

**IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE**

STEPHEN MICHAEL WEST, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 GAYLE RAY, in her official )  
 capacity as Tennessee Commissioner )  
 of Correction, et al. )  
 )  
 Defendants. )

**No. 10-1675-I**

---

**DEFENDANTS' PRETRIAL BRIEF**

---

**PRELIMINARY STATEMENT**

The plaintiff in this action is a condemned inmate incarcerated at Riverbend Maximum Security Institution, (Riverbend), in Nashville, Davidson County, Tennessee. His execution by lethal injection is scheduled for November 30, 2010. The essence of the plaintiff's complaint is that the State intends to use a protocol whereby he would be injected with a dose of sodium thiopental, then with a dose of pancuronium bromide (Pavulon), and then with a dose of potassium chloride. He contends that this Court should declare the protocol unconstitutional and enjoin its use under the Eighth and Fourteenth Amendments.

The plaintiff moved for temporary injunctive relief and appealed when the motion was denied. The Tennessee Supreme Court vacated the order denying injunctive relief and remanded the case to this court for an evidentiary hearing. The Tennessee Supreme Court directed the parties and this court to particularly address:

- (1) The scientific basis for and reliability of Dr. Lubarsky's or any other expert's opinion under the standards of Tennessee Rules of

Evidence 702 and 703 and *McDaniel v. CSX Transp., Inc.*, 95 S.W.3d 257 (Tenn. 1997);

(2) Whether the current amount and concentration of sodium thiopental mandated by Tennessee's current lethal injection protocol are insufficient to ensure unconsciousness so as to create an objectively intolerable risk of severe suffering or pain during the execution process, and if so

(3) At what level sodium thiopental is sufficient to ensure unconsciousness so as to negate the objectively intolerable risk of severe suffering or pain during the execution process.

*West v. Ray*, No. M2010-02275-SC-R11-CV, Order, p. 4 (Tenn. November 6, 2010).

The defendants rely on all defenses previously raised in this case, including but not limited to, waiver, dilatoriness, statute of limitations, and the defense that controlling authority mandates dismissal of the plaintiff's claims as a matter of law.

#### APPLICABLE LAW

The Tennessee Supreme Court set forth the legal standard to be applied in this

case:

In *Baze [v. Rees]*, 553 U.S. 35 (2008), the United States Supreme stated that to prevail on an Eighth Amendment claim there must be proof of a "substantial risk of serious harm," an "objectively intolerable risk of harm" qualifying as cruel and unusual punishment. *Baze*, 553 U.S. at 50 (plurality opinion). "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." *Id.* Rather, to prevail on an Eighth Amendment claim, there must be "a demonstrated risk of severe pain . . . [that] is substantial when compared to the known and available alternatives." *Id.* at 61. The same standard applies under Article 1, section 16 of the Tennessee Constitution. *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 314 (Tenn. 2005). Therefore, to prevail on a claim of cruel and unusual punishment under Article 1, section 16 of the Tennessee Constitution, the inmate must also introduce proof that there is an objectively intolerable risk of harm or suffering that would qualify as cruel and unusual punishment.

The heavy burden of proving this risk is on the party challenging the protocol. *Baze v. Rees*, 553 U.S. at 53.

*West v. Ray*, No. M2010-02275-SC-R11-CV, Order, p. 3 (Tenn. November 6, 2010).

### ARGUMENT

The Tennessee lethal injection protocol involves the injection of 5 grams of sodium thiopental followed by 100 milligrams of pancuronium bromide (Pavulon) followed by 200 millequivalents of potassium chloride, all delivered intravenously. *Workman v. Bredesen*, 486 F.3d 896, 902 (6th Cir. 2007). The Tennessee Supreme Court has concluded that Tennessee's protocol is consistent with contemporary standards of decency and with the overwhelming majority of lethal injection protocols used by other states and the federal government. *Abdur' Rahman v. Bredesen*, 181 S.W.3d 292, 306-07 (Tenn.2005). Moreover, the United States Supreme Court has 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 Tennessee's lethal injection protocol has been found to be substantially similar to the protocol upheld in *Baze*. See *State v. Schneiderer*, 319 S.W.3d 607, 637 (Tenn. 2010); *Harbison v. Little*, 571 F.3d 531, 533 (6th Cir. 2009), *cert. denied*, 130 S.Ct. 1689 (2010). A lethal injection protocol that is substantially similar to the one upheld in *Baze* will likewise pass constitutional muster. *Baze*, 535 U.S. at 60.

In *Harbison*, the Sixth Circuit concluded that "Tennessee's protocol must be upheld because *Baze* addressed the same risks identified by the trial court, but reached the conclusion that they did not rise to the level of a constitutional violation." 571 F.3d at 535. In so holding, the Court rejected the plaintiff's argument that the Tennessee protocol retained an inherent risk that the sodium thiopental would be improperly administered and that the inmate would thus not be unconscious when the subsequent drugs were introduced. *Id.*, 571 F.3d at 534,

536. Therefore, as a matter of law, Tennessee's lethal injection protocol does not create a substantial risk of serious harm in violation of either the Eighth Amendment to the United States Constitution or Article 1, section 16 of the Tennessee Constitution.

**A. The use of post-mortem serum levels of sodium thiopental to determine consciousness at the time of execution is unreliable.**

In support of his claim, the plaintiff proffered the affidavit of Dr. David Lubarsky (Plaintiff's Exhibit 28) who is the plaintiff's expert. Dr. Lubarsky testified that the post-mortem serum levels of sodium thiopental for three inmates executed pursuant to the Tennessee lethal injection protocol, Robert Glen Coe, Philip Workman, and Steve Henley, were 10.2 mg/L, 18.9 mg/L, and 8.31 mg/L, respectively. Dr. Lubarsky opined that these levels were inadequate to establish unconsciousness. (Plaintiff's Exhibit 28, ¶¶ 46, 56, 62). These autopsies, however, were all conducted at least seven hours after execution, thus drawing the usefulness of the serum level results into question.

In *Harbison v. Little*, 2010 WL 2736077 (M.D. Tenn.), the plaintiff therein relied on the same affidavit from Dr. Lubarsky for the same purpose: to show that the post-mortem serum levels of sodium thiopental for Robert Glen Coe, Philip Workman, and Steve Henley were inadequate to establish unconsciousness. The district court pointed to the existing controversy regarding the reliability of this kind of evidence, as recognized by the Supreme Court in *Baze*. *Id.* at \*8. *See Baze*, 553 U.S. at 51 (Roberts, J.) (noting peer responses criticizing conclusions of *Lancet* article based on such evidence); *see also id.*, 553 U.S. at 109 (Breyer, J., concurring) ("The *Lancet* Study ... may be seriously flawed."); *id.*, 553 U.S. at 110 (noting one peer response stating why post-mortem concentrations "could not be relied on as accurate indicators for

concentrations in the blood stream during life").<sup>1</sup> The district court concluded that this *dicta* in *Baze* "compels the conclusion that controversial evidence regarding postmortem sodium thiopental serum levels is not sufficient to show that Tennessee's three-drug protocol is unconstitutional." *Harbison*, 2010 WL 2736077 at \*8. The Tennessee Supreme Court has also declined to afford constitutional weight to the *Lancet* study as a basis for rejecting the three-drug lethal injection protocol. See *State v. Hester* \_\_ S.W.3d \_\_, 2010 WL 3893760, at \*63 (Tenn. 2010).

Dr. Feng Li, the defendants' expert, testified by affidavit that, with regard to the Coe, Workman, and Henley autopsies, the concentration of thiopental indicated in their respective autopsy reports do not accurately reflect actual blood level during or soon after the executions. Dr. Li Affidavit, ¶¶ 5, 7, 9. This is consistent with the peer response referred to by Justice Breyer. *Baze*, 553 U.S. at 110.

**B. Five grams of sodium thiopental is sufficient ensure unconsciousness so as not to create an objectively intolerable risk of severe suffering or pain during the execution process.**

In *Workman v. Bredesen*, 486 F.3d 896 (6th Cir. 2007), the Sixth Circuit considered whether Tennessee's protocol involved the unnecessary and wanton infliction of pain:

The whole point of the Tennessee lethal-injection protocol is to avoid the needless infliction of pain, not to cause it. The idea is to anesthetize the individual with one drug before the State administers the remaining two drugs, so that the serial combination of drugs causes a quick and pain-free death. See *Abdur'Rahman*, 181 S.W.3d at 307-08 (noting "that a dosage of five grams of sodium Pentothal as required under Tennessee's lethal injection protocol causes nearly immediate unconsciousness and eventually death [...] ... that such a dose would cause an inmate to be

---

<sup>1</sup> Plaintiff's expert, Dr. Lubarsky, co-authored the *Lancet* article that was the subject of the Supreme Court's discussion in *Baze*.

*unconscious in about five seconds and that the inmate would never regain consciousness and would feel no pain prior to dying”).*

486, F.3d at 907 (emphasis added). The Sixth Circuit further noted:

Under its lethal-injection protocol, Tennessee administers 5 grams of sodium thiopental to anesthetize the inmate. *See Execution Procedures for Lethal Injection* at 35. That lethal dosage represents the highest level that other States use, and it renders the inmate unconscious “nearly immediate [ly],” *Abdur'Rahman*, 181 S.W.3d at 308. *This 5-gram dose thus reduces, if not completely eliminates, any risk that Workman would “incur constitutionally excessive pain and suffering when he is executed.” See id. at 308 (“Dr. Heath [Workman's expert] ... testified that a lesser dosage of two grams of sodium Pentothal would cause unconsciousness in all but ‘very rare’ cases and that a dosage of five grams would ‘almost certainly cause death.’”).*

486 F.3d at 910 (emphasis added). This is consistent with the expert testimony in *Baze*.<sup>2</sup> *See Baze*, 553 U.S. at 59 (“[A] proper dose of thiopental obviates the concern that a prisoner will not be sufficiently sedated. All the experts who testified at trial agreed on this point.”).<sup>3</sup>

Dr. Feng Li, the defendants’ expert, will testify that, based on the five gram quantity of thiopental administered, which is many time more than the dosages normally administered as part of surgical anesthesia, and the blood levels of Coe, Workman, and Henley at the time of their autopsies compared to levels observed in patients undergoing anesthesia and people who have died from sodium thiopental overdoses in various settings, Coe, Workman and Henley would have been rendered unconscious within a matter of minutes after the administration of sodium thiopental and would not have been aware of the affects of the Pavulon or potassium chloride.

<sup>2</sup> The Kentucky lethal injection protocol upheld in *Baze* calls for the injection of 3 grams of sodium thiopental.

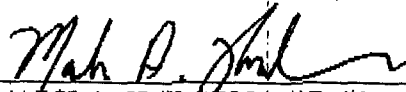
<sup>3</sup> The lethal effect of five grams of sodium thiopental is further evidenced by the adoption by Ohio of a one-drug protocol in which five grams of sodium thiopental is administered. ODR Policy No. 01-COM-11, VI, B., 7, e. [http://www.drc.ohio.gov/web/drc\\_policies/documents/01-COM-11.pdf](http://www.drc.ohio.gov/web/drc_policies/documents/01-COM-11.pdf). Since its adoption on November 30, 2009, nine condemned inmates have been executed using the protocol. *See* Capital Punishment in Ohio, <http://www.drc.ohio.gov/public/capital.htm>; Ohio Executions - 1999 to Present, <http://www.drc.ohio.gov/web/Executed/executed25.htm>.

**CONCLUSION**

Based on the foregoing, Tennessee's lethal injection protocol does not create a substantial risk of serious harm. Therefore, judgment should be entered in favor of the defendants.

Respectfully submitted,

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



---

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 16, 2010, a copy of the foregoing was forwarded by facsimile 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

Roger W. Dickson  
MILLER & MARTIN  
Volunteer Building  
832 Georgia Avenue  
Suite 1000  
Chattanooga, TN 37402

Howell G. Clements  
1010 Market St., Suite 404  
Chattanooga, TN 37402

C. Eugene Shiles, Jr.  
SPEARS, MOORE, REBMAN & WILLIAMS  
P. O. Box 1749  
Chattanooga TN, 37401-1749

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