

No. 10-6196

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHEN MICHAEL WEST,)	
)	
Plaintiff/Appellant,)	
)	
v.)	
)	DEATH PENALTY CASE
GAYLE RAY, in her official capacity)	
as Tennessee’s Commissioner)	<u>EXECUTION DATE:</u>
of Correction, et al.,)	November 9, 2010
)	
Respondent/Appellees.)	

**REPLY TO DEFENDANTS/APPELLEES’ RESPONSE TO
PLAINTIFF/APPELLANT’S MOTION TO VACATE DISTRICT COURT
ORDER AND REMAND TO DISTRICT COURT FOR ORDER
DISMISSING COMPLAINT WITHOUT PREJUDICE**

Now comes Appellant, Stephen Michael West, by and through counsel, and in reply to Defendants/Appellees’ Response to Plaintiff/Appellant's Motion to Vacate District Court Order and Remand to District Court for Order Dismissing Complaint Without Prejudice,¹ hereinafter “Defendants’ Response,” submits that said response is without a basis in law or fact. As their sole ground, Defendants

¹Mr. West’s “Withdrawal of Appellant's Motion to Stay and Abey Proceedings and Motion to Vacate District Court Order and Remand to District Court for Order Dismissing Complaint Without Prejudice” is hereinafter referred to as “Mr. West’s Motion.”

maintain that Mr. West is “judicially estopped” from agreeing with the argument Defendants raised at pages 16-18 of their Brief. Instead, Defendants assert that this Court should proceed as if it has jurisdiction (although Defendants still argue it does not) to review a district court’s decision (which Defendants still argue the court did not have jurisdiction when it was entered). This argument lacks any merit.

I. Courts must have jurisdiction over the subject matter to act on the merits of a case

Subject matter jurisdiction is always a threshold determination. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998)(there is no “doctrine of ‘hypothetical jurisdiction’ that enables a court to resolve contested questions of law when its jurisdiction is in doubt”). It is axiomatic that a lack of subject matter jurisdiction may be raised at any time ““even by a party who originally asserted jurisdiction.”” *United States v. Leon*, 203 F.3d 162, 164 n. 2 (2d Cir. 2000) (quoting *United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1080 (2d Cir. 1970)). Indeed, arguments for or against standing may not be waived. *See Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994)(citing *National Wildlife Fed’n v. United States*, 626 F.2d 917, 924 n. 13 (D.C.Cir. 1980) (voluntary waiver of challenge to prudential standing is necessarily ineffective

because standing implicates federal jurisdiction)). Irrespective of how the parties conduct their case, the courts have an independent obligation to ensure that federal jurisdiction is not extended beyond its proper limits. *See Thompson*, 15 F.3d at 248. *See also Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 14 (1st Cir.1999) (“[C]ourts have been cautioned to give careful consideration to the application of judicial estoppel when subject matter jurisdiction is at stake.”)

In this case, the parties agree upon the determinative fact that Mr. West was not going to be executed by means of lethal injection from February of 2001 until October 20, 2010. This fact means Mr. West lacked standing to challenge the use of Tennessee’s lethal injection protocol during the entire time his complaint was pending in the District Court; from August 19, 2010 - September 24, 2010. This also means the District Court lacked subject matter jurisdiction to enter an order dismissing the complaint as time-barred. And it means there is nothing for this Court to review.

II. The doctrine of judicial estoppel cannot confer subject matter jurisdiction in this case

Having argued before this Court and the court below that they both lack subject matter jurisdiction, Defendants have turned to a novel interpretation of the doctrine of judicial estoppel to argue that this Court should assume jurisdiction

over the District Court's decision which was entered at a time when the District Court was without jurisdiction. The use of the doctrine of judicial estoppel to establish subject matter jurisdiction, however, is greatly discouraged, even when the doctrine is used merely to resolve factual disputes which might affect a court's jurisdiction. It is questionable whether judicial estoppel should even apply "to matters affecting federal subject matter jurisdiction." 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477, at 784 (1981).

III. The doctrine of judicial estoppel does not apply under the facts of this case.

Defendants have failed to present any basis for invoking the doctrine of judicial estoppel. This Court has explained:

"The doctrine of judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position 'either as a preliminary matter or as part of a final disposition.' " *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir.2002) (quoting *Teledyne[Indus., Inc. v. NLRB]*, 911 F.2d 1214 (6th Cir.1990)) at 1218). The doctrine of judicial estoppel, however, "is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement." *Teledyne*, 911 F.2d at 1218 (footnote omitted). Moreover, a court should consider whether a party has gained an unfair advantage from the court's adoption of its earlier inconsistent statement. *New Hampshire[v. Maine]*, 532 U.S. 742 (2001)], at 751.

Longaberger Co. v. Kolt, 586 F.3d 459, 470 (6th Cir. 2009).

A. Mr. West has not asserted contradictory positions

1. Federal District Court proceeding

Mr. West's complaint sought to enjoin Defendants from executing him under Tennessee's unconstitutional lethal injection protocol. *West v. Bell*, No. 3:10-cv-0778, R. 1, Complaint (M.D.Tenn.). Defendants filed a motion to dismiss claiming that Mr. West remained bound by a document he signed which chose electrocution as the means for an execution scheduled in 2001.² Arguing that Mr. West would be executed by means of electrocution on November 9, 2010, Defendants asserted Mr. West had no standing to challenge Tennessee's lethal injection protocol, and therefore had presented no case or controversy by which to invoke the subject matter jurisdiction of the District Court. *Id.* at R. 23 p.1 of 3 and R. 24 p.3-4 of 23. On September 10, 2010, Defendants repeated that claim, again asserting that Mr. West's complaint be dismissed for want of jurisdiction. *Id.* at R. 26. Mr. West argued the District Court had jurisdiction because the nine year old form choosing electrocution was no longer valid. R. 27, Response to Order for Briefing, p. 4-6 of 8 ¶¶ 5, 6, 7, 8, 11.

²The document he signed over nine years ago was part of an execution protocol that was specifically revoked by Tennessee's Governor in 2007.

The District Court requested the parties to brief whether the Defendants' motion to dismiss should be converted to a motion for summary judgment since Defendants had raised facts beyond the complaint, namely the election form. R. 125, order. Mr. West argued it should so that the contested validity of the election form could be settled. *Id.*, p. 5-7 of 8. Defendants argued the District Court could find Mr. West had chosen electrocution even without relying on the election form by looking to other court records. R. 26, Brief of Defendants, p. 2-3 of 4. The District Court held:

The Court will not convert the Motion To Dismiss into a motion for summary judgment as this case is not in the right procedural posture for such a conversion. Nothing herein restricts the parties from filing motions for summary judgment.

R.28, order.

Mr. West then responded to the Defendants' motion to dismiss (R. 31, Plaintiff's Response in Opposition to Motion to Dismiss) and, in return, the Defendants asserted that the case should be dismissed on statute of limitations and other non-jurisdictional grounds. R. 32, p.1-4 of 9, Defendants' Reply to Plaintiff's Response to the Motion to Dismiss. The District Court dismissed the case based on the statute of limitations. R. 33, memorandum, R. 34, order.

2. Proceedings in this Court

Mr. West's appellate brief argued the merits of the lethal injection claim and against the statute of limitations defense. Defendants' response again asserted a lack of subject matter jurisdiction based on the fact that they were going to electrocute Mr. West. Defendants also defended the statute of limitations holding and argued against the merits of the lethal injection claim.

3. Concurrent events

On October 12, 2010, after Defendants had failed to provide Mr. West with a method of execution election form as required under Tennessee's current protocol, Mr. West's counsel presented Defendant Bell with a letter setting out the reasons why Mr. West's almost ten year old election form was not valid, but, out of an abundance of caution, informing Defendant Bell that he was rescinding that form and that he was not making any election regarding his method of execution. (Attachment A). After consulting with Department of Correction counsel, Defendant Bell orally informed Mr. West's counsel that the Department still considered the nine year old form to be binding, that he would not recognize Mr. West's recision, and that the State of Tennessee would subject him to death by electrocution unless he affirmatively chose lethal injection as the method of

execution.³ On October 13, 2010, Mr. West's counsel, Mr. Stephen Ferrell, sent a letter *via* facsimile transmission to Ms. Debbie Inglis, counsel for the Department of Correction, seeking official confirmation of Defendant Bell's representations. (Attachment B). Ms. Inglis did not immediately respond.

4. Proceedings in this Court, continued

On the same date, however, Defendants filed their brief in this case, again asserting that Mr. West had presented no case and controversy regarding the unconstitutionality of lethal injection because he was to be executed by electrocution. Brief of Defendants-Appellees, pages 16-18.

5. Concurrent events lead to a state court lawsuit

On October 15, 2010, Ms. Inglis responded to counsel's letter, stating:

It is the Department of Correction's position that Mr. West's affirmative election of electrocution as his method of execution continues to be in full force and effect. If Mr. West now wishes to choose lethal injection, the Department will allow him to do so by submitting a new affidavit to Warden Bell, no later than October 26, 2010 (14 days prior to the date of the execution) affirmatively stating that he "waives any right he might have to have his execution carried out by electrocution and instead chooses to be executed by lethal injection."

³According to Defendants, acceding to the Department's demand would require Mr. West to forfeit his right to ask that Tennessee carry out his execution by lethal injection in a manner which did not constitute cruel and unusual punishment. *West v. Bell*, Case No 3:10-cv-0778 (M.D.Tenn.)R. 24, pages 4-5.

(Attachment C). Emphasis added. Neither Tennessee's Current Execution manual, nor any other protocol known to Mr. West, requires a condemned inmate to affirmatively choose execution by lethal injection in order to rescind a prior election of electrocution. R.1, Complaint, p. 89 of 127.

Defendants' execution of Mr. West by electrocution on the basis of an invalid election violates TENN.CODE ANN. § 40-23-114 (a) and (b) (which requires the use of lethal injection unless the condemned inmate has affirmatively chosen electrocution). Defendants' non-consensual use of electrocution (which is itself cruel and unusual) to carry out Mr. West's execution also violates Eighth and Fourteenth Amendments to the United States Constitution and Art. 1 § 14 of the Tennessee Constitution. Given Defendants' clearly stated intention to electrocute Mr. West, on October 18, 2010, Mr. West filed suit in the Chancery Court for Davidson County, Tennessee, seeking to permanently enjoin Defendants' illegal conduct and moved for a temporary injunction.⁴

6. Motion to withdraw with suggestion to remand

After consideration of the following three factors, Mr. West filed his reply

⁴Mr. West was unwilling to agree to be executed by Tennessee's cruel and unusual method of carrying out lethal injections in order to avoid Tennessee unlawfully executing him by electrocution which was itself cruel and unusual punishment in violation Eighth and Fourteenth Amendments to United States Constitution and Art. 1 § 14 of the Tennessee Constitution.

brief in this Court:

- (1) Information relayed three days earlier by counsel for the Tennessee Department of Correction that (notwithstanding the fact that Mr. West had pointed out to the Department of Correction the many reasons why his almost ten year-old election form was no longer valid and had even been, out of an abundance of caution, expressly rescinded that election) that Defendants still intended to execute him by means of electrocution;
- (2) Defendants' Sixth Circuit brief received five days earlier, in which they again forwarded the claim that, because of the alleged validity of the election form, Mr. West had failed to present a case or controversy through which he could invoke the subject matter jurisdiction of the federal courts to pursue a lethal injection lawsuit; and,
- (3) The filing of a lawsuit in state court which most properly should have resolved the factual issues raised by Defendants' continued insistence on the validity of the old election form.

In that brief, Mr. West submitted that Defendants' renewed challenge to the jurisdiction of the federal courts to hear Mr. West's lethal injection complaint (based upon the alleged validity of the election form) had created a threshold issue requiring resolution before further review because neither the District Court, nor this Court, could render a decision in a case over which they lacked subject matter jurisdiction. Appellant's Reply Brief, p. 1. He further argued, just as the District Court had recognized earlier, *see generally, West v. Bell*, Case No 3:10-cv-0778, Appellants' Reply Brief, R. 28, p. 1 (M.D.Tenn.), that the need for further factual development regarding the election form dictated that this Court should hold the

matter in abeyance while the state law question could be resolved in the pending state court action. To that end, Mr. West filed a separate motion asking this Court to stay and abey further proceedings.

7. Defendants abandon electrocution and announce their intent to execute Mr. West by lethal injection

Two days later, on October 20, 2010, Defendants responded to Mr. West's state court suit. Rather than defend the merits of either the constitutionality of Tennessee's use of electrocution as a means of execution, or the alleged validity of Mr. West's nine year-old election form, Defendants (while expressly acknowledging that they had fully intended to execute Mr. West by electrocution up - until that date⁵), stated that now they would honor the rescission they had up until then specifically refused to honor:

Nevertheless, the defendants have no desire to litigate this issue. Defendants will therefore accept plaintiff's October 12, 2010, rescission of his previous election of electrocution. With the plaintiff having rescinded his previous election and waiver, plaintiff's sentence of death will now be executed by means of lethal injection, by operation of law. See Tenn. Code Ann. § 40-23-114(a). Consequently, there is simply no need for plaintiff to be presented with a new election affidavit, as he insists. In addition, the plaintiff has affirmatively declared that he would make no election of a

⁵*West v. Ray*, No. 10-1675-I, Defendants' Response to Motion for Temporary Injunction, p.2 ("The defendants maintain that the February 13, 2001 Election Affidavit [choosing electrocution as a means of execution] is valid and still effective."). Attachment D.

method of execution, further obviating any need to present him with a new election affidavit.

West v. Ray, No. 10-1675-I Defendants' Response to Motion for Temporary Injunction, p. 3 (Chancery Court for Davidson County, Tennessee). Emphasis added. Defendants then demanded that, because Mr. West would now be executed by lethal injection, his state court complaint challenging electrocution should be dismissed as moot. *Id.* (“Furthermore, because the defendants have accepted plaintiff’s rescission of his election of electrocution, and his execution will now proceed by means of lethal injection, plaintiff’s complaint is rendered moot and should therefore be dismissed.”).

Mr. West’s position has been consistent. He asserts the old electrocution election form is invalid, however, he maintains that Defendants were going forward with his electrocution regardless of whether the 2001 election form was valid. *See*, Withdrawal of Appellant’s Motion to Stay and Abey, p. 7-8, (“Regardless of whether the February 13, 2001, election form was valid, Appellees admit that they had no intention to carry out Mr. West’s execution by lethal injection until October 20, 2010. The district court was without jurisdiction to render any judgment in this matter and, accordingly, its case must be remanded with instructions that Appellant’s complaint be dismissed without prejudice. *U.S.*

ex rel. Poteet v. Bahler Medical, Inc., ___ F.3d ___, 2010 WL 3491159 (1st Cir. September 08, 2010).”).

B. The district court did not adopt Mr. West’s position; it dismissed his complaint as time-barred.

Defendants claim, “Because West took this position, the District Court ruled on the basis of the statute of limitations.” That claim is unfounded. The District Court specifically refused to address any of Mr. West’s arguments in favor of subject matter jurisdiction.

Moreover, because the District Court did not adopt Mr. West’s position, Mr. West did not gain an unfair advantage from the litigation below. The only party who even arguably benefitted from the District Court’s foray into issuing an opinion in a case over which it had no jurisdiction is Defendants. In Mr. West’s state court suit, Defendants noted that the District Court had dismissed Mr. West’s federal complaint on the basis of the statute of limitations⁶ while forwarding the same statute of limitations arguments that carried the day in the District Court’s extra-jurisdictional order.⁷

⁶See *West v. Ray*, No. 10-1675-I, Defendants’ Response to Motion for Temporary Injunction, pages 1-2, (Chancery Court for Davidson County, Tennessee), (“On September 24, 2010, the district court granted the motion to dismiss, finding that West’s complaint, was barred by the statute of limitations. *West v. Ray*, No. 3:10-cv-0778, Memorandum (M.D. Tenn. Sept 24, 2010)”)

⁷See *Id.* at 4 (“West’s “method-of-execution” challenge to lethal injection accrued, at the latest, on March 30, 2000. West filed his amended complaint

CONCLUSION

Defendants' attempt to induce this Court to address the merits of this appeal while they simultaneously continue to contest its jurisdiction improperly invokes the doctrine of judicial estoppel for the purpose of conferring subject matter jurisdiction. As importantly, and notwithstanding their unfounded and conclusory *ad hominem* accusations, the Defendants have failed to make the slightest showing that any application of judicial estoppel is appropriate in this case. At this point, both parties agree that the District Court was without jurisdiction to consider Mr. West's complaint. Denial of Mr. West's motion, or even delay in granting that motion, serves merely to lend uncertainty to a District Court which is now considering a similar complaint in an action where there exists no question as to subject matter jurisdiction. Mr. West's Motion should be granted without delay.

challenging Tennessee's lethal injection protocol on. October 25, 2010, more than ten years after his cause of action accrued. West's claim clearly fails on limitation grounds")

Respectfully Submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

s/Stephen M. Kissinger
Stephen M. Kissinger
Stephen A. Ferrell
Assistant Federal Defenders
800 S. Gay Street, Suite 2400
Knoxville, TN 37929-9729
(865) 637-7979

MILLER & MARTIN LLP

s/Roger W. Dickson
Roger W. Dickson, Esq.
832 Georgia Avenue, Suite 1000
Chattanooga, TN 37402-2289
(423) 756-6600

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2010, the foregoing Reply to Defendants/appellees' Response to Plaintiff/appellant's Motion to Vacate District Court Order and Remand to District Court for Order Dismissing Complaint Without Prejudice was filed electronically. Notice electronically mailed by the Court's electronic filing system to:

Mark A. Hudson
Mark.Hudson@ag.tn.gov
Martha A. Campbell
Martha.Campbell@ag.tn.gov
Office of Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202-0207

Notice delivered by other means to all other parties via regular U.S. Mail.

Parties may access this filing through the Court's electronic filing system.

s/Stephen M. Kissinger
Stephen M. Kissinger

ATTACHMENT A

TO

**WITHDRAWAL OF APPELLANT'S MOTION TO STAY AND ABEY
PROCEEDINGS AND MOTION TO VACATE DISTRICT COURT ORDER
AND REMAND TO DISTRICT COURT FOR ORDER DISMISSING
COMPLAINT WITHOUT PREJUDICE**

WEST RESCISSION OCTOBER 12, 2010

Mr. Stephen Michael West - 115717
Riverbend Maximum Security Institution
7475 Cockrill Bend Blvd.
Nashville, TN 37243

Mr. Ricky Bell, Warden
Riverbend Maximum Security Institution
7475 Cockrill Bend Blvd.
Nashville, TN 37243

Dear Warden Bell:

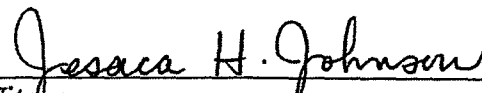
The purpose of this letter is to officially rescind the Affidavit Concerning Method of Execution that I executed on February 13, 2001. That Affidavit no longer has full force and effect since the protocol under which it was signed is no longer in effect. However, you and the other Defendants in *West v. Ray et al.*, case no. 3:10-cv-0778, United States District Court, Middle District of Tennessee, have affirmatively alleged that the Affidavit Concerning Method of Execution that I executed on February 13, 2001, remains in full force and effect in your Motion to Dismiss my complaint in that action. Therefore, in an abundance of caution, I hereby rescind that Affidavit.

You are specifically informed that I neither have made, nor am making, any election of the method of execution under the current execution protocol to be used to carry out the sentence(s) of death imposed upon me by the State of Tennessee on November 9, 2010.



Stephen Michael West

Date: 9/30/10



Witness

Date: 9/30/10

ATTACHMENT B

TO

**WITHDRAWAL OF APPELLANT'S MOTION TO STAY AND ABEY
PROCEEDINGS AND MOTION TO VACATE DISTRICT COURT ORDER
AND REMAND TO DISTRICT COURT FOR ORDER DISMISSING
COMPLAINT WITHOUT PREJUDICE**

LETTER FROM STEPHEN FERRELL

TO

**DEBRA INGLIS, TDOC
OCTOBER 13, 2010**

**FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INCORPORATED**

800 S. Gay Street, Suite 2400
Knoxville, Tennessee 37929

Elizabeth B. Ford
Federal Community Defender

Phone: (865) 637-7979
Fax: (865) 637-7999

VIA FACSIMILE TRANSMISSION
(615) 741-9280

October 13, 2010

Ms. Debra K. Inglis
General Counsel
Tennessee Department of Corrections
320 6th Avenue North, 6th Floor
Nashville, TN 37243

RE: Stephen West, method of execution

Dear Ms. Inglis:

I am writing you this letter concerning my client, Stephen West, who is currently scheduled to be executed on November 9, 2010. I met yesterday with Warden Bell and learned that he is not presently intending to submit to West an election form concerning the method of execution to be used on November 9. According to Warden Bell, Mr. West will be executed by electrocution because, on February 13, 2001, almost ten years ago, Mr. West signed an affidavit to Elect Method of Execution and chose to be executed by electrocution. That Affidavit was submitted to Mr. West and signed by him, pursuant to an execution protocol which was revoked in its entirety by Governor Phil Bredesen on February 1, 2007.

At this meeting with Warden Bell, I submitted to him a letter in which Mr. West gave notice that his 2001 affidavit was no longer in effect since the protocol under which it was signed was no longer in effect. Furthermore, Mr. West gave notice that, in an abundance of caution, he was rescinding that affidavit at this time and that it was no longer his election for the currently scheduled execution date. He specifically gave notice to the Warden that he was making no election under the current execution protocol.

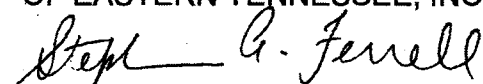
I need to hear from you, in your official capacity, whether you consider Mr. West's 2001 Affidavit to be in full force and effect. I believe that there can be no question that this Affidavit is no longer in effect because (1) the protocol under which it was executed has been revoked by the Governor; (2) out of an abundance of caution, Mr. West has officially rescinded his earlier Affidavit and the Warden was given notice of this more than fourteen (14) days before West's current execution date; (3) under the then-

existing protocol, properly construed, the 2001 Affidavit was effective solely as to his then-scheduled execution; and (4) the 2001 Affidavit was never valid because shortly after this date, Mr. West was diagnosed by prison staff with severe mental illness. Mr. West may well have been incompetent to make this election at that time. Furthermore, you are hereby notified that the Warden has not followed the current protocol which requires him to submit a current election form to condemned inmates within thirty days of any scheduled execution.

Please answer this letter as promptly as possible and inform me of your position on these matters. Time is obviously of the essence. Thank you.

Very truly yours,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.



Stephen A. Ferrell
Asst. Federal Community Defender

cc: Warden Bell

ATTACHMENT C

TO

**WITHDRAWAL OF APPELLANT'S MOTION TO STAY AND ABEY
PROCEEDINGS AND MOTION TO VACATE DISTRICT COURT ORDER
AND REMAND TO DISTRICT COURT FOR ORDER DISMISSING
COMPLAINT WITHOUT PREJUDICE**

LETTER FROM DEBRA INGLIS, TDOC

TO

STEPHEN FERRELL

OCTOBER 15, 2010



STATE OF TENNESSEE
DEPARTMENT OF CORRECTION
4TH FLOOR RACHEL JACKSON BLDG.
320 SIXTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243-0465

October 15, 2010

Stephen A. Ferrell
Assistant Federal Community Defender
Federal Defender Services of Eastern Tennessee, Inc.
800 S. Gay Street, Suite 2400
Knoxville, TN 37929

Dear Mr. Ferrell:

This is in response to your October 13, 2010 letter concerning the status of Stephen West's election of electrocution as his method of execution through an affidavit he executed on February 13, 2001.

It is the Department of Correction's position that Mr. West's affirmative election of electrocution as his method of execution continues to be in full force and effect. If Mr. West now wishes to choose lethal injection, the Department will allow him to do so by submitting a new affidavit to Warden Bell, no later than October 26, 2010 (14 days prior to the date of the execution) affirmatively stating that he "waives any right he might have to have his execution carried out by electrocution and instead chooses to be executed by lethal injection." To date, the Department has not received an affidavit meeting that requirement from Mr. West.

Sincerely,

Debra K. Inglis
Debra K. Inglis
General Counsel

ATTACHMENT D

TO

**WITHDRAWAL OF APPELLANT'S MOTION TO STAY AND ABEY
PROCEEDINGS AND MOTION TO VACATE DISTRICT COURT ORDER
AND REMAND TO DISTRICT COURT FOR ORDER DISMISSING
COMPLAINT WITHOUT PREJUDICE**

DEFENDANTS' RESPONSE TO MOTION FOR TEMPORARY INJUNCTION

**West v. Ray, et al
Chancery Court of Davidson County, Tennessee
No. 10-1675-I
October 20, 210**

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,)
)
 Plaintiff,)
)
 v.)
)
 GAYLE RAY, in her official)
 capacity as Tennessee Commissioner)
 of Correction, et al.,)
)
 Defendants.)

No. 10-1675-I

DEFENDANTS' RESPONSE TO MOTION FOR TEMPORARY INJUNCTION

The plaintiff, Stephen West, a condemned inmate residing at Riverbend Maximum Security Institution, in Nashville, Davidson County, Tennessee, filed this action seeking a temporary injunction effectively enjoining the defendants from carrying out his execution scheduled for November 9, 2010. Specifically, plaintiff contends that his February 2001 choice of electrocution as his method of execution is of no force and effect and that the defendants have not and cannot now present him with an Affidavit Concerning Method of Execution thirty days prior to his execution as outlined in the execution protocols. For the reasons stated below, the motion should be denied and this case dismissed.

On February 13, 2001, plaintiff executed an Affidavit to Elect Method of Execution in which he chose electrocution as the method of his execution and waived his right to be executed by lethal injection. Attachment C to Motion for Temporary Injunction. In response to a 42 U.S.C. § 1983 action in which plaintiff challenged the constitutionality of the Tennessee lethal injection protocol, the state defendants argued that plaintiff was bound by the election he made on

February 13, 2001; consequently, his challenge to the Tennessee lethal injection protocol was hypothetical and did not present a justiciable case or controversy. *West v. Ray*, No. 3:10-cv-0778, Memorandum in Support of Motion to Dismiss filed Sept 3, 2010 (M.D. Tenn. 2010). Plaintiff was also advised that the Tennessee Department of Correction would permit him to change his election by submitting a new affidavit, no later than 14 days prior to the date of the execution, affirmatively stating that he “waives any right he might have to have his execution carried out by electrocution and instead chooses to be executed by lethal injection.” *Id.* On October 12, 2010, plaintiff presented the defendants with a letter in which he purported to rescind his previous election of electrocution; he did not, however, elect lethal injection as his method of execution. Instead, he informed the defendants that he was making no election of the method of execution (see Motion for Temporary Injunction, Attachment F).

This Court is without jurisdiction to enjoin or restrain the July 15, 2010, order of the Tennessee Supreme Court that plaintiff’s sentence of death be executed on November 9, 2010. *See Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (Tenn. 2000). Nothing in *Coe v. Sundquist*, however, would appear to preclude this Court’s jurisdiction to the extent that plaintiff seeks declaratory relief alone.

The defendants maintain that the February 13, 2001, Election Affidavit is valid and still effective. Plaintiff made that election pursuant to Tenn. Code Ann. § 40-23-114(a), which remains unchanged. Although revisions have since been made to the Tennessee Execution Protocol, that protocol also remains materially unchanged. *See Workman v. Bredesen*, 486 F.3d 896, 900-901 (6th Cir. 2007).

Nevertheless, the defendants have no desire to litigate this issue. Defendants will therefore accept plaintiff's October 12, 2010, rescission of his previous election of electrocution. With the plaintiff having rescinded his previous election and waiver, plaintiff's sentence of death will now be executed by means of lethal injection, by operation of law. *See* Tenn. Code Ann. § 40-23-114(a). Consequently, there is simply no need for plaintiff to be presented with a new election affidavit, as he insists.¹ In addition, the plaintiff has affirmatively declared that he would make no election of a method of execution, further obviating any need to present him with a new election affidavit.

Because this Court lacks jurisdiction to order the injunctive relief sought, plaintiff's motion for temporary injunction should be denied. Furthermore, because the defendants have accepted plaintiff's rescission of his election of electrocution, and his execution will now proceed by means of lethal injection, plaintiff's complaint is rendered moot and should therefore be dismissed.

¹ In any event, the plaintiff has no "right" under the Protocol to be presented with an affidavit of election within 30 days of the execution date. The Protocol is a statement concerning only the internal management of state government. Furthermore, the 30-day requirement is obviously for the benefit of the Department, so that it may have sufficient time to prepare for execution by means of the chosen method.

Respectfully submitted,

ROBERT E. COOPER, JR., BPR #010934
Attorney General and Reporter



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Senior Counsel
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Civil Rights and Claims Division
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(615) 741-7401

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2010, a copy of the foregoing was forwarded

by facsimile and U.S. Mail to:

Stephen A. Ferrell
Stephen M. Kissinger
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800 S Gay Street
Suite 2400
Knoxville, TN 37929

Roger W. Dickson
William A. Harris, III
MILLER & MARTIN
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Chattanooga, TN 37402



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Senior Counsel
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