

inflicted psychological torture upon Mr. Harbison.

Finally, the supplier of the drugs used in the lethal injection process recently stated that lethal injection is not an indicated usage. Such use of these drugs will violate the Federal Controlled Substances Act and the Federal Food, Drug & Cosmetics Act.

In support of rehearing, Mr. Harbison would show the following:

Background

1. On July 26, 2010, the State requested this Court to schedule Mr. Harbison's execution for the reason that "[t]here [are] now [] no legal impediments to Harbison's lawful execution." (State's motion dated 7/26/10 p.2).
2. On Friday, September 3, 2010, Mr. Harbison filed a response requesting the Court to deny the State's motion and provide sentencing relief or certify that the case warrants a commutation from the Governor.
3. On Tuesday, September 7, 2010, WSMV-TV in Nashville reported "that drug manufacturer Hospira has stopped delivering Panthanol [sodium thiopental]." Sodium thiopental is the first drug in the three drug protocol and is intended to anesthetize the inmate. (Attachment A). The report said, "the state of Tennessee has enough lethal injection drug to carry out only one more execution." *Id. See also* <http://www.fda.gov/Drugs/DrugSafety/DrugShortages/ucm050792.htm> (noting shortage of thiopental).
4. On Friday, September 10, 2010, the law office representing Mr. Harbison (Federal Defender Services of Eastern Tennessee, Inc.) learned the State "has a sufficient supply of sodium thiopental to carry out an execution" and it "will not have passed its expiration

- date prior to its use in any execution currently scheduled.” (Attachment B, letter from Mark A. Hudson, Senior Counsel with Tennessee’s Office of Attorney General, dated 9/10/10).
5. On Tuesday, September 14, 2010, before Mr. Harbison was able to advise this Court of the drug shortage, this Court entered its order scheduling Mr. Harbison’s execution for February 15, 2010.
 6. On Wednesday, September 15, 2010, undersigned counsel requested additional information from the State regarding its ability to carry out executions by lethal injection. (Attachment C, letter from Dana C. Hansen Chavis dated 9/15/10). The State failed to provide the requested information. Instead, its newest response contains even less information, as it omits any assurances regarding the expiration dates of the sole quantity of thiopental it possesses. (Attachment D, letter from Mark A. Hudson dated 9/21/10).
 7. Also on Wednesday, September 15th, WSMV-TV in Nashville again reported that “the state of Tennessee has enough lethal injection for just one execution because one of the three drugs is not being manufactured right now.” (Attachment E).
 8. On Saturday, September 18, 2010, *The Arizona Republic* newspaper ran an article on the sodium thiopental shortage. (Attachment F, Michael Kiefer, “*Arizona court asked to delay legal [sic] injection executions,*” THE ARIZONA REPUBLIC (9/18/10)). It also reported a shortage of pancuronium bromide, the second drug of the three drug protocol that is intended to paralyze the inmate and suppress breathing. *Id.*
 9. On Monday, September 20, 2010, undersigned confirmed the shortage of pancuronium. The American Society of Health Systems Pharmacists website reports: “Teva had

recalled their pancuronium products because some products may not meet specifications for their expiration dates. They have now discontinued their presentations. Hospira's product is on back order due to increased demand for product. Hospira is the only manufacturer of pancuronium." See <http://www.ashp.org/DrugShortages/Current/> (last visited Sept. 20, 2010).²

10. This petition is timely filed within ten days of the Court's order dated September 14, 2010. TENN.R.APP.P. 39(b).

**Rehearing should be granted because the State sought an execution date
although unable to carry it out**

11. The State sought an execution date for Mr. Harbison either with deliberate indifference for the fact, or, knowing the fact that it did not have enough sodium thiopental to carry out the execution.
12. In 2007, the State of Tennessee implemented a new execution protocol. That protocol requires "that there are enough lethal injection chemicals kept in inventory at RMSI to carry out three executions." (Attachment G, protocol p.36, ¶1). The protocol ensures this inventory by requiring "[t]he Warden and the designee jointly [to] verify all inventories of LICs [lethal injection chemicals] on a semi-annual basis (January/July), at a minimum, and subsequent to each execution." (*Id.* p.37, ¶5).
13. Less than a week after the new protocol was implemented, Phillip Workman was executed by lethal injection. (*See* Attachment H, timeline p.1). Based upon the requirements of the protocol and the recent representation of the State's counsel, it

²Given the recency of this information, undersigned has not been able to obtain information from the State regarding the status of its supply of pancuronium.

appears that the inventory requirement of a quantity of drugs for three executions was obtained before the next scheduled execution.

14. In February 2009, Steve Henley was executed by lethal injection, thereby depleting the lethal injection inventory by one. (*See id.*). According to the protocol, another quantity of the lethal injection drugs should have been ordered at that time. (Attachment G, protocol p.36, ¶1 and p.37, ¶5). Based on facts available to date, it appears that another quantity of the drugs was not obtained.
15. In December 2009, Cecil Johnson was executed by lethal injection. (*See* Attachment H, timeline p.2). Based on facts available to date, this execution again depleted the lethal injection inventory by one and left one quantity of drugs available for an execution.
16. Also in December 2009, the State requested an execution date for Gaile Owens. In April 2010, this Court ordered her execution for September 28, 2010. (*See id.* p.2). Based on facts available to date, this execution would have used the remaining quantities of lethal injection drugs.³
17. Also in April 2010, the State requested another execution date be set; this time for Stephen West. (*See id.* p.2). Based on facts available to date, assuming the Owens execution was carried out there would not have been a quantity of lethal injection drugs

³According to facts available to date, there has been a shortage of sodium thiopental since at least March, 2010. The Kentucky Department of Corrections says, “We’ve had the drug on back order since March. ... The company that supplies it to us advised that they were unable to produce it because they weren’t able to get the active ingredient from their supplier.” (Attachment I, Kathy Lohr, “*All Things Considered: States Delay Executions Owing to Drug Shortage*,” NAT’L. PUB. RADIO (9/16/10)). *See also* Attachment J, letter from J. Michael Brown, Secretary, Kentucky Justice and Public Safety Cabinet, dated August 19, 2010 and letter from Ellen M. Heslen, General Counsel, State of Kentucky, dated August 23, 2010.

sufficient to perform West's lethal injection execution in accordance with the protocol.

18. In May 2010, the State requested an execution date for Billy Ray Irick. (*See id.* p.2).

Assuming execution dates were set for Owens and West and one of these executions was carried out, based on facts available to date, there would not have been a quantity of lethal injection drugs sufficient to conduct another lethal injection execution in accordance with the protocol.

19. On July 6, 2010, the State requested an execution date for Edmond Zagorski. (*See id.*

p.3). Assuming execution dates were set for Owens, West and/or Irick and one of these executions was carried out, based on facts available to date, there would not have been a quantity of lethal injection drugs sufficient to carry out another lethal injection execution in accordance with the protocol.

20. On July 14, 2010, the Governor commuted the death sentence of Gaile Owens. (*See id.*

p.3). Pending in this Court were the State's requests for three execution dates. On July 15th and 19th, execution dates were scheduled for West and Irick, respectively. (*See id.*). Assuming the execution of either West or Irick was carried out, based on facts available to date, the third quantity of lethal injection drugs would have been used. There would not then be a quantity of lethal injection drugs sufficient to conduct another lethal injection in accordance with the protocol.

21. On July 26, 2010, the State requested this Court set Mr. Harbison's execution date. (*See*

id. p.3). At that time, two execution dates were already scheduled (West and Irick), one request for an execution date was pending (Zagorski), and – based on facts available to date – only one sufficient quantity of lethal injection drugs was available.

22. On September 7, 2010, this Court scheduled the execution of Zagorski. This increased the number of pending, scheduled executions to three. (*See id.* p.3). Based on facts available to date, only one sufficient quantity of lethal injection drugs was available.
23. The following week, when this Court entered an order for Mr. Harbison's execution, the total number of pending execution dates the State had secured increased to four. (*See id.* p.3). Based on facts available to date, there remains only one sufficient quantity of lethal injection drugs.
24. When the State requested and obtained an execution date for Mr. Harbison, it did so although it knew, should have known, or was deliberately indifferent to the fact that Mr. Harbison's execution would be factually impossible due to a lack of lethal injection drugs required under the protocol.

Rehearing should be granted because the State's actions in seeking to schedule Mr. Harbison's execution date (while failing to reveal the execution could not take place) serve to inflict psychological harm upon Mr. Harbison, in violation of the United States and Tennessee Constitutions.

25. The order scheduling Mr. Harbison's execution date for February 15, 2011, has caused him severe stress and extreme anxiety. "The prospect of pending execution exacts a frightful toll" on the condemned inmate, even when an execution date is legitimately obtained. *Furman v. Georgia*, 408 U.S. 238, 288-89 (1972) (per curiam) (Brennan, J., concurring). *See also Smith v. Arizona*, 552 U.S. 985, 986 (2007) (Bryer, J., dissenting from denial of certiorari) ("whether it is 'cruel' to keep an individual ... under threat of imminent execution raises a serious constitutional question."). Here, however, when the State obtained an execution date without the ability to carry it out and without following

the lethal injection protocol, it abused its authority and this Court's processes. The State's actions in obtaining an execution date under these circumstances serve only to inflict psychological torture upon Mr. Harbison. *See State v. Carter*, 114 S.W.3d 895, 903 (Tenn. 2003) ("the anticipation of physical harm to oneself is torturous"). *See also Doe v. Welborn*, 110 F.3d 520, 524 (7th Cir. 1997) (the Constitutional prohibition against cruel and unusual punishment "does not countenance psychological torture merely because it fails to inflict physical injury."), quoting *Babcock v. White*, 102 F.3d 267, 273 (7th Cir. 1996). Psychological torture inflicted by state actors that rises to the level of outrageousness constitutes a violation of the Due Process Clause. *United States v. Broussard*, 80 F.3d 1025, 1036 (5th Cir. 1996), citing *Miller v. Fenton*, 474 U.S. 104, 109 (1985).

26. The State's misconduct is highlighted by the conduct of Kentucky officials who have refrained from scheduling execution dates because the State of Kentucky only has a single dose of sodium thiopental. (Attachment I, Kathy Lohr, "*All Things Considered: States Delay Executions Owing to Drug Shortage*," NAT'L. PUB. RADIO (9/16/10)). Accordingly, this Court should reconsider the State's motion to set Mr. Harbison's execution date and enter an order denying that motion. *See State v. Moore*, 273 Neb. 495, 497, 730 N.W.2d 563, 564 (2007) ("every court has the inherent power to control the execution of its orders or processes, to the end of preventing an abuse of them."), quoting *Ex parte State ex rel Attorney General*, 150 Ala. 489, 43 So. 490 (1907).

Rehearing should be granted because the Court's order scheduling Mr. Harbison's execution relies upon the ability of the State to carry out the execution as directed by Tennessee's execution protocol, and that protocol requires the State to violate federal law

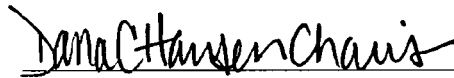
27. Last week, drug manufacturer Hospira (the producers of sodium thiopental and pancuronium bromide) denounced use of its drugs for lethal injection executions. (Attachment F, Michael Kiefer, "Arizona court asked to delay legal [sic] injection executions," THE ARIZONA REPUBLIC (9/18/10)). Referring to any new supply of sodium thiopental that may become available, it stated, "Hospira manufactures this product because it improves or saves lives, and the company markets it solely for use as indicated on the product labeling. The drug is not indicated for capital punishment, and Hospira does not support its use in this procedure." *Id.*
28. The three drugs used in the Tennessee protocol, sodium thiopental, pancuronium bromide and potassium chloride, are regulated by the Federal Controlled Substances Act, 21 U.S.C. §§ 801, *et seq.*, and the Federal Food, Drug & Cosmetic Act, 21 U.S.C. §§ 301, *et seq.*, and their respective regulations. Under the Supremacy Clause of the United States Constitution, the State is required to obey the Federal Controlled Substances Act and the Federal Food, Drug & Cosmetic Act. Notwithstanding the nationwide controversy surrounding lethal injection protocols, Congress has not created an exception to these Acts for using drugs for a legal execution. The United States Government could prosecute the State actors involved in the lethal injection procedure for violating these federal laws. *See Gonzales v. Raich*, 545 U.S. 1 (2005).

29. According to the Tennessee protocol, the State intends to prescribe, procure, distribute and administer sodium thiopental, pancuronium bromide and potassium chloride to Mr. Harbison for the purpose of effecting his death by lethal injection.
30. Under the Tennessee protocol, sodium thiopental, pancuronium bromide and potassium chloride will be obtained from a pharmacist and dispensed and administered for use without physician supervision and without the prescription of a practitioner issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice, in violation of the Federal Controlled Substances Act and the Federal Food, Drug & Cosmetics Act.
31. Thus, rehearing should be granted and the State's motion to set execution date should be denied so as not to sanction the State's willful violation of federal law.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

By:



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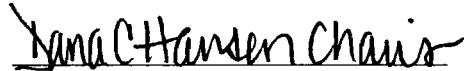
⁴Pursuant to TENN. SUP. CT. R. 12.4(B), Dana C. Hansen Chavis, as attorney of record, requests notification of orders or opinions of the Court by facsimile at (865) 637-7999.

CERTIFICATE OF SERVICE

I, Dana C. Hansen Chavis, hereby certify that a true and correct copy of the foregoing was sent via facsimile and overnight mail to:

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Associate Deputy Attorney General
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on this the 21st day of September, 2010.



Dana C. Hansen Chavis
Assistant Federal Community Defender

Index of Attachments to Petition for Rehearing

A	WSMV-TV Report - Sept. 7, 2010, "Execution Drug Running In Low Supply"
B	Letter from Mark Hudson, Senior Counsel for Tennessee's Office of Attorney General dated Sept. 10, 2010
C	Letter from Dana Hansen Chavis, Asst. Federal Defender to Mark Hudson, Senior Counsel for Tennessee's Office of Attorney General, dated Sept. 15, 2010
D	Letter from Mark Hudson, Senior Counsel for Tennessee's Office of Attorney General dated Sept. 21, 2010
E	WSMV-TV Report - Sept. 15, 2010, "New Lethal Injection Plan May Be Needed"
F	The Arizona Republic - Sept. 18, 2010, "Arizona Court Asked to Delay Legal [sic] Injection Executions"
G	Tennessee's Current Lethal Injection Protocol (effective April 20, 2007) p.36-37
H	Timeline
I	NPR: All Things Considered Report - Sept. 16, 2010
J	Letter from J. Michael Brown, Justice & Public Safety Cabinet Secretary, dated Aug. 19, 2010 and letter from Ellen M. Heslen, General Counsel for the Commonwealth of Kentucky, dated Aug. 23, 2010