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

BRIEF OF APPELLEES

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DESIGNATION OF CORPORATE AFFILIATIONS

Because Appellees are officials and employees of the State of Tennessee, no corporate affiliate/financial interest disclosure statement is required. Fed.R.Civ.P. 26.1 and 6 Cir. R. 26.1(a).

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed.R.App.P. 34(a) and Rule 34(a) of the Rules of the Sixth Circuit, the appellees respectfully submit that this appeal is one which is suitable for disposition without oral argument. The facts and arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Wherefore, the appellees respectfully waive oral argument.

JURISDICTIONAL STATEMENT

This is a civil rights action brought by an inmate plaintiff, Steve Henley under 42 U.S.C. § 1983. (R. 1, Complaint). Henley's complaint was dismissed. (R. 21, Order). Henley timely filed a notice of appeal. (R. 22). Appellate jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court properly dismissed Henley's complaint as barred by the statute of limitations.

2. Whether the district court properly dismissed Henley's complaint because he was dilatory in filing suit.

3. Whether Henley was entitled to judgment in his favor when *Baze v. Rees* demonstrates the constitutionality of Tennessee's lethal injection protocol as a matter of law.

STATEMENT OF THE CASE AND FACTS

A. Criminal Proceedings.

The plaintiff-appellant in this action, Steve Henley, is a condemned inmate residing at Riverbend Maximum Security Institution, (Riverbend), in Nashville, Davidson County, Tennessee. (R. 1, Complaint). 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).

B. Section 1983 Proceedings.

Henley filed his complaint under 42 U.S.C. § 1983 against George Little, the commissioner of the Tennessee Department of Correction, and Ricky Bell, the warden of Riverbend Maximum Security Institution, in the district court

on November 26, 2008. (R. 1, Complaint). Henley contended that the protocol to be used in executing him violates 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). Specifically, Henley contended that the sodium thiopental, used in the execution process to anesthetize the condemned inmate, is not properly mixed or administered and the persons responsible for mixing and administering it are not qualified or adequately trained to do so. (R. 1, Complaint, pp. 6-7, 9-11). He further asserted that the protocol does not require monitoring of anesthetic depth to ensure unconsciousness prior to the administration of the pancuronium bromide and potassium chloride. (R, 1, Complaint, p. 11). And he asserted that the protocol's use of pancuronium bromide and potassium chloride is unconstitutional because it may result in a "gruesome and horrible" death if the condemned inmate is not sufficiently anesthetized. (R. 1, Complaint, pp. 11-14). Henley 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), to which Henley responded (R. 10, Plaintiff's Response to Motion to Dismiss). Henley also filed a motion for summary judgment. (R. 11, Motion for Summary Judgment). The defendants filed a response in opposition to the motion for summary judgment. (R. 16, Response in Opposition to Motion for Summary Judgment). On January 16, 2009, the district court entered an Order directing 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). Both Henley and the defendants filed briefs responsive to the district court's Order to show cause. (R. 17, Response of Defendants George Little and Ricky Bell to Order to Show Cause; R. 18, Plaintiff's Response to Order to Show Cause).

The district court entered its Order granting the motion to dismiss on behalf of the defendants, denying all other pending motions as moot, and dismissing the case with prejudice, on January 26, 2009. (R. 21, Order). The district court held that its decision was controlled by the Sixth Circuit precedent 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), and rejected Henley's Article III arguments to avoid the statute of limitations bar. (R. 20, Memorandum, pp. 4-8). The district court further held, under the authority of *Cooey v. Strickland*, *supra*, *Workman v.*

Bredesen, 486 F.3d 896 (6th Cir. 2007), and *Alley v. Little*, 181 Fed. Appx. 509 (6th Cir. 2006), that Henley was dilatory in filing his complaint, and the court dismissed his complaint on that basis as well. (R. 20, Memorandum, pp. 9-10). The district court did not reach the merits of Henley's § 1983 claims because it rested its decision to dismiss the complaint on the statute of limitations and dilatory filing. (R. 20, Memorandum, p. 11). This appeal followed.

SUMMARY OF ARGUMENT

The district court's dismissal of the complaint as barred by the statute of limitations was required under the authority of *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007). 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. Henley's "method-of-execution" challenge accrued no later than March 30, 2000, when lethal injection became Tennessee's presumptive method of execution. 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.

Henley was dilatory in filing his complaint a mere 70 days before his scheduled execution. Since Henley's "method-of-execution" challenge accrued in March 2000, he had abundant opportunities to challenge the lethal-injection protocol well before November 26, 2008. He was on notice as to both the particulars of the protocol and the availability of making a claim such as the one he now raises for several years before he filed his last minute complaint.

The district court properly denied Henley's summary judgment motion as moot. In any event, the United States Supreme Court's opinion in *Baze v. Rees*, __ U.S. __, 128 S.Ct. 1520 (2008), demonstrates that Henley is not entitled to judgment in his favor. *Baze* held that Kentucky's lethal injection protocol did not

create a substantial risk of severe pain and thus did not violate the Eighth Amendment, and that a State with a lethal injection protocol substantially similar to Kentucky's would likewise not create a substantial risk of severe pain and thus would also not violate the Eighth Amendment. 128 S.Ct. at 1537. Tennessee's is just such a protocol.

STANDARD OF REVIEW

A district court's dismissal of a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed *de novo*. *Prater v. City of Burnside, Kentucky*, 289 F.3d 417, 424 (6th Cir. 2002).

ARGUMENT

I. HENLEY'S COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS.

Nearly twenty years have passed since the Tennessee Supreme Court and the United States Supreme Court affirmed Henley's convictions for first degree murder and his consequent death sentence. *See State v. Henley,* 774 S.W.2d 908 (Tenn. 1989), *cert. denied*, *Henley v. Tennessee*, 497 U.S. 1031, 110 S.Ct. 3291, 111 L.Ed.2d 800 (1990). Nearly nine years have passed since the state law was enacted providing for Henley's sentence to be carried out by lethal injection. Accordingly, Henley's suit is time-barred. This is underscored by the fact that two other circuits have followed this Court's reasoning in *Cooey.* *See Walker v. Epps*, 550 F.3d 407, 411-412 (5th Cir. 2008), and *McNair v. Allen*, 515 F.3d 1168 (11th Cir. 2008).

In *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007)[1], this 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

[1]A Petition for Rehearing en banc was denied by the Sixth Circuit on June 1, 2007. *Cooey v. Strickland*, 489 F.3d 775 (6th Cir. 2007). Certiorari was denied by the United States Supreme Court on April 21, 2008. *Biros v. Strickland*, ___ U.S. ___, 128 S.Ct. 2047, 170 L.Ed.2d 796 (2008).

review, including review by the United States Supreme Court. *Cooey*, 479 F.3d at 422. Cooey concluded the direct appeal of his conviction on April 1, 1991. *Cooey*, 479 F.3d at 414. Lethal injection became available as a means of execution in Ohio in 1993 and the sole method of execution in Ohio in 2001. *Cooey*, 479 F.3d at 417. Cooey's original execution date was July 24, 2003. *Cooey*, 479 F.3d at 414. Cooey filed suit challenging Ohio's lethal injection protocol on December 8, 2004. *Cooey*, 479 F.3d at 415. Based on these facts, this Court concluded:

> [U]nder this standard, Cooey's claim would have accrued in 1991, after the United States Supreme Court denied direct review. However, Ohio did not adopt lethal injection until 1993, or make it the exclusive method of execution until 2001, so the accrual date must be adjusted because Cooey obviously could not have discovered the "injury" until one of those two dates. We need not pinpoint the accrual date in this case, however, because even under the later date, 2001, Cooey's claim exceeds the two-year statute of limitations deadline because his claim was not filed until December 8, 2004.

Cooey, 479 F.3d at 422. Thus, the accrual date for a challenge to a state's lethal injection procedures is no later than the date on which state law provided that the prisoner be executed by lethal injection. *Cooey*, 479 F.3d at 422 ("[t]he test is whether he knew or should have known based upon reasonable inquiry, and could have filed suit and obtained relief").

The holding in *Cooey* was reiterated in *Cooey v Strickland*, 544 F.3d 588, (6th Cir. 2008), *cert. denied*, ___ S.Ct. ___, 2008 WL 4551401 (2008)

wherein Cooey filed a second § 1983 action purportedly raising "new" claims regarding his execution under Ohio's lethal injection protocol. This Court found that the district court properly dismissed Cooey's second challenge as time-barred under its construction of the statute of limitations for such § 1983 claims established in "*Cooey II*, 479 F.3d 412." *Cooey*, 544 F.3d at 589.

Under Tennessee law, civil actions for compensatory or punitive damages, or both, 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). This Court has held that this one-year statute of limitation applies to suits for injunctive relief under § 1983. *See Cox v. Shelby State Community College*, 48 Fed.Appx. 500, 507, 2002 WL 31119695 (6th Cir. 2002)(copy attached).

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.

Henley contended in his complaint filed in the district court that he did not have standing and a ripe justiciable dispute until October 20, 2008, when the Tennessee Supreme Court set a February 4, 2009, execution date, thereby placing Henley in threat of imminent harm. (Document No. 1, Complaint, p. 4). But *Cooey*, 479 F.3d 412, holds to the contrary:

> In *Alley[v. Little*, 186 Fed.Appx. 604 (6th Cir.2006)], a Tennessee inmate also argued that his § 1983 claim challenging Tennessee's lethal injection protocol was not ripe until an execution date was imminent. In rejecting this argument we stated:
>
> Alley's brief cites *Stewart v. Martinez-Villareal* as prohibiting courts from considering challenges such as the one in our case before a petitioner's execution reaches imminence. We reject this reading of this precedent. In that case, unlike in ours, the defendant's claim under *Ford v. Wainwright* had originally been dismissed without prejudice. The Supreme Court's ruling merely allowed the claim to proceed in a habeas petition at a later date. The Court noted that the lower courts had specifically left open the possibility that the defendant's *Ford* claim could proceed in a future filing. No such procedural history informs the posture of the § 1983 claim in our case. Moreover, we note that claims involving mental competency are inherently different from the § 1983 petition before us in at least one respect: mental competency is subject to variance over time. It is indeed possible that last-minute first-instance *Ford* petitions could be justified by a change in a defendant's mental health.

Cooey, 479 F.3d at 423 (citations omitted). Thus, the imminence of the execution has no bearing on when Henley's § 1983 action accrued; the date of the Order setting the execution is not the date his § 1983 action accrued. *See* R. 20, Memorandum Opinion, p. 7 ("*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.").

Despite the controlling authority of *Cooey*, Henley argues in his brief that his § 1983 claim was not ripe under Article III until the Tennessee Supreme Court set his execution date for February 4, 2009, by its order of October 20, 2008. (Brief of Appellant, p. 18). He argues that *Cooey* does not mandate that his complaint is barred by the statute of limitations because it did not address Article III standing. (Brief of Appellant, p. 21). He argues that his claim was not ripe under § 1983 while he was pursuing remedies that could avoid the execution altogether. (Brief of Appellant, pp. 22-23). However, as noted by the district court:

> *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 nevers 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).

(R. 20, Memorandum of the Court, p. 7) (emphasis in original).

As the district court properly concluded, the decisions in *Cooey II*, 479 F.3d 412, and in *Cooey*, 544 F.3d 588, compel the conclusion that Henley's challenge to Tennessee's three-drug protocol is barred by the statute of limitations.

II. HENLEY WAS DILATORY IN FILING HIS COMPLAINT SEEKING EQUITABLE RELIEF.

Henley filed his complaint on November 26, 2008 — a mere 70 days prior to his scheduled execution. He had abundant opportunities to challenge the lethal injection protocol well before that. Delays in bringing challenges to execution protocols are inexcusable. In *McQueen v. Patton*, 118 F.3d 460, 464 (6th Cir. 1997), this Court addressed the equity of allowing a dilatory challenge:

> Even were we to consider the merits of McQueen's claim, we would not permit his claim that death by electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Petitioner has known of the possibility of execution for over fifteen years. It has been ten years since a Kentucky governor first signed a death warrant for his electrocution. The legal bases of such a challenge have been apparent for many years. Indeed, petitioner's claims on the merits are replete with supporting arguments based on events and reasoning from every decade from the 1910s to the 1990s, even discounting the material cited to "Startling Detective" and "News of the Weird" (Memo in Support of Motion for Temporary Restraining Order and Preliminary Injunction, at 31, n.87 and App. 2, n.6.).

> Even though, in petitioner's mind, every year or every day may bring new support for his arguments, the claims themselves have long been available, and have needlessly and inexcusably been withheld. Thus, equity would not permit the consideration of this claim for that reason alone, even if jurisdiction were otherwise proper.

(Citations omitted). Likewise, in *Hicks v. Taft*, 431 F.3d 916 (6th Cir. 2005), this Court concluded that a stay of execution was not warranted where an inmate, on the eve of his execution, moved to intervene in another inmate's challenge to the constitutionality of Ohio's lethal injection protocol. *See also Smith v. Johnson*, 440 F.3d 262, 263 (5th Cir. 2006) (affirming dismissal of § 1983 action challenging lethal injection procedures due to plaintiff's dilatory filing, *i.e.*, five days before the execution); *accord Kincy v. Livingston*, 173 Fed.Appx. 341, 2006 WL 775126 (5th Cir. Mar. 27, 2006) (copy attached) (twenty-seven days before the execution); *Hughes v. Johnson*, 170 Fed.Appx. 878, 2006 WL 637906 (5th Cir. Mar. 14, 2006) (copy attached) (fourteen days before the execution).

More recently, in *Workman v. Bredesen*, 486 F.3d 896 (6th Cir. 2007), this Court addressed the issue of dilatory challenges to the State's "new" lethal-injection protocol. This 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). This Court noted that Workman's conviction became final on direct review in 1984 and that the state court denied his petition for post-conviction relief in 1993. The Tennessee legislature enacted the lethal-injection protocol as a method of execution in 1998, and in 2000 deemed it the presumptive method for all executions. The Tennessee Supreme Court upheld the lethal-injection protocol in *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005), *cert. denied*, 126 S.Ct. 2288, 164 L.Ed.2d 813 (2006). *Workman*, 486 F.3d at 912. "By 2000, Workman had completed his state and federal direct and (initial) collateral attacks on his sentence, and he faced the prospect of imminent execution by lethal injection." *Id*. "By any measurable standard, Workman has had ample time to challenge the procedure." *Id.*

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 likewise vacated an injunction and stay entered by the district court against the execution of the death sentence of Sedley Alley, a condemned Tennessee inmate. Among other things, this Court based its decision on the unnecessary delay with which Alley had brought his challenge to the lethal-injection protocol.

> Fourth, we take note of the unnecessary delay with which Alley brought his challenge to Tennessee's lethal injection protocol. He was on notice as to both the particulars of the protocol and the availability of making a claim such as the one he now raises for several years before he filed his last minute complaint. Another Tennessee death row inmate, Abu-Ali Abdur'Rahman, petitioned the state Commissioner of Correction to declare the lethal injection protocol unconstitutional in April 2002. *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 299-300 (Tenn. 2005). Alley's execution date was set on January 16, 2004, for June 3rd of that year, following the Supreme Court's denial of a writ of certiorari to review our court's decision not to grant habeas relief. *Alley v. Bell,* 540 U.S. 839, 124 S.Ct. 99, 157 L.Ed.2d 72 (2003); *State v. Alley*, No. M1991-00019-SC-DPE-DD (Tenn. Jan. 16, 2004). Lethal injection has been the only method of execution in Tennessee since 2000 for all death row inmates save those who affirmatively express a preference for electrocution. Tenn. Code Ann. § 40-23-114. Alley had ample time in which to express such a preference and/or file his current grievance. Instead he waited until thirty-six days before his currently scheduled execution date.

Id. at 513. Thus, this 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. *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 on 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 justifiably 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).

Henley argues that *Workman* and *Alley* are distinguishable because in those cases the plaintiffs had faced earlier execution dates and failed to challenge the protocol. He points out that they did not file their suits upon the setting of their first execution date following conclusion of initial habeas proceedings, but he has done so. (Brief of Appellant, pp. 25-26). However, a review of *Workman* and *Alley* shows that those cases did not rise or fall on the number of times the plaintiff's execution had been set, but on when the plaintiff had notice of the particulars of the protocol and the availability of their claims. *Workman*, 486 F.3d at 911; *Alley*, 181 Fed. Appx. at 513. And, as noted by the district court:

> Henley filed 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 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.

(R. 20, Memorandum of the Court, p. 9-10).

Henley also argues that the defendants cannot prove "prejudice" resulting from a delay of his execution. (Brief of Appellant, p. 24-25). However, this argument is contrary to the prior rulings of this Court. The defendants have been prejudiced by the delay. In the normal course of events, the defendants would have much longer than 70 days in which to prepare a case of this constitutional magnitude for trial on the merits. As this Court noted in *Workman*:

> Even had Workman filed this challenge on January 17, 2007, that still would have been "too late in the day," *Hill v. McDonough* , ___ U.S. ___ , 126 S.Ct. 2096, 2104, 165 L.Ed.2d 44 (2006), to allow the trial and appellate courts to reach the merits of any subsequent challenge. *See Jones,* 485 F.3d at 639-40 n. 2 ("[A]djudicating Jones's [lethal-injection-protocol] claim would take much more than three months and ... a subsequent appeal would add months, if not years, to this litigation.")

> (internal quotation marks omitted); *Harris v. Johnson,* 376 F.3d 414, 417 (5th Cir.2004) (*"The brief window of time between the denial of certiorari and the state's chosen execution date - in this case, four months - is an insufficient period in which to serve a complaint, conduct discovery, depose experts, and litigate the issue on the merits."*). He thus cannot revive a dilatory action when the only concrete challenges to the new procedure were features of the old procedure.

486 F.3d at 911 (emphasis added).

More importantly, the ultimate prejudice resulting from Henley's dilatory tactics is the harm to 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 v. Bell*, 484 F.3d 837, 842 (6th Cir. 2007) (emphasis added). Furthermore, "the *victims of crime* have an important interest in the timely enforcement of a sentence," *Hill v. McDonough*, 126 S.Ct. 2096, 2104, 165 L.Ed.2d 44 (2006) (emphasis added). 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, 118 S.Ct. 1489, 1501, 140 L.Ed.2d 728 (1998) "The State and the surviving victims have waited long enough for some closure." *Jones v. Allen,* 485 F.3d 635, 641 (11th Cir. 2007).

Under the authority of *Workman* and *Alley*, Henley has been dilatory in filing his complaint without any justification other than delaying his execution; therefore, Henley's action was properly dismissed, and the district court should be affirmed.

III. HENLEY WAS NOT ENTITLED TO JUDGMENT IN HIS FAVOR BECAUSE *BAZE V. REES* DEMONSTRATES THE CONSTITUTIONALITY OF TENNESSEE'S LETHAL INJECTION PROTOCOL AS A MATTER OF LAW.

Henley cites the decision in *Harbison v. Little*, 511 F.Supp.2d 872 (M.D. Tenn. 2007), as grounds for holding that Tennessee's Lethal Injection Protocol is unconstitutional. (R 1, Complaint, pp. 1-2, 18). As discussed above, Henley's complaint was properly dismissed as untimely and dilatory. Accordingly, his summary judgment motion was properly dismissed as moot. But in any event, the recent decision of the Supreme Court in *Baze v. Rees*, ___ U.S. ___,128 S.Ct. 1520 (2008), demonstrates that the district court in *Harbison* erred in granting relief on the complaint challenging Tennessee's lethal injection protocol. Moreover, *Harbison* no longer has any significance since it was decided prior to, and thus without the benefit of, the decision in *Baze*.

In *Baze,* two Kentucky death row inmates challenged the constitutionality under the Eighth Amendment of that state's lethal injection protocol. Kentucky's protocol calls for administration of the same three drugs as

does Tennessee's, namely, sodium thiopental, pancuronium bromide, and potassium chloride. *Id.*, 128 S.Ct. at 1527. While the inmates in *Baze* acknowledged that proper administration of the first drug, sodium thiopental, eliminates any meaningful risk that a prisoner would experience pain, they claimed that, under the Kentucky protocol, the sodium thiopental would not be properly administered to achieve its intended result. They further claimed that this risk of harm could be eliminated by adopting a one-drug protocol or by additional monitoring by trained personnel to ensure proper administration of the first drug. *Id.*, 128 S.Ct. at 1530, 1531.

The Court held that, in order to meet their "heavy burden" of showing that Kentucky's protocol is "cruelly inhumane" and thus violates the Eighth Amendment, the inmates needed to demonstrate that the protocol creates a "substantial risk of serious harm." *Id.*, 128 S.Ct. at 1531, 1532. Noting that the inmates' claim hinged on the risk of improper administration of sodium thiopental, the Court reviewed the "numerous aspects of the [Kentucky] protocol that [the inmates] contend create opportunities for error" and held that the inmates "ha[d] not shown that the risk of an inadequate dose of the first drug is substantial." *Id.*, 128 S.Ct. at 1533. Accordingly, the Court rejected the argument that the Eighth Amendment required Kentucky to adopt the "untested" one-drug protocol. *Id.* As to the task this Court now confronts — that of applying the opinion in *Baze* to

Henley's challenge to Tennessee's protocol — the Supreme Court further held that "[a] State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets [the 'substantial risk'] standard." *Id.*, 128 S.Ct. at 1537. Tennessee's is just such a protocol — its provisions are at least substantially similar to Kentucky's and in many instances are exactly the same as, if not better than, Kentucky's.

A. Tennessee's Lethal Injection Protocol is Substantially Similar to the Kentucky Protocol Upheld in *Baze*.

The very first indicator of the substantial similarity between Kentucky's and Tennessee's protocols is the substantial similarity between the nature of the claims made against the Kentucky protocol by the inmates in *Baze* and the nature of the claims made against the Tennessee protocol by Henley. Indeed, Henley's challenge likewise hinges on the alleged risk of improper administration of the sodium thiopental and the consequent failure sufficiently to anesthetize him. (R. 1, Complaint, p. 7 (¶30); pp. 10-11 (¶¶52-58).

Like Henley, the inmates in *Baze* claimed a risk of improper administration of thiopental because the state employs personnel who are untrained in mixing the proper dosage of thiopental and loading it into syringes. *Id.*, 128 S.Ct. at 1533. (R. 1, Complaint, p. 7 (¶30). But the Supreme Court accepted the trial court's finding that adherence to the manufacturer's instructions would create a

minimal risk of improper mixing, noting the expert testimony that it was not difficult to do. *Baze*, 128 S.Ct., at 1533. *Cf.* R. 14, Exhibit 5, *Harbison* Transcript Vol. IV, p. 471 (Michael Higgins, M.D., court-appointed expert described mixing of thiopental as "fairly straightforward").[2] Members of the Tennessee execution team likewise rely on the thiopental manufacturer's instructions, *see* R. 14, Exhibit 2, *Harbison* Transcript Vol. I, p. 185 (testimony of Executioner B); R. 14, Exhibit 3, *Harbison* Transcript Vol. II, p. 303 (Testimony of Executioner A/IV Team Member C), but the protocol itself also provides instructions for preparation of the thiopental. *See* R. 9, Exhibit: Tennessee Execution Procedures for Lethal Injection, p. 38. Moreover, while Kentucky's protocol *lacks* volume and concentration amounts for the drug, *see Baze*, 128 S.Ct., at 1533, Tennessee's protocol specifies this information. *See* Tennessee Execution Procedures for Lethal Injection, pp. 38, 44.

Like Henley, the inmates in *Baze* also claimed a risk of improper administration of thiopental because of possible catheter infiltration into surrounding tissue and possible IV-line failure. *Baze*, 128 S.Ct. at 1533. (R. 1, Complaint, p. 11, (¶52) incorporating by reference *Harbison*, 511 F.Supp.2d at

[2]"It was just a matter of doing the insertion of the syringe into the sterile water and injecting it into the powder for the sodium pentothal." (R. 14, Exhibit 2, *Harbison* Transcript Vol. I, p. 105 (Testimony of Ricky Bell)).

884-886, 891-892). The Supreme Court, however, found that the asserted problems related to the IV lines did not establish a sufficiently substantial risk of harm, due to the safeguards in the Kentucky protocol designed to ensure that an adequate dose of sodium thiopental is delivered. *Baze*, 128 S.Ct. at 1533. Tennessee's protocol contains either the same, or substantially similar, safeguards. *See Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir.), *cert. denied*, 127 S.Ct. 2160 (2007) ("[T]he State has extensive procedures in place to prevent [a mistake in the implementation of its 'pain avoidance' procedure]."). As was the case with the Kentucky protocol, therefore, and "in light of these safeguards, [it cannot be said] that the risks identified by [plaintiff] are so substantial or imminent as to amount to an Eighth Amendment violation." *Baze*, 128 S.Ct. at 1534.

First, and "most significant[ly]," the Kentucky protocol requires that members of the IV team be certified medical assistants, phlebotomists, EMTs, paramedics, or military corpsmen, with at least one year of professional experience. The Court noted that Kentucky currently uses a phlebotomist and an EMT — "personnel who have daily experience establishing IV catheters." *Baze*, 128 S.Ct. at 1533. Under the Tennessee protocol, the IV team consists of three members, and the protocol likewise requires that two of the three (the two with responsibility for inserting the IV catheters) be either paramedics or certified emergency medical technicians. *See* R. 9, Exhibit: Tennessee Execution

Procedures for Lethal Injection, p. 32; R. 14, Exhibit 2, *Harbison* Transcript, Vol. 1, pp. 100-101, 103, 164 (Testimony of Ricky Bell).[3] Tennessee currently uses two paramedics who have nineteen and fourteen years of professional experience, respectively, and who have daily experience establishing IV catheters, often under difficult circumstances. R. 14, Exhibit 3, *Harbison* Transcript, Vol. II, pp. 348, 360-61 (Testimony of IV Team Member A; R. 14, Exhibit 5, *Harbison* Transcript, Vol. IV, pp. 374, 390 (Testimony of IV Team Member B). As the Supreme Court observed with respect to the Kentucky IV team, the qualifications of the Tennessee IV team "substantially reduce the risk of IV infiltration." *Baze*, 128 S.Ct., at 1534. *See Workman*, 486 F.3d, at 910 ("The [Tennessee] protocol also calls for certification and training requirements that reduce the risk of error in administering the drugs.").

Second, and "[m]oreover," the Kentucky protocol requires that the "IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year." *Id.*, 128 S.Ct. at 1534. "These sessions, . . .

[3]The protocol calls for the third member of the IV Team (who does not perform catheter insertion) to be a corrections officer who has received IV training through the Tennessee Correction Academy by qualified medical professionals. (*Id.*) *See* R. 14, Exhibit 3, *Harbison* Transcript, Vol. II, pp. 315-16 (testimony of Executioner A/IV Team Member C). The protocol also includes specific provisions for IV-line setup, catheter insertion, and connection of the IV lines. *See* R. 9, Exhibit: Tennessee Execution Procedures for Lethal Injection, pp. 40-42.

encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers." *Id*. The Tennessee protocol also requires that the IV team, along with the rest of the execution team, participate in monthly practice sessions, which likewise encompass a complete simulation of all steps of the execution process, including the siting of IV catheters into volunteers. (R. 9, Exhibit: Tennessee Execution Procedures for Lethal Injection, pp. 33, 50; R. 14, Exhibit 2, *Harbison* Transcript, Vol. I, pp. 112-113, 142-143 (Testimony of Ricky Bell); R. 14, Exhibit 2, *Harbison* Transcript, Vol. I, pp. 216 (Testimony of Executioner B)).

Third, the Kentucky protocol "calls for the IV team to establish both primary and backup lines and to prepare two sets of the lethal injection drugs before the execution commences." *Baze*, 128 S.Ct. at 1534. "These redundant procedures ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected." *Id*. The Tennessee protocol likewise calls for the IV team first to establish a primary IV line on the inmate's right side and, "[w]hen the IV Team is confident that there is a well-functioning line," then to establish a second IV line on the inmate's left side. Tennessee Execution Procedures for Lethal Injection, pp. 41-42. The Tennessee protocol also calls for the preparation of "two complete sets" of the lethal injection drugs before

the execution commences; "[o]ne set is color coded red and the back-up set is color coded blue." Tennessee Execution Procedures for Lethal Injection, p. 38. And as one member of the protocol committee observed, the protocol includes "specific instruction on what to do if during the process of the execution using one point of access, we encounter a problem with access and we switch to the other access point; that they are able to begin with the first drug again." (R. 14, Exhibit 4, *Harbison* Transcript, Vol. III, p. 598 (Testimony of Debbie Inglis)). *See* R. 9, Exhibit: Tennessee Execution Procedures for Lethal Injection, p. 44.

Finally, the Court noted "the presence of the warden and deputy warden in the execution chamber with the prisoner" under the Kentucky protocol, which "allows them to watch for signs of IV problems, including infiltration." *Baze*, 128 S.Ct., at 1534. The Tennessee protocol likewise calls for the warden to be present in the execution chamber with the prisoner. Tennessee Execution Procedures for Lethal Injection, pp. 64-65. *See* R. 14, Exhibit 8, Diagram of Capital Punishment Unit; R. 14, Exhibit 2, *Harbison* Transcript, Vol. I, p. 119 (Testimony of Ricky Bell).[4] While the Tennessee protocol does not specifically require the warden to redirect the flow of chemicals to the backup IV site if the

[4]Like the Kentucky protocol, the Tennessee protocol also calls for the deputy warden to be present in the execution chamber, but he would be situated across the room from the prisoner. The warden, however, is positioned next to the gurney, at the head of the prisoner. *Id.*

prisoner does not lose consciousness within a specified period, as Kentucky's does, the warden, who is positioned approximately twelve inches from the head of the inmate (R. 14, Exhibit 2, *Harbison* Transcript, Vol. I, p. 126 (Testimony of Ricky Bell)), is certainly in a position to do just that. *See* R. 14, Exhibit 2, *Harbison* Transcript, Vol. I, p. 214, 219 (Testimony of Executioner B that if the chemicals are not entering the vein, the executioner "absolutely" has the option of transferring to the second line, and during the execution process, the executioner is observing the warden for any signal to stop). Moreover, as alluded to above, the Tennessee protocol *does* specifically require the *executioner* to redirect the flow of chemicals to the second IV line, using the back-up set of syringes, if there is any indication, after pushing the first syringe of thiopental, that the drugs are not being properly delivered (*i.e.*, signs of swelling around the catheter site or resistance to the pressure being applied to the plunger). Tennessee Execution Procedures for Lethal Injection, p. 44.[5] Since the Tennessee protocol also specifically requires a

[5]Swelling or discoloration at the injection site means "there's a very strong possibility that you have a needle that has infiltrated." (R. 14, Exhibit 2, *Harbison* Transcript, Vol. I, p. 213 (Testimony of Executioner B); R. 14, Exhibit 3, Harbison Transcript, Vol. II, p. 324 (Testimony of Executioner A/IV Team member C)); *see also Baze*, 128 S.Ct., at 1534 (noting evidence that signs of infiltration would be "very obvious," because of the swelling that would result). During the actual administration of the chemicals, "[i]t's just a very gentle, even pressure on the syringe. And if you feel something change other than what you've had," there is

member of the execution team in the lethal injection room to monitor the catheter sites for swelling or discoloration (Tennessee Execution Procedures for Lethal Injection, p. 43),[6] this provision is not only substantially similar to Kentucky's, it seems an even *better* safeguard than Kentucky's for ensuring that an adequate dose of thiopental is delivered to the prisoner. *Cf. Baze*, 128 S.Ct., at 1537 (visual inspection of the IV site achieves the objective of determining whether the sodium thiopental has entered the inmate's bloodstream).

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cause for concern. (R. 14, Exhibit 2, *Harbison* Transcript, Vol. I, p. 213 (Testimony of Executioner B)).

[6]This monitoring is done both by observation through the one-way window and by means of a pan-tilt zoom camera and monitor. (R. 14, Exhibit 2, *Harbison* Transcript, Vol. I, pp. 198, 201, 220-221 (Testimony of Executioner B); R. 14, Exhibit 3, *Harbison* Transcript, Vol. II, p. 324 (Testimony of Executioner A/IV Team Member C)). The Tennessee protocol also specifically requires, *before* commencement of the execution and *before* the IV team leaves the execution chamber:

> All members of the IV Team monitor both catheters to ensure that there is no swelling around the catheter that could indicate that the catheter is not sufficiently inside the vein. The IV Team member in the Lethal Injection Room monitors the catheters by watching the monitor in his room which displays the exact location of the catheter(s) by means of a pan-tilt zoom camera. The IV Team Members observe the drip chambers in both lines to ensure a steady flow/drip into each Solution Set line.

(R. 9, Exhibit: Tennessee Execution Procedures for Lethal Injection, p. 43).

B. The Bases upon which the District Court in *Harbison v. Little* Invalidated the Tennessee Protocol were Rejected by the Supreme Court in *Baze*.

The district court in *Harbison* invalidated the Tennessee protocol under the Eighth Amendment, ruling that it "does not employ measures to ensure that [plaintiff] will be unconscious when the second and third drugs are administered." *Harbison*, 511 F.Supp.2d at 884. For the reasons discussed above, the Supreme Court decision in *Baze* effectively rejects that ruling. Indeed, two of the three bases upon which the district court invalidated the Tennessee protocol (failure to check for consciousness and failure to monitor administration of the drugs) were expressly rejected by the Supreme Court in *Baze*, and the third (inadequately trained executioners) impliedly so.[7]

First, the district court ruled that "the most glaring omission" in the Tennessee protocol was the failure to include a specific measure for checking consciousness. *Harbison*, 511 F.Supp.2d at 884. The district court pointed to the measures employed in California, like "talking to and gently shaking the inmate, as

[7]The Supreme Court also rejected yet another basis for the district court judgment in *Harbison* — Tennessee's failure to adopt a one-drug protocol. *See Baze*, 128 S.Ct., at 1535 (citing *Workman*, 486 F.3d, at 919) ("[T]he comparative efficacy of a one-drug method of execution is not so well established that Kentucky's failure to adopt it constitutes a violation of the Eighth Amendment."). But the district court relied on Tennessee's rejection of a one-drug protocol in support of its finding of "deliberate indifference" by Tennessee officials — not in support of its finding of a substantial risk of serious harm. 511 F.Supp.2d at 898.

well as lightly brushing the eyelash" as examples of the types of "reliable, but relatively uncomplicated methods for effectively assessing consciousness" that the Tennessee protocol should have included. *Harbison*, 511 F.Supp.2d at 885. Second, the district court faulted the Tennessee protocol for its reliance solely on *visual inspection* of the IV lines to ensure proper delivery of thiopental, noting that "[n]either the executioners nor anyone else palpates the injection site." 511 F. Supp.2d at 891.

But the Supreme Court expressly eschewed the "rough-and-ready tests for checking consciousness" (like "calling the inmate's name, brushing his eyelashes") that the district court insisted upon. *Baze*, 128 S.Ct. at 1536. In doing so, the Court rejected the inmates' contention (like that of Henley here)[8] that visual observation by the warden and deputy warden was insufficient, observing that "these tests are effective only in determining whether the sodium thiopental has entered the inmate's bloodstream" and that "visual inspection of the IV site . . . achieves that objective." *Id.*, 128 S.Ct. at 1536-1537. In this regard, the Court reemphasized "that a proper dose of thiopental obviates the concern that a prisoner will not be sufficiently sedated" and that "[t]he risks of failing to adopt additional

[8]Henley alleges that "[a]s a result of Defendants'. . . failure to monitor anesthetic depth, there is a substantial risk of serious harm. . . ." (R. 1, Complaint, p. 14, ¶85).

monitoring procedures are thus even more 'remote' and attenuated than the risks posed by the alleged inadequacies of [the] procedures designed to ensure the delivery of thiopental." *Id.*, 128 S.Ct. at 1536. *See Workman*, 486 F.3d at 910 (additional monitoring for unconsciousness is unnecessary; "[the] 5-gram dose [of sodium thiopental] reduces, if not completely eliminates any risk that [the inmate] would 'incur constitutionally excessive pain and suffering when he is executed.'"); *see also* R. 14, Exhibit 2, *Harbison* Transcript, Vol. I, p. 33 (Testimony of George Little that decision whether to add steps to monitor unconsciousness was influenced by knowledge that "5 grams was sufficient to sedate an individual").[9] The Supreme Court thus effectively vindicated the decision of Tennessee officials, criticized by the district court, to reject an additional check for consciousness and to rest on their determination that continuous visual observation by the warden (not to mention the ability of the executioners to watch the inmate through the one-way window and with a zoom camera) was sufficient to ensure proper delivery of the sodium thiopental. *See* R. 14, Exhibit 2, Harbison Transcript, Vol. I, p. 52 (Testimony of George Little: "I felt that the direct observation by the warden and

[9]The 5-gram dose of sodium thiopental under the Tennessee protocol, of course, *exceeds* the 3-gram dose under the Kentucky protocol. *See Baze*, 128 S.Ct. at 1528.

the execution team was sufficient to [ensure that the inmate was unconscious after administration of the first drug].").[10]

The final basis for the district court decision in *Harbison* — the failure to select adequately trained executioners — was at least impliedly rejected by the Supreme Court in *Baze*. The Court's focus on training requirements in the Kentucky protocol was limited to identifying the importance of both the regular practice sessions participated in by all members of the execution team and the professional experience of the members of the *IV team*. *See Baze*, 128 S.Ct. at 1533-1534. The district court, however, *minimized* the value of the Tennessee practice sessions (in which the executioners participate) because they involve only a complete walk-through of the execution procedures and the siting of IV catheters into volunteers. *Harbison*, 511 F.Supp.2d at 890.[11] The Supreme Court, of course, extolled the virtue of the Kentucky practice sessions precisely *because* they involve a complete walk-through of the execution procedures and the siting of IV catheters into volunteers. *See Baze*, 128 S.Ct. at 1534. And while the district court

[10]*See also* R. 14, Exhibit 2, *Harbison* Transcript, Vol.1, p. 90 (Testimony of Steve Elkins that additional measures "like plucking an eyebrow . . . didn't seem to add a lot of medical specificity to the process.").

[11]The district court found fault with the fact that "the executioners do not receive any instruction at the training sessions" and "do not troubleshoot potential problems that might occur, such as catheter infiltration, but simply practice performing their functions with saline solution." *Id.*

found fault with the level of IV training required of the executioners by the Tennessee protocol, and its purported impact on their visual inspection of the IV lines, *Harbison*, 511 F.Supp.2d at 888-89, it nonetheless remains the case that the executioners are required to, and do, have at least *some* IV training under the Tennessee protocol.[12] In contrast, the Supreme Court made no mention in *Baze* of *any* IV training being required of the Kentucky warden and deputy warden while pointing to their visual inspection of the IV lines as another important safeguard of the Kentucky protocol. *See Baze*, 128 S.Ct. at 1534.

The foregoing demonstrates the substantial similarity between the Kentucky protocol upheld in *Baze* and Tennessee's protocol. Despite the erroneous holding in *Harbison*, the Tennessee lethal injection protocol does "not create a risk that meets [the 'substantial risk'] standard." *See Baze*, 128 S.Ct. at 1537. Therefore, Henley was not entitled to judgment in his favor.

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[12]Under the Tennessee protocol, the executioners are correction officers who have "[r]eceived IV training through the Tennessee Correction Academy by qualified medical professionals." (R. 9, Exhibit: Execution Procedures for Lethal Injection, p. 32; R. 14, Exhibit 2, *Harbison* Transcript, Vol. I, p. 203 (Testimony of Executioner B); R. 14, Exhibit 3, *Harbison* Transcript, Vol. II, pp. 315-16 (Testimony of Executioner A/IV Team Member C); R. 14, Exhibit 3, *Harbison* Transcript, Vol. II, p. 342 (Testimony of Executioner C)).

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

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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