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IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

2010 NOV 22 PM 2:45
FILED

STEPHEN MICHAEL WEST,	)	
Plaintiff	)	
BILLY RAY IRICK,	)	No. 10-1675-I
Plaintiff/Intervener	)	**DEATH PENALTY CASE**
	)	**Chancellor Bonnyman**
v.	)	**EXECUTION SCHEDULED:**
	)	**November 30, 2010**
GAYLE RAY, in her official capacity as Tennessee's Commissioner of Correction, et al,	)	
Defendants	)	

ORDER GRANTING DECLARATORY JUDGMENT

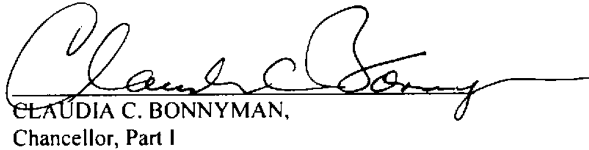
This matter comes before the Court upon the Plaintiff's Amended Complaint for Declaratory Judgment and Injunctive Relief; his Motion for Temporary Injunction; and pursuant to the November 6, 2010, order of the Supreme Court of Tennessee in Case No. M2010-02275-SC-R11-CV, to, "tak[e] proof and issu[e] a declaratory judgment on the issue of whether Tennessee's three-drug protocol constitutes cruel and unusual punishment because the manner in which the sodium thiopental is prepared and administered fails to produce unconsciousness or anesthesia prior to the administration of the other two drugs." The Court subsequently granted without objection the motion to intervene of Plaintiff/Intervener Billy Ray Irick.

On November 19-20, 2010, an evidentiary hearing was held in this matter. After weighing the evidence presented therein and considering the arguments of counsel, the Court

issued its bench ruling, a certified copy of which is attached hereto. For the reasons stated in its bench ruling, which are hereby fully incorporated herein, the Court finds and declares that Tennessee's three-drug protocol violates the prohibition against cruel and unusual punishment contained in Article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.

Pursuant to TENN. R. APP. P. 9(b), the Court finds that this matter is of great public importance and that review upon final judgment will be ineffective.

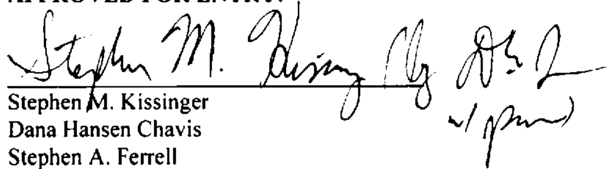
IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Tennessee's three-drug protocol violates the prohibition against cruel and unusual punishment contained in Article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.



CLAUDIA C. BONNYMAN,
Chancellor, Part I

Entered: ______________________________

APPROVED FOR ENTRY:



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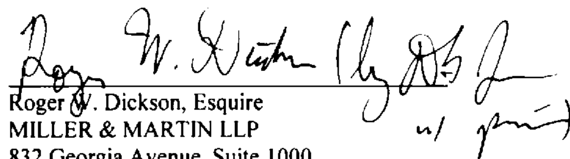

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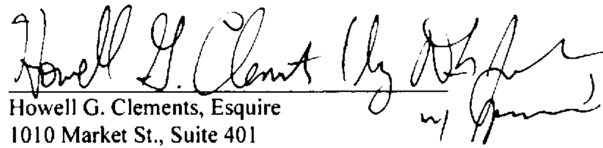

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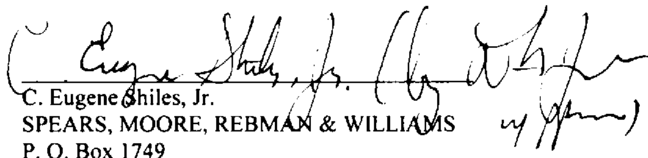

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via email and facsimile to:

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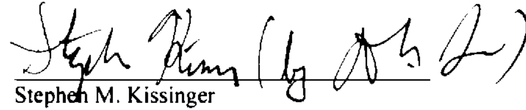
this 22nd day of November, 2010.



Stephen M. Kissinger

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

2010 NOV 22 PM 1:05

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

ORIGINAL

COURT'S RULING

BE IT REMEMBERED that the above-captioned cause came on for hearing this, the 19th day of November, 2010, in the above Court, before the Honorable Claudia C. Bonnyman, Judge presiding, when and where the following proceedings were had, to wit:

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1 APPEARANCES

2

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16 FOR INTERVEINING THIRD-PARTY PLAINTIFF; BILLY

17 IRICK:

18

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24 (Appearances Continued Page 2)

25

1 APPEARANCES CONTINUED

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3 * * * * * *

4 THE COURT: Please be seated.

5 Lawyers and citizens and court reporter, I

6 appreciate your patience. I know this is not

7 easy on people to stay this late.

8 As I stated before this is the

9 Court's bench ruling, and a bench ruling is

10 sometimes pretty rough and this one will be

11 somewhat rough, but I'm hoping and trusting that

12 this will be an opinion that will be

13 understandable and will be useful.

14 The statement of the case: The

15 plaintiff is an inmate condemned to be executed

16 by order of Tennessee's Supreme Court on

17 November 30, 2010 because he murdered

18 15-year-old Sheila Romines and her mother Wanda

19 Romines. He will be executed by the default

20 method of legal injection -- lethal injection.

21 The petitioner filed suit in the

22 Davidson County Chancery Court seeking

23 declaratory judgment that the method of his

24 execution is wrongful under the federal and

25 state constitutions. An additional plaintiff

1 Mr. Irick was allowed to intervene in the case
2 because he faces execution on December 7, 2010
3 and he seeks the same relief against the same
4 defendants.
5 As in all situations involving
6 capital punishment the condemned plaintiff, or
7 inmate, has committed a heinous crime. The
8 Tennessee legislature and many other state
9 legislatures have passed laws requiring that
10 when crimes are determined to be sufficiently
11 horrific, the ultimately penalty, death, will be
12 the punishment. The Court may interfere only --
13 may only interfere with that process that
14 judgment and that penalty when that process runs
15 afoul of the Federal and State Constitutions.
16 The narrow focus of this Court is
17 upon Tennessee's 2007 lethal drug execution
18 method under its protocol and whether the
19 protocol violates the constitutional prohibition
20 against cruel and unusual punishments. And as
21 for the issues in this case, the plaintiff
22 contends that the State's current protocol for
23 execution does not render the inmate unconscious
24 before the second and third lethal drugs are
25 administered, and for that reason the punishment

1 for execution under the 2007 protocol is cruel
2 and unusual punishment.
3 The plaintiff argues that all three
4 drugs are separately intended to kill the
5 condemned man. The plaintiff asserts that the
6 first drug is to render the person unconscious.
7 The second drug is to paralyze the lungs,
8 diaphragm, and the entire body, and the third
9 drug is to stop the heart. According to the
10 plaintiff, the first drug, sodium thiopental,
11 does not function as represented by the State.
12 Instead, says the plaintiff, sodium thiopental
13 is an ultra fast acting drug, which cannot be
14 relied upon to keep the condemned man fully
15 unconscious or to render him dead before the
16 second drug, a paralyzing drug, begins its
17 effect of suffocation.
18 The plaintiff asserts that although
19 the second drug, pancuronium bromide, is
20 administered the prevent the condemned man from
21 moving or breathing or calling out, it is
22 actually the fatal element under the Tennessee
23 protocol and death is therefore by suffocation.
24 The plaintiff argues that the autopsy reports
25 and toxicology reports show postmortem serum

1 levels of sodium thiopental from three
2 executions in Tennessee using the 2007 protocol,
3 and they are proof that the sodium thiopental
4 injection did not and does not keep the
5 condemned man unconscious, and in fact, says the
6 plaintiff the three executed men Henley,
7 Workman, and Coe were conscious, were aware of
8 and experienced their deaths by suffocation.
9 Further says the plaintiff, the
10 State personnel who administered the IVs and the
11 personnel who were executioners are not trained
12 adequately nor are they asked to specifically
13 insure the prisoner is unconscious. According
14 to the plaintiff, Tennessee's 2007 protocol has
15 no safe guards or procedures to verify that the
16 prisoner is unconscious during the injection of
17 the pancuronium bromide and potassium chloride,
18 the third drug. The plaintiff reasons through
19 his expert, Dr. Lubarsky, that the data
20 collected and studied so far, although limited
21 and imperfect, make available postmortem serum
22 thiopental levels as the best evidence to show
23 the inmate's consciousness, and this postmortem
24 data does show such consciousness when the
25 second and third drugs are injected -- when the

1 second drug is injected.

2 The plaintiff does not proffer an
3 alternative to this cruel type of execution, but
4 instead looks at other State's protocols and
5 other State's efforts to reach humane execution.
6 The State has limited its contentions to those
7 which have been identified by the Supreme Court
8 of the United States and by the Tennessee
9 Supreme Court. The State contends that our
10 federal courts have decided a three-drug lethal
11 injection protocol is consistent with standards
12 of decency. The State asserts that Tennessee
13 shares its three-drug lethal injection method
14 with the majority of the states in which capital
15 punishment is allowed.

16 The State asserts that
17 Dr . Lubarsky's study focuses upon postmortem
18 serum levels of sodium thiopental to establish
19 that there was consciousness at the time of
20 execution but that the study has been rebutted
21 by sufficient questions that the study does not
22 have weight or legitimacy. In fact, says the
23 State, no Court has given the study weight. The
24 State argues it is the plaintiff's burden to
25 show that the amount of sodium thiopental

1 mandated in the protocol, which is 5 grams
2 creates an objectively intolerable risk of harm
3 or suffering, and this the plaintiff cannot
4 show. The State reasons that the expert medical
5 examiner, Dr. Li, is an autopsy expert and knows
6 better than the plaintiff's expert what occurs
7 in the blood after death.
8 The issues for the Court to decide
9 are: One, whether the current amount and
10 concentration of sodium thiopental mandated by
11 Tennessee's 2007 lethal injection protocol are
12 insufficient to insure unconsciousness so as to
13 create an objectively intolerable risk of severe
14 suffering or pain during the execution. Two, as
15 a factual matter, the Court is to decide at what
16 level -- what level of sodium thiopental is
17 sufficient to insure unconsciousness so as to
18 negate any objectively intolerable risk of
19 severe suffering or pain during the execution?(cs)
20 Number three, is there a feasible and readily
21 available alternative procedure which could be
22 supplied at execution to insure unconsciousness
23 and negate any objectively intolerable risk of
24 severe suffering or pain?(cs) And, Four, did the
25 State refuse to adopt or adapt to this

1 alternative, and without justification adhere to
2 its current method? (CO)
3 And as for the summary -- a very
4 brief summary of the decision, the Court find
5 the current protocol for execution by lethal
6 injection execution is cruel and usual because
7 the plaintiff has carried its burden to show
8 that the protocol allows suffocation -- death by
9 suffocation while the prisoner is conscious.
10 And as for the facts that the Court
11 is finding as a result of the evidentiary
12 hearing, Number 1, Tennessee's 2007 lethal
13 injection protocol. Tennessee's 2007 protocol
14 requires the administration of three drugs;
15 sodium thiopental, pancuronium bromide, and
16 potassium chloride through an intravenous
17 catheter in a rapid -- by use of 11 large and
18 rapid bolus injections. Before the injection
19 process begins, according to the protocol,
20 catheters are inserted in both of the inmate's
21 arms by two technicians. Once the lines have
22 been established, the technicians leave the
23 execution chamber and remain in an area where
24 they cannot see the inmate.
25 The only person with the inmate in

1 the execution chamber at the time the drugs are
2 administered is the warden of River Bend Maximum
3 Security Institution, the site of the execution
4 apparatus. The -- the need for two catheters is
5 that the first catheter is used for the
6 injection, and the second catheter is a backup
7 in case the first one fails. The executioner
8 first injects 5 grams of sodium thiopental,
9 which the protocol states is disbursed into four
10 syringes at a concentration of 2.5 percent with
11 1.25 grams of the drug in each syringe. Sodium
12 thiopental is a rapid acting barbiturate
13 commonly used in anesthesia. In the past,
14 sodium thiopental was administered in small
15 amounts during surgery, before surgery to induce
16 unconsciousness rapidly while other measures
17 were then used to deepen the level of
18 unconsciousness. Sodium thiopental is now
19 used -- is not commonly used in surgery at this
20 time.
21 Continuing on with the protocol,
22 following a saline flush, the executioner
23 injects 100 milligrams of pancuronium bromide
24 into the IV lines. Pancuronium bromide is a
25 muscle paralytic. The drug completely paralyzes

1 the diaphragm, such that the prisoner cannot
2 breathe. By itself, 100 milligrams of
3 pancuronium bromide would be sufficient to kill
4 a person by suffocation. Pancuronium bromide
5 eliminates the involuntary muscle movements that
6 could be caused by the operation of the third
7 drug, potassium chloride, in the prisoner's
8 body.
9 If pancuronium bromide were
10 injected solely on its own, the prisoner would
11 experience and be aware of his death by
12 suffocation. Following a second saline flush,
13 the executioner injects a third and final drug,
14 potassium chloride in the amount of 200
15 milligrams -- 200 MEQ. The purpose of this drug
16 is to cause cardiac arrest. If conscious, the
17 inmate would suffer a burning pain throughout
18 his body when the potassium chloride is
19 injected. And I believe the parties agree about
20 this and I think they also agree that if
21 pancuronium bromide were given by itself the
22 death would be by conscious suffocation. I
23 don't think there is a dispute about that. Now,
24 the plaintiff does not focus on the third drug
25 in this lawsuit because the plaintiff

1 understands that the third drug is redundant and
2 the prisoner has already died by suffocation.
3 In this case, the plaintiff has
4 carried his burden to show that the first
5 injection of 5 grams of sodium thiopental
6 followed by rapid injection of the second drug
7 will result in the inmate's consciousness during
8 suffocation. And as for further facts in the
9 case and the medical proof, both parties called
10 medical experts. The Court found that both
11 experts could assist the finder of fact because
12 the issues in the case focus upon chemical
13 reaction to drugs in the body before and after
14 death.
15 In compliance with Rule 702 of the
16 rules of evidence both experts are medical
17 doctors. Dr. Lubarsky called by the plaintiff
18 is a board-certified anesthesiologist, who is
19 both a clinician and a prolific academic
20 researcher and published writer. Dr. Lubarsky
21 has been a tenured professor on medical faculties
22 ~~factories~~ at excellent medical schools. He is a
23 teacher accustomed to providing explanations in
24 the language of beginning and in the language of
25 experienced medical students. It appears to the

1 Court than an expert anesthesiologist who is
2 also a teacher is an ideal expert for the
3 evaluation of consciousness and unconsciousness.
4 Dr. Li, a senior assistant medical
5 examiner contracted in Metro Government has also
6 been a teacher in the past. He began his
7 medical education in his native China and then
8 continued with his residency in this country.
9 There is no reason to doubt his expertise based
10 upon his education and background. It appears
11 to the Court that a medical examiner has
12 experience and knowledge about ~~toxicality,~~
13 toxicology, pathology, pharmacology and other
14 matters in order to opine about the cause of
15 death and the manner of death.
16 And as for the medical proof, the
17 plaintiff carried his burden to show that the
18 Tennessee protocol does not insure that the
19 prisoner is unconscious before the paralyzing
20 drug; that is, the second becomes active -- is
21 injected and becomes active in the body. The
22 petitioner, or plaintiff, has never conceded
23 that 5 grams of sodium thiopental ensures
24 unconsciousness or ensures unconsciousness by
25 death for any particular person because there

1 are many variables which prevent such a safe
2 prediction which would prevent conscious death
3 of suffocation.
4 Dr. Lubarsky first explained that
5 breathing is a primary survival impetus for
6 humans. It is extremely disturbing to a patient
7 when the patient is unable to get air. Not to
8 be too simplistic, but life is about getting a
9 breath of air. The body is tuned to need and
10 get air. It is a primary survival issue. There
11 is great suffering and pain if a patient were to
12 suffocate from lack of air. Through
13 Dr. Lubarsky, the plaintiff was able to show
14 that because a paralyzing drug is used soon
15 after sodium thiopental is injected, no one can
16 tell if the prisoner is conscious or unconscious
17 and this is a tragedy given execution by
18 injection.
19 These factual statements made by
20 Dr. Lubarsky and found to be accurate by the
21 Court have increased the Court's comprehension
22 of the anticipated severity of the suffering.
23 Dr. Lubarsky explained the study that he
24 authored, which was published in the British
25 journal Lancet. The study exams the level of

1 sodium thiopental in the blood serum through
2 autopsy, which of course, is after the prisoner
3 has been executed. Dr. Lubarsky explained that
4 he and his co-authors had a difficult time
5 getting data on executed prisoners. But they
6 did get data and they did explain -- they did
7 explain through their data and the study that
8 the level of sodium thiopental in the blood
9 serum, postmortem sometimes measures higher than
10 expected and somewhat lower but is fairly
11 equivalent to the level of sodium thiopental at
12 death; that is, at execution because this kind
13 of chemical is stable in the blood and does not
14 naturally increase or decrease much.
15 He admits that his study published
16 in the Lancet is not perfect, and he concedes
17 they could have used more data but they could
18 not get the data. Dr. Lubarsky makes the very
19 good point that after this article was peer
20 reviewed and published, it was challenged. But
21 following the author's response to the
22 challenges, the critics backed off and have not
23 countered with further criticism, nor have there
24 been other studies.
25 The Court finds that Dr. Lubarsky's

1 testimony is convincing, and his study is
2 convincing that the level of sodium thiopental
3 is used by different people in different ways,
4 and the reactions are variable -- are very
5 variable. The study shows the amount of sodium
6 thiopental in the blood serum of prisoners
7 across the country were lower than one would
8 hope would be the case because the level was not
9 high enough to insure that the prisoners were
10 unconscious.
11 Dr. Lubarsky studied and reported
12 upon the autopsies of three Tennessee prisoners
13 who were executed using the protocol in
14 Tennessee that is the issue in this case. They
15 were injected with 5 grams of sodium thiopental
16 as far as anyone is aware. The level of this
17 drug in the blood measured through the
18 autopsies, however, shows the three men did not
19 have sufficient amounts of this drug to insure
20 unconsciousness. Instead their levels were
21 10.2 milligrams per liter for Mr. Coe, 18.9
22 milligrams per liter in the Workman's case, and
23 8.31 milligrams per liter from the Henley
24 autopsy. His research shows that with 50
25 milligrams per liter, half of the persons would

1 be conscious at that time and half would not be
2 conscious.
3 As for medical proof, continued,
4 Dr. Li opined that he believed that Mr. Coe,
5 Mr. Workman, Mr. Henley were unconscious at the
6 time of their deaths. He based his opinion in
7 part on Winek's drug and chemical blood level
8 data. This is Trial Exhibit 27. This chart
9 shows levels for therapeutic or normal and then
10 for toxic and lethal. The postmortem levels of
11 sodium thiopental in previous Tennessee executed
12 inmates sometimes fell within the range for
13 therapeutic or normal, as well as falling within
14 the range for toxic or lethal. When asked to
15 explain why Mr. Workman's postmortem sodium
16 thiopental level was sufficiently higher --
17 significantly higher than Mr. Coe's and
18 Mr. Henley's even though his autopsy had not
19 been performed until ten days after his
20 execution and the other inmate's autopsies had
21 been performed seven hours after their
22 executions approximately, Dr. Li stated that
23 every human body is different and that these
24 differences have an effect on the drug level.
25 He also states that no single

member such as the one -- no single number such
as the one used in Winek's can be used to
explain or calculate what the drug level would
have been at the time of the inmate's death.
Dr. Li stated that according to general theory,
levels of medication found in the blood
decreased postmortem but that this would depend
upon the medication. The two experts agree --
appear to agree that the levels of sodium
thiopental that will be used in the body depends
upon many variables. This is a complex study,
and Dr. Li conceded or stated that he would need
to draw upon many disciplines and have many
factors to analyze before concluding how a
particular medication would act in the body
predeath and postdeath.

The State called Mr. Voorhies
as a witness. He is a department of corrections
experienced administrator from the State of
Ohio. He testified about nine executions at
which he had been present, where 5 grams of
sodium thiopental were injected. The fact that
5 grams of sodium thiopental is fatal or appear
to be fatal when allowed to work over 11
minutes, however, is not dispositive of the

1 three-drug protocol issue which is presented
2 here.
3 And as for facts regarding the
4 failure to check for consciousness, the Florida
5 Department of Corrections which adopted new
6 lethal injection procedure effective for
7 executions after May 9, 2007 included the
8 following procedure to immediately follow the
9 sodium thiopental injections: ~~In quotes at this~~
10 ~~point~~, "At this point a member of the execution
11 team will assess whether the inmate is
12 unconscious. The warden must determine after
13 consultation that the inmate is indeed
14 unconscious. Until the inmate is unconscious
15 and the warden has ordered the executioners to
16 continue, the executioner shall not proceed to
17 Step 5," ~~close quote~~. And this is from Florida
18 protocol hearing exhibit -- hearing and this is
19 exhibit -- Trial Exhibit 24 Page 8.
20 Proceeding on with the facts --
21 findings of fact under the subject, Failure to
22 check for consciousness, the Court finds that in
23 California's lethal injection protocol and
24 review, which was issued on May 15, 2007, the
25 California Department of Corrections review team

1 pointed out that earlier versions of this
2 protocol made no provisions of any objective
3 assessment of consciousness of the condemned
4 inmate following administration of the sodium
5 thiopental, and before the administration of the
6 other chemicals.
7 The State of California lethal
8 injection protocol review. The California
9 committee noted that there are reliable but
10 relatively uncomplicated methods for effectively
11 assessing consciousness that have been
12 incorporated into California lethal injection
13 protocol. Among them are talking to and gently
14 shaking the inmate as well as lightly brushing
15 eyelash. For that reason, changes were made to
16 the California protocol to place staff in close
17 proximity to the condemned inmate throughout the
18 execution to assess and confirm the condemned
19 inmate is unconscious prior to and during the
20 administration of the pancuronium bromide and
21 the potassium chloride. This is from Trial
22 Exhibit Number 25, Page -- I'm sorry -- Hearing
23 Exhibit 25 Page 20. Number 25, Page 20.
24 The Tennessee protocol committee
25 appears to have been well aware of the necessity

1 for checking consciousness under the three-drug
2 protocol option. In a document prepared by the
3 chair of the committee, Julian Davis, that
4 listed the pros and cons of the various options
5 considered by the committee, the following
6 phrase appears as "con" under the three-drug
7 protocol: Would likely need to add a method of
8 ascertaining consciousness after sodium
9 thiopental. Hearing collective Exhibit Number 3
10 former trial Exhibit Number 7. The April 19,
11 2007, minutes of the Tennessee Protocol
12 Committee state that Deputy Commissioner Ray
13 also mentioned having something that would
14 assure the unconsciousness of the inmate during
15 the execution procedure. In addition, those
16 minutes reflect a conversation between Warden
17 Bell and Physician A in which Warden Bell
18 inquired about what would indicate the inmate is
19 unconscious after the first drug and a saline
20 flush are given, ~~in paren,~~ three drug protocol,
21 ~~close paren~~, so we can give the signal to go
22 ahead with the other drugs. The physician
23 suggested looking at the inmate's eyes but also
24 stated that constricted pupils are not a
25 definitive sign of unconsciousness. Therefore,

1 he also advised checking for an eyelash response
2 by brushing a finger across them, lifting up the
3 person's arm and a pin prick or pinching the
4 nipples. This Hearing Exhibit Collective 3,
5 former Trial Exhibit 29.
6 Ms. Gail Ray's notes from that same
7 meeting include the sentence: What if any
8 safeguards to insure a person is appropriately
9 anesthetized, with an arrow pointing toward any
10 monitoring by medicine, medical personnel,
11 question. Hearing Exhibit Collective 3, former
12 trial Exhibit 31 at Page 30. Mr. Elkins,
13 counselor to the Governor, verified that he had
14 taken notes concerning a telephone conversation
15 with Commissioner Little on April 20, 2007, in
16 which he had written ask them to introduce a
17 step to explicitly go over and check level of
18 sedation. Hearing Exhibit Collective Number 3;
19 former Trial Exhibit 5 at Page 7.
20 And also from Harbison versus
21 Little and Others, Exhibit Number 1, I'm going
22 to read into the record a brief testimony from
23 Debbie Inglis the Tennessee Department of
24 Corrections general counsel, Question posed to
25 her: One of the physicians which you consulted

1 during the course of the committee's work
2 advised the committee about a number of
3 different ways to assess an inmate's anesthetic
4 depth which wouldn't require the use of any
5 machine; is that correct?
6 And her answer was: A physician
7 did recommend in response to our question to
8 give us ways that we could actually sort of
9 determine at a particular point whether there
10 was consciousness or not, but those weren't ways
11 of actively monitoring the anesthetic depth over
12 the process.
13 Question: Okay. Did the physician
14 that told you that those were ways to assess
15 anesthetic depth, was he the one that told you
16 that wasn't -- that that wasn't adequate?
17 Answer: No. What I'm saying is
18 the physician was telling us that at a
19 particular point you could maybe look at -- do a
20 pinprick or move something on the inmate's foot,
21 pinch them, and that right tell you at the time
22 that that inmate was unconscious at this point,
23 but I mean, I think it goes out saying that
24 unless you are -- that does not monitor the
25 anesthetic depth over the course of the

1 execution.

2 Question: Did the physician tell

3 you you couldn't make a second check or third

4 check or a fourth check?

5 Answer: No.

6 Question: If it was needed?

7 Answer: No.

8 Question: Did the physician tell

9 the committee that there was some limitations on

10 how often these checks could be provided or

11 could be conducted?

12 Answer: No.

13 Question: So what is the basis of

14 your statement that these checks could not be

15 continued throughout the lethal injection

16 process?

17 Answer: Well just that it wouldn't

18 be practical as you are carrying out the

19 execution to have someone standing there

20 pinching the inmate. I mean, we didn't think

21 that would be appropriate, and our experts

22 didn't indicate that -- you know, that this was

23 a necessary step. In any event, these

24 suggestions were simply in response to our

25 question of what could be done to check

1 consciousness.

2 Question: You said before that

3 experts -- that you had experts who told you

4 that assessing anesthetic depth wasn't

5 necessary, but those same experts did advise you

6 of the critical importance of the inmate being

7 unconscious before the administration of the

8 second two drugs, did they?

9 Answer: They certainly, yes,

10 indicated that that was the purpose of the first

11 drug and that that was important.

12 And that completes at this time the

13 findings of fact. I'm going to move to the

14 ~~principle law.~~ principle of law. And first the Court is looking

15 at Rule 702, testimony about experts. If

16 scientific, technical, or other specialized

17 knowledge will substantially assist the trier of

18 fact to understand the evidence or to determine

19 a fact in issue, a witness qualified as an

20 expert by knowledge, skill, experience, training

21 or education, may testify in the form of an

22 opinion or otherwise.

23 Rule 703, basis of opinion

24 testimony by experts. The facts or data in the

25 particular case upon which an expert bases an

1 opinion or inference may be those perceived by
2 or made known to the expert at or before the
3 hearing. If of a type reasonably relied upon by
4 experts in a particular field in forming
5 opinions or inferences upon the subject, the
6 facts or data need not be admissible in
7 evidence. The Court shall disallow testimony in
8 the form or opinion or inference if the
9 underlying facts or data indicates lack of
10 trustworthiness.
11 As for principles of the law from
12 McDaniel versus CSX Transportation, which is 955
13 S.W. 2d 257, a 1977 opinion -- Supreme Court
14 opinion, in general, questions regarding the
15 admissibility, qualifications, relevancy and
16 competency of expert testimony are left to the
17 discretion of the trial court. The specific
18 rules of evidence that govern the admissibility
19 of scientific proof in Tennessee are Tennessee
20 Rules of Evidence 702 and 703.
21 In Tennessee under the recent
22 rules, a Trial Court must determine whether the
23 evidence will substantially assist the trier of
24 fact to determine a fact in issue and whether
25 the facts and data underlying the evidence

1 indicate a lack of trustworthiness. The rules
2 together necessarily require determination as to
3 the scientific validity or reliability of the
4 evidence. Simply put, unless the scientific
5 evidence is valid, it will not substantially
6 assist the trier of fact unless underlying facts
7 and data appear to be trustworthy, but there is
8 no requirement any rule be generally accepted.
9 Although we do not expressly adopt -- here the
10 Court is referring to the federal standard in
11 Daubert, The non-exclusive list of factors to
12 determine reliability are useful in applying our
13 Rule 702 and 703. The Tennessee Trial Court may
14 consider in determining liability: One, whether
15 scientific evidence has been testified and the
16 methodology with which it has been tested. Two,
17 whether the evidence has been subjected to peer
18 review or publication. Three, whether a
19 potential rate of error is known. Four, whether
20 as formerly required by Frye the evidence is
21 general accepted in the scientific community.
22 And Five, whether the expert's research in the
23 field has been conducted independent of
24 litigation.
25 Although the Trial Court must

1 analyze the signs and not merely the
2 qualifications, demeanor, or conclusions of
3 witnesses, the Court may not weigh or choose
4 between two legitimate but conflicting
5 scientific views. The Court instead must assure
6 itself that the opinions are based on relevant
7 scientific methods, processes, and data and not
8 upon an expert's mere speculation.
9 And now the Court will continue with
10 principals of law from Baze versus Rees, which
11 is U.S. Supreme Court Case at 553 US35 rendered
12 in 2008. The 8th Amendment to the Constitution
13 applicable to the states through the due process
14 clause of the 14th Amendment provides that
15 excessive bail shall not be required nor
16 excessive fines imposed, nor cruel or unusual
17 punishments inflicted.
18 We begin with a principle settled by
19 Gregg versus Georgia that capital punishment is
20 constitutional. It necessarily follows that
21 there must be a means of carrying it out. Some
22 risk of pain is inherent in method of execution
23 no matter how humane. If only from the prospect
24 of error in following the required procedure,
25 it's clear then that the constitution does not

1 demand the avoidance of all risk of pain in
2 carrying out executions. Our cases; that is,
3 those of the U.S. Supreme Court, recognize that
4 subjecting individuals to a risk of future harm,
5 not simply actually inflicting pain can qualify
6 as cruel and unusual punishment.
7 To establish that exposure violates
8 the 8th Amendment, however, the conditions
9 presenting the risk must be sure or very likely
10 to cause serious illness and needless suffering
11 and give rise to sufficiently imminent dangers.
12 We have explained that to prevail on such a
13 claim, there must be a substantial risk of
14 serious harm, an objectively intolerable risk of
15 harm that prevents prison officials from
16 pleading that they were subjectively blameless
17 for purposes of the 8th Amendment. Simply
18 because an execution method may result in pain
19 either by accident or is an inescapable
20 consequence of the death does not establish the
21 sort of objectively tolerable risk of harm that
22 qualifies as cruel and unusual.
23 Given what our; that is, the U.S.
24 Supreme Court cases, have said about the nature
25 of the risk of harm that is actionable under the

1 8th Amendment, a condemned prisoner cannot
2 successfully challenge the State's method of
3 execution merely by showing a slightly or
4 marginally safer procedure. Instead the
5 proffered alternatives must effectively address
6 a substantial risk of serious harm. To qualify,
7 the alterative procedure must be feasible,
8 readily implemented and in fact significantly
9 reduce the substantial risk of severe pain. If
10 the State refuses to adopt such an alternative
11 in the face of these documented advantages
12 without legitimate penalogical justification for
13 justification for adhering to its current method
14 of execution, then the State's refusal to change
15 its method can be viewed as cruel and unusual
16 under the 8th Amendment.
17 And now the Court is reading from
18 Harbison, Sixth Circuit ruling, and the Court is
19 specifically distinguishing this current case
20 from the Baze ruling and reasoning and from the
21 Harbison ruling and reasoning. Unlike Baze and
22 Harbison, there is no agreement in this case
23 that the level of sodium thiopental in the
24 protocol was constitutionally acceptable. In
25 the Harbison case -- and this is a citation and

1 it is a principle of law from the Harbison case.
2 As in Baze, the inmate in Harbison concedes that
3 if the protocol were followed perfectly it would
4 not pose an unconstitutional risk of pain and
5 argues instead that maladministration of the
6 sodium thiopental would result in a severe risk
7 of pain from the subsequent drugs that could go
8 undetected. Further -- and this is also from
9 Harbison, which I distinguish, but I still think
10 there is some principle of law here that will
11 both illuminate the distinguishing character of
12 Baze and Harbison and also will establish some
13 principles of law. The District Court first
14 concluded that the amended protocol was
15 deficient because it did not provide a proper
16 procedure for insuring that the inmate was
17 unconscious before administering the pancuronium
18 bromide. The Court noted that other states
19 required the execution team to determine if the
20 inmate is still conscious before proceeding with
21 this step.
22 The Tennessee protocol review
23 committee also have recommended that procedures
24 be put in place to insure that the inmate was
25 unconscious at this step. Possible methods for

1 determining unconscious -- returning
2 consciousness included lightly brushing
3 eyelashes, lifting up an arm or pinching a
4 nipple. Despite this recommendation, these
5 safeguards were not adopted in the amended
6 protocol. Instead the prison warden who was in
7 the room with the inmate and the executioners
8 who would be able to see the inmate through a
9 one-way glass window monitored the prisoner
10 visually during the execution process, which the
11 State believed to be sufficient safeguard.
12 The District Court in Harbison
13 disagreed, holding that the failure to check for
14 consciousness greatly enhanced the risk the
15 inmate would suffer unnecessary pain. Baze,
16 however, rejected the necessity of the
17 procedures relied upon by the District Court.
18 It noted at the outset that because a proper
19 dose of sodium thiopental would render any check
20 for consciousness unnecessary. There was no
21 such agreement, however, in this case, as there
22 was in Baze and in Harbison that the protocol as
23 written if properly administered is
24 constitutionally acceptable.
25 Then I'm going back here to Baze

1 for further principles of law and further
2 analysis of this particular case. And this is
3 from the plurality decision in U.S. Supreme
4 Court case in Baze. The decent believes that
5 rough and ready tests for checking
6 consciousness; calling the inmate's name,
7 brushing his eyelashes or presenting him with
8 strong noxious odors could materially decrease
9 the risk of administering the second and third
10 drugs before the sodium thiopental has taken
11 effect. Again -- and this is from Baze, the
12 risk at issue is already attenuated, given the
13 steps Kentucky has taken to insure the proper
14 administration of the first drug.
15 And here this Court notes in Baze and in
16 Harbison, the parties had agreed that if
17 properly administered, the level of sodium
18 thiopental was constitutionally acceptable.
19 This case, this West case, differs
20 because there is no such agreement here and the
21 Court must therefore continue on and -- continue
22 on as I have done earlier in this decision to
23 analyze other factors and not stop at the Baze
24 and Harbison analysis.
25 I am going back now to the issues

1 that the Court must decide in the case, whether
2 the current amount and concentration of sodium
3 thiopental mandated by Tennessee's 2007 lethal
4 injection protocol are insufficient to insure
5 unconsciousness so as to create an objectively
6 intolerable risk of severe suffering or pain
7 during the execution.
8 This Court finds that the current amount
9 and concentration of sodium thiopental are
10 insufficient to insure unconsciousness because
11 the body's ability to and the body's actual use
12 of this drug depends on so many variables, and
13 both medical experts agree that that was the
14 case.
15 And Number Two is a factual matter. The
16 Court is to decide at what level sodium
17 thiopental -- at what level is the sodium
18 thiopental sufficient to insure unconsciousness
19 so as to negate any objectively intolerable risk
20 of severe suffering or pain during the
21 execution. And I should go back to issue
22 Number 1, and say the objectively intolerable
23 risk of severe pain -- suffering or pain during
24 the execution is the injection of the second
25 drug, the paralyzing drug after the first

1 inadequate and inefficient drug has been
2 injected; that is, to do so so quickly and to do
3 at all.
4 As a factual matter -- going on now to
5 issue Number 2, at what level is this particular
6 drug; that is, Number 1 -- sufficient to insure
7 unconsciousness. And although Dr. Li testified
8 that 5 grams of sodium thiopental is fatal -- or
9 should be fatal, Dr. Li also agreed with
10 Dr. Lubarsky that the amount of sodium
11 thiopental which will -- can be -- can provide
12 an assurance that a particular level of this
13 drug will be effective in the body depends on
14 many, many variables. And so although this
15 Court listened very closely to the experts'
16 opinions about this particular issue, this Court
17 is unable to find what level of sodium
18 thiopental is sufficient to insure
19 unconsciousness because I don't think there is
20 one, given the medical proof that the Court is
21 relying on; given the medical proof in the case.
22 Number 3, is there a feasible and
23 readily available alternative procedure which
24 could be supplied at execution to insure
25 unconsciousness and negate any objectively

1 intolerable risk of severe suffering or pain?
2 It appears to this Court that there are feasible
3 and readily available alternative procedures
4 which could be supplied at execution to insure
5 unconsciousness and negate any objectively
6 intolerable risk of severe suffering or pain.
7 This Court should not say or find which of those
8 it would recommend, but I think the Court's
9 finding of fact regarding the ways -- the
10 various ways that unconsciousness can be checked
11 should be left to the State.
12 But the proof in the Harbison case
13 that was filed in this case, the -- the facts
14 that were gleaned from Mr. Voorhies' testimony
15 in which -- and from other state protocols in
16 which checks for consciousness were overt and
17 explicit and intentional indicate that there are
18 various ways to go -- to do that and it should
19 be done.
20 Number 4, did the State refuse to adopt
21 this alternative and without justification
22 adhere to its current method? Well, the State
23 decided that its protocol of injecting sodium
24 thiopental in the measure that its protocol
25 requires; that is, 5 grams, did not require

1 checking for consciousness or unconsciousness,
2 and given the other protocols that have been
3 filed in with Court, given the approach taken
4 by -- taken in Ohio as testified to by
5 Mr. Voorhies, it does seem that the State should
6 have figured out some way -- some simple way,
7 should have adopted one of the simple ways which
8 appears to be used in other states to check on,
9 to make sure that the prisoner was unconscious,
10 and this Court cannot find a justification for
11 not checking on consciousness -- on
12 unconsciousness. I just don't think there is a
13 justification that this Court can understand.
14 And back just for a moment to Issue
15 Number 2. I think the Court should say that it
16 cannot state there is no level of sodium
17 thiopental sufficient to insure unconsciousness.
18 This Court does not find there is no level
19 whatsoever, but this Court does not know what it
20 would be.
21 And Lawyers is there anything else I
22 ought to do? Is there anything -- any
23 housekeeping issue that should be addressed that
24 I have not addressed?
25 MR. KISSINGER: Not that the

1 plaintiffs are aware of, Your Honor.

2 MR. HUDSON: Nothing from the

3 defendants, Your Honor.

4 THE COURT: Okay. Lawyers, I will

5 be here on Monday and Tuesday to sign anything

6 that I need to sign. Too late for me to sign

7 anything today, but like I said I will be here

8 Monday and Tuesday, and appreciate our patience.

9 We are now adjourned.

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1 COURT REPORTER'S CERTIFICATE

2 STATE OF TENNESSEE:

3 COUNTY OF DAVIDSON:

4 I, LEILA ZUPKUS, Court Reporter and Notary

5 Public, Davidson County, Tennessee, CERTIFY:

6 1. The foregoing proceeding was taken before me

7 at the time and place stated in the foregoing

8 styled cause with the appearances as noted;

9 2. Being a Court Reporter, I then reported the

10 proceeding in Stenotype to the best of my skill

11 and ability, and the foregoing pages contain a

12 full, true and correct transcript of my said

13 Stenotype notes then and there taken;

14 3. I am not in the employ of and am not related

15 to any of the parties or their counsel, and I

16 have no interest in the matter involved.

17 WITNESS MY SIGNATURE, this, the

18 22nd day of November, 2010.

19

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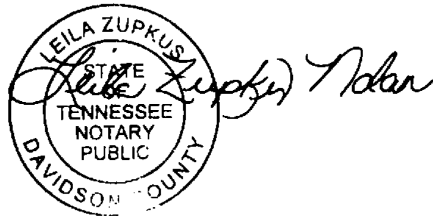

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23

24 LEILA ZUPKUS NOLAN, TLCR

25 My commission expires: June 30, 2012