IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GOVERNOR PHIL BREDESEN, et al.,	)	
Defendants-Appellants,	)	No. 07-5562
	)	**Execution Date: May 9, 1:00 a.m.**
v.	)	
PHILIP WORKMAN,	)	
Plaintiff-Appellee.	)	

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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STATEMENT IN SUPPORT OF PETITION FOR HEARING *EN BANC*

I believe that this proceeding involves one or more questions of exceptional importance:

I.

What constitutes "irretreivable harm" sufficient for an appellate panel to convert an otherwise unappealable temporary restraining order into an appealable injunction?

II.

Can an appellate panel overturn a temporary order restraining application of a lethal injection protocol by resolving factual disputes and making credibility determinations without factual development, and by ignoring clear and voluminous evidence supporting the restraining order contained in the District Court record?

III.

Does a plaintiff "delay" in filing a federal lawsuit when he seeks federal relief within days after his complaint ripens under Article III and where his administrative complaint was not denied on the basis of untimeliness?

The panel decision in this case conflicts with the following decisions:

A temporary restraining order is not appealable, except under circumstances not applicable here: Northeast Ohio Coalition For The Homeless v. Blackwell, 467 F.3d 999 6th Cir. 2006); Office of Personnel Management v. American Federation of Government Employees, 473 U.S. 1301 (1985); Leslie v. Penn Central Railroad Co., 410 F.2d 750, 752 (6th Cir. 1969).

Taylor v. Crawford, No. 06-1278 (8th Cir. 2006)(en banc)(granting stay of execution to consider challenge to lethal injection protocol), *motion to vacate stay denied* 546 U.S. 1161 (2006)

Horton v. Potter, 369 F.3d 906 (6th Cir. 2004)(federal review cannot be barred on timeliness grounds where administrative body decided claim on merits)

Whitmore v. Arkansas, 495 U.S. 149 (1990) and Texas v. United States, 523 U.S. 296 (1998)(Article III prohibits jurisdiction over suits which are not ripe and for which plaintiffs lack standing)

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TABLE OF CONTENTS

The District Court entered a TRO restraining the use of Tennessee's new (and then 4-day-old) lethal injection protocol, which contains the substantial and unjustifiable risk of torture recognized by medical researchers, federal judges throughout the country, and even the United States Attorney General. Philip Workman risks torture, because Tennessee's new 2007 protocol provides no safeguards for the preparation of sodium thiopental (the selected anaesthetic agent) and no monitoring of intravenous lines or anaesthetic depth – without which everyone agrees Philip Workman *will be tortured* through the use of pancuronium bromide and potassium chloride.

Having considered this evidence – and having heard no contrary evidence from the Appellants – the District Court granted a TRO to avoid foreseeable and likely torture to Workman, and to uphold the Defendant Phil Bredesen's self-proclaimed "responsibility of the highest importance," to "administ[er] the death penalty in a constitutional and appropriate manner." In addition, the TRO will only require a 5 to 12 day delay in the execution date should Defendants insist on subjecting Workman to their new protocol. Where other federal judges have issued similar orders under similar circumstances, one can hardly say that the District Court abused its discretion here.

The panel majority reaches the exact opposite conclusion, but only by ignoring Workman's essential challenges to the 2007 protocol, misstating the facts, and ignoring the "consistency of the direction of change" (Atkins v. Virginia, 536 U.S. 304, 315 (2002)) away from the use of thiopental with the paralytic pancuronium bromide – a combination which its creator has now rejected. Instead, the panel uses sleight of hand to convert the unappealable TRO into an appealable injunction, after which it declares (without a hearing) that lethal injection is constitutional, while unfairly faulting Workman for not challenging the new 2007 protocol before it ever existed. This is both a recipe for injustice and a recipe for torture. This Court should grant rehearing *en banc*, vacate the panel's opinion for lack of jurisdiction, and/or and allow the preliminary injunction hearing to proceed.

I.

The Panel Majority Has Impermissibly Created Appellate Jurisdiction Where None Exists: The TRO Is Not Appealable

Without question, a TRO is not an appealable order. The Court made this clear in Northeast Ohio Coalition For The Homeless v. Blackwell, 467 F.3d 999, 1005 (6th Cir. 2006), citing Office of Personnel Management v. American Federation of Government Employees, 473 U.S. 1301 (1985) and Leslie v. Penn Central Railroad Co., 410 F.2d 750, 752 (6th Cir. 1969). If a TRO actually does not maintain the *status quo*, extends past 10 days, or otherwise "threaten[s] to inflict *irretrievable* harms," then it is appealable. 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 Appellants 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*.[1]

The panel majority has taken the exceptional action of arrogating appellate jurisdiction which simply does not exist. The majority's decision conflicts directly with *Blackwell*, *Office of Personnel Management*, and *Leslie*. This unauthorized expansion of appellate jurisdiction sets a most dangerous precedent. This Court should grant rehearing *en banc*, reverse the panel, and dismiss for lack of jurisdiction.

II.
In Claiming That Workman Is Unlikely To Prevail On The Merits The Panel Makes Material Misstatements Of Fact, Ignores The Substance Of Workman's Complaints, Ignores The Medical Evidence Supporting Workman's Complaints, And Refuses To Acknowledge The Experiences Of Other States Where Similar Protocols Have Led To Torture

Aside from its fundamental jurisdictional misstep, the panel majority has also taken liberties with the record and the scientific and medical evidence supporting Workman's claim, either distorting or overlooking the facts which support the District Court's TRO. Fundamental to Workman's complaint are his allegations that he will suffer torture because of lack of anaesthesia

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[1] Let us not forget this crucial point: It was the Governor and Commissioner Little who created the time trap in this case. They alone gave Workman fewer than 10 days to challenge the new 2007 protocol, and it was Workman alone who sought to ameliorate the very harm about which they now complain. Workman requested, but was denied, more than 7 days to raise his federal claims in accordance with the Governor's Executive Order. See Workman, slip op. at 18-19 (Cole, J., dissenting). Workman's pleas for fairness fell on deaf ears. It is the time trap set by Appellants for Workman that has now ensnared them, leaving them claiming "irretrievable harm" flowing from *their* deliberately chosen time line.

due to inadequate application of sodium thiopental.

The evidence before the District Court establishes both a real and foreseeable risk of inadequate anaesthesia. Under the New 2007 Protocol, the thiopental is not mixed by anyone trained in drug compounding or preparation;[2] there is no quality control of the thiopental mixture to insure its true potency (if any);[3] there is no examination of the delivery tubing once the execution begins;[4] the limited visual inspection of the injection site (without physical examination) is inadequate to determine whether the thiopental is actually entering the bloodstream;[5] the quick application of the paralytic pancuronium bromide after the thiopental masks any physical signs of inadequate anesthesia;[6] and there is no effective monitoring of adequate anesthesia.[7] 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

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

[3] Id ¶ 52 (a), p. 15.

[4] Id. ¶ 54 (e), p. 16.

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

[6] Id. ¶¶ 38-39, pp. 10-11.

[7] Id. ¶¶ 60-63, pp. 20-21.

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 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.,[8] the United States' Attorney General's consenting to an injunction prohibiting use of the federal government's lethal injection protocol,[9] numerous federal court rulings from throughout the country either enjoining protocols or finding significant problems with them,[10] and scientific and other literature documenting the significant risks of torture posed by Tennessee's New 2007 Protocol.[11]

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[8] R. 2, Exhibit 2.

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

[10] 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).

[11] 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*

And in fact, the creator of the thiopental-based protocol now questions its efficacy.[12]

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 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**

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.

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

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.*[13] 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,[14] nor is there the "presence of a doctor" to confirm anesthesia and avoid the risks of torture about which Workman rightly complains.[15] Thiopental risks torture.

Moreover, by including the potentially torturous pancuronium in their new protocol,

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[13] 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).

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

[15] R. 2, Exhibit 2, ¶ 68, p. 23.

Defendants cannot validly assert concerns for Workman's "dignity." Workman complains that pancuronium violates his human dignity by torturing him.[16] 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 of pancuronium in the new protocol: Its use is merely "cosmetic" and deliberately risks the infliction of torture without any valid justification.[17]

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 rehearing *en banc*, reverse the panel, and insure that Workman's complaints – valid as they are

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

[17] 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.

– are heard by the District Court at its upcoming preliminary injunction hearing.

III.
This Court Should Grant *En Banc* Rehearing Because The Panel Has Erroneously Denied Relief On The Basis Of Undue Delay: In Grievance Proceedings, The Commissioner Did Not Find Delay, Appellants Waived Any Such Argument Below, And Any Allegation Of Delay Makes A Mockery Of Article III's Standing And Ripeness Doctrines

The panel makes one final fatal error in its analysis: It claims that Workman's challenge to new April 30, 2007 Protocol is somehow untimely. Such a conclusion is untenable given the Commissioner's merits ruling during the administrative grievance hearing, Appellants' waiver of the issue in the District Court, and more importantly, the requirements of Article III.

The Supreme Court has made manifest that challenges to prison conditions such as Workman's must first be exhausted through prison administrative proceedings under 42 U.S.C. §1997e. Exhaustion is a "centerpiece" of the PLRA. Woodford v. Ngo, 548 U.S. ___, 126 S.Ct. 2378, 2382 (2006). The reason for this is simple: Exhaustion gives the state authority the opportunity to correct the problem in the first instance, it facilitates the creation of a record, and it provides the federal court the a clear record of the grounds on which the state body has acted. Woodford, 548 U.S. at ___, 126 S.Ct. at 2385-2386. Exhaustion is not some sort of game by which the parties can withhold their evidence and arguments and then present them to the federal courts. Id. And the grounds relied upon by the state body are the grounds from which the federal court starts its own review of the issues. Compare 28 U.S.C. §2254(d)(judgment of state court).

That being said, Defendants have waived any undue delay defense, because such a ground was never raised or relied upon by Appellants in the administrative proceeding. Indeed, in denying Workman's grievance, the Commissioner never declared that his grievance was untimely. The

Commissioner never claimed that he could not resolve it because of "undue delay." Rather, the Commissioner denied Workman's constitutional claims on the merits. Commissioner Little succinctly stated in no uncertain terms:

> *After careful [review] of all the issues raised, your grievance is denied. The Department's lethal injection protocol meets all Constitutional standards.*

Apx. D to Motion To Dismiss Appeal. It was a routine "denial on the merits."

This is not surprising, because the Commissioner had absolutely no basis for asserting that Workman's challenge to the April 30, 2007 protocol was in any way untimely or delayed: Workman filed his grievance within two (2) days of the promulgation of the new protocol which was the subject of his grievance and which is the subject of the TRO. Workman's challenge *was timely.*

Because Workman's grievance was not denied on the basis of untimeliness or delay, his federal proceedings cannot now be "barred" on any such ground. Indeed, where the Commissioner did not clearly and expressly rely on any alleged "untimeliness or delay" bar in deciding Workman's grievance, any such assertion cannot provide the basis for a federal dismissal. See Harris v. Reed, 489 U.S. 255, 263 (1989)(where state court did not clearly and expressly rely on procedural bar, federal court may not either). Were it otherwise, the administrative process – a "cornerstone" of Congress' prison litigation scheme – would devolve into nothing more than a charade in which the administrator could sandbag for federal court, which has happened here.

In fact, in Horton v. Potter, 369 F.3d 906, 911 (6th Cir. 2004), this Court held that there is no bar to review on the merits in federal court where an agency has decided a complaint or grievance on the merits. For federal court purposes, "Waiver occurs when the agency decides the complaint on the merits without addressing the timeliness defense." Id., citing Ester v. Principi, 250 F.3d 1068,

1071-1072 (7th Cir. 2001), Bowden v. United States, 100 F.3d 433, 438 (D.C.Cir. 1997). That is the exact situation here.

And further, though Appellants had every opportunity to raise the issue of timeliness in the District Court, they refused to do so, instead relying exclusively on their assertion that the District Court should deny the TRO because a complaint had yet to be filed. See R. 9, District Court Transcript, p. 20. Appellants were well aware of a potential delay defense, yet they chose to rely on other arguments. The cases are legion where failure to present an argument in the lower court constitutes waiver. Appellants have waived any delay defense by their inaction in the district court.

Quite apart from Appellants' clear waiver, the panel's finding of undue delay suffers from another fatal flaw: It ignores the strictures of Article III's standing and ripeness doctrines. Both the standing and ripeness doctrine make clear that Workman's complaint challenging the new 2007 protocol only became justiciable days ago. 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.

Perhaps the most fundamental problem with the panel's analysis is that it misconstrues the nature of the case-and-controversy presented by the complaint. Workman is not challenging "lethal injection" in the abstract. He is alleging a particular injury-in-fact which he faces at a particular time under particular circumstances: The application of the New 2007 Protocol to him on May 9, 2007 under the circumstances outlined in his complaint. Properly understood, Workman's complaint makes clear that he did not unduly delay anything: He came into court once his complaint was ripe.

Indeed, 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 Defendants now intend to harm him – the 2007 Protocol – until that protocol was promulgated just days ago.

In fact, Appellants made clear 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). Defendants thus emphasized that, in the absence of any established protocols, any challenge to any future lethal injection protocol was simply "not ripe for adjudication." Id. (Affirmative Defense #1).

By their own admission, Appellants admit that Workman could not have raised a challenge to the 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., concurring), and he also properly recognizes that the panel majority shirks this important consideration.

Instead, the panel seems to think that Workman has forfeited his right to challenge the New 2007 Protocol because he was under some obligation to make general challenges to protocols which

will not be used upon him at some unspecified time in the past. This makes little sense. Appellants made manifest in other litigation that any such challenges to the pre-2007 Protocol – whenever raised – were mooted by the Governor's Executive Order:

> The issues presented by the present action are the constitutionality of the current lethal injection protocol in Tennessee and the constitutionality of the administration of that protocol. State of Tennessee Executive Order Number 43 revokes that protocol . . . and any related procedures, whether written or otherwise, and stays the plaintiff's execution. 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). Defendants 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).

The plain fact is that if Workman had raised a challenge to the pre-2007 Protocol at some time in the past, his suit would have been mooted and dismissed without prejudice as of February 1, 2007, and he would come to the federal courts exactly as he did on May 4, 2007 – after the New 2007 Protocol was promulgated. The panel wants to fault 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.[18] And 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

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[18] To view it another way, one might ask: In accordance with Article III, What would the federal court have done if Workman filed a lawsuit challenging "lethal injection" in April 2007. The Court would have dismissed for not being ripe – exactly as the Defendants argued in *Harbison* and *Payne*. What, then, if Workman filed a lawsuit in early 2007 challenging old lethal injection methods in Tennessee after the state set his May 2007 execution date? The federal court would have dismissed it as moot in March 2007. What if Workman filed a lawsuit at any time before his May 2007 execution date was set? It would have been dismissed for lack of standing and lack of ripeness.

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).

As recognized by the Commissioner when he denied Workman's grievance on the merits, Workman's challenge is not in any way untimely or delayed. One can't delay filing a challenge that doesn't exist. And one can't make a challenge to a protocol which has not been created, for there is no federal jurisdiction under Article III. Having found delay, the panel's conclusion conflicts with this Court's decision in *Horton v. Potter*, the Supreme Court's decision in *Woodford v. Ngo*, and the Supreme Court's settled standing and ripeness jurisprudence, as expressed in *Whitmore* and *Anderson* – and as admitted by Appellants in both *Harbison* and *Payne*. Because the panel has unfairly found delay in a case where the facts and law preclude such a finding, this Court should grant *en banc* review.

CONCLUSION

This Court should grant rehearing, dismiss the appeal and/or affirm the grant of the TRO.

Respectfully Submitted,

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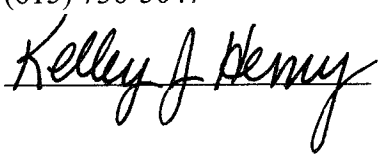

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by e-mail to Mark Hudson, Office of the Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243 on this 8th day of May, 2007.