IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

STEPHEN MICHAEL WEST,	)	
	)	
Plaintiff-Appellant	)	
	)	No. _____
	)	
v.	)	**DEATH PENALTY CASE**
	)	**EXECUTION DATE:**
GAYLE RAY, in her official capacity as Tennessee's Commissioner of Correction, *et al.*,	)	**November 9, 2010 at 10 p.m.**
	)	
	)	Davidson County Chancery Court
	)	No. 10-1675-I
Defendants-Appellees	)	

ON APPEAL FROM THE JUDGMENT OF
THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This appeal arises pursuant to TENN.R.APP.PRO. 9 from the order of the Honorable Claudia C. Bonnyman of the Chancery Court for Davidson County, Tennessee, entered November 1, 2010.

INTRODUCTION

This is an appeal from the lower court's order of November 1, 2010, denying Mr. West's Motion for Temporary Injunction seeking to enjoin state actor defendants from carrying out Mr. West's November 9, 2010, execution by lethal injection in a manner which violates the Eighth and Fourteenth Amendments and Tennessee Constitution Article 1, § 16. Though the chancery court found that Mr. West had demonstrated an entitlement to the temporary injunction sought, it determined that such an injunction would "in effect" stay the Tennessee Supreme Court's July 15, 2010, order setting Mr. West's execution date for November 9, 2010, and that, therefore, it was without power to enter the injunction. Accordingly, this appeal arises from one order entered on November 1, 2010, adjudicating his Motion for Temporary Injunction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The Chancery Court Incorrectly Determined That it Was Without Jurisdiction to Enjoin Defendants from Violating the Eighth and Fourteenth Amendments and Tennessee Constitution Article 1, § 16 Because Such an Injunction Would Indirectly Cause Defendants to Not Carry out Mr. West's Execution on November 9, 2010.

II. In the Event the Chancery Court Had Jurisdiction to Enjoin the Defendants from Violating the Eighth and Fourteenth Amendments and Tennessee Constitution Article 1, § 16, the Court's Alternative Finding That Mr. West Had Shown That Such an Injunction Issue Was Not an Abuse of Discretion and Was, in Fact, Correct.

STATEMENT OF THE FACTS AND OF THE CASE

On July 15, 2010, the Tennessee Supreme Court set Mr. West's execution for November 9, 2010. On October 18, Mr. West filed a complaint and a motion for extraordinary relief in the Chancery Court for Davidson County, as Case No. 10-1675-I, seeking to enjoin Defendants from violating Tennessee law, as well as the constitutions of the State of Tennessee and the United States of America, by carrying out Mr. West's scheduled execution by means of an electrocution protocol which violates the Eighth and Fourteenth Amendments to United States Constitution and Art. 1 § 14 of the Tennessee Constitution and by carrying out that execution by electrocution in violation of TENN.CODE ANN. § 40-23-114 (a) and (b) under the auspices of Mr. West's signature on an almost ten-year old form which was, for multiple reasons, no longer of any legally binding effect.

On October 20, 2010, Defendants stated affirmatively that Mr. West was no longer bound by the almost ten year-old election form, and that they would carry out Mr. West's execution by means of lethal injection. (Defendants' Response to Motion for Temporary Injunction p. 2, 3 (filed Oct. 20, 2010) attached as Attachment 4 to Mr. West's RULE 9 Application).[1] Mr. West then withdrew his motion for extraordinary relief and, on October 25th, filed an amended complaint and a motion for temporary extraordinary relief seeking to enjoin the defendants from carrying out Mr. West's November 9, 2010, execution by means of a lethal injection protocol which violates the Eighth and Fourteenth Amendments to United States Constitution and Art. 1 §

[1]Mr. West submitted all exhibits referenced in this Brief to his Application for Interlocutory Appeal by Permission Pursuant to RULE 9, T.R.A.P. filed simultaneously with this Brief. Because these exhibits are voluminous, that will not be submitted as attachments to this Brief. For the sake of clarity, they are designated by the same exhibit number used in his RULE 9 Application.

14 of the Tennessee Constitution by effecting death through the paralyzation and suffocation of a conscious inmate. (Amended Complaint for Declaratory Judgment and Injunctive Relief with exhibits (filed Oct. 25, 2010) attached as Attachment 1 to Mr. West's RULE 9 Application; Motion for Temporary Injunction (filed Oct. 25, 2010), attached as Attachment 2 to Mr. West's RULE 9 Application; and Memorandum in Support of Motion for Temporary Injunction, attached as Attachment 3 to Mr. West's RULE 9 Application; Memorandum in Opposition to Defendants' Response to Motion for Temporary Injunction (filed Oct. 28, 2010), attached as Attachment 5 to Mr. West's RULE 9 Application).

After allowing both parties an opportunity to submit written memoranda on whether a temporary injunction should issue, and holding hearings on October 27 and 28, 2010, (transcripts attached, Attachment 6 and Attachment 7, respectively to Mr. West's RULE 9 Application) the Chancery Court entered an order: (1) finding that, under the April 19, 2000, order of the Tennessee Supreme Court in *Coe v. Sundquist et al.*, No. M2000-00897-SC-R9-CV, it lacked jurisdiction to enjoin Defendants from violating the federal and Tennessee constitutions because such an injunction would have the "effect" of staying the Tennessee Supreme Court's July 15, 2010, order; and (2) finding that, if the Chancery Court had such jurisdiction, Mr. West had demonstrated that he was entitled to an order enjoining Defendants' allegedly illegal conduct. Pursuant to RULE 9(b), the Chancery Court granted Mr. West permission to file a RULE 9 appeal. (*West v. Ray*, No. 10-1675-I, Memorandum Opinion, p.8, 20 (orally entered Oct. 28, 2010, filed November 1, 2010) attached as Attachment 8 to Mr. West's RULE 9 Application).

ARGUMENT

I. The Chancery Court Has the Jurisdiction to Enjoin the Defendants from Violating the Constitutions of the State of Tennessee and the United States by Subjecting Mr. West to Cruel and Unusual Punishment Even If Defendants' Failure And/or Refusal to Refrain from Such Violations Prior to Be Being Forced to Do So by the Chancery Court Would Result in Their Inability to Carry out Mr. West's Execution at the Date and Time Set.

On April 30, 2010, when the State filed its motion for an execution date, it knew or should have known that all autopsy reports for inmates executed under Tennessee's lethal injection protocol indicate that the inmates were not sufficiently anesthetized and that the only drug to reach lethal levels is pancuronium bromide.[2] On July 15, 2010, the Tennessee Supreme Court ordered Defendants to "execute the sentence of death" upon Mr. West "as provided by law." The execution is to take place on November 9, 2010. On October 20, 2010, the Defendants announced their intent to execute Mr. West by lethal injection.

Mr. West filed suit under Tennessee Constitution Article 1, §16, the Eighth and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983, alleging that the Defendants' use of their lethal injection protocol will result in conscious suffocation and severe pain. The Chancery Court had jurisdiction pursuant to TENN. CODE ANN. §16-11-101 and §§29-14-101, *et. seq.*, to require the Defendants to carry out Mr. West's execution, as ordered by the Tennessee Supreme Court, in a constitutional manner. TENN.R.CIV.P. 65.01 ("An injunction may restrict or mandatorily direct the doing of an act."); *see also Southwest Williamson Co. Cmty. Ass'n. v. Saltsman*, 66 S.W.3d 872, 882 (Tenn.Ct.App. 2001) (a chancery court has

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[2]The facts supporting Mr. West's claims were known to the Defendants in February, 2010, when Mr. Henley's autopsy report was finalized and revealed a pattern of unconstitutional executions.

jurisdiction to order state officials to follow the law).

Mr. West's lawsuit requested only that his execution be conducted in a constitutional manner, specifically, that it not be a cruel and unusual punishment. He did not request an order preventing the Defendants from carrying out his execution. Nevertheless, the court below determined that the Tennessee Supreme Court's order in *Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (April 18, 2000), is controlling and dictates that it is without jurisdiction to enter the requested injunction. In *Coe*, the issues were whether the execution protocol should have been promulgated under the Uniform Administrative Procedures Act and whether physician participation in the execution violates public policy. The circumstances surrounding the order in *Coe* make it distinguishable from this case.

This case, unlike *Coe*, does not concern a request to stay or prohibit the execution. In *Coe*, the Circuit Court's order was vacated because it restrained the State from executing Mr. Coe after the Tennessee Supreme Court had ordered the execution. The lower court had "entered an order enjoining and restraining the appellants from carrying out the planned execution of Coe pending further orders of the court." *Id.* The Tennessee Supreme Court stated, "the order of the trial court enjoining and restraining the execution, which effectively amounted to a stay of the execution scheduled by this Court's order ..., exceeded the jurisdiction of the trial court" because "[a] trial court has no power to enjoin or stay an appellate court order." *Id.* The *Coe* order cited *Seesel v. Seesel*, 748 S.W.2d 422, 423 (Tenn. 1988), *overruled on other grounds*, *Aaby v. Strange*, 924 S.W.2d 623 (Tenn. 1996).

Seesel was another case where "the trial court acted in excess of its jurisdiction in endeavoring to stay the order and judgment of th[e appellate] court." *Id.* It was a child custody

case where the Court of Appeals had found the child could move out of state. On remand, the trial court entered an order directly contrary to the appellate court's determination; it stayed removal of the child. The Tennessee Supreme Court said the trial court "had no power to enjoin or stay the order of the appellate court." *Id.*

The courts in both *Coe* and *Seesel* used the words "enjoin" and "stay" interchangeably, as the lower courts' orders directed action which categorically prohibited the acts ordered by the higher courts. By their very nature, the lower courts' orders were restraining orders. *See* TENN.R.CIV.P. 65.01. ("Injunctive relief may be obtained by (1) restraining order, (2) temporary injunction, or (3) permanent injunction in a final judgment. A restraining order shall only restrict the doing of an act. An injunction may restrict or mandatorily direct the doing of an act.)" The distinction between a restraining order and an injunction is important because injunctive relief directing in a certain manner the "doing of an act," such as carrying out an appellate court order, does not prohibit the act. Consistent with this principle, the State asserted in the *Coe* case that "the only proper remedy for the court to undertake is to enjoin any physician from actually participating further in the lawful execution ... and not to enjoin [*i.e.*, stay] the execution order entered by the Tennessee Supreme Court." *Coe*, *supra*, Application for interlocutory appeal by permission pursuant to Rule 9, T.R.A.P., p.5 (filed April 18, 2000).

The legal doctrine which generally prohibits reconsideration of issues that have already been decided by a higher court in the same case is the "law of the case" doctrine. *Memphis Publ'g Co. v. Tennessee Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998). This doctrine makes an appellate court's decision on an issue of law binding in later trials of the same case if the facts on the second trial are substantially the same as the facts in the first

appeal. *Id.* The doctrine "promotes finality and efficiency of the judicial process, avoids indefinite relitigation of the same issue, fosters consistent results in the same litigation, and assures the obedience of lower courts to the decisions of appellate courts." *Id.*

For the law of the case doctrine to apply, however, the issue presented to the court must have been the same issue which was determined on appeal. *Consolidated Waste Systems v. Metro. Gov't. of Nashville and Davidson Co.*, No. M2006-01345-COA-R3-CV, 2007 WL 4224696, *5 (Tenn.Ct.App. Nov. 29, 2007) ("For the law of the case doctrine to apply to the constitutionality of the table ordinance, ... this Court must have [previously] determined [the issue]."), citing *Memphis Publ'g Co.*, at *id.* In *Consolidated Waste*, the plaintiff successfully challenged the denial of a permit because zoning ordinances were unconstitutional. When the plaintiff subsequently applied for another permit and was again denied, but on the basis of one ordinance, it asserted the law of the case doctrine. The court found the law of the case doctrine inapplicable. It said, "Significantly, the constitutionality of the table ordinance, standing alone was not the issue in *Consolidated I* and neither this Court nor the trial court in the initial proceedings, endeavored to analyze the constitutionality of the table ordinance independent of the buffer ordinance." *Consolidated Waste*, *supra* at *6. The court held that "any perceived ruling as to its constitutionality ... would be no more than dicta, and dicta cannot constitute the law of the case." *Id. See also Seesel*, 728 S.W.2d at 423 (vacating a stay of the appellate court's order but recognizing that "[u]nquestionably the trial court retained jurisdiction to entertain [a separate] petition for change of custody filed on behalf of Mr. Seessel."). As explained in *State v. Williams*, 52 S.W.3d 109, 124 (Tenn.Crim.App. 2001), "[t]he appellate court directs actions and dictates results through its orders, judgments, and mandates. A mandate is controlling as regards

matters 'within its compass, but on remand a lower court is free as regards other issues.'" *Id.*, quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939). Accordingly, a lower court may entertain a different request for relief in a case so long as that relief is grounded on a new issue and does not totally prohibit action already ordered by a higher court. *Sprague*, at *id.* (if the immediate issue now in controversy was not disposed of in the main litigation and therefore foreclosed by the mandate, it may be considered).

The Chancery Court in the instant case, feeling bound by the *Coe* order, stated, if Mr. West's lawsuit was "something about which the Tennessee Supreme Court had not ordered or opined, then I would issue the injunction solely for the purpose of preserving the status quo while the court examined the claims and the law, facts and the law."[3] *West v. Ray*, No. 10-1675-I, Memorandum Opinion, p.20, attached as Attachment 8 to Mr. West's RULE 9 Application. Mr. West's lawsuit, however, sought an order requiring the State to carry out the execution in a constitutional manner and not in a manner that causes conscious death by suffocation. The subject of the lawsuit was not considered or disposed of by the Tennessee Supreme Court's order scheduling Mr. West's execution. Accordingly, the chancery court could consider the lawsuit and, because the requested injunctive relief does not prohibit Mr. West's execution but requires

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[3]The court found an overriding risk of irreparable and immediate harm to Mr. West, the State and the public are harmed by delay, some possibility of success on the merits, and the public has an interest that each individual's case be addressed independently and separately. *West v. Ray*, No. 10-1675-I, Memorandum Opinion, p.15, 20, attached as Attachment 8 to Mr. West's RULE 9 Application . This satisfies the standard for a preliminary injunction, which is: (1) the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the balance between this harm and injury that granting the injunction would inflict on the defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest. *Gentry v. McCain*, No. E2009-01457-COA-R3-CV, 2010 WL 1838074, *5 (Tenn.Ct.App. May 6, 2010), quoting *S. Cent. Tenn. R.R. Authority v. Harakas*, 44 S.W.3d 912, 919, n.6 (Tenn.Ct.App. 2000).

the execution to be constitutional, the court could enter an order requiring that the execution be carried out lawfully.

The Chancery Court also felt that "the effect of the temporary injunction" sought by Mr. West to mandate an execution that is not cruel and unusual requires it to "stay the execution." This reasoning led the court to find it is without jurisdiction. *Id.* at p.6-7. Yet, the fact which may necessitate a brief stay of the execution date is the protocol Defendants now intend to use for Mr. West's execution;[4] not Mr. West's invocation of his constitutional right preventing such a cruel and unusual death. Despite having knowledge for over eight months that the protocol likely causes conscious suffocation,[5] Defendants have not taken corrective action.[6] Thus, it is Defendants' actions and/or inactions that have created the need to postpone the execution if they are unable to proceed with a constitutional punishment. Whether a constitutional execution can be carried out on November 9th has always been within the Defendants' control. Accordingly, an order from the Chancery Court providing the injunctive relief sought by Mr. West would not attempt to render ineffective the Tennessee Supreme Court's order scheduling the execution. The Chancery Court has jurisdiction to enter the requested temporary injunction.

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[4]Defendants announced on October 20, 2010, that Mr. West would be executed by lethal injection. Mr. West's complaint was filed on October 25th.

[5]The third autopsy report demonstrating a pattern of conscious suffocation as a result of the execution protocol was completed on February 17, 2010. On June 1, 2010, Defendants were served with a complaint containing substantially the same allegations as Mr. West's complaint. *Harbison v. Ray*, No. 3:06-cv-01206, R.169-1 (M.D.Tenn.).

[6]Tennessee's current lethal injection protocol was created within three months, from February 1, 2007 - April 30, 2007. There is no reason why a revised protocol would take a longer amount of time.

II. The Chancery Court Did Not Abuse its Discretion in Determining, and in Fact Correctly Determined, That Mr. West Had Shown That Defendants Should Be Enjoined from Violating the Eighth and Fourteenth Amendments and Tennessee Constitution Article 1, § 16 by Subjecting Him to Cruel and Unusual Punishment.

In determining whether to issue a preliminary injunction, the Chancery Court was required to examine four factors: (1) the threat of irreparable harm to the plaintiff if the injunction is not issued; (2) the balance between plaintiff's harm and the injury that granting the injunction would inflict on the defendants; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest. *Moody v. Hutchison*, 247 S.W.3d 187, 199-200 (Tenn.Ct.App. 2007). As the Chancery Court noted, these factors are similar to those considered by the federal courts facing a request for injunctive relief. *See Overstreet v. Lexington-Fayette Urban Co. Gov't.*, 305 F.3d 566, 573 (6th Cir. 2002) (examining same four factors, however, requiring a showing of a "strong likelihood of success" rather than a probability). Because these factors are to be balanced, a strong showing on one factor may outweigh a weaker showing on another. *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

A determination by the trial court to issue, or refuse to issue injunctive relief is reviewed only for abuse of discretion. *Bd. of Comm'rs of Roane Co. v. Parker*, 88 S.W.3d 916, 919 (Tenn.Ct.App. 2002). A trial court abuses its discretion when "its decision is not supported by the evidence, when it applies an incorrect legal standard, [or] when it reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." *Owens v. Owens*, 241 S.W.3d 478, 496 (Tenn.Ct.App. 2007), citing *Biscan v. Brown*, 160 S.W.3d 462, 468 (Tenn.2005). Here, it cannot be seriously argued that the Chancery Court abused its discretion.

1. The Chancery Court applied the correct legal standard

First, the legal standard which the Chancery Court applied was clearly consistent with Tennessee law. The court stated:

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

West v. Ray, No. 10-1675-I, Memorandum Opinion, p.9, attached as Attachment 8 to Mr. West's RULE 9 Application.

The Chancery Court thus required Mr. West to make a showing which, if anything, was actually higher than the showing required by Tennessee law, since it required a "substantial likelihood of success" as opposed to a "probability of success." Compare *Moody v. Hutchison*, 247 S.W.3d at 199-200 (probability of success), with *Overstreet v. Lexington-Fayette Urban Co. Gov't.*, 305 F.3d at 573 (likelihood of success).

2. The Chancery Court's decision is supported by the evidence

The Chancery Court reached four conclusions, each conclusion supported by the evidence, and compels issuance of injunctive relief. The court found an overriding risk of irreparable and immediate harm to Mr. West, the State and the public are harmed by delay, some possibility of success on the merits, and the public has an interest that each individual's case be addressed independently and separately. *West v. Ray*, No. 10-1675-I, Memorandum Opinion,

p.15, 20, attached as Attachment 8 to Mr. West's RULE 9 Application. This satisfies the standard for a preliminary injunction, which is: (1) the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the balance between this harm and injury that granting the injunction would inflict on the defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest. *Gentry v. McCain*, No. E2009-01457-COA-R3-CV, 2010 WL 1838074, *5 (Tenn.Ct.App. May 6, 2010), quoting *S. Cent. Tenn. R.R. Authority v. Harakas*, 44 S.W.3d 912, 919, n.6 (Tenn.Ct.App. 2000).

As shown below, it is impossible to say that the Chancery Court's decision was unsupported by the evidence.

a. "[T]he harm to the plaintiff is irreparable."

In finding that Mr. West had demonstrated irreparable harm, the Chancery Court stated:

> the irreparable harm in this litigation is grave and it concerns the plaintiff's death by a certain method ... . And the harm to the plaintiff is irreparable. It would be death by a particular method, which he asserts he may suffer in a brutal way. The harm to the State, I'm going to examine the harm to the State in a few moments, because I have to look at the harm to all parties. But all of that having been said, in a normal civil case, the opportunity for death, the fact of death, certainly establishes grave irreparable harm. It's certainly not a money case.

West v. Ray, No. 10-1675-I, Memorandum Opinion, p.16-17, attached as Attachment 8 to Mr. West's RULE 9 Application.

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

Id. at p.19.

This finding is inviolate as Mr. West's imminent death by execution is irreparable, even under constitutional circumstances. *See In re Holladay*, 331 F.3d 1169, 1176-77 (11th Cir. 2003)

(where a prisoner is scheduled to be executed, irreparable harm is deemed "to be self-evident."); *In re Morris*, 328 F.3d 739, 741 (5th Cir. 2003). This finding is only strengthened in this case because the Chancery Court also had before it evidence of the torturous death Mr. West will suffer if injunctive relief is not granted. *Owens*, 241 S.W.3d at 496.

b. "[I]rreparable harm [to Mr. West] trumps the situation."

The Chancery Court balanced the harm of the parties and concluded that this factor favors Mr. West.

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

West v. Ray, No. 10-1675-I, Memorandum Opinion p.17, attached as Attachment 8 to Mr. West's RULE 9 Application.

The Chancery Court concluded:

> I've already addressed the relative harm that would result to each party. I'm finding that irreparable and immediate harm possibilities trump the other four issues.

Id. at p.20. Accordingly, the court's conclusion is well considered and established by the evidence.

c. "Plaintiff's position has merit."

The Chancery Court found "the plaintiff's position has merits as regards the Tennessee Constitution and the specific facts which so far have not been evaluated in the State Court." *West v. Ray*, No. 10-1675-I, Memorandum Opinion, p.9, attached as Attachment 8 to Mr. West's RULE 9 Application. The court continued:

> The Court's reasoning is that the Harbison case dealt with the U.S. Constitution, although the District Court in Harbison on remand looked at the affidavit surrounding or addressing the autopsies. ... The Harbison case did not deal with the State Constitution and it was not a State Court addressing that issue. ... The affidavit surrounding the autopsies were not – were analyzed in light of the U.S. Supreme Court in *Baze vs. Rees*.
>
> And the Court has done some independent research into the cases surrounding lethal injection and the Court thinks that the arguments and the analysis of both parties in this case are not – certainly not dead wrong, because each of these cases dealt with different facts.

Id. at p.9-10.

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

Id. at p.15. These conclusions are fully supported by the evidence.

At the time the court reached this conclusion, Mr. West had provided the court with records obtained from agents of the State of Tennessee, specifically, Dr. Bruce Levy, the then-

Chief Medical Examiner for the State of Tennessee, in the form of the autopsy reports from every autopsy conducted on a Tennessee inmate following a Tennessee lethal injections, *i.e.*, the autopsies of Robert Coe, Phillip Workman, and Steven Henley. He provided the court with an affidavit containing the expert opinion of Dr. David Lubarsky that the reports revealed that none of these inmates were unconscious at the time they were injected with the paralytic drug pancuronium bromide and that they had died by suffocation while conscious.

Defendants provided no evidence in response, electing instead to argue that the Court was bound by decisions from courts who had never seen the evidence which had been presented to the Chancery Court and/or which were of co-equal jurisdiction and had no more opportunity to consider that evidence than had the Chancery Court itself. *West v. Ray*, No. 10-1675-I, Defendants' Response to Motion for Temporary Injunction, p.7 (filed October 28, 2010). Defendants further argued that the Chancery Court should consider whether Mr. West had timely sought relief.[7]

Over and above those reasons set forth within the body of the Chancery Court's Order, it is clear that its conclusion was fully supported by the evidence before it. The use of an execution protocol that causes death by conscious suffocation violates the Eighth and Fourteenth

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[7]The Chancery Court correctly refused to consider Defendants' statute of limitations defense in the context of Mr. West's motion for a temporary injunction. As the court recognized, such a defense itself turns upon multiple factors. *West v. Ray*, No. 10-1675-I, Memorandum Opinion, p.18, attached as Attachment 8 to Mr. West's RULE 9 Application. These include, but are not limited to, when all the facts necessary to establish Mr. West's claims first existed. *Carvell v. Bottoms*, 900 S.W.2d 23, 28, 30 (Tenn. 1995); *Caldonia Leasing v. Armstrong, Allen, Braden, Goodman, McBride & Prewitt*, 865 S.W.2d 10, 13 (Tenn.Ct.App. 1992); *Ameraccount Club, Inc. v. Hill*, 617 S.W.2d 876, 878-79 (Tenn. 1981). Accordingly, it cannot be properly developed in the context of a motion for preliminary injunctive relief. *West v. Ray*, No. 10-1675-I, Memorandum Opinion, p.18, attached as Attachment 8 to Mr. West's RULE 9 Application.

Amendments. The evidence presented 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 Defendants are aware that during West's execution he will very likely experience needless suffering.

The Supreme Court says this establishes 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 v. Rees, 553 U.S. 35, 49-50 (2008).

Mr. West's evidence does not present an "accident" or "innocent misadventure" resulting in conscious suffocation. Rather, it proves a pattern or "series" of cruel executions where all autopsied inmates were not sufficiently anesthetized; something state officials may not ignore.

(1) *Baze v. Rees* and the *Lancet* article footnote do not detract from Mr. West's likelihood of success on the legal merits of his claims.

Defendents, however, insisted that the Chancery Court should ignore these facts. They claimed that *Baze* should be read as holding that evidence derived from the autopsy reports of condemned inmates is *per se* unreliable and cannot support Mr. West's claims. They were and are incorrect.

Baze v. Rees is an opinion representing fractured views of the Supreme Court justices. The courts have held that the plurality opinion written by Chief Justice Roberts is controlling. *See e.g.*, *Harbison v. Little*, 571 F.3d 531, 535 (6th Cir. 2009).

Unlike Mr. West, in *Baze,* the "[p]etitioners d[id] not claim that lethal injection or the proper administration of the particular protocol adopted by Kentucky by themselves constitute the cruel or wanton infliction of pain." 553 U.S. at 49. "Instead, petitioners claim[ed] that there is a significant risk that the procedures will not be properly followed--in particular, that the sodium thiopental will not be properly administered to achieve its intended effect--resulting in severe pain when the other chemicals are administered." *Id.* The Court affirmed that "subjecting

individuals to a risk of future harm--not simply actually inflicting pain--can qualify as cruel and unusual punishment, however, it noted that the risk had to be more than the risk of an "accident" or "isolated mishap." *Id.* at 50.

The *Baze* Court rejected the petitioners' proposal to adopt a new standard, one which prohibits a protocol containing "unnecessary," or avoidable, risks. *Id.* at 47. The Court observed that this test would be problematic because the existence of any slightly safer alternative would create an "unnecessary" risk if the alternative wasn't adopted. Thus, such a standard would render unconstitutional *any* risk of harm that could be mitigated by an alternative, *id.* at 51, and this could not be reconciled with existing precedent requiring a "*substantial* risk of serious harm." *Id.* at 50, quoting, *Farmer v. Brennan*, 511 U.S. 825, 846, & n.9 (1994) (emphasis added).

The Court said, "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." *Id.* at 51. This is because a new test that relies upon a marginally safer alternative to elevate an "unnecessary" risk to an unconstitutional, "substantial" risk, "would threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." *Id.* The Court said, "[s]uch an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures--a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death." *Id.* Thus, the Court upheld the "substantial" risk element of an Eighth Amendment

claim as an element to be established independent of the existence of an alternative. *Id.* at 52.[8]

It was in this context that the *Baze* Court dropped a footnote *sua sponte* discussing[9] a study on thiopental concentrations in blood samples drawn from 49 executed inmates in order to illustrate why the "unnecessary" risk or "best practices" approach would be an improper standard. *Id.* at 51, n.2. The study appeared in the *Lancet* medical journal and concluded that most of the executed inmates had thiopental concentrations that would not be expected to produce a surgical plane of anesthesia and 43% had concentrations consistent with consciousness. *Id.* The study received some criticism of its methodology due to the fact that the blood samples were taken "several hours to days after" the inmates' deaths, which may affect the concentration levels of thiopental. *Id.* The original authors responded to the criticism and defended their methodology. *Id.*[10] The Supreme Court said:

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[8]The Court declared that "proffered alternatives must effectively address a 'substantial risk of serious harm,'" and defined such alternatives as ones that are "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Baze*, 553 U.S. at 52.

[9]*Baze*, 553 U.S. at 110 (Breyer, J., dissenting) ("neither the petition for certiorari nor any of the briefs filed in this Court . . . make any mention of the Lancet Study.").

[10]The majority of samples were obtained within 12 hours as most states perform executions in the evening and the autopsies are done the next morning. *Inadequate anaesthesia in lethal injection for execution: Authors' reply*, 366 THE LANCET 1074-75 & Figures (Sept. 24, 2005). All blood samples from South Carolina, Arizona, Georgia and North Carolina were obtained within 18 hours except three, two of which were obtained within 24 hours and one which was obtained 3 ½ days later. Eighteen blood samples from Oklahoma were collected between 5 - 95 minutes after death. There was no significant relation between the times from death to collection and the concentration level of thiopental. The authors confirmed their previous statement that concentrations in blood did not fall with increased time between execution and blood sample collection. Regarding postmortem distribution, the authors stated that after death, concentrations of thiopental in blood have been shown to increase (not decrease) in a similar way to virtually all other barbiturate drugs. *Id.* Indeed, out of the three blood samples available in Tennessee, the blood sample of Mr. Workman was obtained at the latest

> We do not purport to take sides in this dispute. We cite it only to confirm that a "best practices" approach, calling for the weighing of relative risks without some measure of deference to a State's choice of execution procedures, would involve the courts in debatable matters far exceeding their expertise.

Id.

The *Lancet* article footnote discussion must be read in the context of rejecting a "best practices" or "unnecessary" risk standard. The Court did not apply its discussion to the Eighth Amendment standard upheld in *Baze*, which requires a threshold showing of a substantial risk of serious harm. *Id.* at 52, n.3. Thus, this discussion does not reduce the likelihood of success on the merits of Mr. West's claims because he has always asserted the proper legal standard and has presented facts meeting that standard.

(2) The facts presented by Mr. West indicate a likelihood of success and have not been rejected by the United States Supreme Court.

Defendants also suggested that Mr. West is unlikely to prevail because *Baze* indicates that controversial serum-level evidence is not sufficient to overcome a state's choice of a lethal injection protocol. This argument is erroneous for three reasons.

First, *Baze* did not state or indicate that evidence of postmortem thiopental levels is insufficient to invalidate a lethal injection protocol. This is true because the *Baze* petitioners did not present evidence on thiopental levels, nor the *Lancet* article, to challenge Kentucky's protocol. *See Baze*, 553 U.S. at 110 Breyer, J. Dissenting)("neither the petition for certiorari nor any of the briefs filed in this Court . . . make any mention of the Lancet Study."). Thus, the Court did not render such a conclusion. This is also true because the *Lancet* article footnote illustrated

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time and had the highest concentration level of thiopental. The other two samples were obtained within eight hours after death.

why the "best practices" or "unnecessary" risk standard proposed by the *Baze* petitioners was not the proper Eighth Amendment standard. The Court was not speaking to the relevance of the *Lancet* article *vis-a-vis* the proper constitutional standard of a "substantial risk of unnecessary harm" as applied to a method of execution challenge. Thus, there could be no conclusion or indication that evidence of postmortem thiopental levels can never establish an Eighth Amendment claim.

Second, *Baze* did not state or indicate that a cause of action cannot be supported by evidence of postmortem thiopental levels. The Court expressly stated it was not "taking sides" regarding the dispute over the *Lancet* article. *Baze*, 553 U.S. at 52, n.2. Defendants argue, however, that the *Lancet* article footnote operated as a "finding" on the reliability of post-mortem thiopental levels and that this "finding" is binding on any evaluation of Mr. West's proffered evidence. This is an astounding departure from well-established precedent that individual litigants are afforded an opportunity to present their particular cases to the courts. *See, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 329 (1971) ("Some litigants-those who never appeared in a prior action-may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position."); *see also Hansbury v. Lee,* 311 U.S. 32, 40 (1940).

The Supreme Court stated in *Helling v. McKinney*, 509 U.S. 25 (1993), that there may be times where there exists a "sufficiently broad consensus" that a harm will occur and a state may not ignore it under the Eighth Amendment. *Id.* at 34. Rejecting the argument that the lack of

such a consensus can be determined as a matter of law, the Court stated:

> But the United States submits that the harm to any particular individual from exposure to ETS is speculative, that the risk is not sufficiently grave to implicate a "'serious medical nee[d],'" and that exposure to ETS is not contrary to current standards of decency. *Id.*, at 20-22. It would be premature for us, however, as a matter of law to reverse the Court of Appeals on the basis suggested by the United States. The Court of Appeals has ruled that McKinney's claim is that the level of ETS to which he has been involuntarily exposed is such that his future health is unreasonably endangered and has remanded to permit McKinney to attempt to prove his case. In the course of such proof, he must also establish that it is contrary to current standards of decency for anyone to be so exposed against his will and that prison officials are deliberately indifferent to his plight. We cannot rule at this juncture that it will be impossible for McKinney, on remand, to prove an Eighth Amendment violation based on exposure to ETS.

Helling, 509 U.S. at 34-35.

As in *Helling*, Defendants erroneously suggest that, as a matter of law, evidence of post-mortem thiopental levels cannot support a cause of action. That is simply incorrect. Mr. West, like Mr. McKinney, has presented substantial facts supporting a consensus of opinion that harm will occur and he should be provided an opportunity "to attempt to prove his case."

Third, the *Lancet* article footnote does not undermine Mr. West's likelihood of success because it does not require unanimous expert opinion in order to prevail on an Eighth Amendment claim. Here, the evidence establishes that the State should know from every autopsy report of executed Tennessee inmates that a pattern of cruel and unusual punishment has resulted from use of the Tennessee protocol.[11] *Williams v. Mehra*, 186 F.3d 685, 692 (6th Cir. 1999) citing *Farmer*, 511 U.S. at 837 (stating that the question, in the context of the policies or lack of policies is, "whether they kn[ew] of and disregard[ed] an *excessive* risk to inmate health or

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[11]Mr. West does not argue that Defendants are guilty of simple negligence or is acting with deliberate indifference due to an inadvertent failure to adhere to a scientifically proper course of action. *See Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976).

safety"). This evidence need not be unanimous or even rise to the level of a probability. *See Helling*, 509 U.S. at 34-35. A "broad consensus" does not equal unanimity and state action is not immune from an Eighth Amendment challenge simply because the State can produce an expert who adheres to a contrary position.

> While it is true that courts hesitate to find an Eighth Amendment violation when a prison inmate has received medical care, *Hamm v. Dekalb County*, 774 F.2d 1567, 1575 (11th Cir.1985), *cert. denied*, 475 U.S. 1096, 106 S.Ct. 1492, 89 L.Ed.2d 894 (1986), that "[h]esitation does not mean ... that the course of a physician's treatment of a prison inmate's medical or psychiatric problems can never manifest the physician's deliberate indifference to the inmate's medical needs." *Waldrop* [*v. Evans*, 871 F.2d 1030 (11th Cir. 1989)] at 1035; *see also Murrell v. Bennett*, 615 F.2d 306, 310 n. 4 (5th Cir. 1980) (treatment may violate Eighth Amendment if it involves "something more than a medical judgment call, an accident, or an inadvertent failure"). Thus, the district court erred as a matter of law in ruling that mere proof of medical care by a doctor consisting of diagnosis only sufficed to disprove deliberate indifference.

Smith v. Jenkins, 919 F.2d 90, 93 (8th Cir. 1990).

Where unanimity does not exist, a court has an obligation to hear the evidence, to weigh it, and to determine whether the science underlying an opinion is established to such a degree that a state may not claim it is subjectively blameless for ignoring it. *Baze*, 553 U.S. at 47, citing *Farmer*, 511 U.S. at 842, 846, & n.9. Thus, to prove an Eighth Amendment violation, a plaintiff need not show a risk by unanimous, uncontested evidence; but by substantial evidence. At bottom, *Baze* held that

> "a series of [unnecessarily painful executions]" would present a different case [from the one presented by Kentucky]. In terms of our present Eighth Amendment analysis, such a situation-unlike an "innocent misadventure," would demonstrate an "objectively intolerable risk of harm" that officials may not ignore.

Baze, 553 U.S. at 50 (citations omitted). Mr. West has proffered substantial evidence worthy of

further factual development and has demonstrated a likelihood of success on the merits.

(3) Even if the Chancery Court should have considered Defendants' challenge to the timeliness of Mr. West's motion in assessing the merit of Mr. West's claims, their challenge does not detract from the merits.

The Chancery Court correctly rejected Defendants' invitation to consider their act-intensive and highly disputed assertion that Mr. West had not pursued relief in a timely manner. *See, infra* at fn.3. The court said:

> First of all, as for the statue of limitations, a statute of limitations issue, I've never seen that addressed in a motion for a temporary injunction. That's usually addressed in a motion to dismiss, which the State has not had an opportunity or time to file. ... But if the State had had time, if this were an ordinary civil case, the State would have had time to file a motion to dismiss and there are protocols or processes through which the trial Court would look at the statute of limitations and the affidavits and try to determine when the cause accrued and make rulings on that. It is very difficult to evaluate a statute of limitations claim in a motion for temporary injunction, so I decline to review those issues as a defense – as the State's – in the State's response, because I just cannot analyze them.

West v. Ray, No. 10-1675-I, Memorandum Opinion, p.18-19, attached as Attachment 8 to Mr. West's RULE 9 Application.

Even had the court done so, however, it does not detract from the determination that Mr. West's claims have merit and are worthy of careful and full consideration. Asking the Court to adopt the federal court's view of when Mr. West's claims arose, Defendants claimed that Mr. West's claims are barred by the statute of limitations. They have misread both federal and state law.

Under Tennessee law, a cause of action accrues, and the statute of limitations begins to run, at the earliest, when the defendant has committed a wrongful or tortious act. *Carvell v. Bottoms*, 900 S.W.2d 23, 28, 30 (Tenn. 1995); *Caldonia Leasing v. Armstrong, Allen, Braden,*

Goodman, McBride & Prewitt, 865 S.W.2d 10, 13 (Tenn.Ct.App. 1992); *Ameraccount Club, Inc. v. Hill*, 617 S.W.2d 876, 878-79 (Tenn. 1981). It is simply axiomatic that a cause of action accrues when the defendants have committed wrong and the defendant's wrongful act has, or will,[12] cause harm to the plaintiff.

The Sixth Circuit's decision in *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), does not hold otherwise. In *Cooey*, the court stated:

> On the other hand, as the Supreme Court recently made clear, federal law determines when the statute of limitations for a civil rights action begins to run. *Wallace v. Kato*, [549 U.S. 384, 388 (2007)]. "Under those principles, it is 'the standard rule that [accrual occurs] when the plaintiff has complete and present cause of action.'" *Wallace*, [549 U.S. at 388] (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997)). This occurs "when 'the plaintiff can file suit and obtain relief.'" *Id.* (quoting *Bay Area Laundry*, 522 U.S. at 201, 118 S.Ct. 542).

479 F.3d at 416.

On July 15, 2010, when the Tennessee Supreme Court set November 9, 2010, as the date for Mr. West's proposed execution, Defendants had no intention to conduct, took no steps toward conducting, and did not take any of the wrongful acts alleged herein against Mr. West. During the entire period of time from February 18, 2001, through October 20, 2010, Defendants were proceeding toward executing Mr. West by means of electrocution. *West v. Ray*, No. 10-1675-I,

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[12]The question of the immediacy of future harm (*i.e.*, at what point does a condemned inmate know, or should know, that the defendant's conduct in carrying out his execution will result in harm to the inmate), has been heavily litigated in the federal courts, *see, e.g., Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), but is largely irrelevant in this case. Here, Defendants' conduct did not become wrongful until they stated that Mr. West would be suffocated while conscious and paralyzed, *i.e.* that he would be executed by lethal injection. This statement sufficiently demonstrated an "'objectively intolerable risk of harm' that officials may not ignore." *Baze*, 553 U.S. at 50. That event did not occur until recently and Mr. West's lawsuit was filed well within Tennessee's one-year statute of limitations.

Defendants' Response to Motion for Temporary Injunction, p.2, attached as Attachment 4 to Mr. West's RULE 9 Application ("The defendants maintain that the February 13, 2001 Election Affidavit [choosing electrocution as a means of execution] is valid and still effective.").[13]

Nothing in *Cooey* suggests that Mr. West's causes of action accrued before Defendants announced on October 20, 2010, that Mr. West will be executed by lethal injection. This, in conjunction with recent facts establishing a pattern of cruel and unusual punishment, established a cause of action. *Baze v. Rees* affirmed prior Eighth Amendment precedent holding that the Eighth Amendment is violated upon two conditions. First, there must be a showing that a state's execution protocol inflicts unnecessary pain and suffering. Second, it must be proved that the State had actual or implicit knowledge that such pain and suffering will result from carrying out its protocol and the State decided to go forward nonetheless, *i.e.*, the risk must be obvious.

Mr. West's claims arose only when both conditions were satisfied. In *Baze*, the Supreme Court found that Kentucky had not committed the constitutional violations alleged because there was no showing that State officials knew, or had reason to know, that the execution protocol failed to properly anaesthetize condemned inmates. *Baze,* 553 U.S. at 50. Mr. West alleges that it is only upon the accumulation of all of the evidence from recent executions, including, specifically the evidence contained in the February 2010, autopsy report of Steven Henley that Defendants knew, or had reason to know, that Tennessee's lethal injection protocol, even when administered correctly, accomplished death by paralyzing and suffocating conscious inmates. The Henley autopsy results combined with similar information in Defendants' possession

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[13]Mr. West earlier filed a challenge to the lethal injection protocol in federal court. There, Defendants insisted that Mr. West had no standing because they intended to electrocute him. *West v. Ray*, No. 3:10-0778, R.24 p.3-4 (M.D.Tenn. filed Sept. 3, 2010).

regarding the executions of Mr. Workman and Mr. Coe showed the cruel and unusual effects of the protocol do not result from an isolated event or mistake.

Because both February 17, 2010 (the date upon which the Henley autopsy report was finalized and Defendants had reason to know that their lethal injection protocol suffocated conscious and paralyzed inmates), and October 20, 2010 (the first date that Defendants proceeded to execute Mr. West by means of lethal injection) occurred within one-year of the filing of Mr. West's complaint on October 25th, the statute of limitations has not been violated. Defendants' claims of untimeliness are meritless and do not detract from the Chancery Court's preliminary assessment of Mr. West's likelihood of success.

The Chancery Court's fairly modest finding that: (1) Mr. West had presented facts never considered by a higher court, and not previously considered at all by any Tennessee state court; and (2) that these facts, if proven at an evidentiary hearing, would support Mr. West's claims under the Tennessee Constitution, was plainly "supported by the evidence." *Owens v. Owens*, 241 S.W.3d at 496.

d. "The public is probably served, best served by careful review of each case."

After carefully considering the harms alleged by the Defendants, the Chancery Court determined that injunctive relief was in the best interest of the public. The court said, "It's in the public interest that each individual person's case be addressed independently and separately where the law dictates. The public is probably served, best served by careful review of each case ...." *West v. Ray*, No. 10-1675-I, Memorandum Opinion, p.17, attached as Attachment 8 to Mr. West's RULE 9 Application.

The Chancery court's finding in this regard is supported, notwithstanding the public interest in seeing it criminal laws enforced, because the public has no interest in seeing them enforced through violations of the highest laws of this State and this Country. *Planned Parenthood Ass'n. of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987). *See also Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010) ("[T]he public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law."). The evidence proffered by Mr. West, if proven, establishes a violation of the Eighth and Fourteenth Amendments and Tennessee Constitution Article 1, § 16. The Chancery Court's finding that the public interest lies with a full resolution of Mr. West's claims was well-supported by the evidence. *Owens*, 241 S.W.3d at 496.

3. The Chancery Court's determination that Mr. West would be entitled to a temporary injunction so that Defendants do not execute him in a cruel and unusual manner is logical and reasonable and serves the interests of justice.

The equities in this case logically and reasonably favor injunctive relief in the form of requiring the Defendants to perform a constitutional execution. Such relief does not prevent Mr. West's execution. It assures that the execution is carried out pursuant to constitutional law. This principle should not be resisted as Defendants are not representative "of an ordinary party to a controversy, but of a sovereignty whose ... interest, therefore, is not that it shall win a case, but that justice shall be done. As such, [Defendant's] are in a peculiar and very definite sense the servant[s] of the law." *Berger v. United States*, 295 U.S. 78, 88 (1935).

Defendants have long been on notice of evidence tending to prove that the lethal injection protocol has inflicted unnecessary pain and suffering. They could have rectified this situation

before November 9, 2010, but chose instead to litigate and assert legal precedent that does not foreclose Mr. West's cause of action because of the unique facts of his case. Justice is served when the United States and Tennessee Constitutions are enforced, particularly where violations thereof would indisputably result in extreme and unnecessary pain. *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati, supra.* Accordingly, the Chancery Court's fully supported findings serve the interests of justice.

CONCLUSION

WHEREFORE Mr. West respectfully requests this Court:

1. reverse the order of the chancery court denying, for lack of jurisdiction, Mr. West's Motion for Temporary Injunction to enjoin the defendants from violating the Eighth and Fourteenth Amendments and Tennessee Constitution Article 1, § 16 by subjecting him to cruel and unusual punishment;
2. affirm the chancery court's determination that Mr. West had shown that defendants should be enjoined from violating the Eighth and Fourteenth Amendments and Tennessee Constitution Article 1, § 16 by subjecting him to cruel and unusual punishment by executing him in the manner prescribed under Tennessee's current lethal injection protocol;
3. remand this matter to the chancery court for the entry of a Temporary Injunction enjoining the defendants from violating the Eighth and Fourteenth Amendments and Tennessee Constitution Article 1, § 16 by subjecting Mr. West to cruel and unusual punishment by executing him in the manner prescribed under Tennessee's current lethal injection protocol; and,

4. For such other relief as the court deems just and equitable in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen M. Kissinger, hereby certify that a true and correct copy of the foregoing document was sent via e-mail and hand delivery in accordance with TENN. R. APP. P. 20 to:

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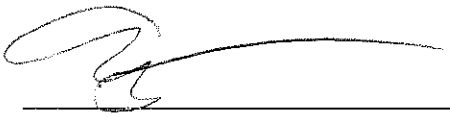
this the 2nd day of November, 2010.



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