December Order to the current dispute, the State fails to mention its existence – not even once. Nevertheless, the State now wishes, *in effect*, to re-litigate this Court’s holding that the protocol litigation requires a full and fair hearing on a fully developed record. As explained below, the State proffers neither meritorious arguments nor “clean hands”.

1. The Court’s December Order prohibits a “likelihood of success” or merits determination in the absence of a “fully developed record.”

As discussed above, this Court has previously ruled that Irick, as well as other similarly situated death row inmates, have brought, pursuant to the protocol litigation, sufficiently meritorious and novel claims as to require a full and fair hearing on a fully developed record. This same ruling has been entered as to numerous inmates and stands for the law of the case.² See, e.g., *State v. Strouth*, Case No. E1997-00348-SC-DDT-DD, April 8, 2014 Order, p.3 (“Accordingly, the Court will set Mr. Strouth’s execution for a future date that will allow plenty of time for resolution of the declaratory judgment action in the state courts.”) A reversal of the December Order requiring a full and fair hearing pursuant to a “fully developed record” would unfairly prejudice Irick and other inmates with early execution dates subjecting them to the very injuries the litigation seeks to preclude. Such a result would be a miscarriage of justice and deny

² “The law of the case doctrine is a longstanding discretionary rule of judicial practice which is based on the common sense recognition that issues previously litigated and decided by a court of competent jurisdiction ordinarily need not be revisited. This rule promotes the finality and efficiency of the judicial process, avoids indefinite relitigation of the same issue, fosters consistent results in the same litigation, and assures the obedience of lower courts to the decisions of appellate courts.” *Jefferson v. State*, 31 S.W.3d 558, 561 (Tenn.2000).

them equal protection under state and federal constitutions.³ *For these reasons alone*, the State's objections should be denied, and Irick's motion for a new execution date granted.

2. There are no changed circumstances justifying a revision of the December Order which requires Irick be given a full and fair hearing prior to his execution.

Ignoring altogether the December Order, the State re-states and re-argues its position taken in this and all previous protocol cases that this Court should infer a lack of merit to Irick's protocol claims because lethal injection litigation from other states has hereto for been unsuccessful. Yet the State's arguments are not new, nor do they allege a change of circumstances which would justify amending the December Order. See *Creech v. Addington*, 281 S.W.3d 363, 383 (Tenn. 2009). See also, *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003) and *Church v. Church*, 346 S.W.3d 474, 482 (Tenn.Ct.App. 2010). Furthermore, the State makes little or no attempt to demonstrate that the facts or controlling law from these other cases are comparable.⁴

In fact, the State's actions reveal its determination to avoid a full and fair merits determination. While drafting an agreed protective order (Exhibit 3 to Irick's September 2014

³ The State's actions demonstrate (1) the existence of purposeful discrimination and (2) that this purposeful discrimination had a discriminatory effect on him or her. See, *State v. Banks*, 271 S.W.3d 90, 156 (Tenn.2008).

⁴ For instance and by way of illustration only: Contrary to the State's characterization, the protocol litigation claims do not attack the use of Pentobarbital in general but instead find constitutional violations specific to the circumstances existing in Tennessee. Once foreign suppliers of Pentobarbital (previously the only existing sources of the drug) refused on moral grounds to supply the drug, each state which persisted in executions was left to its own devices to procure new sources. The State has steadfastly refused to divulge its source. Yet knowledge of the drug's source is absolutely critical to ensuring the purity and effectiveness of the drug. While the State has refused to divulge its source of Pentobarbital, there is reason to believe that the source may be unique to the State of Tennessee, and therefore other Pentobarbital cases from outside Tennessee would be incomparable since a crucial aspect of the case – the drug's source - differs. Similarly, the State has refused to provide verifiable information as to those who would administer the Pentobarbital – again a circumstance unique to Tennessee and for which an individual determination is necessary. That failures related to manufacturing or administration of a lethal injection can cause unnecessary pain and a prolonged death cannot be reasonably disputed. See, Irick's Amended Complaint, ¶¶ 208-211, 215-218, 239, and 288-289 (Exhibit 7 to September 2014 Motion to Alter/Amend).

Motion to Alter) that allowed for the sharing of information critical to a fully developed record, the State subsequently reneged. When the Chancery Court ordered it to comply with the discovery requests for which the protective order had been specifically fashioned, the State appealed the decision knowing full well that the delay would push completion of the protocol litigation past Irick's execution date. Instead of a decision on the merits, i.e. the facts, the State has blocked all efforts to divulge critical facts surrounding its secretive protocol – even to court review. The State's actions belie a confidence in the facts of its case.

Other actions also dispute the State's confidence in its own lethal injection procedures. In reaction to the protocol litigation *at issue*, the Tennessee legislature amended T.C.A. § 40-23-114 to read, in part:

(d) If lethal injection or electrocution is held to be unconstitutional by the Tennessee supreme court under the Constitution of Tennessee, or held to be unconstitutional by the United States supreme court under the United States Constitution, or if the United States supreme court declines to review any judgment holding lethal injection or electrocution to be unconstitutional under the United States Constitution made by the Tennessee supreme court or the United States court of appeals that has jurisdiction over Tennessee, or if the Tennessee supreme court declines to review any judgment by the Tennessee court of criminal appeals holding lethal injection or electrocution to be unconstitutional under the United States or Tennessee constitutions, all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution....

Clearly, the legislature considered the protocol litigation a viable threat to the state's lethal injection protocol.

Furthermore, any merits or likelihood analysis cannot ignore the "likelihood" of the State involuntarily executing Irick by electrocution. While T.C.A. § 40-23-114 provides that lethal injection is the state's method of execution, there are two exceptions. One exception is the unconstitutionality of the state's lethal injection protocol. Under *present* circumstances that exception will not occur prior to October 7, 2014.

The second exception, the unavailability of the necessary lethal injection ingredients, is not at all unlikely according to the State.⁵ Throughout the protocol litigation, the State has warned that its source(s) of Pentobarbital, as well as the administrators thereof, will refuse to participate under various circumstances, including if their identities are revealed. Given that the general capacities of the state's Pentobarbital sources are unknown and given the state's admission that the sources are extraordinarily adverse to any publicity, the likelihood that the state will turn to electrocution – perhaps within hours or minutes before Irick's execution, is substantial.

Plaintiffs' second amended complaint asserts, among other things, that electrocutions (1) contain a substantial risk that a prisoner will experience wanton and unnecessary pain; and (2) burn, mutilate, and disfigure a prisoner's body. The complaint asserts that as a result, every state in the country has abandoned electrocution as an imposed execution method, the federal government does not authorize electrocution for carrying out a federal death sentence, and no government in the world involuntarily imposes electrocution as an execution method. Based on these facts, the last two courts that considered the constitutionality of electrocution held that it was cruel and unusual punishment. See, *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008) ("Examined under modern scientific knowledge, 'electrocution has proven itself could be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber' of state prisons"); *Dawson v. State*, 554 S.E.2 137, 144 (Ga. 2001) ("death by electrocution, with its

⁵ Two states, Pennsylvania and Ohio, have recently stated that they cannot obtain compounded pentobarbital. <http://www.post-gazette.com/news/state/2014/09/12/Gov-Corbett-issues-temporary-relieve-to-allow-more-time-to-procure-execution-drugs/stories/201409120186>; http://www.tulsaworld.com/communities/sapulpa/pruitt-says-execution-drug-shortage-a-continuing-problem/article_a1e81114-d832-5ad6-a8e0-85a893c878e9.html

specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition against cruel and unusual punishment.”)

Finally, the State does not approach the scheduling of Irick’s execution or other death row inmates with clean hands.⁶ As stated above, delays in the prosecution of the protocol litigation result wholly from the State’s litigation tactics described above. Further, the State has withheld information, known only to itself, which would allow a full and fair hearing on a fully developed record. Through its actions, the State has forced Irick into a situation of having to ask this Court for relief and then turns around and blames Irick for a situation that is utterly beyond his control. Such practices not only militate against the State’s objection to delaying Irick’s execution but demonstrate the need for plenary judicial review of all important aspects of Tennessee’s execution protocols.

CONCLUSION

For the reasons stated herein and in the previously filed motion to amend, Irick respectfully requests that his execution date be postponed to allow him and his fellow plaintiffs to fully and fairly litigate their objections to Tennessee’s lethal injection protocols as previously acknowledged and granted in this Court’s December Order.

⁶ It should also be remembered that in 2011 Tennessee had its execution drugs seized by the DEA after it was discovered that the drugs had been imported illegally. Such practices not only militate against the State’s objection to delaying Irick’s execution but demonstrate the need for plenary judicial review of all important aspects of Tennessee’s execution protocols.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing **BILLY RAY IRICK'S REPLY REGARDING HIS MOTION TO ALTER AND AMEND EXECUTION DATE** has been served on counsel for all parties at interest in this cause by depositing a copy of same in the United States Mail with sufficient postage thereon to carry same to its destination, addressed as follows:

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This 18 day of Sept, 2014.

SPEARS, MOORE, REBMAN & WILLIAMS, P.C.

By: _____