IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

ELECTRONICALLY FILED

BRIAN KEITH MOORE, Plaintiff v. JOHN D. REES, Commissioner, Kentucky Department of Corrections, Frankfort, Kentucky THOMAS SIMPSON, Warden, Kentucky State Penitentiary, Eddyville Kentucky, SCOTT HAAS Medical Director for the Kentucky Department of Corrections ERNIE FLETCHER, Governor of the Commonwealth of Kentucky and, UNKNOWN EXECUTIONERS, Defendants.	CIV. ACTION # 3:06-CV-22-KKC **CAPITAL CASE**

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION BARRING DEFENDANTS FROM SCHEDULING OR CARRYING OUT PLAINTIFF'S EXECUTION DURING THE PENDENCY OF THIS LITIGATION.

Come now the Defendants, by and through counsel, and submit the following Response

to Plaintiff Brian Keith Moore's Motion for a Preliminary Injunction Barring Defendants from Scheduling and Carrying Out Plaintiff's Execution During The Pendency of this Litigation.

Plaintiff's motion for a preliminary injunction is nothing more than a guise to stay his execution, and this Court should treat this motion as such rather than a motion for a preliminary injunction.

LEGAL STANDARD FOR PRELIMINARY INJUNCTION

A preliminary injunction should only be granted in extraordinary circumstances where it is clearly shown that one's rights *will* suffer immediate and irreparable injury pending a hearing. In Washington v. Reno, 35 F.3d 1093 (6th Cir. 1994), the Sixth Circuit Court of Appeals set out the four factors to be considered in deciding whether to grant a preliminary injunction as follows:

> (1) The likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction.

Id. at 1099. Here, the Plaintiff's likelihood of success on the merits is minimal, while the public interest in the Commonwealth's ability to carry out the Plaintiff's lawful sentence clearly outweighs the Plaintiff's interest in delaying the scheduling of his execution.

LIKELIHOOD OF SUCCESS ON THE MERITS

The Plaintiff's challenges to the Commonwealth's lethal injection procedures are the same as those raised and decided by in the case of Baze, et al. v. Rees, et.al, Case No. 04-CI-

01094, Franklin Circuit Court (2005); *appeal pending,* Case No. 2005-SC-00543, Kentucky. Supreme Court (2005). In Baze, death row inmates Ralph Baze and Thomas C. Bowling filed an action for declaratory and injunctive relief challenging the constitutionality of Kentucky's death penalty lethal injection protocol on grounds that it constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution and Section 17 of the Kentucky Constitution. The Franklin Circuit Court upheld the state's lethal injection procedures in all respects except for a portion of the protocol that permitted lethal injection into the neck of the condemned prisoner. This portion of the protocol has been removed from Kentucky's lethal injection procedure.

Moreover, Kentucky's lethal injection procedures are substantially similar to the procedures used in other states utilizing lethal injection as a means for carrying out executions. In no instance have these lethal injection procedures been held to violate the prohibition against cruel and unusual punishment of the Eighth Amendment to the United States Constitution or Section 17 of the Kentucky Constitution.[1] As a result, the Plaintiff's prospects for success on the merits are minimal.

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[1] *See* e.g., Kelly v. Lynaugh, 862 F.2d 1126, 1135 (5th Cir. 1988), *cert. denied,* 492 U.S. 925, 109 S.Ct.3263, 106 L.Ed.2d 608 (1989); Woolls v. McCotter, 798 E.2d 695, 698 (5th Cir.1986), *cert. denied,* 478 U.S. 1031, 107 S.Ct. 15,92 L.Ed.2d 769 (1986); Hill v. Lockhart, 791 F.Supp. 1388, 1394 (E.D.Ark1992) (holding that lethal injection is "the most humane type of execution available"); Felder v. Estelle. 588 F.Supp. 664, 674 (S.D.Tcx.1984); State v.Hinchey, Ariz., 890 P.2d 602,610 (1995); State v. Deputy, 644 A.2d 411, 421 (Del. Super.1994); Hopkinson v. State, 798 P.2d 1186, 1187 (Wyo.1990); State v. Moen, 309 Or. 45, 786 P.2d 111, 143 (1990); People v. Stewart 123 Ill.2d 368, 528 N.E.2d 631, 639 (1988), *cert. denied,* 489 U.S. 1072, 109 S.Ct. 1356, 103 L.Ed.2d 824 (1989); Poland v. Stewart 117 F.3d 1094, 1104-05(9th Cir.1997), *cert. denied,* 523 U.S. 1082, 118 S.Ct. 1533, 140 L.Ed.2d 683 (1998); State v. Webb. 252 Conn. 128, 750 A.2d 448, 458 (Conn.), *cert. denied,* 531 U.S. 835, 121 S.Ct. 93, 148 LEd.2d 53(2000); State v. Carter 89 Ohio St.3d 593, 608, 734 N.E.24 345(2000); LaGrand v. Stewart, 133 F.3d 1253, 1265(9th Cir.1998); Cooper v. Rimmer, 358 F.3d at 357; Sims v. State. 754 So.2d 657, 668 n.20 (Fla. 2000); Moore v. State. 771 N.E.2d at 56 n.4; Wheeler v. Commonwealth, 121 S.W.3d at 186; Spencer v. Commonwealth. 385 S.E.2d 850,853 (Va. 1989).

IRREPARABLE HARM

In addition to weighing the Plaintiff's likelihood of success on the merits, the Court must also consider the likelihood of immediate irreparable harm to the Plaintiff. The remote possibility of some feared wrong in the future is insufficient to support a trial court's award of a preliminary injunction. *See also* Reid v. Johnson. 333 F. Supp.2d 543, 550 (2004) ("The rule barring consideration of remote or speculative injury for purpose of a preliminary injunction applied despite the degree of injurious consequences.")

Plaintiff asserts that absent a temporary injunction he will likely suffer an irreparable injury because: (1) he will be executed; (2) the Defendants allegedly do not have procedures in place to reverse the effects of the substances if the first substance is administered and a stay is granted; (3) the Commonwealth allegedly will carry out his execution in a manner that will cause him to suffer severe and unnecessary pain; and (4) the Defendants are allegedly unwilling or unprepared to provide emergency life saving medical treatment if a stay of execution is granted after the first chemical is administered.

In the context of a civil action, the irreparable harm does not include the act of Plaintiff's imminent death. Nelson v. Campbell, ---U.S.---, 124 S.Ct. 2117, 2123, 158 L.Ed2d 924 (2004). *See also* Reid, 333 F. Supp.2d at 550; Manning v. Hunt, 119 F.3d 254, 265 (4th Cir. 1997). Plaintiff's first assertion of likely irreparable harm should therefore be rejected. Plaintiff also contends he is entitled to a preliminary injunction because the Defendants do not have a procedure to revive the inmate in the event of a last minute stay of execution. "[T]he grant of a stay of execution communicated to prison authorities after the lethal injection has been administered is not a likely event" In re Readoption with Amendments of Death Penalty Regulations N.J.A.C. 1OA:23. 367 N.J. Super. 61, 69, 842 A.2d 207, 211 (N.J. Super. 2004). If

such an event does occur, the Defendants intend to make every feasible and possible step to revive the Plaintiff. The Defendants intend to have an ambulance waiting immediately outside the death house, a defibrillator in the death chamber, and medically trained personnel on standby in the event of a last-minute stay after the administration of the drugs has begun. The likelihood of this event happening is remote and speculative and thus, not a ground to grant a preliminary injunction.

The possibility that there may be some minor difficulty locating a vein does not subject Plaintiff to the offensive punishments the Eighth Amendment prohibits. *See* Reid. *supra;* State v. Webb, Conn., 750 A.2d 448,456(2000), *citing,* Hill v. Lockhart, 791 F.Supp. 1388, 1394 (E.D.Ark 1994); Snipes v. DeTella, *95* F.3d 586, 591 (7th Cir 1996) (rejecting the notion that the Eighth Amendment guarantees the right to be free of pain during any medical procedure). Plaintiff's second assertion of likely irreparable harm should be rejected.

Plaintiff contends that under Kentucky's execution protocol there is a risk that he will retain or regain consciousness after the injection of the sodium thiopental and therefore experience all the pain associated with the Pavulon and the potassium chloride. In Reid, the Fourth Circuit examined *facts* surrounding the Virginia execution protocol. Virginia's protocol uses 2 grams of sodium thiopental; and 50 milligrams of pancuronium bromide or Pavulon. Reid, 333 F. Supp.2d at 546. Virginia uses 120 milliequivalents of potassium chloride, where Kentucky uses 240 milliequivalents of potassium chloride. The evidence in the Reid case established the possibility of the inmate regaining consciousness within the ensuing ten minutes after the first drug is administered is 3/1000 of one percent; regaining consciousness by minute fifteen is 6/1000 of one percent; and regaining consciousness within twenty minutes never rises above 1/100 of one percent. Reid. 333 F. Supp.2d at 547. Under the protocol used by Kentucky

the chance that Plaintiff will be conscious of any pain associated with the use of pancuronium bromide and potassium chloride is less than 6/1000 of one percent.

Plaintiff's assertions of irreparable injury are remote and speculative at best. Thus, he fails to satisfy the threshold for a preliminary injunction.

HARM TO OTHERS AND THE PUBLIC INTEREST

An injunction is an equitable remedy, and "[equity must take into consideration the State's strong interest in proceeding with its judgment and attempt{s] at manipulation." Gomez v. United States District Court for Northern Dist. of Cal, 503 U.S. 653, 654, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992) *(per curium).* Thus, before granting a stay, a court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, *see* In re Blodgett. 502 U.S. 236, 239, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992) (per curiam); McCleskev v. Zant, 499 U.S. 467, 491, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) ("[T]he power of a State to pass laws means little if the State cannot enforce them"), there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay. Nelson v. Campbell. -U.S. -, 124 S.Ct. 2117,2126, *158* L.Ed.2d 924 (2004). "[D]eath penalty litigation is replete with the potential for false claims and intentional delay." Van Tran v. State, Tenn., 6 S.W.3d 257, 268 (1999). *See, e.g.* State v. Harris, 114 Wash.2d 419, 789 P.2d 60, 69(1990); Woodard v. Hutchins, 464 U.S. 377, 380, 104 S.Ct. 752, 753, 78 L.Ed.2d 541 (1984) ("A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward--often in a piecemeal fashion--only after the execution date is set or becomes imminent."). This request for a

temporary injunction is just another example of an attempt to abuse the judicial process. *See* Hutchins, *supra.*

Throughout his temporary injunction request, Plaintiff contends that the delay in this matter is the result of the Defendants and the Commonwealth. Interestingly, he does not explain why he waited more than six years after the amendment to KRS 431.220 to file this action. This eleventh hour petition challenging the constitutionality of lethal injection would be encouraged because the death row petitioner would know that the mere filing of a conclusory petition would result in a stay of execution and delay the meting out of his lawful sentence. Van Tran, 6 S.W.3d at 269. Placing no initial burden on Plaintiff is an invitation to specious challenges. Id., Harris. 789 P.2d at 69.

It is well settled that the state has "a significant interest in meting out a sentence of death in a timely fashion." Nelson, –U.S.--, 124 S.Ct. at 2123, *citing,* Calderon v. Thompson. 523 U.S. 538, 556-57, 118 S.Ct. 1489,140 L.Ed.2d 728 (1998); In re Blodgett, 502 U.S. 236, 238, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992) (per curiam); McCleskev v. Zant, 499 U.S. 467, 491, 111 S.Ct. 1454,113 L.Ed.2d 517 (1991) ("[T]he power of a State to pass laws means little if the State cannot enforce them"). The Commonwealth's interest in finality and in meting out a sentence of death in a timely manner acquires "an added moral dimension" when the lengthy state and federal proceedings reviewing the conviction and sentence have run their course. *See* Calderon, 5231.1.5. at *556-57,* 118 S.Ct. 1489. At this point, the Commonwealth and the victims of crime can expect the moral judgment of the Commonwealth to be carried out without delay. Id. at 556, 118 S.Ct. 1489, *citing* Payne v. Tennessee. 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). "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." Id. (internal citations and quotations omitted).

In Bowersox v. Williams, 517 U.S. 345, 346 (1996), the U.S. Supreme Court granted the State's motion to vacate the stay of execution and explained:

> "A stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are 'substantial grounds upon which relief might be granted." *Delo v. Stokes, 495* U.S. 320, 321 (1990) (per *curiam*)(quoting *Barefoot v. Estelle,* 463 U.S. 880, *895* (1983)). Entry of a stay on a second or third habeas petition is a drastic measure, and we have held that it is '"particularly egregious' "to enter a stay absent substantial grounds for relief. *Delo v. Blair,* 509 U.S. 823 (1993) (citation omitted). On the record before us, we can discern no such grounds. We are persuaded by the report prepared by Magistrate Judge Hays, which meticulously addresses each of Williams' claims and finds each to be abusive, successive, procedurally defaulted, or meritless, and by the District Court's order adopting that report, in which the District Court also denied Williams' dilatory motion to amend the habeas petition. The Court of Appeals abused its discretion by entering a stay on this record.

Id. In Hutchins, the Court vacated a stay of execution. Justice Powell filed a concurring opinion approved by a majority of the Court. The Court subsequently cited his opinion with approval in McCleskey v. Zant. 499 U.S. at 488. In Hutchins. 464 U.S. at 379-380, Justice Powell explained the Court's rejection of a stay:

> This case is a clear example of the abuse of the writ that §2254(b) was intended to eliminate. All three of Hutchins' claims could and should have been raised in his first petition for federal habeas corpus. The new evidence that Hutchins offers to support his claim that he was insane at the time of the crime is the report of a forensic psychiatrist prepared after a January 2, 1984 psychiatric examination. Hutchins, convicted some four years ago, and frequently before courts during the intervening

> years, does not explain why this examination was not conducted earlier. He does not claim that his alleged insanity is a recent development. In light of his claim that he also was insane at the time of the crime, such an assertion would be implausible. Finally, Hutchins does not explain why he failed to include his challenge to the jury selection in his prior habeas petition. A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion--only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate--even in capital cases-- this type of abuse of the writ of habeas corpus.

In Re Saon, 118 F.3d 460 (6th Cir. 1997), denied a successive habeas petition and denied a motion for stay of execution in the McQueen death penalty case. The Court stated, in part, that:

> The prevention of the execution is itself an overturning of the sentence. McQueen was sentenced to death, not simply to a lifetime of litigating about death.
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> * * * *
>
> When we are considering a very belated claim, raised at the last minute to prevent execution, after many earlier opportunities to raise the issue were foregone, the significant and irreparable harm of execution is balanced by an equally significant and irreparable harm to the legal process, a harm not fully repairable by action after appeal. *In Re Parker,* 49 F.3d 204,208 (6th Cir.1995). Thus, what is necessary to support a stay is a strong and significant likelihood of success on the merits, which simply does not exist in this case.

Id. at 463, 465. "There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." Gomez v. United States Dist. Court for Northern Dist. of Cal., 503 U.S. 653, 654, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992) (per curiam).

See, e.g., Vickers v. Johnson. – U.S. –, 124 S.Ct. 1196, 157 L.Ed.2d 1224 (2004) (stay of execution denied); Zimmerman v. Johnson, ---U.S. 124 S.Ct. 1168, 157 L.Ed.2d 1059 (2004) (same); Beck v. Rowsey, – U.S. –, 124 S.Ct. 980, 157 L.Ed.2d 811(2004) (stay of execution vacated). The granting of these injunctions not only disrupts settled law but invites meritless last-minute applications to disrupt the orderly state administration of the death penalty. Moore v. Texas, 535 U.S. 1110, 122 S.Ct. 2350, 2354, 153 L.Ed.2d 154 (2002).

Absent a compelling justification for bringing this action at the eleventh hour, such as a material change in the applicable law or factual circumstances or an exceptionally strong showing on the merits, this Court should not simply ignore such clear guidance from the Supreme Court. Moreover, such challenges inappropriately force the Court to make an otherwise unnecessary choice between orderly consideration of the Moore's claims and "the state's interest in the finality of convictions that have survived direct review in the state court system." *See* Calderon v. Thompson. 523 U.S. at *555.*

The Plaintiff thus fails to satisfy the threshold requirement to warrant an injunction in this case. Thus, his request for a temporary injunction should be denied.

CONCLUSION

For all the foregoing reasons, the Defendants respectfully urge this Court to deny Plaintiffs' Motion for a Preliminary Injunction Barring Defendants from Scheduling and Carrying Out Plaintiff's Execution During The Pendency of this Litigation.

Respectfully Submitted,

/s/ Jeffrey T. Middendorf

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed with the Court by using the CM/EFC system and was served by facsimile transmission to: Hon. Susan J. Balliet, Hon. David M. Barron, and Hon. Marguerite Neill Thomas, Assistant Public Advocates, 100 Fair Oaks Lane, Suite 301, Frankfort, Kentucky 40601, on this 30th day of June, 2006.

/s/ Jeffrey T. Middendorf

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