

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

----- X
THOMAS D. ARTHUR,

Plaintiff,

v.

RICHARD ALLEN, COMMISSIONER,
ALABAMA DEPARTMENT OF
CORRECTIONS,
in his official capacity,

GRANTT CULLIVER, WARDEN, HOLMAN
CORRECTIONAL FACILITY,
in his official capacity, and

OTHER UNKNOWN EMPLOYEES AND
AGENTS, ALABAMA DEPARTMENT OF
CORRECTIONS,
in their official capacities,

Defendants.
----- X

CIVIL ACTION NO. CV 07-722

ORAL ARGUMENT REQUESTED

**PLAINTIFF'S MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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Plaintiff Thomas D. Arthur, by and through undersigned counsel, respectfully submits this memorandum in opposition to the motion of Defendants Grantt Culliver and Richard Allen, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss his Complaint.

PRELIMINARY STATEMENT

Defendants' motion to dismiss is premised entirely on the assumption that Mr. Arthur's first lethal injection action is identical to the one pending before this Court. Because each seeks or has sought to challenge Alabama's lethal injection protocol pursuant to 42 U.S.C. § 1983, Defendants argue that both should be treated the same. Defendants' argument ignores the critical fact that wholly undermines their assumption: Mr. Arthur's current Complaint challenges Alabama's revised lethal injection protocol, which did not exist when he filed his prior action.

After this Court dismissed Mr. Arthur's prior action and after such dismissal was affirmed by the Eleventh Circuit, Alabama changed its lethal injection protocol to include an assessment of consciousness purportedly to ensure that condemned inmates are unconscious prior to the delivery of the second and third drugs. The concern that Mr. Arthur will not be properly anesthetized goes to the very heart of his lethal injection challenge. Such a change—in an apparent attempt to satisfy the United States Constitution—is substantial under any measure.

Indeed, as acknowledged by the office of Alabama Governor Bob Riley, Alabama's old protocol was similar to Tennessee's, and Alabama decided to change its protocol in response to a finding by a federal court that Tennessee's lethal injection protocol was unconstitutional.

Notwithstanding the fact that the State of Alabama has essentially conceded that its old protocol was unconstitutional and that it adopted the assessment of consciousness in an apparent attempt to withstand legal challenge, Defendants attempt to minimize this change in protocol. Defendants' argument that such change is minor, however, goes beyond the facts alleged in Mr. Arthur's Complaint and therefore cannot be considered by this Court in deciding Defendants' motion to dismiss.

Based on the well-pleaded allegations in the Complaint, Mr. Arthur unquestionably is challenging the constitutionality of a protocol that is different than that challenged in his prior action. Because Defendants' grounds for dismissing the Complaint—res judicata, unreasonable delay, jurisdiction and law of the case—all mistakenly assume that the instant action is identical to Mr. Arthur's previous § 1983 lethal injection challenge, none of these grounds provides a basis to dismiss the Complaint. Moreover, Mr. Arthur did not unreasonably delay in filing this lawsuit. There was simply no way that Mr. Arthur could have filed the Complaint—which challenges Alabama's new lethal injection protocol

announced on September 26, 2007 and apparently finalized on October 22, 2007—
at any earlier time.

Defendants’ other arguments for dismissing the Complaint fare no better. As the other courts in this Circuit have done, this Court should reject Defendants’ statute of limitations argument because, unlike the “classic” case of tort injury based upon past harm, Mr. Arthur seeks injunctive relief against *prospective* harm from Alabama’s unconstitutional lethal injection protocol. Similarly unavailing is Defendants’ laches argument. Apart from the fact that there has been no delay in bringing this action, the defense of laches requires the Court to engage in a fact-specific inquiry that is inappropriate at this stage of the litigation because it raises factual issues that cannot be determined on a motion to dismiss.

BACKGROUND

Mr. Arthur filed his first complaint on May 14, 2007, challenging Alabama’s then-existing protocol pursuant to 42 U.S.C. § 1983. Without addressing the merits, this Court applied specialized equitable principles and dismissed Mr. Arthur’s complaint on the basis of unreasonable delay on August 10, 2007. Mr. Arthur timely appealed the dismissal to the Eleventh Circuit, which affirmed this Court’s decision. Mr. Arthur filed a petition for writ of certiorari in the United States Supreme Court, requesting clarification of the proper standard for

adjudicating the timeliness of a lethal injection challenge. That petition remains pending before the United States Supreme Court.

Since Mr. Arthur filed his earlier § 1983 lawsuit, new developments have occurred that bear directly on this separate and distinct action before this Court.

On September 25, 2007, the United States Supreme Court granted certiorari in *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), *cert. granted*, 168 L. Ed. 2d 809 (2007), which challenges lethal injection procedures in Kentucky. Alabama apparently uses the same three-drug cocktail as Kentucky.

On September 26, 2007, Scott Rouse, deputy legal advisor to Alabama Governor Bob Riley, informed Mr. Arthur's counsel that in connection with *McNair v. Allen*, 2:06-cv-00695 (M.D. Ala. 2007),¹ a lethal injection case currently pending in the United States District Court for the Middle District of Alabama, the State of Alabama decided to make changes to its lethal injection protocol. The Governor initially refused to stay Mr. Arthur's execution, which had been scheduled for September 27, 2007. Reversing himself the next day, the Governor decided to grant Mr. Arthur a 45-day reprieve "to allow the Department of Corrections sufficient time to make modifications to its lethal injection

¹ *McNair* was consolidated with *Callahan v. Allen*, 2:06-cv-00919 (M.D. Ala. 2007) on November 28, 2006. *See McNair*, 2:06-cv-00695, Doc. #26.

protocol.” (Compl. Ex. A) Shortly after being informed of Alabama’s plans to change its protocol, Mr. Arthur timely filed this lawsuit challenging the new protocol.

The new protocol purportedly includes the application of graded stimulation to assess the consciousness of the inmate after the inmate is administered 100 cubic centimeters of sodium pentothal. (October 26, 2007 Affidavit of Anne C. Adams ¶ 2)² The purported graded stimulation, to be

² Although Mr. Arthur cites to the Affidavit of Anne Adams to highlight Defendants’ position, he expressly does not concede the truth of the matter asserted therein. Indeed, this Court need not accept the “facts” proffered by Defendants at the motion to dismiss stage. When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court’s inquiry is generally limited to the factual allegations contained within the four corners of the complaint. *See Hill v. Trustees of Ind. Univ.*, 537 F.2d 248, 251 (7th Cir. 1976); *see also Carter v. Stanton*, 405 U.S. 669, 671 (1972) (holding that consideration of matters outside the four corners of the complaint without converting the motion to a Rule 56 motion for summary judgment may result in reversible error). Although the Court may convert Defendants’ motion to dismiss into a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, *see Jeter v. Montgomery County*, 480 F. Supp. 2d 1293, 1296 (M.D. Ala. 2007), Rule 56 requires the Court to give the parties ten days’ notice of the contemplated conversion to allow them to supplement the record. *Jones v. Auto. Ins. Co. of Hartford, Conn.*, 917 F.2d 1528, 1532 (11th Cir. 1990). If the Court were to convert this motion, Mr. Arthur would be entitled to discovery on various issues relating to his claims. *See Sanders v. Elyea*, Case No. 96 C 4459, 1998 U.S. Dist. LEXIS 1705, at *2-3 (N.D. Ill. Feb. 10, 1998) (after converting motion to dismiss to summary judgment motion, court provided plaintiff with opportunity to conduct discovery before filing his opposition); *Collier v. City of Chicopee*, Civ. A. No. 97-30123-KPN, 1998 U.S. Dist. LEXIS 21901, at *4 (D. Mass. Feb. 5, 1998) (where motion to dismiss is converted to summary judgment, parties entitled to “ample opportunity to supplement the record”).

performed by an unidentified lethal injection team member whose medical experience—if any—is never described, allegedly involves calling out the inmate’s name, stroking the inmate’s eyelashes and pinching the inmate’s arm. (*Id.*) Following the alleged graded stimulation, if the inmate manages a conscious reaction, an additional 100 cubic centimeters of sodium pentothal should be administered to the inmate before the warden proceeds to administer the lethal and excruciatingly painful second and third chemicals. (*Id.*) The purported “assessment of consciousness” and the potential administration of an additional 100 cubic centimeters of sodium pentothal render this protocol an entirely new procedure whose constitutionality Mr. Arthur has never had an opportunity to challenge, until now.

According to Jeff Emerson, communications director for Governor Riley, the Governor’s decision to change Alabama’s protocol came on the heels of a recent ruling by a federal judge that Tennessee’s lethal injection protocol is unconstitutional. (Compl. ¶ 14) After a bench trial, Judge Trauger of the United States District Court for the Middle District of Tennessee held that Tennessee’s revised lethal injection protocol violates the Eighth Amendment. *See Harbison v. Little*, No. 3:06-01206, 2007 U.S. Dist. LEXIS 72410 (M.D. Tenn. Sept. 19, 2007). As Emerson acknowledged, “[Tennessee’s] protocol is very similar to what Alabama does.” (Compl. ¶ 14) Accordingly, the State of Alabama’s decision to

change its protocol based on this Tennessee case amounted to a concession that its then-current protocol was unconstitutional.

On September 28, 2007, the State of Alabama moved the Supreme Court of Alabama to set an execution date of November 15, 2007 for Mr. Arthur. (Compl. ¶ 16) The State filed such motion notwithstanding the United States Supreme Court's grant of a stay on September 27, 2007 to Carlton Turner, Jr., a Texas inmate who was scheduled to be executed that same day. Like Mr. Arthur, Turner challenged the constitutionality of his state's lethal injection protocol. The Supreme Court's stay has afforded Turner the time to file his certiorari petition and the Court to consider and decide it in due course. The Supreme Court has also stayed the execution of Virginia death row inmate Scott Emmett, "pending final disposition of the appeal by the U.S. Court of Appeals for the Fourth Circuit or further order of this court." James Vicini, *Virginia Death Row Inmate Gets Stay of Execution*, Reuters, Oct. 17, 2007. Numerous other courts and jurisdictions have likewise declined to set execution dates pending a decision in *Baze*.³

³ See Ralph Blumenthal, *Texas Ruling Signals Halt to Executions Indefinitely*, N.Y. Times, Oct. 2, 2007 (Texas Court of Criminal Appeals stays execution of Heliberto Chi); Michael Keifer, *Execution Delayed for Ariz. Killer*, Arizona Republic, Oct. 12, 2007 (Arizona Supreme Court stays execution of Jeffrey Landrigan); Jon Gambrell, *Death Row Inmate Receives Stay As Supreme Court Case Looms*, Morning News (Little Rock, Ark.), Oct. 12, 2007 (Eighth Circuit Court of Appeals stays execution of Jack Jones, Jr.); Sean Whaley, *State's High Court Stays Execution of Castillo*, Las Vegas Review-Journal, Oct. 16, 2007

Most recently, on October 30, 2007, the United States Supreme Court stayed the execution of Mississippi death row inmate Earl Berry, pending the Court's review of an appeal filed by Mr. Berry earlier this week, "thus [giving] a nearly indisputable indication that a majority intends to block all executions until the Court decides a lethal injection case from Kentucky next spring." Linda Greenhouse, *Justices Stay Execution, A Signal to Lower Courts*, N.Y. Times, Oct. 30, 2007. That the Supreme Court stayed Mr. Berry's execution in light of the procedural posture of his case is noteworthy. Mr. Berry did not file his lethal injection challenge until October 18, less than two weeks before his execution and three weeks after certiorari was granted in *Baze*. In affirming the lower court's dismissal of Mr. Berry's complaint, the Fifth Circuit stated that, under its own precedent, a late-filed challenge to a method of execution warranted automatic dismissal. *See Berry v. Epps*, No. 07-70042, 2007 U.S. App. LEXIS 25219, at *7 (5th Cir. Oct. 26, 2007). In granting Berry a stay, the Supreme Court has clearly signaled that courts should defer scheduling executions in their jurisdictions until the Court resolves the important issues presented in *Baze*.

(Nevada Supreme Court stays execution of William Castillo); Matthew Bigg, *Georgia Death Row Inmate Gets Stay of Execution*, Reuters, Oct. 18, 2007 (Georgia Supreme Court stays execution of Jack Alderman).

Notwithstanding the nationwide de facto moratorium, one day after the United States Supreme Court granted Berry a stay, the Alabama Supreme Court set Mr. Arthur's execution date for December 6, 2007. *Ex parte Thomas Douglas Arthur*, No. 1951985, Order (Ala. Oct. 31, 2007). On November 2, 2007, Mr. Arthur filed with the Alabama Supreme Court a motion to vacate the execution date, which is currently pending.

ARGUMENT

I. MR. ARTHUR'S INSTANT LAWSUIT IS SEPARATE AND DISTINCT FROM THE PRIOR ACTION.

Defendants' arguments regarding res judicata, unreasonable delay, jurisdiction and law of the case all hinge on the untenable assertion that the instant action is identical to Mr. Arthur's previous § 1983 lethal injection challenge. Defendants are wrong. Alabama changed its lethal injection protocol to include an assessment of consciousness purportedly to ensure that condemned inmates are unconscious prior to the delivery of the second and third drugs. The concern that Mr. Arthur will not be properly anesthetized goes to the very heart of his lethal injection challenge and the revisions to Alabama's protocol appear significant. Indeed, as acknowledged by Governor Riley's office, Alabama's old protocol was similar to Tennessee's, and Alabama decided to change its protocol in response to a finding by a federal court that Tennessee's lethal injection protocol was

unconstitutional. Such a change—in an apparent attempt to satisfy the United States Constitution—is substantial under any measure.

A cursory review of Mr. Arthur’s two actions shows them to be different, as Mr. Arthur’s instant Complaint contains numerous allegations focusing on Alabama’s revisions to its protocol. The substantial nature of the change in protocol—apparently still inadequate to render Alabama’s new protocol constitutional—is further underscored by the fact that the parties in the *McNair* litigation postponed their scheduled trial to give the State time to develop and implement its new protocol. *See* Order to Show Cause, *McNair v. Allen*, No. 06-cv-00695-WKW (M.D. Ala. Sept. 27, 2007); Order Continuing Trial, *McNair* (M.D. Ala. Sept. 28, 2007).

Although the State of Alabama insists that its revisions to the protocol constitute a “minor additional safeguard” (Def. Mot. at 17 n.3), such assertion not only is unsupportable based upon the allegations in the Complaint but is also disputed in this case. The extent of the change to Alabama’s protocol cannot be determined in the absence of discovery. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1368 (11th Cir. 1997) (Rule 12(b)(6) motions are “limited primarily to the face of the complaint and attachments thereto”). Accordingly, in deciding Defendants’ motion to dismiss, this Court must accept as true Mr. Arthur’s well-pleaded allegations that Alabama substantially revised its

lethal injection protocol. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003) (stating that the court accepts the allegations in the complaint as true and construes them in the light most favorable to the plaintiff).

II. MR. ARTHUR'S COMPLAINT SHOULD NOT BE DISMISSED ON CLAIM PRECLUSION GROUNDS.

Defendants contend that res judicata, or claim preclusion, bars this action. The doctrine of claim preclusion forecloses relitigation of matters that were litigated, or could have been litigated, in an earlier lawsuit. *S.E.L. Maduro (Fla.), Inc. v. M/V Antonio De Gastaneta*, 833 F.2d 1477, 1481 (11th Cir. 1987). For claim preclusion to apply, four elements must be present: (1) the first action resulted in a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties or their privies are identical; and (4) the causes of action in both suits are identical. *Id.* Because claim preclusion is not an appropriate basis for dismissal under Rule 12(b)(6), and because Mr. Arthur's Complaint does not seek to relitigate matters that were or could have been litigated before, Defendants' claim preclusion argument is without merit.

A. Claim Preclusion Is Not Appropriate at This Stage of the Proceedings.

Defendants' attempt to invoke claim preclusion at this stage of the proceedings ignores Eleventh Circuit precedent. It is settled law in this Circuit (and in others) that claim preclusion is an affirmative defense that cannot be raised

in a 12(b) motion unless “the defense’s existence can be judged on the face of the complaint.” *Concordia v. Bendekovic*, 693 F.2d 1073, 1075 (11th Cir. 1982); *see Quiller v. Barclays Am./Credit*, 727 F.2d 1067, 1069 (11th Cir. 1984) (affirmative defense cannot be raised on a Rule 12(b)(6) motion unless the defense appears on its face); *Ga. Farm Bureau Mut. Ins. Co. v. Great Am. Excess & Surplus Ins. Co.*, No. 1:06-CV-0696-JOF, 2007 U.S. Dist. LEXIS 16587, at *5 (N.D. Ga. Mar. 8, 2007) (refusing to dismiss complaint on the basis of claim preclusion because “it cannot be said from the face of the complaint that the defense of res judicata can be applied to Plaintiffs’ claims”).

As set forth above, although Defendants assert that the revisions to Alabama’s protocol constitute a “minor additional safeguard” (Def. Mot. at 17 n.3), such assertion relies on allegations beyond the four corners of Mr. Arthur’s Complaint. Defendants therefore are precluded from raising their affirmative defense of claim preclusion on their motion to dismiss.

B. Claim Preclusion Cannot Apply to Claims Based on Distinct and Newly Arisen Facts.

Even if it were appropriate to consider a claim preclusion defense at this stage, claim preclusion is inapplicable here. Claim preclusion is properly invoked to bar an action only if the cause of action asserted is “identical” to one previously litigated. *S.E.L. Maduro (Florida), Inc.*, 833 F.2d at 1481. Two claims are not “identical” for claim preclusion purposes merely because they are similar in

form; rather, “[i]n determining whether the causes of action are the same, a court must compare the substance of the two actions, not their form.” *Id.* This inquiry, aimed at determining if the claims “aris[e] out of the same operative nucleus of fact,” *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1356-57 (11th Cir. 1998) (internal quotation marks and citation omitted), requires the court to “examine the factual issues that must be resolved in the second suit and compare them with the issues explored in the first case.” *Id.* at 1357 (quoting *Manning v. City of Auburn*, 953 F.2d 1355, 1359 (11th Cir. 1992)); *see also S.E.L. Maduro*, 833 F.2d at 1482.

Applying this approach, courts have rejected claim preclusion arguments when a new material fact is alleged, even when the legal theories and all other facts are identical as between the two cases. For example, in *Southeast Florida Cable, Inc. v. Martin County*, plaintiff cable company had previously sued a local franchising authority for giving preferential treatment to its competitor, alleging constitutional and statutory violations. 173 F.3d 1332, 1334 (11th Cir. 1999). The case was dismissed. *Id.* at 1335. The plaintiff sued again on the same theories and asserting the same facts, but additionally alleged that the competitor’s service area had expanded. The court found that plaintiff’s suit was not barred by res judicata because the factual premise of the present lawsuit differed significantly from the prior one, as an extension of a competitor’s service area to the entire

county was a new fact presenting a new case. *Id.* at 1336-37 (“Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first.”) (quoting Restatement (Second) of Judgments § 24 cmt. f).

There can be no doubt that Mr. Arthur is currently challenging the constitutionality of a protocol that is different than that challenged in his prior action. The purported changes include a new “assessment of consciousness” and the potential administration of additional sodium pentothal. According to the Governor’s office, these changes were specifically made to the “old” protocol for the purpose of withstanding legal challenges. (Compl. ¶ 52) Such significant changes relate to areas that are material and essential to any determination of a lethal injection protocol’s constitutionality. *See Harbison*, 2007 U.S. Dist. LEXIS 72410, at *32 (holding that “the most glaring omission in the new [Tennessee] protocol is the failure to check for consciousness before the pancuronium bromide is administered”). Indeed, where, as here, “there has been a[] . . . modification of significant facts creating new legal conditions,” claim preclusion “is no defense [] between the first and second suits.” *Manning*, 953 F.2d at 1359 (internal quotation marks and citation omitted). Defendants cannot avoid a challenge to Alabama’s

current lethal injection protocol by pointing to a judgment rendered on the “old” protocol.

Even setting aside the factual differences crucial to determining the protocols’ constitutionality, claim preclusion does not apply to “claims which arise after the original pleading is filed in the earlier litigation.” *Pleming*, 142 F.3d at 1357 (quoting *Manning*, 953 F.2d at 1360). Given that the revised protocol had not been established until after Mr. Arthur’s challenge to the now-obsolete protocol was dismissed, it follows that Mr. Arthur’s claim that the revised protocol’s procedures are unconstitutional arose “after the original pleading [was] filed in the earlier litigation.” *Id.*; see also *Heller v. Plave*, 743 F. Supp. 1553, 1569 (S.D. Fla. 1990) (ruling later-arising claims “not previously available” even if “based on similar facts of ongoing misconduct”).

As the “substance of the two actions” is distinguishable, Mr. Arthur’s Complaint is not “identical” to the prior action and therefore should not be dismissed on the basis of claim preclusion.

III. MR. ARTHUR DID NOT UNREASONABLY DELAY IN BRINGING HIS CLAIM.

In assessing unreasonable delay, the proper query “is whether [the petitioner] could have brought his claim ‘at such a time as to allow consideration of the merits without requiring entry of a stay.’” *Jones v. Allen*, 485 F.3d 635, 641 (11th Cir. 2007) (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). This

analysis looks first to the past to determine when the plaintiff initially could have brought his lawsuit and then to the future to judge whether the action can be litigated without the need for a stay. *See Arthur v. Allen*, No. 07-00342, 2007 U.S. Dist. LEXIS 58816, at *12-13 (S.D. Ala. Aug. 10, 2007), *aff'd*, 07-13929, 2007 U.S. App. LEXIS 22506 (11th Cir. Sept. 17, 2007). Because there is no basis to find that Mr. Arthur could have filed his Complaint earlier and in light of the Supreme Court's grants of stays, this Court should not dismiss the Complaint on the basis of unreasonable delay.

The revisions to Alabama's protocol include a new "assessment of consciousness" and the potential administration of an additional 100 cubic centimeters of sodium pentothal. This raises the total volume of sodium pentothal to twice what Mr. Arthur previously believed it to be, rendering this protocol an entirely new procedure. Mr. Arthur is not asserting a general challenge to the abstract concept of lethal injection; he is challenging the precise procedure that the State of Alabama intends to use to execute him. Mr. Arthur could not have brought his Complaint—which challenges Alabama's new lethal injection protocol, announced on September 26, 2007 and apparently finalized on October

22, 2007—at any earlier time. Thus, Mr. Arthur did not unreasonably delay in bringing this action.⁴

The deficiencies in Defendants’ unreasonable delay argument are compounded by the fact that Alabama’s lethal injection protocol is generally kept confidential and is set neither by law nor regulation, allowing the State to alter it at will. In Mr. Arthur’s case, the State announced its intention to change the protocol and publicly divulged the nature of the changes made. No court in this Circuit has applied the unreasonable delay analysis to dismiss a claim based on a protocol with such sweeping changes, especially where, as here, the nature of the change goes to

⁴ Two recent cases, both decided prior to the United States Supreme Court’s grant of certiorari in *Baze*, do not suggest otherwise. In *Workman v. Bredesen*, 486 F.3d 896 (6th Cir. 2007), the petitioner filed his initial lawsuit just days after learning of revisions to the protocol that was to be used in his execution, but the Sixth Circuit found the revisions too minor to be of consequence. Unlike Mr. Arthur’s action, which challenges changes that go to the assessment of consciousness—the core of all lethal injection constitutional complaints—*Workman* did not allege any changes to Tennessee’s assessment of consciousness. *Id.* at 911. Indeed, a federal district court, in holding Tennessee’s revised lethal injection protocol unconstitutional, noted that “the new protocol does not employ measures to ensure that [the inmate] will be unconscious when the second and third drugs are administered. . . .” *Harbison*, 2007 U.S. Dist. LEXIS 72410, at *31. In *Nooner v. Norris*, No. 5:06CV00110, 2007 U.S. Dist. LEXIS 67621 (E.D. Ark. Sept. 11, 2007), the court reached a similar conclusion at the summary judgment stage, with resort to evidentiary materials. Unlike in Mr. Arthur’s case, the “revisions did nothing to change the component of the protocol essential to Nooner’s claim.” *Id.* at *27.

the very heart of the constitutional claim.⁵ Applying the Defendants' timeliness logic would put a condemned inmate in an intolerable Catch-22 situation. The inmate could challenge the method of execution before his execution becomes imminent and risk his claim becoming moot, either because of a change in protocol or because of a grant of relief on direct or collateral review. Alternatively, the inmate could wait until execution is imminent (the usual constitutional criterion for Article III standing), challenge the applicable protocol, and have his claim dismissed for unreasonable delay. Neither result is acceptable as in each instance a potential constitutional violation would go unremedied.

Although the Alabama Supreme Court has scheduled Mr. Arthur's execution for December 6, 2007, the Complaint should not be dismissed on the grounds that such an execution date would make it impossible to adjudicate the merits of his claim without the entry of a stay by this Court. As reflected in its decision to stay *Berry*, the United States Supreme Court has made clear that no executions should take place until a decision is rendered in *Baze*.⁶ In the

⁵ The Defendants wrongly suggest that the district court's decision in *Jones v. Allen*, 483 F. Supp. 2d 1142, 1146 n.2 (M.D. Ala. 2007), is on point. While the *Jones* court did refer to the fact that Alabama's protocol had changed, such a revision was not at issue in the case and the court assumed that it did not materially affect plaintiff's claim. *Id.*

⁶ *See also Alabama Should Take the Hint*, Birmingham News, Nov. 2, 2007, at 10A ("Until the Supreme Court rules on lethal injection, Alabama shouldn't bother

meantime, under an expedited schedule that would be wholly appropriate in this case, the parties may litigate the merits of Mr. Arthur's claim challenging the new protocol. *See, e.g., Gen. Signal Corp. v. MCI Telecomm. 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).

In short, because Mr. Arthur could not have brought his Complaint any earlier than he did and because of the uncertainty surrounding the propriety of his currently scheduled execution date, Mr. Arthur's claim should not be dismissed based on unreasonable delay.⁷

setting execution dates – not just because it is probably futile and wasteful, but because it is wrong.”); *State Justices Erred in Setting Execution Dates*, Tuscaloosa News, Nov. 2, 2007, available at <http://www.tuscaloosanews.com/article/20071102/NEWS/711020312/1012/TL05> (“It’s hard to believe that the Alabama Supreme Court is so out of the loop that its members failed to get the memo on lethal injections.”); *No Justice in the Death Penalty*, Huntsville Times, Nov. 2, 2007, available at <http://www.al.com/opinion/huntsvilletimes/dperson.ssf?/base/opinion/1193995013232990.xml&coll=1> (Alabama Supreme Court set two execution dates “[e]ven though the United States Supreme Court has made it crystal clear that states should not kill any more death row inmates until it examines the procedures used in lethal injection”).

⁷ This Court's decision in *Hallford v. Allen*, No.07-0401-WS-C, 2007 U.S. Dist. LEXIS 66517 (S.D. Ala. Sept. 6, 2007), *motion to amend judgment denied*, 07-0401, 2007 U.S. Dist. LEXIS 79135 (S.D. Ala. Oct. 23, 2007), does not compel a different result, because *Hallford* did not address Alabama's new lethal injection protocol.

IV. THIS COURT HAS JURISDICTION OVER MR. ARTHUR'S CLAIM.

Defendants argue that this Court lacks jurisdiction over Mr. Arthur's Complaint because his petition for certiorari review of his prior action challenging Alabama's then-existing lethal injection protocol is still pending in the Supreme Court. This is incorrect. Mr. Arthur's pending petition for certiorari in a prior, albeit factually related, action does not divest this Court of jurisdiction over this case, which is properly before this Court pursuant to 28 U.S.C. § 1331, and Defendants cite no authority to the contrary.

Instead, Defendants cite cases addressing a variety of inapposite procedural settings, each of which stands for the wholly uncontroversial proposition that two courts should not attempt to simultaneously assert jurisdiction over *the same case*. See, e.g., *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 60 (1982) (court of appeals lacked jurisdiction where notice of appeal was filed after the entry of the district court's judgment but while appellant's motion to alter or amend that judgment remained pending in the district court); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251-52 (11th Cir. 2004) (district court should stay proceedings pending resolution of a non-frivolous appeal under the provision of the Federal Arbitration Act permitting interlocutory appeals); *Boyko v. Anderson*, 185 F.3d 672, 674 (7th Cir. 1999) (district court cannot grant a Rule

60(b) motion vacating its order denying a habeas petition without asking the court of appeals to remand the currently pending appeal).

As set forth above, this case and Mr. Arthur's prior action are necessarily separate and distinct cases, challenging different lethal injection protocols. The pendency of the petition for certiorari for review of one case has no bearing on this Court's jurisdiction over the other.

Moreover, assuming *arguendo* that this action and Mr. Arthur's prior action were the "same case" for jurisdictional purposes—clearly they are not—this Court is the sole court currently exercising jurisdiction. Defendants' assertion that jurisdiction over Mr. Arthur's prior § 1983 action "is vested solely in the Supreme Court of the United States" (Def. Mot. at 9) is incorrect as a matter of law. The pendency of a petition for writ of certiorari is not an assertion of jurisdiction by the Supreme Court. *See Brewer v. Quarterman*, 474 F.3d 207, 209 (5th Cir. 2006) (Dennis, J., dissenting) (citing cases). Rather, jurisdiction is transferred to the Supreme Court only if and when the writ is granted. *Id.*

Accordingly, this Court may properly exercise jurisdiction over Mr. Arthur's Complaint.⁸

⁸ Furthermore, because the Court of Appeals issued a mandate in Mr. Arthur's prior action, thereby relinquishing its jurisdiction over the matter, Defendants cannot argue that the Eleventh Circuit is exercising jurisdiction over this action. *See Heartland By-Products, Inc. v. United States*, 223 F. Supp. 2d 1317, 1333 (Ct.

V. THE LAW OF THE CASE DOCTRINE IS INAPPLICABLE TO MR. ARTHUR'S COMPLAINT.

The State's argument that "consideration of Arthur's current § 1983 complaint is barred by the doctrine of the law of the case" (Def. Mot. at 14) is likewise unavailing.

The law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the *same case*." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815–16 (1988) (emphasis added; citation omitted). As the Supreme Court's formulation in *Christianson* makes plain, the doctrine applies only to subsequent stages of the *same case*. *Id.*; see also *Culpepper v. Irwin Mortg. Corp.*, 491 F.3d 1260, 1271 (11th Cir. 2007) ("[T]he 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.") (internal quotation marks and citation omitted).

Accordingly, the law of the case doctrine does not bar relitigation of issues, however facially similar, arising in a separate and distinct action. This

Int'l Trade 2002) ("Once the mandate is issued, the court of appeals relinquishes jurisdiction over the case back to the trial court for further proceedings consistent with the mandate.") (citing *United States v. Cote*, 51 F.3d 178, 181-82 (9th Cir. 1995)); see also *10280 Northfield Rd., LLC v. Vill. of Northfield*, No. 5:00 CV 0033, 2000 U.S. Dist. LEXIS 5679, at *12-13 (N.D. Ohio Apr. 17, 2000).

principle is well illustrated by *United States v. Phillips*, 59 F. Supp. 2d 1178 (D. Utah 1999). In *Phillips*, which addressed the court’s review of motions to suppress evidence filed by the defendants in a criminal action, the government had argued that because the same suppression issue had been reviewed in a “previously-filed but now-dismissed case” against the same defendants, the law of the case barred the court’s review. *Phillips*, 59 F. Supp. 2d at 1185. In rejecting the government’s argument that the law of the case doctrine applied, the court noted:

Clearly, this is not the same case as the case that was before another judge. That case, although it did involve the same persons as defendants, was a case that was dismissed. It no longer exists except as history. . . . Indisputably, although the issues may be similar, this is not the “same case.” Because this is not a later stage in the same case, the doctrine of law of the case has no application here.

Id. at 1188 (citing *Christianson*, 486 U.S. at 816); *see also Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1214 (5th Cir. 1991) (law of the case doctrine “is applicable only during the pendency of . . . a single proceeding” and did not apply to bar action arising from same facts as a previously dismissed case bringing different causes of action); *United States v. 49.01 Acres of Land*, 802 F.2d 387, 389–90 (10th Cir. 1986) (“law of the case applies only to different proceedings in the same litigation” and did not apply to bar action severed from previously dismissed related case); *Overseas Shipholding Group, Inc. v. Skinner*, 767 F. Supp. 287, 296 (D. D.C. 1991) (“it is hornbook law that the law of the case doctrine operates as a form of issue preclusion within the same case”; doctrine did

not apply to bar action under National Environmental Policy Act challenging different rulemaking process than that challenged in prior NEPA case) (citing J. Friedenthal, M. Kane & A. Miller, Civil Procedure § 14.1, at 611 (1985)).

As discussed above, the Complaint challenges Alabama's revised protocol that did not exist when Mr. Arthur filed his prior action. Because this action is a new and distinct case, Mr. Arthur's Complaint is not barred by the law of the case.⁹

VI. MR. ARTHUR'S CLAIM IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

Defendants argue that Mr. Arthur's claim should be dismissed because the Complaint "was filed after the applicable statute of limitations had expired." (Def. Mot. at 28.) The case law cited by Defendants to support their argument (Def. Mot. at 28-34) is inapposite. None of the cases, save the problematic Sixth Circuit decision, *Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007), addresses the unique issues of a method-of-execution challenge. In contrast to the "classic" case of tort injury based upon past harm, Mr. Arthur seeks injunctive relief against *prospective* harm from Alabama's unconstitutional lethal injection protocol.

⁹ Even within the same case, the law of the case doctrine does not require the application of prior rulings where there are new or different facts. *See, e.g., United States v. White*, 846 F.2d 678, 685 (11th Cir. 1988) (doctrine does not apply when new and substantially different evidence is presented subsequent to the appeal).

Two judges of this Circuit have declined to follow *Cooley*,¹⁰ and no Circuit Court of Appeals has adopted its reasoning either.¹¹ This Court should likewise reject the uncertain and unsound precedent set by *Cooley*. As a threshold matter, the *Cooley* majority's interpretation of *Neville v. Johnson*, 440 F.3d 221 (5th Cir. 2006) and *Wallace v. Kato*, 127 S. Ct. 1091 (2007) was erroneous. The majority's discussion of *Neville* evidences a conflation of the distinct issues of ripeness and accrual. *Neville* discussed only when a claim was *actionable*—stating that a challenge to a method of execution “*may be filed* any time after the plaintiff's conviction has become final on direct review,” 440 F.3d at 222 (emphasis added, citation omitted).

Additionally, as noted in *Jones*, *Cooley*'s reliance upon certain language in *Wallace* pertaining to accrual occurring “when the plaintiff has complete and present cause of action” and “when the plaintiff can file suit and obtain relief” is misplaced. *Jones*, 483 F. Supp. 2d at 1145 (quoting *Cooley*, 479 F.3d at 416 (quoting *Wallace*, 127 S. Ct. at 1095) (internal quotation marks and brackets omitted)). As in the “classic” tort scenario, the plaintiff in *Wallace* sought

¹⁰ *Jones v. Allen*, 483 F. Supp. 2d 1142 (M.D. Ala. 2007); *Grayson v. Allen*, 499 F. Supp. 2d 1228 (M.D. Ala. 2007), *aff'd*, 491 F.3d 1318 (11th Cir. 2007).

¹¹ As of September 2007, the precedential effect of *Cooley* was still unresolved even in the Sixth Circuit. *See Cooley v. Strickland*, No. 2:04-cv-1156, 2007 WL 2688249, at *9-13 (S.D. Ohio Sept. 12, 2007) (quoting several pages of Judge Thompson's “cogent analysis” in *Jones*).

relief for an unconstitutionally tortious act that had occurred in the past, unlike Mr. Arthur who seeks relief to prevent an unconstitutionally tortious act from occurring in the future.

Judge Thompson in *Jones* similarly rejected *Cooley*'s analysis:

[B]y requiring the courts to identify an event that precedes the execution as the event by which the claim accrues, the law would create a hopelessly moving target that is difficult to define non-arbitrarily: Does the claim accrue when the conviction becomes final? At the end of habeas review? When the execution date is set? When (and if) the State alters its execution protocol? There is no rhyme or reason in choosing among these options precisely because they are little more than stand-ins for the actual tortious event the court would otherwise look for in a run-of-the-mill § 1983 case.

483 F. Supp. 2d at 1149.¹²

Defendants' argument that *Jones* was wrongly decided because it focuses on the inmate's actual execution as opposed to the method of execution (Def. Mot. at 36) mischaracterizes that court's analysis. The *Jones* court clearly recognized that "a method-of-execution lawsuit seeks injunctive relief for an allegedly unconstitutional act that has not yet occurred." 483 F. Supp. 2d at 1147. Moreover, Defendants' argument that a "method-of-execution cause of action accrues well before the inmate is executed" (Def. Mot. at 36) conflates accrual and ripeness. "Where, as here, the plaintiff challenges the constitutionality of an event

¹² Judge Watkins in *Grayson* adopted Judge Thompson's reasoning by reference. 499 F. Supp. at 1235 & n.9.

that has not yet occurred, the claim may be ripe for adjudication without having accrued for statute of limitation purposes.” *Jones*, 483 F. Supp. 2d at 1149.

Defendants fail to recognize this critical difference. Being required to challenge a protocol prior to the time when the method of execution has been determined would be premature and contrary to *Hill v. McDonough*'s admonition that a plaintiff's action must be brought as a limited challenge to the specific protocol currently used by defendants rather than as a general challenge to lethal injection. *See* 126 S. Ct. 2096, 2102 (2006). This Court should follow the courts in this Circuit rejecting Defendants' statute of limitations argument and decline to dismiss Mr. Arthur's Complaint.

VII. DEFENDANTS' LACHES DEFENSE IS NOT AMENABLE TO RESOLUTION ON A RULE 12(b)(6) MOTION.

Defendants attempt to avoid judicial resolution of Mr. Arthur's timely and meritorious Complaint by raising the affirmative defense of laches. Entirely apart from the fact that there has been no delay in the bringing of this suit, the defense of laches requires the Court to engage in a fact-specific inquiry that is inappropriate at this stage of the litigation because it raises factual issues that cannot be determined on a motion to dismiss. *See, e.g., Patton v. Jones*, No. Civ-06-0591-F, 2006 WL 2246441, at *4 (W.D. Okla. Aug. 4, 2006) (*cited in Grayson*, 499 F. Supp. 2d at 1236); *Nooner v. Norris*, No. 5:06-cv-0110 (Doc. #24, at 7) (E.D. Ark. June 19, 2006) (same).

A laches analysis is dependent on the facts of each case. *Grayson*, 499 F. Supp. 2d at 1236. “The laches defense raises fact questions regarding the existence of any delays, the reasons for any such delays, the prejudice created by any delays, and the balance of equities.” *Patton*, 2006 WL 2246441, at *4. Accordingly, determining whether laches applies usually requires factual development beyond the content of the complaint. *Adv. Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1161 (Fed. Cir. 1993); *see also Nat’l Ass’n of Gov’t Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 707 (5th Cir. 1994) (noting that the motion before the court was more appropriately treated as one for summary judgment “[b]ecause the district court was required to review the available evidence in order to determine whether to apply laches”); *Grayson*, 499 F. Supp. 2d at 1236 (observing that consideration of the laches defense in the context of a motion for summary judgment was proper “[b]ecause the court ha[d] before it the evidentiary submissions of the parties”).

Defendants’ laches defense raises disputed issues of fact that cannot be resolved on this motion. Defendants’ entire argument is predicated on the erroneous assertion that “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.” (Def. Mot. at 18 n.4) This is not so, as is readily apparent from the face of the Complaint, which clearly challenges the constitutionality of Alabama’s *new*

protocol. Defendants' motion to dismiss the Complaint based on laches should therefore be denied.¹³

¹³ Moreover, Defendants have not even established the first element of laches, *i.e.*, delay in asserting a claim. As set forth above, Mr. Arthur promptly brought this action upon learning the details of Alabama's new lethal injection protocol and he could not have brought his claim earlier.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied in its entirety.

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Respectfully submitted,

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