CAPITAL CASE
EXECUTION DATE 5/09/2007 1:00 a.m.

No. A-06-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2006

PHILIP WORKMAN,

Petitioner,

v.

GOVERNOR PHIL BREDESEN, *et al.,*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR STAY OF EXECUTION

Kelley J. Henry
Gretchen L. Swift
Office of the Federal Public Defender
for the Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
FAX (615)736-5265

CAPITAL CASE
EXECUTION DATE 5/09/2007 1:00 a.m.

Philip Workman comes to this Court to request that this Court stay his execution, currently scheduled to proceed at 1:00 a.m. tomorrow, because a Sixth Circuit panel vacated a TRO that it had no jurisdiction to vacate, in which it determined that Mr. Workman had unduly delayed the filing of his 42 U.S.C. § 1983 complaint challenging the constitutionality of Tennessee's new lethal injection protocol – *which was promulgated only eight days ago*. Having precluded Workman from ever challenging a protocol which has just come into existence, the Sixth Circuit has ignored settled Article III principles which establish – without question – that one cannot unduly delay filing a complaint when one files immediately after the complaint becomes ripe. This Court should grant a stay of execution pending the disposition of the accompanying petition for writ of certiorari, reverse the judgment below, and remand for further proceedings.

I.
The TRO Is Not An Appealable Order:
This Court Should Grant A Stay Of Execution, Reverse The Sixth Circuit,
And Order Respondents' Appeal Dismissed For Lack Of Jurisdiction

This Court has established that TROs are, as a general matter, not appealable orders. See e.g., Office of Personnel Management v. AFL-CIO, 473 U.S. 1301 (1985)(Burger, J.). The exceptions to the appealability rule includes whether a TRO extends beyond the 10-day limit of Fed.R.Civ.P. 65 (Sampson v. Murray, 415 U.S. 61, 86-87 n. 58 (1974)), or if the TRO fails to maintain the *status quo* – either by ordering action, or by allowing irremediable harm to occur. The District Court's TRO did no such thing. The Sixth Circuit asserted that because the State had chosen to execute Workman on May 9, the state would suffer such harm. As Judge Cole noted in dissent below, such harm is not "irretrievable" because, under the TRO, the state would not be barred from executing Workman shortly after May 9, following the preliminary injunction hearing. Moreover, where it is clear that

Respondents knowingly created the time trap in this case – giving Workman slightly over 8 days to seek federal relief on his newly-ripe complaint – Respondents can hardly complain now that it was inequitable for the District Court to enter a TRO, especially where the Governor has made clear that "the administration of the death penalty in a constitutional and appropriate manner is a responsibility of the highest importance" in Tennessee.

Significantly, while the panel's actions fly in the face of the clear jurisprudence of this Court regarding the appealability of TROs, the panel's decision denigrates the authority of District Court Judges to enter status quo TROs, a duty which they – not appeals courts – are given, and which they exercise on a regular basis. This Court should grant a stay of execution, grant certiorari, and vacate the panel's decision for lack of jurisdiction.

II.
Workman's Complaint Cannot Be Untimely:
It Just Became Ripe Eight Days Ago, His Administrative Grievance Was Timely,
And His Grievance Was Denied On The Merits, Not For Undue Delay:
Given The Sixth Circuit's Failure To Apply Fundamental Article III Principles,
This Court Should Grant A Stay Of Execution, Including Pending *Panetti*

Even the Appellants have recognized that Workman could not have challenged the April 30, 2007 protocol before April 30, 2007. This only makes sense. Indeed, Respondents elsewhere properly asserted that, under Article III, any challenges to pre-February 1, 2007 protocols mooted by the Governor's Executive Order #43, because that order revoked all prior protocols. Harbison v. Little, M.D.Tenn. No. 3:06-1206, R. 34, p.1; Payne v. Little, M.D.Tenn.No. 3:06-0825, R. 10. Respondents also acknowledged that any potential challenges to the as-yet-promulgated April 30, 2007 Protocol were not ripe under Article III until the 2007 Protocol was actually promulgated. Harbison, *supra*, R. 40, p. 5.

So how can it possibly be that Workman's May 4 complaint was unduly delayed? He was given 7 days to file a grievance under Tennessee Department of Corrections Policies #501.01.VI.C.1. He filed a timely grievance within two days. The Commissioner denied the grievance on the merits, not for being untimely or unduly delayed. Workman filed his federal complaint two more days later – a total of four days after his complaint became justiciable under Article III. The panel's assertion of undue delay ignores Article III's ripeness and standing requirements. Quite simply Workman did not have a ripe challenge to the April 30, 2007 Protocol until April 30, 2007: He did not unduly delay.

Yet the Sixth Circuit seemed to think that for Workman to be able to present his currently justiciable lawsuit, he was under some sort of obligation to have raised in the past challenges to prior protocols which no longer exist. Article III demands no such thing. Indeed, even if Workman had filed a lawsuit at any time before February 30, 2007, any such case would have been dismissed as moot – whether by the dissipation of imminent harm (Anderson v. Green, 513 U.S. 557 (1995)), or by the mooting of all pre-February 1, 2007 lawsuits by Executive Order #43.

At bottom, the Sixth Circuit and Respondents have closed the courthouse doors to Workman's newly-ripe Article III case-or-controversy because he failed to file nonjusticiable lawsuits challenging no-longer-existing protocols at some unspecified point in the past. The plain fact is: As of February 1, 2007, Workman could not have obtained or secured relief regarding the pre-April 30, 2007 protocols. He is entitled to litigate his newly-ripe complaint. There is no delay whatsoever.

The Sixth Circuit has made the very same error which is a subject of this Court's current review in Panetti v. Quarterman, U.S.No. 06-6407, where one of the questions posed by this Court

is whether Panetti will be barred from presenting his newly-ripe habeas claim because he failed in the past to raise a similar non-ripe claim in a prior lawsuit. This case and *Panetti* are on all fours on this account. Article III dictates that Panetti should win, because, as Justice Scalia stated at argument, there is "good reason to say you shouldn't bring something that isn't ripe" or moot, for that matter. And because Panetti wins, so must Workman. Article III demands this: Article III cannot penalize plaintiffs for filing a justiciable lawsuit when it becomes ripe. This Court should stay execution in this case pending the outcome in *Panetti*.

Finally, the finding of undue delay is untenable for two additional reasons: (1) the administrative decision did not clearly and expressly rely on "undue delay" or untimeliness as a grounds for relief, and therefore Workman's federal action cannot be barred on that basis. Cf. Harris v. Reed, 489 U.S. 255 (1989); and (2) Respondents waived any "undue delay" argument by withholding that argument in the administrative process thereby undermining the critical exhaustion requirement of the PLRA, 42 U.S.C. §1997e (See Woodford v. Ngo, 548 U.S. ___ (2006)) and by withholding that argument from the District Court during the TRO hearing.

Given all these considerations, this Court should grant a stay of execution and reverse the Sixth Circuit on the issue of undue delay and/or grant the stay of execution pending the upcoming decision in *Panetti*.

III.
This Court Should Grant A Stay Of Execution Because Workman Has Made A *Prima Facie* Showing That He Is Likely To Succeed On The Merits Of Challenge To The April 30, 2007 Protocol, And The Sixth Circuit's Contrary Conclusion Is Unsustainable

The Sixth Circuit's decision is fundamentally flawed on the question whether the District Court properly granted a TRO on his complaint. Workman can establish a likelihood of success on

the merits of his challenge to the new protocol. Contrary to the panel's assertions, he can obtain relief. Indeed, the record before the District Court in the TRO proceedings demonstrates that the new protocol chose thiopental as the anesthetizing agent despite known risks that it wouldn't work; there is evidence that prior use of thiopental in Tennessee did not provide adequate anaesthesia; there is no training of those who prepare and administer the thiopental; there is no proper monitoring of the inmate during any execution; and critically, there is no monitoring of anaesthetic depth. Where the second and third chemicals administered under the April 30, 2007 protocol – pancuronium bromide and potassium chloride – will cause conscious torture when administered without adequate anaesthesia, Workman certainly faces the prospect of torture, exactly as found by the District Court in issuing the TRO.

In fact, this Court has previously upheld a similar injunctive order where the plaintiff made similar allegations to those presented by Workman. See Crawford v. Taylor, 546 U.S. 1161 (2006). Moreover, other federal courts have likewise granted temporary and/or permanent relief under similar circumstances to those presented in Workman's complaint. See e.g., Morales v. Tilton, 465 F.Supp.2d 972 (N.D.Cal. 2006); Brown v. Beck, 2006 U.S.Dist.Lexis 60084 (E.D.N.C. 2006). Under these circumstances, the Sixth Circuit improperly vacated the TRO, especially where the Sixth Circuit essentially engaged in appellate factfinding, which was the proper province of the District Court in this matter. See Workman v. Bredesen, ___ F.3d ___ (6th Cir. 2007)

CONCLUSION

This Court should grant a stay of execution pending the disposition of Workman's petition for writ of certiorari. This Court should grant a stay of execution pending the upcoming decision in *Panetti*. This Court should grant the petition for writ of certiorari and reverse, either holding that

the Sixth Circuit lacked jurisdiction to review the TRO or finding that the court of appeals' reversal of the TRO was improper because, under Article III, Workman did not – and could not – unduly delay in filing his newly ripe lawsuit, and the District Court's TRO did not constitute an abuse of discretion under the circumstances, given the voluminous evidence in the District Court showing the validity of Workman's complaints about the new April 30, 2007 Protocol.

Respectfully submitted,

Kelley J. Henry
Gretchen L. Swift
Assistant Federal Public Defenders
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
FAX (615)736-5265

CERTIFICATE OF SERVICE

I certify that a copy of this Petition was served by e-mail on Mark Hudson, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243 this 8th day of May 2007.