No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2008

STEVE HENLEY,
Petitioner,

v.

GEORGE LITTLE et al.,
Respondents.

STEVE HENLEY,
Petitioner,

v.

RICKY BELL, Warden,
Respondent.

APPLICATION FOR STAY OF EXECUTION

THIS IS A DEATH PENALTY CASE
MR. HENLEY IS SCHEDULED TO BE EXECUTED ON
FEBRUARY 4, 2009 at 1:00 a.m. (C.S.T.)

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APPLICATION FOR STAY OF EXECUTION

Petitioner Steve Henley is a condemned Tennessee inmate scheduled for execution this evening – at 1a.m. Central Time, February 4, 2009. He respectfully requests a stay of his execution and suggests that this Court treat the stay as a petition for certiorari and grant certiorari with respect to one of the two issues presented by his case.

STATEMENT OF THE CASE

1. Petitioner was convicted of first-degree murder and sentenced to death in 1986. The Tennessee Supreme Court affirmed the conviction and sentence on direct appeal. *State v. Henley*, 774 S.W.2d 908 (Tenn. 1989). Direct review concluded in 1990 with this Court's denial of certiorari. *See Henley v. Tennessee*, 497 U.S. 1031 (1990) (denying certiorari).

Petitioner filed a state post-conviction petition in 1990, which the trial court denied. The Tennessee Court of Criminal Appeals reversed on the ground that petitioner had received ineffective assistance of counsel, but the Tennessee Supreme Court reversed by a three-to-two margin. *Henley v. State*, 960 S.W.2d 572 (Tenn. 1997). This Court denied review in 1998. *Henley v. Tennessee*, 525 U.S. 830 (1998).

On federal habeas review, the Sixth Circuit denied petitioner relief by a divided vote. *Henley v. Bell*, 487 F.3d 379 (6th Cir. 2007). Federal habeas review concluded in 2008. *See Henley v. Bell*, 128 S. Ct. 2962 (June 23, 2008) (denying certiorari); 129 S. Ct. 19 (Aug. 18, 2008) (denying rehearing).

2. On September 11, 2008, the State filed its motion to set petitioner's execution date. On October 20, 2008, the Tennessee Supreme Court issued its Order directing that the execution proceed. The Order set the execution date for February 4, 2009. The State plans to carry out the

execution at 1a.m. Central Time on the 4th.

3. The day after the Tennessee Supreme Court set petitioner's execution date (October 21, 2008), petitioner immediately moved in federal district court for an Order under 18 U.S.C. § 3599(e) authorizing his appointed counsel in the federal habeas corpus proceedings to pursue state clemency proceedings. App., *infra*, at A:1 (the "3599 Motion"). Petitioner did not merely seek compensation for his counsel. Rather, he sought that appointment because his principal counsel – a federal public defender – would otherwise be *forbidden* from participating in the clemency process.

The question whether such an appointment is permissible is the subject of a circuit split and is currently pending before this Court in its review of a ruling of the Sixth Circuit's decision in No. 07-8521, *Harbison v. Bell* (argued Jan. 12, 2009). Petitioner accordingly requested in the alternative that the district court hold his Motion in abeyance and that he be granted a stay of execution pending this Court's disposition of *Harbison*.

On November 18, 2008, the district court denied petitioner's motion for a stay of execution. App., *infra*, at B:3-5. Because existing Sixth Circuit precedent holds that there is no right to such an appointment (*see Harbison*, *supra*), the district court held that it was powerless to issue a stay under the All Writs Act, 28 U.S.C. § 1651. *Id.* at B:3-4. Alternatively, the district court held that it would deny a stay of execution because petitioner had not shown a likelihood of success on clemency or irreparable harm. *Id.* at B:4-5. But in the same order, the district court refused to adjudicate petitioner's 3599 Motion, ordering it held in abeyance pending this Court's disposition of *Harbison v. Bell*, notwithstanding that *Harbison* likely would not be decided until after petitioner's execution. *Id.* at B:5.

Petitioner timely appealed the denial of his stay request and simultaneously moved in the

Sixth Circuit for a stay of execution pending this Court's disposition of *Harbison*. On December 22, 2009, the Sixth Circuit entered an Order expediting the appeal, allowing the filing of an electronic appendix, and dispensing with a certificate of appealability, but denying petitioner's request for a stay. App., *infra*, at C. On January 9, 2009, the Sixth Circuit entered an Order denying petitioner's request for oral argument on appeal and reiterating its denial of petitioner's request for a stay. App., *infra*, at D.

Notwithstanding that it expedited the appeal of the denial of a stay on his Section 3599 Motion, the court of appeals has thus far failed to decide it, though it has been pending for several months. On January 30, 2009, the district court similarly denied petitioner's renewed request that it rule on the merits of his Section 3599 Motion. App., *infra*, at E.

4. More than two months before the scheduled execution, on November 26, 2008, petitioner also filed suit in federal district court under 42 U.S.C. § 1983, alleging that the State's planned method of executing him violates the U.S. Constitution. The parties promptly briefed the merits of that claim. The State's motion to dismiss and petitioner's corresponding motion for summary judgment were fully briefed and ready for decision on January 23, 2009, nearly two weeks before the scheduled execution.

The district court nonetheless refused to decide the merits of petitioner's claim on the ground that it was not timely filed. On January 26, 2009, the district court dismissed petitioner's suit as untimely under the Sixth Circuit's decision in *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2047 (2008). App., *infra*, at F:8. *Cooey* held that a defendant is required to institute a civil rights suit challenging the method by which he will be executed upon the later of the conclusion of direct review or the State's formal adoption of the challenged method. *Cooey*, 479

F.3d at 422. In this case, petitioner filed his Section 1983 suit soon after habeas review concluded and the State moved to set an execution date, after the state supreme court concluded that he should not be spared from execution, and more than two months before the scheduled execution. But the district court held that, under *Cooey*, petitioner had been too dilatory in filing his complaint because direct review concluded in his case in 1990 and lethal injection became the presumptive method of execution in Tennessee in 2000. App., *infra*, at F:9-10. Thus, the district court held that petitioner was required to challenge the constitutionality of the protocol by which he would be executed either nineteen or nine years earlier.

Petitioner timely appealed. On February 2, the Sixth Circuit affirmed the district court's dismissal of Mr. Henley's 1983 action and denied petitioner a stay of execution. App., *infra*, at G.

5. This Court has jurisdiction to grant a stay with respect to petitioner's request for counsel under Section 3599, which remains pending in the district court pending this Court's decision in *Harbison v. Bell*, under 28 U.S.C. § 1651. This Court has jurisdiction to grant a stay with respect to petitioner's suit under Section 1983, the dismissal of which was affirmed by the Sixth Circuit, under 28 U.S.C. § 2101(f). It has jurisdiction to grant certiorari with respect to that question under 28 U.S.C. § 1254(1).

ARGUMENT

This Court should enter a stay of petitioner's execution. The question whether petitioner is entitled under Section 3599 to authorization for his principal counsel to participate in his state clemency proceedings (and for his other counsel to be compensated) is a frequently recurring question that has divided the circuits and that is now pending before this Court in *Harbison*. The basis for a stay is uniquely strong in petitioner's case: absent authorization under Section 3599, his

clemency application will be severely prejudiced because his principal counsel will be precluded from participating in the clemency process as a matter of law; and petitioner initiated his Section 3599 claim immediately upon the setting of an execution date.

The further question whether petitioner's challenge to his method of execution under Section 1983 was timely is "an issue of exceptional importance" (*Cooey*, 489 F.3d at 776 (Gilman, J., dissenting from the denial of rehearing en banc for six judges)) on which the Sixth Circuit's decision conflicts with this Court's jurisprudence and which has generated substantial confusion in the lower courts. Because petitioner has presented a substantial claim under Section 1983 and has a realistic prospect of prevailing on his 3599 motion and a properly presented request for clemency, a stay is warranted.

This Court should furthermore deem this stay application to be a petition for certiorari and grant certiorari limited to the following question: When is a challenge under 42 U.S.C. § 1983 to a method of execution properly dismissed as untimely or a stay of execution denied on the ground that the plaintiff was unduly dilatory in filing suit? *E.g.*, *Nken v. Mukasey*, 129 S. Ct. 622 (2008); *Darden v. Wainwright*, 473 U.S. 928 (1985) (granting stay of execution, treating application for stay as a petition for a writ of certiorari, and granting certiorari); *Barefoot v. Estelle*, 459 U.S. 1169 (1983) (same). The Sixth Circuit has finally decided that important and recurring question in this case. In order to minimize any prejudice to the State from a stay of execution, petitioner is prepared to brief and argue that question on an expedited basis so that the case can be decided this Term.

I. Standard for Granting a Stay of Execution.

This Court's authority to stay petitioner's execution is established by 28 U.S.C. § 2101(f), which provides, in relevant part:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . . .

This Court has established three criteria that an applicant for a stay must satisfy to rebut the general "presumption that the decisions below – both on the merits and on the proper interim disposition of the case – are correct." *See Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers): "a likelihood of irreparable injury that, assuming the correctness of the applicants' position, would result were a stay not issued; a reasonable probability that the Court will grant certiorari; and a fair prospect that the applicant will ultimately prevail on the merits." *Planned Parenthood v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers). Moreover, in close cases "it may be appropriate to 'balance the equities' – to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker*, 448 U.S. at 1308 (Brennan, J., in chambers).

II. This Court Should Grant a Stay Pending Its Controlling Decision in *Harbison*.

1. This Court granted certiorari to review the Sixth Circuit's decision in *Harbison v. Bell*, 503 F.3d 566 (6th Cir. 2007), *cert. granted*, 128 S. Ct. 2959 (2008), holding that the appointment of counsel under Section 3599 to represent a state death-sentenced defendant in Section 2254 proceedings does not include representation in state clemency proceedings. Both in *Harbison* and petitioner's case, the State declined to express a view on whether Section 3599 provides prisoners sentenced under state law with a right to federally appointed and funded counsel to pursue state clemency. The Court heard oral argument in *Harbison* on January 12, 2009.

2. A stay is warranted because petitioner satisfies each of the three criteria established by

this Court, and the balance of equities also weighs in his favor.

a. First, petitioner will be irreparably injured if a stay is not issued pending this Court's decision in *Harbison*, which will resolve whether petitioner is entitled to the appointment of counsel in clemency proceedings. Absent a stay, petitioner will be executed before this Court resolves the proper construction of Section 3599. Critically, absent an appointment of counsel under Section 3599, petitioner's clemency application will be severely prejudiced. This is not just a question of funding. An appointment is a necessary prerequisite as a matter of law to petitioner's principal counsel – a federal public defender – participating in the clemency process. That counsel has represented petitioner for more than a decade, a length of service that is irreplaceable in the clemency process. In representing petitioner in his clemency proceedings, petitioner's Section 3599 counsel would be able to draw not only on that relationship, but also on his prior experience with the state clemency process (from cases in which such representation had been pre-authorized by the federal courts) and on the resources of the Office of the Federal Public Defender. Any other counsel who could pursue state clemency would be far less familiar with the merits of petitioner's claim for clemency.

The district court's assumption that petitioner's Section 3599 counsel could simply pursue a clemency application on petitioner's behalf, leaving open the question whether counsel could receive compensation for that representation, blinks reality. Because the Federal Public Defender can only represent individuals and use federal funds when authorized to do so by a federal court, petitioner's Section 3599 counsel cannot pursue clemency on petitioner's behalf unless and until this Court overrules the Sixth Circuit's decision in *Harbison*. Nor could petitioner's Section 3599 counsel pursue state clemency on a "pro bono" basis, as both 18 U.S.C. § 3006A(g)(2)(a) and the

Federal Public Defender Code of Conduct preclude him from engaging in the private practice of law, which "encompasses any appearance on behalf of a client which is not permitted under the terms of the appointment order from the court." *See* Affidavit of Henry A. Martin, Federal Public Defender for the Middle District of Tennessee ¶¶ 4-6, attached hereto as Appendix H.

b. There is both a "reasonable probability that the Court will grant certiorari; and a fair prospect that the applicant will ultimately prevail on the merits." *Planned Parenthood v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers). By holding petitioner's Section 3599 Motion in abeyance pending the Court's decision in *Harbison*, the district court has acknowledged that *Harbison* is dispositive. And the plain text of Section 3599 establishes that petitioner has a substantial likelihood of success on the merits of his motion: Section 3599 provides that appointed counsel "shall" represent the petitioner in "executive or other clemency" proceedings; the phrase "executive or other clemency proceedings" must be understood as authorizing representation in state clemency proceedings, as federal officials lack authority to commute a death sentence. The history of Section 3599 supports this interpretation as well: notwithstanding the circuit split over whether federally funded Section 2254 counsel may represent a state death-sentenced inmate in clemency proceedings, Congress in 2006 enacted Section 3599 using the exact same language that it had previously employed in 21 U.S.C. § 848. Had it intended to exclude clemency proceedings from the scope of representation under Section 3599, it could have done so explicitly.

Moreover, the opportunity to pursue state clemency represented by his principal counsel is critical because petitioner has a substantial case for clemency. The physical evidence implicating petitioner, who had no prior history of violent crime, was limited. Instead, the State relied heavily on the testimony of a co-defendant who has since acknowledged that he was "90% sure" that, in

exchange for his testimony, prosecutors had agreed not to object to his early release; although that co-defendant received a twenty-five-year sentence for his role in the crime, he was released after just five years without objection from the State. However, this agreement was never disclosed to the jury.

Further, the Tennessee Governor properly may account for the poor representation petitioner received at trial. In state post-conviction proceedings, the Tennessee Court of Criminal Appeals unanimously reversed the trial court's denial of relief and remanded the case for resentencing, holding that petitioner's trial counsel had been ineffective insofar as he completely failed to prepare for sentencing and called petitioner's mother to the stand without ever having spoken to her; in front of the jury, she refused to testify on her son's behalf. The Tennessee Supreme Court reversed, but by a bare three-to-two margin.

If petitioner is able to pursue state clemency proceedings, his case likely will include an affidavit from (and possible testimony by) Joe Huddleston, a former prosecutor and Tennessee Commissioner of Revenue who attended petitioner's trial as an observer, and who has opined – among other things – that petitioner's case was not one in which the death penalty was appropriate and that petitioner was highly prejudiced by his mother's unwillingness to testify at sentencing. A clemency case would also likely include testimony from a psychiatrist who has examined petitioner and from petitioner's family members.

c. To the extent that it is relevant, the balance of equities strongly favors petitioner, for whom the harm – as detailed above – is significant. Further, this delay is not at all of petitioner's making: he sought the appointment of counsel *immediately* upon the setting of an execution date, and would have presented his case for clemency long ago had that request been granted.

By contrast, any harm to the State from a delay in carrying out petitioner's execution is minimal: under this Court's normal practice, *Harbison* will be decided by the end of June, at the latest. If this Court holds that Section 3599 does indeed authorize federally funded Section 2254 counsel to represent a state death-sentenced defendant in state clemency proceedings, petitioner's counsel can then properly pursue clemency shortly thereafter. The harm from any such delay seems slight, particularly when compared with the harm to petitioner and the twenty-plus years for which this case has been litigated. *San Diegans for the Mt. Soledad National War Memorial v. Paulson*, 128 S. Ct. 2856, 2858 (2006) (Kennedy, J.). *See Heckler v. Blankenship*, 465 U.S. 1301, 1303 (1984) (Connor, J.) (granting stay in light of grant of certiorari in related case when a "stay for several more months until this Court decides *Day* [the related case] should not cause significant incremental hardship to the interests respondents represent"); *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 1301 (1985) (Rehnquist, J.) (denying application to vacate stay when merits case had been argued before Supreme Court days before and decision would be rendered in matter of months).

And although the public concededly does have an interest in the finality of criminal convictions such as petitioner's, that interest is outweighed by the public's broader interest in the proper enforcement of Section 3599, the plain text of which provides that a federally funded counsel appointed to represent a state capital defendant in Section 2254 proceedings shall represent that defendant in clemency proceedings. The public also has an interest in the fair application of Section 3599 to others who are similarly situated; by contrast, a disparate application of Section 3599 – a disparity which would exist if Harbison prevailed in this Court but Henley were executed without having his Section 3599 counsel represent him in clemency proceedings – would undermine the

public's confidence in the justice system.

d. Unlike other cases in which this Court has declined to stay executions pending its decision in *Harbison*, a stay is appropriate in this case, in which no clemency application has been filed – much less denied – and in which petitioner filed his motion to have his Section 3599 counsel appointed for clemency proceedings on October 21, 2008, just one day after the Tennessee Supreme Court set his execution date. Moreover, petitioner is represented by an attorney from the Office of the Federal Public Defender, who is precluded by both the U.S. Code and the Federal Public Defender Code of Conduct from undertaking any representation – such as state clemency proceedings – outside the scope of his court appointment. The cases in which this Court has denied a stay are thus properly distinguished.

In *Turner v. Quarterman* (No. 08-5165), the petitioner did not file a motion for appointment of Section 3599 counsel until the last day on which a clemency application could be filed. *Turner v. Quarterman*, No. 08-5165, Brief in Opposition (BIO) at 12. On the same day that his Section 3599 motion was filed, a clemency application was also filed on his behalf by volunteer lawyers; clemency was subsequently denied, as was a prior clemency petition filed in anticipation of an earlier execution date. *Id.* 1, 12. Moreover, Turner's federally funded habeas counsel was an attorney in private practice who had been appointed by the federal district court; unlike an attorney from the Office of the Federal Public Defender, nothing precluded him from representing Turner in state clemency proceedings and then seeking compensation for that representation later. *Id.* 11.

Similarly, in *Hood v. Quarterman* (No. 07-11423; App. No. 07A995), petitioner's motion for the appointment of Section 3599 counsel was filed on the last day to file a clemency petition. *Hood v. Quarterman,* No. 07-11423, BIO at 1, 12. Although no clemency petition was filed in connection

with that scheduled date, Hood had "previously prepared and filed – through counsel – a clemency petition in connection with his last execution date in 2005." *Id.* 1. And as in *Turner*, Hood's federally funded Section 2254 counsel was a private practitioner appointed by the district court rather than a Federal Public Defender subject to statutory and professional limitations on his ability to represent Hood in state clemency proceedings.

In *Kelly v. Quarterman* (No. 08-6693), petitioner's motion seeking appointment of state clemency counsel was not filed until *after* the deadline to file a clemency application had passed. *Kelly v. Quarterman*, No. 08-6693, BIO at 10. Although the delay in filing a motion for the appointment of clemency counsel was due in part to the state court's apparent failure to notify either the state or petitioner's counsel that an execution date had been set, Kelly was not required to wait until an execution date was set before seeking clemency, *id.* 16 n.11 – unlike his counterparts in Tennessee, where the Governor will only consider requests for clemency when the inmate has exhausted all judicial avenues for relief and where the governor has only granted clemency *after* available judicial remedies have been exhausted. As in *Turner* and *Hood*, Kelly's federally funded counsel was not a Federal Public Defender and thus not precluded from representing him in state clemency.

Finally, in *Bey v. Bagley* (App. No. 08A440), the motion to appoint the Office of the Federal Public Defender was granted one day after clemency was denied. The petitioner's delay in seeking state clemency counsel was significant: an execution date of November 19, 2008, was set on January 21, 2008, but a motion to appoint the Office of the Federal Public Defender was not filed until October 2, 2008. Attorneys from the state defender office prepared a clemency application and represented Bey at a hearing, but clemency was denied on October 23, 2008. Attorneys from the

Office of the Federal Public Defender subsequently returned to federal court, seeking "time to review [Bey's] case and file supplemental briefs in his clemency proceedings as well as to determine whether to raise additional claims" in federal court. Mem. of Op. & Order, No. 3:01CV7385 (N.D. Ohio Nov. 14, 2008). Thus, as it reached this Court, Bey's case did not present the same question as either this case or *Harbison*.

This Court accordingly should grant petitioner a stay of execution pending the disposition of *Harbison v. Bell*.

III. This Court Should Review the Sixth Circuit's Holding That Petitioner's Section 1983 Suit Was Not Timely Filed.

1. Petitioner's Section 1983 suit challenges the precise method by which he will be executed by the State of Tennessee. He alleges that the execution protocol – including both the details of the drug cocktail that the State will employ and the personnel that will administer the drugs – violates the Eighth Amendment to the U.S. Constitution. The lower courts held that petitioner's suit was untimely because he was required to institute it upon the conclusion of direct review in his case (*i.e.*, in 1990) or when the state specified lethal injection as its default method of execution (*i.e.*, in 2000). App., *infra*, at F:5.

The lower courts' rulings conflict with this Court's jurisprudence identifying the point at which administrative action is sufficiently "ripe" and "imminent" to give rise to a justiciable controversy. In 1990 and 2000, it was not certain that petitioner would in fact be executed, as he had yet to pursue federal habeas corpus review, which is provided for both in the Constitution and by statute precisely to provide a vehicle for relief (*i.e.*, an order vacating his conviction or death sentence) that would moot any objection to Tennessee's execution protocol. Of note, the ineffective assistance of counsel claim that petitioner pursued in state and federal collateral proceedings was

unquestionably substantial, having been accepted by the Tennessee Court of Criminal Appeals and denied by the state's Supreme Court by a wafer-thin three-to-two margin, and later denied by the Sixth Circuit by a divided vote.

Even more important for present purposes, it was not *remotely* clear in 1990 and 2000 what precise protocol Tennessee would use ten to twenty years later in putting petitioner to death, should the execution come to pass. The lawsuit that the lower courts hypothesized that petitioner could have filed was thus completely illusory. Though the State had a general, non-public protocol, there remained every reasonable prospect that it would modify it during the multi-year period in which petitioner's state collateral review application and federal habeas corpus petition were considered by the state courts, the federal district court, the court of appeals, and this Court in a petition for certiorari. The State thus had it in its power to change not only the drug cocktail it would employ (as several states in fact have done) but also the nature and training of the personnel who would conduct the execution. There is accordingly no genuine doubt that a suit filed by petitioner at that very early date would properly have been dismissed as unripe and premature.

For its part, in 1990 and 2000, the State had not taken any step to render more concrete and imminent petitioner's interest in pursuing this lawsuit by definitively specifying an execution protocol that would be used in his case. Nor had the State triggered even the earliest stages of the execution process challenged by this suit by requesting that the Tennessee Supreme Court set an execution date. Under Tennessee law, such a request triggers the defendant's right to "assert any and all legal and/or factual grounds why the execution should be delayed, why no execution date should be set, or why no execution should occur." Tenn. S. Ct. R. 12.4(A). Under state law, however, it was unquestionably *premature* to seek an execution date until federal habeas

proceedings had finally concluded, as they did here in 2008. *Id*.

In these circumstances, the lower courts' holding that in 1990 or 2000, a Section 1983 suit by petitioner would have presented a justiciable controversy cannot be reconciled with this Court's precedents. At that time, petitioner's lawsuit was not ripe because it was "'contingent [upon] 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). The Court has established that such a challenge is not ripe until "the effects of the administrative action challenged have been 'felt in a concrete way by the challenging parties.'" *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57 (1993) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). *E.g.*, *Toilet Goods Assn., Inc.* v. *Gardner*, 387 U.S. 158 (1967). This is not a case in which "the promulgation of a regulation will itself affect parties concretely enough to satisfy [the ripeness] requirement," given that the choice of an execution protocol did not "present[] . . . the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation." *Abbott Labs.*, 387 U.S. at 152-153. The federal courts' hesitancy to adjudicate such an unripe claim is properly reinforced by the fact that petitioner's suit alleges unconstitutional conduct by the State of Tennessee. *Cf. Raines* v. *Byrd,* 521 U.S. 811, 819-820 (1997) (ripeness concerns are amplified when "reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional").

A ready analogy exists in the Takings context, where this Court has repeatedly deemed challenges to administrative actions to be unripe in light of the availability of alternative avenues of relief. Thus, *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 297 (1981), held that a Takings challenge to the Surface Mining Control and Reclamation Act of 1977,

30 U.S.C. § 1201 *et seq.*, was unripe because "there is no indication in the record that appellees had availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting . . . a variance." Subsequently, in *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 349 (1986), the Court reiterated that a Takings challenge to an administrative scheme is not ripe "until a final decision is made as to how the regulations will be applied to [the developer's] property."

Under this Court's precedents, petitioner's challenge to the method of his execution was accordingly not ripe in 1990 or 2000. The court of appeals' contrary rule "requires a death-sentenced prisoner to file a method-of-execution claim years before his execution is to take place, during which time the challenged protocol could be materially changed." *McNair v. Allen*, 515 F.3d 1168, 1178 (11th Cir. 2008) (Wilson, J., dissenting), *cert. denied*, 2008 U.S. LEXIS 4744 (June 9, 2008). And it makes no sense to have prisoners "bring a new § 1983 claim each time the protocol changes in a way that implicates constitutional concerns." *Cooey*, 489 F.3d at 776 (Gilman, J., dissenting from the denial of rehearing en banc for six judges). Under that rule, "conscientious defense attorneys would be obliged to file unripe (and, in many cases, meritless)" claims, a "counterintuitive approach [that] would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any." *Panetti v. Quarterman*, 127 S. Ct. 2842, 2852-53 (2007). The very purpose of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967).

There can be no doubt that the court of appeals' ruling – and decisions of several of its sister circuits (*see infra*) – will produce a significant volume of litigation over execution methods that is

premature, often by *decades*. As proceedings before this case illustrate, lengthy delays between the conclusion of direct review and the date of execution are commonplace. *See, e.g.*, Darwin Brown (direct review concluded in 1999; executed on January 22, 2009); James Callahan (direct review concluded in 1985; executed on January 15, 2009); Gregory Bryant-Bey (direct review concluded in 1999; executed on November 19, 2008); and Richard Cooey (direct review concluded in 1991; executed on October 14, 2008).

Any number of alternative rules make far more sense than that applied by the Sixth Circuit here. A Section 1983 action could accrue upon the State's request for an execution date, an act that signifies the initiation of the execution process. Under that approach, "the state can exercise significant control by promptly requesting . . . a date of execution." *Cooey*, 489 F.3d at 777 (Gilman, J., dissenting for six judges). Alternatively, the claim could accrue upon the conclusion of collateral review or the setting of an execution date, events that genuinely signify the imminence of the execution. The latter date had special significance here, because, as a matter of state law, petitioner simply did not face the imminent harm of execution until the state supreme court rejected his proffered reasons for not setting an execution date. By contrast, the Sixth Circuit in *Cooey* specifically rejected an inquiry into the "imminency" of the application of the challenged lethal injection protocol. 479 F.3d at 419.

The lower courts' rulings that petitioner was required to institute his suit upon the conclusion of direct review rest on the fact that petitioner sufficiently knew at that point that he was going to be executed. But that logic is misguided. Such a suit "does not challenge the lethal injection sentence as a general matter but seeks instead only to enjoin" the application of a particular protocol to the plaintiff. *Hill v. McDonough*, 547 U.S. 573, 580 (2006). Thus, petitioner's "§ 1983 action is not

based on the fact of his death sentence or even on the fact that he is to be executed by lethal injection." *McNair*, 515 F.3d at 1178 (Wilson, J., dissenting). Rather, it is that the application of a particular lethal injection protocol to him "is likely to cause him undue pain and suffering." *Id.*

The lower courts' rulings also rest on a policy judgment that condemned inmates should not be permitted to institute last-minute litigation intended to disrupt the execution process. That concern does not justify departure from the dictates of Article III of the Constitution, but it is in any event misguided in this particular context for two principal reasons. *First*, the ripeness of a defendant's challenge to an execution scheme is largely within the control of *the State*, which alone controls the mechanisms of the execution and thus alone has the power to create a definite interest on the part of the condemned inmate in litigating any challenge to the execution protocol. For example, the State can trigger the first stages of the execution process by moving to set an execution date. But here, Tennessee did neither. Of note, the Tennessee Supreme Court has chosen to provide by Rule that a defendant does not have an immediate interest in resolving disputes over a method of execution by specifying that the State *cannot* even initiate the execution process by seeking to set an execution date until *after* the conclusion of federal habeas review. Tenn. S. Ct. R. 12.4(A).

Second, the lower courts' application of the statute of limitations as a method to limit late-filed suits initiated by capital defendants is misguided. Some litigation in death-penalty cases inevitably and necessarily occurs close to the execution date – for example, claims that the condemned is not competent to be executed. *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2852-53 (2007). The ultimate finality of an execution also requires courts to of course take seriously claims properly presented to them. The lower courts' concern is instead properly that capital defendants not use litigation to manipulate and obstruct the execution process, in which the State has a significant

interest. The appropriate and straightforward mechanism for defeating such litigation misconduct, however, is not to create an artificial and illogical trigger for the statute of limitations. Rather, it is to assess the facts and conclude if appropriate that the defendant's delay in initiating his challenge disentitles him to a stay of execution. The fact that a capital defendant has timely filed a suit in federal court does not *ipso facto* create a right to an injunction against the execution process. A defendant's delay that unreasonably obstructs the court's ability to adjudicate his claim is a significant basis for denying him the equitable relief of a stay of execution. "[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

Of note, there was no such delay or obstruction in this case. The federal habeas corpus process concluded with this Court's denial of certiorari (in No. 07-1194) on June 23, 2008 or its denial of rehearing on August 18, 2008. The State filed its Motion to set an execution date on September 11, 2008. On October 20, the Tennessee Supreme Court issued its Order directing that the execution proceed and specifying February 4, 2009, as the execution date. Petitioner did not wait until the last minute to bring this suit. Rather, he filed his complaint on November 26, 2008, more than two months before the death sentence was set to be administered. Importantly, the merits of his claim were completely briefed and ready for decision roughly two weeks before the scheduled execution date.

Finally, no different result follows from the Sixth Circuit's passing suggestion in its Order in this case that petitioner might have filed suit in the wake of a minor change to Tennessee's lethal injection protocol in 2007. App., *infra*, at G. The published precedent of that court specifically

rejects the argument that this change triggers a new statute of limitations for challenges to the State's method of execution. *Workman v. Bredesen*, 486 F.3d 896, 911 (6th Cir. 2007) (reasoning that the 2007 change in Tennessee's execution protocol benefited inmates). Even if that were not the case, petitioner's claim was equally premature in 2007, while federal collateral proceedings remained ongoing.

2. This Court's intervention is also warranted because the Sixth Circuit's holding that petitioner's Section 1983 action was untimely directly implicates a circuit conflict. The court of appeals' ruling is consistent with the precedent of the Fifth and Eleventh Circuits. *See Walker v. Epps*, 550 F.3d 407, 414 (5th Cir. 2008); *McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008), *cert. denied*, 128 S. Ct. 2914 (2008). *Cf. Nooner v. Norris*, 491 F.3d 804, 809 (8th Cir. 2007) (stay precluded when execution is imminent), *cert. denied*, 128 S. Ct. 1275 (2008). But those rulings conflict with *Beardslee v. Woodford*, 395 F.3d 1064, 1070 (9th Cir. 2005), *cert. denied*, 543 U.S. 1096 (2005), which calls for a fact-specific inquiry to ascertain "whether the claims could have been brought earlier, and whether the plaintiff had good cause for delay." In *Beardslee*, the Ninth Circuit reversed the district court's determination that, because the plaintiff did not file his Section 1983 action until after his execution was scheduled, he was subject to a strong presumption against the award of injunctive or stay relief. *Id.* at 1069. According to the *Beardslee* panel, the plaintiff's request for injunctive relief under Section 1983 should not have been deemed dilatory because "[o]nce an execution was imminent, Beardslee acted promptly" and "pursued his claims aggressively as soon as he viewed them as ripe." *Id.* Of note, petitioner filed his Section 1983 action more than two months before his scheduled execution, whereas the defendant in *Beardslee* initiated his suit only thirty days before his execution date.

There is also a substantial conflict in principle between the Sixth Circuit's precedent and rulings of the Texas Court of Criminal Appeals (TCCA), which has final appellate jurisdiction over criminal matters in that state. The TCCA has repeatedly held that method-of-execution claims are not ripe prior to the setting of an execution date. *Carter v. State*, 2009 WL 81328 (Tex. Crim. App. Jan. 14, 2009) ("Appellant's execution is not imminent; therefore, the method in which the lethal injection is currently administered is not determinative of the way it will be administered at the moment of appellant's execution. These claims are not ripe for review.") (citing *Gallo v. State*, 239 S.W.3d 757, 780 (Tex. Crim. App. 2007)); *Segundo v. State*, 270 S.W.3d 79 (Tex. Crim. App. 2008) ("Because appellant's execution is not imminent, his claim is not ripe for review.") (citing *Gallo*); *Ex Parte O'Brien*, 190 S.W.3d 677 (Tex. Crim. App. 2006).

Section 1983 claims may be filed in the Texas courts. *Thomas v. J.W. Allen*, 837 S.W.2d 631 (1992). There is accordingly a square intra-jurisdictional conflict between the Texas courts and the Fifth Circuit with respect to the question presented. *See Walker v. Epps*, 550 F.3d 407, 414 (5th Cir. 2008). *See Perry v. Del Rio*, 66 S.W.3d 239, 249 (2001) (On questions of ripeness, "we see no difference between our law and federal law.").

3. A stay is further warranted because petitioner has a substantial prospect on prevailing on his claim that the method of execution that Tennessee intends to apply violates the Eighth Amendment. *Baze v. Rees*, 553 U.S. ___, 128 S. Ct. 1520 (2007), provides that, under the Eighth Amendment, an alternative method of lethal injection must be employed where it is "feasible, readily implemented, and in fact substantially reduce[s] a substantial risk of severe pain." *Baze*, 553 U.S. at ___, 128 S. Ct. at 1532. Here, as a federal district court has squarely held, there is an alternative–the one-drug protocol proposed by Tennessee's study committee–but the State refuses to use it. *See*

Harbison v. Little, 511 F. Supp. 2d 872, 879, 896 (M.D. Tenn. 2007). Moreover, in the absence of that alternative method, the undisputed evidence before the district court establishes that petitioner faces a substantial risk of severe pain because: (1) Tennessee execution squad members have not properly mixed thiopental in the past; and (2) they have not properly administered it, as evidenced by: (a) Philip Workman's continued talking *two minutes* into his execution (if properly administered, thiopental would have rendered Mr. Workman unconscious in a matter of seconds); and (b) post-mortem blood samples from Robert Coe showing thiopental levels far below those needed to induce anesthesia. *See Henley v. Little*, No. 08-cv-1148, Dkt. 12, Mem. in Support of Mot. for Summ. J. (M.D. Tenn. Jan. 7, 2009). Given these undisputed facts, Steve Henley has a substantial prospect of prevailing on his claim that the method of execution that Tennessee intends to apply violates the Eighth Amendment.

4. The question of the timeliness of Section 1983 method-of-execution claim recurs frequently and the course of capital litigation would be substantially advanced by its final resolution by this Court. *See, e.g.*, *Williams v. Allen*, 128 S. Ct. 24 (2007) (denying stay with four Justices noting dissent); *Callahan v. Allen*, 128 S. Ct. 1138 (2008) (granting stay), *cert. denied*, 128 S. Ct. 2914 (2008). The Court should accordingly grant a stay of execution, treat petitioner's application as a petition for certiorari, and grant certiorari.

CONCLUSION

The Court should grant a stay of execution. The Court should further deem this stay application a petition for certiorari and grant certiorari limited to the following question: When is a challenge under 42 U.S.C. § 1983 to a method of execution properly dismissed as untimely or a stay of execution denied on the ground that the plaintiff was unduly dilatory in filing suit? Petitioner suggests the following briefing schedule: petitioner's Opening Brief filed on February 20; respondent's Opening Brief filed on March 20; any reply filed on April 6.

Respectfully submitted,

February 3, 2009

By: /s/ Thomas C. Goldstein

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct electronic version of the above and foregoing Application for Stay of Execution was served on opposing counsel on February 3, 2009, via email to:

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February 3, 2009

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2008

STEVE HENLEY,
Petitioner

v.

GEORGE LITTLE, et al.,
Respondent.

STEVE HENLEY,
Petitioner

v.

RICKY BELL, Warden,
Respondent.

APPENDIX TO APPLICATION FOR STAY OF EXECUTION

THIS IS A DEATH PENALTY CASE
MR. HENLEY IS SCHEDULED TO BE EXECUTED ON FEBRUARY 4, 2009 at 1:00 a.m. (C.S.T.)

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEVE HENLEY, Petitioner, v. RICKY BELL, Warden Riverbend Maximum Security Institution, Respondent.	)	No. 3:98-0672 Judge Echols

MOTION TO AUTHORIZE FEDERALLY-APPOINTED COUNSEL
TO REPRESENT PETITIONER IN STATE CLEMENCY PROCEEDINGS

Petitioner Steve Henley respectfully requests that this Court issue an order authorizing counsel, who were appointed by this Court, to pursue state clemency proceedings pursuant to 18 U.S.C. §3599(e). A memorandum in support accompanies this motion.

Respectfully Submitted,

s/Paul S. Davidson
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s/ Paul R. Bottei
Paul R. Bottei
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CERTIFICATE OF SERVICE

I certify that a notice of this filing will be sent by operation of the court's electronic filing system to all parties indicated on the electronic filing receipt. All other interested parties will be served by regular U.S. Mail

Office of the Attorney General
425 Fifth Avenue North
P. O. Box 20207
Nashville, Tennessee 37202-0207

this 21st day of October, 2008.

s/Paul S. Davidson

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEVE HENLEY, Petitioner, v. RICKY BELL, Warden Riverbend Maximum Security Institution, Respondent.	)	No. 3:98-0672 Judge Echols

MEMORANDUM IN SUPPORT OF
MOTION TO AUTHORIZE FEDERALLY-APPOINTED COUNSEL
TO REPRESENT PETITIONER IN STATE CLEMENCY PROCEEDINGS

On August 28, 1998, under 21 U.S.C. §848(q)(4)(B), this Court appointed the Office of the Federal Public Defender to represent Steve Henley. R. 5. On December 8, 1998, this Court further appointed Paul Davidson as co-counsel. R. 15. Then-existing law provided that counsel appointed under §848(q)(8) "shall . . . represent the defendant in such . . . proceedings for executive or other clemency as may be available to the defendant." 21 U.S.C. §848(q)(4)(B). In 2006, §848 was recodified as 18 U.S.C. §3599. Like §848(q)(8), 18 U.S.C. §3599(e) provides that appointed counsel "shall" represent the petitioner in "proceedings for executive or other clemency . . . ."

Given the plain language of §848/§3599(e), the Tenth Circuit has concluded that, under the express terms of the statute, appointed counsel remains counsel for state clemency proceedings. *Hain v. Mullin*, 436 F.3d 1168 (10th Cir. 2006)(en banc). In *Harbison v. Bell*, 503 F.3d 566, 570 (6th Cir. 2007), *cert. granted*, 554 U.S. ___ (2008), however, the Sixth Circuit has concluded otherwise, holding that appointment as counsel under §848/§3599 does not include

representation in state clemency process. In *Harbison v. Bell*, U.S.No. 07-8521, the Supreme Court will decide whether the Sixth Circuit's decision is, in fact, correct.

On October 20, 2008, the Tennessee Supreme Court set an execution date for February 4, 2009. Petitioner, therefore, intends to pursue state clemency process, and the question whether federally-appointed counsel is entitled to do so is now ripe for resolution under Article III.

The Sixth Circuit's decision in *Harbison* notwithstanding, Petitioner maintains that counsels' appointment includes state clemency proceedings, and that as appointed counsel, counsel should be authorized to invoke and pursue state clemency process under §848/§3599(e). Petitioner requests that this Court therefore issue an order authorizing appointed counsel to pursue state clemency proceedings under 18 U.S.C. §3599(e). Alternatively, as noted in his contemporaneously-filed motion for stay of execution, this Court should hold this motion in abeyance, and grant a stay of execution pending the Supreme Court's upcoming decision in *Harbison*, especially where Petitioner establishes a strong likelihood of success on the merits of his §848/3599 motion.

Petitioner also respectfully requests that the Court expeditiously decide his motion and/or the request for stay of execution, so that, if necessary, Petitioner may expeditiously seek relief in the Sixth Circuit and United States Supreme Court.

Respectfully Submitted,

s/ Paul S. Davidson
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CERTIFICATE OF SERVICE

I certify that a notice of this filing will be sent by operation of the court's electronic filing system to all parties indicated on the electronic filing receipt. All other interested parties will be served by regular U.S. Mail

Office of the Attorney General
425 Fifth Avenue North
P. O. Box 20207
Nashville, Tennessee 37202-0207

this 21st day of October, 2008.

s/Paul S. Davidson

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEVE HENLEY,	)	
	)	
Petitioner,	)	
v.	)	**No. 3:98-0672**
	)	**JUDGE ECHOLS**
RICKY BELL, Warden, Riverbend Maximum Security Institution,	)	
	)	
	)	
Respondent.	)	

ORDER

Petitioner Steve Henley, a Tennessee prisoner on death row, through his previously-appointed counsel Paul R. Bottei of the Office of the Federal Public Defender and Paul S. Davidson of Waller, Lansden, Dortch & Davis PLLC, filed a Motion To Authorize Federally-Appointed Counsel To Represent Petitioner In State Clemency Proceedings (Docket Entry No. 133), to which Respondent Ricky Bell filed a response taking no position on the issue (Docket Entry No. 139). Petitioner also filed a Motion For Stay Of Execution (Docket Entry No. 135), to which Respondent Bell filed a response in opposition (Docket Entry No. 138), and Petitioner filed a Reply (Docket Entry No. 140).

Petitioner filed a habeas corpus petition under 28 U.S.C. § 2254 in this Court on July 23, 1998. Lengthy litigation on the petition ended in this Court on January 7, 2005. Petitioner appealed the denial of the habeas petition to the Sixth Circuit, which affirmed on May 15, 2007. (Docket Entry No. 128.) The Supreme Court denied a petition for a writ of certiorari on June 23, 2008. (Docket Entry No. 132.) This Court received notice of the denial of certiorari on July 7, 2008. (Id.)

Thereafter, on October 21, 2008, Petitioner's federally-appointed counsel filed the instant motions for authorization to represent Petitioner in a state clemency proceeding and for a stay of

execution. The Tennessee Supreme Court has set February 4, 2009 as the execution date for the Petitioner.

The motion to authorize federally-appointed counsel is brought under 18 U.S.C. § 3599(e), formerly codified at 21 U.S.C. § 848(q)(8). Under Sixth Circuit law, § 3599(e) does not authorize payment of federal compensation for legal representation in a state clemency proceeding. Harbison v. Bell, 503 F.3d 566, 570 (6th Cir. 2007) (relying on House v. Bell, 332 F.3d 997, 998-999 (6th Cir. 2003) (en banc)). The Harbison decision is in accord with cases from the Fifth, Eighth and Eleventh Circuits, see Clark v. Johnson, 278 F.3d 459 (5th Cir. 2002); Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993); and King v. Moore, 312 F.3d 1365 (11th Cir. 2002), but it conflicts with the Tenth Circuit's opinion in Hain v. Mullin, 436 F.3d 1168 (10th Cir. 2006) (en banc).

On June 23, 2008, the Supreme Court granted certiorari in Harbison to resolve whether counsel appointed pursuant to § 3599(e) to represent a state death-sentenced defendant in a § 2254 habeas proceeding may also represent the defendant in subsequent state clemency proceedings when the defendant is otherwise unrepresented. The Supreme Court has scheduled oral argument in the Harbison case on January 12, 2009.

Pending the Supreme Court's decision in Harbison, Petitioner asks this Court to stay his February 2009 execution date and hold in abeyance his motion seeking authorization for his federally-appointed attorneys to proceed with a state clemency proceeding. Respondent takes no position on the motion for authorization of counsel, but he contends this Court lacks jurisdiction to grant a stay of execution and, even if there is jurisdiction, Petitioner cannot satisfy the requirements for a stay.

The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Title 28 U.S.C. § 2251 provides:

> A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

Here, Petitioner's § 2254 petition is no longer pending. This Court denied the habeas petition and the Sixth Circuit affirmed. The Supreme Court denied a petition for a writ of certiorari. Petitioner is not seeking to proceed further before this Court to obtain a federal habeas remedy. See Preiser v. Rodriguez, 411 U.S. 475 (1973). Rather, he desires the assistance of federally-appointed counsel in preparing a state clemency application, which is "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Herrera v. Collins, 506 U.S. 390, 412 (1993). Executive clemency is extrajudicial and purely discretionary. Id. The Court is unaware of any federal statute that expressly authorizes the Court to enter a stay of execution pending resolution of a § 3599 motion, and Petitioner does not cite such a statute. Because Petitioner has exhausted his federal habeas remedy and has made no showing of an exception to the Anti-Injunction Act, this Court lacks jurisdiction to issue a stay of execution pursuant to 28 U.S.C. § 2251 and § 2283.

Nor should a stay of execution be granted under the All Writs Act, 28 U.S.C. § 1651, which empowers "all courts established by Act of Congress" to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Nothing prevents current counsel, who have represented Petitioner for ten years, from pursuing an executive clemency application on behalf of Petitioner in advance of the scheduled execution date. As in

Clark, 278 F.3d at 460, and Hain, 436 F.3d at 1170-1171, the question whether federal counsel will receive compensation for providing legal services to Petitioner in connection with a clemency application may be decided in the future, even post-execution.

Citing Belchaba v. Bush, 520 F.3d 452, 457 (D.C. Cir. 2008), Petitioner suggests that a federal court considering an issue identical to one pending before the Supreme Court may grant a stay to await the Supreme Court's decision, and Petitioner also analogizes his situation to those prisoners who obtained stays of execution in pending 42 U.S.C. § 1983 actions challenging lethal injection protocols while awaiting the Supreme Court's decision in Baze v. Rees, — U.S. —, 128 S.Ct. 1520 (2008). In Belchaba, however, the federal court had colorable habeas corpus jurisdiction, and the § 1983 cases stayed pending Baze rested on sound subject matter jurisdiction pursuant to 28 U.S.C. § 1343. Here, until directed by the Supreme Court otherwise, the Court must follow the Sixth Circuit's reasoning in House that § 3599(e) does not allow the Court to appoint federal counsel to provide Petitioner with legal representation in a state proceeding. It follows that the Court cannot issue a stay of execution in aid of jurisdiction the Court does not possess. See West v. Bell, 242 F.3d 338, 341 (6th Cir. 2001) (observing federal court has limited jurisdiction and petitioner must properly invoke it).

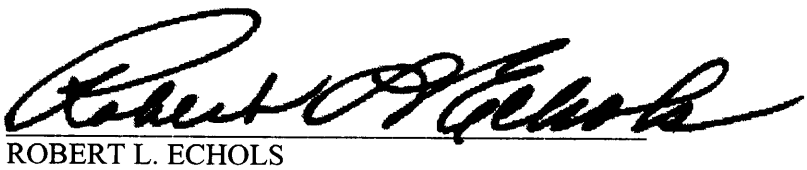
Even assuming the Court has jurisdiction, a stay of execution is an equitable remedy. Cooey v. Strickland, 484 F.3d 424, 425 (6th Cir. 2007). A stay is not available as a matter of right, and the Court must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal court. Id. To obtain a stay of execution, Petitioner must satisfy a four-factor test. He must show: (1) a likelihood of success on the merits; (2) he will suffer irreparable harm absent a stay; (3) the stay will not cause substantial harm to others; and (4) the stay would serve the public interest. Workman v. Bell, 484 F.3d 837, 839 (6th Cir. 2007). Petitioner has

not provided the Court with any information from which the Court can determine that Petitioner will likely succeed on a state clemency application. Moreover, Petitioner has not shown irreparable harm because he is not being denied an opportunity to present a state clemency application. On the other hand, the State's, the public's, and the victims' interests in finality and in the execution of the State's moral judgment are compelling when a federal appeals court issues a mandate denying federal habeas relief in a death penalty case. Calderon v. Thompson, 523 U.S. 538, 556 (1998). For these reasons, the need for a stay of execution has not been shown. Accordingly,

(1) Petitioner's Motion For Stay Of Execution (Docket Entry No. 135) is hereby DENIED; and

(2) Petitioner's Motion to Authorize Federally-Appointed Counsel To Represent Petitioner In State Clemency Proceedings is hereby HELD IN ABEYANCE pending the Supreme Court's decision in Harbison v. Bell, No. 07-8521 (U.S.).

It is so ORDERED.



ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX C

No. 08-6429

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVE HENLEY,
Petitioner - Appellant

v.

RICKY BELL, Warden,
Respondent - Appellee

ORDER

This appeal now comes before the court upon the motions of the petitioner-appellant to (1) expedite submission of the case (2) to allow the filing of an electronic appendix (3) to declare a certificate of appealability to be unnecessary, and (4) to stay his execution, which is scheduled for February 4, 2009.

Upon consideration of the several motions, the responses thereto, and the reply to the response opposing the motion to stay execution:

(1) The motion to expedite consideration of the case is GRANTED;
(2) The motion to allow the filing of an electronic appendix is GRANTED;
(3) The motion to dispense with a certificate of appealability is GRANTED;
(4) The motion to stay execution is DENIED.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX D

No. 08-6429

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVE HENLEY, Petitioner - Appellant	)	
v.	)	O R D E R
RICKY BELL, Warden, Respondent - Appellee	)	

The request of the appellant for oral argument of this matter is hereby DENIED. As previously ordered by the court, the motion of the appellant to stay the execution scheduled for February 4, 2009 is hereby DENIED.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEVE HENLEY,	)	
	)	
Petitioner,	)	
v.	)	**No. 3:98-0672**
	)	**JUDGE ECHOLS**
RICKY BELL, Warden, Riverbend Maximum Security Institution,	)	
	)	
	)	
Respondent.	)	

ORDER

On the afternoon of Friday, January 30, 2009, the Court received a Motion (Docket Entry No. 158) requesting this Court rule on Petitioner's prior "Motion to Authorize Federally-Appointed Counsel to Represent Petitioner in State Clemency Proceedings" (Docket Entry No. 133). This motion was filed by Petitioner Steve Henley on October 21, 2008, under 18 U.S.C. Section 3599(e) requesting that this Court authorize his federally appointed habeas counsel to represent him in a state clemency proceeding. On November 18, 2008, this Court answered Petitioner's request by stating in its Order as follows:

> Under Sixth Circuit law, § 3599(e) does not authorize payment of federal compensation for legal representation in a state clemency proceeding. Harbison v. Bell, 503 F.3d 566, 570 (6th Cir. 2007) (relying on House v. Bell, 332 F.3d 997, 998-999 (6th Cir. 2003) (en banc)). The Harbison decision is in accord with cases from the Fifth, Eighth and Eleventh Circuits, see Clark v. Johnson, 278 F.3d 459 (5th Cir. 2002); Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993); and King v. Moore, 312 F.3d 1365 (11th Cir. 2002), but it conflicts with the Tenth Circuit's opinion in Hain v. Mullin, 436 F.3d 1168 (10th Cir. 2006) (en banc).
>
> On June 23, 2008, the Supreme Court granted certiorari in Harbison to resolve whether counsel appointed pursuant to § 3599(e) to represent a state death-sentenced defendant in a § 2254 habeas proceeding may also represent the defendant in subsequent state clemency proceedings when the defendant is otherwise unrepresented. The Supreme Court has scheduled oral argument in the Harbison case on January 12, 2009.

. . . .

. . . Nothing prevents current counsel, who have represented Petitioner for ten years, from pursuing an executive clemency application on behalf of Petitioner in advance of the scheduled execution date. As in Clark, 278 F.3d at 460, and Hain, 436 F.3d at 1170-1171, the question whether federal counsel will receive compensation for providing legal services to Petitioner in connection with a clemency application may be decided in the future, even post-execution.

(Docket Entry No. 142 at 2, 3-4).

Harbison v. Bell, 503 F.3d 566 (6th Cir. 2007) is instructive to Petitioner regarding the necessity of obtaining a certificate of appealability (COA) in a denial of the motion to appoint a federally-appointed counsel to provide Petitioner with legal representation in such a state court proceeding. Under Harbison, a COA should not be granted under such circumstance, and if an appeal is taken, a COA would not be necessary. Even if a COA was necessary, Petitioner's request for a COA is hereby DENIED.

For the reasons stated above and as indicated in the Court's previous Order of November 18, 2008, the aforesaid Motion for Ruling on Petitioner's Motion to Authorize a Federally-Appointed Counsel to Represent Petition in State Clemency Proceedings (Docket Entry No. 158) is DENIED.

It is so ORDERED.

ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEVE HENLEY	)	
	)	
v.	)	**No. 3:08-1148**
	)	**JUDGE ECHOLS**
GEORGE LITTLE, et al.	)	
	)	

ORDER

In accordance with the Memorandum entered contemporaneously herewith, the Court rules as follows:

(1) the Motion to Dismiss on Behalf of Defendants George Little and Ricky Bell (Docket Entry No. 8) is hereby GRANTED;

(2) all other pending motions are hereby DENIED AS MOOT;

(3) this case is hereby DISMISSED WITH PREJUDICE; and

(4) entry of this Order on the docket shall constitute entry of final judgment in accordance with Federal Rules of Civil Procedure 58 and 79(a).

Plaintiff has sufficient time to appeal the Court's dismissal of his § 1983 Complaint to the Sixth Circuit Court of Appeals prior to his scheduled execution on February 4, 2009.

It is so ORDERED.

ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEVE HENLEY	)	
	)	
v.	)	**No. 3:08-1148**
	)	**JUDGE ECHOLS**
GEORGE LITTLE, et al.	)	
	)	

MEMORANDUM

Plaintiff Steve Henley ("Plaintiff"), an inmate on death row, filed this lawsuit under 42 U.S.C. § 1983 on November 26, 2008, challenging the constitutionality of Tennessee's three-drug lethal injection protocol. Plaintiff asserts that the use of three drugs–sodium thiopental, pancuronium bromide, and potassium chloride–to perform an execution violates the Eighth and Fourteenth Amendments of the federal Constitution. He alleges that, if sodium thiopental is not administered properly, he could experience intense pain after being injected with potassium chloride, but he would be unable to express his pain because of the paralyzing effect of the second drug, pancuronium bromide.

Defendants George Little, Commissioner of the Tennessee Department of Correction, and Ricky Bell, Warden of Riverbend Maximum Security Institution in Nashville ("the State"), filed a Motion to Dismiss on December 23, 2008 (Docket Entry No. 8), to which Plaintiff filed a response in opposition (Docket Entry No. 10). The State argued in the Motion to Dismiss that Plaintiff's complaint is barred by the statute of limitations; Plaintiff was dilatory in filing his complaint seeking equitable relief; Tennessee's three-drug lethal injection protocol is constitutional under the Supreme Court's recent decision in Baze v. Rees, — U.S. —, 128 S.Ct. 1520 (2008); and Plaintiff's case is controlled by Baze, not the prior decision of District Judge Aleta Trauger in Harbison v. Little, 511 F.Supp.2d 872 (M.D. Tenn. 2007). In Harbison, Judge Trauger held in 2007 that Tennessee's lethal injection protocol is unconstitutional under the Eighth and Fourteenth Amendments, and her decision is currently pending

on appeal before the Sixth Circuit Court of Appeals. However, in 2008, after the Harbison decision, the Supreme Court in Baze found that Kentucky's three-drug lethal injection protocol, which is the same as that used in Tennessee, is constitutional and does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. The State also pointed out that, before Baze, the Tennessee Supreme Court upheld the lethal injection protocol in Abdur'Rahman v. Bredesen, 181 S.W.3d 292 (Tenn. 2005), and the Sixth Circuit twice reversed stays of execution where it held Tennessee death row inmates were dilatory in bringing § 1983 claims challenging the lethal injection protocol. Workman v. Bredesen, 486 F.3d 896 (6th Cir. 2007); Alley v. Little, 181 Fed. Appx. 509 (6th Cir. 2006). Therefore, according to the State, Plaintiff cannot succeed on the merits of his claims even if his suit is not barred by the statute of limitations or by his dilatory action in bringing suit.

Plaintiff resisted the Motion to Dismiss arguing first that no statute of limitations applies to a § 1983 suit seeking to enjoin a future prospective harm and therefore, he had not violated any statute of limitations in bringing this lawsuit within one month after the Tennessee Supreme Court, on October 20, 2008, set his execution date for February 4, 2009. Plaintiff also argued that, under settled Article III principles, he did not have a ripe, justiciable lawsuit until October 2008, when the execution date was set and he was exposed to the imminent threat of harm. Next, Plaintiff contended that the State's *laches* argument fails because the State has not shown Plaintiff's lack of diligence in bringing his suit nor prejudice to the State, since the State has already tried the same issues in Harbison. Finally, Plaintiff argued that his complaint could not be dismissed under Federal Rule of Civil Procedure 12(b)(6) because he has stated non-frivolous claims, including those found to be meritorious in Harbison.

On January 7, 2009, Plaintiff filed a Motion for Summary Judgment (Docket Entry No. 11), to which Defendants filed a response in opposition (Docket Entry No. 16), and Plaintiff filed a reply

(Docket Entry No. 19). Plaintiff relies on the trial record of Harbison to contend that this Court should follow Harbison and hold that Tennessee's lethal injection protocol is unconstitutional.

On January 16, 2009, the Court entered an Order directing the parties to show cause why the Court should not hold this case in abeyance pending the Sixth Circuit's decision in Harbison. Plaintiff filed a response requesting that the Court stay the case pending the outcome in Harbison and enter a stay of execution. (Docket Entry No. 18.) The State filed a response reiterating the arguments made in support of the Motion to Dismiss and in opposition to Plaintiff's Motion for Summary Judgment. (Docket Entry No. 17.) The State objects to this Court reaching the merits of Plaintiff's § 1983 claims, and the State objects to this Court granting a stay of execution and holding the case in abeyance pending the Sixth Circuit's decision in Harbison. Before reaching the merits of Plaintiff's § 1983 claims and before determining whether a stay of execution is appropriate, the Court must consider the State's arguments that Plaintiff's complaint is time-barred and that Plaintiff was dilatory in bringing this lawsuit challenging the lethal injection protocol.

II. STANDARD OF REVIEW

In evaluating the Complaint under Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true all of Plaintiff's allegations and resolve all doubts in Plaintiff's favor. See Morgan v. Church's Fried Chicken, 829 F.2d 10, 11-12 (6th Cir. 1987). While a complaint need not contain detailed factual allegations, the Plaintiff must provide the grounds for his entitlement to relief, and this "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. —, 167 L.Ed.2d 929, 940 (2007) (abrogating Conley v. Gibson, 355 U.S. 41 (1957)). The factual allegations supplied must be enough to show a plausible right to relief. Id. at 940-942. A complaint must contain either direct or inferential

allegations respecting all of the material elements to sustain a recovery under some viable legal theory. Id. at 944; Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988).

III. ANALYSIS

A. Statute of limitations

In Tennessee, a one-year statute of limitations applies to civil rights claims brought under § 1983. Tenn. Code Ann. § 28-3-104(a)(3); Wilson v. Garcia, 471 U.S. 261, 275-276 (1985). The State contends that Plaintiff's complaint is barred by this one-year statute of limitations, relying on the reasoning of Cooey v. Strickland, 479 F.3d 412 (6th Cir. 2007), *petition for rehearing en banc denied*, 489 F.3d 775 (6th Cir. 2007), *cert. denied,* Biros v. Strickland, — U.S. —, 128 S.Ct. 2047 (April 21, 2008). The State represents that it did not raise the statute of limitations issue in Harbison, but it has raised the affirmative defense of limitations in this case. The State emphasizes that this difference distinguishes the posture of this case from Harbison.

The Sixth Circuit held in Cooey, in a 2-1 panel decision, that the inmate's § 1983 cause of action to challenge the three-drug lethal injection protocol in Ohio accrued upon conclusion of direct review in the state court or the expiration of time for seeking such review. Cooey, 479 F.3d at 421-422. The court adopted the conclusion of direct review as the proper accrual date because it is at that point that the inmate knows or should know that the act providing the basis of his injury has occurred. Id. at 416 (citing Wallace v. Kato, — U.S. —, 127 S.Ct. 1091, 1095 (2007)). In other words, because the inmate knows, or though the exercise of reasonable diligence and inquiry should know, at the conclusion of direct review that he will be subject to execution, the inmate at that time has a complete and present cause of action. Id. The affirmance of the conviction and death sentence should alert the typical lay person to protect his rights by filing suit to challenge the method of execution and seek relief. Id.

The Sixth Circuit further ruled, however, that the accrual date for the cause of action should be adjusted to take into account the date the State adopted lethal injection as the method of execution and the date the State adopted lethal injection as the exclusive method of execution. This adjustment is necessary because an inmate could not have discovered his injury relating to a lethal injection protocol until one of those two dates. Id. at 422. Applying this rule to Cooey, the court observed that Cooey's direct appeal process concluded in 1991, but lethal injection became available as a means of execution in Ohio in 1993, and lethal injection became the sole method of execution in Ohio in 2001. Without pinpointing the actual accrual date, the court held that, even under the later date of 2001, Cooey's claim exceeded Ohio's two-year statute of limitations because he did not file his § 1983 challenge to the lethal injection protocol until 2004. Id. The Sixth Circuit directed the district court on remand to dismiss the case as time-barred. Cooey, 479 F.3d at 422-424.

Applying this analysis to the instant case, Henley's § 1983 challenge to Tennessee's lethal injection protocol is barred by the one-year statute of limitations. On April 10, 1989, the Tennessee Supreme Court affirmed Plaintiff's convictions on two counts of first-degree murder and one count of aggravated arson, as well as his death sentence. State v. Henley, 774 S.W.2d 908 (Tenn. 1989). The United States Supreme Court denied Plaintiff's petition for writ of certiorari on June 28, 1990. Henley v. Tennessee, 497 U.S. 1031 (1990). Under Cooey, Plaintiff's cause of action for challenging a method of execution accrued in June 1990 because he knew or should have known through reasonable diligence and inquiry that he would be subject to execution. At that time he had a complete and present cause of action, and the affirmance of his convictions and death sentence should have alerted him to protect his rights by filing suit to obtain relief. Id.

As Cooey teaches, the Court must consider, however, that lethal injection became available as a method of execution in Tennessee in May 1998, and on March 30, 2000, lethal injection became

Tennessee's presumptive method of execution. Tenn. Code Ann. § 40-23-114; 2000 Tenn. Pub. Act, Ch 614, § 8. Thus, under Cooey, Plaintiff's constitutional challenge to execution by lethal injection accrued at the latest on March 30, 2000, when there was little question but that he would be executed using the three-drug lethal injection protocol unless he opted to be executed by electrocution. Plaintiff was required to file this action within one year–that is, no later than March 30, 2001. Plaintiff did not file this case until November 26, 2008, over seven years later. Thus, the lawsuit is barred by the statute of limitations under the authority of Cooey.

In the time period between the affirmance of Plaintiff's convictions and sentence and his filing of this § 1983 action, Plaintiff unsuccessfully pursued state post-conviction relief. Henley v. State, 960 S.W.2d 572 (Tenn. 1997), *cert. denied*, Henley v. Tennessee, 525 U.S. 830 (1998). This Court then denied Plaintiff's petition for a writ of habeas corpus under 28 U.S.C. § 2254, and the Sixth Circuit affirmed that decision on May 15, 2007. Henley v. Bell, 487 F.3d 379 (6th Cir. 2007). The Supreme Court denied Plaintiff's petition for writ of certiorari on June 23, 2008. Henley v. Tennessee, 128 S.Ct. 2962 (2008), *rehearing denied*, 129 S.Ct. 19 (2008). On October 20, 2008, the Tennessee Supreme Court set Plaintiff's execution date for February 4, 2009. Plaintiff filed his § 1983 action challenging the constitutionality of the lethal injection method of execution on November 26, 2008.

Plaintiff contends that no statute of limitations applies to a § 1983 suit seeking to enjoin a future prospective harm. Alternatively, Plaintiff asserts that even if there was a statute of limitations which applied in a case challenging the method of execution on a future execution date, the cause of action does not accrue until the threat of death is imminent, which is no earlier than the date the court sets the execution date. Therefore, Plaintiff alleges he did not violate any statute of limitations in bringing this lawsuit within one month after the Tennessee Supreme Court set his execution date on October 20, 2008. Plaintiff also argues that, under settled Article III principles, he did not have a ripe, justiciable lawsuit

until October 20, 2008, when the execution date was set and he was exposed to the imminent threat of harm. He appears to contend that any change in the nature or administration of Tennessee's three-drug lethal injection protocol is subject to challenge and starts a new period of imminency and a new one-year period within which to file another lawsuit.

In Cooey the Sixth Circuit was presented with the issue whether a death row inmate's § 1983 method-of-execution challenge accrues, for statute of limitations purposes, when execution is imminent or at some earlier stage during state and federal proceedings. The Sixth Circuit expressly rejected an argument identical to Plaintiff's that imminency of execution is the critical factor or that "the fluid nature" of Ohio's "execution protocol requires imminency of execution to be a key factor in the accrual calculus[.]" Id. at 423. Citing its prior decision in Alley v. Little, 186 Fed.Appx. 604, 607 (6th Cir. 2006), the court soundly rejected the legal theory that a "§ 1983 claim challenging Tennessee's lethal injection protocol was not ripe until an execution date was imminent." Id. The court reasoned that, while the protocol "is subject to change, there was no evidence, until recently, that the protocol had ever been changed." Id. In any event, the court held, none of the recent changes to the Ohio protocol related to Cooey's core complaint that the use of a three-drug combination had the potential to cause him excruciating pain during the execution and amounted to cruel and unusual punishment under the Eighth and Fourteenth Amendments. Id. at 424.

Cooey makes clear that imminency of Plaintiff's execution is not the pivotal factor in deciding whether Plaintiff's constitutional challenge to the method of execution is timely brought. Thus, the Sixth Circuit directly addressed in Cooey the issues of Article III ripeness and justiciability, contrary to Plaintiff's statement that "***Cooey never mentions, let alone addresses, the significance of Article III's standing and ripeness requirements*** [.]" (Docket Entry No. 10, Plaintiff's Response to Motion to Dismiss at 5 (emphasis in original).)

The Court has considered the Tennessee Department of Correction's recent study of its execution procedures at the direction of Governor Phillip N. Bredesen. The study committee issued a final report in April 2007. Harbison, 511 F.Supp.2d at 874-880. While Tennessee retained the same three-drug protocol for lethal injection executions, revisions were made to the procedures used during executions. On June 15, 2007, death row inmate Harbison challenged the constitutionality of this so-called "new" or revised protocol by filing an amended complaint in district court. (No. 3:06-1206, Harbison v. Little, Docket Entry No. 63.)

The 2007 revision to Tennessee's lethal injection protocol still does not make Plaintiff's lawsuit timely. Even giving Plaintiff the benefit of the doubt that the one-year statute of limitations for his § 1983 action began to run in May or June 2007, when Tennessee issued its latest revision of its lethal injection procedures, Plaintiff's case is still time-barred because he did not file suit until November 26, 2008, more than one year after the protocol was revised.

This Court is bound by controlling Sixth Circuit precedent despite Plaintiff's arguments to the contrary. The Cooey decision and prior Sixth Circuit decisions vacating stays of execution in § 1983 cases challenging the lethal injection protocol, see Workman v. Bredesen, 486 F.3d 896 (6th Cir. 2007); Alley v. Little, 181 Fed. Appx. 509 (6th Cir. 2006), are binding precedents which this Court must follow. See Timmereck v. United States, 577 F.2d 372, 374 n.6 (6th Cir. 1978), *rev'd on other grounds*, 441 U.S. 780 (1979). The analysis in Cooey directs the outcome in this case because it specifically rejects the arguments Plaintiff makes to avoid the statute of limitations bar. The Court is also cognizant that two other circuits have followed the Sixth Circuit's reasoning in Cooey. Walker v. Epps, 550 F.3d 407, 411-412 (5th Cir. 2008); McNair v. Allen, 515 F.3d 1168 (11th Cir. 2008). For these reasons, the Court holds that Plaintiff's § 1983 lawsuit challenging the lethal injection protocol is barred by the statute of limitations.

B. Plaintiff was dilatory in filing suit

The State also contends that Plaintiff's lawsuit should be dismissed because Plaintiff was dilatory in bringing his constitutional challenge to the lethal injection protocol. The Court agrees. A section 1983 case "challenging the constitutionality of certain aspects of a state's execution does not 'entitle the complainant to an order staying [his] execution as a matter of course[,]'" Cooey, 479 F.3d at 421, and the State and the surviving victims of the crime have a strong interest in the timely enforcement of a death sentence. Thus, an inmate intending to assert such a constitutional challenge must file suit in sufficient time to allow consideration of the merits without requiring entry of a stay. Id. The Supreme Court has made clear that federal courts can and should protect States from dilatory or speculative suits. Id. (discussing Hill v. McDonough,547 U.S. 573 (2006) and Nelson v. Campbell, 541 U.S. 637 (2004)).

Plaintiff did not file this suit until November 26, 2008, only seventy (70) days prior to his scheduled execution, and more than one year after June 2007, when the most recent changes to the protocol went into effect. Plaintiff filed suit over eighteen (18) years after his direct appeal was final; over eight and one-half (8 ½) years after lethal injection became Tennessee's presumptive method of execution; over three (3) years after the Tennessee Supreme Court upheld the three-drug lethal injection protocol as constitutional, Abdur'Rahman v. Bredesen, 181 S.W.3d 292 (Tenn. 2005); over two (2) years after the Supreme Court ruled that an inmate may challenge his method of execution by a § 1983 action, Hill v. McDonough, — U.S. —, 126 S.Ct. 2096 (2006); and over one and one-half (1 ½) years after the Sixth Circuit's definitive ruling in Cooey. Cooey clarified (1) that the accrual date for the statute of limitations in an action challenging the method of execution is the date that direct review ends, adjusted by the date lethal injection was adopted or the date lethal injection became the exclusive or presumptive method of execution, and (2) the fatality of delaying an action beyond the applicable statute of

limitations. Plaintiff's suit also was filed more than one (1) year after the filing of Harbison v. Little and Payne v. Little, No. 3:07-0714 (M.D. Tenn.), both of which also challenge the constitutionality of the same three-drug lethal injection protocol. These delays by Plaintiff are inexcusable and cannot be justified under controlling law. See Cooey, 479 F.3d at 420-422; Workman, 486 F.3d at 911-913; Alley, 181 Fed.Appx. at 513. The basis for Plaintiff's challenge has been apparent for a number of years.

It appears that some death penalty prisoners delay intentionally, perhaps on advice from their attorneys, until near the date of execution to file complaints raising "new" claims or challenging the method of execution, although the issues could have been raised much earlier. In such cases, the prisoner plaintiffs have exhausted their direct appeal remedies and have finalized their post-conviction appeal proceedings, but choose to wait until near the execution date to raise other claims. This is a risky strategy that creates unnecessary judicial emergencies fraught with emotional pressure, public drama, and tight deadlines within which to make life-threatening decisions. Creating such a cauldron of boiling emotions, newly raised legal claims, conflicting legal theories, and demands for immediate emergency action by the Court because of the fast approaching execution date is not a strategy that should be encouraged or sanctioned, especially when it could be easily avoided by simply filing the complaint when the claims became known or should have been known for over a year before the complaint was filed.

Plaintiff has had ample time to bring his constitutional challenge to the lethal injection protocol. Because he delayed in filing his lawsuit until seventy (70) days before his execution, the Court concludes under Cooey, Workman, and Alley that Plaintiff was dilatory and that his complaint must be dismissed on this basis as well.

Because the Court rests its decision to dismiss the complaint on the statute of limitations and Plaintiff's dilatory filing, the Court cannot, and need not, reach the merits of Plaintiff's § 1983 claims.

IV. CONCLUSION

For all of the reasons stated, the Court will grant the State's motion to dismiss and Plaintiff's claims will be dismissed with prejudice under Rule 12(b)(6). The Court will also deny as moot all other outstanding motions, including Plaintiff's motion for summary judgment.

An appropriate Order will be entered.

ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX G

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 09-5084

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVE HENLEY, Plaintiff-Appellant, v. GEORGE LITTLE, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

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

PER CURIAM. Petitioner Steve Henley moves this Court for a stay of his execution scheduled for February 4, 2009, pending the Court's disposition of *Harbison v. Little*, No. 07-6225 (6th Cir. filed Oct. 5, 2007), which presents a similar challenge to the constitutionality of Tennessee's three-drug lethal injection protocol. The district court dismissed Henley's case as barred by the applicable statute of limitations. We agree, decline to stay Henley's execution, and dismiss his appeal.

The district court correctly held that *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007) is the law of this Circuit. Under *Cooey*, an inmate's § 1983 cause of action accrues upon the conclusion of direct review in state court or at the expiration of time for seeking such review. *Id.* at 421-22. Henley petitioned for Supreme Court review, which was denied in June 1990. Under *Cooey*,

however, the accrual date must be adjusted if an inmate could not have discovered the "injury"—here, the method of execution—until a later date. *Id.* at 422. Tennessee adopted lethal injection as its presumptive method of execution on March 30, 2000 and the district court viewed March 30, 2001 as the date Henley's right to bring this action expired. Henley clearly missed this deadline.

Alternatively, construing all the relevant dates in the way most favorable to Henley, the very latest his cause of action could have accrued was June 2007, when Tennessee revised its lethal injection protocol. But Henley did not file suit until November 26, 2008. Thus, he missed even this June 2008 expiration date by several months.

The cause of action being stale when brought, the district court correctly dismissed it, and we affirm that dismissal.

APPENDIX H

State of Tennessee)
)
County of Davidson)

AFFIDAVIT OF HENRY A. MARTIN

I, Henry A. Martin, being of lawful age, swear as follows:

1. I am the Federal Public Defender for the Middle District of Tennessee. I have served in that capacity for 23 years.

2. My office is a Federal Public Defender Organization which receives all of its funding from the Criminal Justice Act Appropriation. We are not authorized to receive any funding from any private sources or grants, unlike Federal Community Defender Organizations, which are primarily funded by grants under the Criminal Justice Act, but may receive funds from private sources as well.

3. My office has both a Criminal Defense Unit and a Capital Habeas Unit. All of the lawyers in my office are assigned cases based on an appointment order from the Court.

4. Our capital habeas clients are received into the office by appointment orders from the United States District Court pursuant to 18 U.S.C. §§ 3006A and 3599. The lawyers in my office are not allowed to appear in any case absent an appointment order from the court.

5. Every lawyer in my office is subject to the Federal Public Defender Code of Conduct. The Code of Conduct is prescribed by the Judicial Conference of the United States. The Code of Conduct, which does not apply to Community Defender Organizations, is available online at: http://jnet.ao.dcn/Guide/Volume_2/Chapter_2/Part_B.html.

6. The Criminal Justice Act, 18 U.S.C. § 3006A, and the Federal Defender Code of Conduct prohibit any lawyer in my office from engaging in the private practice of law. The private practice of law encompasses any appearance on behalf of a client which is not permitted under the terms of the appointment order from the court.

7. It has come to my attention that a view was expressed in oral argument in the case of Harbison v. Bell, that federally appointed attorneys, including federal defenders, would provide representation for their clients in state clemency proceedings, even without such representation being authorized under 18 U.S.C. § 3599 pursuant to their ethical duties as lawyers.

8. This view, however, is in conflict with the Code of Conduct which defines the limits of our representation.

Further affiant saith not.

Henry A. Martin
Federal Public Defender
Middle District of Tennessee

Subscribed to and sworn before me this 2nd day of February, 2009, in Nashville, Tennessee.

Notary Public

CHRIS F. ARMSTRONG
STATE OF TENNESSEE
NOTARY PUBLIC
DAVIDSON COUNTY, TN

My commission expires: January 7, 2013

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct electronic version of the above and foregoing Appendix to Application for Stay of Execution was served on opposing counsel on February 3, 2009, via email to:

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February 3, 2009