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

PERVIS PAYNE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 3:07-cv-00714**
	)	**JUDGE HAYNES**
GOVERNOR PHIL BREDESEN, et al., in their official capacity,	)	
	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION
TO PLAINTIFF'S MOTION FOR STAY OF EXECUTION

Defendants Phil Bredesen, George Little, Ricky Bell, Gayle Ray, Roland Colson, Julian Davis, and Deborah K. Inglis, appearing in their official capacities only, hereby respond in opposition to the plaintiff's motion for a stay of execution.

PRELIMINARY STATEMENT

The plaintiff in this action is a condemned inmate residing at Riverbend Maximum Security Institution ("Riverbend") in Nashville, Davidson County, Tennessee. In 1988, the plaintiff, Pervis Payne, was tried and convicted of two counts of first-degree murder and one count of assault with intent to commit first-degree murder. The plaintiff was sentenced to death on each conviction for first-degree murder, and received a 30-year sentence on the conviction for assault with intent to commit first-degree murder. The Tennessee Supreme Court affirmed the plaintiff's convictions and sentences in 1990. *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990). The United States Supreme Court granted certiorari review as to one sentencing issue,

but the court ultimately affirmed the judgment of the Tennessee Supreme Court. *Payne v. Tennessee*, 501 U.S. 808 (1991).

On August 21, 2006, the plaintiff filed a complaint against George Little, Ricky Bell, and John Doe State employees, all in their official capacities, challenging Tennessee's lethal-injection protocol in *Payne vs. Little, et al.*, M.D. Tenn. No. 3:06-CV-825. (Document 1, Complaint). On February 1, 2007, Governor Bredesen issued Executive Order Number 43. By the terms of that Executive Order, the Governor directed the TDOC Commissioner to initiate a comprehensive review of the manner in which the death penalty is administered in Tennessee. Additionally, the Executive Order granted a temporary reprieve to four condemned inmates, including the plaintiff herein. In light of Executive Order No. 43, the defendants in *Payne vs. Little, et al.*, M.D. Tenn. No. 3:06-CV-825, moved to dismiss the complaint as moot. The court granted the motion on April 26, 2007, and dismissed the complaint without prejudice. (Document 16, Order).

The Sixth Circuit summarized Executive Order No. 43 and the State of Tennessee's revised execution protocol in *Workman v. Bredesen*, 486 F.3d 896, 900 (6th Cir. 2007):

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

On May 22, 2007, the Tennessee Supreme Court re-set the date for execution of plaintiff's sentence for December 12, 2007.[1] The plaintiff filed the current complaint challenging Tennessee's lethal-injection protocol against defendants Bredesen, Little, Bell, Ray, Colson, Davis, and Inglis on July 9, 2007. (Document 1, Complaint). The case is presently held in abeyance. (Document 24, Order).

The plaintiff now files his motion for stay of execution, contending that under 28 U.S.C. § 1651, this Court should grant him a stay of execution pending the Supreme Court's grant of certiorari in *Baze v. Rees*, 128 S.Ct. 34, amended, 128 S.Ct. 372 (2007), and pending final disposition of this matter. The plaintiff argues that Judge Trauger has already declared Tennessee's three-drug lethal-injection protocol unconstitutional in *Harbison v. Little*, M.D. Tenn. No. 3:06-CV-1206. The plaintiff further argues that the Sixth Circuit has stayed the *Harbison* appeal pending the Supreme Court's decision in *Baze*. *See Harbison v. Little*, No. 07-6225 (6th Cir. Oct. 31, 2007) (Order staying proceedings pending *Baze*). The plaintiff argues that since granting certiorari in *Baze*, the Supreme Court has granted a stay of execution in every § 1983 lethal-injection challenge when a stay has been requested. Finally, the plaintiff argues that the Eleventh and Eighth Circuits have granted stays of execution pending challenges to the three-drug lethal-injection protocol. (Document 25, Motion for Stay of Execution).

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[1] Plaintiff filed a motion with the Tennessee Supreme Court on September 27, 2007, to vacate the execution date. By order dated October 22, 2007, the Tennessee Supreme Court denied the motion, declining to await further action by the United States Supreme Court and noting that the Tennessee Supreme Court had upheld the prior three-drug lethal-injection protocol under both the federal and state constitutions. *See State v. Payne*, No. M1988-00096-SC-DPE-DD, Order (Tenn. Oct. 22, 2007)(copy attached).

ARGUMENTS

I. THE PLAINTIFF HAS NOT SATISFIED THE REQUIREMENTS FOR THE ISSUANCE OF A STAY OF HIS EXECUTION.

The Sixth Circuit discussed the factors to be considered in deciding whether to grant a stay of execution in *Workman v. Bell*, 484 F.3d 837, 839 (6th Cir. 2007).

> We consider the following factors in deciding whether to grant Workman a stay of execution: 1) whether there is a likelihood he will succeed on the merits of the appeal; 2) whether there is a likelihood he will suffer irreparable harm absent a stay; 3) whether the stay will cause substantial harm to others; and 4) whether the injunction would serve the public interest. *See Capobianco v. Summers*, 377 F.3d 559, 561 (6th Cir. 2004); *see also In re Sapp*, 118 F.3d 450, 464 (6th Cir. 1997), *abrogated on other grounds by Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007). As the Supreme Court recently has indicated, a claimant must show a 'significant possibility of success on the merits' in order to obtain a stay. *Hill v. McDonough*, ___ U.S. ___, 126 S.Ct. 2096, 2104, 165 L.Ed.2d 44 (2006).

The defendants now respectfully submit that this Court must consider the plaintiff's likelihood of success on the merits of his complaint. In doing so, this Court must consider the timeliness of his complaint — including a recent decision of the Sixth Circuit holding that a similar § 1983 "method-of-injection" challenge failed on limitations grounds. *See Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007).

Second, this Court must consider the recent instruction from the Supreme Court that "inmates seeking time to challenge the manner in which the State plans to execute them *must* satisfy *all* of the requirements for a stay", including the Supreme Court's concomitant directive that "[a] court considering a stay *must* apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Hill v. McDonough*, 126 S.Ct. 2096, 2104 (2006) (emphasis added). *See Futernick v. Sumpter Twp.*, 207 F.3d 305, 313 (6th Cir. 2000) (abuse of

discretion occurs when district court improperly applies the law).

Lastly, in purporting to "balance the relative harms," this Court must consider the pertinent interests of the State and give appropriate regard to the harm that would be caused by granting injunctive relief. At this juncture, the interests of the State are paramount. *See Calderon v. Thompson*, 523 U.S. 538, 557 (1998). As the Sixth Circuit recently observed, both the State and the public have an interest in finality in this case, "which, if not deserving of respect yet, may never receive respect." *Workman v. Bell*, 484 F.3d 837, 842 (6th Cir. 2007).

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

In *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), the Sixth Circuit held that § 1983 "method-of-injection" challenges are subject to the applicable statute of limitations, and that the accrual date for such a cause of action was no later than the date on which state law required that the prisoner be executed by lethal injection. *Id.*, 479 F.3d at 422 ("the test is whether he knew or should have known based upon reasonable inquiry, and could have filed suit and obtained relief"). Under Tennessee law, civil actions for compensatory or punitive damages, or both, under the federal civil rights statutes must be brought within one year after the cause of action accrues. The Sixth Circuit has held that this one-year statute of limitation applies to suits for injunctive relief under § 1983. *See Cox v. Shelby State Community College*, 48 Fed.Appx. 500, 507 (6th Cir. 2002) (copy attached).

The plaintiff's "method-of-injection" challenge thus accrued as early as May 1998 — when lethal injection became available as a method of execution in Tennessee — and no later than March 30, 2000 — when it became Tennessee's primary method of execution. *See* Tenn. Code Ann. § 40-23-114; 2000 Tenn. Pub. Acts, ch. 614, § 8. The plaintiff filed his first complaint challenging Tennessee's three-drug lethal-injection protocol on August 21, 2006 —

no less than six years after his cause of action accrued. As in *Cooey*, therefore, the plaintiff's claim quite clearly fails on limitation grounds.

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

"[B]efore granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harm to the parties, but also *the extent to which the inmate has delayed unnecessarily in bringing the claim*." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (emphasis added). The plaintiff's unnecessary delay in seeking to challenge the State's three-drug lethal-injection protocol, even after the statute of limitations had run, deprives him of the right to ask a federal court to exercise its equitable authority to provide him time to do so now. "[F]ederal courts can and should protect States" from lawsuits seeking equitable relief that are filed too late in the day. *Hill*, 126 S.Ct. at 2104. And the Sixth Circuit has recognized that delays in bringing challenges to execution protocols are inexcusable. In *In re Sapp*, 118 F.3d 460 (6th Cir. 1997), *abrogated on other grounds by Cooey* , 479 F.3d 412 (6th Cir. 2007), where a capital prisoner sought to challenge electrocution as his method of execution, the Sixth Circuit observed:

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

Id., 118 F.3d at 464. *See Hicks v. Taft*, 431 F.3d 916 (6th Cir. 2005). *See also Alley v. Little*, 186 Fed.Appx. 604, 607 (6th Cir. June 24, 2006), *cert. denied*, 126 S.Ct. 2975 (2006) (where prisoner's challenge to lethal injection "was very late in coming," its untimeliness was both a correct and adequate basis on which to deny equitable relief) (copy attached). The plaintiff's

claims likewise have "needlessly and inexcusably been withheld." *Sapp*, 188 F.3d at 464.

More recently, in *Workman v. Bredesen*, the Sixth Circuit addressed the issue of dilatory challenges to the State's "new" lethal-injection protocol. The Court held that Workman had been dilatory in filing his complaint for injunctive relief even though he had filed it four days after receiving the revised Tennessee lethal-injection protocol. "Having refused to challenge the old procedure on a timely basis, he gets no purchase in claiming a right to challenge a *better* procedure on the eve of his execution." *Id.* at 911 (emphasis in original). The Court noted that Workman's conviction became final on direct review in 1984 and that the state court denied his petition for post conviction relief in 1993. The Tennessee legislature enacted the lethal-injection protocol as a method of execution in 1998, and in 2000 deemed it the presumptive method for all executions. The Tennessee Supreme Court upheld the lethal-injection protocol in *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005), *cert. denied*, 126 S.Ct. 2288 (2006); *Workman v. Bredesen*, 486 F.3d at 912. "By 2000, Workman had completed his state and federal direct and (initial) collateral attacks on his sentence, and he faced the prospect of imminent execution by lethal injection." *Id*. "By any measurable standard, Workman has had ample time to challenge the procedure." *Id.*

Here, the plaintiff filed his original complaint challenging the lethal-injection protocol on August 21, 2006, and filed the instant complaint on July 9, 2007. (Docket 1, Complaint). The plaintiff had abundant opportunities to challenge the lethal-injection protocol well before August 21, 2006. The plaintiff's convictions and sentences were affirmed on direct appeal by both the Tennessee Supreme Court and United States Supreme Court on June 27, 1991. *Id*. Therefore, state law has mandated the plaintiff's execution since 1991. The plaintiff's "method-of-injection" challenge accrued as early as May 1998, — when lethal injection became available as a method of execution in Tennessee, — and on March 30, 2000, when it became

Tennessee's primary method of execution. See Tenn. Code Ann. § 40-23-114; 2000 Tenn. Pub. Act, Ch 614, § 8.

Because any challenge the plaintiff might file to the lethal-injection protocol was time-barred years ago, it is irrelevant that his original complaint was dismissed for mootness on April 26, 2007, due to the three-month absence of a protocol. (Docket 16, Order). During that three-month period there was no lethal-injection protocol in effect; thus, there was nothing to litigate and dismissal for mootness was appropriate. But, after the Commissioner's review was concluded, the protocols and procedures emerged "unchanged in the main, though it formalized some components of the procedure and improved others." *Workman v. Bredesen*, 486 F.3d at 901. The plaintiff's main complaints regarding the "old" protocol as well as the "new" protocol relate to the use of the same three drugs and the alleged absence of qualified medical professionals from the process. Because the essential elements of Tennessee's three-drug lethal-injection protocol remain the same, the plaintiff cannot rely on the recent changes made to it to revive his untimely and dilatory complaint.

Moreover, the defendants have been prejudiced by the delay. The ultimate prejudice resulting from the plaintiff's dilatoriness is the harm to the State's interest in finality and its corresponding interest in enforcing its criminal judgments. Indeed, "both the state *and the public* have an interest in finality." *Workman v. Bell*, 484 F.3d 837, 842 (6th Cir. 2007) (emphasis added). Furthermore, "the *victims of crime* have an important interest in the timely enforcement of a sentence," *Hill v. McDonough*, 126 S.Ct. 2096, 2104 (2006) (emphasis added). The surviving victims of this crime are fully entitled to expect that the plaintiff's sentence will finally be carried out. "To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims of crime alike. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). "The State and the

surviving victims have waited long enough for some closure." *Jones v. Allen*, 485 F.3d 635, 641 (11th Cir. 2007).

The plaintiff was dilatory in filing his complaint without any justification other than delaying his own execution. That lack of diligence is not a basis for a stay of execution.

C. The Court is Bound by the Decision in *Workman v. Bredesen*; *Harbison v. Little* has no precedential effect.

The Sixth Circuit has already considered and disposed of the plaintiff's allegations against the Tennessee lethal-injection protocol. In *Workman v. Bredesen*, 486 F.3d 896 (6th Cir. 2007), the Sixth Circuit addressed all of the challenges to Tennessee's lethal-injection protocol that were raised by Workman and that are now raised by the plaintiff herein and allowed the execution of Workman's sentence to proceed, due in part to the "absence of any meaningful chance of success on the merits. . . ." *Id*. at 911. In doing so, the Sixth Circuit thoroughly considered Tennessee's lethal-injection protocol and found it to meet constitutional muster.

"The district courts in this circuit are, of course, bound by pertinent decisions of [the Sixth Circuit Court of Appeals] even if they find what they consider more persuasive authority in other circuits." *Timmreck v. United States*, 577 F.2d 372, 374, n. 6 (6th Cir. 1978), *rev'd on other grounds* 441 U.S. 780 (1979). The district courts in this circuit recognize the binding effect of the decisions of the Sixth Circuit. *See, e.g., Power Marketing Direct, Inc. v. Clark*, No. 2:05-CV-767, 2006 WL 1064058 (S.D. Ohio April 20, 2006)(copy attached)(Court is bound by controlling Sixth Circuit precedent despite plaintiff's references to case law of other circuits); *Hadley v. United States*, No. Civ.A. 105CVP20R, CRIM.A. 101CR52R, 2005 WL 3006989 (W.D. Ky. Nov. 8, 2005)(copy attached)(Court was bound by Sixth Circuit precedent until there is an en banc Sixth Circuit decision to the contrary and/or a Supreme Court ruling to

the contrary); *Grupo Condumex, S.A. DE C.V. v. SPX Corp.*, 331 F.Supp.2d 623, 629 (N.D. Ohio 2004)(Court bound to apply governing Sixth Circuit precedent despite misgivings about its propriety).

By contrast, the decision of a district court has no precedential effect. *See* 18 *Moore's Federal Practice* § 134.02[1][d] (Matthew Bender 3d ed.) (decision of a federal district court judge is not binding precedent in same judicial district). *See, e.g.*, *Howard v. Wal-Mart Stores, Inc.* 160 F.3d 358, 59 (7th Cir. 1998) ("a district court's decision does not have precedential authority"); *United States v. Article of Drugs Consisting of 203 Paper Bags,* 818 F.2d 569, 572 (7th Cir.1987) (single district court decision has little precedential effect and is not binding on other district judges in the same district); *Hart v. Massanari,* 266 F.3d 1155, 1174 (9th Cir.2001) (noting that "the binding authority principle applies only to appellate decisions, and not to trial court decisions"); *EEOC v. Pan American World Airways,* 576 F.Supp. 1530, 1535 (S.D.N.Y. 1984) (district court decision was not binding even on other district courts in the same district). Thus, the decision in *Harbison v. Little* does not bind this Court to a similar conclusion. Instead, the Sixth Circuit's opinion in *Workman v. Bredesen* controls and requires the court to deny the plaintiff's motion for stay of execution.

II. THE UNITED STATES SUPREME COURT'S GRANT OF CERTIORARI IN *BAZE v REES* PROVIDES NO BASIS FOR A STAY OF THE PLAINTIFF'S EXECUTION.

The plaintiff contends that he should be granted a stay of execution based on the United States Supreme Court's grant of certiorari in *Baze v. Rees*, 128 S. Ct. 34, amended, 128 S. Ct. 372 (2007), and the subsequent granting of stays of execution in *Barry v. Epps*, 552 U.S. ___ (Oct. 30, 2007); *Emmit v. Johnson* 552 U.S. ___ (Oct. 17, 2007); and *Turner v. Texas*, 551 U.S. ___ (Sept. 27, 2007). However, the grant of certiorari on an issue does not suggest a view on the merits and cannot provide the basis for a petitioner arguing the likelihood of success on

the merits of his claims.

Typically, a court will not grant stays of execution simply because the Supreme Court has granted certiorari on an issue pertaining to the death penalty which is raised by subsequent petitioners. *See, e.g., Streetman v. Lynaugh*, 835 F.2d 1519, 1520 (5th Cir.1988); *Wicker v. McCotter*, 798 F.2d 155, 157-58, (5th Cir.1986); *Berry v. Phelps*, 795 F.2d 504, 507 (5th Cir.1986) *cert. denied*, 481 U.S. 1042 (1987); *Rutherford v. Crosby*, 438 F.3d 1087, 1093 (11th Cir.) ("At least four times over the years we have been asked to issue a stay of execution based on a grant of certiorari in another case raising an issue identical to one that the movant was raising in the case before us, an issue foreclosed by existing circuit precedent that might be overruled by the Supreme Court. All four times we have declined to do so because the grant of certiorari does not change circuit precedent, and it makes more sense to let the Court that is going to be deciding the issue determine whether there should be a stay in another case raising it."), *stay granted*, 546 U.S. 1159, 126 S. Ct. 1191, *opinion vacated sub nom., Rutherford v. McDonough*, 126 S. Ct. 2915, *reinstated in part*, 466 F.3d 970 (11th Cir.), *cert. denied*, 127 S. Ct. 465 (2006); *Robinson v. Crosby*, 358 F.3d 1281, 1284 (11th Cir. 2004) (declining to grant a stay pending the Supreme Court's decision in another case because "the grant of certiorari alone is not enough to change the law of this circuit or to justify this Court in granting a stay of execution on the possibility that the Supreme Court may overturn circuit law"), abrogated on other grounds by *Hill v. McDonough*, 126 S. Ct. 2096 (2006). *See also Ritter v. Thigpen*, 828 F.2d 662, 665–66 (11th Cir. 1985) ("A grant of certiorari does not constitute new law."); *Bowden v. Kemp*, 774 F.2d 1494, 1495 (11th Cir. 1985) (holding that a grant of certiorari is not authority to the contrary of binding circuit precedent).

The Court that is going to ultimately decide an issue should determine whether there should be a stay in another case raising it. The Supreme Court did so in *Barry v. Epps*,

Emmit v. Johnson, and *Turner v. Texas, supra*. It is fully capable of granting a stay in this case if it chooses to do so. It is not the role of this Court to preempt Supreme Court action on motions requesting stays pending decisions that Court will make in the future.

Moreover, under the facts of this case, the "constitutional standard" at issue in *Baze* does not affect the result. The first question at issue in *Baze* is whether the Eighth Amendment prohibits a means of carrying out an execution that creates an "unnecessary" risk of pain and suffering as opposed to "only a substantial risk of the wanton infliction of pain." As the Sixth Circuit found in *Workman v. Bredesen*:

> Under its lethal injection protocol, Tennessee administers 5 grams of sodium thiopental to anesthesize the inmate . . . That lethal dosage represents the highest level that other states use, and it renders the inmate unconscious "nearly immediate[ly]." [citation omitted]. This 5-gram dose thus reduces, if not completely eliminates, any risk that [an inmate] would "incur constitutionally excessive pain and suffering when he is executed."

486 F.3d at 910. In other words, because the inmate will be unconscious before the other lethal injections drugs are given, there is virtually no possibility of pain and suffering because, whatever the effects of the remaining drugs, the inmate will be unaware of them. Against these facts, it is clear that however the United States Supreme Court may ultimately decide *Baze*, that decision will not benefit the plaintiff— whatever standard that Court may decide to apply is satisfied by the Tennessee lethal-injection protocol.

The second and third questions presented in *Baze* are interrelated, because both concern the availability of alternative drugs which are claimed to "pose less risk of pain and suffering." But, as explained above, once an inmate is rendered unconscious by the injection of sodium thiopental, he will not perceive the injection of the other drugs and will suffer no pain. 486 F.3d at 910. Since the inmate will not feel anything when the pancuronium bromide and potassium chloride are injected, the existence of "alternative" drugs has no constitutional

significance.

CONCLUSION

The defendants pray that the plaintiff's motion for stay of execution be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2007, a copy of the foregoing response was filed electronically. Notice of this filing will be sent to the parties listed below by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt or by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

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