

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

EXECUTION IMMINENT

**EXECUTION SCHEDULED FOR
SEPTEMBER 25, 2007**

**MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR A
PRELIMINARY INJUNCTION BARRING RALPH BAZE'S EXECUTION PENDING
THE SUPREME COURT OF THE UNITED STATES' DISPOSITION OF
THE PETITION FOR CERTIORARI IN *COOEY V. STRICKLAND***

Ralph Baze respectfully requests that this Court grant a preliminary injunction barring Defendants from executing him until the Supreme Court of the United States has decided *Cooley v. Strickland*. In *Cooley*, the United States Court of Appeals for the Sixth Circuit ruled that the statute of limitations on a lethal injection claim begins to run when the condemned inmate reasonably should have known of the information giving rise to the action and could have filed suit. As this Court recognized, *Cooley* is “potentially dispositive of the claims asserted” in this case. [Record No. 139 at 34]. Yet, *Cooley* is not final and thus could be reversed by the United States Supreme Court, which may agree with post-*Cooley* courts that have ruled that the statute of limitations does not apply to lethal injection challenges.¹

Recognizing the importance of the issues decided in *Cooley* and that it not yet enforceable, the Sixth Circuit stayed its mandate pending en banc review and then again pending filing of a petition for a writ of certiorari.² By staying the mandate pending the petition for a writ of certiorari, the Sixth Circuit recognized that the “certiorari petition [will] present a substantial question and that there is good cause for a stay.”³ In line with that, after deciding *Cooley*, the Sixth Circuit refused to vacate the injunction the federal district court granted to Kenneth Biros to litigate lethal injection issues.⁴ The United States Supreme Court likewise refused to vacate the injunction even though *Cooley* made his claim time barred.⁵ That injunction is still in effect. Similarly, after *Cooley* was decided, the United States District Court for the Southern District of Ohio granted a preliminary injunction to Clarence Carter, noting that until the mandate issues,

¹ See, e.g., *Jones v. Allen*, 483 F.Supp.2d 1142 (M.D.Ala. 2007).

² Exhibit 6 (Sixth Circuit order staying mandate in *Cooley*).

³ FRAP 41(d)(2)(A).

⁴ Exhibit 1 (Sixth Circuit order denying motion to vacate Biros’ preliminary injunction).

⁵ Exhibit 2 (United States Supreme Court order denying motion to vacate preliminary injunction granted to Biros).

Cooley is not enforceable.⁶ While the injunction remains in force,⁷ all litigation in *Cooley* is on hold pending the United States Supreme Court's action on the petition for a writ of certiorari.

Cooley's certiorari petition will be filed at the end of August 2007. The State of Ohio has thirty days to file a response in opposition, and the case will be reviewed shortly thereafter, with a decision granting or denying certiorari expected by late October. Despite this, Defendant Fletcher set Ralph Baze's execution for September 25, 2007 - - approximately one month before the Supreme Court will decide *Cooley's* petition for a writ of certiorari.

Defendants should not be allowed to control the timing of the litigation in this case in such a manner that prevents a potentially dispositive issue from first being decided by the highest court in the land. Because *Cooley* is potentially dispositive of the underlying action (which could impact Baze's right to intervene and to receive a preliminary injunction on the underlying merits) and will become final soon, this Court should take the same action the Southern District of Ohio, the Sixth Circuit, and the United States Supreme Court has taken with the other execution dates directly impacted by *Cooley* - - grant a preliminary injunction barring Baze's execution until the mandate is issued in *Cooley*,⁸ which, by operation of the Federal Rules of Appellate Procedure, will occur immediately upon the United States Supreme Court rendering a decision.⁹

⁶ Exhibit 3 (Southern District of Ohio order granting Carter a preliminary injunction).

⁷ It appears that Ohio never sought to vacate the preliminary injunction granted to Clarence Carter.

⁸ The United States District Court for the District of Delaware took the same action in regard to the Supreme Court of the United States pending action in *Hill v. McDonough*. Recognizing that *Hill* could be dispositive of the lethal injection case pending before it, the court granted a preliminary injunction barring Robert Jackson's execution pending the outcome of *Hill*. *Jackson v. Taylor*, 2006 WL 1237044 (D.Del. May 9, 2006) (exhibit 4).

⁹ FRAP 41(d)(2)(B) says that a stayed mandate will remain in force "until the Supreme Court's final disposition." Under FRAP 41(d)(2)(D), "[t]he court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for a writ of certiorari is filed."

INTRODUCTION AND PROCEDURAL HISTORY

On August 9, 2004, well before he exhausted federal habeas corpus remedies, Ralph Baze filed a lethal injection challenge in state court. On March 21, 2005, the United States Supreme Court denied Baze's petition for a writ of certiorari on the denial of federal habeas corpus relief. Although no stay of execution was in place, Defendants did not seek an execution date.

The state trial court decided the lethal injection case on July 8, 2005, after holding a trial in which counsel for Baze were not allowed to question any member of the execution team. The trial court held that inserting an I.V. in the neck was unconstitutional but decided the case against the plaintiffs in all other regards. The Kentucky Supreme Court affirmed that decision on November 22, 2006. Despite that decision and no stay of execution being in place, Defendants still did not seek an execution date.

On November 27, 2006, Baze moved to intervene in this action, which has been pending since April 19, 2006. In response to that motion, this Court ordered briefing on the applicability of the *Rooker-Feldman* Doctrine, which was completed on January 22, 2007. This Court has yet to decide Baze's motion to intervene. Baze has moved to expedite a ruling on his motion to intervene.

While the *Rooker-Feldman* briefing was taking place, Baze sought rehearing in state court. No execution date was sought while rehearing was pending. Rehearing was denied on April 19, 2007. Defendants did not immediately request an execution date on Baze. Shortly after rehearing was denied, Baze asked the Kentucky Supreme Court for a stay of execution pending the filing of a petition for a writ of certiorari. Defendants objected. On May 4, 2007, fifteen days after rehearing was denied and with no execution date having been requested, the Kentucky Supreme Court granted Baze's motion, staying Baze's execution until July 18, 2007 - -

the longest amount of time for which the Kentucky Supreme Court, under Kentucky law, is allowed to stay an execution pending a petition for a writ of certiorari. When that stay expired, Defendants still did not request an execution date. Instead, they waited nearly a month and then requested an execution date just before filing its brief in opposition to the petition for a writ of certiorari. Defendant Fletcher signed Baze's execution warrant two days after Defendants filed their Brief in Opposition to certiorari in the state court case.

While lethal injection litigation on behalf of Baze was playing out in state court and before this Court, the United States Court of Appeals was dealing with an issue of first impression - - when does the statute of limitations begin to run in an action challenging chemicals and procedures used in lethal injections? On March 2, 2007, more than three months after Baze moved to intervene in this case, the Sixth Circuit answered the statute of limitations question in *Cooley v. Strickland*.¹⁰ That, however, was not the end of the story.

Recognizing that *Cooley* could be dispositive on this case, shortly after *Cooley* was decided, this Court ordered briefing on the application of the statute of limitations and stayed all discovery pending its ruling on the application of the statute of limitations. [Record No. 139]. This Court has yet to rule on whether the statute of limitations bars this action. One reason for that is because *Cooley* is not yet final and the Sixth Circuit and United States Supreme Court has taken action suggesting that *Cooley* should not be applied until the United States Supreme Court has the opportunity to decide whether to grant Cooley's petition for a writ of certiorari.

After ruling that Cooley's lethal injection challenge was barred by the applicable statute of limitations, the Sixth Circuit stayed its mandate pending a ruling on the petition for rehearing en banc, thereby maintaining the preliminary injunctions that had been granted by the United

¹⁰ 479 F.3d 412 (6th Cir. 2007).

States District Court for the Southern District of Ohio.¹¹ After staying the mandate, the Sixth Circuit refused to lift an injunction that had been granted to Kenneth Biros, who had intervened in the *Cooley* case.¹² The United States Supreme Court also refused to vacate that injunction.¹³ And, the United States District Court for the Southern District of Ohio continued to grant preliminary injunctions pending finality of *Cooley*.¹⁴

On June 1, 2007, a bitterly divided en banc panel of the Sixth Circuit denied en banc review in *Cooley*.¹⁵ Yet, the Sixth Circuit stayed the mandate pending disposition of a petition for a writ of certiorari.¹⁶ After doing so, it refused to vacate the preliminary injunction granted to Kenneth Biros, who had intervened in *Cooley*.¹⁷ Preliminary injunctions remain in force for both Kenneth Biros and Clarence Carter even though the Sixth Circuit decided that their lethal injection claims are barred by the statute of limitations. This is because the United States Supreme Court may soon weigh in on this issue of first impression and quite possibly will resoundingly reject *Cooley* as all courts addressing the issue since *Cooley* have done.¹⁸

Cooley's petition for a writ of certiorari will be filed this week (by the end of August) and the United States Supreme Court will decide whether to take the case by the end of October. If it does, the mandate in *Cooley* will remain stayed until the Court decides *Cooley*.¹⁹ If certiorari is denied, the mandate will issue immediately upon the denial of certiorari.²⁰ Despite the fact that

¹¹ Exhibit 5 (Docket sheet in *Cooley v. Strickland*, No. 05-4057). The docket sheet does not expressly state that the mandate was stayed pending rehearing, but there is no indication on the docket sheet that the mandate issued and it surely did not for the court stayed the issuance of the mandate pending the filing of a petition for a writ of certiorari. FRAP 41(d)(1) says, "[t]he timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise."

¹² Exhibit 1 (Sixth Circuit order denying motion to vacate Biros' preliminary injunction).

¹³ Exhibit 2 (United States Supreme Court order denying motion to vacate preliminary injunction granted to Biros).

¹⁴ Exhibit 3 (Southern District of Ohio order granting Carter a preliminary injunction).

¹⁵ *Cooley v. Strickland*, 489 F.3d 775 (6th Cir. 2007).

¹⁶ Exhibit 6 (Sixth Circuit order staying mandate in *Cooley*).

¹⁷ Exhibit 1 (Sixth Circuit order denying motion to vacate Biros' preliminary injunction).

¹⁸ See, e.g., *Jones v. Allen*, 483 F.Supp.2d 1142 (M.D.Ala. 2007).

¹⁹ FRAP 41(d)(2)(B).

²⁰ FRAP 41(d)(2)(D).

the petition for a writ of certiorari in *Cooley* will be decided and despite the fact that discovery in this case has been stayed pending a determination of the applicability and impact of *Cooley*, Defendants have scheduled Ralph Baze's execution for September 25, 2007 - - shortly before *Cooley* is to be decided

ARGUMENT

As this Court already recognized, the Sixth Circuit's decision in *Cooley* may be dispositive of the claims asserted in this case. [Record No. 139 at 34]. *Cooley*, however, is not final because the mandate has yet to issue and the petition for a writ of certiorari is about to be filed.²¹ Thus, it remains to be determined if *Cooley* applies at all or if *Cooley* will be modified in a material way. All other courts dealing with the issue have flat out rejected *Cooley*, thereby increasing the likelihood that the Supreme Court of the United States will grant *Cooley*'s petition for a writ of certiorari. The ambiguity surrounding the applicability of *Cooley*, along with the reality that the ambiguity will soon be resolved, means that this Court should enjoin Defendants from executing Ralph Baze until the mandate has issued in *Cooley* (when the United States Supreme Court decides the case).

Because the Supreme Court could render a decision in *Cooley* that would preclude this Court from hearing this case or a ruling that would require this Court to hear the case, it would be a waste of judicial resources for this Court to decide the application of *Cooley* to this case until we know if the Supreme Court will change the analysis this Court must conduct or tell it that statute of limitations does not apply at all.

²¹ See, .e.g., *United States v. Swan*, 327 F.Supp.2d 1068, 1072 (D.Neb. 2004) (exhibit 7). As *Swan* notes, the 1998 Amendments to Rule 35(c) of the Federal Rules of Appellate procedure deleted the portion of the rule that said "a request for rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate." Thus, any pre-1998 case law saying that a decision becomes binding when rendered rather than when the mandate is issued is no longer the law. Instead, as the Sixth Circuit realized in upholding the injunction granted to *Biros* and as the United States District Court for the Southern District of Ohio recognized in granting *Carter* an injunction after *Cooley* had been decided, *Cooley* cannot be applied until the mandate issues, which in *Cooley*, will not be until the United States Supreme Court decides the petition for a writ of certiorari.

It also would not be proper for this Court to allow Baze's execution before the United States Supreme Court has the opportunity to weigh in on *Cooley* and until *Cooley* becomes final by the issuance of the mandate. The federal district court for Delaware, the United States Court of Appeals for the Sixth Circuit, and, most recently, the United States Supreme Court have already intimated to that effect by enjoining executions and refusing to lift injunctions in parallel situations and cases directly governed by the Sixth Circuit's decision in *Cooley*.

A similar situation arose in Delaware when the state scheduled the execution of Robert Jackson for shortly before a decision would be rendered in *Hill v. McDonough* on whether a challenge to the chemicals and procedures used in lethal injections is cognizable in a 42 U.S.C. §1983 suit. Recognizing that *Hill* could have a dispositive effect on Jackson's claims and that it would be a waste of money and judicial resources to litigate the case when the Supreme Court would be rendering a decision in *Hill* within a matter of three months that could require dismissal of the action or require the court to revisit some of its rulings, the United States District Court granted a preliminary injunction barring Jackson's execution pending disposition of *Hill*.²² While *Jackson* is strong authority for granting a preliminary injunction, the issue of the applicability of *Cooley* is stronger grounds to enjoin Baze's execution pending a decision on whether certiorari will be granted in *Cooley*.

Unlike the issue of whether a lethal injection suit is cognizable under 42 U.S.C. §1983, for which there was circuit precedent before *Hill*, the issue decided in *Cooley* is an issue of first impression. Thus, *Cooley* neither overrules nor reaffirms binding precedent that this Court must apply; instead, it could create new law that would have to be applied when it becomes final. Realizing this and that the difficult issue involving the statute of limitations could be decided

²² *Jackson v. Taylor*, 2006 WL 1237044 (D.Del. May 9, 2006) (exhibit 4). The United States Court of Appeals for the Sixth Circuit also stayed briefing in *Cooley* pending the United States Supreme Court's disposition of *Hill*. See, Exhibit 5 (Docket sheet in *Cooley v. Strickland*, No. 05-4057).

differently by the en banc court of the Sixth Circuit or the United States Supreme Court, the Sixth Circuit stayed the mandate in *Cooley* and then refused to vacate a preliminary injunction granted to Kenneth Biros. Although that injunction was granted before *Cooley* was decided, the Sixth Circuit upheld it after *Cooley* and ruled that it should remain in effect until the mandate issues in *Cooley* after rehearing and certiorari.²³ The United States Supreme Court agreed, also refusing to vacate Biros' injunction despite *Cooley*.²⁴ Guided by the Sixth Circuit's action in regard to Biros, the United States District Court for the Southern District of Ohio enjoined Clarence Carter's execution.²⁵ Both of those injunctions remained in effect after the rehearing en banc was denied and will continue to do so until the Supreme Court of the United States decides whether to grant certiorari in *Cooley*.

This Court should heed the guidance of the courts that have come before it and pay respect to the higher federal courts by recognizing the principle it laid out - - inmates who have filed lethal injection litigation claims more than days before a scheduled execution are entitled to a preliminary injunction pending the issuance of the mandate in *Cooley*, which will be rendered when the Supreme Court decides the case - - possibly as early as a month after Baze is scheduled to be executed. Abiding by the edict of the Sixth Circuit and the Supreme Court, this Court should do as was done in Biros and Carter - - grant Baze a preliminary injunction barring his execution until the Supreme Court decides *Cooley*.

The United States Supreme Court has ruled that a stay or preliminary injunction is particularly appropriate when a ruling in another proceeding will likely "narrow the issues in the

²³ Exhibit 1 (Sixth Circuit order denying motion to vacate Biros' preliminary injunction).

²⁴ Exhibit 2 (United States Supreme Court order denying motion to vacate preliminary injunction granted to Biros).

²⁵ Exhibit 3 (Southern District of Ohio order granting Carter a preliminary injunction).

pending case.”²⁶ This practical consideration is most compelling when the other proceeding is before a court whose decision will bind the enjoining court.²⁷ This is the exact situation here.

If the Supreme Court of the United States decides that the statute of limitations is inapplicable, this Court will not need to address the statute of limitations defense. If the United States Supreme Court addresses the issue and modifies or changes *Cooley*, this Court will not have rendered a decision that will have to be revisited. If the United States Supreme Court affirms *Cooley* or does not grant certiorari, this Court will know that the statute of limitations applies generally and then will only have to determine its application to this case. One of these scenarios will take place within a month of Baze’s scheduled execution, and each of them will narrow the statute of limitations issue presently before this Court. And, once *Cooley* becomes final upon the United States Supreme Court rendering a decision, it will be binding on this Court. Thus, under the United States Supreme Court’s framework, its actions in *Biros*, and the Sixth Circuit’s actions in *Biros* and *Carter*, a preliminary injunction barring Baze’s execution until *Cooley* becomes final is not only appropriate but should be granted.

A preliminary injunction is also warranted here by considerations of “wise judicial administration” and “comprehensive disposition of litigation.”²⁸ It makes no sense for this Court

²⁶ *Landis v. North Am. Co.*, 299 U.S. 248, 253 (1936).

²⁷ See, e.g., *Florida Farmworkers Council, Inc. v. Donovan*, 672 F.2d 893 (D.C. Cir. 1981) (ordering the district court to stay action on appellant’s claim pending decision by the Eleventh Circuit “because action by the Eleventh Circuit may be dispositive of [appellant’s claims]”); *Marshel v. AFW Fabric Corp.*, 552 F.2d 471 (2d Cir. 1977) (per curiam) (staying district court proceedings pending decision on determinative question of law by the United States Supreme Court); *Wing Shing Prods. (BVI) Ltd. V. Simatex Mfg. Co.*, 2005 WL 912184, *2-3 (staying action to wait “potentially outcome determinative” decision by the Federal Circuit in a related appeal) (exhibit 8); *In re: Literary Works in Elect. Databases Copyright Litig.*, 2001 WL 204212, *2-3 (S.D.N.Y.) (staying district court action pending United States Supreme Court decision “likely to have a significant, if not dispositive, impact on the cases here”) (exhibit 9); *Marbury v. Colonial Mortgage Co.*, 2001 WL 135719, *9 (M.D.Ala.) (staying district court action pending decision by Eleventh Circuit in another case presenting a similar issue of law) (exhibit 10); *KK Motors, Inc. v. Brunswick Corp.*, 1999 WL 246808, *2 (D. Minn.) (noting that if Eighth Circuit were to vacate, or reverse, decision of another district court within that circuit involving same legal issues, then Eighth Circuit’s “formulation of the law to be applied in this Circuit, which will inevitably apply to this case, will set the agenda for discovery, Motion practice and the Trial itself. Such a potentiality properly cautions restraint.”) (exhibit 11).

²⁸ *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

to embark on applying the complex decision in *Cooley* to the even more complex procedure posture of this case when within a month of Baze's scheduled execution, we could learn that *Cooley* is not the law. Likewise, it makes no sense for this Court to determine whether the facts of this case distinguish it from *Cooley* when a ruling in *Cooley* could change how this Court analyzes the issue. The prudent course that would save this Court's resources, decrease the likelihood of an erroneous ruling, and avoid the possibility of this Court having to readdress the issue after *Cooley* becomes final, is to grant a preliminary injunction barring Baze's execution until the mandate is issued in *Cooley*. Doing so will not only save this Court resources, it will also give life to the meaning of the Sixth Circuit's and United States Supreme Court's rulings in *Biros*, refusing to vacate a preliminary injunction until the Supreme Court decides *Cooley* and until the mandate issues. A preliminary injunction for such a short period of time will not substantially harm Defendants.

Although Baze exhausted federal habeas remedies on March 21, 2005 and only had a stay in place for a total of approximately six months since then, the Attorney General's Office did not request an execution date until August 2007, and Defendant Fletcher did not set an execution date on Baze until August 22, 2007. Defendant Fletcher scheduled Baze's execution despite the pendency of this case and despite the fact that *Cooley's* petition for a writ of certiorari will be filed in the United States Supreme Court within a matter of days and will be decided by the end of October. Defendant Fletcher had the authority to schedule Baze's execution for after the United States Supreme Court conferences *Cooley*, but he decided not to do so. By scheduling Baze's execution despite all of this and setting the execution date for September 25 2007 (approximately a month before the United States Supreme Court will weigh in on *Cooley*), any

harm to Defendants from the grant of a preliminary injunction is self-inflicted harm from which it should not be allowed to benefit.

That harm, if it can be called harm, is minimal. It will not prevent Baze's execution. Instead, it will only delay Baze's execution for a very short period of time. Considering that until this month, Defendants were in no rush to execute Baze and were seemingly willing to allow this case to be decided first, this short delay is little to no harm. In light of this, any minimal harm does not even register when compared to the prejudice that would be suffered by Baze if he is executed before the case that could be dispositive on whether Baze's claim can proceed forward is decided. For the reasons expressed above this Court should grant Baze a preliminary injunction barring his execution on September 25, 2007.

REQUEST FOR RELIEF

For the reasons expressed above, Ralph Baze requests that this Court enjoin Defendants from executing him until the United States Supreme Court decides whether to grant certiorari in *Cooley* and until the mandate issues in *Cooley*.

RESPECTFULLY SUBMITTED,

/s/ David M. Barron

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August 26, 2007.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed with the Court by using the CM/ECF system on this 26th day of August 2007.

/s/ David M. Barron

Counsel for Ralph Baze