

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.)	

**WITHDRAWAL OF APPELLANT’S MOTION TO STAY AND ABEY
PROCEEDINGS AND MOTION TO VACATE DISTRICT COURT ORDER
AND REMAND TO DISTRICT COURT FOR ORDER DISMISSING
COMPLAINT WITHOUT PREJUDICE**

Now comes Appellant, Stephen Michael West, by and through counsel, and withdraws his Motion to Stay and Abey Proceedings filed October 18, 2010. Mr. West further moves this Court for an order vacating the decision of the district court below on the grounds and for the reasons the district court lacked subject matter jurisdiction when it rendered its decision. Finally, Mr. West moves this Court to enter an order dismissing Mr. West’s complaint without prejudice so that, now that subject matter jurisdiction has been established, he may file a new complaint.

IN SUPPORT HEREOF, Appellant would show to the court as follows:

1. Appellant previously asked this Court to stay and abey proceedings in this matter until the Tennessee Courts had determined whether Appellant was bound by an election form choosing electrocution which he signed almost ten-years ago. Appellees asserted the validity of that form before the district court, and then again before this Court, in support of their argument that the district court (and by virtue of having no valid order to review on appeal, this Court) lacked subject matter jurisdiction over this matter.

2. Recent developments in the state courts of Tennessee reveal that, regardless of the validity of this almost ten year-old document, the district court did indeed lack subject matter jurisdiction over Appellant's complaint at the time it rendered its decision. Those developments, however, also reveal that the district court would have jurisdiction over that complaint if the complaint was considered by the district court at this time.

3. In order to understand the procedural quagmire which now exists, a brief review of the history of the State's actions regarding this election form is necessary.

4. On November 7, 2000, the Tennessee Supreme Court entered an order setting March 1, 2001, as Appellant's execution date. *See West v. Bell*, 242 F.3d

338, 339 (6th Cir. 2001)

5. On February 13, 2001, Appellant signed an "Affidavit to Elect Method of Execution" (hereinafter "Old Election Form") as required by Tennessee's then-existing execution protocol. R. 24-1

6. Appellant's March 1, 2001, execution was not carried out.

7. On February 1, 2007, Tennessee's Governor Phil Bredesen issued an Executive Order which (a) revoked current [execution] protocols and any related procedures [including the protocol under which Mr. West had been presented with, and signed whether written or otherwise]; (b) instructed the Commissioner of Correction to complete a comprehensive review of the manner in which death sentences are administered in Tennessee; (c) directed the Commissioner to issue new protocols and related procedures by May 2, 2007; and, d) stayed the executions of Michael Joe Boyd a/k/a/ Mika'eel Abdullah Abdus-Samad, Edward Jerome Harbison, Daryl Keith Holton and Pervis T. Payne. R. 1, at ¶5, pages 2-3 of 106.

8. Pursuant to the Executive Order, the Tennessee Department of Corrections issued new execution protocols for both lethal injection and electrocution on April 30, 2007 (hereinafter "Current Protocol"). R. 1-2, R. 1 at ¶6, page 3 of 106.

9. On July 15, 2010, the Tennessee Supreme Court set Appellant West's execution for November 9, 2010. R. 1, at ¶8, page 3 of 106

10. On August 19, 2010, Appellant filed his complaint in district court alleging that Tennessee's method of carrying out executions by lethal injection violated the Eighth And Fourteenth Amendments to the Constitution.

11. On September 3, 2010, Appellees filed their motion to dismiss and supporting memorandum claiming, *inter alia*: (a) that the district court lacked jurisdiction to render a decision on Appellant's complaint because Mr. West had elected electrocution as the manner of his death and therefore presented no case in controversy, R. 24 at pages 3-4 of 23; (b) that Appellant's challenge to lethal injection was barred by the statute of limitations, *Id.* at pages 5-9 of 23; (c) that Appellant's complaint was foreclosed by the doctrine of laches, *Id.* at pages 9-13 of 23; and (d) that this Court's decision in *Harbison v. Little*, 571 F.3d 531 (6th Cir. 2009) foreclosed all challenges to Tennessee's lethal injection protocol as a matter of law. R. 24 at 13-15 of 23.

12. On September 24, 2010, the district court dismissed Mr. West's complaint on statute of limitations grounds without resolving Appellees' subject matter jurisdiction challenge.

13. In accordance with this Court's order setting expedited briefing,

Appellant filed his initial brief on October 6, 2010.

14. In an abundance of caution Mr. West executed a rescission of his prior Affidavit on October 12, 2010, and presented that rescission to Appellee Bell (Mr. Bell is the Warden of Riverbend Maximum Security Institution, located in Nashville, Tennessee, where Plaintiff's execution will occur). Plaintiff's Attachment A, Rescission.

15. At that time, Appellee Bell told Plaintiff's counsel that the rescission would not be effective and that the execution would proceed by electrocution.

16. On October 13, 2010, counsel for Appellant also faxed a letter to Debra Inglis, General Counsel for the Tennessee Department of Corrections (TDOC), asking that she confirm Warden Bell's communication that Mr. West's execution would be by electrocution. Counsel informed Ms. Inglis that: (a) Governor Bredesen explicitly revoked the all execution protocols and related procedures on February 1, 2007 (among which was the election form signed by Mr. West) ; (b) that election form, read in the context of the remainder of the then-existing protocol, expired upon the passage of Mr. West's then-scheduled March 1, 2001, execution date; and, (c) the Old Election Form had, out of an abundance of caution, been rescinded by Mr. West. Attachment B, Ferrell letter.

17. Later on October 13, 2010, Appellees filed their initial brief,

specifically re-raising their claim that the district court lacked subject matter jurisdiction. Brief of Defendants-Appellees at 23-25 (Brief page numbering at 16-18)

18. On October 15, 2010, Ms. Inglis replied that it was TDOC's position that the 2001 Affidavit was in full force and effect and that, in order to avoid execution by electrocution, Mr. West would have to execute an Affidavit in which he affirmatively chose to be executed by lethal injection, thereby waiving, at least according to Appellees, *see* R. 24 at pages 4-5 of 23, his pending challenge to lethal injection as a method of execution. Attachment C, Inglis letter.

19. On October 18, 2010, Appellant filed suit in Chancery Court for Davidson County, Tennessee, challenging Appellees' attempts to bind him to the almost ten year old election form and the constitutionality of electrocution as a means of execution and on date same asked this Court to stay and abey further proceedings until the state court resolved the issue of whether Appellant was still bound by the election form he had signed on February 13, 2001.

20. On October 20, 2010, before the state court could rule on Mr. West's claims, Defendants filed a motion in the Davidson County Chancery Court stating affirmatively that they would now accept Mr. West's recision, that Mr. West was no longer bound by the 2001 election form, and that they would carry out Mr.

West's execution by means of lethal injection. Attachment D, Defendants' Response to Motion for Temporary Injunction.

21. While accepting the rescission by Mr. West, which they had as recently as five days earlier refused to accept, Appellees specifically stated that they "maintain that the February 13, 2001, Election Affidavit is valid and still effective." *Id.* at page 2.

22. Appellees' sudden reversal rendered Mr. West's state court constitutional challenge to electrocution moot. It also rendered moot, for purposes of his state court action, all arguments about the ongoing validity of his 2001 election form. Accordingly, Appellant withdrew that challenge.

23. Appellees' reversal, coupled with their continued insistence that, from February 13, 2001, through October 20, 2010, the State of Tennessee had no intention to carry out Mr. West's execution by means of lethal injection, also reveals:

- a. Regardless of whether the February 13, 2001, election form was valid, Appellees admit that they had no intention to carry out Mr. West's execution by lethal injection until October 20, 2010. The district court was without jurisdiction to render any judgment in this matter and, accordingly, its case must be remanded with instructions

that Appellant's complaint be dismissed without prejudice. *U.S. ex rel. Poteet v. Bahler Medical, Inc.*, ___ F.3d ___, 2010 WL 3491159 (1st Cir. September 08, 2010); and

- b. On the date when Tennessee adopted the Current Protocol, and on every day following up until October 20, 2010 (including every day since Tennessee enacted the Current Protocol), Appellant could not have maintained an action challenging the Current Protocol.
- c. As of October 20, 2010, Defendants intend to execute Mr. West by means of the lethal injection and he now has standing to pursue those causes of action.

24. Appellant's request for this Court to stay and abey these proceedings was for the purpose of allowing the Tennessee state courts to resolve a pending matter of state law. Because of Appellees' eleventh hour reversal of position, that resolution will not take place. Accordingly, the grounds for Appellant's prior request have been extinguished.

CONCLUSION

For the reasons set forth above, Mr. West respectfully requests the Court allow him to Withdraw his Motion to Stay and Abey Proceedings in this appeal and that the Court remand the matter to the district court with instructions to

dismiss the complaint without prejudice to allow Appellant to re-file his complaint now that his standing is no longer in question.

Respectfully Submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

s/Stephen A. Ferrell
Stephen A. Ferrell
Stephen M. Kissinger
Assistant Federal Defenders
800 S. Gay Street, Suite 2400
Knoxville, TN 37929-9729
(865) 637-7979

MILLER & MARTIN LLP
s/Roger W. Dickson
Roger W. Dickson, Esq.
832 Georgia Avenue, Suite 1000
Chattanooga, TN 37402-2289
(423) 756-6600

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2010, the foregoing Withdrawal of Appellant's Motion to Stay and Abey Proceedings and Motion to Vacate District Court Order and Remand to District Court for Order Dismissing Complaint Without Prejudice 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

**WITHDRAWAL OF APPELLANT'S MOTION TO STAY AND ABEY
PROCEEDINGS AND MOTION TO VACATE DISTRICT COURT ORDER
AND REMAND TO DISTRICT COURT FOR ORDER DISMISSING
COMPLAINT WITHOUT PREJUDICE**

WEST RESCISSION OCTOBER 12, 2010

Mr. Stephen Michael West - 115717
Riverbend Maximum Security Institution
7475 Cockrill Bend Blvd.
Nashville, TN 37243

Mr. Ricky Bell, Warden
Riverbend Maximum Security Institution
7475 Cockrill Bend Blvd.
Nashville, TN 37243

Dear Warden Bell:

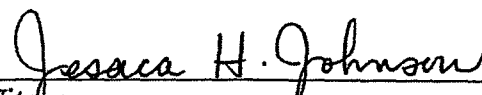
The purpose of this letter is to officially rescind the Affidavit Concerning Method of Execution that I executed on February 13, 2001. That Affidavit no longer has full force and effect since the protocol under which it was signed is no longer in effect. However, you and the other Defendants in *West v. Ray et al.*, case no. 3:10-cv-0778, United States District Court, Middle District of Tennessee, have affirmatively alleged that the Affidavit Concerning Method of Execution that I executed on February 13, 2001, remains in full force and effect in your Motion to Dismiss my complaint in that action. Therefore, in an abundance of caution, I hereby rescind that Affidavit.

You are specifically informed that I neither have made, nor am making, any election of the method of execution under the current execution protocol to be used to carry out the sentence(s) of death imposed upon me by the State of Tennessee on November 9, 2010.



Stephen Michael West

Date: 9/30/10



Witness

Date: 9/30/10

ATTACHMENT B

TO

**WITHDRAWAL OF APPELLANT'S MOTION TO STAY AND ABEY
PROCEEDINGS AND MOTION TO VACATE DISTRICT COURT ORDER
AND REMAND TO DISTRICT COURT FOR ORDER DISMISSING
COMPLAINT WITHOUT PREJUDICE**

LETTER FROM STEPHEN FERRELL

TO

**DEBRA INGLIS, TDOC
OCTOBER 13, 2010**

**FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INCORPORATED**

800 S. Gay Street, Suite 2400
Knoxville, Tennessee 37929

Elizabeth B. Ford
Federal Community Defender

Phone: (865) 637-7979
Fax: (865) 637-7999

VIA FACSIMILE TRANSMISSION
(615) 741-9280

October 13, 2010

Ms. Debra K. Inglis
General Counsel
Tennessee Department of Corrections
320 6th Avenue North, 6th Floor
Nashville, TN 37243

RE: Stephen West, method of execution

Dear Ms. Inglis:

I am writing you this letter concerning my client, Stephen West, who is currently scheduled to be executed on November 9, 2010. I met yesterday with Warden Bell and learned that he is not presently intending to submit to West an election form concerning the method of execution to be used on November 9. According to Warden Bell, Mr. West will be executed by electrocution because, on February 13, 2001, almost ten years ago, Mr. West signed an affidavit to Elect Method of Execution and chose to be executed by electrocution. That Affidavit was submitted to Mr. West and signed by him, pursuant to an execution protocol which was revoked in its entirety by Governor Phil Bredesen on February 1, 2007.

At this meeting with Warden Bell, I submitted to him a letter in which Mr. West gave notice that his 2001 affidavit was no longer in effect since the protocol under which it was signed was no longer in effect. Furthermore, Mr. West gave notice that, in an abundance of caution, he was rescinding that affidavit at this time and that it was no longer his election for the currently scheduled execution date. He specifically gave notice to the Warden that he was making no election under the current execution protocol.

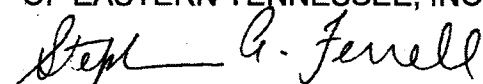
I need to hear from you, in your official capacity, whether you consider Mr. West's 2001 Affidavit to be in full force and effect. I believe that there can be no question that this Affidavit is no longer in effect because (1) the protocol under which it was executed has been revoked by the Governor; (2) out of an abundance of caution, Mr. West has officially rescinded his earlier Affidavit and the Warden was given notice of this more than fourteen (14) days before West's current execution date; (3) under the then-

existing protocol, properly construed, the 2001 Affidavit was effective solely as to his then-scheduled execution; and (4) the 2001 Affidavit was never valid because shortly after this date, Mr. West was diagnosed by prison staff with severe mental illness. Mr. West may well have been incompetent to make this election at that time. Furthermore, you are hereby notified that the Warden has not followed the current protocol which requires him to submit a current election form to condemned inmates within thirty days of any scheduled execution.

Please answer this letter as promptly as possible and inform me of your position on these matters. Time is obviously of the essence. Thank you.

Very truly yours,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.



Stephen A. Ferrell
Asst. Federal Community Defender

cc: Warden Bell

ATTACHMENT C

TO

**WITHDRAWAL OF APPELLANT'S MOTION TO STAY AND ABEY
PROCEEDINGS AND MOTION TO VACATE DISTRICT COURT ORDER
AND REMAND TO DISTRICT COURT FOR ORDER DISMISSING
COMPLAINT WITHOUT PREJUDICE**

LETTER FROM DEBRA INGLIS, TDOC

TO

STEPHEN FERRELL

OCTOBER 15, 2010



STATE OF TENNESSEE
DEPARTMENT OF CORRECTION
4TH FLOOR RACHEL JACKSON BLDG.
320 SIXTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243-0465

October 15, 2010

Stephen A. Ferrell
Assistant Federal Community Defender
Federal Defender Services of Eastern Tennessee, Inc.
800 S. Gay Street, Suite 2400
Knoxville, TN 37929

Dear Mr. Ferrell:

This is in response to your October 13, 2010 letter concerning the status of Stephen West's election of electrocution as his method of execution through an affidavit he executed on February 13, 2001.

It is the Department of Correction's position that Mr. West's affirmative election of electrocution as his method of execution continues to be in full force and effect. If Mr. West now wishes to choose lethal injection, the Department will allow him to do so by submitting a new affidavit to Warden Bell, no later than October 26, 2010 (14 days prior to the date of the 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." To date, the Department has not received an affidavit meeting that requirement from Mr. West.

Sincerely,

Debra K. Inglis
General Counsel

ATTACHMENT D

TO

**WITHDRAWAL OF APPELLANT'S MOTION TO STAY AND ABEY
PROCEEDINGS AND MOTION TO VACATE DISTRICT COURT ORDER
AND REMAND TO DISTRICT COURT FOR ORDER DISMISSING
COMPLAINT WITHOUT PREJUDICE**

DEFENDANTS' RESPONSE TO MOTION FOR TEMPORARY INJUNCTION

**West v. Ray, et al
Chancery Court of Davidson County, Tennessee
No. 10-1675-I
October 20, 210**

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,)
)
 Plaintiff,)
)
 v.)
)
 GAYLE RAY, in her official)
 capacity as Tennessee Commissioner)
 of Correction, et al.,)
)
 Defendants.)

No. 10-1675-I

DEFENDANTS' RESPONSE TO MOTION FOR TEMPORARY INJUNCTION

The plaintiff, Stephen West, a condemned inmate residing at Riverbend Maximum Security Institution, in Nashville, Davidson County, Tennessee, filed this action seeking a temporary injunction effectively enjoining the defendants from carrying out his execution scheduled for November 9, 2010. Specifically, plaintiff contends that his February 2001 choice of electrocution as his method of execution is of no force and effect and that the defendants have not and cannot now present him with an Affidavit Concerning Method of Execution thirty days prior to his execution as outlined in the execution protocols. For the reasons stated below, the motion should be denied and this case dismissed.

On February 13, 2001, plaintiff executed an Affidavit to Elect Method of Execution in which he chose electrocution as the method of his execution and waived his right to be executed by lethal injection. Attachment C to Motion for Temporary Injunction. In response to a 42 U.S.C. § 1983 action in which plaintiff challenged the constitutionality of the Tennessee lethal injection protocol, the state defendants argued that plaintiff was bound by the election he made on

February 13, 2001; consequently, his challenge to the Tennessee lethal injection protocol was hypothetical and did not present a justiciable case or controversy. *West v. Ray*, No. 3:10-cv-0778, Memorandum in Support of Motion to Dismiss filed Sept 3, 2010 (M.D. Tenn. 2010). Plaintiff was also advised that the Tennessee Department of Correction would permit him to change his election by submitting a new affidavit, no later than 14 days prior to the date of the 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.” *Id.* On October 12, 2010, plaintiff presented the defendants with a letter in which he purported to rescind his previous election of electrocution; he did not, however, elect lethal injection as his method of execution. Instead, he informed the defendants that he was making no election of the method of execution (see Motion for Temporary Injunction, Attachment F).

This Court is without jurisdiction to enjoin or restrain the July 15, 2010, order of the Tennessee Supreme Court that plaintiff’s sentence of death be executed on November 9, 2010. *See Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (Tenn. 2000). Nothing in *Coe v. Sundquist*, however, would appear to preclude this Court’s jurisdiction to the extent that plaintiff seeks declaratory relief alone.

The defendants maintain that the February 13, 2001, Election Affidavit is valid and still effective. Plaintiff made that election pursuant to Tenn. Code Ann. § 40-23-114(a), which remains unchanged. Although revisions have since been made to the Tennessee Execution Protocol, that protocol also remains materially unchanged. *See Workman v. Bredesen*, 486 F.3d 896, 900-901 (6th Cir. 2007).

Nevertheless, the defendants have no desire to litigate this issue. Defendants will therefore accept plaintiff's October 12, 2010, rescission of his previous election of electrocution. With the plaintiff having rescinded his previous election and waiver, plaintiff's sentence of death will now be executed by means of lethal injection, by operation of law. *See* Tenn. Code Ann. § 40-23-114(a). Consequently, there is simply no need for plaintiff to be presented with a new election affidavit, as he insists.¹ In addition, the plaintiff has affirmatively declared that he would make no election of a method of execution, further obviating any need to present him with a new election affidavit.

Because this Court lacks jurisdiction to order the injunctive relief sought, plaintiff's motion for temporary injunction should be denied. Furthermore, because the defendants have accepted plaintiff's rescission of his election of electrocution, and his execution will now proceed by means of lethal injection, plaintiff's complaint is rendered moot and should therefore be dismissed.

¹ In any event, the plaintiff has no "right" under the Protocol to be presented with an affidavit of election within 30 days of the execution date. The Protocol is a statement concerning only the internal management of state government. Furthermore, the 30-day requirement is obviously for the benefit of the Department, so that it may have sufficient time to prepare for execution by means of the chosen method.

Respectfully submitted,

ROBERT E. COOPER, JR., BPR #010934
Attorney General and Reporter



MARK A. HUDSON, BPR #12124
Senior Counsel
Office of the Attorney General
Civil Rights and Claims Division
P. O. Box 20207
Nashville, TN 37202-0207
(615) 741-7401

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2010, a copy of the foregoing was forwarded

by facsimile and U.S. Mail to:

Stephen A. Ferrell
Stephen M. Kissinger
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
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Knoxville, TN 37929

Roger W. Dickson
William A. Harris, III
MILLER & MARTIN
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