

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,

Plaintiff

v.

GAYLE RAY, in her official capacity as
Tennessee's Commissioner of
Correction, et al

Defendants

No. 10-1675-I

DEATH PENALTY CASE

EXECUTION SCHEDULED:

November 30, 2010

MOTION *IN LIMINE*

Comes the Plaintiff, Stephen Michael West, and moves this Court for an order *in limine* preventing Feng Li, M.D., J.D., Ph.D., from offering any testimony regarding and/or referring to:

1. The state of consciousness at the time of death of Robert Glen Coe, Phillip Workman, Steven Henley, and/or any other inmate executed under any three-drug protocols;
2. The state of consciousness of any person at a given serum sodium thiopental concentration;
3. The state of consciousness of any person after being administered a particular dose and/or amount of sodium thiopental;
4. The distribution in the human body of a living subject of sodium thiopental following bolus injection of that drug;
5. The post-mortem distribution of sodium thiopental following bolus injection of that drug; and,
6. Until such time as the admissibility of the writings and/or opinions of any other

alleged expert in the field of anaesthesiology has been established, said writings and/or opinions.

IN SUPPORT HEREOF, Mr. West would show to the court as follows:

Memorandum of Law

The State of Tennessee has filed notice that it intends to offer Feng Li, M.D., J.D., Ph.D., as an expert to testify concerning the critical issue of whether Mr. West will be sufficiently anesthetized so that he will not feel or be aware of the fact that he is being suffocated and administered a severely painful injection during his execution. Dr. Li is not qualified as an expert in the field of anaesthesiology nor any other related field.

Moreover, Dr. Li's opinion is not based upon his own training, experience and expertise in the subject matter, but, rather, he merely acts as a vehicle for the introduction of the hearsay opinions of Dr. Mark Dershwitz, while insulating Dr. Dershwitz' opinions from the rigors of cross-examination. Finally, the opinions of Dr. Dershwitz (published only in the form of a law journal article and never submitted for medical and/or scientific peer review) were originally prepared for the purpose of litigation and are thus devoid of reliability. *See McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265 (Tenn. 1997)(“A Tennessee trial court may consider in determining reliability: . . . whether the evidence has been subjected to peer review or publication; . . . and . . . whether the expert's research in the field has been conducted independent of litigation.”)

Rule 702 of the Tennessee Rules of Evidence provides that “[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.” TENN. R. EVID. 702

(emphasis added). He received a general M.D. from Zhejiang Medical University in Hangzhou P.R., in the People's Republic of China in 1983. He received a Masters of Science in Pathophysiology from the Second Medical College of PLA in Shanghai, P.R. in the People's Republic of China in 1986. He received his Ph.D. in 1992 from the University of Louisville, School of Medicine. His experience and employment is in forensic pathology. It is not in anaesthesiology nor any field related to anaesthesiology.

Dr. Li's resume indicates he has absolutely no training or experience in anaesthesiology or the post-mortem properties of anesthetics. In over 22 years of publications, he has never published an article in the field of anaesthesiology or the post-mortem properties of anesthetics. He has never worked or researched in the field of anaesthesiology or the post-mortem properties of anesthetics. In short, nothing in Dr. Li's background qualifies him as an expert in the field of anaesthesiology or the post-mortem properties of anesthetics. His qualifications do not authorize him to give an informed opinion on the subject at issue in this case. *State v. Stevens*, 78 S.W.2d 817, 835 (Tenn. 2002).

Dr. Li, however, repeatedly asserts in his affidavit that the sodium thiopental levels obtained from executed Tennessee inmates "does not accurately reflect actual blood levels during or soon after the execution," and that the use of five grams of sodium thiopental, "which is many times more than the dosages normally administered as part of surgical anaesthesia" would cause unconsciousness. Li Affidavit at ¶¶ 5, 7, and 9. Dr. Li, however, has no training in anaesthesia, much less any experience in administering anaesthesia in a clinical setting. He has no training, experience, or expertise in the distribution of thiopental either before or after death.

Instead, Dr. Li offers his affidavit after reading four items. Li Affidavit at ¶11. The first

two are affidavits of anesthesiologist David Lubarsky which directly contradict Dr. Li's claims. The third source is *Winek's Drug and Chemical Blood Level Data* and the fourth, Randall C. Baselt, *Disposition of Toxic Chemicals in Man* (7th Ed.), are medical treatises containing and discussing, respectively, therapeutic and lethal values of drugs. The fifth item is a law journal article written by anesthesiologist Mark Dershwitz. The conclusions from that law journal article are parroted in Dr. Li's affidavit.

Though not yet addressed by Tennessee courts, the attempt to introduce hearsay expert opinions in a particular field through the conduit of a witness who lacks an independent expertise in that field has been universally condemned.¹ As stated in *Plourde v. Gladstone*, 190 F.Supp.2d 708 (D.Vt. 2002) (excluding proposed expert testimony):

Moreover, it is unclear the extent to which Drs. Cottrell, Sawyer, Genereaux and Durand will be subject to cross-examination on their medical opinions in open court. If those doctors are not made available at trial, Dr. Simon's opinion really amounts to nothing more than inadmissible "hearsay in disguise" under Rule 703. See *Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 719, 721-22 (6th Cir. 1999) (Suhrheinrich, C.J., concurring in part and dissenting in part) (*citing* 29 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure: Evidence § 6273 (1997) ("Rule 703 does not authorize admitting hearsay on the pretense that it is the basis for expert opinion when, in fact, the expert adds nothing to the out-of-court statements other than transmitting them to the jury. In such a case, Rule 703 is simply inapplicable and the usual rules regulating the admissibility of evidence control.")); *United States v. Burt*, 76 F.3d 1064, 1068-69 (9th Cir. 1996); *United States v. Johnson*, 54 F.3d 1150, 1157 (4th Cir. 1995); *Law v. Nat'l Collegiate Athletic Assoc.*, 185 F.R.D. 324, 341 (D.Kan. 1999) ("The NCAA basically presented [the expert] as a channeler, seeking to present non-expert,

¹In Tennessee, the courts have been even more hostile to the consideration of scientific evidence being offered by means other than the testimony of its author or a witness qualified to express the same opinions. Unlike the federal rules, which allow the introduction of learned treatises (which Dr. Dershwitz' law journal article is not) under 803(18), Tennessee Rules of Evidence do not. As, the Advisory Commission Comment to the reserved subsection of Tenn. R. Evid. 803(18) states, "No good reason exists to permit hearsay to be taken as true just because it is written in books."

otherwise inadmissible hearsay through the mouth of an economist.”); *State v. Towne*, 142 Vt. 241, 246, 453 A.2d 1133 (1982) (a testifying physician may not act as a mere “conduit” for another physician's opinion); *Dupona v. Benny*, 130 Vt. 281, 287, 291 A.2d 404 (1972) (“By his own admission [the proffered expert] was not an expert in the field of brain injury [and] he merely stated the conclusions of the doctors to whom he had sent the patient. Such testimony was not as to any conclusion of his own, for admittedly his training gave him no basis for coming to such conclusions.”).

Plourde v. Gladstone, 190 F.Supp.2d at 720-21 (emphasis added).

Here, Dr. Li's affidavit does nothing but relay the untested assertions of Dr. Dershwitz. As such, his testimony should be excluded as impermissible hearsay. The importance of Mr. West being allowed to cross-examine Dr. Dershwitz, if his opinions are going to be considered, cannot be overstated. Dr. Dershwitz has consistently refused to submit himself to full cross-examination by refusing to answer questions probative of his bias. He has undertaken actions which are consistent with a bias so great as to influence his professional judgment, such as attempting to change public records regarding the extent of his input into the creation of Tennessee's current three-drug protocol. He has issued opinions which deserve examination in light of the evidence in this case and in light of the growing evidence that he is incorrect. Dr. Li cannot shield Dr. Dershwitz from cross-examination by repeating these scientifically unsound theories for this Court's ears. *Id.*

Moreover, Dr. Dershwitz's opinions are of questionable admissibility, even if he took the stand and expressed them himself. First, they have never been submitted for peer-review, or if they have, they have been rejected during the process and they have never been generally accepted by the scientific community. A law journal is not peer-reviewed by medical experts. *See, Harbison v. Bell*, Case No. 3:06-CV-1206, Transcript September 7, 2007, p.844-45

(M.D.Tenn.).² Moreover, now that Dr. Dershwitz has placed his theories in the public realm they will not be accepted for peer review and thus subjected to the scrutiny of the medical community.³ When a scientific opinion is uttered without the benefit of peer review, its reliability for the purposes of Rule 702 is suspect. *McDaniel*, 955 at 265.

Second, Dr. Dershwitz' opinions were formulated for the purpose of litigation. He has been the primary medical professional assisting and advising States across the country about their respective lethal injection protocols. He assisted Tennessee in formulating its current protocol. His law journal article rehashes (to the point of including the same charts and graphs) the testimony he offered as a paid expert for the Defendants in *Harbison*. Dr. Dershwitz' theories were not created independent of litigation and therefore lack trustworthiness. *See* TENN. R. EVID. 702, Advisory Commission Comments (2001).

The Tennessee Supreme Court stated that "[d]ecisions 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 v. Ray*, No.

²[Dr. Dershwitz:] The first place that we believe it's going to be published is actually a law review journal that is conducting or holding a symposium in the spring, at which both of us are going to speak.

* * *

Q. Dr. Dershwitz, are law review journals peer reviewed by anesthesiologists?

A. I actually don't even know if that particular law journal is peer reviewed by anyone.

³Peer review and publication involves two separate issues: (1) whether key parts of the expert's argument have been subjected to peer review in the sense that articles supporting the opinion can be found in the peer reviewed literature, and (2) whether the particular expert has published the argument in the peer reviewed literature. David L. Faigman, Michael J. Saks, Joseph Sanders, Edward K. Cheng, *Modern Scientific Evidence: The Law and Science of Expert Testimony*, Vol. 3 § 22:12, p. 150-51 (Thomson West 2008-2009).

M2010-02275-SC-R11-CV, order p. 2 (Nov. 6, 2010). Yet, Defendants have chosen to utilize Dr. Li as an expert in this case although he is unqualified in the field of anesthesiology and cannot contribute to the process contemplated by the Tennessee Supreme Court. Dr. Li is unqualified to explain the principles and methodology underlying the science of anesthesiology and the postmortem properties of anesthetic drugs; principles central to this case. *See McDaniel*, 955 S.W.2d at 258 (discussing TENN. R. EVID. 703). Dr. Li's background and qualifications do not make him able to "substantially assist" this Court in determining the issues in this case. Instead, Dr. Li's affidavit merely repeats Dr. Dershwitz' opinion; as such it is inadmissible hearsay. Defendants have proposed Dr. Li's testimony, in lieu of Dr. Dershwitz's testimony or any qualified expert's testimony. This circumvents the crucible of adversarial testing. The law does not allow that. Equity does not allow it. An Order *in Limine* should issue.

WHEREFORE, Mr. West respectfully requests the Court to enter an order *in limine* preventing Feng Li, M.D., J.D., Ph.D., from offering any testimony regarding and/or referring to:

1. The state of consciousness at the time of death of Robert Glen Coe, Phillip Workman, Steven Henley, and/or any other inmate executed under any three-drug protocols;
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that drug; and,

6. Until such time as the admissibility of the writings and/or opinions of any other alleged expert in the field of anaesthesiology has been established, said writings and/or opinions.

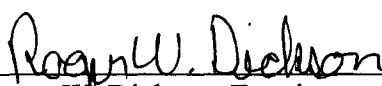
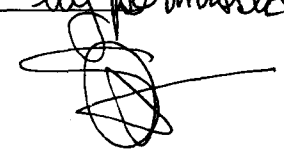
Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen M. Kissinger, hereby certify that a true and correct copy of the foregoing document was emailed and forwarded by facsimile to:

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this the 15th day of November, 2010.



Stephen M. Kissinger