IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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STATE OF TENNESSEE v. BILLY RAY IRICK

NO. M1987-00131-SC-DPE-DD
NO. M2010-02275-SC-R11-CV

NOTICE OF FILING OF TRANSCRIPT

Comes the plaintiff, Billy Ray Irick, and pursuant to this court's order of November 23, 2010, files the attached transcript of the trial court's bench ruling.

SPEARS, MOORE, REBMAN & WILLIAMS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading has been served on counsel for all parties at interest in this cause addressed as follows:

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This 23rd day of November 2010.

SPEARS, MOORE, REBMAN & WILLIAMS

By: C Eugene Shiles (by PBotter w/express permission)

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IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,	)
Plaintiff	)
BILLY RAY IRICK,	)
Plaintiff/Intervener	)
v.	)
GAYLE RAY, in her official capacity as Tennessee's Commissioner of Correction, et al,	)
Defendants	)

FO/4

No. 10-1675-I
DEATH PENALTY CASE

Chancellor Bonnyman
EXECUTION SCHEDULED: November 30, 2010

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

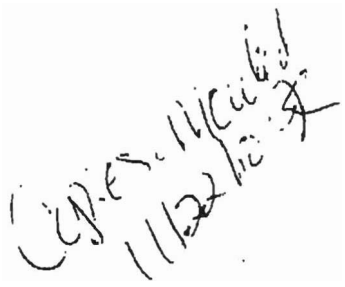
issued its bench ruling, a certified copy of which is attached hereto. For the reasons stated in its bench ruling, which are hereby fully incorporated herein, the Court finds and declares that Tennessee's three-drug protocol violates the prohibition against cruel and unusual punishment contained in Article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



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this 22nd day of November, 2010.

Stephen M. Kissinger

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,

Plaintiff,

vs. No. 10-1675-I

GAYLE RAY, In her official capacity as Tennessee Commissioner of Corrections, et al.,

Defendants.

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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(Appearances Continued Page 2)

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* * * * * *

THE COURT: Please be seated. Lawyers and citizens and court reporter, I appreciate your patience. I know this is not easy on people to stay this late.

As I stated before this is the Court's bench ruling, and a bench ruling is sometimes pretty rough and this one will be somewhat rough, but I'm hoping and trusting that this will be an opinion that will be understandable and will be useful.

The statement of the case: The plaintiff is an inmate condemned to be executed by order of Tennessee's Supreme Court on November 30, 2010 because he murdered 15-year-old Sheila Romines and her mother Wanda Romines. He will be executed by the default method of legal injection -- lethal injection.

The petitioner filed suit in the Davidson County Chancery Court seeking declaratory judgment that the method of his execution is wrongful under the federal and state constitutions. An additional plaintiff

Mr. Irick was allowed to intervene in the case because he faces execution on December 7, 2010 and he seeks the same relief against the same defendants.

As in all situations involving capital punishment the condemned plaintiff, or inmate, has committed a heinous crime. The Tennessee legislature and many other state legislatures have passed laws requiring that when crimes are determined to be sufficiently horrific, the ultimately penalty, death, will be the punishment. The Court may interfere only -- may only interfere with that process that judgment and that penalty when that process runs afoul of the Federal and State Constitutions.

The narrow focus of this Court is upon Tennessee's 2007 lethal drug execution method under its protocol and whether the protocol violates the constitutional prohibition against cruel and unusual punishments. And as for the issues in this case, the plaintiff contends that the State's current protocol for execution does not render the inmate unconscious before the second and third lethal drugs are administered, and for that reason the punishment

for execution under the 2007 protocol is cruel and unusual punishment.

The plaintiff argues that all three drugs are separately intended to kill the condemned man. The plaintiff asserts that the first drug is to render the person unconscious. The second drug is to paralyze the lungs, diaphragm, and the entire body, and the third drug is to stop the heart. According to the plaintiff, the first drug, sodium thiopental, does not function as represented by the State. Instead, says the plaintiff, sodium thiopental is an ultra fast acting drug, which cannot be relied upon to keep the condemned man fully unconscious or to render him dead before the second drug, a paralyzing drug, begins its effect of suffocation.

The plaintiff asserts that although the second drug, pancuronium bromide, is administered to prevent the condemned man from moving or breathing or calling out, it is actually the fatal element under the Tennessee protocol and death is therefore by suffocation. The plaintiff argues that the autopsy reports and toxicology reports show postmortem serum

levels of sodium thiopental from three executions in Tennessee using the 2007 protocol, and they are proof that the sodium thiopental injection did not and does not keep the condemned man unconscious, and in fact, says the plaintiff the three executed men Henley, Workman, and Coe were conscious, were aware of and experienced their deaths by suffocation.

Further says the plaintiff, the State personnel who administered the IVs and the personnel who were executioners are not trained adequately nor are they asked to specifically insure the prisoner is unconscious. According to the plaintiff, Tennessee's 2007 protocol has no safe guards or procedures to verify that the prisoner is unconscious during the injection of the pancuronium bromide and potassium chloride, the third drug. The plaintiff reasons through his expert, Dr. Lubarsky, that the data collected and studied so far, although limited and imperfect, make available postmortem serum thiopental levels as the best evidence to show the inmate's consciousness, and this postmortem data does show such consciousness when the second and third drugs are injected -- when the

second drug is injected.

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

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

mandated in the protocol, which is 5 grams creates an objectively intolerable risk of harm or suffering, and this the plaintiff cannot show. The State reasons that the expert medical examiner, Dr. Li, is an autopsy expert and knows better than the plaintiff's expert what occurs in the blood after death.

The issues for the Court to decide are: One, whether the current amount and concentration of sodium thiopental mandated by Tennessee's 2007 lethal injection protocol are insufficient to insure unconsciousness so as to create an objectively intolerable risk of severe suffering or pain during the execution. Two, as a factual matter, the Court is to decide at what level -- what level of sodium thiopental is sufficient to insure unconsciousness so as to negate any objectively intolerable risk of severe suffering or pain during the execution? Number three, is there a feasible and readily available alternative procedure which could be supplied at execution to insure unconsciousness and negate any objectively intolerable risk of severe suffering or pain? And, Four, did the State refuse to adopt or adapt to this

alternative, and without justification adhere to its current method. (CA)

And as for the summary -- a very brief summary of the decision, the Court find the current protocol for execution by lethal injection execution is cruel and usual because the plaintiff has carried its burden to show that the protocol allows suffocation -- death by suffocation while the prisoner is conscious.

And as for the facts that the Court is finding as a result of the evidentiary hearing, Number 1, Tennessee's 2007 lethal injection protocol. Tennessee's 2007 protocol requires the administration of three drugs; sodium thiopental, pancuronium bromide, and potassium chloride through an intravenous catheter in a rapid -- by use of 11 large and rapid bolus injections. Before the injection process begins, according to the protocol, catheters are inserted in both of the inmate's arms by two technicians. Once the lines have been established, the technicians leave the execution chamber and remain in an area where they cannot see the inmate.

The only person with the inmate in

the execution chamber at the time the drugs are administered is the warden of River Bend Maximum Security Institution, the site of the execution apparatus. The -- the need for two catheters is that the first catheter is used for the injection, and the second catheter is a backup in case the first one fails. The executioner first injects 5 grams of sodium thiopental, which the protocol states is disbursed into four syringes at a concentration of 2.5 percent with 1.25 grams of the drug in each syringe. Sodium thiopental is a rapid acting barbiturate commonly used in anesthesia. In the past, sodium thiopental was administered in small amounts during surgery, before surgery to induce unconsciousness rapidly while other measures were then used to deepen the level of unconsciousness. Sodium thiopental is now used -- is not commonly used in surgery at this time.

Continuing on with the protocol, following a saline flush, the executioner injects 100 milligrams of pancuronium bromide into the IV lines. Pancuronium bromide is a muscle paralytic. The drug completely paralyzes

the diaphragm, such that the prisoner cannot breathe. By itself, 100 milligrams of pancuronium bromide would be sufficient to kill a person by suffocation. Pancuronium bromide eliminates the involuntary muscle movements that could be caused by the operation of the third drug, potassium chloride, in the prisoner's body.

If pancuronium bromide were injected solely on its own, the prisoner would experience and be aware of his death by suffocation. Following a second saline flush, the executioner injects a third and final drug, potassium chloride in the amount of 200 milligrams -- 200 MEQ. The purpose of this drug is to cause cardiac arrest. If conscious, the inmate would suffer a burning pain throughout his body when the potassium chloride is injected. And I believe the parties agree about this and I think they also agree that if pancuronium bromide were given by itself the death would be by conscious suffocation. I don't think there is a dispute about that. Now, the plaintiff does not focus on the third drug in this lawsuit because the plaintiff

understands that the third drug is redundant and the prisoner has already died by suffocation.

In this case, the plaintiff has carried his burden to show that the first injection of 5 grams of sodium thiopental followed by rapid injection of the second drug will result in the inmate's consciousness during suffocation. And as for further facts in the case and the medical proof, both parties called medical experts. The Court found that both experts could assist the finder of fact because the issues in the case focus upon chemical reaction to drugs in the body before and after death.

In compliance with Rule 702 of the rules of evidence both experts are medical doctors. Dr. Lubarsky called by the plaintiff is a board-certified anesthesiologist, who is both a clinician and a prolific academic researcher and published writer. Dr. Lubarsky has been a tenured professor on medical faculties ~~factories~~ at excellent medical schools. He is a teacher accustomed to providing explanations in the language of beginning and in the language of experienced medical students. It appears to the

Court than an expert anesthesiologist who is also a teacher is an ideal expert for the evaluation of consciousness and unconsciousness.

Dr. Li, a senior assistant medical examiner contracted in Metro Government has also been a teacher in the past. He began his medical education in his native China and then continued with his residency in this country. There is no reason to doubt his expertise based upon his education and background. It appears to the Court that a medical examiner has experience and knowledge about ~~toxicality~~ toxicology, pathology, pharmacology and other matters in order to opine about the cause of death and the manner of death.

And as for the medical proof, the plaintiff carried his burden to show that the Tennessee protocol does not insure that the prisoner is unconscious before the paralyzing drug; that is, the second becomes active -- is injected and becomes active in the body. The petitioner, or plaintiff, has never conceded that 5 grams of sodium thiopental @nsures unconsciousness or @nsures unconsciousness by death for any particular person because there

are many variables which prevent such a safe prediction which would prevent conscious death of suffocation.

Dr. Lubarsky first explained that breathing is a primary survival impetus for humans. It is extremely disturbing to a patient when the patient is unable to get air. Not to be too simplistic, but life is about getting a breath of air. The body is tuned to need and get air. It is a primary survival issue. There is great suffering and pain if a patient were to suffocate from lack of air. Through Dr. Lubarsky, the plaintiff was able to show that because a paralyzing drug is used soon after sodium thiopental is injected, no one can tell if the prisoner is conscious or unconscious and this is a tragedy given execution by injection.

These factual statements made by Dr. Lubarsky and found to be accurate by the Court have increased the Court's comprehension of the anticipated severity of the suffering. Dr. Lubarsky explained the study that he authored, which was published in the British journal Lancet. The study exam[illegible] the level of

sodium thiopental in the blood serum through autopsy, which of course, is after the prisoner has been executed. Dr. Lubarsky explained that he and his co-authors had a difficult time getting data on executed prisoners. But they did get data and they did explain -- they did explain through their data and the study that the level of sodium thiopental in the blood serum, postmortem sometimes measures higher than expected and somewhat lower but is fairly equivalent to the level of sodium thiopental at death; that is, at execution, because this kind of chemical is stable in the blood and does not naturally increase or decrease much.

He admits that his study published in the Lancet is not perfect, and he concedes they could have used more data but they could not get the data. Dr. Lubarsky makes the very good point that after this article was peer reviewed and published, it was challenged. But following the author's response to the challenges, the critics backed off and have not countered with further criticism, nor have there been other studies.

The Court finds that Dr. Lubarsky's

testimony is convincing, and his study is convincing that the level of sodium thiopental is used by different people in different ways, and the reactions are variable -- are very variable. The study shows the amount of sodium thiopental in the blood serum of prisoners across the country were lower than one would hope would be the case because the level was not high enough to insure that the prisoners were unconscious.

Dr. Lubarsky studied and reported upon the autopsies of three Tennessee prisoners who were executed using the protocol in Tennessee that is the issue in this case. They were injected with 5 grams of sodium thiopental as far as anyone is aware. The level of this drug in the blood measured through the autopsies, however, shows the three men did not have sufficient amounts of this drug to insure unconsciousness. Instead their levels were 10.2 milligrams per liter for Mr. Coe, 18.9 milligrams per liter in the Workman's case, and 8.31 milligrams per liter from the Henley autopsy. His research shows that with 50 milligrams per liter, half of the persons would

be conscious at that time and half would not be conscious.

As for medical proof, continued, Dr. Li opined that he believed that Mr. Coe, Mr. Workman, Mr. Henley were unconscious at the time of their deaths. He based his opinion in part on Winek's drug and chemical blood level data. This is Trial Exhibit 27. This chart shows levels for therapeutic or normal and then for toxic and lethal. The postmortem levels of sodium thiopental in previous Tennessee executed inmates sometimes fell within the range for therapeutic or normal, as well as falling within the range for toxic or lethal. When asked to explain why Mr. Workman's postmortem sodium thiopental level was sufficiently higher -- significantly higher than Mr. Coe's and Mr. Henley's even though his autopsy had not been performed until ten days after his execution and the other inmate's autopsies had been performed seven hours after their executions approximately, Dr. Li stated that every human body is different and that these differences have an effect on the drug level.

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 will be used in the body depending 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.

Next, 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

three-drug protocol issue which is presented here.

And as for facts regarding the failure to check for consciousness, the Florida Department of Corrections which adopted new lethal injection procedure effective for executions after May 9, 2007 included the following procedure to immediately follow the sodium thiopental injections: ~~In quotes at this point~~, "At this point a member of the execution team will assess whether the inmate is unconscious. The warden must determine after consultation that the inmate is indeed unconscious. Until the inmate is unconscious and the warden has ordered the executioners to continue, the executioner shall not proceed to Step 5, ~~close quote~~." And this is from Florida protocol hearing exhibit -- hearing and this is exhibit -- Trial Exhibit 24 Page 8.

Proceeding on with the facts -- findings of fact under the subject, Failure to check for consciousness, the Court finds that in California's lethal injection protocol and review, which was issued on May 15, 2007, the California Department of Corrections review team

pointed out that earlier versions of this protocol made no provisions of any objective assessment of consciousness of the condemned inmate following administration of the sodium thiopental, and before the administration of the other chemicals.

The State of California lethal injection protocol review. The California committee noted that there are reliable but relatively uncomplicated methods for effectively assessing consciousness that have been incorporated into California lethal injection protocol. Among them are talking to and gently shaking the inmate as well as lightly brushing eyelash. For that reason, changes were made to the California protocol to place staff in close proximity to the condemned inmate throughout the execution to assess and confirm the condemned inmate is unconscious prior to and during the administration of the pancuronium bromide and the potassium chloride. This is from Trial Exhibit Number 25, Page -- I'm sorry -- Hearing Exhibit 25 Page 20. Number 25, Page 20.

The Tennessee protocol committee appears to have been well aware of the necessity

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

he also advised checking for an eyelash response by brushing a finger across them, lifting up the person's arm and a pin prick or pinching the nipples. This Hearing Exhibit Collective 3, former Trial Exhibit 29.

Ms. Gail Ray's notes from that same meeting include the sentence: What if any safeguards to insure a person is appropriately anesthetized, with an arrow pointing toward any monitoring by medicine, medical personnel, question. Hearing Exhibit Collective 3, former trial Exhibit 31 at Page 30. Mr. Elkins, counselor to the Governor, verified that he had taken notes concerning a telephone conversation with Commissioner Little on April 20, 2007, in which he had written ask them to introduce a step to explicitly go over and check level of sedation. Hearing Exhibit Collective Number 3; former Trial Exhibit 5 at Page 7.

And also from Harbison versus Little and Others, Exhibit Number 1, I'm going to read into the record a brief testimony from Debbie Inglis the Tennessee Department of Corrections general counsel, Question posed to her: One of the physicians which you consulted

during the course of the committee's work advised the committee about a number of different ways to assess an inmate's anesthetic depth which wouldn't require the use of any machine; is that correct?

And her answer was: A physician did recommend in response to our question to give us ways that we could actually sort of determine at a particular point whether there was consciousness or not, but those weren't ways of actively monitoring the anesthetic depth over the process.

Question: Okay. Did the physician that told you that those were ways to assess anesthetic depth, was he the one that told you that wasn't -- that that wasn't adequate?

Answer: No. What I'm saying is the physician was telling us that at a particular point you could maybe look at -- do a pinprick or move something on the inmate's foot, pinch them, and that right tell you at the time that that inmate was unconscious at this point, but I mean, I think it goes out saying that unless you are -- that does not monitor the anesthetic depth over the course of the

execution.

Question: Did the physician tell you you couldn't make a second check or third check or a fourth check?

Answer: No.

Question: If it was needed?

Answer: No.

Question: Did the physician tell the committee that there was some limitations on how often these checks could be provided or could be conducted?

Answer: No.

Question: So what is the basis of your statement that these checks could not be continued throughout the lethal injection process?

Answer: Well just that it wouldn't be practical as you are carrying out the execution to have someone standing there pinching the inmate. I mean, we didn't think that would be appropriate, and our experts didn't indicate that -- you know, that this was a necessary step. In any event, these suggestions were simply in response to our question of what could be done to check

consciousness.

Question: You said before that experts -- that you had experts who told you that assessing anesthetic depth wasn't necessary, but those same experts did advise you of the critical importance of the inmate being unconscious before the administration of the second two drugs, did they?

Answer: They certainly, yes, indicated that that was the purpose of the first drug and that that was important.

And that completes at this time the findings of fact. I'm going to move to the principles of law. And first the Court is looking at Rule 702, testimony about experts. If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify in the form of an opinion or otherwise.

Rule 703, basis of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an

opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The Court shall disallow testimony in the form or opinion or inference if the underlying facts or data indicate a lack of trustworthiness.

As for principles of the law from McDaniel versus CSX Transportation, which is 955 S.W. 2d 257, a 1977 opinion -- Supreme Court opinion, in general, questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. The specific rules of evidence that govern the admissibility of scientific proof in Tennessee are Tennessee Rules of Evidence 702 and 703.

In Tennessee under the recent rules, a Trial Court must determine whether the evidence will substantially assist the trier of fact to determine a fact in issue and whether the facts and data underlying the evidence

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

Although the Trial Court must

analyze the signs and not merely the qualifications, demeanor, or conclusions of witnesses, the Court may not weigh or choose between two legitimate but conflicting scientific views. The Court instead must assure itself that the opinions are based on relevant scientific methods, processes, and data and not upon an expert's mere speculation.

And now the Court will continue with principals of law from Baze versus Rees, which is U.S. Supreme Court Case at 553 US35 rendered in 2008. The 8th Amendment to the Constitution applicable to the states through the due process clause of the 14th Amendment provides that excessive bail shall not be required nor excessive fines imposed, nor cruel or unusual punishments inflicted.

We begin with a principle settled by Gregg versus Georgia that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out. Some risk of pain is inherent in method of execution no matter how humane. If only from the prospect of error in following the required procedure, it's clear then that the constitution does not

demand the avoidance of all risk of pain in carrying out executions. Our cases; that is, those of the U.S. Supreme Court, recognize that subjecting individuals to a risk of future harm, not simply actually inflicting pain can qualify as cruel and unusual punishment.

To establish that exposure violates the 8th Amendment, however, the conditions presenting the risk must be sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers. We have explained that to prevail on such a claim, there must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the 8th Amendment. Simply because an execution method may result in pain either by accident or is an inescapable consequence of the death does not establish the sort of objectively tolerable risk of harm that qualifies as cruel and unusual.

Given what our; that is, the U.S. Supreme Court cases, have said about the nature of the risk of harm that is actionable under the

8th Amendment, a condemned prisoner cannot successfully challenge the State's method of execution merely by showing a slightly or marginally safer procedure. Instead the proffered alternatives must effectively address a substantial risk of serious harm. To qualify, the alterative procedure must be feasible, readily implemented and in fact significantly reduce the substantial risk of severe pain. If the State refuses to adopt such an alternative in the face of these documented advantages without legitimate penalogical justification for justification for adhering to its current method of execution, then the State's refusal to change its method can be viewed as cruel and unusual under the 8th Amendment.

And now the Court is reading from Harbison, Sixth Circuit ruling, and the Court is specifically distinguishing this current case from the Baze ruling and reasoning and from the Harbison ruling and reasoning. Unlike Baze and Harbison, there is no agreement in this case that the level of sodium thiopental in the protocol was constitutionally acceptable. In the Harbison case -- and this is a citation and

it is a principle of law from the Harbison case. As in Baze, the inmate in Harbison concedes that if the protocol were followed perfectly it would not pose an unconstitutional risk of pain and argues instead that maladministration of the sodium thiopental would result in a severe risk of pain from the subsequent drugs that could go undetected. Further -- and this is also from Harbison, which I distinguish, but I still think there is some principle of law here that will both illuminate the distinguishing character of Baze and Harbison and also will establish some principles of law. The District Court first concluded that the amended protocol was deficient because it did not provide a proper procedure for insuring that the inmate was unconscious before administering the pancuronium bromide. The Court noted that other states required the execution team to determine if the inmate is still conscious before proceeding with this step.

The Tennessee protocol review committee also have recommended that procedures be put in place to insure that the inmate was unconscious at this step. Possible methods for

determining unconscious -- returning consciousness included lightly brushing eyelashes, lifting up an arm or pinching a nipple. Despite this recommendation, these safeguards were not adopted in the amended protocol. Instead the prison warden who was in the room with the inmate and the executioners who would be able to see the inmate through a one-way glass window monitored the prisoner visually during the execution process, which the State believed to be sufficient safeguard.

The District Court in Harbison disagreed, holding that the failure to check for consciousness greatly enhanced the risk the inmate would suffer unnecessary pain. Baze, however, rejected the necessity of the procedures relied upon by the District Court. It noted at the outset that because a proper dose of sodium thiopental would render any check for consciousness unnecessary. There was no such agreement, however, in this case, as there was in Baze and in Harbison that the protocol as written if properly administered is constitutionally acceptable.

Then I'm going back here to Baze

for further principles of law and further analysis of this particular case. And this is from the plurality decision in U.S. Supreme Court case in Baze. The decent believes that rough and ready tests for checking consciousness; calling the inmate's name, brushing his eyelashes or presenting him with strong noxious odors could materially decrease the risk of administering the second and third drugs before the sodium thiopental has taken effect." Again -- and this is from Baze, "the risk at issue is already attenuated, given the steps Kentucky has taken to insure the proper administration of the first drug."

And here this Court notes in Baze and in Harbison, the parties had agreed that if properly administered, the level of sodium thiopental was constitutionally acceptable. This case, this West (and Irick) case, differs because there is no such agreement here and the Court must therefore continue on and -- continue on as I have done earlier in this decision to analyze other factors and not stop at the Baze and Harbison analysis.

I am going back now to the issues

that the Court must decide in the case, whether the current amount and concentration of sodium thiopental mandated by Tennessee's 2007 lethal injection protocol are insufficient to insure unconsciousness so as to create an objectively intolerable risk of severe suffering or pain during the execution.

This Court finds that the current amount and concentration of sodium thiopental are insufficient to insure unconsciousness because the body's ability to and the body's actual use of this drug depends on so many variables, and both medical experts agree that that was the case.

And Number Two is a factual matter. The Court is to decide at what level sodium thiopental -- at what level is the sodium thiopental sufficient to insure unconsciousness so as to negate any objectively intolerable risk of severe suffering or pain during the execution. And I should go back to issue Number 1, and say the objectively intolerable risk of severe pain -- suffering or pain during the execution is the injection of the second drug, the paralyzing drug after the first

inadequate and inefficient drug has been injected; that is, to do so so quickly and to do at all.

As a factual matter -- going on now to issue Number 2, at what level is this particular drug; that is, Number 1 -- sufficient to insure unconsciousness. And although Dr. Li testified that 5 grams of sodium thiopental is fatal -- or should be fatal, Dr. Li also agreed with Dr. Lubarsky that the amount of sodium thiopental which will -- can be -- can provide an assurance that a particular level of this drug will be effective in the body depends on many, many variables. And so although this Court listened very closely to the experts' opinions about this particular issue, this Court is unable to find what level of sodium thiopental is sufficient to insure unconsciousness because I don't think there is one, given the medical proof that the Court is relying on; given the medical proof in the case.

Number 3, is there a feasible and readily available alternative procedure which could be supplied at execution to insure unconsciousness and negate any objectively

intolerable risk of severe suffering or pain? It appears to this Court that there are feasible and readily available alternative procedures which could be supplied at execution to insure unconsciousness and negate any objectively intolerable risk of severe suffering or pain. This Court should not say or find which of those it would recommend, but I think the Court's finding of fact regarding the ways -- the various ways that unconsciousness can be checked should be left to the State.

But the proof in the Harbison case that was filed in this case, the -- the facts that were gleaned from Mr. Voorhies' testimony in which -- and from other state protocols in which checks for consciousness were overt and explicit and intentional indicate that there are various ways to go -- to do that and it should be done.

Number 4, did the State refuse to adopt this alternative and without justification adhere to its current method? Well, the State decided that its protocol of injecting sodium thiopental in the measure that its protocol requires; that is, 5 grams, did not require

checking for consciousness or unconsciousness, and given the other protocols that have been filed in with Court, given the approach taken by -- taken in Ohio as testified to by Mr. Voorhies, it does seem that the State should have figured out some way -- some simple way, should have adopted one of the simple ways which appears to be used in other states to check on, to make sure that the prisoner was unconscious, and this Court cannot find a justification for not checking on consciousness -- on unconsciousness. I just don't think there is a justification that this Court can understand.

And back just for a moment to Issue Number 2. I think the Court should say that it cannot state there is no level of sodium thiopental sufficient to insure unconsciousness. This Court does not find there is no level whatsoever, but this Court does not know what it would be.

And Lawyers is there anything else I ought to do? Is there anything -- any housekeeping issue that should be addressed that I have not addressed?

MR. KISSINGER: Not that the

plaintiffs are aware of, Your Honor.

MR. HUDSON: Nothing from the defendants, Your Honor.

THE COURT: Okay. Lawyers, I will be here on Monday and Tuesday to sign anything that I need to sign. Too late for me to sign anything today, but like I said I will be here Monday and Tuesday, and appreciate your patience. We are now adjourned.

COURT REPORTER'S CERTIFICATE

STATE OF TENNESSEE:

COUNTY OF DAVIDSON:

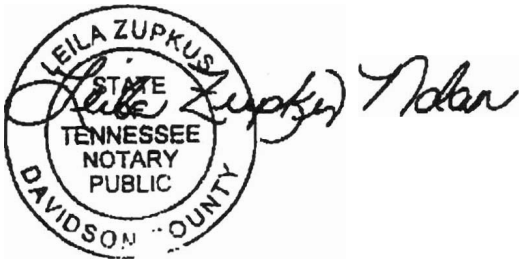
I, LEILA ZUPKUS, Court Reporter and Notary Public, Davidson County, Tennessee, CERTIFY:

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

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

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

WITNESS MY SIGNATURE, this, the 22nd day of November, 2010.



LEILA ZUPKUS NOLAN, TLCR
My commission expires: June 30, 2012