

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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

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

Under FRAP 28(j), Workman submits Jones v. Allen, 2007 U.S. Dist. LEXIS 28415 (N.D. Ala., April 17, 2007) aff’d Jones v. Allen, 2007 U.S. App. LEXIS 9571 (11th Cir. Apr. 27, 2007) (addressing stay denial) as supplemental authority. Jones found the majority opinion in Cooey v. Strickland, 479 F.3d 412 (6th Cir. 2007), “misapprehended the statute of limitations as it applies to a § 1983 case such as this one.” Jones, 2007 U.S. Dist. LEXIS 28415 at \*27. Jones provides support for arguments made in Mr. Workman’s Motion to Dismiss or Deny Appeal and Response in Opposition to Motion to Vacate TRO.

In particular, Jones rejects the *Cooley* majority's reliance on equitable interests relating to delay as irrelevant to the statute of limitations (SOL) determination. Jones, 2007 U.S. Dist. LEXIS 28415 at \*26-28. This supports Mr. Workman's arguments, that the *Cooley* panel majority improperly considered delay when determining the statute of limitations arguments for *Cooley*'s § 1983 challenge.

At page \*26, the Jones Court specifically notes the majority's discussion of the AEDPA, and rejects that as an equitable consideration inappropriate to the statute of limitations determination.

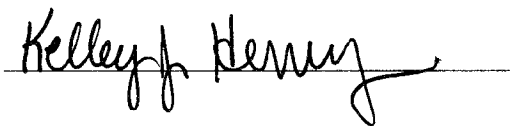
Finally, the Jones Court did not specifically determine when Jones' claim became ripe—it found ripeness was irrelevant to the SOL inquiry. While a claim is necessarily ripe when it accrues, it is not necessarily true that once a claim is ripe it has accrued. Jones, 2007 U.S. Dist. LEXIS 28415 at \*21. In particular, the Jones Court found there was no way Jones' claim was barred by the Statute of limitations "to prevent an unconstitutionally tortious act from occurring in the future, such a claim cannot be barred by the statute of limitations because the tortious act has not yet occurred and the tort is not yet complete." Jones, 2007 U.S. Dist. LEXIS 28415 at \*17-18 (footnote omitted). This portion of the opinion supports Mr. Workman's arguments that the statute of limitations has not run on his § 1983 complaint.

Mr. Workman also cites this Court to the Order of a panel of this Court granting a stay of execution to Ohio death row inmate *Biros*. A copy of that order was just provided to Mr. Workman's counsel and is attached hereto as Appendix A. The panel's order in *Biros* supports Mr. Workman's position that if this panel were to seriously consider Appellant's arguments that *Cooley* applies in this improperly taken appeal, then, Mr. Workman is entitled to a stay of proceedings pending the outcome of the en banc petition in *Cooley v. Strickland*.

Respectfully submitted,


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By: 

**CERTIFICATE OF SERVICE**

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

  
\_\_\_\_\_  
Kelley J. Henry

## APPENDIX A

NO. 06-4660

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

RICHARD COOEY, KENNETH BIROS  
(Intervenor),

Plaintiff-Appellee,

v.

TED STRICKLAND, Governor,  
REGINALD WILKINSON, Director,  
TERRY COLLINS, Director, EDWARD  
VOORHIES, Warden, JAMES HAVILAND,  
Warden,

Defendants-Appellees.

ON APPEAL FROM THE  
UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN  
DISTRICT OF OHIO

O R D E R

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**BEFORE: SUHRHEINRICH, SILER, and GILMAN, Circuit Judges.**

Ohio inmate Kenneth Biros is scheduled to be executed on Tuesday, March 20, 2007. On December 21, 2006, the district court granted Biros a preliminary injunction barring the State of Ohio or its agents “from implementing an order for the execution of Kenneth Biros issued by any court of the State of Ohio until further Order from this Court.” The State has filed a motion to vacate that injunction in this Court. However, as Biros is also an intervenor in the district court in the matter appealed as No. 05-4057, *Cooley v. Strickland*, decided by this Court on March 2, 2007, and has joined in the petition for rehearing with suggestion for rehearing *En Banc*, currently pending before this Court, *see Cooley v. Strickland*, No. 05-4057, – F.3d –, (6th Cir. March 2, 2006), *petition*

*for reh'g filed* March 13, 2007, this Court **DENIES** the State's motion **without prejudice**. The State can renew its motion, if appropriate, upon resolution of that petition.

**SO ORDERED.**

ENTERED BY ORDER OF THE COURT

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Clerk