No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2008

STEVE HENLEY,
Petitioner

v.

GEORGE LITTLE, et al.,
Respondent.

STEVE HENLEY,
Petitioner

v.

RICKY BELL, Warden,
Respondent.

APPENDIX TO 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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APPENDIX A

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

STEVE HENLEY, Petitioner, v. RICKY BELL, Warden Riverbend Maximum Security Institution, Respondent.	)	No. 3:98-0672 Judge Echols

MOTION TO AUTHORIZE FEDERALLY-APPOINTED COUNSEL
TO REPRESENT PETITIONER IN STATE CLEMENCY PROCEEDINGS

Petitioner Steve Henley respectfully requests that this Court issue an order authorizing counsel, who were appointed by this Court, to pursue state clemency proceedings pursuant to 18 U.S.C. §3599(e). A memorandum in support accompanies this motion.

Respectfully Submitted,

s/Paul S. Davidson
Paul S. Davidson
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s/ Paul R. Bottei
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CERTIFICATE OF SERVICE

I certify that a notice of this filing will be sent by operation of the court's electronic filing system to all parties indicated on the electronic filing receipt. All other interested parties will be served by regular U.S. Mail

Office of the Attorney General
425 Fifth Avenue North
P. O. Box 20207
Nashville, Tennessee 37202-0207

this 21st day of October, 2008.

s/Paul S. Davidson

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

STEVE HENLEY, Petitioner, v. RICKY BELL, Warden Riverbend Maximum Security Institution, Respondent.	)	No. 3:98-0672 Judge Echols

MEMORANDUM IN SUPPORT OF
MOTION TO AUTHORIZE FEDERALLY-APPOINTED COUNSEL
TO REPRESENT PETITIONER IN STATE CLEMENCY PROCEEDINGS

On August 28, 1998, under 21 U.S.C. §848(q)(4)(B), this Court appointed the Office of the Federal Public Defender to represent Steve Henley. R. 5. On December 8, 1998, this Court further appointed Paul Davidson as co-counsel. R. 15. Then-existing law provided that counsel appointed under §848(q)(8) "shall . . . represent the defendant in such . . . proceedings for executive or other clemency as may be available to the defendant." 21 U.S.C. §848(q)(4)(B). In 2006, §848 was recodified as 18 U.S.C. §3599. Like §848(q)(8), 18 U.S.C. §3599(e) provides that appointed counsel "shall" represent the petitioner in "proceedings for executive or other clemency . . . ."

Given the plain language of §848/§3599(e), the Tenth Circuit has concluded that, under the express terms of the statute, appointed counsel remains counsel for state clemency proceedings. *Hain v. Mullin*, 436 F.3d 1168 (10th Cir. 2006)(en banc). In *Harbison v. Bell*, 503 F.3d 566, 570 (6th Cir. 2007), *cert. granted*, 554 U.S. ___ (2008), however, the Sixth Circuit has concluded otherwise, holding that appointment as counsel under §848/§3599 does not include

representation in state clemency process. In *Harbison v. Bell*, U.S.No. 07-8521, the Supreme Court will decide whether the Sixth Circuit's decision is, in fact, correct.

On October 20, 2008, the Tennessee Supreme Court set an execution date for February 4, 2009. Petitioner, therefore, intends to pursue state clemency process, and the question whether federally-appointed counsel is entitled to do so is now ripe for resolution under Article III.

The Sixth Circuit's decision in *Harbison* notwithstanding, Petitioner maintains that counsels' appointment includes state clemency proceedings, and that as appointed counsel, counsel should be authorized to invoke and pursue state clemency process under §848/§3599(e). Petitioner requests that this Court therefore issue an order authorizing appointed counsel to pursue state clemency proceedings under 18 U.S.C. §3599(e). Alternatively, as noted in his contemporaneously-filed motion for stay of execution, this Court should hold this motion in abeyance, and grant a stay of execution pending the Supreme Court's upcoming decision in *Harbison*, especially where Petitioner establishes a strong likelihood of success on the merits of his §848/3599 motion.

Petitioner also respectfully requests that the Court expeditiously decide his motion and/or the request for stay of execution, so that, if necessary, Petitioner may expeditiously seek relief in the Sixth Circuit and United States Supreme Court.

Respectfully Submitted,

s/ Paul S. Davidson
Paul S. Davidson
Waller, Lansden, Dortch, & Davis PLLC
511 Union Street
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(615) 244-6380

s/ Paul R. Bottei
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810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

CERTIFICATE OF SERVICE

I certify that a notice of this filing will be sent by operation of the court's electronic filing system to all parties indicated on the electronic filing receipt. All other interested parties will be served by regular U.S. Mail

Office of the Attorney General
425 Fifth Avenue North
P. O. Box 20207
Nashville, Tennessee 37202-0207

this 21st day of October, 2008.

s/Paul S. Davidson

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEVE HENLEY,	)	
	)	
Petitioner,	)	
v.	)	**No. 3:98-0672**
	)	**JUDGE ECHOLS**
RICKY BELL, Warden, Riverbend Maximum Security Institution,	)	
	)	
	)	
Respondent.	)	

ORDER

Petitioner Steve Henley, a Tennessee prisoner on death row, through his previously-appointed counsel Paul R. Bottei of the Office of the Federal Public Defender and Paul S. Davidson of Waller, Lansden, Dortch & Davis PLLC, filed a Motion To Authorize Federally-Appointed Counsel To Represent Petitioner In State Clemency Proceedings (Docket Entry No. 133), to which Respondent Ricky Bell filed a response taking no position on the issue (Docket Entry No. 139). Petitioner also filed a Motion For Stay Of Execution (Docket Entry No. 135), to which Respondent Bell filed a response in opposition (Docket Entry No. 138), and Petitioner filed a Reply (Docket Entry No. 140).

Petitioner filed a habeas corpus petition under 28 U.S.C. § 2254 in this Court on July 23, 1998. Lengthy litigation on the petition ended in this Court on January 7, 2005. Petitioner appealed the denial of the habeas petition to the Sixth Circuit, which affirmed on May 15, 2007. (Docket Entry No. 128.) The Supreme Court denied a petition for a writ of certiorari on June 23, 2008. (Docket Entry No. 132.) This Court received notice of the denial of certiorari on July 7, 2008. (Id.)

Thereafter, on October 21, 2008, Petitioner's federally-appointed counsel filed the instant motions for authorization to represent Petitioner in a state clemency proceeding and for a stay of

execution. The Tennessee Supreme Court has set February 4, 2009 as the execution date for the Petitioner.

The motion to authorize federally-appointed counsel is brought under 18 U.S.C. § 3599(e), formerly codified at 21 U.S.C. § 848(q)(8). Under Sixth Circuit law, § 3599(e) does not authorize payment of federal compensation for legal representation in a state clemency proceeding. Harbison v. Bell, 503 F.3d 566, 570 (6th Cir. 2007) (relying on House v. Bell, 332 F.3d 997, 998-999 (6th Cir. 2003) (en banc)). The Harbison decision is in accord with cases from the Fifth, Eighth and Eleventh Circuits, see Clark v. Johnson, 278 F.3d 459 (5th Cir. 2002); Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993); and King v. Moore, 312 F.3d 1365 (11th Cir. 2002), but it conflicts with the Tenth Circuit's opinion in Hain v. Mullin, 436 F.3d 1168 (10th Cir. 2006) (en banc).

On June 23, 2008, the Supreme Court granted certiorari in Harbison to resolve whether counsel appointed pursuant to § 3599(e) to represent a state death-sentenced defendant in a § 2254 habeas proceeding may also represent the defendant in subsequent state clemency proceedings when the defendant is otherwise unrepresented. The Supreme Court has scheduled oral argument in the Harbison case on January 12, 2009.

Pending the Supreme Court's decision in Harbison, Petitioner asks this Court to stay his February 2009 execution date and hold in abeyance his motion seeking authorization for his federally-appointed attorneys to proceed with a state clemency proceeding. Respondent takes no position on the motion for authorization of counsel, but he contends this Court lacks jurisdiction to grant a stay of execution and, even if there is jurisdiction, Petitioner cannot satisfy the requirements for a stay.

The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Title 28 U.S.C. § 2251 provides:

> A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

Here, Petitioner's § 2254 petition is no longer pending. This Court denied the habeas petition and the Sixth Circuit affirmed. The Supreme Court denied a petition for a writ of certiorari. Petitioner is not seeking to proceed further before this Court to obtain a federal habeas remedy. See Preiser v. Rodriguez, 411 U.S. 475 (1973). Rather, he desires the assistance of federally-appointed counsel in preparing a state clemency application, which is "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Herrera v. Collins, 506 U.S. 390, 412 (1993). Executive clemency is extrajudicial and purely discretionary. Id. The Court is unaware of any federal statute that expressly authorizes the Court to enter a stay of execution pending resolution of a § 3599 motion, and Petitioner does not cite such a statute. Because Petitioner has exhausted his federal habeas remedy and has made no showing of an exception to the Anti-Injunction Act, this Court lacks jurisdiction to issue a stay of execution pursuant to 28 U.S.C. § 2251 and § 2283.

Nor should a stay of execution be granted under the All Writs Act, 28 U.S.C. § 1651, which empowers "all courts established by Act of Congress" to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Nothing prevents current counsel, who have represented Petitioner for ten years, from pursuing an executive clemency application on behalf of Petitioner in advance of the scheduled execution date. As in

Clark, 278 F.3d at 460, and Hain, 436 F.3d at 1170-1171, the question whether federal counsel will receive compensation for providing legal services to Petitioner in connection with a clemency application may be decided in the future, even post-execution.

Citing Belchaba v. Bush, 520 F.3d 452, 457 (D.C. Cir. 2008), Petitioner suggests that a federal court considering an issue identical to one pending before the Supreme Court may grant a stay to await the Supreme Court's decision, and Petitioner also analogizes his situation to those prisoners who obtained stays of execution in pending 42 U.S.C. § 1983 actions challenging lethal injection protocols while awaiting the Supreme Court's decision in Baze v. Rees, — U.S. —, 128 S.Ct. 1520 (2008). In Belchaba, however, the federal court had colorable habeas corpus jurisdiction, and the § 1983 cases stayed pending Baze rested on sound subject matter jurisdiction pursuant to 28 U.S.C. § 1343. Here, until directed by the Supreme Court otherwise, the Court must follow the Sixth Circuit's reasoning in House that § 3599(e) does not allow the Court to appoint federal counsel to provide Petitioner with legal representation in a state proceeding. It follows that the Court cannot issue a stay of execution in aid of jurisdiction the Court does not possess. See West v. Bell, 242 F.3d 338, 341 (6th Cir. 2001) (observing federal court has limited jurisdiction and petitioner must properly invoke it).

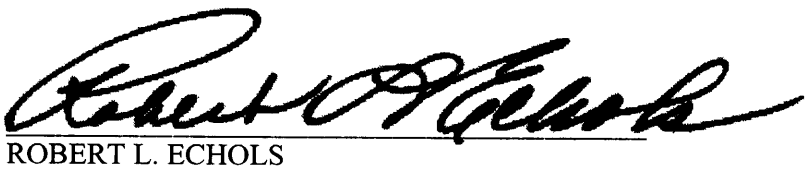
Even assuming the Court has jurisdiction, a stay of execution is an equitable remedy. Cooey v. Strickland, 484 F.3d 424, 425 (6th Cir. 2007). A stay is not available as a matter of right, and the Court must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal court. Id. To obtain a stay of execution, Petitioner must satisfy a four-factor test. He must show: (1) a likelihood of success on the merits; (2) he will suffer irreparable harm absent a stay; (3) the stay will not cause substantial harm to others; and (4) the stay would serve the public interest. Workman v. Bell, 484 F.3d 837, 839 (6th Cir. 2007). Petitioner has

not provided the Court with any information from which the Court can determine that Petitioner will likely succeed on a state clemency application. Moreover, Petitioner has not shown irreparable harm because he is not being denied an opportunity to present a state clemency application. On the other hand, the State's, the public's, and the victims' interests in finality and in the execution of the State's moral judgment are compelling when a federal appeals court issues a mandate denying federal habeas relief in a death penalty case. Calderon v. Thompson, 523 U.S. 538, 556 (1998). For these reasons, the need for a stay of execution has not been shown. Accordingly,

(1) Petitioner's Motion For Stay Of Execution (Docket Entry No. 135) is hereby DENIED; and

(2) Petitioner's Motion to Authorize Federally-Appointed Counsel To Represent Petitioner In State Clemency Proceedings is hereby HELD IN ABEYANCE pending the Supreme Court's decision in Harbison v. Bell, No. 07-8521 (U.S.).

It is so ORDERED.



ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED
DEC 22 2008
LEONARD GREEN, Clerk

No. 08-6429

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVE HENLEY,
Petitioner - Appellant

v.

RICKY BELL, Warden,
Respondent - Appellee

ORDER

This appeal now comes before the court upon the motions of the petitioner-appellant to (1) expedite submission of the case (2) to allow the filing of an electronic appendix (3) to declare a certificate of appealability to be unnecessary, and (4) to stay his execution, which is scheduled for February 4, 2009.

Upon consideration of the several motions, the responses thereto, and the reply to the response opposing the motion to stay execution:

(1) The motion to expedite consideration of the case is GRANTED;
(2) The motion to allow the filing of an electronic appendix is GRANTED;
(3) The motion to dispense with a certificate of appealability is GRANTED;
(4) The motion to stay execution is DENIED.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX D

No. 08-6429

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVE HENLEY, Petitioner - Appellant	)	
v.	)	O R D E R
RICKY BELL, Warden, Respondent - Appellee	)	

The request of the appellant for oral argument of this matter is hereby DENIED. As previously ordered by the court, the motion of the appellant to stay the execution scheduled for February 4, 2009 is hereby DENIED.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEVE HENLEY,	)	
	)	
Petitioner,	)	
v.	)	**No. 3:98-0672**
	)	**JUDGE ECHOLS**
RICKY BELL, Warden, Riverbend Maximum Security Institution,	)	
	)	
	)	
Respondent.	)	

ORDER

On the afternoon of Friday, January 30, 2009, the Court received a Motion (Docket Entry No. 158) requesting this Court rule on Petitioner's prior "Motion to Authorize Federally-Appointed Counsel to Represent Petitioner in State Clemency Proceedings" (Docket Entry No. 133). This motion was filed by Petitioner Steve Henley on October 21, 2008, under 18 U.S.C. Section 3599(e) requesting that this Court authorize his federally appointed habeas counsel to represent him in a state clemency proceeding. On November 18, 2008, this Court answered Petitioner's request by stating in its Order as follows:

> Under Sixth Circuit law, § 3599(e) does not authorize payment of federal compensation for legal representation in a state clemency proceeding. Harbison v. Bell, 503 F.3d 566, 570 (6th Cir. 2007) (relying on House v. Bell, 332 F.3d 997, 998-999 (6th Cir. 2003) (en banc)). The Harbison decision is in accord with cases from the Fifth, Eighth and Eleventh Circuits, see Clark v. Johnson, 278 F.3d 459 (5th Cir. 2002); Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993); and King v. Moore, 312 F.3d 1365 (11th Cir. 2002), but it conflicts with the Tenth Circuit's opinion in Hain v. Mullin, 436 F.3d 1168 (10th Cir. 2006) (en banc).
>
> On June 23, 2008, the Supreme Court granted certiorari in Harbison to resolve whether counsel appointed pursuant to § 3599(e) to represent a state death-sentenced defendant in a § 2254 habeas proceeding may also represent the defendant in subsequent state clemency proceedings when the defendant is otherwise unrepresented. The Supreme Court has scheduled oral argument in the Harbison case on January 12, 2009.

. . . .

. . . Nothing prevents current counsel, who have represented Petitioner for ten years, from pursuing an executive clemency application on behalf of Petitioner in advance of the scheduled execution date. As in Clark, 278 F.3d at 460, and Hain, 436 F.3d at 1170-1171, the question whether federal counsel will receive compensation for providing legal services to Petitioner in connection with a clemency application may be decided in the future, even post-execution.

(Docket Entry No. 142 at 2, 3-4).

Harbison v. Bell, 503 F.3d 566 (6th Cir. 2007) is instructive to Petitioner regarding the necessity of obtaining a certificate of appealability (COA) in a denial of the motion to appoint a federally-appointed counsel to provide Petitioner with legal representation in such a state court proceeding. Under Harbison, a COA should not be granted under such circumstance, and if an appeal is taken, a COA would not be necessary. Even if a COA was necessary, Petitioner's request for a COA is hereby DENIED.

For the reasons stated above and as indicated in the Court's previous Order of November 18, 2008, the aforesaid Motion for Ruling on Petitioner's Motion to Authorize a Federally-Appointed Counsel to Represent Petition in State Clemency Proceedings (Docket Entry No. 158) is DENIED.

It is so ORDERED.

ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEVE HENLEY	)	
	)	
v.	)	**No. 3:08-1148**
	)	**JUDGE ECHOLS**
GEORGE LITTLE, et al.	)	
	)	

ORDER

In accordance with the Memorandum entered contemporaneously herewith, the Court rules as follows:

(1) the Motion to Dismiss on Behalf of Defendants George Little and Ricky Bell (Docket Entry No. 8) is hereby GRANTED;

(2) all other pending motions are hereby DENIED AS MOOT;

(3) this case is hereby DISMISSED WITH PREJUDICE; and

(4) entry of this Order on the docket shall constitute entry of final judgment in accordance with Federal Rules of Civil Procedure 58 and 79(a).

Plaintiff has sufficient time to appeal the Court's dismissal of his § 1983 Complaint to the Sixth Circuit Court of Appeals prior to his scheduled execution on February 4, 2009.

It is so ORDERED.

ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEVE HENLEY	)	
	)	
v.	)	**No. 3:08-1148**
	)	**JUDGE ECHOLS**
GEORGE LITTLE, et al.	)	
	)	

MEMORANDUM

Plaintiff Steve Henley ("Plaintiff"), an inmate on death row, filed this lawsuit under 42 U.S.C. § 1983 on November 26, 2008, challenging the constitutionality of Tennessee's three-drug lethal injection protocol. Plaintiff asserts that the use of three drugs–sodium thiopental, pancuronium bromide, and potassium chloride–to perform an execution violates the Eighth and Fourteenth Amendments of the federal Constitution. He alleges that, if sodium thiopental is not administered properly, he could experience intense pain after being injected with potassium chloride, but he would be unable to express his pain because of the paralyzing effect of the second drug, pancuronium bromide.

Defendants George Little, Commissioner of the Tennessee Department of Correction, and Ricky Bell, Warden of Riverbend Maximum Security Institution in Nashville ("the State"), filed a Motion to Dismiss on December 23, 2008 (Docket Entry No. 8), to which Plaintiff filed a response in opposition (Docket Entry No. 10). The State argued in the Motion to Dismiss that Plaintiff's complaint is barred by the statute of limitations; Plaintiff was dilatory in filing his complaint seeking equitable relief; Tennessee's three-drug lethal injection protocol is constitutional under the Supreme Court's recent decision in Baze v. Rees, — U.S. —, 128 S.Ct. 1520 (2008); and Plaintiff's case is controlled by Baze, not the prior decision of District Judge Aleta Trauger in Harbison v. Little, 511 F.Supp.2d 872 (M.D. Tenn. 2007). In Harbison, Judge Trauger held in 2007 that Tennessee's lethal injection protocol is unconstitutional under the Eighth and Fourteenth Amendments, and her decision is currently pending

on appeal before the Sixth Circuit Court of Appeals. However, in 2008, after the Harbison decision, the Supreme Court in Baze found that Kentucky's three-drug lethal injection protocol, which is the same as that used in Tennessee, is constitutional and does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. The State also pointed out that, before Baze, the Tennessee Supreme Court upheld the lethal injection protocol in Abdur'Rahman v. Bredesen, 181 S.W.3d 292 (Tenn. 2005), and the Sixth Circuit twice reversed stays of execution where it held Tennessee death row inmates were dilatory in bringing § 1983 claims challenging the lethal injection protocol. Workman v. Bredesen, 486 F.3d 896 (6th Cir. 2007); Alley v. Little, 181 Fed. Appx. 509 (6th Cir. 2006). Therefore, according to the State, Plaintiff cannot succeed on the merits of his claims even if his suit is not barred by the statute of limitations or by his dilatory action in bringing suit.

Plaintiff resisted the Motion to Dismiss arguing first that no statute of limitations applies to a § 1983 suit seeking to enjoin a future prospective harm and therefore, he had not violated any statute of limitations in bringing this lawsuit within one month after the Tennessee Supreme Court, on October 20, 2008, set his execution date for February 4, 2009. Plaintiff also argued that, under settled Article III principles, he did not have a ripe, justiciable lawsuit until October 2008, when the execution date was set and he was exposed to the imminent threat of harm. Next, Plaintiff contended that the State's *laches* argument fails because the State has not shown Plaintiff's lack of diligence in bringing his suit nor prejudice to the State, since the State has already tried the same issues in Harbison. Finally, Plaintiff argued that his complaint could not be dismissed under Federal Rule of Civil Procedure 12(b)(6) because he has stated non-frivolous claims, including those found to be meritorious in Harbison.

On January 7, 2009, Plaintiff filed a Motion for Summary Judgment (Docket Entry No. 11), to which Defendants filed a response in opposition (Docket Entry No. 16), and Plaintiff filed a reply

(Docket Entry No. 19). Plaintiff relies on the trial record of Harbison to contend that this Court should follow Harbison and hold that Tennessee's lethal injection protocol is unconstitutional.

On January 16, 2009, the Court entered an Order directing the parties to show cause why the Court should not hold this case in abeyance pending the Sixth Circuit's decision in Harbison. Plaintiff filed a response requesting that the Court stay the case pending the outcome in Harbison and enter a stay of execution. (Docket Entry No. 18.) The State filed a response reiterating the arguments made in support of the Motion to Dismiss and in opposition to Plaintiff's Motion for Summary Judgment. (Docket Entry No. 17.) The State objects to this Court reaching the merits of Plaintiff's § 1983 claims, and the State objects to this Court granting a stay of execution and holding the case in abeyance pending the Sixth Circuit's decision in Harbison. Before reaching the merits of Plaintiff's § 1983 claims and before determining whether a stay of execution is appropriate, the Court must consider the State's arguments that Plaintiff's complaint is time-barred and that Plaintiff was dilatory in bringing this lawsuit challenging the lethal injection protocol.

II. STANDARD OF REVIEW

In evaluating the Complaint under Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true all of Plaintiff's allegations and resolve all doubts in Plaintiff's favor. See Morgan v. Church's Fried Chicken, 829 F.2d 10, 11-12 (6th Cir. 1987). While a complaint need not contain detailed factual allegations, the Plaintiff must provide the grounds for his entitlement to relief, and this "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. —, 167 L.Ed.2d 929, 940 (2007) (abrogating Conley v. Gibson, 355 U.S. 41 (1957)). The factual allegations supplied must be enough to show a plausible right to relief. Id. at 940-942. A complaint must contain either direct or inferential

allegations respecting all of the material elements to sustain a recovery under some viable legal theory. Id. at 944; Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988).

III. ANALYSIS

A. Statute of limitations

In Tennessee, a one-year statute of limitations applies to civil rights claims brought under § 1983. Tenn. Code Ann. § 28-3-104(a)(3); Wilson v. Garcia, 471 U.S. 261, 275-276 (1985). The State contends that Plaintiff's complaint is barred by this one-year statute of limitations, relying on the reasoning of Cooey v. Strickland, 479 F.3d 412 (6th Cir. 2007), *petition for rehearing en banc denied*, 489 F.3d 775 (6th Cir. 2007), *cert. denied,* Biros v. Strickland, — U.S. —, 128 S.Ct. 2047 (April 21, 2008). The State represents that it did not raise the statute of limitations issue in Harbison, but it has raised the affirmative defense of limitations in this case. The State emphasizes that this difference distinguishes the posture of this case from Harbison.

The Sixth Circuit held in Cooey, in a 2-1 panel decision, that the inmate's § 1983 cause of action to challenge the three-drug lethal injection protocol in Ohio accrued upon conclusion of direct review in the state court or the expiration of time for seeking such review. Cooey, 479 F.3d at 421-422. The court adopted the conclusion of direct review as the proper accrual date because it is at that point that the inmate knows or should know that the act providing the basis of his injury has occurred. Id. at 416 (citing Wallace v. Kato, — U.S. —, 127 S.Ct. 1091, 1095 (2007)). In other words, because the inmate knows, or though the exercise of reasonable diligence and inquiry should know, at the conclusion of direct review that he will be subject to execution, the inmate at that time has a complete and present cause of action. Id. The affirmance of the conviction and death sentence should alert the typical lay person to protect his rights by filing suit to challenge the method of execution and seek relief. Id.

The Sixth Circuit further ruled, however, that the accrual date for the cause of action should be adjusted to take into account the date the State adopted lethal injection as the method of execution and the date the State adopted lethal injection as the exclusive method of execution. This adjustment is necessary because an inmate could not have discovered his injury relating to a lethal injection protocol until one of those two dates. Id. at 422. Applying this rule to Cooey, the court observed that Cooey's direct appeal process concluded in 1991, but lethal injection became available as a means of execution in Ohio in 1993, and lethal injection became the sole method of execution in Ohio in 2001. Without pinpointing the actual accrual date, the court held that, even under the later date of 2001, Cooey's claim exceeded Ohio's two-year statute of limitations because he did not file his § 1983 challenge to the lethal injection protocol until 2004. Id. The Sixth Circuit directed the district court on remand to dismiss the case as time-barred. Cooey, 479 F.3d at 422-424.

Applying this analysis to the instant case, Henley's § 1983 challenge to Tennessee's lethal injection protocol is barred by the one-year statute of limitations. On April 10, 1989, the Tennessee Supreme Court affirmed Plaintiff's convictions on two counts of first-degree murder and one count of aggravated arson, as well as his death sentence. State v. Henley, 774 S.W.2d 908 (Tenn. 1989). The United States Supreme Court denied Plaintiff's petition for writ of certiorari on June 28, 1990. Henley v. Tennessee, 497 U.S. 1031 (1990). Under Cooey, Plaintiff's cause of action for challenging a method of execution accrued in June 1990 because he knew or should have known through reasonable diligence and inquiry that he would be subject to execution. At that time he had a complete and present cause of action, and the affirmance of his convictions and death sentence should have alerted him to protect his rights by filing suit to obtain relief. Id.

As Cooey teaches, the Court must consider, however, that lethal injection became available as a method of execution in Tennessee in May 1998, and on March 30, 2000, lethal injection became

Tennessee's presumptive method of execution. Tenn. Code Ann. § 40-23-114; 2000 Tenn. Pub. Act, Ch 614, § 8. Thus, under Cooey, Plaintiff's constitutional challenge to execution by lethal injection accrued at the latest on March 30, 2000, when there was little question but that he would be executed using the three-drug lethal injection protocol unless he opted to be executed by electrocution. Plaintiff was required to file this action within one year–that is, no later than March 30, 2001. Plaintiff did not file this case until November 26, 2008, over seven years later. Thus, the lawsuit is barred by the statute of limitations under the authority of Cooey.

In the time period between the affirmance of Plaintiff's convictions and sentence and his filing of this § 1983 action, Plaintiff unsuccessfully pursued state post-conviction relief. Henley v. State, 960 S.W.2d 572 (Tenn. 1997), *cert. denied*, Henley v. Tennessee, 525 U.S. 830 (1998). This Court then denied Plaintiff's petition for a writ of habeas corpus under 28 U.S.C. § 2254, and the Sixth Circuit affirmed that decision on May 15, 2007. Henley v. Bell, 487 F.3d 379 (6th Cir. 2007). The Supreme Court denied Plaintiff's petition for writ of certiorari on June 23, 2008. Henley v. Tennessee, 128 S.Ct. 2962 (2008), *rehearing denied*, 129 S.Ct. 19 (2008). On October 20, 2008, the Tennessee Supreme Court set Plaintiff's execution date for February 4, 2009. Plaintiff filed his § 1983 action challenging the constitutionality of the lethal injection method of execution on November 26, 2008.

Plaintiff contends that no statute of limitations applies to a § 1983 suit seeking to enjoin a future prospective harm. Alternatively, Plaintiff asserts that even if there was a statute of limitations which applied in a case challenging the method of execution on a future execution date, the cause of action does not accrue until the threat of death is imminent, which is no earlier than the date the court sets the execution date. Therefore, Plaintiff alleges he did not violate any statute of limitations in bringing this lawsuit within one month after the Tennessee Supreme Court set his execution date on October 20, 2008. Plaintiff also argues that, under settled Article III principles, he did not have a ripe, justiciable lawsuit

until October 20, 2008, when the execution date was set and he was exposed to the imminent threat of harm. He appears to contend that any change in the nature or administration of Tennessee's three-drug lethal injection protocol is subject to challenge and starts a new period of imminency and a new one-year period within which to file another lawsuit.

In Cooey the Sixth Circuit was presented with the issue whether a death row inmate's § 1983 method-of-execution challenge accrues, for statute of limitations purposes, when execution is imminent or at some earlier stage during state and federal proceedings. The Sixth Circuit expressly rejected an argument identical to Plaintiff's that imminency of execution is the critical factor or that "the fluid nature" of Ohio's "execution protocol requires imminency of execution to be a key factor in the accrual calculus[.]" Id. at 423. Citing its prior decision in Alley v. Little, 186 Fed.Appx. 604, 607 (6th Cir. 2006), the court soundly rejected the legal theory that a "§ 1983 claim challenging Tennessee's lethal injection protocol was not ripe until an execution date was imminent." Id. The court reasoned that, while the protocol "is subject to change, there was no evidence, until recently, that the protocol had ever been changed." Id. In any event, the court held, none of the recent changes to the Ohio protocol related to Cooey's core complaint that the use of a three-drug combination had the potential to cause him excruciating pain during the execution and amounted to cruel and unusual punishment under the Eighth and Fourteenth Amendments. Id. at 424.

Cooey makes clear that imminency of Plaintiff's execution is not the pivotal factor in deciding whether Plaintiff's constitutional challenge to the method of execution is timely brought. Thus, the Sixth Circuit directly addressed in Cooey the issues of Article III ripeness and justiciability, contrary to Plaintiff's statement that "***Cooey never mentions, let alone addresses, the significance of Article III's standing and ripeness requirements*** [.]" (Docket Entry No. 10, Plaintiff's Response to Motion to Dismiss at 5 (emphasis in original).)

The Court has considered the Tennessee Department of Correction's recent study of its execution procedures at the direction of Governor Phillip N. Bredesen. The study committee issued a final report in April 2007. Harbison, 511 F.Supp.2d at 874-880. While Tennessee retained the same three-drug protocol for lethal injection executions, revisions were made to the procedures used during executions. On June 15, 2007, death row inmate Harbison challenged the constitutionality of this so-called "new" or revised protocol by filing an amended complaint in district court. (No. 3:06-1206, Harbison v. Little, Docket Entry No. 63.)

The 2007 revision to Tennessee's lethal injection protocol still does not make Plaintiff's lawsuit timely. Even giving Plaintiff the benefit of the doubt that the one-year statute of limitations for his § 1983 action began to run in May or June 2007, when Tennessee issued its latest revision of its lethal injection procedures, Plaintiff's case is still time-barred because he did not file suit until November 26, 2008, more than one year after the protocol was revised.

This Court is bound by controlling Sixth Circuit precedent despite Plaintiff's arguments to the contrary. The Cooey decision and prior Sixth Circuit decisions vacating stays of execution in § 1983 cases challenging the lethal injection protocol, see Workman v. Bredesen, 486 F.3d 896 (6th Cir. 2007); Alley v. Little, 181 Fed. Appx. 509 (6th Cir. 2006), are binding precedents which this Court must follow. See Timmereck v. United States, 577 F.2d 372, 374 n.6 (6th Cir. 1978), *rev'd on other grounds*, 441 U.S. 780 (1979). The analysis in Cooey directs the outcome in this case because it specifically rejects the arguments Plaintiff makes to avoid the statute of limitations bar. The Court is also cognizant that two other circuits have followed the Sixth Circuit's reasoning in Cooey. Walker v. Epps, 550 F.3d 407, 411-412 (5th Cir. 2008); McNair v. Allen, 515 F.3d 1168 (11th Cir. 2008). For these reasons, the Court holds that Plaintiff's § 1983 lawsuit challenging the lethal injection protocol is barred by the statute of limitations.

B. Plaintiff was dilatory in filing suit

The State also contends that Plaintiff's lawsuit should be dismissed because Plaintiff was dilatory in bringing his constitutional challenge to the lethal injection protocol. The Court agrees. A section 1983 case "challenging the constitutionality of certain aspects of a state's execution does not 'entitle the complainant to an order staying [his] execution as a matter of course[,]'" Cooey, 479 F.3d at 421, and the State and the surviving victims of the crime have a strong interest in the timely enforcement of a death sentence. Thus, an inmate intending to assert such a constitutional challenge must file suit in sufficient time to allow consideration of the merits without requiring entry of a stay. Id. The Supreme Court has made clear that federal courts can and should protect States from dilatory or speculative suits. Id. (discussing Hill v. McDonough,547 U.S. 573 (2006) and Nelson v. Campbell, 541 U.S. 637 (2004)).

Plaintiff did not file this suit until November 26, 2008, only seventy (70) days prior to his scheduled execution, and more than one year after June 2007, when the most recent changes to the protocol went into effect. Plaintiff filed suit over eighteen (18) years after his direct appeal was final; over eight and one-half (8 ½) years after lethal injection became Tennessee's presumptive method of execution; over three (3) years after the Tennessee Supreme Court upheld the three-drug lethal injection protocol as constitutional, Abdur'Rahman v. Bredesen, 181 S.W.3d 292 (Tenn. 2005); over two (2) years after the Supreme Court ruled that an inmate may challenge his method of execution by a § 1983 action, Hill v. McDonough, — U.S. —, 126 S.Ct. 2096 (2006); and over one and one-half (1 ½) years after the Sixth Circuit's definitive ruling in Cooey. Cooey clarified (1) that the accrual date for the statute of limitations in an action challenging the method of execution is the date that direct review ends, adjusted by the date lethal injection was adopted or the date lethal injection became the exclusive or presumptive method of execution, and (2) the fatality of delaying an action beyond the applicable statute of

limitations. Plaintiff's suit also was filed more than one (1) year after the filing of Harbison v. Little and Payne v. Little, No. 3:07-0714 (M.D. Tenn.), both of which also challenge the constitutionality of the same three-drug lethal injection protocol. These delays by Plaintiff are inexcusable and cannot be justified under controlling law. See Cooey, 479 F.3d at 420-422; Workman, 486 F.3d at 911-913; Alley, 181 Fed.Appx. at 513. The basis for Plaintiff's challenge has been apparent for a number of years.

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.

Plaintiff has had ample time to bring his constitutional challenge to the lethal injection protocol. Because he delayed in filing his lawsuit until seventy (70) days before his execution, the Court concludes under Cooey, Workman, and Alley that Plaintiff was dilatory and that his complaint must be dismissed on this basis as well.

Because the Court rests its decision to dismiss the complaint on the statute of limitations and Plaintiff's dilatory filing, the Court cannot, and need not, reach the merits of Plaintiff's § 1983 claims.

IV. CONCLUSION

For all of the reasons stated, the Court will grant the State's motion to dismiss and Plaintiff's claims will be dismissed with prejudice under Rule 12(b)(6). The Court will also deny as moot all other outstanding motions, including Plaintiff's motion for summary judgment.

An appropriate Order will be entered.

ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX G

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 09-5084

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

Before: SILER, COLE, and COOK, Circuit Judges.

PER CURIAM. Petitioner Steve Henley moves this Court for a stay of his execution scheduled for February 4, 2009, pending the Court's disposition of *Harbison v. Little*, No. 07-6225 (6th Cir. filed Oct. 5, 2007), which presents a similar challenge to the constitutionality of Tennessee's three-drug lethal injection protocol. The district court dismissed Henley's case as barred by the applicable statute of limitations. We agree, decline to stay Henley's execution, and dismiss his appeal.

The district court correctly held that *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007) is the law of this Circuit. Under *Cooey*, an inmate's § 1983 cause of action accrues upon the conclusion of direct review in state court or at the expiration of time for seeking such review. *Id.* at 421-22. Henley petitioned for Supreme Court review, which was denied in June 1990. Under *Cooey*,

however, the accrual date must be adjusted if an inmate could not have discovered the "injury"—here, the method of execution—until a later date. *Id.* at 422. Tennessee adopted lethal injection as its presumptive method of execution on March 30, 2000 and the district court viewed March 30, 2001 as the date Henley's right to bring this action expired. Henley clearly missed this deadline.

Alternatively, construing all the relevant dates in the way most favorable to Henley, the very latest his cause of action could have accrued was June 2007, when Tennessee revised its lethal injection protocol. But Henley did not file suit until November 26, 2008. Thus, he missed even this June 2008 expiration date by several months.

The cause of action being stale when brought, the district court correctly dismissed it, and we affirm that dismissal.

APPENDIX H

State of Tennessee)
)
County of Davidson)

AFFIDAVIT OF HENRY A. MARTIN

I, Henry A. Martin, being of lawful age, swear as follows:

1. I am the Federal Public Defender for the Middle District of Tennessee. I have served in that capacity for 23 years.

2. My office is a Federal Public Defender Organization which receives all of its funding from the Criminal Justice Act Appropriation. We are not authorized to receive any funding from any private sources or grants, unlike Federal Community Defender Organizations, which are primarily funded by grants under the Criminal Justice Act, but may receive funds from private sources as well.

3. My office has both a Criminal Defense Unit and a Capital Habeas Unit. All of the lawyers in my office are assigned cases based on an appointment order from the Court.

4. Our capital habeas clients are received into the office by appointment orders from the United States District Court pursuant to 18 U.S.C. §§ 3006A and 3599. The lawyers in my office are not allowed to appear in any case absent an appointment order from the court.

5. Every lawyer in my office is subject to the Federal Public Defender Code of Conduct. The Code of Conduct is prescribed by the Judicial Conference of the United States. The Code of Conduct, which does not apply to Community Defender Organizations, is available online at: http://jnet.ao.dcn/Guide/Volume_2/Chapter_2/Part_B.html.

6. The Criminal Justice Act, 18 U.S.C. § 3006A, and the Federal Defender Code of Conduct prohibit any lawyer in my office from engaging in the private practice of law. The private practice of law encompasses any appearance on behalf of a client which is not permitted under the terms of the appointment order from the court.

7. It has come to my attention that a view was expressed in oral argument in the case of Harbison v. Bell, that federally appointed attorneys, including federal defenders, would provide representation for their clients in state clemency proceedings, even without such representation being authorized under 18 U.S.C. § 3599 pursuant to their ethical duties as lawyers.

8. This view, however, is in conflict with the Code of Conduct which defines the limits of our representation.

Further affiant saith not.

Henry A. Martin
Federal Public Defender
Middle District of Tennessee

Subscribed to and sworn before me this 2nd day of February, 2009, in Nashville, Tennessee.

Notary Public

CHRIS F. ARMSTRONG
STATE OF TENNESSEE
NOTARY PUBLIC
DAVIDSON COUNTY, TN

My commission expires: January 7, 2013

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct electronic version of the above and foregoing Appendix to Application for Stay of Execution was served on opposing counsel on February 3, 2009, via email to:

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February 3, 2009