

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at FRANKFORT

ELECTRONICALLY FILED

BRIAN KEITH MOORE, and)
)
 JEFFREY LEONARD)
)
 Plaintiffs)
)
 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.)

CIVIL ACTION # 3:06-CV-22

CAPITAL CASE

**BRIAN KEITH MOORE’S MEMORANDUM OF LAW ON WHETHER HIS
“BAD VEINS” PREVENT HIS EXECUTION AND WHETHER
THE STATUTE OF LIMITATIONS BARS HIS CLAIMS**

In compliance with this Court’s March 30, 2007 Order, Brian Keith Moore files this brief explaining that his allegations concerning the lethal injection chemicals not remaining in his

veins neither argue that his execution cannot take place nor transform his complaint into a habeas petition, and that his claims are not barred by the statute of limitations.¹

ARGUMENT

Moore's allegations, in his complaint, that the lethal injection chemicals are not likely to remain in his veins and that this will cause excruciating pain may be inartfully worded. But these allegations do not mean that Moore is claiming that his execution by lethal injection is foreclosed by any means. Rather, as discussed in detail below, Moore's complaint alleges that there are complications with carrying out his execution by lethal injection that do not exist when executing people who do not suffer from compromised veins. Because these complications are foreseeable, Defendants have a heightened obligation to take steps to lessen the risk of these complications and to take remedial actions if these complications occur.

If Defendants do not take action to prevent this risk, it is likely that the spectacle of the horrific execution of Angel Diaz in Florida will take place in Kentucky. It took 34 minutes for Diaz to die, because the I.V.s punctured the veins, sending the chemicals into Diaz's tissue. This caused it to take longer than normal for the chemicals to circulate throughout the body and for the chemicals to have the desired effect. It also caused Diaz to suffer twelve-inch chemical burns on both arms. This all occurred in someone who does not have compromised veins, as Moore does. The fact that Moore suffers from compromised veins substantially increases the likelihood that the horror that was Diaz's execution will occur in Kentucky during the execution of Moore.

¹ Because neither the "bad veins" issue nor the affirmative defense of statute of limitations applies to Jeffrey Leonard, his status as an intervenor in this case should allow this case to proceed forward on his behalf, regardless of whether this Court dismisses Moore's Complaint. *See, Diamond v. Charles*, 476 U.S. 54, 68 (1986); *Willis v. Gov't Accountability Office*, 448 F.3d 1341, 1344 (6th Cir. 2006); *Allgeier v. Boldrick*, 909 F.2d 869, 875 (6th Cir. 1990); *Horn v. Eltra Corp.*, 686 F.2d 439, 440 (6th Cir. 1982); *Kelly v. Carr*, 691 F.2d 800, 806 (6th Cir. 1980). For the same reasons, if this Court dismisses Moore's Complaint, Roger Epperson should be allowed to intervene and proceed with the litigation in this case as long as he satisfies the requirements for intervention under the Federal Rules of Civil Procedure.

All of this can easily be avoided if Defendants become adequately trained and prepared for such a situation and learn how to insert a central line, which guarantees venous access in a person with compromised veins and eliminates the risk that the veins will blow. the moment, however, unlike nearly all other states that carry out executions by lethal injection, Defendants have no contingency plan for inserting an I.V. when it cannot be done through peripheral access. Having a contingency plan and using it immediately in someone with bad veins increases the likelihood that the veins will not rupture and that the chemicals will remain in the vein. In addition, adequately trained individuals should be able to easily recognize when the chemicals do not enter or remain in the veins and immediately take action to ensure that an anesthetic is administered to guarantee unconsciousness, and then inject the chemicals through a different location in the body, without creating additional unnecessary pain. All of these remedial steps can be taken while still carrying out Moore's execution in conformance with the Eighth Amendment.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment, and the United States Supreme Court has interpreted that in terms of unnecessary risk of pain and suffering. Of course, some pain is inherent in carrying out an execution. Perhaps, for someone with medical complications, like Moore, the risk of pain acceptable under the Eighth Amendment is greater. But, the Eighth Amendment requires Defendants to take steps to lessen the risk of unnecessary pain. This can easily be done by using one of the many forms of central venous access that most Department of Corrections are ready to perform during every execution, just in case peripheral access cannot be obtained. Because this solution can be accomplished with little to no difficulty, does not require a statutory amendment, does not require participation of a doctor, and will allow Moore's execution to proceed without the risk of

pain and suffering associated with using peripheral access as the means for inserting an I.V. into a person with compromised veins, Moore's complaint does not argue that his execution can never be carried out by lethal injection by any means. Rather, with additional training and procedures, the I.V. can be asserted with little to no risk of pain and suffering.

If this Court construes Moore's compromised veins claim as challenging the sentence itself and thus considers the claim to be a habeas petition, this Court must isolate the claims that are only cognizable in a habeas petition from the claims that are properly before this Court in a 42 U.S.C. §1983 action. This Court must then dismiss the habeas claims, but allow the claims that are properly presented in a §1983 action to proceed.

Once this Court rules that Moore's claims are cognizable in this action, this Court must address the application of the statute of limitations. Because Moore is requesting equitable relief rather than damages, the applicable statute of limitations for §1983 suits does not apply. Rather, the claim is only subject to the equitable defense of laches.

Should this Court apply the one-year statute of limitations for personal injury actions under state law, the statute of limitations did not begin to run until Moore should reasonably have known of the information necessary to bring each of his claims and could have brought the suit and obtained relief. As explained below, this did not take place until the state court lethal injection trial. In addition, because of Defendants' unwillingness to disclose information concerning how it carries out executions, numerous aspects of this case only became known on a piecemeal basis, which means that the statute of limitations may have begun to run at different points for different claims within Moore's complaint. In other words, a ruling that some claims are barred by the statute of limitations does not necessarily foreclose other claims.

As explained below, Moore's claims do not foreclose his execution by lethal injection, thereby allowing all his claims (or at least some of his claims) to proceed in this §1983 action. Further, the statute of limitations does not apply at all, but even if this Court rules otherwise, it does not preclude this Court from reaching the merits of Moore's claims.

I. Because Moore's complaint does not allege facts that would prevent his execution by lethal injection, his complaint is properly before this Court as a 42 U.S.C. §1983 suit.

Moore first explains why his claims concerning compromised veins do not allege that his execution cannot be carried out under any circumstance. In case this Court rules against him on this issue, Moore also explains that this Court cannot dismiss the entire suit because one claim is only cognizable in a habeas action. Instead, this Court must dismiss those claims and allow the rest of the claims to proceed.

A. Moore's allegations that the chemicals will likely not remain in his veins if the chemicals are injected via peripheral access and cause excruciating pain does not foreclose Moore's execution by lethal injection.

In the March 30, 2007 Order, this Court expressed its concern that, on the limited information before this Court, the following three paragraphs in Moore's complaint mean that his execution by lethal injection could not be carried out without violating the Eighth Amendment prohibition against cruel and unusual punishment:

- 1) A person with bad veins likely will not be able to handle the flow of the lethal injection chemicals, causing the veins and other blood vessels to blow;

- 2) Because of Plaintiff's bad veins,² even if Defendants are able to insert an I.V. into Plaintiff, the chemicals likely will not remain in his veins; and,
- 3) If the chemicals do not remain in Plaintiff's veins, Plaintiff will suffer an excruciatingly painful death.

[Record 139 at 33.]. Admittedly, these statements could be more coherently written. These allegations were meant to only apply when an I.V. is inserted via peripheral access, which is the only means called for in Defendants' execution protocol.³ As explained by the attached declaration from Dr. Mark Heath, an Assistant Professor of Clinical Anesthesiology at Columbia University in New York City, the problems with the chemicals remaining in Moore's veins are likely to take place only when peripheral access is attempted, rather than a percutaneous procedure or some other form of central access.⁴ Thus, as explained below, if Defendants take proper remedial actions, they should be able to carry out Moore's execution, despite his bad veins, without violating the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.⁵

Dr. Heath states "to a reasonable degree of medical certainty that it is possible to achieve I.V. access to a person with compromised peripheral veins" in a manner that will result in a "humane execution,"⁶ by inserting a central line.⁷ A central vein "is one of the large vessels close to the heart like the internal jugular vein, the subclavian, or the femoral vein. Central veins

² Defendants strenuously dispute the fact that Moore suffers from compromised veins. *See, e.g.*, Record No. 38, Answer to Moore's Complaint, denying the fact that Moore suffers from bad veins. This creates an issue of fact that should be decided by this Court after hearing testimony on the issue.

³ Exhibit 15 (2006 Execution Protocol).

⁴ Exhibit 1 (Heath. Decl.). Dr. Heath's curriculum vitae is attached as exhibit 2.

⁵ Moore only addresses the issue of the chemicals remaining in his veins. This section should not be construed as a waiver of the other allegations/claims presented in Moore's complaint.

⁶ Exhibit 1 (Heath. Decl., para. 19).

⁷ *Id.* at para. 13.

are typically larger, more robust, vessels than peripheral veins.”⁸ Central venous access is usually “achieved by placing a percutaneous central line, which means placing an IV catheter by tunneling the catheter under the skin to reach the central vein.”⁹

According to Dr. Heath, “[i]f a person has compromised peripheral veins, placing an I.V. in those limbs is medically contraindicated” for the reasons expressed in Moore’s complaint.¹⁰ In other words, inserting an I.V. into the peripheral veins of a person with “bad veins” can blow the vein, causing the release of the chemicals into the muscle or tissue, which would be excruciatingly painful.¹¹ “Simply because peripheral IV access is not possible or prudent, however, does not mean that IV access cannot be achieved.”¹²

The medically appropriate technique for achieving venous access to a person with compromised peripheral veins is to use percutaneous placement of central venous catheters, which entails placement of an I.V. catheter by tunneling under the skin to reach a central vein.”¹³ The risk of a blown vein causing chemicals to not remain in the vein is substantially lessened when central venous access is used instead of peripheral access. As Dr. Heath states, “because central veins are larger and closer to the heart than peripheral veins I.V. drug delivery through those veins is far less prone to extravasation or infiltration than is drug delivery through peripheral venous access in a person with compromised veins,¹⁴ and “is the medically appropriate form of venous access for a person with compromised peripheral veins and, if appropriately performed, could be used to achieve a humane execution.”¹⁵ Defendants could almost guaranteedly prevent Moore’s veins from blowing as a result of his compromised veins

⁸ *Id.* at para. 13.

⁹ *Id.* at para. 14.

¹⁰ *Id.* at para. 20.

¹¹ *Id.* at para. 22.

¹² *Id.* at para. 21.

¹³ *Id.*

¹⁴ *Id.* at para. 15, 22.

¹⁵ *Id.* at para. 22.

and the resulting leak of the chemicals into his tissue and muscle by resorting to a central line, such as a percutaneous procedure, for inserting the lethal injection chemicals. At a minimum, doing so, will lessen the risk of pain and suffering and risks associated with injecting the chemicals into a person with “bad veins” via peripheral access to a negligible level that cannot rise to the level of cruel and unusual punishment.

The problem is that Defendants are not prepared for this and, despite being put on notice of the possibility of complications executing Moore by inserting an I.V. peripherally, Defendants have taken no steps to prepare for this situation or to learn how to insert a central line. As an alternative to peripheral access, most states are prepared to perform central venous access and have information concerning this in their execution protocols.¹⁶ Defendants, however, are not prepared to do so.

Although Defendants recognize the possibility that a central venous line may be necessary to access a vein and is a viable option, as evidenced by the fact that central venous line is mentioned on the Lethal Injection IV Site Placement form used for the execution of Eddie Harper in Kentucky,¹⁷ they concede that they are currently not qualified to insert a central venous line. The following exchange took place during the deposition of Glenn Haeberlin, who was the Warden at the Kentucky State Penitentiary at the time of the state court lethal injection litigation on behalf of Baze and Bowling:¹⁸

¹⁶ *Id.* at para. 23.

¹⁷ Exhibit 19 (Lethal Injection IV Site Placement form for the execution of Edward Harper on May 25, 1999). This form was disclosed to undersigned counsel Barron during discovery in *Baze et al. v. Rees et al.*, No. 04-CI-1094 (Franklin Cir. Ct.).

¹⁸ The Kentucky State Penitentiary is the prison where Defendants carry out executions. Since the trial in the *Baze* case, Haeberlin has retired and been replaced by Thomas Simpson.

SHOUSE: Uh, what would you do if you couldn't find a vein on the inmate?

HAEBERLIN: Well, not ever?

SHOUSE: The execution is ready to proceed and you can't find it.

HAEBERLIN: Uh,

SHOUSE: you personally.

HAEBERLIN: Well, it, I, I, guess if it came to we were unable to site an I.V. uh, I guess it would my duty to step outside the chamber uh, and, advise my counsel and the Attorney General's Office that we were unable to site.

SHOUSE: And then what?

HAEBERLIN: **That's a good question, I, I, I don't know the answer to that.**

SHOUSE: OK.

HAEBERLIN: **I mean at that point in time it would be uh, a decision that would be made by an entity above me.**

SHOUSE: Are there provisions and protocol for such a, occurrence?

HAEBERLIN: **No.**

SHOUSE: **OK, uh, are there provisions and protocol for a cut down procedure?**¹⁹

HAEBERLIN: **Uh, specifically, no.**

SHOUSE: **How about not specifically?**

HAEBERLIN: **At this point in time, uh, we're, we're not in a position to do that.**

¹⁹ A cut-down procedure is a form of central venous access.

SHOUSE: Alright. Would um, would medical people be consulted if you couldn't find a vein, or just the Attorney General and the uh, your General Counsel?

HAEBERLIN: I mean as far as I'm concerned the people I've, so it would be my counsel and the Attorney General's Office.²⁰

At this point, the deposition turned to a different issue. This exchange makes clear that, as late 2004, Defendants did not have a plan for a situation such as the one that exists here, where the inmate suffers from compromised veins, and do not know how to insert a central line - - a procedure that would lessen the risk of pain and suffering during the execution of a person with compromised veins and a procedure that could be performed with little to no risk that the chemicals will not remain in Moore's veins. Rather than learn how to insert a central line, Defendants have affirmatively chosen to do nothing.

In December 2004, Defendants revised their execution protocol to address the situation where venous access could not be obtained through the peripheral veins. Defendants, however, did not create a provision to guarantee venous access by using a central line. Instead, they added a provision saying, "[i]f the IV team cannot secure one (1) or more [IV] sites within one (1) hour, the Governor's Office shall be contacted by the Commissioner and a request shall be made that the execution be scheduled for a later date."²¹ This provision remains part of the current execution protocol.²² If the Governor calls off the execution, the execution team will practice more and re-attempt the same thing. It remains unknown what will happen if the Governor refuses to call off the execution.

²⁰ Exhibit 20 (Excerpts of Deposition of Warden Glenn Haeberlin in *Baze et al. v. Rees et al.*, No. 04-CI-1094, at 41-42).

²¹ Exhibit 11 (Notice of filing of Updated Redacted Execution Protocol in *Baze et al v. Rees et al.*, No. 04-CI-1094 with 2004 Revised Execution Protocol attached).

²² Exhibit 15 (2006 Execution Protocol).

Defendants also have no plans to deal with a situation where peripheral access is undertaken but a vein blows. At that point, if another vein cannot be located quickly, central venous access is necessary and is the only way to prevent an excruciatingly painful death. Defendants' failure to adequately anticipate the situation of accessing veins in a person with compromised veins, and failure to learn how to insert a central line (such as percutaneous procedure) if peripheral venous access should not be attempted, cannot be obtained, or if the vein blows during the execution and another suitable vein cannot be quickly located, shows deliberate indifference towards Moore's medical condition and creates an unnecessary risk of pain and suffering, in violation of the Eighth Amendment to the United States Constitution. This is particularly so because Defendants could learn how to insert a central line, as nearly all Departments of Corrections responsible for carrying out lethal injections have done.

"Although it is absolutely necessary that a person performing the mechanical act of central line access be appropriately trained, experienced, and skilled, it is not always necessary for that person to be a credentialed medical doctor."²³ In other words, it is the training and skill of the person inserting the central line, not the title the person possesses or whether "MD" appears after the person's name, which determines whether a person can successfully insert a central line. In fact, Dr. Heath is personally aware of one execution where a central line was successfully inserted by a non-physician for the purpose of creating venous access.²⁴ If adequate training is provided, a non-doctor could, likewise, insert a central line, via a percutaneous procedure or another form of central venous access, in Kentucky lethal injections.

As discussed above, there is a simple way to alleviate the problem that Moore's compromised veins make it likely that the veins or blood vessels will blow, causing the

²³ Exhibit 1 (Heath Decl., para. 25).

²⁴ *Id.* at para. 17.

chemicals to not remain in the vein and Moore to suffer an excruciatingly painful death. The simple way is to insert the I.V. (and thereby inject the chemicals) through central venous access rather than peripheral access. By doing so, Defendants will have a guaranteed means of accessing Moore's veins that will either eliminate or render negligible the likelihood that Moore's veins will be unable to handle the flow of the lethal injection chemicals, causing the veins and other blood vessels to blow and Moore to suffer excruciating pain as the chemicals seep into his tissue and muscle. Because Defendants could insert the I.V. and chemicals through a central line, as numerous states other than Kentucky are prepared to do, without amending Kentucky's lethal injection statute (K.R.S. 431.220), Moore's allegations concerning the lethal injection chemicals not remaining in his veins (which is limited to when the I.V. is inserted by peripheral access), do not mean that Defendants cannot carry out his execution by lethal injection by any means. Thus, the allegations in Moore's complaint concerning the chemicals not remaining in his veins and the rest of the allegations in his complaint are properly before this Court as a civil action (conditions of confinement suit) under 42 U.S.C. §1983.²⁵

B. Where a complaint contains claims that are jurisdictionally barred and claims that are properly before a court, the court must dismiss the barred claims and adjudicate the claims that are properly before the court.

In the March 30, 2007 Order, this Court expressed its belief that "Moore's claims collectively foreclose his execution by lethal injection by any means, which would require dismissal of his complaint under 28 U.S.C. §2244(b)." [Record No. 139 at 33]. Dismissing Moore's suit on this basis is prohibited by United States Supreme Court law on what to do with §1983 actions that contain "good" and "bad" claims.

The United States Supreme Court addressed this exact situation less than three months ago in a case arising out of the Sixth Circuit. *Jones v. Bock* dealt, in part, with whether a §1983

²⁵ See, *Hill v. McDonough*, 126 S.Ct. 2096 (2006); *Nelson v. Campbell*, 541 U.S. 637 (2004).

action must be dismissed where exhaustion of administrative remedies under the Prison Litigation Reform Act had been accomplished for some, but not all, of the claims. The Sixth Circuit held that the entire action must be dismissed if any one claim is not properly before the court, but the United States Supreme Court held otherwise.²⁶

In deciding this issue, the *Jones* Court noted that it has “never heard of an entire complaint being thrown out simply because one of several discrete claims was barred by the statute of limitations, and it is hard to imagine what purpose such a rule would serve.”²⁷ Instead of disposing of the entire complaint, “if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad. Only the bad claims are dismissed; the complaint as a whole is not.”²⁸ If this Court believes that Moore’s allegations concerning his “bad veins” and the pain that will be caused if the chemicals do not remain in his veins challenge his sentence on its face and thus lies in habeas corpus, this Court must dismiss that claim but doing so does not mean that the entire suit must be dismissed.

Rather, this Court must both look at each claim individually and, under *Hill v. McDonough*,²⁹ consider the request for relief. As this Court recognized, [Record No. 139 at 33], “[i]f the relief sought would foreclose execution, recharacterizing a complaint as an action for habeas corpus **might** be proper.”³⁰ Together, *Hill* and *Jones* stand for the proposition that the focus should be on the request for relief and that individual claims that are properly before the court must be allowed to proceed even if other claims must be dismissed for lack of

²⁶ *Jones v. Bock*, 127 S.Ct. 910, 923-24 (2007).

²⁷ *Id.* at 924.

²⁸ *Id.*; see also, *Exxon Mobil Corp. v. Allapatah Services, Inc.*, 545 U.S. 546, 560-63 (2005) (holding that the district court had jurisdiction over a civil action even if it might not have jurisdiction over each separate claim comprising the action); *Chicago v. International College of Surgeons*, 522 U.S. 156, 166 (1997) (holding that the district court had jurisdiction over a civil action removed to federal court even if every claim did not satisfy the jurisdictional prerequisites).

²⁹ 126 S.Ct. 2096 (2006).

³⁰ *Id.* at 2101 (emphasis added).

jurisdiction.³¹ Analyzing Moore's claims in this manner requires this Court to recognize that, at a minimum, some of Moore's claims are properly before this Court and thus those claims must be allowed to proceed.

The prayer for relief in Moore's complaint requested a temporary restraining order and a preliminary injunction barring Defendants from the following and requested a declaratory judgment that the following is unconstitutional:

- 1) carrying out Moore's execution during this lawsuit;
- 2) carrying out Moore's execution in the manner they currently utilize for carrying out lethal injections;
- 3) carrying out his execution until they come up with a reasonable, humane means for guaranteeing venous access during his execution;
- 4) carrying out his execution by a lethal injection process that does not administer an analgesic.
- 5) forcibly medicating Moore with Valium prior to his execution.
- 6) carrying out his execution by a lethal injection process that utilizes sodium thiopental.
- 7) carrying out his execution by a lethal injection process that utilizes pancuronium bromide.

³¹ Support for not dismissing the entire case if some claims are properly before this Court is also found in *Rhines v. Weber*, 544 U.S. 269 (2005). In *Rhines*, the United States Supreme Court held that the total exhaustion requirement in habeas petitions (the *Jones* Court expressly rejected the concept of total exhaustion in §1983 actions) does not require dismissal of an action when a claim is not properly before a court. Rather, "if a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief." *Id.* at 279. Rather than dismiss the entire lawsuit, if this Court does not follow the *Jones/Hill* line of reasoning argued above, this Court should allow Moore to delete the claims/allegations that this Court concludes are not cognizable in a §1983 suit and allow the rest of the claims to proceed.

8). carrying out his execution by a lethal injection process that utilizes potassium chloride.

9). carrying out Moore's execution by lethal injection unless Defendants inject the chemicals directly into his vein.

10). carrying out Moore's execution without adequate procedures for monitoring for the ability to feel pain prior to and during the injections of pancuronium bromide and potassium chloride.

11). carrying out Moore's execution unless an anesthesiologist monitors for consciousness throughout the execution, and unless the anesthesiologist can take remedial measures to stop Moore from feeling pain if the anesthesiologist determines that Moore is in pain at any point during the execution;

12). inserting an I.V. in the groin;

13). using a cut down procedure;

14). attempting to insert an I.V. into Moore for more than 20 minutes;

15). carrying out Moore's execution until Defendants have the proper equipment for maintaining life after sodium thiopental and pancuronium bromide have been injected, and until Defendants have properly trained individuals to operate that equipment. [Record No. 1 at 59-62].

Moore also sought an order declaring that Defendants' failure to consider using alternative chemicals in lethal injections constitutes deliberate indifference in violation of the Eighth Amendment to the United States Constitution. *Id.*

None of the above requests in Moore's prayer for relief asks that Defendants not execute him or ask for a finding that his execution could not take place by lethal injection. Rather, he merely complains about particular aspects of the chemicals and procedures Defendants intend to

use to carry out his execution and request that the execution not be permitted until these procedures are changed. Moore also does not request a permanent injunction barring his execution by lethal injection. All of this demonstrates that the relief requested would not foreclose Moore's execution. Because *Hill* only allows the entire suit to be dismissed if the relief sought forecloses execution, the fact that the relief Moore requests (at a minimum, some of the relief requested) does not foreclose his execution, *Hill* prevents this Court from automatically dismissing the entire suit if this Court believes that Moore's allegations that the chemicals will not remain in his veins and that this will cause excruciating pain transform this claim into a habeas claim. Instead, this Court must move on to the *Jones* analysis of the individual claims.

Doing so here is much easier than in most lethal injection cases. Not only has Moore laid out his request for relief in numerous, separate paragraphs requesting distinct forms of relief, but he has also broken down his complaint into a large number of subparagraphs laying out distinct allegations that can easily be parceled out and separated from the rest of his complaint. As this Court identified in its March 30, 2007 Order, Moore's claims include amongst other claims: 1) challenges to the execution team members' training; 2) challenges to the use of the chemicals administered; 3) the failure to monitor for consciousness before the third drug is administered; 4) the absence of adequate life-saving equipment if a last minute stay of execution is granted; and 5) problems inserting the I.V. [Record No. 139 at 32]. This Court has correctly acknowledged that these claims, individually, are properly before this Court under §1983 because any constitutional violations in this regard can be corrected by more training, the acquisition of better or additional equipment, changes to the composition, amount, or method of injection of the chemicals, or by using the percutaneous procedure of accessing Moore's veins. *Id.* at 32-33. Thus, these claims belong in a §1983 action, not a habeas action. Because of this, under *Hill* and

Bock, this Court must allow these claims to go forward regardless of whether this Court rules that the claim involving the chemicals not remaining in Moore's veins lies in habeas.

II. Moore's claims are not barred by the one-year statute of limitations applicable to 42 U.S.C. §1983 actions seeking damages.

Moore's claims are not barred by the statute of limitations for two reasons: 1) the statute of limitations does not apply to purely equitable claims; and, 2) even if the one-year statute of limitations under Kentucky law is applied, Moore's claims were filed within the statute of limitations.

A. The statute of limitations does not apply to equitable relief that does not seek damages.

Moore's complaint is not subject to the affirmative defense of statute of limitations because his Complaint seeks only declarative and injunctive relief. "Statutes of limitations go to matters of remedy, not destruction of fundamental rights."³² It is well settled that where, as here, a plaintiff seek only equitable remedies, "statutes of limitations are not controlling measures."³³ "Laches, rather than a state statute of limitations governs claims brought to enforce an equitable right created by Congress."³⁴ When the relief requested is only a declaratory judgment or an

³² *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)

³³ *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946).

³⁴ *Ford Motor Co. v. Catalanotte*, 342 F.3d 543, 550 (6th Cir. 2003); accord, *State Mut. Life Assur. Co. v. Heine*, 141 F.2d 741, 744 (6th Cir. 1944) (holding that the statute of limitations fixes the time limit for filing a claim unless equitable relief is sought, in which the doctrine of laches applies); *Freeman v. Cincinnati Gas & Electric Co.*, 2005 WL 2837466, *2 (S.D. Ohio) (recognizing that "statutes of limitations historically do not control measures of equitable relief"); *United States v. American Electric Power Service Corp.*, 137 F.Supp.2d 1060, 1068 (S.D. Ohio 2001) (ruling that the statute of limitations does not bar a request for injunctive relief, because "[w]hile the doctrine of laches may prevent injunctive relief, statutes of limitations historically do not control measures of equitable relief"); *United States v. American Electric Power Service Corp.*, 136 F.Supp.2d 808, 811 (S.D. Ohio 2001)) (quoting *Holmberg* that "statutes of limitations are not controlling measures of equitable relief"); *Goodman v. McDonnell Douglas*, 606 F.2d 800, 805 (8th Cir. 1979), citing, *Holmberg*, 327 U.S. at 396; *Nicholson v. Board of Comm'rs of the Alabama State Bar Ass'n*, 338 F.Supp. 48, 53 (M.D. Ala. 1972) (finding that §1983 action raising First Amendment claims not barred by the statute of limitations because plaintiffs sought only injunctive and declaratory relief). The doctrine of laches, which is beyond the scope of the briefing ordered by this Court also does not bar Moore's suit. Laches bars relief only when the plaintiff is guilty of unreasonable and inexcusable delay that has resulted in prejudice to Defendants, and Defendants have "unclean hands." Here, Defendants' actions in refusing to disclose information concerning executions by lethal injections prevent them from having "unclean hands." Further, as this Court acknowledged in denying an injunction, this lawsuit was filed more than a year ago

injunction, 42 U.S.C. §1983, the Civil Rights Act, is an example of a statute that creates an enforceable equitable right where the statute of limitations does not apply. Thus, whether the statute of limitations applies here comes down to the relief Moore requested in his Complaint.

His Complaint is entitled “Complaint for Declaratory Judgment and Injunctive Relief,” [Record No. 1] and requests only equitable relief. More specifically, each of the eighteen paragraphs (other than the paragraph requesting “such further relief that this Court finds necessary”) requests a temporary restraining order, a preliminary injunction, or a declaratory judgment that a specific act is unconstitutional. [Record No. 1 at 59-62]. At no point does Moore request damages or any other form of non-equitable relief. In this regard, Moore’s case is starkly different from *Cooley v. Strickland*,³⁵ where the Sixth Circuit ruled that a lethal injection claim was barred by the statute of limitations.

Cooley filed a complaint entitled, “Plaintiff’s Original Complaint for Injunctive and Declaratory Relief, Attorney Fees, and Costs of Suit.”³⁶ In the Prayer for Relief, Cooley expressly requested attorney fees and the expenses of the litigation.³⁷ By doing so, Cooley requested more than just equitable relief - - he essentially requested damages for Defendants’ alleged unconstitutional behavior and activities.³⁸ This makes Cooley’s complaint materially different than Moore’s complaint. As the Sixth Circuit recognized by applying the statute of

and no execution warrant has issued. Thus, Defendants are not prejudiced by the timing of the filing of the lawsuit. Laches, as a result, does not bar this suit. But because the doctrine of laches is beyond the scope of the briefing requested by this Court, rather than go into detail on this now, Moore will reserve the argument to present only if this Court requests further briefing on the issue.

³⁵ 479 F.3d 412 (6th Cir. 2007).

³⁶ Exhibit 3 (Complaint in *Cooley v. Taft*, No. 2:04-cv-001156 (S.D. Ohio). Strickland was substituted in as the lead Defendant when he replaced Taft as Governor of Ohio.

³⁷ *Id.* at 25.

³⁸ To obtain attorney fees under 42 U.S.C. §1988, a party must substantially prevail on the underlying claims. The purpose of this statute when enacted was to get attorneys to take civil rights cases when the plaintiff was too poor to pay the attorney the costs of the litigation. §1988 operated as a way to guarantee Plaintiff attorneys compensation when they prevailed in a case in a way that would not ordinarily provide them the money that other civil cases would provide. By requiring a defendant to pay the costs of litigation when the defendant loses, §1988 requires a finding of “fault,” in the same manner as a tort suit. In other words, it is a form of damages, which transforms a case in equity into a traditional legal claim that is governed by the statute of limitations.

limitations in *Cooley*, Cooley's claims fell within the traditional tort type of claim and thus was governed by the statute of limitations. As mentioned above, Moore's complaint, however, only requests declaratory and injunctive relief. Thus, unlike *Cooley*, the statute of limitations does not apply to Moore.

B. Applying the one-year statute of limitations from the time of accrual adopted in *Cooley* does not bar Moore's suit.

If this Court rules that Moore's complaint is governed by the doctrine of statute of limitations even though his suit lies purely in equity, Moore's complaint is not barred by the applicable statute of limitations. Because § 1983 does not provide its own statute of limitations, the most analogous statute of limitations from the state where the events giving rise to the claim applies.³⁹ In Kentucky, the applicable statute to be used for civil rights claims is the one-year statute of limitations for residual tort claims found in K.R.S. 413.140(1)(a).⁴⁰ But, when the statute of limitations begins to accrue is matter of federal law.⁴¹

As this Court recognized in its March 30, 2007 Order, under the Sixth Circuit's recent decision in *Cooley*, "a claim asserting a facial challenge to a method of execution accrues upon the conclusion of direct review of criminal conviction." [Record No. 139 at 16, n.5, *citing*, *Cooley*]. But, when the claim asserts an as applied challenge to the chemicals, procedures, or other specific aspects of lethal injection, under *Cooley*, the statute of limitations began to accrue when the plaintiff knows or has reason to know the act providing the basis of the injury, which is defined as when the plaintiff should have discovered it through the exercise of reasonable

³⁹ *Wilson v. Garcia*, 471 U.S. 261, 276-80 (1985).

⁴⁰ *Collard v. Kentucky Board of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990).

⁴¹ *Wallace v. Kato*, 127 S.Ct. 1091 (2007); *Cooley v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007).

diligence, and could have filed suit and obtained relief.⁴² As explained below, applying this standard to Moore's complaint, demands a ruling that all claims in his complaint satisfy the one-year statute of limitations. But, in case this Court rules otherwise, in subsection b, Moore breaks down the timing of when each particular piece of information was disclosed so that this Court can isolate claims that are barred by the statute of limitations and claims that are not, which under *Jones*, discussed *supra* I (B), must be allowed to proceed.

1. **Defendants' refusal to disclose information about lethal injections in Kentucky and the limited information publicly known about how Defendants carry out lethal injections in Kentucky distinguish Moore's case from *Cooley* and require this Court to rule that he filed his action within one year of when he reasonably should have known of his claims.**

The *Cooley* Court found that the statute of limitations had expired for litigating lethal injection claims in Ohio because Ohio had made its execution protocol publicly available for years prior to *Cooley's* lethal injection challenge. Specifically, the *Cooley* Court noted that *Cooley's* complaint contained a 2002 letter disclosing the chemical mixture and equipment to be used, and that a law review article written by Professor Deborah Denno explained that as of 2001, Ohio had a vague written policy, but that more specific information was available upon request.⁴³ The *Cooley* Court also noted that an Ohio newspaper ran an article that contained a nine page Ohio Department of Rehabilitation and Corrections policy on how lethal injections are carried out in Ohio and that the Ohio Corrections sent a follow-up letter later in 2002 explaining in more detail the procedures used by prison personnel in performing lethal injections.⁴⁴ Based on the wealth of information concerning Ohio's lethal injection procedures and chemicals that

⁴² *Cooley*, 479 F.3d at 421. If this Court rules that the statute of limitations began to run when Kentucky adopted lethal injection in 1998, equitable tolling would result in the same finding that Moore's claims fall within the applicable statute of limitations.

⁴³ *Cooley*, 479 F.3d at 417, citing, Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What it Says About Us*, 63 Ohio St. L.J. 63 (2002).

⁴⁴ *Id.*

were publicly available and conveyed directly to counsel for Cooley as early as 2002, the Sixth Circuit held that Cooley knew or had reason to know of the facts giving rise to the specific allegations he presented in the instant complaint in 2001, when information concerning lethal injection was publicly available upon request.⁴⁵ Because Cooley did not file his complaint within two years of this, the Sixth Circuit held that the statute of limitations expired before Cooley filed his complaint.⁴⁶

Moore's situation is drastically different than Cooley's. Kentucky adopted lethal injection as a method of execution in 1998,⁴⁷ but unlike Ohio, Kentucky refused to release information about the chemicals and procedures it uses in lethal injections. In fact, while Ohio released information concerning its protocol to Professor Denno, including a statement that it had an execution protocol and would release more detailed information upon request, Kentucky did the exact opposite. When Professor Denno inquired of the Kentucky Department of Corrections about Kentucky's lethal injection protocol, she was informed that, even though Kentucky executed Eddie Harper by lethal injection in 1999, it did not have a lethal injection protocol.⁴⁸

⁴⁵ *Id.* at 422.

⁴⁶ *Id.*

⁴⁷ K.R.S. 431.220.

⁴⁸ Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What it Says About Us*, 63 Ohio St. L.J. 63, 117, tb. 17, tb. 20 (2002). It was not until December 22, 2004, when Defendants responded to the Request for Production of Documents and Interrogatories in *Baze et al. v. Rees et al.*, No. 04-CI-1094 (Franklin Cir. Ct.) (exhibit 5, response to production of documents and interrogatories), that it became known to anyone that Kentucky actually had an execution protocol in 1999. Exhibit 4 (Kentucky Lethal Injection Protocol as of 1999). This protocol establishes a beginning of a pattern that the *Cooley* Court expressly stated did not exist in Ohio - - regular modifications to the protocol. According to the 1999 protocol, it was revised on April 9, 1998, April 19, 1999, and May 14, 1999. Because the protocol is under seal by court order, when counsel for Baze and Bowling learned of this, they were prohibited from disclosing this information to attorneys representing other death sentenced inmates. The protocol remains under seal, meaning that counsel still is unable to disclose this information, and are only able to use it here because Defendants incorporated the discovery it provided in the *Baze* case as discovery in this case. Undersigned counsel Barron did not represent Moore at the time of the *Baze* and *Bowling* case. Thus, although he possessed this information through his representation of *Baze* and *Bowling*, he neither could use it at the time for Moore nor disclose it to the attorneys representing Moore.

Also, in 2001, Roberta Harding, a Professor at the University of Kentucky School of Law requested a copy of the execution protocol and the names and quantities of the chemicals used to carry out lethal injections in Kentucky. Unlike Ohio, where the Department of Corrections was responsive to Open Records Requests, Defendants refused to disclose any information concerning the protocol or even the chemicals used in lethal injections. Roberta Harding filed an appeal with the Kentucky Attorney General, but it was denied.⁴⁹ Similarly, in December 2003, an attorney with the Department of Public Advocacy filed an open records request seeking the same information. Once again, Defendants denied the request, refusing to even disclose the names of the chemicals used in lethal injections.⁵⁰

In July 2004, undersigned counsel, who, at the time, was representing Baze and Bowling, filed another open records request expecting to receive the same response. To his surprise, the Defendants abruptly changed its mind, in August 2004, and disclosed the names and quantities of the chemicals its uses to carry out lethal injections, but it refused to disclose any other information.⁵¹ At this point the chemicals became known, marking the earliest point at which the statute of limitations could begin to accrue for any Kentucky death-sentenced inmate, but this does not mean that all Kentucky death-sentenced inmates should have been on notice at that point as to the chemicals Kentucky uses for lethal injections. These death-sentenced inmates cannot be required to anticipate or learn that Defendants had changed their mind on whether to disclose this information and it was speculative on whether the Department of Corrections would disclose the information in future open records requests. As it turned out, and as will be

⁴⁹ Exhibit 6 (*In re Harding/Department of Corrections*, No. 01-ORD-247 (2001)).

⁵⁰ Exhibit 7 (December 23, 2003 Response to Open Records Request by Ted Shouse).

⁵¹ Exhibit 8 (August 3, 2004 Response to Open Records Request by David M. Barron filed in his capacity as attorney for Ralph Baze and Thomas Clyde Bowling)

discussed later, Defendants relied on the attorney-client privilege and pending litigation as grounds to refuse to disclose information in future open records request.⁵²

Although the names of the chemicals became available in a limited forum in August 2004, the actual execution protocol, which are the basis for a substantial number of claims in Moore's complaint,⁵³ did not become available until much later. Defendants even refused to disclose the execution protocols during the state court lethal injection litigation on behalf of Baze and Bowling. In fact, it was not until October 25, 2004 that Defendants were ordered to disclose a redacted copy of the protocol to counsel for Baze and Bowling.⁵⁴ The redacted protocol was disclosed under seal on October 30, 2004.⁵⁵

This protocol notes that almost the entire protocol, including the portions dealing with the injection of the chemicals and the insertion of the I.V.'s, was revised on November 1, 2002.⁵⁶ But, these were not the last substantive changes made to the protocol. On December 17, 2004, Defendants filed an updated redacted protocol under seal.⁵⁷ This version of the execution protocol - - the third of four versions that undersigned counsel currently know exists - - notes that the entire protocol was revised on December 14, 2004.⁵⁸ Accompanying the filing of this protocol was a document requesting that the unredacted protocol remain under seal.

⁵² Exhibit 9 (April 7, 2006 Response to Open Records Request filed by David M. Barron in his capacity as attorney for Brian Keith Moore).

⁵³ All claims in Moore's complaint, other than the ones limited to the chemicals Defendants use in lethal injections, either arise out of information in Kentucky's lethal injection litigation or are substantially supported by information in the protocol. Until the state court lethal injection trial took place, this information was not publicly available for Moore to know or for counsel for Moore to use without potentially violating the sealing order. The state court trial began on April 18, 2005 and concluded on May 2, 2005. Moore filed suit on April 19, 2006 [Record No. 1]. This was within a year of the conclusion of the trial. Applying equitable tolling to the number of days it took for Moore to exhaust his administrative remedies [see Grievance Rejection Notice, attached to Record No. 1 - - the Complaint], as required by law, means that Moore filed his suit not only within one year of the state court trial concluding but within one year of the commencement of the trial.

⁵⁴ Exhibit 12 (October 25, 2004 Order in *Baze et al. v. Rees et al.*, No. 04-CI-1094 (Franklin Cir. Ct.)

⁵⁵ *Id.*

⁵⁶ Exhibit 10 (2004 Kentucky Execution Protocol).

⁵⁷ Exhibit 11 (Notice of filing of Updated Redacted Execution Protocol in *Baze et al v. Rees et al.*, No. 04-CI-1094 with 2004 Revised Execution Protocol attached).

⁵⁸ *Id.*

Specifically, Defendants said, “[t]he Defendants object to the disclosure of the redacted portions of the protocol due to this information constituting a threat to security pursuant to KRS 197.025(1), KRS 197.025(6).”⁵⁹ Each version of Kentucky’s lethal injection protocol remained under seal.

Shortly thereafter, a local newspaper intervened in the *Baze* litigation for the limited purpose of moving the state circuit court to set aside the order sealing the redacted lethal injection protocols.⁶⁰ In deciding this motion, the state circuit court noted that the redacted protocol “contain **detailed** information regarding the location of the drugs used prior to execution, those persons (by title) having access to the drugs, the location of the condemned inmate leading to the execution, and a step-by-step sequential process of the actions taken after receiving an execution including the persons (by title) to complete those tasks and where they are to be performed.”⁶¹ The circuit court then agreed with “Defendants that to allow the above information to be released to the public would necessarily result in inmate access to the same information, which then could be used to threaten security and disrupt the execution process.”⁶² As a result, the circuit court denied the motion to unseal the redacted portion of the execution protocol, concluding “as a matter of law that the protocols remain properly sealed pursuant to KRS 197.025(1).”⁶³

The message stemming from this is clear - - death-sentenced inmates, other than Baze and Bowling, had no right to be informed of the information contained in the execution protocol, and, in fact, were affirmatively being denied access to the information contained in the protocol.

⁵⁹ Exhibit 13 (Defendants’ Notice of Filing of Unredacted Execution Protocol Under Seal to the Court).

⁶⁰ Exhibit 14 (Order & Opinion dated Feb. 11, 2005, in *Baze et al. v. Rees et al.*, No. 04-CI-1094 (Franklin Cir. Ct.), at 1).

⁶¹ *Id.* at 2 (emphasis added).

⁶² *Id.*

⁶³ *Id.* at 2-3.

Further, the circuit court's ruling originally sealing the protocol and then refusing to lift the sealing order, because it would result in inmate access, prevented counsel for Baze and Bowling from a) disclosing or discussing the protocol with attorneys representing other death sentenced inmates; b) disclosing or discussing the protocols in connection with other clients Baze and Bowling's attorney represented at the time of the state court litigation or after the trial took place in that case; and, c) using the protocols on behalf of other clients. Thus, even though undersigned counsel Barron (not Thomas or Palombi) represented Baze and Bowling in the state court lethal injection litigation, the sealing order in that case prevented him from using the information in support of any other client who was not a party to that action and for any future clients he obtained after the trial in the *Baze* case.

Of great importance in this regard is when undersigned counsel Barron undertook representation of Brian Keith Moore. In the March 30, 2007 Order, this Court noted that "Moore offers no explanation for his decision" not to join the litigation filed in state court on behalf of Baze and Bowling and faults Moore because "his counsel in this litigation also represented the inmates in the *Baze* case." [Record No. 139 at 7]. Factually, this is not accurate.

Baze and Bowling filed suit in August 2004. The state court trial on the merits began on April 18, 2005 and concluded on May 10, 2005. Undersigned counsel Barron did not begin representing Moore until November 1, 2005.⁶⁴ Thus, Barron had no authority to join or intervene Moore in the *Baze* case, and by virtue of the sealing order, Barron was prohibited from discussing the information he obtained from the protocol with counsel for Moore or even advising as to the propriety of intervening/joining the Baze and Bowling litigation. In other words, Defendants affirmatively took steps that were adopted by the circuit court to prevent

⁶⁴ See, e.g., exhibit 14 (Notice of Substitution of Counsel filed, on November 1, 2005, in *Moore v. Simpson*, No. 3:99cv-745-R (W.D. Ky.)). This was the first action undersigned counsel took on behalf of Brian Keith Moore in any court.

other inmates from obtaining information contained in the lethal injection protocol that were necessary to raise many, if not all, of the claims in Moore's complaint. Because Defendants are at fault for both the fact that Moore did not have information necessary to his suit and the attorneys who had the information could not use it on his behalf or share it with those who could, Defendants cannot now claim that the statute of limitations expired before he obtained this information. Thus, this Court must rule that the statute of limitations did not begin to accrue against Moore when Baze and Bowling filed suit. But, this Court still must ascertain when the statute of limitations began to accrue.

The fact that, unlike in *Cooey*, Defendants still refuse to release the execution protocol to the public prevents the statute of limitations from beginning to accrue. As a federal district court in Oklahoma recognized, an argument can be made that the refusal to publicly disclose the execution protocol prevents the statute of limitations from accruing until the protocol is released.⁶⁵ Particularly in light of the gravity of the information contained in the protocol and the fact that the sealing order in the *Baze* case prevented anyone with the information from discussing it with attorneys representing other death-sentenced inmates or using the information on behalf of other clients they represent, this Court should recognized the principle acknowledged by the federal district court in Oklahoma and rule that until Defendants publicly release their execution protocol, the statute of limitations does not begin to run.

If this Court does not recognize that the statute of limitations has yet to begin to run, this Court must determine when the statute of limitations accrued. The possibility of filing an open records request for information concerning lethal injections in Kentucky does not trigger the statute of limitations in this case. As discussed previously, Defendants' response to requests for the execution protocol and the names of the chemicals used in lethal injections is nothing short of

⁶⁵ *Anderson v. Evans*, 2006 WL 83093, *2 (W.D. Okla., Jan. 11, 2006).

random. At one point, they deny all information, yet when a different attorney requests the same information only a few months later, Defendants released the names of the chemicals. But, they still refused to release the protocol. And, when an Open Records request was filed on Moore's behalf, it served little to no purpose. Although Defendants released the names of the chemicals, Defendants refused to release any other information, **including information that had been disclosed during the discovery process in the *Baze* case.** The reasons for this were: 1) the protocol was sealed by the Franklin Circuit Court in the *Baze* case; 2) that all documents concerning lethal injections in Kentucky now pertain to civil litigation because of the *Baze* suit, and thus, Defendants were only obligated to disclose that which is required by the Rules of Civil Procedure (which Defendants appear to interpret as nothing since they only provided the publicly available policies and procedures adopted in conformance with Kentucky's Administrative Procedures Act and the number of hours of "execution training" that Warden Simpson has received); and, 3) that documents disclosed during the *Baze* case and any other documents pertaining to how Defendants' carry out lethal injections are now protected by the "attorney-client privilege and work product rule as they were utilized by [Defendants] in the *Baze* litigation."⁶⁶

As Defendants' denial of access to information pertaining to Kentucky lethal injections make clear, Defendants believe that they are entitled to withhold information that was used in the *Baze* case, are now disclosing less information than was disclosed during the *Baze* case, believe that the information used in the *Baze* case cannot automatically be used on behalf of other inmates, and are attempting to hide behind the *Baze* case to avoid disclosing information. In light of this, it is clear that Moore's situation is unlike that in *Cooley* in that Defendants persist in

⁶⁶ Exhibit 9 (April 7, 2006 Response to Open Records Request filed by David M. Barron in his capacity as attorney for Brian Keith Moore).

concealing relevant information to litigating the issues presented in this case. As a result, the theoretical possibility that an open records request for the information necessary to file suit would have resulted in Moore obtaining the necessary information earlier is nothing more than a theoretical aberration that does not exist in reality. It did not provide the necessary information and would not have had it been filed earlier. Thus, it does not stand for the proposition that the statute of limitations began to run before the information concerning Kentucky's lethal injection protocol became publicly available.

Admittedly, the media reported on the lethal injection litigation in the *Baze* case. But, unlike in Ohio, the media was denied a copy of the execution protocol. As a result, until the trial in the *Baze* case began, the media only had information on the chemicals, rather than the other information for which Moore now takes issue, to report. Thus, Moore cannot be held to have been on constructive notice of his claims because of information provided by the media. In addition, the media reports on the state court lethal injection litigation was sporadic during the seven months of litigation leading up to the trial. Because of this, it is unreasonable to hold that due diligence required Moore to watch media reports on a daily basis in the hope that information may be reported that could be beneficial to his cause.

“The essential question is not whether the relevant information was known by a large number of people, but whether [Moore] should be expected to take actions which would lead him to the information.”⁶⁷ “Absent some reasonable basis for concluding that the local news is likely to be a source of information at the particular time, due diligence does not require a [death-sentenced inmate] to monitor the news on a regular basis on the unlikely chance that he might

⁶⁷ *Wilson v. Beard*, 426 F.3d 653, 662 (3d Cir. 2005).

learn something which would be useful to his case.”⁶⁸ Such a reasonable basis does not exist here.

Moore did not know which days over a seven month period were likely to include media coverage concerning lethal injection litigation in Kentucky, and was unable to follow the media due to the fact that he was held in isolation in the “hole,” without access to media reports, during that period of time. Thus, he cannot be held, under the due diligence standard, with constructive knowledge of the information pertaining to many, if not all, of his claims by virtue of limited, undetailed media reports on the issue. Further, even if Moore saw the media reports, it would have done little to put him on notice since the media was denied access to the execution protocol and thus had little to nothing other than the chemicals to report. Thus, mere media reporting on general aspects of Defendants’ lethal injection procedures on a sporadic basis over an extended period of time does not cause the statute of limitations to begin to accrue. Instead, the earliest it can begin is when Moore was both put on notice by the information becoming widely known (or directly conveyed to him) and could file suit and obtain relief. This did not take place until the state court lethal injection trial in the *Baze* case.

The trial in the *Baze* case began on April 18, 2005 and concluded on May 10, 2005. During the trial, Defendants’ lethal injection procedures were discussed in detail. The trial was open to the public and, even though the testimony involved numerous aspects of the protocol that were under seal, none of the testimony was placed under seal and the courtroom was never closed. Thus, the state court trial in the *Baze* case is when the information concerning Defendants’ lethal injection procedures became generally known, constituting the point where Moore should have reasonably known of his cause of action. In other words, because of Defendants’ refusal to publicly release the execution protocol as Ohio has done, the state court

⁶⁸ *Id.* at 661.

trial in the *Baze* case is the equivalent to the information that was generally disclosed in Ohio in 2001 that the *Cooley* Court ruled put Cooley on notice of his cause of action.

The state court lethal injection trial in the *Baze* case also allowed undersigned counsel Barron to discuss the portions of the trial that stated portions of the execution protocol that were under seal. Until the information was publicly stated during testimony at the *Baze* trial, the information had never been conveyed to the public and was still sealed by the state circuit court. This prohibited undersigned counsel Barron from using the information on behalf of Moore or discussing it with anyone acting on Moore's behalf. But, when the information was discussed at an open trial, by virtue of the trial, the information was conveyed to the public, freeing undersigned counsel Barron to discuss those aspects of the trial. Barron did that.

On April 19, 2006, Barron, who, at that point, had undertaken the representation of Moore, filed this action. Both in the complaint and as exhibits to the memorandum of law in support of the complaint, Barron relied heavily upon testimony provided at the state court trial and even attached unofficial copies of excerpts of the transcript of testimony at the trial.⁶⁹ This further supports the reasonable belief held by undersigned counsel Barron that he could not use any of the information he obtained from the lethal injection protocols he obtained in the *Baze* case for Moore's benefit until the information was publicly disclosed at trial. Further support for this is found in the Joint Rule 26(f) Report [Record No. 43]. In order to obtain a redacted copy of the execution protocol, undersigned counsel had to agree to the following: "Counsel for plaintiff has agreed not to disclose the protocol to anyone not working on the litigation. The parties agreed that disclosure of the protocol to all attorneys, investigators, and interns working on the case is permissible, but that no one will disclose it to outside parties. Counsel for Plaintiff

⁶⁹ In Kentucky, the official record of court proceedings is a video tape. There is no written transcript of the trial. Thus, the transcripts of the *Baze* case that were prepared for litigation in this case are unofficial transcripts.

has agreed not to discuss the protocol with Brian Keith Moore or any other death-sentenced inmate.” *Id.* at 4. This statement makes clear that both Defendants and undersigned counsel Barron understood the sealing order to prevent Barron or any other attorney from using the information obtained from the lethal injection protocol disclosed in the *Baze* case for the benefit of Moore until portions of it was released to the public during the actual trial in the *Baze* case. Thus, this Court must rule that the statute of limitations for this action began to accrue at the conclusion of the lethal injection trial, May 10, 2005.

Should this Court conclude that the statute of limitations began to run at the beginning of the state court lethal injection trial, Moore’s complaint was still filed within the one year statute of limitations. The statute of limitations is tolled during the period of time during which Moore was exhausting his administrative remedies.⁷⁰ Moore filed his grievance with the Department of Corrections in accordance with the prison grievance system in March 2006, well before the expiration of the statute of limitations.⁷¹ It took five days for Moore to exhaust his administrative remedies.⁷² Thus, tolling means that Moore had five days beyond the one year to file suit. As discussed above the one year began to accrue no earlier than April 18, 2005. With the five days being added, Moore had to April 23, 2006 to file his suit. Moore filed his complaint on April 19, 2006, which is within the one year statute of limitations. Thus, this Court must rule that Moore filed his claim within the applicable statute of limitations.

As the detailed discussion above explains, Moore’s case is drastically different than *Cooley*. The *Cooley* Court relied, in part, on the fact that Ohio had only recently made changes to its execution protocol. By contrast, the state court litigation in the *Baze* revealed that Defendants not only have an execution protocol, which they denied when asked that by Professor Denno, but

⁷⁰ *Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir. 2000).

⁷¹ *See*, Grievance Rejection Notice, attached to Record No. 1 – Complaint].

⁷² *Id.*

that over the years, they have gone through three versions of the protocol. Many of the sections of these protocols were revised on different dates, suggesting that there may be even more than three versions of the execution protocol in existence. Then, through litigation in this case, Moore learned that Defendants have revised the execution protocol yet again - - this time after the conclusion of the trial in the *Baze* case.⁷³ The fact that Defendants continue to revise/change its execution protocol means that general knowledge of the chemicals or other aspects of the lethal injection procedures is insufficient to alert Moore to his own specific cause of action because Defendants could have altered the execution protocol after *Baze* and *Bowling* filed suit such that a different protocol for which Moore had no objection might apply to his execution.⁷⁴ Aside from the regular revisions of the execution protocol, Moore's case is different from *Cooley* in other substantive regards that are important to determining when the statute of limitations begins to run.

In *Cooley*, the Ohio Department of Corrections disclosed substantial portions of the protocol to the public and the media. The Ohio Department of Corrections also disclosed substantial amounts of information concerning the protocol in open records requests. By contrast, here, Defendants initially refused to even release the names of the lethal injection chemicals, would not provide the protocol to the public, would not provide the protocol to attorneys representing death sentenced inmates except under seal after litigation has been filed, and have taken steps, successfully, to prevent attorneys from disclosing information obtained through litigation to other attorneys or using it on behalf of other clients. In all regards, the

⁷³ Exhibit 15 (2006 Execution Protocol).

⁷⁴ Exhibit 17 (*Harbison v. Little*, No. 3:06-cv-01206 (M.D. Tenn., Jan. 29, 2007), at 10) (ruling that, for purpose of the statute of limitations, Plaintiff's abstract awareness of the lethal injection of another Tennessee death-sentenced inmate and how the execution was carried out is insufficient to have alerted Plaintiff to his own cause of action because "Tennessee might well have altered the protocol after the Coe execution, such that a different protocol – one to which the plaintiff had no objection – would apply to his execution").

information concerning the lethal injection procedures in Kentucky is not publicly or readily available in any where near the manner it is in Ohio. Perhaps, if the information was as available as it was in Ohio, the statute of limitations would have begun to run a long time ago, but that is not the case.

Under *Cooley*, this Court must rule that the statute of limitations began to run when Moore reasonably should have known of the facts giving rise to his cause action and could have filed suit and obtained relief. The secrecy surrounding executions in Kentucky, which does not exist in Ohio, and the absolute restrictions on attorneys using this information on behalf of death-sentenced inmates who are parties to the action in which the information is obtained, prevent this Court from ruling that the statute of limitations began to run before the information became publicly known and undersigned counsel was able to use it on behalf of Moore. This occurred when the state court lethal injection trial in the *Baze* case took place. It was at this point that the contents of the lethal injection protocol, which form a substantial portion of Moore's complaint, became known and undersigned counsel Barron was able to use the information, since the trial allowed sealed information to be discussed in open court. Moore filed suit within one year of this trial (and one year of the beginning of the trial when tolling during the time it took to exhaust administrative remedies is applied). Thus, his action was filed within the one-year statute of limitations that is applicable to this type of action only if this Court rules that the doctrine of statute of limitations applies purely equitable actions.

2. Because the statute of limitations applies claim-by-claim, a complaint cannot be dismissed on statute of limitations grounds unless each claim within the complaint is barred by the statute of limitations.

If this Court rules that either the statute of limitations applies to this case because Moore is only seeking equitable relief, or that the case, as a whole, was filed outside the one-year statute of limitations, this Court must address each and every claim to determine which, if any, claims were brought within the one-year statute of limitations. The United States Supreme Court “have never heard of entire complaint being thrown out simply because one of several discrete claims was barred by the statute of limitations, and it is hard to imagine what purpose such a rule would serve.”⁷⁵ Particularly in light of the gravity of the issues presented in this case and the fact that this case has been pending for a year, this case does not serve any imaginable purpose for doing so and should not be the first case the United States Supreme Court hears of where the entire case was thrown out because a claim was barred by the statute of limitations. Rather, this Court must ascertain when the statute of limitations began to run for each individual claim in Moore’s complaint. To do so, this Court must determine when Moore reasonably should have known about the facts giving rise to the claim and could have filed suit and obtained relief.

As discussed, *supra* II (B)(1), Moore asserts that the entire action was brought within the applicable statute of limitations. But, in case this Court rules otherwise, Moore hereby breaks down the dates on which certain information first became known.

The names of the chemicals were first disclosed in the *Baze* case in August 2004, but for the reasons discussed in II(B)(1), the timing of this should not impact Moore’s claims. The protocol was never disclosed until November 2004. This date, however, is not important because, as explained previously, Moore could not have obtained the information in the protocol.

⁷⁵ *Jones v. Bock*, 127 S.Ct. 910, 924 (2007).

He received a copy of the protocol on July 13, 2006.⁷⁶ Other aspects of Moore's claims became known on an even more piecemeal basis.

It was in the December 2004 revisions to the execution protocol that Defendants inserted a provision requiring the I.V. team to attempt to insert an I.V. for up to sixty minutes before requesting that the Governor call off the execution, so that the I.V. team could practice more and then attempt the same thing. It was these same protocol revisions where the Defendants first adopted minimum qualifications for members of the execution team and where the crash cart was added to the protocol. But, the contents of the items on the crash cart were not disclosed until April 21, 2005.⁷⁷ Thus, the statute of limitations on Moore's claim that Defendants failure to have the proper equipment and chemicals available at the execution chamber in case of a last minute stay of execution is granted after the first or second chemical is administered constitutes the arbitrary deprivation of life in violation of the Eighth Amendment and violates substantive due process could not begin to run before April 21, 2005. Because Moore filed suit on April 19, 2006, regardless of how this Court treats the rest of the claims in this case, this Court must rule that this claim was filed prior to the expiration of the statute of limitations, and thus, this Court must adjudicate this claim on the merits.

Finally, Moore has alleged that "Defendants' failure to conduct medical or scientific tests on the chemicals since August 2004 and their failure to adopt chemicals and procedures in light of the information presented to them since August 2004 shows their deliberate indifference towards known medical needs." [Record No. 1, Complaint at 34, para. 307. Although, in

⁷⁶ Exhibit 15 (2006 Execution Protocol).

⁷⁷ Exhibit 18 (List of chemicals on the Banyan Stat Kit 700). The date on the faxed copy of it is April 21, 2005. Despite traditional discovery in civil cases and pretrial disclosures, the list of chemicals on the crash cart was provided to undersigned counsel Barron, for the first, in open court on April 21, 2005, after a witness had testified the day before that he had purchased a crash cart to comply with the recent protocol revisions and named the crash cart manufacturer.

hindsight, it could have been expressed more clearly, this allegation includes Defendants' deliberate indifference for failing to lessen the risk of pain and suffering in light of information they obtained during the state court lethal injection trial in the *Baze* case. Because the allegation involves information from the state court trial, the statute of limitations on this claim could not begin to run until the state court trial took place. As mentioned previously, the trial began on April 18, 2005 and Moore filed his suit within one year of that. Thus, all claims involving Defendants deliberate indifference for failing to adopt alternative chemicals and procedures in light of the information presented at the state court trial were filed prior to the expiration of the one year statute of limitations and must be adjudicated on the merits by this Court.

While Moore maintains that his entire complaint has been filed within the one year statute of limitations, at an absolute minimum, this Court must rule that the claims involving deliberate indifference for not taking remedial action based on information from the state court trial and the claim regarding Defendants' failure to have proper equipment and chemicals to maintain life if a last minute stay of execution is granted were filed within the one year statute of limitations. Regardless of what this Court does with the rest of Moore's claims, under *Jones*, this Court must adjudicate these claims on the merits since, individually, these claims are properly before this Court.

CONCLUSION

Defendants cannot, consistent with the Eighth Amendment to the United States Constitution, inflict unnecessary pain and suffering solely because a statute requires a particular action. For instance, if Kentucky's method of execution statute required Defendants to carry out lethal injections by injecting potassium chloride - - one of the most excruciatingly painful chemicals known to society - - the statute would not conform with the Eighth Amendment to the United States Constitution. Hopefully, this Court would not permit such an obvious violation of the cruel and unusual punishment clause to take place solely because a statutory amendment would be required to change it. Likewise, this Court should not permit violations of the cruel and unusual punishment clause to take place solely because Defendants have not figured out a way to carry out the lethal injection without inflicting unnecessary pain and suffering. Fortunately, because Moore's claims neither present a situation where his execution by lethal injection could never be carried out with violating the cruel and unusual punishment clause nor require a statutory amendment to rectify the constitutional infirmities with the chemicals and procedures Defendants intend to use to carry out Moore's execution, this Court does not have to confront the difficult issue of what to do when it knows cruel and unusual punishment will take place but claim does not squarely fall within the ambit of 42 U.S.C. §1983 claims.

With the exception of the three paragraphs concerning the lethal injection chemicals remaining in Moore's veins, all the claims in his Complaint are clearly properly before this Court as §1983 claims. United States Supreme Court law requires this Court to decide those claims on the merits regardless of whether the claim identified by this Court as possibly lying in habeas is dismissed for lack of jurisdiction because it is not cognizable in a §1983 action. The claim

concerning the lethal injection chemicals remaining in Moore's veins, however, is also properly before this Court under §1983.

That claim only involves problems that are likely to take place if Defendants attempt to peripherally access Moore's veins. Defendants can easily avoid the complications that come with peripheral access in a person with compromised veins by inserting the I.V. through a central line, which does not pose a risk of the chemicals escaping from the veins. Defendants also can lessen the risk of unnecessary pain and suffering by being prepared to insert a central line if peripheral access is unsuccessfully attempted or if the vein blows. A central line can be inserted by a non-doctor, as long as the person doing so has been adequately trained in inserting a central line. Thus, using a central line to access Moore's veins not only is an alternative to peripheral access that does not pose the same risks, but also does not require participation by a doctor - - which is prohibited by K.R.S. 431.220. As a result, no statutory amendment is necessary to use a central line, meaning that neither reason for construing Moore's complaint as a habeas petition - - that he is alleging that Defendants could not constitutionally carry out his lethal injection by any means, or that a statutory amendment is necessary to carry out the execution - - apply in this case. Thus, this Court must rule that Moore's entire complaint is properly before this Court under 42 U.S.C. §1983.

Moore's action is also not barred by the affirmative defense of statute of limitations. Where the only relief sought is equitable, laches not statutes of limitations are applicable as an affirmative defense. Unlike *Cooey*, where the death-sentenced inmate sought damages as part of his lethal injection suit and whose claim was held by the Sixth Circuit to be barred by the statute of limitations, Moore only seeks equitable relief in the form of a declaratory judgment and an

injunction. Thus, his Complaint lies completely in equity, meaning that the statute of limitations is inapplicable to his case.

Even if this Court applies the one year statute of limitations under Kentucky law for personal injury actions, Moore's claims are not barred by the statute of limitations. Under *Cooley*, the statute of limitations begins to run when the death-sentenced inmate has reason to know the act providing the basis of the injury, through the exercise of reasonable diligence, and could have filed suit and obtained relief. Because, unlike in *Cooley*, Defendants have steadfastly refused to publicly release their execution protocol or discuss the contents of the protocol, the statute of limitations arguably has yet to begin to run. But even if this Court determines it has, Defendants' culpable conduct in depriving Moore of access to the information necessary to many, if not all, of his claims prevents this Court from ruling that his claim is barred by the statute of limitations.

When the execution protocol was released in the *Baze* case, it was released only to counsel for the two plaintiffs in the action - - Ralph Baze and Thomas Clyde Bowling. The attorneys for Baze and Bowling did not represent Moore at the time, and because the protocol was under seal (mainly for the purpose of preventing other death-sentenced inmates in Kentucky from learning of the contents of the execution protocol), Baze and Bowling's attorneys were prohibited from discussing the protocol with the attorneys who represented Moore and even prohibited from advising them as to the propriety of joining or intervening in the suit filed on behalf of Baze and Bowling. Undersigned counsel Barron, who represented Baze and Bowling, was prohibited by the sealing order from using the information he obtained while representing Baze and Bowling on behalf of Moore, whom Barron began representing after the state court lethal injection trial in the *Baze* case. Thus, to obtain the protocol for use on behalf of Moore,

Barron had to file suit on his behalf and then enter into an agreement that he would not share the protocol with anyone not working on behalf of Moore's lethal injection suit.

The confidentiality of the execution protocol and the fact that even when an attorney learned of its contents, that attorney could not use it to the benefit of other clients or provide the information to other attorneys representing death-sentenced inmates prevents this Court from ruling that the statute of limitations began to run when Baze and Bowling filed suit, or even at any time during the litigation in that case, prior to the state court trial.

During the state court trial, which began on April 18, 2005 and concluded on May 10, 2005, numerous aspects of Defendants' execution protocol that were under seal, yet essential to the claims alleged in Moore's Complaint, were discussed in open court. For practical purposes, this lifted the sealing (gag) order on these portions of the protocol, thereby allowing undersigned counsel Barron to discuss those aspects of the protocol and to use that information on Moore's behalf. Barron did just that. He filed this suit on April 19, 2006, relying heavily upon information obtained through the state court lethal injection trial in the *Baze* case and even attaching excerpts from the trial as exhibits.

Because Moore filed his lethal injection suit within one-year of the conclusion of the trial in the *Baze* case, his suit was filed within the applicable statute of limitations. But, even if this Court rules that he needed to file the suit within one year of the commencement of the trial, the five days that were tolled while Moore was exhausting administrative remedies, renders the timing of the filing of this suit to be within the one year statute of limitations. Thus, if this Court rules that the affirmative defense of statute of limitations applies to this purely equitable action, this Court must rule that Moore's action is not barred by the one year statute of limitations.

At a minimum, this Court must rule that his claims regarding deliberate indifference for not taking remedial action based on information learned during the trial in the *Baze* case and his claims regarding the failure to have adequate equipment and chemicals if a last minute stay of execution is granted were filed within the one year statute of limitations, because the contents of the crash cart were not disclosed until April 21, 2005, and the deliberate indifference claim did not arise until Defendants heard the testimony at the *Baze* trial. Because the affirmative defense of statute of limitations does not allow a court to dismiss a suit where some claims were filed prior to the expiration of the statute of limitations, at a minimum, this Court must isolate these claims from the rest of the claims in Moore's Complaint and allow these claims to proceed.

RESPECTFULLY SUBMITTED,

/s/ David M. Barron

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April 18, 2007.

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, on this 18th day of April 2007.

/s/ David M. Barron

COUNSEL FOR BRIAN KEITH MOORE