RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 07-5562

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP WORKMAN, Petitioner-Appellee, v. GOVERNOR PHIL BREDESEN, et al., Respondents-Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Before: SILER, COLE, and SUTTON, Circuit Judges.

SUTTON, Circuit Judge. Philip Ray Workman is scheduled to be executed by the State of Tennessee on May 9, 2007, at 1:00 a.m., for the murder of Lieutenant Ronald Oliver. On May 4, 2007, Workman filed a motion for a temporary restraining order in federal district court, claiming that the State's three-drug protocol for implementing the death penalty violates the Eighth (and Fourteenth) Amendment, and later that day the court granted the motion. Still later that same day, the Governor of Tennessee and the other defendants filed an appeal from that order. Early today, May 7, 2007, the Governor and others filed a 19-page motion in this court to vacate the district court's order. A little later this morning, Workman filed a 45-page brief in response.

This dispute arises from a 25-year-old capital sentence, and the district court's order, if upheld, would be Workman's *sixth* stay of an execution date set by the State over the last seven years. At no point until last Friday, May 4, 2007, did Workman challenge the State's method of execution, even though the components of the procedure that Workman challenges today have been

in existence in the main since 1998. He thus cannot escape the Supreme Court's and this court's limitations on dilatory challenges to an execution procedure.

Workman's prospects for success on the merits also are dim. The Supreme Court has never invalidated a State's chosen method of execution. No court has invalidated the three-drug protocol used by Tennessee (and 28 other jurisdictions). Several state and federal courts have upheld this same three-drug protocol (including the Tennessee Supreme Court in 2005). Our court vacated a similar stay decision in 2006 with respect to a similar challenge and permitted the State to execute the inmate under the protocol. Notwithstanding the decision of the Tennessee Supreme Court in 2005 and the decision of this court in 2006, the State undertook an effort in 2007 to review and improve the procedure. Workman acknowledges that the new procedure is only slightly different from the old procedure and offers no explanation how Tennessee has done anything more than make the new procedure less prone to implementation errors. Everything, indeed, the State has done in reviewing and revising the procedure shows that it is trying to prevent Workman from suffering *any* pain during his execution, not that it is trying or willing to allow a procedure that imposes unnecessary and wanton pain. For these reasons and those elaborated below, we vacate the district court's temporary restraining order.

I.

A.

On August 5, 1981, at 10:00 p.m., Workman walked into a Wendy's restaurant in Memphis, Tennessee, held the employees and a customer at gunpoint, herded them into the manager's office and ordered the manager to empty the day's receipts into a bag. *State v. Workman*, 667 S.W.2d 44, 46 (Tenn. 1984). He instructed the employees to remain in the office, stole an employee's car keys, locked the door and started to leave the restaurant. *Id*.

Responding to a silent alarm that one of the employees had triggered, Lt. Oliver stopped the defendant as he was exiting. *Id.* At some point, Workman broke away from Lt. Oliver and fled. Additional officers at the scene grabbed Workman, who broke free of their grasp, then shot Lt. Oliver in the chest and a second officer in the arm, fired a second shot at the second officer, then ran to a business next door, pausing mid-flight to fire another bullet at a third officer. *Id.* Lt. Oliver died from the gun shot. *Id.* at 47. Police cordoned off the crime scene area and after an extensive search found Workman hiding in the underbrush with a .45 caliber pistol nearby. *Id*.

In 1982, a jury found Workman guilty of first-degree murder and imposed a capital sentence. *Id.* Direct review of Workman's conviction and sentence ended without success in 1984. *See State v. Workman*, 667 S.W.2d 44 (Tenn.), *cert. denied*, *Workman v. Tennessee*, 469 U.S. 873 (1984). In 1986, the Shelby County Criminal Court denied Workman's first petition for post-conviction relief, which the Tennessee Court of Criminal Appeals affirmed. *Workman v. State*, C.C.A. No. 111, 1987

WL 6724 (Tenn. Ct. Crim. App. 1987). The Tennessee Supreme Court denied leave to appeal, and so did the United States Supreme Court. *Workman v. Tennessee*, 484 U.S. 873 (1987).

In 1988, Workman filed a second petition for post-conviction relief, which also was unsuccessful. *See Workman v. State*, 868 S.W.2d 705 (Tenn. Ct. Crim. App. 1993), *cert. denied, Workman v. Tennessee*, 510 U.S. 1171 (1994).

In 1994, Workman filed a petition for a writ of federal habeas corpus in the United States District Court for the Western District of Tennessee. When that proved unsuccessful, *see Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998), *cert. denied*, 528 U.S. 913 (1999), he filed several other petitions in federal court, which also proved unsuccessful. *See Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1193 (2001) (unsuccessful request to reopen habeas proceedings); *Workman v. Bell*, 245 F.3d 849 (6th Cir. 2001), *cert. denied*, 532 U.S. 955 *and In re Workman*, 532 U.S. 954 (2001) (second attempt to reopen habeas proceedings denied).

In March 2001, he collaterally attacked his conviction in state court, filing a petition for a writ of *coram nobis. See Workman v. Tennessee*, No. 81239 (Tenn. Crim. Ct. March 28, 2001); Tenn. Code § 40-25-105. The state courts rejected the claim. *See Tennessee v. Workman*, 111 S.W.3d 10 (Ct. Cr. App. 2002).

In 2003, Workman returned to federal court. He filed a motion for relief from the district court's denial of his first federal habeas petition, *see* Fed. R. Civ. P. 60(b), claiming that the

Tennessee Attorney General perpetrated a fraud upon the district court during Workman's habeas proceedings. The district court denied the motion on October 17, 2006.

On January 17, 2007, the Tennessee Supreme Court scheduled Workman's execution for May 9.

On February 1, Governor Bredesen issued an executive order suspending Tennessee's lethal-injection protocol and asked the Commissioner of Corrections to review the State's capital punishment administration procedures and to develop a new protocol by May 2. *See* State of Tennessee, Executive Order by the Governor No. 43 (Feb. 1, 2007). In late April (April 30), the Governor announced the new lethal-injection procedure for the State, which left the prior procedure unchanged in the main, though it formalized some components of the procedure and improved others.

On April 27, the district court granted Workman a certificate of appealability to seek review of the district court's denial of his Rule 60(b) motion but denied Workman's request for a stay pending appeal. On May 1, Workman filed an appeal from the Rule 60(b) motion and sought a stay of his execution in this court. On May 4, 2004, we denied the motion for a stay, concluding that Workman had not shown a likelihood of success in reversing the district court's Rule 60(b) decision. *Workman v. Bell*, Nos. 06-645, 07-5031, Order at 4-5 (6th Cir. May 4, 2007).

That same day, Workman filed a new complaint in a different federal court—the Middle District of Tennessee. In an 82-page complaint, he challenged the constitutionality of the State's

lethal-injection protocol and sought a temporary retraining order suspending his May 9 execution date. Later that same day (still May 4), the district court granted a temporary restraining order, set a preliminary injunction hearing for May 14 regarding the constitutionality of the procedure and effectively stayed Workman's May 9 execution date.

B.

Given the nature of Workman's challenge, a brief review of the history of Tennessee's execution procedures is in order. In 1796, Tennessee became a State and the first state constitution mentioned "capital offenses." The common law permitted the death penalty, which the State generally carried out by hanging. Tennessee Dep't of Corrs., Capital Punishment Chronology, *available at* http://www.state.tn.us/correction/newsreleases/pdf/chronology-rev0905.pdf (last visited May 7, 2007). The State adopted a criminal code in 1829, which codified hanging as the sole method of imposing the death penalty. *Id.* Death by hanging remained the method of execution in Tennessee until 1913, when the State replaced the gallows with the electric chair. Tennessee's last execution by electrocution took place in 1960. In the aftermath of *Furman v. Georgia*, 408 U.S. 238 (1972), the Tennessee General Assembly passed a new death penalty statute in 1974, which the State's Supreme Court later declared unconstitutional. The State enacted another death-penalty law in 1977, which still authorized electrocution as the State's method of execution. Tennessee Dep't of Corrs., Capital Punishment Chronology.

In 1998, Tennessee legislators made lethal injection an option for capital inmates though it continued to allow inmates to choose electrocution. *Abdur'Rahman v. Bredesen*, No. M2003-01767-COA-R3-CV, 2004 WL 2246227, at *3 (Tenn. Ct. App. Oct. 6, 2004); *see also* Tenn. Code. Ann. § 40-23-114(a). The State's General Assembly vested the Tennessee Department of Corrections with the authority "to promulgate necessary rules and regulations to facilitate the implementation" of death by lethal injection. Tenn. Code § 40-23-114(c). The Department of Corrections decided to use a three-drug protocol modeled after the one that Texas adopted because "Texas had the most experience with carrying out executions by lethal injection." *Abdur'Rahman*, 2004 WL 2246227, at *3.

In 2003, an inmate challenged the constitutionality of the State's lethal-injection protocol under the Eighth Amendment. In 2005, the Tennessee Supreme Court rejected the challenge. *See Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 314 (Tenn. 2005).

On February 1, 2007, the Governor directed the Department of Corrections to engage in a "comprehensive review" of Tennessee's death penalty protocol and procedures, both for lethal injection and for electrocution. *See* Executive Order No. 43; Report on Administration of Death Sentences in Tennessee (Report) (Apr. 30, 2007) at 3. The Commissioner of the Department formed a committee, which conducted research, obtained input from experts, sought information from other jurisdictions and updated its execution manual for carrying out the death penalty. Report at 3.

The updated execution manual includes:

- Detailed descriptions of each step of the electrocution and lethal-injection processes.
- Detailed descriptions of the qualifications, selection processes, and training requirements for execution team members.
- A detailed description of the services provided to family members of the condemned inmate's victims.
- Enhanced requirements for contemporaneous documentation of each significant stage of an execution as it is carried out.
- Enhanced accountability in connection with the procurement, storage, and disposition of the legal-injection chemicals.

Report at 1 (attached).

In reviewing the State's lethal-injection protocol, the committee focused on (1) what chemicals should be used in the procedure and in what quantities, (2) what training and qualifications the executioner and the IV team should possess, (3) what method the IV team should use to administer drugs if unable to establish "peripheral venous access," and (5) what documentation should be required regarding the administration of the chemicals. Report at 4. The committee met 19 times from February through April 2007 and held a public hearing in April before issuing its findings. Report at 5.

Chemical selection and amounts. Tennessee decided to retain the three-drug protocol it had adopted in 1998, a protocol that 29 other jurisdictions, including the Federal Government, employ. Report at 6. The protocol involves the injection of 5 grams of sodium thiopental followed by 100 milligrams of pancuronium bromide (Pavulon) followed by 200 millequivalents of potassium

chloride, all delivered intravenously. Report at 6. The dose of sodium thiopental, a barbiturate that "reduces oxygen flow to the brain and causes respiratory depression," Execution Procedures for Lethal Injection at 35, quickly anesthetizes the inmate and is sufficient to cause death in the absence of the two additional chemicals in the protocol. Pancuronium bromide is a "muscle paralytic" that "assist[s] in the suppression of breathing and ensure[s] death." *Id.* The amount of pancuronium bromide the State administers also proves fatal on its own, and the State selected the drug because it hastens death and "prevents involuntary muscular movement that may interfere with the proper functioning of the IV equipment," thus "contribut[ing] to the dignity of the death process." Report at 6, 7. Potassium chloride, a salt, interferes with heart function, causing "cardiac arrest and rapid death." Report at 6; Execution Procedures for Lethal Injection at 35. If administered properly, the sodium thiopental anesthetizes inmates before they receive the remaining two chemicals. Report at 7.

Before deciding to continue using the three-drug protocol, the committee considered two variations on this procedure—a two-drug option and a one-drug option. The two-drug option would have eliminated pancuronium bromide from the protocol. The State rejected this approach after concluding that "the administration of potassium chloride without a preceding dose of pancuronium bromide would typically result in involuntary movement which might be misinterpreted as a seizure or an indication of consciousness." Report at 8. The State rejected a one-drug protocol, which would have used sodium thiopental alone, because it would slow down the death process and because "the effect of the required dosage of sodium thiopental would be less predictable and more

variable when it [was] used as the sole mechanism for producing death." Report at 8. On top of these concerns, the commission noted that no State had used a one- or two-drug protocol to carry out an execution, leaving Tennessee with no data or case studies to indicate that these options would work better and would operate more humanely than the three-drug protocol. Report at 8.

The State also considered the benefits of the three-drug protocol—that the protocol had worked well in the past, that all courts that had reviewed the protocol had deemed it constitutional and that dozens of States had used it and thus could provide information, data and expertise about their experiences with it and refinements to it. The State balanced these considerations against the risks associated with the three-drug protocol—that using three different chemicals is the "most complicated" of the three options, that "there is a remote chance of an error in implementation that may cause the inmate to incur brief pain" and that pancuronium bromide requires special attention because it must be refrigerated. Report at 7–8. Balancing these costs and benefits, Tennessee chose to continue using the three-drug protocol.

Training and qualifications of IV team and executioner. Tennessee's IV teams have always consisted of "Emergency Medical Technicians with IV certification or certified paramedics," Report at 9, but the previous execution manual did not contain language requiring team members to possess this training and these qualifications. The State therefore updated the manual to make these requirements express. Report at 9; *see also* Execution Procedures for Lethal Injection at 32–33. Despite the fact the State always has mandated that IV team members adhere to continuing education requirements to keep their licences and certification current, as well as required that team

members "regularly practice establishing IV access during execution training exercises," these requirements had not been contained in the execution manual. The State also made these requirements express. Report at 9; Execution Procedures for Lethal Injection at 33, 50.

Tennessee, finally, formalized its previously unwritten rule that executors must be trained in IV therapy so that they can recognize when they have failed to establish IV access. Report at 9; Execution Procedures for Lethal Injection at 32–33.

Cut-down procedure. If the IV team cannot locate a usable vein during an execution (due for example to drug use by the inmate), *see* Execution Procedures for Lethal Injection at 41, Tennessee uses a cut-down procedure—which means that a physician makes an incision in order to obtain IV access. After reviewing the cut-down procedure and its alternatives "with several experts," the State concluded that "cut-down procedures are not particularly difficult for physicians to perform," and therefore decided to keep the procedure as its contingency plan during the lethal-injection process. Report at 9; Execution Procedures for Lethal Injection at 20, 41, 67.

Documentation. Tennessee revised its procedures to require "enhanced documentation" for procurement and storage of the chemicals used for lethal injection. Report at 9. The State also amended its execution manual to include a "contemporaneous documentation" requirement—meaning that a member of the IV team must document the administration of the three-drug protocol during an execution. Report at 10; Execution Procedures for Lethal Injection at 21, 65, 82–86.

II.

We have jurisdiction, as an initial matter, to review the district court's temporary restraining order. *See N.E. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1005 (6th Cir. 2006). While we generally do not have jurisdiction to review temporary restraining orders, our jurisdiction is not controlled by the name that a claimant attaches to a motion or the name that a district court attaches to an order. Rather than looking to "the label attached by the trial court, we"look[] to the nature of the order and the substance of the proceeding below to determine whether the rationale for denying appeal applies." *Id*. Were the shoe on the other foot, we suspect, Workman would agree.

Name aside, the salient question is whether the order effectively operates as an "injunction[]—which is what 28 U.S.C. § 1292(a)(1) permits us to review on an interlocutory basis. The Tennessee Supreme Court set Workman's execution date for May 9; the temporary restraining order runs through May 14; and once May 9 passes Tennessee may not execute its judgment until a new execution date is set by order of the Tennessee Supreme Court. *See* Tenn. Sup. Ct. R. 12.4(E). To suggest, as Workman does, that the district court's order does not enjoin Tennessee from executing Workman on May 9, that the State has meaningful appellate options for imposing this 25-year-old sentence other than through interlocutory review and that the trial court's order does not affect an important interest of the State is untenable. The order "has the practical effect of an injunction," which simultaneously operates to stay Workman's long-delayed execution and give us authority to review it. *N.E. Ohio Coal. for Homeless*, 467 F.3d at 1005; 28 U.S.C. § 1292(a)(1); *see*

Boltz v. Jones, 182 F. App'x 824, 825 (10th Cir. June 1, 2006) (vacating temporary restraining order that stayed execution, reasoning that "[t]hough the order is denominated a TRO rather than an injunction, we have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1)"); *see also Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981) (holding that an interlocutory order is immediately appealable when appellant can show that the order might have a "serious, perhaps irreparable consequence, and that the order can be effectually challenged only by immediate appeal") (internal quotation marks omitted); *cf. Hill v. McDonough*, 126 S. Ct. 2096, 2104 (2006) (noting "the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts.").

III.

We review a district court's decision to issue a temporary restraining order for abuse of discretion. *See Bowersox v. Williams*, 517 U.S. 345, 346 (1996) (per curiam) (reviewing order involving stay of execution); *N.E. Ohio Coal. for Homeless*, 467 F.3d at 1009; *see also Alley v. Little*, 181 F. App'x 509, 512 (6th Cir. May 12, 2006) (explaining that we "weigh the merits of the district court's stay [of an execution] . . . based on the reason furnished in its opinion."). We will find an abuse of discretion only when left with "a definite and firm conviction that the trial court committed a clear error of judgment." *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." *Tompkin v. Philip Morris USA, Inc.*, 362 F.3d 882, 891 (6th Cir. 2004).

In reviewing the district court's decision, we consider the same four factors that the district court considered: (1) whether the claimant has demonstrated a strong likelihood of success on the merits, (2) whether the claimant will suffer irreparable injury in the absence of a stay, (3) whether granting the stay will cause substantial harm to others, and (4) whether the public interest is best served by granting the stay. *N.E. Ohio Coal.*, 467 F.3d at 1009.

We have two objections to the district court's order—one that the district court briefly considered in its four-page order (whether Tennessee's three-drug protocol likely violates the Eighth Amendment) and one that it did not (whether Workman has waited too long in bringing this challenge). Before we reach these issues, however, we must address Workman's contention that the State has waived any right to challenge the district court's decision on these two grounds.

A.

After challenging our power to review the district court's order, Workman challenges the State's power to contest the bases for it. Last Friday morning, on May 4, 2007, Workman served a motion for a temporary restraining order on the State, and the court held a hearing on the motion. At the hearing, the State took the legitimate position that the court had no authority to grant the order because Workman had not yet filed his complaint and that it would not respond to a complaint that it had not seen. After the hearing, Workman filed his 82-page complaint, and an hour later the district court (without holding a new hearing) granted the motion. The State did not waive any

challenges to the motion under these circumstances, and Workman offers no relevant authority to suggest otherwise.

The State also did not waive these arguments in the motion that it filed in our court this morning. As to undue delay, the State makes that consideration one of the key points of the motion (if not the key point of the motion). As to the likelihood that a court would strike down this procedure on constitutional grounds, the State throughout its motion relies heavily on our decision in *Alley* and the Tennessee Supreme Court's decision in *Abdur' Rahman*—one of which found that this same claim had little likelihood of success on the merits, and the other of which rejected the claim on the merits. The State also specifically critiques the district court's reliance on the opinions of Dr. Heath as grounds for establishing a "likelihood of success," objecting that the district court failed to address the *Alley* and *Abdur'Rahman* decisions, even though they addressed the same issue and even though they found unpersuasive the reports of this same doctor about the same procedure. Motion at 14 n.12. Again, no waiver occurred.

B.

Like a prior panel of this court that considered a challenge to Tennessee's lethal-injection procedure a year ago, we think that Workman has "a small likelihood" of success with respect to this challenge because his contention is "unsupported by current law, which offers no basis for finding lethal injection protocols unconstitutional." *Alley*, 181 F. App'x at 513. And like that panel, we think that the district court abused its discretion in concluding otherwise.

In contending that Tennessee's lethal-injection protocol likely violates the Eighth Amendment's prohibition on imposing "cruel and unusual punishments," U.S. Const. amend. VIII, Workman faces several obstacles. *First*, the Supreme Court has never invalidated a State's (or the Federal Government's) chosen method of execution. As best we can tell, the Court has considered three such challenges under the Eighth Amendment, only one of which reached the merits. *See Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1878) (holding that the use of a firing squad was not cruel and unusual); *In re Kemmler*, 136 U.S. 436, 446–49 (1890) (declining to apply the Eighth Amendment to the States); *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (plurality) ("We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty."). Since these decisions, the Court has had ample opportunities to constrain methods of execution that seem to raise far greater risk of cruel and unusual punishment than lethal injection, but it has declined to do so. *See, e.g.*, *Campbell v. Wood*, 511 U.S. 1119, 1119 (1994) (Blackmun, J., dissenting from denial of certiorari) (hanging); *Gomez v. U.S. Dist. Court for the N. Dist. of Cal.*, 503 U.S. 653, 657–58 (1992) (Stevens J., dissenting from vacation of stay of execution) (gas chamber) (critiquing the majority for sanctioning the use of the gas chamber when most States had moved away from this method of execution because it caused unnecessary infliction of pain); *Glass v. Louisiana*, 471 U.S. 1080, 1080 (1985) (Brennan, J., dissenting from denial of certiorari) (electrocution); *Gray v. Lucas*, 463 U.S. 1237, 1240 (1983) (Marshall, J., dissenting from denial of certiorari) (gas chamber).

Second, the experience of the lower state and federal courts is similar. No court to our knowledge has issued a final decision declaring a State's lethal-injection protocol unconstitutional. And several lower courts have upheld this specific three-drug, lethal-injection protocol. *See, e.g.*, *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 297-98 (Tenn. 2005); *Aldrich v. Johnson*, 388 F.3d 159, 161 (5th Cir. 2004) (lethal injection in Texas); *People v. Snow*, 65 P.3d 749, 800–01 (Cal. 2003); *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000); *State v. Webb*, 750 A.2d 448, 453-57 (Conn. 2000); *LaGrand v. Stewart*, 133 F.3d 1253, 1265 (9th Cir. 1998) (lethal injection in Arizona); *cf. Hill v. Lockhart*, 791 F.Supp. 1388, 1394 (E.D. Ark. 1992) (Arkansas lethal injection protocol); *State v. Hinchey*, 181 Ariz. 307, 315 (1995); *State v. Deputy*, 644 A.2d 411, 421 (Del. Super. Ct. 1994); *State v. Moen*, 309 Or. 45, 98–99 (1990); *Hopkinson v. State*, 798 P.2d 1186, 1187 (Wyo.1990). One cannot credibly establish a likelihood of success in attacking a death-penalty procedure when the theory of success has yet to succeed in a considerable number of cases over a considerable number of years.

Third, one of the benchmarks the Court uses to identify Eighth Amendment violations—a consideration of the "evolving standards of decency that mark the progress of a maturing society," *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987) (internal quotation marks omitted)—does not help Workman. The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (internal quotation marks omitted). As modern sensibilities have moved away from hanging, the firing squad, the gas chamber and electrocution as methods of carrying out a death sentence, so too

have the death-penalty procedures of the States and Federal Government. While the Supreme Court has tolerated continuity rather than change in this area, the democratic processes to their credit have insisted on change. The method of execution in 37 of the 38 States that authorize capital sentences has evolved to lethal injection with only Nebraska clinging to electrocution. The Federal Government now uses lethal injection as well. *See* Death Penalty Information Center, Lethal Injections, *available at* http://www.deathpenaltyinfo.org/ article.php?did=1686&scid=64#drugs (last visited May 7, 2007); *see also Jones v. Allen*, ___ F.3d ___, 2007 WL 1225393, at *3 n.3 (11th Cir. April 27, 2007) (noting that Alabama also uses 3-drug protocol).

Not only is there a consensus among the States and the Federal Government that lethal injection is the most humane method of execution, but there also is a consensus among these jurisdiction that the three-drug protocol used by Tennessee is the preferred form of lethal injection. Twenty-nine States (and the Federal Government) use the same three drugs, while one State uses a combination of the first two drugs in the protocol, and the remaining seven States—Kansas, Kentucky, Nevada, New Hampshire, Pennsylvania, South Carolina and Virginia—apparently do not specify what drugs they use. Death Penalty Information Center, Lethal Injections; *see also* Report at 6 ("At least 30 jurisdictions . . . have a three-chemical lethal injection protocol consisting of sodium thiopental, pancuronium bromide, and potassium chloride in varying amounts."). If "evolving standards of decency" are the measure of constitutionality, Tennessee has satisfied the requirement.

Fourth, the other benchmark the Court uses to identify Eighth Amendment violations—whether the punishment involves the "unnecessary and wanton infliction of pain," *Nelson*, 541 U.S. at 645 (internal quotation marks omitted); *cf. id.* at 644 (referring to the "deliberate indifference" standard)—does not help Workman either. The whole point of the Tennessee lethal-injection protocol is to avoid the needless infliction of pain, not to cause it. The idea is to anesthetize the individual with one drug before the State administers the remaining two drugs, so that the serial combination of drugs causes a quick and pain-free death. *See Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 307–08 (Tenn. 2005) (noting "that a dosage of five grams of sodium Pentothal as required under Tennessee's lethal injection protocol causes nearly immediate unconsciousness and eventually death[,] . . . that such a dose would cause an inmate to be unconscious in about five seconds and that the inmate would never regain consciousness and would feel no pain prior to dying").

No one debates these premises, or this purpose, of Tennessee's lethal-injection procedure. We thus do not have a situation where the State has any intent (or anything approaching intent) to inflict unnecessary pain; the complaint is that the State's *pain-avoidance procedure* may fail because the executioners may make a mistake in implementing it. But no one alleges that this problem has occurred in Tennessee in the past, and as we have shown the State has extensive procedures in place to prevent this very thing from happening. The risk of negligence in implementing a death-penalty procedure, particularly when the risk has not come to pass in the State, does not establish a cognizable Eighth Amendment claim. At some level, every execution procedure ever used contains

risk that the individual's death will not be entirely pain free. *See Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005) ("Obviously there are risks involved in virtually every method of execution. However the Supreme Court has rejected Eighth Amendment challenges based on an 'unforeseeable accident,' and has presumed that state officials have acted 'in a careful and humane manner.'") (quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462, 464 (1947)); *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994) (en banc) ("[T]he risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review.").

Fifth, even though Tennessee has adopted a method of execution designed to eliminate rather than cause pain, even though the vast majority of executions carried out in modern times have moved progressively to this procedure, even though no state or federal court has issued a final decision invalidating the three-drug protocol under the Eighth Amendment, even though the Tennessee Supreme Court in 2005 held that the three-drug protocol did not inflict "unnecessary physical or psychological pain and suffering," *Abdur'Rahman*, 181 S.W.3d at 307, and even though our court in 2006 permitted the State to execute Sedley Alley under the three-drug protocol, *Alley*, 181 F. App'x at 514, the State has not left it at that. In 2007, the Tennessee Governor initiated a review of the procedure to ensure "that death sentences are administered in a constitutional and appropriate manner." Executive Order No. 43, at 1. To that end, Governor Bredesen directed the corrections commissioner to undertake "a comprehensive review of the manner in which death sentences are administered in Tennessee" and asked the commissioner to establish a revised protocol by May 2. *Id*. at 1–2.

In response, the corrections commissioner appointed a committee to prepare a report on the administration of death sentences in Tennessee. Among other things, the committee reviewed available court decisions addressing lethal injection protocols; spoke with officials in sister States regarding their experiences in implementing lethal injection; attended an on-site presentation by the Federal Bureau of Prisons' execution team; consulted with anesthesiologists; and held a public hearing, inviting representatives from the Tennessee Medical Association, the Tennessee Bar Association, the University College of Medicine, and the Southeastern Pharmacology Society, among others. *See* Report at 4–5.

"The most significant issue" the committee faced was "the selection of the chemicals and dosage to be used in lethal injection executions in Tennessee." *Id*. at 6. "After considerable research and consultation with medical experts," it "retained a three-chemical protocol." *Id*. While several considerations drove the committee's decision (including weaknesses in the one-drug and two-drug options), the paramount consideration was the reality that "the three-chemical protocol has been used in almost all of the lethal injection executions that have taken place in this country, allowing Tennessee to draw upon the considerable experience of other jurisdictions in implementing the protocol." *Id*. at 7. The committee also sought to improve Tennessee's practices by "develop[ing] updated execution manuals for lethal injection . . . that incorporate best practices" from other jurisdictions. *Id*. at 1.

Call the requirements of the Eighth Amendment what you will—avoiding the "unnecessary and wanton infliction of pain," refraining from "deliberate indifference" to the needs of inmates or

keeping up with "evolving standards of decency"—they do not prohibit the adoption, implementation and refinement of a lethal-injection procedure in as comprehensive manner as this. The efforts of the Governor and the corrections department suggest a State intent not just on satisfying the requirements of the Eighth Amendment but on far exceeding them.

Attempting to fend off this conclusion, Workman maintains that the use of pancuronium bromide (the second of the three drugs used by Tennessee) must be cruel and unusual because even veterinarians refuse to use it in euthanizing animals. On reflection, however, this contention is more of a debater's point than a legitimate attack on the three-drug protocol. In euthanizing animals, veterinarians use just one drug—a barbituate not unlike sodium thiopental (the first drug used by Tennessee), except that the barbituate used on animals acts more slowly. The problem with using a barbituate alone, Tennessee determined, is that it takes too long, and no other State uses a barbituate by itself. Report at 8 (noting that a multi-drug protocol "likely result[s] in a more rapid death" and that "to date no other state has used a [one drug] protocol"). In its recent review of the protocol, Tennessee also considered the other option for eliminating pancuronium bromide from the procedure—use the first and third drugs. As the State explained, however, a two-drug protocol would lead to convulsions, a phenomenon the State understandably wished to avoid out of respect for the dignity of the individual and presumably out of respect for anyone, including the inmate's family, watching the execution. *Id*. at 8 (Lethal injection without pancuronium bromide "would typically result in involuntary movement which might be misinterpreted as a seizure or an indication of consciousness."). Like the vast majority of States and the Federal Government, as a result,

Tennessee uses pancuronium bromide to prevent this from happening. *Id.* at 7 ("[P]ancuronium bromide . . . speeds the death process, prevents involuntary muscular movement that may interfere with the proper functioning of the IV equipment, and contributes to the dignity of the death process.").

That employees of the corrections department, who are not physicians, perform the execution procedure in a typical case does not change matters. For one, no one alleges that running an IV requires a doctor. For another, the State has a doctor on hand to address any problems if the trained employee cannot start the IV. Execution Procedures for Lethal Injection at 20 (A physician must "be present at the precise time of execution" and "perform the cut-down procedure should the IV Team be unable to find a vein adequate to insert the catheter"). As the State's recent review of its procedures confirms, moreover, it requires its employees to engage in considerable training to handle executions. Report at 9. While Workman claims that the employees and doctor should be next to him during the administration of the procedure (rather than in an adjacent room), there are countervailing interests at work. As the state trial court observed in upholding this procedure:

> A paramount concern in an execution is security. The condemned has committed a violent act, and he is facing termination of life. Under these circumstances it is necessary to deviate from the surgical norm of physical proximity. It is necessary, for security reasons, to assure that the executioner is securely removed from the condemned. The separateness of the executioner and the syringes containing the lethal dosages, while it does decrease the executioner's ability to monitor intake of the Pentothal, is for good reason. To make up for the separateness of the executioner, the Tennessee lethal injection method has a TV monitor in the execution room, a camera above the gurney, and the warden is located in the execution room within a foot of the condemned's head. The warden has been trained on detecting

> problems such as crimping of the IV line, or failure of the injection to go into the vein.

Abdur'Rahman v. Sundquist, No. 02-2236-III, Order at 9 (Tenn. Ch. Ct. 20th Dist. June 2, 2003), *available at* http://www.tsc.state.tn.us/OPINIONS/TSC/CapCases/Rahman/Rahman.htm (last visited May 7, 2007). For exceedingly practical reasons, no State can carry out an execution in the same manner that a hospital monitors an operation.

Nor, relatedly, does the Eighth Amendment require an anesthesiologist to be on hand to monitor the inmate's consciousness during every execution. While it may well be a good practice for a State to hire an anesthesiologist for each execution (assuming one is willing to handle the task), the Constitution does not require it. The risks of pain that Workman complains about remain remote (and do not occur when the procedure is properly implemented), and no one alleges that they have occurred in Tennessee in the past. Under its lethal-injection protocol, Tennessee administers 5 grams of sodium thiopental to anesthesize the inmate. *See* Execution Procedures for Lethal Injection at 35. That lethal dosage represents the highest level that other States use, and it renders the inmate unconscious "nearly immediate[ly]," *Abdur'Rahman*, 181 S.W.3d at 308. This 5-gram dose thus reduces, if not completely eliminates, any risk that Workman would "incur constitutionally excessive pain and suffering when he is executed." *See id.* at 308 ("Dr. Heath [Workman's expert] . . . testified that a lesser dosage of two grams of sodium Pentothal would cause unconsciousness in all but 'very rare' cases and that a dosage of five grams would 'almost certainly cause death.'"). The protocol also calls for certification and training requirements that reduce the

risk of error in administering the drugs. Although the protocol does not contain an explicit instruction to monitor Workman's consciousness, it does require the participation of a certified IV team and the presence of a doctor. This combination of factors suggests that there is ample recourse if the 5-gram dosage of sodium thiopental—14 times the dosage used to anesthetize hospital patients—somehow fails to render Workman unconscious.

Under these circumstances, we cannot accept the district court's conclusion that Tennessee's lethal-injection protocol "creates a foreseeable and likely unnecessary risk that the Plaintiff will incur constitutionally excessive pain and suffering when he is executed." Temporary Restraining Order at 3. Only one thing has changed since a panel of this court convincingly demonstrated that this challenge to the Tennessee procedure has a "small likelihood of . . . success," *Alley*, 181 F. App'x at 513, and accordingly vacated a similar stay order—the State has *reevaluated and improved* its procedure. Then as now, it remains the case that no state or federal court has yet to issue a final decision invalidating the three-drug protocol, and several decisions (including the Tennessee Supreme Court's decision in 2005) have upheld this procedure. In its defense, the district court of course had just a half day to consider all of this, which brings us to our second objection to Workman's action—undue delay.

C.

While the absence of any meaningful chance of success on the merits suffices to resolve this matter, Workman faces a second problem: He waited far too long to bring this challenge—just five

days before what is now the *sixth* execution date the Tennessee has set for him. The district court did not consider this reason for denying the motion (perhaps because it had too little time to do so and perhaps because it had only one party's—Workman's— brief), even though the Supreme Court has indicated that in considering the equitable remedy of staying an execution, "a district court *must* consider . . . the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004) (emphasis added). *See Tompkin*, 362 F.3d at 891 (abuse of discretion occurs when district court makes a mistake of law).

Workman responds that he filed this lawsuit within four days of receiving the revised lethal-injection protocol. *See* TRO Motion at 52–53. But as Workman acknowledges, the new protocol is only "slightly different" from the old protocol, Complaint at 3, and he does not point to any revision that makes the protocol worse, only to revisions that could have been made but were not. Workman's problem, then, is not just that he waited until five days before his execution; his challenge would have been late even had he filed it immediately before or after the Governor set his most recent execution date on January 17, 2007. Having refused to challenge the old procedure on a timely basis, he gets no purchase in claiming a right to challenge a *better* procedure on the eve of his execution.

There is "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." *Nelson*, 541 U.S. at 650. Even had Workman filed this challenge on January 17, 2007, that still would have been "too late in the day," *Hill v. McDonough*, 126 S. Ct. 2096, 2104 (2006), to allow

the trial and appellate courts to reach the merits of any subsequent challenge. *See Jones v. Allen*, ___ F.3d ___, 2007 WL 1225393, at *3 n.2 (11th Cir. April 27, 2007) ("[A]djudicating Jones's [lethal-injection-protocol] claim would take much more than three months and . . . a subsequent appeal would add months, if not years, to this litigation.") (internal quotation marks omitted); *Harris v. Johnson*, 376 F.3d 414, 417 (5th Cir. 2004) ("The brief window of time between the denial of certiorari and the state's chosen execution date—in this case, four months—is an insufficient period in which to serve a complaint, conduct discovery, depose experts, and litigate the issue on the merits."). He thus cannot revive a dilatoriness action when the only concrete challenges to the new procedure were features of the old procedure.

Workman's opportunities to avoid this scenario— where the only way to litigate the validity of the three-drug protocol is to stay his execution—were many. The Tennessee Supreme Court affirmed his death sentence in 1984, *see State v. Workman*, 667 S.W.2d 44 (Tenn. 1984), the state courts denied his petition for post-conviction relief in 1993, *see Workman v. State*, 868 S.W.2d 705 (Tenn. Ct. Crim. App. 1993), and we denied his initial federal habeas petition in 1998, *see Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998); *see also Neville v. Johnson*, 440 F.3d 221, 223 (5th Cir. 2006) ("A challenge to a method of execution may be filed at any time after the plaintiff's conviction has become final on direct review."). In 1998, Tennessee prescribed lethal injection as a lawful means of execution, *see* Tenn. Code § 40-23-114; 1998 Tenn. Pub. Acts ch. 982, and the State adopted "a lethal injection protocol that included the use of three drugs," the same three drugs the State currently uses, *Abdur'Rahman v. Bredesen*, 181 S.W.3d at 300. In 2000, the legislature deemed

lethal injection the presumptive method for all executions in the State—in other words, the State will use that method of execution unless the individual affirmatively opts for electrocution. *See* Tenn. Code § 40-23-114; 2000 Tenn. Pub. Acts ch. 614.

By 2000, Workman had completed his state and federal direct and (initial) collateral attacks on his sentence, and he faced the prospect of imminent execution by lethal injection. Nonetheless, from that year to the present, he chose not to challenge the procedure, whether in federal or state court. In April 2000, Workman came within two days of being executed by lethal injection but he did not challenge the procedure before (or after) a stay was issued. *Workman v. Bell*, 209 F.3d 940 (6th Cir. 2000) (en banc). In January 2001, he came within five days of execution but did not challenge the procedure before (or after) a stay was issued. *Workman v. Bell*, Nos. 96-6652/00-5367 (6th Cir. Jan. 26, 2001) (en banc). In March 2001, he came within two hours of execution but did not challenge the procedure before (or after) a stay was issued. *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001). In September 2003, he came within nine days of execution but did not challenge the procedure before (or after) an executive reprieve was granted. *See Workman v. Bell*, No. 03-2660 (W.D. Tenn. Sept. 15, 2003). And in September 2004, he came within 20 days of execution but did not challenge the procedure before (or after) a stay was issued. *Workman v. Bell*, Nos. 94-2577, 03-2660 (W.D. Tenn. Sept. 2, 2004).

By any measurable standard, Workman has had ample time to challenge the procedure. While Workman may be correct that his other litigation efforts during these seven years—his state *coram nobis* petition and his federal Rule 60(b)(6) motion, among others—did not *require* a

challenge to the procedure in these actions, his suggestion that he had no way to challenge the procedure simultaneously in a separate action in federal or state court is simply mistaken. Throughout this time, other Tennessee death-row inmates, though not Workman, have challenged the constitutionality of the State's lethal injection protocol. *See Alley v. Little*, 181 F. App'x 509 (6th Cir. May 12, 2006); *Abdur'Rahman*, 181 S.W.3d 292. Nothing prevented Workman from intervening in the *Abdur'Rahman* case. *See* Tenn. R. Civ. P. 24.02. And our court told Alley in 2006 that he had been dilatory in bringing that challenge. *See Alley*, 186 Fed. Appx. at 607 (vacating district court stay and noting that challenge "was very late in coming"). Having waited until the eve of his sixth execution date to bring this challenge and having chosen to challenge the improved (but not the inferior) method of execution, Workman must face the reality that this is the kind of "dilatory" suit from which "federal courts can and should protect [the] States." *Hill*, 126 S. Ct. at 2104. *See Jones v. Allen*, __ F.3d __, 2007 WL 1225393, at *3 n.3 (11th Cir. Apr. 27, 2007) (noting that delay in filing lethal-injection challenge could not be justified on ground that inmate knew little about the procedure because the thrust of the challenge went to the impermissibility of the same three-drug procedure that most States use).

Any balancing of hardships on this record strongly favors the State with respect to this 25-year-old sentence. "A State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief," *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)—an event which in Workman's case occurred in 1999, *see Workman v. Bell*, No. 96-6652 (6th Cir. Oct. 12, 1999), or 2000 at the latest. At that point, the State's interest in finality acquired

"an added moral dimension. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Id*. Indeed, while we need not rely on the point, it bears adding that, whether one looks to the test for determining the timeliness of a §1983 death-penalty-procedure action adopted by the majority or the dissent in our recent decision in *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), a challenge by Workman to the three-drug protocol in January 2007 seemingly would have been *time barred* under either approach.

It is true, as Workman points out and as the district court pointed out, that a few courts have granted stays to litigate this question. But we have not seen a case, and Workman has not pointed us to a case, where the inmate passed on as many opportunities to challenge the three-drug protocol as Workman has and the inmate has waited so long after the completion of his first federal habeas petition to bring the action.

At some point in time, the State has a right to impose a sentence—not just because the "State's interests in finality are compelling," but also because there is a "powerful and legitimate interest in punishing the guilty," which attaches to "the State and the victims of crime alike." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Twenty-five years after the imposition of this sentence, that time, it seems to us, has come.

IV.

For these reasons, we vacate the district court's temporary restraining order.