CAPITAL CASE
EXECUTION DATE 5/09/2007 1:00 a.m.
No. 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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For the first time in this country, a State intends to execute a death row prisoner in accordance with an eight day old execution protocol which is subject to attack in a 288 paragraph complaint supported by two volumes of evidence which the District Court found established a foreseeable and likely risk that the inmate will suffer gratuitous torture at the hands of Respondents' unskilled and uncredentialed agents. The protocol, which was drafted in secret, has been shown to be utterly void of necessary safeguards to protect the constitutional rights of the citizens who will be subjected to it.

When Respondents finally disclosed their brand-new protocol, Petitioner, Philip Workman, immediately exhausted his administrative remedies, which were denied on the merits, and proceeded to file a complaint just four days after receiving notice of the harm that is about to befall him. In do doing so, Petitioner provided the District Court with a fifty-five page Memorandum, two volumes of exhibits, (including a twenty-three page declaration from the country's top medical expert on lethal injection and the statements of the lethal injection creator, Dr. Jay Chapman, who admits that his concoction should be revised), oral argument, and an extensive complaint specific to the failures of the brand new protocol. The District Court pursuant to Article III and Fed. R.Civ. P. 65 issued a ten-day Temporary Restraining Order and scheduled an evidentiary hearing for May 14, 2007, just five days after Mr. Workman's scheduled execution. Despite the fact that Petitioner had previously asked Respondents and the Tennessee Supreme Court to set aside his May 9, 2007 execution date, which the State opposed, Respondents for the first time on appeal claimed that Petitioner's claim was untimely, despite having ruled on the merits in denying Workman's administrative remedies and taking contrary positions in other federal district courts.

Based on Respondents' arguments, the panel majority found that because Workman failed to file a non-justiciable, non-ripe lawsuit to an execution protocol used by the State some time in the past, Workman had unduly delayed in filing his challenge despite recently emerging scientific evidence that the brand new lethal injection protocol as administered by the Respondents carries a known and avoidable risk of torture. This, even though he filed his complaint within hours or exhausting administrative remedies, as he was required to do. The Questions Presented are:

I. As a pre-requisite to filing a later meritorious and ripe challenge to an execution protocol which actually threatens him with imminent harm, is an indigent death-sentenced prisoner with no scientific or medical background required to file a non-justiciable, unripe complaint under 42 U.S.C. §1983 challenging a lethal injection protocol which does not threaten him with imminent harm and can and does change over time at the discretion of the Commissioner of Corrections?

II. A. Where Respondents revoked the existing execution protocol with full

knowledge of Petitioner's scheduled execution and then adopted brand-new protocols just eight days before his scheduled execution on May 9, 2007, and where the Petitioner acted with extraordinary diligence in exhausting his administrative remedies (on the merits) and filed his well-supported, specific and detailed complaint within four days of the new protocol's publication, did the District Court have the authority to issue a Temporary Restraining Order which merely delays an execution for a mere five days in order to hold an evidentiary hearing, after which Petitioner may be executed in seven days if he fails to meet his burden of proof?

B. If the District Court has the authority to issue such an order did the panel majority have jurisdiction to transform the TRO into an injunction where the TRO merely maintained the status quo and did not wreak any irretrievable harm upon the Respondents whose self-proclaimed interest is the constitutional administration of the state's death penalty?

III. Does Petitioner properly state a claim under the Eighth and Fourteenth Amendments that he risks conscious torture, including through deliberate indifference, through application of Respondents' New 2007 Protocol? Did the District Court abuse its discretion granting a TRO and did the Sixth Circuit erroneously conclude otherwise?

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The District Court's opinion granting a Temporary Restraining Order (Appendix 1) is unreported. The Sixth Circuit opinion vacating the District Court's Temporary Restraining Order (Appendix 2) is reported at ___ F.3d ___ (6th Cir. May 8, 2007). The opinion of the Sixth Circuit denying rehearing *en banc* (Appendix 3) is unreported.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion vacating the District Court's Temporary Restraining Order. On May 8, 2007, the Sixth Circuit Court of Appeals denied *en banc* rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that "Cruel and unusual punishments (shall not) be inflicted."

The Fourteenth Amendment to the United States Constitution provides that "No state shall ... deprive any person of life, liberty, or property, without due process of law ...."

42 U.S.C. § 1983 provides that "Every person who, under color of [State law] subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ...."

STATEMENT OF THE CASE

I. On February 1, 2007, Governor Bredesen Mooted All Challenges To The Old Lethal Injection Protocol And Rendered Unripe An Challenges To The New 2007 Protocol

On January 17, 2007, the Tennessee Supreme Court set Philip Workman's execution date for May 9, 2007. On February 1, 2007, Governor Bredesen issued Executive Order No. 43 revoking Tennessee's execution protocol and any related procedures. Governor Bredesen called the old execution protocol a "sloppy" "cut and paste job" that was "full of deficiencies." The Governor directed the Department of Corrections to draw up new protocols no later than May 2, 2007, while

acknowledging that "the administration of the death penalty in a constitutional and appropriate manner is a responsibility of the highest importance." At the time he did so, Governor Bredesen stayed the executions of four death row inmates, three of whom have been on death row for twenty years or longer, the other is a volunteer for execution. Governor Bredesen knew when he issued Execution Order No. 43 that Mr. Workman would have a mere week in which to review and challenge, including through administrative review, the brand new protocol which Respondents devised in secret.

Following the issuance of the Governor's order, Respondents moved expeditiously to dismiss as non-justiciable both of the method of execution lawsuits pending in the Middle District of Tennessee challenging Tennessee's lethal injection protocol and procedures. In both Harbison v. Little (M.D.Tenn. No. 06-1206), and Payne v. Little (M.D.Tenn. No. 06-0825), Respondents filed Motions to Dismiss informing the District Court that both lawsuits were "**moot**, in that there is no longer an actual case or controversy, and, therefore, this Court lacks jurisdiction under Article III of the United States Constitution" given: (1) the Governor's Executive Order; and (2) that execution of those inmates was no longer **"imminent."** (emphasis added). As Respondents explained in *Harbison*, any challenge to the pre-February 1, 2007 protocols or procedures no longer existed because those protocols and procedures no longer existed:

> This action is not ripe for adjudication because the protocols and procedures for executing inmates in Tennessee were revoked by Executive Order No. 43, and no new execution protocols and procedures have been established.

See Harbison v. Little, Defendants' Amended Answer, Feb. 14, 2007. Respondents also made clear that any challenge to the new protocol was not ripe, and thus non-justiciable until the new protocols were actually promulgated.

II. When His Challenge To The New Protocol Ripened, Philip Workman Immediately Exhausted His Administrative Remedies – Which Denied His Claims On The Merits – And He Almost Immediately Filed His Newly-Ripe Challenge In Federal Court

On April 30, 2007, at the close of the business day, the Governor of the State of Tennessee signed off on the newly promulgated execution protocol. Less than forty-eight hours after the new 2007 protocol was approved and within the seven-day window for challenges to a new Department of Corrections policy, Mr. Workman filed an Emergency Grievance objecting to the protocol on numerous constitutional grounds. The grievance was subsequently denied by the Commissioner on the merits on May 4, 2007: "*After careful [review] of all the issues raised, your grievance is denied. The Department's lethal injection protocol meets all Constitutional standards.*"

Also on May 4, 2007, Mr. Workman filed a Motion for Temporary Restraining Order and a 55-page Memorandum In Support, with two volumes of forty-eight exhibits. Within hours, the District Court scheduled a hearing giving both parties an opportunity to present arguments and defenses. Subsequently, the District Court entered a TRO to expire on May 14, 2007 (in ten days) "to preserve its ability to adjudicate the constitutional claims asserted on their merits before Plaintiff is executed" – claims which the Court found demonstrate a likelihood of success on the merits. Respondents appealed the District Court's Order.

III. The Sixth Circuit Assumed Jurisdiction And Vacated The District Court's TRO

Subsequently, a divided panel of the Sixth Circuit vacated the TRO – converting the unappealable TRO into an appealable injunction, while unfairly faulting Workman for not challenging the new 2007 protocol before it ever existed. As Judge Cole found, "it is unfortunate that the majority chooses to foreclose the limited inquiry – an inquiry that does no more than preserve the status quo for a mere five days – that could very well confirm its conclusion that Philip

Workman has nothing to fear from Tennessee's new lethal injection protocol." Workman, slip op. at p.19 (Cole, J. dissenting).

REASONS FOR GRANTING THE WRIT

I. The Panel Opinion Denegrates The Power of Federal District Courts To Grant TROs And Assumes Jurisdiction Where It Does Not Lie: This Court Should Grant Certiorari And Vacate The Panel Opinion Where The Panel Had No Jurisdiction To Vacate The TRO Entered By The District Court

Without question, a ten-day TRO that maintains the *status quo* is not an appealable order. This Court made this clear in Office of Personnel Management v. American Federation of Government Employees, 473 U.S. 1301 (1985), and the Sixth Circuit has followed that clear ruling, see Northeast Ohio Coalition For The Homeless v. Blackwell, 467 F.3d 999 (6th Cir. 2006), until yesterday. The panel majority's opinion directly conflicts with well-settled and prudent jurisprudence and undermines the authority of federal district courts to act in emergency situations. Further, the panel majority opinion invites needless and wasteful appeals of TRO's and essentially eviscerates any distinction between a TRO and a preliminary injunction.

"The purpose of a [TRO] is to preserve an existing situation in *statu quo* until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction. Such an order is necessarily limited to a very brief period . . . A union, for example, may have a perfect right to strike and may have chosen a particular opportune time for doing so. By the issuance of a temporary restraining order a court, without adjudicating the basis right, prohibits the strike." Pan American World Airways, Inc. v. Flight Engineers' International Association, 306 F.2d 840, 842-843 (2nd Cir. 1962). It is the short duration of a TRO (Fed.R.Civ.P. 65(b) requires that TROs be limited to 10 days, as the District Court granted here) and the maintenance of the status quo during a TRO pending

a decision on the merits that make its appealability an impracticality. See Sampson v. Murray, 94 S.Ct. 937, 951(1974); Connell v. Dulien Steel Products, 240 F.2d 414 (5th Cir. 1957); Northeast Ohio Coalition for the Homeless, et al., v. Blackwell, 467 F.3d 999 (6th Cir. 2006).

Courts recognize that preventing an action can have serious consequences, whether by a TRO or a preliminary injunction. This is why Court's have mechanisms in place to protect parties from those consequences. The protection for parties where an injunction is entered is the statutory right to appeal. The protection for cases where a TRO is entered rests in the short duration of a TRO – just 10 days or less. See Sampson v. Murray, 415 U.S. 61, 86 n.58 (1974).

Despite this clear jurisprudence, the panel majority determined that a district court's ten-day TRO "[could] be magically transformed into a preliminary injunction" so that Respondent could appeal. Workman, slip op. at p.2 (Cole, J. dissenting). Essentially, as Judge Cole notes, the panel's ruling "provides grounds for converting every TRO into a preliminary injunction, thereby eviscerating the distinctions between these two procedural devices." Workman, slip op. at p. 3 (Cole, J. dissenting).

But here there is clearly no need for an immediate appeal to challenge the District Court's interlocutory order. The TRO is of short duration and simply maintains the status quo. There is nothing special about May 9, 2007 – the day that the Tennessee Supreme Court chose for Mr. Workman's execution. Indeed, the very fact that Mr. Workman has been on death row for 25 years makes Respondents' argument that it has an irretrievable interest in executing Mr. Workman this week absurd. Put differently, even if injunction is denied, Mr. Workman will be just as executable on May 14 as he is on May 9, and the fact that the execution takes place a few days later does not harm the state at all. Respondents just don't want to delay Mr. Workman's execution, even if just

for 5 more days.[1]

As Judge Cole points out, this is not an adequate reason for the appellate court to usurp jurisdiction. Indeed, "If an interest in avoiding any delay, no matter how brief, is a legitimate consideration in determining whether a TRO is substantively a preliminary injunction, then TRO's could always be characterized as preliminary injunctions." Workman, slip op. at p.4 (Cole, J. dissenting). The precedent set by this panel invites needless, expensive, and wasteful use of scare judicial resources. It encourages piecemeal litigation and results in appeals being decided on undeveloped records. And, it limits the usefulness of the well-established TRO process by forcing litigants to develop a record at the TRO stage, which will further consume limited judicial resources.

It is because the District Court has the distinct advantage in assessing the facts and because the time line is almost always too short for the appellate court to second guess the district court (who was in a better position to view the evidence anyway) that this Court and the courts of appeals have taken the well-reasoned approach that TRO's are unappealable out of deference to the role and authority of the district court. As Judge Cole noted here, the District Court had "the benefit of, namely, the parties themselves," and was able to "engage[] [them] with the difficult questions," to

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[1]It must be stressed that Respondents singled Workman out for this truncated time table. Respondent Governor Bredesen had no problem staying the executions of three death row inmates who are similarly situated to Mr. Workman. While Respondents make much of Mr. Workman's five previous stays of execution, they fail to accept responsibility for their actions which led to the five stays. Further, one of those stays came from Respondent himself when he had to deal with the political fallout related to the fact that the State's medical examiner had been indicted for wrapping himself up in barbed wire and strapping a live bomb to his chest, endangering the lives of ATF agents, in an effort to deflect attention away from his perjured testimony in Workman's case. This is a truly unusual case. The five previous stays were due to serious questions surrounding Mr. Workman's guilt of the crime and Respondents misconduct in court proceedings seek to lethally inject him. "[T]he petitioner has raised serious questions concerning his eligibility for the death penalty." In Re: Philip Workman, 432 U.S. 954 (2001)(Stevens, J., opinion respecting the denial of petition for original writ for habeas corpus).

be "thoughtful in his assessment," and "to test their respective positions." Workman, slip op. at p.6 (Cole, J. dissenting). The panel did not have that benefit.

It should be noted that Respondents claim that they are "irretrievably harmed" by the District Court's TRO. If Respondent was truly irretrievably harmed, then it is appealable. See Blackwell, 467 F.3d at 1006. The term is ***irretrievable***, i.e., unable to be remedied in any way whatsoever. Such an order, by definition, alters the *status quo* forever.

As Judge Cole makes clear, that is not the case here. The TRO merely means that Appellants (who are only putative Appellants) cannot use their protocol on Philip Workman on May 9. Should their protocols pass muster at the May 14 preliminary junction hearing, then they can use their protocol on Workman on May 21. This is not "irretrievable" harm. It might be an annoyance to Appellants, but it is only a question of timing. Their desire to execute Workman *now* under their new protocol does not allow the panel to overreach and confer jurisdiction upon itself, when Appellants will be able to do exactly what they want at a later date. See Morales v. Hickman, 415 F.Supp. 1037. 1046 (N.D.Cal. 2006).

In other words, if Respondents can proceed with identical actions in the future, their harm is not "irretrievable." That is exactly the situation here, as it is with almost all TROs. For if mere delay in carrying out one's wishes were sufficient to confer appellate jurisdiction upon this Court, *every TRO would be appealable*. As Judge Cole notes, that simply cannot be true. Workman, slip op. at 3 (Cole, J., dissenting). And it is not true here. Judge Cole's analysis is especially on point:

> The State's interest is in no way *irreparably*, or even seriously undermined. The TRO here does not interfere with the State's conviction of Workman; it does not interfere with the State's ultimate imposition of the death sentence; and it does not indefinitely preclude the State from executing Workman. The TRO does no more than prohibit Workman's execution on May 9, so that the district court may determine – a mere

five days later – whether a preliminary injunction should issue.

Workman, slip op. at 3 (Cole, J., dissenting). Five days after 25 years is *de minimis.*

The Sixth Circuit panel has taken the exceptional action of arrogating appellate jurisdiction which simply does not exist. This unauthorized expansion of appellate jurisdiction sets a most dangerous precedent. This Court should grant certiorari and dismiss for lack of jurisdiction.

II. Just Like The Fifth Circuit's Treatment Of Ford Claims In Panetti v. Quarterman, The Panel's Decision Regarding Undue Delay Ignores Article III Jurisprudence And Effectively Requires Capital Plaintiffs To File Any Challenge To The Method Of Execution Before It Is Ripe And Though It Is Moot

The panel majority's decision wreaks havoc with Article III and creates a brand new requirement that prisoners seeking redress for perceived constitutional harms relating to their conditions of confinement must now file non-justiciable, possibly moot, and certainly unripe challenges to lethal injection protocols that do not threaten them with imminent harm in order to protect their rights to complain of real and imminent harm in the future. Such a ruling is against public policy and will result in the Court receiving voluminous, senseless, needless, and wasteful *pro se* filings. Where this Court is grappling with nearly identical issues in the case of Panetti v. Quarterman, No. 06-6407, at the very least Mr. Workman is entitled to a brief stay while this Court resolves these serious and important questions.

This Court has made clear that there is no Article III jurisdiction unless a plaintiff establishes standing which, in part, requires an "injury in fact," defined as a "distinct and palpable" harm, which is either "actual" (past harm) or "imminent" (future harm). Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). As Chief Justice Rehnquist explained in *Whitmore*, for there to be standing: "A threatened injury *must certainly be impending* to constitute injury in fact." Id. at 158. In addition, under Article

III's ripeness requirement: "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed, may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998). Together, Article III's standing and ripeness requirements make clear that Workman lacked standing and a ripe lawsuit challenging the means by which Respondents now intend to torture him – the 2007 Protocol – until that protocol was promulgated just days ago.

The panel ignored the strictures of Article III's standing and ripeness doctrines finding that instead that Workman forfeited his right to challenge the specifics of the new 2007 protocol because he was under some obligation to make some general challenge to protocols which will not be used upon him at some unspecified time in the past. This makes little sense. What Workman could or couldn't do at some point in the past with a now-revoked protocol is not relevant to the Article III inquiry here.

Respondents themselves have admitted in their filings in other lethal injection lawsuits that until the new 2007 Protocol was promulgated Workman could not have sought federal relief because he lacked a ripe lawsuit under Article III. As they stated in Harbison v. Bell, M.D.Tenn.No. 3:06-cv-1206, before the New 2007 Protocol was promulgated:

> This action is not ripe for adjudication because the protocols and procedures for executing inmates in Tennessee were revoked by Executive Order No. 43, and no new execution protocols and procedures have been established.

Harbison, R. 40, p. 5 (Defendants' Amended Answer)(Feb. 14, 2007). And Respondents went on to emphasize this point, arguing that Harbison's lawsuit should be dismissed because:

> There is no lethal injection protocol currently in effect; thus, there is nothing to litigate. In light of this, the issues presented by the present action are moot, as there is no actual case or controversy, and this Court lacks jurisdiction under Article III of the United States Constitution.

Harbison, R. 35, p. 4 (Memorandum In Support Of Defendants' Motion To Dismiss).[2]

Thus, by their own admission, Respondents admit that Workman could not have raised a challenge to the new 2007 Protocol until April 30, 2007 at the earliest. It was at that point that Workman had both standing and a ripe lawsuit – two Article III prerequisites to this present action. Judge Cole properly recognizes this (*Workman*, slip op. at 15-18, (Cole, J., dissenting)).

Judge Cole also properly recognizes that the panel majority shirks this important consideration by faulting Workman for not filing a suit at some point in the past on which Workman could never have obtained the relief from the imminent harm he faces on May 9, 2007. The fact that Workman may have had a threat of injury in the past does not mean that an Article III court could have even adjudicated any such claim, for once such harm dissipated (as it did in 2003 or 2004), he again lacked a ripe lawsuit for he didn't face imminent execution. See Anderson v. Green, 513 U.S. 557 (1995)(when a prior potential harm in the past dissipates, a claim is no longer ripe or justiciable, and the potential for imminent harm must re-occur before a justiciable controversy exists).

It is the malleability of Tennessee's administration of their execution protocols that is very similar in kind to the litigation of a *Ford* claim. Under Article III, *Ford* claims, much like Workman's claim here, are intrinsically unripe until an execution is scheduled and imminent. See Stewart v. Martinez-Villareal, 523 U.S. 637, 645 (1998)(recognizing that, because Martinez-Villareal's execution 'was not imminent . . . his competency to be executed could not be determined at that time"); Herrera v. Collins, 506 U.S. 390, 406 (1993) (recognizing that "the issue of sanity [for a Ford claim] is properly considered in proximity to the execution"). This Court is considering this

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[2]Respondents repeated this in Payne v. Little, M.D.Tenn. No. 3:06-0825. *Payne*, R. 11, p. 3 (Memorandum In Support Of Defendants' Motion To Dismiss).

precise question in Panetti v. Quarterman, U.S. No. 06-6407: whether Panetti's newly-ripe, *Ford* claim will be barred because he failed in the past to raised a similar non-ripe claim in a prior lawsuit.

As counsel for Scott Panetti have argued in their April 7, 2007 Reply in Panetti v. Quarterman: "The point is conceptual as well as practical. Unlike most constitutional claims, a *Ford* claim is forward-looking (challenging the carrying out of an execution in the near future against an arguably incompetent inmate) rather than backward-looking (challenging the constitutionality of proceedings during the petitioner's earlier trial or appeal). Consequently, it is the setting of an execution date that triggers the cause of action and makes a *Ford* claim ripe. For that reason -- as well as the obvious impracticality of determining future competency long in advance of an execution -- the claim ordinarily cannot be heard until state and federal courts have finally adjudicated all of the petitioner's backward-looking habeas claims . . ." Panetti v. Quarterman, Reply Brief of Petitioner-Appellant, at p.6, n.4 (April 11, 2007).

Just like a *Ford* claim, a Section 1983 lawsuit challenging a particular protocol for lethal injection is a forward-looking rather than a backward-looking claim – it challenges the carrying out of an execution in the near future using an particular and unconstitutional protocol.[3] Thus, just like

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[3] "the *Ford* claim was not ripe at the time counsel filed Mr. Panetti's initial federal petition. The claim would not become ripe for another four years, after the federal courts rejected all of his challenges to his conviction and sentence, and when his execution was scheduled and imminent. Moreover, Texas law does not contemplate the filing of a *Ford* claim until that time. Therefore, counsel would have been unable to exhaust the claim until after the initial federal habeas proceedings had ended and the State sought an execution date. The phrase 'second or successive' in Section 2244(b) is a term of art that is inapplicable to a *Ford* petition filed in these circumstances, under the reasoning of *Stewart v. Martinez-Villareal,* 523 U.S. 637 (1998). The only way the Court could distinguish *Martinez-Villareal* in Mr.

(continued...)

Scott Panetti's claim challenging his competency to be executed under *Ford* could not be ripe prior to his imminent execution, Mr. Workman also could not have a ripe, justiciable challenge to the new 2007 Protocols before those protocols were promulgated or long in advance of his execution. Where Article III thus dictates that Panetti should win, Workman must also win. 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.*

III. The Panel's Decision Is Fundamentally Flawed Where Workman Has Made A *Prima Facie* Showing That He Is Likely To Succeed On The Merits Of His Challenge To The New April 30, 2007 Protocol; The District Court Did Not Abuse Its Discretion

The evidence before the District Court establishes both a real and foreseeable risk that under the New 2007 Protocol, there is an unacceptable quantum of risk that Philip Workman will not be anesthetized and therefore will suffer excruciating pain during his execution. Under the New 2007 Protocol, the thiopental is not mixed by anyone trained in drug compounding or preparation;[4] there is no quality control of the thiopental mixture to insure its true potency (if any);[5] there is no examination of the delivery tubing once the execution begins;[6] the limited visual inspection of the

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[3](...continued)

> Panetti's case would be to adopt a rule that would require every prudent attorney to include a *Ford* claim in a first federal petition in every capital case, only to have it dismissed as premature. Such a rule would be senseless and inefficient, benefitting no one." Panetti, No. 06-6407, Reply Brief of Petitioner-Appellant, at pp.1-2 (April 11, 2007).

[4] R. 2, Mem. In Support Mtn TRO, Exhibit 2, Declaration of Dr. Mark Heath, ¶ 24, p. 7.

[5] Id ¶ 52 (a), p. 15.

[6] Id. ¶ 54 (e), p. 16.

injection site (without physical examination) is inadequate to determine whether the thiopental is actually entering the bloodstream;[7] the quick application of the paralytic pancuronium bromide after the thiopental masks any physical signs of inadequate anesthesia;[8] and there is no effective monitoring of adequate anesthesia.[9] All of these safeguards are critical, for even when 5 grams of thiopental have supposedly been used by other states and in Tennessee's prior protocol, there is clear evidence that inmates have *not* been adequately anesthetized – for any of the number of reasons just described. See e.g., R. 2, Exhibit 2, ¶¶ 40-42.

Despite Workman's complaints, the panel does not look to whether the District Court could conclude that Workman's complaints have substance. Instead, the panel completely ignores Workman's complaints and proclaims *as uncontroverted fact* the Defendants' view of thiopental: "The dose of sodium thiopental . . . quickly anesthetizes the inmate and is sufficient to cause death in the absence of the two additional chemicals in the protocol." *Workman,* slip op. at 9.

Respectfully, ***the crux of the dispute before the District Court is whether administration of thiopental under the 2007 Protocol would, in fact, anesthetize Workman prior to the administration of the other two drugs***. The panel majority just speaks Workman's complaints out of existence. *Ipse dixit.*

Having done so on this most crucial of issues before the District Court, the panel has certainly overstepped its bounds by ignoring Workman's complaints, only to adopt Appellants' contrary view of thiopental. In essence, after having usurped the District Court's power over the

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[7] Id.¶54 (f), p. 17 (botched execution of Florida death row inmate Angel Diaz).

[8] Id. ¶¶ 38-39, pp. 10-11.

[9] Id. ¶¶ 60-63, pp. 20-21.

TRO, the panel has not even engaged in a proper factfinding process, instead deciding the critical disputed facts without a hearing. One can hardly imagine a more troubling determination of the "facts" when the torture of a man is at issue.

The impropriety in the majority's one-sided view of thiopental is even more disturbing when one considers significant scientific and medical evidence which the panel ignored, but which establishes that Workman will be tortured due to inadequate anesthesia. The panel first falsely asserts that Workman can't succeed on his claims about inadequate anaesthesia because "[N]o one alleges that [inadequate anaesthesia has] occurred in Tennessee in the past." *Workman*, slip op. at 24. *That crucial premise is demonstrably false.* Workman's complaint speaks for itself: Robert Coe was inadequately anaesthetized, as shown by his autopsy report, which showed a post-mortem thiopental level of 10ng/ml – well below the level needed for anaesthesia. See R. 6, Complaint, ¶¶ 63, 75(c), 175; Compare Koniaris, R. 2, Exhibit 45.

And while the panel ignores this evidence – which confirms the clear possibility of torture here – the panel then proceeds to ignore the voluminous medical and scientific evidence and literature proffered by Workman to the District Court which also acknowledges the risk of inadequate anaesthesia. Such evidence includes the Declaration of Dr. Mark Heath, M.D.,[10] the United States' Attorney General's consenting to an injunction prohibiting use of the federal government's lethal injection protocol,[11] numerous federal court rulings from throughout the country

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[10] R. 2, Exhibit 2.

[11] Id., Exhibit 10, Roane v. Gonzales, No. 05-2337 (D.C. Dist.), February 16, 2007 Order and Unopposed Motion for Preliminary Injunction.

either enjoining protocols or finding significant problems with them,[12] and scientific and other literature documenting the significant risks of torture posed by Tennessee's New 2007 Protocol.[13] And in fact, the creator of the thiopental-based protocol now questions its efficacy.[14]

Other District Judges presented with similar issues as those presented here have rightly addressed the types of evidence ignored by the panel and found various protocols to be

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[12] Id., Exhibit 13, Morales v. Hickman, 415 F.Supp.2d 1037 (N.D.Cal. 2006); Exhibit 14, Taylor v. Crawford, 2006 U.S. Dist. LEXIS 42949 (W.D.Mo. 2006); Brown v. Beck, 2006 U.S. Dist. LEXIS 60084 (E.D.N.C. April 7, 2006); Exhibit 28, Cooey v. Taft, 430 F.Supp.2d 702 (S.D. Ohio April 28, 2006); Exhibit 29, Nooner v. Norris, No. 06-00110 (E.D. Ark.), June 26, 2006 Order; Exhibit 36, Morales v. Tilton, 465 F.Supp.2d 972 (N.D.Cal. Dec. 15, 2006); Exhibit 37, Jackson v. Taylor, et al., 2006 U.S. Dist. LEXIS 27658 (D.Del May 9, 2006); Exhibit 38, Jackson v. Danberg, 2007 U.S. Dist. LEXIS 12376 (D.Del. 2007); Exhibit 39, Taylor v. Crawford, 2006 U.S. Dist. LEXIS 74896 (W.D.Mo. October 16, 2006); Exhibit 40, Taylor v. Crawford, 2006 U.S. Dist. LEXIS 51008 (W.D.Mo. July 25, 2006); Exhibit 41, Robinson and Thomas v. Beck, No. 07-CVS-001109 (Wake County, NC); Exhibit 42, State v. Holman, No. 97-49226 (Wake County, NC), March 6, 2007; Exhibit 43, Cooey v. Taft, 2006 U.S. Dist. LEXIS 92521 (S.D. Ohio Dec. 21, 2006); Exhibit 44, Cooey v. Taft, 2006 U.S. Dist. LEXIS 85234 (S.D. Ohio Nov. 22, 2006).

[13] See e.g., Id., Exhibit 16, 2000 Report of the AVMA Panel on Euthanasia, 218 J. Am. Veterinary Med. Ass'n 669 (2001); Exhibit 18, Affidavit of Dr. James Ramsey Exhibit 19, Chris Tisch, *Executed Man Takes 34 Minutes To Die*, www.Tampabay.com, December 13, 2006; Exhibit 20, Chris Tisch, *Second Dose Needed To Kill Inmate*, www.Tampabay.com, December 14, 2006; Exhibit 21, Florida Commission Report; Exhibit 22, Declaration of Margo Rocconi, Exhibit 23, Declaration of Dr. Mark Heath (California), Exhibit 24, Execution Log of Manuel Babbit; Exhibit 25m Execution Log of William Bonin; Exhibit 26,; Exhibit 27 Adam Liptak, *Trouble Finding Inmate's Vein Slows Lethal Injection In Ohio*, New York Times, May 3, 2006; Exhibit 30, Bill Simmons, *Stoic Murderer Meets His Fate By Quiet Means*, Arkansas Democrat Gazette, June 26, 1990 at 9A; Exhibit 31, Affidavit of Dr. Mark Heath (Arkansas); Exhibit 32, Sonja Clinesmith, *Moans Pierced Silence During Wait*, Arkansas Democrat Gazette, January 26, 1992 at 1B; Exhibit 33, Ron Fournier, *13 Outsiders View Death Of Rector, Witnesses Listen, Wait Beyond Curtain*, Arkansas Democrat Gazette, January 26, 1992, at 4B; Exhibit 34, Joe Farmer, *Rector, 40, Executed For Officer's Slaying*, Arkansas Democrat Gazette, January 25, 1992, at 9A; Exhibit 35, Andy Gotlieb and Linda Satter, *Hill Dies By Injection for '84 Police Killing*, Arkansas Democrat Gazette, May 8, 1992, at 17A; Exhibit 45, Leonard Koniaris, *Lethal Injection for Execution: Chemical Asphyxiation?*, PLOS Medicine, Vol. 4, Issue 4, April 2007.

[14] *Lethal Injection Creator: Maybe It's Time To Change*, at CNN.com.

unconstitutional – for reasons similar to those raised by Workman in his complaint and relied upon by the District Court in granting the TRO. In Morales v. Tilton, 465 F. Supp. 2d 972 (N.D.Cal. 2006), the Court found that the lack of monitoring for anesthetic depth coupled with the use of pancuronium created, as it does here, "an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment." Id. at 974. The Court found that "the responsibility for this . . . . falls squarely upon Defendants" (Id. at 980) and enjoined use of the protocol unless officials changed to a one-drug protocol (using only sodium thiopental) or they enlisted an anesthesiologist to assist in determining whether the individual was sedated. Id. at 975.

Similarly, the United States District Court for the Western District of Missouri found the lethal injection protocol there unconstitutional and required corrections officials to revise their protocol (which was essentially identical to Tennessee's new protocol). See Taylor v. Crawford, 2006 U.S. Dist. LEXIS 74896 (W.D.Mo. October 16, 2006); Taylor v. Crawford, 2006 U.S. Dist. LEXIS 51008 (W.D.Mo. July 25, 2006)(same). Specifically, the *Taylor* Court said: **"If the proposed three drug protocol is to be used, it is crucial that someone with the appropriate training and experience in monitoring anesthetic depth must be present to ensure that Missouri's executions of its condemned inmates are carried out humanely.**" See Taylor at *2-3 (emphasis added).

In Brown v. Beck, the United States District Court for the Eastern District of North Carolina agreed with both *Morales* and *Taylor* and found that Brown had raised "serious questions" regarding the current North Carolina protocol – specifically "regarding inadequate anesthesia prior to execution." Brown v. Beck, 2006 U.S. Dist. LEXIS 60084, *22 (E.D.N.C. 2006). The Brown Court fashioned a remedy similar to that in *Morales*, requiring "the presence of medical personnel who are qualified to ensure that Plaintiff is unconscious at the time of his execution." Brown, at * 24-25.

When it comes to the crucial issue of monitoring anesthesic depth – required by other federal judges – the panel glibly states that there is "ample recourse" if the thiopental doesn't work. *No there isn't.*[15] Without scientific or medical monitoring a layperson simply cannot tell whether Workman would be adequately anesthetized *because lack of movement does not establish adequate anesthesia, lack of movement is caused by the pancuronium bromide, and no one can determine anaesthetic depth by looking at a person.* Anesthesiologists require extensive training to make such findings. And contrary to the panel's assertions (slip op. at 25), members of the IV team are not present at the purported time of anesthesia,[16] nor is there the "presence of a doctor" to confirm anesthesia and avoid the risks of torture about which Workman rightly complains.[17] Thiopental risks torture.

Moreover, by including the potentially torturous pancuronium in their new protocol, Defendants cannot validly assert concerns for Workman's "dignity." Workman complains that pancuronium violates his human dignity by torturing him.[18] It is Workman's concept of his own dignity – not some false one imposed by the Defendants – that governs this Court's inquiry. Defendants cannot, as the panel asserts, risk torturing Workman for the sake of making his death "appear" placid to others when would it would be, in reality, a chemical "entombment" followed by suffocation and a heart attack. Workman thus states a viable claim for relief based on the inclusion

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[15] R. 2, p. 27; Id, Exhibit 2, ¶¶ 41-42 (botched executions of Diaz and LaFevers); Id., Exhibit 27 (newspaper article describing botched execution of Ohio death row inmate Joseph Clark); Id, Exhibit 28, Cooey v. Taft, 430 F.Supp.2d 702, 707 (S.D.Ohio 2006)("evidence raises grave concerns about whether a condemned inmate would be sufficiently anaesthetized).

[16] R. 2, Exhibit 1, ¶¶43, 61; Id., Exhibit 2, ¶61.

[17] R. 2, Exhibit 2, ¶ 68, p. 23.

[18] R. 6, Complaint, ¶¶ 2, 55, 57, 82, 236, 256.

of pancuronium in the new protocol: Its use is merely "cosmetic" and deliberately risks the infliction of torture without any valid justification.[19]

Rather than giving substantial deference to the District Court's analysis of Workman's likelihood of relief, the panel has instead improperly made itself the factfinder. In doing so, the panel improperly resolves critical factual disputes by adopting the Defendants' version of the facts without a hearing, erroneously ignores Workman's allegations of constitutional error, refuses to consider the scientific and medical evidence supporting his allegations, and makes numerous misstatements of facts. Workman ought not face execution with the new protocol under these circumstances where clearly it was the panel which abused its discretion in finding no likelihood of harm, rather than the District Court which carefully considered the record and concluded otherwise. This Court should grant certiorari.

CONCLUSION

This Court should grant certiorari and reverse, either holding that the Sixth Circuit lacked jurisdiction to review the TRO or that its 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 complaint. In the alternative, this Court should hold Mr. Workman's petition for certiorari pending the Court's

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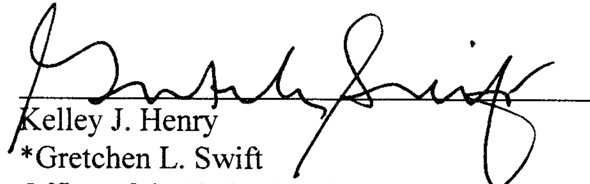
[19] The panel misapprehends the point arising from the absolute prohibition against the use of pancuronium in animal euthanasia. Even if thiopental or some other anaesthetic were used as well, the new 2007 protocol could not be used on an animal by virtue of the fact that it includes pancuronium. The risk of torture faced by Workman is a risk which no dog in Tennessee will ever face. See *Workman*, slip op. at 9 (Cole, J., dissenting). And for that reason, because Tennessee has easily eliminated the risk of torture to dogs, Defendants are deliberately indifferent to the known risk posed to Workman by their new protocol.

upcoming decision in *Panetti*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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