

Nos. 18-6739, 18A528

**IN THE
SUPREME COURT OF THE UNITED STATES**

**DAVID EARL MILLER, STEPHEN MICHAEL WEST, and
NICHOLAS TODD SUTTON,
Petitioners,**

v.

**TONY PARKER, et al.,
Respondent.**

**ON APPLICATION FOR STAY OF EXECUTION AND ON
PETITION FOR WRIT OF CERTIORARI**

RESPONDENTS' APPENDIX

**HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee**

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED

JAN 18 2018

Clerk of the Appellate Courts
Rec'd By _____

STATE OF TENNESSEE)

v.)

DAVID EARL MILLER)

No. E1982-00075-SC-DDT-DD

RESPONSE TO NOTICE

COMES NOW David Earl Miller, by counsel, and responds to the Notice filed on behalf of the State of Tennessee on January 11, 2018, and urges this Court to refrain from scheduling a new execution date because the State of Tennessee has adopted an entirely new and untested lethal injection protocol which Mr. Miller intends to challenge. This response is filed pursuant to Article VI, clause 2 of the United States Constitution; the Eighth and Fourteenth Amendments to the United States Constitution; Article I, §§ 8 and 16 of the Tennessee Constitution; and Tennessee Supreme Court Rule 12(E). In support of his position, Mr. Miller states as follows:

1. On January 11, 2018, the State of Tennessee filed a notice with this Court advising that the petition for writ of certiorari filed by Mr. Miller and others was denied by the United States Supreme Court on January 8, 2018.¹ While it is true that Mr. Miller's petition was denied, petitioners have until February 2, 2018,

¹ Counsel for the State mailed the service copy of the notice to counsel for Mr. Miller. The Notice was received on January 16, 2018.

to file a petition for rehearing. Petitioners intend to file a petition for rehearing in light of public records received which indicate that the petitioners' position that the State intends to obtain pentobarbital illegally is well founded. Specifically, on July 20, 2017, the State of Tennessee received an email from its pharmacist which states, "I have some news on the pento. It's not good. I had the DEA invite me over to discuss it. I can call you tomorrow to fill you in on the details." Exhibit 1, July 20, 2017, email.

2. On January 16, 2018 Mr. Miller learned that the State of Tennessee adopted an entirely new lethal injection protocol on January 8, 2018 that the state would use in his execution. Public records and the adoption of this new protocol suggest that Tennessee does not have access to pentobarbital. This new three drug protocol uses a combination of drugs never before used in this state. *See* "Protocol B" pp. 40-41, Exhibit 2, January 8, 2018 lethal injection protocol. The new combination uses midazolam (a benzodiazepine which has no analgesic effect), vecuronium bromide (a paralytic which stops movement and breathing creating the feeling of suffocation), and potassium chloride (which creates the searing sensation of being burned from the inside and eventually stops the heart).

3. Public records reveal that the State of Tennessee is fully aware that the first drug, midazolam, is not effective in preventing the pain and suffering caused by the second and third drugs because it was warned by its supplier. On September 7, 2017, the supplier wrote:

Here is my concern with Midazolam. Being a benzodiazepine, it does not elicit strong analgesic effects. The subjects may be able to feel pain from

the administration of the second and third drugs. Potassium chloride especially. It may not be a huge concern but can open the door to some scrutiny on your end.

Exhibit 3, September 7, 2017 email. As discussed below, the use of midazolam in lethal injection protocols is controversial and has been associated with numerous problematic executions, including the botched executions of Joseph Wood in Arizona and Clayton Lockett in Oklahoma.

4. This Court has recognized that when the state adopts a new execution protocol a petitioner is entitled to timely challenge the protocol through fair procedures in Tennessee courts.

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.

State of Tennessee v. West, No. M1987-000130-SC-DPE-DD (Tenn. Nov. 29, 2010)(*per curiam*), p. 3 (Exhibit 4). When Mr. West challenged a revised execution protocol in 2010, this Court stayed executions to allow Mr. West and similarly situated petitioners to challenge that protocol in the Chancery Court and on appeal. *Id.* (ordering stay pending chancery court ruling in 90 days and “throughout the pendency of any appeal of the trial court’s final judgment in the declaratory judgment action”). After the 2010 protocol was abandoned by the State, Mr. West and others (including Mr. Miller) challenged the revised lethal injection protocol in September 2013. This Court reaffirmed the right of Mr. West and others

to challenge the new and untested protocol in court. Further, this Court recognized that the litigation required stays of execution pending resolution of constitutional challenges to the new protocol in the chancery court, and on appeal as well. *See e.g., State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Sept. 25, 2014)(*per curiam*)(granting stay of execution to allow resolution of interlocutory appeal and chancery court declaratory judgment action in accordance with expedited schedule)(exhibit 5); *State v. Zagorski*, No. M1996-00110-SC-DPE-DD (Tenn. Oct. 22, 2014)(*per curiam*)(same)(Exhibit 6); *State v. West*, No. M1987-00130-SC-DPE-DD (Tenn. Nov. 26, 2014)(*per curiam*)(same)(Exhibit 7); *State v. Johnson*, No. M1987-00072-SC-DPE-DD (Tenn. Dec. 22, 2014)(same)(Exhibit 8); *State v. Miller*, No. E1982-00075-SC-DDT-DD (Tenn. Mar. 31, 2015), p. 2 (granting stay of execution pending “final disposition of the declaratory judgment action” challenging the new protocol)(Exhibit 9); *Abdur’Rahman, Hall, Strouth, & Sutton v. State of Tennessee*, Nos. M1988-00026-SC-DPE-PD, E1997-00344-SC-DDT-DD, E1997-00348-SC-DDT-DD, E2000-00712-SC-DDT-DD (Tenn. Apr. 10, 2015)(*per curiam*), p. 2 (vacating “execution dates pending the conclusion of that [declaratory judgment] action, through appeal of the trial court’s final judgment.”)(Exhibit 10).

5. While properly recognizing a death-sentenced petitioner is entitled to meaningfully challenge a revised execution protocol in chancery court and on appeal, this Court has also acknowledged that the chancery court should promptly decide any challenge presented by a petitioner. In *West v. Schofield*, No. M2014-00320-SC-R11-CV (Tenn. Mar. 10, 2015)(*per curiam*)(Exhibit 11), this Court

required the chancery court to commence a trial within 120 days, conclude such trial within 150 days, and enter a decision within 30 additional days. *See also State v. West*, No. M19870000130-SC-DPE-DD (Tenn. Nov. 29, 2010)(*per curiam*)(requiring challenge to initial revision to be adjudicated by chancery court within 90 days)(Exhibit 12).

6. Tennessee deliberately chose to revise its execution protocol to include as the first drug, midazolam, despite knowledge of the substantial harm that drug will cause. It is the most controversial protocol ever adopted by this State. Petitioner's forthcoming challenge will raise serious and substantial claims that the protocol is cruel and unusual. The experiences of other states reveal that midazolam is ineffective in preventing the sensation of suffocation and searing, burning pain caused by the other two drugs. News reports of executions involving midazolam in Alabama, Arizona, Arkansas, Ohio, and Oklahoma indicate the inmates are noticeably sensate and move during the execution after administration of the drugs.

7. Midazolam is associated with the 2014 botched execution of Joseph Wood in Arizona. A veteran reporter who had witnessed five other executions where midazolam had not been used describes what happened:

At the start of Wood's execution, none of [the lawyers] concerns seemed warranted.

Then at 2:05, Wood's mouth opened. Three minutes later it opened again, and his chest moved as if he had burped. Then two minutes again, and again, the mouth open wider and wider. Then it didn't stop. He gulped like a fish on land. The movement was like a piston: The mouth opened, the chest rose, the stomach convulsed. And when the

doctor came in to check on his consciousness and turned on the microphone to announce that Wood was still sedated, we could hear the sound he was making: a snoring, sucking, similar to when a swimming-pool filter starts taking in air, a louder noise than I can imitate, though I have tried.

It was death by apnea. And it went on for an hour and a half. I made a pencil stroke on a pad of paper, each time his mouth opened, and ticked off more than 640, which was not all of them, because the doctor came in at least four times and blocked my view.

I turned to my friend Troy Hayden, the anchor and reporter from Fox 10 News, who was sitting next to me. Troy and I witnessed another execution together in 2007, and he had seen one before that, so he also knows what it looks like.

"I don't think he's going to die," I said.

A moment later, Troy turned to me and whispered, "I think you're right."

Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, Arizona Republic, azcentral.com (July 23, 2014), <https://www.azcentral.com/story/news/arizona/politics/2014/07/24/arizona-execution-joseph-wood-eyewitness/13083637/> (last visited January 17, 2018).

8. The Arizona protocol in Wood's execution is not identical to the newly minted Tennessee protocol. Because Arizona did not use a paralytic, the ineffectiveness of midazolam as an anesthetic was plainly visible. Tennessee's protocol, which uses a paralytic, will mask the inmate's movements and thus create a danger that the inmate will feel the torturous sensation of suffocation from the paralytic and the burning from the third drug.

9. When Alabama executed Ronald Bert Smith using Midazolam, "Smith heaved and coughed for about 13 minutes" continuing to gasp and cough even after

the first of two consciousness checks. Kent Faulk, *Alabama Death Row Inmate Ronald Berth Heaved, Coughed For 13 Minutes During Execution*, AL.com, (December 8, 2016), http://www.al.com/news/birmingham/index.ssf/2016/12/alabama_death_row_inmate_is_se.html (last checked January 17, 2018).

10. Again, in Alabama, after the administration of midazolam and two consciousness checks, Torrey McNabb raised his right arm and grimaced causing “family members and attorneys [to] audibly [express] concern that he was not yet unconscious” at the point of the injection of the remaining drugs. *Alabama Executes Montgomery Co-Killer Torrey Twane McNabb*, AL.com (October 20, 2017), http://www.al.com/news/birmingham/index.ssf/2016/12/alabama_death_row_inmate_is_se.html (last checked January 17, 2018).

11. Oklahoma infamously botched the execution of Clayton Lockett in 2014 using a protocol initiated by Midazolam. In that case, prison officials were unable to execute Lockett. Reporters describe the scene that unfolded just after Lockett was declared unconscious:

Three minutes later, “the violent reaction” began, she said. First, she saw his foot kick. Then his body bucked, he clenched his jaw and he began rolling his head from side to side, trying to lift his head up, grimacing and clenching his teeth. “He mumbled some things we didn’t understand,” Branstetter said. “The only thing I could make out was when he said ‘man.’”

It looked like he was trying to get up, she said.

“He looked like he was in pain to me,” Branstetter said. “How much pain, nobody knows but him.”

A prison official looked under the sheet and announced that they were going to close the blinds temporarily. The beige blinds went back down and never went back up. "Reporters exchange shocked glances," Branstetter wrote in her account. "Nothing like this has happened at an execution any of us has witnessed since 1990, when the state resumed executions using lethal injection."

Dean Sanderford, one of Lockett's attorneys, called the execution "the most awful thing I've ever seen."

Some of the younger reporters in attendance, who had not witnessed executions before, "were quite shaken, to say the least," Branstetter said the following day.

"Nobody was crying, but...afterwards, there were some reporters whose hands were shaking, who were quite disturbed by what they had seen," she said.

The reporters sat in silence for several minutes — the exact time wasn't clear because the clock on the wall in the execution chamber was now hidden behind the blinds — before Patton announced to them that he has halted the execution.

Mark Berman, *What It Was Like Watching Botched Oklahoma Execution*, WashingtonPost.com (May 2, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/05/02/what-it-was-like-watching-the-botched-oklahoma-execution/?utm_term=.cb62695258e8 (last visited January 17, 2018). When Oklahoma executed Charles Warner a year later using midazolam, his last words were "my body is on fire" — indicating that he was sensate and able to feel the searing pain as the potassium burned through his veins. Andrew Buncombe, *Charles Warner Execution: Oklahoma Inmate's Last Words Are 'My Body Is On Fire' As State Carries Out First Death Penalty In Nine Months*, Independent.com (January 16, 2015), <https://www.washingtonpost.com/news/post->

nation/wp/2014/05/02/what-it-was-like-watching-the-botched-oklahoma-execution/?utm_term=.cb62695258e8 (last visited January 17, 2018).

12. Kenneth Williams was “coughing, convulsing, lurching, [and] jerking” during what was described as a “horrifying” execution in Arkansas. Midazolam was used for that execution. Phil McCausland, *Arkansas Execution of Kenneth Williams ‘Horrifying’: Lawyer*, nbcnews.com (April 27, 2017), <https://www.nbcnews.com/storyline/lethal-injection/arkansas-executes-kenneth-williams-4th-lethal-injection-week-n752086> (last visited January 17, 2018).

13. Executions in Ohio also reveal evidence that midazolam is not an appropriate drug for use in lethal injections. Gary Otte was executed in Ohio on September 13, 2017. Witnesses observed that Otte’s stomach moved abnormally and that he was crying – both signs that he was sensate. Eric Heisig, *Attorney For Executed Parma Murderer Says She Believes Inmate Suffered Pain During Lethal Injection*, cleveland.com (September 13, 2017), http://www.cleveland.com/metro/index.ssf/2017/09/attorney_for_executed_parma_mu.html (last visited January 17, 2018).

14. Where Tennessee’s own advisor admits that midazolam does not prevent an inmate from feeling the horrendous pain of the paralytic and potassium chloride, and where recent experience in several states confirms that midazolam does not, in fact, prevent an inmate from feeling pain, petitioners have a serious challenge to Tennessee’s brand new lethal injection protocol that must be carefully examined and reviewed by the chancery court and on appeal.

15. Given the State's adoption of a new lethal injection protocol just last week, this Court should not set any execution dates. Mr. Miller and others intend to challenge the new protocol in chancery court. Mr. Miller requires some amount of time to consult with experts and prepare his legal arguments. Mr. Miller requests the time necessary to investigate, draft, and file such an important challenge, a period Mr. Miller estimates at no less than thirty days. Respectfully, thirty days seems to be a reasonable amount of time given the circumstances and the complex science and medicine involved.

16. As with the previous *West* litigation, this Court should establish an expedited schedule for the litigation in this case similar to that in the previous *West* litigation, *e.g.*, order the chancery court to commence a trial within 120 days of the filing of the new legal challenge, to conclude the trial within 30 days, and to issue a final order within 30 days thereafter. *West v. Schofield*, No. M2014-00320-SC-R11-CV (Tenn. Mar. 10, 2015)(per curiam)(Exhibit 11.)

CONCLUSION

Wherefore, David Earl Miller respectfully responds to the Notice filed on behalf of the State of Tennessee on January 11, 2018, and urges this Court to refrain from scheduling a new execution date because the State of Tennessee has adopted an entirely new and untested lethal injection protocol which Mr. Miller intends to challenge.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

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Designation of Attorney of Record

Dana Hansen Chavis is Mr. Miller's attorney of record upon whom service shall be made. Counsel's contact information is:

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² Undersigned attorney of record prefers to be notified of any orders or opinions of the Court by email to the following email addresses: Dana_Hansen@fd.org, Stephen_Ferrell@fd.org, Susanne_Bales@fd.org and Bridget_Stucky@fd.org.

CERTIFICATE OF SERVICE

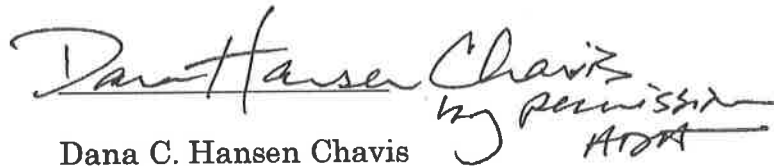
I hereby certify that a copy of the foregoing document is being delivered to the Court via Fed-Ex for delivery on January 18, 2018, and via email and U.S. Mail, first-class to:

HERBERT H. SLATTERY III
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this the 18th day of January, 2018.


Dana C. Hansen Chavis

IN THE CHANCERY COURT OF THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

ABU-ALI ABDUR'RAHMAN, et al.,

Plaintiffs,

V.

TONY PARKER, et al.,

Defendants.

2018 MAY 21 AM 10:25

CLERK OF COURT
DAVIDSON CO. CHANCERY CT

No. 18-183-III D.C. & M.

AFFIDAVIT OF DEFENDANT COMMISSIONER TONY C. PARKER

Comes now the affiant, Tony C. Parker, Commissioner of the Tennessee Department of Correction, who after being duly sworn, states as follows:

1. My name is Tony C. Parker and I am over the age of eighteen (18) and competent to make the statements contained in this affidavit.

2. I was appointed Commissioner of the Tennessee Department of Correction ("TDOC") by Governor Bill Haslam in June of 2016.

3. I oversee over 5,000 TDOC employees, operate 14 prisons 24 hours a day, 7 days a week, and am in charge of the incarceration and efforts to rehabilitate over 86,000 felony offenders.

4. As Commissioner, I approved the January 8, 2018, Tennessee Lethal Injection Execution Manual, Execution Procedures for Lethal Injection ("Lethal Injection Procedures") because the drug pentobarbital and chemicals to compound pentobarbital, the drug in TDOC's previous procedures, are unavailable to TDOC for the purpose of carrying out executions by lethal injection.

5. My counsel in this case have advised me the Plaintiffs have served a notice to take my deposition on Tuesday, May 22, 2018, at 10:00 a.m. at the Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee [37203].

6. I was absent from the Office the entire week of May 14-18, 2018, and have just returned on Monday, May 21, 2018.

7. At this time I have a prior commitment at the time of the scheduled deposition.

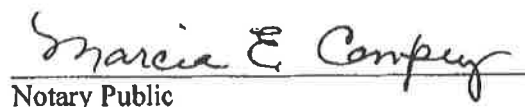
8. In the event it is necessary to take my deposition in this case, I am requesting that it be re-scheduled to a date and time which is mutually convenient for the parties.



Tony C. Parker, Commissioner
Tennessee Department of Correction

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

SWORN TO AND SUBSCRIBED before me this 21st day of May, 2018.



Notary Public


My Commission Expires: 3-8-2021



CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Respondent's Appendix was forwarded by United States mail, first-class postage prepaid, and by email on the 20th day of November, 2018, to the following:

Stephen M. Kissinger
Asst. Federal Community Defender
800 S. Gay Street, Suite 2400
Knoxville, TN 37929



JENNIFER L. SMITH
Associate Solicitor General