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

STEPHEN MICHAEL WEST,	)
	)
Plaintiff,	)
	)
BILLY RAY IRICK	)
	)
Plaintiff/Intervener,	)
	)
v.	)
	)
DERRICK D. SCHOFIELD[1], in his official capacity as Tennessee Commissioner of Correction, et al.,	)
	)
Defendants.	)

FOM

No. 10-1675-I

ORDER

In an order filed on November 29, 2010, the Tennessee Supreme Court in *State v. West*, No. M1987-000130-SC-DPE-DD, directed the State to "file a motion in the trial court presenting for determination in the first instance the issues of whether the revised [lethal injection] protocol eliminates the constitutional deficiencies the trial court identified in the prior protocol and whether the revised protocol is constitutional." The Court also stated that in order for the plaintiff to prove that the revised protocol created an "'objectively intolerable risk of harm that qualifies as cruel and unusual' ... 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, or demonstrate that no lethal injection protocol can significantly reduce the substantial risk of

[1] In accordance with Tenn. R. Civ. P. 25.04(1), Commissioner Derrick D. Schofield, as Ms. Gayle Ray's successor in public office, is automatically substituted for Ms. Ray as a party in this action.

severe pain." *State v. West*, No. M1987-000130-SC-DPE-DD (Tenn. Nov. 29, 2010) (Order, p. 3) (emphasis in the original) (citations omitted).

On December 20, 2010, the defendants in this case filed a motion to amend findings of fact and to alter or amend judgment based on the November 24, 2010 revision of the lethal injection protocol to include checks for consciousness prior to the administration of the pancuronium bromide and potassium chloride. The plaintiff filed a response supported by an affidavit from Dr. David A. Lubarsky. After argument, this Court granted the motion to amend findings of fact and also ordered that the affidavit of Dr. Lubarsky be made a part of the record in this case. The Court further ordered that the parties would reconvene on February 16, 2011, for the Court's bench ruling on the defendants' motion to alter or amend and on the issues referred back to this Court by the Tennessee Supreme Court.

Based on the evidence in the record and the arguments of counsel, this Court issued a bench ruling on February 16, 2011, a certified copy of which is attached hereto. For the reasons stated in the bench ruling, which is hereby fully incorporated herein, the Court finds as follows:

1. Applying the standards from the plurality opinion in *Baze v Rees*, 553 U.S. 35 (2008), as directed by the Tennessee Supreme Court, the revised Tennessee lethal injection protocol is constitutional and does not violate the Eighth Amendment prohibition against cruel and unusual punishments;

2. Based on the record before the Court, the plaintiffs have not carried their burden to show that the one-drug protocol or any other protocol is, as a matter of fact, feasible, readily implemented and significantly reduces the substantial risk of severe pain presented by the revised Tennessee lethal injection protocol.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the revised Tennessee lethal injection protocol is constitutional and does not violate the Eighth Amendment prohibition against cruel and unusual punishments. **IT IS, FURTHER, ORDERED, ADJUDGED AND DECREED** that the defendants' motion to alter or amend judgment is granted.

CLAUDIA C. BONNYMAN, CHANCELLOR
CHANCERY COURT, PART I

APPROVED FOR ENTRY:

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RULE 58 CERTIFICATION

A Copy of this order has been served by U. S. Mail upon all parties or their counsel named above.

Deputy Clerk and Master
Chancery Court

3/4/11
Date

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2011, a copy of the foregoing was forwarded by e-mail and/or U.S. Mail to:

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IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST, Plaintiff, vs. GAYLE RAY, In her official capacity as Tennessee Commissioner of Corrections, et al., Defendants.	No. 10-1675-I

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-captioned cause came on for hearing this, the 16th day of February, 2011, in the above Court, before the Honorable Claudia C. Bonnyman, Judge presiding, when and where the following proceedings were had, to wit:

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(Appearances Continued Page 3)

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PROCEEDINGS

THE COURT: All right. Lawyers and parties, we are here for the Court to dictate to the court reporter its bench ruling on the second remand in this case. And I will be going back and forth somewhat. And I ask the -- everybody's patience on that.

As for the statement of case, the plaintiff, Mr. West, petitioned this Court for a declaratory judgment that the three-drug lethal injection protocol to be used by the State Tennessee Department of Corrections in his execution violates the Eighth Amendment prohibition against cruel and unusual punishments.

The Tennessee Supreme Court twice remanded case to the Chancery Court for a decision. The opinion announced today resolves the second and most recent time the case has been sent back to Chancery for a merits review. Specifically the opinion announced today resolves the State's Motion to Alter or Amend the Judgment based upon its revised protocol.

Before addressing the case, it is helpful to understand the backdrop or the givens

against which the issues in this case must be litigated or decided. When ruling upon capital punishment cases, the Trial Courts, which this, of course, include this Trial Court must accept the higher Court's decisions, which define and interpret the Eighth Amendment to the U.S. Constitution.

The Eighth Amendment applies to the States through the due process clause of the 14th Amendment. The Eighth Amendment states excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted. This amendment has been consistently interpreted to mean that government's punishments of torture and any punishments involving unnecessary cruelty are forbidden. Deliberate infliction of pain by the State for the sake of causing pain is illegal.

Consequently, if there is, in fact, a readily available means to avoid or significantly reduce the substantial risk of severe pain during an execution and government will not use the means, then the risk of severe pain is unnecessary cruelty. Executions that mimmick or match the suffering of the victims in

these heinous crimes have never been -- or has never been approved in this country. Wanton infliction of ~~One who inflicts~~ pain, meaning merciless or uncontrolled pain infliction, is also prohibited.

The Constitution does not demand, however, that Government avoid all risk of pain. Capital punishment is constitutional, and there must be -- there may be some pain as an inescapable consequence of death.

Another given about which the parties agree is that if the prisoner is conscious when the State injects the second and third drugs, according to the original and revised protocols, he will experience severe pain. The first drug, sodium thiopental, is injected so that the prisoner will not be conscious, and will not therefore experience pain caused by the second and third drugs.

The Court will state the principles of law which establish these givens later in this opinion. And as for the history of this case, on November 6, 2010, the Tennessee Supreme Court remanded this case to the Davidson County Chancery Court because it concluded that a declaratory judgment action is a proper vehicle for

this challenge to the State's execution protocol. This Court was to decide if the State's three-drug lethal injection protocol created an objectively intolerable risk of severe suffering or pain and determine what level of sodium thiopental is necessary to negate the risk that the condemned inmate is conscious and in pain.

The Tennessee Supreme Court made it clear that the plurality opinion in Baze v Rees 533 U.S.35 (2008), U.S. Supreme Court case is controlling. Specifically, in that case -- it is decided in that case that the risk was to be evaluated against known and available protocol alteratives, which would, in fact, significantly reduce or eliminate substantial risk. In other words, what other protocols should the State consider and be following.

After a hearing on November 18 and 19, 2010, this Court found that Tennessee's three-drug lethal injection protocol constituted cruel and unusual punishment because the sodium thiopental was not adequate to avoid the intolerable risk that the prisoner remained or became un- -- became conscious after the first

drug was administered according to the execution protocol.

And there appeared to be some alternative and readily available method of available to the State, which would negate or significantly reduce the risk. Proof at the November hearing did not show that any particular -- or the parties at the November hearing did not show that any particular amount of sodium thiopental would cause the prisoner to remain sedated because of the variables always present in individuals.

The plaintiffs did not demonstrate there was any particular method to ensure that the plaintiffs remained unconscious when the second and third drugs were administered, but the plaintiff consistently pointed out that other states do check for consciousness before the second drug is injected.

The State did not appeal the Court's November ruling. Based upon the Chancery ruling, the plaintiffs sought a stay of execution from the Tennessee Supreme Court. The State responded to the effort showing that after the November ruling in Chancery, the State

revised Tennessee's lethal injection execution protocol, adding methods to check the consciousness of the condemned person before administration of the second and third drugs so that the State would be assured that the inmate would stay sedated.

The revised protocol provides that the warden will access consciousness by brushing the back of his hand over the inmate's eyelashes, calling the inmate's name and gently shaking the condemned prisoner. The Tennessee Supreme Court stayed the plaintiff's execution and the executions of three other condemned men, including Mr. Irick who joined in this action as a plaintiff.

In its November 29, 2010 order, the Supreme Court directed the State to file a motion in the trial court "presenting for determination in first instance the issues of whether the revised protocol, which now includes checks for consciousness, eliminates the Constitutional deficiencies the Trial Court identified in the prior protocol and whether the revised protocol is Constitutional."

The Supreme Court ordered: In any

proceedings on remand the standards annunciated in the plurality opinion in Baze v Rees 553 U.S. 35 U.S. Supreme Court cased decided in 2008 shall apply. The burden is Mr. West -- here I'm quoting from the Tennessee Supreme Court order directing the Trial Court: The burden on Mr. West to prove that the revised protocol creates an objectively intolerable risk of harm that qualifies as cruel and unusual." 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's feasible, readily implemented, and which significantly reduces the substantial risk of severe pain, or he must demonstrate that no lethal injection protocol can significantly reduce the substantial risk of severe pain.

And it's important to note that the Supreme Court ordered that the Trial Court shall afford the parties an opportunity to submit argument or evidence about or on the revised protocol.

In compliance with this directive, the Court scheduled the hearing for the State's

motion and set aside two days in February for an evidentiary hearing should one be necessary. In opposition to the State's Motion to Amend the Fact Findings and to Alter or Amend the Judgment, the plaintiff filed Dr. Lubarsky's affidavit.

In -- at the January 2011 motion hearing, the parties agree that the Court should rule on the merits and constitutionality of the revised protocol, considering the record without a further evidentiary hearing and without further proof.

The Court granted the State's Motion to Amend the Fact Findings and took the issue of whether and how the November 2010 judgment should be amended. ~~The judgment itself should be amended~~ under advisement. The Court allowed the plaintiffs to supplement the record with Dr. Lubarsky's affidavit in response to the revised protocol.

Finally, the Court announced it would dictate its ruling to a court reporter on February 16 at 1:30 p.m., ~~on~~ one of the days set aside for an evidentiary hearing.

And then as for the issues in this

case, the plaintiffs oppose an alteration of the November 22, 2010, judgment because they contend that the revised protocol fails to add any material information which could even arguably cure the unconstitutionality of the State's lethal injection protocol.

The plaintiffs assert in their Amended Complaint for Declaratory Judgment that Tennessee's original protocol fails the Baze test in part because of a glaring omission: failure to check for consciousness. Kentucky does have these safeguards say the plaintiffs, as do some other states such as California.

The plaintiffs contend, however, that the stimuli chosen by the State to check for consciousness as set out in the revised protocol is too mild to be useful or effective in reducing intolerable risk.

According to the plaintiff, when an unconscious, condemned person receives this mild stimuli, only half will remain unconscious. The plaintiffs argue further that the record in the case shows that every single one of the condemned will, during execution, be suffocated by the second drug while conscious if they show

a sodium thiopental level of 10.2 milligrams per liter.

The plaintiffs do not attempt to show that there is an execution protocol that is -- that can significantly reduce the substantial risk of severe pain. The plaintiffs assert instead, without agreeing in theory, that the State decided the one-drug protocol using sodium thiopental only, is a feasible alternative.

For example, claimed the plaintiffs, former Commissioner George Little, admitted in a deposition that the one-drug protocol will work and even reduce litigation, and yet the State did not adopt the method. The plaintiffs' reason that the risk of severe pain is avoidable because the State has said, We have an alternative execution method that eliminates the pancuronium bromide and eliminates the potassium chloride. The plaintiffs do not necessarily agree with the State, but take the position that the one-drug protocol is an obvious solution, which must be tested to see if it is in fact a solution.

Last, the plaintiffs contend that

under the revised protocol, the warden will check for consciousness. The plaintiffs make the point that anesthesiologists are trained to match the depth of anesthesia to stimulus intensity while wardens are certainly not so trained. The plaintiffs announced at the motion hearing that they would not seek an evidentiary hearing.

The State contends that in prior proceedings before this Court, the plaintiff argued that the State's original protocol imposed a substantial risk of harm because the original protocol contained no checks for consciousness, such as the ones from Florida and California that the Tennessee Departments of Corrections protocol ~~employee~~ Committee (8) reviewed but did not implement.

The State also asserts that this Court based its November 2010 ruling in part on the lack of consciousness checks in the original protocol. The State argues that placing consciousness checks similar to Florida's and California's in the revised protocol solves the Constitutional problem.

The State particularly asserts that

the plaintiff should not be able to complain about the presence of these consciousness checks in the revised protocol when it complained about the lack of these same checks in the original protocol.

The State argues that checks for consciousness similar to those in the revised protocol are used by 19 of the 36 states that have adopted the three-drug lethal injection method. The State claims the Eighth Amendment does not require the State to eliminate every risk of pain. It need only eliminate an objectively intolerable risk.

The State further contends that because there is a pause in the process while consciousness of the condemned is assessed, there is less opportunity for the sodium thiopental to interact with the pancuronium bromide. Consequently, says the State, any objectively intolerable risk that the condemned man would be conscious during injection of the second drug has been eliminated.

The State reminded the Court that like Tennessee, Ohio also uses 5 grams of sodium thiopental in its execution method. During nine

executions in Ohio says the State -- says the State, all nine inmates were dead after administration of 5 grams of sodium thiopental. The effective of 5 grams plus the consciousness check eliminate any objectively intolerable risk the inmate would be conscious -- that the inmate would be conscious during the administration of the second and third chemicals reasons the State. The State decided before the motion hearing that the revised protocol and the record are sufficient for the Court to make its decision, and the State does not seek an evidentiary hearing.

The issues for the Court to decide are, one, have the plaintiffs shown that the revised protocol creates an objectively intolerable risk of harm that qualifies as cruel and unusual. In other words, have the plaintiffs demonstrated that the revised protocol imposes a substantial risk of serious harm.

Two, have the plaintiffs also shown that there is an alternative method of execution that's feasible readily implemented and which significantly reduces the substantial risk of

severe pain.

Three, have plaintiffs alternatively demonstrated that no lethal injection protocol can significantly reduce the substantial risk of severe pain.

The plaintiff stated at the motion hearing that the answer to issue number three is, no, the plaintiffs must believe there is an execution protocol which can pass constitutional muster, although they do not concede what it is and to be fair they do not know what it is.

And as for a summary of the decision, the Court finds that applying the standards from the plurality opinion in Baze as directed by the Tennessee Supreme Court, the revised protocol is Constitutional and does not violate the Eighth Amendment against -- prohibition against cruel and unusual punishments.

The alternative that the State presented, the consciousness checks, seem to take care of the problem, and the plaintiffs have not come forward with an alternative or with sufficient proof that the consciousness checks do not work.

And as for the principles of law in the case, I'm reading these into the record all from Baze v Reese, the U.S. Supreme Court case of 2008. The Eighth Amendment to the Constitution applicable to the States through the due process clause of the 14th Amendment provides that excessive bail should not be required nor excessive fines imposed, nor cruel and inhumane punishments inflicted.

We begin with the principle, Greg v Georgia that capital punishment is constitutional. It necessarily follows there must be a means of carrying it out. Some risk pain is inherent in any method of execution no matter how humane, if only from the prospect of error in following the required procedure. It's clear then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.

Our U.S. Supreme Court cases recognize that subjecting individuals to a risk of future harm, not actively inflicting pain can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting

the risk must be sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers. We have explained that to prevail in such a claim, there must be a substantial risk of serious harm, ~~and~~ an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment.

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.

Given what the U.S. Supreme Court's cases have said about the nature of the risk of harm that is actionable under the Eighth Amendment, a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative.

Instead, the proffered alternatives must effectively address a substantial risk of serious harm. To qualify, the alternative procedure must

be feasible, readily implemented and, in fact, significantly reduce a substantial risk of severe pain. If the State refuses to adopt such an alternative in the face of these documented advantages, without legitimate justification for adhering to its current method of execution, then the State's refusal to change its method of execution can be viewed as cruel and unusual under the Eighth Amendment.

State efforts to implement capital punishments must certainly comply with the Eighth Amendment, but what that amendment prohibits is wanton exposure to objectively intolerable risk, not simply the possibility of pain.

Justice Ginsburg comments upon the plurality opinion and she makes some summaries that I think are applicable here and with -- which I believe are consistent with the plurality opinion. And Justice Ginsburg says it is undisputed that the second and third drugs used in Kentucky's three-drug lethal injection protocol pancuronium bromide and potassium chloride would cause a conscious inmate to suffer excruciating pain. Pancuronium bromide

paralyzes the lung muscles and results in slow asphyxiation. Potassium chloride causes burning and intense pain as it circulates through the body.

Pancuronium bromide and potassium chloride use of -- strike that.

Use of pancuronium bromide and potassium chloride on a conscious inmate, the plurality recognizes would be constitutionally unacceptable. The constitutionality of Kentucky's protocol, therefore, turns on whether inmates are adequately anesthetized by the first drug in the protocol, sodium thiopental.

Kentucky's protocol lacks basic safeguards used by other states to confirm that an inmate is unconscious before injection of the second and third drugs. And she states she would vacate and remand with instructions to consider whether the Kentucky's omission of these safeguards poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain.

She goes on to say that she agrees with the petitioners and with the plurality of justices, that the degree of risk, magnitude of

pain and the availability of alternatives must be considered. And in her dissent, she specifically discusses the manual checks for consciousness that are -- that are included in the revised protocol.

And as for analysis of the facts in the record, the Court previously made findings of fact in this case, and those are incorporated into this decision. The revised protocol states in pertinent part: 5. After 5 grams of sodium thiopental and a saline flush have been dispensed, the executioner shall signal to the warden and await further direction from the warden.

6. At this time, the warden shall assess the consciousness of the condemned inmate by brushing the back of his hand over the condemned inmate's eyelashes, calling the condemned inmate's name and gently shaking the condemned inmate. Observations shall be documented.

If the condemned inmate is unresponsive, it will demonstrate that the inmate is unconscious and the warden shall direct the executioner to resume with the administration of

the second and third chemicals. If the condemned inmate is responsive, the warden shall direct the executioner to switch to the secondary IV line.

See contingency issues on Page 67. The contingency issues referenced above provide if the condemned inmate is responsive after the administration of the first chemical and saline flush, the warden shall check for consciousness after the sodium thiopental and a saline flush have been administered. If the condemned inmate is determined to be responsive by the warden, the executioner shall switch to the secondary IV line at the direction of the warden and begin administration of the second set of chemicals.

The revised protocol lethal injection chemical administration record includes a time slot for signal to the warden and pause for consciousness assessment and a time slot for warden directs resumption of chemical administration. And this is from the revised protocol, Pages 85 and 86.

The Court read and reread the record carefully. There is little in the record addressing the effectiveness of the basic manual

consciousness checks in the revised protocol. Dr. Lubarsky's affidavit expresses his opinion that the addition of the checks for consciousness in the revised protocol will not assure that condemned inmates will remain unconscious as they experience the effects of the second and third drugs. He believes that the inmate who fails to respond to the mild stimuli can still respond to something far more noxious and painful and that the addition of the second and third drugs will awaken the inmate to a death of suffocation.

He says that based upon the serum levels of sodium thiopental reported in Trial Exhibit 9, one-half of inmates subjected to the mild -- mild consciousness checks would respond to the consciousness checks; while the other half, not responding would nevertheless experience the effects of severely painful drugs two and three.

Dr. Lei, the medical examiner, who was the State's expert at the November hearing agreed, that if the sodium thiopental levels in condemned man are low, he would not be surprised that the inmate would respond to verbal stimuli.

According to the revised protocol, if the inmates do respond, more sodium thiopental will be administered. The checks for consciousness based on this reasoning alone are worthwhile. The Plaintiff's Amended Complaint stated that the lack of the consciousness check as done in some other states during the three-drug protocol was a glaring omission, and this Court agrees.

Trial Exhibit 3 consists of the process and outcome of the Department of Corrections committee work on the original protocol. In 2007, before Baze was decided, Governor Bredesen directed the Department of Corrections to generate a new protocol for execution because there were some deficiencies in the then current one. The Governor expressed the goal that the department ensure that its new protocol be administered in a constitutional manner. He also stated that executions carried out under the protocol in effect in 2007 had been accomplished in a professional manner.

The Department of Corrections 2007 protocol committee investigated three-drug, two-drug and one-drug execution protocols. On several occasions during their meeting it was

noted that the three-drug protocol might require a check for consciousness before the second drug is injected. Several manual methods were recommended by a physician, although, no one check would always be sufficient.

The committee investigation noted stated that some commonly used medical testing devices, such as EKG were not useful for checking consciousness. The Court finds that simple manual checks for consciousness of another human being are common sense. The checks for consciousness in the revised protocol are feasible, readily implemented, and the checks will significantly reduce the substantial risk of severe pain.

Moving to the subject of the one-drug protocol. There was no testimony from Dr. Lubarsky or Dr. Lei that addresses the one-drug protocol. The plaintiffs do not advocate for this protocol because the plaintiffs do not wish to choose their method of execution and because the plaintiffs do not know enough about it. The plaintiffs believe, however, that the State has conceded that the one-drug plan is the Constitutional lethal drug

protocol. The Court disagrees.

The Department of Correction 2007 protocol committee addressed best practices and recommended or suggested the one-drug, noting its pros and cons. The Department of Correction -- Department commissioner kept the three-drug protocol. Although Baze dealt with the three-drug protocol that all the parties agreed was humane and Constitutional if administered correctly, Baze found merit in use of the second drug, which the plaintiffs argue paralyzes and pains without any other benefit.

The analysis of the second drug in Baze shows the second drug may have merit in the Tennessee execution process. The plaintiffs also show that Ohio has used the one-drug protocol to execute inmates without incident. A witness's testimony at trial was, however, ~~antidotal~~ anecdotal. It did not prove anything.

The record does reflect through committee notes and minutes the one-drug protocol will not result in a quick death. The plaintiffs have not, based on this record carried their burden to show that the one-drug protocol or any other protocol is as a matter of

fact feasible, readily implemented and it significantly reduces the substantial risk of severe pain presented by the revised protocol.

As for that decision itself, the Court takes no pleasure in ruling on a case in which a life and lives hang in the balance. The Court finds that applying the standards from the plurality in Baze as directed by the Tennessee Supreme Court, the revived protocol is Constitutional and does not violate the Eighth Amendment prohibition against cruel and unusual punishments.

The alternative that the State presented, the consciousness checks, seem to address the consciousness issues. And the plaintiffs have not come forward with an alternative or with sufficient proof that the consciousness checks do not work to significantly reduce the risk of severe pain.

And, lawyers, besides asking that the State will order the bench ruling and may choose to attach a summary judgment, I can't think of any housekeeping or other issues the Court needs to address.

Is there anything else that I failed to

do?

MR. KISSINGER: Your Honor, the only think I can think to is possibly a certification for appellate purposes if that is -- I'm not really sure what procedural posture we are in, whether the Supreme Court thinks we are headed back up there, or just what process we are supposed to be filing. It might be useful --

THE COURT: Any certification that you need, I do grant. So that anybody who needs to go to the Supreme Court -- and I think you are right. I think they expect -- I think they expect something. Whatever you need, I grant it now, as opposed to waiting. I don't think there's as hurry, but we have done that pretty consistently in those other hearings.

I thank all the lawyers for an excellent job.

(WHEREUPON, THE PROCEEDINGS CONCLUDED AT APPROXIMATELY 2:30 P.M.)

COURT REPORTER'S CERTIFICATE

STATE OF TENNESSEE:

COUNTY OF DAVIDSON:

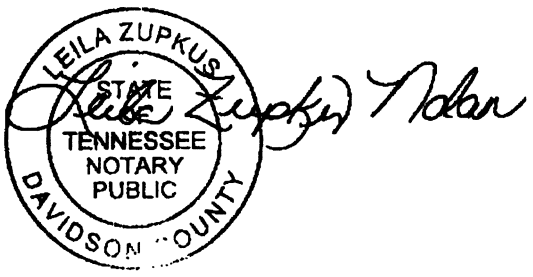
I, LEILA ZUPKUS NOLAN, Licensed Court Reporter and Notary Public, Davidson County, Tennessee, CERTIFY:

1. The foregoing proceeding was taken before me at the time and place stated in the foregoing styled cause with the appearances as noted;

2. Being a Court Reporter, I then reported the proceeding in Stenotype to the best of my skill and ability, and the foregoing pages contain a full, true and correct transcript of my said Stenotype notes then and there taken;

3. I am not in the employ of and am not related to any of the parties or their counsel, and I have no interest in the matter involved.

WITNESS MY SIGNATURE, this, the 2nd day of March, 2011.



LEILA ZUPKUS NOLAN, TLCR #242
My license expires: June 30, 2012