DEATH PENALTY CASE
Execution scheduled: February 4, 2009

NO. 09-5084

IN THE 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

RESPONSE TO MOTION TO STAY EXECUTION

ROBERT E. COOPER, JR.
Attorney General and Reporter

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INTRODUCTION

Steve Henley is a condemned inmate residing at Riverbend Maximum Security Institution, in Nashville, Davidson County, Tennessee. On November 26, 2008, Henley filed this lawsuit pursuant to 42 U.S.C. § 1983 challenging the constitutionality of Tennessee's three-drug lethal injection protocol. Henley contended that the protocol violated his Eighth Amendment right to be free from cruel and unusual punishment and that it should be declared unconstitutional as it was in *Harbison v. Little*, 511 F.Supp.2d 872 (M.D. Tenn. 2007). (R. 1, Complaint, pp. 6-7, 9-14). He requested declaratory and injunctive relief enjoining his execution by use of the Tennessee lethal injection protocol. (R. 1, Complaint, pp. 18-19).

The defendants filed a motion to dismiss the complaint. (R. 8, Motion to Dismiss). The defendants argued that the complaint should be dismissed as time-barred and dilatory and that Tennessee's lethal injection protocol is constitutional under the authority of *Baze v. Rees*, __ U.S. __,128 S.Ct. 1520 (2008). Henley filed a motion for summary judgment relying on the proof in the *Harbison* evidentiary hearing. (R 11, Motion for Summary Judgment). The defendants responded, opposing the motion. (R. 16, Response in Opposition to Motion for Summary Judgment).

On January 16, 2009, the district court ordered the parties to show cause why it should not stay the case and hold it in abeyance pending this Court's ruling in *Harbison v. Little*, No. 07-6225 (6th Cir.). (R. 15, Order). After the parties responded to the Order, the district court granted the defendants' motion to dismiss, denied other pending motions as moot, and dismissed the case with prejudice. (R. 21, Order). The bases for dismissal were that the case was barred by the statute of limitations and that Henley was dilatory in filing suit. (R. 20, Memorandum Opinion). Henley timely filed a notice of appeal. (R. 22, Notice of Appeal).

PROCEDURAL HISTORY

The Tennessee Supreme Court affirmed Henley's convictions on two counts of first-degree murder and one count of aggravated arson, as well as his death sentence on April 10, 1989. *State v. Henley*, 774 S.W.2d 908 (Tenn. 1989). The United States Supreme Court denied his petition for writ of certiorari on June 28, 1990. *Henley v. Tennessee*, 497 U.S. 1031, 110 S.Ct. 3291, 111 L.Ed.2d 800 (1990). This Court affirmed the district court's denial of his petition for *habeas corpus* relief on May 15, 2007. *Henley v. Bell*, 487 F.3d 379 (6th Cir. 2007). On June 23, 2008, the United States Supreme Court denied certiorari. *Henley v. Tennessee*, 128 S.Ct. 2962 (2008). On October 20, 2008, the Tennessee Supreme Court set Henley's execution for February 4, 2009. *State v. Henley*, No.

M1987-00116-SC-DPE-DD (Tenn. October 20, 2008) (order setting date of execution).

ARGUMENT

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

This Couer 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).

In considering Henley's likelihood of success on the merits, this Court must consider the timeliness of his complaint — including the controlling decision of this Court 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 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).

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 this Court recently observed in *Workman*, 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*, 484 F.3d at 842.

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

In *Cooey*, the Court held that § 1983 "method-of-execution" challenges are subject to the applicable statute of limitations and that the appropriate accrual date is upon conclusion of direct review of a conviction in the state court or the expiration of time for seeking such review, including review by

the United States Supreme Court, although it had to be adjusted because a new method of execution was enacted. *Cooey*, 479 F.3d at 422. *See also Cooey v Strickland*, 544 F.3d 588, (6th Cir. 2008), *cert. denied*, ___ S.Ct. ___, 2008 WL 4551401 (2008).

Under Tennessee law, civil actions under the federal civil rights statutes must be brought within one year after the cause of action accrues. Tenn. Code Ann. § 28-3-104(3). In May 1998, lethal injection became available as a method of execution in Tennessee, and on March 30, 2000, lethal injection became Tennessee's presumptive method of execution. *See* Tenn. Code Ann. § 40-23-114; 2000 Tenn. Pub. Act, Ch 614, § 8. Since Henley's convictions and sentences were affirmed on direct appeal by both the Tennessee Supreme Court and the United States Supreme Court by June 28, 1990, his "method-of-execution" challenge accrued, at the latest, on March 30, 2000. Henley filed his complaint challenging Tennessee's three-drug lethal injection protocol on November 26, 2008, more than eight years after his cause of action accrued. As in *Cooey*, therefore, Henley's claim clearly fails on limitation grounds. *See* R. 20, Memorandum Opinion, p. 8 ("The analysis in *Cooey* directs the outcome in this case….").

Henley asserts that the execution of his sentence should be stayed pending this Court's decision in *Harbison v. Little*, No. 07-6775 (6th Cir.), but the statute of limitations issue is not under consideration in the *Harbison* appeal, and

nothing the Harbison Panel decides in that case can salvage Henley's lawsuit from *Cooey's* time-bar. Particularly in light of the strong public policy in favor of the timely enforcement of criminal judgments, a stay of execution is clearly unwarranted in order to wait on a decision that will not address this issue.

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

Delays in bringing challenges to execution protocols are inexcusable. *McQueen v. Patton*, 118 F.3d 460,464 (6th Cir. 1997). In *Workman*, this Court also 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." 486 F.3d at 911 (emphasis in original). A year before deciding *Workman*, in the case of *Alley v. Little,* 181 Fed. Appx. 509, 2006 WL 1313365 (6th Cir. 2006), *cert. denied*, 126 S.Ct. 2973, 165 L.Ed.2d 982 (2006) (copy attached), this Court vacated an injunction and stay entered by the United States District Court against the execution of the death sentence of Sedley Alley, a condemned Tennessee inmate. The Court based its decision on, among other things, the unnecessary delay with which Alley had brought his challenge to the lethal-injection protocol. *Id*. at 513. Thus, the Court

has ruled that challenges to the Tennessee lethal-injection protocol were filed in a dilatory manner on both occasions it has been asked to consider this issue.

Here, Henley waited to file the instant complaint until November 26, 2008. (R. 1, Complaint). He had abundant opportunities to challenge the lethal-injection protocol well before November 26, 2008. In May 1998, lethal injection became available as a method of execution in Tennessee, and on March 30, 2000, lethal injection became Tennessee's primary method of execution. *See* Tenn. Code Ann. § 40-23-114; 2000 Tenn. Pub. Act, Ch 614, § 8. Henley's convictions and sentences were affirmed on direct appeal in 1989. *See State v. Henley,* 774 S.W.2d 908 (Tenn. 1989). The United States Supreme Court denied his petition for writ of certiorari on June 28, 1990. *Henley v. Tennessee*, 497 U.S. 1031, 110 S.Ct. 3291, 111 L.Ed.2d 800 (1990). Thus, Henley's "method-of-execution" challenge accrued no later than March 30, 2000. Yet he waited over eight years, and until 70 days before his execution, to file suit, without any justification other than delaying his execution. The district court was critical of this tactic:

> 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.

(R. 20, Memorandum Opinion, p. 10). Under the authority of *Workman* and *Alley*, Henley has been dilatory in filing his complaint; for this reason as well, Henley's action was properly dismissed. And again, this issue is not raised on appeal in *Harbison*.

C. Henley's Claims Have No Likelihood of Success on the Merits; *Baze v. Rees* Demonstrates the Constitutionality of Tennessee's Lethal Injection Protocol as a Matter of Law.

Even beyond the procedural bars to his complaint, Henley cannot demonstrate a likelihood of success on its underlying merits. As he points out, *Baze* instructs that "[a] stay of execution may not be granted unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives." (Motion, pp. 5-6) (quoting *Baze*, 128 S.Ct. at 1537). Henley says that he has met this standard.

But Henley completely ignores the Supreme Court's further instruction in *Baze* that "[a] State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard." *Baze*, 128 S.Ct. at 1537. Tennessee's protocol is just such a protocol,[1] and Henley has certainly *not* shown otherwise. Nor can he. Tennessee's lethal injection protocol includes all four of the safeguards for proper administration of sodium pentothal upon which the Supreme Court relied in upholding the Kentucky protocol in *Baze*. *Id.*, 128 S.Ct. at 1533-1544 (*i.e.*, IV catheters inserted by qualified medical personnel; regular practice sessions for entire execution team; establishment of back-up IV lines and drugs; and presence of prison personnel in execution chamber). *See* R. 9, Exhibit: Tennessee Execution Procedures for Lethal Injection, pp. 32, 33, 38, 41, 42, 50, 64, 65.[2] While it is Henley's burden at

[1] *See* R. 20, Memorandum of the Court, p. 2 ("Kentucky's three-drug lethal injection protocol . . . is the same as that used in Tennessee").

[2] All petitioner can muster is to point to "evidence" of past, alleged problems with the administration of sodium pentothal. (Motion, p. 5 (citing Brief of Appellant, pp. 26-30)). This is clearly inadequate. Moreover, the "evidence" to which he points in support of this allegation is entirely unpersuasive. For example, Henley's "clear proof" that Philip Workman, whose sentence was executed in 2007, "continued talking for minutes after administration of thiopental" (Motion, p. 2; Brief of Appellant, p. 27 (citing R. 12, Ex. 79)), consists only of a news article that has existed for nearly two years; refers only to estimated time periods; is contradicted by the record evidence presented in *Harbison v. Little*, No. 3:06-1206 (M.D.Tenn.); and itself reflects that "[Workman] took his last visible breaths as his head drifted to the left and he appeared to go unconscious." R. 12, Ex. 79, News Article.

this juncture to demonstrate that Tennessee's protocol is *not* substantially similar to Kentucky's, the conclusion that it *is* substantially similar, and thus does not violate the Eighth Amendment, is inescapable.

II. This Court Must Consider The Harm That Would Be Caused By Granting A Stay Of Execution And The Public Interest In The State's Enforcing Its Criminal Judgments.

When acting on any request for injunctive relief, a court must weigh the harm that would result from denying an injunction against the harm that would result from granting one. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997). But equitable relief is not a matter of right, and in this context, "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 126 S.Ct. 2096. At stake here is 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*, 484 F.3d at 842 (emphasis added). Twenty years have passed since the judgment of conviction and sentence was issued in Henley's case. The State's interest in enforcing this judgment is paramount.

Furthermore, "the *victims of crime* have an important interest in the timely enforcement of a sentence," *Hill,* 126 S.Ct. at 2104 (emphasis added), and this Court must likewise consider that interest. After twenty years, the surviving victims of this crime are fully entitled to expect that Henley'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). There is no reason to stay execution of Henley's lawful sentence.

CONCLUSION

For the foregoing reasons, this Court should deny the motion for stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served via the electronic filing process upon Paul S. Davidson, Waller, Lansden, Dortch, & Davis, PLLC, 511 Union Street, Suite 2700, Nashville, Tennessee 37219 and Paul R. Bottei, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee 37203, on this 30th day of January, 2009.

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