



while plaintiff's assertion that "the Sixth Circuit has assumed that [he] can proceed under § 1983" may not be inaccurate, it is misleading; the court so assumed merely for the sake of argument in the course of granting defendants' motion to vacate the preliminary injunction and stay of execution issued by this Court on the basis of the pendency of *Hill* on May 11, 2006. *See Alley v. Little*, No. 06-5650, slip op., p. 4 (6th Cir. May 12, 2006) ("regardless of a prediction as to the outcome in *Hill*, we will, *arguendo*, treat Alley's action as a properly filed § 1983 claim"). The Sixth Circuit *did not* say, as plaintiff intimates, that it *believes* or *expects* that plaintiff can proceed under § 1983. Accordingly, the circumstances that gave rise to this Court's decision to hold defendants' motion to dismiss in abeyance still exist.

Moreover, what the Sixth Circuit *did* say when it vacated the preliminary injunction and stay issued by this Court quite clearly shows that, even if this Court were inclined to accept plaintiff's argument that he should now be able to proceed on his § 1983 complaint, the Court should grant defendants' motion to dismiss that complaint — not allow plaintiff to engage in discovery thereon — because plaintiff unnecessarily delayed in bringing his claims. *See Alley v. Little*, No. 06-5650, slip op., pp. 6-8 (6th Cir. May 12, 2006). "[Plaintiff] was on notice as to both the particulars of the [lethal injection] 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." *Id.*, p. 6. As the Sixth Circuit reiterated from a prior decision, and as the defendants argued in support of their motion to dismiss, "[e]ven though, in [plaintiff'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.*" *In re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997) (quoted with approval in *Alley v. Little*, No. 06-5650, slip op., p. 7 (6th Cir. May 12, 2006)) (emphasis added). Based upon the Sixth Circuit's unmistakably clear admonition that

plaintiff cannot prevail on his claims under any circumstances, the complaint should be dismissed, thus obviating the need for any status conference, let alone discovery.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 9, 2006, a copy of the foregoing response was filed electronically. Notice of this filing will be sent to the parties listed below by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt or by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

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