

CASE NO. 07-15877-P

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

THOMAS D. ARTHUR,
Petitioner-Appellant,

— v. —

RICHARD ALLEN, ET AL.
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

BRIEF OF THOMAS D. ARTHUR

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January 25, 2008

CERTIFICATE OF INTERESTED PERSONS

ARTHUR V. ALLEN, ET AL.

CASE NO. 07-15877-P

Under Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, Appellant certifies that the following is a complete list of all trial judges, attorneys, persons, associations of persons, partnerships, or corporations that have an interest in the outcome of this appeal.

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CERTIFICATE OF INTERESTED PERSONS

ARTHUR V. ALLEN, ET AL.

CASE NO. 07-15877-P

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11th Cir. R. 28-1(c) of the Court's Local Rules, Appellant Thomas D. Arthur, by his attorney, hereby respectfully requests that the Court hear oral argument on this appeal.

Oral argument will assist the Court in the disposition of this method-of-execution action, which includes complex and novel issues of law concerning the circumstances under which a petitioner may challenge revisions to an execution protocol without being subjected to dismissal based on the developing doctrine of unreasonable delay. Oral argument is particularly important in this case because the law governing Mr. Arthur's novel claims is unsettled, and oral argument will allow the Court to question counsel regarding the important issues raised by Mr. Arthur's claims.

Therefore, Mr. Arthur respectfully requests that the Court hear oral argument on this appeal.

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STATEMENT OF JURISDICTION

The District Court had federal question jurisdiction over Mr. Arthur's Complaint, filed under 42 U.S.C. § 1983, pursuant to 28 U.S.C. § 1331. Because this action constitutes an appeal from a final order of dismissal with prejudice entered by the District Court on November 15, 2007, this Court has jurisdiction over Mr. Arthur's appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

- (1) Did the District Court err in concluding that Mr. Arthur's second lethal injection challenge was indistinguishable from his first lethal injection challenge on the grounds that Mr. Arthur failed to allege that a new wrong had been perpetrated or a new or heightened danger had been introduced?
- (2) Did the District Court err in holding, for the purposes of determining whether Mr. Arthur's second lawsuit is functionally equivalent to his first lawsuit, that it is immaterial whether the changes to the lethal injection protocol are considered substantial or minor?
- (3) Did the District Court err in dismissing Mr. Arthur's challenge to Alabama's new lethal injection protocol, where Mr. Arthur could not have brought the claim any earlier and before Mr. Arthur had an execution date set?

STATEMENT OF THE CASE

This case is the first challenge to the constitutionality of Alabama's revised lethal injection protocol. It presents this Court with a critical opportunity to delineate the as-yet-undefined contours of the doctrine of unreasonable delay in a context that is novel but likely to become widespread: where a State revises its lethal injection protocol in an attempt to eliminate the protocol's constitutional infirmities, and a death row inmate challenges the legality of the new protocol. The "traditional" unreasonable delay analysis—which itself is hardly well-established law—asks whether the inmate could have brought his lawsuit earlier, and whether discovery, an evidentiary hearing and a decision on the merits could be accomplished without the need for a stay of execution. Where the lawsuit challenges a new act of the State (the revision) in connection with pre-existing State conduct (determining to execute the inmate by lethal injection), the court that must decide whether the inmate has unreasonably delayed in bringing suit faces a complex set of factual and legal problems.

Mr. Arthur brought this lawsuit *within two weeks* of learning of Defendants' plans to revise Alabama's lethal injection protocol, and he currently has no scheduled execution date. The District Court, rather than

analyze the relevance of the Defendants' conduct to the factual and legal circumstances of the case, simply concluded in a four-page Order that Mr. Arthur's second lawsuit was functionally equivalent to his earlier, dismissed lawsuit because Mr. Arthur failed to allege that the revised protocol presented any "new or heightened danger" as compared to the old protocol. Since the District Court decided that the lawsuits were essentially the same, it concluded that this second lawsuit too must be dismissed based on unreasonable delay.

This decision has no foundation in law or logic, and sidesteps important legal issues that require resolution as it ignores Mr Arthur's Eighth Amendment rights. Such omissions are unwarranted: in light of the United States Supreme Court's grant of a writ of certiorari in *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), *cert. granted*, 128 S. Ct. 34 (2007), and the ensuing efforts of states to alter their lethal injection protocols in order to stave off challenges to protocols like the one at issue in *Baze*, federal courts likely will face a wave of lawsuits concerning these new protocols. It is therefore crucial that courts apply a clearly defined standard to determine the circumstances under which a petitioner may challenge revisions to an execution protocol without being subject to dismissal based on the developing doctrine of unreasonable delay.

STATEMENT OF THE FACTS

Mr. Arthur's initial challenge to Alabama's lethal injection protocol was dismissed by the District Court based on the evolving equitable doctrine of unreasonable delay. *Arthur v. Allen*, No. 07-00342, 2007 U.S. Dist. LEXIS 58816 (S.D. Ala. Aug. 10, 2007). This Court affirmed the decision below on September 17, 2007, over Judge Barkett's strongly worded dissent. *Arthur v. Allen*, No. 07-13929, 2007 U.S. App. LEXIS 22506 (11th Cir. Sept. 17, 2007). Mr. Arthur filed a petition for a writ of certiorari and application for a stay with the United States Supreme Court on September 21, 2007, *Arthur v. Allen*, No. 07-395, six days before his scheduled execution date of September 27, 2007. The Supreme Court has not yet ruled on Mr. Arthur's petition.

As Mr. Arthur's case has proceeded, the legal landscape of lethal injection has undergone significant change. On September 19, 2007, District Judge Trauger held that Tennessee's lethal injection protocol was unconstitutional. *Harbison v. Little*, 511 F. Supp. 2d 872 (M.D. Tenn. 2007). Because Alabama's lethal injection protocol was "very similar" to

the protocol that had just been adjudged unconstitutional in Tennessee,¹ Alabama began to review its own procedures. On September 25, 2007, the United States Supreme Court granted a petition for a writ of certiorari to the Kentucky Supreme Court in *Baze v. Rees*, 07-5439, 217 S.W.3d 207 (Ky. 2006), *cert. granted*, 128 S. Ct. 34 (2007), to address the proper standard for determining the constitutionality of a method-of-execution challenge. On September 26, 2007, Mr. Arthur's counsel received a telephone call from Scott Rouse, deputy legal advisor to Governor Riley. Mr. Rouse informed counsel that the Governor had decided to implement changes to the lethal injection protocol, but that these changes would not be made in time for Mr. Arthur's execution set for the following day. (Compl. ¶ 12) The State of Alabama nevertheless decided to proceed with Mr. Arthur's execution under the then-current protocol. Six hours prior to the scheduled execution, and before the United States Supreme Court ruled on Mr. Arthur's application for a stay, Governor Riley granted Mr. Arthur a 45-day reprieve "to allow the Department of Corrections sufficient time to make modifications to its lethal injection protocol." (Compl. ¶ 13)

On September 28, 2007, the very next day, the State of Alabama moved the Alabama Supreme Court to set an execution date of

¹ See Statement of Jeff Emerson. Stan Diel, *Riley Delays Arthur's Execution*, Birmingham News, Sept. 28, 2007. (Compl. ¶ 14)

November 15, 2007 for Mr. Arthur. (Compl. ¶ 16) Mr. Arthur brought the instant lawsuit challenging the constitutionality of Alabama's revised lethal injection protocol on October 9, 2007, less than two weeks after the changes were announced. Because the Defendants keep the details of Alabama's protocol secret, Mr. Arthur was able to allege only the few facts about the revised protocol that Defendants had chosen to reveal to the media. After Mr. Arthur commenced his action and despite the fact that the United States Supreme Court had already issued stays of execution to three other death row inmates who also were litigating lethal injection challenges pending a decision in *Baze*,² the Alabama Supreme Court set December 6, 2007 as Mr. Arthur's execution date. *Ex parte Thomas Douglas Arthur*, No. 1951985, Order (Ala. Oct. 31, 2007). Mr. Arthur again applied for a stay of execution in the United States Supreme Court.

On December 5, 2007, the United States Supreme Court granted Mr. Arthur's application for a stay of execution, prohibiting Defendants from executing Mr. Arthur pending disposition of his petition for a writ of certiorari filed September 21, 2007. *Arthur v. Allen*, 07A451 (U.S.

² See *Berry v. Epps*, 07A367 (U.S. Oct. 30, 2007); *Emmett v. Johnson*, 07A304 (U.S. Oct. 17, 2007); *Turner v. Texas*, 07A272 (U.S. Sept. 27, 2007).

Dec. 5, 2007). Defendants have not moved to set a new execution date for Mr. Arthur.

STATEMENT OF THE STANDARD

A district court's denial of equitable relief is reviewed for abuse of discretion. *See SEC v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004). Factual findings made by a district court in support of its denial of an injunction are reviewed for clear error and underlying questions of law are reviewed de novo. *See Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1220 (11th Cir. 2002). A district court's dismissal of a § 1983 method-of-execution challenge for inexcusable delay is reviewed for abuse of discretion. *See Rutherford v. Crosby*, 438 F.3d 1087, 1089-90 (11th Cir.) (per curiam), *rev'd on other grounds sub nom. Rutherford v. McDonough*, 126 S. Ct. 2915 (2006). Such a dismissal is open to review by a court of appeals. *See Ecology Ctr. of La., Inc. v. Coleman*, 515 F.2d 860, 868, n.8 (5th Cir. 1975) (a district court's discretion is "confined by recognizable standards and does not in itself give rise to a presumption of legal correctness").

SUMMARY OF THE ARGUMENT

The District Court's dismissal of Mr. Arthur's 42 U.S.C. § 1983 petition was erroneous for at least three reasons.

First, the District Court erred in concluding that Mr. Arthur's second lethal injection challenge was indistinguishable from his first lethal injection challenge on the grounds that Mr. Arthur failed to allege that a new wrong had been perpetrated or a new or heightened danger had been introduced.

Second, the District Court erred in holding, for the purposes of determining whether Mr. Arthur's second lawsuit is functionally equivalent to his first lawsuit, that it is immaterial whether the changes to the lethal injection protocol are considered substantial or minor.

Third, the District Court erred in dismissing Mr. Arthur's challenge to Alabama's new lethal injection protocol, where Mr. Arthur could not have brought the claim any earlier and before Mr. Arthur had an execution date set.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT ALABAMA'S "NEW" PROTOCOL IS IDENTICAL IN RELEVANT PART TO ITS "OLD" PROTOCOL

The District Court's analysis and conclusion are based on the faulty premise that Alabama's "'new' protocol is identical to the 'old' protocol in every particular as to which the plaintiff finds constitutional objection." (Order at 3-4) Mr. Arthur's Complaint clearly alleges key differences in the protocol—in particular, changes in the means of assessing consciousness—that go to the heart of his Eighth Amendment violation claim. The District Court's conclusion that Mr. Arthur was required to allege that the change in protocol "cause[d] or exacerbate[d] an Eighth Amendment violation" (Order at 3) is not based on any cognizable legal standard. Indeed, requiring Mr. Arthur to allege initially that revisions to the lethal injection protocol introduce a "new or heightened danger" (Order at 4) would entail Mr. Arthur's drawing conclusions about the relative merits of an undisclosed protocol and its successor. This comparison cannot be made without the benefit of discovery.

A. Mr. Arthur Adequately Alleged Relevant Differences That Work a New Injury

Mr. Arthur filed his Complaint shortly after he learned from the Governor's office and the Department of Corrections that Alabama's lethal injection protocol would be changed. (Compl. ¶ 12) The only change affirmatively known to Mr. Arthur at the time of filing is that Alabama planned to conduct an assessment of the inmate's consciousness after the delivery of sodium thiopental, to be conducted by "someone in the chamber with the condemned" (Compl. ¶ 54) (although Mr. Arthur alleged based on information and belief that other changes "would be substantial" (Compl. ¶ 56)). This change is an apparent attempt to satisfy the standards set forth in the Eighth Amendment to the United States Constitution and is substantial by any measure. Indeed, as acknowledged by Governor Riley's office,³ Alabama's old protocol was similar to Tennessee's protocol, which was held to be unconstitutional in part because it did not include an assessment of consciousness. *Harbison*, 511 F. Supp. 2d at 884 ("[T]he most glaring omission in the new protocol is the failure to check for

³ According to Jeff Emerson, communications director for Governor Riley, "[Tennessee's] protocol is very similar to what Alabama does." Mr. Emerson further stated that the Governor's legal advisor began to review Alabama's procedures after a federal judge ruled that Tennessee's procedures are unconstitutionally cruel. (Compl. ¶ 52)

consciousness before the pancuronium bromide is administered.”).⁴ No matter how substantial this change is, however, it is not at all clear that the change will remedy the constitutional defects in the old protocol, or that it will prevent the risk that Mr. Arthur will not be properly anesthetized before he is put to death. Mr. Arthur cannot know, without discovery, whether this change will actually *increase* the probability that he will suffer an agonizing death. Mr. Arthur should not be forced to speculate about probable outcomes before he has had an opportunity to examine the evidence of potential harms associated with the new protocol.

In addition to the substantial and relevant difference alleged in Mr. Arthur’s Complaint, Defendants have asserted in their papers moving to dismiss the Complaint that additional relevant changes also have been implemented. (Oct. 26, 2007 Anne C. Adams Aff. ¶ 2)⁵ Alabama’s new

⁴ *Harbison* also held that Tennessee’s failure to train adequately its execution team and failure to monitor adequately the administration of the drugs unconstitutionally increased the risk of unnecessary pain. 511 F. Supp. 2d at 891-92. Defendants do not aver that any changes to Alabama’s protocol have been made to rectify either of these flaws.

⁵ Mr. Arthur cites to the Affidavit of Anne C. Adams to highlight Defendants’ position but expressly does not concede the truth of the matter asserted therein. To the extent the District Court considered these changes in his determination that the protocols were not different in any relevant way, this was improper. *Bickley v. Caremark Rx, Inc.*, 461 F.3d 1325, 1329 (11th Cir. 2006) (court is generally limited to four corners of complaint on a motion to dismiss). *See also Byrne v. Nezhat*, 261 F.3d 1075, 1097 n.46

protocol purportedly includes the application of graded stimulation to assess the consciousness of the inmate after the inmate is administered 100 cubic centimeters of sodium pentothal. (*See id.*) The purported graded stimulation, to be performed by an unidentified lethal injection team member whose medical experience—if any—is never described, allegedly involves calling out the inmate’s name, stroking the inmate’s eyelashes and pinching the inmate’s arm. (*See id.*) Following the alleged graded stimulation, if the inmate manages a conscious reaction, an additional 100 cubic centimeters of sodium pentothal should be administered to the inmate before the warden proceeds to administer the lethal and potentially excruciatingly painful second and third chemicals. (*See id.*) The purported “assessment of consciousness” and the possible administration of an additional 100 cubic centimeters of sodium pentothal render this protocol an entirely new procedure whose constitutionality Mr. Arthur could not possibly have challenged before it was announced just four months ago.

In concluding that these “modifications, in short, do not provide the basis, or even part of the basis, for the constitutional challenge” because “no new wrong has been perpetrated” and “no new or heightened danger

(11th Cir. 2001) (where court considered a matter outside the four corners of the complaint, it should have treated the motion as one for summary judgment under Fed. R. Civ. P. 56).

introduced,” the District Court ruled that a protocol must be either more dangerous or dangerous in a new way before any new challenge can be considered distinct from an earlier challenge for purposes of assessing the existence of any unreasonable delay on the part of petitioner. The court articulates no legal basis for this conclusion. In fact, the court ignored the parties’ arguments regarding the application of res judicata (Def. Mot. at 12-14; Pl. Opp. at 11-15); it simply concluded, without relying on facts or law, that the new protocol was functionally equivalent to the old protocol so that the ground for dismissing the original complaint—specialized equitable principles—also required dismissal of the new complaint (Order at 3-4 & n.7).

Had the court squarely addressed the res judicata issues briefed by the parties, it would not have been diverted down the erroneous path of deciding whether the new complaint alleges more or less of a violation of a plaintiff’s rights than the initial complaint. Indeed, plaintiff is aware of no court that has applied such a test in making the central res judicata determination as to whether the new cause of action is “identical” to a prior action. *Cf. Heller v. Plave*, 743 F. Supp. 1553, 1569 (S.D. Fla. 1990) (finding that claims “not previously available” but “based on similar facts of ongoing misconduct” are not barred by res judicata). Mr. Arthur’s challenge

to the new protocol is clearly not identical to his challenge to the old protocol, and had the court so recognized, it would not have been able to dismiss Mr. Arthur's case.

Mr. Arthur never raised this same claim before. Indeed, *no* court has encountered these facts before—a new challenge to a new lethal injection protocol—and the few cases that address a revised lethal injection protocol (not one of which is cited in the District Court's opinion) are distinguishable. In *Workman v. Bredesen*, after the plaintiff brought his one and only lethal injection challenge four days after the state revised its lethal injection protocol (just five days before his execution date), the court found that the new protocol was only “slightly different” from the old protocol, as acknowledged by the plaintiff himself, and did not differ in any way crucial to his constitutional claim. 486 F.3d 896, 911 (6th Cir. 2007). In *Nooner v. Norris*, the plaintiff filed a challenge fourteen months before the lethal injection protocol was revised but later argued that one reason the court should not find unreasonable delay was because defendants had “reset the dilatoriness clock” when they revised the protocol. No. 5:06cv00110, 2007 U.S. Dist. LEXIS 67621, at *26 (E.D. Ark. Sept. 11, 2007). The plaintiff did not file a new action challenging the new lethal injection protocol and citing the constitutional problems arising out of it, but rather used the

modifications to rationalize his *prior* claim against the newly defunct protocol. *See id.* The critical distinction between these cases and Mr. Arthur's is that he has made a new challenge to a new protocol, and the modifications in this new protocol are central to his constitutional challenge because they relate to the assessment of consciousness and ultimately the Eighth Amendment inquiry of whether the punishment involves an "unnecessary and wanton infliction of pain." *Nelson v. Campbell*, 541 U.S. 637, 645 (2004) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

Indeed, it would be clearly erroneous to conclude, as the District Court did, that whether the modifications are "substantial" or "minor" is immaterial to whether a new wrong has been committed that can give rise to a new cause of action. During oral argument in *Baze*, Chief Justice Roberts and Justice Souter both supposed that if a single-drug (thiopental) protocol were implemented, additional cases would be brought challenging the new lethal injection protocol as modified from the current three-drug protocol. (Transcript of Oral Argument at 11, 51) In this scenario, such a modification, likely viewed as "substantial," would serve as a basis for new causes of action. The District Court's assumption that the degree of modification is of no consequence in this analysis is supported by neither legal authority nor common sense.

B. Discovery Is Needed to Determine the Extent of the Changes and Dismissal Is Inappropriate at the Motion to Dismiss Stage

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Citation of specific facts is not required; the statement need only “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 48 (1957)). In addition, when ruling on a motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Id.* at 1965. The threshold that a complaint must meet to survive a motion to dismiss for failure to state a claim is “exceedingly low.” *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 703 (11th Cir. 1985). “[T]he test is whether the complaint outline[s] or adumbrate[s] a violation of the statute, [common law theory] of recovery or constitutional provision on which the plaintiff relies . . . and connects the violation to the named defendants.” *Gen. Elec. Capital Corp. v. Posey*, 415 F.3d 391, 397 n.6 (5th Cir. 2005) (alterations in original) (internal quotations and citations omitted); *see also Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam) (vacating judgment of Court of Appeals where allegation that decision to remove petitioner from Hepatitis C medication

endangered his life could not be considered “too conclusory to put these matters in issue”).

Furthermore, factfinding is inappropriate at the motion to dismiss stage. *See, e.g., Rescuecom Corp. v. Computer Troubleshooters, USA, Inc.*, 464 F. Supp. 2d 1263, 1266 (N.D. Ga. 2005) (dismissal inappropriate where case triggers a novel legal question the factual underpinnings of which are not clear). Claims lacking factual merit are properly dealt with through summary judgment under Rule 56. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

Here, Mr. Arthur adequately alleged that the revisions to Alabama’s protocol would be “substantial, [even though] these changes will do little if anything to mitigate the substantial risk of cruel and unusual pain.” (Compl. ¶ 56) Mr. Arthur, in order to avoid exactly this dismissal based on unreasonable delay, filed his Complaint before Defendants finalized the lethal injection protocol and before details about it were publicized. Mr. Arthur was aware when he filed his Complaint that the change would include at the very least a purported assessment of consciousness, and that the change was an apparent attempt to salvage Alabama’s protocol in light of the *Harbison* decision. At the time of

Mr. Arthur's Complaint, the changes in the protocol were unknown in scope, but alleged to be substantial.

As no discovery has taken place in this action and Defendants have historically shrouded Alabama's execution protocol in secrecy, there is simply no way to determine at this point in the proceedings the scope of the changes, and whether they introduce a new or heightened danger. The District Court erred in concluding—without resort to any evidence—that the “new” protocol is identical to the ‘old’ protocol in every particular as to which plaintiff finds constitutional objection.” (Order at 3-4)⁶ Whether this conclusion is correct is a matter that must await development of a factual record. In relying upon Defendants’ factual assertions that the new protocol takes the “assessment [of consciousness] one step further” (Oct. 26, 2007 *Anne C. Adams Aff.* ¶ 2, *cited in* Order at 3), the District Court has accepted Defendants’ assertions as true without giving Mr. Arthur the opportunity to discover the nature, scope and extent of the changes to the protocol.

⁶ To the extent the District Court considered Defendants’ factual assertions in determining the nature of the change, this was error. *See Hill v. Trustees of Ind. Univ.*, 537 F.2d 248, 251 (7th Cir. 1976); *see also Carter v. Stanton*, 405 U.S. 669, 671-72 (1972) (holding that consideration of matters outside the four corners of the complaint without converting the motion to a Rule 56 motion for summary judgment may result in reversible error).

II. THE DISTRICT COURT ERRED IN DISMISSING MR. ARTHUR'S TIMELY CLAIM BASED ON "SPECIALIZED EQUITABLE PRINCIPLES."

The "strong equitable presumption" doctrine was the sole legal basis for the District Court's dismissal of Mr. Arthur's complaint. (Order at 4) This presumption acts to prevent the entry of a stay where the plaintiff unreasonably delayed in challenging the lethal injection protocol. The district court erred in its application of the doctrine to the current case.

The "strong equitable presumption" against the grant of a stay applies "where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill v. McDonough*, 126 S. Ct. 2096, 2104 (2006) (quoting *Nelson*, 541 U.S. at 650); *Arthur v. Allen*, 2007 U.S. App. LEXIS 22506, at *6. The test thus looks both to whether a complaint can be litigated without the need for a stay and to whether the complaint could have been brought earlier.

The Supreme Court created the "strong equitable presumption" doctrine to enable federal courts to protect States from dilatory suits. *See Hill*, 126 S. Ct. at 2104. Specifically, the presumption serves to protect "the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* (quoting *Nelson*, 541 U.S. at 649-50). It follows then, that in order for the presumption to apply, the delay

giving rise to the applicability of the presumption must have some causal relationship to the necessity of a stay. Without this causal relationship, the presumption does not protect the State's ability to carry out its sentence; rather, it only punishes someone who previously delayed in filing an action. If punishing the late-filer were the only motivation behind the doctrine, the sole precondition to its invocation would be an unreasonable delay in filing. By also requiring that the petitioner have had the ability to bring the claim at such time as to allow adjudication without a stay, the Supreme Court sought to ensure that the need for a stay is causally related to the dilatory tactics engaged in by the plaintiff.

This causal connection is broken where a State revises its lethal injection protocol in a manner material to the protocol's constitutionality so as to create a new cause of action. Defendants made substantial changes to Alabama's lethal injection procedures that are material to the determination of the protocol's constitutionality, and Mr. Arthur is entitled to that determination.⁷

The District Court's cursory conclusion that "petitioner has not overcome the strong presumption against the grant of injunctive relief that arose because he unreasonably delayed in bringing this action and because

⁷ Mr. Arthur does not currently have an execution date set.

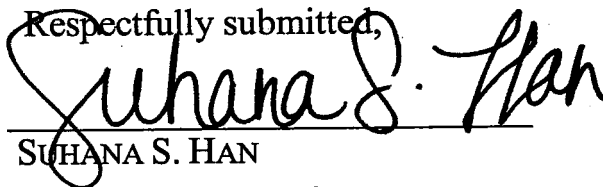
he could have brought his claim in time to allow consideration of its merits without requiring a stay of execution” (Order at 4) ignores the fact that Mr. Arthur could not have challenged the new protocol until it was announced in late September 2007. By focusing on whether a “new or heightened danger was introduced” in the new protocol, the court failed to follow clear Supreme Court precedent. Notwithstanding whether there is a “new or heightened danger,” the strong equitable presumption applies *if and only if* “a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” *Hill*, 126 S. Ct. at 2104. Mr. Arthur’s claim, as his complaint makes clear, is a challenge to the constitutionality of “the lethal injection procedures *as recently modified* by the State of Alabama.” (Compl. at 1 (emphasis added)) The extent to which those modifications make the protocol more or less “dangerous” (assuming this could be known absent any discovery) says nothing about *when* the plaintiff could have brought the challenge. Indeed, Mr. Arthur clearly could not have challenged the constitutionality of the “new” protocol—including the assessment of consciousness which goes to the heart of his constitutional claim—at any time prior to the announcement of these revisions. Furthermore, Defendants made the decision to change Alabama’s lethal injection protocol and the decision to issue Mr. Arthur a

45-day reprieve, giving him an impossibly short time to litigate the constitutionality of the new protocol. The District Court cannot fault Mr. Arthur for Defendants' decision to expedite his execution.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed, and the case should be remanded for the District Court to apply a test according to which the propriety of Mr. Arthur's claims, in the circumstances under which they are brought, may be appropriately assessed.

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE WITH
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Dated: New York, New York
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Suhana S. Han

CERTIFICATE OF SERVICE

I certify that I caused a true and complete copy of the foregoing Brief of Thomas D. Arthur to be served by next-day courier, on the 25th day of January, 2008, upon the following:

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