

No. 10-6196

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHEN MICHAEL WEST,)	
)	
Plaintiff/Appellant,)	
)	
v.)	
)	DEATH PENALTY CASE
GAYLE RAY, in her official capacity)	
as Tennessee’s Commissioner)	<u>EXECUTION DATE:</u>
of Correction, et al.,)	November 9, 2010
)	
Respondent/Appellees.)	

MOTION TO STAY AND ABEY PROCEEDINGS

Now comes Appellant, Stephen Michael West, by and through counsel, and moves this Honorable Court to Stay and Abey Proceedings in this appeal until a threshold jurisdictional issue is resolved in a currently pending proceeding in the Davidson County, Tennessee Chancery Court.

In the district court below, the Appellees attached to their memorandum in support of their RULE 12(b)(6) Motion to Dismiss (R. 24) an Affidavit to Elect Method of Execution (R. 24-1), hereinafter “Affidavit,” which they purport to be Mr. West’s binding election of electrocution as the means of carrying out his pending November 9, 2010, execution. As Mr. West argued in the court below,

the proper interpretation of this Affidavit is seriously in dispute and presents a threshold issue of subject matter jurisdiction that must be resolved before this Court can resolve other aspects of this litigation.

The resolution of the subject matter issue is of paramount importance before this litigation can go forward. If the Affidavit remains valid, it would deprive the federal courts of subject matter jurisdiction. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). The Court would be powerless to resolve the other issues and defenses in this case. That threshold issue must therefore be resolved. *See United States v. Gabrion*, 517 F.3d 839 (6th Cir. 2008) (court held all other issues in abeyance until issue of subject matter jurisdiction had been resolved).

To that end, Mr. West has filed an action in the Chancery Court for Davidson County, Tennessee so that the state court may rule on this important state law issue and, concurrent with the filing of his Reply Brief, moves this Court to stay and abey further proceedings until the state court has ruled and this Court's subject matter jurisdiction has been determined.¹ Mr. West's state court challenge to the viability of the Affidavit is far from frivolous. In fact, it is patently

¹The first pages of Mr. West's Chancery Court pleadings filed October 18, 2010, and "filed" stamped by the Chancery Court Clerk (Complaint, Motion for Temporary Injunction, Memorandum in Support of the motion, and an order for a hearing on October 22, 2010) are attached hereto as Attachment A.

meritorious. It deserves the fair, complete, and prompt adjudication which the Chancery Court of Davidson County has the ability to provide.

At the time the Affidavit was executed in 2001, two weeks before Mr. West's March 1, 2001, scheduled execution date, it was merely a small piece of a much larger document, Tennessee's then-existing execution manual. As Mr. West has alleged more fully before the Chancery Court, when read in *pari materia* with the entirety of the rules and regulations of which it was a part, it becomes clear that the execution manual set forth procedures to be followed as every execution date drew near and that the "finality" language upon which Defendants-Appellees rely in their brief is in reference to the particular scheduled execution date and not to a new execution date set after almost a decade of habeas corpus litigation. As Mr. West has also alleged more fully before the Chancery Court, Tennessee's current execution manual similarly requires the presentation of a new "affidavit" each time a new execution date has been set following a substantial delay. Additionally, and again as more fully alleged in the appropriate state court forum, even if the Affidavit submitted by Defendants-Appellees did not expire with the passage of Mr. West's 2001 execution date, the Governor of the State of Tennessee revoked all then existing execution rules and procedures on February 1, 2007, almost six years after the State obtained Mr. West's signature on the

Affidavit.² Finally, Mr. West, in an abundance of caution, has since rescinded that Affidavit once he learned that the State was claiming that it was still valid. There is no reason to question the validity of this rescission.³ Though Mr. West has raised other state law grounds demonstrating the invalidity of the Affidavit before the Chancery Court,⁴ even without examining those grounds, it is clear that Mr.

²On February 1, 2007, Governor Phil Bredesen issued an Executive Order Number 43 which provided, in the pertinent part:

The current protocols and any related procedures, whether written or otherwise, used by the Department of Correction and related to the administration of death sentences in Tennessee, both by lethal injection and by electrocution, are hereby revoked.

Attachment B.

³Though Defendants-Appelles have claimed that Mr. West can only change his method of execution by “submit[ting] a new affidavit, no later than 14 days prior to the date of execution (affirmatively stating that he ‘waives any right he might have to have his execution carried out by electrocution and instead chooses to be executed by lethal injection.’” (R.24, p. 4, fn.2)), Defendants-Appellees give no authority for that demand. That is because there is none. The current protocol contains no such quotation because the right that must be waived is the right to have the execution carried out by lethal injection. (R.1-3, Current Protocol).

⁴Mr. West has further alleged before the Chancery Court that the State’s conduct subsequent to Mr. West signing the Affidavit further demonstrates that it is no longer of any force and effect. To wit, Appellant is informed and believes that in all other cases where an inmate has executed an Affidavit to Elect Method of Execution prior to a scheduled execution and that execution has been stayed by either court order or State action until after that date has expired, the State of Tennessee has provided each inmate with a new opportunity to elect, or refuse to elect, a method of execution. *Terry Barr Sales Agency, Inc. v. All-Lock Co., Inc.*, 96 F.3d 174 (6th Cir. 1996); *Lancaster Glass Corp. v. Philips ECG, Inc.*, 835 F.2d 652, 659 (6th Cir. 1987)(finding the parties’ course of performance controlling because the parties

West is proceeding in good faith in order to protect his rights under state law.

This Court cannot go forward on this appeal until this threshold issue is resolved. If Mr. West has no standing to challenge Tennessee's lethal injection protocol, this Court has no jurisdiction to decide any other issue. The Tennessee courts, where an action is now pending, are best suited to resolve the issue of whether the Affidavit remains binding. The litigation before this Court should be stayed until the state court has ruled. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). *See also Rienhardt v. Kelly*, 164 F.3d 1296 (10th Cir. 1999).

CONCLUSION

For the reasons set forth above, Mr. West respectfully requests the Court Stay and Abey Proceedings in this appeal until a threshold jurisdictional issue is resolved in a currently pending proceeding in the Davidson County, Tennessee Chancery Court.

themselves best know what they meant by the instrument which they executed).

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

s/Stephen A. Ferrell
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Stephen M. Kissinger
Assistant Federal Defenders
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MILLER & MARTIN LLP
s/Roger W. Dickson
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Chattanooga, TN 37402-2289
(423) 756-6600

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2010, the foregoing *Motion to Stay and Abey Proceedings* was filed electronically. Notice electronically mailed by the Court's electronic filing system to:

Mark A. Hudson
Mark.Hudson@ag.tn.gov
Martha A. Campbell
Martha.Campbell@ag.tn.gov
Office of Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202-0207

Notice delivered by other means to all other parties via regular U.S. Mail.

Parties may access this filing through the Court's electronic filing system.

s/Stephen A. Ferrell
Stephen A. Ferrell

ATTACHMENT A

TO

MOTION TO STAY AND ABEY PROCEEDINGS

FIRST PAGES OF PLEADINGS FILED IN DAVIDSON COUNTY, TENNESSEE,
CHANCERY COURT OCTOBER 18, 2010

Plaintiff)

No. 10.1675-T

v.)

DEATH PENALTY CASE

**GAYLE RAY, in her official capacity as)
Tennessee's Commissioner of)
Correction,)**

EXECUTION SCHEDULED:

November 9, 2010

**RICKY BELL, in his official capacity as)
Warden of Riverbend Maximum)
Security Institution,)**

**DAVID MILLS, in his official capacity as)
Deputy Commission of Tennessee)
Department of Correction,)**

**REUBEN HODGE, in his official capacity)
as Assistant Commissioner of)
Operations,)**

JOHN DOE EXECUTIONERS 1-100,)

JOHN DOES 1-100)

Defendants)

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Comes the Plaintiff, Stephen Michael West, and hereby files this Complaint against the above-named defendants, showing the Court as follows:

JURISDICTION AND VENUE

Jurisdiction is proper pursuant to TENN.CODE ANN. § 16-11-101. Venue is in Davidson

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,)

Plaintiff)

v.)

GAYLE RAY, in her official capacity as)
Tennessee's Commissioner of)
Correction,)

RICKY BELL, in his official capacity as)
Warden of Riverbend Maximum)
Security Institution,)

DAVID MILLS, in his official capacity as)
Deputy Commission of Tennessee)
Department of Correction,)

REUBEN HODGE, in his official capacity)
as Assistant Commissioner of)
Operations,)

JOHN DOE EXECUTIONERS 1-100,)

JOHN DOES 1-100)

Defendants)

No. _____

DEATH PENALTY CASE

EXECUTION SCHEDULED:

November 9, 2010

FILED
2010 OCT 18 PM 1:29
CLERK OF CHANCERY CT.
DAVIDSON CO. TENNESSEE
DC2M

MOTION FOR TEMPORARY INJUNCTION

Comes the Plaintiff, Stephen Michael West, and moves this Court for a temporary injunction temporarily enjoining the Defendants and their employees, agents, successors and assigns, and other persons in active concert or participation with the Defendants who receive actual notice of this Temporary Injunction, from engaging, directly or indirectly, in acts which

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,)

Plaintiff)

v.)

GAYLE RAY, in her official capacity as)
Tennessee's Commissioner of)
Correction,)

RICKY BELL, in his official capacity as)
Warden of Riverbend Maximum)
Security Institution,)

DAVID MILLS, in his official capacity as)
Deputy Commission of Tennessee)
Department of Correction,)

REUBEN HODGE, in his official capacity)
as Assistant Commissioner of)
Operations,)

JOHN DOE EXECUTIONERS 1-100,)

JOHN DOES 1-100)

Defendants)

No. _____

DEATH PENALTY CASE

EXECUTION SCHEDULED:

November 9, 2010

FILED
2010 OCT 18 PM 1:29
CLERK OF COURT
DAVIDSON CO. CHANCERY CT.
DC&M

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

Comes the Plaintiff, Stephen Michael West, and in support of his Motion for Temporary Injunction submits the following memorandum of law:

I. Introduction

A party seeking a temporary injunction must demonstrate: (1) a substantial likelihood of

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

Stephen M. West

Plaintiff(s)

Docket No. 10-1675-T

Vs.

Gayle Ray, et al

Defendant(s).

Method of Service*:

- Davidson County Sheriff
- Commissioner of Insurance
- Secretary of State
- Out of County Sheriff
- Attorney

*Attach Required Fees

Address for Service:
c/o Robert E. Cooper, Jr., TN Atty. General
425 Fifth Ave. N., Nashville, TN

FILED
2010 OCT 18 PM 12:28
DAVIDSON CO. CHANCERY CT.
BREN

ORDER SETTING HEARING

It appearing to the Court that the Mr. West has filed an application for a temporary injunction pursuant to Rule 65.02, Tennessee Rules of Civil Procedure, it is accordingly ORDERED that a hearing be held upon the application for injunctive relief on the 22 day of Oct 2010, at 2:30 P.M., before Part I of this court.

Alanna C. Sawyer
CHANCELLOR

Issued this 18 day of Oct 2010 at 12:30 o'clock P. M.

CRISTI SCOTT, Clerk and Master By Jane H D.C. & M.

ATTORNEY FOR _____ - PHONE NUMBER _____

* NOTICE *

Rule 19.04 of the rules of this Court provides that hearings on applications for temporary injunctions are to be heard upon affidavits or depositions unless a request for the introduction of oral testimony is made prior to the hearing. If introduction of oral testimony is requested, all parties or counsel must be notified.

Received this _____ day of _____, _____
Sheriff - Deputy Sheriff

RETURN ON SERVICE

I hereby certify and return that on the _____ day of _____, _____, I served a true copy of this order upon _____ as follows:

ATTACHMENT B

TO

MOTION TO STAY AND ABEY PROCEEDINGS

EXECUTIVE ORDER SIGNED BY GOVERNOR BREDESEN
FEBRUARY 1, 2007, REVOKING EXECUTION PROTOCOLS AND PROCEDURES



STATE OF TENNESSEE
EXECUTIVE ORDER
BY THE GOVERNOR

Number 43

**AN ORDER DIRECTING THE DEPARTMENT OF CORRECTION TO
COMPLETE A COMPREHENSIVE REVIEW OF THE MANNER IN WHICH THE
DEATH PENALTY IS ADMINISTERED IN TENNESSEE**

WHEREAS, this Administration has been and continues to be firmly committed to carrying out death sentences properly imposed under the laws of this state in a timely and judicious manner; and

WHEREAS, this Administration also recognizes its unique responsibility to ensure that death sentences are administered in a constitutional and appropriate manner; and

WHEREAS, since 2000, two inmates sentenced to death have been executed in Tennessee by lethal injection, and both executions were completed professionally in a constitutional and appropriate manner; and

WHEREAS, while these executions have been carried out appropriately, a recent review has highlighted deficiencies in the written procedures intended to ensure that all legal executions will continue to be carried out appropriately; and

WHEREAS, the administration of the death penalty in a constitutional and appropriate manner is a responsibility of the highest importance.


NOW THEREFORE, I, Phil Bredesen, Governor of the State of Tennessee, by virtue of the power and authority vested in me by the Tennessee Constitution and law, do hereby order and direct the following:

1. I hereby direct the Commissioner of Correction ("Commissioner") to initiate immediately a comprehensive review of the manner in which death sentences are administered in Tennessee. This review shall specifically include the state's protocols and any related procedures, whether written or otherwise, related to the administration of death sentences, both by lethal injection and by electrocution. In completing this review, the Commissioner is directed to utilize all relevant and appropriate resources, including but not limited to scientific and medical experts, legal experts, and Correction professionals, both from within and outside of Tennessee. As a component of this review, the Commissioner is further directed to research and perform an analysis of best practices used by other states in administering the death penalty.
2. As soon as practical, but no later than May 2, 2007, the Commissioner of Correction is directed to establish and provide to me new protocols and related written procedures for administering death sentences in Tennessee, both by lethal injection and electrocution. In addition, the Commissioner is directed to provide me with a report outlining the results of the review completed pursuant to paragraph one (1) above.

3. The current protocols and any related procedures, whether written or otherwise, used by the Department of Correction and related to the administration of death sentences in Tennessee, both by lethal injection and by electrocution, are hereby revoked.

By separate orders of reprieve, I have this day granted reprieves to the following individuals, all of whom had sentences of death scheduled to be carried out within the next ninety (90) days: Michael Joe Boyd a/k/a/ Mika'eel Abdullah Abdus-Samad, Edward Jerome Harbison, Daryl Keith Holton and Pervis T. Payne. These four (4) reprieves will remain in place until May 2, 2007.

IN WITNESS WHEREOF, I have subscribed my signature and caused the Great Seal of the State of Tennessee to be affixed this 1st day of February, 2007.


GOVERNOR

ATTEST:


SECRETARY OF STATE

