Exhibit 8

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

SEDLEY ALLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3:06-0340
	)	JUDGE TRAUGER
GEORGE LITTLE, et al.,	)	
	)	
Defendants.	)	

RESPONSE OF DEFENDANTS LITTLE AND BELL TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Thirty-six days before the scheduled execution of his sentence, plaintiff filed this complaint under 42 U.S.C. § 1983 challenging Tennessee's lethal injection protocol. Now, thirteen days before the scheduled execution date, plaintiff moves for "a preliminary injunction prohibiting Defendants from executing Plaintiff using the protocol described in the complaint." He bases his motion on the Supreme Court's grant of certiorari in *Hill v. McDonough*, No. 05-8794 (U.S.), *cert. granted*, 126 S.Ct. 1189 (Jan. 25, 2006). Plaintiff's motion should be denied for two primary reasons.

First, plaintiff misplaces his reliance on *Hill* to support his request that this Court enjoin the State from executing his sentence "using the protocol described in the complaint." The question presented in *Hill* is a purely procedural one; any decision rendered in *Hill* will not address the validity of any lethal injection protocol, much less Tennessee's. There is thus no need to await a decision in *Hill*; accordingly, preliminary injunctive relief or, for that matter, an outright stay of execution is not warranted.

The cases cited by plaintiff in which the Supreme Court granted stays of execution are inapposite. In both *Hill v. Crosby*, 546 U.S. __, 126 S.Ct. 1189, 163 L.Ed.2d 1144 (2006), and *Rutherford v. Crosby*, 546 U.S. __, 126 S.Ct. 1191, 163 L.Ed.2d 1144 (2006), although the inmates there had likewise filed § 1983 actions challenging Florida's lethal injection protocol, their complaints had been dismissed by the district court as successive habeas petitions, and the Eleventh Circuit had affirmed those dismissals. *See Hill v. Crosby*, 437 F.3d 1084 (11th Cir. 2006); *Rutherford v. Crosby*, 438 F.3d 1087 (2006). Consequently, the grant of certiorari in *Hill* was directly relevant to the basis upon which the cases had been adjudicated by the lower court. *Cf. Donahue v. Bieghler*, 126 S.Ct. 1190, 163 L.Ed.2d 1144 (2006) (vacating stay of execution issued on basis of *Hill* by Seventh Circuit, where § 1983 complaint challenging lethal injection protocol had not been treated as successive habeas petition).[1] And the order entered in *James Roane, Jr. v. Alberto Gonzalez*, No. 05-2337 (D.D.C. Feb. 27, 2006) (order enjoining execution), reflects that the defendants there did not oppose the entry of an order temporarily enjoining plaintiff Roane's execution and that the court issued its order on the basis of that assent.

The remaining cases cited by plaintiff serve only to undermine, rather than support, his position. The stay issued in *Taylor v. Crawford*, No. 06-1397 (8th Cir. Feb. 1, 2006), had nothing to do with the grant of certiorari in *Hill*. *See Morales v. Hickman*, 415 F.Supp.2d 1037, 1042 n.7 (N.D. Calif. 2006) (citing *Taylor* as an example of an instance in

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[1] *See Bieghler v. Donahue*, No. 1:06cv00136 (S.D. Ind. Jan. 26, 2006) (entry order of dismissal) (citing *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004), and *White v. Johnson*, 429 F.3d 572 (5th Cir. 2005)) (district court denied request for injunctive relief and dismissed complaint because prisoner "delayed unnecessarily in seeking relief," where prisoner filed § 1983 complaint three months after certiorari denied in his habeas case, *Bieghler v. McBride*, 126 S.Ct. 430, 163 L.Ed.2d 327 (2005), and one day prior to scheduled execution) (copy attached).

which stay was granted because inmate did not unduly delay in filing his § 1983 challenge to the state's execution method)

And plaintiff's reminder of the several cases, including his own, in which stays were issued on the basis of the then-unsettled question regarding a habeas petitioner's ability to file a Rule 60(b) motion serves only to emphasize the dilatory tactics in which plaintiff continues to engage. In 2004, twenty-two days before his then-scheduled execution, plaintiff filed a Rule 60(b) motion in the Western District and then requested a stay on the basis of the pendency in the Sixth Circuit of *Abdur'Rahman v. Bell*, Nos. 02-6547/6548 (6th Cir.) (en banc), which was expected to decide the question. *Sedley Alley v. Ricky Bell*, No. 97-3159 (W.D. Tenn.). In 2006, thirty-six days before his rescheduled execution, plaintiff filed a §1983 action in this Court and now requests injunctive relief on the basis of the pendency in the Supreme Court of *Hill v. McDonough*. In doing so, plaintiff now reveals his own view that Sixth Circuit precedent "appears to indicate that this Court lacks jurisdiction." It certainly appears, then, that plaintiff filed his complaint in the hope that it would be construed and dismissed as a habeas petition and that his execution would yet again be stayed, this time on the basis of *Hill*. But as the Supreme Court has instructed, equity courts should be mindful of litigants' "obvious attempt[s] at manipulation." *Gomez v. United States District Court for the Northern District of California*, 503 U.S. 653, 654, 112 S.Ct. 1652, 1653, 118 L.Ed.2d 293 (1992).

Second and moreover, plaintiff has not satisfied the requirements for issuance of an injunction. When considering a motion for preliminary injunctive relief, courts must balance: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Tumblebus Inc. v. Cramer*, 399 F.3d 754, 760 (6th Cir.), *cert. denied*,

126 S Ct 361, 163 L Ed 2d 68 (2005) (citing *PACCAR Inc v TeleScan Techs, L L C*, 319 F 3d 243, 249 (6th Cir 2003))

Here, plaintiff has no likelihood of success, much less a strong one For the reasons set forth in the memorandum in support of defendants' motion to dismiss, and in their reply to plaintiff's response thereto, plaintiff's § 1983 complaint should be dismissed for the inexcusable delay in its filing, if for no other reason.[2] *See Hicks v Taft*, 431 F 3d 916, 917 (6th Cir 2005) (citing *Nelson v Campbell*, 541 U S 637, 124 S Ct 2117, 158 L Ed 2d 924 (2004)) (denying request for stay of execution "primarily because the motion was untimely," where inmate intervened in § 1983 action challenging lethal injection protocol six months after denial of certiorari in his habeas case and six days before scheduled execution)

Even on the underlying merits of his complaint, plaintiff utterly fails to support his conclusory statement that "he will likely prevail." He makes a solitary reference to his proffered evidence that Robert Glenn Coe was conscious and suffering when his sentence was executed in 2000 But this evidence is directly contradicted, not by mere rebuttal evidence, but by the factual findings made by the state court after another inmate similarly challenged Tennessee's lethal injection protocol *See* R 16, Memorandum in Support of Defendants' Motion to Dismiss, p 13 & Ex 2, *Abdur'Rahman v Sundquist*, p 15; *see also Abdur'Rahman v Bredesen*, 181 S W 3d 292, 304 (Tenn 2005) (recounting testimony of Dr Bruce Levy, the pathologist who conducted the Coe autopsy, that "Coe would have been unconscious within seconds of being injected with sodium Pentothal . . . and would not have regained consciousness and would not have experienced any pain or discomfort as a result of any of the three drugs")

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[2] Even if plaintiff's complaint were actually a habeas petition, then it would certainly fail to satisfy the requirements for filing it as a second or successive such petition *See* 28 U S C § 22544(b)

(copies of Coe autopsy report and Dr Levy's testimony in *Abdur 'Rahman* attached). Furthermore, the evidence to which plaintiff points is clearly insufficient on its face; it ultimately supports only the *possibility* that persons subjected to Tennessee's protocol would not be adequately anesthetized (R 11, Ex A, ¶ 24) *Cf* R 16, Ex 2, *Abdur 'Rahman v Sundquist*, p 13 (state court finding that "there is less than a remote chance that the condemned would ever be conscious by the time the Pavulon is administered"). *See N A A C P v City of Mansfield*, 866 F 2d 162, 179 (6th Cir 1989) ("we reiterate that the demonstration of a mere 'possibility' of success on the merits is not sufficient, and renders the test [for granting injunctive relief] meaningless").[3]

And while it is obviously true that plaintiff stands to lose his life when his sentence is executed, it is only as lawful punishment for his own heinous conduct — the abduction and brutal rape and murder of nineteen-year-old Suzanne Marie Collins on July 11, 1985 And with the execution of plaintiff's sentence having previously been delayed for nearly two years, the harm that would befall the State by virtue of yet another stay would be substantial At this juncture, with the plaintiff having long since completed state and federal review of his convictions and sentence, the State's interests in finality are "all but paramount." *Calderon v Thompson*, 523 U S 538, 557, 118 S Ct 1489, 1502, 140 L Ed 2d 728 (1998) The State must be allowed to "execute its moral judgment in [this] case" and allow "the victims of crime [to] move forward knowing the moral judgment will be carried out." *Id*, 523 U S at 556, 118 S Ct t 1501

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[3] Plaintiff refers to reported recent events in Ohio that, while unfortunate, have little bearing on his challenge to Tennessee's protocol; indeed, they do not reflect any infirmity in the three-drug protocol itself Instead, they illustrate only what has long been recognized — that, during an execution by lethal injection, difficulty may be encountered in gaining venous access

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2006, 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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