

Attachment 6

to

REQUEST FOR ASSUMPTION OF JURISDICTION OF
UNDECIDED CASE PURSUANT TO RULE 48,
RULES OF THE SUPREME COURT OF THE
STATE OF TENNESSEE

**Transcript of Hearing on
Motion for Temporary Injunction
October 27, 2010**

ALLIED COURT REPORTING SERVICE

Missy Davis
2934 Rennoc Road
Knoxville, Tennessee 37918
Phone (865) 687-8981

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,)

Plaintiff,)

Vs.)

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

Defendants.)

No. 10-1675-I

TRANSCRIPT OF PROCEEDINGS

OCTOBER 27, 2010

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APPEARANCES:

Attorneys for Plaintiff

Stephen M. Kissinger, Esquire
Federal Defender Services of Eastern Tennessee
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929

Stephen A. Ferrell, Esquire
Federal Defender Services of Eastern Tennessee
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929

Attorney for Defendant

Mark A. Hudson, Esquire
Office of Tennessee Attorney General
425 5th Avenue North
Nashville, Tennessee 37243

Also Present

Jason Steinle, Esquire
Capital Case Staff Attorney
Tennessee Administrative Office of the Courts
511 Union Street, Suite 600
Nashville, Tennessee 37219

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TRANSCRIPT OF PROCEEDINGS

The following is a transcript of the proceedings had and evidence introduced in the above-styled cause, which came on to be heard on this the 27th day of October 2010, before the Honorable Claudia C. Bonnyman, Chancellor, holding the Chancery Court for Davidson County, Tennessee.

* * * * *

THE COURT: This is Claudia Bonnyman. I would like to find out who I have on the line with me. And I'm thinking or I've been told that I have Mr. Kissinger, who has also entered an appearance for the plaintiff, from Federal Defender Services.

MR. KISSINGER: That is correct, Your Honor.

THE COURT: All right. I have Mr. Zach Greene from Miller and Martin.

MR. GREENE: I'm here, Your Honor.

THE COURT: All right. And is Mr. Roger Dickson available?

MR. GREENE: He is not. I'm sitting in for him.

THE COURT: Okay. Now, last time our counter-part communicated with Miller and Martin, Mr. Dickson had asked the hearing be today so he could be here,

1 but he still can't be here?

2 MR. GREENE: Well, Your Honor, he is the
3 lead counsel, I guess, from our side on that and he had not
4 had a chance to review the complaint and all the other
5 matters --

6 THE COURT: Right. I noticed it didn't
7 get copied to him.

8 MR. GREENE: That's right. And talked
9 to Mr. Kissinger, Mr. Kissinger is going to lead the
10 argument from the plaintiff's side, and so I'm here for Mr.
11 Dickson and so we're good from our side.

12 THE COURT: And then I have Mr. Mark
13 Hudson from the Attorney General's Office?

14 MR. HUDSON: Yes.

15 THE COURT: All right. And then I also
16 have Jason Steinle from the Capital Resource Offices,
17 Capital Attorneys Offices --

18 MR. STEINLE: That's correct, Your
19 Honor.

20 THE COURT: -- who is not participating,
21 but I have asked him to be here and to hear what the
22 parties' arguments are so he can help the Court if that's
23 possible. So I had asked for this conference call so that I
24 could address certain questions that are raised by the
25 motion for a temporary injunction. I'm not saying these are

1 the only questions raised by the temporary injunction, but
2 these are the ones that this Court was able to sort of
3 encapsulate in a sentence, and they're the primary arguments
4 as this Court sees it.

5 And one thing that I wanted to focus on
6 first was the fact that the situation that the plaintiff is
7 in is urgent and it's grave and we can assume without
8 deciding that we've got irreparable harm here. I want to be
9 sure that whatever this Court decides, and I think the
10 Court's ability to deviate from decisions that have already
11 been made by the Supreme Court, the Court of Criminal
12 Appeals, the Sixth Circuit, and the U.S. Supreme Court don't
13 give this Court much room to move to the contrary. Given
14 this Court's impression of that, then I want to find the
15 quickest way to get this case to the Court of Appeals so it
16 can be reviewed, and in case this Court is wrong, then I
17 want to have this case sent back down here so I can
18 adjudicate it. So let me hear a response about that first.

19 I'm kind of leaping to issue number 6,
20 what remedies, if any, are available to the plaintiff by
21 which he can present to the Tennessee Supreme Court the
22 claims contained in his complaint? Well, one way he can do
23 that is by litigating and adjudicating here -- or litigating
24 here as quickly as possible so the case gets up to the Court
25 of Appeals. That's one way. There may be other ways. But

1 my thought is that if this temporary injunction can be
2 argued today and resolved today, then it can be appealed
3 today or tomorrow. So let me get a response to that from
4 Mr. Kissinger first.

5 MR. KISSINGER: Well, thank you, Your
6 Honor. Before I begin, I just want to take care of just a
7 couple of quick housekeeping matters. One is that, given
8 the Court's order, we did go ahead and have a court
9 reporter --

10 THE COURT: All right.

11 MR. KISSINGER: -- appear for the
12 proceedings and so they are -- we thought we should record
13 them. And the other is that Mr. Ferrell, who is co-counsel
14 in this case, is also present today. However, as was noted
15 earlier, I will be providing the argument.

16 THE COURT: Okay. That's good. Thank
17 you.

18 MR. KISSINGER: Your Honor, I think the
19 first thing that I want to bring to the Court's attention is
20 that I don't believe that the Court is correct in terms of
21 it being bound in this matter by the decisions in Baze vs.
22 Rees or Harbison vs. Little or State vs. Jordan, for that
23 matter. And there are some pretty simple and
24 straightforward reasons that it isn't. And that is that
25 Baze vs. Rees does not, in fact, stand for the proposition

1 that lethal injection is not cruel and unusual punishment.
2 What Baze vs. Rees held was that the Kentucky protocol, and
3 again, it relied on the findings of fact in the -- made by
4 the state courts of Kentucky in reaching this conclusion.
5 But what it held was that the evidence presented in the
6 Kentucky case did not establish that there was a risk of
7 error in the administration of lethal injection that was so
8 great that it would meet the constitutional standard, the
9 constitutional standard for violation of the Eighth
10 Amendment. What it said about the Eighth Amendment is it's
11 violated only when the risk of harm, of unnecessary harm is
12 so obvious that state officials cannot be heard to say that
13 they were unaware of it. And they said that the evidence
14 presented in Kentucky didn't meet that.

15 One of the important distinctions and
16 perhaps one of the most important distinctions in this case
17 is that in the Baze case, the Court specifically held that
18 the Kentucky plaintiffs had conceded that if Kentucky
19 officials carried out the execution exactly as it was
20 supposed to be carried out under the Kentucky protocol, that
21 there was no risk of harm. That same finding was also made
22 in Harbison vs. Little, that the plaintiff had conceded that
23 if it was carried out correctly, there was no risk of harm.
24 So the only real issues addressed in Baze or in Harbison was
25 whether the evidence showed enough risk of error that it

1 would be administered improperly to create this undeniable
2 risk of harm.

3 That is an important distinction with
4 what we have alleged in this cause of action and it's an
5 allegation which has arisen from facts which became known on
6 March of this year with the release of the Henley autopsy.
7 What we have alleged in this action as far as the cruel and
8 unusual punishment aspect of it is that the Tennessee
9 protocol, when administered exactly as intended, exactly as
10 prescribed by the protocol itself, accomplishes death by the
11 suffocation and -- by paralyzing and suffocating a conscious
12 inmate. I think one of the important things about that is
13 that we supported that allegation not just with documentary
14 evidence in the forms of the Workman and Henley autopsy, but
15 with the affidavit of an expert witness who said that he had
16 reviewed the information contained in those autopsies, the
17 toxicology results, and his conclusion was that, yes,
18 indeed, these inmates were paralyzed and suffocated while
19 they were conscious.

20 Now, also contained within the records
21 that we submitted to the Court and contained within the
22 testimony of the Harbison case was the testimony of Dr.
23 Bruce Levy, the State's pathologist who testified that all
24 of Tennessee's executions were carried out exactly as they
25 were required to be carried out by the Tennessee protocol.

1 He said that the catheters were still within the veins where
2 they were supposed to be, that there was nothing amiss in
3 the apparatus, that the drugs had all been used, basically
4 that there was no error that occurred. And yet the
5 affidavit submitted by Mr. West in this action was that the
6 sodium thiopental levels found in Mr. Henley and Mr.
7 Workman's blood were consistent with them being conscious at
8 the time they were paralyzed and suffocated.

9 Now, that has to be taken as true at
10 this point. It's submitted by -- it's supported by
11 competent evidence and the State has filed no response to
12 that. So if we take that fact as true, it brings us
13 completely outside of the parameters of both --

14 THE COURT: Well, let me interject here,
15 because the State really probably can't, that I have not
16 given the State a chance to respond.

17 MR. KISSINGER: And that's correct, Your
18 Honor. And at this stage of proceedings, and because of
19 that, at this stage of proceedings, everything that Mr. --
20 now, if the Court gives the State a chance to respond and
21 they come up with something else, if they come up with an
22 expert of their own perhaps who says that he's reviewed the
23 Tennessee -- the autopsy of Mr. Henley and that he's
24 reviewed the autopsy of Mr. Workman and that his conclusion
25 is that they were not -- that they were unconscious at the

1 time, well, we've created an issue of fact. However, again,
2 all the issue -- even if we get to that stage, to what we
3 would call summary judgment stage when we have competing
4 issues of fact, they have to be resolved in a light most
5 favorable --

6 THE COURT: And so I'm understanding
7 that you're the plaintiff's counsel --

8 MR. KISSINGER: Yes.

9 THE COURT: -- and have had time to pull
10 together your argument. You could, it seems to me from the
11 quality of your argument, you could proceed with a motion
12 for preliminary injunction today --

13 MR. KISSINGER: Absolutely, Your Honor.

14 THE COURT: -- if the State could be
15 ready. And I know that, because the State hasn't filed
16 anything yet, and I know from the fact the State has
17 explained to my calendar clerk that they can't get an answer
18 ready today, that we have an issue there. I mean, ideally,
19 I would like to hear this matter since you appear to be
20 prepared today.

21 MR. KISSINGER: Right, Your Honor. And
22 I have no problem with that. And perhaps this brings into
23 play some of the Court's other questions, which is what are
24 we looking for in terms of preliminary relief? Are we
25 looking for a stay of the execution? What is it we want

1 this Court to do at this point? And what we want this Court
2 to do is a simple thing. There are rules that the Court has
3 to go by when only one party has had a chance to present
4 their evidence. And those rules -- and we don't deny that
5 those are high standards for preliminary injunctive relief.
6 But given -- unless this Court is prepared to hold that as a
7 matter of law, Tennessee can carry out executions by
8 suffocating and paralyzing conscious inmates simply because
9 the Sixth Circuit in Harbison vs. Little found that our
10 protocol was substantially similar to Kentucky's, unless
11 it's ready to make that kind of a holding, then we have met
12 that burden of showing a substantial likelihood of success
13 because --

14 THE COURT: Now, I'm understanding that
15 because -- that the plaintiff takes the position that
16 because he has not been given an opportunity to choose, to
17 sign the affidavit choosing electrocution, that the
18 plaintiff is taking the position that the execution cannot
19 go forward without that affidavit.

20 MR. KISSINGER: Well, Your Honor --

21 THE COURT: Opportunity.

22 MR. KISSINGER: We're taking the
23 position -- and that's a completely separate claim really
24 from our cruel and unusual punishment claims.

25 THE COURT: It is. It has greatly to do

1 with what relief the plaintiff is asking for, what specific
2 injunction the plaintiff is asking for.

3 MR. KISSINGER: Well, in a way they're
4 actually similar, because in both counts, what -- in both
5 claims, what we're asking the Court to do is not to enjoin
6 the execution, but to enjoin the defendants from going --
7 from not complying with their own laws, not going forward
8 with an execution before it complies with its own laws.
9 Now, if Tennessee were to -- and I think this is a really
10 important distinction. It was something that was actually
11 brought up when I looked carefully at the Coe decision and
12 saw what hte Court did there, was they're saying, no, we're
13 enjoining the execution. We're not asking that. We are
14 asking this Court to enjoin the State of Tennessee from
15 violating the Constitution, the highest law of the land, the
16 Constitutions of both the United States and the State of
17 Tennessee to enjoin them, in the course of carrying out that
18 order.

19 As we pointed out, this is entirely
20 consistent with the order saying the execution date, which
21 says it must be performed in accordance with law. Well,
22 what the State of Tennessee intends to do and what the
23 evidence, the uncontroverted at this point evidence shows is
24 that they intend to go forward in violation of the
25 Constitution of the United States and the State of

1 Tennessee, as well as the law in the forms of the
2 regulations which they promulgated, their own regulations
3 which they promulgated pursuant to Section 114(c) where the
4 Tennessee Legislature delegated to them the authority to
5 create the rules and regulations. And what we have said
6 with regard to that claim is you can't just arbitrarily
7 decide not to follow your own rules simply because it might
8 get in the way of carrying out an order. You have to carry
9 out all aspects of the order. The requirement that it's
10 carried out in accordance with law is not some lesser part
11 of the Supreme Court's order and it's not a lesser part of
12 Tennessee's obligation.

13 So what we're asking the Court to do is
14 to say we're saying, you know something, go ahead, you know,
15 if you can -- if you can show or if you can carry out this
16 execution without violating the Constitution of the United
17 States, the Constitution of the State of Tennessee and your
18 own rules, go for it. Feel free, you know. But you can't
19 violate the law during the course of it because that isn't
20 going forward with the order.

21 So if Tennessee were to come forward
22 with a constitutional method of execution, one which didn't
23 accomplish death by suffocating and paralyzing conscious
24 inmates, that would be a different story, and obviously, the
25 injunction wouldn't apply for that. But at this point,

1 they're insisting on going forward with it under an
2 unconstitutional means, under a method which I think the
3 Court would agree that, if true, and it has to be taken as
4 true if what Dr. Labarsky said in his affidavit is true, the
5 Court would agree it's nothing short of torture.

6 THE COURT: Now, I would like to
7 associate it with the issue of the State not following its
8 own rules and regulations. How does the State's failure to
9 provide the plaintiff with an opportunity to elect
10 electrocution, because I think that is among the parts of
11 the protocol that the plaintiff says is not being followed,
12 how does that particular failure to follow the rules and
13 regulations harm the plaintiff? Is that because he wishes
14 to choose electrocution?

15 MR. KISSINGER: No, Your Honor. I think
16 the way it harms the plaintiff is actually a little more
17 basic than that, which is that Tennessee established a set
18 of rules, and basically, our argument is that those set of
19 rules were established for the benefit of the condemned
20 inmate. It allowed the condemned inmate 30 days -- or
21 allowed the condemned inmate -- or required the condemned
22 inmate to be presented with an affidavit selecting a method
23 of execution 30 days ahead of time so he could begin that
24 30-day period of contemplating not only his impending death
25 but the manner of his death. And concurrent with allowing

1 him that 30-day period to contemplate how he was going to
2 die regardless of whether he elected or didn't elect, he was
3 still entitled to that 30 days to contemplate the manner of
4 his death. It also allowed another 14 days for him to
5 change his mind. Now, another -- right, another 14 days to
6 change his mind.

7 So Mr. West will be deprived, if the
8 execution goes forward as scheduled without complying with
9 the rules and regulations, Mr. West will not only have the
10 30 days he was entitled to contemplate the manner of his
11 death, because the State didn't notify anyone that they were
12 going to go forward under lethal injection until, what,
13 seven days ago, not only will he be deprived of that, he
14 will be deprived of that opportunity to reconsider his
15 decision not to sign the form, or if he had actually been
16 presented with it, whatever decision he made when the form
17 was presented to him. And that's a substantial -- and we
18 think that's a substantial right.

19 This whole matter of being able to
20 contemplate one's death is a matter of such importance that
21 it was a very substantial factor in the Supreme Court's
22 decision to hold that inmates who were incompetent were not
23 eligible for execution. And one of the reasons they
24 mentioned in the decision holding that was that these
25 inmates, because of their mental state, didn't have that

1 opportunity to contemplate the manner of their death. So
2 it's not like this is just, oh, you know, we're just
3 throwing something up there just to come up with something.
4 It's something that the Supreme Court has specifically
5 recognized. So he's been deprived of that. And, again,
6 that just goes to the nature of the harm.

7 We don't think there's a real question
8 over the fact that Mr. Harbison -- oh, I'm sorry, Freudian
9 slip. I represent Mr. Harbison. That Mr. West, that
10 there's been anything other than arbitrariness in their
11 denial of that right. Mr. Harbison -- I said it again,
12 didn't I? Mr. West has gone forward, far more than 30 days
13 earlier, went forward and challenged lethal injection as a
14 method of execution and the State knew right then that that
15 was how he thought he was going to be executed. And they
16 came in and they asserted lack of standing in the Federal
17 Court. They asserted lack of standing -- or they asserted
18 lack of standing in the Federal Court, said he can't
19 challenge that because we're going to electrocute him. And
20 after the time had passed for that Court to make a decision,
21 they came in and said, oh, well, you know, now we'll accept
22 his waiver after they had delayed and postponed proceedings
23 and avoided merits review in Federal Court. Then they
24 suddenly say, well, okay, well, now he can pursue this
25 claim. So Mr. West has basically been dragged here and

1 there by the State and by their arbitrary refusal to -- or
2 their arbitrary decision to not provide -- not act according
3 to their own protocols.

4 THE COURT: So then what I'm
5 understanding from your comments is that the plaintiff is
6 not necessarily going to -- he's not seeking the right to
7 elect electrocution. And what I'm also understanding is
8 that the issue of the constitutionality of the lethal
9 injection here in Tennessee is also being challenged in
10 Federal Court now at the same time.

11 MR. KISSINGER: Well, right, Your Honor,
12 although yesterday, again, because of the revelations that
13 the State made in the course of these proceedings, which was
14 basically that its intent from February 13th of 2001 until
15 October 20th of 2010 was to execute Mr. West by means of
16 electrocution, even if the Federal Court -- and they argue
17 in Federal Court that the District Court lacks subject
18 matter jurisdiction, again, on the same grounds that they
19 did before. Well, regardless of whether the February 13th
20 election form was still valid or not, because the State has
21 represented now in three courts, the District Court, the
22 Middle District, the Sixth Circuit, and this Court, that
23 regardless of the validity of the affidavit, they never
24 intended to execute him by lethal injection until October
25 20th. I'm sorry, I kind of lost track of what I was saying.

1 THE COURT: I understand.

2 MR. KISSINGER: But anyway, was that
3 that was the first time that the action in Federal Court --
4 or that's the first moment at which Mr. West had standing in
5 Federal Court to even challenge lethal injection. Because
6 of that, we have filed a pleading in the Sixth Circuit,
7 which we think we really don't have an argument to the
8 contrary, which is that it's pretty obvious, given the
9 State's position, that they never intended to execute him by
10 lethal injection at the time the District Court rendered its
11 decision, that the District Court did lack subject matter
12 jurisdiction, just like the State has argued three times now
13 and that the Sixth Circuit, therefore, has nothing to review
14 and that the Federal Court also has nothing to review.

15 And we have asked -- because of that, we
16 have asked the Sixth Circuit to send us back to the District
17 Court, send it back to the District Court with instructions
18 to dismiss Mr. West's lethal injection complaint without
19 prejudice, because that's what courts do when they don't
20 have subject matter jurisdiction, it has to be dismissed
21 without prejudice. So our feeling, and it's on -- and it's
22 basically in agreement with what the State has asserted over
23 and over again, is that the District Court had no
24 jurisdiction to enter an order, that the Circuit Court,
25 therefore, has nothing to review and that we have to go back

1 to square one if we want to go back to Federal Court.

2 THE COURT: Okay. And then, last,
3 regardless of what this Court decides, regardless of what
4 this Court decides, do you agree that it's important to get
5 the decision to the Court of Appeals as soon as possible?

6 MR. KISSINGER: Well, I do, Your Honor.
7 And that actually goes to question number 6, which I know
8 the Court started with, which is, it is our position that
9 until this Court, until Your Honor rules, that the Supreme
10 Court of Tennessee has no jurisdiction to entertain any
11 motion for injunction or anything else arising out of this
12 action. The injunctive relief we seek, whether it's
13 temporary or preliminary or permanent, grows out of the
14 complaint, the cause of action that we filed challenging the
15 constitutionality of the manner in which Tennessee is
16 carrying out its lethal injection protocols. And the
17 Supreme Court, the Supreme Court of Tennessee does not have
18 original jurisdiction over that kind of an action. It only
19 has appellate jurisdiction. So, we do need to have an order
20 from this Court that we can appeal in order to get the
21 matter in front of the Supreme Court, because at this point
22 in time, they have no jurisdiction whatsoever over a motion
23 to enjoin the State from violating the Constitution,
24 violating the constitutional provision against cruel and
25 unusual punishment.

1 THE COURT: Thank you. Now, Mr. Hudson,
2 I know that you have not had a chance, any chance, or just a
3 few days chance to file anything in response, but is there
4 some sort of oral presentation that you can present on
5 behalf of the State?

6 MR. HUDSON: Well, Your Honor, I believe
7 we received the motion for temporary injunction as well as
8 the amended complaint. We later received word that the
9 parties would be required, or at least the State would be
10 required, to file a response by noon on Thursday. I think
11 that was by your -- I'm sorry, her name escapes me.

12 THE COURT: Julie Spencer.

13 MR. HUDSON: Ms. Spencer. And we are
14 working on a response and want to prepare a response. I
15 think it would be helpful that the Court have a written
16 response before a decision is made on the temporary
17 injunction motion.

18 As far as the question that you have
19 raised since you have said that these are the important
20 questions, I guess initially looking at the question about
21 the harm the plaintiff would face due to not being able to
22 have an opportunity to elect his method of execution, the
23 provision of the protocol as is cited in the motion for
24 temporary injunction is that the warden is to present the
25 opportunity to the inmate at least 30 days before execution.

1 The protocol does not require that the inmate be given 30
2 days to contemplate his method of execution before he
3 elects. He is given a form at least 30 days prior to the
4 execution, at which point he will execute it at that time,
5 making his choice. Mr. West has had years to contemplate
6 his method of execution after the Supreme Court rendered
7 its -- affirmed his conviction and sentence.

8 This protocol does not create any rights
9 for Mr. West. It is not a statute. It is not a law. It is
10 a protocol that outlines the procedures that will be
11 followed in carrying out the execution. In Rahman, I think
12 the Court addressed the insistence that the protocol be
13 promulgated pursuant to the Uniform Administrative
14 Procedures Act. And the Supreme Court recognized that that
15 was not necessary because it was not something that dealt
16 with -- it was something that dealt with the internal
17 management of prisons. And in doing that, I think it was
18 saying that this is not something that is -- takes on the
19 aura of a statute and a violation amounts to some sort of a
20 statutory right. There is no right to the provisions of the
21 protocol, particularly as we're dealing with the 30 days
22 provision of the protocol.

23 As we have stated before, this is more
24 of a benefit to the State as opposed to the inmate. And at
25 that point in time, we'll know what -- the State will know

1 what it will have to do in order to prepare for the
2 execution, whether it will have to prepare for electrocution
3 or whether it will have to prepare for a lethal injection.
4 So I don't think that there is any sort of harm of whatever
5 kind to Mr. West in not being presented with an opportunity
6 to elect.

7 On September the 30th, 2010, more than
8 30 days prior to his execution, he submitted -- he prepared
9 a letter indicating that he was rescinding his affidavit of
10 election that he executed back on February 13th of 2001.
11 That was not presented to Warden Bell until October the 12th
12 of 2010, so clearly, on September 30th, Mr. West had been
13 contemplating the method of his execution and decided that
14 he did not want to be electrocuted and that he wanted to
15 be -- well, he didn't even want to make a decision, because
16 in the letter indicating that he was rescinding his
17 affidavit of election choosing electrocution, he indicated
18 that he was not making any choice one way or the other.
19 Well, so Mr. West, in fact, wants an opportunity not to be
20 able to make a decision because he has indicated that he --
21 if presented with an affidavit of election, he would not
22 make a decision. So we feel that no harm comes to Mr. West
23 as a result of that, of not having the opportunity.

24 As far as the claims regarding the
25 lethal injection, we believe that *Baze vs. Rees* and *State*

1 vs. Jordan, as well as another recent case, State vs.
2 Schmiderer is also controlling in this case. And the
3 State's position in this is that regardless of whether the
4 plaintiff doesn't concede or concedes that the lethal
5 injection protocol when properly administered will not
6 create a substantial risk of pain, or will not cause pain,
7 or they're talking about -- they're arguing that, well, he's
8 going to suffocate under the current protocol even if it's
9 applied correctly, if it's carried out correctly in
10 accordance with its provisions, I think the Supreme Court in
11 Baze has made it clear regardless that the Kentucky protocol
12 did not create a substantial risk of harm, that the protocol
13 that was substantially similar to the Kentucky protocol
14 would not create a substantial risk of pain.

15 The Tennessee Supreme Court in Jordan,
16 in Schmiderer -- I'm not sure if I'm pronouncing that right,
17 have both indicated that the Tennessee protocol is
18 substantially similar to the protocol that was upheld in
19 Baze. And we really feel that essentially that is
20 dispositive of the issue. Certainly Harbison is persuasive
21 and I think the same arguments were made in Harbison about
22 the concession about whether the protocol when carried out
23 in accordance with its provisions still creates a
24 substantial risk of pain. And the same testimony I
25 anticipate that was presented in that case is being

1 presented in this case and that, at least after the Sixth
2 Circuit vacated the District Court decision in Harbison
3 finding the protocol constitutional and finding that it was
4 substantially similar to the protocol upheld in Baze, the
5 Supreme Court -- the U.S. Supreme Court denied cert. and the
6 Sixth Circuit vacated it back to the District Court. These
7 same arguments were being made by the plaintiff Harbison in
8 that case and were rejected by the District Court and that
9 now is before the Sixth Circuit on appeal. And really the
10 reason for that is it really doesn't make a difference.

11 And the District Court also called into
12 question the compliance that was relied upon by plaintiff
13 Harbison in that case and that is essentially what the
14 Supreme Court did, the U.S. Supreme Court in Baze. They
15 called into question the reliability of the affiant that was
16 being relied upon in making the assertion with regard to
17 whether the inmate was conscious when the other lethal
18 injection drugs were administered. And in the case, I
19 believe, State vs. Hester, an inmate made a similar argument
20 regarding the material found in the Lancet article and also
21 rejected that as unreliable in State vs. Hester. So our
22 position is that certainly Baze and Jordan and Schmiderer
23 are applicable and bind this Court as far as the
24 determination as to the constitutionality of the lethal
25 injection protocol. And certainly Harbison is persuasive,

1 at least persuasive authority for this Court to consider in
2 its determination.

3 With regard to issue number 5 regarding
4 whether the plaintiff is asking the Court to stay the
5 execution, the plaintiff is very artful in setting out
6 its -- the injunctive relief it is seeking, but really, when
7 it comes down to it, what they are asking the Court to do is
8 to keep -- is to stop the execution. That's essentially
9 what they are doing. They are requesting that the
10 defendants be enjoined from carrying out the execution in a
11 manner which constitutes cruel or unusual punishment under
12 the Eighth and Fourteenth Amendments to the United States
13 Constitution and the Tennessee Constitution, Article 1,
14 Section 16, as does the current protocol. Essentially what
15 they are saying, the current protocol as it stands violates
16 the Fourteenth Amendment and the Tennessee Constitution, and
17 therefore, it cannot proceed under this protocol. They're
18 essentially asking the Court to set aside -- to stay the
19 execution because he cannot be executed under this protocol.

20 I mean, we beg to differ, we feel that
21 the protocol is constitutional and that it does comply with
22 the law. And we also feel that there has been no violation
23 of the law and that Mr. West has suffered no harm by not
24 being given an opportunity at least 30 days prior to his
25 execution to elect his method of execution when he --

1 especially when he rescinded his election more than 30
2 days -- he attempted to rescind his election more than 30
3 days before the execution. And he has affirmatively
4 indicated that he is not going to make a selection prior to
5 his execution. As a consequence, he will be executed by
6 lethal injection. The Court pointed this out in the order
7 regarding the first temporary injunction, which was
8 withdrawn, that there was no need for Mr. West to make an
9 election.

10 So although we feel that the policy --
11 or that the protocol complies with the law and that the
12 defendants have complied with the law, that Mr. West is not
13 entitled to 30 days, opportunity in 30 days prior to
14 execution to -- for the method of execution as a matter of
15 law or as a right. We still feel that the injunctive relief
16 that they are seeking is clearly a means of superseding the
17 order of the Tennessee Supreme Court that he be executed on
18 November the 9th, 2010.

19 THE COURT: As to the question number 6,
20 do you have any thoughts about that? And then I'm going to
21 ask all the -- well, the two lawyers what you think we
22 should do going forward. And I know the State wants the
23 Court to wait until it has a chance to respond in writing,
24 but do you -- and I'm not trying to get you here to help the
25 plaintiff, but do you know of any way besides getting an

1 order from this Court to the Appellate Court quickly that
2 the Tennessee Supreme Court can review his claims, and
3 therefore, perhaps modify its July 15th order? Anything
4 that you want to say about that?

5 MR. HUDSON: I'm not sure that there is
6 anything that I can say about that. I mean, I will say that
7 I do not know of any direct way that the plaintiff can
8 appear before the Supreme Court to raise these particular
9 issues. I know that apparently other attempts have been
10 made to bring issues before the Court, the Supreme Court,
11 without filing an action in the State Court and those
12 efforts were not successful. I'll leave it at that. But
13 really, when it comes down to it, you know, I know the
14 situation is urgent, but this is really a situation of the
15 plaintiff's making. They had filed an action in Federal
16 Court regarding this August of this year, August 19th, I
17 believe. The execution was set on July the 15th. They had
18 the time.

19 THE COURT: Well, maybe. It's hard for
20 this Court to evaluate that when, you know, I'm very aware
21 that this Court's resources are limited, your office's
22 resources are limited, and everybody's resources are limited
23 in that you've only got so many people. But that's not a
24 judgment one way or the other on whether they should have
25 filed earlier or whether they should have filed differently.

1 You know, I just recognize the finite nature of our
2 situation time-wise, other resource-wise. But is there
3 anything else that you would like to say? And then I'm
4 going to go back and ask the plaintiff's lawyer and I'm
5 going to come back to you also. I'm not going to ignore
6 your representation or advocacy for your client that you
7 want to be sure to get a chance to file papers because these
8 papers will go to the Court of Appeals.

9 MR. HUDSON: Yes.

10 THE COURT: So is there anything else
11 that you would like to say about the questions that I posed,
12 that the Court posed?

13 MR. HUDSON: I don't believe so, Your
14 Honor.

15 THE COURT: Okay. So, now, I'm coming
16 back to the plaintiff's counsel.

17 MR. KISSINGER: Yes, Your Honor.

18 THE COURT: My calendar clerk made
19 inquiry of the State about how soon they could get papers
20 filed in response to the motion that was served and filed
21 and came to this Court's knowledge on Monday.

22 MR. KISSINGER: I understand that, Your
23 Honor.

24 THE COURT: And I know that the
25 plaintiff's co-counsel didn't get copies until probably

1 Tuesday, so -- but recognizing all those problems, I would
2 like to proceed as quickly as I can. So, plaintiff's
3 counsel, if you have any ideas, I'm looking for ideas here.

4 MR. KISSINGER: Okay, Your Honor. Let
5 me just -- if I could just reply really, really quickly to
6 just some points that were made. One is the suggestion that
7 the 30-day provision was made for -- is actually there for
8 the State's benefit so they have 30 days to kind of get
9 things set up and maybe, you know, set up their apparatus
10 for the execution method that was chosen, those kind of
11 things. I think that kind of flies in the face of the fact
12 that the plaintiff can change his mind 14 days into it. So
13 if the plaintiff can change his mind 14 days ahead of time,
14 I don't see how there's an argument that this is for the
15 State's benefit.

16 The other really quick point I want to
17 make was the suggestion that somehow the lethal injection
18 protocol does not have the force of law. I know the ruling
19 that it's not promulgated under the Administrative
20 Procedures Act. Again, I'm not arguing about that. I think
21 my concern is that the suggestion that the rules and
22 regulations of the Department of Corrections aren't laws,
23 per se, that confer rights. Well, if they don't confer
24 rights, they don't confer obligations and the State
25 routinely asserts that defendants haven't exhausted

1 administrative remedies when they try and bring these
2 actions. So, apparently, the position is, yeah, these rules
3 confer rights and obligations when we can use them as a
4 subject matter jurisdiction defense to a Federal Court
5 action or even to State action, as I know this Court
6 requires exhaustion as well. But if it comes to a fact that
7 we might have -- so, defendants have to follow and the
8 plaintiffs don't. I don't think that argument really holds
9 water.

10 The one other quick point that I wanted
11 to make was this idea that the letter that Mr. West sent
12 that was witnessed where he said that he was out of
13 abundance of caution rescinding the February 13th, 2001
14 election, that somehow this makes everything fine and good
15 and that, well, you know, Mr. West had the opportunity from
16 that point forward to contemplate the manner of his death,
17 contemplate that he would be killed by lethal injection.
18 Well, the only problem with that is that we know that for --
19 that until October 20th, whatever contemplation Mr. West was
20 doing was totally false. It was a false expectation because
21 the State of Tennessee was going to electrocute him until
22 October 20th. So, at best what he had is that period until
23 October 20th to thought -- to contemplate a manner of
24 execution which the State had no intention of carrying out.
25 So I don't think that we can say that he's really been

1 afforded that opportunity to contemplate the manner of his
2 death when the State refused to even concede that they were
3 going go with that manner until, again, seven days ago.

4 One other point really quickly, and I do
5 have additional briefing on this that I've prepared for the
6 Harbison case, is that this idea that somehow the Lancet
7 study is relevant to our action or that it's the science of
8 the Lancet study which has been called into question in
9 either the Supreme Court's decision, Baze, or in the State
10 Court decision, which I believe the State has provided to me
11 in an earlier action I had the opportunity to review.

12 That's actually incorrect, Your Honor, if for no other
13 reason than that Mr. West isn't relying on the Lancet study.

14 Mr. West is relying on the evidence, the specific evidence
15 in this case. The Lancet study was criticized largely
16 because of its methodology because it used information which
17 wasn't -- was accused of relying on information which wasn't
18 reliable because there was no knowledge about when the
19 samples they looked at were obtained. Here we have all that
20 information. We have everything that was necessary for Dr.
21 Labarsky to issue an expert opinion. And at this point in
22 time, the State has come forward with no opinion based upon
23 the information in Tennessee executions regarding Tennessee
24 executions to rebut Dr. Labarsky's affidavit in any way.

25 This relying on the Lancet study, which

1 was not relied upon by Mr. Baze is, at least to my way of
2 thinking, yet another example of the State treating Baze,
3 treating Harbison as sort of a super collateral estoppel
4 kind of case where just because the evidence presented in
5 Kentucky didn't meet -- didn't demonstrate an Eighth
6 Amendment violation, no other evidence can possibly do it
7 and all future challenges are foreclosed as a matter of law.
8 Quite frankly, we believe the District Court's order in the
9 Harbison case was incorrect. We have actually appealed that
10 order. Based on the fact that, in essence, the District
11 Court's holding is kind of what we're suggesting that the
12 State is asking this Court to hold, which is that regardless
13 of whether the undisputed facts show that Tennessee -- that
14 Baze stands for the proposition that it doesn't matter if
15 Tennessee, as a factual matter, if Tennessee is suffocating
16 and paralyzing conscious inmates, the Eighth Amendment is
17 violated as long as you can look at the two protocols and
18 say they're the same. And we think that that is a
19 proposition which is, quite frankly, rather shocking and a
20 tremendous over-extension of Baze, Harbison, as well as
21 Jordan and the other cases cited by the plaintiff.

22 As to the time schedule, which I know is
23 the Court's original order, and perhaps I should have got to
24 it a little quicker, but I'll get to it now, I really have
25 no problem with allowing the State time to file a written

1 response. It's Wednesday already. We're just talking
2 about, if I understand correctly, another day to file that
3 response. Again, depending on if the Court is to
4 determine -- if the Court determines ultimately that the
5 response does not raise an issue which would show that Mr.
6 West does not have a substantial likelihood of success, if
7 it fails to do that, the Court, as we argued, is empowered
8 to enjoin the State from going forward with an -- go forward
9 with the Court's order in an unconstitutional manner so the
10 Court can issue a preliminary injunction keeping them from
11 doing that, and that if the Court were to do that, we have
12 plenty of time to have a hearing to present evidence and
13 those kind of things.

14 So, if the Court determines -- if the
15 Court accepts the argument that the Constitution allows any
16 state with a protocol similar to Kentucky's to suffocate and
17 paralyze conscious inmates, then, you know, we don't get it
18 and we take it to the Tennessee Supreme Court and then
19 perhaps to the U.S. Supreme Court to see if they agree with
20 that construction of the Baze decision, or if they're
21 willing to review that construction of the Baze decision
22 because we know what Supreme Court practice is like. But
23 that's fine. I have no problem with the State filing a
24 response on Thursday. I would appreciate it if it got filed
25 before 5:00 eastern time, but, you know, I know they will do

1 the best they can. I would ask that we be allowed to file a
2 reply to that if indeed the State intends to assert some of
3 the same kind of things it has asserted here, or at the very
4 least, what I could file with the Court is a copy of our
5 appellate brief in the Harbison case, which does address
6 this Lancet study issue as well as some of the other issues
7 that the State has raised. So I have no objection to giving
8 the State an opportunity to respond. As the Court knows
9 from the last claim in our complaint, you know, we really
10 respect the concept of procedural due process and that
11 everybody should have the rights that are afforded under the
12 law and we think that that goes for the defendants as well
13 as it goes for Mr. West.

14 THE COURT: Well, I think the first and
15 foremost issue for this Court is the issue the Court raised
16 when the first motion for temporary injunction was filed,
17 which was whether this Court can issue an order whose effect
18 is to stay the execution. You know, I wish we were in
19 another circumstance and the Court could, with deliberation
20 and taking the time that should be devoted to every case
21 that comes before this Court, that there were more time.
22 And like I said, I'm still primarily -- I wanted to hear
23 about the merits, of course. I'm still primarily focused on
24 this Court's power to issue an order which directly stays
25 the execution or has the effect of staying the execution.

1 You know, I'm focused on that. We have addressed that. You
2 know, both sides addressed that before. That's still in
3 front of this Court. And as soon as the State files its
4 response, which I think the word was, although there's no
5 order down, I think the word was the State would probably do
6 that by tomorrow at noon.

7 MR. HUDSON: That's the word that we
8 received from Ms. Spencer, that you would like us to have it
9 filed by tomorrow at noon.

10 THE COURT: Right. And then my plan
11 would be to -- you know, we have had a court reporter for
12 this discussion about the merits of the plaintiff's
13 position. I will take up another telephone conference call
14 and then I'll issue an order doing whatever I think is my
15 duty, whatever that is. So you can be thinking about -- the
16 plaintiff can be thinking about what sort of comments it did
17 not make today or arguments that it did not make today that
18 it wants to make so that the record is complete. And the
19 defendant will be doing the same thing.

20 Now, let's go ahead and set up a time
21 tomorrow. You know, the plaintiff has to -- I understand
22 the plaintiff's willingness to let everybody have their say
23 and take their time, but November 9 is coming up pretty
24 fast. I know the plaintiff is very aware of that.

25 MR. KISSINGER: We are, Your Honor.

1 THE COURT: I understand that. So I'm
2 really -- what I'm trying to say here is the worst case for
3 the plaintiff is probably that this Court puts down an order
4 saying this Court does not have the -- you can call it
5 jurisdiction, the power, the authority to affect the Supreme
6 Court's order. Now, assuming that that's the case just for
7 the moment, just for hypothetical sake, assuming that is the
8 case, then I think the plaintiff has to think how soon do we
9 need that done so we can go up and have the Court of Appeals
10 send this case back down to this Court to deal with the
11 merits. I want you to be thinking about that, because I
12 don't want to be burning time.

13 MR. KISSINGER: Yeah, I understand that,
14 Your Honor. But, again, we are just looking at just one
15 period -- I know the period of time is short. I kind of
16 object to the suggestion that the shortness of time we have
17 to conduct this has anything to do with Mr. Harbison. I
18 think the Court needs to --

19 THE COURT: You mean you're talking
20 about --

21 MR. KISSINGER: I'm sorry, Mr. West. I
22 think the Court needs to remember that until October 20th,
23 Mr. West couldn't have challenged the lethal injection.

24 THE COURT: Now, let's go back here. I
25 don't think there's anything that I said that implied or was

1 intended to imply that anybody in this case is doing
2 anything except that which they need to do.

3 MR. KISSINGER: Right.

4 THE COURT: And everybody is doing their
5 duty and I'm going to do mine, too.

6 MR. KISSINGER: I understand that.

7 THE COURT: I have no criticism of
8 either party.

9 MR. KISSINGER: Right. I know the time
10 is short. I think we were like super diligent in the manner
11 we pursued relief in this case and have really made a very
12 determined effort to do that.

13 THE COURT: They may not think so,
14 but --

15 MR. KISSINGER: Well, then the State
16 shouldn't have asserted for ten years that -- basically a
17 fact which precludes any court from having jurisdiction to
18 consider lethal injection. I mean, you know, it's like
19 everything, every defense has been based on some kind of
20 procedural thing. Oh, it's you don't have standing. Well,
21 we went out and we got -- as soon as we knew that -- as soon
22 as they said, okay, now you do have standing, we were in
23 here, what, five days later. I mean, I think we have really
24 tried to get this thing moved.

25 THE COURT: I don't have the impression

1 from this Court's view, since I know nothing about the
2 federal litigation, I don't have any criticism of anybody at
3 this point. I'm just thinking, you know, I'm putting this
4 on the -- I'm putting the Court's concern on the record, not
5 a criticism of any party, but just to state a fact.

6 MR. KISSINGER: Yeah, I appreciate -- I
7 mean, I appreciate the Court's concern and I do know that we
8 do need to get this thing moving, but I don't see how --

9 THE COURT: It's moving. I just want to
10 do what I can in taking everybody's ideas, including my own,
11 to try to figure out how to do that in the best way.

12 MR. KISSINGER: And, again, I don't see
13 that the delay of what is going to amount to maybe -- if we
14 were to set this tomorrow afternoon, a delay of 12 hours --
15 or, I'm sorry, 24 hours is going to result in Mr. West being
16 denied an opportunity to have full judicial review in the
17 courts of Tennessee and actually time to pursue anything he
18 would need to pursue in the Supreme Court of the United
19 States by way of certiorari. I for one think that this idea
20 that in effect it stays the execution is really kind of a
21 way of avoiding what Mr. West is really asking for. And
22 he's not asking for his execution to be stayed. I can't
23 emphasize that enough. He's just saying follow the law.
24 The fact that Tennessee can't comply, is unable to comply
25 with the Supreme Court's order to carry out this execution

1 in a legal manner is nothing -- is not the fault of Mr.
2 Harbison. The fact that if the execution doesn't come off,
3 it isn't because of any order by this Court. It's because
4 they failed to perform their duty to set up an execution
5 method that complied with the Constitution. So it's not a
6 Court order that's stopping them, it's their own failures.

7 THE COURT: All right. Now, I think a
8 lot of the merits have been argued, so when this Court --
9 after the State has its chance to respond, let's go ahead
10 and set up a time. Or would you like to go ahead and set up
11 a time to argue the rest of -- to make any additional
12 arguments you would like to make to complete all the
13 arguments you believe your client is entitled to on
14 preliminary injunction?

15 MR. KISSINGER: Sure. Whatever works
16 for the Court. As I told Julie yesterday when I talked to
17 her, I said, there is not a time when I'm not available. I
18 mean, if I'm at home, I'll do it by cell phone. I'll do
19 whatever it needs to get this matter resolved as
20 expeditiously as possible.

21 THE COURT: Well, everybody has -- you
22 know, you're also representing Mr. Harbison obviously and
23 probably some other plaintiffs as well. The State is in the
24 same position. I have a trial that's going forward tomorrow
25 that's already been set once before, so I have to try this

1 case that's set tomorrow. So, I may need to keep you
2 lawyers on call so that -- on call for the afternoon, for
3 tomorrow afternoon. Is that possible?

4 MR. KISSINGER: That's absolutely fine
5 with me, Your Honor. The only request, I mean, I kind of
6 hinted at earlier is that assuming that the State is going
7 to raise arguments similar to the ones they raised orally
8 today, I would just ask perhaps the Court's permission and
9 maybe the stipulation from the State that, by way of
10 response, that I can simply file a motion incorporating the
11 Harbison -- that Mr. Harbison's appellate brief rather than
12 have to roll that over into a completely new pleading,
13 because that way, I can file the reply within basically 20
14 minutes of the time I receive the State's response.

15 THE COURT: I don't have any problem
16 with that. Mr. Hudson, do you? What he's saying is that he
17 will file a notice and attach to the notice his appellate
18 brief for Mr. Harbison.

19 MR. HUDSON: I assume that he will be
20 free to do that. I'm not going to express any opinion one
21 way or the other.

22 THE COURT: All right. And Mr. Hudson,
23 will you be available tomorrow afternoon?

24 MR. HUDSON: I have a hearing at noon
25 tomorrow, another lethal injection case.

1 THE COURT: Where is that?

2 MR. HUDSON: In District Court here in
3 Nashville. And hopefully it should not be too long. I
4 should be available after 1:00.

5 THE COURT: All right. So if we can
6 have an agreement that the lawyers will be available to this
7 Court any time from 1:00 p.m. on, that would be 2:00 p.m. in
8 Knoxville.

9 MR. KISSINGER: That's fine, Your Honor.
10 No problem there.

11 THE COURT: That's really helpful to me.
12 I appreciate it.

13 MR. KISSINGER: Mr. Hudson, just perhaps
14 so everything gets in your hands, would you object to any
15 reply I do that I serve it to you by e-mail? I can go ahead
16 and serve it according with the Court rules, but I think
17 it -- just, again, on this idea that I think the State is
18 entitled to a fair shot at argument, as well as Mr. West,
19 that would at least give you a chance to see it before the
20 Court argues -- or before the Court sets argument.

21 MR. HUDSON: That's fine.

22 MR. KISSINGER: Okay.

23 THE COURT: Okay. All right. And
24 whatever the two of you decide about service -- in fact,
25 I'll get off the phone and let you talk if you want to.

1 MR. KISSINGER: I think we've got it
2 settled.

3 THE COURT: Okay. Then I'll hang up and
4 I will be -- the hearing that I have tomorrow involves an
5 interpreter so it's sort of a double length hearing, but
6 I'll be able to get out and take this up and read the
7 State's response before I have my staff place the call.

8 MR. KISSINGER: The State has filed its
9 other stuff by fax. They can do it by fax, they can do it
10 by e-mail, however they want.

11 MR. HUDSON: That's fine. Our response,
12 again, will be due by tomorrow at noon, Your Honor.

13 THE COURT: Yes. Yes. Thank you.
14 Thank you, lawyers.

15 Thereupon, Court Adjourned.

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Chancellor Claudia C. Bonnyman

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C E R T I F I C A T E

I do hereby certify that the foregoing transcript is a true, complete, and accurate record of the proceedings had and evidence introduced in the hearing of this case.

I do hereby further certify that I am of neither kin, counsel nor interest to any party hereto.



Missy Davis

Missy Davis
Court Reporter