IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

STEPHEN MICHAEL WEST, *et al.*,	)	
	)	
Plaintiffs-Appellees,	)	
	)	No. M2015-01305-COA-R10-CV
	)	
v.	)	Chancery Case No. CV13-1627-I
	)	**Death Penalty Case**
DERRICK D. SCHOFIELD, *et al.*,	)	
	)	
Defendants-Appellants.	)	

PLAINTIFFS-APPELLEES' ANSWER TO APPLICATION FOR EXTRAORDINARY APPEAL PURSUANT TO TENN. R. APP. P. 10(D) AND SUPPLEMENT THERETO

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INTRODUCTION

Defendants' mid-bench-trial application for interlocutory review of discovery and relevancy determinations is moot and non-justiciable. Plaintiffs have formally withdrawn their request to call the John Doe Executioner and request for a site visit, and the Chancellor has vacated her order. Attachment 1. The only other issue is a discovery dispute regarding limited depositions of two named defendants and their agent who have relevant information about issues both parties agree are critical to the case. The application should be denied.[1]

STATEMENT OF RELEVANT FACTS

The trial in the underlying case began on July 7, 2015, pursuant to the directive of the Tennessee Supreme Court that the Tennessee Lethal Injection Protocol – now in its third iteration in less than two years[2] – be subjected to a full and complete adversarial hearing. *See e.g. State v. Stephen West*, No. M1987-00130-SC-DPE-DD, Order Filed December 17, 2013 (recognizing that the Supreme Court has previously required that a challenge to a new lethal injection protocol be adjudicated on a "fully developed record addressing the specific merits of the challenge.") *Id.* at 3, *quoting, State v. Stephen West*, No. M1987-00130-SC-DPE-DD, Order Filed November 29, 2010.

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[1] Similarly, Defendants' supplement to the original Rule 10 does not present a justiciable matter. The supplement complains about the Chancellor's limited grant of discovery. While Plaintiffs' believe the Chancellor erred in denying discovery and limiting the scope of the evidence in this case and further that the limited grant of discovery mid-trial is not sufficient to cure that error, the time for those arguments is in a Rule 3 appeal.

[2] The June 25, 2015 protocol differs in material respects from the protocol attached to the initial complaint and from that which was before the Tennessee Supreme Court when they decided *West v. Schofield*, 460 S.W. 3d 113 (Tenn. 2015). The protocol attached to the Defendants' application is **not** the protocol at issue in the trial.

Prior to trial, Plaintiffs sought and were denied discovery of information about ambiguities and gaps in the protocol. Defendants later admitted that the written protocol does not "account for all circumstances that arise during an execution." Plaintiffs promptly filed a motion to reconsider the previous denial of discovery given Defendants' admission. Alternatively, Plaintiffs requested that the Court prohibit Defendants from presenting any evidence, inference, or testimony about the protocol other than the written document itself. *See* Plaintiffs' Motion to Reopen Discovery and Conduct Depositions or in the Alternative to Limit Defendants' Evidence Regarding the Tennessee Lethal Injection Protocol to the Contents of the Written September 24, 2014 Protocol and Contract Without Elaboration, filed June 15, 2015, Attachment 2. Defendants opposed both forms of relief arguing that they are entitled to present evidence at trial to explain "the meaning of the provisions or terms contained in the protocol." Response at 6, Attachment 3. They further argued that "Defendants clearly are permitted to present relevant evidence as to **how the Protocol's terms can and will be carried out[.]**" *Id.* (emphasis added).[3] Plaintiffs' motion was overruled.

The trial is now in its fourth week and the Chancellor, who is the trier of fact, has heard ten days of testimony from six expert witnesses and five lay witnesses. Four of the five lay witnesses are state employees who plaintiffs had no opportunity

[3] Defendants' newest protocol was adopted on June 25, 2015, after Defendants admitted that the written protocol was not comprehensive.

to interview or depose pre-trial.[4] As is typical in any trial, the Chancellor gained a firm grasp of the relevant facts. After carefully listening to the facts, the Court found on the record that:

> Plaintiffs have laid a foundation for their theory that the protocol as written will cause a substantial risk of serious harm to inmates based in part on ambiguities in the protocol and the absence of a plan for the ordering and handling of the pentobarbital, compounded pentobarbital.

July 14, 2015 Transcript, p. 10, Attachment 4.

The trial record, which is not before this Court, is replete with discussions regarding efforts made by Plaintiffs to avoid the need to call certain of the John Doe parties who possess relevant knowledge of "how the Protocol's terms can and will be carried out[.]" Moreover, the ultimate record on appeal will reflect the Chancellor's many limitations on proof and discovery based on the Supreme Court's March, 2015 opinion.[5] At the time that Plaintiffs announced their need to call the John Doe Executioner, the purpose was not to discover his/her identity or qualifications. His/her identity is known to Plaintiffs' counsel through other means. Likewise, Plaintiffs' counsel did not seek to discover the John Doe Executioner's qualifications. Those are also known to Plaintiffs' counsel. The simple fact is that John Doe Executioner is a fact witness who has relevant evidence.[6] The site visit was relevant to Plaintiffs' counsel for the reason that it would also assist Plaintiffs'

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[4] These witnesses, two of whom are named Defendants, are available to Defendants and their counsel.

[5] Plaintiffs have certainly complained about the Chancellor's reading of the opinion, Defendants' clear overreading of the opinion, and the fact that the *dicta* in the opinion about issues not raised or briefed has resulted in confusion during the course of the trial. Those issues are for another day.

[6] The trial court record will reflect that Defendants' counsel considered this evidence relevant and went so far as to attend a lethal injection practice session in order to obtain this knowledge.

in their case with their expert witnesses to establish "that the protocol as written will cause a substantial risk of serious harm to inmates based in part on ambiguities in the protocol and the absence of a plan for the ordering and handling of the ...compounded pentobarbital."

While Defendants pursued their appeal in this court, they elected to move forward with their evidence. Defendants did not expressly reserve the right to move to dismiss at the close of the Plaintiffs' case. Their decision made good sense in light of the fact that this is a bench trial, the matters are of great importance, and the facts are highly disputed.[7] During the course of Defendants' proof, they presented evidence that had previously been unavailable to Plaintiffs through the testimony of state actors who had refused to cooperate with Plaintiffs' requests for interviews and/or who are parties to this case. As a result of the additional proof, Plaintiffs decided to forego the site visit and executioner's testimony, not because the order allowing such was in error, but because Plaintiffs believe that they had been able to establish relevant facts through these state witnesses.[8]

When the Defendants announced that all of their proof, save one expert witness, was in, Plaintiffs moved to conform their complaint to the evidence and rested their case. The parties agreed that court would not again convene until July

[7] "'Following the denial of a Tenn. R. Civ. P 41.02(2) motion, the moving party may stand on its motion and bring an appeal or present its evidence; it cannot do both.'" *White v. Empire Exp., Inc.*, 395 S.W.3d 696, 719 (Tenn. Ct. App. 2012), quoting *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 484 (Tenn.Ct.App.1997).

[8] The fact that Plaintiffs were able to establish the relevant facts through these witnesses underscores the point that Plaintiffs had no intention of trying to present evidence of the identities and qualifications of the executioner.

24, 2015, when Defendants would present their last witness. Three days later, Defendants announced by email that they wanted to make and argue a motion to dismiss at the close of the Plaintiffs' case. Attachment 5, email communications. Plaintiffs notified the court that they would object to such a motion. *Id.* The Court gathered the parties for a scheduling conference call on Tuesday, July 21, 2015, and indicated that she would entertain the motion. That call was impromptu and not transcribed. The parties agreed to gather at 10:00 A.M. on July 22, 2015 for Defendants to argue their motion.

On July 22, 2015, the Court advised the parties that, "Now that the plaintiffs have laid out their proof and the plaintiffs' theories have 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." July 22, 2015 Transcript at 5, Attachment 3 to Rule 10 Supplement. The Court went on to find that "the lack of that discovery may prevent the plaintiffs from presenting all of the merits of their case." *Id.* at 8. The Court next carefully analyzed the *West* decision and case law regarding discovery, including mid-trial discovery.

While the Court made clear that the case would conclude by August 7 in compliance with the Tennessee Supreme Court's order, the Court ultimately ruled that the interests of justice would be served by permitting limited discovery of three witnesses, two of whom (Schofield and Westbrooks) are parties and two of whom (Westbrooks and Inglis) have testified, and all of whose identities are known. The Court reasonably observed, "I certainly 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." *Id.* at p. 24.

Defendants sought a stay of the Court's July 22, 2015 order which this court denied on July 23, 2015. The depositions will have concluded by the time this Court rules on the instant application.

On July 24, 2015, Plaintiffs asked the Chancellor to formally vacate her order permitting Plaintiffs to call the John Doe Executioner and to conduct a site visit. The Chancellor entered the order, though she made clear that she was in no way seeking to influence appellate proceedings. Attachment 1, July 24, 2015 Order, and Attachment 6, July 24, 2015 Transcript.

LEGAL ARGUMENT

I. DEFENDANTS' APPLICATION IS NOT JUSTICIABLE

The Tennessee Supreme Court recently held in Defendants' second interlocutory appeal in this case that "Tennessee courts decide only legal controversies ... and a legal controversy exists when the disputed issue is real and existing, and not theoretical or abstract, and when the dispute is between parties with real and adverse interests." *West v. Schofield*, No. M2014-02478-SC-R10-CV, Slip op. at 9 (Tenn. July 2, 2015) (internal citations omitted). Put simply, there is no legal controversy for this Court to settle. The executioner is not going to be called, the site visit is not going to happen, and this Court has already ruled that the depositions can move forward. The evidence in this case is almost complete, and the trial will end by August 7, 2015. Any party who disputes certain evidence as

irrelevant can raise those complaints in the appeal that will most certainly follow in due course.

The most recent *West* decision explains:

> To determine whether a particular case involves a legal controversy, Tennessee courts use justiciability doctrines that "mirror the justiciability doctrines employed by the United States Supreme Court and the federal courts," and these doctrines "include: (1) the prohibition against advisory opinions, (2) standing, (3) ripeness, (4) mootness, (5) the political question doctrine, and (6) exhaustion of administrative remedies." Id. (footnotes omitted). Without justiciability doctrines, " 'the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.' " *Am. Civil Liberties Union of Tenn. v. Darnell*, 195 S.W.3d 612, 620 (Tenn.2006) (quoting *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

Id. Defendants' claims are unripe, moot, and seek an advisory opinion from this Court.

A. Ripeness

"The central concern of the ripeness doctrine is whether the case involves uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all." *West, supra,* p. 10, quoting *B & B Enters.*, 318 S.W.3d at 848 (citing *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 479–80, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990)). Here, the events (executioner testimony and site visit) will not occur. Defendants claim, without support, that they are somehow still subject to the Chancellors' order. Not only is this contention hypothetical and speculative, it is flatly wrong based on the record.

B. Mootness

Defendants' filings in this Court make it clear that the issues presented are moot.

> A moot case is one that has lost its character as a present, live controversy. *McIntyre v. Traughber*, 884 S.W.2d 134, 137 (Tenn. App. 1994). It seeks a judgment on a matter that, when rendered, cannot have any practical effect upon a then-existing controversy; one in which no relief can be granted; or one in which the judgment rendered cannot be carried into effect. *Boyce v. Williams*, 389 S.W.2d 272, 277 (Tenn. 1965).

Defedants' Response to Plaintiff-Appellees' "Notice that Pending Motion for Rule 10(D) appeal is now moot" at 2. Defendants complain about three things: executioner testimony; site visit; limited depositions of known parties.[9] The first two are not going to happen as a matter of fact and as such any decision by this Court will have no practical effect. The Court has already ruled that the depositions can proceed and they will have been completed by the time that this Court rules. Thus, the matter has lost all character as a current live controversy.

C. Advisory Opinion

Defendants write, "Given the fluidity of the chancery court's rulings throughout this proceeding, the controversy before this court –which encompasses the scope of its authority under the Declaratory Judgment Act, not to mention the Supreme Court's mandate on remand--remain alive." Resp. at 2. Defendants' apparent disrespect for the Chancellor aside, this argument does not establish ripeness. Rather, it underscores that Defendants' seek an impermissible advisory

[9] Plaintiffs in no way waive their requests for discovery and request to present additional testimony. Those matters are more properly addressed on appeal with the benefit of a fully developed record.

opinion in order to influence the outcome of the trial. The true motive of the Defendants is laid plain in their latest filing. In their "Supplement" to their Rule 10 application, the Defendants complain 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." Supplement at p. 7. Such hyperbole is both untrue and unwarranted.

The pace of this trial is difficult on all parties, but the schedule was set by the Tennessee Supreme Court and neither the Chancellor nor the parties have control over it. The trial started on July 7 by agreement and all significant delays in the testimony have been at the request of the Defendants. Defendants fail to explain how they could possibly be ambushed by testimony that comes from the Defendants themselves or their agents.[10]

The Chancellor has repeatedly stated that she will be viewing the evidence presented at trial through the lens of the Supreme Court's opinion and limiting her decision to a facial challenge to the protocol. There is no reason to believe that she will violate her oath. The aggrieved party can and will appeal from an adverse judgment.

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[10] Defendants' trial counsel's failure to interview his own clients is not an ambush.

II. DEFENDANTS' APPLICATION FAILS TO MEET THE STANDARD UNDER RULE 10

Defendants describe their application as one that seeks review of a lower court order "related to the relevance and admissibility of proof in a trial that is ongoing." Response to Plaintiff-Appellees' "Notice that a Pending Motion for Rule 10(D) Appeal is Now Moot" at 2. Evidentiary rulings such as these are inappropriate for interlocutory appeal.

Tenn. R. App. P. 10 states:

> An extraordinary appeal may be sought on application and in the discretion of the appellate court alone of interlocutory orders of a lower court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals: (1) if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or (2) if necessary for complete determination of the action on appeal as otherwise provided in these rules.

Tenn. R. App. P.10(a). Appeals granted under Rule 10 are extraordinary in nature. The Advisory Comment for Rule 10(a) adds:

> The circumstances in which review is available under this rule, however, are very narrowly circumscribed to those situations in which the trial court or the intermediate appellate court has acted in an arbitrary fashion, or as may be necessary to permit complete appellate review on a later appeal.

The standards governing the common law writ of certiorari apply to Rule 10 applications. *State v. Willougby*, 594 S.W.2d 388, 392 (Tenn. 1980); *see also Cooper v. Williamson County Board of Education*, 746 S.W.2d 176, 178-79 (Tenn. 1987) (discussion of the differences between the common law writ of certiorari and the statutory writ of certiorari). The Court in *Willougby* held under these standards,

an appellate court can grant a Rule 10 application **only if** (1) the lower court's ruling represents a fundamental illegality; (2) the lower court's ruling constitutes a failure to proceed according to the essential requirements of the law; (3) the lower court's ruling is tantamount to a denial of a party's day in court; (4) the lower court did not have legal authority to take the action it took; (5) the lower court's action constituted a plain and palpable abuse of discretion; or (6) a party lost a right or interest that it cannot recapture. *Willoughby*, 594 S.W.2d at 392. The Courts in this State are clear: "Before an extraordinary appeal will be granted, the party appealing must establish (one of the *Willoughby* factors)." *State v. Headrick*, 2009 WL 4505440 at *8 (Tenn.Crim.App. 2009).

Defendants' Rule 10 application fails to discuss the *Willoughby* factors in any meaningful way. Defendants' Rule 10 application fails to carry its burden, and this Court should deny it for that reason alone. In point of fact, none of the *Willoughby* factors are implicated.

The trial court's admission of relevant evidence is well within its purview and not an interlocutory matter for an appellate court. This Court should properly allow the trial court to continue toward disposition of the complaint without undue interference. Indeed, where the trial court has been put under time constraints to decide this matter, this Court ought not "unilaterally interrupt a trial court's orderly disposition of a case." *Gilbert v. Wessels*, 458 S.W.3d 895, 898 (Tenn. 2014).

Rather, the standards for a Rule 10 appeal are exacting and extraordinary, and Defendants have not met that exacting standard. As the Tennessee Supreme Court explained in *Gilbert*,

> An appellate court should grant a Rule 10 extraordinary appeal only when the challenged ruling represents a fundamental illegality, fails to proceed according to the essential requirements of the law, is tantamount to the denial of a party's day in court, is without legal authority, is a plain and palpable abuse of discretion, or results in either party losing a right or interest that may never be recaptured.

Gilbert, 458 S.W.3d at 898.

Having engaged in an ordinary relevance determination, the trial court's ruling simply does not represent a "fundamental illegality." *Id.* Again, by applying relevancy appropriately, the trial court has not overlooked "the essential requirements of the law." *Id.* Nor has she denied Defendants their "day in court." *Id.* The chancellor is acting within her "legal authority," and this ruling on relevance – based upon careful consideration of the evidence before the trial court – does not represent a "plain and palpable abuse of discretion." *Id.* To be sure, a Rule 10 appeal may be granted when a "party" may los[e] a right or interest that may never be recaptured," (*Id.*) but the Defendants have not identified any interest that they *as parties* would lose if the trial proceeds as ordered by the chancellor. Rather, the Defendants can appeal as necessary upon the conclusion of the trial.

Under *Gilbert*, the Defendants simply have not established an extraordinary error by the trial court here requiring immediate intervention and the stopping of the trial, which proceeds under a tightly imposed deadline. "In this case, there was no extraordinary departure from the accepted and usual court of judicial

proceedings; the trial court adhered to established legal standards." *Gilbert*, 458 S.W.3d at 899.

In fact, the Tennessee Supreme Court has clearly held that a trial court must be given broad latitude to admit and consider relevant evidence. A trial court's consideration of such evidence is not the proper subject of a Rule 10 appeal. Thus, in *State v. Cowden*, 2011 Tenn.LEXIS 291, the Tennessee Supreme Court denied a Rule 10 appeal – even when the trial court's assessment of evidence was alleged to be erroneous, much like the situation here.

Rather, the Tennessee Supreme Court has held that "unless the trial court's alleged error qualifies for immediate review under the specific criteria indicated by Rule 10, *the appellate court must respect the trial court's discretionary decision not to grant permission to appeal under Rule 9 and refrain from granting a Rule 10 appeal.*" *Gilbert*, 458 S.W.3d at 899 (emphasis supplied). That is the precise situation here.

Accordingly, the Rule 10 application should be denied.

III. ENTERTAINING DEFENDANT'S APPLICATION WOULD SET A DANGEROUS PRECEDENT; ENCOURAGE ABUSIVE MID-TRIAL INTERLOCUTORY APPEALS; AND UNDERMINE THE IMPORTANCE OF THE ROLE OF TRIAL COURT IN OUR AJUDICATORY SYSTEM

The Chancellor is the trier of fact. This Court gives great deference to the trial judge. Interference with the trial judge at this point on the basis of an incomplete record is ill-advised and not legally supportable. Mid-bench-trial interlocutory appeals should be, and are, disfavored. *State v. Gilley*, 173 S.W.2d 1 (Tenn. 2005). If this Court were to accept the Defendants' application, the door

would be opened for other litigants who are unhappy with a particular ruling to seek this court's interference with a trial in progress. This flies in the face of our judicial architecture.

CONCLUSION

Defendants' do not present this Court with a justiciable controversy. Moreover, the Chancellor has been carefully listening to the evidence in this matter, sifting through any number of relevancy objections and upholding any number of such objections, while overruling others. This is precisely a trial judge does: She determines what matters are relevant to the issues before the court and, being the trier of fact, admits or denies the admission of such evidence, and then weighs the evidence. The Rule 10 appeal should be denied.

Respectfully submitted this 29th day of July, 2015.

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CERTIFICATE OF SERVICE

I, Kelley J. Henry, hereby certify that a true and correct copy of the foregoing document in Adobe PDF format was served via email and United States Mail postage pre-paid to:

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this the 29th day of July, 2015.

Kelley J. Henry
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ATTACHMENT 1

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST, *et al.*,

Plaintiffs,

v.

DERRICK D. SCHOFIELD, *et al.*,

Defendants.

No. 13-1627-I
Chancellor Bonnyman
Death Penalty Case

2015 JUL 24 PM 4:43

ORDER VACATING ORDER PERMITTING TESTIMONY OF JOHN DOE EXECUTIONER AND REQUEST FOR SITE VISIT

This matter, having come before the Court upon Plaintiffs' withdrawal of their oral motions to call the defendant John Doe Executioner as a witness in this matter and for a site visit of the execution facilities at Riverbend Maximum Security Institution, and the Court, having found its July 14, 2015 order allowing such requests to be ~~moot~~, it is hereby ordered that this Court's order allowing Plaintiffs to call the defendant executioner and allowing Plaintiffs to visit the execution facilities at Riverbend Maximum Security Institution, should be, and the same is hereby, vacated.

So ORDERED this ____ day of July, 2015.

CHANCELLOR CLAUDIA BONNYMAN
DAVIDSON COUNTY CHANCERY COURT, PART I

CERTIFICATE OF THE CLERK

A copy of this order has been served by Facsimile and U. S. Mail upon all parties or their counsel named below.

Julie Spencer, Deputy Clerk and Master — Date: 1/27/15

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ATTACHMENT 2

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST, *et al.*,

Plaintiffs,

v.

DERRICK D. SCHOFIELD, *et al.*,

Defendants.

No. 13-1627-I
Chancellor Bonnyman
Death Penalty Case

PLAINTIFFS' MOTION TO REOPEN DISCOVERY AND CONDUCT DEPOSITIONS OR IN THE ALTERNATIVE TO LIMIT DEFENDANTS' EVIDENCE REGARDING THE TENNESSEE LETHAL INJECTION PROTOCOL TO THE CONTENTS OF THE WRITTEN SEPTEMBER 24, 2014 PROTOCOL AND CONTRACT WITHOUT ELABORATION AND MEMORANDUM IN SUPPORT

COMES NOW the Plaintiffs' in this matter, by undersigned counsel, and move this Court to reopen the discovery in this case to permit the taking of limited depositions of witnesses whose testimony has been placed in issue by the recent responses to interrogatories and requests for admission, or in the alternative, for a pre-trial ruling that the Defendants in this case will not be permitted to present evidence, inference, or testimony regarding the Tennessee Lethal Injection Protocol other than the specific contents of the September 24, 2014 written protocol and written contract, without expansion or explication. In support of this Plaintiffs state the following:

1. Plaintiffs previously sought leave to take depositions of specified witnesses who Plaintiffs reasonably believed to have knowledge of unwritten customs, practices, protocols, and/or procedures that Defendants intend to follow in carrying out each Plaintiffs' execution. Defendants vehemently opposed these depositions stating that the protocol speaks for itself. Defendants have repeatedly represented to this Court and to Plaintiffs' that Defendants do not

have any unwritten customs, practices, protocols, and/or procedures for carrying out a lethal injection protocol. This Court relied heavily on Defendants representations to deny all discovery sought in this case.

2. On May 15, 2015, Plaintiffs' served Defendants a Request for Admission which asked Defendants to admit the following:

A. That the Tennessee Lethal Injection Protocol consists of the September 24, 2014 Execution Procedures for Lethal Injection and Agreement between the Riverbend Maximum Security Prison, Tennessee Department of Correction and _____, Pharmacist.

B. That the Tennessee Department of Corrections has no unwritten practices, procedures, customs, or protocols for carrying out executions in the State of Tennessee

C. That the Tennessee Department of Correction must exactly follow the September 24, 2014 Execution Procedures for Lethal Injection and Agreement between the Riverbend Maximum Security Prison, Tennessee Department of Correction and _____, Pharmacist in carrying out Plainttifs' executions.

D. That the Tennessee Department of Correction will not deviate in any way form the September 24, 2014 Execution Procedures for Lethal Injection and Agreement between the Riverbend Maximum Security Prison, Tennessee Department of Correction and _____, Pharmacist in carrying out Plainttifs' executions.

E. That the Tennessee Department of Correction has not withheld any portion of its lethal injection protocol from Plaintiffs other than the section regarding perimeter security at pp. 70-75 of the September 24, 2014 Execution Procedures of Lethal Injection.

3. Also on May 15, 2015, Plaintiffs served court authorized interrogatories on Defendants as follows:

INTERROGATORY NO. 4: What method will be used by the physician to make the declaration of death as described on pp. 18,48 and 64 of the September 24, 2014 Execution Procedures for Lethal Injection?

INTERROGATORY NO. 5: What medical instruments, implements, or tools will be accessible to the physician when he examines the inmates for death as described on pp.18, 48 and 64 of the September 24, 2014 Execution Procedures for Lethal Injection? Please describe in detail including where the instruments, implements or tools will be located.

INTERROGATORY NO. 6: Are there any contingency plans other than those contained on pp. 52, 56, and 66 of the September 24, 2014 Execution Procedures for Lethal Injection? If yes, please describe.

4. Defendants provided responses to the above listed discovery matters on June 15, 2015. Attachments A (Admissions) and B (Interrogatory Responses). The June 15, 2015 discovery responses of Defendants, together with the Affidavits of Debbie Inglis attached to Defendants June 12, 2015 Motion for Summary Judgment, as well as the position of Defendants' counsel in an email regarding witness disclosures, Attachment C,[1] call into question the validity of Defendants previous representations to this Court (and the Tennessee Supreme Court) that the Department of Correction does not possess unwritten protocols, practices, procedures, or customs that will be followed as part of the lethal injection protocol at issue in this case. For

[1] Attachments to this Motion will be filed by hand in the Clerk's Office on Monday, June 22, 2015 but are being provided via email to opposing counsel on this date.

example, in response to Request for Admission # 3, Defendants designee swore under oath, "Defendants deny that the Protocol does or can account for any and all circumstances for any and all circumstances arising during the course of an execution." Attachment A, p. 2. Defendants adopt this answer for Request for Admission #2 and #4 as well.

5. Plaintiffs have relied on the previous rulings of this Court and the in court representations of Defendants' counsel that the September 24, 2014 disclosed written protocol and contract define the entirety of Tennessee Lethal Injection Protocol. Now, Defendants appear to be abandoning their position. As a result, Plaintiffs have been prejudiced in preparing for expert depositions and witness disclosures and in having been denied discovery on key factual matters which are in dispute. Plaintiffs have already deposed both of Defendants expert witnesses and one of Plaintiffs experts has been deposed. One such deposition of Defendants' expert took place prior to Defendants responses to discovery. Two more of Plaintiffs experts will be deposed prior to any opportunity for Plaintiffs to address this matter with the Court.

6. Plaintiffs are entitled to relief as a result of this abrupt change in positions and to be permitted to prepare for trial. Plaintiffs see only one of two options. First, the Court can reopen discovery and permit Plaintiffs to take the depositions of four individuals who Plaintiffs reasonably believe have knowledge of unwritten practices and procedures that Defendants will use in carrying out lethal injection executions, to wit: Debbie Inglis, Derric Schofield, Tommy Vance, and Bruce Westbrook.[2] Alternatively, the Court can enter an order prohibiting Defendants from providing any explanation, explication, elaboration or evidence beyond the printed words of the September 24, 2014 Execution Procedures for Lethal Injection and

[2] Plaintiffs request the opportunity to present the reasons why these witnesses are believed to have relevant information in an in chambers hearing.

Agreement between the Riverbend Maximum Security Prison, Tennessee Department of Correction and _____, Pharmacist.

7. Failure to grant one of the two suggested measure of relief will deprive Plaintiffs of their rights to due process and a fair trial as guaranteed by the United States and Tennessee Constitution, as well as the protections afforded by the Tennessee Rules of Civil Procedure.

WHEREFORE, the motion should be granted.[3]

Respectfully submitted this 19th day of June, 2015.

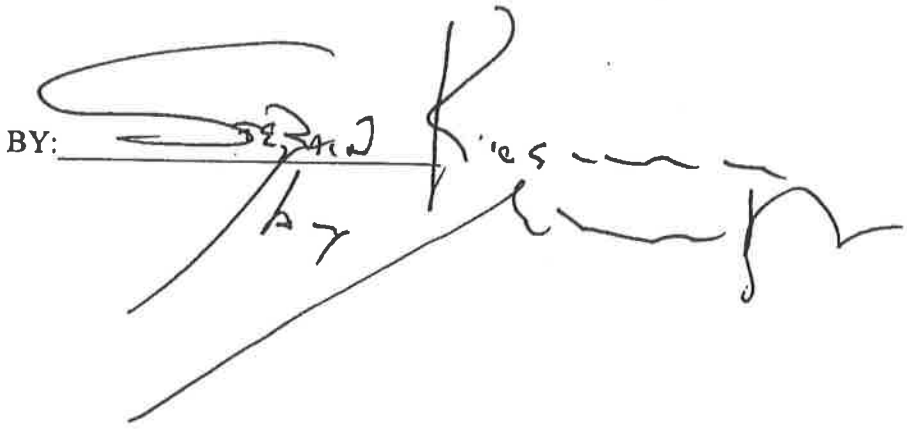
STEPHEN KISSINGER
SUSANNE BALES
Asst. Federal Community Defender
Federal Defender Services of Eastern Tennessee, Inc.
800 S. Gay Street, Suite 2400
Knoxville, TN 37929

C. EUGENE SHILES, JR.
Attorney at Law
WILLIAM J. RIEDER
Attorney at Law
SPEARS, MOORE, REBMAN & WILLIAMS, P.C.
801 Broad Street, Suite 600
PO Box 1749
Chattanooga, TN 37404-1749

KELLEY J. HENRY, BPR# 21113
Supervisory Asst. Federal Public Defender
MICHAEL J. PASSINO, BPR# 005725
Asst. Federal Public Defender
Federal Public Defender for the
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047
Fax: (615) 736-5265

[3] This motion was prepared with great haste owing to the urgency of the matters presented herein. Plaintiffs reserve the right to supplement this motion at the hearing on the matter or with a written supplement as time permits.

KATHLEEN MORRIS
42 Rutledge Street
Nashville, TN 37210-2043

BY: 

THIS MOTION WILL BE HEARD ON

FRIDAY, JUNE 26, 2015, AT 1:00 PM

This notice of a hearing is filed pursuant to Local Rule 26.03(a) and this Courts March 26, 2015 Case Management Order

NOTE: PER LOCAL RULE 26.04 AND THE COURTS MARCH 26, 2015 CASE MANAGEMENT ORDER IF YOU OPPOSE THIS MOTION YOU MUST FILE A WRITTEN RESPONSE WITH THE COURT BY WEDNESDAY, JUNE 24, 2015 IN ACCORDANCE WITH THE PROCEDURES SET FORTH IN THE CASE MANAGEMENT ORDER. **IF NO RESPONSE IS TIMELY FILED AND PERSONALLY SERVED, THE MOTION SHALL BE GRANTED AND THE PARTIES NEED NOT APPEAR IN COURT AT THE TIME AND DATE SCHEDULED FOR THE HEARING.**

CERTIFICATE OF SERVICE

I, Michael J. Passino, pursuant to Tenn. R. Civ. P. 5.02 and the Court's March 26, 2015 Case Management Order, and agreement of the parties hereby certify that a true and correct copy of the foregoing document in Adobe PDF format was served via email to:

Scott Sutherland
Linda Kirklen
Assistant Attorneys General
Office of the Attorney General of Tennessee
P.O. Box 20207
Nashville, TN 37202

this the 19th day of June, 2015.

Michael J. Passino
Asst. Federal Public Defender

Attachment A

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE

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

DEFENDANTS' ANSWERS TO PLAINTIFFS' REQUESTS FOR ADMISSIONS

Defendants submit the following Answers to Plaintiffs' Requests for Admissions pursuant to Tenn. R. Civ. P. 33 and L.R. 22.04 and pursuant to the Court's direction,

1. Admit that the Tennessee Lethal Injection Protocol consists of the September 24, 2014 Execution Procedures for Lethal Injection and Agreement between Riverbend Maximum Security Prison, Tennessee Department of Correction and _____, _____, Pharmacist.

RESPONSE: Admit.

2. Admit that the Tennessee Department of Correction has no unwritten practices, procedures, customs, or protocols for carrying out executions in the State of Tennessee.

RESPONSE: See Defendants' answer to Plaintiffs' Interrogatory No. 3.

3. Admit that the Tennessee Department of Correction must exactly follow the September 24, 2014 Execution Procedures for Lethal Injection and Agreement between Riverbend Maximum Security Prison, Tennessee Department of Correction and _____ _____, Pharmacist in carrying out Plaintiffs' execution.

RESPONSE: Defendants deny that the Protocol does or can account for any and all circumstances arising during the course of an execution. The Protocol provides at p. 1 as follows:

> This manual contains a summary of the most significant events and departmental procedures to be followed in the process of carrying out the orders of the Court regarding the imposition of death by lethal injection. It contains a detailed listing of some of the duties and responsibilities of certain key departmental personnel. In addition, the manual covers institutional perimeter security prior to, during, and subsequent to an execution.
>
> It will be used as a guideline for the Warden to assure that the operational functions are properly planned with the staff who have designated responsibilities in performing a judicially ordered execution by lethal injection.

The Protocol further provides for the following directive from Defendant Derrick Schofield, Commissioner, Tennessee Department of Correction at p. 5:

> In the capacity as Commissioner, it is my duty by law to oversee the humane and constitutional execution of individuals sentenced to death by judicial authority in Tennessee. This manual explains the procedures for lethal injection.

4. Admit that the Tennessee Department of Correction will not deviate in any way from the September 24, 2014 Execution Procedures for Lethal Injection and Agreement between Riverbend Maximum Security Prison, Tennessee Department of Correction and _____, Pharmacist in carrying out Plaintiffs' execution.

RESPONSE: See Answer to Request for Admission No. 3.

5. Admit that the Tennessee Department of Correction has not withheld any portion of its lethal injection protocol from Plaintiffs other than the section regarding perimeter security at pp. 70-75 of the September 24, 2014 Execution Procedures for Lethal Injection.

RESPONSE: Admit.

Charles C. Taylor, Jr. Chief of Staff/Acting Commissioner
Tennessee Department of Corrections

Oath

State of Tennessee)

County of Davidson)

I, Charles C. Taylor, Jr., after first being duly sworn according to law, make oath that the above response to the Interrogatories propounded by Plaintiffs is true to the best of my knowledge, information and belief.

Charles C. Taylor, Jr. Chief of Staff/Acting Commissioner
Tennessee Department of Corrections

Sworn to and subscribed before me this the 15th day of June, 2015.

NOTARY PUBLIC

My Commission Expires: 07-02-2015

MARCIA E. CAMPEY STATE OF TENNESSEE NOTARY PUBLIC DAVIDSON COUNTY, TENN.

CERTIFCATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded via first-class U.S. Mail, postage prepaid, to:

Stephen M. Kissinger
Susanne Bales
Federal Defender Services of Eastern Tennessee, Inc.
800 S. Gay Street, Ste. 2400
Knoxville, TN 37929

Kelley J. Henry
Michael J. Passino
Assistant Federal Public Defenders
810 Broadway, Ste. 200
Nashville, TN

Carl Gene Shiles, Jr.
William J. Reider
Shiles, Spears, Moore, Rebman & Williams
801 Broadway Street, Ste. 600
P.O. Box 1749
Chattanooga, TN 37201

Kathleen Morris
42 Rutledge Street
Nashville, TN 37210-2043

on this 15th day of June, 2015.

Scott C. Sutherland
Assistant Attorney General
BPR # 29013

Attachment B

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE

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

DEFENDANTS' ANSWERS TO PLAINTIFFS' INTERROGATORY NOS. 4-6

Defendants submit the following Answers to Plaintiffs' Interrogatory Nos. 4-6 pursuant to Tenn. R. Civ. P. 33 and L.R. 22.04 and pursuant to the Court's direction,

INTERROGATORY NO. 4: What method will be used by the physician to determine whether to make the declaration of death as described on pp. 18, 48 and 64 of the September 24, 2014 Execution Procedures for Lethal Injection?

ANSWER: The physician will utilize a method for determination and declaration of death under the Protocol utilizing accepted medical standards in the practice of medicine for making such determinations.

INTERROGATORY NO. 5: What medical instruments, implements, or tools will be accessible to the physician when he examines the inmates for death as described on pp. 18, 48 and 64 of the September 24, 2014 Execution Procedures for Lethal Injection? Please describe in detail including where the instruments, implements or tools will be located.

ANSWER: The physician will have access to all instruments, implements, or tools specifically referenced in the Protocol and any other instrument, implement or tool the physician determines is necessary for making a determination and declaration of death under accepted medical standards in the practice of medicine for making such determinations.

INTERROGATORY NO. 6: Are there any contingency plans other than those contained on pp. 52, 56, and 66 of the September 24, 2014 Execution Procedures for Lethal Injection? If yes, please describe.

ANSWER: Contingency plans are enumerated in the Protocol. There are no specific contingency plans other than those set forth in the terms of the Protocol.

Charles C. Taylor, Jr. Chief of Staff/Acting Commissioner
Tennessee Department of Corrections

Oath

State of Tennessee)

County of Davidson)

I, Charles C. Taylor, Jr., after first being duly sworn according to law, make oath that the above response to the Interrogatories propounded by Plaintiffs is true to the best of my knowledge, information and belief.

Charles C. Taylor, Jr. Chief of Staff/Acting Commissioner
Tennessee Department of Corrections

Sworn to and subscribed before me this the 15th day of June, 2015.

NOTARY PUBLIC

My Commission Expires: 07-03-2017

MARCIA E. CAMPEY
STATE OF TENNESSEE
NOTARY PUBLIC
DAVIDSON COUNTY, TENN.

CERTIFCATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded via first-class U.S. Mail, postage prepaid, to:

Stephen M. Kissinger
Susanne Bales
Federal Defender Services of Eastern Tennessee, Inc.
800 S. Gay Street, Ste. 2400
Knoxville, TN 37929

Kelley J. Henry
Michael J. Passino
Assistant Federal Public Defenders
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Nashville, TN

Carl Gene Shiles, Jr.
William J. Reider
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801 Broadway Street, Ste. 600
P.O. Box 1749
Chattanooga, TN 37201

Kathleen Morris
42 Rutledge Street
Nashville, TN 37210-2043

on this 15th day of June, 2015.

Scott C. Sutherland
Assistant Attorney General
BPR # 29013

Attachment C

Re: Written Discovery issue

Stephen Kissinger to: Scott C. Sutherland, Linda.Kirklen 06/03/2015 04:41 PM
Cc: Kelley Henry, "Kelly Gleason", Michael Passino, Susanne Bales

History: This message has been forwarded.

Dear Scott,

Thank you for your email and your input at today's hearing: I believed the Court's protective order was far broader than it actually was.

Here is a list of the persons who may be called in support of Plaintiffs' claims alleging that the State of Tennessee regularly follows certain practices and procedures in carrying out executions by lethal injection that are not set out in Tennessee's written execution protocol. Each of these persons is believed to have either direct or indirect knowledge of, *inter alia*, the procedures and practices followed during the monthly "training" sessions, the practices and procedures followed in selecting the executioner who will carry out our clients' executions, the practices and procedures surrounding requirements regarding skills and qualifications of those persons who will actually carry out our clients' executions notwithstanding the provisions of Tennessee's written execution protocol., and/or the specific acts that each such person will perform during our clients' executions, the practices and procedures regarding the pronouncement of death and removal of the condemned inmate following the execution of sentence.

Allow me to add that the description of the scope of their potential anticipated testimony may well be incomplete as Defendants sought and obtained an order preventing discovery of such matters. Moreover, because discovery was not allowed and because this information is within the exclusive control of the State of Tennessee, a broad request for additional information in light of the court's protective order is, as we stated in our objection, unduly burdensome and oppressive.

Allow me to also add that some of these witnesses are identified only by general description. The general nature of that identification is also due to the fact that Defendants sought and obtained an order preventing discovery of such matters. Moreover, because discovery was not allowed and because this information is within the exclusive control of the State of Tennessee, a broad request for additional information in light of the court's protective order is, as we stated in our objection, unduly burdensome and oppressive.

Allow me to also add that the addresses and telephone number of these witnesses may also be incomplete. I have provided those addresses of which I am aware. Because discovery was not allowed and because this information is within the exclusive control of the State of Tennessee, a broad request for additional information in light of the court's protective order is, as we stated in our objection, unduly burdensome and oppressive.

Regarding your request for production of documents, to the extent that this refers to documents relevant to lay witnesses, all such documents were introduced during the *West* litigation and are already in your possession.

Finally, I apologize for my misunderstanding of the scope of the Court's protective order. Given the fact that each witness identified herein is a current or former employee of the State of Tennessee, I am sure you will have no problem speaking with them in time to complete your trial preparation.

Witnesses:

Frank Bainbridge - FORMER TDOC INSTITUTIONAL CHAPLAIN,
Ricky Bell - 546 Beech Grove Way, Burns TN
Wayne Carpenter - Tennessee Department of Correction, Rachel Jackson Building, 6th Floor, Nashville, TN 37243
Roland Colson - Bethel University, College of Public Service, 16035 Higland Dr, McKenzie, TN

Mike Crutcher - former RMSI ADW - current address unknown
Stanton Heidle - Tennessee Department of Correction, Rachel Jackson Building, 6th Floor, Nashville, TN 37243
Debbie Inglis - Tennessee Department of Correction, Rachel Jackson Building, 6th Floor, Nashville, TN 37243
Jenny Jobe-Morgan County Drug Court, 415 S. Kingston St, Wartburg, TN 37887
Carolyn Jordan- Tennessee Department of Correction, Rachel Jackson Building, 6th Floor, Nashville, TN 37243
Ernest Lewis -Tennessee Department of Correction, Rachel Jackson Building, 6th Floor, Nashville, TN 37243
Lester Lewis-current address unknown but believed to be in Kentucky, former TDOC Medical Director
Tony Mays-Tennessee Department of Correction, Rachel Jackson Building, 6th Floor, Nashville, TN 37243
David Mills-Arkansas Department of Correction, Delta Unit, 880 East Gaines, Dermott Arkansas
Tony Parker-Tennessee Department of Correction, Rachel Jackson Building, 6th Floor, Nashville, TN 37243
Derrick Schofield-Tennessee Department of Correction, Rachel Jackson Building, 6th Floor, Nashville, TN 37243
Jennifer Smith-Tennessee Attorney General's Office, 425 Fifth Avenue North, Nashville, TN
Tommy Vance-Tennessee Department of Correction, Rachel Jackson Building, 6th Floor, Nashville, TN 37243
Bruce Westbrook-Tennessee Department of Correction, Rachel Jackson Building, 6th Floor, Nashville, TN 37243
All John Doe Defendants relevant to Plaintiffs un-dismissed lethal injection causes of action not otherwise specified

If you have any questions or concerns, please do not hesitate to contact me as it appears that our dispute over your discovery requests is at an end.

Stephen M. Kissinger
Assistant Federal Community Defender
Federal Defender Services of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, TN 37929-9714
865.637.7979 (office)
865.637.7999 (fax)

"Scott C. Sutherland" Steve, I am writing to confer with Plaintiffs' co... 06/01/2015 02:35:29 PM

From: "Scott C. Sutherland" <Scott.Sutherland@ag.tn.gov>
To: Stephen Kissinger <Stephen_Kissinger@fd.org>,
Cc: Michael Passino <Michael_Passino@fd.org>, "Kelley Henry (Kelley_Henry@fd.org)" <Kelley_Henry@fd.org>, "'Kelly Gleason' (GleasonK@tnpcdo.net)" <GleasonK@tnpcdo.net>, "Gene Shiles (CES@SMRW.com)" <CES@SMRW.com>, "William J. Rieder (WJR@SMRW.com)" <WJR@SMRW.com>
Date: 06/01/2015 02:35 PM
Subject: Written Discovery issue

Steve,
I am writing to confer with Plaintiffs' counsel in compliance with Davidson County LR 22.08 in an attempt to resolve an issue with Plaintiffs' written discovery responses provided to the Defendants on May 11, 2015. It is my hope that we can come to agreement without the need to file a motion for an order compelling discovery.
Specifically, I call to your attention the following requests by Defendants and Plaintiffs'

responses:

Defendants' Interrogatory No. 2 requests the "name, address and telephone number of each individual likely to have discoverable information, along with the subjects of that information, which the Plaintiffs may use to support their claims."

Plaintiffs have objected stating that this request is "overly broad and burdensome and seeking irrelevant information."

First, the language of this interrogatory comes directly from the federal rules of civil procedure for required pre-trial disclosures, thus, this request is neither novel nor overly burdensome, nor does it seek irrelevant information.

Second, contrary to Plaintiffs' response, the Court has not held that Plaintiffs' may not challenge Tennessee's unwritten practices and procedures in carrying out the Protocol. The Court has merely held that Plaintiffs may not conduct discovery into this matter because they have failed to plead any specific facts in support of the existence of any unwritten, secret protocol(s) and the time for doing so has passed. Indeed, the Court invited Plaintiffs to submit through you as lead counsel, an affidavit stating what factual basis you have for believing such unwritten, secret protocols exist, identify what they are, and state how they violate Plaintiffs' rights. No such affidavit was filed.

Defendants have affirmed in an answer to the interrogatory the Court permitted that there are no unwritten, secret protocols, practices, etc. which will be used beyond what is in the Protocol.

If Plaintiffs intend to present any proof in support of the unsupported allegations in the current complaints at the hearing, Defendants are entitled to the information requested in Interrogatory No. 2 as to any such person so that they may depose such persons. If Plaintiffs are abandoning these allegations and do not intend to present any such proof, Defendants are entitled to know this in advance of filing dispositive motions.

We are requesting that Plaintiffs answer Interrogatory No. 2 as to persons with such knowledge of any unwritten practices, procedures, customs, secret protocol(s) that Plaintiffs may attempt to introduce at the hearing in this case or otherwise indicate whether no such proof will be offered through any such witness.

Defendants' Request for Production of documents No. 3 requests Plaintiffs produce "any document which any witness who may testify for the Plaintiffs at trial has reviewed as part of, or in any way forms the basis of his/her testimony."

Plaintiffs have objected citing the Court's case management order. However, the case management order only requires production of "exhibits." Defendants are asking Plaintiffs to produce documents specifically in relation to Defendants' Interrogatory No. 2, discussed above, that Plaintiffs do not intend to introduce, or to state there are no such documents that meet this request.

Since this matter needs to be resolved as soon as possible please let me know your position on this by close of business on Wednesday, June 3, 2015, so that we can prepare an appropriate motion if we cannot agree.

Thank you in advance.

Scott

Scott Crawford Sutherland
Assistant Attorney General
Prosecutions Team Leader
Law Enforcement and Special Prosecutions Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 532-7688 / scott.sutherland@ag.tn.gov

ATTACHMENT 3

ORIGINAL

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE

FILED
2015 JUN 23 AM 10: 14
CLERK & MASTER
DAVIDSON COUNTY CHANCERY COURT
D.C. & M.

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

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO REOPEN DISCOVERY OR IN THE ALTERNATIVE TO LIMIT DEFENDANTS' EVIDENCE REGARDING THE TENNESSEE LETHAL INJECTION PROTOCOL

Come the Defendants, by counsel, the Tennessee Attorney General and Reporter, to oppose "Plaintiffs' Motion to Reopen Discovery and Conduct Depositions or in the Alternative to Limit Defendants' Evidence Regarding the Tennessee Lethal Injection Protocol to the Contents of the Written September 24, 2014, Protocol and Contract Without Elaboration" as follows:

FACTUAL BACKGROUND

On March 10, 2015, the Tennessee Supreme Court stated that Plaintiffs' cause of action is a facial challenge to the Tennessee Execution Procedures for Lethal Injection ("Protocol") "*as written*" and the Protocol "must be assessed *on its face* against the constitutional challenges levied by the Plaintiffs." *West v. Schofield*, ____ S.W.3d ____, 2015 WL 1044099 at *9-10 (Tenn. 2015). (emphasis in original). In Lethal Injection Count I ("Count I") of Plaintiffs' current complaints, Plaintiffs allege that the Tennessee Execution Procedures for Lethal Injection ("Protocol") *and Defendants' unwritten practices* "create a substantial risk of unnecessary pain and suffering"

(Count I A), "cause a lingering death," (Count I B) and "disgrace a condemned inmate through the treatment of his still living body as if it were dead," (Count I C), in violation of the Eighth and Fourteenth Amendments. Throughout these proceedings, Plaintiffs, through counsel, have made repeated allegations that Defendants will employ unwritten practices and procedures in carrying out their executions by using terminology such as "unwritten protocol" (Transcript of Hearing, "TH," April 17, 2015, p. 10), "secret protocol" (*Id.*), "unwritten practices and procedures policies and customs" (*Id.*), and "the 45 day book" (TH, April 10, 2015, p. 45).

At a hearing on April 17, 2015, the Court ruled that the bare allegations in Plaintiffs' complaints alleging "unwritten practices," without more, are insufficient to merit seeking discovery from Defendants. (TH, April 17, 2015, pp. 78-80.) However, the Court stated that it would reconsider its ruling if Plaintiffs, through lead counsel, filed an affidavit stating (1) the nature of the secret protocol(s), (2) the factual basis for counsel's belief that a secret protocol(s) exists, and (3) how such unwritten practices cause or contribute to Plaintiffs' claims that the Tennessee Lethal Injection Protocol ("Protocol") violates the Plaintiff's constitutional rights. (TH, April 17, 2015, pp. 80-82.) To date no such affidavit has ever been filed with the Court; nor did Plaintiffs ever provide Defendants with any such specific information in response to requests for discovery.

The Court did permit Plaintiffs to propound Interrogatory No. 3 upon Defendants, to which Defendants agreed, that asked the following:

> Is there any other written or unwritten protocol, secret or known, including, but not limited to the 45 day book, which will be utilized by the Department of Corrections in carrying out executions by lethal injection as part of, or in addition to, the September 27, 2013, Execution Procedures for Lethal Injection?[1]

[1] As the Court and parties are aware, it is the Protocol, revised September 24, 2014, which is the subject of Plaintiffs' Amended Complaints.

(*See* Attachment A.) On April 27, 2015, Defendants provided an expedited response to Plaintiffs' Interrogatory No. 3 signed by David Bruce Westbrooks, Warden, Riverbend Maximum Security Institution stating:

> No. It is my duty under the Tennessee Execution Procedures for Lethal Injection Rev. September 24, 2014 (Lethal Injection Protocol), as warden, to insure that executions by lethal injection are performed only as prescribed by law and in accordance with the Lethal Injection Protocol.

In view of the above, Defendants have filed and noticed to be heard a motion *in limine* asking the Court to exclude evidence of alleged unwritten practices and procedures based upon the bare allegation in Plaintiffs' complaint as per the Court's April 17, 2015, ruling.[2]

On June 19, 2015, Plaintiffs filed the instant motion requesting that the Court reopen discovery to permit them to take depositions of state officials, yet again, to seek information in support of their allegations as to the existence of Defendants' unwritten practices and procedures in carrying out their executions.

ARGUMENT

In support of the instant motion, Plaintiffs suggest that Defendants' responses to their requests for admission and Interrogatories 4-5 support the bare allegations in their Amended Complaint, namely, that Defendants' will utilize some unwritten practices and procedures in carrying out their executions, and once again without any factual basis as to what such practices are or how their rights are violated, they should be permitted to conduct a fishing expedition to attempt to confirm their existence. Plaintiffs' motion to reopen discovery or alternatively, to limit Defendants' proof at trial is meritless and should be denied.

[2] In addition, Plaintiffs have served at least seven current and former state officials with subpoenas to appear and testify at trial for the purpose of seeking testimony in regard to alleged unwritten practices and procedures.

Plaintiffs' motion specifically relies upon Defendants' response to requests for admissions #3 and #4 in which Plaintiffs asked Defendants to admit the following:

> That the Tennessee Department of Corrections *must exactly* follow the September 24, 2014, Execution Procedures for Lethal Injection and Agreement between the Riverbend Maximum Security Prison, Tennessee Department of Correction and _____, Pharmacist in carrying out Plaintiffs' executions.
>
> That the Tennessee Department of Corrections *will not deviate in any way* from the September 24, 2014, Execution Procedures for Lethal Injection and Agreement between the Riverbend Maximum Security Prison, Tennessee Department of Correction and _____, Pharmacist in carrying out Plaintiffs' executions.

(emphasis added.) In response, Defendants have stated as follows:

> Defendants deny that the Protocol does or can account for any and all circumstances arising during the course of an execution. The Protocol provides at p. 1 as follows:
>
> > This manual contains a summary of the most significant events and departmental procedures to be followed in the process of carrying out the orders of the Court regarding the imposition of death by lethal injection. It contains a detailed listing of some of the duties and responsibilities of certain key departmental personnel. In addition, the manual covers institutional perimeter security prior to, during and subsequent to an execution.
>
> The Protocol further provides for the following directive from Defendant Derrick Schofield, Commissioner, Tennessee Department of Correction at p. 5:
>
> > In the capacity as Commissioner, it is my duty by law to oversee the humane and constitutional execution of individuals sentenced to death by judicial authority in Tennessee. This manual explains the procedures for lethal injection.

Defendants deny that their response to Plaintiffs' interrogatories or requests for admissions #3 and #4 somehow admit to the existence of some "secret," "unwritten" practice, procedure or protocol that is routinely used as part of Defendants execution procedures for lethal injection. As noted above, Plaintiffs have made the bare allegation without more that the Protocol *and* Defendants' unwritten practices and procedures violate their constitutional rights. This Court has correctly ruled that, without more, Plaintiffs may not conduct a fishing expedition to support their bare

allegations and has previously given them an opportunity to present the Court with information that would merit reconsideration of the Court's April 17, 2015, ruling. Plaintiffs have failed to do so and despite the Court's ruling, they continue to pursue evidence of an alleged "unwritten protocol" from Defendants.

Plaintiffs' motion presupposes that because the Protocol does not set forth every detail of the execution process that it is deficient and they should be entitled to challenge the Protocol on this basis. This argument has already been considered and rejected by Tennessee's appellate courts:

> Mr. Abdur'Rahman's medical expert also criticized Tennessee's protocol because it was "cobbled together by the warden" and because "the design of the protocol is not eloquently thought out." *He insisted that the lack of written detailed procedures regarding the handling, preparation, and administration of the drugs created an unacceptable risk that a prisoner would experience a painful death.* These arguments overlook the profound difference between the administration of drugs in a clinical setting and the administration of the same drugs to carry out an execution by lethal injection.
>
> Other courts have dismissed similar challenges to the completeness of lethal injection protocols. A lethal injection protocol is not constitutionally infirm simply because it does not specify every step of the procedure in explicit detail. *LaGrand v. Lewis,* 883 F.Supp. at 470; *Sims v. State,* 754 So.2d at 668.

Abdur'Rahman v. Bredesen, No. M2003-01767-COA-R3-CV, 2004 WL 2246227 at *16-17 (Tenn. Ct. App. Oct. 6, 2004), *affm'd*, 181 S.W.3d 292 (Tenn. 2005). (emphasis added). Thus, to the extent Plaintiffs contend that the Protocol fails to set forth every detail of the process related to their executions, they cannot show that it violates their rights. And to the extent they continue to allege that there is some other unwritten practice or procedure the Defendants will use that does, they have failed to follow this Court's direction in providing the necessary factual basis to permit discovery on the bare allegations in their Amended Complaint. Indeed the Court's previous ruling recognizes what the Supreme Court of Tennessee has already recognized in these proceedings:

> We are mindful that public officials in Tennessee are presumed to discharge their duties in good faith and in accordance with the law. *See, e.g., Reeder v. Holt,* 220 Tenn. 428, 418 S.W.2d 249, 252 (1967); *Mayes v. Bailey,* 209 Tenn. 186, 352 S.W.2d 220, 223 (1961) ("There is a presumption of good faith ordinarily accorded to public officials and quasi public officials."); *Jackson v. Aldridge,* 6 S.W.3d 501, 503 (Tenn.Ct.App.1999) (recognizing the presumption that "public officials perform their duties in the manner prescribed by law"); *State ex rel. Witcher v. Bilbrey,* 878 S.W.2d 567, 576 (Tenn.Ct.App.1994) ("Public officials ... are presumed to perform their duties in good faith and are also presumed to know and act in accordance with the law.") (internal citations omitted).

West, ___ S.W.3d at ___, 2015 WL 1044099 at *14. The motion to reopen discovery should therefore be denied.

Plaintiffs' alternative motion is equally meritless. Essentially, Plaintiffs seek to preclude Defendants from presenting any evidence to explain the meaning of provisions or terms contained in the Protocol. For example, presumably, Plaintiffs would suggest that because every detail of the procurement, storage and testing of lethal injection drugs is not set forth in detail in the Protocol, Defendants should be precluded from introducing relevant evidence to show how the drug is procured, stored and tested to comport with the requirements of the Protocol (*i.e.*, in accordance with professional standards, state and federal law, etc.). Of course, they fail to cite a single provision of law in support of this baseless request.

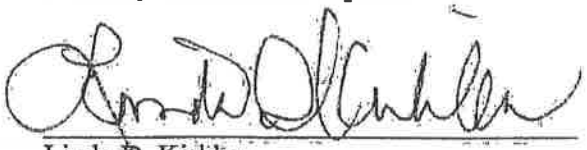
Plaintiffs alternative request overlooks a fundamental proposition of law set forth in the Tennessee Rules of Evidence: "All relevant evidence is admissible except as provided by the Constitution of the United States, Constitution of Tennessee, these rules, or other rules or laws of general application in the courts of Tennessee . . . ." Tenn. R. Evid. 402. As noted above, Defendants are not required to set forth every detail of the execution process in the Protocol. Defendants clearly are permitted to present relevant evidence as to how the Protocol's terms can and will be carried out in a manner which insures that Plaintiffs will be executed in a manner which

comports with the state and federal constitutions. Plaintiffs' alternative motion to limit the Defendants' proof at trial should be denied.

WHEREFORE, Defendants respectfully request that the Plaintiffs' motion to reopen discovery and alternative motion to limit the Defendants' proof to the words of the Protocol without explanation be denied.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter



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CERTIFCATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded via electronic mail and first-class U.S. Mail, postage prepaid, to:

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on this 23rd day of June, 2015.

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ATTACHMENT 4

ORIGINAL

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,	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 14, 2015

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I N D E X

* * * * *

THE COURT: All right, lawyers. I have had time to read the defendants' motion for authorization of Rule 9 interlocutory appeal and stay of testimony of the Tennessee Department of Correction employees, and I'm understanding this will now be argued. Will that be right? Do you plan to do that?

MR. SUTHERLAND: Just very briefly.

THE COURT: Okay.

MR. SUTHERLAND: Your Honor, I think it would be redundant for me to repeat the arguments I have already made, and I am going to rely on the writing.

I would point out that a part of this request is to stay the proposed proof as to TDOC employees and the site visit until the Appellate Court addresses this and to move forward with the proceedings that we can with the defendants' proof in the case. And for all the reasons that are stated in here, which I have I think said many times --

THE COURT: So we don't go back and forth, back and forth.

MR. SUTHERLAND: Yes, ma'am.

THE COURT: What is your witness availability and plan, given this change? What are you thinking?

MR. SUTHERLAND: Well, it depends on the Court's ruling. I'm prepared to --

THE COURT: Well, either way you want a stay. Regardless of what the Court does, you want a stay.

MR. SUTHERLAND: Yes, ma'am. If the Court grants the Rule 9 application and grants a stay, we'll be prepared to proceed in the morning. Dr. Li, I think, is available at 10:45.

THE COURT: And what else? And who else?

MR. SUTHERLAND: And then, as you know, the other witnesses we had indicated to the Court would be available Thursday morning. Dr. Evans and -- Dr. Dilliard, the executive director of the Tennessee Board of Pharmacy is in Washington and will be back and available to testify. He's been subpoenaed for Thursday morning.

And Dr. Evans leaves Washington tomorrow at 2:00 p.m. and will be available -- and will be flying to Nashville and will be available on

Thursday.

THE COURT: Who else is available?

MR. SUTHERLAND: And I think that's going to be --

THE COURT: That's it.

MR. SUTHERLAND: Yes. We may -- we will probably put on another witness unless the -- if we have to, just to introduce the 2010 protocol unless they may be willing to stipulate to put that in. But yes. So that'll be it, Your Honor. Dr. Li, Dr. Dilliard, and Dr. Evans.

THE COURT: Okay. That's good to know so I know what you're able to do. Thank you.

MR. KISSINGER: Your Honor, likewise, I don't want to take up a bunch of time repeating arguments which have already been provided to the Court. However, I would note that in terms of the issues raised in this petition, as well as many of the issues raised by the defendants in their opposition to us calling the executioner in the first place, were raised -- those were actually more addressed by myself back when we were in chambers, and I would incorporate the arguments that I made back

there rather than rehash them here.

As far as the -- particularly, the aspects of this motion, which really are attacks on the merit of our underlying claims rather than really a discussion of the relevance of the proposed evidence to the claims themselves, we feel that the Court has already made its decision on those issues and it's correct.

As to the -- as to the proposed schedule that the defendants have made, I don't know that we have an opposition to that schedule. I have an opposition to the Court granting a stay in this case because a stay isn't deserved. They haven't met the requirements for a stay.

I have a problem with the Court granting Rule 9 in this case because the standards for Rule 9 haven't been met. There's no -- there is no irreparable damage. There's no damage at all if this Court goes forward.

There is no way that the identity of this person will be revealed if we, if we employ the procedures that the Court has proposed. That is the rankest speculation I can imagine.

As for the chances of success on appeal, I believe the Court has correctly analyzed the

situation in this case, which is that the Court's order is not a violation of the West decision. It's not a violation of any other decision. And that our causes of action under -- our causes of action are perfectly valid. They state a claim.

The Tennessee Supreme Court said that these cases are to be decided on the basis of the facts presented in Tennessee courts and decided here. And that's what we're attempting to do here. But defendants in this motion, in their argument in chambers, same thing, which is this Court should rely on the decisions of other courts presented with other facts at other times. That's incorrect. It's incorrect as a matter of law.

And if we want to talk about a violation of the orders, the Supreme Court said it's a violation of the most fundamental order that the Supreme Court in this State has issued. That's the order in the original West case when they said decide this case based on the facts presented to you, Judge. Not on the basis of what other courts have said.

So, again, as I mentioned, I don't want to

stay on this subject. We've argued this pretty much to death through the course of this proceeding. But, certainly, Rule 9 is not justified under these circumstances. There's no damage. There is no substantial likelihood of success on appeal, and we oppose the granting of the Rule 9 motion.

We oppose the granting of the stay, but at the same time have no problem with if the defendants are -- will allow the plaintiffs to keep their case open and proceed with their proof in order to move this thing down the road, we're prepared to go with that procedure.

THE COURT: Okay. So, respectfully, the Court is denying the Rule 9 application because there is no irreparable harm. It has not been explained why it is that a site visit to the prison is going to cause any harm, much less irreparable harm.

As for the taking of the testimony of the executioner, the Court also does not find the irreparable harm in that regard because every effort that this Court can think of to protect the executioner's identity will be taken. Every effort will be taken.

And it has not been explained -- once the person's voice is obscured, it has not been explained or commented upon why the person's identity will be revealed in some way, especially since he's going to be testifying by telephone.

The decision of this Court is not adverse to the West decision that has been so thoroughly discussed, analyzed, and read. This is a facial challenge by the plaintiffs.

The plaintiffs are not seeking to show that there is a shadow protocol as the Court had understood earlier. Instead, the plaintiffs have laid a foundation for their theory that the protocol as written will cause a substantial risk of serious harm to the inmate based in part upon the ambiguities in the protocol and the absence of a plan for the ordering and handling of the pentobarbital, compounded pentobarbital.

The Court denies a stay as to the prison visit. The Court denies a stay as to the taking of testimony from the executioner. However, I see no reason not to give the State some time to make its case to the Appellate

Court. And regarding the testimony of the executioner, I see no harm in setting up an order of proof, in the absence of a stay, setting up an order of proof that this Court must be in charge of. It won't hurt either side but that takes up Dr. Li tomorrow, Dr. Dilliard Thursday, Dr. Evans Thursday. Maybe another minor, in terms of the period of time, minor witness on the State's part.

I am not going to make a commitment sitting here today -- we're all together today -- that the executioner's testimony will be taken on a particular day or a particular time.

I'd like to know and for the State to find out tonight when the executioner person can be available because I think it's under subpoena. Right? He's under subpoena.

And so he is subject to the Court's orders for him to come to court. But as we have treated every person who has testified, we're not going to make people give up their medical examinations and appointments that they have scheduled. We're not going to make them give up some sort of trip that they have to make or

maybe they are making right now. We just need to find out what his availability is and I think the State are obviously the people to do that. And the Court would appreciate very much having that information.

So I'm going to not issue a stay but thoughtfully try to address the order of the mode -- not the mode but the order of proof so that the State does have some time to address its concerns.

MR. SUTHERLAND: May I respond to that, Your Honor?

THE COURT: Yes.

MR. SUTHERLAND: I think I can say because I was going to say on behalf of the Attorney General we're going to request that but I don't have to do that because you said you would.

THE COURT: That seems reasonable.

MR. SUTHERLAND: We intend to seek immediate relief. And that process, I mean -- the same thoughtful process has gone into the Rule 9 that we gave you yesterday. It's already gone into a Rule 10 application.

So we intend to move for a stay in the Appellate Courts and file a Rule 10 and it will

happen as soon as we leave today. So it --

THE COURT: It's good.

MR. SUTHERLAND: We are not going to dilly dally.

THE COURT: Not going to sit around.

MR. SUTHERLAND: I do appreciate that. I have the individuals. I was provided with the contact information by Ms. Inglis so I have that and I will check on that.

THE COURT: Just let us know about that tomorrow.

MR. SUTHERLAND: Yes, ma'am, I'll do that.

THE COURT: Okay. Now, let's see.

MR. KISSINGER: Your Honor, just a minor housekeeping matter. Given the State's indication that they do intend to file a Rule 10, we'd ask that in terms of making a record on appeal complete, that the record contain a transcript of the chambers proceedings submitted under seal, as well as the transcripts of the arguments on the Rule 9 motion.

THE COURT: Okay. Now, let's think just a minute. The transcript of the in-chambers meeting was in chambers for several reasons. I

think by doing that -- and one reason was I did not want the plaintiffs or the State to be put in a position of setting out the proof that they might show because there might be witnesses in the courtroom who might be influenced. Their memories might be influenced. So that was one reason.

Can you help me with any other concerns that you might have?

MR. KISSINGER: I think that's why I thought to submit it under seal so that none of those concerns would be affected.

THE COURT: I'm just not sure it needs to be under seal. I'm just thinking about that.

MR. KISSINGER: Oh.

MS. HENRY: I think -- I don't mean to speak for Steve but I think the other issue was probably about the name. And since that's been taken care of, I don't know that we need it to be under seal unless the Court does.

THE COURT: So now, looking at the State, so much water has gone under the bridge after that meeting in chambers --

MR. SUTHERLAND: We don't have any objection to it being under seal. I think it

certainly needs to be a part of the record and it will be as will the Court's earlier ruling.

THE COURT: Anything that is placed under seal causes an administrative problem for the clerks.

MR. SUTHERLAND: I think so long as -- so long as there's not any reference to the name, I think, and --

THE COURT: The name was not referred to in chambers. I'm going to take a really short break here, like two or three minutes, go back and look at my notes and see what I think that chambers meeting was about so that I make sure I don't make a mistake. I would prefer not to have something under seal.

Now, if there were to be something coming up down the road later that should be placed under seal, I'm not prejudging to that. But I don't know what that might be.

MR. KISSINGER: Your Honor, we have no objection to it not being under seal.

THE COURT: Okay.

MR. KISSINGER: I think the concern that the Court expressed, again, you're right. This is all water under the bridge now. We've

probably gone through it a hundred times.

THE COURT: I just want to be sure I'm remembering correctly what we covered. And I'm going to go back and look at my notes and -- and I'll be right back.

(Break was taken at 4:24 p.m. until 4:28 p.m.)

THE COURT: Lawyers, I have assured myself that the in-chambers meeting did not address anything that was -- that is of concern. And I addressed two things with the help of the lawyers.

One was, what are the different ways the identity of the executioner could be -- what different ways could he be protected? And the Court has already decided that the telephone is going to be the best idea. But some other ideas were discussed.

And then the other issue was to ask the plaintiffs to address what they anticipated they might prove going forward in the case so -- or might show or plan to show going forward in their case with their fact witnesses.

So that being said, I see no reason to

seal. And so we discussed the Rule 10. We discussed the denial of the Rule 9, the denial of the stay, but a change in the mode of presentation of proof so that the State has a chance to move forward with its Rule 10. And is there anything else that should be addressed today?

MR. SUTHERLAND: Your Honor, I spoke to our office. And due to the hour, we were on the phone in anticipation of the possibility of the Court's ruling. Due to the late hour, it will be filed first thing in the morning.

THE COURT: Okay.

MR. SUTHERLAND: And I indicated that the Court had expressed a willingness to let us move on.

THE COURT: Now, something you might think about is, it's totally up to you and your timing and your office needs, but you might think about contacting the Appellate Court clerk because as I understand it all of the courts are open 24/7.

MR. SUTHERLAND: We have talked to the clerk.

THE COURT: Okay.

MR. SUTHERLAND: Or I say we. I haven't, but the clerk has been --

THE COURT: Okay. Well, the clerk may have said our office is closed at 4:30, just for example hypothetically. And so that doesn't mean where you can't file something.

MR. SUTHERLAND: I will follow up on the court hearing. Just so you know, we are not dilly dallying.

THE COURT: Oh, yes. And I understand that. I'm suggesting that to you as something that I have seen that they are very effective on occasion. Because I have every reason to want things resolved quickly. We want to be in the trial schedule the Supreme Court has given us and we'll do all that. Everybody here does.

MR. SUTHERLAND: Yes, ma'am.

THE COURT: So okay. I think we'll be finished today then. Unless there's something that the plaintiffs or the defendants think we can accomplish today in a half hour. Is there anything that could be accomplished today? Any other witnesses or anything like that?

MR. KISSINGER: No, Your Honor.

THE COURT: Okay. Then we will adjourn

and we will be back here at -- what time is Dr. Li available?

MR. SUTHERLAND: 10:45.

THE COURT: 10:45. Is there anything that could be done in the morning?

MR. KISSINGER: Not I can think of off the top of my head under the circumstances. Obviously, we'll be spending some of that time reviewing the Rule 10 motion.

THE COURT: Well, that's true. So you might need a little time. I know the State needs time.

But I guess I was hoping for your sake that there are people in your office who are working on this while you're here. I'm hoping that that's the case.

MR. SUTHERLAND: Absolutely, Your Honor.

THE COURT: That being the case, are you both just sort of saying you need to have that time off in the morning anyway?

MS. HENRY: Until 10:45.

MR. KISSINGER: I think until 10:45.

THE COURT: Well, let's be back here then at 10:45 to take up Dr. Li's proof. Thank you.

* * * * *

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 16th day of July 2015.

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

ATTACHMENT 5

RE: West v. Schofield-Defendants' Motion to Dismiss

Scott C. Sutherland to: Stephen Kissinger, JulieSpencer@jis.nashville.org

07/20/2015 10:52 AM

Cc: "Kelley Henry (Kelley_Henry@fd.org)", "Linda D. Kirklen", Michael Passino, Kathleen Morris, Susanne Bales

Ms. Spencer,

As the Court and counsel are aware, motions to dismiss at the close of the Plaintiffs proof are routinely made and heard in civil and criminal cases without briefing or scheduling. Since the Plaintiffs have formally rested the rules permit the Defendants to make a motion for dismissal under Tenn. R. Civ. P. 41.02 as the Court recognized in its June 30, 2015, Order Denying the State's Oral Motion for Leave to File and Set its Second Motion for Summary Judgment.

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-----Original Message-----
From: Stephen Kissinger [mailto:Stephen_Kissinger@fd.org]
Sent: Monday, July 20, 2015 10:39 AM
To: JulieSpencer@jis.nashville.org
Cc: Kelley Henry (Kelley_Henry@fd.org); Linda D. Kirklen; Michael Passino; Kathleen Morris; Susanne Bales; Scott C. Sutherland
Subject: Re: West v. Schofield-Defendants' Motion to Dismiss

Ms. Spencer,

Mr. Sutherland has requested a hearing on a motion which has yet to be made and for which he has allowed himself 6 days to prepare while expecting Plaintiffs to respond immediately upon its presentation to the Court.

Plaintiffs object to any hearing on such a motion being set without an order allowing them an equivalent amount of time to prepare their response.

Little or nothing is to be gained from halting this trial after Defendants have already presented three of their four anticipated witnesses and only one Defense witness remains. This remains true notwithstanding the State's claim that there are "concerns" regarding the length of Dr. Evans' testimony. In addition, allowing Defendants to pursue such a motion in such an expedited manner after most of their case, including one of their experts, has been heard, yet no rebuttal to that case has been presented, would place the Court in the untenable position of having to "un-ring the

bell" as to the substance of Defendants' case.

Accordingly, please inform Chancellor Bonnyman that Plaintiffs oppose Defendants' suggested hearing date, as well as their proposed procedure for consideration of their as yet un-filed motion.

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Date: 07/20/2015 09:48 AM
Subject: West v. Schofield-Defendants' Motion to Dismiss

Ms. Spencer,

Following the Plaintiffs' announcement that they rest their case at the end of the day on Friday the Defendants will be making an oral motion to dismiss pursuant to Tenn. R. Civ. P. 41.02. Since the Court has previously given the parties up to 30 minutes to argue such motions and in light of the concerns regarding the length of Dr. Evans' testimony on Friday, July 24, 2015, could you please ask Chancellor Bonnyman if she would like the parties to appear another day this week to argue the Defendants' motion and get back with us. Thank you.

Scott

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cid:image001.jpg@01C98CF9.31412CB0

ATTACHMENT 6

COPY

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 24, 2015

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I N D E X

* * * * *

THE COURT: So, lawyers, it's 4:10, and maybe we don't want to make big decisions on a late Friday afternoon. But this Court has been made aware that the Court of Appeals has issued another order. Everybody knows that. And so here's my question or comment.

When these depositions are taken, these three depositions are taken, I don't want there to be -- I don't want things to be slowed down or confused any more than maybe is just sort of normal.

But I read the Court of Appeals language in this case to mean that -- I will see if you think I'm right -- to mean that the subject matter to be addressed at the depositions may include discovery about gaps and ambiguities in the protocol.

That's what I think shadow and hidden protocol means, as well as any larger meaning it might have which has really not been present in this case as it's turned out.

MR. SUTHERLAND: May I respond, Your Honor?

THE COURT: Yes.

MR. SUTHERLAND: I would say this in response to what Your Honor has said. The other day, the Court, I thought, was very clear, Your Honor was very clear, in the reading into the record, what your perception of the plaintiffs' theory about hidden and shadow protocol was. That transcript was part of our supplemental application --

THE COURT: Okay.

MR. SUTHERLAND: -- and motion for stay. And as I recall what this Court said was is that the Court originally thought that the plaintiffs were talking about a hidden or shadow protocol, something different. And what the Court concluded is that that's not what we were dealing with. It's actually something else.

So my reading of -- my reading of this order is that -- or our reading -- is that it encompasses what this Court originally believed the plaintiffs' allegations were and that deposition discovery of that type of information would be appropriate. Other than that, it would not.

THE COURT: Okay. Well, I think -- and

I'll get the plaintiffs to comment too. I think that the word "hidden" is a pretty big word. It's a pretty big word.

But I don't want -- like I said, I don't want the parties to get bogged down into something that may delay the completion of the depositions.

So when do you have any depositions scheduled? Are there some scheduled yet?

MS. HENRY: So, Your Honor, Mr. Sutherland was kind enough yesterday afternoon to send us the preferences of the three witnesses and when they might be available. It was our thought that we would do all of them in one day.

Commissioner Schofield requested that his deposition preferably be Thursday afternoon. That was his preference. He is also available Tuesday.

We wanted to accommodate his preference in schedule. And so it was our thought that we would schedule all three that day. Mr. Scofield. We haven't noticed them, but thought that we would start with Mr. Westbrooks. Probably schedule him for

about an hour. Ms. Inglis and then Mr. Schofield. Given the limited nature of the depositions, it should very easily be able to be taken care of all in one day.

That would, I think, probably put us into requesting the Court for an opportunity to present rebuttal testimony the following Monday. Or -- Mr. Sutherland is going to be out of town all next week. I assume Mr. Sutherland wants to be present. We all have vacations. Mr. Passino is leaving August 1st.

THE COURT: I don't think we will be convening next week except for deposition purposes.

MS. HENRY: Thursday probably wouldn't delay anything. It seems a little late in the week but it seems important to accommodate Mr. Schofield.

THE COURT: If both parties are in agreement, I don't have any problem with that.

MR. SUTHERLAND: Well, understanding the Court's ruling, we don't agree with the scope of the depositions and we'll make appropriate

objections at the time, Your Honor. I would ask that if we could, that those be taken at the Department of Correction since we're dealing with the Commissioner and his general counsel, if we do those perhaps in a conference room at TDOC.

MS. HENRY: I didn't hear the rest of that.

THE COURT: Mr. Kissinger was listening.

MR. KISSINGER: We have no problem with that, Your Honor.

THE COURT: Take the depositions at the Department of Correction.

MR. KISSINGER: I assume he means at the Department, not out at Riverbend, right?

MR. SUTHERLAND: Downtown.

MR. KISSINGER: You have our agreement.

THE COURT: Well, you may have -- you lawyers may have a disagreement -- it may be a subtle one, it may be a nuanced one -- about what subjects can be or should be addressed at the discovery deposition. But it is a discovery deposition. And so you just go forward just like any discovery deposition, understanding that there is some

guidance by the Court of Appeals about what should be addressed.

And it's not surprising to think that one side of the case would read the subject narrowly and the other side would read it more broadly. That's not an uncommon issue in any case.

So you're all professionals. I should leave everything to your good judgment. I will be in chambers, hearing cases, trying other cases, doing telephone conference calls, preparing for motions, just like we do any other week.

But if I'm needed for some sort of ruling on the deposition, and I hope I won't be, but if I am I'll be there. Just one of you make a call.

It's just rare in the extreme for a deposition to actually be ended except for a privilege problem, except for privilege problems. But I will get on the telephone. If I can be helpful I will. Sometimes trial judges are not as helpful as they want to be because they are not present in the deposition, don't know the questions before, don't know the

questions answered, but I'll do my best.

Is there anything else that should be addressed before we break because we won't be back together until -- well, let's think about this just a minute.

I'm assuming that we'll reconvene on Monday, August 3rd, either for the plaintiffs to finish, for the State to argue their motions to dismiss, and then to be followed by rebuttal.

I do find that the State should be able to argue their motions to dismiss before rebuttal proof. And it makes it kind of implicit everything we've done.

So what do you think about August the 3rd?

MS. HENRY: Your Honor, if it would be okay with you, what I would suggest, given those parameters, is that could we plan on maybe August the 3rd and August the 4th, and that way we have our expert witnesses coming in on August the 3rd, and given the fact that arguments or motions and that sort of thing. We may not have any more proof on the 3rd, I don't know.

But in case we did, before we argued a

motion to dismiss, I hate for Dr. Ruble and Dr. Lubarsky to sit around all day on Monday only to testify on Tuesday.

THE COURT: Would it be too late for experts to make their plans -- if we had a telephone conference call on Thursday afternoon after the last deposition, to then decide who will be called on August 3rd, if anybody?

MS. HENRY: That'll be fine. Yes, ma'am.

THE COURT: Is that going to be early enough for everybody's experts to be available to you or for you to speak to your experts or whatever?

MS. HENRY: Yes, ma'am.

MS. KIRKLEN: Well, Your Honor, I guess the only question would be if we're doing depositions on Thursday, they think they would be finished by the time the Court would still be here to do the telephone conference.

MR. KISSINGER: Yes, Your Honor.

THE COURT: Well, somebody could call me in the afternoon to say we think we're going to be through at 6:00. I'll be here to 6:00

anyway. So I will be working on motions. If you're working, I work. Just tell me what the issue -- when are you going to finish and then we'll get together a telephone conference call.

Why don't we say tentatively that we will have a telephone conference call at 5:30 on Thursday afternoon. And if somebody wants to move that earlier or move it later, just give me a call.

MR. SUTHERLAND: Your Honor, am I excused from that teleconference?

THE COURT: You've got a cell phone. I'm teasing. Whatever Ms. Kirklen decides is what we'll do.

MR. KISSINGER: Your Honor, just one other minor thing. I did present that proposed order on the withdrawal. I don't know if the Court has had a chance to read it. And I'm not certain I interpret -- that I have interpreted Mr. Sutherland's comments correctly if I did. Maybe it's not an issue any longer. But if I didn't, it could still be an issue.

As I understood Mr. Sutherland, he didn't

consider -- he does not consider the fact that the Court hasn't actually entered an order vacating its prior decision to be a relevant consideration regarding the issue of mootness in the Court of Appeals.

If it isn't a relevant consideration, if the State is not going to argue that it's a relevant consideration, then, you know, I think everything is pretty clear we're not going forward with those people.

But if there is going to be some argument in the Court of Appeals that they're still subject to this Court's prior order, then I would ask the Court to enter the written order that was submitted earlier.

THE COURT: Well, the issue of mootness, as I understand it, is in front of the Court of Appeals right now. And I think they are probably thinking about it and trying to figure out what it means in this context.

So I'm not going to address mootness at all, because that's not in my -- that's not in my hands now. But I will be striking through that order that the Court's decision allowing the plaintiffs to call the executioner and

allowing the plaintiffs to visit is vacated.

MR. SUTHERLAND: I think that's fine, Your Honor. I don't think it changes our position. But I don't have a problem.

THE COURT: No, I don't think it does. I don't want to comment on mootness because I don't have -- what I'm thinking at this point doesn't matter.

MR. KISSINGER: We have no problem with that, Your Honor. Just as long as the order has been vacated.

THE COURT: I'll sign it. I will vacate it because the plaintiffs' request has been withdrawn. And I don't think the Court's order will be in effect anymore. So I don't think it's going to have any impact whatsoever and I don't want it to.

I do not want this order to have any impact on what -- or to be seen as having an impact on what the Court of Appeals might decide. So all right.

So that having been done, the latest order that this Court is aware of was filed today. And I don't know what time, but I think it was around lunchtime, is how it appears. And I'm

not aware of any other orders.

Is anybody aware of any other orders from the Court of Appeals?

MR. SUTHERLAND: The defendants are not.

THE COURT: Okay. All right, sir. So we're now adjourned. And I will look forward to talking with all of you on the telephone conference call on Friday at 5:30 -- Thursday at 5:30. And I'll need to figure out some way to make sure that call gets made and how -- so Ms. Spencer is going to help me make sure that telephone is available because all the staff won't be here until 5:30.

MR. SUTHERLAND: Your Honor, you are striking through the language in the order?

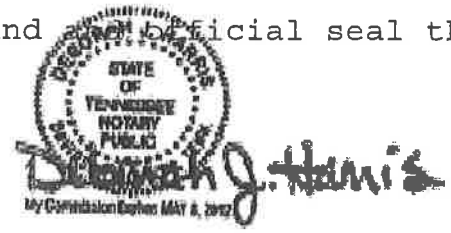
THE COURT: I am. All right. Thank you. We are now adjourned.

(Proceedings were concluded at 4:25 p.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 27th day of July 2015.



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