R. GUY COLE, JR., Circuit Judge, dissenting. For the first time in a death-penalty case, to my knowledge, this Court vacates a temporary restraining order—an order that the Court is incompetent to review because it is not appealable—and in so doing clears the way for Philip Workman's execution on May 9, 2007.

Just as troubling, despite the extensive and detailed allegations Workman raises tending to show that Tennessee's new lethal-injection protocol will subject him to pain and suffering in violation of the Eighth Amendment; despite that Workman supports his allegations with testimony from physicians familiar with lethal-injection protocols, medical studies, and evidence from recent botched executions; despite the statements from federal courts across the United States expressing deep skepticism with similar lethal-injection protocols adopted by other states; and despite the deference that an appellate court owes to the judgment of a district court, the majority concludes that Workman's concerns are insufficiently compelling to warrant a brief five-day preservation of the status quo to determine whether his claims have merit.

In the end, I simply cannot conclude that in the face of Workman's disturbing allegations, the State's legitimate interest in "finality" and giving effect to its criminal judgments will be irretrievably impaired by the TRO here. Indeed, the State's interest in executing Workman "will, at worst, simply be delayed but not denied" if this Court affirms the district court's issuance of the TRO. *Skillern v. Procunier*, 469 U.S. 1182, 1185 (1985) (Brennan, J. dissenting). And if Workman is ultimately successful in proving the constitutional infirmity of Tennessee's new lethal-injection protocol, "then [the TRO] will have prevented a harm the legality of which will be open to serious question under federal law." *Id.* Accordingly, I respectfully dissent.

I. Appealability

The majority's opinion rests on a profound jurisdictional defect: There is no appealable order before this Court. The district court issued a *temporary restraining order*, not a preliminary injunction. It is well established that "[a]n order granting, denying, or dissolving a temporary restraining order is generally not appealable." Moore's Federal Practice § 65.41 (3d ed. 2005). TROs have the modest purpose of preserving the status quo to give the court time to determine whether a preliminary injunction should issue. *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 650 (6th Cir. 1993). The short duration of a TRO—no more than 10 days under Rule 65(b)—is one of its chief distinctions from a preliminary injunction. Indeed, as this Court recently acknowledged, "[t]he rationale for this rule [(i.e., the non-appealability of TRO's)] is that TRO's are of short duration and usually terminate with a prompt ruling on a preliminary injunction, from which the losing party has an immediate right of appeal." *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1005 (6th Cir. 2006).

The district court's TRO cannot be magically transformed into a preliminary injunction, which *is* an appealable order, even though the State and a majority of this Court may wish it. This makes the majority's heavy reliance on the unpublished decision in *Alley v. Little*, 181 F. App'x 509 (6th Cir. May 12, 2006)—which involved a preliminary injunction—entirely inapposite. True, in certain situations not applicable here, courts will treat TRO's as appealable preliminary injunctions. For instance, if a TRO is extended beyond the 10-day limit provided for in Rule 65(b), then it may be treated as a preliminary injunction. *See, e.g., Nordin v. Nutri/Sys., Inc.*, 897 F.2d 339 (8th Cir. 1990) (treating TRO as preliminary injunction because it had no expiration date and exceeded Rule

65(b)'s 10-day limit); *Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940 (7th Cir. 2006) (treating TRO as preliminary injunction because 20 days since its issuance had elapsed). This is not an issue here because the district court's order sets a preliminary-injunction hearing date of May 14, 2007, and specifies that the TRO will dissolve on that date.

In addition, courts sometimes say that even though an order is styled a TRO, it is in substance a preliminary injunction. *Ne. Ohio Coal. for the Homeless,* 467 F.3d at 1005. The State contends that this is precisely the situation here because the TRO will prevent the State from carrying out its May 9 scheduled execution of Workman, and therefore cause "serious, perhaps irreparable" harm to the State's interest in giving effect to its criminal judgments. (Defs.' Motion To Vacate Temporary Restraining Order at 5 (quoting *Ne. Ohio Coal. for the Homeless*, 467 F.3d at 1005)). But that conclusion is illogical. The State's interest is in no way *irreparably* harmed, 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. I cannot conclude that the State's interest—whether described as avoiding delay or achieving finality—is so compelling as to necessitate treating what is manifestly a TRO as a preliminary injunction. Indeed, such a conclusion cannot be right for two reasons.

First, as a legal matter, the State's contention provides grounds for converting every TRO into a preliminary injunction, thereby eviscerating the distinctions between these two procedural

devices. Parties subjected to TRO's invariably have an interest in proceeding on schedule with whatever activity they intended to undertake prior to being restrained. The essence of a TRO is to preserve the status quo; by definition, then, its purpose is to prevent from happening an event that would otherwise happen. 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. This is exactly the majority's mistake: in its view, any TRO that prevents an act from taking place as scheduled "effectively operates" as a preliminary injunction and can therefore be reviewed.

Second, as a practical matter, the State's interest in "finality" is simply not the type of interest that can be irreparably or even seriously harmed by the one-week delay imposed by the district court's TRO. Although the State's interest in giving effect to Workman's death sentence is certainly recognized to be a strong one under applicable case law, it is not so strong as to amount to an inviolable interest in executing Workman on May 9. As described above, the TRO does no more than give the district court five additional days in which to decide whether a preliminary injunction should issue. And if the district court denies the preliminary injunction, the State can hardly complain that the minimal delay entailed in the issuance of the TRO put it in a materially worse position. The State will be free to proceed with Workman's execution and, under Tennessee law, it will not be required to take any action to do so, such as applying to the state supreme court for a new death warrant. The Tennessee Supreme Court will automatically set a new execution date, which could be fixed as little as seven days from the date of the court's new execution order. Tenn. Sup. Ct. R. 12.4(E). If the district court grants Workman's motion for a preliminary injunction, *that*

order will be immediately appealable to this Court, and nothing would stand in the way of the State requesting expedited review of its appeal.

Because I believe that there is no doubt that the district court issued a TRO and not a preliminary injunction, I would deny the State's appeal for lack of jurisdiction.

II. Standard of Review: Abuse of Discretion

"The district court's decision to grant a temporary restraining order, when appealable, is reviewed by this Court for abuse of discretion." *Ne. Ohio Coalition for the Homeless*, 467 F.3d at 1009. This Court has stated many times that the abuse-of-discretion standard is "highly deferential" to the judgment of the district court. *See, e.g., United States v. Owens*, 426 F.3d 800, 805 (6th Cir. 2006); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 516 (6th Cir. 2005). Indeed, "[w]e will find an abuse of discretion only when we have a definite and firm conviction that the trial court committed a clear error of judgment." *Mitchell v. Boelcke*, 440 F.3d 300, 303 (6th Cir. 2006). Thus, so long as the district court acted within its sound discretion, we may not reverse its judgment even if we would have decided the matter differently. *EEOC v. Ky. State Police Dep't*, 80 F.3d 1086, 1100 (6th Cir. 1996).

Whatever else may be said about the majority's review of the district court's order, it is not for an abuse of discretion. Workman put before the district court an impressive record, particularly when considering that he was only at the TRO stage, not the preliminary-injunction stage. As discussed in more detail below, Workman filed an 82-page complaint detailing extensive allegations with respect to the constitutional infirmity of Tennessee's Revised Protocol. He further filed a 55-page memorandum in support of his motion for a TRO, supported by 48 exhibits, including, among

other things, the Revised Protocol, affidavit testimony from two physicians familiar with lethal-injection protocols and their inherent risks, a recent medical study critical of lethal injection, and execution logs from two botched executions. Besides the record, the district court had before it something that this Court has not had the benefit of, namely, the parties themselves. Even though it was operating under difficult time constraints, the district court heard oral argument from the parties and was able to test their respective positions. The transcript of the oral argument shows that the district judge was engaged with the difficult questions presented in Workman's motion and thoughtful in his assessment. (Tr. of Dist. Ct. Proceedings, Motion for TRO, May 4, 2007.)

As discussed in more detail below, I simply cannot say that the district court abused its discretion in issuing the TRO. More importantly, the clear import of the majority's holding is that virtually no defendant in Workman's shoes—facing an imminent execution under a lethal-injunction protocol that may be unconstitutional—can make a sufficient showing to satisfy this Court that a brief five-day delay is warranted to determine whether a preliminary injunction should issue. The majority sets the bar extraordinarily high, and unnecessarily so given the limited nature of a TRO.

III. The Four Traditional TRO Factors

Each of the four traditional factors for equitable relief weighs in Workman's favor. The district judge was well within his discretion to so conclude.

1. Success on the Merits

The Eighth Amendment bars executions that "involve the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), or that "involve torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447 (1890). Whether a particular execution procedure will inflict

unnecessary pain is fundamentally an inquiry regarding whether the inmate is "subject to an *unnecessary risk* of unconstitutional pain or suffering." *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2006) (emphasis added). Workman has shown the likelihood of that risk here.

a. *Risk of Unnecessary Pain*

There is no dispute that the drugs used to execute Tennessee inmates can inflict excruciating pain if not properly administered. Yet Tennessee's Revised Protocol fails to provide for properly credentialed personnel to ensure that the drugs are properly administered.

But grave problems arise even before the drugs enter the inmate. For example, if the EMT cannot access the inmate's vein—something particularly relevant here because of Workman's past intravenous drug use—the Revised Protocol instructs that a doctor will conduct what is known as a "cut-down procedure." (Workman's Mem. In Support of TRO, Ex. 1, at 41, 67.) As Columbia University anesthesiologist Dr. Mark Heath explains, this is "an outdated method of achieving venous access for the administration of anesthetic drugs"; it has been "virtually completely supplanted by the 'percutaneous' technique," which is "less invasive, less painful, less mutilating, faster, safer, and less expensive." (*Id.*, Ex. 23, Heath Decl. 22.) Using the cut-down method "would defy contemporary medical standards and would be in violation of any modern standard of decency." (*Id.*) Tennessee's adherence to this outdated method "would represent the *gratuitous infliction of pain and mutilation* to the condemned prisoner." (*Id.* (emphasis added).) This explains why many states have abandoned this procedure for executions. (*Id.*)

Once a vein is accessed—perhaps through this unnecessary, mutilating cut-down procedure—the first of the three drugs, sodium thiopental, is provided to anesthetize the inmate.

Properly providing this anesthetic is, of course, crucial to ensure lack of consciousness; everyone recognizes that the next two drugs would otherwise inflict unbearable pain.

But there is a risk that Workman will be conscious. Sodium thiopental is an ultrashort-acting anesthetic that is extremely sensitive to errors in administration. (*Id.* 14–15.) Thus, if the intended amount of sodium thiopental fails to reach the inmate's brain, the duration of narcosis will be only brief and the inmate will reawaken during the execution process. (*Id.*) Yet the Revised Protocol does not require medically trained personnel to supervise or assist in the medical tasks necessary to prepare for the execution or during the execution. These critical tasks include mixing the sodium-thiopental solution; setting up the IV line and associated equipment to ensure fluids do not leak and are not misdirected (not an immaterial possibility considering that IV-line extensions extend into another room—something that would not be permitted in a medical setting) (*Id.* 16); finding a usable vein and properly inserting the IV line in the proper direction in the vein; and avoiding the risk that the inmate's vein will rupture and the drugs will flow into the surrounding tissue. (*Id.* 17.) The President of the American Society of Anesthesiologists, writing about lethal injection, recently stated that "the only way to assure [a proper level of anesthesia] would be to have an anesthesiologist prepare and administer the drugs, carefully observe the inmate and all pertinent monitors, and finally to integrate all this information." (*Id.*19 (quoting Orin F. Guidry, M.D., *Message from the President. Observations Regarding Lethal Injection* (June 30, 2006)).) There is no evidence that anyone on the Tennessee injection team has any training in administering anesthesia, or, if there is training, what that training might be. (*Id.* 20.)

Most disturbingly, the Revised Protocol makes no mention of the need for effective

monitoring of the inmate's condition or whether he is anesthetized and unconscious after the IV lines are inserted. (*Id.*) No medical personnel are permitted to be in the execution chamber during the administration of the drugs. (*Id.* 20.) In other words, there is no way to determine if something went wrong and the inmate is awake. Monitoring consciousness is a regular part of the standard of care in many states for euthanizing dogs and cats. (*Id.*) It should also be the standard for inmates.

In light of the possibility that the sodium thiopental will be improperly administered, and the inmate therefore will be improperly anesthetized, it is critical that execution personnel be able to ascertain if that occurs. But the second drug, pancuronium bromide, eliminates this possibility: pancuronium is a neuromuscular blocking agent that paralyzes the inmate's muscles. This paralytic effect is so complete that even an anesthesiologist in a clinical setting must vigilantly monitor diagnostic indicators to assess the anesthetic effect. (*Id.* 10–11.) Because the drug does not affect the brain or nerves themselves, however, an unanesthetized patient remains completely conscious, and suffer slow suffocation and excruciating pain from the third drug (potassium chloride), all while appearing to be in a peaceful sleep. (*See id.* 11.) For this very reason, Tennesee in 2001 declared the use of pancuronium bromide or any other neuromuscular blocking agent on non-livestock animals inhumane and illegal. *See* Tenn. Code Ann. § 44-17-303(c); 44-17-303(j) (providing criminal sanctions for using any substance that acts as a neuromuscular blocking agent when euthanizing non-livestock animals). Thus, Tennessee protects dogs and cats from the risk of excruciating pain in execution, but not death-row inmates.

In this case, however, Tennessee contends that pancuronium bromide serves useful purposes: it speeds the death process, prevents involuntary muscular movement that may interfere with the

functioning of the IV equipment, and contributes to the dignity of the death process. (*See* Workman's Mem. In Support of Motion for TRO, Ex. 7 (Tennessee Report on the Administration of Death Sentences at 7).) In this context, these purposes are not so noble. First, although speeding the death process is generally a good idea, that is not the case where a slower death would more likely be painless. The problem arises when the inmate is conscious yet dying a torturous death, unable to scream out to alert anyone that there is a problem. That death may ultimately be quicker (because of the pancuronium bromide), but it will not satisfy any minimal constitutional standard. Second, it would also be expedient if any muscle spasms did not interfere with the IV equipment; but, again, whatever inconvenience that might cause pales in comparison to the torturous death the inmate might otherwise suffer. Finally, I assume whatever "dignity" pancuronium bromide adds to the death process comes from the perspective of the witnesses to the death—the execution certainly would look like a peaceful death. But where is the dignity when we know that under that peaceful surface could be a person (even if a convicted murderer) writhing in agony? No dignity arises from wilful blindness to possible torture.

The excruciating (yet invisible) pain the final drug, potassium chloride, would cause absent proper anesthesia is not the only troubling aspect of the drug. For example, although the drug's purpose is to cause electrical arrest of the human heart, Dr. Ramsey explains that the dosage provided for in the Revised Protocol is "wholly ineffective" to achieve this purpose. (Workman's Mem. In Support of Motion for TRO, Ex. 18 at 2.) Thus, if an inmate is improperly anesthetized, asphyxiation because of the paralysis caused by the pancuronium bromide kills the inmate while he suffers the painful effects of the potassium chloride.

These risks are unacceptable.

b. *Other Courts Recognize this Risk*

The risk of pain discussed above is not mere conjecture; substantially similar execution methods in other states have resulted in botched executions, leading those states to suspend the practice. A few months ago in Florida, for example, inmate Angel Diaz appeared not to receive an effective amount of sodium thiopental because the IV lines were improperly seated in his veins. (Workman's Mem. In Support of Motion for TRO, Ex 21 (Florida Commission Report to Governor, at 8–9).) Observers stated that Diaz "looked like he was in a lot of pain," was "gasping for air for 11 minutes," was "grimacing" and "seem[ed] to speak." (*Id.*, Ex. 20 (*Second Dose Needed to Kill Inmate*, at 1).) Following this execution, Governor Bush ordered all executions stayed while a committee reviewed this execution and the lethal-injection protocols. (*Id.*, Ex. 21, at 2.)

Similar incidents suggesting a lack of proper anesthesia have occurred in California (*Id.*, Ex. 22) (noting that inmate's stomach and chest "heaved more than 30 times," which suggests improper anesthetization)); North Carolina (*Brown v. Beck*, 2006 U.S. Dist. LEXIS 60084 (E.D.N.C April 7, 2006) (noting accounts of inmates convulsing, twitching, gagging, and choking); Ohio (Workman's Mem. In Support of Motion for TRO, Ex. 27 (*Trouble Finding Inmate's Vein Slows Lethal Injection in Ohio* (noting that after chemicals began flowing, inmate sat up several times to say "it's not working" and asked if he could have "something by mouth to end this"; after execution team closed the curtain, witnesses reported cries of pain for five or ten minutes))); Arkansas (*Id.*, Ex. 30 (*Stoic Murderer Meets His Fate By Quiet Means* (noting that inmate cried out and coughed sporadically after appearing to nod off into unconsciousness))).

In light of these concerns, many of these states have stayed executions pending further review of these procedures. *See, e.g.*, *Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006); *Nooner v. Norris*, No. 06-00110 (E.D. Ark. June 26, 2006). Additionally, the United States Attorney General has agreed to a preliminary injunction for federal inmates challenging the federal lethal-injection protocols as unconstitutional. *Roane v. Gonzales*, No. 05-2337 (D.D.C. Feb. 16, 2007). As the court in *Cooey v. Taft* explained, "This Court would be remiss if it did not take note of the evidence [from other states] . . . [that] raises grave concerns about whether a condemned inmate would be sufficiently anesthetized under [this protocol] prior to and while being executed." 430 F. Supp. 2d 702, 707 (S.D. Ohio 2006) (*vacated on other grounds by Cooey v. Strickland*, 479 F.3d 412 (6th Cir. March 2, 2007)).

The majority raises the unremarkable point that no court has yet made a final ruling on the merits that these lethal-injection procedures violate the Eighth Amendment. This is of course not surprising considering that these lethal-injection challenges are in their infancy—the Supreme Court's decision in *Hill v. McDonough*, 126 S. Ct. 2096 (2006), less than a year ago breathed life into these claims. (*See, e.g.*, David Stout, *Justices Open Door to Lethal Injection Challenges*, New York Times, June 12, 2006.) But the majority also misses the point that more and more courts have determined that there is a substantial likelihood that these procedures violate the Eighth Amendment. *See, e.g.*, *Taylor v. Crawford*, 2006 U.S. Dist. LEXIS 51008 (D. Mo. 2006) ("Missouri's current lethal injection procedure subjects condemned inmates to an unnecessary risk of unconstitutional pain and suffering. Without appropriate monitoring of the anesthesia, there is a strong argument that these executions might even be torturous."). Ultimately, regardless of the current scorecard on

lethal-injection challenges, the compelling evidence remains that Workman is subjected to unnecessary risk of a torturous death and therefore has shown a substantial likelihood of success on the merits.

The majority also states that the Eighth Amendment's concerns regarding evolving standards of decency "do not help Workman one bit" because there is a consensus that lethal injection is the most humane method of execution. But everyone knows that this consensus is built entirely on the perception that the process actually is painless and dignified. The challenge here is not to proper, painless lethal injection; the challenge is to the grave risk that this particular lethal-injection procedure causes true suffering—*exactly opposite* of what the consensus believes the method achieves.

Additionally, the majority notes that, despite what it sees as overwhelming evidence that lethal injection is indeed as humane as the consensus intends, Tennessee has—as if unprompted—taken the affirmative act of re-evaluating this apparently impeccable procedure and somehow "refined" it even more. What of course really happened here is that Tennessee recognized that numerous courts across the country were enjoining this procedure on Eighth Amendment grounds because of the real risk of a torturous death. And for that, Tennessee should be applauded. At the present time, however, there is no basis for concluding that Tennessee has sufficiently lessened this risk. Indeed, the evidence suggests the risk remains pronounced.

2. Irreparable Injury

Nobody contests that Workman will suffer irreparable harm if his execution is not stayed. Worse than simply the harm of execution, however, Workman also faces substantial risk of excruciating pain in the process.

3. Harm to Others

Tennessee no doubt has an interest in the finality of justice; under the law, if the execution is constitutional, it should be carried out. But the issue here is the additional harm caused by adding five days to Workman's 25 years on death row; that cannot outweigh the harm to Workman, who may be put to death through a procedure that inflicts so much pain it cannot be used on non-livestock animals.

4. The Public Interest

Lethal injection has become the predominant method of execution in large part because the public *perceived* it to be the most humane form of execution. But the method—perhaps veiled by drug-induced paralysis—may be horrific. The public deserves assurances that this is not the case. As the Tennessee Governor has explained, "The administration of the death penalty in a constitutional and appropriate manner is a responsibility of the highest importance." (Governor's Executive Order No. 43, Feb. 1, 2007).)

IV. Timeliness

The majority further contends that the district court erred by failing to consider whether Workman's filing of his § 1983 action was timely. As an initial matter, despite the State's and the majority's heavy reliance on the contention that Workman has unreasonably delayed in bringing his § 1983 suit, the State failed to raise this as a defense before the district court. (Tr. of Dist. Ct. Proceedings, Motion for TRO, May 4, 2007.). *See Thurman v. Yellow Freight Sys.*, 97 F.3d 833, 835 (6th Cir. 1996) (holding that arguments not raised before the district court are waived). The majority does not contend that Workman was dilatory in challenging the Revised Protocol, nor could it. Once the Revised Protocol was made public on April 30, Workman promptly filed his administrative grievance with the Tennessee Department of Correction on May 2 and, having exhausted his administrative remedies, filed his § 1983 action in the district court on May 4. (*See* Workman's Mem. In Support of Motion for TRO, Ex. 11.) Instead, the majority determines that Workman unreasonably delayed because he did not file his § 1983 suit promptly after the conclusion of his habeas proceedings, which, in the majority's view, terminated in 2000.

I do not take lightly the Supreme Court's admonition that we must ensure that death-row inmates timely pursue available relief rather than engage in last-minute requests that could have been brought earlier. In many instances, applicable challenges can be lodged sufficiently in advance to avoid stays of already-scheduled executions. In some instances, however, such stays are necessary and proper. This is one of those instances.

To begin, it would have been legally futile for Workman to bring his § 1983 challenge to

Tennessee's lethal-injection protocol at the conclusion of his habeas proceedings, assuming that the majority is right that those proceedings terminated in 2000, rather than with subsequent activity in this Court. Until the Supreme Court's May 24, 2004 decision in *Nelson v. Campbell*, 541 U.S. 637, 645-47 (2004), the law of this Circuit precluded inmates from challenging lethal-injection protocols through § 1983 actions. *See In re Sapp*, 118 F.3d 460 (6th Cir. 1997); *In re Williams*, 359 F.3d 811 (6th Cir. 2004); *see also Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007) (Gilman, J. dissenting) (agreeing with the district court's holding that petitioner was not required to bring his § 1983 method-of-execution challenge prior to *Nelson*). Thus, had Workman filed his § 1983 complaint when the majority maintains he should have, it presumably would have been dismissed. Moreover, had Workman's § 1983 case been pending on February 1, when Governor Bredesen rescinded the prior protocol, there is a very real possibility that it would have been dismissed at that time. The State moved to dismiss two § 1983 lethal-injection challenges pending in the Tennessee federal courts on the grounds that they were moot, in light of the Governor's Executive Order. *See Payne v. Little*, No. 06-00825; *Harbison v. Little*, No. 06-1206. In *Harbison*, the State argued that

> 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, Mem. In Support Of Defendants' Motion To Dismiss (emphasis added). In *Payne*, the State made the identical argument that because the prior protocol had been rescinded, "[t]here is no lethal injection protocol currently in effect; thus there is nothing to litigate." *Payne*, Mem. In

Support Of Defendants' Motion To Dismiss, at 3.

Next, Workman's execution was in no way imminent in 2004, when his § 1983 claims first became cognizable, because he was still litigating his conviction and death sentence and his execution was *stayed* for a two-year period between September 1, 2004 and October 17, 2006. Workman filed his motion for relief from the district court's judgment denying his habeas petition on August 27, 2004. At the same time, he filed a motion for a stay. The district court granted the stay on September 1, 2004, and ordered it to remain in effect until the court had disposed of Workman's motion for relief from judgment. On September 22, 2004, this Court declined to vacate the stay. Because the district court did not deny Workman's motion for relief from judgment until October 17, 2006, the stay did not expire until that date.

It makes no sense to say that Workman should have filed his § 1983 challenge to the lethal-injection protocol even before he knew whether he would succeed on his pending challenge in the district court to his conviction and sentence, or on his state *coram nobis* petition. Such a requirement forces inmates, such as Workman, to simultaneously litigate their claims that they are entitled to relief from their convictions and sentences, and that, even if not entitled to relief from their convictions and sentences, they are nonetheless entitled to relief from a state's particular execution methodology. *See Cooey*, 479 F.3d at 429 (Gilman, J. dissenting). Further, such parallel litigation is inefficient and burdensome for both litigants and the courts. *See id*. Indeed, there is no point to requiring an inmate to file his § 1983 action to a lethal-injection protocol when success on

a challenge to a conviction or sentence will moot the § 1983 case.[1]

Thus, where any § 1983 challenge Workman filed before the Supreme Court's 2004 decision in *Nelson* would not have been cognizable under the law of this Circuit; where Workman's execution was not imminent because it was stayed for more than two years by the district court; where Workman was actively pursuing relief that, if granted, would have mooted his § 1983 claims; where the Governor rescinded Tennessee's lethal-injection protocol on February 1, 2007 and moved to dismiss pending lethal-injection challenges in the Tennessee federal courts on the grounds that they were moot; and where the actual lethal-injection protocol under which Workman will be executed was not established until April 30, 2007, I simply cannot conclude that Workman unreasonably delayed in bringing his § 1983 action.

Two final points remain. First, the record shows that Workman diligently applied to the Tennessee Supreme Court to vacate his execution date on precisely the grounds about which he now complains, namely, that setting his execution date within just a few days of the establishment of the Revised Protocol would prevent him from challenging the constitutionality of that protocol. (*See* Workman's Mem. In Support of Motion For TRO, Ex. 4.) The State opposed Workman's motion. (*See id.*, Ex. 5.) In so doing, the State represented to the Tennessee Supreme Court that "the courts could take action later should circumstances warrant staying Workman's execution date." (*See id.*, Ex. 6, Tenn. Sup. Ct. Order.) Although not tantamount to a waiver of its rights to contest

[1]To the extent that the State and the majority argue that the § 1983 statute-of-limitations analysis in this Court's recent divided decision in *Cooey* applies here, I cannot agree. At a minimum, we should be circumspect about following *Cooey* where it is not yet a final judgment owing to the pendency of a petition for rehearing en banc.

Workman's challenge now, it might reasonably be said that insofar as Workman may be charged with "delay," the State was complicit as well.

Second, the majority and the State urge that the time has come to execute Workman because his conviction is now 25 years old and he has received multiple stays in the past. Of course, neither Congress nor the courts have seen fit to specify limitations on how long death-row inmates may be kept alive prior to their executions, or limitations on the number of stays that a defendant may be entitled to. Thus, I am simply not persuaded that, in and of themselves, Workman's 25 years on death row and his past stays have any bearing on whether the district court properly issued a TRO here. This is not to minimize the interests of the State and the victims in seeing Workman's sentence carried out. But we must remember that while justice should be prompt, "prompt *injustice* is not the answer." *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1040 n.43 (5th Cir. 1982) (emphasis added); *see also Evans v. Muncy*, 498 U.S. 927, 930 (1990) (Marshall, J., dissenting) (explaining that the state's interest in finality does not permit a court to "look the other way when late-arriving evidence upsets its determination that a particular defendant can lawfully be executed").

V. Conclusion

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. The majority's reasons for doing so are unconvincing. Whatever harm the State might sustain by the issuance of the TRO—if indeed "harm" it can be called—pales next to the damage done to our

Constitution by allowing a single defendant to perish under a method of execution that violates his rights. Of course, at this most preliminary of stages we cannot know whether Workman's allegations ultimately will prove meritorious. Our task is only to ascertain whether the allegations he raises are sufficiently disturbing to warrant a brief and temporary halt to his execution. Considering the record in this case and the deference owed to the district court, I would affirm the issuance of the TRO.

Accordingly, I respectfully dissent.