

Attachment 7

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 28, 2010**

ALLIED COURT REPORTING SERVICE

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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

<u>STEPHEN MICHAEL WEST,</u>)	
)	
Plaintiff,)	
)	
Vs.)	
)	
<u>GAYLE RAY, in her official</u>)	No. 10-1675-I
<u>capacity as Tennessee</u>)	
<u>Commissioner of Corrections,</u>)	
<u>et al.,</u>)	
)	
Defendants.)	
)	

APPEARANCES:

Attorney for Plaintiff

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TRANSCRIPT OF PROCEEDINGS

OCTOBER 28, 2010

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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 28th day of October 2010, continued from the 27th day of October 2010, before the Honorable Claudia C. Bonnyman, Chancellor, holding the Chancery Court for Davidson County, Tennessee.

* * * * *

CLERK: Okay. Mr. Kissinger, I'm trying to obtain Mr. Dickson on the line.

MR. KISSINGER: Mr. Dickson is not going to be available this afternoon. My understanding is that he is en route to Chattanooga at the present time. It will just be myself appearing on behalf of Mr. West, as Mr. Ferrell is also on his way en route back to Knoxville.

CLERK: Okay. And then Mr. Greene, will he be participating, Zach Greene?

MR. KISSINGER: Zach Greene. No, my understanding is that he will not be participating either.

CLERK: So it will just be you and -- you on behalf of Mr. West?

THE COURT: That's correct.

CLERK: Okay. Just a moment. Mr. Hudson?

MR. HUDSON: Yes.

1 CLERK: Okay. And Mr. Kissinger?

2 MR. KISSINGER: Yes.

3 CLERK: Okay. Very good. I'm going to
4 transfer you to the Court.

5 MR. KISSINGER: Oh, okay.

6 THE COURT: Lawyers?

7 MR. KISSINGER: Yes, Your Honor.

8 THE COURT: I am thinking that I would
9 probably have Mr. Kissinger and Mr. Hudson on the line.

10 MR. KISSINGER: That's correct, Your
11 Honor.

12 MR. HUDSON: That's correct.

13 THE COURT: And do we have a court
14 reporter?

15 MR. KISSINGER: We do have a court
16 reporter here in my office, Your Honor.

17 THE COURT: Okay. Thank you. I thought
18 you would take care of that and I appreciate you doing so.

19 MR. KISSINGER: Right.

20 THE COURT: Lawyers, I meant to, and I
21 hope you got a fax of the order setting the temporary
22 injunction hearing for today.

23 MR. KISSINGER: I did, Your Honor.

24 THE COURT: Okay. And we discussed this
25 yesterday. My goal was to have the hearing as soon as

1 possible given the urgency and gravity of the lawsuit and
2 given the fact that temporary injunctions are often heard
3 quickly without everything that the Court needs to know for
4 the case having been filed or even addressed. But at the
5 early stages of the lawsuit, you hear the temporary
6 injunction as soon as you can get the papers filed to
7 address just the injunction itself. So part of this hearing
8 took place yesterday. There was a court reporter yesterday.
9 And the part of the hearing that took place yesterday was
10 the plaintiff's -- I'm going to call it the plaintiff's go
11 at the law in the case and why it is that the plaintiff's
12 lawsuit has merit and why is it this Court has the
13 jurisdiction and authority to issue a mandatory injunction
14 which does not, in the plaintiff's position, in the
15 plaintiff's theory of the case, require an injunction -- I
16 mean, does not enjoin the, or stay the execution, but is a
17 different kind of animal.

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

20 THE COURT: The State, Mr. Hudson argued
21 and needed more time because the Attorney General's Office
22 had not had a chance to file its written response. The
23 State would have liked to have more time to file a written
24 response, but the State did file a written response and I
25 have read it and I think it's very helpful and workmanlike.

1 And I'm sorry for the rush. I feel bad for all the lawyers
2 who are under so much stress and have to do things a lot
3 more quickly than they would like. But be that as it may,
4 you know, I think it's a very workable response and gives
5 the Court a chance to understand the State's position, or
6 confirm the State's position, because these are really --
7 what is in the response is exactly what the State argued
8 yesterday. And now, of course, we have something to put in
9 the record that is not -- you know, that the court reporter
10 doesn't have to generate. So I'm asking the plaintiff now
11 if the plaintiff has -- I remember well and took notes from
12 the argument that was made yesterday and so I'm asking the
13 plaintiff now that you've seen the State's response, which
14 really was the oral argument the State made yesterday, is
15 there something new or something that you conclude you
16 should add?

17 MR. KISSINGER: Well, Your Honor, I
18 think just a couple of things and hopefully it won't be
19 quite as -- my comments will not be as extensive as they
20 were yesterday. One of the things I did want to mention is
21 something that we actually raised in our reply to their
22 response and it was actually kind of in response to a
23 question the Court had earlier, which was how can we resolve
24 this matter in a manner which will allow the most
25 expeditious and complete appellate review. And the

1 suggestion I made was that the Court, if it's inclined to
2 accept the argument that even though we're not asking this
3 Court to enjoin the order of the Supreme Court, we're simply
4 asking this Court to enjoin the State from carrying out that
5 order in a manner that's contrary to the Constitution, would
6 be for -- if the Court were to decide that it did not have
7 the jurisdiction to enjoin the State from acting because the
8 State would then be unable to follow the Supreme Court's
9 order, that the Court make an alternate determination on the
10 four criteria required to -- alternative decision on the
11 presence or absence of the four criteria which Mr. West is
12 required to establish in order to obtain a temporary
13 injunction.

14 As we explained in our reply, the Court,
15 the Appellate Court -- or the case would then be in a
16 situation that were the Appellate Court to say, no, District
17 Court, you know, if there's a delay in this case, it's not
18 the plaintiff's fault and it's not the Court's fault, it's
19 the fault of the defendants for not being prepared to go
20 forward in a manner that complied with the Constitution. If
21 the Appellate Court were to -- and they're the ones
22 responsible for the delay, not the Court or the plaintiff,
23 that if the Appellate Court were to hold that and send it
24 back to this Court saying you do have jurisdiction over
25 this, or this -- the Court would be in a position that

1 wouldn't need to have any further hearings. The Court could
2 simply enter an order temporarily enjoining the defendants'
3 unconstitutional conduct and that would take care of it
4 unless the State -- well, that would take care of any
5 urgency in determining -- in making the ultimate merits
6 determination. So that was -- I just wanted to point that
7 possible method of solving the problem perceived by the
8 Court and just kind of throw it out there for what it's
9 worth.

10 In terms of the State's response to the
11 motion for temporary injunction, I do think that the Court
12 is correct that we have gone over pretty much all of these
13 things and we have submitted a responsive pleading. I think
14 that our responsive pleading actually addresses most of the
15 concerns. I actually drafted that before I received the
16 State's response kind of based on what they said at the
17 argument -- what arguments they raised in other actions. So
18 it turned out to work pretty good because when I got it, I'm
19 going, yeah, we covered it all.

20 Basically, I think the only things that
21 I did want to address a little further was just to kind of
22 comment on this idea that the Baze decision, first the
23 overall Baze decision acts as kind of a super collateral
24 estoppel for all lethal injection cases regardless of the
25 facts that are presented in them. The Supreme Court

1 throughout the plurality opinion, the three-judge plurality
2 opinion states over and over again that this is a fact
3 intensive inquiry, it depended upon the facts presented in
4 it.

5 And the facts presented by Mr. West are
6 not only just radically different than the facts presented
7 in the Baze case, they're radically different than the facts
8 that were presented in Mr. Harbison's case the first time
9 that it came through. And those important facts that are
10 being presented to this Court are the substance of those
11 autopsy reports, the revelation from those autopsy reports,
12 the last of them coming in early 2010, the revelation of
13 those reports of the sodium thiopental levels as well as the
14 other levels in the toxicology reports and the new affidavit
15 from Dr. Labarsky saying that we now have a pattern in
16 Tennessee executions that every Tennessee inmate who has had
17 an autopsy, who has had toxicology results, every one of
18 those results point to the inescapable conclusion reached by
19 Dr. Labarsky that Tennessee's protocol, when carried out
20 perfectly, accomplishes death by the suffocation of a
21 conscious inmate.

22 So those are new facts and they are
23 important facts and they're facts which I think Baze, in its
24 fact intensive inquiry, sets us apart from the overall
25 holding in Baze and the overall holding in Harbison, as a

1 matter of fact, the overall holding in Jordan and the other
2 cases cited by the defendants in this case, because those
3 are also cases where the Court didn't have this important
4 information before it. And we think that's important.

5 The other thing, very briefly, and I
6 think it's an even more extreme over-reading of Baze is this
7 idea that Baze somehow holds that Dr. Labarsky's affidavit
8 is -- or that the science behind it is unreliable or
9 something like that. And it's one of the things we really
10 tried to point out in our responsive pleading, which was
11 that first we're talking about two different things. We're
12 talking about a study that was based upon -- that was
13 criticized because it was based on uncertain information
14 that we didn't know when the blood samples were obtained for
15 those inmates and a number of other variables that weren't
16 accounted for, but are accounted for in the study of -- are
17 in Dr. Labarsky's opinion regarding Tennessee inmates. We
18 know exactly when their blood samples were taken and those
19 kind of things.

20 But I think more importantly, it's not
21 just that it's apples and oranges. It's also the idea that
22 the entire subject of this Lancet study was never even
23 presented to the Supreme Court. It wasn't briefed by any of
24 the parties. It wasn't part of the record. It was
25 something that the Court -- that the Supreme Court simply

1 addressed relative to an issue, which isn't before this
2 Court, relative to an issue not before this Court that it
3 addressed in a sua sponte manner. And to say that the Court
4 without having any facts before it regarding the reliability
5 or the unreliability of the Lancet study or underlying
6 science, with having no testimony before it, without
7 anything before it, actually prejudged its reliability for
8 all time and in the face of all evidence. I think it's just
9 a really grotesque over-extension of the Baze holding.

10 The final thing, and again, I would
11 certainly hope that the Court is not inclined to look at it
12 in this direction, that is the statute of limitations
13 discussion as well as the laches argument which is framed as
14 dilatory conduct on the part of Mr. West. This Court is
15 well aware that for at least ten years, or almost ten years,
16 Mr. West has had no standing to challenge lethal injection.
17 The State argued it and, quite frankly, given their
18 statements that they had no intent of executing him by
19 lethal injection, they argued it correctly that the Court
20 didn't have jurisdiction, that no court had jurisdiction
21 during this entire nine plus year period to consider a
22 lethal injection lawsuit made by Mr. West. Standing is one
23 of the elements of a claim and that certainly was an element
24 which didn't exist during that period.

25 The idea that somehow his cause of

1 action arose before that period is -- again, it relies on an
2 over-reading of the Coeey decision. And I actually urged
3 the Court to read the Coeey decision because in the Coeey
4 decision, it is clear that the Coeey decision is talking
5 about only one aspect of the accrual of a cause of action
6 and that is the aspect of the imminence of the harm, because
7 in a suit for prospective -- or to enjoin prospective harm,
8 one of the requirements has always been that the harm be
9 imminent. But Coeey reaffirms the basic principle that Mr.
10 West relies upon, and that is that cause of action does not
11 accrue until the defendants' conduct -- until the defendants
12 commit a wrong, until they have done something wrongful.
13 And the Supreme Court in Baze made it clear that a method of
14 execution does not become wrongful even if it does inflict
15 pain, even if it does inflict unnecessary pain, it does not
16 become wrongful until the point that it is -- that this risk
17 is substantial. And in the quote which we provided the
18 Court in our briefings, risk is not substantial just when
19 there is an isolated incident, an incident here, an incident
20 there, but only when there is a pattern of damage, a pattern
21 of unnecessary harm. And the Court is just very, very clear
22 about that, that the cause of action doesn't arise until
23 then. There's no violation, there's no constitutional
24 violation until that point. And given that fact, given the
25 fact that Coeey talks only about one aspect, imminence,

1 while at the same time affirms the basic principle that,
2 hey, everything you need -- you need to have -- everything
3 that you need to sustain a cause of action has to exist.
4 That's when your cause of action accrues and Coeey
5 acknowledges that.

6 Well, for Mr. West, everything did not
7 exist until the harm that -- or, no, I'm sorry, until the
8 risk that he was to suffer became substantial, and
9 substantial is described by the Supreme Court, is that it
10 has to be so clear, so obvious that the defendants are no
11 longer able to deny that it exists. We don't see any date
12 prior to March of this year that that could be said to have
13 occurred, particularly given the fact that Mr. West didn't
14 even have standing until -- from February, I believe,
15 15th -- February 13th of 2001 until October 20th of 2010.
16 So we think those are important things to keep into
17 consideration.

18 As to the dilatoriness, I -- given the
19 fact he didn't have a cause of action until March of this
20 year and he didn't have standing until seven days ago, the
21 suggestion that he was dilatory is -- I just really cannot
22 even comprehend how there is a basis for that. He brought
23 his cause of action three days after he had standing and I
24 don't see how he can be accused of being dilatory at this
25 point in time, or as the defendants argue, because he didn't

1 file this action 15 years ago or back in 1990, I believe --
2 no -- well, back when Tennessee adopted its lethal injection
3 protocol. It's clear that at that time, there was certainly
4 no evidence -- the evidence which supports his cause of
5 action simply didn't exist. It hadn't happened.

6 THE COURT: All right. Would the State
7 now like to respond?

8 MR. HUDSON: Yes, Your Honor. First of
9 all, the defendants would say with regard to -- in response
10 to the plaintiff's assertions regarding the statute of
11 limitations issue, this issue is identical -- was raised and
12 addressed by the District Court in Mr. West's federal
13 filing, federal case, and it was rejected by the Court that
14 Baze does not read that you look at the conduct of the
15 defendant or what the defendant did some sort of wrong to
16 determine when the statute of limitations accrued. And the
17 Court cited as well -- the District Court cited as well a
18 Sixth Circuit case Getsy vs. Strickland, which applies Cooley
19 just as it is presented by the defendants that the cause of
20 action accrues with the -- at the conclusion of the direct
21 review in the State Court, or the expiration of seeking such
22 a review, or when the method of execution became -- the full
23 method of execution or when that method of execution became
24 a viable and useable means, which in this case was in 2000
25 at the latest. So this interpretation that the plaintiff is

1 putting on Baze and Coeys is -- it just does not hold water,
2 Your Honor. The District Court rejected it, which is also
3 the reason why they're making -- why this case, the West
4 case has been appealed.

5 With regard to the issue regarding the
6 protocol itself and the effect of Baze and of the other
7 Tennessee Supreme Court cases that have concluded that the
8 Tennessee lethal injection protocol is substantially similar
9 to the protocol in Baze, the plaintiff is essentially
10 disregarding the plain language of Baze. The opinion in
11 Baze stated that a state with a lethal injection protocol
12 substantially similar to the protocol we uphold today would
13 not create a risk that meets the standard. Why would there
14 be a need to make such a statement if the Supreme Court did
15 not intend to set a guide for other states to follow and for
16 other courts to follow, really, a guide that the protocols
17 of other states be examined, and like the decision in Baze,
18 if they determine that that protocol is substantially
19 similar to the one upheld in Baze, that it is
20 constitutional. The Tennessee Supreme Court has said that
21 the Tennessee protocol is substantially similar to the
22 protocol upheld in Baze. The Sixth Circuit Court of Appeals
23 has said that that protocol is substantially similar to the
24 protocol upheld in Baze.

25 The arguments also that the plaintiff is

1 making regarding the new -- the autopsy evidence and the new
2 affidavit from Dr. Labarsky regarding the postmortem sodium
3 thiopental serum levels in the blood of Workman and Henley,
4 again, these same arguments were made in the Harbison case
5 after the Sixth Circuit vacated the District Court's
6 decision in Harbison. Then Harbison filed a motion to -- a
7 second motion to amend his complaint in which he forwarded
8 this argument, in which he filed the affidavit of Dr.
9 Labarsky, which is the same affidavit that was filed in this
10 case, and even has the Harbison heading on it in this case.
11 It is the same affidavit. And, again, the District Court
12 rejected the plaintiff's argument regarding the significance
13 of this new -- so-called new evidence of the thiopental
14 levels in Henley and Workman and revisited the issue again
15 when the plaintiff Harbison filed a motion to alter or amend
16 and reiterated her decision that this -- these findings and
17 these opinions expressed by Dr. Labarsky were not sufficient
18 to proceed as a new cause of action or as new claims that
19 had not already been disposed of by the Sixth Circuit in
20 Harbison. And now here we see them making the exact same
21 arguments.

22 Mr. Kissinger indicated his interest in
23 filing his brief in the Sixth Circuit on this issue for the
24 Court to review. And the defendants would suggest that they
25 be able to file the District Court's order on the motion to

1 amend, not the second motion to amend the complaint, and the
2 motion to alter or amend, so it can see the Court's
3 reasoning as to why this evidence is not sufficient and why
4 it does not change the applicability of Baze, that because
5 the Tennessee protocol is similar to the one upheld in Baze
6 that it likewise must be upheld.

7 And, again, as Your Honor indicated
8 yesterday, the most important question is what is the effect
9 of the temporary injunction? If a temporary injunction is
10 issued, it is going to effectively stay the execution of the
11 order of the Supreme Court and this Court does not have the
12 jurisdiction to do so. And I will end my comments there.

13 THE COURT: All right. I think, Mr.
14 Kissinger, that you addressed everything in your reply and
15 everything in your response that you wanted to highlight.

16 MR. KISSINGER: Your Honor, everything
17 except the mention of the two District Court opinions, which
18 I would suggest neither of which are binding on this Court,
19 one of which was the West -- the order in West was rendered
20 at a time that the defendants contended, and quite frankly
21 we have to agree, Mr. West didn't have standing, the
22 District Court didn't have subject matter jurisdiction to
23 issue any order. And we suggest that the discussion of the
24 statute of limitations in that case is certainly not
25 binding, and as a matter of fact, is not even persuasive.

1 And the reason for that, Your Honor, is an important thing
2 which was -- has not been brought to the Court's attention,
3 which was the Court in Cooley said that as far as the date
4 upon which the cause of action accrued in Federal Court,
5 that's a federal question, not an application of state law.
6 Of course, Your Honor applies state law as to when the time
7 should accrue.

8 And not to mention the fact, and again,
9 those are kind of technical kind of objections to a certain
10 extent, but the biggest problem is that they're just wrong,
11 is that it's a complete misreading of Cooley and that it
12 ignores the fact that Mr. West did not have a cause of
13 action -- that Mr. West did not have a cause of action until
14 the risk became -- the risk in the Tennessee protocol became
15 so apparent that defendants could no longer deny it. Again,
16 we have provided the Court with the exact language from
17 Cooley -- or from Baze which makes it clear that that is an
18 element of the offense.

19 I think the one thing, and I hope it was
20 obvious from counsel's comment, but I do want to reiterate
21 it just because it's such a dramatic statement that I think
22 it really bears out the incorrectness of the defendants'
23 position, that is the idea that what could Baze mean if it
24 wasn't to exclude from challenge all protocols, to render
25 immune all protocols that were facially similar to

1 seven months to come up with a new protocol which doesn't
2 violate the Constitution and they didn't do it. They chose
3 not to. They chose to go forward, to rely on this just
4 incredibly expansive reading of Baze and go forward and
5 just -- again, as the evidence is at this time, suffocate
6 inmate after inmate after inmate while they're still
7 conscious. I don't see how the fact that a court comes in
8 and says, listen, you need to do this according to the law,
9 according to the Constitution, you need to carry out the
10 Tennessee Supreme Court's order in the manner they said to
11 do it, which, again, was according to law, that the effect
12 of it is simply stopping them from disregarding their
13 obligations under the Constitution and, in fact, under the
14 Supreme Court's order setting the execution date.

15 THE COURT: All right. Lawyers, if I
16 can get you to -- what I have been doing is pulling together
17 as I listen, and after I read all the papers that have been
18 filed in support and then in opposition to this second
19 motion for temporary injunction, I have been pulling
20 together and word processing what I hope will be an
21 understandable and complete finding and ruling on the
22 motion, on the second motion. And I want to get you to hang
23 on along with the court reporter for a few minutes while I
24 get these papers in order so that I can dictate the ruling
25 and -- can you hold on for maybe five minutes?

1 MR. KISSINGER: We can, Your Honor.

2 THE COURT: Is that all right, Mr. -- I
3 mean, you'll get --

4 MR. HUDSON: Yes, Your Honor.

5 THE COURT: Do whatever else you need to
6 do, but just come back to the phone in five minutes.

7 (Brief Recess)

8 * * * * *

9 Memorandum Opinion, Findings of Fact, and
10 Conclusions of Law

11 THE COURT: This is, of course, a bench
12 ruling as opposed to taking the issues under advisement and
13 writing a long and detailed decision which usually cannot be
14 done in a temporary injunction setting.

15 This is a complaint for declaratory
16 judgment and injunctive relief brought by Stephen West, who
17 has been sentenced to execution for a capital crime. The
18 plaintiff filed a second motion for a temporary injunction
19 on October 25, 2010, along with an amended complaint and a
20 memorandum of law. The Court convened the parties for a
21 hearing by telephone on October 27, 2010 at 11:30 a.m. to
22 examine the specific relief which the plaintiff sought
23 through his motion for extraordinary relief. The Court then
24 had planned to address the merits of the plaintiff's amended
25 complaint, one of the factors to be considered in deciding

1 the motion. A court reporter was present to record the
2 proceeding on October 27.

3 The parties agree that the Supreme
4 Court, Tennessee Supreme Court ordered the execution of Mr.
5 West, the plaintiff, to take place on November 9, 2010. On
6 October 27, the Court heard the plaintiff's arguments in
7 support of his motion and the State's response on October 27
8 and then reconvened the parties so that they could add any
9 argument after the State had filed its written response.
10 The parties have now fully argued their theories of the case
11 and their positions in this motion for a temporary
12 injunction. The Court has reviewed all the papers which
13 have been mentioned or addressed in the briefs and
14 arguments, including the affidavits of the expert witnesses,
15 the two physicians.

16 And the Court notes as for all temporary
17 injunction proceedings in civil court, the purpose of a
18 preliminary injunction is merely to preserve the relative
19 positions of the parties until a trial on the merits can be
20 held. Given this limited purpose and given the haste that
21 is often necessary if those positions are to be preserved, a
22 preliminary injunction is customarily heard and heard based
23 upon procedures that are less formal and evidence that is
24 less complete than in a trial of the merits. A party is
25 thus not required to prove its case in full at a preliminary

1 injunction hearing and findings of fact and conclusions of
2 law made by a court either granting or denying a preliminary
3 injunction are not binding at a trial on the merits.

4 As for the issues in the case, the
5 plaintiff argues that his request for emergency relief does
6 not run afoul of the ruling by the Supreme Court in Coe vs.
7 Sundquist, number M2000-00897-SE-R9-CD. And here, Mr.
8 Kissinger, I'll confirm that we do have a court reporter
9 still?

10 MR. KISSINGER: We do, Your Honor.

11 THE COURT: All right. After that
12 break. In a declaratory judgment action, the trial court is
13 without power or jurisdiction to supersede a valid order of
14 the Tennessee Supreme Court. Instead, claims the plaintiff,
15 the relief he seeks in the temporary injunction is to cause
16 compliance with the Tennessee Supreme Court order that
17 officials shall execute the sentence of death as provided by
18 law on the 9th day of November 2010, and the emphasis is on
19 the provided by law. The plaintiff contends that this Court
20 should enforce the Tennessee and U.S. Constitutions and
21 enjoin Tennessee officials to provide the plaintiff in
22 compliance with Tennessee protocol an affidavit concerning
23 the method of execution at least 30 days before November 9,
24 the execution date. The purpose for the protocol
25 requirement is for the plaintiff's benefit, says the

1 plaintiff, that 30 days was designed to focus the plaintiff
2 on his method of death and the fact of his death. The
3 plaintiff seeks further extraordinary relief that this Court
4 enjoin State officials from carrying out his execution on
5 November 9 using the three drug protocol since it
6 accomplishes the plaintiff's death by suffocation while he
7 is conscious and paralyzed.

8 And as for the merits issues raised by
9 the motion, the plaintiff contends that his amended
10 complaint raises facts and claims different from the facts
11 and claims of *Baze vs. Rees*. According to the plaintiff,
12 absent from other death penalty cruel and unusual punishment
13 cases is the proof he presents through expert affidavit at
14 the preliminary injunction stage that as a matter of fact
15 and not merely as a matter of risk, when Tennessee officials
16 carry out Tennessee's lethal injection protocol, inmates are
17 conscious and paralyzed, and this plaintiff in particular
18 will experience unnecessary pain and suffering by
19 suffocation and other avoidable death throes. The plaintiff
20 reasons this from autopsies of three inmates, and these are
21 Steve Henley, Philip Workman, and Robert Glen Coe, who were
22 executed pursuant to the protocol showing that these three
23 inmates were not adequately anesthetized from suffocation
24 and extreme pain expected and planned through the drug --
25 Tennessee's lethal drug protocol.

1 The State contends that this Court is
2 without jurisdiction to enjoin, or supersede, or retain the
3 July 15 order of the Tennessee Supreme Court -- I'm sorry,
4 that's restrain the Tennessee -- July 15 order of the
5 Tennessee Supreme Court. The ultimate effect of Mr. West's
6 position and motion, says the State, is to encumber, enjoin,
7 or stay enforcement of the Tennessee Supreme Court order.
8 The State also argues that the statute of limitations of one
9 year applies to suits for injunctive relief under Section
10 1983. According to the State, the plaintiff's method of
11 execution challenges lethal injection -- the plaintiff's
12 claim that the method of execution challenge to lethal
13 injection accrued at the latest on March 30, 2000, and this
14 complaint arrives too late.

15 The State also claims the plaintiff has
16 no likelihood of success on the merits because of the great
17 delay in its filing. The State and the public and the
18 victims of crime and their families have an interest in
19 finality and in the timely enforcement of sentence. The
20 State asserts that the plaintiff does not show how he will
21 likely prevail because the Tennessee Supreme Court has
22 concluded that Tennessee's lethal injection protocol is
23 consistent with the majority of other states' methods and
24 protocols and the Tennessee protocol was upheld by the
25 Tennessee -- was held by the Tennessee Supreme Court to be

1 substantially similar.

2 According to the State, in the Harbison
3 lawsuit, the Sixth Circuit upheld the Tennessee protocol and
4 found it does not create a substantial risk of serious harm
5 in violation of the U.S. Constitution. The State contends
6 the form to be presented to inmates 30 days before execution
7 is to take place does not create a right. The language is
8 not mandatory and it exists -- and it does not exist for the
9 benefit of the inmate.

10 And the issues for the Court to decide
11 in this motion for preliminary injunction are, one, is this
12 Court empowered to address, affect, or supersede the
13 Tennessee Supreme Court order that the plaintiff be executed
14 on November 9, 2010? The Court finds, no, this Court, this
15 trial Court does not have the power to enjoin or supersede
16 the Tennessee Supreme Court order, which the parties agree
17 sets the execution of this plaintiff, Mr. West, on November
18 9, 2010.

19 The effect of a temporary injunction,
20 which the plaintiff seeks, does require this Court to stay
21 the execution. And the Court is looking here at Robert Glen
22 Coe vs. Don Sundquist, and I've already given the cite in
23 the case. In that case, the Tennessee Supreme Court held
24 that while a trial judge may be authorized to issue a stay
25 of execution under certain circumstances upon the filing of

1 a proper petition for post-conviction relief or a petition
2 for habeas corpus, it says that where an action for
3 declaratory judgment is brought, no jurisdiction exists
4 under the declaratory judgment statute to supersede a valid
5 order of the Tennessee Supreme Court. It says, the Supreme
6 Court goes on to say that in those cases where a trial court
7 has exceeded its jurisdiction, the Tennessee Supreme Court
8 has the right, power, and duty to protect its decree and to
9 recognize that the trial Court has exceeded its
10 jurisdiction. And where the trial Court does exceed its
11 jurisdiction in this way, the Tennessee Supreme Court will
12 vacate its order.

13 And this Court must find that the relief
14 the petitioner seeks in its motion for temporary injunction
15 requires both due to the issues surrounding the method of
16 execution and due to the 30-day protocol requirement that --
17 upon which the plaintiff relies would definitely require the
18 effect on the Supreme Court order -- would the trial Court's
19 order be valid of a stay on the execution date?

20 That having been said, the Court, in the
21 alternative, did plan and is going to rule on the four
22 factors because it may be helpful to the Appellate Court,
23 and at the end of the day, this Court plans to grant a Rule
24 9 application for appeal if the plaintiff plans such a
25 process, the plaintiff does plan to do that, the Court in

1 advance is going to grant that motion or request for a Rule
2 9 application, because, first of all, that seems to be the
3 custom in such a situation. It seems to be a wise thing to
4 do in advance.

5 Now, as for the preliminary injunction,
6 assuming only hypothetically that this Court does have the
7 jurisdiction and power to affect the Tennessee Supreme
8 Court's order of execution, the question is, has the
9 plaintiff, Mr. West, demonstrated the four factors which the
10 Court must balance in deciding a motion for temporary
11 injunction. The first one, here are the four, and these
12 four are from a federal case adopted by -- in this state, of
13 PACCAR, Inc. vs. Telescan Techs, LLC, at 319 F3d 243, 249
14 (6th Cir. 2003), Federal Court case. And the four factors
15 to be examined are -- if I can find my notes here -- is
16 there a substantial likelihood of success on the merits; is
17 there irreparable and immediate harm; number three, the
18 relative harm that will result to each party as a result of
19 the disposition of the application for injunction; and four,
20 is the public interest served by issuance of the injunction.

21 And as for the merit, the Court does not
22 find that there is a substantial likelihood of success on
23 the merits. But the Court finds at this early stage of a
24 declaratory judgment action, that the plaintiff's position
25 has merits as regards the Tennessee Constitution and the

1 specific facts which so far have not been evaluated in the
2 State Court. The Court's reasoning is that the Harbison
3 case dealt with the U.S. Constitution, although the District
4 Court in Harbison on remand looked at the affidavit
5 surrounding or addressing the autopsies. Sorry, gentlemen,
6 I'm still looking for my notes here so I can complete this
7 thought. The Harbison case did not deal with the State
8 Constitution and it was not a State Court addressing that
9 issue. And I have the -- I'm sorry. The affidavit
10 surrounding the autopsies were not -- were analyzed in light
11 of the U.S. Supreme Court in Baze vs. Rees.

12 And the Court has done some independent
13 research into the cases surrounding lethal injection and the
14 Court thinks that the arguments and the analysis of both
15 parties in this case are not -- certainly not dead wrong,
16 because each of these cases dealt with different facts. The
17 Tennessee Supreme Court first held that the State's lethal
18 injection protocol did not violate the cruel and unusual
19 punishment protection provided in the Eighth Amendment to
20 the U.S. Constitution and Article 1, Section 16 of the
21 Tennessee Constitution.

22 In Abdur'Rahman vs. Bredesen, the Court
23 based its conclusion that the petitioner failed to establish
24 cruel and unusual punishment on two factors. First, given
25 that only two of the approximately 37 states authorizing

1 lethal injection as a method of execution did not provide
2 for some combination of sodium pentothal and potassium
3 chloride in their lethal injection protocols, the Court
4 concluded the lethal injection protocol does not violate
5 contemporary standards of decency. Second, the Tennessee
6 Supreme Court rejected the petitioner's assertion, that is
7 the petitioner in that case, that the use of pancuronium
8 bromide and potassium chloride would create a risk of
9 unnecessary pain and suffering because the petitioner's
10 arguments were not supported by the evidence in the record.
11 The Court said, we cannot judge the lethal injection
12 protocol based solely on speculation as to problems or
13 mistakes that might occur, although Abdur'Rahman was decided
14 before both 2007 revisions to Tennessee's lethal injection
15 protocol and the Tennessee -- and the U.S. Supreme Court's
16 2008 decision in *Baze vs. Rees*. At least one post-*Baze*
17 opinion has cited to Abdur'Rahman with approval, and that's
18 the case of *State vs. Banks*, which is at 371 SW3d 90, and
19 that's a 2008 Tennessee Supreme Court case.

20 I could then go on and analyze *Baze vs.*
21 *Rees*. The parties have done that. The seven justices
22 rejected the petitioner's claims. There was none of the
23 plurality claims garnered a majority of justices. The
24 plurality opinion authored by Chief Justice Roberts, joined
25 by Justices Kennedy and Alito have been cited extensively by

1 Tennessee's Appellate Courts and also by the plaintiff in
2 his brief. The Baze petitioners argued there is a
3 significant risk that sodium thiopental will not be properly
4 administered to achieve its intended effect of rendering an
5 inmate unconscious resulting in severe pain when other
6 chemicals are administered. And the plurality opinion
7 recognized that subjecting individuals to a risk of future
8 harm can qualify as cruel and unusual punishment. But to
9 establish that such exposure violates the Eighth Amendment
10 conditions presenting the risk must be sure or very likely
11 to cause serious illness and needless suffering and give
12 rise to sufficiently imminent dangers. In other words,
13 cruel and unusual punishment occurs when lethal injection as
14 an execution method presents a substantial or objectively
15 intolerable risk of serious harm in light of feasible,
16 readily implemented alternative procedures. Simply because
17 an execution method may result in pain either by accident or
18 the inescapable consequence of death does not establish this
19 sort of objectively intolerable risk of harm that qualifies
20 the cruel and unusual.

21 The Chief Justice observed -- the Chief
22 Justice talked about Kentucky's method of execution. It was
23 believed to be the most humane available. It shares its
24 protocol with 35 other states. And if it were administered
25 as intended would result in a painless death. The Chief

1 Justice observed that a state with a lethal injection
2 protocol substantially similar to the protocol we uphold
3 today would not create a demonstrative risk of severe pain
4 that would render the protocol violative of the Eighth
5 Amendment. The Tennessee Supreme Court has determined that
6 Tennessee's three drug protocol for lethal injection is
7 substantially similar to that employed by Kentucky. And the
8 Tennessee Supreme Court decided this in State vs. David
9 Jordan, 2010 West Law 3668513 at page 75. And this was a
10 decision that came out December 22nd, 2010. And also in
11 Workman vs. Bredesen, which is -- I'm sorry, and
12 Abdur'Rahman, which the Court has already discussed. The
13 Sixth Circuit reached a summary decision or conclusion in
14 Harbison vs. Little, the Sixth Circuit 2009 case, which the
15 Court, I understand, is on appeal.

16 And so the Tennessee Supreme Court has
17 said that Tennessee's lethal injection protocol in itself
18 does not constitute cruel and unusual punishment. We know
19 that Baze vs. Rees discussed the British Medical Journal,
20 the Lancet, that reviewed the autopsy results of 49 inmates
21 executed using lethal injection. And the U.S. Supreme
22 Court -- the Baze petitioners raised the issue of the Lancet
23 findings in their arguments as did the appellant HR Hester
24 in the Tennessee Supreme Court. As our Supreme Court stated
25 in its Hester opinion, the U.S. Supreme Court has declined

1 Harbison attempted to raise the issue regarding the autopsy
2 results as a matter of fact of three inmates who were
3 executed and he presented an affidavit from the physician
4 retained as an expert who, I believe, was a co-author in the
5 Lancet matter. Dr. Bruce Levy also participated in that
6 case. And the District Court did not address the facts or
7 the merits of the autopsy picture or the affidavits
8 presented by the two physicians, one on one side and one on
9 the other, because Mr. Harbison failed to raise these issues
10 in the Sixth Circuit.

11 And as of this writing, this Court did
12 not find post-Abdur'Rahman opinions issued by Tennessee's
13 Appellate Court that addressed directly the cruel and
14 unusual punishment issues that is the factors, the fact of
15 the three autopsies and what the three autopsies mean that
16 the plaintiff is raising in this petition, those have not
17 been directly addressed by any State Court as regards the
18 Tennessee Constitution. And this Court finds that every
19 case is different and that there may be at this early part
20 of the litigation, the Court would not and cannot conclude
21 that there is no merit to the examination that the plaintiff
22 has made of its -- as a matter of fact, that based upon
23 these autopsies, that he will also be paralyzed and
24 conscious and will experience unnecessary pain and suffering
25 by suffocation and other avoidable death throes. So this

1 Court cannot find that there is substantial merit, but the
2 Court finds that there is some merit.

3 And so going on to the second factor,
4 irreparable and immediate harm. And I'll ask you gentlemen
5 to hang in there with me just for a minute while I find my
6 notes on these issues. I've got too many papers in front of
7 me and I know you all do, too.

8 This is a civil Court, which exists in
9 part to resolve the states of fact and resolve challenges to
10 the law. This is a very early stage of the civil suit. The
11 civil Court, at least the Chancery Court, rarely deals with
12 a danger to a person's physical well-being. This civil
13 Court rarely deals with the exhibition and fact of the
14 suffering of victims of terrible crime. These are not
15 usually exhibited in civil cases, at least civil cases in
16 the Chancery Court. That having been remarked upon, the
17 irreparable harm in this litigation is grave and it concerns
18 the plaintiff's death by a certain method and it also
19 concerns whether the Tennessee Supreme Court could decide
20 that the merits in this lawsuit should be examined before
21 the execution occurs. And the harm to the plaintiff is
22 irreparable. It would be death by a particular method,
23 which he asserts he may suffer in a brutal way. The harm to
24 the State, I'm going to examine the harm to the State in a
25 few moments, because I have to look at the harm to all

1 parties. But all of that having been said, in a normal
2 civil case, the opportunity for death, the fact of death,
3 certainly establishes grave irreparable harm. It's
4 certainly not a money case.

5 As to the third category, the relative
6 harm that will result to each party as a result of the
7 disposition of the application for the injunction, the harm
8 to the State is further delay, a lack of finality, a
9 possible eroding of the power of the Criminal Court in that
10 there's just a lot of delay that will be built in if the
11 injunction is granted because the injunction would in most
12 probability last until the end of the litigation, and the
13 litigation, according to the plaintiff, would involve
14 testimony of parties, the testimony of expert witnesses who
15 would probably -- most probably be physicians, and the
16 examination of scientific proof that this Court would
17 definitely need help in. So the damage to the State and to
18 the public interest is really one and the same and that is
19 that delay in litigation is always harmful and not a
20 positive thing and that finality is a high value which plays
21 a serious and significant part in the administration of
22 justice and that should be taken very seriously by every
23 trial or other judge. And so the harm to the State, the
24 Court has addressed.

25 It's in the public interest that each

1 individual person's case be addressed independently and
2 separately where the law dictates. The public is probably
3 served, best served by careful review of each case, which is
4 not to say that this case hasn't already been carefully
5 reviewed. I'm certainly not implying that. But this
6 declaratory judgment action is a new lawsuit. The public
7 has an interest, as I said, the public has an interest in
8 finality and freedom from second guessing without good
9 cause.

10 I want to go on and talk about the
11 merits of -- the other merits beyond and aside from the
12 lethal injection issues, and those two are statute of
13 limitations and the 30-day -- the absence of the 30-day
14 protocol process. First of all, as for the statute of
15 limitations, a statute of limitations issue, I've never seen
16 that addressed in a motion for a temporary injunction.
17 That's usually addressed in a motion to dismiss, which the
18 State has not had an opportunity or time to file. If a
19 motion to dismiss had been proposed, if it could have
20 been -- it could not have been in this case. We've got
21 things going too fast. But if the State had had time, if
22 this were an ordinary civil case, the State would have had
23 time to file a motion to dismiss and there are protocols or
24 processes through which the trial Court would look at the
25 statute of limitations and the affidavits and try to

1 determine when the cause accrued and make rulings on that.
2 It is very difficult to evaluate a statute of limitations
3 claim in a motion for temporary injunction, so I decline to
4 review those issues as a defense -- as the State's -- in the
5 State's response, because I just cannot analyze them.

6 This Court does not find that there is
7 merit to the idea that the plaintiff should be given 30 days
8 to contemplate the method of his death when, under the facts
9 of this case, the plaintiff has contemplated the exact
10 methods available to him and has litigated over whether he
11 would be forced to choose the method of his death or
12 whether -- and whether he would choose electrocution or be
13 required to make any choice at all. And these very issues
14 have been litigated in this very lawsuit. And the Court
15 finds that probably the 30-day protocol is to benefit both
16 the inmate and the State, but the plaintiff has already
17 received the benefit of that 30-day contemplation as a
18 matter of fact. And so although I don't find that as a
19 matter of fact in this because I can't do that yet, this is
20 just a motion for temporary injunction, I do find that that
21 particular claim does not have merit.

22 So to go back, I've already found
23 there's irreparable and immediate harm, there's a risk of
24 irreparable and immediate harm, which is the most
25 significant factor to be balanced. I have found that the

1 plaintiff has some merit and when he address whether the
2 lethal injection protocol challenge has been fully litigated
3 in the State Court, I don't think it has, and so I would
4 find that there is some -- some possibility of success on
5 the merits, but I cannot find that there is a substantial
6 likelihood of success on the merits.

7 I've already addressed the relative harm
8 that would result to each party. I'm finding that
9 irreparable and immediate harm possibilities trump the other
10 four issues. And if this -- if there were not a Supreme
11 Court order down setting the execution date, this Court
12 would issue an injunction solely to preserve the status quo
13 and to allow this Court to seriously address a lawsuit. A
14 serious addressing of the lawsuit could result in dismissal
15 of the case. It could result -- it could go the other way.
16 And so, as I said before, irreparable harm trumps the
17 situation.

18 And, lawyers, I have denied the motion
19 for an injunction based upon the reasoning in Coe, which
20 seems to be on all fours with this situation. I have gone
21 on to say that in the alternative, if this were something
22 about which the Tennessee Supreme Court had not ordered or
23 opined, then I would issue the injunction solely for the
24 purpose of preserving the status quo while the Court
25 examined the claims and the law, facts and the law.

1 And is there anything, lawyers, that
2 this Court should do besides reminding the parties that I
3 have -- I am granting an application for a Rule 9 appeal if
4 that's what Mr. West's plan was.

5 MR. KISSINGER: Thank you, Your Honor.

6 THE COURT: All right. Now, is there
7 anything -- I would like to have the bench ruling ordered
8 and filed. Who do you think should order that? Should the
9 State do that? The State has prevailed. What do you think,
10 Mr. Hudson?

11 MR. HUDSON: I have not been subject to
12 very many bench rulings, Your Honor, so I do not know.

13 MR. KISSINGER: Your Honor, we'll take
14 care of it.

15 THE COURT: Well, I hate to throw a
16 monkey wrench in there, but, again, I just want to be sure
17 that it does get ordered and get filed so that you lawyers
18 can -- maybe you'll get a day of rest, maybe you won't.

19 MR. KISSINGER: We hired the reporter,
20 Your Honor, it will be easier for us.

21 THE COURT: Okay. Well, I appreciate
22 that. Are there any housekeeping issues that this Court or
23 any issues that this Court failed to address?

24 MR. KISSINGER: Not that the plaintiff
25 is aware of, Your Honor.

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THE COURT: Mr. Hudson?

MR. HUDSON: No, Your Honor.

THE COURT: So, the lawyers, I think
that's it.

MR. KISSINGER: Thank you, Your Honor.

THE COURT: Thank you for agreeing to
address the motion for temporary injunction as soon as we
have. So, we're now adjourned.

Thereupon, Court Adjourned.

* * * * *

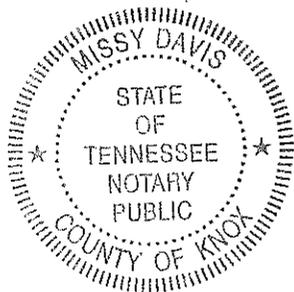
Chancellor Claudia C. Bonnyman

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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