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

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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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