

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

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|------------------------|---|-----------------------------|
| THOMAS D. ARTHUR, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Case No. 1:07-cv-00722-WS-M |
| |) | |
| RICHARD ALLEN, et al., |) | |
| |) | |
| Defendants. |) | |

**DEFENDANTS’ MOTION TO DISMISS ARTHUR’S
MOST RECENT 42 U.S.C. § 1983 ACTION CHALLENGING
ALABAMA’S METHOD OF EXECUTION**

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, Defendants Richard Allen, et al., respectfully move this Court to dismiss this action on the following grounds: 1) the court lacks jurisdiction over this case; 2) Arthur’s claims are barred by res judicata; 3) Arthur’s claims are barred by the law of the case; 4) Arthur’s claims are barred by equitable principles and laches; and 5) Arthur’s claims are barred by the applicable statute of limitations. In support of this motion, defendants state the following:

I. Legal Standard

“[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.”

Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007). In ruling on the Defendants' motion to dismiss for failure to state a claim, courts should look to the plausibility of success on the allegations in the complaint. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1968-73 (2007). "To survive a motion to dismiss, the factual allegations in the complaint 'must be enough to raise a right to relief above the speculative level.'" Rattigan v. Gonzales, No. 04-2009-ESH, 2007 WL 1577855, at *6 (D.D.C. May 31, 2007) (Slip. Op.) (quoting Bell Atlantic Corp., 127 S. Ct. at 1965); Watts v. Florida Intern. University, 495 F.3d 1289, 1295 (11th Cir. 2007).

Further, "[i]n order for the plaintiff to satisfy his 'obligation to provide the grounds of his entitlement to relief,' he must allege more than 'labels and conclusions'; his complaint must include '[f]actual allegations [adequate] to raise a right to relief above the speculative level.'" Financial Sec. Assur., Inc. v. Stephens, Inc., No. 04-14894, 2007 WL 2700280, at *3 (11th Cir. Sept. 18, 2007) (quoting Bell Atlantic Corp., 127 S. Ct. at 1964-65). "Stated differently, the factual allegations in a complaint must "possess enough heft" to set forth "a plausible entitlement to relief." Financial Sec. Assur., Inc., 2007 WL 2700280, at *3 (quoting Bell Atlantic Corp., 127 S. Ct. at 1966-67).

II. Procedural History And Facts

This Court, in its order dismissing Arthur's first § 1983 complaint, succinctly summarized the relevant procedural history and facts as follows:

The salient, undisputed facts are these: In January 1992, the plaintiff was sentenced to death (for the third time) for a murder committed in 1982. His conviction and sentence became final in approximately June 1998, and his state collateral proceedings became final in May 2002.

In July 2002, Alabama adopted lethal injection as its method of execution, applicable to all existing death row inmates who did not opt for electrocution within thirty days. The plaintiff did not opt for electrocution.

The plaintiff filed a federal habeas petition in April 2001, which the trial court dismissed as untimely in December 2002. The Eleventh Circuit affirmed in June 2006, which opinion was modified slightly on petition for rehearing and rehearing en banc in August 2006. The dismissal of the plaintiff's federal habeas petition became final on April 16, 2007, when the Supreme Court denied his petition for writ of certiorari. The state filed a motion to set an execution date the next day. The Alabama Supreme Court granted the motion on June 22, 2007, setting an execution date of September 27, 2007.

The plaintiff filed this Section 1983 action on May 14, 2007, challenging the constitutionality of Alabama's lethal injection protocol, in particular its use of a three-drug sequence including a short-acting anesthetic (sodium pentothal), a drug inducing muscle paralysis (pancuronium bromide), and a final, lethal drug (potassium chloride); its procedures (or lack thereof) for their administration; and its standards (or lack thereof) for persons involved in the execution process.

Arthur v. Allen, No. 07-0342-WS-C, 2007 WL 2320069, at *1 (S.D. Ala. Aug. 10, 2007).

In his May 14, 2007, complaint Arthur sought to enjoin the defendants from executing him with alleged “inadequate anesthesia and execution procedures.” (Exhibit A) On August 10, 2007, this Court dismissed Arthur’s action holding that he is not entitled to injunctive relief due to his unreasonable delay in filing the action (laches). Arthur, 2007 WL 2320069, at *1-5. On September 17, 2007, in an unpublished opinion, the Eleventh Circuit Court of Appeals affirmed. Arthur v. Allen, No. 07-13929, 2007 WL 2709942, at *4 (11th Cir. Sept. 17, 2007).

On September 21, 2007, Arthur filed a petition for writ of certiorari in the Supreme Court of the United States. (Exhibit B). Later, on September 25, 2007, Arthur filed in the Supreme Court a “Petitioner’s Supplemental Brief In Further Support Of His Petition For A Writ Of Certiorari And Motion For A Stay.” (Exhibit C) In his supplemental brief, Arthur argued that the Supreme Court should grant his petition for certiorari review because it had recently done so in Baze v. Rees, 07-5439. Id. The following day, Arthur filed a second “Supplemental Brief In Further Support Of His Petitioner For A Writ Of Certiorari And Motion For A Stay.” (Exhibit D) Arthur’s second supplemental brief was based on proposed revisions to Alabama’s lethal injection protocol.

Although his petition for writ of certiorari is still pending, Arthur filed another § 1983 complaint challenging Alabama's method of execution and seeking to enjoin the defendants from executing him with alleged "inadequate anesthesia and execution procedures." (Exhibit A at 10-11); (Doc. #1 at 18).

III. Time Line Of Relevant Events

The timing of relevant events is summarized as follows:

- December 5, 1991: Arthur convicted for a third time of capital murder.
- January 24, 1992: Arthur sentenced to death.
- March 8, 1996: Alabama Court of Criminal Appeals affirmed Arthur's conviction and sentence of death. Arthur v. State, 711 So. 2d 1031 (Ala. Crim. App. 1996).
- November 21, 1997: Alabama Supreme Court affirmed Arthur's conviction and sentence of death. Ex parte Arthur, 711 So. 2d 1097 (Ala. 1997).
- September 8, 2000: After two and a half years of inactivity by Arthur, the State moved the Alabama Supreme Court to set an execution date.
- January 25, 2001: Arthur filed and untimely Rule 32 post-conviction petition in state court.
- March 5, 2001: State trial court dismissed the Rule 32 petition as untimely.
- March 23, 2001: Alabama Supreme Court set Arthur execution for April 27, 2001.
- April 20, 2001: Arthur filed petition for writ of habeas corpus with the United States District Court for the Northern

District of Alabama and a motion for a stay of execution.

- April 25, 2001: Alabama Court of Criminal Appeals affirmed the denial of post-conviction relief. Arthur v. State, 820 So. 2d 886, 889 (Ala. Crim. App. 2001). The Federal District Court issued a stay of execution and stayed the habeas proceedings pending the outcome of the state post-conviction proceedings.
- November 02, 2001: Supreme Court of Alabama denied petition for writ of certiorari. Id.
- May 13, 2002: Supreme Court of the United States denied petition for writ of certiorari. Arthur v. Alabama, 535 U.S. 1053 (2002).
- July 1, 2002: Alabama adopted lethal injection as the method of execution (inmates then on death row given thirty days to affirmatively elect electrocution as method of execution).
- July 31, 2002: Arthur failed to affirmatively elect electrocution as method of execution.
- December 4, 2002: District Court dismissed Arthur's § 2254 petition as untimely.
- June 21, 2006: United States Court of Appeals for the Eleventh Circuit affirmed district court's judgment. Arthur v. Allen, 452 F. 3d 1234, 1240 (11th Cir. 2006).
- April 12, 2007: Arthur filed his first § 1983 action. This action was filed in the Federal District Court for the Middle District and sought access to evidence (hereinafter "DNA § 1983"). Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992 (M.D. Ala. Aug. 17, 2007).

- April 16, 2007: United States Supreme Court denied petition for writ of certiorari. Arthur v. Allen, 127 S.Ct. 2033, 75 USLW 3547, 75 USLW 3554 (U.S. Apr 16, 2007)
- April 17, 2007: The State of Alabama filed its motion to set an execution date.
- May 14, 2007: Arthur filed his second § 1983 complaint (hereinafter “first LI § 1983”). This complaint was filed in this Court and challenged Alabama’s method of execution.
- June 22, 2007: Alabama Supreme Court granted the State’s motion and set Arthur’s execution date for September 27, 2007.
- August 10, 2007: This Court dismissed Arthur’s first LI § 1983 under the doctrine of laches. Arthur v. Allen, No. 07-0342-WS-C, 2007 WL 2320069, (S.D. Ala. Aug. 10, 2007).
- August 17, 2007: Federal District Court for the Middle District of Alabama dismissed Arthur’s DNA § 1983 action because it was filed with unreasonable delay. Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992 (M.D. Ala. Aug. 17, 2007).
- September 17, 2007: The Eleventh Circuit Court of Appeals affirmed this Court’s dismissal of Arthur’s first LI § 1983 complaint.
- September 21, 2007: The Eleventh Circuit Court of Appeals affirmed the District Court’s dismissal of Arthur’s DNA § 1983.
- September 21, 2007: Arthur filed a petition for writ of certiorari in the Supreme Court of the United States seeking review of the dismissal of his first LI § 1983 complaint.

- September 25, 2007: Arthur filed “Petitioner’s Supplemental Brief In Further Support Of His Petition For A Writ Of Certiorari And Motion For A Stay.” In his supplemental brief, Arthur argued that the Court should grant certiorari and a stay of execution based on its recent grant of certiorari in Baze v. Rees, 07-5439. Id.
- September 25, 2007: Arthur filed petition for writ of certiorari in the Supreme Court of the United States seeking review of the dismissal of his DNA § 1983.
- September 26, 2007: Arthur filed a second “Supplemental Brief In Further Support Of His Petitioner For A Writ Of Certiorari And Motion For A Stay.” Arthur’s second supplemental brief was based on proposed revisions to Alabama’s lethal injection protocol.
- September 27, 2007: Governor Bob Riley Granted Arthur a 45 day reprieve to allow the Department of Corrections on institute a minor revision to Alabama lethal injection protocol. See Doc. #1 at 5; (Exhibit E)
- September 28, 2007: The State again moved the Alabama Supreme Court to set Arthur’s date of execution. (Exhibit F)
- October 18, 2007: The revision to Alabama’s Lethal Injection protocol, which added a minor additional safeguard, was finished. See Siebert v. Allen, 2:07-cv-295-MEF-WC, Doc. # 56; (Exhibit H)
- October 31, 2007: The Alabama Supreme Court granted the State’s motion and set Arthur’s execution for December 6, 2007. (Exhibit I).

IV. Arthur's Newest § 1983 Action Challenging Alabama's Lethal Injection Protocol Should Be Dismissed Because Jurisdiction Over This Case Is With The Supreme Court Of The United States.

Jurisdiction over Arthur's § 1983 action challenging the method with which the State of Alabama will execute him is vested solely in the Supreme Court of the United States. This Court should, therefore, dismiss Arthur's newest § 1983 action for lack of jurisdiction.

As this Court is well aware, jurisdiction over a particular case cannot remain in two courts at the same time. "The Supreme Court has explained that 'a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously.'" Blinco v. Green Tree Servicing, LLC, 366 F.3d 1249, 1251 (11th Cir. 2004) (quoting Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S. Ct. 400, 401 (1982)). "The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Blinco, 366 F.3d at 1251 (quoting Griggs, 459 U.S. at 58, 103 S. Ct. at 401); see also In re Mosley, 494 F.3d 1320, 1328 (11th Cir. 2007) (quoting Griggs, 459 U.S. at 58, 103 S. Ct. 400) ("The filing of a notice of appeal generally 'confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the

appeal.”). The Seventh Circuit Court of Appeals aptly stated the relevant law as follows:

[T]he district court and the court of appeals do not share jurisdiction over the same case. Jurisdiction is either all in one court or all in the other. This rule is necessary to prevent one court's stepping on the toes of the other, which would waste judicial time as well as forcing the parties to proceed in two courts in the same case at the same time.

Boyko v. Anderson, 185 F.3d 672, 674 (7th Cir. 1999)

On May 14, 2007, Arthur filed, in this Court, a § 1983 action challenging Alabama’s lethal injection protocol. Thereafter, on August 10, 2007, this Court dismissed Arthur’s action holding that Arthur is not entitled to injunctive relief due to his unreasonable delay in filing the action. On August 21, 2007, Arthur filed a notice of appeal. In an unpublished opinion, the Eleventh Circuit affirmed. Arthur v. Allen, No. 07-13929, 2007 WL 2709942, at *4 (11th Cir. Sept. 17, 2007).

On September 21, 2007, Arthur filed a petition for writ of certiorari in the Supreme Court of the United States. (Exhibit B) Later, on September 25, 2007, Arthur filed in the Supreme Court “Petitioner’s Supplemental Brief In Further Support Of His Petition For A Writ Of Certiorari And Motion For A Stay.” (Exhibit C) In his supplemental brief, Arthur argued that the Supreme Court should grant his petition for certiorari review because it had recently done so in Baze v. Rees, 07-5439. Id. The following

day, Arthur filed a second “Supplemental Brief In Further Support Of His Petitioner For A Writ Of Certiorari And Motion For A Stay.” (Exhibit D) Arthur’s second supplemental brief was based on proposed revisions to Alabama’s lethal injection protocol.

Although his petition for certiorari is still pending in the Supreme Court, Arthur filed this action challenging the method in which he will be executed. This is the same action he has pending in the Supreme Court. Arthur has merely filed it under the guise of a new case number.¹

Because Arthur’s § 1983 action challenging the method in which Alabama will execute him has been dismissed by this Court and is currently pending in the Supreme Court, this Court lacks jurisdiction to hear the case. Blinco, 366 F.3d at 1251; Boyko, 185 F.3d at 674. Arthur cannot circumvent the Supreme Court’s jurisdiction over this case by simply re-filing it under a different case number. As noted above, Arthur’s previously dismissed § 1983 lethal injection challenge is currently pending in the Supreme Court, and Arthur has not moved that Court to dismiss it. He cannot revive that claim in this Court or create dueling jurisdiction over the same controversy by simply re-filing it. Therefore, this Court should

¹ This Court should note that Arthur has not taken any action to dismiss his lethal injection challenge that is pending in the Supreme Court.

dismiss Arthur's newest § 1983 action for lack of jurisdiction.

V. This Court Should Dismiss This Action Because It Is Barred By Res Judicata.

Arthur's current § 1983 action is precluded by the doctrine of res judicata. Therefore, this Court should dismiss this action challenging Alabama's execution protocol.

For purposes of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action." Federated Department Stores v. Moite, 452 U.S. 394, 398 (1981)(emphasis added); Olmstead v. Amoco Oil Co., 725 F.2d 627, 631 (11th Cir. 1984). Res judicata "will bar a subsequent action if: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties were identical in both suits; and (4) the prior and present causes of action are the same." Urfirer v. Cornfeld, 408 F.3d 710, n.1 (11th Cir. 2005) (quoting Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1187 (11th Cir. 2003)). The res judicata bar extends to all relevant issues and legal theories arising out of the same set of operative facts, whether or not fully presented in the previous litigation. Olmstead, 725 F.2d at 632. Because Arthur previously filed this action, and it was dismissed, his current action is barred by res judicata.

As detailed above, Arthur previously filed a § 1983 action seeking to enjoin the defendants from executing him by lethal injection. This Court dismissed Arthur's lawsuit based on the equitable principle that he unnecessarily delayed and thus was not entitled to injunctive relief. The Eleventh Circuit affirmed ruling that dismissal of a prisoner's § 1983 action is mandated when that prisoner unreasonably delayed in filing his action. Arthur v. Allen, No. 07-13929, 2007 WL 2709942, at *3 (11th Cir. Sept. 17, 2007). This Court's prior dismissal of Arthur's § 1983 action was appealable, and it, in fact, was appealed. Therefore, it was a decision on the merits. See Lemuel v. Lifestar Response of Alabama, Inc., No. 06-11155, 2007 WL 57097, at *2 (11th Cir. Jan. 9, 2007) (unreported) (citing Walker v. Blackwell, 800 So. 2d 582, 587 (Ala.2001)) (holding that a decision on the merits was reached when the issue presented in the current litigation is the same issue from the previous litigation, and the decision in the prior litigation was an subject to appeal). There can be no question that the parties to both of Arthur's § 1983 actions are the same. Finally, Arthur's prior and present causes of action are the same. In both actions, Arthur seeks a declaratory judgment adjudicating the method of execution Alabama will use to execute him unconstitutional and an injunction enjoining the defendants from executing him using lethal injection. (Exhibit A at 10-

11)(Arthur sought the exact same relief in his May 14, 2007 complaint as he seeks in his current complaint)

Because this Court previously denied injunctive relief, Arthur's current request for the same relief is barred under the doctrine of res judicata. Therefore, this Court should dismiss Arthur's newest § 1983 complaint.

VI. This Court Should Dismiss Arthur's Newest § 1983 Action Because Under The Doctrine Of The Law Of The Case, Arthur Is Not Entitled To Any Relief.

The Eleventh Circuit ruled that Arthur is not entitled to injunctive relief because he unreasonably delayed in filing his May 14, 2007, § 1983 complaint. Arthur v. Allen, No. 07-13929, 2007 WL 2709942, at *3 (11th Cir. Sept. 17, 2007). Based on that holding, consideration of Arthur's current § 1983 complaint is barred by the doctrine of the law of the case. Therefore, this action should be dismissed.

“The law-of-the-case doctrine holds that subsequent courts will be ‘bound by the findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case.’” Culpepper v. Irwin Mortg. Corp., 491 F.3d 1260, 1271 (11th Cir. 2007) (quoting Wheeler v. City of Pleasant Grove, 746 F.2d 1437, 1440 (11th Cir. 1984)); see also Turner v. Howerton, No. 06-16268, 2007 WL 3082138, at *4 (11th Cir. Oct. 23,

2007) (unreported) (quoting Westbrook v. Zant, 743 F.2d 764, 768 (11th Cir. 1984) (“[T]he ‘law of the case’ doctrine invokes the rule that findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal.”)). “The doctrine ‘generally operates to preclude a reexamination of issues decided upon appeal, either by the district court on remand or by the appellate court itself upon a subsequent appeal.’” Turner, 2007 WL 3082138, at *4 (quoting Westbrook, 743 F.2d at 768).

Arthur’s newest § 1983 complaint challenging Alabama’s method of execution and seeking an injunction is barred by the law of the case doctrine. The Eleventh Circuit held that Arthur’s previous § 1983 complaint relating to Alabama’s method of execution was properly dismissed and that he was not entitled to injunctive relief because he unreasonably delayed in filing the action. Under the law of the case doctrine, this Court is bound by the Eleventh Circuit’s holding that Arthur is not entitled to injunctive relief.

VII. Arthur’s § 1983 Action Should Be Dismissed Because He Unreasonably Delayed In Filing It.

Like his previous two § 1983 actions, Arthur unreasonable delayed in

filing this one.² Due to his unreasonable delay, Arthur is not entitled to any equitable relief. This action, therefore, should be dismissed.

“In considering the dismissal of a § 1983 challenge, courts are to apply equitable principles which mandate dismissal when the plaintiff ‘delayed unnecessarily in bringing the claim, ... knowing full well that the discovery, evidentiary hearing, and decision on the merits that he demands could not possibly be accomplished’ within the short period of time between filing and the scheduled execution date.” Arthur v. King, 2007 WL 2744884, at *5 (11th Cir. Sept. 21, 2007) (quoting Rutherford v. McDonough, 466 F.3d 970, 974 (11th Cir. 2006) (also citing and quoting Hill v. McDonough, 126 S. Ct. 2096, 2104 (2006))) (“The federal courts can and should protect States from dilatory ... suits” or “suits ... filed too late in the day.”); see also Grayson v. Allen, 491 F. 2d 1318, 1321 (11th Cir. 2007) (same); Williams v. Allen, 496 F.3d 1210, 1215 (11th Cir. 2007) (“[T]he district court did not abuse its discretion in dismissing Williams's § 1983 action due to his unnecessary delay, especially given the strong presumption against the grant of equitable relief.”).

² Arthur’s two previous § 1983 actions are as follows: 1) a § 1983 action filed in this Court challenging Alabama’s method of execution; and 2) a § 1983 action filed in the Federal District Court for the Middle District of Alabama seeking access to biological evidence.

Two district courts, including this one, have found that Arthur unreasonably delayed in filing two previous § 1983 complaints; therefore, he is not entitled to equitable relief.³ Arthur v. Allen, No. 07-0342-WS-C, 2007 WL 2320069, at *1-5 (S.D.Ala. Aug. 10, 2007); Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992, at *13 (M.D. Ala. Aug. 17, 2007) (“The court finds that Arthur's delay in bringing his § 1983 complaint is unreasonable. . . .”). In addition to two district courts’ determinations that Arthur unreasonably delayed in filing his two prior § 1983 complaints, the Eleventh Circuit has twice looked at this issue and both times found that Arthur unreasonably delayed. Arthur v. King, 2007 WL 2744884, at *5-7 (11th Cir. Sept. 21, 2007); Arthur v. Allen, No. 07-13929, 2007 WL 2709942, at *2-5 (11th Cir. Sept. 17, 2007). Each of these decisions establishes that Arthur unreasonably delayed in filing this – his third – §

³ Arthur may argue that he did not unreasonably delay because Alabama has a new execution protocol that could not have been challenged previously. This argument is without merit because Alabama does not have a new execution protocol. Alabama did recently revise its protocol to add a minor additional safeguard; however, this minor revision does not change the equitable considerations. See Jones v. Allen, 483 F. Supp. 2d 1142, n.2, 1151-53 (M.D.Ala. 2007) (noting that Alabama had revised its execution protocol, then denied the plaintiff’s motion for a stay of execution due to unreasonable delay).

1983 complaint.⁴

Because Arthur unreasonably delayed in filing this action, this Court should apply Arthur v. King, 2007 WL 2744884, at *5, Rutherford, 466 F.3d at 974, Hill, 126 S. Ct. at 2104, Grayson, 491 F. 2d at 1321, Williams, 496 F.3d at 1215, and dismiss this lawsuit.

VIII. Arthur's Claims Should Be Dismissed Because They Are Barred Under The Doctrine Of Laches.

Due to Arthur's unreasonable delay and the resulting prejudice to the Defendants, his action is barred under the doctrine of laches. This action, therefore, should be dismissed.

A claim is barred by laches if the following three elements are present: "(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." Kason Indus., Inc. v. Component hardware Group, Inc., 120 F.3d 1199, 1203 (11th Cir. 1997). The first two elements are met because Arthur knew or should have known of his claim in 2002 when his sentence changed to lethal injection by operation of law. As stated above, two district courts and the Eleventh Circuit have determined that Arthur unreasonably delayed in filing previous § 1983 actions – one of which he

⁴ Arthur's current § 1983 lawsuit pending before this Court is the same cause of action that is pending before the Supreme Court of the United States.

has merely re-filed here. Arthur v. Allen, No. 07-0342-WS-C, 2007 WL 2320069, at *1-5 (S.D. Ala. Aug. 10, 2007); Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992, at *13 (M.D. Ala. Aug. 17, 2007); Arthur v. King, 2007 WL 2744884, at *5-7 (11th Cir. Sept. 21, 2007); Arthur v. Allen, No. 07-13929, 2007 WL 2709942, at *2-5 (11th Cir. Sept. 17, 2007). Consequently, there is no question that Arthur unreasonably delayed and that his delay is inexcusable.

Due to Arthur's delay, the Defendants will suffer undue prejudice if this action is not dismissed. Arthur's delay in filing his action has caused the State undue prejudice "on two fronts." Grayson v. Allen, 499 F. Supp. 2d 1228, 1240-43 (M.D. Ala. 2007) (dismissing a virtually identical action under the doctrine of laches). First, at the conclusion of federal post-conviction review the State has an "added moral dimension" "in meting out a sentence of death in a timely manner." Id. (quoting Calderon v. Thompson, 523 U.S. 538, 556 (1998)); Arthur, 2007 WL 2744884, at *4 (internal citations omitted) ("The strong interest of the State and the victims's families is in the timely enforcement of a sentence,' which acquires 'an added moral dimension' once post-trial proceedings finalize."). "To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and

the victims of crime alike.” Grayson, 499 F. Supp. 2d at 1240 (quoting Calderon, 523 U.S. at 556). Second, defendants are prejudiced because the case would have to be placed on a “fast-track” in order to litigate it so that a stay of execution would not have to be granted. Id. at 1241.

Arthur, and Arthur alone, controlled when he filed his lawsuit and he chose to file it after the State of Alabama has twice sought an execution date and when he knew that the courts and the parties would have to expedite their schedules in order to litigate the late-filed claim. See (Exhibit G) (This Court’s recent decision in Hallford v. Allen recognizing that it cannot reach a merits determination on Hallford’s June 1, 2007 lethal injection challenge by April of 2008) “Expedited litigation taxes the resources and schedules of the defendants.”⁵ Grayson, 499 F. Supp. 2d at 1241. “Moreover, expedited cases create future inefficiencies, including the specter of each inmate demanding late in the day the same consideration given to [Arthur].” Id. This Court should follow Grayson and dismiss this case on laches grounds.

A. Arthur’s Late-Filed Claim Causes Prejudice Because The State Cannot Enforce Its Judgment If Arthur Is Allowed To Fully Adjudicate His Claim

The State is prejudiced because Arthur’s December 6, 2007 execution

⁵ This Court should note that the State and Courts are further taxed by the fact that Arthur and his daughter, Sherrie Stone, have filed three other § 1983 actions.

cannot be carried out if this lawsuit is fully adjudicated including appeals. The State has a legitimate expectation that it will be able to carry out a death sentence at the conclusion of federal habeas review.

The Eleventh Circuit has recently reiterated the State's expectation in expeditiously carrying out its duly-adjudicated judgments:

It is common practice in Alabama for the State to seek an execution date soon after the Supreme Court denied certiorari review of an inmate's federal habeas petition. As a matter of common sense, completion of collateral review eliminates the last possible obstacle to execution, and Jones should have foreseen that the execution date would likely be set promptly upon completion of collateral review.

Jones v. Allen, 485 F.3d 635, n.2 (11th Cir. 2007); see also Grayson v. Allen, 491 F.3d 1318, 1325 (11th Cir. 2007) (quoting Jones, 485 F.3d at 641) (“We will not interfere with the State’s strong interest in enforcing its judgment in this case.”); id. (quoting Grayson, 460 F.3d at 1342 (“The government has a strong interest in the finality of duly adjudicated criminal judgments.”); id. (quoting Thompson v. Wainwright, 714 F.2d 1495, 1506 (11th Cir. 1983)(“Each delay, for its span, is a commutation of a death sentence to one of imprisonment.”)).

The State suffers undue prejudice based on the “change in circumstances” between the time Arthur should have filed his lethal-

injection challenge and the time he actually did. Grayson, 499 F. Supp. 2d at 1240. The “change in circumstances” is brought about because the State here has a legitimate and legally recognized expectation that justice will finally be served at the conclusion of federal habeas review. Arthur’s late-filed claim, if litigated to conclusion, will impede the State’s interest in carrying out its judgment. “He who would invoke laches must show a delay which has subjected him to a disadvantage in asserting and establishing his claimed right or defense.” Esso International, Inc. v. SS Captain John, 443 F.2d 1144, 1150 (5th Cir. 1971). The State here has a “claimed right” (in fact, a right recognized by the Eleventh Circuit and the Supreme Court) to carry out its duly-adjudicated judgment.

Arthur filed his lethal-injection challenge almost five years after Alabama changed its method of execution to lethal injection, after his federal habeas appeals concluded, and after the State of Alabama sought an execution date. As recognized by the Supreme Court, the State has a “moral” interest “in meting out a sentence of death in a timely manner” when post-trial proceedings have run their course. Grayson, 499 F. Supp. 2d at 1240 (quoting Calderon, 523 U.S. at 556). The delay in filing thus causes prejudice because the State cannot carry out Arthur’s sentence, which is set for December 6, 2007 if his late-filed claim is fully adjudicated.

The timing of Arthur's filing, after two previous § 1983 complaints were dismissed, leads ineluctably to the conclusion that his primary purpose for filing his lawsuit is to yet again forestall his execution. The Eleventh Circuit has ruled that: "[b]y waiting until November 2006 to file his challenge to the State's lethal injection protocol, Jones 'leaves little doubt that the real purpose behind his claim is to seek a delay of his execution, not merely to effect an alteration of the manner in which it is carried out.'" Jones, 485 F.3d at 640. If Arthur were truly interested in challenging Alabama's method of execution, he would have filed his lawsuit so that it could be litigated without the entry of a stay or without the time pressures created by his delay. By filing his § 1983 action when he did, Arthur implicitly asserts that he is entitled to what amounts to a fourth layer of appeal.

Arthur is following in the footsteps of other § 1983 death-row inmates who filed at the conclusion of habeas review and successfully delayed (or prevented, as the case may be) their executions. One of those individuals, Danny Bradley, filed a § 1983 action on June 26, 2001, at the conclusion of his federal post-conviction appeals seeking DNA testing. See Bradley v. Nagle, 2:01-cv-01601-SLB (N.D. Ala.) After that complaint was dismissed, the Eleventh Circuit reversed – ruling that claims seeking post-conviction

access to biological evidence for DNA testing purposes may be brought in § 1983 actions. Bradly v. Pryor, 305 F.3d 1287, 1290 (11th Cir. 2002). The federal district court recently entered a memorandum opinion denying relief and dismissing Bradley's lawsuit. Bradley v. Nagle, 2:01-cv-01601-SLB (N. D. Ala. March 29, 2007). Bradley has appealed.

There are two other Alabama death-row inmates who have successfully prevented their executions by filing § 1983 actions at the conclusion of federal habeas review. Darrell Grayson filed a § 1983 action on November 15, 2002, requesting DNA testing. Grayson v. Pryor, CV-02-BE-2800-S. Grayson's lawsuit was dismissed by the federal district court and rejected on appeal by the Eleventh Circuit and the Supreme Court. See Grayson v. King, 460 F.3d 1328 (11th Cir. 2006), cert. denied, Grayson v. King, 127 S. Ct. 1005 (Jan. 8, 2007).⁶ Similarly, David Larry Nelson filed a complaint on October 6, 2003, alleging that any use of a so-called "cut-down" procedure would be unconstitutional. Nelson v. Campbell, 2:03-cv-1008-MHT (M.D. Ala.). The Supreme Court ultimately reversed the lower courts, ruling that Nelson could challenge the "cut-down" procedure in a §

⁶ Grayson, however, was successful in preventing his execution. The Alabama Supreme Court (over three dissents) denied the State's motion to set an execution "pending a ruling on the motion for DNA testing." Ex parte Grayson, 1830756 (Ala. May 22, 2003). Grayson then filed a lethal-injection challenge that was dismissed on laches grounds. Grayson, 2007 WL 1491009.

1983 action. See Nelson v. Campbell, 541 U.S. 637, 124 S. Ct. 2117 (2004). The case was subsequently remanded to the federal district court where it languishes to this day. Each of these § 1983 cases delayed an execution.

Thus, these examples demonstrate that the State suffers prejudice from Arthur's delay in filing. Arthur is presumably aware that other death-row inmates have filed § 1983 actions at the conclusion of federal habeas review and successfully forestalled their executions. As previously stated, the Eleventh Circuit has ruled that this type of challenge has been available since 2002 and denied a stay of execution because, inter alia, the inmate could have filed his lethal-injection challenge sooner. Jones, 485 F.3d at 639 n.2.

B. Prejudice Results When Courts Are Forced To Expedite Litigation Schedules Due To Late-Filed Claims.

Given when this case was filed and the fact that Arthur's execution is scheduled for December 6, 2007 the only possible way to reach a hearing on the merits is to grant him a stay or expedite the schedule.⁷ As shown above, a stay of execution prejudices the defendants. Likewise, expedited litigation prejudices the defendants. There is no question that expedited litigation of a complex case, even a single complex case, causes prejudice. Forcing the

⁷ For the same reasons outlined in Jones v. Allen, Arthur is not entitled to a stay of execution. Jones v. Allen, 485 F.3d 635 (11th Cir. 2007)

Defendants to attempt to squeeze the litigation necessary for a merits determination into a few months prejudices the Defendants in this case and cases to come. When a complex matter such as a challenge to the lethal injection protocol of a State is litigated at a pace necessary to allow adjudication within a few months (by December 6, 2007), no matter how diligently the parties, counsel, and court do their jobs, the result is a different sort of – and less complete – record than would result if a case is given the time that its complexity requires.

The State is also prejudiced because if an inmate does prevail, any resulting alteration of the execution procedures could not be fully adjudicated without having to enter a stay. “[I]f the court were to find in favor of [Arthur] on the merits, fashioning relief, (that is, reviewing the State’s adoption of a new protocol for lethal injections) would take much more than three months.” Jones v. Allen, 483 F. Supp. 2d 1142, 1152 (M.D. Ala. 2007). However, Arthur’s unjustifiable delay ensures that a stay will be required if any such alteration (no matter how slight) is ordered.

The strategy of the day for death-row inmates is to seek a delay of execution by challenging lethal-injection procedures, and it apparently is a strategy that all death-row inmates will use. Currently, the cases are decided on the basis of a motion for stay of execution, and the result is a rushed case

that prejudices the Defendants as they try to handle litigation of the merits, litigation of a stay, and expedited appeals, often occurring simultaneously in multiple cases.⁸ It will continue to be this way unless there is a rule, either based on laches or the statute of limitations, which requires inmates to file by a date certain. If this Court establishes such a rule, then to reach the merits, an inmate would have to file much earlier; and when an inmate files as late as Arthur, the case may be disposed of quickly and efficiently. Until then, and for purposes of this case, the late filing and rushed appeals of multiple cases interfere with the State's right to timely enforcement of judgments, places an unfair burden on the Defendants, and results in an incomplete and less reliable record.

Arthur filed this action over fifteen years after his conviction for capital murder; over nine years after his direct appeal ended; five years after the end of his state Rule 32 review; six years after he initiated habeas proceedings; and five years after the State of Alabama made lethal injections its method of execution. He filed after the conclusion of habeas review. More importantly, he only filed this action after the State sought an order

⁸ Arthur is a prime example of a death row inmate forcing the defendants to litigate multiple cases at an expedited pace. Arthur, now, has filed three § 1983 actions, two of which are pending in the Supreme Court of the United States. Arthur v. Allen, 07-395; Arthur v. King, 07-397. In addition to Arthur's three complaints, his daughter, Sherrie Stone, has filed a § 1983 actions in this Court seeking to enjoin the State from performing an autopsy on Arthur. Stone v. Allen, 1:07-cv-00681-WS-M.

from the Alabama Supreme Court setting a date for the administration of his sentence. Binding Eleventh Circuit precedent provides that Arthur could have and should have filed his claim earlier. Arthur's decision to wait until the State sought an execution date (and now has one) file this action has created a situation where the case cannot be litigated to conclusion without prejudicing the State. Laches, then, is an absolute bar and requires dismissal.

IX. Arthur's Claims Should Be Dismissed Because He Filed This Action After The Applicable Statute Of Limitations Expired.

Arthur's § 1983 action challenging Alabama's method of execution should be dismissed because it was filed after the applicable statute of limitations had expired. Actions filed pursuant to § 1983 are subject to a period of limitations concurrent with "the personal injury limitations period of the [forum] state." Rozar v. Mullis, 85 F.3d 556, 561 (11th Cir. 1996) (citing Wilson v. Garcia, 471 U.S. 261, 269, 105 S. Ct. 1938, 1943 (1985)). Personal injury actions in Alabama are subject to a two-year statute of limitation. See Ala. Code § 6-2-38(1) (2005). Thus, Arthur's § 1983 challenge to Alabama's method of execution is barred if it was filed more than two years after the limitations period began to run.

Although the length of the limitations period is left to state law, "[t]he question of when the limitations period begins to run is one of federal law."

Uboh v. Reno, 141 F.3d 1000, 1002 (11th Cir. 1998)(citing Wilson v. Garcia, 471 U.S. 261, 268-71, 105 S. Ct. 1938, 1942-44, 85 L. Ed.2d 254 (1985)). Federal law applies an accrual-based standard to the running of periods of limitation. For claims filed under § 1983, the Eleventh Circuit has held that “[the] statute of limitations begins to run when the cause of action accrues.” Uboh, 141 F.3d at 1002; see also Kelly v. Serna, 87 F.3d 1235, 1239-40 (11th Cir. 1996) (same). That is “the statute of limitations begins to run from the date ‘the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.’” Brown v. Georgia Bd. of Pardons & Paroles, 335 F.3d 1259, 1261 (11th Cir. 2003) (quoting Rozar v. Mullis, 85 F.3d 556, 561-62 (11th Cir. 1996)); see also Williams v. City of Tampa Police Dept., No. 06-12978, 2007 WL 412978, at *1 (11th Cir. 2007) (unreported opinion) (“The statute of limitations accrues ‘from the date the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.’”); Lovett v. Ray, 327 F.3d 1181, 1182-83 (11th Cir. 2003) (holding that the statute of limitation for a prisoner § 1983 challenge to the State’s decision to alter the frequency with which it considers parole began to run when the prisoner “knew, or should have known, all of the facts necessary to pursue a cause of action”). As the

Supreme Court reiterated in Wallace v. Kato, “the standard rule [is] that [accrual occurs] when the plaintiff has ‘a complete and present cause of action.’” Wallace v. Kato, 127 S. Ct. 1091, 1095 (2007) (quoting Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997) (quoting Rawlings v. Ray, 312 U.S. 96, 98 (1941))). “[T]hat is, [accrual occurs] when ‘the plaintiff can file suit and obtain relief.’” Wallace, 127 S. Ct. at 1095 (quoting Bay Area Laundry, 522 U.S. at 201)).

The Eleventh Circuit recently applied the above detailed statute of limitations principles in Lesley v. David, 186 Fed. Appx. 926, 2006 WL 1760816, at *1 (11th Cir. (June 28, 2006) (unpublished opinion). Inmate Arlen Leslie was informed in June 1999 that he was eligible for parole in November 2005. Id. The next month (July 1999), however, the Florida Parole Commission “instituted new, harsher parole guidelines, resulting in a new parole date of November 2030.” Id. Leslie was informed of the new guidelines and his new parole date in 1999. Id. Leslie was again informed of the guidelines change in 2004. Id.

Shortly thereafter, the Supreme Court in Wilkinson v. Dotson, 544 U.S. 74 (2005), held that “habeas corpus petitions were not the exclusive remedy for prisoners seeking declaratory or injunctive relief for parole

eligibility decisions.” Lesley, 2006 WL 1760816, at *1. Thus, in September 2005, Lesley filed a § 1983 action claiming that the new guidelines violated the Ex Post Facto, Due Process, and Equal Protection Clauses, and sought “a declaratory judgment and injunctive relief” to force Florida to reinstate his previous parole date. See Lesley v. David, No. 405-CV-00343-MP/WCS, 2005 WL 3536276, at *1-2 (N.D. Fla. Dec. 23, 2005).

Applying the standard that a statute of limitations begins to run on § 1983 claims when “the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights,” the district court dismissed Leslie’s action as time-barred under Florida’s four-year statute of limitation because he learned of the guidelines change in June 1999. Id. at *3. The Eleventh Circuit affirmed, holding that Leslie’s cause of action accrued once the Florida’s guidelines changed and Leslie discovered the change affected him. Id. at *2-3. Furthermore, the Leslie Court rejected the argument that the accrual date did not begin until the Supreme Court’s decision in Wilkinson alerted Lesley that § 1983 might be a possible avenue to raise his claim. Id. at *3, n.1.

Recently, the Sixth Circuit, in Cooley v. Strickland, determined that a death row inmate’s § 1983 method-of-execution challenge accrues for statute-of-limitation purposes at the conclusion of direct review – when the

sentence becomes final - or when the State elects lethal injection as its method of execution.⁹ Cooley v. Strickland, 479 F.3d 412, 422 (6th Cir. 2007), rehearing denied, Cooley v. Strickland, --- F.3d ----, 2007 WL 1574663 (6th Cir. June 1, 2007). In accord with Wallace, 127 S. Ct. at 1095, and Brown, 335 F.3d at 1261, the Cooley Court “look[ed] to the event that should have alerted the typical lay person to protect his or her rights.” Id. at 416 (internal citation and punctuation omitted). The Cooley Court stated that “the most logical choice of a triggering event is the point when the death penalty is ordered, upon judgment of conviction and sentence.” Id. at 418. To support its conclusion, the Cooley court cited a Fifth Circuit decision that holds that a method-of-execution claim may be raised any time after the inmate's conviction becomes final on direct appeal. Id. (citing Neville v. Johnson, 440 F.3d 221, 222 (5th Cir. 2006)). In addition, the Cooley Court emphasized that this triggering date mirrored the one found in 28 U.S.C. § 2244(d)(1)(A): “upon conclusion of direct review in the state court or the expiration of time for seeking such review.” Id. at 422. Under that

⁹ The Cooley case appears to be the only reported decision of a federal appeals court addressing the issue of when a death-row inmate's § 1983 method-of-execution challenge accrues for statute of limitation purposes. However, in a recent case ruling that Missouri's execution protocol is constitutional, the Eight Circuit emphasized that the State had not raised “timeliness” as an issue. See Taylor v. Crawford, --- F.3d ----, 2007 WL 1583874 (8th Cir. June 4, 2007).

particular triggering event, the inmate's claim in Cooey would have accrued in 1991, after the United States Supreme Court denied direct review.

Because Ohio did not adopt lethal injection as a method of execution until 1993, or make it the exclusive method of execution until 2001, the Cooey Court held that "the accrual date must be adjusted because Cooey obviously could not have discovered the injury until one of those two dates." Id. at 422. Thus, Cooey held that the statute of limitations for § 1983 actions challenging a State's method of executions begins to run when the State adopts the method challenged or at the conclusion of the plaintiff's direct appeal, whichever is later. Id.

Applying the holdings of Wallace, Brown, and Cooey to this case, Arthur's lawsuit should be dismissed because it was filed after the statute of limitations had expired. Under precedent from the Eleventh Circuit, Arthur's two-year "statute of limitations [began] to run [when] 'the facts which would support [this cause of action became] apparent or should [have been] apparent to a person with a reasonably prudent regard for his rights.'" Brown, 335 F.3d at 1261. The facts which would support Arthur's § 1983 challenge to Alabama's method of execution became apparent or should have been apparent on July 1, 2002, when Alabama changed its primary method of execution to lethal injection. See Ala. Code § 15-18-82.1 (2006

Cumulative Supplement). Arthur, therefore, had “a complete and present cause of action,” and could have filed this action and obtained relief at that point. Wallace, 127 S. Ct. at 1095; cf. Rutherford v. McDonough, 466 F.3d 970, 975 (11th Cir. 2006), cert. denied, 127 S. Ct. 465 (2006) (holding that Rutherford could have filed as early as 2000 when he knew or should have known of the claim); Jones v. Allen, 485 F.3d 635, 640 (11th Cir. 2007) (“We see no convincing reason why, after Alabama made lethal injection its primary method of execution, Jones could not have brought his method-of-execution challenge sooner than he did. Jones knew of the State's intention to execute him at least by July 2002.”); Gomez v. United States Dist. Court for Northern Dist. of Cal., 503 U.S. 653, 654 (1992) (holding that a claimant’s § 1983 action challenging the constitutionality of California’s method of execution (gas) “could have been brought more than a decade ago”). Thus, the two-year statute of limitations for Arthur’s § 1983 action challenging lethal injection as Alabama’s method of execution began to run on July 1, 2002, when Alabama changed its primary method of execution to lethal injection, or, alternatively, no later than July 31, 2002, when Arthur failed to affirmatively select electrocution as his method of execution. See Ala. Code § 15-18-82.1 (2006 Cumulative Supplement).

Using these triggering dates, any claim filed after July 1, 2004, or July 31, 2004, is untimely. Arthur knew on July 1, 2002, that Alabama changed its method of execution to lethal injection and knew on July 31, 2002, when he did not affirmatively select electrocution as a method of execution, that lethal injection was the method of execution that will be used during his execution; therefore, he could have and should have filed his action, at a minimum, by July 31, 2004. Under either triggering date, Arthur, which was not filed until October 9, 2007, is barred by the statute of limitations.

Most of these same arguments were presented in Jones v. Allen, 483 F. Supp. 2d 1142 (M.D. Ala. 2007), and Grayson v. Allen, Grayson v. Allen, 499 F. Supp. 2d 1228 (M.D. Ala. 2007). The inmate in Jones filed a § 1983 lawsuit virtually identical to the one presented here and did so while his petition for certiorari was pending in the United States Supreme Court. Defendants moved for summary judgment soon after the Cooney decision was released and argued that Jones's lawsuit was barred by the statute of limitations. Jones, 483 F. Supp. 2d at 1145. The district court in Jones, although denying Jones's motion for a stay of execution, ruled that the statute of limitations was no bar to Jones's action. Jones, 483 F. Supp. 2d at 1145-51. The essence of the district court's ruling in Jones was that a claim requesting injunctive relief to prevent an unconstitutionally tortious act from

occurring in the future cannot be barred by a statute of limitations. Jones 483 F. Supp. 2d at 1147. The district court in Grayson adopted in full the holding of Jones regarding the statute-of-limitations defense. Grayson, Grayson, 499 F. Supp. 2d at 1235. This Court should not follow those rulings for the reasons stated below.

The district court's ruling in Jones is incorrect primarily because it wrongfully focuses on the inmate's actual execution. The district court in Jones ignored the fact that Jones, like Arthur, did not challenge his execution itself but rather challenged lethal injection. See Doc. 1. Accordingly, Arthur's execution is not necessary to file a § 1983 method-of-execution claim and (potentially) obtain relief.

Consequently, a method-of-execution cause of action accrues well before the inmate is executed. And because federal law holds that the limitation period begins to run when a § 1983 cause of action accrues, the district court in Jones is wrong to say the limitations period fails to run until the inmate is executed (and, consequently, that it never runs at all).

With respect, the district court in Jones missed the true nature of method-of-execution claims. According to the court in Jones, Arthur's cause of action is tort-based and, therefore, cannot accrue until the plaintiff suffers an injury during his execution. See Jones 483 F. Supp. 2d at 1147

(“such a claim cannot be barred by the statute of limitations because the tortious act has not yet occurred and the tort is not yet complete”).

But, this action is not based on a tort arising from an execution. It cannot be. If Arthur were seeking tort-based damages for suffering a cruel and unusual punishment, his claim would be immediately dismissed for failing to state a cause of action because he has yet to be executed and suffer an injury.

And, just as importantly, if Arthur was attacking his actual execution, instead of the method used to implement his execution (which is what he truly challenges), this claim would be properly dismissed as a successive habeas petition. In allowing method-of-execution claims under § 1983, the Supreme Court has made clear that the relief sought in a § 1983 action cannot attack or foreclose the plaintiff’s actual execution. See Hill, 126 S. Ct. at 2102; Nelson, 541 U.S. at 647-48 (ruling that because such challenges are brought under § 1983, which authorizes challenges to conditions of confinement, the inmate cannot challenge lethal injection as unconstitutional per se); see also Hutcherson, 468 F.3d at 754 (“Simply put, if the relief sought by the inmate would either invalidate his conviction or sentence or change the nature or duration of his sentence, the inmate’s claim must be raised in a § 2254 habeas petition, not a § 1983 civil rights action.”).

Consequently, Arthur's § 1983 suit is a challenge to Alabama's method of execution – specifically, the drugs it uses and how it implements those drugs. To raise this challenge, Arthur does not have to be executed first. Thus, Arthur could have (and did) file his cause of action before he was executed.

Because the focus of the plaintiff's lawsuit is the State's method of execution, not the execution itself, the “the facts which would support [his] cause of action [became] apparent or should [have been] apparent to a person with a reasonably prudent regard for his rights,” Brown, 335 F.3d at 1261, when Alabama changed its method of execution to lethal injection. Thus, the statute of limitation begins to run when the plaintiff's sentence is final – at the conclusion of direct review – and the State has adopted the method of execution under attack. Consequently, the Jones Court erred in holding that there is no statute of limitations for § 1983 challenges to lethal injection and that opinion should not be followed.

Furthermore, the Jones Court erroneously held that choosing a date on which the statute of limitations begins to run is arbitrary. Jones, 483 F. Supp. 2d at 1149. Contrary to that Court's holding, there is nothing arbitrary in applying binding case law and holding that the statute of limitation for a plaintiff's action begins to run when he has “a complete and present cause of

action.” Wallace v. Kato, 127 S. Ct. 1091, 1095 (2007). Applying this simple principle, a plaintiff has two years from the date on which he could have “file[d] suit and obtain[ed] relief.” Wallace, 127 S. Ct. at 1095.

In short, the defendants respectfully request that this Court adopt the well-reasoned holding in Cooey and dismiss Arthur’s action because it is barred by the applicable statute of limitations.

Conclusion

For the foregoing reasons, the defendants respectfully request that this Court dismiss Arthur’s § 1983 action.

Respectfully submitted,

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s/ Jasper B. Roberts, Jr.
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Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that on the 31st day of October, 2007, a copy of the foregoing has been electronically filed with the Clerk of the Court using the CM/ECF system, which will electronically send a copy of the same to the following: **Sultana L. Bennett, Suhana S. Han, Jordan T. Razza, and Sara Linda Manaugh.**

s/ Jasper B. Roberts, Jr.
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