

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

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APPELLATE COURT CLERK
NASHVILLE

STATE OF TENNESSEE

v.

BILLY RAY IRICK,

Defendant.

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No. M1987-00131-SC-DPE-DD

RESPONSE OF THE STATE OF TENNESSEE TO
"MOTION TO ALTER, AMEND OR MODIFY ORDER SETTING
EXECUTION DATE OF OCTOBER 7, 2014"

By order dated October 22, 2013, this Court set an execution date of January 15, 2013, in the above-styled matter. The Court subsequently granted Irick's motion, styled "Motion to Alter, Amend or Modify Order Setting Execution Date," and reset the execution for October 7, 2014, based on its conclusion that "there is no controlling law in Tennessee on the constitutionality of the use of the single drug, Pentobarbital, to execute a death row inmate."¹

Now, ten months later and just 25 days before the current execution date, Irick has filed another motion, styled "Motion to Alter, Amend or Modify Order Setting Execution Date of October 7, 2014." He cites as authority for the request Tenn. R. Civ. P. 59.04 ("Motion to Alter or Amend a Judgment") and argues that

¹ Irick filed his initial "Motion to Alter, Amend or Modify Order Setting Execution Date" on Friday, December 6, 2014. The Court granted that motion and reset the execution date *five days later* on December 11, 2014, without awaiting or calling for a response from the State.

litigation before the Davidson County Chancery Court challenging the constitutionality of Tennessee's lethal-injection protocol is still pending and is potentially "still seven to eight months away from a trial court judgment."

The instant motion, which is little more than a motion for a stay of execution under a different label, should be denied. First, the Rules of Civil Procedure are plainly inapplicable to proceedings before this Court, as it is not a circuit or chancery court and it was not exercising the "civil jurisdiction of the circuit or chancery courts" when it set Irick's execution date. *See* Tenn. R. Civ. P. 1 ("[T]he Rules of Civil Procedure shall govern procedure in the circuit or chancery courts in all civil actions . . . and in all other courts while exercising the civil jurisdiction of the circuit or chancery courts."). And even if that were not the case, the motion was filed eight months beyond the permissible time for filing a motion to alter or amend a judgment. *See* Tenn. R. Civ. P. 59.04 ("A motion to alter or amend a judgment shall be filed and served within thirty (30) days after entry of the judgment."). Indeed, this Court's order setting the execution date in this case is not a judgment at all; it is the final mandate in a capital murder case directing the execution of a criminal judgment that became final more than 25 years ago after being upheld repeatedly throughout the standard three-tier appeals process.²

² *See* Tenn. Code Ann. § 40-30-120 (a) ("When affirming a conviction and sentence of death on direct appeal, the Tennessee supreme court shall contemporaneously set a date for an execution."); Tenn. Sup. Ct. R. 12.4(A) ("After a death-row prisoner has pursued at least one unsuccessful challenge to the prisoner's conviction and sentence through direct appeal, post-conviction, and federal habeas corpus proceedings, the State Attorney General shall file a motion requesting that this Court set an execution date.")

Pointing to ongoing litigation in the Davidson County Chancery Court challenging the protocol to be employed in his lethal injection, Irick asks this Court to delay once again the execution of his lawful sentence. But while it is true that Tennessee courts have yet to pass on the use of pentobarbital in this state, numerous other courts have done so, and *none* has found its use constitutionally infirm.³ See, e.g., *Sepulvado v. Jindal*, 729 F.3d 413 (5th Cir. 2013); *Thorson v. Epps*, 701 F.3d 444 (5th Cir. 2012); *Towery v. Brewer*, 672 F.3d 650 (9th Cir. 2012); *Cooey v. Strickland*, 589 F.3d 210 (6th Cir. 2009). Likewise, courts have upheld the use of pentobarbital obtained through a compounding pharmacy. See, e.g., *Campbell v. Livingston*, __ Fed. Appx. __, 2014 WL 1887578 (5th Cir. 2014) (affirming the district court's denial of a preliminary injunction based upon an inmate's challenge to the use of compounded pentobarbital: "The State of Texas has used pentobarbital in the last ten executions. "The single-drug protocol is valid." (citing *Thorson v. Epps*, 701 F.3d 444, 447 n. 3 (5th Cir.2012))).

In order to obtain a stay of execution, Irick must demonstrate a likelihood of success on the merits of his declaratory-judgment action. See *In re Sapp*, 116 F.3d 460, 464 (6th Cir. 1997); *Delo v. Blair*, 509 U.S. 823 (1993) (*per curiam*) (stay of execution requires showing of substantial grounds upon which relief might be granted). Compare *Nashville, C. and St. L. Ry. Railroad and Public Utilities*

³ Pentobarbital has been used in at least 61 executions in seven states. Statistical information obtained from the Death Penalty Information Center (DPIC), <http://www.deathpenaltyinfo.org>, as of September 15, 2014.

Commission, 32 S.W.2d 1043, 1045 (Tenn. 1930) (injunction to maintain status quo will not issue unless party establishes that it will probably prevail on the merits).

Irick makes no attempt to show how the present litigation meets that threshold, arguing only that a stay is necessary in order to obtain a “a fully developed record” on the merits of his challenge and citing as precedent a November 29, 2010 order of this Court in *State v. Stephen Michael West*, No. M1987-000130-SC-DPE-DD (Tenn. Nov. 29, 2010). But the order in *West* came at a fundamentally different juncture, because it was issued on the heels of a trial-court order declaring *unconstitutional* Tennessee’s earlier three-drug protocol. In response to that decision, the State immediately revised its protocol to address the basis of the trial court’s conclusion. In those unique circumstances, this Court concluded that further record development was proper to give the trial court an opportunity to “consider in the first instance whether the revised protocol eliminates the constitutional deficiencies the trial court identified in the prior protocol.” *Id.* at 3. In short, West had already met his burden of showing some likelihood of success on the merits to justify the requested stay. Of course, that success was short-lived when the Tennessee Court of Appeals upheld the constitutionality of the protocol after concluding that the plaintiffs had “failed to carry their ‘heavy burden’ to demonstrate that the lethal injection protocol as revised in November 2010 constitutes wanton exposure to an objectively intolerable risk of severe and unnecessary pain and suffering.” *West v. Schofield*, 380 S.W.3d 105, 116-17 (Tenn. Ct. App. 2012), *perm. app. denied* (Tenn. Aug. 17, 2012).

In the present motion, Irick does not even approach the showing necessary to obtain a stay. Indeed, the protocol adopted by the Department of Correction in September 2013 is neither novel nor unique, having first been employed by the State of Ohio in March 2011 and used by eight states in 61 executions since then.⁴ In 2014 alone, 17 executions in three different states have been accomplished with a single-drug protocol using pentobarbital. And in each instance, the pentobarbital was prepared by a compounding pharmacy.⁵ See, e.g., *Trottie v. Livingston*, __ F.3d __, 2014 WL 4428140 (5th Cir. 2014) (declining to stay September 10, 2014 execution of Missouri inmate using a single dose of pentobarbital prepared by a compounding pharmacy); *Wellons v. Georgia Dep't of Corrections, et al.*, 754 F.3d 1260 (11th Cir. 2014) (upholding district court's refusal to stay inmate's June 17, 2014 execution based on claim that Georgia's use of compounded pentobarbital violated the Eighth Amendment); *Sells v. Livingston*, 750 F.3d 478 (5th Cir. 2014) (vacating stay of inmate's execution where challenge to new source of compounded pentobarbital was speculative and unlikely to succeed on the merits).⁶

⁴ Arizona, Georgia, Idaho, Missouri, Ohio, South Dakota, and Texas have successfully employed the single-drug protocol using pentobarbital in 61 executions. See Death Penalty Information Center, <http://www.deathpenaltyinfo.org>, as of September 15, 2014.

⁵ Statistical information from the Death Penalty Information Center, <http://www.deathpenaltyinfo.org>, as of September 15, 2014.

⁶ A portion of Irick's motion discusses the need to assess evolving standards of decency involving electrocution as a method of execution. But the State of Tennessee does not intend to execute his sentence by that method on October 7, 2104, since the Department of Correction is mandated by law to carry out his execution by lethal injection. See Tenn. Code Ann. § 40-23-114(a) ("For any person who commits an offense for which the person is sentenced to the punishment of death, the method for carrying out the sentence shall be by lethal injection.")

In *Baze v. Rees*, 553 U.S. 35 (2008), the United States Supreme Court held that in order to prevail on a claim that a state's execution protocol violates the Eighth Amendment, a prisoner must establish that it creates an "objectively intolerable risk of harm." 553 U.S. at 50, 53. Thus, only if conditions are "sure or very likely to cause serious illness and needless suffering" will there be an Eighth Amendment claim. To meet this showing, an inmate must show that the risk is substantial, not speculative, and the pain severe, not slight. In *Brewer v. Landrigan*, __ U.S. __, 131 S.Ct. 445 (2010), the Supreme Court summarily reversed the grant of a temporary restraining order because "speculation cannot substitute for evidence that the use of the drug is 'sure or very likely to cause serious illness and needless suffering,'" citing *Baze v. Rees*, 553 U.S. 35, 50, (2008) (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993)). Further, this Court previously instructed the chancery court that "[t]he heavy burden of proving this risk is on the party challenging the protocol." *West v. Ray*, No. M2010-02275-SC-R11-CV (Tenn. Nov. 6, 2010) (Order, p. 3).

Irick does not allege, nor can he show, that he is likely to prevail on a claim that Tennessee's single-drug protocol is "sure or very likely" to cause severe pain or needless suffering. His allegations, even when taken at face value, are speculative at best, and successive delays in the execution of a lawful death sentence while condemned inmates raise endless challenges to each discrete component of Tennessee's execution protocol undermine the validity of criminal judgments and deny justice to the victims of this State's most morally offensive crimes. On

November 1, 1986, a Knox County jury convicted Irick of the first-degree murder and aggravated rape of a seven-year-old child. *State v. Irick*, 762 S.W.2d 121 (Tenn. 1988). The State of Tennessee should be allowed to “execute its moral judgment in [this] case” and allow “the victims of crime [to] move forward knowing the moral judgment will be carried out.” *See Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

CONCLUSION

Irick’s motion seeking a stay of his execution should be denied.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General & Reporter

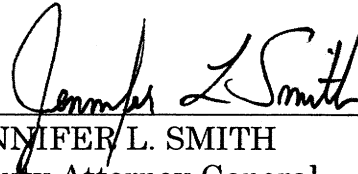
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion has been forwarded via facsimile and U.S. mail, first-class postage prepaid, on the 16th day of September, 2013 to: C. Eugene Shiles and William J. Rieder, Spears, Moore, Rebman, & Williams, P.O. Box 1749, Chattanooga, TN 37401-1749.

A handwritten signature in black ink, appearing to read "Jennifer L. Smith", is written over a horizontal line.

JENNIFER L. SMITH
Deputy Attorney General