

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

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APPELLATE COURT CLERK  
NASHVILLE

STATE OF TENNESSEE, )  
)  
Movant, )  
)  
v. )  
)  
BILLY RAY IRICK, )  
)  
Defendant. )

No. M1987-00131-SC-DPE-DD

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**MOTION TO ALTER, AMEND OR MODIFY  
ORDER SETTING EXECUTION DATE**

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Comes Defendant, Billy Ray Irick ("Mr. Irick"), by and through counsel, and pursuant to Rule 59.04 of the *Tennessee Rules of Civil Procedure* moves this Honorable Court to alter, amend or modify its October 22, 2013 Order ("October Order") setting his execution for January 15, 2014. As grounds for this Motion, Mr. Irick would show that a declaratory judgment action challenging the constitutionality of Tennessee's newly adopted lethal injection protocol has been filed in the Chancery Court for Davidson County by ten inmates condemned to death. *West et al. v. Schofield, et al.* No. 13-1627-I, In The Chancery Court, Part I, 20<sup>th</sup> Judicial District ("the Chancery Court action") (the Chancery Court action Complaint is attached as *Exhibit 1*). Counsel for the parties to the Chancery Court action participated in a teleconference with Chancellor Bonnyman on December 2, 2013 at which point Chancellor Bonnyman issued a Scheduling Order governing the timeframe for litigating the case. See *Exhibit 2* (with the attached unofficial transcript of the Court's Order). As part of the Scheduling Order, Chancellor Bonnyman set the trial of this matter for July 7, 2014. Mr. Irick's date of execution currently is

set for January 15, 2014. Therefore, given the ultimate finality of carrying out Mr. Irick's sentence, a modification to the current October Order is warranted in order to allow Mr. Irick the opportunity to fully litigate whether the newly enacted protocol is, in fact, constitutional.

In support of this Motion, Mr. Irick incorporates by reference pursuant to Rule 10 of the *Tennessee Rules of Civil Procedure* the arguments contained in Defendant Zagorski's Supplement to Response to Motion to Set Execution Date (No. M1996-00110-SC-DPE-DD), as well as the arguments contained in Defendant Miller's Supplement to Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation (No. E1982-00075-SC-DDT-DD). In further support of his Motion, Mr. Irick would show as follows:

1. The State of Tennessee issued its new lethal injection protocol ("protocol") on Friday, September 7, 2013. *See Exhibit 3*. Less than a week later, on October 3, 2013, Mr. Irick administratively grieved the State's newly issued protocol. *See Exhibit 4*. After following the grievance appeals process, the Legal Department for the Department of Corrections fully and finally denied the grievance on Wednesday, November 13, 2013. *See Exhibit 4*. Mr. Irick and the other Plaintiffs promptly filed the Chancery Court action on November 20, 2013 alleging that the protocol was unconstitutional on numerous grounds.

2. On October 3, 2013 (the same day that Mr. Irick initiated his administrative grievance), the State filed a Motion to Reset Mr. Irick's execution date.

3. On October 22, 2013, "at a point when [this Court] could not take into account the fact of a Tennessee constitutional challenge to the protocol," (*Exhibit 2*, Transcript, p. 5, ll. 9-12), this Court entered an Order setting Mr. Irick's execution date for January 15, 2014.

4. On November 27, 2013, pursuant to Chancellor Bonnyman's instructions, the parties to the Chancery Court action submitted their respective Proposed Scheduling Orders to the court. On December 2, 2013, counsel for the parties to the Chancery Court action participated in a teleconference with Chancellor Bonnyman for the purpose of establishing a Scheduling Order in the Chancery Court action. *Exhibit 2*.

5. In order to allow the parties the opportunity to fully and fairly litigate the novel claims at issue in the Chancery Court action, and in order to allow the parties to conduct the requisite and appropriate discovery to do so, Chancellor Bonnyman adopted the time parameters in Plaintiffs' Proposed Scheduling Order<sup>1</sup> and entered an order appropriately balancing the interests at stake.

6. Chancellor Bonnyman's Scheduling Order also reflected the admonition from this Court's order in *West v. Ray, et al.*, No. M2010-02275-SC-R11-CV, in which this Court considered Stephen Michael West's Rule 11 appeal, or, in the alternative, Motion to Vacate or Modify the Order Setting Execution Date in order to allow him sufficient time to litigate the claims pending in a Chancery Court action challenging the constitutionality of the then existing three-drug lethal injection protocol. In the course of granting Mr. West's Motion to Modify the July 15, 2010 execution order, this Court admonished:

Decisions involving such profoundly important and sensitive issues such as the ones involved in this case are best decided on evidence that has been presented, tested, and weighed in an adversarial hearing such as the one that was held by the United States District Court for the Middle District of Tennessee in Harbison v. Little, No. 3:06-cv-01206, 2010 WL 2736077 (M.D. Tenn. July 12, 2010). ... 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

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<sup>1</sup> Chancellor Bonnyman adopted the Plaintiffs' Proposed Scheduling Order, but, since it imposed an initial deadline of December 2, 2013 for the State to respond to Plaintiffs' initial interrogatories, the Court extended the December 2 deadline to December 4, 2013.

an opportunity to make findings of fact and conclusions of law with regard to the issues presented by the parties.

*Exhibit 2*, Transcript, p. 8, ll. 5-20 (citing *West v. Ray, et al.*, No. M2010-02275-SC-R11-CV, p. 2 (Tenn. Nov. 6, 2010) (attached as *Exhibit 5*)).

7. Chancellor Bonnyman also based the scheduling order in part on this Court's guidance in *State v. West*, No. M1987-130-SC-DPE-DD (Tenn. Nov. 29, 2010), which considered a constitutional challenge to Tennessee's revised three-drug lethal injection protocol. Upon Plaintiff Stephen Michael West's request that this Court modify its November 6, 2010 Order setting his execution date for November 30, 2010 in order to litigate in the Chancery Court issues regarding whether the revision to the three drug protocol cured the prior constitutional deficiencies, this Court instructed:

The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges to acts of the Executive and Legislative Branches be considered in light of a fully developed record addressing the specific merits of the challenge. The requirement of a fully developed record envisions a trial on the merits during which both sides have an opportunity to develop the facts that have a bearing on the constitutionality of the challenged provision.

*Exhibit 2*, Transcript, p. 9, ll. 1-19 (citing *State v. West*, No. M1987-130-SC-DPE-DD, p. 3 (Tenn. Nov. 29, 2010) (attached as *Exhibit 6*)).

8. In *U.S. Bank, N.A. v. Tennessee Farmers Mut. Ins. Co.*, 410 S.W.3d 820, 827 (Tenn. Ct. App. 2012), appeal denied (May 8, 2013), the Western Division of the Tennessee Court of Appeals articulated the consensus standard for considering motions to alter or amend, stating that "[a] motion to alter or amend should 'be granted when [a] the controlling law changes before the judgment becomes final; [b] when previously unavailable evidence becomes

available; [c] or to correct a clear error of law *or to prevent injustice.*” *Id.* (emphasis added) (quoting *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005)).

a. **Controlling law.** The Chancery Court action challenges the constitutionality of a newly enacted lethal injection protocol. Thus, there is no controlling law on this subject. Although, technically the “controlling law” has not changed, the manner in which the controlling law is carried out has changed. *See Exhibit 3.* Therefore, an Order modifying the October Order setting Mr. Irick’s date of execution is warranted in order to allow him to present facts and supporting evidence to be tested and weighed in the Chancery Court action so that the controlling law can be developed, if not changed.

b. **Previously unavailable evidence.** In this case, the state has withheld any and all critical details relating to drug compounding and procurement process that Mr. Irick needs to fully and fairly litigate his claims. *See, e.g., Complaint*, Count VI at pp. 66 through 74. Accordingly, evidence that was purposefully withheld and, thus, was unavailable to Mr. Irick when this Court set his date of execution will become available in the course of discovery in the Chancery Court action. Thus, an Order modifying the October Order setting Mr. Irick’s date of execution is warranted in order to allow him to discovery previously unavailable evidence, develop it appropriately, and present it to the Chancery Court to be tested and weighed in order to determine the constitutionality of the protocol.

c. **Prevent injustice.** Similar to the issues raised in *West v. Ray, supra* at ¶ 6, the issues Mr. Irick has raised in the Chancery Court action are “profoundly important and sensitive” (*Exhibit 4*, p. 2) as they implicate, among other issues, the Bill of Rights’ prohibition against cruel and unusual punishment under both the State (*Tenn. Const.*, Art. I, § 16)<sup>2</sup> and

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<sup>2</sup> The fundamental right to not have “cruel and unusual punishments inflicted,” (*Tenn. Const.*, Art. I, § 16), is inviolate. *Tenn. Const.*, Art. 11, § 16 (“The declaration of rights hereto prefixed is declared to be a part of the

Federal Constitutions (*U.S. Const.*, amend. VII). Certainly, the execution of a man in violation of the Constitution would constitute an injustice. However, this Court can prevent such an injustice by modifying its October 22, 2013 Order to reset Mr. Irick's execution for a future date in order to allow Mr. Irick to present a "fully developed record addressing the specific merits of [his] challenge" to the constitutionality of the protocol for the Chancery Court's consideration and any necessary appellate review. *State v. West, supra* at ¶ 7 (*Exhibit 6*, p. 3).

9. Such a determination would be in line with this Court's holding in *West v. Ray* that "both Mr. [Irick] 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." *West v. Ray, supra* at ¶ 6 (*Exhibit 5*, p. 2). Moreover, such a determination would be in line with this Court's statement in *State v. West, supra* at ¶ 7, that "[t]he principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges to acts of the Executive and Legislative Branches be considered in light of a fully developed record addressing the specific merits of the challenge." (*Exhibit 6*, p. 3).

10. It also should be noted that an Order modifying the October 22, 2013 Order setting Mr. Irick's execution date for January 15, 2013, while likely preventing an execution in violation of multiple constitutional prohibitions, does not preclude the State from executing its judgment and enforcing the criminal laws governing and protecting the populous. Such an Order would merely reset the date of Mr. Irick's execution to ensure that the State does not execute a man in an unconstitutional manner on January 15, 2013. Certainly, protecting one of the essential

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Constitution of this State, and shall never be violated on any pretence whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate.").

liberties afforded to all United States citizens in the Tennessee and Federal Constitution's Bill of Rights and ensuring adherence the constitutional protections we hold most dear is worth a relatively minor delay in the execution of the judgment against Mr. Irick.<sup>3</sup>

11. The Chancery Court action is a legitimate constitutional challenge to the State's lethal injection protocol. In the Chancery Court's Scheduling Order, Chancellor Bonnyman stated: "It does appear likely there are merits to be reached[,]" and explained "why a shortened trial schedule is not workable if the Court hopes to reach the merits." *Exhibit 2*, Order, p. 3. As noted by Plaintiff Zagorski, the apparently meritorious issues at stake in the Chancery Court action include:

(a) The first challenge of its kind to Tennessee's new lethal injection protocol which uses a new drug, pentobarbital;

(b) The first challenge in Tennessee to creating execution drugs through compounding (a process we have all recently learned is fraught with dangers); and

(c) The first challenge of its kind in Tennessee to the procurement and use of execution drugs in violation of various state and federal laws.

*State v. Zagorski*, No. M1996-00110-SC-DPE-DD, Supplement to Response to Motion to Set Execution Date, p. 1.<sup>4</sup> The Plaintiffs' position will be supported by expert witness testimony. The

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<sup>3</sup> To this end, it is also worth noting that Chancellor Bonnyman's Scheduling Order setting a trial date just over seven months after the Chancery Court action was filed, which is an expedited time frame when compared to other declaratory judgment action in Davidson County. *See Exhibit 2*, Transcript, p. 10, l. 24 through p. 11, l. 4 ("The timetable the plaintiffs propose is otherwise reasonable and in fact shortens the time for litigation of civil lawsuits of this complexity. Most declaratory judgment actions in Chancery Court in Davidson County are resolved within one year. Some declaratory Judgment Actions require 18 months.").

<sup>4</sup> Mr. Miller's Supplement to Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation couches the issues in suit as follows:

In his Chancery Court declaratory judgment action, Miller has presented novel issues that require careful fact development and discovery before a final merits ruling, including, *inter alia*:

- (a) Challenging Tennessee's new lethal injection protocol which uses only pentobarbital, a drug never before used in a Tennessee execution;
  - (b) Challenging Tennessee's creation of execution drugs through compounding;
- and

action was not filed and does not seek to prevent the State from executing any of the nine Plaintiffs, but rather to ensure that their execution is carried out in a constitutional manner. The purpose of the action is not to delay justice, but to ensure it.

12. The State may try to argue that a modification is not warranted in this case because Mr. Irick and the other Plaintiffs in the Chancery Court action jointly proposed the scheduling order, which provides for a trial on the merits after he is set to be executed, whereas the State proposed a scheduling order providing a January 6, 2014 trial date. If made, such an argument patently would belie the obvious realities regarding the complexity of the issues in the Chancery Court action. Given the complex issues in the Chancery Court action, the State's proposed scheduling was, at best, unrealistic.<sup>5</sup> As Chancellor Bonnyman stated:

p. 9

22 ... the defendants' proposal implicitly  
23 concedes that it is impossible by January 15, 2014,  
24 for the parties to conduct necessary discovery to  
25 bring the case to trial in time for the Court to

p. 10

1 deliberate, issue a ruling, and still allow even  
2 minimal time for considered appellate review.  
14 The time the defendants would allot for

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(c) Challenging Tennessee's procurement and use of execution drugs in violation of various state and federal laws.

*State v. Miller*, (No. E1982-00075-SC-DDT-DD), Miller's Supplement to Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation, p. 2.

<sup>5</sup> For instance, the State's proposed scheduling order would have required the Chancery Court action Plaintiffs to disclose their expert witnesses (on December 6) before the State even took a position in its Answer (proposed to be due by December 11). Moreover, the State sought to disclose its expert witnesses by December 16, and would have cut off discovery (including the deposition of these experts) by December 31. Attempting to schedule and depose multiple expert witnesses in a two week window is patently unworkable even if one of the weekdays in that two week window was not Christmas Day.



15 discovery and trial preparation is too short to  
16 develop and present complex factual issues that must  
17 be decided. Yet even that allotment of time is  
18 impracticably long, because it forces a reduction in  
19 an already inadequate amount of time for this Court  
20 and the appellate court to consider the merits and  
21 issue their ruling.

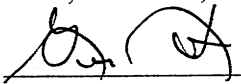
*Exhibit 2* (transcript, p. 9, ll. 22-25; p. 10, ll. 1-2, 14-21). Thus, the Chancery Court specifically found that the time frame within which the State proposed to discover, compile, develop and present evidence on the complex issues at stake in the Chancery Court action was too short.

13. “Decisions involving such profoundly important and sensitive issues such as the ones involved in this case are best decided on evidence that has been presented, tested, and weighed in an adversarial hearing,” *West*, No. M2010-02275-SC-R11-CV, p. 2, and should be “considered in light of a fully developed record addressing the specific merits of the challenge.” *State v. West*, No. M1987-130-SC-DPE-DD, p. 3. “The requirement of a fully developed record envisions a trial on the merits during which both sides have an opportunity to develop the facts that have a bearing on the constitutionality of the challenged provision.” *Id.* Instead, to the extent the State attempts to make the argument that Mr. Irick has caused this situation by agreeing to a trial date beyond his scheduled execution as opposed to beforehand, the State would be seeking to substitute an unnecessarily truncated proceeding lacking any semblance of due process for one with a fully developed record as would be necessary to reach a meaningful, fair and considered decision on these unprecedented, complex and apparently meritorious issues of law and fact.

WHEREFORE, Petitioner, Billy Ray Irick respectfully requests that this honorable Court enter an Order altering, amending, or modifying its October 22, 2013 Order setting Mr. Irick's execution for January 15, 2014 to reset the scheduled execution on a date that will allow Mr. Irick to fully and fairly litigate his claims in the Davidson County Chancery Court action and that will allow sufficient time for any necessary appellate review. Mr. Irick respectfully suggests this would be a date at least four (4) months after the conclusion of the Chancery Court action, which is set to occur from July 7 through July 9, 2014.

Respectfully submitted,

SPEARS, MOORE, REBMAN & WILLIAMS, P.C.

By:  \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and exact copy of the foregoing **MOTION TO ALTER, AMEND OR MODIFY ORDER SETTING EXECUTION DATE** has been served on counsel for all parties at interest in this cause by depositing a copy of same in the United States Mail with sufficient postage thereon to carry same to its destination, addressed as follows:

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This 5 day of December, 2013.

**SPEARS, MOORE, REBMAN & WILLIAMS, P.C.**

By: Pat Case

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