

CASE NO. 07-13929-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

JORDAN T. RAZZA
SULTANA L. BENNETT
125 BROAD STREET
NEW YORK, NEW YORK 10004
(212) 558-4000

Of Counsel

SUHANA S. HAN
125 BROAD STREET
NEW YORK, NEW YORK 10004
(212) 558-4000

Counsel of Record

Attorneys for Appellant
Thomas D. Arthur

September 7, 2007

CERTIFICATE OF INTERESTED PERSONS

ARTHUR v. ALLEN ET AL.

CASE NO. 07-13929-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.

Allen, Richard

Alverson, Gary

Arthur, Thomas D.

Bennett, Sultana L.

Bruce, Steven

Crenshaw, J. Clayton

Culliver, Grantt

Davis, James W.

Del Grosso, William

Fogel, Ruben

Gao, Qian Allison

Gustat, Steve

Han, Suhana S.

CERTIFICATE OF INTERESTED PERSONS

ARTHUR v. ALLEN ET AL.

CASE NO. 07-13929-P

Levine, Arnold J.

Manaugh, Sara L.

Maze, Corey L.

McKinney, Theron

Parkinson, Jennifer L.

Pryor, Jr., William H.

Razza, Jordan T.

Roberts, Jr., Jasper B.,

Rowland, Teresa (a.k.a. Teresa Vickers)

Steele, William H.

Stone, Sherrie

Trzaskoma, Theresa

Vercelli, Charles

Walden, Harold

Wicker, Judy (a.k.a. Mary Turner)

Wicker, Jr., Troy

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 numerous complex and novel issues of law concerning: (1) the applicability of traditional laches principles on a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12"); (2) the applicability of laches under "specialized equitable principles" on a Rule 12(b)(6) motion; (3) the proper measure of timeliness for the filing of method-of-execution complaints; and (4) a trial court's discretion in dismissing method-of-execution complaints for failure to meet newly formulated specialized equitable standards. Oral argument is particularly important in this case because the law governing Mr. Arthur's claims is in some respects unsettled in this Circuit, 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.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
STATEMENT OF THE STANDARD.....	6
SUMMARY OF THE ARGUMENT	7
ARGUMENT.....	9
I. THE DISTRICT COURT ERRED IN APPLYING ITS OWN LACHES DOCTRINE BASED ON “SPECIALIZED EQUITABLE PRINCIPLES”	9
A. Defendants Bear the Burden of Demonstrating the Elements of Laches	9
B. Dismissal on the Basis of Laches Is Inappropriate on a Motion to Dismiss	12
C. Limited Discovery Is Warranted.....	16
II. THE DISTRICT COURT ERRED IN DISMISSING MR. ARTHUR’S COMPLAINT BASED ON NEW “SPECIALIZED EQUITABLE PRINCIPLES” WITHOUT PROVIDING A CLEAR STANDARD BY WHICH TO MEASURE THE TIMELINESS OF LETHAL INJECTION CHALLENGES.....	19
A. The Timing of Mr. Arthur’s Filing Was Reasonable Under the Circumstances.....	20
B. Mr. Arthur’s Challenge to Alabama’s Lethal Injection Protocol Merits Substantive Review	25
CONCLUSION.....	29

TABLE OF CITATIONS

Page(s)

FEDERAL CASES

Advanced Cardiovascular System, Inc. v. Scimed Life System, Inc., 988 F.2d 1157 (Fed. Cir. 1993)..... 13

AmBrit, Inc. v. Kraft, Inc.,
812 F.2d 1531 (11th Cir. 1986)..... 10

Ancata v. Prison Health Services, Inc.,
769 F.2d 700 (11th Cir. 1985)..... 12

Anderson v. Evans,
2005 U.S. Dist. LEXIS 39407
(W.D. Okla. Dec. 20, 2005) 26

Anderson v. Evans,
2006 U.S. Dist. LEXIS 1632 (W.D. Okla. Jan. 11, 2006) 26

Brooks v. Blue Cross & Blue Shield of Fla., Inc.,
116 F.3d 1364 (11th Cir. 1997)..... 13

Brown v. Beck,
2006 U.S. Dist. LEXIS 60084 (E.D.N.C. Apr. 7, 2006)..... 27

Dow Jones & Co. v. Kaye,
256 F.3d 1251 (11th Cir. 2001)..... 16

Ellis v. Gen. Motors Acceptance Corp.,
160 F.3d 703 (11th Cir. 1998)..... 14

Gen. Signal Corp. v. MCI Telecomm. Corp.,
66 F.3d 1500 (9th Cir. 1995)..... 24

Grayson v. Allen, 2007 U.S. Dist. LEXIS 37063
(M.D. Ala. May 21, 2007)..... *passim*

Grayson v. Allen, 491 F.3d 1318 (11th Cir. 2007)..... 11, 12, 14

<i>Hill v. McDonough</i> 126 S. Ct. 2096 (2006)	3
<i>In re Henderson,</i> 577 F.2d 997 (5th Cir. 1978).....	10
<i>Jackson v. Danberg,</i> 240 F.R.D. 145 (D. Del. 2007).....	28
<i>Jackson v. Taylor,</i> 2006 U.S. Dist. LEXIS 27658 (D. Del. May 9, 2006).....	27-28
<i>Jones v. Allen,</i> 2007 U.S. Dist. LEXIS 28415 (M.D. Ala. Apr. 17, 2007)	29
<i>Koon v. United States,,</i> 518 U.S. 81, 116 S. Ct. 2035 (1996)	7
<i>Leonen v. Johns-Manville Corp.,</i> 717 F. Supp. 272 (D.N.J. 1989)	24
<i>Lowrey v. Texas A&M University System,</i> 117 F.3d 242 (5th Cir. 1997).....	13
<i>McNair v. Allen,</i> 2006 U.S. Dist. LEXIS 78094 (M.D. Oct. 25, 2006).....	19, 25
<i>Milburn v. United States,</i> 734 F.2d 762 (11th Cir. 1984).....	12
<i>Morales v. Tilton,</i> 465 F. Supp. 2d 972 (N.D. Cal. 2006)	27
<i>Morales v. Calderon,</i> 85 F.3d 1387 (9th Cir. 1996).....	23
<i>Morales v. Hickman,</i> 415 F. Supp. 2d 1037 (N.D. Cal. 2006)	26
<i>Morales v. Hickman,</i> 438 F.3d 926 (9th Cir. 2006).....	26

<i>Patton v. Jones</i> , 2006 U.S. Dist. LEXIS 54429 (W.D. Okla. Aug. 4, 2006).....	13
<i>Patton v. Jones</i> , 193 Fed. Appx. 785 10th Cir. 2006)	27
<i>Preferred Sites, LLC v. Troup County</i> , 296 F.3d 1210 (11th Cir. 2002).....	7
<i>Rutherford v. McDonough</i> , 466 F.3d 970 (11th Cir. 2006).....	21
<i>SEC v. Ginsburg</i> , 362 F.3d 1292 (11th Cir. 2004).....	7
<i>Simmons v. Sonyika</i> , 394 F.3d 1335 (11th Cir. 2004).....	6
<i>Smith v. Jones</i> , 256 F.3d 1135 (11th Cir. 2001).....	17
<i>Spain v. Brown & Williamson Tobacco Corp.</i> , 363 F.3d 1183 (11th Cir. 2004).....	6
<i>Stearns v. Page</i> , 48 U.S. 819 (1849)	18
<i>Taylor v. Crawford</i> , 457 F.3d 902 (8th Cir. 2006).....	28
<i>Taylor v. Crawford</i> , 487 F.3d 1072 (8th Cir. 2007).....	28
<i>Texas v. United States</i> , 523 U.S. 296 (1998)	22
<i>United States v. Edmond</i> , 52 F.3d 1080 (D.C. Cir. 1995)	24
<i>United States v. Grier</i> , 449 F.3d 558 (3d Cir. 2006).....	24

<i>United States v. Kikumura</i> , 918 F.2d 1084 (3d Cir. 1990).....	23
<i>Wanlass v. General Electric Co.</i> , 148 F.3d 1334 (Fed. Cir. 1998).....	18
<i>Williams v. Allen</i> 2007 U.S. App. LEXIS 19836 (11th Cir. Aug. 21, 2007).....	20
<i>Workman v. Bredesen</i> , 486 F.3d 896 (6th Cir. 2007).....	26

STATE CASES

<i>Evans v. State</i> , 396 Md. 256, 914 A.2d 25 (Ct. App. 2006).....	28
<i>Gayle v. Pennington</i> , 185 Ala. 53, 64 So. 572 (1914).....	18
<i>Ex parte Grubbs</i> , 542 So. 2d 927 (Ala. 1989).....	18
<i>Merrill v. Merrill</i> , 260 Ala. 408, 71 So. 2d 44 (1954).....	18
<i>Woods v. Sanders</i> , 247 Ala. 492, 25 So. 2d 141 (1946).....	18

FEDERAL STATUTES & RULES

42 U.S.C. § 1983.....	1, 2, 7
28 U.S.C. § 1291.....	1
28 U.S.C. § 1331.....	1
Federal Rule of Civil Procedure 12.....	<i>passim</i>

TREATISE

TILLEY’S ALABAMA EQUITY § 1.1 (2007).....	19-20
---	-------

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 August 10, 2007, this Court has jurisdiction over Mr. Arthur's appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

- 1) In granting dismissal under Federal Rule of Civil Procedure 12, whether the District Court erred in failing to apply the law with respect to laches and Rule 12's deferential standard of review.
- 2) In granting dismissal under Federal Rule of Civil Procedure 12, whether the District Court erred in applying a laches doctrine based on "specialized equitable principles" and failing to permit limited discovery.
- 3) In granting dismissal under Federal Rule of Civil Procedure 12, whether the District Court erred by relying on undefined and amorphous "specialized equitable principles."
- 4) Whether under "specialized equitable principles," the District Court should have found that there was no unreasonable delay and that substantive review was warranted.

STATEMENT OF THE CASE

Mr. Arthur, an inmate at Holman Prison who has steadfastly maintained his innocence, is scheduled to be executed by lethal injection on September 27, 2007. Defendants intend to anesthetize temporarily Mr. Arthur with a short-acting barbiturate, immobilize his muscles and pump his veins full of potassium chloride, which will ravage his internal organs and ultimately stop his heart.

After the conclusion of his habeas proceedings and before the State of Alabama set an execution date, Mr. Arthur commenced this action on May 14, 2007 pursuant to 42 U.S.C. § 1983 (the "Complaint"). Mr. Arthur seeks injunctive and declaratory relief against Richard Allen, Grantt Culliver and other unknown employees and agents of the Alabama Department of Corrections ("Defendants") in order to prevent violations and threatened violations of Mr. Arthur's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. In his Complaint, Mr. Arthur alleges that the Defendants' improper use of anesthesia as a precursor to execution unnecessarily risks infliction of excessive pain and suffering. Mr. Arthur also alleges that because the chemicals used for execution require the proper induction and maintenance of anesthesia, Defendants' failure to use

medically approved procedures and properly trained personnel creates an unacceptable risk that Mr. Arthur will suffer excruciating pain during the course of his execution.

As Justice Breyer asked during oral arguments in *Hill v.*

McDonough, 126 S. Ct. 2096 (2006):

[A] significant number of executed people are conscious when they die, and that's painful. And then it's been suggested there are ways around that. Just give them more sodium pentothal or have a doctor or somebody there to make certain the individual is unconscious at the time that the death-causing drugs take effect. . . . Now, that doesn't seem too difficult. . . . They don't have any real interest in – in causing suffering. Why don't they just do it?¹

Mr. Arthur brings this action not to prevent or delay his execution: he simply asks that Defendants take the precautions necessary to ensure that he does not suffer a cruel, unusual and unconstitutional death.

STATEMENT OF THE FACTS

In 1991, Mr. Arthur was convicted and sentenced to death for the 1982 murder of Troy Wicker. No physical evidence linked Mr. Arthur to the crime. Instead, his conviction was based almost exclusively on the

¹ Transcript of Oral Argument at 28-29, *Hill v. McDonough*, 126 S. Ct. 2096, (2006) (No. 05-8794).

testimony of the victim's wife, Judy Wicker. At the time she testified against Mr. Arthur, Judy Wicker was serving a life sentence for the same crime. In exchange for her testimony against Mr. Arthur, the state prosecutor—who had previously represented her in connection with her parole proceedings—offered the ultimate deal: assist in the prosecution of Mr. Arthur and obtain early parole. Although Judy Wicker had testified under oath at her own trial that a burglar killed her husband, she changed her story when she testified against Mr. Arthur and secured her freedom.

Mr. Arthur's conviction and sentence were affirmed on direct appeal in 1998. Notwithstanding his diligent efforts, Mr. Arthur was unable to find counsel or access either state or federal collateral proceedings before both statutes of limitations had run. After an execution date was set for April 27, 2001, Mr. Arthur finally located counsel, and the district court in the Northern District of Alabama granted Mr. Arthur a stay of execution on April 25, 2001, to allow him to litigate the existence of any basis to toll the statute of limitations.

To overcome this procedural bar, Mr. Arthur diligently attempted to develop facts relating to his gateway claim of actual innocence and his tolling claims, but the district court refused to toll the limitations

period and dismissed his *first* federal habeas petition as untimely. Although Mr. Arthur presented compelling evidence of actual innocence, the district court disregarded sworn affidavits of two alibi witnesses without even holding a hearing to resolve factual disputes. The district court also refused Mr. Arthur's request for DNA testing that could demonstrate that Judy Wicker testified truthfully at her own trial when she stated that a burglar assaulted her and murdered Troy Wicker. Specifically, by comparing the results to the FBI's national DNA database containing millions of DNA profiles of individuals convicted of crimes, Mr. Arthur could prove that Judy Wicker was raped by someone who was previously convicted of a violent crime, and that this person fits the description of her husband's murderer that she provided during her own trial.

On June 21, 2006, the Eleventh Circuit Court of Appeals affirmed the district court's ordering dismissing Mr. Arthur's habeas petition and denying his requests for discovery and a hearing. On August 14, 2006, the Eleventh Circuit denied Mr. Arthur's petition for rehearing and rehearing en banc. On April 16, 2007, the United States Supreme Court denied Mr. Arthur's petition for a writ of certiorari.

On April 17, 2007, the State of Alabama moved to set an execution date for Mr. Arthur. The Alabama Supreme Court granted the motion on June 22, 2007, and set an execution date for September 27, 2007.

On May 14, 2007, Mr. Arthur filed his Complaint, less than a month after the Supreme Court denied certiorari and more than a month before the Alabama Supreme Court set an execution date.

On June 25, 2007, Defendants filed a motion to dismiss the Complaint (“Def. Mot.”) on various grounds pursuant to Rule 12. On July 16, Mr. Arthur filed a Memorandum in Opposition to Defendants’ motion, and Defendants’ reply brief was filed on July 26, 2007. In an order dated August 10, 2007, Judge William H. Steele granted Defendants’ motion to dismiss on the basis of laches (“Order”), with a final judgment issued on the same day. Mr. Arthur appeals from that Order.

STATEMENT OF THE STANDARD

The Eleventh Circuit reviews a district court’s dismissal on a motion to dismiss *de novo*, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. *Simmons v. Sonyika*, 394 F.3d 1335, 1338 (11th Cir. 2004); *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1187 (11th Cir. 2004). 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). “A district court by definition abuses its discretion when it makes an error of law.” *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047 (1996). 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).

SUMMARY OF THE ARGUMENT

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

First, in granting Defendants’ motion to dismiss Mr. Arthur’s Complaint on the basis of laches, the District Court failed to apply the elements of laches and Rule 12’s deferential standard. Although laches is an affirmative defense, the District Court erroneously relieved Defendants of their burden to demonstrate each of the elements. Moreover, dismissal based on the affirmative defense of laches requires a court to engage in fact-specific inquiry that is wholly inappropriate on a motion to dismiss. Without limited discovery, dismissal was premature.

Second, in granting dismissal under Federal Rule of Civil Procedure 12, the District Court erred in applying a laches doctrine based on “specialized equitable principles” and finding that Defendants and the victim’s family suffered prejudice as a matter of law. No factual record has been developed with respect to this issue, and there is no support in the case law for a laches doctrine based on “specialized equitable principles.”

Third, even if the District Court correctly adopted “specialized equitable principles” as part of its laches inquiry, such a standard is undefined and amorphous. Due to the lack of clear guidance as to what this standard requires, the timing of Mr. Arthur’s filing was reasonable. The equities weigh in favor of permitting Mr. Arthur to litigate the merits of his Complaint.

ARGUMENT

I. THE DISTRICT COURT ERRED IN APPLYING ITS OWN LACHES DOCTRINE BASED ON “SPECIALIZED EQUITABLE PRINCIPLES.”

In dismissing Mr. Arthur’s Complaint, the District Court concluded that the doctrine of laches “is dispositive” and expressly limited its opinion to that ground. (Order at 2.) The District Court, however, neither applied each of the elements of laches nor the proper legal standards for evaluating a motion to dismiss under Rule 12. The District Court instead held that “the equitable timeliness of the plaintiff’s complaint is not measured by traditional laches principles but by the specialized equitable principles at issue when inmates facing imminent execution delay in raising their § 1983 method-of-execution challenges.” (Order at 8-9 (citation omitted).) The District Court’s application of laches under “specialized equitable principles” to bar Mr. Arthur’s Complaint is not supported by the law of this Circuit or the facts alleged in the Complaint. Moreover, absent limited discovery, the District Court erred in dismissing the Complaint.

A. Defendants Bear the Burden of Demonstrating the Elements of Laches.

“To establish laches, a defendant must demonstrate 1) a delay in asserting a right or a claim, 2) that the delay was not excusable, and 3)

that there was undue prejudice to the party against whom the claim is asserted.” *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1545 (11th Cir. 1986). “Laches is an affirmative defense that must be pled and proved by the defendants.” *In re Henderson*, 577 F.2d 997, 1002 (5th Cir. 1978). The District Court erred in relieving Defendants of their burden to satisfy each of the elements of laches.

Pursuant to “specialized equitable principles,” the District Court held that Defendants “need not show the ‘undue prejudice’ that is an element of laches.” (Order at 9 n.7.) According to the District Court, the “equitable principles in play here do not ignore prejudice but find it, as a matter of law, in the damage caused by an unreasonably delayed Section 1983 challenge to the interests of the state and victims ‘in the timely enforcement of a sentence.’” (*Id.* (citations omitted).) Such a conclusory finding—ignoring Defendants’ burden to demonstrate prejudice—is fundamentally flawed for two reasons.

First, the District Court has no factual basis to assume that victims’ families necessarily have an interest in enforcing a death sentence while questions about the constitutionality of the method of execution remain unanswered. Notwithstanding their tragic loss, family members may

decide that the benefit of a timely execution does not outweigh the risk of inflicting cruel and unusual punishment through lethal injection. *Cf.*

RACHEL KING, *DON'T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY* (2003) (examining the stories of ten murder victims' families and the reasons why these survivors chose reconciliation over retribution). Indeed, no facts regarding the wishes of Troy Wicker's family have been developed in this litigation.² Because laches requires a fact-specific inquiry, the District Court erred in releasing Defendants of their burden and finding prejudice as a matter of law.

Second, although the District Court purported to rely on *Grayson v. Allen*, 491 F.3d 1318 (11th Cir. 2007), in support of its “specialized equitable principles” (Order at 8-9), such reliance is misplaced. The district court in *Grayson* dismissed Grayson's claim on the basis of laches, addressing each of the three elements in turn: delay by the plaintiff in asserting his claim, inexcusable delay, and undue prejudice to defendant caused by such delay. *Grayson v. Allen*, No. 2:06-cv-1032, 2007 U.S. Dist.

² It is worth noting that in connection with Mr. Arthur's efforts to obtain access to physical evidence for purposes of DNA testing, the victim's sister stated that she opposes the death penalty and supports DNA testing. (*See* Affidavit of Peggy Wicker Jones, dated August 21, 2007).

LEXIS 37063, at *17-39 (M.D. Ala. May 21, 2007). The *Grayson* court limited its decision to “the unique circumstances of this case,” *id.* at *16, noting that it had “before it the evidentiary submissions of the parties.” *Id.* at *17. In affirming the court below, this Court held that the district court did not abuse its discretion in dismissing Grayson’s complaint on traditional laches grounds. *Grayson*, 491 F.3d at 1321, 1326. Thus, this Court in *Grayson* did not replace the doctrine of laches with “specialized equitable principles.”

B. Dismissal on the Basis of Laches Is Inappropriate on a Motion to Dismiss.

In applying “specialized equitable principles,” the District Court failed to adhere to the proper legal standard for granting Defendants’ motion to dismiss on the basis of laches.

The threshold for surviving a motion to dismiss under Rule 12 is “exceedingly low.” *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 703 (11th Cir. 1985). Such motion “should not be granted unless it appears to a certainty ‘that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Id.* at 702-03 (quoting *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984)). Dismissal pursuant to

Rule 12 is “disfavored” and a motion to dismiss should be “rarely granted.”
Lowrey v. Texas A&M Univ. Sys., 117 F.3d 242, 247 (5th Cir. 1997).

Rule 12 motions are “limited primarily to the face of the complaint and attachments thereto.” *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1368 (11th Cir. 1997). Application of traditional laches doctrine requires a court to engage in a fact-specific inquiry that is wholly inappropriate on a motion to dismiss. *See, e.g., Patton v. Jones*, No. Civ-06-0591-F, 2006 U.S. Dist. LEXIS 54429, at *16 (W.D. Okla. Aug. 4, 2006) (cited in *Grayson*, 2007 U.S. Dist. LEXIS 37063, at *18) (“The laches defense raises fact questions regarding the existence of any delays, the reasons for any such delays, the prejudice caused by any delays, and the balance of equities. These issues cannot be determined on a motion to dismiss.”). Determining whether laches applies “usually requires factual development beyond the content of the complaint.” *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1161 (Fed. Cir. 1993).

In granting Defendants’ motion to dismiss on the basis of laches, the District Court found no “impediment to resolving the timeliness issue.” (Order at 9.) Rather than taking “all material allegations of the

complaint as true while liberally construing the complaint in favor of the plaintiff,” *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998), the District Court held that what Mr. Arthur “knew or should have known” is “established by sources independent of the plaintiff.” (Order at 9.) Such reasoning finds no support in the only case explicitly decided on the basis of laches. *Grayson*, 2007 U.S. Dist. LEXIS 37063, *aff’d*, *Grayson v. Allen*, 491 F.3d 1318 (11th Cir. 2007).

In *Grayson*, this Court held that the district court, after several months of discovery and briefing by both parties, did not abuse its discretion in dismissing the plaintiff’s § 1983 action on laches grounds. *Grayson*, 491 F.3d at 1326. The district court had explicitly concluded that the consideration of the laches defense in the context of defendants’ motion for summary judgment was proper because the court had before it the evidentiary submissions of the parties. *Grayson*, 2007 U.S. Dist. LEXIS 37063, at *18. In contrast, no factual development beyond the content of the Complaint has occurred in Mr. Arthur’s case.

Furthermore, the District Court stated that “postponing resolution of the timeliness issue” would “effectively eviscerate the *Hill* Court’s admonition that federal courts can and should protect States from

dilatory or speculative suits.” (Order at 9-10 (citation omitted).) Such admonition, however, does not require courts to ignore clearly established burdens of proof or legal standards for evaluating a motion to dismiss. Moreover, such admonition does not prohibit courts from permitting the parties to develop facts directly relevant to the issue of timeliness. The District Court, however, declined to exercise its broad discretion to order expedited discovery before dismissing Mr. Arthur’s Complaint, which was filed four months before his scheduled execution—sufficiently in advance to permit limited discovery. Rather than compelling the “ent[ry] [of] a stay of execution” (*id.* at 10), such limited discovery would provide a legal and factual basis for the disposition of Mr. Arthur’s Complaint.

Thus, because the District Court failed to apply the laches doctrine within the traditional framework of Rule 12’s deferential standard, the judgment of the District Court should be reversed.³

³ At the very least, Mr. Arthur should be given the opportunity to amend his Complaint to include facts necessary to determine whether a dismissal based on laches is appropriate.

C. Limited Discovery Is Warranted.

Had the District Court utilized a traditional laches inquiry as urged by Defendants and required under the law, Mr. Arthur's Complaint should not have been dismissed absent limited discovery regarding Mr. Arthur's purported delay and the alleged prejudice to the State of Alabama and the victim's family. This Court should therefore remand the case to the District Court for limited discovery relating to these dispositive issues.

In asserting their affirmative defense of laches, Defendants argued in their motion that Mr. Arthur's delay was inexcusable because he "knew or should have known of his claim in 2002 when his sentence changed to lethal injection by operation of law." (Def. Mot. at 25.) Rather than engaging in a fact-intensive inquiry, as required by the traditional doctrine of laches, the District Court presented and debunked several hypothetical reasons for Mr. Arthur's purported delay. (Order at 3-7.) But opinions "advising what the law would be upon a hypothetical set of facts" are universally disfavored. *Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1254 (11th Cir. 2001) (internal quotation marks and citation omitted).

Additionally, there is no factual basis to conclude what Mr. Arthur knew or should have known about potential lethal injection

claims or when Mr. Arthur knew or should have known it. For example, Defendants assert that the facts supporting Mr. Arthur’s method-of-execution challenge “became apparent or should have been apparent” on July 1, 2002 when the State of Alabama changed its primary method of execution to lethal injection. (Def. Mot. at 18.) Defendants, however, have not explained how—if at all—they notified death-row inmates of this change. Nor do Defendants explain whether Alabama’s execution protocol has remained unchanged since 2002.

Even assuming that Defendants have shown unreasonable delay on the part of Mr. Arthur, which they have not, Defendants certainly have not shown prejudice, which the District Court essentially admits when it excuses Defendants of that obligation under its “specialized equitable principles.” (Order at 9, n.7.) Setting aside the District Court’s erroneous finding of prejudice as “a matter of law” (*id.*), the only types of “prejudice” Defendants identified were inconvenience to Defendants and to the Court resulting from “expedited” litigation and the possible delay of Mr. Arthur’s execution. Neither is sufficient to satisfy the doctrine of laches, which is not a favored defense. *See, e.g., Smith v. Jones*, 256 F.3d 1135, 1143 & n.8 (11th Cir. 2001) (noting that laches principles apply only in extreme cases).

The lapse of time does not, by itself, establish laches. *Merrill v. Merrill*, 260 Ala. 408, 411, 71 So. 2d 44, 46 (1954). As a general matter, the types of prejudice that concern courts relate either to prejudice to a party's ability to put on and defend its case, or economic prejudice. *See, e.g., Wanlass v. Gen. Elec. Co.*, 148 F.3d 1334, 1337 (Fed. Cir. 1998) (economic prejudice results where a defendant will lose significant monetary investments or incur damages as a result of conduct which could have been altered by an earlier lawsuit) (citation omitted); *Ex parte Grubbs*, 542 So. 2d 927, 929 (Ala. 1989) (listing factors such as the unavailability of witnesses, changed personnel, and the loss of pertinent records as classic elements of undue prejudice); *Woods v. Sanders*, 247 Ala. 492, 496, 25 So. 2d 141, 144 (1946) (plaintiffs precluded from relief where, as the result of delay, any conclusion the court may arrive at must at best be conjectural and it would be difficult to do justice due to lapse of time, loss of evidence and death of parties); *Gayle v. Pennington*, 185 Ala. 53, 66, 64 So. 572, 576-77 (1914) (addressing concerns regarding the obfuscation of the truth and destruction of the evidence of past transactions that arise from the lapse of time) (quoting *Stearns v. Page*, 48 U.S. 819, 829 (1849)).

Given the fact that Defendants have been able to conduct discovery similar to what will be required here in at least three other cases,⁴ Defendants cannot and do not argue that they suffer prejudice because of inability to put on and defend their case. Accordingly, limited discovery relating to any prejudice suffered by Defendants and the victim's family is warranted.

II. THE DISTRICT COURT ERRED IN DISMISSING MR. ARTHUR'S COMPLAINT BASED ON NEW "SPECIALIZED EQUITABLE PRINCIPLES" WITHOUT PROVIDING A CLEAR STANDARD BY WHICH TO MEASURE THE TIMELINESS OF LETHAL INJECTION CHALLENGES.

Even if the District Court correctly adopted "specialized equitable principles" as part of its laches inquiry, the equities counsel against dismissing Mr. Arthur's Complaint, especially where the standard as articulated is novel and undefined. In balancing the equities, a court has "the power to meet the moral standards of justice in a particular case" through its "discretion to mitigate the rigidity of the application of a strict rule of law so as to adapt the relief to the circumstances of the particular case." TILLEY'S

⁴ See *Grayson*, 2007 U.S. Dist. LEXIS 37063; *Jones v. Allen*, No. 2:06cv986, 2007 U.S. Dist. LEXIS 28415 (M.D. Ala. Apr. 17, 2007); *McNair v. Allen*, No. 2:06-cv-695, 2006 U.S. Dist. LEXIS 78094 (M.D. Oct. 25, 2006).

ALABAMA EQUITY § 1.1 (2007). Under the circumstances of this case, the equities weigh in favor of Mr. Arthur litigating the merits of his Complaint.

A. The Timing of Mr. Arthur’s Filing Was Reasonable Under the Circumstances.

According to the District Court’s Order, a method-of-execution complaint is vulnerable to dismissal if a plaintiff “unreasonably delays” in filing suit, but the court provides no guidelines as to how early such an action is to be filed. Mr. Arthur filed his Complaint less than a month after the Supreme Court denied certiorari review in Mr. Arthur’s federal habeas proceedings and before the Alabama Supreme Court set an execution date. As noted by Judge Barkett in her dissent in *Williams v. Allen*, No. 07-13638, 2007 U.S. App. LEXIS 19836 (11th Cir. Aug. 21, 2007), filing within 25 days of the conclusion of federal habeas review and only 16 days after the State moved to set an execution date could be construed as prompt by reasonable standards, as Mr. Williams’ claim “did not become ripe until it was clear that he had exhausted the claims pertaining to his conviction and sentence.” *Id.*, at *12 (Barkett, J., dissenting.) Mr. Arthur similarly brought his action after exhausting his claims in habeas proceedings.

In light of the uncertainty with respect to the standard for “unreasonable delay” for method-of-execution challenges in this Circuit

during the relevant period, the timing of Mr. Arthur's filing was reasonable. For example, in *Rutherford v. McDonough*, 466 F.3d 970 (11th Cir. 2006), this Court upheld the denial of a stay on the basis of unreasonable delay. Unlike Mr. Arthur, the plaintiff there brought his suit a mere four days prior to a scheduled execution. *Id.* at 975. By the time decisions in *Grayson* and *Williams* were issued providing further guidance, Mr. Arthur had already filed his Complaint.

Indeed, as evidenced by the District Court's Order, the "unreasonable delay" standard in this Circuit is far from settled. Under the District Court's laches doctrine based on "specialized equitable principles," it is not clear when a death-row inmate must file his § 1983 action challenging the constitutionality of lethal injection procedures in order to be allowed to litigate his claim on the merits. The District Court suggested that such claims must be filed before execution is "imminent," which apparently occurs when a circuit court denies habeas relief. (Order at 8.) There are, however, two major problems with this analysis.

First, the District Court did not define "imminent." Given the complexities of state and federal habeas litigation and the scant resources allocated to death-row inmates, it is unfair to subject capital litigators to this

type of guesswork. Nor is it an acceptable solution to require death-row inmates to file their lethal injection claims as soon as possible at the risk of failing to satisfy Article III's "case or controversy" requirement. *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 1259 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all") (citation omitted).

Second, the District Court did not explain whether the standard for determining "imminence" is an objective standard, based on a time certain,⁵ a subjective standard, based on a death-row inmate's perception of

⁵ Given the realities of capital litigation, it is difficult to say as a matter of logic when an execution must be considered "imminent." Mr. Arthur's execution was "imminent" in April 2001, until a district court granted a stay. Mr. Grayson's execution also was imminent in 2002, when the state moved the Alabama Supreme Court to set an execution date. The court denied the State's motion in 2003 pending a ruling in Grayson's § 1983 DNA action. *Grayson*, 2007 U.S. Dist. LEXIS 37063, at *6. *See also* Bill Poovey, *Alabama Supreme Court Delays July 20 Execution*, Associated Press State & Local Wire, July 13, 2001 (Alabama Supreme Court blocks Danny Joe Bradley's execution pending DNA testing of evidence); Harry R. Weber, *Parole Board Grants Stay of Execution*, Mobile Register, July 17, 2007, at B2 (Georgia State Board of Pardons and Paroles grants last-minute stay of execution to Troy Davis to allow board to weigh evidence of innocence); Gary D. Robertson, *Federal Judge Stays Execution of Rowsey, Three Other N.C. Prisoners*, Associated Press State & Local Wire, Jan. 7, 2004 (federal judge grants last-minute stay to inmate to allow attorneys to challenge constitutionality of lethal injection); Kyle Wingfield, *Stay of Thursday Execution Granted for Alabama Inmate*, Associated Press State & Local

(continued ...)

the likelihood of his execution, or some hybrid standard that looks objectively at the specific facts of each case to make a unique determination as to when execution is imminent and when a lethal injection challenge needs to be filed.⁶ This sort of ambiguity is generally disfavored by courts in other contexts. *See, e.g., Morales v. Calderon*, 85 F.3d 1387, 1393 (9th Cir. 1996) (concluding that a California rule on timeliness was not “clear, consistently applied and well-established” at any time after petitioner’s convictions were affirmed or before he filed his state habeas petition and thus could not bar federal relief) (citation omitted); *United States v. Kikumura*, 918 F.2d 1084, 1113 (3d Cir. 1990) (recommending that courts “avoid the kind of standardless determinations of reasonableness that inevitably produce unwanted disparity” in application of the Federal

(... continued)

Wire, May 27, 2003 (federal appeals court halts impending execution of death row inmate to give him a chance to prove mental retardation); Robin DeMonia, *Judge Grants Barbour’s Plea to Delay Execution*, Birmingham News, May 24, 2001 (federal judge blocks impending execution of death row inmate who missed appeals because he was unable to get a lawyer). Neither the District Court nor this Court has ruled as a matter of law as to the exact time that an execution becomes “imminent.”

⁶ This appears to be the approach taken by the district court in *Grayson*, which engaged in a full-blown laches analysis and found unreasonable delay “under the unique circumstances of this case.” *Grayson*, 2007 U.S. Dist. LEXIS 37063 at *16.

Sentencing Guidelines), *overruled in part*, *United States v. Grier*, 449 F.3d 558, 570 (3d Cir. 2006); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 280 (D.N.J. 1989) (noting that void for vagueness doctrine prohibits a law that is so “vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any fixed legal standards, what is prohibited and what is not in each particular case.”)

Moreover, aside from the obvious concerns regarding ripeness, as Judge Barkett noted, the amount of time necessary to conduct discovery, hold evidentiary hearings and reach a decision on the merits varies between cases. There simply is no “standard” time required to litigate these cases and the District Court erred by faulting Mr. Arthur for failing to file “in time,” without giving specific guidance as to when it is “too late.”

The District Court also failed to consider that expedited litigation is not uncommon and courts, in their discretion, have the power to tailor schedules according to the needs of the parties before them. *See, e.g., Gen. Signal Corp. v. MCI Telecomms. Corp.*, 66 F.3d 1500, 1509 (9th Cir. 1995) (district courts have discretion to impose rules to expedite completion of trials); *United States v. Edmond*, 52 F.3d 1080, 1100 (D.C. Cir. 1995)

(trial judge has wide discretion to adapt methods to expedite a trial) (citation omitted). Indeed, the State of Alabama has already completed discovery in another case involving similar issues as Mr. Arthur's. *See McNair*, 2006 U.S. Dist. LEXIS 78094.

In short, Mr. Arthur filed his Complaint at the conclusion of his habeas proceedings. Such timing was wholly reasonable in light of the uncertainty surrounding the standard for "unreasonable delay" during the relevant period, as evidenced by the District Court's adoption of "specialized equitable principles."

B. Mr. Arthur's Challenge to Alabama's Lethal Injection Protocol Merits Substantive Review.

Equity requires a substantive review of Mr. Arthur's Complaint challenging the constitutionality of Alabama's lethal injection protocol. It is beyond dispute that the State of Alabama has no valid interest in violating Mr. Arthur's constitutional rights. Mr. Arthur has raised serious issues that should be resolved before he is executed by the same means he challenges as being cruel and unusual punishment.

Indeed, other judges have recognized that "the risk of pain ... is not mere conjecture; substantially similar execution methods in other states have resulted in botched executions, leading those states to suspend

the practice.” *Workman v. Bredesen*, 486 F.3d 896, 926-27 (6th Cir. 2007) (Cole, J., dissenting) (discussing executions in Florida, Ohio, Arkansas and North Carolina).

For example, in *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1046-49 (N.D. Cal. 2006), Judge Fogel held that there was undue risk that Morales would still be conscious following the administration of the anesthetic, and that California could proceed with his execution only if it either employed anesthesiologists to ensure that Morales was unconscious and remained unconscious or used only sodium thiopental during the execution process. The Ninth Circuit affirmed, holding that the district court did not abuse its discretion in fashioning an appropriate remedy. *Morales v. Hickman*, 438 F.3d 926, 931 (9th Cir. 2006).

Anderson v. Evans provides another example of a successful § 1983 action challenging the constitutionality of lethal injection. No. Civ-05-825-F, 2005 U.S. Dist. LEXIS 39407 (W.D. Okla. Dec. 20, 2005), *adopted in full*, 2006 U.S. Dist. LEXIS 1632 (W.D. Okla. Jan. 11, 2006). The *Anderson* court denied the Oklahoma Department of Corrections’ motion to dismiss, finding that the DOC protocol created an excessive risk of substantial injury or deprivation. 2005 U.S. Dist. LEXIS 39407, at *14.

In *Brown v. Beck*, No. 5:06-CT-3018-H, 2006 U.S. Dist.

LEXIS 60084, at *25 (E.D.N.C. Apr. 7, 2006), the court denied Brown's motion for a preliminary injunction, but required North Carolina to ensure that "there are present and accessible to Plaintiff throughout the execution personnel with sufficient medical training to ensure that Plaintiff is in all respects unconscious prior to and at the time of the administration of any pancuronium bromide or potassium chloride." North Carolina revised its execution protocol to address the court's concerns and Mr. Beck was executed pursuant to the revised protocol. *See also Patton v. Jones*, 193 Fed. Appx. 785, 789-90 (10th Cir. 2006) (affirming dismissal of inmate's § 1983 action, but noting that defendants allayed plaintiff's concern by "revising the protocol during the pendency of this appeal to require the personnel carrying out an execution to wait two and a half minutes after the injection of the anesthetic before proceeding to inject the remaining two drugs called for in the protocol.")

Furthermore, lethal injection is currently or was previously suspended in California, Delaware, Florida, Maryland, Missouri, North Carolina, South Dakota and Tennessee. *See Morales v. Tilton*, 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006); *Jackson v. Taylor*, No. 06-300-SLR, 2006

U.S. Dist. LEXIS 27658, at *3-4 (D. Del. May 9, 2006) (enjoining execution until further order); *Jackson v. Danberg*, 240 F.R.D. 145, 149 (D. Del. 2007) (order granting class certification to all death-sentenced prisoners); Fla. Exec. Order No. 06-260 (Dec. 15, 2006) (no further death warrants will be signed until after a commission on lethal injection issues findings and the Department of Corrections makes necessary revisions); *Evans v. State*, 396 Md. 256, 350, 914 A.2d 25, 81 (Ct. App. 2006) (enjoining enforcement of the lethal injection checklist in the Execution Operations Manual until the list was properly adopted as regulations or exempted by the Maryland General Assembly); *Taylor v. Crawford*, 457 F.3d 902, 903-04 (8th Cir. 2006) (detailing finding by district court that Missouri's lethal injection protocol was unconstitutional), *appeal after remand*, 487 F.3d 1072, 1085 (8th Cir. 2007) (finding revised lethal injection protocol constitutional); *Berger Again Calls on Governor to Act*, Targeted News Service, Apr. 3, 2007, (de facto moratorium in North Carolina); Katie Brown, *Death Penalty Measure Signed*, Rapid City J., Feb. 27, 2007 (referencing South Dakota's new death penalty law, effective July 1, 2007, after which executions may resume); *see also* Tenn. Exec. Order No. 43 (Feb. 1, 2007) (directing

revision of lethal injection protocol and staying scheduled executions until May 2, 2007, pending such revision).

In short, numerous courts and executives have closely examined the lethal injection protocol in their respective states in response to well-founded constitutional concerns. The State of Alabama should do the same here.

CONCLUSION

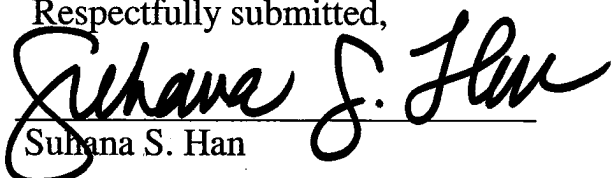
For the foregoing reasons, the judgment of the District Court should be reversed, and the case should be remanded for the District Court to allow Mr. Arthur to engage in limited discovery and to either consider the Defendants' motion on traditional laches principles, or in the alternative, develop an appropriate test pursuant to which the standard of "specialized equitable principles" can be assessed.

JORDAN T. RAZZA
SULTANA L. BENNETT
125 BROAD STREET
NEW YORK, NEW YORK 10004
(212) 558-4000

Of Counsel

September 7, 2007

Respectfully submitted,



Sultana S. Han
Counsel of Record
125 Broad Street
New York, New York 10004
(212) 558-4000