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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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MAR 15 2018
Clerk of the Appellate Courts
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STATE OF TENNESSEE,)
)
Movant,)
)
v.)
)
EDMUND ZAGORSKI,)
)
Defendant.)

No. M1996-00110-SC-DPE-DD

BRIEF OF TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS AND INDIVIDUAL TENNESSEE ATTORNEYS
AS AMICI CURIAE
IN SUPPORT OF DEFENDANT

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BRIEF OF TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS AND INDIVIDUAL TENNESSEE ATTORNEYS
AS AMICI CURIAE IN SUPPORT OF DEFENDANT

This *amici curiae* brief is filed in conjunction with the Motion for Leave to File Brief *Amici Curiae*, which is filed contemporaneously herewith.

INTEREST OF THE *AMICI CURIAE*

Amici are the Tennessee Association of Criminal Defense Lawyers, one of the nation's oldest state criminal bar associations comprised of criminal defense attorneys, and certain individual members of the Tennessee Bar. Before the Court is the state's motion to set execution dates before the drugs to be used in its new lethal injection protocol expire. Defendant has filed an action in the Chancery Court of Davidson County, Tennessee, alleging the new protocol violates the Tennessee and United States Constitutions. The Chancery Court action is currently pending, and *Amici* seek leave to file a brief in this matter urging the Court to allow the Chancery Court action to proceed to a full trial on the merits, as required by due process.

Amici have a profound interest in upholding the rule of law and the integrity of the judiciary as the State seeks to carry out what is a somber and irrevocable task. As attorneys practicing in Tennessee, and an organization of criminal law practitioners in particular, *Amici* are engaged

in “a common calling to promote justice and public good;” they are “public citizen[s] having special responsibility for the quality of justice.” Tennessee Supreme Court Rule 8, Rules of Professional Conduct, Preamble, Comment [1]. It is in furtherance of these obligations and interests that the undersigned file this Motion.

Before this Court can set execution dates, there are critically important interpretations of the Tennessee and United States Constitutions that simply must be resolved and developments in the evidence of the community’s evolving standards of decency that must be given due consideration in the appropriate tribunal. And, they must take place on a fully developed record before a trier of fact, not on a rushed basis so the State can use a new protocol before its drugs expire. The promotion of a full and fair trial on these matters is of vital importance to the administration of justice in Tennessee and, by extension, of vital interest to the undersigned.

STATEMENT OF THE CASE AND FACTS

The *Amici* adopt the statement of the case and the facts as set forth in the Response in Opposition to Motion to Set Execution Dates.

ISSUE PRESENTED

Should the Court set dates for executions using a drug cocktail whose constitutionality has not been reviewed by Tennessee courts when a lawsuit is currently pending in Chancery Court challenging the constitutionality of

the cocktail, and the parties have not had a full opportunity to litigate the constitutionality of the cocktail in the pending lawsuit?

ARGUMENT

I. Introduction

Amici are the Tennessee Association of Criminal Defense Lawyers, one of the nation's oldest state criminal bar associations comprised of criminal defense attorneys, and certain individual members of the Tennessee Bar. Before the Court is the state's motion to set execution dates before the drugs to be used in its new lethal injection protocol expire. Defendant has filed an action in the Chancery Court of Davidson County, Tennessee, alleging the new protocol violates the Tennessee and United States Constitutions. The Chancery Court action is currently pending, and *Amici* seek leave to file a brief in this matter urging the Court to allow the Chancery Court action to proceed to a full trial on the merits, as required by due process.

Amici have a profound interest in upholding the rule of law and the integrity of the judiciary as the State seeks to carry out what is a somber and irrevocable task. As attorneys practicing in Tennessee, and an organization of criminal law practitioners in particular, *Amici* are engaged in "a common calling to promote justice and public good;" they are "public citizen[s] having special responsibility for the quality of justice." Tennessee Supreme Court Rule 8, Rules of Professional Conduct, Preamble, Comment

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Before this Court can set execution dates, there are critically important interpretations of the Tennessee and United States Constitutions and facts evidencing the community's evolving standards of decency that simply must be resolved. And, they must take place on a fully developed record before a trier of fact, not on a rushed basis so the State can use a new protocol before its drugs expire. The promotion of a full and fair trial on these matters is of vital importance to the administration of justice in Tennessee and, by extension, of vital interest to the undersigned.

II. Tennessee Courts Have Not Determined the Constitutionality of the Untested Protocol.

The constitutionality of the Untested Protocol has never been considered by a Tennessee court. As Movant notes in its Motion to Set Execution Dates, the "constitutionality of Tennessee's Lethal Injection Protocol, which called for the use of the single drug pentobarbital" *has* been previously litigated in Tennessee. Mot. to Set Execution Dates at 2. The parties briefed the constitutionality of *pentobarbital* in Chancery Court and on appeal, and the U.S. Supreme Court denied review on *that* drug. Despite Movant's attempt to characterize prior litigation over *other* protocols binding as to future protocols, the constitutionality determination is distinct

for different methods of execution. Never in any of these decisions has this Court (or any other) even referenced the Untested Protocol.

Indeed, no Tennessee court has analyzed the constitutionality of the Untested Protocol under the Tennessee or United States Constitutions, because the Department of Corrections did not add it to its execution protocol until January 8, 2018 – less than two months ago.¹ Now, Movant attempts to conflate the two protocols, asking the Court to sanction the Untested Protocol in a rush to execute the Defendant on the basis of determinations it made about *pentobarbital*.² Movant similarly points to this Court’s prior determination of the constitutionality of sodium pentothal, but *that* determination likewise has no bearing on this analysis. Prior analyses of the constitutionality of *other* protocols cannot be imputed to Movant’s current plan to use the new Untested Protocol.

¹ The U.S. Supreme Court has also not addressed the Untested Protocol. Although it analyzed the use of midazolam in executions *in Glossip v. Gross*, 135 S.Ct. 2726 (2015), the Court found only that the parties in that case had not met their burden of proving the requisite level of risk of harm. Since that time, evidence of the harm caused by the use of midazolam in executions has compounded, and states are moving away from its use.

² Movant’s Motion actually demonstrates that Movant is aware of the distinction between the Untested Protocol and pentobarbital, having anticipated a challenge to the Untested Protocol, most likely from widespread media coverage of horribly botched executions using midazolam. *See Mot. to Set Execution Dates* at 4. (“Pointing to anecdotal evidence from news reports, defendants (sic) will argue that midazolam is not effective in preventing pain and suffering caused by the second and third drugs of the protocol.”).

III. Defendant Should Be Given A Full and Fair Opportunity to Litigate the Constitutionality of the Untested Protocol.

In challenges to sentences of death and execution methodologies, the importance of due process is magnified. “Due process is flexible and calls for such procedural protections as the particular situation demands.” *Howell v. State*, 151 S.W.3d 450, 461 (Tenn. 2004) (quoting *State v. Seals*, 23 S.W.3d 272, 277 (Tenn. 2000)). In determining what review should be afforded an inmate’s challenge to his sentence of death, this Court should “be mindful that ‘a sentence of death is final, irrevocable, and qualitatively different than any other form or level of punishment.’” *Pike v. State*, 164 S.W.3d 257, 266 (Tenn. 2005) (quoting *Van Tran v. State*, 66 S.W.3d 790, 809 (Tenn. 2001) (internal quotations omitted)). As weighed against the State’s “interest in the finality of judgments,” this Court has recognized that a defendant sentenced to die has “[an] interest [that] is even stronger—his interest in protecting his very life.” *Howell*, 151 S.W.3d at 462.

This Court has long recognized a “heightened due process applicable in capital cases” and “the heightened reliability required and the gravity of the ultimate penalty in capital cases.” *Smith v. State*, 357 S.W.3d 322, 346 (Tenn. 2011) (quoting *State v. Cazes*, 875 S.W.2d 253, 260 (Tenn. 1994)). To meet these standards, all available evidence should be given due consideration in an appropriate tribunal. As this Court held in a prior challenge to an execution protocol, “[d]ecisions involving such profoundly

important and sensitive issues such as the ones involved in this case are best decided on evidence that has been presented, tested, and weighed in an adversarial hearing.” Order, *West v. Ray*, No. M2010-02275-SC-R11-CV (Tenn. Nov. 6, 2010) (per curiam) (copy attached).

Indeed, this Court, in discussing a potential challenge to a new method of execution, specifically recognized that defendants are entitled to challenge a new execution protocol with a full trial on the merits. *State v. West*, No. M1987-000130-SC-DPE-DD, slip op. at 3 (Tenn. Nov. 29, 2010) (per curiam) (copy attached). The Court stated:

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.

Id. The Chancery Court Action regarding the Untested Protocol is such a challenge, and due process requires that it be considered only with the aid of a fully developed record.

Critically, to the extent there is any added urgency in these proceedings, it is a false urgency of Movant’s creation and is irrelevant to the due process issues at stake. Movant litigated a case about pentobarbital through the fall of 2017 and only informed the Court on February 15, 2018 that it “currently has [no pentobarbital] on hand.” Mot. to Set Execution

Dates at 2. Movant gives no basis for this statement but now claims the Department of Corrections has “deemed it necessary to provide an alternative drug combination to ensure it could comply with its statutory obligation to carry out death sentences by lethal injection when ordered to do so.” *Id.* at 3. In fact, Movant has only been “ordered” to carry out one death sentence – that of Billy Ray Irick – and that sentence is not set to be carried out until August 9, 2018. What Movant seeks to do here is not to carry out its statutory obligation but instead to foreclose the Tennessee Courts’ ability to ensure Defendant’s executions is conducted in accordance with the Tennessee and U.S. Constitutions. Movant relies on an alleged exigency of its own making by rushing to avoid the expiration of drugs in an Untested Protocol that Movant only recently indicated it intends to use.

Movant’s self-created sense of urgency cannot be allowed to outweigh the irrevocable and fatal consequence of depriving due process to Defendant.

A. This Court Has Made Clear That Defendant Has The Right to Challenge New Methods Of Execution.

In *West v. Schofield*, 468 S.W.3d 482, 494 (Tenn. 2015), this Court acknowledged that Defendant should be afforded a right to challenge a new method of execution and required that Defendant be given notice of any use of a new method of execution to provide time for Defendant to file a declaratory judgment action. *See id.* Because the chemicals in the Untested Protocol constitute an entirely new method of execution, *West v. Schofield*

dictates that Defendant be granted a chance to fully challenge, vet, and litigate the constitutionality of the Untested Protocol. *Id.* Defendant seeks to stay his executions for this purpose, as contemplated by this Court. *See id.* (“Should the Inmates need additional time to *litigate* future ripe challenges to electrocution, the Inmates may seek stays from this Court.”).³ As acknowledged by this Court, due process requires that Defendant be afforded the chance to fully litigate the constitutionality of the Untested Protocol before he is executed with it.

B. Defendant’s Due Process Rights Are Heightened by the Eighth Amendment’s Protections.

The Untested Protocol consists of midazolam, a sedative that has no anesthetic effect; vecuronium bromide, a paralytic designed only to mask signs of discomfort and pain; and potassium chloride, a poison that kills with extreme pain. Defendant asserts that this new cocktail “presents a risk that is sure or very likely to cause serious illness and needless suffering, amounting to an objectively intolerable risk of harm,” in contravention of the Eighth Amendment. *See Glossip*, 135 S.Ct. at 2736 (internal quotations omitted). The Eighth Amendment’s prohibition against cruel and unusual

³ Technically, Defendant will not seek a stay because Movant has not waited for the Court to set executions in its ordinary course of business, but instead seeks the extraordinary relief of expediting those executions. Accordingly, the proper method to challenge this effort is to oppose the Motion to Set Execution Dates.

punishment amplifies the need for due process and, in turn, for Defendant to receive a full trial on the merits of his Eighth Amendment challenge.

The United States Supreme Court has consistently held that the Eighth Amendment demands regular re-evaluation of what constitutes cruel and unusual punishment. “To enforce the Constitution’s protection of human dignity,” when a punishment is challenged, courts must “look to the evolving standards of decency that mark the progress of a maturing society.” *Moore v. Texas*, 137 S.Ct. 1039, 1048 (2017) (internal quotations omitted). In this way, the Eighth Amendment “is not fastened to the obsolete.” *Id.* (internal quotations omitted).

Supreme Court cases over time have illustrated the nation’s fidelity to this concept. For instance, the Supreme Court determined that the Eighth Amendment did not prohibit the execution of juvenile offenders between the ages of 15 and 18 in 1989, and “[a] plurality of the Court also ‘emphatically reject[ed]’ the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty.” *Roper v. Simmons*, 543 U.S. 551, 562 (2005) (quoting *Stanford v. Kentucky*, 492 U.S. 361, 377-78 (1989)). The Court later determined that the Eighth Amendment prohibits the imposition of the death penalty on juveniles under the age of eighteen. *See id.* The Court also later reversed a prior ruling when it held that the Eighth Amendment exempts from the death

penalty individuals with intellectual disabilities. *See id.* (discussing *Penry v. Lynaugh*, 492 U.S. 302 (1989) and *Atkins v. Virginia*, 536 U.S. 304 (2002)).

As evidence arises that a punishment is cruel and unusual, as it has here, the government must re-evaluate the punishment's constitutionality and reaffirm the compact with the citizenry that they shall be treated with dignity. Casting aside Defendant's Due Process rights as if they were less valuable than the perishable drugs that will kill him would utterly eviscerate Defendant's dignity and violate the Eighth Amendment.

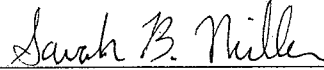
Therefore, Due Process, heightened by the Eighth Amendment considerations inherent in the Chancery Court Action, should lead this Court to decline to hasten Defendant's executions without affording him the opportunity to challenge the Untested Protocol.

CONCLUSION

Granting the State's Motion to Set Execution Dates without affording Defendant an opportunity to present his case fully in the Chancery Court Action would deprive Defendant of his due process rights and work an irreversible injustice upon him. Undersigned counsel respectfully ask the Court to afford Defendant this basic and fundamental opportunity.

March 5, 2018.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent via U.S. Mail, first-class postage prepaid, and by email on the 5th day of March, 2018, to the following:

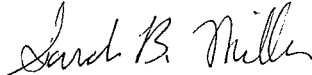
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EXHIBIT 1

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

2010 NOV 29 PM 4:04

APPELLATE COURT CLERK
NASHVILLE

STATE OF TENNESSEE V. STEPHEN MICHAEL WEST

Circuit Court for Union County
No. 415A

No. M1987-000130-SC-DPE-DD

ORDER

On November 6, 2010, this Court reset the execution date for Stephen Michael West to November 30, 2010, pending an evidentiary hearing and ruling in a declaratory judgment action filed by Mr. West challenging the constitutionality of Tennessee's three-drug protocol for lethal injection. On November 22, 2010, the trial court entered an order granting a declaratory judgment to Mr. West. To date, no appeal has been lodged.

Also on November 22, 2010, Mr. West filed in this Court a "Motion to Vacate or Further Modify Court's Order Scheduling Mr. West's Execution." A transcript of the trial court's ruling was included with the filing, but not a transcript of the evidence. On November 24, 2010, the State filed a response in opposition to Mr. West's Motion and attached to the response a copy of a revised protocol. Later that same day, this Court denied Mr. West's motion to vacate or further modify his execution date because the revised protocol appeared to address the basis of the trial court's conclusion that the previous protocol was unconstitutional. However, we specified that the denial of Mr. West's motion was without prejudice to his ability to seek further relief in this or any other court.

On November 26, 2010, Mr. West filed in this Court a motion to reconsider or in the alternative a renewed motion to vacate or further modify the order scheduling his execution for November 30, 2010. Mr. West forcefully asserts that reconsideration is warranted because he was not afforded an opportunity to reply to the State's response and to address

¹Mr. West styled his motion *Stephen Michael West et al. v. Gayle Ray et al.*, and referred to the number of the declaratory judgment action pending in the Chancery Court for Davidson County. As previously stated, to date no appeal has been lodged in the declaratory judgment action. Because Mr. West's motion asks this Court to modify a scheduled execution, it is more properly filed under the style of the order initially setting Mr. West's execution, listed above.

the trial court on the issues of whether the revised protocol eliminates the constitutional deficiencies in the prior protocol and whether the revised protocol is constitutional. In support of his motion, Mr. West has submitted the transcript of the testimony presented at the two-day hearing in the trial court. This Court has now received and fully reviewed the motion and the transcript.

The evidence presented in this case differs from the evidence presented in *Abdur'Rahman v. State*, 181 S.W.3d 292 (Tenn. 2005). The inmate's primary challenge to the three-drug protocol in *Abdur'Rahman* was that the inclusion of pancuronium bromide in the three-drug protocol rendered the protocol unconstitutional. We determined that the use of the pancuronium bromide did not undermine the constitutionality of the protocol because it was preceded by the administration of a dose of sodium thiopental sufficient to render the inmate unconscious. *Abdur'Rahman v. State*, 181 S.W.3d at 307-08. The inmate in *Abdur'Rahman* did not produce evidence that the required dose of sodium thiopental would fail to render the inmate unconscious.

Proper administration of an adequate amount of sodium thiopental is essential to the constitutionality of Tennessee's three-drug protocol. Chief Justice Roberts has noted that "[i]t is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Baze v. Rees*, 553 U.S. 35, 53 (2008). Echoing Chief Justice Roberts, the trial court in this case found that Tennessee's lethal injection protocol was unconstitutional because it "allows . . . death by suffocation while the prisoner is conscious." Following this finding, the trial court also determined feasible and readily available alternative procedures existed to insure unconsciousness and to negate any objectively intolerable risk of severe suffering or pain.²

After the trial court's findings and conclusions, on November 24, 2010, the State revised its three-drug execution protocol to include a process to assess the consciousness of the inmate following the administration of the sodium thiopental and to provide for the administration of additional sodium thiopental should the inmate be conscious following the administration of the first dose of the drug.

²The trial court stated:

It appears to this Court that there are feasible and readily available alternative procedures which could be supplied at execution to insure unconsciousness and negate any objectively intolerable risk of severe suffering or pain. This Court should not say or find which of those it would recommend, but I think the Court's finding of fact regarding the ways – the various ways that unconsciousness can be checked should be left to the State.

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. Mr. West is correct that the trial court has not been given the opportunity to consider in the first instance whether the revised protocol eliminates the constitutional deficiencies the trial court identified in the prior protocol and whether the revised protocol is constitutional.

Upon due consideration, Mr. West's Motion is GRANTED, and his November 30, 2010 execution is stayed. Additionally, the State is directed to file a motion in the trial court presenting for determination in the first instance the issues of whether the revised protocol eliminates the constitutional deficiencies the trial court identified in the prior protocol and whether the revised protocol is constitutional. *See* Tenn. R. Civ. P. 52.02; 59.04. The trial court shall afford the parties an opportunity to submit argument or evidence on the revised protocol. The trial court shall render its final, appealable judgment expeditiously, but in no event later than ninety (90) days from the date of the entry of this Order.

In any proceedings on remand, the standards enunciated in the plurality opinion in *Baze v. Rees*, 553 U.S. 35, 51 (2008) apply. The burden is on Mr. West to prove that the revised protocol creates an "objectively intolerable risk of harm that qualifies as cruel and unusual." *Baze v. Rees*, 553 U.S. at 52. In order to carry this heavy burden, he must demonstrate that the revised protocol imposes a substantial risk of serious harm, *and* he must either propose an alternative method of execution that is feasible, readily implemented, and which significantly reduces the substantial risk of severe pain, *Baze v. Rees*, 553 U.S. at 52-53, or demonstrate that no lethal injection protocol can significantly reduce the substantial risk of severe pain.

The stay granted herein shall remain in effect throughout the pendency of any appeal of the trial court's final judgment in the declaratory judgment action and until the State files a motion to reset the execution date pursuant to Tennessee Supreme Court Rule 12.4.

The final resolution of the issues in this case impacts the scheduled executions of Billy Ray Irick, Edmund Zagorski, and Edward Jerome Harbison. Accordingly, entered contemporaneously herewith are orders staying the executions of Mr. Irick, Mr. Zagorski, and Mr. Harbison.

It is so ORDERED.

PER CURIAM



IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

2010 NOV -6 PM 12: 24

STEPHEN MICHAEL WEST v. GAYLE RAY, ET AL. AFFILIATE COURT CLERK
NASHVILLE

Chancery Court for Davidson County
No. 10-1675-I

No. M2010-02275-SC-R11-CV

ORDER

On July 15, 2010, this Court set the execution of the applicant, Stephen Michael West, for November 9, 2010. On October 25, 2010, Mr. West filed in the Chancery Court for Davidson County, Tennessee, an Amended Complaint for Declaratory Judgment and Injunctive Relief, and a Motion for Temporary Injunction.

Mr. West contended that injunctive relief was appropriate because the method of lethal injection by which the defendants intend to execute him would constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, section 16 of the Tennessee Constitution. Mr. West maintained that under Tennessee's existing three-drug lethal injection protocol, the dosage of the first drug administered, sodium thiopental, is insufficient to render the prisoner unconscious. Therefore, he maintained, inmates are likely awake and conscious when the second and third drugs, which paralyze the muscles and cause cardiac arrest, are administered.

Mr. West supported this claim with two affidavits from Dr. David Lubarsky. In the April 22, 2010 affidavit, Dr. Lubarsky attested that he had reviewed the autopsy reports from three other condemned inmates who were executed under Tennessee's current three-drug lethal injection protocol. According to Dr. Lubarsky, these autopsy reports show that the postmortem levels of the initial anesthetic drug used, sodium thiopental, were not sufficient to produce unconsciousness or anesthesia. Dr. Lubarsky opined that as a result, all three of these inmates would have suffocated and suffered pain during the execution process. The State did not introduce any proof on this issue.

On October 28, 2010, the Chancery Court found that the injunctive relief sought by Mr. West would necessarily require issuance of a stay of execution and held that it did not have jurisdiction to supersede a valid order of the Supreme Court. Accordingly, the court denied the Motion for Injunction and immediately granted Mr. West's motion for permission

to take an interlocutory appeal under Tenn. R. App. P. 9. Mr. West promptly filed an application for an interlocutory appeal in the Court of Appeals. On November 3, 2010, the Court of Appeals denied permission to appeal. The matter is now before this Court on Mr. West's application for permission to appeal pursuant to Tenn. R. App. P. 11 or, in the alternative, a motion to vacate or modify the order setting execution.

We agree with both the Chancery Court and the Court of Appeals that the Chancery Court does not have the authority to stay this Court's execution order. See Robert Glen Coe v. Sundquist, No. M2000-00897-SC-R9-CV (Tenn. Apr. 19, 2000) (Order). However, we do not agree that the time constraints created by the pending execution necessarily prevented the Chancery Court from taking proof and issuing a declaratory judgment on the issue of whether Tennessee's three-drug protocol constitutes cruel and unusual punishment because the manner in which the sodium thiopental is prepared and administered fails to produce unconsciousness or anesthesia prior to the administration of the other two drugs.

Decisions involving such profoundly important and sensitive issues such as the ones involved in this case are best decided on evidence that has been presented, tested, and weighed in an adversarial hearing such as the one that was held by the United States District Court for the Middle District of Tennessee in Harbison v. Little, No. 3:06-cv-01206, 2010 WL 2736077 (M.D. Tenn. July 12, 2010). The current record in this case contains no such evidence. Accordingly, we have determined that both Mr. West and the State of Tennessee should be afforded an opportunity to present evidence supporting their respective positions to the Chancery Court and that the Chancery Court should be afforded an opportunity to make findings of fact and conclusions of law with regard to the issues presented by the parties.

Accordingly, we grant Mr. West's application for permission to appeal and, dispensing with further briefing and argument in accordance with Tenn. R. App. P. 2, we vacate the Chancery Court's October 28, 2010 order and remand the case to the Chancery Court for further proceedings consistent with this order. Because of the shortness of the time between the entry of this order and the current date of Mr. West's execution, we also grant Mr. West's motion to modify our July 15, 2010 execution order and reset the date of Mr. West's execution for November 30, 2010.

In order to assist the parties and the Chancery Court in identifying and focusing on the issues to be addressed following the remand of this case, we note that the United States Supreme Court addressed Kentucky's three-drug lethal injection protocol in Baze v. Rees, 553 U.S. 35 (2008). The Court issued several opinions in that case, including Chief Justice Roberts' plurality opinion (writing for two other justices), one concurring opinion, four other opinions concurring in the judgment, and one dissenting opinion. Under these circumstances,

Chief Justice Roberts' plurality opinion is controlling. See Harbison v. Little, 571 F.3d 531, 535 (6th Cir. 2009); Emmett v. Johnson, 532 F.3d 291, 298 n. 4 (4th Cir. 2008); see also Walker v. Epps, 287 Fed. App'x 371, 375 (5th Cir.2008) (relying on plurality opinion for controlling legal standard). In Baze, the United States Supreme stated that to prevail on an Eighth Amendment claim there must be proof of a "substantial risk of serious harm," an "objectively intolerable risk of harm" qualifying as cruel and unusual punishment. Baze, 553 U.S. at 50 (plurality opinion). "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." Id. Rather, to prevail on an Eighth Amendment claim, there must be "a demonstrated risk of severe pain . . . [that] is substantial when compared to the known and available alternatives." Id. at 61. The same standard applies under Article 1, section 16 of the Tennessee Constitution. Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 314 (Tenn. 2005). Therefore, to prevail on a claim of cruel and unusual punishment under Article 1, section 16 of the Tennessee Constitution, the inmate must also introduce proof that there is an objectively intolerable risk of harm or suffering that would qualify as cruel and unusual punishment. The heavy burden of proving this risk is on the party challenging the protocol. Baze v. Rees, 553 U.S. at 53.

The plurality opinion in Baze, in addressing the constitutionality of Kentucky's similar three-drug lethal injection protocol, noted that the intent behind administration of the first drug, sodium thiopental, is to ensure that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs. Id. at 44. Even viewing the uncontroverted affidavit of Dr. Lubarsky as true,¹ we note that there is no objective proof in the record regarding what level of sodium thiopental is necessary to ensure that a prisoner is at a level of unconsciousness where he or she will be unable to feel severe pain at the time the second and third drugs are administered. Furthermore, although Dr. Lubarsky opined that the sodium thiopental serum levels present in the three executed inmates were not high enough to ensure unconsciousness, there is no evidence in the record as to what serum level (and concomitant dosage) would induce a level of unconsciousness to assure that the inmate does not suffer severe pain. Accordingly, there is currently no evidence upon which to base a decision of what procedures are required to ensure an execution by lethal injection is free of risk of suffering. Furthermore, the State has not yet

¹In reaching the conclusion that Tennessee's lethal injection procedures do not render those being executed in Tennessee unconscious before the pancuronium bromide and potassium chloride are administered, Dr. Lubarsky relied upon the findings set forth in an article titled Inadequate Anaesthesia in Lethal Injection for Execution that he co-authored with Drs. Leonidas G. Koniaris, Teresa A. Zimmers, and Jonathan P. Sheldon and which was published in the British medical journal The Lancet in April 2005 ("Lancet study"). In State v. Hester, ___ S.W.3d ___, 2010 WL 3893760, at *63 (Tenn. 2010), this Court joined the United States Supreme Court and other jurisdictions in declining to afford constitutional weight to the Lancet Study as a basis for rejecting the three-drug lethal injection protocol.

been afforded an opportunity to present evidence countering the currently uncontested opinion testimony of Dr. Lubarsky. At present, there is no evidence in the record in defense of the adequacy of existing procedures to ensure that inmates are unconscious before the pancuronium bromide and potassium chloride are administered. Without such evidence, we cannot determine whether lethal injection under the current protocol, specifically the portion of the protocol that sets out the proper amount and concentration for sodium thiopental, constitutes cruel and unusual punishment.

Accordingly, on remand, the parties and the Chancery Court should, in addition to any of the other matters properly raised by the parties, particularly address:

- (1) The scientific basis for and reliability of Dr. Lubarsky's or any other expert's opinion under the standards of Tennessee Rules of Evidence 702 and 703 and McDaniel v. CSX Transp., Inc., 95 S.W.2d 257 (Tenn. 1997);
- (2) Whether the current amount and concentration of sodium thiopental mandated by Tennessee's current lethal injection protocol are insufficient to ensure unconsciousness so as to create an objectively intolerable risk of severe suffering or pain during the execution process; and if so
- (3) At what level sodium thiopental is sufficient to ensure unconsciousness so as to negate the objectively intolerable risk of severe suffering or pain during the execution process.

It is further ordered that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law at 10:00 p.m. on the 30th day of November, 2010, or as soon as possible thereafter within the following twenty-four hours, unless otherwise ordered by this Court or other appropriate authority.

Counsel for Mr. West shall provide a copy of any order staying execution of this order to the Office of the Clerk of the Appellate Court in Nashville. The Clerk shall expeditiously furnish a copy of any order of stay to the Warden of the Riverbend Maximum Security Institution.

The costs of these proceedings are taxed to the State of Tennessee.

IT IS SO ORDERED.

PER CURIAM