IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

STEPHEN WEST, *et al.*,	)	
	)	
	)	
Plaintiffs-Appellees,	)	
	)	**No. M2015-01305-COA-R10-CV**
v.	)	
	)	
DERRICK D. SCHOFIELD, *et al.*,	)	
	)	
	)	
Defendants-Appellants.	)	

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 Westbrooks 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 Westbrooks, 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 Westbrooks) 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 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?

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: Well, no.

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

THE COURT: Right.

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

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

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

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

MR. PASSINO: Yes, Your Honor.

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

MR. PASSINO: I understand.

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

MR. PASSINO: That's correct.

THE COURT: Okay.

See Transcript of Proceedings, July 17, 2015, at pp. 6-9 (Attachment 4).

Despite plaintiffs' clear representation regarding the need for additional questioning of the witness, the chancery court justified its *sua sponte* actions by stating that "it may be that the

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.

CONCLUSION

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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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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

2015 JUL 22 PM 4:20

STEPHEN MICHAEL WEST, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CASE No. 13-1627-I**
	)	
DERRICK D. SCHOFIELD, *et al.*,	)	
	)	
Defendants.	)	

NF

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 Westbrooks, 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. Lee 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 TWENTIETH 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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I N D E X

THE COURT: Well, I'm sorry for the people who drove in this morning and probably were in a big hurry to get here by 10:00, but I have needed this extra time to pull my thoughts together to raise the housekeeping issue that I think is the perfect time -- well, it's not the perfect time, but close to perfect time -- to address before the Court hears the motion to dismiss. And so here is the issue that I think should be raised at this time.

So Part I of Chancery was assigned this case by random automated draw. It's Part I's responsibility to assure that all parties receive and are provided a fair and full hearing so that a just resolution in compliance with the law is reached. I feel sure everybody agrees with that.

To that end, the Trial Court should avoid the possibility of reversal and a second trial because the specter of having a case sent back to be retried, although often unavoidable, can be a disservice to all of the parties and to the taxpayers.

When listening to the plaintiffs' arguments and proof, the Court was led to

believe and understand and/or thought that the plaintiffs would at trial present any proof they had that a hidden or shadow protocol was influencing and even driving the actual written protocol.

For example, the plaintiffs referred several times to a 45-day execution manual that was in a safe in the warden's office. The plaintiffs' second amended complaint asserts that the plaintiffs' constitutional rights as provided by the United States and Tennessee Constitutions are denied by unwritten execution procedures without stating that those objected-to procedures were without -- the pleading didn't state what they were, and the pleading didn't stay how they would work, or how they would damage the inmates or increase the risk of serious harm and pain in the process of the execution.

Now that the plaintiffs have laid out their proof and the plaintiffs' theories have both evolved or come to light, the Court is aware of its possible error and is addressing whether its possible error should be resolved or solved.

And first the Court looks to the Supreme Court decision that sent this case back to the Trial Court with a trial schedule and with some guidance and, of course, its ruling that the identities of the execution team are not relevant to the case and must be protected. But of course the Appellate Court said a few other things, too.

The plaintiffs agreed with the Supreme Court that its challenges to the protocol are facial challenges. The Court first read the text and the dicta or the findings or rulings and the dicta in the appellate decision to suggest that this facial challenge would be limited to the text of the protocol.

After reviewing other cases, however, and rereading the decision, the Court finds that the plaintiff should be allowed to address and have addressed at trial the creation, the production, and the administration of the protocol. The error the Court now wishes -- possible error the Court now wishes to correct is the strict limitation of discovery on those subjects.

On June 15, 2015, the plaintiffs filed

their motion to reopen discovery and conduct the depositions of Debbie Inglis, Derrick Schofield, who is the Commissioner of the Department of Correction, and Bruce Westbrooks, the current warden. The Court denied the discovery based upon relevancy to the text and the protocols.

To correct this possible error in the limitation of discovery, the Court now reopens the subject of discovery. Now, we know that Debbie Inglis, general counsel for the Department of Correction for many years, testified at length both when the plaintiffs called her and when the defendants out of order put forth her testimony.

And the out of order was caused not by some party's fault but by the schedules of the witnesses and also the expert witnesses in the case. Taking evidence, taking proof out of order is nothing unusual on a bench trial, and it should be done when it's helpful to everyone.

The Court allowed the plaintiffs to conduct some discovery as she testified in the case-in-chief, but it may be that the

plaintiffs need to address other matters with her that would lead to further proof.

Mr. Westbrooks testified he's been in the new position as warden at Riverbend for just a few months. He's been to training at least twice but testified that he was not familiar with the protocol yet. Mr. Schofield has not testified and the Court assumes that his deposition was not taken.

The Court is raising 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.

And I want the plaintiffs and the defendants to focus with me so that you understand where this Court is coming from on the language in Justice Wade's concurring opinion, in which he discusses -- and all of the justices discuss the Harbison case -- discusses cross-examination of persons responsible for creation, production, and administration of the one-drug protocol.

So there's some guidance. There's not a lot because that wasn't the purpose of the

decision. But there's some guidance there.

Then the Court is looking at Justice Koch's discussion about the history of discovery in a case reported at 693 S.W. 2d, page 350, Middle Section, Court of Appeals decision in 1985.

And the plaintiff's name is -- I'm going to spell this here because I don't think the pronunciation is going to help very much -- V-Y-T-H-O-U-L-K-A-S versus Vanderbilt University Hospital.

And in that case, Justice Koch goes through a long explanation of the history of discovery in the State of Tennessee and he discusses that in the past, before the rules were passed in 1970, trial preparation and practice were based upon the supporting theory of justice wherein the outcome of the case depended primarily upon the fortuitous availability of the evidence or upon the skill and strategy of counsel.

And then the states began to permit the use of deposition for discovery for the purpose of obtaining evidence because the prior way cases were tried did not often reach the merits

and were dissatisfying, not satisfying, to the judiciary or to the public.

The present system of discovery, according to this case and according to former Justice Koch, who was also a former Court of Appeals Justice, who as we know wrote an awful lot about the history of his decisions and the subject of his decisions.

And he states and finds the present system of discovery contained in Tennessee Rule of Civil Procedure 26 should be construed liberally to permit the broadest discovery possible; that the course of pretrial discovery is in large measure left to the discretion of the trial judge and the exercise of this discretion is based upon the broad parameters of the rules and the fundamental notions of fairness. And then of course the subject of should the trial judge raise at trial the issue of discovery, possible discovery errors and problems.

And in Knox versus Anderson, reported at 21 Federal Rules Decisions, page 97, it's a 1957 case, but I didn't find any cases to the contrary. And it sure makes sense to this

Court. And he found -- the District Court found it is not crystal clear under the rules that during a trial or a recess a party may as of right take a deposition.

And then he cites a few lines in Rule 26, and says: When 26 is correlated with Rule 30, I am satisfied that a deposition may be taken during a trial not as of right but within the discretion of the court.

And the case that that District Court judge was addressing is somewhat like the case this Trial Court and these parties are addressing in that case is the litigation is of considerable size and shape and I might also add of great importance to the public and to the plaintiffs and to the State.

And then there's the case of Sanford versus Waugh & Company at 326 S.W. 3rd, 836, in which our Supreme Court Justice Lee stated that: The purpose of the discovery process is to promote the ascertainment of truth by aiding a party in preparing for trial to prevent surprise and ensure as far as possible the trial on the merits rather than upon gratuitous and unforeseen development at the trial.

So in addressing this possible error and raising concern about this possible error, the Court thinks that given the plaintiffs' position on June 15, 2015 about reopening discovery, the solution may be that the plaintiff be offered the opportunity to depose Debbie Inglis, Warden Westbrooks, and Commissioner Schofield.

And so I'm turning now to the plaintiffs. And if you hadn't ever raised any need for further discovery, I wouldn't be asking you to give me a position here today in five minutes. But I know that both sides are well familiar with the discovery issues and we've had a lot of motions in that regard.

So I'm turning to the plaintiffs to say, to ask, whether -- to ask what your position would be on this Court's concern and housekeeping matter?

And I'm also going to ask the State for its position. And do you want a short adjournment to be able to discuss with each other your response to the housekeeping issue? It might help the State, too, to be able to -- I'm talking about a ten-minute break.

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

MR. KISSINGER: Your Honor, kind of a larger group over here, a short break would help.

THE COURT: Okay. Well, we'll make it like ten minutes. And I think maybe that will be enough.

MR. KISSINGER: Thank you, Your Honor.

THE COURT: All right.

(Break was taken at 10:58 a.m. until 11:07 a.m.)

THE COURT: Please be seated.

MR. KISSINGER: Your Honor, plaintiffs have had the opportunity to talk about this. I think Your Honor is already aware of the issues and having been said at trial, and so I don't want to spend a lot of time going over them. I think we've discussed them already.

I think the Court is correct in its observation that certainly more discovery, particularly at this point, particularly with what we've heard at trial, should be allowed in this case.

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

couple of things from -- not just from defendants' counsel, but from some of the witnesses, that make it very clear, very clear, that there are unwritten procedures.

I think one of the things that perhaps -- and I don't know if it was our fault or if it's just one of those things that sometimes gets lost in translation, when we talk about unwritten procedures, it becomes -- it seemed to get to the point where we were talking about it in terms of they're hiding something from us and that was really not the point. The point was that there were ways of carrying out this protocol, there were practices that they followed, and that they were -- and that this is how the protocol is executed. We heard Ms. Inglis talk about these kind of things.

We heard discussions about how -- how the trainings, the substance of the practice sessions, what all went on in those.

So, yes, I think there are clearly a number of areas regarding the proper interpretation of the protocol, the proper interpretation of the written words, as well as the procedures that were not specifically

covered in the written words themselves that really we should have been -- that really discovery should be permitted on.

So we agree, again, with the Court's observations. I would think as a procedural matter that, and it would certainly not prejudice the defendants in any way, that we should be allowed to reopen our case until discovery is complete and we've had the opportunity to talk to these people and to get discovery on these important issues that the Court itself has already observed are out there.

So we would request that we perhaps set up some remedy here. I know that -- and I hate to bring it up, but we are backing up, we are approaching that date where the end of evidence has to be -- or the taking of evidence needs to be ended. I do know that Mr. Sutherland had expressed a desire to go on a vacation all of next week and --

THE COURT: I don't have in mind changing that schedule. In other words, I think that the way I'm sitting here seeing things right now, I think we can finish by the deadline of

August 7.

MR. KISSINGER: And I don't think we -- again, that's my point. Even if -- I guess my point was even if we were -- we couldn't get these things scheduled any other time but during that week, like our office, they have other attorneys as well and it's -- and it is -- I mean no disrespect with this -- it's just a deposition.

And I don't think it's necessarily mandatory that Mr. Sutherland be the attorney who handles it. So we're willing to work with the Court.

THE COURT: I'm not going to make Mr. Sutherland miss his vacation. I just really wouldn't want that to happen.

MR. KISSINGER: Your Honor, I went five years without vacations with my kids and I bleed for Mr. Sutherland, trust me. So we are willing to work with the Court and with counsel for defendants in any way, shape, or form, timing, location, anything, in order to --

THE COURT: What do you think you need?

MR. KISSINGER: I think the three depositions that Your Honor proposed would

actually do the trick. You can't get much more relevant than those three people. So -- so we would -- we would accept the Court's proposal for those three witnesses.

THE COURT: Before I hear from the State, I want to recognize that with at least two of -- or maybe all three -- with at least two of those witnesses, there are probably things the plaintiffs would like to know but the information is probably privileged or at least a legitimate privilege can be raised and will probably be raised. I say that just because I think I should.

MR. KISSINGER: Certainly, Your Honor. And we recognize that. Particularly, given Ms. Inglis's status as counsel. There, obviously, are areas where the issue of privilege could come up. We will make every effort to avoid them.

I know that -- and, again, all respect to opposing counsel. I know there are situations where sometimes agencies try to use the privilege to cloak just regular administrative kind of decisions. I would hope that doesn't become an issue here.

I have seen no indication that it will. But, again, this is an area that -- we're willing to try and stay away from areas involving privilege.

THE COURT: Okay. So, Mr. Sutherland, what can you tell me?

MR. SUTHERLAND: Yes, ma'am. Thank you, Your Honor. I hope the record is clear, but I feel compelled to restate the positions we've previously made in this case.

Your Honor, in response to the Court's thoughtful ruling this morning, I would say that we respectfully disagree with the Court and we believe that Your Honor was correct in the reading of the West decision in limiting discovery within the scope of what the majority in the case said.

We believe it is abundantly clear that when the West decision was rendered they made it very clear that under the theory of the complaint at the time that they ruled on this case, this case was brought pursuant to the Tennessee Declaratory Judgment Act. It was recognized as a facial challenge to the protocol as written, not as applied.

This Court has already dismissed all as-applied challenges in this complaint by specific order based upon the representations of the plaintiff that there were no as-applied challenges in this complaint.

The Supreme Court has made it very clear in their -- in their decision in pointing out the errors of the Trial Court and the Appellate Court, and I'll read once again.

In relation to discovery of identities of people who might be -- and qualifications of people who might be carrying it out in the future, they said, The Court of Appeals concluded that the identities of John Doe defendants were relevant because without their identities the plaintiffs would be unable to independently verify their qualifications to participate in executing a condemned inmate or subject those qualifications to meaningful scrutiny.

This conclusion indicates the Court of Appeals is analyzing the relevance of the John Doe defendants' identities in terms of their qualifications to comply with the protocol.

However, the subject matter involved in

the pending action is the constitutionality of the protocol itself. In short, this declaratory judgment action involves a facial challenge to the constitutional validity of the protocol as written, not as applied.

The trial court, likewise, failed to consider the crucial distinction between the plaintiff's facial challenge to the protocol as written and any challenges the plaintiffs may be attempting to raise to the protocol as it hypothetically may be applied on some uncertain date in the future by currently-unidentifiable persons. The identities of these individuals were not relevant because, as the Court recognized, if the parties had their identities, they would not lead to the discovery of relevant evidence.

In other words, there was no discovery needed to have the identities because if they knew the identities, deposing these people wouldn't lead to the discovery of relevant evidence in this proceeding.

It's not just who they are, but the fact that what they have to say in this facial challenge under the Declaratory Judgment Act is

speculative and hypothetical about what might happen in the future.

So I hope the record is clear or I hope I have made that clear previously and that is still our position. We believe the Court was correct.

I would say that we had planned to file response to the plaintiffs' filing -- Ms. Henry's filings in the Court of Appeals on the Rule 10 application today, in which we would say that, frankly, it is not moot until the case is concluded, until proof is concluded. And certainly this -- we may be -- we will be considering whether we need to amend that application to include a stay of the Court's ruling this morning.

Specifically, the discovery of the site visit, which the Court of Appeals has stayed also involves mid-trial discovery. I have notified the office and we're evaluating whether or not this specifically needs to be added to amend our request for an emergency stay on these specific issues. And so we'll be making that decision sometime today.

THE COURT: Okay.

MR. SUTHERLAND: I guess, frankly, if at this point, if the Court -- based on the Court's ruling, it would seem to me that the Court -- Mr. Kissinger has asked to reopen the case. It would --

THE COURT: Well, to reopen -- right.

MR. SUTHERLAND: To reopen the plaintiffs' proof. And, therefore, it would seem to me that it's premature for us to make a motion to dismiss until this issue is resolved.

THE COURT: I think that's right. I think that's right. I actually did not know whether the plaintiffs would -- what position the plaintiffs would take.

MR. SUTHERLAND: I understand.

THE COURT: They've now taken their position.

MR. SUTHERLAND: Yes, ma'am.

THE COURT: Let's think just for a minute about -- or more than a minute, about the order of proof that we have left. We have Dr. Evans coming in on Friday.

As far as the proof has developed so far, taking Dr. Evans's deposition this Friday would seem very consistent with the flow of events as

they have occurred. What do you think?

MR. SUTHERLAND: I don't disagree with that and, frankly, I'd hate to go back and have to ask him to change his plans, if we don't have to -- if they don't have a problem with it.

THE COURT: If you ever had to do that, you can certainly blame it on me. So maybe that will help. But let's not reschedule him.

MR. SUTHERLAND: I did tell him that I had been requested, if possible, to move heaven and earth to get him here for Friday and he did.

THE COURT: And he did do that. And I am appreciative of that.

MR. SUTHERLAND: Yes, ma'am.

THE COURT: And I know these things aren't easy. On the other hand, people get subpoenaed. They do get subpoenaed. You've just got to push ahead. So we will push ahead with Dr. Evans's deposition. And everybody is satisfied with that time.

And while we're sitting here, of course I realize that the Court of Appeals and the Supreme Court and Appellate Court may ultimately be making the decision about whether

these depositions are taken.

But I think we ought -- and many is the time I have thought having a hand reach down and tell the trial judge what to do so as not to waste time, so as not to waste the resources of the parties, you know, it's not a bad thing.

But whether it's the wise thing to do, whether it makes more sense for the State to take a different position, I really wouldn't know.

So I certainly would hope that everybody involved wants to avoid a serious, serious error that would cause a second trial, that would cause a remand of a second trial. That's where my mind is.

MR. SUTHERLAND: Yes, ma'am.

THE COURT: So that having been said --

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

THE COURT: No. Go ahead.

MR. SUTHERLAND: Is it the Court's -- is it the Court's feeling that this ruling this morning on the motion to reopen discovery expands the Court's earlier ruling on the site visit as far as conducting discovery?

THE COURT: No. I think the plaintiffs

have made their decision about the site examination and the executioner's testimony. That issue has gone as far as I understand it.

MR. SUTHERLAND: Is it the Court's feeling that the order from the Court of Appeals staying the discovery based on the language contained in our application doesn't prohibit what the Court has ruled this morning?

THE COURT: My understanding of this stay is that that gives the Appellate Court a chance to look at your petition and the plaintiffs' response without -- holding the status quo, so that nobody gets damaged while they examine whether they will accept the appeal.

MR. SUTHERLAND: Let me try to be a little more clear. Is it the Court's feeling that what the Court ruled this morning was not precluded by the stay issued?

THE COURT: Definitely.

MR. SUTHERLAND: Okay.

THE COURT: Because if I thought it were, I would be sitting here waiting for the Court of Appeals decision.

MR. SUTHERLAND: I understand.

THE COURT: No. I don't think they are

related. They are not related in my mind.

MR. SUTHERLAND: Okay. Well, I --

THE COURT: Except that, except that -- except that allowing discovery during a trial -- well, calling the executioner and calling the -- and going to the site visit really were not discovery. That was calling -- that was calling a witness that the State concluded was not -- would not be relevant. Is that kind of the way to say it? It wasn't discovery. It was calling the executioner to testify, so ...

MR. SUTHERLAND: I would -- I don't really have any feeling on that.

THE COURT: Okay.

MR. SUTHERLAND: I think, since there was no discovery, we would basically be doing discovery at trial as to that witness.

THE COURT: Could be. Could be. That would be something that might come up in argument before the Appellate Court.

MR. SUTHERLAND: Yes, ma'am.

THE COURT: But I guess in answer to your specific question, which is whether I would think that the stay would govern the current --

the Court's current concern about correcting the error, I don't see them as being addressed by the stay.

MR. SUTHERLAND: I understand, Your Honor. That's helpful.

THE COURT: Okay.

MR. SUTHERLAND: So I guess I would ask, is the Court going to allow the plaintiffs to reopen, and I would assume that would -- that would obviate the need for us to make our motion, at least at this time?

THE COURT: Right. And it was my suggestion that that would be a way to address what I think is a potential error. If it's an error, it would be a serious error if it were.

MR. SUTHERLAND: Yes, ma'am.

THE COURT: And so what I'd like for us to do now, what I'd like for both sides to do, since we are all here in the room, we've got our calendars and everything, is figure out the dates for those three depositions this week or the early part of next week and see what can be done, knowing that of course the State is going to be addressing whether it will add these issues to its appeal, Rule 10 appeal.

MR. SUTHERLAND: Yes, ma'am.
THE COURT: So I don't think I need to be --
MR. SUTHERLAND: May I have just a moment?
THE COURT: Sure.
MR. SUTHERLAND: All right. I think we can do that.
THE COURT: Okay. And --
MR. SUTHERLAND: I would ask that the Court give us -- today is Wednesday -- at least through -- through noon tomorrow to --
THE COURT: In other words, not take any depositions before then?
MR. SUTHERLAND: Yes, ma'am.
THE COURT: I think that's -- everybody has --
MR. SUTHERLAND: My recommendation would be that the application be amended to include this.
THE COURT: Okay.
MR. SUTHERLAND: But I'm not the one that's going to make that decision in terms of --
THE COURT: Well, that would be something I wouldn't expect you to make on a dime. You

need to think about that. I understand.

And I think the plaintiffs need a few hours to think about their -- to plan for the deposition and the State to defend the deposition -- depositions. There will be three.

So you-all do your best to set those up. I'm going to make sure that I'm available during the depositions to address any privilege that comes up or any other problem you have. I hope you don't have any, but if you have any I'll be here. I don't usually do that because sometimes it's not very productive. But I'll do that for this case because we need to move on.

MR. SUTHERLAND: I have one other thing. I have in my possession evidence that's been introduced to this Court and I would like to get rid of it.

THE COURT: The record shall reflect that Exhibit 48 has been returned.

MR. SUTHERLAND: Yes, ma'am.

THE COURT: Everybody has got copies?

MS. HENRY: Yes, ma'am.

MR. KISSINGER: Your Honor, just one very

brief thing. I think the record needs to be absolutely perfectly clear on this because what I'm hearing is a little disturbing in terms of their position on the instant appeal.

We will not be calling the executioner and we have withdrawn our request for a site visit. And they will not be renewed.

THE COURT: That's what I had understood.

MR. KISSINGER: That is matter is over. Completely over.

THE COURT: Okay. And this Court is reopening discovery and the plaintiffs' proof allowing that and the plaintiffs have taken the Court up on the offer.

And I hope that I have set out my reasoning and it's certainly not because I want to work the lawyers harder -- you've been worked hard enough -- or create problems. But I'm thinking I may be solving one or two.

So we'll be in adjournment until Friday morning at 9:00 o'clock.

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

REPORTER'S COURT CERTIFICATE

I, Deborah J. Harris, LCR, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Witness my hand and official seal this 22nd day of July 2015.

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

ATTACHMENT 4

ATTACHMENT 4

IN THE CHANCERY COURT PART I, FOR THE STATE OF TENNESSEE TWENTIETH 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

EXCERPT OF PROCEEDINGS

Had Before the Honorable Claudia Bonnyman

July 17, 2015

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I N D E X

* * * * *

THE COURT: So Mr. Passino, can you help me? What am I listening for here?

MR. PASSINO: I apologize, Your Honor. What you're listening for is that we have requested these documents and the requests have been clear. That we haven't made a request every month doesn't change anything. And that the documents should have been provided pursuant to the express provisions of our request. And this is going to take just a couple of minutes.

THE COURT: You can ask her, but it really doesn't -- just so I get the complete picture to the extent that that can be done from where I'm sitting, was Ms. Inglis's deposition taken in this case?

MR. PASSINO: No, Your Honor. It was not.

THE COURT: Okay.

MR. PASSINO: We didn't have discovery of anyone, as you may recall, other than experts and that was pursuant to this Court's order and this Court's order interpreting the direction of the Supreme Court and the

decision written by Justice Bivens. So there have been no discovery depositions. So I apologize for wasting your time on this, but I think we can get through it pretty quickly.

MR. SUTHERLAND: I guess, your Honor, if I may, a few minutes ago when we were talking about this, I think what the Court is getting at is that the Court is not concerned with operation of the Open Records Act. What the Court is concerned with is whether the training occurred or not. And I think what Mr. Passino is wanting to establish with his question is that they requested it and Ms. Inglis didn't provide it pursuant to those requests.

Now, I don't have a problem with him asking those questions. But if the Court feels like compliance with the Open Records Act is related to these training records is not relevant, then that's where you're going, the same thing we were talking about a few minutes ago. Is that fair?

MR. PASSINO: That's not only fair. Let me propose a stipulation based on the Court's observations. Can the parties stipulate that

TPRA requests were made? Responses were provided. Plaintiffs reasonably believe that there were documents missing.

Ms. Inglis has made a subsequent and detailed search and she has submitted them as Exhibit 48. That way we don't have to go into all this TPRA nonsense.

MR. SUTHERLAND: I don't have a problem with that, with the caveat that there be in addition to that that Ms. Inglis doesn't have any current reason to believe that she did not provide those records. Aside from that, she has no reason. Do you have a problem with that?

MR. PASSINO: Absolutely not. Let's get this behind us.

THE COURT: And the other thing -- the other thing that I'm -- 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: 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: That's correct, Your Honor.

THE COURT: Okay. And 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 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 that's -- we were reading the discovery order as virtually

prohibiting all discovery, that's correct.

THE COURT: Okay.

MR. PASSINO: Other than the 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 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?

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: Well, no.

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

THE COURT: Right.

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

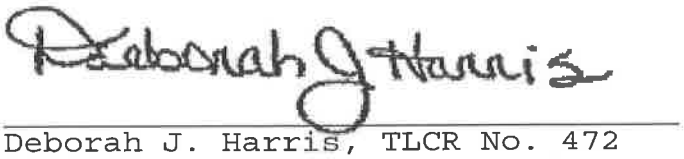
THE COURT: That's what I'm remembering.
MR. SUTHERLAND: -- presumably that they would have asked her in a deposition and even more. So there's been --
THE COURT: Well, cross-examination can be -- at this point because she's been called as the State's witness --
MR. PASSINO: Yes, Your Honor.
THE COURT: -- cross-examination can be on any subject that the case involves.
MR. PASSINO: I understand.
THE COURT: But what you're telling me is really all you want to ask her about is the training?
MR. PASSINO: That's correct.
THE COURT: Okay.
MR. PASSINO: And I appreciate the Court's concern --
THE COURT: Okay.
MR. PASSINO: -- very much. But I think it's time to get on the training issue.
THE COURT: All right. And you're ready to do that?
MR. PASSINO: Yes, ma'am.
THE COURT: Okay.

* * * * *

REPORTER'S COURT CERTIFICATE

I, Deborah J. Harris, LCR, certify that I was authorized to and did stenographically report the foregoing excerpt of proceedings and that the transcript is a true and complete record of my stenographic notes.

Witness my hand and official seal this 22nd day of July 2015.



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