

IN THE SUPREME COURT OF TENNESSEE

2010 NOV 22 PM 4:09
APPELLATE COURT CLERK
NASHVILLE

STEPHEN MICHAEL WEST,)
)
 Plaintiff)
)
 BILLY RAY IRICK,)
)
 Plaintiff/Intervener)
)
)
)
 v.)
)
 GAYLE RAY, in her official capacity as)
 Tennessee's Commissioner of)
 Correction, et al,)
)
 Defendants)

No. M2010-02275-SC-R11-CV

Davidson County Chancery Court
Case No. 10-1675-I

**DEATH PENALTY CASE
EXECUTION SCHEDULED:
November 30, 2010**

**MOTION TO VACATE OR FURTHER MODIFY COURT'S
ORDER SCHEDULING MR. WEST'S EXECUTION**

Comes now Plaintiff-Appellant, Stephen Michael West, and respectfully requests that the Court vacate or modify its November 6, 2010, order setting Mr. West's execution for November 30, 2010; to vacate said execution date and to not reset said date until such time as the Defendants demonstrate that they have revoked their current lethal injection protocol and adopted a lethal injection protocol which does not violate Article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.

In support hereof, Mr. West states:

1. On November 6, 2010, this Court directed the Chancery Court of Davidson County to

“tak[e] proof and issu[e] a declaratory judgment on the issue of whether Tennessee’s three-drug protocol constitutes cruel and unusual punishment because the manner in which the sodium thiopental is prepared and administered fails to produce unconsciousness or anesthesia prior to the administration of the other two drugs.”

2. On November 19-20, 2010, the Chancery Court complied with this Court’s directive and held an evidentiary hearing in this matter.
3. After weighing the evidence presented therein and considering the arguments of counsel, the Court issued a bench ruling finding and declaring that Tennessee’s three-drug protocol violates the prohibition against cruel and unusual punishment contained in Article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution. That order was entered on November 22, 2010. A copy of that decision is attached hereto.
4. The State of Tennessee’s current three-drug protocol does not carry out lethal injections in the manner provided by the law of Article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution. Accordingly, Defendants are unable to comply with this Court’s November 6, 2010, order. *See* November 6, 2010 order at 4 (directing that Defendants “shall execute the sentence of death as provided by law.”)
5. Accordingly, this Court should vacate its November 6, 2010, order setting Mr. West’s execution date for November 30, 2010.
6. Furthermore, as this Court’s November 6, 2010, order recognizes, the constitutionality of any method of execution cannot be determined simply as matter of law but rather is an

intensely factual question which must be resolved by a trier of fact. *See* November 6, 2010 order at 2 (“Accordingly, we have determined that both Mr. West and the State of Tennessee should be afforded an opportunity to present evidence supporting their respective positions to the Chancery Court and that the Chancery Court should be afforded an opportunity to make findings of fact and conclusions of law with regard to the issues presented by the parties.”)

7. Less than 8 days remain between the date of this motion and Mr. West’s scheduled execution. Should the Defendants at this late date change their method of carrying out lethal injections, Mr. West and the Defendants will have no such “opportunity to present evidence supporting their respective positions to the Chancery Court” and the Chancery Court will have no “opportunity to make findings of fact and conclusions of law with regard to the issues presented by the parties.”)
8. Accordingly, this Court should not consider a request by the State of Tennessee to reset Mr. West’s execution date until such time as the courts of this State have had the opportunity to fully consider whether Defendants have demonstrated that their new method of execution comports with Article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution. *See, e.g., Taylor v. Crawford*, 487 F.3d 1072, 1078 (8th Cir. 2007)¹

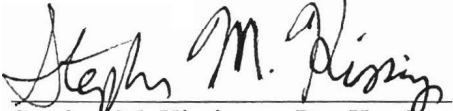
¹ In *Taylor*, following the invalidation of its lethal injection protocol, the district court ordered that any lethal injection protocol not previously approved by the district court be submitted for approval. When the State of Missouri submitted an unapproved protocol, the following procedures were approved: “On July 14, 2006, the State submitted a [new] written lethal injection protocol to the district court. Taylor objected on grounds that this new protocol [was unconstitutional]. The district court correctly noted that it lacked jurisdiction to consider the

WHEREFORE Mr. West respectfully requests that this Court vacate its order setting his execution date for November 30, 2010, and that it decline to reset said date until such time as Defendants have demonstrated that any new method of carrying out lethal injections comports with Article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.

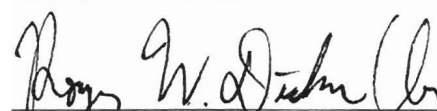
Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

BY:


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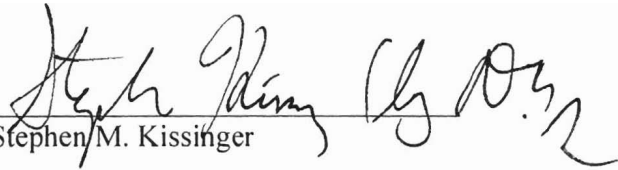
new protocol because the case was on appeal to this court. On August 9, 2006, we therefore remanded the entire dispute to provide the district court the first opportunity to consider the constitutionality of the newly propounded protocol.”

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing this Motion to Vacate or Further Modify Court's Order Scheduling Mr. West's Execution was sent via email and U.S. Mail, postage prepaid, in accordance with TENN. R. APP. P. 20 to:

Mark A. Hudson
Senior Counsel
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Nashville, TN 37243
Mark.A.Hudson@state.tn.us

this the 22nd day of November, 2010.



Stephen M. Kissinger

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Day. Co. Chancery Court

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,)
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 Plaintiff)
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 BILLY RAY IRICK,)
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 Plaintiff/Intervener)
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 v.)
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 GAYLE RAY, in her official capacity as)
 Tennessee's Commissioner of)
 Correction, et al,)
)
 Defendants)

FO 74
 No. 10-1675-1
DEATH PENALTY CASE
 Chancellor Bonnyman
EXECUTION SCHEDULED:
 November 30, 2010

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ORDER GRANTING DECLARATORY JUDGMENT


This matter comes before the Court upon the Plaintiff's Amended Complaint for Declaratory Judgment and Injunctive Relief; his Motion for Temporary Injunction; and pursuant to the November 6, 2010, order of the Supreme Court of Tennessee in Case No. M2010-02275-SC-R11-CV, to, "tak[e] proof and issu[e] a declaratory judgment on the issue of whether Tennessee's three-drug protocol constitutes cruel and unusual punishment because the manner in which the sodium thiopental is prepared and administered fails to produce unconsciousness or anesthesia prior to the administration of the other two drugs." The Court subsequently granted without objection the motion to intervene of Plaintiff/Intervener Billy Ray Irick.

On November 19-20, 2010, an evidentiary hearing was held in this matter. After weighing the evidence presented therein and considering the arguments of counsel, the Court

issued its bench ruling, a certified copy of which is attached hereto. For the reasons stated in its bench ruling, which are hereby fully incorporated herein, the Court finds and declares that Tennessee's three-drug protocol violates the prohibition against cruel and unusual punishment contained in Article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.

Pursuant to TENN. R. APP. P. 9(b), the Court finds that this matter is of great public importance and that review upon final judgment will be ineffective.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Tennessee's three-drug protocol violates the prohibition against cruel and unusual punishment contained in Article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.



CLAUDIA C. BONNYMAN,
Chancellor, Part I

Entered: _____

I HEREBY CERTIFY THAT THIS IS A TRUE COPY
OF ORIGINAL INSTRUMENT FILED IN MY OFFICE.

THIS 22 DAY OF NOV 2010

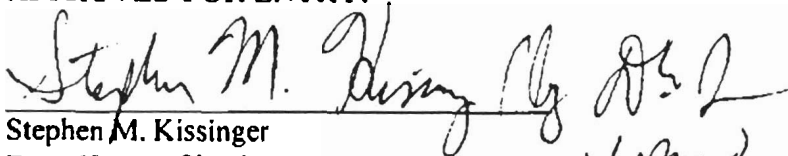
CRISTI SCOTT, CLERK & MASTER

BY Carmen Ferrell

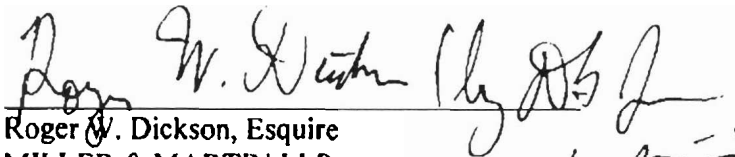
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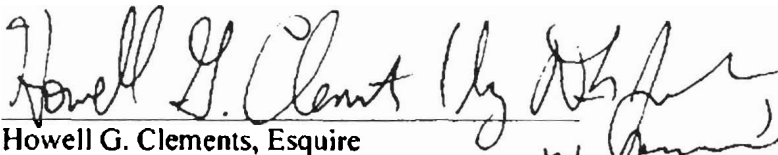
APPROVED FOR ENTRY:


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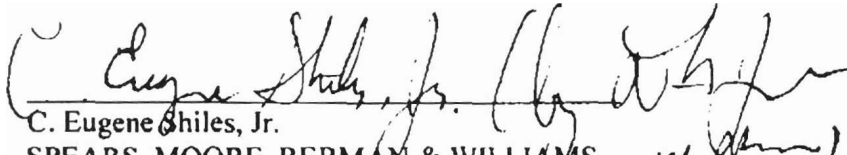
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C. Eugene Shiles, Jr.

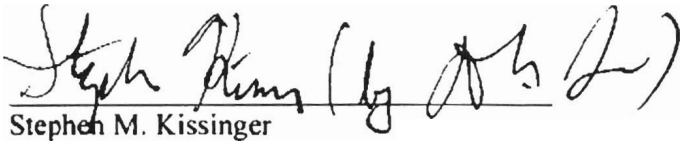
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via email and facsimile to:

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Fax number: 615-532-2541

this 22nd day of November, 2010.


Stephen M. Kissinger