

Attachment 4

to

REQUEST FOR ASSUMPTION OF JURISDICTION OF
UNDECIDED CASE PURSUANT TO RULE 48,
RULES OF THE SUPREME COURT OF THE
STATE OF TENNESSEE

**Defendants' Response to
Motion for Temporary Injunction
Filed October 20, 2010**

February 13, 2001; consequently, his challenge to the Tennessee lethal injection protocol was hypothetical and did not present a justiciable case or controversy. *West v. Ray*, No. 3:10-cv-0778, Memorandum in Support of Motion to Dismiss filed Sept 3, 2010 (M.D. Tenn. 2010). Plaintiff was also advised that the Tennessee Department of Correction would permit him to change his election by submitting a new affidavit, no later than 14 days prior to the date of the execution, affirmatively stating that he "waives any right he might have to have his execution carried out by electrocution and instead chooses to be executed by lethal injection." *Id.* On October 12, 2010, plaintiff presented the defendants with a letter in which he purported to rescind his previous election of electrocution; he did not, however, elect lethal injection as his method of execution. Instead, he informed the defendants that he was making no election of the method of execution (see Motion for Temporary Injunction, Attachment F).

This Court is without jurisdiction to enjoin or restrain the July 15, 2010, order of the Tennessee Supreme Court that plaintiff's sentence of death be executed on November 9, 2010. *See Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (Tenn. 2000). Nothing in *Coe v. Sundquist*, however, would appear to preclude this Court's jurisdiction to the extent that plaintiff seeks declaratory relief alone.

The defendants maintain that the February 13, 2001, Election Affidavit is valid and still effective. Plaintiff made that election pursuant to Tenn. Code Ann. § 40-23-114(a), which remains unchanged. Although revisions have since been made to the Tennessee Execution Protocol, that protocol also remains materially unchanged. *See Workman v. Bredesen*, 486 F.3d 896, 900-901 (6th Cir. 2007).

Nevertheless, the defendants have no desire to litigate this issue. Defendants will therefore accept plaintiff's October 12, 2010, rescission of his previous election of electrocution. With the plaintiff having rescinded his previous election and waiver, plaintiff's sentence of death will now be executed by means of lethal injection, by operation of law. See Tenn. Code Ann. § 40-23-114(a). Consequently, there is simply no need for plaintiff to be presented with a new election affidavit, as he insists.¹ In addition, the plaintiff has affirmatively declared that he would make no election of a method of execution, further obviating any need to present him with a new election affidavit.

Because this Court lacks jurisdiction to order the injunctive relief sought, plaintiff's motion for temporary injunction should be denied. Furthermore, because the defendants have accepted plaintiff's rescission of his election of electrocution, and his execution will now proceed by means of lethal injection, plaintiff's complaint is rendered moot and should therefore be dismissed.

¹ In any event, the plaintiff has no "right" under the Protocol to be presented with an affidavit of election within 30 days of the execution date. The Protocol is a statement concerning only the internal management of state government. Furthermore, the 30-day requirement is obviously for the benefit of the Department, so that it may have sufficient time to prepare for execution by means of the chosen method.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2010, a copy of the foregoing was forwarded

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