

**IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE**

|   |   |  |
|---|---|--|
| <b>STEPHEN MICHAEL WEST,</b>              | ) |  |
|   | ) |  |
| <b>Plaintiff,</b>                         | ) |  |
|   | ) |  |
| <b>v.</b>                                 | ) | <b>S.Ct. No. M2010-02275-SC-R11-CV</b> |
|   | ) |  |
| <b>GAYLE RAY, in her official</b>         | ) |  |
| <b>capacity as Tennessee Commissioner</b> | ) |  |
| <b>of Correction, et al.,</b>             | ) |  |
|   | ) |  |
| <b>Defendants.</b>                        | ) |  |

---

**ANSWER IN OPPOSITION TO RULE 11 APPLICATION FOR PERMISSION TO  
APPEAL**

---

On November 2, 2010, Stephen West filed a Rule 9 application for permission to appeal from the Davidson County Chancery Court’s denial of a motion for temporary injunction. His motion for temporary injunction was filed in a case in which he challenged the constitutionality of Tennessee’s lethal injection protocol.<sup>1</sup> On November 3, 2010, the Court of Appeals denied plaintiff’s application for interlocutory appeal under Rule 9, and West filed an application for permission to appeal in this Court under T.R.A.P. 11. For the reasons discussed below, this Court

---

<sup>1</sup> This is one of three complaints the plaintiff has filed challenging Tennessee’s lethal injection protocol. Plaintiff first filed such a challenge in federal district court on August 19, 2010. That complaint was dismissed as untimely, and is presently on appeal in the Sixth Circuit. In response to that complaint the state defendants reminded plaintiff that he had previously elected electrocution as his method of execution, on February 13, 2001. On October 12, 2010, plaintiff purported to rescind his previous election of electrocution, but he failed to do so in the manner prescribed. On October 18, 2010, plaintiff filed a complaint in Davidson County Chancery Court challenging the electrocution protocol and claiming that his previous election of electrocution was invalid. On October 20, 2010, having no desire to litigate the issue, the State accepted his rescission. Plaintiff thereafter filed the instant amended complaint in chancery court challenging the lethal injection protocol. On October 28, 2010, plaintiff filed another complaint in federal district court challenging the lethal injection protocol, which the State has since moved to dismiss.

should deny both the Rule 11 application and West's alternative motion to vacate or modify this Court's July 15, 2010, order setting date of execution.

First, West's Rule 11 application should be denied because the trial court clearly did not abuse its discretion when it denied West's motion for temporary injunction. The court recognized that, in light of this Court's order in *Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (Tenn. 2000), it was without jurisdiction to enjoin or restrain the July 15, 2010, order of this Court that plaintiff's sentence of death be executed on November 9, 2010. Although plaintiff couched his request for injunctive relief in terms of enjoining the defendants to carry out his execution "only in a manner which does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments and Tennessee Constitution Article 1, § 16, as does the Current Protocol," the ultimate effect would be to encumber, enjoin, or stay enforcement of the order of the Tennessee Supreme Court that West's sentence be executed on November 9, 2010. The chancery court had no authority or jurisdiction to supersede a valid order of this Court.

Second, this Court should deny West's alternative motion to vacate or modify its previous order setting a date of execution, the effect of which would be to stay execution of the sentence. Plaintiff cannot satisfy the requirements for issuance of an injunction. When considering a motion for preliminary injunctive relief, courts must balance: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Tumblebus Inc. v. Cramer*, 399 F.3d 754, 760 (6th Cir. 2005).

The plaintiff has no likelihood of success on the merits of his complaint challenging the constitutionality of Tennessee's lethal injection protocol.<sup>2</sup> This Court has previously upheld that protocol against a challenge under the Eighth Amendment to the United States Constitution and Article I, § 16, of the Tennessee Constitution. See *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 306-07 (Tenn.2005). The United States Supreme Court has recently held that Kentucky's three-drug lethal injection protocol does not violate the Eighth Amendment, *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), and in the wake of *Baze*, the Sixth Circuit also upheld Tennessee's lethal injection protocol, finding it to be substantially similar to the protocol upheld in *Baze*. See *Harbison v. Little*, 571 F.3d 531, 533 (6th Cir. 2009), *cert. denied*, 130 S.Ct. 1689 (2010). See also *State v. Schneiderer*, 319 S.W.3d 607, 637 (Tenn. 2010); *State v. Banks*, 271 S.W.3d 90, 160, (Tenn. 2008). In *Baze*, the United States Supreme Court held that a lethal injection protocol that is substantially similar to Kentucky's will likewise pass constitutional muster. *Baze*, 535 U.S. at 60.

The plaintiff, however, seeks to escape the weight of this controlling precedent by arguing that, unlike the plaintiffs in *Baze* and *Harbison*, he does not concede that proper administration of the lethal injection protocol will sufficiently anesthetize him; he further argues that he has evidence from the autopsies of three Tennessee death row inmates showing inadequate serum levels of sodium thiopental. But plaintiff's refusal to concede is inconsequential; it does nothing to alter the fact that the five-gram dose of sodium thiopental administered pursuant to Tennessee's lethal injection protocol "is more than ten times the dose

---

<sup>2</sup> As argued below, plaintiff's complaint also suffers from several procedural defects. It is barred by the applicable one year statute of limitations for § 1983 actions. See *Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007). It is also subject to dismissal for inexcusable delay, having been filed a mere 15 days prior to his scheduled execution. See *Workman v. Bredesen*, 486 F.3d 896, 911 (6th Cir. 2007). Also, by rescinding his election of electrocution when the only remaining alternative is lethal injection, plaintiff effectively chose lethal injection and thus waived any challenge to it. See *Stewart v. LaGrand*, 526 U.S. 115, 119 S.Ct. 1018, 143 L.Ed.2d 196 (1999).

usually given for clinical purposes.” *Harbison v. Little*, \_\_\_ F.Supp.2d \_\_\_, 2010 WL 2736077, \*9 (M.D. Tenn. July 12, 2010). *See also Abdur’Rahman*, 181 S.W.3d at 308 (“a dosage of five grams of sodium Pentothal as required under Tennessee’s lethal injection protocol causes nearly immediate unconsciousness and eventually death”).

Furthermore, the use of post-mortem serum levels to determine levels of consciousness at the time of execution has been discredited, as this Court recently observed in *State v. Hester*, \_\_\_ S.W.3d \_\_\_, 2010 WL 3893760, \*63 (Tenn. October 5, 2010). *See Baze*, 553 U.S. at 51 n.2; *Id.* at 67 (Alito, J., concurring); *Id.* at 110 (Breyer, J., concurring in the judgment) (noting that *Lancet* study “may be seriously flawed”). Consequently, as the federal district court recently concluded in *Harbison*, “evidence regarding [sodium thiopental serum levels] is not sufficient to invalidate a lethal injection protocol.” 2010 WL 2736077 at \*9; *see also id.* at \*10 (“any claim based on [such] evidence would be futile”). Because plaintiff’s autopsy evidence fails to demonstrate any likelihood of success on his challenge to Tennessee’s protocol, he is not entitled to a stay of this Court’s order that his sentence be executed on November 9, 2010.

Plaintiff’s request for injunctive relief from this Court threatens the State’s interest in finality and its corresponding interest in enforcing its criminal judgments. Indeed, “both the state *and the public* have an interest in finality.” *Workman v. Bell*, 484 F.3d 837, 842 (6th Cir. 2007) (emphasis added). Furthermore, “the *victims of crime* have an important interest in the timely enforcement of a sentence,” *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096, 2104, 165 L.Ed.2d 44 (2006) (emphasis added). The surviving victims of this crime are fully entitled to expect that plaintiff’s sentence will finally be carried out. “To unsettle these expectations is to inflict a profound injury to the ‘powerful and legitimate interest in punishing the guilty,’ an interest shared by the State and the victims of crime alike.” *Calderon v. Thompson*, 523 U.S.

538, 556, 118 S.Ct. 1489, 1501, 140 L.Ed.2d 728 (1998). “The State and the surviving victims have waited long enough for some closure.” *Jones v. Allen*, 485 F.3d 635, 641 (11th Cir. 2007).

Plaintiff’s motion to vacate or modify this Court’s order of July 15, 2010, should be denied.

Respectfully submitted,

ROBERT E. COOPER, JR., BPR #010934  
Attorney General and Reporter

MICHAEL E. MOORE, BPR #006440  
Solicitor General



---

MARK A. HUDSON, BPR #12124  
Senior Counsel  
Office of the Attorney General  
Civil Rights and Claims Division  
P. O. Box 20207  
Nashville, TN 37202-0207  
(615) 741-7401

**CERTIFICATE OF SERVICE**

I hereby certify that on November 3, 2010, a copy of the foregoing was forwarded

by e-mail and U.S. Mail to:

Stephen A. Ferrell  
Stephen M. Kissinger  
FEDERAL DEFENDER SERVICES  
OF EASTERN TENNESSEE, INC.  
800 S Gay Street  
Suite 2400  
Knoxville, TN 37929  
[Stephen\\_Ferrell@fd.org](mailto:Stephen_Ferrell@fd.org)  
[stephen\\_kissinger@fd.org](mailto:stephen_kissinger@fd.org)

Roger W. Dickson  
MILLER & MARTIN  
Volunteer Building  
832 Georgia Avenue  
Suite 1000  
Chattanooga, TN 37402  
[rdickson@millermartin.com](mailto:rdickson@millermartin.com)



---

MARK A. HUDSON, BPR #12124  
Senior Counsel  
Office of the Attorney General  
P. O. Box 20207  
Nashville, TN 37202-0207  
(615) 741-7401