

Attorneys predict court won't release executioners' names

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The execution chamber at Riverbend Maximum Security Institution in Nashville (Photo: Jae S. Lee / The Tennessean)

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They are three women and two men. Three are appointees of a Democratic governor; two were handpicked by Republican Gov. Bill Haslam. The most senior member has served since 2005; the newest joined the bench in September.

Those five members of the Tennessee Supreme Court are charged with deciding whether to release, on a limited basis, the names of people involved in executions in the Volunteer State.

No one knows how the court will come down on the issue. But The Tennessean asked attorneys who have worked with or closely watched the court to analyze the issues in the case and predict how the justices might rule.

Attorney Mark Fulks has argued about 45 cases before the court, most of those during his 12-year stint with the state



attorney general's office. Last year, he was considered as a selection for state attorney general. He now practices financial, commercial and appellate court law with Baker, Donelson, Bearman, Caldwell & Berkowitz in Johnson City.

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Tennessee Supreme Court to debate execution secrecy today

He predicted the court would consider two issues. First, whether the names of the execution team are relevant in a Davidson County Chancery Court challenge in which inmates are alleging the state's lethal injection protocols are unconstitutional.

"I think it's entirely conceivable they'll say the actual names are not relevant and shouldn't be disclosed," Fulks said. "I think that's probably the way they'll go."

He said knowing the names of the execution team does not affect whether the participants are qualified or whether the process is flawed.

But if the court rules in favor of the inmates and releases the information, Fulks said, the justices will face the second issue: Whether a 2013 law exempting such information from public disclosure also exempts the information from release in trial court proceedings.

If the court gets to that issue, Fulks predicted the Supreme Court would uphold an appeals court ruling that said the statute does not apply in discovery proceedings, and the names should be released.

Discovery is a legal term for sharing information and evidence in court cases. That is the process the inmates are going through in chancery court that has sparked the appeal and debate whether to release the names of the executioners and suppliers of lethal injection drugs.

"I think the Court of Appeals ruled correctly and the state hasn't provided any real grounds for the statute to be construed any differently" than it is written, Fulks said. "It may very well be that the legislature intended to keep that information out of discovery practice, but the language they enacted did not do it."

Privacy, safety concerns

Nashville attorney David Raybin's law firm runs a blog that predicts the outcome of cases before the Supreme Court. He predicted the court will order disclosure of information related to the drug suppliers, but not the executioners.

A protective order in the chancery court case says information can only be released to attorneys and experts.

"If it's not going to be publicly disclosed, you have less of a harm issue there," he said. "I still think the court will require the disclosure of that. If it's under a protective order, it wouldn't have any direct harm to the companies."

But when it comes to names of individual executioners, Raybin said he expected the court to withhold that information. He said there are other ways to make sure a person is qualified without knowing their names.

The state has offered to give the inmates' attorneys medical license and employment history information, for example

"I think the potential for harm is significant and could potentially go on for years," Raybin said. "It's not only a privacy interest that I think is a concern here. I think it is a safety issue."

Reach Stacey Barchenger at 615-726-8968 and on Twitter [@sbarchenger](https://twitter.com/sbarchenger).

Who are the justices on Tennessee's highest court?



- Sharon G. Lee, 61, of Knoxville, served from 2004 to 2008 as a judge on the eastern section of the state appeals court. Gov. Phil Bredesen appointed her to the Supreme Court in October 2008, and she became chief justice this year.
- Cornelia A. Clark, 64, of Franklin, was a circuit judge for 11 years before becoming director of the Tennessee Administrative Office of the Courts. She worked there six years before Bredesen appointed her to the Supreme Court in September 2005.
- Gary R. Wade, 66, of Knox County, was appointed to the Tennessee Court of Criminal Appeals in 1987. He served the bench there until 2006, when Bredesen appointed him to the Supreme Court.
- Jeffrey S. Bivins, 54, of Kingsport, was appointed to the criminal appeals court in August 2011 by Gov. Bill Haslam. Haslam appointed Bivins to the Supreme Court in July.
- Holly M. Kirby, 57, of Memphis, was appointed to the Court of Appeals in 1995. Haslam appointed her to the Supreme Court, and she was sworn in in September.

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