

Attachment 8

to

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

***West v. Ray*, No. 10-1675-I,
Memorandum Opinion
Filed November 1, 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

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

Attorney for Defendant

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Office of Tennessee Attorney General
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Nashville, Tennessee 37243

MEMORANDUM OPINION

OCTOBER 28, 2010

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

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

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

7 MR. KISSINGER: We do, Your Honor.

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

1 enjoin State officials from carrying out his execution on
2 November 9 using the three drug protocol since it
3 accomplishes the plaintiff's death by suffocation while he
4 is conscious and paralyzed.

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

23 The State contends that this Court is
24 without jurisdiction to enjoin, or supersede, or retain the
25 July 15 order of the Tennessee Supreme Court -- I'm sorry,

1 that's restrain the Tennessee -- July 15 order of the
2 Tennessee Supreme Court. The ultimate effect of Mr. West's
3 position and motion, says the State, is to encumber, enjoin,
4 or stay enforcement of the Tennessee Supreme Court order.
5 The State also argues that the statute of limitations of one
6 year applies to suits for injunctive relief under Section
7 1983. According to the State, the plaintiff's method of
8 execution challenges lethal injection -- the plaintiff's
9 claim that the method of execution challenge to lethal
10 injection accrued at the latest on March 30, 2000, and this
11 complaint arrives too late.

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

24 According to the State, in the Harbison
25 lawsuit, the Sixth Circuit upheld the Tennessee protocol and

1 found it does not create a substantial risk of serious harm
2 in violation of the U.S. Constitution. The State contends
3 the form to be presented to inmates 30 days before execution
4 is to take place does not create a right. The language is
5 not mandatory and it exists -- and it does not exist for the
6 benefit of the inmate.

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

16 The effect of a temporary injunction,
17 which the plaintiff seeks, does require this Court to stay
18 the execution. And the Court is looking here at Robert Glen
19 Coe vs. Don Sundquist, and I've already given the cite in
20 the case. In that case, the Tennessee Supreme Court held
21 that while a trial judge may be authorized to issue a stay
22 of execution under certain circumstances upon the filing of
23 a proper petition for post-conviction relief or a petition
24 for habeas corpus, it says that where an action for
25 declaratory judgment is brought, no jurisdiction exists

1 under the declaratory judgment statute to supersede a valid
2 order of the Tennessee Supreme Court. It says, the Supreme
3 Court goes on to say that in those cases where a trial court
4 has exceeded its jurisdiction, the Tennessee Supreme Court
5 has the right, power, and duty to protect its decree and to
6 recognize that the trial Court has exceeded its
7 jurisdiction. And where the trial Court does exceed its
8 jurisdiction in this way, the Tennessee Supreme Court will
9 vacate its order.

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

17 That having been said, the Court, in the
18 alternative, did plan and is going to rule on the four
19 factors because it may be helpful to the Appellate Court,
20 and at the end of the day, this Court plans to grant a Rule
21 9 application for appeal if the plaintiff plans such a
22 process, the plaintiff does plan to do that, the Court in
23 advance is going to grant that motion or request for a Rule
24 9 application, because, first of all, that seems to be the
25 custom in such a situation. It seems to be a wise thing to

1 do in advance.

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

18 And as for the merit, the Court does not
19 find that there is a substantial likelihood of success on
20 the merits. But the Court finds at this early stage of a
21 declaratory judgment action, that the plaintiff's position
22 has merits as regards the Tennessee Constitution and the
23 specific facts which so far have not been evaluated in the
24 State Court. The Court's reasoning is that the Harbison
25 case dealt with the U.S. Constitution, although the District

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

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

19 In *Abdur'Rahman vs. Bredesen*, the Court
20 based its conclusion that the petitioner failed to establish
21 cruel and unusual punishment on two factors. First, given
22 that only two of the approximately 37 states authorizing
23 lethal injection as a method of execution did not provide
24 for some combination of sodium pentothal and potassium
25 chloride in their lethal injection protocols, the Court

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

17 I could then go on and analyze *Baze vs.*
18 *Rees*. The parties have done that. The seven justices
19 rejected the petitioner's claims. There was none of the
20 plurality claims garnered a majority of justices. The
21 plurality opinion authored by Chief Justice Roberts, joined
22 by Justices Kennedy and Alito have been cited extensively by
23 Tennessee's Appellate Courts and also by the plaintiff in
24 his brief. The *Baze* petitioners argued there is a
25 significant risk that sodium thiopental will not be properly

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

18 The Chief Justice observed -- the Chief
19 Justice talked about Kentucky's method of execution. It was
20 believed to be the most humane available. It shares its
21 protocol with 35 other states. And if it were administered
22 as intended would result in a painless death. The Chief
23 Justice observed that a state with a lethal injection
24 protocol substantially similar to the protocol we uphold
25 today would not create a demonstrative risk of severe pain

1 that would render the protocol violative of the Eighth
2 Amendment. The Tennessee Supreme Court has determined that
3 Tennessee's three drug protocol for lethal injection is
4 substantially similar to that employed by Kentucky. And the
5 Tennessee Supreme Court decided this in *State vs. David*
6 *Jordan*, 2010 West Law 3668513 at page 75. And this was a
7 decision that came out December 22nd, 2010. And also in
8 *Workman vs. Bredesen*, which is -- I'm sorry, and
9 *Abdur'Rahman*, which the Court has already discussed. The
10 Sixth Circuit reached a summary decision or conclusion in
11 *Harbison vs. Little*, the Sixth Circuit 2009 case, which the
12 Court, I understand, is on appeal.

13 And so the Tennessee Supreme Court has
14 said that Tennessee's lethal injection protocol in itself
15 does not constitute cruel and unusual punishment. We know
16 that *Baze vs. Rees* discussed the *British Medical Journal*,
17 the *Lancet*, that reviewed the autopsy results of 49 inmates
18 executed using lethal injection. And the U.S. Supreme
19 Court -- the *Baze* petitioners raised the issue of the *Lancet*
20 findings in their arguments as did the appellant *HR Hester*
21 in the Tennessee Supreme Court. As our Supreme Court stated
22 in its *Hester* opinion, the U.S. Supreme Court has declined
23 to give constitutional weight to the study's findings. In
24 his separate concurring opinion, Justice Alito noted that
25 the evidence cited in the study regarding alleged defects in

1 these protocols and the supposed advantages is frighteningly
2 haphazard and unreliable. Similarly, Justice Breyer noted
3 in his opinion that the Lancet study may be seriously
4 flawed. A non-expert judge cannot give the Lancet study
5 significant weight. And in the Hester case, the Tennessee
6 Supreme Court concluded that Mr. Hester has not offered a
7 persuasive argument for revisiting this Court's previous
8 decisions upholding the constitutionality of the protocol
9 itself.

10 And I have more to say here. I
11 appreciate your patience.

12 In September 2007, the District Court
13 granted Mr. Harbison injunctive relief finding that
14 Tennessee's lethal injection protocol constituted cruel and
15 unusual punishment because there was that substantial risk,
16 the District Court found. And the Sixth Circuit disagreed,
17 holding that the basic findings of the District Court
18 issuing the injunction were inadequate findings, that the
19 failure to provide procedures for adequately monitoring the
20 administration of drugs, the allegations that those were
21 inadequate procedures, and failure to adopt an alternative
22 one drug protocol were without merit. On remand, Mr.
23 Harbison attempted to raise the issue regarding the autopsy
24 results as a matter of fact of three inmates who were
25 executed and he presented an affidavit from the physician

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

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

1 certainly not a money case.

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

22 It's in the public interest that each
23 individual person's case be addressed independently and
24 separately where the law dictates. The public is probably
25 served, best served by careful review of each case, which is

1 not to say that this case hasn't already been carefully
2 reviewed. I'm certainly not implying that. But this
3 declaratory judgment action is a new lawsuit. The public
4 has an interest, as I said, the public has an interest in
5 finality and freedom from second guessing without good
6 cause.

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

1 review those issues as a defense -- as the State's -- in the
2 State's response, because I just cannot analyze them.

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

19 So to go back, I've already found
20 there's irreparable and immediate harm, there's a risk of
21 irreparable and immediate harm, which is the most
22 significant factor to be balanced. I have found that the
23 plaintiff has some merit and when he address whether the
24 lethal injection protocol challenge has been fully litigated
25 in the State Court, I don't think it has, and so I would

1 find that there is some -- some possibility of success on
2 the merits, but I cannot find that there is a substantial
3 likelihood of success on the merits.

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

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

23 And is there anything, lawyers, that
24 this Court should do besides reminding the parties that I
25 have -- I am granting an application for a Rule 9 appeal if

1 that's what Mr. West's plan was.

2 MR. KISSINGER: Thank you, Your Honor.

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

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

10 MR. KISSINGER: Your Honor, we'll take
11 care of it.

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

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

18 THE COURT: Okay. Well, I appreciate
19 that. Are there any housekeeping issues that this Court or
20 any issues that this Court failed to address?

21 MR. KISSINGER: Not that the plaintiff
22 is aware of, Your Honor.

23 THE COURT: Mr. Hudson?

24 MR. HUDSON: No, Your Honor.

25 THE COURT: So, the lawyers, I think

1 that's it.

2 MR. KISSINGER: Thank you, Your Honor.

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

6 Thereupon, Court Adjourned.

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Chancellor Claudia C. Bonnyman

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