IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

PHILIP WORKMAN'S MOTION TO DISMISS OR DENY APPEAL AND RESPONSE IN OPPOSITION TO MOTION TO VACATE TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

This Court lacks jurisdiction to consider this interlocutory appeal of a Temporary Restraining Order. Office of Pers. Mgmt. v. Am Fed'n of Gov't Employees, 473 U.S. 1301 (1985); Leslie v. Penn Cent. R.R. Co., 410 F.2d 750, 752 (6th Cir. 1969). Even if the appeal were proper, Appellants are still not entitled to relief in this Court where the unrefuted record shows that with the full knowledge of Mr. Workman's May 9, 2007, execution date, Appellant Bredesen *revoked* all execution protocols in the State of Tennessee, rendering any challenge to the old

protocols moot,[1] and where Appellants worked in secret to develop the *new* protocol for eighty-eight days, making Mr. Workman's current challenge to the new protocols unripe during that period of time.[2]

Further, as soon as the new protocols were released on April 30, 2007, Mr. Workman immediately and expeditiously began the process of exhausting his administrative remedies, as he was required to do as a pre-requisite to filing this lawsuit. Mr. Workman's administrative appeal was subsequently *denied on the merits* by Appellant Little, as conceded by Appellants' lawyers in the Court below. R. 9, 5/4/07 Transcript, Appendix C, p. 20.[3] Especially where Appellants have not meaningfully challenged *in any way* the finding that Mr. Workman's lawsuit has a

---

[1]Appellants and their lawyers have admitted as much. See Harbison v. Little, M.D.Tenn No. 3:06-cv-1216, R. 34, p. 1, R. 35, p.4 (Appendix A)(Appellants moved to dismiss Harbison's §1983 complaint alleging constitutional deficiencies with the old lethal injection protocols by affirmatively representing that any challenge to Tennessee's old execution protocols are moot and that the district court lacks jurisdiction over Harbison's complaint because there is no case or controversy). See also, Payne v. Little, M.D.Tenn. No. 3:06-cv-0825, R. 10 p.1; R. 11, p. 3 (Appendix B)(same).

[2]Appellants have also admitted this point. See Harbison, R. 40, p. 5 (amended answer)(Appellants Little and Bell states that any challenge to the new lethal injection protocols are not ripe for adjudication). It is worth noting that counsel for the Defendants in Harbison and Payne are the same counsel for all of the Appellants in this action.

[3]Appellant Little's merits ruling on Mr. Workman's grievance is attached as Appendix D.

reasonable likelihood of success on the merits, the district court did not abuse its discretion in granting a Temporary Restraining Order to maintain the *status quo* so that the Court can hear evidence and argument at an expedited hearing. If, after a hearing, Mr. Workman is unable to sustain his burden of proof, Appellants are free to obtain a new execution date within seven days after the Temporary Restraining Order expires on May 14, 2007. As such, Appellants are not harmed.

Moreover, Appellants themselves acknowledge that the Temporary Restraining Order entered by the District Court serves the public's interest. See R. 8, Order, p.3, Appendix E ("Defendants have no interest in proceeding with an execution protocol which may ultimately be found to be unconstitutional."). When Governor Bredesen revoked the old execution protocols he described them as a "sloppy" "cut and paste job" that was "full of deficiencies." In directing Appellant Little and his agents (Appellants Bell, Colson, Davis, Inglis, and Raye) to develop a new protocol, Governor Bredesen acknowledged that "the administration of the death penalty in a constitutional and appropriate manner is a responsibility of the highest importance." R. 2, Memorandum in Support of Motion for Temporary Restraining Order (Appendix F), Exhibit 3, Executive Order No. 43, Appendix G.[4] In fact, because this

---

[4]Mr. Workman filed a fifty-five page memorandum in support of his motion for Temporary Restraining Order supported by two volumes of exhibits. Selected exhibits are being provided to this Court electronically. However, due to size

responsibility is so important, the Governor saw fit to stay the executions of four death row inmates by executive reprieve. Id. p. 2. One inmate, Daryl Holton, is a "volunteer" for execution who has no complaints about the constitutionality of his capital sentence nor any objections to it being carried out. The other three inmates, Edward Jerome Harbison, Mika'eel Abdullah Abdus-Samad (formerly Michael Joe Boyd), and Pervis Payne have been on death row for more than two decades.[5] The fact that each of these inmates received a reprieve is essentially an admission by Appellants that the public's interest in a constitutional method of execution outweighs the State's interest in executing its judgments. The public's interest is no less compelling in Mr. Workman's case, where Mr. Workman has provided substantial documentation that the brand-new protocol does not comport with constitutional guarantees.

Moreover, Mr. Workman clearly demonstrated a likelihood of success on the merits through his evidentiary submission. Appellants were fully aware of Mr.

---

limitations, Mr. Workman cannot provide the Court with all of the exhibits in the time frame allowed. Mr. Workman has provided the Court a table of contents to the two volumes of exhibits, attached as Appendix H, and will provide electronic copies of any exhibits as directed by the Court. The exhibits are also available for download on the District Court's ECF website.

[5]See State v. Harbison, 704 S.W.2d 314 (Tenn. 1986)(1983 offense); State v. Boyd, 797 S.W.2d 589 (Tenn. 1990)(1986 offense); State v. Payne, 791 S.W.2d 10 (Tenn. 1990)(1987 offense).

Workman's complaints given their denial of his administrative appeal. Despite that, Appellants deliberately chose not to dispute any of the factual averments in any of Mr. Workman's submissions, including a detailed, thorough, and specific expert declaration from Dr. Mark Heath. See Appendix I.[6] Based on this uncontested evidence, the District Court, found that, at this stage,

> Plaintiff has a probability of success on the merits of the claim that the lethal [injection] protocol creates a forseeable and likely unncessary risk that the Plaintiff will incur constitutionally excessive pain and suffering when he is executed, especially given that there is no procedure for monitoring the Plaintiff's level of consciousness during the process.

Appendix E at p.3.

Given all of this, where Appellants chose the timetable that necessitates the entry of a Temporary Restraining Order and the Court has not abused its discretion, Appellants' appeal should be dismissed or denied.

II. DEFENDANTS' APPEAL SHOULD BE DISMISSED: THIS COURT HAS NO JURISDICTION TO VACATE A TEMPORARY RESTRAINING ORDER

The law is clear. This Court lacks subject-matter jurisdiction over this appeal from the entry of a Temporary Restraining Order. Office of Pers. Mgmt. v. Am Fed'n

---

[6]Appellants chose to deliberately bypass the opportunity to dispute any of the facts submitted by Mr. Workman. Counsel for Appellants stated, "I don't want to get into an argument or discussion with regard to their issues with regard to the protocol." See Appendix C at p. 20. Appellants are bound by that tactical decision and are bound in this Court by the limited argument they made below.

of Gov't Employees, 473 U.S. 1301 (1985); Leslie v. Penn Cent. R.R. Co., 4190 F.2d 750, 752 (6th Cir. 1969). See also, Wilcox v. Lewis, 47 Fed. Apx. 714 (6th Cir. 2002)("An order ruling on a motion for a TRO is not appealable."); Ledger v. Walters, 2000 U.S. App. LEXIS 25257 (6th Cir. 2000)(same). While certain rare and limited exceptions to this general rule exist, none are present in this case.

Recently, a panel of this Court reviewed the scope of this Court's appellate jurisdiction under 28 U.S.C. §1292(a) in the context of an appeal from the entry of a Temporary Restraining Order. In Northeast Ohio Coalition for the Homeless, et al., v. Blackwell, 467 F.3d 999 (6th Cir. 2006), Judge Gibbons discussed the general rule prohibiting the appeal of a Temporary Restraining Order:

> [T]his court generally lacks jurisdiction to hear an appeal of the district court's decision to grant or deny a TRO. The rationale for this rule is that TROs 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.

Id., 467 F.3d at 1005. Judge Gibbons set out the limited exceptions to this rule which include: (1) where the Temporary Restraining Order does not simply preserve the status quo but is in fact a "mandatory injunction requiring affirmative action;" or (2) where the non-movant faces irretrievable harm. Id. Neither circumstance is applicable here.

First, the Temporary Restraining Order issued by the district court is limited

in duration and scope and merely maintains the *status quo*. It does not order any affirmative action. As such, it is not the equivalent of a mandatory injunction. Should Mr. Workman fail to meet his burden of proof at the evidentiary hearing on May 14, 2007 at 8:00 a.m., then, the Temporary Restraining Order will expire by its own terms and the Tennessee Supreme Court will be free to set Mr. Workman's execution for as soon as May 21, 2007. See Tenn. Supreme Court Rule 12(E)(court will *sua sponte* set new execution date no later than seven (7) days from the order setting the new execution date). As such, the Temporary Restraining Order merely maintains the *status quo* to preserve the Court's admitted jurisdiction over this case or controversy. See Appendix C, p. 25.[7]

Second, there is no risk of irretrievable harm to Appellants. In Northeast Ohio Coalition for the Homeless, Judge Gibbons explained the necessary showing for irretrievable harm:

> When a TRO does not 'merely preserve the status quo pending further proceedings,' but rather 'directs action so potent with consequences so irretrievable, we provide an immediate appeal to protect the rights of the parties.'

Id. at 1006. Appellants here do not face irretrievable harm. Any harm they do face in

---

[7]The Court inquired of Appellants counsel, "But it would appear to me we have an actual case or controversy in that Mr. Workman is going to be executed next week. Right? That's what you want to do?" Appellants counsel responded, "That's right." See Appendix C, p. 25.

terms of not being able to carry out Mr. Workman's execution on May 9, 2007, is time limited. Therefore, it is not irretrievable.

The harm at issue in *Northeast Ohio Coalition For The Homeless* is vastly different from any perceived harm in this case. In that case, the district court had enjoined the enforcement of a voter identification law which had been in place for some months before the Appellees brought their complaint. The Temporary Restraining Order issued by the district judge prohibited the Ohio election board from enforcing the voter identification law and affirmatively ordered the election officials to permit voters to submit ballots without proper identification. The Temporary Restraining Order would have allowed potentially unqualifed and unidentified voters to cast their ballots. Under those circumstances, if the voter identification laws were later upheld (as they were), it would have been impossible for the election board to determine which ballots to throw out.

Contrary to the scenario in *Northeast Ohio Coalition for the Homeless,* nothing irretrievable will happen here while the Temporary Restraining Order is in effect. As an initial matter, this is not a case about the constitutionality or enforcement of the State Court judgment sentencing Mr. Workman to death. The district court judge has not, and cannot, set aside Mr. Workman's conviction and sentence in this proceeding. Mr. Workman hasn't requested such relief here. And as described above, Appellants

will not ultimately lose their opportunity to execute Mr. Workman because of the Temporary Restraining Order or this litigation. See Brown v. Beck, 2006 U.S. Dist. LEXIS 60084 (E.D.N.C. 2006); Morales v. Hickman, 415 F.Supp. 2d 1037, 1046 (N.D. Cal. 2006)("Neither the death penalty nor lethal injection as a means of execution will be abolished. ... Presumably, at some point, Plaintiff would be executed."). Moreover, Appellants are not required to take any affirmative action because of the Temporary Restraining Order. The district court's Temporary Restraining Order merely preserves the *status quo* so that it can expeditiously hold a hearing on the merits of Mr. Workman's well-supported claims that Appellants' newly enacted, and newly disclosed lethal injection protocol "creates a foreseeable and likely unnecessary risk that the Plaintiff will incur constitutionally excessive pain and suffering when he is executed." Appendix E, p.3.[8]

In addition, any harm to Appellants in not being able to carry out the death sentence on May 9, is based on their own actions. It was Appellants – not Mr. Workman – who created a timetable wherein Mr. Workman had only eight days to review the new protocol, evaluate his legal options, exhaust administrative remedies, and file his underlying Complaint and motion for Temporary Restraining Order. See

---

[8]The District Court's ruling is on all fours with the test articulated by the United States Supreme Court in Hill v. McDonough, __ U.S. __, 126 S.Ct. 2096, 2102 (2006).

Appendix F and Exhibits 3-8 thereto; Appendix C, pp. 4-6, 17. On February 1, 2007, Governor Bredesen issued Executive Order No. 43 revoking Tennessee's execution protocol and any related procedures. The Governor directed the Department of Corrections to draw up new protocols no later than May 2, 2007. See Appendix G. Recognizing that the timetable adopted by Appellants would leave him little to no time to review the new protocols and explore his legal options, on March 15, 2007, Mr. Workman filed a Motion to Vacate his May 9, 2007, execution date in the Tennessee Supreme Court. See R.2, Memorandum, Exhibit 4, Philip Workman's Motion to Vacate Execution Date. The State of Tennessee opposed Mr. Workman's motion (See R.2, Memorandum, Exhibit 5, State's Response to Motion to Vacate Execution Date), and the Tennessee Supreme Court refused Mr. Workman's request. See R.2, Memorandum, Exhibit 6, Tennessee Supreme Court Order, March 27, 2007.

The Governor's timetable was made more challenging based on the fact that the execution review team conducted their work in complete secrecy. The contents of the New April 30, 2007 Protocol were only made known to Mr. Workman for the first time at 4:10 p.m. on April 30, 2007. The review team's Report on Administration of Death Sentences In Tennessee was delivered the following day. See R. 2, Memorandum, Exhibit 7, Tennessee Report on Administration of Death Sentences in Tennessee. Prior to and after April 30, 2007, Mr. Workman requested public records

from the Governor, the Commissioner of the Department of Corrections, and each member of the review team, related to the development, promulgation, evaluation, and implementation of those protocols. See R. 2, Memorandum, Exhibit 8, Philip Workman's April 25, 2007 Records Requests. Some documents were disclosed as late as the morning of May 4, 2007 (Appendix C, p.6); other documents have yet to be disclosed. Id. Moreover, Appellants Bredesen and Little had both stated publicly that they anticipated litigation challenging the constitutionality of the new protocols. Nonetheless, despite requests by counsel for Mr. Workman to the Governor's legal counsel and the State Attorney General to provide Mr. Workman with sufficient time to review the new protocols, Appellants insisted on going forward with Mr. Workman's execution on May 9, 2007, at 1:00 a.m.

Thus, any harm visited upon the Appellants is of their own making and is not irretrievable, as demanded by *Northeast Ohio Coalition For The Homeless*. Based on the Appellant's own actions, any interference that the district court's Temporary Restraining Order has on the ability of the State to carry out its judgment is well-circumscribed and appropriate under the circumstances. Thus, none of the exceptions warranting an interlocutory appeal under 28 U.S.C. §1292(a) are applicable here.

Moreover, the limited Temporary Restraining Order issued by the District Court is not the equivalent of a stay of execution. And, even if is, it was properly entered.

The stay inquiry involves a balance of equities. Hill, 126 S.Ct. at 2104; Barefoot v. Estelle, 463 U.S. 880 (1983)("substantial grounds upon which relief may be granted.") Contrary to Appellants' rhetoric, the District Court engaged in a thoughtful and careful evaluation of the equitable principles in this case and found that the balance was in favor of granting a Temporary Restraining Order. The Court's finding that Mr. Workman's allegations established a "foreseeable and likely unnecessary risk that the Plaintiff will incur constitutionally excessive pain and suffering when he is executed, especially given that there is no procedure for monitoring the Plaintiff's level of consciousness during the process" satisfies the *Barefoot* standard. Given that the United State Supreme Court granted a Stay of Execution to Hill, who filed his Motion for Stay of Execution four days before his execution, on claims that had long since been known to him, Hill S.Ct. at 2100, where Mr. Workman could not have brought his claims any earlier, the District Court did not abuse its discretion.

III. DEFENDANTS' APPEAL SHOULD BE DENIED: THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION

A. AN INJUNCTION MAY BE OVERTURNED ONLY IF IT CONSTITUTES AN ABUSE OF DISCRETION

As the law makes clear, this Court reviews the district court's order under an abuse of discretion standard. United States v. Szoka, 260 F.3d 516, 521 (6th Cir. 2001).

A district court's decision to maintain the *status quo* is accorded *great deference.*" United States v. Edward Rose & Sons, 384 F.3d 258, 261 (6th Cir. 2004)(emphasis supplied), quoting Washington v. Reno, 35 F.3d 1093, 1098 (6th Cir. 1994). An abuse of discretion is therefore found "*only in the rarest of cases*" and "*only if* the district court relied upon clearly erroneous findings of fact, improperly applied governing law, or based an erroneous legal standard." Id. at 261 (emphasis supplied). The district court did not abuse its discretion here. Even if the district court's temporary Restraining Order were an appealable order, Appellants cannot meet their heavy burden of establishing an abuse of discretion.

Instead, the District Court's Order granting a Temporary Restraining Order pursuant to his authority under 28 U.S.C. §1651, Fed. R. Civ. P. 65, and the inherent powers of the Court and setting a hearing for May 14, 2007, is eminently reasonable and appropriate. This is especially true in light of the fact that Appellants created both the time table under which these claims must be litigated and the new unconstitutional April 30, 2007 protocol for lethal injection, yet offered no defense to either when called upon by the District Court. Based on the record before the District Court, the weighing of the equities, and the fact that other federal courts have granted similar orders in similar circumstances, there was no abuse of discretion here.

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN TEMPORARILY RESTRAINING APPELLANTS FROM USING THEIR BRAND NEW APRIL 30, 2007 PROTOCOL

1. The District Court Applied The Correct Legal Standard

Appellants' assertion that the District Court failed to identify and apply the correct legal standard is refuted by the Court's Order. The Court clearly identifies the operative test:

> In determining whether to issue a TRO pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Court is to Consider: (1) whether the movant has shown a strong or substantial likelihood of success on the merits; (2) whether irreperable harm will result without an injunction; (3) whether issuance of a preliminary injunction is advanced by the injunction. Michigan State AFL-CIO v. Miller, 103 F.2d 1240, 1249 (6th Cir. 1997).

Appendix E, p. 2. Appellants argue that the District Court failed to consider undue delay in its analysis. But, Mr. Workman established that he did not unduly delay in his Memorandum in Support of his Motion for Temporary Restraining Order, Appendix F, and it is apparent from the Order that the Court accepted Mr. Workman's uncontested reasons why he did not unduly delay.[9]

---

[9]Appellants complain that the District Court did not give them time to respond. Their complaint is not well-taken. The District Court gave Appellants every opportunity to make their position known. Appellants were not in the dark as to the issues, though they feigned ignorance. Appellants had received, processed, and denied Mr. Workman's administrative grievance. They had ample opportunity to read Mr. Workman's filings with the Court. The time to speak was when the Court called

(continued...)

2. Mr. Workman Has Established a Reasonable Likelihood of Success on the Merits.

In an unprecedented move, the State of Tennessee wants to execute a death row inmate just eight days and one hour after adopting a new execution protocol – a protocol described by Dr. Mark Heath as one that "does little to nothing to assure they will reliably achieve humane executions by lethal injection." See R.2, Memorandum, Exhibit 2, Declaration of Dr. Mark Heath, Appendix I, ¶ 69. In fact, the New April 30, 2007 Protocol was described by the District Court as one that "creates a foreseeable and likely unnecessary risk that the Plaintiff will incur constitutionally excessive pain and suffering when he is executed, especially given that there is no procedure for monitoring the Plaintiff's level of consciousness during the process." See Appendix E, p.3.

Mr. Workman provided the District Court with more than ample evidence to support its finding. For example, Mr. Workman provided the Court with a declaration from Dr. Mark Heath, M.D., Assistant Professor of Clinical Anesthesiology at Columbia University. Dr. Heath has reviewed and/or testified about lethal injection

---

[9](...continued)
the case. Appellants chose to forum shop, rather than make their position known in the District Court where Mr. Workman would have had an opportunity to answer their arguments and provide the District Court with a fair opportunity to rule. This Court should not countenance their efforts.

procedures over twenty-seven jurisdictions and has reviewed the New April 30, 2007 Protocol and concluded:

> Based on my research into methods of lethal injection used by various states and the federal government, and based on my training and experience as a medical doctor specializing in anesthesiology, it is my opinion stated to a reasonable degree of medical certainty that, given the apparent absence of a central role for a properly trained professional in TDOC's execution procedure, the characteristics of the drugs or chemicals used, the failure to understand how the drugs in question act in the body, the failure to properly account for foreseeable risks, the design of a drug delivery system that exacerbates rather than ameliorates the risk, the TDOC has created an revised execution protocol that does little to nothing to assure they will [reliably] achieve humane executions by lethal injection.

See Appendix I, ¶ 69.

Dr. Heath's comprehensive twenty-five page declaration carefully details the many failings of the New April 30, 2007 Protocol. Dr. Heath's declaration details problems with the New April 30, 2007 Protocol relating to the lack of qualifications of those procuring, prescribing, mixing, and loading the lethal chemicals. He further details problems associated with the lack of experience and qualifications of those who set up the very complicated IV delivery system and the many problems associated with this contraption (including kinks in the line and leakage which will lead to underdosage). Dr. Heath discusses at length the risks associated with the failure to

have any qualified individual at bedside monitoring for anesthetic depth and to make sure that the IV remains in place. Further, Dr. Heath describes all of the very real risks associated with unqualified and uncredentialed individuals administering these highly unstable chemicals. See Appendix I.

It is beyond dispute that two of the drugs called for in the New April 30, 2007 Protocol will cause extreme pain, torture, and terror if administered without proper anesthesia. Thus, the district court had ample evidence upon which to base its finding that there is a "foreseeable and likely unnecessary risk that [Mr. Workman] will incur constitutionally excessive pain and suffering when he is executed." Appendix E, p.3.

The record reflects never before known evidence that Appellants were aware of, and rejected, any pain-free methods of accomplishing a lethal injection primarily for aesthetic concerns (it would take too long). In reporting Appellants' reasons for rejecting a one-chemical protocol, Appellant Little writes that the one-drug protocol is "much simpler to administer and provides an even lower risk of error in its administration." It further has the advantage of "eliminating both of the chemicals which, if injected into a conscious person, would cause pain," and "greatly simplifies the process of maintaining and accounting for the lethal injection chemicals." R. 2, Memorandum, Exhibit 7, Tennessee Report, p. 8.

Under these circumstances, where the risk of a botched execution are known,

have been realized in fact, and are avoidable; and where Appellants chose chemicals which may inflict pain while rejecting a process which would avoid it, the District Court cannot be said to have abused his discretion.

An additional problem with the New April 30, 2007 Protocol poses a significant risk to Mr. Workman personally. The New April 30, 2007 Protocol provides for a physician to perform a cut-down to obtain venous access if all IV methods fail. Because Mr. Workman was an intravenous drug user for a number of years (a fact known to Appellants), Mr. Workman faces an increased risk of cut-down procedure being performed in his execution. Dr. Heath explains this potentially mutilating and outdated technique:

> Cut-down procedures are an outdated method of achieving venous access for the administration of anesthetic drugs. The cut-down procedure has been virtually completely supplanted by the "percutaneous" technique for achieving central venous access. The percutaneous technique is less invasive, less painful, less mutilating, faster, safer, and less expensive than the cut-down technique. I have personally never used the cut-down technique to achieve intravenous access for drug delivery to a patient. The cut-down technique is still used in clinical situations that are not pertinent to executions by lethal injection, including emergency scenarios where there has been extensive blood loss, and in situations involving very small pediatric patients and premature infants. These are the only situations in which I have seen colleagues perform cut-down procedures for the administration of drugs. That Tennessee intends to use a cut down procedure on Mr. Workman if it can not successfully place peripheral IVs after 4 attempts is unconscionable. To use a cut-down as the backup method of achieving IV access would defy contemporary medical standards and would be a violation of any modern standard of

> decency. The ready availability of a superior alternative technique for achieving central IV access, should it be necessary, means that the TDOC's adherence to the outdated cut-down method would represent the gratuitous infliction of pain and mutilation to the condemned prisoner. Most other states have abandoned the use of the cutdown procedure as a means of obtaining IV access during executions.

See Appendix I, pp. 21-23, ¶¶65-66.

Included in Mr. Workman's Complaint is never before known evidence that Appellants knew of the risks associated with the cutdown procedure when they included it in their protocol. Indeed, their own experts told them not to use it. Appendix C, p. 13. Despite the known potential for harm associated with cutdowns, Appellants failed to specify the qualifications of the doctor who would be waiting in the garage to pronounce death when he would be called upon to perform the cutdown or the procedure by which the cutdown should be performed. Appendix C, p. 14.

In the face of this record, including the arguments made in Mr. Workman's extensive Motion for Temporary Restraining Order, the two volumes of exhibits attached thereto, and the arguments made by counsel, all of which remain uncontested,[10] it cannot be said that the District Court abused his discretion. Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. Feb. 14, 2006) and Taylor v. Crawford,

---

[10]Mr. Workman's Memorandum in Support of Motion for Temporary Restraining Order discusses the evidentiary showing which supports the District Court's finding at Appendix F, pp. 10-48.

2006 U.S. Dist. LEXIS 74896 (W.D. Mo. October 16, 2006).

2. As The District Court Found, "The Balance of Relative Harms Among The Parties Weighs In Favor Of Plaintiff Against Defendants"[11]

The District Court found "the irreparable harm to Plaintiff is undisputed," (Appendix E, p. 3), and said that "Plaintiff has demonstrated that he will suffer immediate and irreparable harm if injunctive relief is not granted pending a preliminary injunction hearing." Id. The District Court weighed that harm against Appellants' interests and found that "Defendants have no interest in proceeding with an execution protocol which may ultimately be found to be unconstitutional." Id.

Indeed, where, Appellant Governor Bredesen has publicly declared that the constitutionality of the use of the new protocol is of the "highest importance" for the

---

[11]Appellants claim that the District Court did not consider the interests of the State in enforcing its judgments. First, Appellant did not make this argument below. Second, it is clear that the Court did weigh the State's interest, and found that the State, like the public they represent, has no interest in carrying out an unconstitutional death sentence. The Court relied on the authority of *Morales* and *Taylor, infra* in support of its position. Its order was not abusive.

On a different note, Appellants' fault the District Court Judge for failing to consider the interest of the victim. Appellants are not being fully candid with the Court. In this case, the decedent's daughter has openly and publicly supported a reduced sentenced for Mr. Workman. See http://www.youtube.com/watch?v=xoWvZXOBgmA (Last visited May 6, 2007)(Lt. Oliver's daughter states that she wants Mr. Workman's sentence reduced to at least life). It is the Appellants who have refused to consider Lt. Oliver's daughter's interests.

State of Tennessee, the District Court's Order can hardly be characterized as abusive. See Appendix G. In fact, Governor Bredesen has said "this Administration also recognizes its unique responsibility to ensure that death sentences are administered in a constitutional and appropriate manner . .." Id. Given the admissions of Appellant Governor Bredesen, the District Court did not abuse its discretion by finding, "the public has an interest, as evidenced by Defendant Bredesen's decision to review the execution protocol, in assuring that the lethal injection protocol for Tennessee is constitutional." Appendix E, p. 4.

Moreover, the District Court's decision is clearly not abusive when viewed in light of the decisions of the other district courts who were faced with lethal injection challenges. For example, as Appellants well know, federal executions at Terre Haute facility are on hold pursuant to the ***agreement of the United States Attorney General.*** In the memorandum supporting the ***unopposed*** motion for preliminary injunction, plaintiff wrote "Briefly delaying his execution will not harm the defendants in any way, and certainly will not cause them 'substantial harm'." Roane v. Gonzales, No. 05-2337 (D.C. Dist.), Docket Entry No. 23, Attachment 1, p.4. Further, in Nooner, et al., v. Norris, No. 06-00110, *5 (E.D.Ark.), the United States District Court for the Eastern District of Arkansas, stayed the execution of Plaintiff Davis finding that the State's interest would not be harmed. The Nooner court found that:

> The Court finds that the balance of potential harms favors Davis. If a stay is granted and Davis' allegations prove true, he and others will be spared subjection to an unconstitutional execution procedure and the State's interest in enforcing death penalties in compliance with constitutional standards will be served. If on the other hand a stay is granted and Davis' allegations are without merit, the state can carry out Davis' execution without the specter that the ADC's protocol carries an unreasonable risk of inflicting unnecessary pain.

R.2, Memorandum, Exhibit 29, p.5.

Similarly, in Morales v. Hickman, the District Court found that the balance of equities weighed in favor of an injunction even where the defendant had been on death row for twenty-five years. In weighing the State's strong interest in executing its judgments against the harm to the Plaintiff, the Court reasoned,

> Even if the Court were to hold an evidentiary hearing and Plaintiff were to prevail, Plaintiff would remain under a sentence of death. Neither the death penalty nor lethal injection as a means of execution would be abolished. At best, Plaintiff would be entitled to injunctive relief requiring the State to modify its lethal-injection protocol to correct the flaws Plaintiff has alleged. Presumably, at some point, Plaintiff would be executed.

Morales v. Hickman, 415 F.Supp.2d 1037, 1046 (N.D. Cal. 2006). Relying on Morales, the Court in Brown v. Beck[12] wrote:

> [I]f the State of North Carolina is permitted to execute Brown as scheduled on April 21, 2006, Brown will be deprived of any opportunity to pursue this action or to seek interest in finality and the enforcement of its criminal judgments. However, the Court determines that it would be

[12]The plaintiff, Willie Brown, had been on death row for twenty years.

> inappropriate to allow Defendants to proceed with Mr. Brown's execution under the current protocol considering the substantial questions raised.

Brown v. Beck, 2006 U.S. Dist. LEXIS 60084, *22-23 (E.D. N.C. 2006).

District Court did not abuse his discretion in the balance of the equities.[13]

---

[13]Appellants have argued that Mr. Workman has received five previous stays of execution and that this fact entitles them to an order vacating the temporary Restraining Order. Appellants however fail to accept responsibility for their role in those previous stays. In 2000, Workman's case was stayed because it was discovered that agents of the State of Tennessee had failed to turn over evidence responsive to a federal subpoena. In 2000, this court split evenly (7-7) on the importance of that evidence. Seven United States Court of Appeals Judges believed that Mr. Workman was entitled to relief. In 2001, Mr. Workman received a brief stay from the en banc Court to allow him time to seek certiorari review. Just two months later, Mr. Workman received a stay from the Tennessee Supreme Court because serious questions remained. As Justice Drowota, writing for the Court observed, "If [Workman] did not fire that shot, he is not guilty of the crime for which he is scheduled to be put to death." *State v. Workman*, 41 S.W.2d 100 (Tenn. 2001). In 2003, Mr. Workman received a reprieve from Appellant Bredesen because medical examiner O.C. Smith was under investigation and was later indicted for causing himself to be wrapped in barbed wire with a live bomb strapped to his chest in an effort to deflect attention away from his perjurious testimony in Mr. Workman's clemency hearing. In 2004, Mr. Workman's case was stayed by the District Court while she considered allegations which she has characterized as "compelling" and which may well entitle Mr. Workman to relief. This is truly an extraordinary case. Even though Mr. Workman has received five stays, 8 federal judges, 3 United States Supreme Court Justices, and 3 Tennessee Supreme Court Justices have all been deeply troubled by the circumstances surrounding his conviction and the apparent perjury or misconduct by the State that was used to obtain his capital conviction.

3. The Public Interest is Served by the District Court's Temporary Restraining Order

The record fully supports the District Court's conclusion that "the public has an interest, as evidenced by Defendant Bredesen's decision to review the execution protocol, in assuring that the lethal injection protocol for Tennessee is constitutional." Appendix E, p. 4.

Whether the State of Tennessee is executing its prisoners in a way that subjects them to an excruciatingly painful, torturous, and horrifying death is clearly a matter of vital public interest. Public interest lies in avoiding the unnecessary infliction of conscious suffering of excruciating pain. The standards of decency and humanity in a society such as ours are gravely offended by such practices and so it is affirmatively in the public interest to address and resolve the merits of the Mr. Workman's claims in order to identify and put an end to unnecessary procedures that pose a risk of causing gratuitous suffering. Again, in Roane v. Gonzales, No. 05-2337 (D.C. Dist.), in a Memorandum unopposed by the Attorney General of the United States, Plaintiff writes:

> Webster's request for injunctive relief serves the public interest because if an injunction is not granted the Defendants will violate Webster's constitutional right. The United States' criminal justice system, including the implementation of capital punishment, is founded on the constitutional guarantees intended to limit governmental overreaching. Among those guarantees is the right to due process and to be free from

> cruel and unusual punishment. Absent an injunction, BOP will violate Webster's constitutional rights, which creates doubt about the legitimacy of the federal capital punishment system. The public's best interest is served when courts force the government to afford condemned inmates all of their constitutional rights, protecting the public as well as inmates from future violations. Because the public has a strong interest in protecting the constitutional rights of all citizens, the third factor favors injunctive relief.

See Roane v. Gonzales, Docket Entry No. 23, Attachment 1, pp.3-4.

It is thus clearly paramount to the public interest that Mr. Workman's claims be resolved on the merits. "In considering an Eighth Amendment claim the court must be mindful that it embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency." LaFaut v. Smith, 834 F.2d 389, 391 (4th Cir. 1987)(quoting Estelle v. Gamble, 429 U.S. 97 (1976)).

Lethal injection became the predominant method of execution in Tennessee because it was previously perceived to be the most humane form of execution. To the extent that the Tennessee legislature chose lethal injection on the assumption that it was painless, this selection demonstrates an intention to employ the most humane method of execution possible. Moreover, the Governor's 90-day Reprieve to "initiate a comprehensive review of the manner in which death sentences are administered in Tennessee," demonstrates that carrying out executions "in a constitutional and appropriate manner" is important to the public – as the Governor himself said, "The

administration of the death penalty in a constitutional and appropriate manner is a responsibility of the highest importance." See Appendix G.

There is compelling evidence in the form of medical evidence, opinion, and eyewitness accounts that the New April 30, 2007 Protocol creates a significant and unacceptable risk of, and in other states has actually resulted in, the infliction of unnecessary and excruciating pain and torture. If the Temporary Restraining Order is not upheld, Mr. Workman's execution will necessarily take place before the issues can be adjudicated. In light of the importance of the questions involved, it is clearly in the public interest that temporary relief be granted to solve this dilemma and permit a definitive determination of the merits to be made. "[T]he public interest only is served by enforcing constitutional rights and by the prompt and accurate resolution of disputes concerning those constitutional rights. By comparison, the public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights." R. 2, Memorandum, Exhibit 43 (Cooey v. Taft, 2006 U.S. Dist. LEXIS 92521, *17 (S.D. Ohio 2006)(granting preliminary injunction)).

There are no countervailing considerations suggesting that the District Court's Temporary Restraining Order hurts the public interest. Mr. Workman has not engaged in abusive delay. Appellant's counsel admits as much. "We certainly understand and

appreciate that the plaintiff is working expeditiously[.]" Appendix C, p. 20. Nor is this suit an attempt simply to put off Mr. Workman's execution. Where an inmate presents a meritorious challenge of constitutional dimension and is not attempting to manipulate the judicial process, it cannot be in the public interest to allow Defendants to execute him using the very flawed process he challenges.

The District Court did not abuse his discretion.

4. Philip Workman Did Not Delay: He Acted As Soon As Appellants Released Their Brand New April 30, 2007 Protocols And The District Court Did Not Abuse His Discretion In So Concluding

i. Appellants Have Waived Any Timeliness Defenses

Appellants have waived any complaints about the timeliness of Mr. Workman's complaint. [14] Indeed, in the District Court, Appellant's admitted Mr. Workman's diligence: "We certainly understand and appreciate that the plaintiff is working expeditiously." Appendix C, p.20. Moreover, when given an opportunity to raise any timeliness objections, Appellant demurred. Indeed, Appellant's counsel did not utter a single word about undue delay or statute of limitations. Having deliberately bypassed his opportunity to raise a timeliness defense to the Motion for Temporary

---

[14]Any finding by this Court that Mr. Workman's claims are not timely brought would fly in the face of Article III's case and controversy requirement as well as the doctrines of mootness and ripeness.

Restraining Order in the District Court, Appellant cannot raise such arguments for the first time on appeal.

Importantly, Appellant's decision on the merits of Mr. Workman's administrative appeal also demonstrates that Appellant has waived any timeliness defenses as a matter of fact. Woodford v. Ngo, __ U.S. ___ , 126 S.Ct. 2378 (2006), required Mr. Workman to exhaust administrative remedies prior to filing a complaint. He did that expeditiously. Mr. Workman's administrative appeal was subsequently denied without any reference to its timeliness. Rather, the Commission denied it on the merits: "your grievance is denied. The Department's lethal injection protocol meets all constitutional standards."

In Horton v. Potter, 369 F.3d 906, 911 (6th Cir. 2004), a panel of this Court held that "Waiver occurs when the agency decides the complaint on the merits without addressing the timeliness defense." Id., citing Ester v. Principi, 250 F.3d 1068, 1071-1072 (7th Cir. 2001), Bowden v. United States, 100 F.3d 433, 438 (D.C.Cir. 1997). Thus, according to precedent in this Court, Appellants have waived any reliance on untimeliness or undue delay both by their admissions before the District Court and by their own waiver.

ii. Executive Order No. 43 Rendered Moot Any Challenges To Pre-February 1, 2007 Lethal Injection Protocols And Procedures, While Rendering Unripe Any Potential Challenge To Any New Protocols Or Procedures, At Least Until Such New Protocols Or Procedures Were Promulgated

A. Executive Order No. 43 Revoked All Existing Lethal Injection Protocols Or Procedures, Whether Written Or Otherwise, And Required The Promulgation Of New Written Protocols And Procedures

Moreover, in challenging the New April 30, 2007 Protocol, Philip Workman could not have come to court any sooner than he has. On February 1, 2007, the Governor issued Executive Order in which he unequivocally revoked any and all then-existing lethal injection protocols and procedures:

> The current protocols and any related procedures, whether written or otherwise, used by the Department of Correction and related to the administration of death sentences in Tennessee . . . by lethal injection . . . are hereby revoked.

Appendix G,¶ 3. In that same order, the Governor requested that, following study, the Commissioner of Correction provide him "new protocols and related written procedures for administering death sentences in Tennessee . . . by lethal injection . . . ." Id., ¶2.

B. Under Article III, Executive Order Number 43 Rendered Moot Any Challenges To Pre-February 1, 2007 Protocols Or Procedures, While Making Any Potential Challenges To Any New Protocols Unripe For Adjudication

The Governor's Order had two primary Article III effects on any possible challenge to the lethal injection process in Tennessee. First, Executive Order No. 43 rendered moot, and nonjusticiable, any challenge to pre-February 1, 2007 protocols and procedures. Second, Executive Order No. 43 made any potential challenge to any "new" protocols and procedures unripe and nonjusticiable, at least until such protocols and procedures were promulgated. In fact, following the Governor's Executive Order, Appellants told two separate district court judges in two separate cases that there was no basis for Article III Jurisdiction, because challenges to the revoked protocols were mooted, and any challenge to any future protocols was not yet ripe.

1. Executive Order No. 43 Rendered Any Challenges To Pre-February 1, 2007 Protocols Moot And Nonjusticiable

In Harbison v. Little, M.D.Tenn.No. 3:06-cv-1206, the plaintiff had challenged then-existing lethal injection protocols and procedures which were to be used at his proposed February 22, 2007 execution. Almost immediately following the Governor's Executive Order, Appellants told the United States District Court that Harbison had nothing left to challenge. The case was, "moot, in that there is no longer an actual case

or controversy, and, therefore, this Court lacks jurisdiction under Article III of the United States Constitution." Id., R. 34, p. 1 (Defendants' Motion To Dismiss).[15] Appellants made the very same assertion in Payne v. Little, M.D.Tenn. No. 3:06-0825, in which the plaintiff had also challenged the constitutionality of protocols and procedures which were to be used at his proposed April 11, 2007 execution. Id., R. 10, p. 1 (Defendants' Motion To Dismiss).

As Defendants explained, such cases were mooted given: (1) the Governor's Executive Order; and (2) that execution of those inmates was no longer "imminent." See pp.__, *infra*; See also, *Harbison*, R. 34, p. 1-2; *Payne*, R. 10, pp. 1-2. Yet Appellants explained, Harbison's challenges to the pre-February 1, 2007 protocols or procedures no longer existed because those protocols and procedures no longer existed:

> 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

---

[15]It is noteworthy that, in *Harbison*, Appellants were under court orders to disclose to Harbison by February 2, 2007 significant documentation concerning their carrying out of lethal injections. Executive Order 43 was issued just in time to moot those orders as well. In filing their motion to dismiss almost immediately upon the issuance of the Governor's Order, Appellants told the court that they should not have to comply with those discovery orders, given the Executive Order 43, which was issued less than a day before discovery was to be provided. *Harbison*, R. 35, p. 4 (Memorandum In Support Of Defendants' Motion To Dismiss). The District Court then revoked the discovery order. *Harbison*, R. 37 (Amended Order).

lacks jurisdiction under Article III of the United States Constitution. *Harbison*, R. 35, p. 4 (Memorandum In Support Of Defendants' Motion To Dismiss)(emphasis added). Appellants repeated this in *Payne*: Any challenges to the pre-February 1, 2007 protocol were mooted, because the pre-February 1, 2007 protocols which had been at issue no longer existed. *Payne*, R. 11, p. 3 (Memorandum In Support Of Defendants' Motion To Dismiss).[16]

And indeed, this is correct under Article III of the Constitution. Now that the New April 30, 2007 Protocol has been adopted, Appellants' lawyer correctly conceded on the record that there is a case or controversy in this cause of action. Appendix C, p. 25.

2. Executive Order No. 43 Made Any Challenge To A New Procotol Premature And Unripe, At Least Until The Commissioner Promulgated Such New Protocol

By revoking then-current protocols and procedures, Executive Order No. 43 also had a second effect: It rendered unripe any future challenge to any new protocols

---

[16]In Payne, the Defendants argued, "The issues presented in this action are the constitutionality of *the then current lethal injection protocol in Tennessee and the manner of administration of that protocol.* State of Tennessee Executive Order Number 43 revoked that protocol . . . and any related procedures, whether written or otherwise, and the plaintiff was granted a reprieve. There is no lethal injection protocol currently in effect; thus there is nothing to litigate." Id. at p. 3.

or procedures, because no new protocols existed. Indeed, with then-existing protocols having been revoked in their entirety, Appellants made clear in *Harbison* that "the protocol that will be utilized in executing the plaintiff [after May 2, 2007] ***does not exist***. *Harbison*, R. 34, p. 2 n. 1 (Motion To Dismiss)(emphasis added). Appellants also made clear that they had no idea whatsoever about what individuals might be involved in any future execution under any new protocol: "[T]he composition of the personnel involved in carrying out executions is unknown at this time. The training records of the personnel under the revoked protocol are irrelevant." *Harbison*, R. 34, p. 2 n. 1 (Motion To Dismiss).

Thus, Appellants made manifest that in the wake of Executive Order No. 43, any potential challenges to the Commissioner's new protocols were not yet ripe, because new protocols had not yet been established:

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

Harbison, R. 40, p. 5 (Defendants' Amended Answer)(filed Feb. 14, 2007). Appellants thus emphasized that, in the absence of any established protocols, any challenge to lethal injection was simply "not ripe for adjudication." R. 40, p. 5 (Affirmative

Defense #1).[17] In other words, where the future written protocols or procedures had not yet come into existence, any challenge to those not-yet-existing policies could not be adjudicated.

Appellants are collaterally estopped from taking a different position in this Court.

iii. Philip Workman's Complaint Filed Within Four Days Of The Existence Of An Article III Case Or Controversy Is Unquestionably Timely

A. Philip Workman's Challenges To The New April 30, 2007 Protocol Was Not Justiciable Until May 2007

Until April 30, 2007, Mr. Workman lacked standing to challenge the New April 30, 2007 lethal injection protocols, because there was no cognizable "injury" and nothing "redressable" before promulgation of the new protocols. Moreover, his claim for relief was not ripe until the protocols were promulgated. A federal court could not have entertained his challenge any time before May, 2007, because there was nothing to litigate. Even the state had no idea what the protocols might look like, and the federal court could not have enjoined something that didn't exist.

---

[17] In that amended answer, Appellants repeatedly stated that the former lethal injection protocols had been revoked and there were no execution protocols or procedures in place. *Harbison*, R. 40, ¶¶1, 4, 5, 6, 7, 8, 9, 12, 13. Appellants thus denied Harbison's allegations of constitutional deprivation. Id., ¶13.

As the Supreme Court has recently declared, a cause of action accrues when a plaintiff can file suit and obtain relief. Wallace v. Kato, 127 S.Ct. 1091 (2007). "[I]t is 'the standard rule that [accrual occurs] when the plaintiff has complete and present cause of action.'" Wallace, 127 S. Ct. 1091, 2007 WL 517122, at *3 (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal*, 522 U.S. 192, 201, 118 S. Ct. 542, 139 L. Ed. 2d 553 (1997)). Under these principles, it is clear that Mr. Workman did not have a complete and present cause of action until the New April 30, 2007 Protocols were promulgated.[18]

When a potential cause of action is not ripe for resolution under Article III,

---

[18]For this reason, this Court's decision in Cooey v. Strickland, 479 F.3d 412 (6th Cir. 2007) is inapplicable to this case. Even if it were applicable, and if Appellants had not waived their statute of limitations argument, Mr. Workman has not violated the operative Tennessee Statute of Limitations, which is ten years. The applicable Tennessee law regarding statute of limitations requires that, for a limitations period to exist, it must be "*expressly provided for*" by statute. Tenn. Code Ann. §28-3-110(3). Unless the Tennessee Code contains an *express* limitations period governing a particular action, the limitations period is 10 years. Id.

To be sure, Tennessee has a one-year statute of limitations for certain civil rights violations, but that provision expressly applies only to cases seeking damages which involve claims for "*compensatory or punitive damages, or both.*" Tenn. Code Ann. §28-3-104(3)(emphasis supplied).

That being said, Tennessee has not "expressly provided" a limitations period for civil actions for injunctive relief such as those raised by Philip Workman. Tenn. Code Ann. §28-3-110(3) thus makes clear that Philip Workman's complaint is not barred by any limitations period, because Philip Workman filed his lawsuit within 10 years of any alleged violation of his rights by Defendants.

Moreover, the panel's decision in Cooey is subject to review by the *en banc* court.

however, it is clear that a plaintiff cannot "obtain relief" on a potential lawsuit: By definition, Article III prohibits the very exercise of jurisdiction under such circumstances.

For this reason, therefore, it is only when a claim ripens into a justiciable controversy that any statute of limitations begins to run. As the Fourth and Third Circuits have explained: "[A] cause of action accrues for purposes of the statute limitations when it is sufficiently ripe that one can maintain a suit on it." Franks v. Ross, 313 F.3d 184, 194 (4th Cir. 2002); Whittle v. Local 641, Intl. Brotherhood of Teamsters, 56 F.3d 487, 489 (3d Cir. 1995). This is not simply the law: It is the essence of common sense and fundamental fairness.

> For a cause of action to accrue and the statute of limitations to run, the claim must be ripe. Common sense, as much as case law, dictates this maxim, for the alternative would lead plaintiffs into a conundrum in which their claims could be time-barred before even becoming amenable to judicial resolution.

Plaintiffs In Winstar-Related Cases v. United States, 37 Fed.Cl. 174, 1997 U.S. Claims Lexis 5 (Ct.Cl. 1997).

Accordingly, as mandated by Article III, when a claim becomes ripe, the statute of limitations begins. Conversely, when a cause of action is not ripe under Article III, the statute of limitations has yet to begin. Put another way, "The conclusion that a

claim is premature for adjudication controls as well the determination that the claim has not accrued for purposes of limitations of actions." Norco Construction Inc. v. King County, 801 F.2d 1143, 1146 (9th Cir. 1986).

Here, without question, Philip Workman's challenge to the New April, 30, 2007 protocols was not ripe until those protocols came into existence. Appellants conceded as much in *Harbison*. Workman could not have obtained relief on his now-pending challenges to those policies before then. Indeed, all a federal court could have done in March 2007 would have been to speculate about what the 2007 policies and provide an advisory opinion about the constitutionality of possible protocols. Without question, the federal court could not have entertained this present lawsuit before May, 2007: To use the Defendants' own words, "There [was] nothing to litigate," and nothing for a federal court to do.

Because Philip Workman had no cause of action regarding the New April 30, 2007 Protocols until they were promulgated, Workman's claims were not ripe until then, and his present lawsuit – filed within four days of the ripening of his cause of action (and hours after exhausting administrative remedies) – is unquestionably timely. See also Schulz v. Milne, 1996 U.S.App.Lexis 26266 (9th Cir. 1996)(district court improperly dismissed claim on statute of limitations ground, where claim had not yet ripened, and thus statute of limitations had not begun: "the statute has not yet begun

to run on the . . . claim because it is not yet ripe."). Any claim that Workman's lawsuit is barred by some statute of limitations thus fails, because any such contention is untenable under Article III. Appellants' attempt to claim that Workman's suit is "time-barred before even becoming amenable to judicial resolution" is untenable. Plaintiffs In Winstar-Related Cases v. United States, *supra*.

IV. *COOEY v. STRICKLAND* IS INAPPLICABLE TO MR. WORKMAN'S CASE, AND IN ANY EVENT, *COOEY* WAS WRONGLY DECIDED

Fundamentally, this Court's decision in *Cooey* is fatally flawed because the panel there has mixed apples and oranges. For statute of limitations purposes, *Cooey* improperly conflates the known harm flowing from a past event (the criminal trial) with the potential future harm flowing from a possible future event (an execution) and says that a person convicted of a capital crime must challenge both the past and future harm at the same time, when the conviction becomes final. Cooey, 479 F.3d at 422. This flies in the face of Article III's ripeness and case-or-controversy requirements.

Under Article III and general statute of limitations analysis, it is logical for Congress to require *habeas petitioners* raising constitutional challenges arising from their criminal trials to file such challenges within one year of finality *of the criminal judgment*. Article III permits this, because, upon finality, the defendant is on notice of

the harm which occurred at the trial, and there is an existing, ripe Article III case- or-controversy when a petitioner challenges state action occurring at the trial. With knowledge of past harms occurring at the criminal trial, the defendant can clearly articulate and identify them, and a federal court can grant him relief for those past violations.

Under Article III, however, the situation is quite different when it comes to the future event of a possible execution. Article III prevents a federal court from adjudicating a case which is not ripe. And the ripeness requirement demands that a controversy not be abstract, nor subject to contingencies, and requires imminent harm. When it comes to executing a death sentence, there are many contingencies which prevent a case-or-controversy from ever ripening – many of which occur after the date of finality. An execution might never be imminent, because, for example, the person might get relief in post-conviction proceedings. The person might get relief in habeas corpus proceedings. And if any one of those post-trial events occurs, there will never be a case-or-controversy surrounding the manner in which the never-to-occur execution would have taken place. Put in Article III terms, in such cases, there was never a ripe controversy concerning a future execution.

The fundamental flaw in the *Cooey* analysis is that while the statute of limitations for challenging past harm is to be measured *forward* from the trial to the

date of finality, any statute of limitations relating to the execution of sentence must be analyzed *backward* from the date of potential execution, taking into Article III's standing, case-or-controversy and ripeness requirements.

First, there is no Article III jurisdiction unless a plaintiff establishes standing which, in part, requires an "injury in fact," defined as a "distinct and palpable" harm which is either "actual" (past harm) or "imminent" (future harm). Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). As Chief Justice Rehnquist explained in *Whitmore*, for there to be standing: "A threatened injury *must certainly be impending* to constitute injury in fact." Id. at 158. Second, under Article III's ripeness requirement: "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed, may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998).

Together, Article III's standing and ripeness requirements make clear that *Cooey*'s use of "finality" of a criminal conviction as the date for the running of a statute of limitations for a potential future challenge to an execution are mismatched. Here Workman's proposed May 2007 execution date is (and was) simply too remote in time to be considered within the scope of "imminent harm" required for standing when finality occurred. Compare McConnell v. FEC, 540 U.S. 93, 226 (2003)(no standing where potential future harm was 5 years away). The fall-back position of

Cooey – that the implementation of lethal injection in general (Cooey, 479 F.3d at 422) provides the date for challenging a future execution – also fails in Workman's case. That date was in 2000 – 7 years from the Article III required "imminent harm" that faces Philip Workman on May 9, 2007.

In sum, the Supreme Court's decision in *McConnell* makes it eminently clear that this Court's decision in *Cooey* is wrong. Neither the date of finality nor the date that lethal injection was passed as a general method of execution in 2000 provides – for purposes of Article III – the date on which Workman could have filed suit to challenge the April 30, 2007 protocol. Indeed, that protocol was not to be promulgated for 7 years, and the harm flowing from that particular protocol was not imminent. Indeed, it was not imminent until the protocol itself was promulgated.

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

lack of ripeness.

The fact that Mr. Workman may have had a claim of injury in the past relating to the old protocols is irrelevant to any harm that he may have forced upon him in the future. See Anderson v. Green, 513 U.S. 557 (1995)(when a prior potential harm in the past dissipates, a claim is no longer ripe or justiciable, and the potential for imminent harm must re-occur before a justiciable controversy exists). The injury that Mr. Workman is seeking to redress is that posed by the New April 30, 2007 protocol. Appellants' argument that because Mr. Workman did not challenge the old, revoked protocols, which never could have been used to execute him, he is prohibited from challenging the New Protocol, which actually threatens him with imminent injury, is absurd. In Tennessee, the method of carrying out a lethal injection is completely discretionary. Under Appellants' theory, they could have changed the method of lethal injection to an intravenous shot of Drano and Mr. Workman would have no right of redress. This cannot be.

Appellant's make much of a single line in Mr. Workman's 255 paragraph complaint to argue that Mr. Workman's claims are the same claims that he could have brought under the old protocol. They point to the fact that a particular line in the more than eighty page complaint is similar to a complaint filed on behalf of our former client Sedley Alley. Appellants fail to acknowledge that Mr. Alley's complaint

contained 109 paragraphs of allegations. Mr. Workman's contains 256 paragraphs of allegations. Mr. Workman was indeed correct when he told the Tennessean that Appellant's didn't fix anything. In fact,

> In comparing the Tennessee lethal injection protocols, the new protocols, we have discovered, not only has Tennessee failed to improve on their old flawed protocols, but in fact they have made them substantially worse. And, when comparing those protocols to the protocols developed in the other jurisdictions which provide for lethal injection, it has become clear to us that Tennessee offers the fewest safeguards of any jurisdiction that uses lethal injection.

Appendix C. Mr. Workman specifically incorporated all of the arguments made by counsel, as well as the factual averments contained in his Memorandum in Support of Motion for Temporary Restraining Order and the two volumes of exhibits presented to the District Court, into his Complaint. R.6, p.2. Mr. Workman's challenge to the New April 30, 2007 Protocol is unquestionably new.

Under normal circumstances, as the Supreme Court recognized in Stewart v. Martinez-Villareal, 523 U.S. 637 (1998), and as required by Article III, any statute of limitations for challenging a potential execution is, as the Chief Justice made clear in *Whitmore*, is when "a threatened injury [*is*] *impending*. That occurs when an execution date is set. Mr. Workman filed within months of that date and so his suit cannot be untimely in any sense of the word. See Harbison, supra.

The ultimate problem with Appellants' position is that it misconstrues Mr.

Workman's lawsuit. Mr. Workman is not challenging "lethal injection" in some abstract sense. Indeed, Article III would prohibit such a suit. *Mr. Workman is challenging an imminent harm which is to occur on May 9, 2007 in a manner which has just been promulgated on April 30, 2007.* It is ludicrous for Appellant to claim that Mr. Workman should have challenged the harm flowing from the April 30, 2007 protocol before the protocol existed and before the new protocol posed an imminent threat to Mr. Workman. Article III prohibited it. Appellants' contention that Mr. Workman should somehow be barred from federal review because he should have challenged no longer existing protocols is foolish. This is especially true where statutes of limitations are designed to prevent stale litigation, and Mr. Workman is suing the Defendants over events and policies which they have just last week promulgated and discussed. The Defendants' memories haven't faded. The case is now ripe for adjudication, as Defendants admitted, and as common sense dictates.

This Court's decision in *Cooey* is not to the contrary, because *Cooey* overlooks the Article III standing and ripeness requirements, while conflating the harm flowing from a criminal trial with the potential harm from a future execution, which Article III demands to be "imminent" and "impending." Mr. Workman has come to the federal courts when they could hear his challenge to the New April 30, 2007 Protocol.

Appellant's motion must be denied.[19]

V. CONCLUSION

Having carefully reviewed the facts and applied all applicable law, the District Court has entered a non-abusive order of temporary duration to determine the constitutionality of Defendants' use of their brand New April 30, 2007 Protocol before they kill someone with it. Where this Court has no jurisdiction to vacate that order, where Appellants failed to put forth any facts or defense when they had the opportunity, where other District Courts have entered similar orders (and even the Attorney General of the United States has agreed to one such order), and where Appellants' statute of limitations and timeliness arguments are waived and do not otherwise bar the entry of the order, one cannot reasonably conclude that the District Court – after weighing all the equities – has engaged in abusive conduct.

Respectfully submitted,

Kelley J. Henry
Gretchen L. Swift

---

[19]The *Cooey* decision is not a final order. A request for rehearing *en banc* is pending. Should this panel consider vacating the District Court's Temporary Restraining Order on statute of limitations grounds, this Court should stay these proceedings pending the en banc court's action on the rehearing petition. Biros v. Strickland, No. 06A900, Application to Vacate Stay of Execution entered to allow for *en banc* consideration of *Cooey* denied.

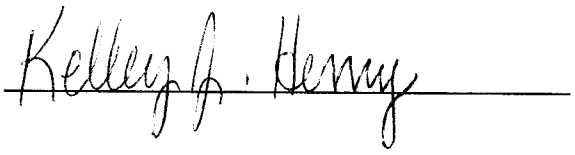
Assistant Federal Public Defenders

Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
FAX (615)736-5265

By: Kelley J. Henry

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing and all appendices hereto have been served via email upon Mark Hudson, Office of the Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243 this 7th of May, 2007.



APPENDICES TO PHILIP WORKMAN'S
MOTION TO DISMISS OR DENY APPEAL

A Harbison v. Little, No. 3:06-cv-1216 (M.D.Tenn.), Docket Entry No. 34, p.1 and Docket Entry No. 35, p.4

B Payne v. Little, No. 3:06-cv-0825 (M.D.Tenn.), Docket Entry No. 10, p.1 and Docket Entry No. 11, p. 3.

C Transcript of May 4, 2007 District Court Hearing (R.9)

D Commissioner Little's Response to Mr. Workman's Emergency Grievance

E District Court Order in Workman v. Bredesen (R.8)

F Memorandum In Support of Motion for Temporary Restraining Order (R.2)

G Governor Bredesen's Executive Order No. 43

H List of Exhibits Filed with Memorandum In Support of Motion for Temporary Restraining Order in Workman v. Bredesen (R.2)

I Declaration of Dr. Mark Heath