

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

STATE OF TENNESSEE)	
)	
v.)	No. E1982-00075-SC-DDT-DD
)	
DAVID EARL MILLER)	

**SUPPLEMENT TO RESPONSE OPPOSING
MOTION TO SET EXECUTION DATE AND
REQUESTING A CERTIFICATE OF COMMUTATION**

In his response opposing the State's motion to set an execution date Miller requested that, in the event the Court grants the State's motion, any scheduling of an execution date should account, in part, for pending litigation about Tennessee's new one-drug lethal injection protocol. Such consideration in scheduling an execution date provides an adequate opportunity for that litigation and minimizes the need for additional or last-minute filings with this Court. Accordingly, Miller's response requested in the alternative that his execution date be scheduled no earlier than four-months-time after the conclusion of Miller's suit for declaratory judgment.

Miller now supplements his response to inform the Court that the trial in his lethal injection protocol lawsuit has been scheduled for July 7-9, 2014.

On December 2, 2013, adhering to this Court's pronouncements in *State v. West*, No. M1987-130-SC-DPE-DD (Tenn. Nov. 29, 2010), Chancellor Bonnyman entered a scheduling order in Miller's declaratory judgment action challenging Tennessee's new lethal injection protocol. *West, et al. v. Schofield, et al.*, No.

13-1627-I, in the Chancery Court, Part I, 20th Judicial District (Dec. 2, 2013) (Ex. 1, Court's Order & Transcript). Chancellor Bonnyman stated, "It does appear likely there are merits to be reached[,]” and explained “why a shortened trial schedule is not workable if the Court hopes to reach the merits.” (Ex. 1, Order, p. 3). The scheduling order, therefore, reasonably allows full fact development and presentation of the issues as well as an expeditious decision on the merits. Accordingly, this Court should not schedule any execution dates during the pendency of the Chancery Court proceedings, and only then, if the Chancery Court declares the State's protocol to be constitutional.

In his Chancery Court declaratory judgment action, Miller has presented novel issues that require careful fact development and discovery before a final merits ruling, including, *inter alia*:

- (a) Challenging Tennessee's new lethal injection protocol which uses only pentobarbital, a drug never before used in a Tennessee execution;
- (b) Challenging Tennessee's creation of execution drugs through compounding; and
- (c) Challenging Tennessee's procurement and use of execution drugs in violation of various state and federal laws.

On September 27, 2013, the State abandoned its three-drug protocol and issued a new, one-drug protocol. A week later, the State asked for an execution date while simultaneously cloaking from scrutiny critical details about the drug compounding and procurement process that Miller needs to fairly litigate his

claims. Exploring those heretofore hidden details (and all the relevant facts) will understandably take time. For his part, Miller has promptly challenged the new lethal injection protocol and his novel challenges are now proceeding apace toward disposition under the Chancellor's carefully-considered schedule which provides both the "procedural fairness" and the "fully developed record" envisioned by this Court in *State v. West*, No. M1987-130-SC-DPE-DD (Tenn. Nov. 29, 2010), p. 3.

To allow the parties to fairly litigate such claims after discovering and exploring all relevant facts (including those surrounding the defendants' creation and implementation of their new protocol, the process of fabricating and procuring the compounded drugs, and the nature and quality of such substances), Chancellor Bonnyman entered an order balancing the interests at stake. *See* Ex. 1, Order p. 3; Transcript pp. 4, 9-11.

Chancellor Bonnyman noted that in Davidson County, declaratory judgment actions are usually resolved within a year, though it sometimes takes as long as eighteen months. (Ex. 1, Transcript p. 11). She nevertheless has accelerated that normal schedule, while allowing for discovery procedures, even as she balances the needs of her other cases. *Id.* (noting litigation schedules in other cases before the Chancery Court would be burdened by a more truncated schedule). The Court's scheduling order culminates in a hearing on the merits in a matter of months (by July 2014), while allowing reasonable development of the facts that Miller requires to properly challenge the new protocol which uses compounded pentobarbital for the first time.

That schedule is as follows (See Ex. 1, Order p. 2; Transcript pp. 11-12):

- Initial Interrogatories To Defendants
Served by **November 27, 2013**; Responses by **December 4, 2013**

- Defendants' Answer To Complaint
December 11, 2013

- Party Discovery: Written Interrogatories & Requests For Production Of Documents (Tenn. R. Civ. P. 33 & 34)
Served by **January 10, 2014**; Response/Production by **January 31, 2014**

- Non-Party Discovery: Requests For Production Of Documents (Tenn. R. Civ. P. 34.03, 45)
Served by **February 10, 2014**; Production by **March 1, 2014**

- Party & Non-Party Discovery: Requests For Production, Inspection, Copying, Testing Or Sampling Of Things & Entry Upon Land For Inspection And Other Purposes; Supplemental Interrogatories And/Or Requests For Production Of Documents; Requests For Admission (Tenn. R. Civ. P. 33, 34, 36 & 45)
Served by **March 10, 2014**; Completed by **April 30, 2014**

- Parties' Identification Of Experts
May 1, 2014

- Depositions
Completed by **June 1, 2014**

- Pretrial Conference
June 16, 2014

- Trial
July 7-9, 2014

In setting forth this schedule, Chancellor Bonnyman drew upon her own experience in declaratory judgment actions as well as this Court's admonitions in *State v. West*, No. M1987-130-SC-DPE-DD (Tenn. Nov. 29, 2010). There, when a new lethal injection protocol was challenged in Chancery Court for the first time,

this Court declared:

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. at 3.

Adhering to these principles, the Chancellor adopted a schedule to allow “procedural fairness” and the “fully developed record” mandated by this Court in *West*. See Ex. 1, p. 9 (citing *West*). See also *id.* at 8 (citing *West*, No. M2010-02275-SCR-11-CV, for the proposition that resolution of lethal injection challenge requires evidence presented and weighed at an adversarial hearing). Nonetheless, the time frame for the hearing is even shorter than the federal court’s time line in the lethal injection challenge in *Harbison v. Little*, M.D. Tenn. No. 3:06-1206, where (as here) significant discovery was required. See *id.*, R.1 (complaint filed December 2006 and three-day hearing held in September 2007).

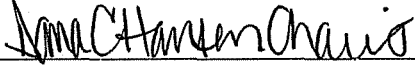
The Chancellor has discretion to prescribe appropriate procedures for the litigation and disposition of Miller’s declaratory judgment action. *Schneider v. City of Jackson*, 226 S.W.3d 332, 346 (Tenn. 2007) (acknowledging chancellor’s discretion). Exercising that discretion, she has acted in a reasonable manner, balancing the needs for a fully developed record on the one hand and an expeditious

resolution of the case on the other.

Miller is pursuing the full and fair adjudication of his constitutional claims in accordance with the Chancellor's reasonable schedule. Therefore, should this Court grant the State's motion to set an execution date, Mr. Miller respectfully requests that his execution date be scheduled only after the July 7-9, 2014 trial and then only if the Chancery Court finds the new execution protocol to be constitutional.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

BY: 
Dana C. Hansen Chavis
Assistant Federal Community Defender
BPR # 019098

Stephen Michael Kissinger
Assistant Federal Community Defender
Appearing *Pro Hac Vice*

Designation of Attorney of Record

Dana C. Hansen Chavis is Mr. Miller's attorney of record upon whom service shall be made. Counsel's contact information is:

Federal Defender Services of
Eastern Tennessee, Inc.
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Knoxville, TN 37929
Email: dana_hansen@fd.org
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Counsel prefers to be notified of orders or opinions of the Court by email to the following email addresses:


Dana_Hansen@fd.org, Stephen_Kissinger@fd.org and Bridget_Stucky@fd.org.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document is being delivered to the Court via FedEx for delivery on December 5, 2013, and a true and exact copy of the foregoing document delivered via FedEx, for delivery on December 5, 2013 to:

Jennifer L. Smith
Deputy Attorney General
500 Charlotte Avenue
Nashville, Tennessee 37243-1401
Phone: (615) 741-3487
Facsimile: (615) 532-4892

this the 4th day of December, 2013.


Dana C. Hansen Chavis

State of Tennessee v. David Earl Miller

Case No. E1982-00075-SC-DDT-DD

Exhibit 1

Court's Order & Transcript

West, et al. v. Schofield, et al., No. 13-1627-I, Chancery Court,
Part I, 20th Judicial District (Dec. 2, 2013).

DATE _____ TIME _____
DAVIDSON COUNTY CHANCERY COURT

IN THE CHANCERY COURT PART I, FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, NASHVILLE AND DAVIDSON COUNTY

STEPHEN MICHAEL WEST, BILLY RAY
IRICK, NICHOLAS TODD SUTTON, DAVID
EARL MILLER, AND OLEN EDWARD
HUTCHINSON,

Plaintiffs,

and

EDMUND ZAGORSKI, ABU-ALI
ABDUR'RAHMAN, CHARLES WRIGHT,
DON JOHNSON, and LEE HALL (formerly
knows as Leroy Hall, Jr.),

Intervening Plaintiffs,

v.

DERRICK D. SCHOFIELD, in his official
capacity as Commissioner, Tennessee Department
of Correction (TDOC), WAYNE CARPTENTER,
in his official capacity as Warden, Riverbend
Maximum Security Institution (RMSI), TONY
MAYS, in his official capacity as Deputy Warden
RMSI, JASON WOODALL, in his official capacity
as Deputy Commissioner TDOC, TONY PARKER,
in his official capacity as Assistant Commissioner
TDOC, JOHN DOE PHYSICIANS 1-100, JOHN
DOE PHARMACISTS 1-100, JOHN DOES
MEDICAL PERSONNEL 1-100, and JOHN DOE
EXECUTIONS 1-100,

Defendants.

2013 DEC -3 PM 2:54

FILED

NP
No. 13-1627-1

ORDER

Pursuant to this Court's November 26, 2013 Case Management Order, schedules
submitted by counsel on November 27, 2013, and for the reasons stated in the attached transcript
of this Court's bench order pursuant to a lengthy telephone conference on December 2, 2013, this

Court enters the following schedule for the proceedings in this case. *The transcript is incorporated by reference. (83)*

SCHEDULE

Initial Interrogatories	Served by November 27, 2013 Response by December 4, 2013
Answer To Complaints	December 11, 2013
Party Discovery: Written Interrogatories & Requests For Production Of Documents (Tenn.R.Civ.P. 33 & 34)	Served by January 10, 2014 Response/Production by January 31, 2014
Non-Party Discovery: Requests For Production Of Documents (Tenn.R.Civ.P. 34.03, 45)	Served by February 10, 2014 Production by March 1, 2014
Party & Non-Party Discovery: Requests For Production, Inspection, Copying, Testing Or Sampling Of Things & Entry Upon Land For Inspection And Other Purposes; Supplemental Interrogatories And/Or Requests For Production Of Documents; Requests For Admission (Tenn.R.Civ.P. 33, 34, 36 & 45)	Served by March 10, 2014 Completed by April 30, 2014 ¹
Parties' Identification Of Experts	May 1, 2014
Depositions (Tenn.R.Civ.P. 30 & 45)	Completed by June 1, 2014
Pretrial Conference	June 16, 2014
Hearing Date	July 7-9, 2014

¹Trans. date of 4/3/13
and hearing dates corrected.

Based on representations of counsel in telephone conferences on November 26, 2013 and December 3, 2013, this Court anticipates the submission of an agreed protective order shortly, so that this matter may proceed expeditiously,

ENTERED this 3rd day of December 2013

Order Proposed by Michael Passino (B)

Claudia C. Bonnyman
CLAUDIA C. BONNYMAN, CHANCELLOR
CHANCERY COURT, PART 1

The date for the first scheduled event has passed. Lawyers on both sides indicate that the interrogatories first addressed, seek the identities of the nonhuman defendants. Even with the protective order, the State has objections. Of course, valid objections should be made.

The exchange describing a temporary decision despite over the interrogatories illuminates why a shortened trial schedule is not workable if the Court hopes to reach the merits. It does appear likely these are merits to be reached. (B)

MAILED
12/3/13

MAILED
12/3/13

CERTIFICATE OF SERVICE

Kelley J. Henry, counsel for intervening plaintiffs Abdur'Rahman, Johnson, Wright and Zagorski, hereby certifies that on December 3, 2013 a true and correct copy of the foregoing proposed ORDER and transcript of bench ruling was served via United States Mail, first-class, postage pre-paid to the following:

Stephen Kissinger
Susanne Bales
Asst. Federal Public Defenders
Federal Public Defender Services of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, TN 37929

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Andrew Smith
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Kelley J. Henry

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CHANCERY COURT PART I FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT
NASHVILLE AND DAVIDSON COUNTY

STEPHEN MICHAEL WEST,
BILLY RAY IRICK, NICHOLAS
TODD SUTTON, DAVID EARL
MILLER, and OLEN EDWARD
HUTCHINSON,

Plaintiffs,

EDMUND ZAGORSKI, ABU-ALI
ABDUR'RAHMAN, CHARLES WRIGHT,
DON JOHNSON, and LEE HALL,
(formerly known as Leroy
Hall, Jr.,

Intervening Plaintiffs,

(Appearances continued on the
Next page)

FILED
2013 DEC - 3 PM 2:54
CLERK OF COURT
NASHVILLE, TENNESSEE

Case No. 13-1627-I

PARTIAL TRANSCRIPT OF TELEPHONE CONFERENCE

JUDGE'S ORDERS

Before: Mon. Claudia Bonnyman, Chancellor

December 2, 2013

CLEETON DAVIS COURT REPORTERS
402 BNA Drive, Suite 108
Nashville, Tennessee 37217
(615) 726-2737
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1 APPEARANCES (Continued)

2 v.)

3 DERRICK D. SCHOFIELD, in his)

4 official capacity as)

5 Tennessee's Commissioner of)

6 Corrections, WAYNE)

7 CARPENTER, in his official)

8 capacity as Warden of Riverbend)

9 Maximum Security Institution,)

10 TONY MAYS, in his official)

11 capacity as Deputy Warden)

12 of Riverbend Maximum Security)

13 Institution, JASON WOODALL, in)

14 his official capacity as Deputy)

15 Commissioner of Operations,)

16 TONY PARKER, in his official)

17 capacity as Assistant)

18 Commissioner of Prisons,)

19 JOHN DOE PHYSICIANS 1-100,)

20 JOHN DOE PHARMACISTS 1-100,)

21 JOHN DOE MEDICAL EXAMINERS)

22 1-100, JOHN DOE MEDICAL)

23 PERSONNEL 1-100,)

24 JOHN DOE EXECUTIONERS 1-100,)

25 Defendants.)

16 -----

17 APPEARANCES (By speakerphone):

18 For Plaintiffs Stephen Michael West, Nicholas Todd

19 Sutton, David Earl Miller, and Olen Edward Hutchison:

20 Stephen Kissinger, Esq.

21 Susanne Bales, Esq.

22 Assistant Federal Community Defenders

23 Federal Defender Services

24 of Eastern Tennessee, Inc.

25 800 South Gay Street, Suite 2400

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For Plaintiff Billy Ray Irick:

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William J. Rieder, Esq.

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Chattanooga, Tennessee 37201

1 APPEARANCES (Continued):
2 For Intervening Plaintiffs Edmund Zagorski, Charles
3 Wright, Don Johnson, and Abu-Ali Abdur'Rahman:
4 Michael J. Passino, Esq.
5 Kelley J. Henry, Esq.
6 Paul Bottei, Esq.
7 Assistant Federal Public Defenders
8 Office of the Federal Public Defender
9 810 Broadway, Suite 200
10 Nashville, Tennessee 37203-3861
11 For Intervening Plaintiff Lee Hall:
12 Kelly A. Gleason, Esq.
13 Assistant Post-Conviction Defender
14 Office of the Post-Conviction Defender
15 530 Church Street, Suite 600
16 Post Office Box 198068
17 Nashville, Tennessee 37219-8068
18 For the Defendants:
19 Andrew H. Smith, Esq.
20 Nicolas White Spangler, Esq.
21 Assistant Attorneys General
22 425 Fifth Avenue, North
23 Post Office Box 20207
24 Nashville, Tennessee 37202-0207
25 Also Present:
Jason Steinle, Esq.
Tennessee Administrative Office of the Courts
511 Union Street, Suite 600
Nashville, Tennessee 37219
Greg Nies, Esq.
Staff Attorney

1 (Proceedings held, reported but not transcribed.)

2 The Court convened a conference on
3 December 2nd, 2013, after the parties submitted
4 proposed schedules for pretrial and trial events in
5 this case.

6 And now off the record just a second.

7 (Proceedings held off the record.)

8 THE COURT: Now we're back on the
9 record for the bench ruling.

10 The Court had initially announced that
11 because of the January 15, 2014, execution date, the
12 declaratory judgment decision must be issued by
13 December 31 at the latest to allow for appellate
14 review before an execution date arises. The Court
15 was mindful of the inadequacy of time that the
16 December 31st, 2013, deadline would allow, both the
17 trial and appellate phase of the litigation. But the
18 deadline appeared to be necessary given the orders
19 issued by the criminal court and the Tennessee
20 Supreme Court regarding the plaintiff, Mr. Irick.
21 Neither the plaintiffs nor the State were able to
22 propose a schedule fitting within this Court's
23 initial plan.

24 The plaintiff seeks a trial date of July 7,
25 starting July 7, 2014. And I think, gentlemen that

1 and ladies, that July 6, I think that's a Sunday, so
2 we're talking about starting on July 7, 2014. That's
3 the date that the plaintiffs seek, while the
4 defendants scheduled the trial date for January 6,
5 2014.

6 The January 15, 2014, execution date, which
7 so constrains the parties and the Court, would set --
8 appears to have been set shortly after the
9 State-reviewed execution protocol was issued but at a
10 point when the Supreme Court could not take into
11 account the fact of a Tennessee constitutional
12 challenge to the protocol now pending before this
13 Court.

14 And as for the issues in the case, the State
15 complains that the -- that the plaintiffs delayed
16 their lawsuit unreasonably when they filed their
17 complaint 60 days after the protocol was issued
18 rather than filing the complaint earlier.
19 The plaintiffs contend they were not allowed access
20 to public records deemed confidential by the state
21 legislature at T.C.A Section 10-7-104 and thus could
22 not discover matters essential to their lawsuit such
23 as identity of the pharmacy to track the compounds of
24 the lethal drug used in the execution.

25 The plaintiffs contend that they sought these

1 public records before the protocol -- some of the
2 public records before the protocol was issued. The
3 Court notes that the parties did not discuss the
4 protective order ^(S) for the confidential material until
5 the week the complaint was filed, even though neither
6 party disagreed to a protective order solution.
7 ^{Confidential material (S)} Further, as regards ~~to~~ delay, although it can
8 be said ^{that} the plaintiffs should have been ready to
9 challenge the new protocol earlier, when the Court
10 became involved, the State was unable to accept
11 service of the complaint on numerous defendants, even
12 those who were probably state employees. In other
13 words, the State could not advise the Court whether
14 certain defendants were employed by the State or were
15 subcontractors.

16 By the time the State filed its proposed
17 schedule on November 27th, the State was authorized
18 to accept service of process on behalf of all ~~of the~~ ^{CA}
19 defendants. By the time of the December 2nd
20 conference, the State was aware of its preference for
21 an expert witness but was unable to reveal the
22 identity of the expert because of some administrative
23 matters.

24 The plaintiffs contend that the State has all
25 the information and they, the plaintiffs, have been

1 dependent on the recalcitrant State for many actual
2 allegations and background and such.

3 Whatever the comparative effect of the delays
4 recounted here, the combined impact was relatively
5 small. The fact that no one is to blame for the
6 present scheduling dilemma does not make the problem
7 less serious for the Court, however.

8 At the conference, the plaintiffs discussed
9 Tennessee discovery rules which contains the built-in
10 delay such as the manner in which expert witness
11 information is revealed. The State contends that its
12 -- contends that its proposal that experts be
13 addressed along with Rule 26.02 disclosures the week
14 of December 16 is doable, and it appears that the
15 State does not contemplate depositions for the
16 experts but will make decisions about its proof from
17 the formal written disclosures provided by the
18 plaintiffs while the plaintiffs instead built in time
19 for depositions of the opposing expert.

20 And now I am going to briefly discuss the
21 principles of law that I'm looking at so that I can
22 think about how to schedule this case in light of the
23 execution constraints. And I am reciting first or
24 reading first from the November 6, 2010, order from
25 the Supreme Court in the -- the first entry, West

1 case, Case No. -- Chancery No. 10-1675, Part I. And
2 the Supreme Court number is M2010-02275 scr 11 cv.
3 And from that order, the following is taken. And
4 this should be in quotes, please.

5 "Decisions involving such profoundly
6 important and sensitive issues such as the ones
7 involved in this case are best decided on evidence
8 that has been presented, admitted, and weighed in an
9 adversarial hearing such as the one that was held by
10 the U.S. District Court for the Middle District of
11 Tennessee in Harbison v. Little, Middle District of
12 Tennessee, July 12, 2010. The current record in this
13 case contains no such evidence. Accordingly, we have
14 determined that both Mr. West and the State of
15 Tennessee should be afforded an opportunity to
16 present evidence supporting their respective
17 positions to the chancery court and that the chancery
18 court should be afforded an opportunity to make
19 findings of fact, conclusions of law with regard to
20 the issues presented by the parties." And then --
21 and that's end of the quote.

22 Then taken from the November 29, 2010, order
23 *related to* ^(B) ~~the same chancery court case -- no, I'm sorry,~~
24 this was filed in the circuit court for Union County,
25 No. M1987, Supreme Court DPE-DD. And the Supreme

1 Court states, "The principles of constitutional
2 adjudication and procedural fairness require" -- and
3 if I didn't say this before, this needs to be in
4 quotes, please. "The principles of constitutional
5 adjudication and procedural fairness require that
6 decisions regarding constitutional challenges to acts
7 of the executive and legislative branches be
8 considered in light of a fully developed record
9 addressing the specific merits of the challenge. The
10 requirement of a fully developed record envisions a
11 trial on the merits during which both sides have an
12 opportunity to develop the facts, has a bearing on
13 the constitutionality of the challenge provision.
14 Mr. West is correct that the trial court has not been
15 given the opportunity to consider in the first
16 instance whether the revised protocol eliminates the
17 constitutional deficiencies the trial court
18 identified in a prior protocol of whether the revised
19 protocol is constitutional." And that's -- and
20 that's the end of the quote.

21 And now as to a separate section of this
22 decision, the ^{State's} ~~defendants~~ ⁽³⁾ proposal implicitly
23 concedes that it is impossible by January 15, 2014,
24 for the parties to conduct necessary discovery to
25 bring the case to trial in time for the Court to

1 deliberate, issue a ruling, and still allow even
2 minimal time for considered appellate review. The
3 schedule that the ^{State} defendants propose ^(B) contemplates
4 discovery and trial preparation ^{that} will extend past
5 December 31, 2013. And, lawyers, remember, I didn't
6 say this has to be done, you have to present a
7 schedule that matches December 31, 2013, but I did
8 state at our earlier conference, the trial court did
9 state at the earlier conference that I did not see
10 how this Court, whether they -- did not see how there
11 could be appellate review of any decision or
12 fact-finding this Court makes without having the
13 trial before or on December 31, 2013.

14 The time the ^{State} defendants would allot for
15 discovery and trial preparation is too short to
16 develop and present complex factual issues that must
17 be decided. Yet even that allotment of time is
18 impracticably long, because it forces a reduction in
19 an already inadequate amount of time for this Court
20 and the appellate court to consider the merits and
21 issue their ruling.

22 The plaintiffs proposed a trial schedule
23 that, in light of the execution date, is even more
24 unworkable. The timetable the plaintiffs propose is
25 otherwise reasonable and in fact shortens the time

1 for litigation of civil lawsuits of this complexity.
2 Most declaratory judgment actions in chancery court
3 in Davidson County are resolved within one year.
4 Some declaratory judgment actions require 18 months.

5 The plaintiffs' schedule -- adoption of the
6 plaintiff's schedule would be more fair to other
7 litigants whose cases have long been scheduled for
8 trial over the next month but who will now lose their
9 places or could lose their places on the Court's
10 schedule to make way for hurried disposition of this
11 case. Because the plaintiffs' schedule is
12 objectively more reasonable, the Court adopts ^{their} ~~its~~
13 plan, ~~its~~ ^{their} schedule, with the notice from the trial
14 court that the schedule will be adhered to ^(B) absent a
15 different directive from the Supreme Court or a
16 different schedule.

17 And I'm going to dictate this schedule into
18 this order so that any review can be done in this one
19 document. The schedule adopted by the Court is,
20 initial interrogatory, start by November 27, 2013;
21 response -- response by December 2nd, 2013.
22 Answer to complaint, December 11, 2013. And this is
23 the one provision that both parties agree to. And
24 their schedule, that is, the answer to complaint,
25 will be filed on December 11, because that's when the

1 State stated it could file its answer, ^(S) ~~answer the~~
2 ~~parties' discovery~~. Written interrogatories or
3 requests for production of documents will be served
4 January 10, 2014, response to production by January
5 31, 2014. Nonparties' discovery request of
6 production of documents served by February 10, 2014,
7 production by March 1, 2014. Parties' and
8 nonparties' discovery, requests for production,
9 inspection, copying, testing, or sampling of things,
10 and entry upon land for inspection and other
11 purposes, supplemental interrogatories and/or
12 requests for production of documents, requests for
13 admissions served by March 10, 2014, completed by
14 April 3, 2013. Parties' identification of experts
15 May 1, 2014, depositions completed by June 1, 2014.
16 Pretrial conference on June 16, 2014, with the trial
17 date to begin on Monday, July 7, 2014. And the Court
18 is setting aside July 6, 7, and 8 in case those three
19 days are needed.

20 And, lawyers, let me stop here and look at my
21 notes to see if there's something else that I need to
22 add.

23 July ^{7th 8th} ~~7th~~ and 9th, 2014, ^(S) ~~would~~ ^{will} be the trial
24 dates.

25 Lawyers, is there anything else that I need

1 to address besides how the transcript should be
2 managed?

3 MR. PASSINO: No, your Honor. And
4 we've got the court reporter, Mr. Ratekin, here. We
5 have asked him about how fast he could get this to
6 you. And based on my past experience, you have liked
7 to have the transcript with you when you enter the
8 order or to attach it to the order. So it's now in
9 his hands.

10 THE COURT: Okay. Do we know how
11 quickly such an expedited matter could be managed?
12 Can we ask our court reporter that?

13 MR. PASSINO: He is looking at -- he is
14 working right now, and he is looking at the speaker.
15 What do you think?

16 THE COURT REPORTER: Two days.

17 MR. PASSINO: Is two days fast enough
18 for the Court? How about if we call back --

19 THE COURT: How about just -- you know,
20 it doesn't have to be -- my dictation is not perfect.
21 It doesn't have to be perfect.

22 MR. PASSINO: What about this? Because
23 there may be some misunderstanding on my part. What
24 about just the transcription of her order? How fast
25 could you get that?

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THE COURT REPORTER: Tomorrow.

THE COURT: Yeah. I think that's more -- that would be what I would expect. I'm sorry I made you think -- I don't need the -- I do not need the transcript of the hearing.

MR. PASSINO: Right.

THE COURT: I might want to get it later, but I don't need it.

MR. PASSINO: Okay. All right.

THE COURT: It was not a hearing, anyway; it was a conference. If you wanted the transcript of the conference, of course, that would be up to you. But I don't need it to enter the order.

MR. PASSINO: I understand, and it was my misunderstanding. So tomorrow sometime.

THE COURT: Okay. So the cover order will just say that the Court adopted the plaintiffs' trial schedule, and the transcript of the bench ruling is incorporated into this order, and I will sign it. And then everybody can do with it what they need to do.

MR. PASSINO: And we will have the court reporter, then, e-mail it, if that's not inappropriate, to the Court and all parties, the

1 transcript of your --

2 THE COURT: Well, let me ask you this.
3 I don't anticipate any problems, because I just
4 rarely see anybody stand on formalities. But don't
5 you have to have a page from the court reporter
6 saying that it is accurate?

7 MR. SMITH: Right.

8 MR. PASSINO: Yes.

9 THE COURT: So you're probably going to
10 need that, and so that kind of makes e-mailing it --
11 I don't think that works.

12 MR. PASSINO: Okay. All right. We can
13 get it hand-delivered to the Court and e-mailed to
14 the parties if everybody is agreeable.

15 THE COURT: Okay. That will work.

16 MR. SMITH: That works.

17 MR. PASSINO: Okay.

18 THE COURT: Okay. You know what I'm
19 saying about the order and the court reporter and
20 everything is based on the fact that we don't have
21 automated filing. If we did, what I'm stating to you
22 wouldn't matter. But since we don't, you know, we
23 will have -- I will look forward to receiving that
24 document tomorrow. It will be entered tomorrow --
25 I'll sign it tomorrow, it will be entered tomorrow,

1 and I will have my office manager fax it to everybody
2 with stamped dates and the time and everything.

3 MR. PASSINO: Oh, good. Good.

4 THE COURT: Okay. Any other need that
5 anybody has?

6 MR. SMITH: Your Honor, the one issue
7 that the State would present is, this order being
8 entered tomorrow issues an interrogatory deadline of
9 today on the State. The State would seek some relief
10 from that given the pending order adopted and the
11 time we were proposed with the interrogatory. We
12 would just request relief from that..

13 THE COURT: I'm sorry; I didn't even
14 see that. I didn't even think about it.

15 MR. KISSINGER: Your Honor, those were
16 the interrogatory sets, were sent in terms of -- that
17 were sent for the very limited purpose of identifying
18 the Joe Doe defendants.

19 THE COURT: Oh, okay.

20 MR. SMITH: The State understands the
21 purpose of that was to get them served, which the
22 State has now adopted service on. But irrespective,
23 the State didn't receive them until the closing of
24 business Tuesday afternoon and just can't respond to
25 that in any detail today.

1 THE COURT: Okay. So it looks like
2 interrogatories have to do with -- do they ask for
3 the identity of these people?

4 MR. SMITH: Yes.

5 MR. KISSINGER: That's correct, your
6 Honor.

7 THE COURT: And when does the State
8 think they can provide that along with a protective
9 order?

10 MR. SMITH: The parties have been
11 discussing a protective order. I emailed one over
12 for review at 2:10 on Wednesday afternoon and have
13 not heard a final position from the opposing parties
14 yet.

15 My understanding is that we think we have an
16 agreement in principle, at least. But I'm waiting on
17 a response back from petitioners.

18 MR. PASSINO: Can we agree that if
19 you'll give Mr. Kissinger and our office and the
20 other plaintiffs' counsel 45 minutes, I can give you
21 or Mr. Kissinger can give you a call and maybe e-mail
22 you a proposed final draft?

23 MR. KISSINGER: Or maybe someone over
24 there at your office can do that, Mike. 45 minutes
25 puts us kind of late in the day.

1 MR. PASSINO: Okay. I apologize. How
2 about first thing tomorrow morning?
3 MR. KISSINGER: Yeah. That works.
4 MR. PASSINO: Okay.
5 MR. KISSINGER: If it works for the
6 State, of course.
7 MR. SMITH: The State does not -- there
8 still may be some objections to the interrogatories
9 based on how they are worded and the state of the
10 proceedings. But as far as the protective order,
11 that's something we can do I think regardless of our
12 interrogatory responses. We would like the
13 protective order in place before we respond to the
14 interrogatories.
15 MR. PASSINO: Absolutely, and
16 understood. What we'll do is, we'll get together,
17 the plaintiffs, immediately after this call, and then
18 we will get something to you the first of the morning
19 tomorrow on the protective order.
20 MR. SMITH: And I would ask the Court
21 if we have Wednesday to issue a response to this
22 initial round of interrogatories. We have a meeting
23 with the Department of Corrections tomorrow.
24 MR. PASSINO: Oh, that's absolutely
25 fine with us. I can't speak for Mr. Kissinger.

1 MR. KISSINGER: Oh, that's no problem
2 at all.

3 THE COURT: What should I put in here,
4 anything? Because what I can do when I get the
5 transcript is just strike through that subject
6 matter.

7 MR. PASSINO: We would prefer that you
8 would draft it with the modifications just discussed,
9 that the parties will enter an -- a protective order
10 or submit a protective order sometime tomorrow to the
11 Court for its approval, review and approval, and that
12 Mr. Smith will have until Wednesday at the close of
13 business to respond to interrogatories or to present
14 objections.

15 MR. KISSINGER: How does that work? I
16 mean, that's fine. That's fine with me. How does
17 that work for you, Andrew?

18 MR. SMITH: I think I can do that.

19 THE COURT: Wednesday, December 4?

20 MR. KISSINGER: Yes.

21 MR. SMITH: That's correct, your Honor.

22 THE COURT: Okay. All right. I will
23 make that change when I get the transcript.

24 MR. KISSINGER: Okay. Good. And I'll
25 get that to you first thing tomorrow, Andrew, the

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protective order, proposed protective order.

THE COURT: Okay. I'm going to get off now, and you-all can talk, if you want to.

MR. PASSINO: Thank you.

MR. SMITH: Thank you, your Honor.

MS. HENRY: Thank you, your Honor.

(Proceedings concluded.)

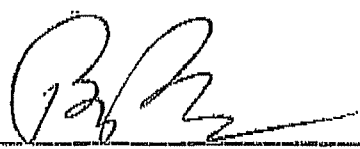
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REPORTER'S CERTIFICATE

I, Brian V. Ratekin, Registered Diplomate Reporter and Notary Public for the State of Tennessee, do hereby certify that I recorded to the best of my skill and ability by machine shorthand the proceedings contained herein, that same was reduced to computer transcription by myself, and that the foregoing is a true, accurate and complete transcript of the portion of proceedings requested in this cause.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

Dated this 3rd day of December, 2013.



Brian V. Ratekin
LCR No. 067; Exp. 6/30/14

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May 28, 2017

