

# **Attachment 6**

to

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

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

Defendants. )

No. 10-1675-I

TRANSCRIPT OF PROCEEDINGS

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

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

MR. KISSINGER: That is correct, Your Honor.

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

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

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

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

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

1 but he still can't be here?

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

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

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

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

14 MR. HUDSON: Yes.

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

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

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

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

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

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

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

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

10 THE COURT: All right.

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

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

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

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

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



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

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

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

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

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

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

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

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

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

8 MR. KISSINGER: Yes.

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

13 MR. KISSINGER: Absolutely, Your Honor.

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

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

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

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

20 MR. KISSINGER: Well, Your Honor --

21 THE COURT: Opportunity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

1 THE COURT: I understand.

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

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

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

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

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

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

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

12 THE COURT: Julie Spencer.

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

9 MR. HUDSON: Yes.

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

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

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

17 MR. KISSINGER: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

25 This relying on the Lancet study, which



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

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

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

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

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

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

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

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

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

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

25 MR. KISSINGER: We are, Your Honor.

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

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

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

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

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

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

3 MR. KISSINGER: Right.

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

6 MR. KISSINGER: I understand that.

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

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

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

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

25 THE COURT: I don't have the impression

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

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

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

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

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

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

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

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



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

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

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

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

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

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

1 THE COURT: Where is that?

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

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

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

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

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

21 MR. HUDSON: That's fine.

22 MR. KISSINGER: Okay.

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

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

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

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

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

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

15 Thereupon, Court Adjourned.

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Chancellor Claudia C. Bonnyman

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C E R T I F I C A T E

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

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



*Missy Davis*  
\_\_\_\_\_  
Missy Davis  
Court Reporter