

IN THE SUPREME COURT OF TENNESSEE

FILED

AT NASHVILLE

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STATE OF TENNESSEE

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APPELLATE COURT CLERK
NASHVILLE

v.

No. M1996-00110-SC-DPE-DD

EDMUND ZAGORSKI,

Defendant.

**RESPONSE OF THE STATE OF TENNESSEE TO
“MOTION TO VACATE EXECUTION DATE”**

By order dated January 31, 2014, this Court set the execution of Edmund Zagorski’s sentence for December 9, 2014. Zagorski now asks this Court to vacate that order, pointing to the need to resolve ongoing litigation in the Davidson County Chancery Court in which he and other inmates are challenging the Department of Correction’s protocol for carrying out executions by lethal injection, *Stephen Michael West, et al. v. Derrick Schofield*, No. 13-1627-I (Davidson County Chancery), and the State’s pending Application for Permission to Appeal in an interlocutory appeal arising from that case, *Stephen Michael West, et al. v. Derrick Schofield*, No. M2014-00320-SC-R11 (Tenn.). He cites this Court’s order vacating the execution date of inmate Billy Ray Irick as support for the request. *State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Sept. 25, 2014).

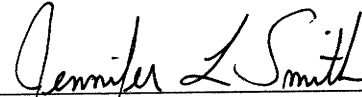
The State of Tennessee previously opposed a stay of execution in Irick's case on grounds that he had failed to demonstrate a likelihood of success on the merits of the declaratory-judgment action challenging Tennessee's execution protocol, particularly where courts in other jurisdictions have approved the use of substantially similar protocols, and given the "heavy burden" on plaintiffs to establish that a state's execution protocol creates an "objectively intolerable risk of harm" under *Baze v. Rees*, 553 U.S. 35, 53 (2008). *See also West v. Ray*, No. M2010-02275-SC-R11-CV (Tenn. Nov. 6, 2010) (Order, p. 3).

Nevertheless, given the Court's September 25, 2014 order in *State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Sept. 25, 2014), vacating the execution date of a similarly situated inmate; establishing an expedited schedule for seeking review of the Court of Appeals' decision in *Stephen Michael West v. Derrick Schofield*, No. M2014-00320-COA-R9-CV (Tenn. Ct. App. Sept. 29, 2014) (perm. app. pending); and indicating the Court's intention to set a new date of execution and to establish an expedited schedule for resolution of the declaratory-judgment action upon disposition of the Rule 11 application, the State does not oppose Zagorski's motion. The State would request, however, that, just as in *Irick*, the Court exercise its authority under Tenn. Sup. Ct. R. 12(4)(E) to set a new date of execution in this case upon final disposition of the State's application for permission to appeal in *West v. Schofield*, No. M2014-00320-COA-R9-CV.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion has been forwarded via email and U.S. mail, first-class postage prepaid, on the 20th day of October, 2014 to: Kelley J. Henry and Paul R. Bottei, Federal Public Defender's Office, 810 Broadway, Suite 200, Nashville, TN 37203.



JENNIFER L. SMITH
Deputy Attorney General