EXPEDITED ACTION REQUESTED
DEATH PENALTY CASE
Execution Scheduled: May 9, 2007

No. 07-____

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP R. WORKMAN
Plaintiff-Appellee

v.

GOVERNOR PHIL BREDESEN, et al.
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

MOTION TO VACATE TEMPORARY RESTRAINING ORDER

ROBERT E. COOPER, JR.,
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

JOSEPH F. WHALEN
Associate Solicitor General

MARK A. HUDSON
Senior Counsel

INTRODUCTION

On May 4, 2007 — five days prior to the *sixth* date scheduled for the execution of his 1982 death sentence for murdering Memphis Police Lieutenant Ronald Oliver in the line of duty — Workman filed a complaint under 42 U.S.C. § 1983 challenging, *for the first time*, the manner in which his sentence would be carried out, namely, by lethal injection. At the heart of his complaint lies his contention that the State intends to use a three-drug protocol (sodium thiopental, pancuronium bromide, and potassium chloride) that is unconstitutional, because "the use of this mixture of chemicals causes an unnecessarily painful and prolonged death experienced without total unconsciousness." (R. 6, Complaint, ¶ 2) Though Workman brings this complaint for the first time now, he has faced the imminent execution of his death sentence by lethal injection, using this same three-drug protocol, on five prior occasions over the last seven years.

Just hours before filing his complaint, Workman had filed a motion for a Temporary Restraining Order, seeking to restrain the defendants from executing his sentence for a time sufficient to allow him to exhaust his administrative remedies and to prepare and file § 1983 complaint. (R. 1, Motion for Temporary Restraining Order) The district court immediately scheduled a hearing on that motion, at which the defendants informed the court that, as of that morning, Workman had completed the

grievance process with respect to the issues raised in his grievance. Defendants objected to the issuance of a TRO in the absence of a complaint asserting any cause of action against them; the defendants further asserted that, if and when a complaint was filed, they should be afforded an opportunity to assert their defenses to it, in order to show that Workman was unlikely to prevail and that injunctive relief was therefore unwarranted. Shortly after the conclusion of the hearing, Workman filed an 82-page complaint, consisting of 255 paragraphs. And less than an hour after the complaint was filed, the district court granted Workman's motion, "restrain[ing] and enjoin[ing]" the defendants from executing his sentence pursuant to the lethal injection protocol in place, in order to allow Workman time to challenge that protocol. (R. 8, Temporary Restraining Order, p. 4).

Defendants now respectfully move to vacate the Temporary Restraining Order, because the district court abused its discretion in granting it. First, while the court purported to assess Workman's likelihood of success on the merits of his complaint, the court utterly failed to consider the timeliness of his complaint — despite a recent decision of this Court holding that a similar § 1983 "method-of-injection" challenge failed on limitations grounds. *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007).

Second, the district court failed to acknowledge the recent instruction from the Supreme Court that "inmates seeking time to challenge the manner in which the State

plans to execute them *must* satisfy *all* of the requirements for a stay"; consequently, the court also failed to acknowledge, much less follow, the Court's concomitant directive that "[a] court considering a stay *must* apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Hill v. McDonough*, 126 S.Ct. 2096, 2104 (2006) (emphasis added). *See Futnerick v. Sumpter Twp.*, 207 F.3d 305, 313 (6th Cir. 2000) (abuse of discretion occurs when district court improperly applies the law).

Lastly, in purporting to "balance the relative harms," the district court misidentified the pertinent interests of the State and thus failed to give any regard whatsoever to the harm that would be caused by granting injunctive relief. At this juncture, the interests of the State are paramount. *See Calderon v. Thompson*, 523 U.S. 538, 557 (1998). As this Court recently observed, both the State and the public have an interest in finality in this case, "which, if not deserving of respect yet, may never receive respect." *Workman v. Bell*, __ F.3d __, Nos. 06-6451; 07-5031, slip op, p. 4 (6th Cir. May 4, 2007).

ARGUMENT

I. THAT WORKMAN SOUGHT, AND THE DISTRICT COURT GRANTED, A "TRO" RATHER THAN A "STAY OF EXECUTION" DOES NOT DEPRIVE THIS COURT OF JURISDICTION AND DOES NOT RELIEVE WORKMAN OF THE REQUIREMENTS FOR OBTAINING A STAY.

At the outset, defendants address two potential issues of a procedural nature. Presumably, Workman sought a Temporary Restraining Order in the district court, rather than a stay of execution, for a reason. And the most likely reason is that by doing so, it would allow him then to argue either (1) that this Court lacks jurisdiction to entertain an appeal from the district court's grant of the TRO, or (2) that because he sought a TRO — and not a stay of execution — he was not subject to the requirements for obtaining a stay of execution. Should Workman advance either or both of these arguments, however, they would be without merit.

A. The TRO Issued By the District Court Amounts to a Stay of Execution.

First, while this Court may generally lack jurisdiction to hear an appeal of a district court's grant of a TRO under 28 U.S.C. § 1292(a)(1), "the label attached to an order by the trial court is not decisive," and this Court will "look[] to the nature of the order and the substance of the proceeding below to determine whether the rationale for denying appeal applies." *Northeast Ohio Coal. for Homeless and Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1005 (6th Cir. 2006).

The rationale for the rule is that, typically, TROs are of short duration and usually terminate with a ruling on a preliminary injunction. But an order may nevertheless be appealed "if it has the practical effect of an injunction and 'furthers the statutory purpose of permitting litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Id.*

The district court's order granting a TRO in this case is just such an order, for it is in legal effect a full-blown, completely effective stay of Workman's execution. The execution of Workman's sentence has been set by the Tennessee Supreme Court for May 9, 2007. *State v. Workman*, No. M1999-01334-SC-DPE-DD (Tenn. Jan. 17, 2007). Under Tennessee law, if that date passes without an execution, then the sentence may not be executed unless and until a new date is set by order of the Tennessee Supreme Court. Tenn.Sup.Ct.R. 12.4(E). The district court's "temporary" restraining order does not expire until May 14, 2007 — five days *after* the State's authority to execute Workman's sentence will have terminated. Any review at that point would be completely ineffectual. The district court has thus granted Workman a stay of execution, under the guise of a "Temporary Restraining Order." This Court's authority under § 1292(a)(1) to review district court orders granting stays of execution is unquestioned. The district court's labeling of its legally erroneous order should not shield it from this Court's review.

B. *Hill v. McDonough* Mandates That Any Prisoner Seeking Time to Challenge the Manner of His Execution Must Satisfy All of the Requirements for a Stay.

Should Workman argue that, because he sought and obtained only a TRO to restrain and enjoin the manner in which his sentence is to be executed — and not a stay of execution — the district court was not required to consider the dilatory nature of his complaint in deciding whether to grant injunctive relief, such an argument would be foreclosed by *Hill* itself. Hill had likewise not sought a stay of execution but instead sought only "to enjoin the respondents 'from executing [him] in the manner they currently intend.'" *Hill*, 126 S.Ct. at 2102. It was for this reason — that "a grant of injunctive relief could not be seen as barring the execution of Hill's sentence," *id.* — that his complaint was not construed to be a habeas petition and thus could proceed under § 1983. *See Nelson v. Campbell*, 541 U.S. 637, 648 (2004) (request to enjoin state's use of a particular execution procedure does not sound in habeas, but a request for a complete stay of the execution might).

But the Court recognized that "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." The Court thus went on to stress that "[f]iling an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course" and proceeded to impose the requirements for granting a stay on prisoners like Hill, and like

Workman here, who "seek[] time to challenge the manner in which the State plans to execute them." *Id.*, 126 S.Ct. at 2104. *See, e.g., Brown v. Livingston*, 457 F.3d 390, 391 (5th Cir.), *cert. denied*, 127 S.Ct. 10 (2006) (construing request to enjoin use of a "particular lethal injection protocol" as a request for a stay of execution). "[E]quity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill* 126 S.Ct. at 1204.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER AND APPLY THE LAW RELATIVE TO THE TIMING OF WORKMAN'S COMPLAINT.[1]

A. Workman's Claims Have No Likelihood of Success on the Merits; His Complaint Is Clearly Barred by the Applicable Statute of Limitations.

In *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), this Court held that § 1983 "method-of-injection" challenges are subject to the applicable statute of limitations, and that the accrual date for such a cause of action is no later than the date on which state law required that the prisoner be executed by lethal injection. *Id.*, 479 F.3d at 422 ("the test is whether he knew or should have known based upon reasonable inquiry, and could have filed suit and obtained relief"). Under Tennessee

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[1]In the event Workman were to argue that the district court did not consider the timing of his complaint because the defendants did not raise this argument below, he would only emphasize the fact that, in its apparent haste to award Workman injunctive relief, the district court deprived the defendants of *any opportunity* to raise these arguments below.

law, civil actions for compensatory or punitive damages, or both, under the federal civil rights statutes must be brought within one year after the cause of action accrues. This Court has held that this one-year statute of limitation applies to suits for injunctive relief under § 1983. *See Cox v. Shelby State Community College*, 48 Fed.Appx. 500, 507 (6th Cir. 2002).

Workman's "method-of-injection" challenge thus accrued as early as May 1998 — when lethal injection became available as a method of execution in Tennessee — and no later March 30, 2000 — when it became Tennessee's primary method of execution. *See* Tenn.Code Ann. § 40-23-114; Tenn.Pub Act., ch. 614, § 8. Workman filed his complaint challenging Tennessee's three-drug lethal injection protocol on May 4, 2007 — no less than seven years after his cause of action accrued. As in *Cooey*, therefore, Workman's claim quite clearly fails on limitations grounds.

B. Workman Delayed Unnecessarily in Filing His Challenge to the State's Three-Drug Lethal Injection Protocol.

"[B]efore granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harm to the parties, but also *the extent to which the inmate has delayed unnecessarily in bringing the claim.*" *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (emphasis added). Workman's unnecessary delay in seeking to challenge the State's three-drug lethal injection protocol, even

after the statute of limitations had run, deprives him of the right to ask a federal court to exercise its equitable authority to provide him time to do so now. "[F]ederal courts can and should protect States" from lawsuits seeking equitable relief that are filed too late in the day. *Hill*, 126 S.Ct. at 2104. And this Court has recognized that delays in bringing challenges to execution protocols are inexcusable. In *In re Sapp*, 118 F.3d 460 (6th Cir. 1997), *abrogated on other grounds by Cooey*, 479 F.3d at 422, where a capital prisoner sought to challenge electrocution as his method of execution, this Court observed:

> Petitioner has known of the possibility of execution for over fifteen years. It has been ten years since a Kentucky governor first signed a death warrant for his electrocution. . . . Even though, in petitioner's mind, every year or every day may bring new support for his arguments, the claims themselves have long been available, and have needlessly and inexcusably been withheld. Thus, equity would not permit the consideration of this claim for that reason alone, ...

Id., 118 F.3d at 464. *See also Alley v. Little*, 186 Fed.Appx. 604, 607 (6th Cir. June 24, 2006), *cert. denied*, 126 S.Ct. 2975 (2006) (where prisoner's challenge to lethal injection "was very late in coming," its untimeliness was both a correct and adequate basis on which to deny equitable relief); *Hicks v. Taft*, 431 F.3d 916 (6th Cir. 2005) (denying stay of execution "primarily because the motion was untimely"). Workman's claims likewise have "needlessly and inexcusably been withheld." *Sapp*, 188 F.3d at 464.

Seven years ago, in April 2000, Workman came within two days of the execution of his sentence by lethal injection before a stay was issued,[2] but he never challenged the State's three-drug lethal injection protocol.[3] In January 2001, Workman came within five days of the execution of his sentence by lethal injection before a stay was issued,[4] but he never challenged the State's three-drug lethal injection protocol. In March 2001, Workman came within two hours of the execution of his sentence by lethal injection before a stay was issued,[5] but he never challenged the State's three-drug lethal injection protocol. In September 2003, Workman came within nine days of the execution of his sentence by lethal injection,[6] but he never

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[2]Workman's sentence was scheduled to be executed on April 6, 2000; this Court granted a stay on April 4, 2000. *Workman v. Bell*, 209 F.3d 940 (6th Cir. 2000) (en banc).

[3]Again, lethal injection became an available method of executing a death sentence in Tennessee in 1998 and the primary method as of March 30, 2000. Tenn.Pub.Acts, ch. 614, § 8.

[4]Workman's sentence was scheduled to be executed on January 31, 2001; this Court granted a stay on January 26, 2001. *Philip Workman v. Ricky Bell*, Nos. 96-6652/00-5367 (6th Cir. Jan. 26, 2001) (en banc).

[5]Workman's sentence was scheduled to be executed on March 30, 2001; the Tennessee Supreme Court granted a stay shortly before midnight on March 29, 2001. *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001).

[6]Workman's sentence was scheduled to be executed on September 24, 2003; an executive reprieve was issued on September 15, 2003. *See Philip Workman v. Ricky Bell*, No. 03-2660 (W.D.Tenn. Sept. 15, 2003) (docket minutes reflecting withdrawal of motion for stay of execution in light of executive reprieve).

challenged the State's three-drug lethal injection protocol.[7] And in September 2004, Workman came within twenty days of the execution of his sentence by lethal injection,[8] but he never challenged the State's three-drug lethal injection protocol. Workman's previous failure ever to have challenged the three-drug protocol, particularly in the face of all of these instances in which one would have expected him to have done so, is fatal to his equitable request for time to do so now.

C. Workman Seeks to Challenge the Same Three-Drug Protocol That Has Been in Place Since Tennessee Made Lethal Injection Its Primary Method of Execution.

Workman will no doubt argue, in response both to the contention that his action fails on limitation grounds and that he was dilatory in bringing his claims, that the Governor of Tennessee recently ordered a review of the State's execution protocol

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[7]Workman's failure to challenge the protocol at this juncture is particularly notable given the ongoing state litigation initiated by another Tennessee prisoner that did just that. *See Abdur'Rahman*, 181 S.W.3d 292 (Tenn. 2005), *cert. denied*, 126 S.Ct. 2288 (2006). *See also Alley v. Little*, 181 Fed.Appx. 509, 513 (6th Cir. May 12, 2006), *cert. denied*, 126 S.Ct. 2973 (2006) (finding unnecessary delay in prisoner's bringing challenge to Tennessee's lethal injection protocol, Court notes that "Abu-Ali Abdur'Rahman[] petitioned the state Commissioner of Correction to declare the lethal injection protocol unconstitutional in April 2002"). Indeed, there seems no reason why Workman could not have sought to intervene in Abdur'Rahman's case. *See* Tenn.R.Civ.P. 24.02.

[8]Workman's sentence was scheduled to be executed on September 22, 2004; the United States District Court for the Western District of Tennessee granted a stay on September 2, 2004. *See Philip Workman v. Ricky Bell*, Nos. 94-2577; 03-2660 (W.D.Tenn.).

and that, consequently, he is now seeking to challenge a *brand new* lethal injection protocol — one that he could not have challenged in this manner before. But such an argument would be to no avail. No one disputes that, on February 1, 2007, the Governor of Tennessee ordered a review of the State's execution protocol, to be completed by May 2, 2007;[9] nor does anyone dispute that the adjective "new" may be used properly to modify the lethal injection protocol now in place. But this protocol, in its essential elements, *is the same as it was* prior to the review. Workman concedes as much — his own Complaint alleges that "[h]aving concluded its 'comprehensive' review, . . . the TDOC released a protocol that is *only slightly different* than the prior protocol." (R. 6, Complaint, ¶ 1, pp. 3-4) Indeed, Paragraph 2 of Workman's Complaint is a nearly verbatim recitation of Paragraph 1 of the Complaint filed by capital prisoner Sedley Alley on April 11, 2006, challenging the State's three-drug lethal injection protocol. *See Sedley Alley* v. *George Little*, No. 06-0340 (M.D.Tenn.)[10]

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[9]On February 1, 2007, Governor Bredesen signed State of Tennessee Executive Order Number 43. The Executive Order gave a reprieve to those condemned Tennessee inmates whose executions were scheduled between that date and May 2, 2007.

[10]For example, Workman's Complaint alleges, "The use of this mixture of chemicals causes an unnecessarily painful and prolonged death experienced without total unconsciousness." (R. 6, Complaint, ¶ 2) Sedley Alley, who was represented by the same counsel as Workman, filed a Complaint alleging,"The use of this mixture

That Workman is right to concede that the difference between the two protocols is only slight is demonstrated by a comparison of Workman's complaint with the opinion in *Abdur'Rahman*, in which the Tennessee Supreme Court upheld the constitutionality of the State's three-drug lethal injection protocol. Both the former and current protocol call for the use of five grams of sodium thiopental, as well as doses of pancuronium bromide and potassium chloride. (R. 6, Complaint, p. 11, ¶32); *Abdur'Rahman*, 181 S.W.3d at 300. Both provide for the administration of the chemicals in the following sequence: sodium thiopental, saline flush, pancuronium bromide, saline flush, potassium chloride.[11] (R. 6, Complaint, p. 38, ¶132); *Abdur'Rahman*, 181 S.W.3d at 301. Both provide for the insertion of the IV lines by EMT/paramedics. (R. 6, Complaint, p. 36, ¶128); *Abdur'Rahman*, 181

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of chemicals causes a painful death experienced without total unconsciousness." *Alley*, No. 06-0340 ((R. 1, Complaint, ¶ 1). Furthermore, Workman alleges in his Complaint that fourteen other states "have protocols that are almost identical to Tennessee's New April 30, 2007 Protocol." (R. 6, Complaint, ¶ 183) Much the same could be said, and was said, of the former protocol. *See Abdur'Rahman*, 181 S.W.3d at 307 ("Tennessee's lethal injection protocol is consistent with the overwhelming majority of lethal injection protocols used by other states . . . ."); *see also Edward Harbison v. George Little*, No. 06-1206 (M.D. Tenn.) (R. 18-1, Plaintiff's Jan. 23, 2007, Response to Motion to Dismiss, p. 24) (prisoner challenging Tennessee's former lethal injection protocol asserts that "California's three-drug protocol [is] the same used here").

[11]The revised protocol provides for a saline flush following administration of the potassium chloride.

S.W.3d at 300. Both provide for the monitoring of the IV site by closed-circuit camera. (R. 6, Complaint, p. 20, ¶75a); *Abdur'Rahman*, 181 S.W.3d at 301. Both provide for a physician on site to perform a "cutdown" procedure if the EMT cannot gain access to a vein. (R. 6, Complaint, p. 37, ¶129); *Abdur'Rahman*, 181 S.W.3d at 301.

Ironically (or perhaps not so), both Workman and Abdur'Rahman relied on the expertise of Dr. Mark. J. S. Heath to support their claims. And Dr. Heath's criticism of the three-drug lethal injection protocol is much the same in both cases. Dr. Heath opines that the protocol lacks sufficient procedures to ensure that inmates are sufficiently anesthetized. (R. 6, Complaint, p. 44); *Abdur'Rahman*, 181 S.W.3d at 302. Dr. Heath is critical of the alleged absence of safeguards for monitoring the IV catheter. (R. 6, Complaint, pp. 43-44); *Abdur'Rahman*, 181 S.W.3d at 302-303. Dr. Heath expresses concern about the mixing and administration of the chemicals. (R. 6, Complaint, p. 26-27); *Abdur'Rahman*, 181 S.W.3d at 302. And Dr. Heath criticizes the use of the "cutdown" procedure. (R. 6, Complaint, p. 37-38); *Abdur'Rahman*, 181 S.W.3d at 303.[12]

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[12]In support of its determination that Workman had demonstrated a "strong or substantial likelihood of success on the merits of his constitutional claims," (R. 8, Temporary Restraining Order, p. 2), the district court pointed to the opinions of Dr. Heath, but the court made no mention of the rejection of Dr. Heath's opinions in *Abdur'Rahman*. *See also Alley*, 186 Fed.Appx. at 606 (finding small likelihood of

The current protocol is new only in the sense that additional procedures have now been included in order to improve the administration of the *very same three-drug lethal injection protocol* that has always existed.[13] And Workman's main complaints relate to the use of this three-drug protocol and the alleged absence of qualified medical professionals from the process. Because the essential elements of Tennessee's three-drug lethal injection protocol remain the same, Workman cannot rely on the recent changes made to it to revive his untimely and dilatory complaint. *See Cooey*, 479 F.3d at 423-424 (changes made to lethal injection protocol do not resurrect prisoner's lost ability to challenge it where changes do not relate to prisoner's core complaints); *see also Jones v. Allen*, __ F.3d __, 2007 WL 1225393, at *3 n.3 (11th Cir. Apr. 27, 2007), *cert. denied*, __ S.Ct. __, 2007 WL 1257938 (May 3, 2007) (delay in filing challenge to lethal injection protocol not justified by lack of specific information about it; crux of prisoner's challenge was that state used three-drug-protocol that was same as that used in almost every other death penalty state, and he could not assert that he had been unaware that state employed this method).

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success on the merits of Sedley Alley's constitutional claims).

[13]For his part, Workman complained in a recent interview that the revised execution procedures "didn't fix anything." *The Tennessean*, May 3, 2007 (copy attached).

Similarly, Workman may also argue that he was not dilatory in filing his complaint because he could not have filed it any sooner than he did due to the fact that the protocol was under review between February 1 and April 30, 2007, and one other case litigating the protocol was therefore dismissed as moot. But such an argument would entirely miss the point. In arguing that Workman delayed unnecessarily in filing his complaint, defendants do not seek to hold him accountable for the three months during which the protocol was under review; defendants *do* seek, however, to hold Workman accountable for the *eighty-two months* prior to that, during which he did nothing to challenge the three-drug protocol. *See Jones*, __ F.3d __, 2007 WL 1225393, at *3 (affirming denial of stay to litigate § 1983 challenge to three-drug lethal injection protocol where suit had been filed six months prior to execution date but "nearly four years after Alabama made lethal injection its primary method of execution"). "[There is] no convincing reason why, after . . . [Tennessee] made lethal injection its primary method of execution, . . . [Workman] could not have brought his method-of-execution challenge sooner than he did." *Id.* It would simply defy logic, not to mention basic principles of equity, to conclude that Workman, despite having sat on his hands and done nothing in this respect for the last seven years and thus lost his right to challenge the State's three-drug lethal injection protocol, may now enjoy a windfall and have that right fully restored — to the point

of once again derailing the execution of the State's judgment — merely as the result of the State's effort to improve upon the administration of that protocol.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO IDENTIFY PROPERLY AND CONSIDER APPROPRIATELY THE HARM THAT WOULD BE CAUSED BY GRANTING INJUNCTIVE RELIEF.

When acting on any request for injunctive relief, a court must weigh the harm that would result from denying an injunction against the harm that would result from granting one. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997) (cited by the district court). But equitable relief is not a matter of right, and in this context, "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 126 S.Ct. 2096. Here, the district court was wholly *in*sensitive to this interest of the State, as it failed even to acknowledge it. Instead, the district court concluded only that "[t]he balance of the relative harms among the parties weighs in favor of Plaintiff against Defendants. . . . Defendants have no interest in proceeding with an execution which may ultimately be found to be unconstitutional." (R. 8, Temporary Restraining Order, p. 3)

But the interest of the State at stake here is not in utilizing any particular method of execution; the interest of the State at stake here is its interest in finality and its corresponding interest in enforcing its criminal judgments. Indeed, "both the state

and the public have an interest in finality." *Workman v. Bell*, __ F.3d __, Nos. 06-6451; 07-5031, slip op., p. 4 (6th Cir. May 4, 2007) (emphasis added). Twenty-five years have passed since the judgment of conviction and sentence was issued in Workman's case, and in an effort to forestall the lawful execution of that sentence, he has been litigating that judgment for the seven-and-a-half-years since federal habeas review was completed in 1999. *See Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998), *cert. denied*, 528 U.S. 913 (1999). The execution of Workman's sentence has been delayed on five prior occasions during this period — a fact that the district court did not take into consideration. The harm that would befall the State's now paramount interest in enforcing this judgment far exceeds any accounted for by the district court.

Furthermore, "the *victims of crime* have an important interest in the timely enforcement of a sentence," *Hill*, 126 S.Ct. at 2104 (emphasis added), and the district court failed to give *any* regard to this interest. After twenty-five years and five prior execution dates, the surviving victims of this crime are fully entitled to expect that Workman's sentence will finally be carried out. "To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims of crime alike." *Calderon*, 523 U.S. at 556. "The State and the surviving victims have waited long enough for some

closure," *Jones*, __ F.3d__ , 2007 WL 1225393, at *4; the district court thus clearly erred in electing to interfere with the State's strong interest in enforcing its judgment in this case.

CONCLUSION

For the foregoing reasons, the Temporary Restraining Order issued by the district court should be vacated.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

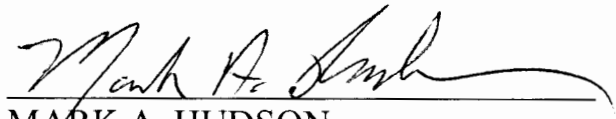
JOSEPH F. WHALEN
Associate Solicitor General

MARK A. HUDSON
Senior Counsel
Office of the Attorney General
P. O. Box 20207
Nashville, TN 37202
(615) 741-7401

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was forwarded by e-mail on this, the 6th day of May, 2007, to:

Kelley J. Henry
Paul R. Bottei
Gretchen L. Swift
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, TN 37203



MARK A. HUDSON
Senior Counsel
Office of the Attorney General
P. O. Box 20207
Nashville, TN 37202
(615) 741-7401

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Condemned man expects his death to be painful

SHEILA BURKE
STAFF

By SHEILA BURKE

Staff Writer

A Memphis man scheduled to be the first Tennessee inmate put to death since the end of a 90-day moratorium on executions criticized the state's new execution procedures, saying they would do little to ensure death is not painful and inhumane.

"It didn't fix anything," Philip Workman said Wednesday during an interview at Riverbend Maximum Security Institution in Nashville. "You wouldn't use that drug to kill a dog. You can't move if you're in pain. You can't bat your eyelashes. You can't do anything.

"All this is doing is making folks choose the electric chair."

Workman, 53, expects to be executed.

He admits taking part in a hold-up at a fast-food restaurant in 1981 but denies firing the bullet that killed Memphis police Lt. Ronald Oliver during a subsequent shootout.

During the interview Wednesday, Workman acknowledged that he could win another stay of his death sentence, scheduled to be carried out at 1 a.m. Wednesday.

But, in the long run, he says, it would make little difference.

"There's a bias because he's a police officer," Workman said. "There is no way I can win, no matter what the evidence is."

His execution date comes a week after the state lifted a three-month moratorium on executions to allow prison officials to develop new procedures for executions by injection and the electric chair.

Workman, who had already selected lethal injection, would become the first prisoner executed under the new protocol.

Death date will be encore

During Wednesday's interview in a visiting area at death row, Workman wore a baseball cap emblazoned with a cross and a reference to the biblical verse Job 13:15:

The Scripture says: "Though he slay me, yet will I hope in him; I will surely defend my ways to his face."

Barring a reprieve, Workman will be moved Sunday from his death row cell to "death watch" in a holding area closer to the death chamber. At some point, he will be asked to select a last meal and make final preparations for his death.

He has gone through the grim ritual on three other occasions, once coming within 45 minutes of being executed before it was postponed by order of the Tennessee Supreme Court. He recalled how a prison worker paced back and forth near the cell, awaiting the order to proceed.

"It was nerve-racking," Workman said.

He has unsuccessfully asked Gov. Phil Bredesen for clemency in the past, and he vowed he won't grovel for mercy again. "The governor has made his position clear," Workman said.

He admits only robbery

But though he's resolved to die, he doesn't think his death sentence is fair.

"I did an armed robbery, and that's all I should be punished for," he said.

He points to a slew of evidence — a witness who has since recanted his story, pathologists who say that the officer was killed by friendly fire, and the testimony of a Shelby County medical examiner who was later indicted.

A spokeswoman for the state attorney general's office declined to comment.

Verna Wyatt, a victims' rights advocate, said the sentence is fair because the crime led to Oliver's death.

"The deal is he's responsible for a police officerbeing dead," she said. "There's nothing to listen to. He set everything in motion. That police officer is dead because of Philip Workman."

Workman has heard that argument before but points out that Tennessee law, at the time, wouldn't have allowed him to be executed for a friendly-fire shooting.

He finds comfort in the belief that if he must die people will know the truth about the officer's killing.

"I just don't like dying under a lie," he said.

Contact Sheila Burke at 664-2144 or sburke@tennessean.com.

HIGHLIGHTS OF NEW PROCEDURES

Tennessee's 90-day moratorium on executions ended Wednesday with new procedures for putting people to death by electrocution and lethal injection. Here are highlights.

• Separates lethal injection from electrocution. There are now two separate manuals.

• Gives more detail about each step of the process. The new documentation gives specific dosage amounts for the three drugs used in lethal injection

— sodium thiopental, pancuronium bromide and potassium chloride.

• Corrects clerical errors made in the old manual and added additional safeguards. For example, the old execution manual gave instructions for an inmate who was to die by lethal injection to have his head shaved and for a fire extinguisher to be present, failing to distinguish between execution by electric chair and injection.

• Includes more documentation and more checks and balances during the execution process. There are additional forms for prison workers to document the process.

• Adds people responsible for observing the entire process and documenting what happens and at what time. For example, a new person, called the "lethal injection recorder," will document each event.

SOURCE: Tennessee Department of Correction

WHAT'S NEXT

Philip Workman's lawyers have asked a three-judge panel of the 6th U.S. Circuit Court of Appeals for a stay of execution, charging that state officials withheld exculpatory evidence from the federal courts. The state responded Wednesday, saying

Workman hasn't proved that it withheld evidence and that his chances of winning this appeal are extremely low.

The losing side will almost certainly appeal to the full panel of the court.

— SHEILA BURKE