Attachment 7

to

Application for Interlocutory Appeal By Permission
Pursuant to Rule 9, T.R.A.P.

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

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

APPEARANCES:

Attorney for Plaintiff

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TRANSCRIPT OF PROCEEDINGS

OCTOBER 28, 2010

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.

CLERK: Okay. And Mr. Kissinger?

MR. KISSINGER: Yes.

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

MR. KISSINGER: Oh, okay.

THE COURT: Lawyers?

MR. KISSINGER: Yes, Your Honor.

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

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

MR. HUDSON: That's correct.

THE COURT: And do we have a court reporter?

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

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

MR. KISSINGER: Right.

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

MR. KISSINGER: I did, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The idea that somehow his cause of

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

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

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

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

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

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

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

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

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

The arguments also that the plaintiff is

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

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

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

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

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

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

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

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

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

Kentucky's. And what the defendants are saying there, and it's just very clear, is that even if Tennessee, even if Mr. West is a hundred percent correct and he is at this -- you know, he is just as a factual matter, he is regardless, even if he were a hundred percent correct that Tennessee's protocol when administered perfectly paralyzes and then suffocates conscious inmates, even if that was an absolute proven fact, Tennessee's protocol doesn't violate the Constitution because it looks like Kentucky's. That's simply an incomprehensible argument, Your Honor, and I would hope that would be an argument that would be summarily rejected.

Again, I keep hearing the words about the effect of an order enjoining the State from going forward in an unconstitutional manner. The only effect of that order is a requirement that the State of Tennessee go forward in a constitutional manner. That's the only effect of the order. If the execution does not occur on November 9th, it's not the effect of the order. It's the effect of the defendants' failure in this case and since they got the autopsy in the Henley execution, it's the effect of them refusing to adopt a protocol that doesn't violate the Constitution. They have had the Henley execution. You know, they talk about Mr. West didn't have standing until seven days ago and got in two days later, they have had

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

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

MR. KISSINGER: We can, Your Honor.

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

MR. HUDSON: Yes, Your Honor.

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

(Brief Recess)

* * * * * *

Memorandum Opinion, Findings of Fact, and Conclusions of Law

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

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

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

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

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

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

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

MR. KISSINGER: We do, Your Honor.

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

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

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

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

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

substantially similar.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

to give constitutional weight to the study's findings. In his separate concurring opinion, Justice Alito noted that the evidence cited in the study regarding alleged defects in these protocols and the supposed advantages is frighteningly haphazard and unreliable. Similarly, Justice Breyer noted in his opinion that the Lancet study may be seriously flawed. A non-expert judge cannot give the Lancet study significant weight. And in the Hester case, the Tennessee Supreme Court concluded that Mr. Hester has not offered a persuasive argument for revisiting this Court's previous decisions upholding the constitutionality of the protocol itself.

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

In September 2007, the District Court granted Mr. Harbison injunctive relief finding that Tennessee's lethal injection protocol constituted cruel and unusual punishment because there was that substantial risk, the District Court found. And the Sixth Circuit disagreed, holding that the basic findings of the District Court issuing the injunction were inadequate findings, that the failure to provide procedures for adequately monitoring the administration of drugs, the allegations that those were inadequate procedures, and failure to adopt an alternative one drug protocol were without merit. On remand, Mr.

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

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

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

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

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

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

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

It's in the public interest that each

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

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

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

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

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

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

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

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

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

MR. KISSINGER: Thank you, Your Honor.

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

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

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

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

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

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

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

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.

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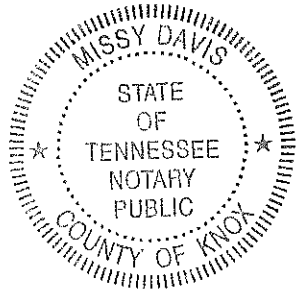
Chancellor Claudia C. Bonnyman

_____ _____, _____

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
Court Reporter