UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CAPITAL CASE

ELECTRONICALLY FILED

CIVIL ACTION NO. 3:06-CV-00022-KKC

BRIAN KEITH MOORE, ET. AL PLAINTIFFS

v.

JOHN D. REES, ET. AL DEFENDANTS

BRIEF OF APPELLEES ADDRESSING ISSUES IDENTIFIED IN THE COURT'S MEMORANDUM OPINION AND ORDER ENTERED MARCH 30, 2007

Come now the Defendants, by and through counsel, and pursuant to the Court's Memorandum Opinion and Order entered March 30, 2007 [Docket #139], submit the following Brief addressing the issues identified by the Court.

The Court's Memorandum Opinion and Order directed the parties to brief two (2) potentially dispositive issues relating to the action. First, the parties were directed to brief the issue of whether Moore's claims relating to his allegedly compromised veins foreclose any means of executing him using intravenous injection as required by statute in Kentucky, thereby making Moore's action the functional equivalent of a prohibited successive habeas challenge to his death sentence. Second, the parties were directed to brief the issue of whether Moore's lethal injection challenge is barred by the running of the statute of limitations under the analysis articulated by Sixth Circuit in Cooey v. Strickland, 2007 WL 623482 (6th Cir. March 2, 2007).

I. Moore's Complaint forecloses any means of executing him using intravenous injection as required in Kentucky, thereby making Moore's action the functional equivalent of a prohibited successive habeas challenge to his death sentence.

In his Complaint, Plaintiff Brian Keith Moore contended that his alleged "bad veins" would prevent the Department of Corrections from using an I.V. catheter to execute him by lethal injection without resulting in the risk of pain and suffering that Moore alleged would violate his rights under the Eight Amendment to the United States Constitution and Section 17 of the Kentucky Constitution. [1] It was not until the Plaintiff was faced with the prospect of having his action dismissed as the functional equivalent of a prohibited successive habeas challenge that he was willing to concede that central line access by a percutaneous procedure would satisfy his constitutional concerns posed by his alleged "bad veins."[2] This "shift" in their position is an obvious attempt to avoid dismissal and should be viewed as disingenuous at best.

In his Memorandum of Law on Whether his "Bad Veins" Prevent his Execution and Whether the Statute of Limitations Bars his Claims (hereinafter "Plaintiff's Memorandum"), Plaintiff Moore now concedes that the percutaneous placement of a central venous I.V. catheter would allow the Defendants to lawfully carry out his death sentence while addressing his constitutional concerns about the lethal

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[1] Moore's Complaint alleges that because of his "bad veins," the Defendants will be unable to use an I.V. to inject him with lethal injection chemicals without creating an unnecessary risk of pain violating his rights under the Eighth Amendment of the U.S. Constitution and Section 17 of the Kentucky Constitution. He also sought a temporary restraining order and a preliminary injunction preventing the defendants from carrying out his execution until Defendants came up with a means of guaranteeing venous access. *See* Complaint at ¶¶ 16, 525.

For purposes of this Brief, the Defendants assume *arguendo* the unsubstantiated allegations of Plaintiff Moore's complaint regarding his "bad veins" and alleged effect the condition will have on him if he is executed under the existing lethal injection protocol. In reality, the Plaintiff Moore has submitted no evidence to support his allegations that he suffers from any condition that would prevent the Department of Corrections utilizing the existing protocol. The Defendants expressly deny that the Plaintiff suffers from any such condition.

[2] As recently as December 20, 2006, Plaintiff Moore filed a Reply in which he recommended "perhaps injecting chemicals directly into Moore's veins in a manner other than a percutaneous procedure. " *See* Plaintiff's Reply to Response in Opposition to Plaintiff Brian Keith Moore's Second Motion for Leave to Conduct Depositions [Docket #123] at 3.

injection chemicals blowing out his veins if the chemicals can be successfully injected into his veins.[3] In his Memorandum, the Plaintiff argues that the Defendants should have already identified the Plaintiff's proposed solution and that "[t]he problem is that Defendants are not prepared for this possibility and, . . . have taken no steps to prepare for this situation or learn how to insert a central line."[4] However, the Plaintiff has overlooked a serious problem with his proposed solution: as a result of the efforts of the Plaintiff's lead counsel, David Barron, on behalf of fellow death row inmates Ralph Baze and Thomas Bowling in the state court case Bowling and Baze v. Rees, Franklin Circuit Court Case No. 04-CI-1094 (filed Aug. 8, 2004) (hereinafter "Bowling and Baze v. Rees"), the Franklin Circuit Court entered a judgment[5] on July 8, 2005 in which it held as follows:

> The Plaintiffs have demonstrated by a preponderance of the evidence that the procedure where the Department of Corrections attempts to insert an intravenous catheter into the neck through the carotid artery or jugular vein does create a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death. Accordingly, that portion, and only that portion, of Kentucky's lethal injection protocol allowing for this procedure is stricken as violating the Plaintiffs' safeguards against cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Section 17 of the Kentucky Constitution.

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[3] Plaintiff's Memorandum at 7. The Plaintiff's latest concession was in response to the Court's Memorandum Opinion and Order entered March 30, 2007 [Docket #139], in which the Court ordered the parties to address whether the allegations of Paragraphs 392, 394, and 395 collectively foreclose Moore's execution by lethal injection by any legal means, resulting in dismissal of his complaint under 28 U.S.C. §2244(b) due to lack of subject matter jurisdiction. Paragraphs 392, 394, and 395 state as follows:

> 392. 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. . . .
>
> 394. Because of Plaintiff's bad veins, even if Defendants are able to insert an I.V. into Plaintiff, the chemicals likely will not remain in his veins.
>
> 395. If the chemicals do not remain in the Plaintiff's veins, Plaintiff will suffer an excruciatingly painful death.

Complaint at ¶¶ 392, 394 and 395.

[4] Plaintiff's Memorandum at 8.

[5] The document is titled "Findings of Fact and Conclusions of Law," but it is designated a final, appealable order of the Court on the last page of the document.

See Judgment, Case No. 04-CI-1094, at 11-12.[6] In addition, the Franklin Circuit Court enjoined the Kentucky Department of Corrections from utilizing the portion of the lethal injection protocol that permitted injection of lethal chemicals into the neck of the condemned prisoner. *See* Exhibit 1 at 13. Defendants decided not to appeal Judge Crittenden's findings since Judge Crittenden confirmed there were a minimum of four locations (arms, hands, feet and ankles) that would be available for a constitutional execution. The judgment was then affirmed on appeal by the Kentucky Supreme Court in Baze and Bowling v. Rees, Appeal No. 2005-SC-000543, ---S.W.3d --- (Nov. 22, 2006), *petition for rehearing denied,* (Apr. 19, 2007).[7]

The result is that any attempt to attain venous access through the jugular vein would clearly be unlawful under Baze and Bowling v. Rees.[8] Furthermore, due to proximity of the subclavian vein to the neck, the Defendants are concerned that any attempt to gain venous access through the subclavian vein would also be unlawful under Baze and Bowling v. Rees.

In addition to discussing the jugular and subclavian veins as potential sites of venous access, the Declaration of Mark J.S. Heath, M.D. that was included as Exhibit 2 to the Plaintiff's Memorandum, Dr.

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[6] A certified copy of the Findings of Fact and Conclusions of Law entered in Case No. 04-CI-1094 is included as Exhibit 1 to the Defendants' Brief.

[7] A certified copy of the Kentucky Supreme Court's Opinion Affirming entered in Appeal No. 2005-SC-000543 is included as Exhibit 2 to the Defendants' Brief. The following language in the Opinion addresses the Franklin Circuit Court's conclusion regarding central venous access through the neck:

> The circuit judge concluded that the preponderance of the evidence indicates that the procedure which attempts to insert an intravenous catheter into the neck through the carotid artery or jugular vein does create a substantial risk of wanton and unnecessary infliction of pain and that only that portion of the legal injection protocol was stricken as violating the safeguards against cruel and unusual punishment. The Department of Corrections has since amended its previous protocol to meet the directions of the circuit court.

Exhibit 2 at p. 6, numbered paragraph 6.

[8] Similarly, and attempt to attain venous access through the carotid vein would also be clearly unlawful under Baze and Bowling v. Rees.

Heath also mentions the femoral vein. However, while Dr. Heath's Declaration clearly identifies the jugular and subclavian veins as central veins, Dr. Heath's Declaration fails to state whether the femoral vein is medically defined as a "central vein."[9] As a result, Dr. Heath's Declaration provides no indication whether or not central venous access through the femoral vein would be an acceptable alternative. Based on the information provided in Dr. Heath's Declaration, the Court must reject the femoral vein as an acceptable means of central venous access, if it is even intended to be listed as a means of central venous access. [10]

Even if the femoral vein could be medically defined as a central line, Dr. Heath's declaration fails to address a crucial issue in determining whether venous access can be achieved using a percutaneous procedure. The critical problem that Dr. Heath's declaration fails to address is the impact of Plaintiff Moore's obesity[11] on the prospects of obtaining venous access through either the femoral or subclavian (or even the jugular)[12] vein without the use of a cut-down procedure. None of the evidence submitted by the Plaintiff shows that venous access through any of the veins discussed by Dr. Heath could be achieved by even a licensed doctor without the use of a cut-down procedure. It is also noted that both the Plaintiff and Dr. Heath have consistently contended that use of a cut-down procedure would violate the constitutional rights of an inmate. *See, e.g.,* Complaint [Docket No. 1] at ¶¶ 368, 507.

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[9] *See* Declaration of Dr. Heath at p. 4, ¶13 ("the issue of whether a femoral catheter would technically constitute a 'central line' would depend on the length of the catheter and the strictness of the definition. Colloquially speaking, most physicians would call a femoral line a "central line, and very few if any would call a femoral line a "peripheral line").

[10] The Defendants do not state any opinion at this time of whether or not central venous access would be possible on the Plaintiff through a percutaneous procedure, or whether such a procedure could be performed by a non- physician, or with or without the supervision of a licensed physician.

[11] At last report, Plaintiff Moore indicated that he weighed in excess of 370 pounds.

[12] As stated above, access through the jugular vein is clearly unlawful under Baze and Bowling v. Rees. The Defendants also believe that access through the subclavian vein is unlawful under Baze and Bowling v. Rees because of the proximity of the subclavian vein to the neck.

In addition, the Plaintiff has failed to establish that a medical doctor would not be needed to perform or to supervise any of the percutaneous procedures or cut-down procedures described in the Plaintiff's Memorandum. While the Plaintiff claims in his Memorandum that a doctor would not be required, Dr. Heath's Declaration is far more equivocal on the subject. Dr. Heath concedes that "[t]ypically, the persons who perform such access include emergency room doctors, radiologists, cardiologists, surgeons, intensivists, and anesthesiologists."[13] Dr. Heath also concedes that he is aware of only one confirmed occasion in which a central line was successfully placed by a non-physician for purposes of creating venous access for an execution.[14] While Dr. Heath states that it is not always necessary for the person performing central line access to be a credentialed doctor, he recognizes that it is absolutely necessary for the person to have the requisite "training, experience, and skill," and that the person be "adequately equipped *and supervised.*"[15] If the "supervision" mentioned by Dr. Heath refers to supervision by a doctor, KRS 431.220(3) prohibits both direct and indirect involvement by a doctor in any execution.

No doctor involvement is authorized by KRS 431.220(3) except to certify the cause of death, provided that the condemned is declared dead by another person. The Plaintiff has failed to demonstrate that any of the percutaneous procedures or cut-down procedures described in his Memorandum can be performed without the direct or indirect involvement of doctor, as required under KRS 431.220(3).

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[13] *See* Declaration of Mark J.S. Heath, M.D. at p.6, ¶ 25. (a copy of Dr. Heath's Declaration was included as Exhibit 2 to the Plaintiff's Memorandum).

[14] *See* Declaration of Mark J.S. Heath, M.D. at p.4, ¶ 17. (a copy of Dr. Heath's Declaration was included as Exhibit 2 to the Plaintiff's Memorandum).

[15] *See* Declaration of Mark J.S. Heath, M.D. at p.6, ¶ 25. (a copy of Dr. Heath's Declaration was included as Exhibit 2 to the Plaintiff's Memorandum).

The end result is that the Plaintiff has failed to establish any lawful means of carrying out his execution that would solve the constitutional and jurisdictional problems arising from his allegations of Paragraphs 392, 394 and 395 of his Complaint in which he claims that the lethal injection chemicals will blow through his veins if injected with an I.V.[16] Again, Moore has produced no evidence that his veins are in any way compromised that would prohibit his execution to be carried out by the protocol unanimously affirmed by the Kentucky Supreme Court in Baze and Bowling v. Rees. Surprisingly, the Plaintiffs call for a more invasive procedure by calling for accessing a central line in either the neck, that has been declared unconstitutional, or in the femoral artery, that due to Moore's size would potentially call for a "cut-down" procedure which Plaintiffs believe is unconstitutional. Since the allegations of Plaintiff Moore's Complaint leave no lawful means of carrying out his lethal injection, Moore's Complaint must be deemed the functional equivalent of a prohibited second or successive habeas petition, and therefore be dismissed pursuant to 28 U.S.C. §2244(b) due to lack of subject matter jurisdiction.

II. Moore's Action is Barred by the Running of the Statute of Limitations under the Analysis Articulated by the Sixth Circuit in *Cooey v. Strickland* for Accrual of §1983 Lethal Injection Claims.

In his argument addressing the appropriate accrual date for §1983 lethal injection challenges under the analysis articulated by the Sixth Circuit in Cooey, 479 F.3d 412 (6th Cir. 2007), the Plaintiff attempts to draw a distinction between "a claim asserting a facial challenge to a method of execution" and "an as-applied challenge to the chemicals, procedures, or other specific aspects of lethal injection" *See* Plaintiff's Memorandum at 19-20. The Plaintiff would have the Court believe the Sixth Circuit in Cooey adopted two different standards for determining the accrual date of §1983

[16] *See* note 3, *supra.*

lethal injection challenges, one for "facial challenge[s] to a method of execution," and another for " as-applied challenge[s] to the chemicals, procedures, or other specific aspects of lethal injection." Id. It appears that the Plaintiff's argument is the result of his misinterpretation of a footnote found in the Court's Memorandum Opinion and Order entered March 30, 2007 [Docket # 139 at 16, n. 5].[17] The Plaintiff has seemingly interpreted the Court's statement that "a facial challenge to a method of execution accrues upon the conclusion of direct review" as an indication that a different standard must govern the accrual of other types of method of execution challenges to lethal injection.

In reality, no distinction was drawn by the Sixth Circuit in Cooey between broad facial challenges to an entire method of execution and narrower method of execution challenges to specific chemicals or procedures employed during an execution. As a practical matter, actions involving general facial challenges to an entire method of execution are not likely to be decided on statute of limitations grounds. This is because the relevant United States Supreme Court decisions have not implicitly or explicitly overruled established Sixth Circuit precedent holding that general facial challenges to a method of execution must be dismissed for lack of subject matter jurisdiction as the functional equivalent of a second or successive habeas petition.[18] As a result, the Cooey case itself involves a narrower "method of execution" challenge in which the plaintiff was "challenging the

[17] The Plaintiff states in his Memorandum the following:

> As this Court recognized in its March 30, 2007 Order, under the Sixth Circuit's recent decision in Cooey, "a claim asserting *a facial challenge to a method of execution* accrues upon the conclusion of direct review of criminal convictions. [Record No. 139 at 16, n.5, *citing* Cooey]. But, when the claim asserts *an as applied challenge to the chemicals, procedures, or other specific aspects of lethal injection*, under Cooey, the statute of limitations begins 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 diligence, and could have filed suit and obtained relief.

Plaintiff's Memorandum [Docket #146] at 19-20 (emphasis added).

[18] *See* Memorandum Opinion and Order [Docket #139] at 13-15.

constitutionality of certain aspects of a state's execution [procedures]." Cooey, 479 F.3d at 421.[19] There is absolutely no support for the Plaintiff's suggestion that the Cooey decision applies different analytical approaches to the determination of the accrual date for §1983 lethal injection claims based upon Plaintiff's notion of whether the action should be classified as "a claim asserting a facial challenge to a method of execution" or "an as-applied challenge to the chemicals, procedures, or other specific aspects of lethal injection method of execution." Plaintiff's Memorandum at 19-20.

In Cooey, the Sixth Circuit began its analysis by stating the general standard for determining the point of accrual of the statute of limitations as follows:

> [A]s the Supreme Court recently made clear, federal law determines when the statute of limitations for a civil rights action begins to run. Wallace v. Kato, No. 05-1240, ---U.S.---, 127 S.Ct. 1091, ---L.Ed.2d---, 2007 WL 517122, at *3 (Feb. 21, 2007). "Under those principles, it is 'the standard rule that [accrual occurs] when the plaintiff has [a] complete and present cause of action.' " Wallace, --- U.S. at---, 127 S. Ct 1091, 2007 WL 517122, at*3 (quoting Bay Area Laundry & Dry Cleaning pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997)). This occurs "when 'the plaintiff can file suit and obtain relief.' " Id. (quoting Bay Area Laundry, 522 U.S. at 201, 118 S.Ct. 542).
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> This Court has previously stated that "[u]nder federal law, as developed in this Circuit, the statute of limitations period begins to run when the plaintiff knows or has reason to know that the act providing the basis of his or her injury has occurred." (6th Cir. 2001); Collyer v. Darling, 98 F.3d 211, 220 (6th Cir. 1996); Ruff v. Runyon, 258 F.3d 498, 500-01 (6th Cir. 2001) (same); Sevier v. Turner, 472 F.2d 262, 273 (6th Cir. 1984). Stated differently, "[i]n determining when the cause of action accrues in §1983 cases, we look to the event that should have alerted the typical lay person to protect his or her rights." Trzebuckowski v. City of Cleveland, 319 F.3d 853, 856 (6th Cir. 2003).

Cooey, 479 F.3d at 417.

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[19] The terms "method of execution challenge" and "method of injection challenge" are therefore used interchangeably in the Cooey decision to refer to the types of "as applied" challenges to specific procedures that have been allowed to proceed as civil action under 42 U.S.C. §1983. *See* Cooey 479 F.3d at 421, *citing* Hill v. McDonough, 126 S.Ct. 2096, 2102-104 (2006); Nelson v. Campbell, 541 U.S. 637, 644-51, 124 S.Ct. 2117(2004).

The Sixth Circuit then applied these general principles to Cooey's challenge to Ohio's lethal injection procedures.[20] It was noted that the statute of limitations applicable to habeas actions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) begins to accrue from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for such review." Cooey, 479 F.3d at 420, *quoting* 28 U.S.C. §2244(d)(1)(A)(1996). The Sixth Circuit acknowledged that the AEDPA's statute of limitations "quite plainly serves the well-recognized interest in the finality of state court judgments . . . [and] reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." Cooey, 479 F.3d at 221, *quoting* Duncan v. Walker, 533 U.S. 167, 179, 121 S.Ct.2120, 150 L.Ed. 2d 251 (2001). The Sixth Circuit then determined that "[t]he concerns articulated by the Supreme Court both pre-and post-AEDPA, and by Congress in the AEDPA itself, apply with equal force in this case, which 'fall[s] at the margins of habeas.'" Cooey, 479 F. 3d at 421, *quoting* Nelson, 541 U.S. at 646, 124 S.Ct. 2117.

As a result, the Sixth Circuit adopted an accrual date for all §1983 "method of execution" claims to "mirror that found in the AEDPA." Cooey, 479 F.3d at 422. Borrowing from the AEDPA, the Sixth Circuit held that an inmate's §1983 challenge to the chemicals and procedures used by a state to carry out lethal injections occurs "upon conclusion of direct review in the state court or the expiration of time for seeking such review. " Cooey, 479 F.3d at 422, *citing* 28 U.S.C. §2244(d)(1)(A) (1996).[21] The only

[20] On June 10, 2004, Richard Wade Cooey and another inmate, Adremy Dennis, filed a complaint alleging that Ohio's lethal injection protocol constitutes cruel and unusual punishment in violation of the Eighth Amendment. Ohio utilizes the same three drugs as Kentucky in performing lethal injection: sodium thiopental, pancurionium bromide, and potassium chloride. Cooey asserted that if the sodium thiopental is not administered properly and in sufficient dosage, the prisoner could experience intense pain after being injected with the potassium chloride, but would be unable to convey the sensation due to the paralyzing agent in pancurionium bromide. They also maintained that to subject the prisoner to such excruciating pain while he is still conscious would amount to cruel and unusual punishment. They also alleged that the personnel attending to the executions are inadequately trained and, as such, Defendants' execution methods would violate a prisoner's constitutional rights. Cooey, 479 F. 3d at 414-15.

21 Direct review of conviction includes review by the United States Supreme Court. Cooey, 479 F.3d at 422, n.6, *citing*

adjustment authorized by the Sixth Circuit to the standard borrowed from the AEDPA was to address the situation when the date of conclusion of direct review of the inmate's death sentence occurred prior to the date that lethal injection became the legal method of execution in the state. Cooey, 479 F.3d at 422.[22] In such situations, the Sixth Circuit held that the accrual date should be adjusted to reflect the date that lethal injection became the legal method of execution. Id.

Applying this in the case sub *judice*, Brian Keith Moore's capital conviction and death sentence were affirmed by the Kentucky Supreme Court on November 17, 1988. *See* Moore v. Com., Ky., 771 S.W.2d 34 (Nov. 17, 1988). Direct review of Moore's capital conviction and death sentence was then concluded on March 26, 1990, when the United States Supreme Court denied Moore's Petition for Writ of Certiorari. *See* Moore v. Kentucky, 494 U.S. 1060, 110 S.Ct. 1536, 108 L.Ed.2d 774 (U.S. Ky. Mar 26, 1990), *rehearing denied,* 495 U.S. 941, 110 S.Ct. 2196, 109 L.Ed.2d 524 (U.S. Ky. May 14, 1990). Lethal injection was subsequently adopted as the primary method of execution in Kentucky effective March 31, 1998. As a result, applying the standard adopted by the Sixth Circuit in Cooey, Plaintiff Brian Keith Moore's §1983 lethal injection claim accrued on March 31, 1998, the date when lethal injection became the primary method of execution in Kentucky. Because Plaintiff Moore did not file his

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Bell v. Maryland, 378 U.S. 226, 232, 84 S.Ct. 1814, 12 L.Ed.2d 822 (1964). . The one-year statute of limitations for habeas review under AEDPA does not begin to run until the ninety-day time period for direct review in the United States Supreme Court has expired. Cooey, 479 F.3d at 422, n.6, *citing* Bronaugh v. Ohio, 235 F.3d 280, 283 (6th Cir. 2000); Isham v. Randle, 226 F.3d 691, 694-95 (6th Cir. 2000).

[22] As stated by the Sixth Circuit in Cooey,

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

Cooey, 479 F.3d at 422.

Complaint in the present action until April 19, 2006, the Plaintiff's claim is barred under the one-year statute of limitations applicable to §1983 actions in Kentucky.

The Plaintiff devotes a significant portion of his Memorandum to various arguments in which he attempts to persuade the Court that a later accrual date should apply to his §1983 lethal injection claim. However, with the exception of the Plaintiff's unique argument that the statute of limitations should not apply to him,[23] the Plaintiff's arguments amount to little more than mere variations of the arguments considered and rejected by the Sixth Circuit in Cooey.

The arguments set forth in the Plaintiff's Memorandum are shaped by his underlying belief that his action should not accrue until he possessed actual knowledge of all minute details of Kentucky's lethal injection protocol. This viewpoint, however, is erroneous in at least two ways. First, the Sixth Circuit has roundly rejected any notion that actual knowledge is required before a party's claim accrues, the Sixth Circuit having expressly rejected actual knowledge as the measure of when an action accrues. Cooey, 479 F.3d at 422 (stating that "[a]ctual knowledge, however, is not the appropriate measure; the test is whether he knew or should have known based upon a reasonable inquiry, and could have filed suit and obtained relief."). Second, it is not necessary for information to be available as to every minute detail of fact for a party's claim to accrue. "In determining when the cause of action accrues in §1983 cases, we look to the event that should have alerted the typical lay person to protect his or her rights." Trzebuckowski v. City of Cleveland, 319 F.3d 853, 856 (6th Cir. 2003).

The fundamental holding in the Cooey is that a state's act of adopting lethal injection as the legal method of execution is generally sufficient to alert death row inmates of the existence of

[23] Plaintiff's Memorandum at 17-19. The Defendant's response to this argument is found on page 13, *supra*, of the Defendants' Brief.

potential "method of execution" lethal injection claims. The Sixth Circuit found that as long as basic information was generally available about the state's lethal injection procedure, a death row inmate's §1983 claims challenging the state's lethal injection procedures accrues on the date that direct review of the inmate's capital conviction and death sentence is concluded or the date the state adopts lethal injection as the legal method of execution, whichever is later. The Sixth Circuit expressly rejected the notion that the accrual date depends on any subjective analysis of whether and when specific information may have been disclosed or obtained relating to specific aspects of the lethal injection procedure. A subjective analysis of that type would have been unworkable due to the technical nature and ever-evolving complexity of lethal injection challenges. For example, no death row inmate had ever asked for information about Kentucky's procedures for reviving a condemned inmate prior to discovery in the Baze and Bowling v. Rees case. Does this mean that the information was not available prior to the time it was disclosed in discovery? How can an inmate claim that specific information was not available when the inmate had not previously requested the particular information? To avoid this unworkable situation, the Sixth Circuit adopted an objective standard for determining the accrual date of a death row inmate's §1983 "method of execution" challenge to a state's lethal injection procedures, subject only to the availability to of basic information concerning the state's lethal injection procedures. [24] As described below in the Defendants' Brief, the available

[24] The Sixth Circuit stated that "Cooey should have known of his cause of action in 2001 after amendments to the law required that he be executed by lethal injection, and the information was publicly available upon request." Cooey, 477 F.3d at 422. The type of information being referred to by the Sixth Circuit was basic information like that contained in letters issued by the Ohio Department of Rehabilitation and Correction on April 19, 2002 and May 30, 2002 that are quoted in the Sixth Circuit's opinion in Cooey. Id. at 417. Furthermore, in holding that Cooey's claim accrued by 2001 at the latest, the Sixth Circuit makes it clear that accrual of an inmate's claim does not require preemptive disclosure of information. It was sufficient that the information was eventually released in April and May of 2002, Cooey's attorney had requested it. Id. This is made clear by the fact that the record in Cooey did not reflect that the Ohio Department of Rehabilitation and Correction was willing to release information about the state's lethal injection procedures until April, 2002, yet the yet the Sixth Circuit held that Cooey's claim accrued no later than the date in 2001. Id.

information concerning Kentucky's lethal injection procedures easily equaled or exceeded the amount of basic information available in Ohio during the time period at issue in the Cooey case.

The remainder of the Defendants' Brief will address the specific arguments raised by the Plaintiff. The Defendants' responses will be arranged in the order arguments are presented in the Plaintiff's Memorandum.

A. The one-year statute of limitations applicable to §1983 actions in Kentucky applies to the Plaintiff's action.

Contrary to the Plaintiff's assertions, the Plaintiff's §1983 action challenging lethal injection in Kentucky is not exempt from the one-year statute of limitations applicable to §1983 actions in Kentucky. For purposes of determining the appropriate statute of limitations applicable to a §1983 action, the United States Supreme Court has held that §1983 claims are best characterized as tort actions for the recovery of damages for personal injury and that federal courts must borrow the statute of limitations governing personal injury actions from the state where the §1983 action was brought. Wilson v. Garcia, 471 U.S. 261, 275-76, 105 S.Ct 1938, 85 L.Ed.2d 254 (1985). If a state has more than one statute of limitations for personal injuries, the state's residual or general statute of limitations governing personal injury actions is applied to all §1983 actions brought in that state. Owens v. Okure, 488 U.S. 235, 249-50, 109 S.Ct 573, 102 L.Ed.2d 594 (1989). In Kentucky, §1983 claims are subject to the one-year statute of limitations period under KRS 413.140 for personal-injury actions. Brown v. Wigginton, Ky., 981 F.2d 913 (6th Cir. 1992).

The cases cited by the Plaintiff for the proposition that the statute of limitations does not apply to his action are inapposite, since none of the cited cases ore §1983 actions. The case law shows that the statute of limitations applies to §1983 actions even in cases where the plaintiff seeks only injunctive relief, not money damages. As a result, the Court should reject the Plaintiff's argument that the statute of limitations does not apply to his claims.

B. Available information regarding Kentucky's lethal injection procedures was more than sufficient to meet the modest requirements set by the Sixth Circuit in Cooey.

The Plaintiff argues at length that Kentucky does not meet the modest requirements set by the Sixth Circuit in Cooey for availability of information because Kentucky has not made its written lethal injection protocol available to the public. *See* Plaintiff's Memorandum at 20 -25. The Plaintiff repeatedly asserts that Ohio has a written lethal injection protocol that was released to the public during the time period relevant in Cooey. These assertions simply are not true. In Cooey, the record reflected that Ohio had only a vague written policy. Cooey, 479 F.3d at 417. To this date, Ohio has no written "protocol" separate from its written policy. The only document even vaguely resembling a lethal injection protocol is the Ohio Department of Rehabilitation and Correction ("ODRC") that has released to the public is referred to as Policy No. 001-09.[25] A copy of ODRC Policy No. 001-09, effective date November 21, 2001 is included as Exhibit 3. The 2001 Policy contains no information concerning the lethal injection drugs or procedures for administering the drugs. It contains provisions analogous to Kentucky's Execution policy, which is also available to the public. A copy of ODRC Policy No. 001-09, effective date July 17, 2003 is included as Exhibit 4. It also fails to provide any details regarding the actual lethal injection process. The first time that Ohio's lethal injection policy was revised to include specific information about the lethal injection chemicals was in 2006, long after Cooey's claim had accrued. A copy of ODRC Policy No. 001-09, effective date October 11, 2006 is included as Exhibit 5. Thus, Kentucky's execution policy contains as much information about the lethal injection process as Ohio's lethal injection policy did during the time period relevant in the Cooey case and in the instant action. A copy of Kentucky execution policy, CPP 9.5, effective

[25] The Plaintiff repeatedly asserts that Ohio has disclosed its lethal injection protocol to the public. *See, e.g.,* Plaintiff's Memorandum at 21, 26, 28, 29 and 32. However, the Plaintiff fails to provide any proof that Ohio has released its lethal

date December 17, 1998 is included as Exhibit 6.

Likewise, letters issued by the Kentucky Department of Corrections from May 14, 2002 and August 3, 2004, contain practically the same types of information found in letters issued by ODRC on April 19, 2002 and May 30, 2002. The information provided in KDOC's May 14, 2002 letter to Assistant Public Advocate, Thomas M. Ransdell, describe the procedures followed during lethal injections in Kentucky and identify the chemicals and the amounts utilized. The August 3, 2004 letter from the Justice and Public Safety Cabinet to Assistant Public Advocate, David M. Barron, contains similar information. A copy of ODRC letter dated April 19, 2002 is included as Exhibit 7. A copy of ODRC letter date May 30, 2002 is included as Exhibit 8. A copy of the Kentucky Department of Corrections (KDOC) letter dated May 14, 2002 is included as Exhibit 9. A copy of the Justice and Public Safety Cabinet open records letter dated August 3, 2004 is included as Exhibit 10. Thus, there is no basis for the Plaintiff's assertions that Kentucky has refused to make available information about the lethal injection chemicals and procedure.

Furthermore, a review of the information disclosed in newspaper articles during the relevant time period show that at least as much, if not more information about Kentucky's lethal injection procedure was published than was released concerning Ohio's lethal injection procedure. A copy of the Cleveland Plain Dealer article dated February 17, 1999 is included as Exhibit 11. A copy of the Lexington Herald Leader article dated November 28, 2004 is included as Exhibit 12. The Herald Leader article was filed as an attachment to a Response to a motion in the Baze and Bowling case. A copy of the Response in the Baze and Bowling case dated January 19, 2005 is included as Exhibit 13.

A review of the foregoing policies, letters and newspaper articles demonstrates that more than adequate information was available about Kentucky's lethal injection procedures in comparison to

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injection protocol. In reality, Ohio's protocol was filed with the federal district court under seal in the Cooey case, just as

information made available regarding Ohio's lethal injection procedures. The Plaintiff's claim that Ohio made more information available simply is not true. Similarly, the Plaintiff has no basis for his claims that ODRC has been more cooperative in providing information than KDOC.[26] Public disclosure of a state's written lethal injection protocol is not required to meet the requirements set forth in the Cooey decision for making information available. Simply stated, the Cooey case does not require the availability of the detailed, minute information contained in a state's lethal injection protocol. The Sixth Circuit's decision Cooey contemplates only the availability of basic information about a state's lethal injection chemicals and procedures, as evidenced by the letters and newspaper article cited in the majority opinion in Cooey.

C. The filing of Kentucky's lethal injection protocol under seal in Baze and Bowling v. Rees did not prevent unsealed documents and information disclosed during the course of discovery relating to Kentucky's lethal injection procedures from becoming available to Moore or to the public.

The Plaintiff argues at great length that his lethal injection claim did not accrue until after the trial took place in Baze and Bowling v. Rees, due to an alleged lack of information specifically available to the Plaintiff until after the trial. *See* Plaintiff's Memorandum at 25. The Plaintiff's argument appears to be partially based on the assertions of his lead counselor, David Barron, that he did not officially represent Plaintiff Moore until November 1, 2005. Id. The Plaintiff's argument also appears to be partially based upon Mr. Barron's assertions that he was under some duty to refrain from discussing with anyone any information he learned during the course of discovery the Baze and Bowling v. Rees case. Mr. Barron indicates that this duty continued until some point during the trial in the Baze and Bowling v. Rees case. *See* Plaintiff's Memorandum at 30. Mr. Barron's apparent

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Kentucky's lethal injection protocol has been filed under seal in Baze and Bowling v. Reese and in the case *sub judice.* .

[26] *See* note 24, *supra.*

reason for claiming he was under such a duty is because Kentucky's written lethal injection protocol had been filed under seal in the Baze and Bowling v. Rees case. No explanation is provided why Mr. Barron would believed that he was under any duty of to refrain from disclosing information learned in the course of discovery or from other sources besides the sealed lethal injection protocol[27] There is also no explanation given why Mr. Barron would believe, in the absence of any applicable protective order in the Base and Bowling v. Rees case, that any difference existed between his obligation to keep information from the trial confidential versus his obligation to deep information learned in depositions and discovery confidential. In any event, these are the excuses given why Plaintiff Moore should only be charged with actual knowledge of the developments in Baze and Bowling v. Rees and other relevant litigation since the time lethal injection became the legal method of execution in Kentucky.

It would be facetious for Mr. Barron or any other attorney from the Kentucky Department of Public Advocacy to suggest that the attorney's representation of a death row inmate like the Plaintiff on a §1983 lethal injection challenge was initiated by the inmate making the first contact with the attorney and asking the attorney to represent the inmate in filing a complex lethal injection challenge. For example, a DPA attorney is not going to be contacted out of the blue by a death row inmate with a new idea for a lethal injection challenge to the adequacy of the State's procedures and equipment for resuscitating condemned inmates in the event a stay is ordered after lethal injection has begun. As a practical matter, complex legal claims of this nature are likely to be the idea of the DPA attorneys who work regularly with death row inmates. While Mr. Barron, may not have personally represented Mr. Moore until November of 2005, it is likely that someone else from DPA had contact

[27] Mr. Barron's reason for contending that he was under a duty not disclose information learned during depositions and discovery from sources besides the sealed protocol are particularly perplexing in view of the fact that while Kentucky's lethal injection protocol remains under seal in the case *sub judice,* Mr. Barron now understands that his duty of nondisclosure only extends to the lethal injection protocol, not to information obtained from other sources, such as

with the Plaintiff at some point prior to that time. Nevertheless, the Plaintiff expects the Court to believe that DPA attorneys representing death row inmates do not talk to one another about new developments and information learned during the course of discovery and litigation of a groundbreaking case like Baze and Bowling v. Rees.

Plaintiff Moore expects the Court to ignore all information about Kentucky's lethal injection procedures disclosed during the course of discovery in the Baze and Bowling v. Rees case and treat it as if the only way a the Plaintiff could learn such information is if Mr. Barron personally disclosed it to the Plaintiff. Fortunately, the Sixth Circuit rejected this position in the Cooey case, holding that actual personal knowledge is *not* required. Cooey, 479 F.3d. at 422. Information disclosed in unsealed depositions and discovery from the Baze and Bowling v. Rees case are fair game, and should be considered by the Court in determining whether any minimal informational requirements arising out of the Cooey decision have been satisfied.

At the same time that the Plaintiff is asking the Court to assume that death row inmates have no access to information readily available to the DPA attorney representing a given inmate unless the information was disclosed in a particular action to which the inmate is a party, the Plaintiff is also asking the Court to assume that death row inmates have no access to the outside media or any other external information. If the Cooey case required the court to treat inmates in this manner, a death row inmate's §1983 lethal injection action would never accrue until the inmate had actual knowledge of information alerting the inmate to the potential existence of a claim. Again, it is fortunate that the Sixth Circuit rejected this position in the Cooey case, holding that personal knowledge is *not* required. Cooey, 479 F.3d. at 422. The minimal informational requirements arising out of the Cooey decision are satisfied as long as information is available that could be expected to alert a reasonable

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discovery. *See* Plaintiff's Memorandum at 30.

person to the possibility the existence of a claim.

D. Newspaper articles containing information about Kentucky's lethal injection procedures were sufficient to meet the Sixth Sixth Circuit's minimal informational requirements imposed In Cooey.

The Plaintiff argues that newspaper articles and media reports would not serve to notify a death row inmate of a potential claim, since the inmates are "held in the hole, without access to media reports." Plaintiff's Memorandum at 29. He also argues that media reports would not have included enough information to place an inmate on notice of a potential claim because Kentucky's lethal injection protocol has not been released to the media. Id. As stated above, however, the Sixth Circuit has made it clear that actual knowledge is not the appropriate measure. Cooey, 479 F.3d at 422. The sources of information cited in Cooey as being sufficient to place an inmate on notice of a possible claim included a newspaper article from the Columbus Dispatch and a law review article. . Cooey, 479 F.3d at 417. The Sixth Circuit was not concerned over the actual availability of either of these items to the plaintiff in Cooey, who was also a death row inmate. Furthermore, as stated above, the Plaintiff is in error when he states that the Ohio has disclosed its lethal injection protocol. Ohio does not have a written lethal injection protocol. Instead, the Ohio Department of Rehabilitation and Correction ("ODRC") has a written policy directive that contains some of its lethal injection procedures. A copy of ODRC's written policy directive in effect from November 1, 2001 to July 16. 2003 is included as Exhibit 3. A copy of ODRC's written policy directive in effect July 17, 2003 is included as Exhibit 4. Furthermore, disclosure of the detailed information contained in the protocol is not required to place inmates on notice of the existence of potential claims. It is clear from the Cooey decision that the amount and level of detail of information being required by the Sixth Circuit does not begin to approach the level expected by the Plaintiff.

E. The statute of limitations was not tolled during the time period while Moore was exhausting his administrative remedies.

Plaintiff Moore claims that the running of the statute of limitations on his action was tolled during a five-day time period while he was exhausting his administrative remedies. *See* Plaintiff's Memorandum at 31. For the reasons stated previously in this Brief, the Defendants submit that the Plaintiff's lethal injection claim accrued long before April of 2006, rendering the issue of tolling during this five-day period moot. In any event, the Sixth Circuit's opinion in Cooey implicitly rejected the Plaintiff's argument that the running of the statute of limitations was tolled during any period that an inmate is exhausting his administrative remedies. The plaintiff in the Cooey case initially filed his petition on July 10, 2004, but it was dismissed due to failure to exhaust administrative remedies. He then re-filed his complaint on December 10, 2004. Cooey at 415-16. The Sixth Circuit found that for purposes of applying the statute of limitations, his claim was not filed until December 8, 2004. See Cooey at 422. Thus, it is clear from the Cooey opinion that the Sixth Circuit did not deem the statute of limitations to be tolled during the time that a plaintiff was exhausting his administrative remedies.

F. Revisions to Kentucky's lethal injection protocol have had no effect on the accrual of Plaintiff Moore's lethal injection claim.

Plaintiff Moore apparently contends that because of what he describes as frequent amendments to Kentucky's lethal injection protocol, his lethal injection claim could not have accrued until he filed his Complaint in the case *sub* judice. *See* Plaintiff's Memorandum at 31-33. In the Cooey case, however, the Sixth Circuit expressly rejected the argument that the plaintiff's lethal injection claim had not accrued due to the fluid nature of Ohio's lethal injection procedures. Cooey,

479 F.3d at 421.[28] The Sixth Circuit looked at the changes made to Ohio's protocol, and found that none of the changes related to the plaintiff's core claims. The Sixth Circuit also found that the changes to the lethal injection procedure were not implicated as a basis for the plaintiff's conclusion that Ohio's lethal injection procedures presented an unconstitutional risk of cruel and unusual punishment.[29]

Despite the Plaintiff's assertions to the contrary, the changes to Kentucky's lethal injection protocol have been minor and have not related to any of the Plaintiff's core claims. Besides updates to the names and telephone numbers of personnel listed in the protocol, the only revisions made to the protocol were on

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[28] The Sixth Circuit also expressly rejected the "date the lethal injection protocol is imposed" as the accrual date; on the basis it was infeasible. Cooey, 479 F.3d at 421-22. If the date the protocol is imposed is infeasible, then the date the protocol is released to the public is at least equally infeasible.

[29] The Sixth Circuit stated the following:

> Ohio's recent amendments to its lethal injection protocol resulted from difficulties encountered during the execution of Joseph Clark on May 2, 2006. When preparing Clark for execution, prison officials could find only one accessible vein in Clark's arms to establish a heparin lock, through which the lethal drugs are administered. (Two locks usually are inserted.) However, once the execution began and the drugs were being administered, this vein collapsed, and Clark repeatedly advised officials that the process was not working. Officials stopped the lethal injection procedure, and after a significant period of time, were able to establish a new intravenous site. The process then was restarted, and Clark was executed.
>
> To avoid similar difficulties in future executions, Ohio made several changes to its lethal injection protocol. First, officials removed time deadlines that previously dictated executions begin by a certain hour, and be completed within a narrow time frame. Second, prisoners are given more in-depth medical examinations prior to execution. Third, correctional personnel will make every effort to obtain two sites for heparin locks before proceeding to the execution chamber. Fourth, personnel will no longer use "high pressure" saline injections to check the viability of the intravenous lines. Instead, a "low pressure" drip of saline will be used to keep the line open and confirm its ongoing viability. Fifth, correctional personnel will observe each inmate's arms and check for signs of intravenous incontinence while the drugs are being administered to the inmate.
>
> As Defendants assert, none of these changes relates to Cooey's core complaints. Further, none of these areas were implicated as a basis for Cooey's expert's conclusion that the process presents a risk that Cooey will experience pain. Rather, Dr. Heath, Cooey's expert, criticized the use of pancuronium bromide, the use and dosage of sodium thiopental, the failure to provide a continuous dose of an ultra-short-acting barbiturate, and the lack of information regarding prison personnel's training to prepare and administer the drugs.

Cooey, 479 F.3d at 423-424.

May 12, 2005, when the protocol was modified to increase the amount of sodium thiopental from 2 gm. to 3 gm., and on June 30, 2006, when the protocol was revised to remove the provision allowing venous access through the neck of the condemned inmate in order to conform to the judgment in Baze and Bowling v. Rees.

Like the Cooey case,[30] none of these revisions relate to or adversely impact any of the Plaintiff's core claims. The increase in the dose of sodium thiopental was consistent with the testimony in the Baze and Bowling v. Rees case of Dr Heath, the doctor whose affidavit Plaintiff Moore included with his Memorandum filed April 18, 2006. The removal of the provision previously allowing for venous access through the neck of the condemned inmate was required under the judgment in the Baze and Bowling v. Rees case. Both of these revisions to the protocol made changes that were favorable to death row inmates, including the Plaintiff. In any event, the revisions did not affect the accrual of

G. Moore's entire cause of action has accrued and is barred by the running of the Statute of Limitations.

Finally, the Plaintiff argues that Court must look at his Complaint on a claim-by-claim basis in determining whether the statute of limitations has run on his claims, and that his claims relating to the following two (2) issues should not be dismissed even if it turns out his Complaint is otherwise subject to dismissal based on the running of the statute of limitations:

First, the Plaintiff contends that the statute of limitations has not run on his so-called "claim" arising out of the Defendants' alleged failure to have the proper equipment and chemicals available at the execution chamber in case a last minute stay of execution is granted after the first or second lethal injection chemicals are administered. The Plaintiff now claims this constitutes an arbitrary

[30] *See* note 26, *supra*.

deprivation of life in violation of the Plaintiff's Eighth Amendment rights and a violation of his substantive due process rights. The Plaintiff argues this "claim" did not accrue until April 21, 2005, when the Defendants sent him a document describing the equipment and chemicals on the crash cart.

Second, the Plaintiff contends that the statute of limitations has not run on his "claim" arising out of his allegation that Defendants have failed to conduct medical or scientific tests on the lethal injection chemicals since August 2004, when the complaint in Baze and Bowling v. Rees was filed in state court. The Plaintiff claims this shows deliberate indifference toward known medical needs, apparently on the theory that the Defendants failed to take remedial action after based on information presented in Ralph Baze's and Thomas Bowling's complaint in that case and the accompanying exhibits.

The overriding problem with these arguments is that the listed matters do not represent separate, independent claims. Instead, the listed matters amount to nothing more than factual allegations that support one or more of the Plaintiffs' claims.

In the case of the crash cart, these allegations merely represent facts that are relevant to the Plaintiff's claim that Kentucky's procedures and equipment for carrying out executions by lethal injection constitute an arbitrary deprivation of life in violation of the Eighth Amendment rights and his substantive due process rights. His factual allegations that the crash cart did not include the appropriate equipment and chemicals to revive an inmate in the event of a stay are merely some of the facts Plaintiff is alleging to support this broader claim. Other alleged facts that support the claim include the Plaintiff's claims that Department of Corrections personnel are not properly qualified or trained to revive an inmate in the event of a stay. *See* Complaint at Paragraphs 403 through 442 and Paragraphs 514 through 517. The fact that the Plaintiff attempts to label Paragraphs 514 through 517 of the Complaint as a series of one-paragraph "claims" does not make them separate and independent

claims. These alleged "claims" do not even contain separate factual allegations regarding ham to the Plaintiff or separate demands for relief.

In the case of the Plaintiff's allegations about the Defendants' alleged failure to conduct medical or scientific tests on the lethal injection chemicals, these allegations are simply part of the Plaintiff's claim that Kentucky's lethal injection procedures violate his Eighth Amendment rights. Contrary to the Plaintiff's assertions, there is absolutely no indication in Paragraph 307 of the Plaintiff's Complaint that the allegations are intended as part of a separate or independent claim of deliberate indifference to the Plaintiff's medical needs. The Plaintiff's argument that anything involving the choice of lethal injection chemicals could constitute deliberate indifference to the Plaintiff's medical needs makes no sense whatsoever, given that lethal injection is a form of execution, not a medical procedure. The Plaintiff's argument that each statement of fact constitutes a separate claim is equally nonsensical.

If the Plaintiff's argument was correct, every civil action would consist of a fluid and seemingly infinite number of "claims" that would continue to expand throughout the litigation. If each new fact constituted a new claim, a plaintiff's action would never accrue until he or she obtained actual knowledge of every minute detail of fact touching on a case. Fortunately, the Sixth Circuit expressly rejected the Plaintiff's argument that a claim does not accrue until a party has obtained perfect knowledge of all possible facts relevant to the claim. Under Cooey, the accrual date of the Plaintiff's claim was the date Kentucky adopted lethal injection as the legal means of execution, subject only to the condition that basic information concerning the state's lethal injection procedures be available. As stated in previous sections of this Brief, the available information concerning Kentucky's lethal injection protocol more than meets this requirement.

The Defendants also note that the Plaintiff's claim would be barred by the statute of

limitations even it the Court construes the "availability of information" part of the test to require availability of basic information about the procedures, training and equipment for reviving inmates in the event of a stay. As stated above, the Cooey decision rejected the notion that actual knowledge is ever required. Cooey, 479 F.3d 422. While the Plaintiff may not have had actual knowledge of certain specific facts until April 21, 2005, it does not follow that information about Kentucky's procedures, training and equipment for reviving inmates was not "available" prior to that date. "Availability" does not require the State to preemptively publicize information before the Plaintiff even asks for it.[31] In the present case, there is no proof that the Plaintiff ever asked for information about Kentucky's procedures, training and equipment for reviving inmates. Thus, even if the Court construes Cooey to require availability of information condition to require availability of information about procedures, training and equipment for reviving inmates, the Plaintiff has failed to offer proof that the information was not available.[32]

Although it is not clear from the Plaintiff's Memorandum, another possibility is that the Plaintiff may be arguing that the Court should presume the unavailability of the information based on the alleged fact that his attorney, David Barron, did not obtain the document listing the contents of the crash cart until April 21, 2005 in the Baze and Bowling v. Rees case. If this is the Plaintiff's argument, the Defendants respond by asking the Court to take a look at all the information that Mr. Barron had already obtained during the course of discovery in the Base and Bowling v. Reese case. For example, on January 5, 2005, Mr. Barron took the deposition of Deputy Warden Richard Pershing. A copy of the transcript of the deposition is included ad Exhibit 14. Deputy Warden Pershing is the person who informed Mr. Barron that a recommendation had been made for a crash

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[31] *See* note 24, *supra.*

[32] It is noted that the Plaintiff does not even allege when or even whether his attorney, David Barron, specifically asked for information about the contents of the crash cart. In the January

cart to be on site in case that was a stay after the lethal injection process started.[33] Deputy Warden Pershing also identified at least one piece of equipment included in the crash cart, a defibrillator.[34]

In fact, an incredible amount of information was disclosed to Mr. Barron and other DPA attorneys during the course of discovery in the Baze and Bowling v. Rees case on just about any conceivable issue that is relevant in the present action. For example, the transcript of the October 19, 2004 deposition of former Warden Glenn Haeberlin that is included as Exhibit 15 discloses information on a myriad of issues relevant to claims presented by the Plaintiff in this action.[35] Warden Haeberlin's deposition was just one (1) of seventeen (17) depositions in the Baze and Bowling v. Rees case covering information relevant to every claim the Plaintiff has made in the case *sub judice*. The Plaintiff expects the Court to believe that his attorney, David Barron, did not rely on the transcripts of these depositions or any other information obtained during the course of discovery in the Baze and Bowling v. Rees case when he prepared the Plaintiff's Complaint in this action. [36] Obviously, the Plaintiff and his attorney relied heavily on the information obtained during the course of discovery. Basic information and more, touching on all of the Plaintiff's claims had been disclosed to Mr. Barron and other DPA attorneys long before the trial in Baze and Bowling v. Rees. It is disingenuous for the Plaintiff to now claim that no information was available.

Second, the Plaintiff contends that the statute of limitations has not run on his "claim" arising out of his allegation that Defendants failed to conduct medical or scientific tests on the

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[33] *See* Exhibit 14 at 5.
[34] *See* Exhibit 14 at 9.

[35] Warden Haeberlin's deposition provided information on a number of subjects, including the following: execution team training (*See* training – mixing chemicals, Exhibit 15 at page 37; *see* security of chemicals, Exhibit 15, page 37; *see* qualifications of IV Team Member, Exhibit 15, page 59);

[36] The Plaintiff apparently expects the Court to believe that Mr. Barron relied only upon videotapes of the trial testimony in preparing the Plaintiff's Complaint, to the exclusion of all the information learned during the course of discovery. *See* Plaintiff's Memorandum at 30.

chemicals since August 2004, when the complaint in Baze and Bowling v. Rees was filed in state court. The Plaintiff claims this shows deliberate indifference toward known medical needs, apparently on the theory that the Defendants failed to take remedial action based on information presented in Ralph Baze's and Thomas Bowling's complaint in that case and the accompanying exhibits.

III. CONCLUSION

The Plaintiff has failed to establish any lawful means of carrying out his execution that would solve the constitutional and jurisdictional problems arising from his allegations that the lethal injection chemicals will "blow out" his veins. Since the allegations of Plaintiff Moore's Complaint appear to leave no lawful means of carrying out his lethal injection, Moore's Complaint must be deemed the functional equivalent of a prohibited second or successive habeas petition, and therefore be dismissed pursuant to 28 U.S.C. §2244(b) due to lack of subject matter jurisdiction.

The Plaintiff's Complaint should be dismissed on due to the running of the statute of limitations. Applying the standard adopted by the Sixth Circuit in Cooey, Plaintiff Brian Keith Moore's §1983 lethal injection claim accrued on March 31, 1998, the date when lethal injection became the primary method of execution in Kentucky. Because Plaintiff Moore did not file his Complaint in the present action until April 19, 2006, the Plaintiff's claim is barred under the one-year statute of limitations applicable to §1983 actions in Kentucky.

Respectfully submitted,

/s/ John C. Cummings

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2007, I electronically filed this document with the clerk of the court by using the CM/ECF System, which will send a notice of electronic filing to the following users: David M. Barron (davembarron@yahoo.com); John Anthony Palombi (john.palombi@ky.gov); and Marguerite Neill Thomas (marguerite.thomas@ky.gov).

Notice will be sent by other means to: none.

/s/ John C. Cummings

John C. Cummings