

DEATH PENALTY CASE
EXECUTION DATE: AUGUST 5, 2025
Case No. M2025-01095-SC-RDO-CV

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

BYRON BLACK,
Respondent,

v.

FRANK STRADA, et. al,
Applicants.

Davidson County Chancery Court Case No. 25-0414-IV

REPLY

FEDERAL PUBLIC DEFENDER
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TDOC brazenly flouts the courts rules and doubles down on its factual misrepresentation of the record in its response to Petitionr's Motion to Strike.

This Court has a procedure for supplementing a record on appeal. Tenn. R. App. P. 24(e). TDOC does not acknowledge the rule, nor does it try to meet it. Unsurprisingly, because their "appendix" does not qualify.

It is hornbook law that the record on appeal contains the evidence that was *actually considered* by the lower court. This newly created "evidence" did not exist at the time of the lower court's decision.

But consider what did happen in the lower court. Mr. Black presented the Court with evidence that the defibrillator problem is easily solvable. The State's own expert testified that she would turn off the defibrillator in this situation if asked. TDOC App. 5 at 173 Mr. Black requested a remedy that would have protected the anonymity of the medical provider who agreed to do so. Mr. Black's request would have had the medical provider come to the prison and turn off the defibrillator there. This would have happened outside public view and would keep the identity of the person confidential, consistent with the Chancellor's July 3, 2025 order¹ on anonymity for execution participants and ensuring the safety and security of the institution. The Chancellor granted that request.

It was TDOC who knowingly and intentionally put Nashville General on blast by naming them in public pleadings which could have

¹ The July 3, 2025 order is attached for this Court's convenience.

been filed under seal or with redactions. And we now know that they did so without following proper procedure. They supported their new request with a declaration that was intentionally vague and misleading. When the substance of the declaration was questioned, TDOC essentially said “don’t look behind the curtain.”

The declaration filed in the lower court led the court and the parties to believe that the declarant had personal knowledge of its contents. Now we know that she did not. Now, the court is faced with the appeal of an order that was modified because of this factually untrue declaration.

These actions call into question the integrity of TDOC’s entire appeal. The defibrillator problem is solvable. The court’s original order would solve the problem. All TDOC has to do is comply. Instead, they continue to resist in a way that has manufactured a crisis that did not have to happen. The Court should also consider the questionable timing of TDOC’s filing. If the information that they provided is so important, then why did they wait **6 days** before informing this Court and Mr. Black. Why did it take an inquiry from WPLN to force this revelation?

This Court should hold TDOC accountable for its actions by striking the improperly filed “appendix,” denying the Rule 10 Appeal, and remanding the case back to the chancery court with instructions to reinstate the original July 18, 2025 order, and any other orders this Court believes justice requires.

Respectfully submitted this 31st day of July, 2025.

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CERTIFICATE OF SERVICE

I, Kelley J. Henry, certify that on July 31, 2025, a true and correct copy of the foregoing was served via the Court's electronic filing system to opposing counsel, Nicholas Spangler, Associate Solicitor General.

/s/ Kelley J. Henry
Kelley J. Henry, BPR #21113
Counsel for Respondent

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART IV**

**KEVIN BURNS, BYRON BLACK,)
JON HALL, KENNATH HENDERSON,)
ANTHONY DARRELL HINES, HENRY)
HODGES, FARRIS MORRIS,)
WILLIAM GLENN ROGERS, and)
OSCAR SMITH,)**

Plaintiffs,

v.

**FRANK STRADA, in his official capacity)
as Tennessee's Commissioner of)
Correction, and)**

**KENNETH NELSEN, in his official)
capacity as Warden of Riverbend)
Maximum Security Institution,)**

Defendants.

**NF
CAPITAL CASE**

CASE NO. 25-414-IV

FILED
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MEMORANDUM AND ORDER

Eight death row inmates are challenging Tennessee's current lethal injection protocol on constitutional and statutory grounds.¹ This lawsuit was filed on March 14, 2025, and is on an expedited schedule. After conferring with the parties, the Court entered a Rule 16 Scheduling Order allowing for expedited discovery and setting this case for a two-week bench trial commencing on January 12, 2026. On May 15, 2025, the Court issued a mixed ruling on Defendants' motion to dismiss Plaintiffs' Complaint. On May 16, 2025, the Court heard the parties' arguments in favor of, and in opposition to, Defendants' Motion for Order Protecting the Source of Lethal Injection Chemicals and Identity of Execution Team Members ("Motion for Protective Order"). For the reasons set forth in this Memorandum and Order, the Court GRANTS in part and DENIES in part

¹ Originally, there were nine challengers. On May 22, 2025, the State of Tennessee executed Plaintiff Oscar Smith by lethal injection.

Defendants' Motion for Protective Order. The Court respectfully DECLINES to adopt Defendants' proposed Protective Order.

Generally speaking, Defendants are seeking a protective order to keep the identity of the following persons or identities confidential: 1) individuals directly involved in carrying out death sentences; 2) an employee of the State who has training related to direct involvement in the process of executing a sentence of death; a contractor or employee of a contractor or a volunteer who has had direct involvement in the process of executing a sentence of death; and 3) persons or entities that are directly involved in procuring or providing the chemicals used to carry out death sentences. Defendants' Motion for a Protective Order, although informed by records requests made under the Tennessee Public Records Act and possibly actual or anticipated written discovery requests, is not actually bound to particular pending discovery requests or pending Public Records Act requests, but rather is an effort to proactively seek a framework for addressing these disputes in this expedited trial preparation context.

Discussion

Apart from Tennessee's commitment to liberal discovery, the particulars of Tenn. R. Civ. P. 26, and related procedural rules, the primary legal provision at issue here is an exception in Tennessee's Public Records Act. This exception, set out in Tenn. Code Ann. § 10-7-504(h), reads in its entirety as follows:

(h)(1) Notwithstanding any other law to the contrary, those parts of the record identifying an individual or entity as a person or entity who or that has been or may in the future be directly involved in the process of executing a sentence of death shall be treated as confidential and shall not be open to public inspection. For the purposes of this section "person or entity" includes, but is not limited to, an employee of the state who has training related to direct involvement in the process of executing a sentence of death, a contractor or employee of a contractor, a volunteer who has direct involvement in the process of executing a sentence of death, or a person or entity involved in the

procurement or provision of chemicals, equipment, supplies and other items for use in carrying out a sentence of death. Records made confidential by this section include, but are not limited to, records related to remuneration to a person or entity in connection with such person's or entity's participation in or preparation for the execution of a sentence of death. Such payments shall be made in accordance with a memorandum of understanding between the commissioner of correction and the commissioner of finance and administration in a manner that will protect the public identity of the recipients; provided, that, if a contractor is employed to participate in or prepare for the execution of a sentence of death, the amount of the special payment made to such contractor pursuant to the contract shall be reported by the commissioner of correction to the comptroller of the treasury and such amount shall be a public record.

(2) Information made confidential by this subsection (h) shall be **redacted wherever possible and nothing in this subsection (h) shall be used to limit or deny access to otherwise public information because a file, a document, or data file contains confidential information.**

Tenn. Code Ann. § 10-7-504(h)(1)-(2)(emphasis added).

The first sentence of Tenn. Code Ann. § 10-7-504(h)(1) mandates that the identity of employees, contractors or employees of contractors, or volunteers whom the State has permitted, or may permit in the future, to be directly involved in executing a sentence of death be treated as confidential. Similarly, the first part of the second sentence of Tenn. Code Ann. § 10-7-504(h)(1) treats as confidential the identities of state employees who have training related to direct involvement in the process of executing a sentence of death.

The parties' most vigorous dispute about this statute appears to flow from the second part of the second sentence of Tenn. Code Ann. § 10-7-504(h)(1). This part of the statute requires that the identity of employees, contractors or employees of contractors, or volunteers whom the State has permitted, or may permit in the future, to be involved in the procurement or provision of chemicals, equipment, supplies, or other items for use in carrying out a sentence of death be treated as confidential. The first two sentences in

Tenn. Code Ann. § 10-7-504(h)(1) covers persons, as well as entities, and are subject to the language of Tenn. Code Ann. § 10-7-504(h)(2).

On its face, the statute does not appear to make these identities confidential in an absolute sense, but rather contemplates that restrictions, such as redaction, be put in place to keep these identities confidential and to make associated material disclosable. *See* Tenn. Code Ann. § 10-7-504(h)(2). It follows that the use of pseudonyms and other mechanisms are encouraged.² The parties disagree about how the second part of the second sentence of Tenn. Code Ann. § 10-7-504(h)(1) should be applied to this case.

As to the first sentence of Tenn. Code Ann. § 10-7-504(h)(1), the Court concludes that all of the persons and entities who have been or may in the future be directly involved in executing a sentence of death should be identified by pseudonyms only (e.g., Person A, B, C or Entity A, B, C) in responses to interrogatories, depositions, and other references in this litigation. The State may keep the identities of these persons and entities confidential, and they should not be disclosed to Plaintiffs or to the Court. These names should be redacted from otherwise discoverable documents before they are produced.

Similarly, regarding the first part of the second sentence of Tenn. Code Ann. § 10-7-504(h)(1), the Court concludes that an employee of the State who has training related to direct involvement in executing a sentence of death and a contractor or employee of a contractor or a volunteer who has direct involvement in the process of executing a sentence of death should be identified by pseudonyms only (e.g., Person A, B, C or Entity A, B, C) in responses to interrogatories, depositions, and other references

² For example, if an *in camera* review of documents is deemed necessary at some point, the Court may elect to conduct such an *in camera* review of sensitive documents at a location away from chambers, such as the Attorney General's office.

in this litigation. The State may keep the identities of the persons and entities confidential, and they should not be disclosed to Plaintiffs or to the Court. The names should be redacted from otherwise discoverable documents before they are produced.

As to the second part of the second sentence of Tenn. Code Ann. § 10-7-504(h)(1), the Court notes that the statute provides that the identity of a person or entity involved in the procurement or provision of chemicals, equipment, supplies and other items for use in carrying out a sentence of death shall not be disclosed to the public. This provision presents difficulties to both sides in the context of this litigation. As noted by Defendants, disclosure of the provider of the lethal injection drug would likely result in extra-judicial pressure on the provider that might result in the provider deciding to no longer make the drug available to states for lethal injection purposes. This is a legitimate concern. On the other hand, Plaintiffs may elect to seek discovery related to the manufacturing processes, quality control mechanisms, and other issues that could theoretically be determined to be pertinent to their claims.

The Court determines that the second part of the second sentence of Tenn. Code Ann. § 10-7-504(h)(1) provides that the identities of all of the persons and entities involved in the procurement or provision of chemicals, equipment, supplies and other for use in carrying out a sentence of death should be treated as confidential and identified by pseudonyms only. Although the State may keep the identities of the persons and entities confidential, this does not mean that the State does not have to respond to written discovery requests by using appropriate redactions and/or pseudonyms to protect identifying information from disclosure, consistent with the provisions of Tenn. Code Ann. § 10-7-504(h)(2) and Tennessee's commitment to liberal discovery.

Conclusion³

For the foregoing reasons, the Court hereby GRANTS in part and DENIES in part Defendants' Motion for Protective Order in the particulars set forth above. Given the rulings made in this Memorandum and Order, the Court requests that the parties meet and confer in an attempt to formulate a joint proposed Protective Order, while noting that agreement on the form of an Order does not operate to waive or restrict the position of any party. If the parties are unable to agree on a joint proposed Protective Order, then the parties shall separately submit proposed draft Protective Orders for the Court's consideration, while noting that a party's effort to draft a proposed Protective Order in keeping with the ruling contained in this Memorandum and Order does not operate to waive the position of that (or any) party. In any event, the parties should lodge either a joint proposed Protective Order or their separate proposed Protective Orders on or before July 24, 2025 at 4:30 p.m.

IT IS SO ORDERED.


RUSSELL T. PERKINS, CHANCELLOR

cc: Kelley J. Henry, Esq.
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Elijah Swiney, Esq.
Katherine Dix, Esq.
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David Wickenheiser, Esq.
Matthew Kubicek, Esq.

³ As a trial court, this Court is reluctant to adopt a common law participant-supplier privilege absent clear, specific guidance from a Tennessee appellate court.