

IN THE CHANCERY COURT
FOR TENNESSEE'S 20TH JUDICIAL DISTRICT
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN,

Plaintiff,

vs

No.

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

TENNESSEE DEPARTMENT OF
CORRECTION

Defendants.

PETITION FOR A DECLARATORY JUDGMENT

INTRODUCTION

1. Pursuant to T.C.A. § 29-14-102, Plaintiff Abu-Ali Abdur'Rahman respectfully requests that this Court enter a judgment declaring that Plaintiff's purported waiver of his right to die by lethal injection was invalid. The purported waiver was invalid because (1) Defendant Ricky Bell (the Warden) obtained the purported waiver at a time contrary to Tennessee procedures for obtaining such a waiver; (2) despite knowing that Plaintiff is represented by undersigned counsel, the Warden approached Plaintiff and obtained the purported waiver without counsel being present; and (3) prior to obtaining the purported waiver, the Warden did not provide Plaintiff with information necessary for Plaintiff to make a voluntary, knowing, intelligent, and understanding decision to waive his right to die by lethal injection.

PARTIES

2. Plaintiff Abu-Ali Abdur'Rahman is an inmate confined under a sentence of death at the Riverbend Maximum Security Institution (RMSI), 7475 Cockrill Bend Industrial Road, Nashville, Tennessee 37209.

3. Defendant Ricky Bell (the Warden) is the Warden of RMSI, 7475 Cockrill Bend Industrial Road, Nashville, Tennessee 37209. Defendant Tennessee Department of Correction (DOC) is the agency of the State of Tennessee responsible for formulating the policies and practices relating to executions and for carrying out executions in Tennessee. In that connection, DOC has issued an "Execution Manual" which purports to set forth the rules and regulations governing executions.

JURISDICTION/VENUE

4. This Court has jurisdiction over this action pursuant to T.C.A. §§ 16-11-101, 16-11-102(a), 29-14-102(a).

5. Venue is proper in Tennessee's 20th Judicial District because Plaintiff resides in that district and the events involved in this lawsuit occurred in that district.

FACTS

6. On or around July 15, 1987, a Davidson County, Tennessee, jury sentenced Plaintiff to death for the homicide of Patrick Daniels which occurred on or around February 16, 1986. Plaintiff's execution is set for April 10, 2002, at 1:00 a.m.

7. In 1996, the undersigned attorneys, Mr. William R. Redick, Jr., and Mr. Bradley A. MacLean, were appointed by the United States District Court for the Middle District of Tennessee to represent Plaintiff in Plaintiff's federal habeas corpus proceedings. Mr. Redick and Mr. MacLean have represented Plaintiff in all legal matters continuously since that time. On January 15, 2002, the Tennessee Supreme Court issued an Order appointing Mr. Redick and Mr. MacLean as Plaintiff's attorneys in matters in state proceedings relating to Plaintiff's death sentence and scheduled execution. At all times relevant hereto, Defendants have been well aware of the fact that Mr. Redick and Mr. MacLean are the attorneys for Plaintiff. Over the past several years, on numerous occasions, Mr. Redick and Mr. MacLean have communicated by correspondence, telephone, and direct conversation with the Defendants about matters concerning Plaintiff and Mr. Redick's and Mr. MacLean's legal representation of Plaintiff.

8. T.C.A. § 40-23-114(a) provides that "For any person who commits an offense prior to January 1, 1999, for which such person is sentenced to the punishment of death, the method for carrying out this sentence shall be lethal injection."

9. T.C.A. § 40-23-114(c) provides that "Any person who commits an offense prior to January 1, 1999, for which such person is sentenced to the punishment of death may elect to be executed by electrocution by signing a written waiver waiving the right to be executed by lethal injection."

10. The Execution Manual addresses the procedures to be followed during the "death watch," which typically begins approximately three days before a scheduled execution. The Execution Manual further provides that the Warden of RMSI is to give a condemned inmate an opportunity to elect execution by electrocution, and waive his right to die by lethal injection.

"within 30 days immediately preceding the scheduled execution date." Execution Manual at 2, ¶ 9 (attached as Exhibit 1).

11. The Warden has stated to Plaintiff's counsel that the Defendants test the execution equipment on a regular basis, and that there is in place on a continuous basis one or more execution teams who are "always ready" to do what is necessary to carry out an execution.

12. On February 7, 2002, the Warden approached Plaintiff, without prior warning to either Plaintiff or Plaintiff's legal counsel, and told Plaintiff that Plaintiff would need to make some decisions about matters relating to Plaintiff's scheduled execution. The Warden mentioned such matters as selection of an attorney witness to the execution, selection of the last meal, election of the means of execution, disposition of personal property, and disposition of Plaintiff's body after the execution. Plaintiff told the Warden that "he was not ready to go there" with that kind of discussion, and further stated that "we are still fighting this thing," referring to the scheduled execution. There was no further discussion between the Warden and Plaintiff about these matters.

13. On March 4, 2002, the Warden called Plaintiff into a closed office near Plaintiff's cell. The only persons present were the Warden, Plaintiff, and a notary public who accompanied the Warden. No prior notice was given to Plaintiff or to Plaintiff's legal counsel of this meeting. Plaintiff's legal counsel were never alerted to the fact that this kind of meeting might take place. In that meeting, the Warden demanded Plaintiff to make a choice between being executed by lethal injection or by electrocution. The Warden told Plaintiff that Plaintiff had to make the choice at that time. The Warden also told Plaintiff that Plaintiff's election would be final and irrevocable. The Warden also told Plaintiff that if Plaintiff did not make an election, the state would choose to have Plaintiff executed by means of lethal injection. The Warden did not suggest that Plaintiff might consult with legal counsel and did not offer Plaintiff the opportunity to consult with legal counsel. Plaintiff filled out and signed a piece of paper handed to him by the Warden. This paper, as filled out by Plaintiff, purported to waive Plaintiff's right to be executed by lethal injection and instead die by being electrocuted. 3/4/02 Affidavit to Elect Method of Execution (attached as Exhibit 2).

14. Prior to this meeting of March 4, 2002, Plaintiff had never seriously considered which method of execution he might elect. Prior to this meeting, Plaintiff had never discussed the different methods of execution, or his right to waive lethal injection, with his attorneys, his

spiritual advisor, the Warden, or any other person. Plaintiff's spiritual advisor, Ms. Linda Manning, had left the country on other business on February 22, 2002, and did not return to the country until the evening of March 5, 2002. Ms. Manning, therefore, was not available to Plaintiff on March 4, 2002, when the Warden approached Plaintiff and demanded that Plaintiff make his election. When Plaintiff signed the form purporting to waive his right to lethal injection, the Warden was surprised. Another official at Unit 2 at RMSI has told Plaintiff's counsel that if he had known that Plaintiff was even considering waiving his right to lethal injection, that official would have first brought Plaintiff into the office and would have recommended that Plaintiff call his lawyers to discuss the issue before making a decision on this matter. This official, however, also was not given prior notice that the Warden would approach Plaintiff with a demand to make the election on March 4, 2002, and he also had no prior knowledge that Plaintiff would consider waiving Plaintiff's right to lethal injection.

15. Prior to obtaining Plaintiff's purported waiver, Defendants did not provide Plaintiff with any information necessary for Plaintiff to make a voluntary, knowing, intelligent and understanding decision respecting whether he should waive his right to die by lethal injection and be electrocuted instead. Among other things, Defendants did not provide Plaintiff the following information respecting Tennessee's electric chair:

15.1. On or around August 26, 1988, Fred A. Leuchter, Associates (Leuchter) submitted a bid to provide DOC an electric chair. In the bid Leuchter offered to "test and Certify (the) equipment and conduct (DOC's) execution, under (DOC's) direction, to ensure a trouble free and uneventful execution. Under this plan, Fred A. Leuchter Associates will assume full responsibility for the competency of the execution" 8/26/88 Letter From Fred A. Leuchter to Thomas Joplin at 3 (attached as Exhibit 3).

15.2. RMSI contracted with Leuchter for an electric chair.

15.3. On or around November 29, 1989, Leuchter completed installing the electric chair at RMSI. Upon doing so, Leuchter tested the electric chair and found that the system's performance was satisfactory. Leuchter certified that the electric chair, at that time, was "competent and ready to be utilized for the purpose for which it was constructed." 12/2/89 Equipment Certification (attached as Exhibit 4).

15.4. Leuchter's Manual for the electric chair provides that during an execution, "current should be kept under six (6) amperes to minimize body damage (cooking)." 11/27/89

Manual at 2 (attached as Exhibit 5). Given this concern, Leuchter's electric chair contained a current regulator that limited the current to five amperes, maximum, during an execution, and, if the current regulator failed, an over current breaker was set to trip at six amperes. *Id.* at 3-4.

15.5 According to statements made by the Warden to Plaintiff's counsel, Leuchter gave DOC a warranty on the operation of the electric chair for the shorter of five (5) years or two (2) executions. This warranty has expired.

15.6 On or around April 16, 1994, Michael Morse, Ph.D., inspected and tested the electric chair.

15.7 On or around April 18, 1994, Dr. Morse wrote the Tennessee Attorney General's Office that "The electrocution system for the state of Tennessee does not deliver adequate current and does not seem to have the capacity to function with a typical load for an execution." 4/18/94 Letter From Morse to State of Tennessee, Attorney General, at 3 (attached as Exhibit 6).

15.8 Dr. Morse provided DOC with a list of fourteen recommendations to be followed in order to ensure that the electric chair worked properly. 4/18/94 Letter From Morse to State of Tennessee, Attorney General, at 4-5 (attached as Exhibit 6).

15.9 DOC contracted with Jay Wiechert Mfg. (Wiechert) to further inspect the electric chair and implement Dr. Morse's recommendations. Wiechert made modifications to the electric chair. According to statements by the Warden to Plaintiff's counsel, Wiechert did not give DOC a warranty on the electric chair or these modifications.

15.10 On or around April 25, 1994, Wiechert inspected the electric chair. During a test of the electric chair, it malfunctioned. 4/27/94 Letter From Wiechert to Mr. Bobby Campbell (attached as Exhibit 7).

15.11 While Wiechert thereafter followed some of the recommendations made by Dr. Morse, he failed to make the following modifications recommended by Dr. Morse:

15.11.1 Removing one of the leg electrodes; 4/18/94 Letter From Morse to State of Tennessee, Attorney General, at 4, ¶ 4 (attached as Exhibit 6);

15.11.2 Replacing a wire with grooved insulation in the electrical box at the base of the chair; *id.* at ¶ 6; and

15.11.3 Including a chart recorder that clearly reads both current and voltage as it is delivered to the chair. *Id.* at 5, ¶ 6.

15.12. On or around April 23, 1996, the JVM Custom Machinery Group (JVM) wrote DOC that it had acquired all of Leuchter's rights to Leuchter's execution technology, and, as a result, it had assumed all guarantees on Leuchter designed and installed equipment throughout the country, including the execution system at RMSI. After reviewing the modifications Wiechert made to the electric chair, particularly modifications to amperes allowed to flow during an execution and the cycle of electrical energy provided, JVM wrote that "these modifications ... are dangerous and inconsistent with proper Execution Technology and Procedure. These modifications may result in 'tissue cooking' of the executee and further, fibrillation of the executee's heart resulting in failure to execute and a brain dead vegetable at the conclusion of the execution procedure." 4/23/96 Letter From JVM to Mr. Bobby Campbell (attached as Exhibit 8); compare 1/26/96 Letter From Wiechert to Mr. Bobby Campbell (attached as Exhibit 9).

15.13. On or around April 27, 1996, DOC tested the electric chair. During the test current flowed at 7.5 amperes which is 2.5 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 1996 Log (attached as Exhibit 10); compare Paragraph 15.4, above.

15.14. On or around September 13, 1996, DOC tested the electric chair. During the test current flowed at 8.2 amperes which is 3.2 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 1996 Log (attached as Exhibit 10); compare Paragraph 15.4, above.

15.15. On or around November 17, 1996, DOC tested the electric chair. During the test current flowed at 8.0 amperes which is 3 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 1996 Log (attached as Exhibit 10); compare Paragraph 15.4, above.

15.16. On or around January 9, 1997, DOC tested the electric chair. During the test current flowed at 8.0 amperes which is 3.0 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 1997 Log (attached as Exhibit 11); compare Paragraph 15.4, above.

15.17. On or around June 30, 1997, DOC tested the electric chair. During the test current flowed at 8.0 amperes which is 3.0 amperes over the 5 amperes Leuchter had originally

limited his electric chair to prevent tissue cooking. 1997 Log (attached as Exhibit 11); compare Paragraph 12.4, above.

15.18. On or around November 13, 1997, DOC tested the electric chair. During the test current flowed at 8.0 amperes which is 3.0 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 1997 Log (attached as Exhibit 11); compare Paragraph 15.4, above.

15.19. On or around January 14, 1998, DOC tested the electric chair. During the test current flowed at 8.0 amperes which is 3.0 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 1998 Log (attached as Exhibit 12); compare Paragraph 15.4, above.

15.20. On or around July 22, 1998, DOC tested the electric chair. During the test current flowed at 8.0 amperes which is 3.0 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 1998 Log (attached as Exhibit 12); compare Paragraph 15.4, above.

15.21. On or around November 18, 1998, DOC tested the electric chair. During the test current flowed at 8.0 amperes which is 3.0 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 1998 Log (attached as Exhibit 12); compare Paragraph 15.4, above.

15.22. On or around February 10, 1999, DOC tested the electric chair. During the test current flowed at 8.0 amperes which is 3.0 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 1999 Log (attached as Exhibit 13); compare Paragraph 15.4, above.

15.23. On or around May 5, 1999, DOC tested the electric chair. During the test current flowed at 8.0 amperes which is 3.0 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 1999 Log (attached as Exhibit 13); compare Paragraph 15.4, above.

15.24. On or around August 18, 1999, DOC tested the electric chair. During the test current flowed at 8.0 amperes which is 3.0 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 1999 Log (attached as Exhibit 13); compare Paragraph 15.4, above.

15.25. On or around February 14, 2001, DOC tested the electric chair. During the test current flowed at 7.0 amperes which is 2.0 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 2001 Log (attached as Exhibit 14); compare Paragraph 15.4, above.

15.26. On or around February 21, 2001, DOC tested the electric chair. During the test current flowed at 7.0 amperes which is 2.0 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 2001 Log (attached as Exhibit 13); compare Paragraph 15.4, above.

15.27. On or around February 28, 2001, DOC tested the electric chair. During the test current flowed at 7.0 amperes which is 2.0 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 2001 Log (attached as Exhibit 14); compare Paragraph 15.4, above.

15.28. On or around June 20, 2001, DOC tested the electric chair. During the test current flowed at 7.0 amperes which is 2.0 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 2001 Log (attached as Exhibit 14); compare Paragraph 15.4, above.

15.29. On or around September 12, 2001, DOC tested the electric chair. During the test current flowed at 7.0 amperes which is 2.0 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 2001 Log (attached as Exhibit 14); compare Paragraph 15.4, above.

15.30. On or around December 12, 2001, DOC tested the electric chair. During the test current flowed at 7.0 amperes which is 2.0 amperes over the 5 amperes Leuchter had originally limited his electric chair to prevent tissue cooking. 2001 Log (attached as Exhibit 14); compare Paragraph 15.4, above.

15.31. On or around March 18, 2002, Fred Leuchter wrote Governor Don Sundquist to inform him that the electric chair, as currently configured, has problems with the Voltage, the Current, and the Timing. Leuchter informed Governor Sundquist that use of the electric chair could be a disaster in which Plaintiff would be tortured and turned into a "living vegetable." Leuchter implored Governor Sundquist to abolish the electric chair by executive order. 3/18/02 Letter From Leuchter to Don Sundquist (attached as Exhibit 15).

15.32 The Execution Manual provides at p. 42, ¶ V.1, as follows: "The Officer in Charge and/or the Assistant Officer in Charge shall conduct a training session at least once each month at which time all appliances and electrical circuits will be tested." (Emphasis original). According to statements by the Warden and DOC documents, however, Defendants have violated this rule because, among other things, training sessions and testing of all appliances and electrical circuits have not occurred monthly.

16. Prior to obtaining Plaintiff's purported waiver of his right to die by lethal injection, and instead be electrocuted, Defendants did not provide Plaintiff any information respecting death by electrocution in general. Among other things, Defendants did not provide Plaintiff the following information:

16.1. Members of the medical community believe that an electrocution, no matter how done, is extraordinarily painful. 3/9/92 Affidavit of Orrin Devinsky, M.D., at 3-7 (attached as Exhibit 16)(concluding that "there is no evidence that intentional electrocution is either painless or humane. To the contrary, all credible scientific evidence indicates the opposite.").

16.2. Executions by electrocution have left the condemned inmate's body with third and fourth degree burns. See Autopsies and Photographs of Individuals Executed By Electrocutation (attached as Collective Exhibit 17).

COUNT 1

17. Plaintiff incorporates all preceding paragraphs.

18. March 4, 2002, is thirty-seven (37) days prior to April 10, 2002, and Defendants therefore obtained Plaintiff's purported waiver of his right to die by lethal injection at a time contrary to Tennessee's written procedure that the RMSI Warden obtain such a waiver either during the "death watch" or, at most, "within 30 days immediately preceding the scheduled execution date." Because Defendants obtained Plaintiff's purported waiver at a time contrary to written procedures, the purported waiver is invalid as a matter of State procedural law, and it is invalid under Article I, §§ 3 and 16 of the Tennessee Constitution and under the Eighth and Fourteenth Amendments to the United States Constitution.

COUNT 2

19. Plaintiff incorporates all preceding paragraphs.

20. Defendants obtained Plaintiff's purported waiver of his right to die by lethal injection without notifying undersigned counsel that Defendants were going to approach Plaintiff on this issue and without offering Plaintiff an opportunity to consult with counsel respecting any such waiver. Defendants' actions in doing so violated Article I, §§ 8, 9, 16, and 17 of the Tennessee Constitution and the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. As such, Plaintiff's purported waiver of his right to die by lethal injection is invalid.

COUNT 3

21. Plaintiff incorporates all preceding paragraphs.


22. Because Defendants obtained Plaintiff's purported waiver without counsel being present, and because Defendants did not provide Plaintiff the information contained in paragraphs 15-16, above, Plaintiff's purported waiver of his right to die by lethal injection was not a knowing, intelligent, and voluntary decision and, as a result, is invalid under Article I, §§ 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

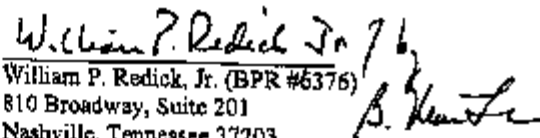
PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Declare invalid Plaintiff's purported waiver of his right to die by lethal injection;
2. Shorten the time periods for answering this Complaint and responding to discovery in this action; and
3. Order such other relief as this Court deems just.

Respectfully Submitted,


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