

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

FILED
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STEPHEN WEST, *et al.*,

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Plaintiffs-Appellees,

v.

DERRICK D. SCHOFIELD, *et al.*,

Defendants-Appellants.

APPELLATE COURT CLERK
NASHVILLE

No. M2015-01305-COA-R10-CV

**ON APPLICATION FOR AN EXTRAORDINARY
APPEAL FROM THE ORDER OF THE
DAVIDSON COUNTY CHANCERY COURT**

**SUPPLEMENT TO DEFENDANTS'
APPLICATION FOR EXTRAORDINARY APPEAL
BY PERMISSION PURSUANT TO TENN. R. APP. P. 10
AND FOR IMMEDIATE STAY**

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INTRODUCTION

The Defendants-Appellants, Derrick D. Schofield, *et al.*, have applied to this Court for extraordinary interlocutory review of the chancery court order of July 14, 2015, permitting the testimony of the State's executioner and a mid-trial discovery site visit to Riverbend Maximum Security Institution. The Court stayed the chancery court's orders pending resolution of the application and directed a response from the appellees on or before July 29, 2015. Issue II of defendants' application presents this Court with the question: Does the chancery court's order permitting mid-trial discovery on the future "administration of the Protocol" violate the Supreme Court's order on remand that the Protocol "must be assessed *on its face* against constitutional challenges levied by the Plaintiffs" and exceed the chancery court's authority under the Declaratory Judgments Act? Circumstances arising in the chancery court since entry of this Court's stay order directly implicate that issue and compel the defendants, once again, to seek relief from this Court.

The trial of this matter commenced July 7, 2015, in accordance with the scheduling order set out in the Supreme Court's mandate. *West, et al. v. Schofield, et al.*, No. M2014-00320-SC-R11-CV (Tenn. Order, Mar. 10, 2015) (Attachment 1). On July 17, 2015, the plaintiffs rested their case. Six days later, and with only one defense witness remaining, the chancery court *sua sponte* announced that discovery is reopened; that the plaintiffs are permitted to conduct depositions of the Commissioner of the Department of Correction, the Department's General Counsel, and the Warden of Riverbend Maximum Security Institution; and that the plaintiffs' proof "shall remain open until further order of this Court." *See* Order, July 22, 2015 (Attachment 2); Transcript of Proceedings, July 23, 2015 (Attachment 3). The purpose of

discovery, according to the chancery court, is to allow the plaintiffs "to address and have addressed at trial the creation, the production, and the administration" of the Protocol. See Attachment 3, at p. 6.

The chancery court's latest discovery order, like its earlier one, is beyond the scope of its authority under the Declaratory Judgments Act and violates the Supreme Court's mandate that the lethal injection Protocol "must be assessed *on its face* against the constitutional challenges levied by the Plaintiffs." *West v. Schofield*, 460 S.W.3d 113, 126 (2015). Moreover, the chancery court's *sua sponte* action in a case whose scope and timing have already been clearly defined by the Supreme Court is the antithesis of the orderly administration of justice and so far departs from the accepted and usual course of judicial proceedings as to require immediate appellate review. An immediate stay of discovery is warranted pending disposition of this appeal.

STATEMENT OF RELEVANT FACTS

Defendants applied to this Court on July 15, 2015, for extraordinary interlocutory review of a mid-trial order of the chancery court, which reopened discovery related to the state's "administration" of the Protocol and permitted the plaintiffs to conduct a site visit of the execution chamber. The Court stayed the chancery court's order pending resolution of the application and directed a response from the appellees on or before July 29, 2015.

Two days later, on July 17, 2015, the plaintiffs moved the chancery court to withdraw their request for the site visit (and for testimony of the State's executioner) and rested their case-in-chief. See "Plaintiffs-Appellees Notice That Pending Motion for Rule 10(D) Appeal is Now Moot," filed July 17, 2015, at p. 1, and Declaration, at p. 2.

With the plaintiffs having rested, on Monday, July 20, 2015, the defendants requested leave to present a motion for involuntary dismissal under Tenn. R. Civ. P. 41.02(2) on the ground that, upon the facts and the law, the plaintiffs have shown no right to relief. The chancery court granted the defendants' request and set the motion for hearing on July 22, 2015. On the morning of the hearing and before defendants' argument on the motion, the chancery court *sua sponte* announced that it had reconsidered its pre-trial order denying the plaintiffs' request to conduct depositions of Commissioner Derrick Schofield, General Counsel Debra Inglis, and Warden David Westbrook and "now reopens the subject of discovery." Attachment 3, Transcript, at p. 7. The court ruled that "the plaintiff[s] should be allowed to address and have addressed at trial the creation, the production, and the administration of the protocol." *Id.*, at p. 6. The court further expressed "concern about the possible unduly erroneously-limited discovery because the lack of that discovery may prevent the plaintiffs from presenting all of the merits of their case." *Id.*, at p. 8.

The chancery court thereafter entered a written order reopening the plaintiffs' proof and the plaintiffs' discovery. Based on the authority and reasoning announced from the bench on July 22, 2015 incorporated by reference, the Plaintiffs shall be allowed to take the discovery depositions of Tennessee Department of Correction Warden Bruce Westbrook, General Counsel Ms. Debra Inglis, and Commissioner Derrick D. Schofield. The Defendants and Plaintiffs should schedule the depositions on dates from July 23rd after the noon hour, through July 31, 2015. The Plaintiffs' opportunity to present proof shall remain open until further order of this Court.

Order, July 22, 2015 (Attachment 1).

The chancery court's action came despite the fact that two of the three witnesses (Debra Inglis and Warden Westbrook) had already testified at length in the plaintiffs' case-in-chief.

The court's discovery order is even more striking given that plaintiffs' counsel had represented to the court on the day they rested their case-in-chief that no further questioning of Ms. Inglis was necessary even if they now had the opportunity for discovery.

THE COURT: I remember when Ms. Inglis was first called in the case a few days ago, is that right some days ago? She was called by the plaintiffs?

MR. SUTHERLAND [Counsel for defendants]: Last week, Your Honor.

THE COURT: And I'm looking for an affirmation here or maybe I'm wrong. As I recall, Ms. Inglis was asked – went through the protocol and was asked about provisions that the plaintiffs thought were ambiguous or otherwise troublesome?

MR. PASSINO [Counsel for plaintiffs]: That's correct, Your Honor.

THE COURT: Okay. I'm realizing – looking back in the history of the case, I'm realizing in looking at the order of April 16th the order says that the plaintiffs are prohibited from seeking discovery of information from persons who may be responsible for carrying out lethal injection protocol. And I have to say that I had not thought about Ms. Inglis as being one of those people because she's not on the execution team. She's not going into the chamber. She's not taking any of those actions.

MR. PASSINO: No, Your Honor, she is not.

THE COURT: So I wanted to – it sounds like the plaintiffs were reading the protective order as prohibiting discovery for Ms. Inglis too, is that right?

MR. PASSINO: I think that's – we were reading the discovery order as virtually prohibiting all discovery that's correct.

THE COURT: Okay.

MR. PASSINO: Other than experts.

THE COURT: Okay.

MR. PASSINO: And please excuse me. With the exception of the limited discovery that the Court authorized, as you recall.

the witness, the chancery court justified its *sua sponte* actions by stating that "it may be that the
Despite plaintiffs' clear representation regarding the need for additional questioning of
See Transcript of Proceedings, July 17, 2015, at pp. 6-9 (Attachment 4).

THE COURT: Okay.

MR. PASSINO: That's correct.

THE COURT: But what you're telling me is really all you want to ask her about
is training?

MR. PASSINO: I understand.

THE COURT: Cross-examination can be any subject that the case involves.

MR. PASSINO: Yes, Your Honor.

THE COURT: Well, cross-examination can be -- at this point because she's been
called as the State's witness --

MR. SUTHERLAND: -- presumably that they would have asked her in a
deposition and even more. So there's been --

THE COURT: That's what I'm remembering.

MR. SUTHERLAND: And they've spent hours asking her all the questions --

THE COURT: Right.

MR. SUTHERLAND: Your Honor, if I may, they have called her to testify.

THE COURT: Well, no.

MR. PASSINO: Your Honor, although that would be extraordinarily fun, I think
the cow is out of the barn. I think that she's been proffered for the reason of
providing missing training documents and that's all behind us now. That's what
my -- my cross-examination would be limited to.

THE COURT: Is there anything that the plaintiffs need to ask Ms. Inglis now had
you had the opportunity to discover? Is there anything you can think of that
you'd like to ask her?

plaintiffs need to address other matters with [Ms. Inglis] that would lead to further proof.”

Attachment 2, at p. 8.

As already outlined in the defendants’ application for extraordinary interlocutory review, the chancery court’s actions plainly contravene the law of the case set forth by the Tennessee Supreme Court. But beyond that, the chaotic progress of this case is fundamentally unfair to the State defendants, who have been forced to defend against constantly mutating claims (dubbed by the chancery court as “evolving”) in a trial by ambush on a matter of grave public importance. Immediate intervention by this Court is warranted.

Tenn. R. App. P 10(a) provides that “the appellate court may issue whatever order is necessary to implement review under this rule.” Because the chancery court’s discovery order exceeds its authority under the Supreme Court’s mandate on remand, an immediate stay of the chancery court’s *sua sponte* “Order Reopening the Plaintiffs’ Proof and the Plaintiffs’ Discovery” is warranted.


For these reasons, the defendants respectfully request that the court grant an extraordinary appeal by permission under Tenn. R. App. P. 10 and direct that the chancery court's mid-trial discovery order be vacated. The defendants further request that the Court issue an immediate stay of the chancery court's order pending disposition by the appellate courts of the State's application for permission to appeal.

CONCLUSION

Respectfully submitted,

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I hereby certify that a true and exact copy of the foregoing was served by United States mail, first-class postage prepaid, and electronic mail to the following counsel of record:

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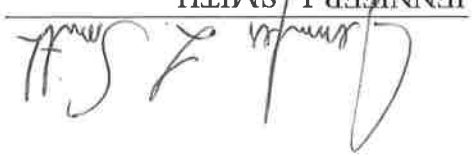
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Deputy Attorney General

ATTACHMENT 1

ATTACHMENT 1

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STEPHEN MICHAEL WEST, et al. v. DERRICK D. SCHOFIELD, et al.

Appeal by Permission from the Court of Appeals, Middle Section
Chancery Court for Davidson County
No. 13-1627-I Claudia C. Bonnyman, Chancellor

No. M2014-00320-SC-R11-CV - Filed March 10, 2015

JUDGMENT

This interlocutory appeal was heard upon the record from the Court of Appeals, application for permission to appeal having heretofore been granted, and upon the briefs and argument of counsel. Upon consideration thereof, this Court holds that the judgments of the Court of Appeals and the trial court should be reversed.

In accordance with the Opinion filed herein, it is, therefore, ordered and adjudged that the judgment of the Court of Appeals is hereby reversed, and this matter is remanded to the Chancery Court for Davidson County for additional proceedings consistent with this Opinion.

The Chancery Court further is directed to commence the trial in this matter on the claims at issue in this appeal within 120 days from the date of this Judgment. The trial shall conclude within 150 days from the date of this Judgment. Within 30 days of the date upon which the trial concludes, the trial court shall enter its decision in this matter as a final, appealable order as to the claims at issue in this appeal.

It appearing that the plaintiffs in this matter are indigent, the costs of this appeal shall be paid by the State of Tennessee, for which execution may issue if necessary.

PER CURIAM

ATTACHMENT 2

ATTACHMENT 2

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

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[Signature]

CASE No. 13-16274

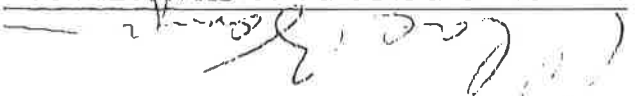
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ORDER REOPENING THE PLAINTIFFS' PROOF
AND THE PLAINTIFFS' DISCOVERY

Based upon the authority and reasoning announced from the bench on July 22,

2015 incorporated by reference, the Plaintiffs shall be allowed to take the discovery depositions of Tennessee Department of Correction Warden Bruce Westbrook, General Counsel Ms. Debra Inglis, and Commissioner Derrick D. Schofield. The Defendants and the Plaintiffs should schedule the depositions on dates from July 23rd after the noon hour, through July 31, 2015. The Plaintiffs' opportunity to present proof shall remain open until further order of this Court.

The Court will hear the Defendants' expert witness, Dr. Lec Evans, on July 24, 2015 at 9:00 a.m. (CDT).


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ATTACHMENT 3

ATTACHMENT 3

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

STEPHEN MICHAEL WEST, et al.,
Plaintiffs,
and
EDMUND ZAGORSKI, et al.
Intervening Plaintiffs,
v.
DERRICK D. SCHOFIELD, in his
official capacity as
Commissioner of the Tennessee
Department of Correction, et
al.,
Defendants.

No. 13-1627-I
Death Penalty Case

PROCEEDINGS

Had Before the Honorable Claudia Bonnyman
July 22, 2015

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1 THE COURT: Well, I'm sorry for the people
2 who drove in this morning and probably were in
3 a big hurry to get here by 10:00, but I have
4 needed this extra time to pull my thoughts
5 together to raise the housekeeping issue that I
6 think is the perfect time -- well, it's not the
7 perfect time, but close to perfect time -- to
8 address before the court hears the motion to
9 dismiss. And so here is the issue that I think
10 should be raised at this time.
11 So Part I of Chancery was assigned this
12 case by random automated draw. It's Part I's
13 responsibility to assure that all parties
14 receive and are provided a fair and full
15 hearing so that a just resolution in compliance
16 with the law is reached. I feel sure everybody
17 agrees with that.
18 To that end, the Trial Court should avoid
19 the possibility of reversal and a second trial
20 because the specter of having a case sent back
21 to be retried, although often unavoidable, can
22 be a disservice to all of the parties and to
23 the taxpayers.
24 When listening to the plaintiffs'
25 arguments and proof, the court was led to

1 believe and understand and/or thought that the
2 plaintiffs would at trial present any proof
3 they had that a hidden or shadow protocol was
4 influencing and even driving the actual written
5 protocol.
6 For example, the plaintiffs referred
7 several times to a 45-day execution manual that
8 was in a safe in the warden's office. The
9 plaintiffs' second amended complaint asserts
10 that the plaintiffs' constitutional rights as
11 provided by the United States and Tennessee
12 constitutions are denied by unwritten execution
13 procedures without stating that those
14 objected-to procedures were without -- the
15 pleading didn't state what they were, and the
16 pleading didn't stay how they would work, or
17 how they would damage the inmates or increase
18 the risk of serious harm and pain in the
19 process of the execution.
20 Now that the plaintiffs have laid out
21 their proof and the plaintiffs' theories have
22 both evolved or come to light, the court is
23 aware of its possible error and is addressing
24 whether its possible error should be resolved
25 or solved.

1 And first the Court looks to the Supreme
2 Court decision that sent this case back to the
3 Trial Court with a trial schedule and with some
4 guidance and, of course, its ruling that the
5 identities of the execution team are not
6 relevant to the case and must be protected.
7 But of course the Appellate Court said a few
8 other things, too.
9 The plaintiffs agreed with the Supreme
10 Court that its challenges to the protocol are
11 facial challenges. The Court first read the
12 text and the dicta or the findings or rulings
13 and the dicta in the appellate decision to
14 suggest that this facial challenge would be
15 limited to the text of the protocol.
16 After reviewing other cases, however, and
17 rereading the decision, the Court finds that
18 the plaintiff should be allowed to address and
19 have addressed at trial the creation, the
20 production, and the administration of the
21 protocol. The error the Court now wishes --
22 possible error the Court now wishes to correct
23 is the strict limitation of discovery on those
24 subjects.
25 On June 15, 2015, the plaintiffs filed

1 their motion to reopen discovery and conduct
2 the depositions of Debbie Inglis, Derrick
3 Schofield, who is the Commissioner of the
4 Department of Correction, and Bruce Westbrook,
5 the current warden. The Court denied the
6 discovery based upon relevancy to the text and
7 the protocols.
8 To correct this possible error in the
9 limitation of discovery, the Court now reopens
10 the subject of discovery. Now, we know that
11 Debbie Inglis, general counsel for the
12 Department of Correction for many years,
13 testified at length both when the plaintiffs
14 called her and when the defendants out of order
15 put forth her testimony.
16 And the out of order was caused not by
17 some party's fault but by the schedules of the
18 witnesses and also the expert witnesses in the
19 case. Taking evidence, taking proof out of
20 order is nothing unusual on a bench trial, and
21 it should be done when it's helpful to
22 everyone.
23 The Court allowed the plaintiffs to
24 conduct some discovery as she testified in the
25 case-in-chief, but it may be that the

1 plaintiffs need to address other matters with
2 her that would lead to further proof.
3 Mr. Westbrook testified he's been in the
4 new position as warden at Riverbend for just a
5 few months. He's been to training at least
6 twice but testified that he was not familiar
7 with the protocol yet. Mr. Schofield has not
8 testified and the court assumes that his
9 deposition was not taken.
10 The court is raising concern about the
11 possible unduly erroneously-limited discovery
12 because the lack of that discovery may prevent
13 the plaintiffs from presenting all of the
14 merits of their case.
15 And I want the plaintiffs and the
16 defendants to focus with me so that you
17 understand where this court is coming from on
18 the language in Justice Wade's concurring
19 opinion, in which he discusses -- and all of
20 the justices discuss the Harbison case --
21 discusses cross-examination of persons
22 responsible for creation, production, and
23 administration of the one-drug protocol.
24 So there's some guidance. There's not a
25 lot because that wasn't the purpose of the

1 decision. But there's some guidance there.
2 Then the Court is looking at
3 Justice Koch's discussion about the history of
4 discovery in a case reported at 693 S.W. 2d,
5 page 350, Middle Section, Court of Appeals
6 decision in 1985.
7 And the plaintiff's name is -- I'm going
8 to spell this here because I don't think the
9 pronunciation is going to help very much --
10 V-Y-T-H-O-U-L-K-A-S versus Vanderbilt
11 University Hospital.
12 And in that case, Justice Koch goes
13 through a long explanation of the history of
14 discovery in the State of Tennessee and he
15 discusses that in the past, before the rules
16 were passed in 1970, trial preparation and
17 practice were based upon the supporting theory
18 of justice wherein the outcome of the case
19 depended primarily upon the fortuitous
20 availability of the evidence or upon the skill
21 and strategy of counsel.
22 And then the states began to permit the
23 use of deposition for discovery for the purpose
24 of obtaining evidence because the prior way
25 cases were tried did not often reach the merits

1 and were dissatisfying, not satisfying, to the
2 judiciary or to the public.
3 The present system of discovery, according
4 to this case and according to former
5 Justice Koch, who was also a former Court of
6 Appeals Justice, who as we know wrote an awful
7 lot about the history of his decisions and the
8 subject of his decisions.
9 And he states and finds the present system
10 of discovery contained in Tennessee Rule of
11 Civil Procedure 26 should be construed
12 liberally to permit the broadest discovery
13 possible; that the course of pretrial discovery
14 is in large measure left to the discretion of
15 the trial judge and the exercise of this
16 discretion is based upon the broad parameters
17 of the rules and the fundamental notions of
18 fairness. And then of course the subject of
19 should the trial judge raise at trial the issue
20 of discovery, possible discovery errors and
21 problems.
22 And in Knox versus Anderson, reported at
23 21 Federal Rules Decisions, page 97, it's a
24 1957 case, but I didn't find any cases to the
25 contrary. And it sure makes sense to this

1 Court. And he found -- the District Court
2 found it is not crystal clear under the rules
3 that during a trial or a recess a party may as
4 of right take a deposition.
5 And then he cites a few lines in Rule 26,
6 and says: When 26 is correlated with Rule 30,
7 I am satisfied that a deposition may be taken
8 during a trial not as of right but within the
9 discretion of the court.
10 And the case that that District Court
11 judge was addressing is somewhat like the case
12 this Trial Court and these parties are
13 addressing in that case is the litigation is of
14 considerable size and shape and I might also
15 add of great importance to the public and to
16 the plaintiffs and to the State.
17 And then there's the case of Sanford
18 versus Waugh & Company at 326 S.W. 3rd, 836, in
19 which our Supreme Court Justice Lee stated
20 that: The purpose of the discovery process is
21 to promote the ascertainment of truth by aiding
22 a party in preparing for trial to prevent
23 surprise and ensure as far as possible the
24 trial on the merits rather than upon gratuitous
25 and unforeseen development at the trial.

1 So in addressing this possible error and
2 raising concern about this possible error, the
3 court thinks that given the plaintiffs'
4 position on June 15, 2015 about reopening
5 discovery, the solution may be that the
6 plaintiff be offered the opportunity to depose
7 Debbie Inglis, Warden Westbrook, and
8 Commissioner Schofield.
9 And so I'm turning now to the plaintiffs.
10 And if you hadn't ever raised any need for
11 further discovery, I wouldn't be asking you to
12 give me a position here today in five minutes.
13 But I know that both sides are well familiar
14 with the discovery issues and we've had a lot
15 of motions in that regard.
16 So I'm turning to the plaintiffs to say,
17 to ask, whether -- to ask what your position
18 would be on this Court's concern and
19 housekeeping matter?
20 And I'm also going to ask the state for
21 its position. And do you want a short
22 adjournment to be able to discuss with each
23 other your response to the housekeeping issue?
24 It might help the state, too, to be able to --
25 I'm talking about a ten-minute break.

1 MR. SUTHERLAND: We don't need a break but

2 they may.

3 MR. KISSINGER: Your Honor, kind of a

4 larger group over here, a short break would

5 help.

6 THE COURT: Okay. Well, we'll make it

7 like ten minutes. And I think maybe that will

8 be enough.

9 MR. KISSINGER: Thank you, Your Honor.

10 THE COURT: All right.

11 (Break was taken at 10:58 a.m. until

12 11:07 a.m.)

13 THE COURT: Please be seated.

14 MR. KISSINGER: Your Honor, plaintiffs

15 have had the opportunity to talk about this. I

16 think Your Honor is already aware of the issues

17 and having been said at trial, and so I don't

18 want to spend a lot of time going over them. I

19 think we've discussed them already.

20 I think the Court is correct in its

21 observation that certainly more discovery,

22 particularly at this point, particularly with

23 what we've heard at trial, should be allowed in

24 this case.

25 I think we've -- I think there are a

1 couple of things from -- not just from
2 defendants' counsel, but from some of the
3 witnesses, that make it very clear, very clear,
4 that there are unwritten procedures.
5 I think one of the things that perhaps --
6 and I don't know if it was our fault or if it's
7 just one of those things that sometimes gets
8 lost in translation, when we talk about
9 unwritten procedures, it becomes -- it seemed
10 to get to the point where we were talking about
11 it in terms of they're hiding something from us
12 and that was really not the point. The point
13 was that there were ways of carrying out this
14 protocol, there were practices that they
15 followed, and that they were -- and that this
16 is how the protocol is executed. We heard
17 Ms. Inglis talk about these kind of things.
18 We heard discussions about how -- how the
19 trainings, the substance of the practice
20 sessions, what all went on in those.
21 So, yes, I think there are clearly a
22 number of areas regarding the proper
23 interpretation of the protocol, the proper
24 interpretation of the written words, as well as
25 the procedures that were not specifically

1 covered in the written words themselves that
2 really we should have been -- that really
3 discovery should be permitted on.
4 So we agree, again, with the Court's
5 observations. I would think as a procedural
6 matter that, and it would certainly not
7 prejudice the defendants in any way, that we
8 should be allowed to reopen our case until
9 discovery is complete and we've had the
10 opportunity to talk to these people and to get
11 discovery on these important issues that the
12 Court itself has already observed are out
13 there.
14 So we would request that we perhaps set up
15 some remedy here. I know that -- and I hate to
16 bring it up, but we are backing up, we are
17 approaching that date where the end of evidence
18 has to be -- or the taking of evidence needs to
19 be ended. I do know that Mr. Sutherland had
20 expressed a desire to go on a vacation all of
21 next week and --
22 THE COURT: I don't have in mind changing
23 that schedule. In other words, I think that
24 the way I'm sitting here seeing things right
25 now, I think we can finish by the deadline of

1 August 7.

2 MR. KISSINGER: And I don't think we --

3 again, that's my point. Even if -- I guess my

4 point was even if we were -- we couldn't get

5 these things scheduled any other time but

6 during that week, like our office, they have

7 other attorneys as well and it's -- and it's

8 is -- I mean no disrespect with this -- it's

9 just a deposition.

10 And I don't think it's necessarily

11 mandatory that Mr. Sutherland be the attorney

12 who handles it. So we're willing to work with

13 the court.

14 THE COURT: I'm not going to make

15 Mr. Sutherland miss his vacation. I just

16 really wouldn't want that to happen.

17 MR. KISSINGER: Your Honor, I went five

18 years without vacations with my kids and I

19 bleed for Mr. Sutherland, trust me. So we are

20 willing to work with the court and with counsel

21 for defendants in any way, shape, or form,

22 timing, location, anything, in order to --

23 THE COURT: What do you think you need?

24 MR. KISSINGER: I think the three

25 depositions that Your Honor proposed would

1 actually do the trick. You can't get much more
2 relevant than those three people. So -- so we
3 would -- we would accept the court's proposal
4 for those three witnesses.
5 THE COURT: Before I hear from the state,
6 I want to recognize that with at least two
7 of -- or maybe all three -- with at least two
8 of those witnesses, there are probably things
9 the plaintiffs would like to know but the
10 information is probably privileged or at least
11 a legitimate privilege can be raised and will
12 probably be raised. I say that just because I
13 think I should.
14 MR. KISSINGER: Certainly, Your Honor.
15 And we recognize that. Particularly, given
16 Ms. Inglis's status as counsel. There,
17 obviously, are areas where the issue of
18 privilege could come up. We will make every
19 effort to avoid them.
20 I know that -- and, again, all respect to
21 opposing counsel. I know there are situations
22 where sometimes agencies try to use the
23 privilege to cloak just regular administrative
24 kind of decisions. I would hope that doesn't
25 become an issue here.

1 I have seen no indication that it will.
2 But, again, this is an area that -- we're
3 willing to try and stay away from areas
4 involving privilege.
5 THE COURT: Okay. So, Mr. Sutherland,
6 what can you tell me?
7 MR. SUTHERLAND: Yes, ma'am. Thank you,
8 Your Honor. I hope the record is clear, but I
9 feel compelled to restate the positions we've
10 previously made in this case.
11 Your Honor, in response to the Court's
12 thoughtful ruling this morning, I would say
13 that we respectfully disagree with the Court
14 and we believe that Your Honor was correct in
15 the reading of the West decision in limiting
16 discovery within the scope of what the majority
17 in the case said.
18 We believe it is abundantly clear that
19 when the West decision was rendered they made
20 it very clear that under the theory of the
21 complaint at the time that they ruled on this
22 case, this case was brought pursuant to the
23 Tennessee Declaratory Judgment Act. It was
24 recognized as a facial challenge to the
25 protocol as written, not as applied.

1 This court has already dismissed all
2 as-applied challenges in this complaint by
3 specific order based upon the representations
4 of the plaintiff that there were no as-applied
5 challenges in this complaint.
6 The Supreme Court has made it very clear
7 in their -- in their decision in pointing out
8 the errors of the Trial Court and the Appellate
9 Court, and I'll read once again.
10 In relation to discovery of identities of
11 people who might be -- and qualifications of
12 people who might be carrying it out in the
13 future, they said, The Court of Appeals
14 concluded that the identities of John Doe
15 defendants were relevant because without their
16 identities the plaintiffs would be unable to
17 independently verify their qualifications to
18 participate in executing a condemned inmate or
19 subject those qualifications to meaningful
20 scrutiny.
21 This conclusion indicates the Court of
22 Appeals is analyzing the relevance of the John
23 Doe defendants' identities in terms of their
24 qualifications to comply with the protocol.
25 However, the subject matter involved in

1 the pending action is the constitutionality of
2 the protocol itself. In short, this
3 declaratory judgment action involves a facial
4 challenge to the constitutional validity of the
5 protocol as written, not as applied.
6 The trial court, likewise, failed to
7 consider the crucial distinction between the
8 plaintiff's facial challenge to the protocol as
9 written and any challenges the plaintiffs may
10 be attempting to raise to the protocol as it
11 hypothetically may be applied on some uncertain
12 date in the future by currently-unidentifiable
13 persons. The identities of these individuals
14 were not relevant because, as the court
15 recognized, if the parties had their
16 identities, they would not lead to the
17 discovery of relevant evidence.
18 In other words, there was no discovery
19 needed to have the identities because if they
20 knew the identities, deposing these people
21 wouldn't lead to the discovery of relevant
22 evidence in this proceeding.
23 It's not just who they are, but the fact
24 that what they have to say in this facial
25 challenge under the Declaratory Judgment Act is

1 speculative and hypothetical about what might
2 happen in the future.
3 So I hope the record is clear or I hope I
4 have made that clear previously and that is
5 still our position. We believe the Court was
6 correct.
7 I would say that we had planned to file
8 response to the plaintiffs' filing --
9 Ms. Henry's filings in the Court of Appeals on
10 the Rule 10 application today, in which we
11 would say that, frankly, it is not moot until
12 the case is concluded, until proof is
13 concluded. And certainly this -- we may be --
14 we will be considering whether we need to amend
15 that application to include a stay of the
16 Court's ruling this morning.
17 Specifically, the discovery of the site
18 visit, which the Court of Appeals has stayed
19 also involves mid-trial discovery. I have
20 notified the office and we're evaluating
21 whether or not this specifically needs to be
22 added to amend our request for an emergency
23 stay on these specific issues. And so we'll be
24 making that decision sometime today.
25 THE COURT: Okay.

1 MR. SUTHERLAND: I guess, frankly, if at
2 this point, if the Court -- based on the
3 Court's ruling, it would seem to me that the
4 Court -- Mr. Kissinger has asked to reopen the
5 case. It would --
6 THE COURT: Well, to reopen -- right.
7 MR. SUTHERLAND: To reopen the plaintiffs'
8 proof. And, therefore, it would seem to me
9 that it's premature for us to make a motion to
10 dismiss until this issue is resolved.
11 THE COURT: I think that's right. I think
12 that's right. I actually did not know whether
13 the plaintiffs would -- what position the
14 plaintiffs would take.
15 MR. SUTHERLAND: I understand.
16 THE COURT: They've now taken their
17 position.
18 MR. SUTHERLAND: Yes, ma'am.
19 THE COURT: Let's think just for a minute
20 about -- or more than a minute, about the order
21 of proof that we have left. We have Dr. Evans
22 coming in on Friday.
23 As far as the proof has developed so far,
24 taking Dr. Evans's deposition this Friday would
25 seem very consistent with the flow of events as

1 they have occurred. What do you think?
2 MR. SUTHERLAND: I don't disagree with
3 that and, frankly, I'd hate to go back and have
4 to ask him to change his plans, if we don't
5 have to -- if they don't have a problem with
6 it.
7 THE COURT: If you ever had to do that,
8 you can certainly blame it on me. So maybe
9 that will help. But let's not reschedule him.
10 MR. SUTHERLAND: I did tell him that I had
11 been requested, if possible, to move heaven and
12 earth to get him here for Friday and he did.
13 THE COURT: And he did do that. And I am
14 appreciative of that.
15 MR. SUTHERLAND: Yes, ma'am.
16 THE COURT: And I know these things aren't
17 easy. On the other hand, people get
18 subpoenaed. They do get subpoenaed. You've
19 just got to push ahead. So we will push ahead
20 with Dr. Evans's deposition. And everybody is
21 satisfied with that time.
22 And while we're sitting here, of course I
23 realize that the Court of Appeals and the
24 Supreme Court and Appellate Court may
25 ultimately be making the decision about whether

1 these depositions are taken.

2 But I think we ought -- and many is the

3 time I have thought having a hand reach down

4 and tell the trial judge what to do so as not

5 to waste time, so as not to waste the resources

6 of the parties, you know, it's not a bad thing.

7 But whether it's the wise thing to do,

8 whether it makes more sense for the state to

9 take a different position, I really wouldn't

10 know.

11 So I certainly would hope that everybody

12 involved wants to avoid a serious, serious

13 error that would cause a second trial, that

14 would cause a remand of a second trial. That's

15 where my mind is.

16 MR. SUTHERLAND: Yes, ma'am.

17 THE COURT: So that having been said --

18 MR. SUTHERLAND: I'm sorry, Your Honor.

19 THE COURT: No. Go ahead.

20 MR. SUTHERLAND: Is it the Court's -- is

21 it the Court's feeling that this ruling this

22 morning on the motion to reopen discovery

23 expands the Court's earlier ruling on the site

24 visit as far as conducting discovery?

25 THE COURT: No. I think the plaintiffs

1 have made their decision about the site
2 examination and the executioner's testimony.
3 That issue has gone as far as I understand it.
4 MR. SUTHERLAND: Is it the court's feeling
5 that the order from the Court of Appeals
6 staying the discovery based on the language
7 contained in our application doesn't prohibit
8 what the court has ruled this morning?
9 THE COURT: My understanding of this stay
10 is that that gives the Appellate Court a chance
11 to look at your petition and the plaintiffs'
12 response without -- holding the status quo, so
13 that nobody gets damaged while they examine
14 whether they will accept the appeal.
15 MR. SUTHERLAND: Let me try to be a little
16 more clear. Is it the court's feeling that
17 what the court ruled this morning was not
18 precluded by the stay issued?
19 THE COURT: Definitely.
20 MR. SUTHERLAND: Okay.
21 THE COURT: Because if I thought it were,
22 I would be sitting here waiting for the court
23 of Appeals decision.
24 MR. SUTHERLAND: I understand.
25 THE COURT: No. I don't think they are

1 related. They are not related in my mind.
2 MR. SUTHERLAND: Okay. Well, I --
3 THE COURT: Except that, except that --
4 except that allowing discovery during a
5 trial -- well, calling the executioner and
6 calling the -- and going to the site visit
7 really were not discovery. That was calling --
8 that was calling a witness that the State
9 concluded was not -- would not be relevant. Is
10 that kind of the way to say it? It wasn't
11 discovery. It was calling the executioner to
12 testify, so ...
13 MR. SUTHERLAND: I would -- I don't really
14 have any feeling on that.
15 THE COURT: Okay.
16 MR. SUTHERLAND: I think, since there was
17 no discovery, we would basically be doing
18 discovery at trial as to that witness.
19 THE COURT: Could be. Could be. That
20 would be something that might come up in
21 argument before the Appellate Court.
22 MR. SUTHERLAND: Yes, ma'am.
23 THE COURT: But I guess in answer to your
24 specific question, which is whether I would
25 think that the stay would govern the current --

1 the Court's current concern about correcting
2 the error, I don't see them as being addressed
3 by the stay.
4 MR. SUTHERLAND: I understand, Your Honor.
5 That's helpful.
6 THE COURT: Okay.
7 MR. SUTHERLAND: So I guess I would ask,
8 is the Court going to allow the plaintiffs to
9 reopen, and I would assume that would -- that
10 would obviate the need for us to make our
11 motion, at least at this time?
12 THE COURT: Right. And it was my
13 suggestion that that would be a way to address
14 what I think is a potential error. If it's an
15 error, it would be a serious error if it were.
16 MR. SUTHERLAND: Yes, ma'am.
17 THE COURT: And so what I'd like for us to
18 do now, what I'd like for both sides to do,
19 since we are all here in the room, we've got
20 our calendars and everything, is figure out the
21 dates for those three depositions this week or
22 the early part of next week and see what can be
23 done, knowing that of course the State is going
24 to be addressing whether it will add these
25 issues to its appeal, Rule 10 appeal.

1 MR. SUTHERLAND: Yes, ma'am.
2 THE COURT: So I don't think I need to
3 be --
4 MR. SUTHERLAND: May I have just a moment?
5 THE COURT: Sure.
6 MR. SUTHERLAND: All right. I think we
7 can do that.
8 THE COURT: Okay. And --
9 MR. SUTHERLAND: I would ask that the
10 Court give us -- today is Wednesday -- at least
11 through -- through noon tomorrow to --
12 THE COURT: In other words, not take any
13 depositions before then?
14 MR. SUTHERLAND: Yes, ma'am.
15 THE COURT: I think that's -- everybody
16 has --
17 MR. SUTHERLAND: My recommendation would
18 be that the application be amended to include
19 this.
20 THE COURT: Okay.
21 MR. SUTHERLAND: But I'm not the one
22 that's going to make that decision in terms
23 of --
24 THE COURT: Well, that would be something
25 I wouldn't expect you to make on a dime. You

1 need to think about that. I understand.

2 And I think the plaintiffs need a few

3 hours to think about their -- to plan for the

4 deposition and the state to defend the

5 deposition -- depositions. There will be

6 three.

7 So you-all do your best to set those up.

8 I'm going to make sure that I'm available

9 during the depositions to address any privilege

10 that comes up or any other problem you have. I

11 hope you don't have any, but if you have any

12 I'll be here. I don't usually do that because

13 sometimes it's not very productive. But I'll

14 do that for this case because we need to move

15 on.

16 MR. SUTHERLAND: I have one other thing.

17 I have in my possession evidence that's been

18 introduced to this Court and I would like to

19 get rid of it.

20 THE COURT: The record shall reflect that

21 Exhibit 48 has been returned.

22 MR. SUTHERLAND: Yes, ma'am.

23 THE COURT: Everybody has got copies?

24 MS. HENRY: Yes, ma'am.

25 MR. KISSINGER: Your Honor, just one very

1 brief thing. I think the record needs to be

2 absolutely perfectly clear on this because what

3 I'm hearing is a little disturbing in terms of

4 their position on the instant appeal.

5 We will not be calling the executioner and

6 we have withdrawn our request for a site visit.

7 And they will not be renewed.

8 THE COURT: That's what I had understood.

9 MR. KISSINGER: That is matter is over.

10 Completely over.

11 THE COURT: Okay. And this Court is

12 reopening discovery and the plaintiffs' proof

13 allowing that and the plaintiffs have taken the

14 Court up on the offer.

15 And I hope that I have set out my

16 reasoning and it's certainly not because I want

17 to work the lawyers harder -- you've been

18 worked hard enough -- or create problems. But

19 I'm thinking I may be solving one or two.

20 So we'll be in adjournment until Friday

21 morning at 9:00 o'clock.

22 (Proceedings were concluded at 11:30 a.m.)

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REPORTER'S COURT CERTIFICATE

1 I, Deborah J. Harris, LCR, certify that I was
2 authorized to and did stenographically report the
3 foregoing proceedings and that the transcript is a
4 true and complete record of my stenographic notes.
5 Witness my hand and official seal this 22nd day
6 of July 2015.



Deborah J. Harris, LCR No. 472
My commission expires: 5/03/2016

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15
16
17
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19
20
21
22
23
24
25

48	29:21	added	21:22	amended	5:9
		address	4:8	28:18	
6		analyzing	6:18 8:1	19:22	
	693 9:4	addressed	27:13 29:9	and/or	5:1
		Anderson	6:19 27:2	10:22	
7		addressing	5:23	10:22	
		appeal	11:11,13	25:14	
8		appeals	12:1 27:24	27:25 30:4	
		adjourment	12:22	10:6	
	836 11:18	administration	12:22	19:13,22	
		administration	30:20	21:9,18	
9		administration	6:20 8:23	23:23	
	97 10:23	administrative	17:23	6:7,13	
2		agencies	17:22	19:8 23:24	
	A	agrees	15:4	26:21	
		agreed	6:9	21:10,15	
		agrees	4:17	25:7 28:18	
2d	9:4	abundantly	23:19	applied	
		abundantly	24:19	18:25	
3		accept	11:21	20:5,11	
		accepted	17:3	18:25	
		allowed	6:18	appreciative	
		allowed	7:23 13:23	23:14	
		approaching	15:8	15:17	
3rd	11:18	allowing	26:4 30:13	area	18:2
		action	20:1,	areas	14:22
		actual	5:4	amend	21:14,
		add	11:15	22	17:17 18:3
45-day	5:7				

26:9	30:22	27:1	9,10,17,	19,21,22,	19,21,22,
conclusion	19:21	Correction	7:4,12	25 26:3,	damage 5:17
concurring	8:18	correlated	11:6	23 27:6,8,	damaged 25:13
condemned	19:18	counsel 7:11	28:2,5,8,	12,17	date 15:17
conduct 7:1,	24	9:21 14:2	10,12,15,	20,24	dates 27:21
conducting	24:24	17:16,21	29:18,20,	23 30:8,	deadline 15:25
considerable	11:14	14:1	11,14	11,14	Debtfe 7:2,
considerable	18,25 5:22	court 4:1,8,	12:18 15:4	12:18 15:4	11 12:7
considerable	6:1,2,3,7,	10,11,17,	17:3 18:11	17:3 18:11	decision
consistent	21,22 7:5,	9,23 8:8,	21:16 22:3	21:16 22:3	6:2,13,17
constitutional	5:10 20:4	10,17 9:2,	23 25:4,16	23 25:4,16	18:15,19
constitutional	12,19 12:3	5 10:5	27:1	27:1	19:7 21:24
constitutional	11:1,9,10,	11:1,9,10,	covered 15:1	covered 15:1	23:25
city 20:1	13:6,10,	12,19 12:3	create 30:18	create 30:18	25:1,23
Constitutions	5:12	13,20	creation	creation	28:22
Constitutions	15:12,22	15:12,22	6:19 8:22	6:19 8:22	decisions
construed	16:13,14,	16:13,14,	cross-	cross-	10:7,8,23
contained	10:10 25:7	19:1,6,8,	crucial 20:7	crucial 20:7	18:23
contrary	10:25	9,13,21	crystal 11:2	crystal 11:2	20:3,25
copies 29:23	21:5,9,18,	20:6,14	current 7:5	current 7:5	29:4
correct 6:22	25 22:2,4,	21:5,9,18,	currently-	currently-	7:14 8:16
correcting	24:17,19,	6,11,16,19	defendants'	defendants'	15:7 16:21
	18:14 21:6	23:7,13,	19:15	19:15	14:2 19:23
	25 25:5,8,	16,23,24	20:12	20:12	

denied 5:12	6,9,10,24	19:1	ensure 11:23
7:5	8:11,12	disrespect	erroneously-
Department	9:4,14,23	16:8	limited 8:11
7:4,12	10:3,10,	dissatisfying	error 5:23,
depended	11:20	10:1	24 6:21,22
9:19	12:5,11,14	disservice	7:8 12:1,2
depose 12:6	13:21	4:22	24:13
deposing	15:3,9,11	distinction	27:2,14,15
20:20	18:16	20:7	errors 10:20
deposition	19:10	District	19:8
8:9 9:23	20:17,18,	11:1,10	evaluating
11:4,7	21 21:17,	disturbing	21:20
16:9 22:24	24 25:6	30:3	Evans 22:21
23:20	26:4,7,11,	Doe 19:14,	Evans's
29:4,5	17,18	23	22:24
depositions	30:12	draw 4:12	23:20
7:2 16:25	discretion	driving 5:4	events 22:25
24:1 27:21	10:14,16	drove 4:2	evidence
28:13	11:9	discuss 8:20	7:19 9:20,
29:5,9	12:22	earlier	24 15:17,
Derrick 7:2	discussed	24:23	18 20:17,
desire 15:20	13:19	earlier	22 29:17
developed	discusses	27:22	evolved 5:22
22:23	8:19,21	early	examination
development	9:15	earth 23:12	25:2
11:25	discuss	easy 23:17	examine
dicta 6:12,	9:3	effort 17:19	25:13
13	discussions	emergency	executed
time 28:25	14:18	21:22	14:16
disagree	discuss 4:9	end 4:18	executing
18:13 23:2	22:10	15:17	19:18
discovery	discussed	ended 15:19	execution
6:23 7:1,			5:7,12,19

6:5	fault 7:17	22:22,24	Harbison 8:20
26:5,11	Federal 14:6	23:12	hard 30:18
30:5	10:23	4:14	harder 30:17
executioner's	feel 4:16	fundamental 10:17	harm 5:18
25:2	18:9	future 19:13	hate 15:15
exercise	feeling 24:21	20:12 21:2	hear 17:5
10:15	25:4,16	26:14	heard 13:23
Exhibit	27:20	figure 27:20	hearing 4:15
24:23	file 21:7	file 21:7	30:3
expect 28:25	filed 6:25	filed 6:25	hears 4:8
expert 7:18	filling 21:8	filling 21:8	heaven 23:11
explanation	findings 21:9	findings 21:9	helpful 7:21
9:13	find 10:24	find 10:24	HENRY 29:24
expressed	findings 6:12	group 13:4	Henry's 21:9
extra 4:4	finds 6:17	guess 16:3	hidden 5:3
15:20	10:9	22:1 26:23	hiding 14:11
fatal 6:11,	flow 22:25	guidance 6:4	history 9:3,
14 18:24	focus 8:16	8:24 9:1	holding 25:12
20:3,8,24	form 16:21	H	Honor 13:3,
fact 20:23	form 16:21	hand 23:17	9,14,16
failed 20:6	fortuitous 9:19	24:3	16:17,25
fair 4:14	found 11:1,2	handles 17:14	18:8,11,14
fairness	frankly 21:11 22:1	16:12	24:18 27:4
10:18	23:3	21:2	29:25
12:13	Friday		

hope	17:24	independently	22:10 25:3	26:10
18:8 21:3	19:17	indication	issued 25:18	Kissinger
24:11	18:1	individuals	issues 12:14	13:3,9,14
29:11	18:1	20:13	13:16	16:2,17,24
30:15	20:13	influencing	21:23	17:14 22:4
9:11	5:4	information	27:25	29:25 30:9
hours 29:3	5:4	17:10	John 19:14,	Knox 10:22
housekeeping	4:5 12:19,	23	22	Koch 9:12
hurry 4:3	11 12:7	14:17	judge 10:15,	10:5
21:1	17:16	17:16	18:23	judgment
hypothetical	19:18	19:18	20:3,25	24:4
20:11	19:18	19:18	judiciary	10:2
I	instant 30:4	interpretation	June 6:25	8:18 25:6
I's 4:12	14:23,24	introduced	justice 8:18	larger 13:4
identities	29:18	involved	11:19	law 4:16
6:5 19:10,	19:25	involved	11:19	lawyers
14,16,23	24:12	involved	justices	lead 8:2
19,20	20:3 21:19	involves	8:20	lead 8:2
importance	15:11	important	11:15	lead 8:2
11:15	15:11	include	18:4	legitimate
21:15	21:15	include	18:4	legitimate
28:18	28:18	issue 4:5,9	14:17	legitimate
5:17	12:23	17:17,25	17:24	legitimate

persons	8:21	16:3,4	presenting	8:13
parameters	5:18	petition	pointing	19:7
part	4:11, 12 27:22	plaintiff	position	8:4
participate	19:18	plaintiff's	positions	18:9
parties	4:13,22	plaintiffs	possession	29:17
party	11:3,	plaintiff's	possibility	4:19
party's	7:17	plaintiff's	potential	27:14
passed	9:16	plaintiff's	practices	14:14
past	9:15	plaintiff's	practice	9:17 14:19
pending	20:1	plaintiff's	privilege	17:10
people	4:1	plaintiff's	priviledged	23:5
permitted	15:3	plaintiff's	priviledged	29:10
permt	9:22	plans	problems	10:21
perfectly	30:2	planned	procedures	5:13,14
perfect	4:6,	plan	procedures	14:4,9,25
permt	9:22	plans	preparing	11:22
permt	10:12	pleading	preparation	9:16
permt	13:22	point	present	5:2
	14:10,12		present	10:3,9
			proceedings	30:22

process	5:19	10	random	4:12	relation	19:10
production	6:20	8:22	provided	4:16	relevance	19:22
productive	29:13	4:14	read	6:11	relevancy	7:6
prohibit	25:7	11:15	reading	19:9	relevant	6:6
promote	11:21	9:23	realize	23:23	remand	24:14
pronunciation	9:9	18:22	reasoning	30:16	remedy	15:15
proof	4:25	23:19	receive	4:14	rendered	18:19
	5:2,21	7:15	recess	11:3	renewed	30:7
	21:12	put	recognize	17:6,15	reopen	7:1
	22:8,21,23	7:15	recognize	17:6,15	reopened	22:4,
	30:12	qualifications	recognized	18:24	reopened	27:9
proper	14:22,23	19:11,17,	recognized	18:24	reopening	12:4
proposal	17:3	26:24	recommendation	28:17	reopening	30:12
proposed	16:25	25:12	record	18:8	reopens	7:9
protected	6:6	R	record	21:3	reported	9:4
protocol	5:3,5	10:19	referred	5:6	representation	19:3
	6:10,15,21	20:10	reflect	29:20	request	15:14
	8:7,23	4:10	regard	12:15	requested	23:11
	14:14,16,	12:10	regular	17:23	rereading	6:17
	23 18:25	17:11,12	related	26:1		
	19:24	8:10	raising	12:2		

reschedule	8:4	7:17	skill 9:20
23:9	room 27:19	Schofield	solution
resolution	Rule 10:10	7:3 8:7	12:5
4:15	11:5,6	12:8	solved 5:25
resolved	21:10	scope 18:16	solving
5:24 22:10	27:25	scrutiny	30:19
resources	ruled 18:21	19:20	specific
24:5	25:8,17	seated 13:13	19:3 21:23
respect	rules 9:15	Section 9:5	26:24
17:20	10:17,23	sense 10:25	specifically
respectfully	11:2	24:8	14:25
18:13	ruling 6:4	sessions	21:17,21
response	18:12	14:20	specter 4:20
12:23	21:16 22:3	set 15:14	speculative
18:11 21:8	24:21,23	29:7 30:15	21:1
25:12	rulings 6:12	shadow 5:3	spell 9:8
responsibility	S	shape 11:14	spend 13:18
4:13		16:21	state 5:15
responsible	S.W. 9:4	short 12:21	9:14 11:16
8:22	11:18	13:4 20:2	12:20,24
restate 18:9	safe 5:8	sides 12:13	17:5 24:8
4:21	Sanford	27:18	26:8 27:23
returned	11:17	site 21:17	29:4
29:21	satisfied	24:23 25:1	stated 11:19
reversal	11:7 23:21	26:6 30:6	states 5:11
4:19	satisfying	sitting	9:22 10:9
reweaving	10:1	15:24	stating 5:13
6:16	schedule 6:3	23:22	status 17:16
rid 29:19	15:23	25:22	25:12
rights 5:10	scheduled	situations	stay 5:16
16:5	16:5	17:21	18:3
risk 5:18	schedules	size 11:14	21:15,23
Riverbend			25:9,18

26:25	27:3	20 25:4,	tested	27:11
21:18	stayed	15,20,24	7:13,24	times 5:7
25:6	staying	26:2,13,	8:3,6,8	timing 16:22
9:21	strategy	27:4,7,16	26:12	today 12:12
6:23	strict	28:1,4,6,	testimony	21:10,24
7:10	subject	9,14,17,21	7:15 25:2	28:10
10:8,18	subject	29:16,22	text 6:12,	tomorrow 28:11
19:19,25	subjects	system 10:3,	15 7:6	trainings 8:5
6:24	subpoenaed	9	theory 9:17	translation 14:19
23:18	substance	taking 7:19	18:20	14:8
14:19	suggestion	22:24	thing 24:6,7	trial 4:18,
9:17	supporting	talk 13:15	29:16 30:1	19 5:2
6:14	supreme	14:8,17	things 6:8	6:3,19
19:6 23:24	surprise	15:10	14:1,5,7,	7:20 9:16
11:23	sutherland	12:25	17 15:24	10:15,19
13:1 15:19	ten-minute	14:10	16:5 17:8	11:3,8,12,
18 23:2,	ten	12:25	23:16	22,24,25
22:1,7,15,	ten-payers	14:23	thinking	13:17,23
19 18:5,7	team 6:5	4:23	30:19	19:8 20:6
16:11,15,	team 6:5	6:5	thinks 12:3	24:4,13,14
10:10	ten	13:7	thought 5:1	26:5,18
5:11 9:14	ten-minute	13:7	thought 5:1	trick 17:1
18:23	terms 14:11	12:25	thoughtful	trust 16:19
19:23	Tennessee	18:12	thoughts 4:4	turning 12:9,16
28:22 30:3	turning	4:4	truth 11:21	ultimately 23:25

unable 19:16	validity 24:7	wise 24:7
unavoidable 4:21	Vanderbilt 9:10	wishes 6:21,
uncertain 20:11	verify 19:17	withdrawn 30:6
understand 5:1 8:17	versus 9:10	witnesses 7:18 14:3
22:15	11:18	17:4,8
25:3,24	visit 21:18	words 14:24
27:4 29:1	24:24 26:6	15:1,23
understanding 25:9	30:6	20:18
understood 30:8	Wade's 8:18	16:12,20
unduly 8:11	waiting 25:22	work 5:16
unforeseen 11:25	warden 7:5	worked 30:18
United 5:11	warden's 5:8	written 5:4
University 9:11	waste 24:5	14:24 15:1
unusual 7:20	Waugh 11:18	18:25
unwritten 5:12 14:4,	ways 14:13	20:5,9
9	Wednesday 28:10	wrote 10:6
V	week 15:21	Y
V-y-t-h-o-u-1-	16:6	years 7:12
k-a-s 9:10	27:21,22	16:18
vacation 15:20	West 18:15,	you-all 29:7
16:15	19	
vacations 16:18	Westbrooks 7:4 8:3	
	12:7	

ATTACHMENT 4

ATTACHMENT 4

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

STEPHEN MICHAEL WEST, et al.,

plaintiffs,

and

EDMUND ZAGORSKI, et al.

Intervening Plaintiffs,

No. 13-1627-I

v. Death Penalty Case

DERRICK D. SCHOFIELD, in his

official capacity as

Commissioner of the Tennessee

Department of Correction, et

al.,

Defendants.

EXCERPT OF PROCEEDINGS

Had Before the Honorable Claudia Bonnyman

July 17, 2015

VOWELL, JENNINGS & HUSEBY
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1	I N D E X	
2	Proceedings	4
3	Court Certificate	11
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
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2 THE COURT: So Mr. Passino, can you help
3 me? What am I listening for here?
4 MR. PASSINO: I apologize, Your Honor.
5 What you're listening for is that we have
6 requested these documents and the requests
7 have been clear. That we haven't made a
8 request every month doesn't change anything.
9 And that the documents should have been
10 provided pursuant to the express provisions
11 of our request. And this is going to take
12 just a couple of minutes.
13 THE COURT: You can ask her, but it
14 really doesn't -- just so I get the complete
15 picture to the extent that that can be done
16 from where I'm sitting, was Ms. Inglis's
17 deposition taken in this case?
18 MR. PASSINO: No, Your Honor. It was
19 not.
20 THE COURT: Okay.
21 MR. PASSINO: We didn't have discovery
22 of anyone, as you may recall, other than
23 experts and that was pursuant to this Court's
24 order and this Court's order interpreting the
25 direction of the Supreme Court and the

1 decision written by Justice Bivens. So there
2 have been no discovery depositions. So I
3 apologize for wasting your time on this, but
4 I think we can get through it pretty quickly.
5 MR. SUTHERLAND: I guess, your Honor, if
6 I may, a few minutes ago when we were talking
7 about this, I think what the court is getting
8 at is that the court is not concerned with
9 operation of the Open Records Act. What the
10 court is concerned with is whether the
11 training occurred or not. And I think what
12 Mr. Passino is wanting to establish with his
13 question is that they requested it and
14 Ms. Inglis didn't provide it pursuant to
15 those requests.
16 Now, I don't have a problem with him
17 asking those questions. But if the court feels
18 like compliance with the Open Records Act is
19 related to these training records is not
20 relevant, then that's where you're going, the
21 same thing we were talking about a few minutes
22 ago. Is that fair?
23 MR. PASSINO: That's not only fair. Let
24 me propose a stipulation based on the court's
25 observations. Can the parties stipulate that

1 TPRA requests were made? Responses were
 2 provided. Plaintiffs reasonably believe that
 3 there were documents missing.
 4 Ms. Inglis has made a subsequent and
 5 detailed search and she has submitted them as
 6 Exhibit 48. That way we don't have to go into
 7 all this TPRA nonsense.
 8 MR. SUTHERLAND: I don't have a problem
 9 with that, with the caveat that there be in
 10 addition to that that Ms. Inglis doesn't have
 11 any current reason to believe that she did
 12 not provide those records. Aside from that,
 13 she has no reason. Do you have a problem
 14 with that?
 15 MR. PASSINO: Absolutely not. Let's get
 16 this behind us.
 17 THE COURT: And the other thing -- the
 18 other thing that I'm -- I remember when
 19 Ms. Inglis was first called in the case a few
 20 days ago, is that right, some days ago? She
 21 was called by the plaintiffs?
 22 MR. SUTHERLAND: Last week, Your Honor.
 23 THE COURT: And I'm looking for an
 24 affirmation here or maybe I'm wrong. As I
 25 recall, Ms. Inglis was asked -- went through

1 the protocol and was asked about provisions
2 that the plaintiffs thought were ambiguous or
3 otherwise troublesome?

4 MR. PASSINO: That's correct,

5 Your Honor.

6 THE COURT: Okay. And I'm realizing --

7 looking back in the history of the case, I'm
8 realizing in looking at the order of

9 April 16th the order says that the plaintiffs
10 are prohibited from seeking discovery of

11 information from persons who may responsible
12 for carrying out lethal injection protocol.

13 And I have to say that I had not thought

14 about Ms. Inglis as being one of those people

15 because she's not on the execution team. She's

16 not going into the chamber. She's not taking

17 any of those actions.

18 MR. PASSINO: No, Your Honor, she is

19 not.

20 THE COURT: So I wanted to -- it sounds

21 like the plaintiffs were reading the

22 protective order as prohibiting discovery for

23 Ms. Inglis, too; is that right?

24 MR. PASSINO: I think that that's -- we

25 were reading the discovery order as virtually

1 prohibiting all discovery, that's correct.
2 THE COURT: Okay.
3 MR. PASSINO: Other than the experts.
4 THE COURT: Okay.
5 MR. PASSINO: And please excuse me.
6 With the exception of the limited discovery
7 that the court authorized, as you recall.
8 THE COURT: Is there anything that the
9 plaintiffs need to ask Ms. Inglis now had you
10 had the opportunity to discover? Is there
11 anything you can think of that you'd like to
12 ask her?
13 MR. PASSINO: Your Honor, although that
14 would be extraordinarily fun, I think the cow
15 is out of the barn. I think that she's been
16 proffered for the reason of providing missing
17 training documents and that's all behind us
18 now. That's what my -- my cross-examination
19 would be limited to.
20 THE COURT: Well, no.
21 MR. SUTHERLAND: Your Honor, if I may,
22 they have called her to testify.
23 THE COURT: Right.
24 MR. SUTHERLAND: And they've spent hours
25 asking her all the questions --

1 THE COURT: That's what I'm remembering.
2 MR. SUTHERLAND: -- presumably that they
3 would have asked her in a deposition and even
4 more. So there's been --
5 THE COURT: Well, cross-examination can
6 be -- at this point because she's been called
7 as the State's witness --
8 MR. PASSINO: Yes, Your Honor.
9 THE COURT: -- cross-examination can be
10 on any subject that the case involves.
11 MR. PASSINO: I understand.
12 THE COURT: But what you're telling me
13 is really all you want to ask her about is
14 the training?
15 MR. PASSINO: That's correct.
16 THE COURT: Okay.
17 MR. PASSINO: And I appreciate the
18 Court's concern --
19 THE COURT: Okay.
20 MR. PASSINO: -- very much. But I think
21 it's time to get on the training issue.
22 THE COURT: All right. And you're ready
23 to do that?
24 MR. PASSINO: Yes, ma'am.
25 THE COURT: Okay.

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1 REPORTER'S COURT CERTIFICATE

2 I, Deborah J. Harris, LCR, certify that I was

3 authorized to and did stenographically report the

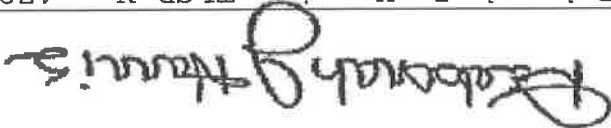
4 foregoing excerpt of proceedings and that the

5 transcript is a true and complete record of my

6 stenographic notes.

7 Witness my hand and official seal this 22nd day

8 of July 2015.

9 

10 Deborah J. Harris, TLCR No. 472

11 My commission expires: 5/03/2016

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exception	8:6	Court's	4:23,24	exception	8:6
excuse	8:5	cow	8:14	excuse	8:5
execution	7:15	cross-		execution	7:15
Exhibit	6:6	examination	8:18 9:5,9	Exhibit	6:6
experts	4:23	current	6:11	experts	4:23
express	4:10	D		express	4:10
extent	4:15	days	6:20	extent	4:15
extraordinary	8:14	decision	5:1	extraordinary	8:14
F		deposition	4:17 9:3	F	
fair	5:22, 23	depositions	5:2	fair	5:22, 23
feels	5:17	detailed	6:5	feels	5:17
fun	8:14	direction	4:25	fun	8:14
G		discover	8:10	G	
guess	5:5	discovery	4:21 5:2	guess	5:5
H		couple	4:12	H	
history	7:7	Court	4:2, 13,20,25	history	7:7
Honor	4:4,18	documents	4:6,9 6:3	Honor	4:4,18
hours	8:24	establish	5:12	hours	8:24
back	7:7	back	7:7	back	7:7
barn	8:15	barn	8:15	barn	8:15
based	5:24	based	5:24	based	5:24
Bivens	5:1	Bivens	5:1	Bivens	5:1
1		C		1	
16th	7:9	called	6:19, 21 8:22	16th	7:9
4		carrying	7:12	4	
48	6:6	case	4:17	48	6:6
A		case	4:17	A	
Absolutely	6:15	caveat	6:9	Absolutely	6:15
Act	5:9,18	chamber	7:16	Act	5:9,18
actions	7:17	change	4:8	actions	7:17
addition	6:10	clear	4:7	addition	6:10
affirmation	6:24	complete	4:14	affirmation	6:24
ambiguous	7:2	compliance	5:18	ambiguous	7:2
apologize	4:4 5:3	concern	9:18	apologize	4:4 5:3
April	7:9	concerned	5:8,10	April	7:9
authorized	8:7	correct	7:4	authorized	8:7
B		correct	7:4	B	
back	7:7	couple	4:12	back	7:7
based	5:24	Court	4:2, 13,20,25	based	5:24
Bivens	5:1	documents	4:6,9 6:3	Bivens	5:1
19,22,25		establish	5:12	19,22,25	

minutes 4:12	20,24	people 7:14	pursuant 4:10,23 5:14
missing 6:3	persons 7:11	picture 4:15	Q
month 4:8	plaintiffs 6:2,21	question 5:13	question
nonsense 6:7	point 9:6	questions 5:17 8:25	quickly 5:4
observations 5:25	pretty 5:4	reading 7:21,25	R
occurred 5:11	proffered 8:16	realizing 7:6,8	reason 6:11, 13 8:16
open 5:9,18	prohibited 7:10	recall 4:22	related 5:19
operation 5:9	prohibiting 7:22 8:1	records 5:9, 18,19 6:12	relevant 5:20
opportunity 8:10	propose 5:24	recall 4:22	remember 6:18
order 4:24	protective 7:22	records 5:9, 18,19 6:12	remembering 9:1
7:8,9,22, 25	protocol 7:1,12	related 5:19	request 4:8, 11
parties 5:25	provide 5:14	relevant 5:20	request 4:8, 11
Passino 4:2,	provided 4:10 6:2	relevant 5:20	request 4:8, 11
4,18,21	providing 8:16	relevant 5:20	request 4:8, 11
5:12,23	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
18,24 8:3, 6:15 7:4,	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
5,13 9:8, 11,15,17,	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
made 4:7	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
6:1,4	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
M	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
listening 4:3,5	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
19	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
limited 8:6,	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
19	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
lethal 7:12	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
L	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
justice 5:1	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
J	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
issue 9:21	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
involves 9:10	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
interpreting 4:24	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
7:12	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
injection 7:12	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
4:16	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
inghis's 4:16	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
8:9	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
25 7:14,23	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
6:4,10,19,	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
inghis 5:14	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
7:11	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
information 7:11	provisions 4:10 7:1	relevant 5:20	request 4:8, 11
I	provisions 4:10 7:1	relevant 5:20	request 4:8, 11

requested	4:6 5:13		
requests	4:6 5:15 6:1		
Responses	6:1		
responsible	7:11		
s			
search	6:5		
seeking	7:10		
sitting	4:16		
sounds	7:20		
spent	8:24		
states	9:7		
stipulate	5:25		
stipulation	5:24		
subject	9:10		
submitted	6:5		
subsequent	6:4		
Supreme	4:25		
SUTHERLAND	5:5 6:8,22 8:21,24		
virtually	7:25		
requested	4:6 5:13		
taking	7:16		
talking	5:6, 5:12		
wanting	5:3		
wasting	6:22		
team	7:15		
telling	9:12		
testify	8:22		
thing	5:21		
thought	7:2, 13		
time	5:3		
TPRA	6:1,7		
training	5:11,19		
troublesome	8:17 9:14, 21		
understand	9:11		
virtually	7:25		
requested	4:6 5:13		
taking	7:16		
wanted	7:20		
wanting	5:12		
wasting	5:3		
team	7:15		
telling	9:12		
testify	8:22		
thing	5:21		
thought	7:2, 13		
time	5:3		
TPRA	6:1,7		
training	5:11,19		
troublesome	8:17 9:14, 21		
stipulation	5:24		
stipulate	5:25		
states	9:7		
spent	8:24		
sounds	7:20		
sitting	4:16		
search	6:5		
seeking	7:10		
s			
responsible	7:11		
Responses	6:1		
requests	4:6 5:15 6:1		
requested	4:6 5:13		