

# **Attachment 3**

to

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

**Memorandum in Support of  
Motion for Temporary Injunction  
Filed October 25, 2010**

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE. FILED

2010 OCT 25 AM 11:07

STEPHEN MICHAEL WEST, )  
 )  
 Plaintiff )

CLERK & MASTER  
DAVIDSON CO. CHANCERY CT.

No.10-1675-I \_\_\_\_\_ D.C. & M.

v. )

DEATH PENALTY CASE

GAYLE RAY, in her official capacity as )  
 Tennessee's Commissioner of )  
 Correction, )

EXECUTION SCHEDULED:

November 9, 2010

RICKY BELL, in his official capacity as )  
 Warden of Riverbend Maximum )  
 Security Institution, )

DAVID MILLS, in his official capacity as )  
 Deputy Commission of Tennessee )  
 Department of Correction, )

REUBEN HODGE, in his official capacity )  
 as Assistant Commissioner of )  
 Operations, )

JOHN DOE EXECUTIONERS 1-100, )

JOHN DOES 1-100 )

Defendants )

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION<sup>1</sup>

Comes the Plaintiff, Stephen Michael West, and in support of his Motion for Temporary

\_\_\_\_\_

<sup>1</sup>Mr. West has already submitted all exhibits to this memorandum as exhibits to his Complaint for Declaratory Judgment and Injunctive Relief. Because these exhibits are voluminous, they will not be submitted again as attachments to this memorandum. In addition, for the sake of clarity, they are designated by the same exhibit number used in his Complaint for Declaratory Judgment and Injunctive Relief.

Injunction submits the following memorandum of law:

## **I. Introduction**

A party seeking a temporary injunction must demonstrate: (1) a substantial likelihood of success on the merits; (2) immediate and irreparable harm; (3) that the equities balance in his favor; and (4) that the public interest would benefit from the issuance of an injunction. *Faust v. Metropolitan Government of Nashville*, 206 S.W.3d 475, 494 (Tenn.Ct.App. 2006). Given the balancing test to be applied, a strong showing on one element may compensate for a weaker showing on another. *Denver Area Meat Cutters and Employers Pension Plan ex rel. Clayton Homes, Inc. v. Clayton*, 120 S.W.3d 841, 854 (Tenn.Ct.App. 2003). Here, Mr. West makes a strong showing as to all four elements.

## **II. Substantial Likelihood of Success**

### **A. Jurisdiction to Afford Injunctive Relief**

This action arises under Tennessee Constitution Article 1, § 16 and the Eighth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. This Court has jurisdiction pursuant to TENN.CODE ANN. §§ 29-14-103, 29-14-113, and is empowered to grant injunctive relief under RULE 65 of the TENNESSEE RULES OF CIVIL PROCEDURE.

This Court has jurisdiction to enter injunctive relief. This Court has already raised a question about its jurisdiction to enter an injunction in this matter pursuant to the April 19, 2000, order of the Tennessee Supreme Court in *Coe v. Sundquist et al.*, No. M2000-00897-SC-R9-CV (hereinafter, “*Coe order*”). Defendants have asserted this lack of jurisdiction in relation to Plaintiff’s now-withdrawn challenge to the constitutionality of electrocution. Despite *Coe*, this Court has the power to enter an order affirmatively instructing Defendants to carry out the

Tennessee Supreme Court's July 15, 2010, order setting Mr. West's execution date, in a manner which does not violate the Constitutions of the State of Tennessee and the United States of America.

In *Coe*, the Circuit Court for Davidson County entered an order "enjoining and restraining" Mr. Coe's execution. *Coe* order at 1. Appropriately enough, the Tennessee Supreme Court held that the Chancery Court, being an inferior state court of Tennessee, was without power or jurisdiction to stay a decree of the Supreme Court. *Id.* ("[A] circuit court is without power or jurisdiction to stay a decree of [the Tennessee Supreme Court].") Mr. West, however, seeks no such order. Mr. West concedes for the purposes of this action that the Tennessee Supreme Court's order is lawful and that Defendants are required to carry out that order. Mr. West does not concede, however, that the Tennessee Supreme Court's order to carry out Mr. West's execution authorizes, much less orders, Defendants to carry out that order in violation of the laws or constitutions of the State of Tennessee or the United States of America.

The order setting Mr. West's execution date states:

It is, therefore, ordered that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law at 10:00 p.m. on the 9th day of November, 2010

Plaintiff's Exhibit 10, Order, State of Tennessee vs. Stephen Michael West, Case No.

M1987-00130-SC-DPE~DD, Filed: July 15, 2010. Emphasis supplied.

By its own clear terms, Defendants are not to carry out Mr. West's execution by any means they choose, but only "as provided by law."

The Supreme Court's Order does not state that the execution shall be carried out in accordance with Tennessee's New Execution Manual. Neither does it limit the body of law with

which Defendants must comply. It does not say, for example, that Defendants may act in accordance with their own rules and regulations, but not in accordance with the constitutions of the State of Tennessee and United States of America. To the contrary, it requires Defendants to act in accordance with “the law.”

When Mr. West seeks to enjoin Defendants from carrying out his execution in a manner which violates Tennessee Constitution Article 1, § 16 and the Eighth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, he does not ask this Court to “in effect” overrule the order of a superior court. Instead, he asks this Court to enforce the Tennessee and Federal constitutions, an act in entirely consistent with, if not implicit in, the Tennessee Supreme Court's order setting Mr. West's execution date.

A Chancery Court clearly has the jurisdiction to order state officials to follow the law. *See, generally, Southwest Williamson County Community Ass'n v. Saltsman*, 66 S.W.3d 872, 882 (Tenn.Ct.App. 2001). Accordingly, this Court has the jurisdiction to require Defendants to carry out the Tennessee Supreme Court's order setting Mr. West's execution date “as provided by law.”

**B. Tennessee's Current Protocol violates Tennessee Constitution Article 1, § 16 and the Eighth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983**

Each of the seven claims challenging the constitutionality of Tennessee's method of carrying out lethal injections contained in Mr. West's Complaint for Declaratory Judgment and Injunctive Relief (Claims I-VII) describe separate grounds under which that method violates Tennessee Constitution Article 1, § 16 and the Eighth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. Certainly the substantial difference between

Tennessee's Current Protocol and the protocol upheld in *Baze v. Rees*, 553 U.S. 35 (2008) are outlined within Mr. West's complaint. Notwithstanding the State of Tennessee's assertion to the contrary, however, it is not those differences that best demonstrate the substantial likelihood that this Court will determine that Tennessee's Current Protocol violates both the state and federal constitutions. Rather, it is the inescapable fact that Tennessee's Current Protocol accomplishes the condemned inmate's death by the suffocation of a conscious and paralyzed human being, a method of death that the Supreme Court has declared to be torture. *Baze*, 553 U.S. at 53.

The facts of past Tennessee executions establish a pattern showing that, when the protocol is implemented as designed, the fatal agent in Tennessee's lethal injection protocol is pancuronium bromide which inflicts death by suffocation.<sup>2</sup> Evidence from autopsies performed on three executed prisoners, Robert Coe, Philip Workman, and Steve Henley, reveals lethal blood concentrations of pancuronium at 4.7 mg/L, .630 mg/L, and 1.6 mg./L, respectively. (Complaint at ¶¶ 226-228). In addition, witnesses to Mr. Henley's execution observed his skin color turn blue to purple which indicates death by suffocation because a change of color occurs when non-oxygenated blood is pumped to the extremities by a beating heart. (Complaint at ¶ 98, 100, 102, 127, 242-44).

The facts establish a pattern also showing that when the protocol is implemented as designed, inmates are not adequately anesthetized so they experience the sensation and horror of suffocation from the pancuronium bromide and extreme pain from the administration of potassium chloride. (Complaint at ¶¶ 112, 180; Plaintiff's Exhibit 32, Dr. Lubarsky Affidavit,

---

<sup>2</sup>The facts established a pattern ruling out death by cardiac arrest because the potassium chloride concentrations were at insufficient levels to cause death. (Complaint at ¶¶ 123-131).

p.4, 8-9). Evidence from the autopsies performed on Robert Coe, Phillip Workman, and Steve Henley, reveals the blood concentration of thiopental was 10.2 mg/L, 18.9 mg/L, and 8.31 mg/L, respectively. (Complaint at ¶ 111). These levels are not high enough to ensure unconsciousness during execution. (Complaint ¶¶ 106-113).

More specifically, Mr. West alleged:

### COUNT VII

#### **VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND TENNESSEE CONSTITUTION ARTICLE 1, § 16 BY THE USE OF AN EXECUTION PROTOCOL WHICH CAUSES DEATH BY THE SUFFOCATION OF A CONSCIOUS INMATE.**

275. Mr. West incorporates, as if fully set forth herein, the preceding paragraphs in their entirety.

276. In addition to Defendants' violation of the Eighth Amendment and Tennessee Constitution Article 1, § 16 through the choice to use sodium thiopental, pancuronium bromide and potassium chloride, the choice to use such drugs in the combination and method of administration required by the Tennessee Protocol will result in the infliction of unnecessary and severe pain and suffering upon Mr. West if he is executed in the manner required by the Tennessee Protocol.

277. This infliction of unnecessary and severe pain and suffering upon Mr. West will not only occur in the event of the Protocol being administered improperly, but rather when it is administered exactly as set forth in the Current Protocol. This is demonstrated by every autopsy report of an inmate executed under Tennessee's lethal injection protocol.

278. Because, under *Baze v. Rees*, 553 U.S. 35 (2008), a protocol which poses merely a substantial risk of unnecessary severe pain and suffering, violates the Eighth Amendment and Tennessee Constitution Article 1, § 16, a protocol which does, in fact, cause substantial pain and suffering when carried out in the manner intended must necessarily violate the Eighth Amendment and Tennessee Constitution Article 1, § 16.

279. Moreover, the Defendants' deliberate indifference to using the Tennessee Protocol knowing that the autopsy results prove ineffective the use of sodium thiopental and potassium chloride and that inmates are actually executed

by means of suffocation violates the Eighth Amendment and Tennessee Constitution Article 1, § 16.

(Pages 104-105, Complaint for Declaratory and Injunctive Relief).

Attached to Mr. West's Complaint were, *inter alia*: (1) the October 24, 2007, autopsy report on Phillip Workman (Workman Autopsy, Plaintiff's Exhibit 27); (2) the February 17, 2010, autopsy report on Steven Henley (Plaintiff's Exhibit 29); and, (3) the 2010 affidavit of Dr. David Lubarsky stating that both inmates were conscious at the time of death. (Plaintiff's Exhibit 32).

Dr. Lubarsky affirmed that because Mr. Workman's blood sample was taken from his heart, the level of 18.9 mg/L is higher than would be found at the time of death. (*Id.* at ¶30). He also affirmed that the thiopental levels measured in Mr. Henley's blood would not be sufficient to produce unconsciousness or anesthesia. (*Id.* at ¶35). Dr. Lubarsky affirmed that because Mr. Workman's blood sample was taken from his heart, the level of 18.9 mg/L is higher than would be found at the time of death. (*Id.* at ¶30, p.6-7 of 83). He also affirmed that the thiopental levels measured in Mr. Henley's blood would not be sufficient to produce unconsciousness or anesthesia. (*Id.* at ¶35, p.7 of 83).

Mr. West alleged that use of an execution protocol that causes death by conscious suffocation violates Tennessee Constitution Article 1, § 16 and the Eighth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. (Complaint ¶¶275-280). Evidence proffered in support of this claim included autopsy reports with toxicological findings, eyewitness statements regarding the executions of Robert Coe and Steve Henley, expert testimony and scientific evidence. This evidence establishes a pattern showing that all inmates

executed under Tennessee's three-drug lethal injection protocol for whom autopsies were performed were not adequately anesthetized during the execution. The evidence establishes a pattern showing that the cause of death under Tennessee's protocol is suffocation induced by pancuronium bromide. The facts show the State is aware that during Mr. West's execution he will very likely experience needless suffering.

The Supreme Court has declared that facts such as these establish a valid cause of action:

Our cases recognize that subjecting individuals to a risk of future harm--not simply actually inflicting pain--can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be "*sure or very likely* to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers." *Helling v. McKinney*, 509 U.S. 25, 33, 34-35, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993) (emphasis added). We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n. 9, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual. In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), a plurality of the Court upheld a second attempt at executing a prisoner by electrocution after a mechanical malfunction had interfered with the first attempt. The principal opinion noted that "[a]ccidents happen for which no man is to blame," *id.*, at 462, and concluded that such "an accident, with no suggestion of malevolence," *id.*, at 463, did not give rise to an Eighth Amendment violation, *id.*, at 463-464.

As Justice Frankfurter noted in a separate opinion based on the Due Process Clause, however, "a hypothetical situation" involving "a series of abortive attempts at electrocution" would present a different case. *Id.*, at 471 (concurring opinion). In terms of our present Eighth Amendment analysis, such a situation--unlike an "innocent misadventure," *id.*, at 470, would demonstrate an "objectively intolerable risk of harm" that officials may not ignore. *See Farmer*, 511 U.S., at 846, and n. 9. In other words, an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a

“substantial risk of serious harm.” *Id.*, at 842.

*Baze*, 553 U.S. at 49-50.

Mr. West’s first seven claims, supported as they are in his Complaint and, by reference, in his motion for extraordinary relief, by affidavits and evidence of which the Court may take judicial notice, establish that the Tennessee Protocol, when implemented as designed, does not present an “accident” or “innocent misadventure” resulting in conscious suffocation. Rather, they prove a pattern or “series” of cruel executions where all autopsied inmates were not sufficiently anesthetized. This pattern constitutes something state officials may not ignore. Because *Baze* unambiguously holds that an execution where the condemned inmate is conscious while being suffocated would violate the Eighth Amendment, his entitlement to relief at this point is beyond dispute. *Baze v. Rees*, 553 U.S. at 33. He has therefore established a substantial likelihood of success on the merits as to each of those claims.

- C. The Tennessee Department of Correction has promulgated rules and regulations implementing TENN.CODE ANN. § 40-23-114(b) requiring Defendants to present Mr. West with the “Affidavit Concerning Method of Execution.” (Plaintiff’s Exhibit 4, p. 88) 30 days prior to his November 9, 2010, execution. Defendants have arbitrarily and capriciously denied Mr. West those rights and, in so doing, treated him unlike similarly situated persons.**

The Tennessee Department of Correction promulgated “rules and regulations” in the form of the new execution manual which it issued on April 30, 2007. *See* Plaintiff’s Exhibit 4 to Mr. West’s Complaint for Declaratory Judgment and Injunctive Relief. Those rules and regulations refer twice to the manner in which TENN.CODE ANN. § 40-23-114(b) is to be carried out. The undisputed facts now before this Court demonstrate that the “rules and regulations” have not been followed.

First, on Page 12, at numbered paragraph 2 under the duties of the warden relative to carrying out each execution performed in Tennessee, the manual states that the warden is, “[t]o assure condemned inmates sentenced prior to January 1, 1999 are given the opportunity to select electrocution or lethal injection as a legal means of execution at least 30 days before the execution.” Plaintiff’s Exhibit 4 (Emphasis supplied.) Notably, this duty is prospective in nature. The warden is not to assure that condemned inmates “were” given the opportunity to select electrocution or lethal injection, but that he is to assure that they “are” given that opportunity.<sup>3</sup> Second, the manual provides the form which must be presented to the inmate, which appears at Page 88 of the manual, entitled “Affidavit Concerning Method of Execution.” Plaintiff’s Exhibit 4. When these three provisions of Tennessee’s current execution manual are read in *pari materia* as they must be, *see Carver v. Citizen Utils. Co.*, 954 S.W.2d 34, 35 (Tenn.1997) (Statutes relating to the same subject or sharing a common purpose must be construed together in *pari materia* “in order to advance their common purpose or intent.”), they set forth the practice which must be followed before every scheduled execution.

It is undisputed that Mr. West has never been provided with a copy of the election form required under Plaintiff’s Exhibit 4. The Tennessee legislature has delegated the power to enact rules and regulations implementing Tennessee’s death penalty, *see*, TENN.CODE ANN. § 40-23-114(c), and Defendants have done so by adopting the Current Protocol. Defendants are therefore required by law (and accordingly by the Tennessee Supreme Court’s order setting Mr. West’s

---

<sup>3</sup>This comports with the stated purpose of the manual which is to provide, “ a summary of the most significant events and departmental procedures which will occur during the final days leading to the execution of a condemned inmate.” Cover, Plaintiff’s Exhibit 4 to Mr. West’s Complaint for Declaratory Judgment and Injunctive Relief. (Emphasis supplied.)

execution date) to comply with the Current Protocol. Those provisions described in this Court are enacted for the benefit of Mr. West and accordingly afford him certain statutory rights.<sup>4</sup>

Mr. West has demanded that Defendants comply with those provisions at Page 12 of the Current Protocol. Thus, Defendant Bell must assure that Mr. West is presented with an opportunity to “waive,” *i.e.*, avoid, the cruel and unusual execution by lethal injection prescribed for him under the current protocol in the manner prescribed at Page 88 of the Current Protocol at least 30 days prior to any execution. Defendants, through counsel, have stated that they will not comply with that request. Defendants have not denied any other similarly situated person such a request. Moreover, Defendants’ denial is arbitrary and capricious and has no rational relationship to any legitimate governmental purpose.

By arbitrarily and capriciously denying Mr. West those rights without any rational relationship to any legitimate governmental purpose, Defendants have deprived Mr. West of the right to equal protection and due process under the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. *See, Howard v. Grinage*, 82 F.3d 1343, 1349-50 (6th Cir. 1996).

Mr. West’s rights under Plaintiff’s Exhibit 4 are clear. Defendants have asserted no rational governmental interest underlying their arbitrary and capricious denial. Defendants have admitted the denial itself. There is therefore also a substantial likelihood that Mr. West will prevail on Claim VIII.

---

<sup>4</sup>The suggestion that such provisions are for the benefit of the State of Tennessee is in error. If indeed such provisions were adopted to allow Defendants at least 30 days to prepare to carry out Mr. West’s sentence of death in the manner required under TENN.CODE ANN. § 40-23-114(a) and (b), they would not allow Mr. West to change his method of execution only 14 days prior to his execution date.

### **III. Immediate and Irreparable harm**

It is beyond cavil that Mr. West will suffer immediate and irreparable harm should a temporary injunction not issue. Should he be executed without being afforded the 30-day period of reflection required by Tennessee law and the 16 days within which he may choose to avoid the torture of lethal injection as carried out by the State of Tennessee, he will be deprived of the rights guaranteed to him by the legislature of the State of Tennessee.

More importantly, Mr. West will also be deprived of the rights guaranteed to him by the constitutions of the State of Tennessee and the United States of America to be free from a cruel and unusual punishment, as explained in Counts I-VII of his Complaint for Declaratory Judgment and Injunctive Relief. Once Mr. West is executed, those rights can never be restored. In cases where a prisoner is scheduled to be executed, irreparable harm is deemed “to be self-evident.” *In re Holladay*, 331 F.3d 1169, 1176-77 (11th Cir. 2003)(granting stay of execution); *In re Morris*, 328 F.3d 739, 741 (5th Cir. 2003)(same).

### **IV. The equities lie with Mr. West**

Regardless of the State of Tennessee’s interest in seeing Mr. West’s sentence of death carried out, it has no interest in seeing it carried out in violation of its own constitution, laws, rules, and regulations, or in violation of the constitution and laws of the United States. *In re Holladay, supra; In re Morris, supra*

Moreover, the fact that the injunction sought by Mr. West might delay his scheduled execution is solely attributable to: (1) Defendants’ insistence in ignoring the rules and regulations the Department of Correction promulgated as Plaintiff’s Exhibit 4; and (2) their insistence at clinging to the Current Protocol despite the un-controverted evidence that it accomplishes death

through the suffocation of a conscious and paralyzed inmate, when they could have chosen to execute him in a manner which would not have inflicted such torture and which has been used successfully in the State of Ohio. They chose not to. They elected instead to ignore their obligations under the constitutions of the United States and the State of Tennessee and the Tennessee's Supreme Court's instruction to carry out Mr. West's execution consistent with the requirements of the law. Here, Mr. West asked merely for the protections afforded him by our laws. In the face of Defendants' lawlessness, he asks only for the laws to be enforced in a constitutional manner. The equities lie with him.

**V. The public interest is served by enjoining violations of the State of Tennessee's laws by its own officials**

The public interest can only benefit from an order of this Court requiring Defendants to comply with the laws of this State. *Johnson v. Levy*, Slip Copy, 2010 WL 119288 (Tenn.Ct.App. January 14, 2010). We are a nation of laws and not men and no man is above the law. When governments flaunt the law, only tyranny remains. *In re Adoption of J.J.*, 366 Pa.Super. 94, 530 A.2d 908 (Pa. Super. 1987)("Our Constitution restricts the ways in which the government may deal with the citizenry out of a concern for fairness and as a protection against tyranny.") An order requiring Tennessee officials to obey the laws of this State will revitalize the public trust damaged by Defendants' actions.

**VI. Conclusion**

On the basis of the foregoing points and authorities, Mr. West respectfully requests that his Motion for Temporary Injunction be granted.

Respectfully submitted,  
FEDERAL DEFENDER SERVICES  
OF EASTERN TENNESSEE, INC.

BY: Stephen A. Ferrell

Stephen A. Ferrell  
Stephen M. Kissinger  
Assistant Federal Community Defender  
800 S. Gay Street, Suite 2400  
Knoxville, TN 37929  
(865) 637-7979  
Fax: (865) 637-7999  
[Stephen\\_Ferrell@fd.org](mailto:Stephen_Ferrell@fd.org)  
[Stephen\\_Kissinger@fd.org](mailto:Stephen_Kissinger@fd.org)

MILLER & MARTIN

Roger W. Dickson <sup>by S.A.F.</sup>

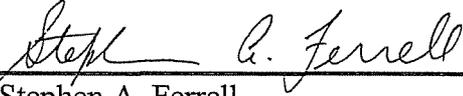
Roger W. Dickson, Esquire  
832 Georgia Avenue, Suite 1000  
Chattanooga, TN 37402  
phone: (423) 756-6600  
fax: (423) 785-8480  
[rdickson@millermartin.com](mailto:rdickson@millermartin.com)

**CERTIFICATE OF SERVICE**

I, Stephen A. Ferrell, hereby certify that a true and correct copy of the foregoing document was hand delivered to:

Mark A. Hudson  
Senior Counsel  
Office of Attorney General  
425 Fifth Avenue North  
P. O. Box 20207  
Nashville, TN 37243  
Mark.A.Hudson@state.tn.us

this the 25<sup>th</sup> day of October, 2010.

  
\_\_\_\_\_  
Stephen A. Ferrell