

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

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

**DEFENDANTS’ REPLY TO ARTHUR’S  
OPPOSITION TO THE DEFENDANTS’ MOTION TO DISMISS**

The defendants, Richard Allen, et al., submit this reply to Arthur’s opposition to their motion to dismiss.

**I. Arthur’s Current § 1983 Action Is The Same As His Earlier § 1983 Action Challenging Lethal Injection**

In his opposition to the defendants’ motion to dismiss, Arthur goes to great lengths attempting to establish that his current § 1983 lethal injection challenge is different from his previous § 1983 lethal injection challenge. To do this, Arthur argues that his “instant Complaint contains numerous allegations focusing on Alabama’s revisions to its protocol.” (Doc. #20 at 10); (Doc. #20 at 12-15) (arguing that there are factual distinctions and newly arisen facts relevant to his current § 1983 action based on the State’s revisions to its protocol); (Doc #20 at 16) (arguing that Arthur is challenging

the revisions and could not have brought such action earlier). This argument is inaccurate.<sup>1</sup>

Arthur's current action challenges the procedures that Alabama has used during executions since 2002 when it changed its method of execution to lethal injection. Arthur does not challenge the new consciousness assessment as cruel and unusual. Instead, he, as in his previous § 1983 action, challenges the three drugs used during an execution and the qualifications of the execution team. Arthur's complaint alleges, the defendants will undertake "to execute Mr. Arthur by lethal injection using an insufficient, improperly designed and improperly administered procedures [sic] for inducing and maintaining anesthesia prior to execution, and by using chemicals that cause severe pain in the process of causing death. (Doc. #1 at 16); see also (Doc. #20 at 1) ("The Concern that Mr. Arthur will not be properly anesthetized goes to the very heart of his lethal injection challenge."); (Doc. #20 at 9) (same statement). While Arthur challenges the inducement and maintenance of unconsciousness, he makes no mention of a

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<sup>1</sup> Arthur also states throughout his complaint and his opposition to the defendants' motion to dismiss that by revising the protocol Alabama has conceded that the earlier protocol was unconstitutional. (Doc. #1 at 14); (Doc. #20 at 2, 7, 10). Again, this statement is egregiously false. The Department of Correction's decision to add an additional safeguard to ensure further that inmates are unconscious during the execution does not in any manner constitute a concession that its protocol is unconstitutional without such safeguard. Arthur's statements to the contrary should be disregarded.

challenge to the assessment of consciousness. In fact, the only substantive allegation Arthur makes in his complaint regarding the revision is as follows: Alabama's revision to its lethal injection protocol "will do little if anything to mitigate the substantial risk of cruel and unusual pain." (Doc. #20 at 14)

Arthur's statement in his complaint that recent revisions to the protocol "will do little if anything to mitigate the substantial risk of cruel and unusual pain," (Doc. #20 at 14), serves as a concession that this complaint merely re-raises and re-alleges the same allegations that were raised in his first § 1983 action – that the drugs are insufficient and that the personnel is unqualified.

In sum, Arthur's current complaint does not raise any constitutional challenge to the recent minor revision to Alabama's lethal injection protocol. On the contrary, Arthur has simply re-alleged the same cause of action that he alleged in his first § 1983 action challenging lethal injection.

## **II. Arthur's Claims Should Be Dismissed On Preclusion Grounds.**

Arthur's current § 1983 action is barred by res judicata; therefore, it should be dismissed. As stated above, Arthur's current complaint does not challenge the revision to Alabama's lethal injection protocol. He does not allege that the consciousness awareness test violates the Constitution of the United States at all. Instead, he has merely re-alleged the same challenges

that he alleged in his previous lethal injection challenge – insufficient anesthesia, insufficient training, and inappropriate chemicals. (Doc. #1) Therefore, for the reasons stated in the defendants’ motion to dismiss, this action is precluded.

**A. Arthur’s Argument That Claim Preclusion Is Not Appropriate At This Stage Of The Proceedings Is Inaccurate.**

Dismissal of Arthur’s action on the pleadings is appropriate. As Arthur correctly concedes in his opposition to the defendants’ motion to dismiss, “a party may raise a *res judicata* defense by motion rather than by answer where the defense's existence can be judged on the face of the complaint.” Concordia v. Bendekovic, 693 F.2d 1073, 1075 (11th Cir. 1982). In the current action, the Court can determine on the face of Arthur’s current § 1983 complaint that it is barred by res judicata.

Arthur’s current § 1983 complaint challenges the same procedures and relies on the same operative facts as his previous lethal injection action. See (Doc. #1 at 8-13) (describing Alabama’s lethal injection procedure prior to the revision); (Doc. #1 at 13-16) (describing Alabama’s recent revision); (Doc. 16-17) (alleging a cause of action that arises solely from the procedures Alabama has used during executions since 2002). As detailed above, the only allegation Arthur makes in his complaint relating to the

minor revision to Alabama's lethal injection protocol is his statement that it "will do little if anything to mitigate the substantial risk of cruel and unusual pain." (Doc. #20 at 14) From the complaint itself, this Court can determine that Arthur's constitutional allegation – Alabama's lethal injection procedures are infirm due to insufficient anesthesia, insufficient training, and inappropriate chemicals (Doc. #1) – do not arise from a different set of operative facts than his previous lethal injection challenge.<sup>2</sup>

Because this Court can determine from the face of Arthur's complaint that he is challenging procedures that he previously challenged in § 1983 action, dismissal on the pleadings is appropriate.

**B. Res Judicata Applies Because Arthur's Current § 1983 Action And His Previous § 1983 Action Are Based On The Same Operative Facts**

Arthur's attempts to distinguish his current § 1983 challenging Alabama's method of execution from his previous § 1983 challenging Alabama's method of execution ignore the substantive allegations in his complaint. Arthur argues that his current § 1983 action is not barred by res judicata because it is based on a different set of operative facts. This argument is without merit.

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<sup>2</sup> In his complaint, Arthur concedes that the revision to Alabama's protocol merely consists of a consciousness assessment. (Doc. #1 at 13-16). Apparently, this revision is so minor that Arthur felt it unnecessary to challenge its constitutionality. (Doc. #1 at 16-17)

As the defendants detailed in their motion to dismiss, 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 (emphasis added).

As detailed above, Arthur’s current § 1983 complaint challenges the same procedures and relies on the same operative facts as his previous lethal injection action. (Doc. #1) He alleges that Alabama’s lethal injection protocol violates the Eight Amendment’s prohibition of cruel and unusual punishment because the defendants will insufficiently “induc[e] and maintain[] anesthesia prior to execution, and [will use] chemicals that cause

severe pain in the process of causing death.” (Doc. #1 at 16) see S.E.L. Maduro Inc. v. M/V Antonion De Gastaneta, 833 F.2d 1477, 1481 (11th Cir. 1987) (holding that “[i]n determining whether the cause of action are the same, a court must compare the substance of the two actions, not their form.”) The procedures that Alabama uses to induce and maintain anesthesia and the chemicals Alabama uses in an execution are the same procedures and chemicals that have been in place since 2002 and they were challenged in Arthur’s previous § 1983 action. See (Doc. #1 at 8-13; Doc. #19-2) The only allegation Arthur makes in his complaint relating to the minor revision Alabama made to its protocol is his statement that the revision “will do little if anything to mitigate the substantial risk of cruel and unusual pain.” (Doc. #20 at 14)

In his opposition to the defendants’ motion to dismiss, Arthur argues that under the facts of Florida Cable, Inc. v. Martin County, 173 F.3d 1332 (11th Cir. 1999), his current § 1983 action is not barred by res judicata. Arthur’s reliance on Florida Cable is misplaced. Unlike the case at hand, the two law suits involved in Florida Cable were based on and arose out of a different set of operative facts. Id. at 1136-37. In its original law suit, the plaintiff, a cable provider named Adelpia, alleged that the defendant, Martin County, violated the Equal Protection Clause and Florida law when it

granted Comcast a license to provide cable to a limited area. Adelphia argued that by allowing Comcast to operate solely in that limited area, the County was improperly exempting Comcast from a county ordinance that required cable providers to provide service to a minimum of ninety percent of the currently unserved subscribers.

The district court found that both Adelphia and Comcast had an obligation to maintain the capability of providing service to ninety percent of the service area's residents, albeit in different-sized areas. It therefore ruled that Martin County had not discriminated between franchise licenses and had not deprived Adelphia of any constitutional protection.

Id. at 1334. “Two years later, Martin County granted Comcast a service area geographically equivalent to Adelphia's-that is, county-wide-without requiring that Comcast provide service to ninety percent of the area's residents.” Id. at 1335. “Also at that time, Adelphia sought to renew its existing franchise and Martin County declined to act on Adelphia's license renewal request saying that Adelphia had failed to file a proper formal application.” Id.

Based on the fact that Martin County now exempted Comcast from the ninety percent ordinance and refused to act on Adelphia's renewal, Adelphia filed a second law suit. Reviewing these facts, the Eleventh Circuit held as follows:

At the time of the prior lawsuit, Comcast's service area was limited to Summerfield. However, Comcast now has a county-wide service area.

Therefore, the factual premise of the present lawsuit differs significantly from the prior one. Consequently, because Martin County now has given county-wide service areas to both Adelphia and Comcast, but requires only Adelphia to service ninety percent of the entire community, we cannot agree with the district court that the legal claims in the two suits arise from the same operative nucleus of fact. Extension of Comcast's service area to the entire county is a new fact which presents a new case to be decided by the district court. Whether a county-wide service area carries with it the concomitant obligation to serve ninety percent of the residents of the county is a different question than whether a limited area carries with it an obligation to service an area greater than the license covers. Accordingly, we hold Adelphia's suit is not barred by res judicata.

Id. at 1336-37. Because Adelphia's causes of action arose from different operative facts – one action claiming that the county violated the Constitution by granting a limited license with no exemption from the ninety percent rule and the second action claiming that the county violated the Constitution by granting a county wide license with an exemption from the ninety percent rule – the Eleventh Circuit held that the second lawsuit was not barred by res judicata. Id.

Unlike Adelphia's two causes of action, Arthur's two actions do not arise from two distinguishable sets of facts. Arthur's current § 1983 raises the same cause of action that he raised in his prior action, and it relies on the same operative facts that he relied on in his prior action. Because the substance of Arthur current § 1983 action arises "out of the same set of operative facts," Olmstead, 725 F.2d at 632, as his previous § 1983 action,

his current challenge to Alabama's method on execution is barred by res judicata and should be dismissed.

Arthur also argues that his current action is not barred by res judicata because "claim preclusion does not apply to 'claims which arise after the original pleading is filed in the earlier litigation.'" (Doc. #20 at 15) (citing Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1357 (11th Cir. 1998) (quoting Manning v. city of Auburn, 953 F.2d. 1355, 1360 (11th Cir. 1992))). Arthur then argues that, because the revision to Alabama's lethal injection protocol was not made until after his previous § 1983 action was filed, his current action is not barred by res judicata. (Doc. #20 at 15) The flaw in Arthur's logic stems from the fact that he does not challenge the constitutionality of the revision. Instead, he uses the minor revision as an opportunity to re-assert the same claims challenging the same procedures that he challenged in his previous lethal injection action.

Because the claims Arthur raises in his current § 1983 and the facts he relies on were available, and were, in fact, included in his previous § 1983 action, his current § 1983 action is barred by res judicata and should be dismissed.

### **III. This Court Lacks Jurisdiction Over Arthur’s § 1983 Action**

This Court lacks jurisdiction over Arthur’s current § 1983 action because the same cause of action is pending in the Supreme Court of the United States.

As stated above, Arthur’s current § 1983 challenges the same lethal injection procedures as his first § 1983 lethal injection challenge – the three drugs, the inducement of anesthesia, and the maintenance of anesthesia. (Doc. #1 at 16-17) These are the same allegations Arthur has asked the Supreme Court to review. See (Doc. #19-3)

“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.”); cf. D.H. Blair & Co. v. Gottdiener , 462 F.3d 95, 106 (2nd Cir. 2006) (quoting First City Nat'l Bank & Trust v. Simmons, 878 F.2d 76, 79 (2nd Cir. 1989)) (holding that “[W]here there are two competing lawsuits, the first suit should have priority. . . .”). Because the same case is pending in the Supreme Court, this Court lacks jurisdiction over the case and it should be dismissed.

Arthur argues that this Court does have jurisdiction over his current § 1983 action because his current § 1983 action challenges new execution procedures used in Alabama. Arthur’s argument, again, ignores the allegations contained in his current § 1983 complaint. As detailed above, the procedures Arthur challenges in his current § 1983 action are the same procedures he challenged in his previous § 1983 complaint, the dismissal of which is pending before the Supreme Court. Arthur’s concedes that Alabama’s recent revision is relevant only to show that the revision is insufficient to ameliorate the pain caused by the procedures used prior to the revision.<sup>3</sup> (Doc. #20 at 15) Consequently, this action should be dismissed for lack of jurisdiction.

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<sup>3</sup> This is not the first time Arthur has attempted to increase his odds of success by filing multiple actions in multiple courts. On April 12, 2007, “Arthur filed a § 1983 complaint seeking access to various pieces of evidence to have it tested for DNA and other testing” in the federal district court of the Middle District of Alabama. Arthur v. King, No. 2:07-

Arthur next argues that jurisdiction over his case is not in the appellate courts because the Supreme Court has not granted his petition for writ of certiorari. To support this proposition, Arthur cites the dissenting opinion in Brewer v. Quarterman, 474 F.3d 207 (5th Cir. 2006). Arthur's reliance on the Brewer dissent overlooks two key facts. First, the Brewer dissent discusses a situation where the Supreme Court granted certiorari in a case in which the Fifth Circuit had pending before it a motion for rehearing en banc. Id. at 210-11. Thus, the dissent discussed possible jurisdictional conflicts between the Supreme Court and a circuit court. Id. at 210. Arthur's current § 1983 action does not present a case in which there is a jurisdictional conflict between the Supreme Court and a circuit court.

Second, Arthur ignores the fact that to petition the Supreme Court for certiorari review of his previous lethal injection challenge, he filed a notice of appeal and litigated this Court's dismissal of that complaint in the Eleventh Circuit. Blinco, 366 F.3d at 1251 ("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."). Arthur's filing of that notice of appeal

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cv-319-WKW, 2007 WL 2381992, at \*4 (M.D. Ala. Aug. 17, 2007). Less than a month and a half later and while that § 1983 action was pending in the Middle District, Arthur filed another § 1983 action in this Court challenging Alabama's method of execution. (Doc. # 19-3) Both of those actions are pending before the Supreme Court.

removed his lethal injection challenge from this Court and conferred jurisdiction on the appellate courts. Accordingly, Arthur's argument that jurisdiction remains in this Court because the Supreme Court has not granted his petition for writ of certiorari is without merit.

Because the same lawsuit is currently pending before the Supreme Court, this Court lacks jurisdiction over Arthur's § 1983. Arthur cannot create dueling jurisdiction and the potential for conflicting judgments by simply re-filing the same action in this Court. Consequently, this Court should dismiss Arthur's current § 1983 and allow the Supreme Court of the United States to take whatever action it deems appropriate on Arthur's pending petition for certiorari.

**IV. This Case Should Be Dismissed Because Arthur Unreasonably Delayed In Filing It.**

As the State detailed in its motion to dismiss, Arthur unreasonably delayed in filing his current § 1983 action. (Doc. #19 at 15-28); see Arthur v. Allen, No. 07-13929, 2007 WL 2709942, at \*2-5 (11th Cir. Sept. 17, 2007); Arthur v. Allen, No. 07-0342-WS-C, 2007 WL 2320069, at \*1-5 (S.D. Ala. Aug. 10, 2007); Arthur v. King, 2007 WL 2744884, at \*5-7 (11th Cir. Sept. 21, 2007); Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992, at \*13 (M.D. Ala. Aug. 17, 2007).

Arthur concedes in his opposition to the defendants motion to dismiss that “[i]n 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.’” (Doc. #20 at 15) (quoting Jones v. Allen, 485 F.3d 635, 641 (11th Cir. 2007) (quoting Nelson v. Campbell, 541 U.S. 637, 650 (2004))). Arthur then argues that under this standard he did not unreasonably delay for the following reasons: 1) he is challenging Alabama’s revision to its lethal injection protocol, (Doc. #20 at 16-17); 2) Alabama’s lethal injection protocol is confidential; and 3) the Supreme Court may stay his execution; therefore, this Court will have sufficient time to reach the merits. Each of these arguments is without merit.

First, Arthur’s argument that he could not have filed his current § 1983 action earlier because he is challenging a recent revision to Alabama’s lethal injection protocol is belied by the cause of action he raises in his complaint. (Doc. #1) Arthur’s complaint does not allege Alabama’s consciousness assessment constitutes cruel and unusual punishment. He does not allege that such procedure causes pain or suffering. Instead, Arthur challenges the same procedures that have been in place since 2002. Clearly, Arthur could have filed earlier (and in fact did file earlier) a lawsuit challenging the procedures Alabama has used since 2002. Furthermore, had

he filed this lawsuit in 2002, the courts could have reached the merits without the need for a stay of his December 6, 2007 execution. In short, this Court should follow binding precedent and dismiss this action due to Arthur's unreasonable delay. Arthur, 2007 WL 2709942, at \*2-5; Arthur, 2007 WL 2320069, at \*1-5; Arthur, 2007 WL 2744884, at \*5-7; Arthur, 2007 WL 2381992, at \*13.

Arthur's next argument – that he could not have filed this lawsuit earlier because Alabama's lethal injection protocol is confidential – is equally meritless and again ignores binding precedent in this Circuit. As this Court held in dismissing Arthur's previous lethal injection challenge:

The Eleventh Circuit . . . has rejected the proposition that the confidentiality of the protocol excuses a plaintiff's delay, for reasons largely present here. As in Jones, any assertion of reasonable ignorance “is belied by [the plaintiff's] complaint, which alleges ‘upon information and belief’ “that Alabama uses the three-drug cocktail; “[t]hus, [the plaintiff] knew of the basis of his claim before he filed his complaint.” 485 F.3d at 640 n. 3. Also as in Jones, the plaintiff “knew or should have known before 2006 that the State uses the same three-drug cocktail as nearly every other state where substantially similar challenges have been made.” Id. The plaintiff should have known this from the published report, in February 2006, that of the 37 states employing lethal injection, 35 used the same three-drug cocktail. Evans v. Saar, 412 F. Supp. 2d 519, 522 (D. Md. 2006). As discussed below, the ingredients of that cocktail had been identified in Evans and numerous other published opinions before 2007.

The Grayson Court followed Jones, concluding that allegations in the complaint substantively identical to those in Jones and this case “belied” the plaintiff's “assertion that he was unaware of Alabama's three-drug protocol.” 2007 WL 2027903 at \*5 & n. 3. The Grayson Court also concluded that, since the plaintiff's allegations were based “on information and belief” rather

than knowledge, “there is no reason why [he] could not have filed a similar § 1983 complaint based ‘upon information and belief’ months, if not years, earlier.” Id. Because this plaintiff pleads based on information and belief, Grayson's reasoning applies here as well.

Arthur, 2007 WL 2320069, at \*2 (S.D. Ala. 2007). This Court went on to find that:

[Arthur’s] case for reasonable ignorance is even weaker than that of the plaintiffs in Jones and Grayson. As he acknowledges, (Doc. 17 at 13), a number of Alabama cases substantively similar to the plaintiff’s were filed in 2006. Each of them contains the allegation that Alabama employs the same three-drug cocktail the plaintiff now alleges. McNair v. Allen, 2:06-cv-696-WKW (M.D.Ala.) (filed August 7, 2006); Callahan v. Allen, 2:06-cv-919-WKW (M.D.Ala.) (filed October 11, 2006); Jones v. Allen, 2:06-cv-1032-MHT (M.D.Ala.) (filed November 1, 2006); Grayson v. Allen, 2:06-cv-1032-WKW (M.D.Ala.) (filed November 17, 2006). If the plaintiffs in these cases were able to make this allegation in the summer and fall of 2006, there can be no good reason the plaintiff here could not have made the same allegation long before May 2007. See Hill v. McDonough, 464 F.3d 1256, 1259 (11th Cir.) (given that a fellow prisoner had challenged Florida’s lethal injection protocol years before, “Hill cannot claim that it was impossible for him to initiate his federal suit any earlier.”), cert. denied, 127 S. Ct. 465 (2006). Even assuming that the plaintiffs in these cases had access to sources that this plaintiff did not, once the complaints were filed they were publicly available online, and little effort would have been required to locate them through the CM/ECF system. At least after Hill was handed down in June 2006, there was every incentive to do so.

Arthur, 2007 WL 2320069, at \*2; see also Jones v. Allen, 485 F.3d 635, n.3 (11th Cir. 2007) (rejecting the argument that a plaintiff’s delay in filing his lethal injection challenge is excused by the fact that Alabama’s lethal injection protocol is confidential). This Court has already found that Arthur’s unreasonable delay in filing his earlier § 1983 action challenging

the same procedures he challenges here was not excused by the fact that Alabama's lethal injection protocol is confidential. Incredibly, Arthur offers that same excuse now. As in his earlier action, this Court should find that Arthur unreasonably delayed and dismiss this action.

Finally, Arthur argues that this Court should not dismiss this action because the Supreme Court may grant him a stay based on its grant of certiorari in Baze v. Rees, 168 L. Ed. 2d 809 (2007).<sup>4</sup> If that happens, so goes Arthur's argument, this Court could reach the merits without the need for the entry of a stay. (Doc. #20 at 18-19) In addressing a similar situation, the Eleventh Circuit held that when "an issue [is] foreclosed by existing circuit precedent that might be overruled by the Supreme Court," . . . "[t]he Supreme Court is in a better position to decide whether it wants a stay of execution" to decide the issue. Rutherford v. Crosby, 438 F.3d 1087, 1093 (11th Cir. 2006). Under Rutherford, nothing in the Supreme Court's grant of certiorari in Baze excuses Arthur's delay or relieves this Court of its duty to follow binding precedent. Consequently, Arthur's argument that this Court should not follow precedent based of conjecture as to what the Supreme Court will do at some point later should be rejected.

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<sup>4</sup> It is unclear from Arthur's argument whether he means the Supreme Court will grant him a stay of execution in his earlier filed lethal injection challenge currently pending before that Court or whether he believes the Supreme Court will grant him a stay of execution on this lethal injection challenge.

In sum, Arthur could have filed this action at any time after Alabama changed its method of execution in 2002, yet chose not to do so. This Court should apply binding circuit precedent and dismiss this action due to Arthur's unreasonable delay.

**V. Dismissal On Laches Grounds Is Appropriate At This Stage Of The Proceedings**

In their motion to dismiss, the defendants' moved this Court to dismiss Arthur's current § 1983 action on laches grounds. Arthur's only response to the defendants' laches argument is that laches is inappropriate for a 12(b)(6) motion.

In offering this argument, Arthur incredibly ignores the fact that his previous § 1983 lethal injection action was dismissed on a 12(b)(6) motion. Arthur v. Allen, No. 07-0342-WS-C, 2007 WL 2320069, at \*1-5 (S.D. Ala. Aug. 10, 2007) (holding that there is no "impediment to resolving the timeliness issue on motion to dismiss"); Arthur v. Allen, No. 07-13929, 2007 WL 2709942, at \*4 (11th Cir. Sept. 17, 2007) (unpublished opinion) ("We conclude that the district court did not abuse its discretion in dismissing Arthur's § 1983 action due to laches."); see also Arthur v. King, 500 F.3d 1335, \*n.1 (11th Cir. 2007) ("In May 2007, Arthur also filed an action under § 1983 in the Southern District of Alabama, challenging Alabama's method of execution. The district court, however, granted

Alabama's motion to dismiss based on laches, Arthur v. Allen, No. 07-0342, 2007 WL 2320069 (S.D.Ala. Aug.10, 2007) (“Arthur XVIII”), and we affirmed, No. 07-13929, ---Fed.Appx. ---- (11th Cir. Sep. 17, 2007) (“Arthur XIX”). This Court should follow its own precedent and dismiss this action based on laches.

As the defendants have repeated throughout this reply, Arthur’s current § 1983 action does not raise any issues relating to Alabama’s recent revision to its lethal injection protocol. Instead, he challenges the drugs used in lethal injection, the inducement of anesthesia, and the maintenance of anesthesia. (Doc. #20 at 16-17) He does not allege that the consciousness assessment will cause pain or suffering or in any other manner violate the Eighth Amendment. He merely alleges that the revision “will do little if anything to mitigate the substantial risk of cruel and unusual pain.” (Doc. #20 at 15) That alleged “substantial risk of cruel and unusual pain” stems from Arthur’s challenges to the lethal injection procedures that have been in place since 2002 and were part of his earlier § 1983 lethal injection challenge. This Court can determine these dispositive facts on the face of Arthur’s complaint. See Marsh v. Butler County, Ala., 268 F.3d 1014, 1022 (11th Cir. 2001) (en banc) (“A complaint is also subject to dismissal under Rule 12(b)(6) when its allegations-on their face-show that an

affirmative defense bars recovery on the claim.”); Powell v. Barrett, 496 F.3d 1288, 1304 (11th Cir. 2007) (“A complaint is subject to dismissal under Rule 12(b)(6) when the allegations in the complaint, on their face, show that an affirmative defense bars recovery on the claim.”); Cf. Concordia v. Bendekovic, 693 F.2d 1073, 1075 (11th Cir. 1982) (holding that “a party may raise a res judicata defense by motion rather than by answer where the defense's existence can be judged on the face of the complaint.”)

Because this Court can determine from the face of Arthur’s complaint that he only raises concerns relating to Alabama’s procedures that have been in place since 2002, this Court can and should dismiss this action on the grounds of laches.

#### **VI. Arthur’s Claim Is Barred By The Applicable Statute Of Limitations**

As the defendants’ detailed in their motion to dismiss and reassert here, Arthur’s current § 1983 action was filed over three years after the applicable statute of limitations expired. Consequently, this action should be dismissed.

In response to the defendants’ motion to dismiss, Arthur argues that this Court should not follow binding precedent that holds that a plaintiff’s § 1983 cause of action accrues “when the plaintiff has [a] complete and present cause of action and when the plaintiff can file suit and obtain relief.”

(Doc. # 20 at 24-25) (internal citations and quotations omitted) Arthur argues that this Court should ignore this precedent because he seeks “injunctive relief against prospective harm. ...” (Doc. # 20 at 24-25) (internal citations and quotations omitted) Under Arthur’s rationale, because he seeks to enjoin a future harm, the statute of limitations does not accrue until that harm occurs. (Doc. #20 at 24-27)

Arthur, however, fails to mention, much less address or attempt to distinguish, the binding Eleventh Circuit precedent cited by the defendants. Brown v. Georgia Bd. of Pardons & Paroles, 335 F.3d 1259, 1261-62 (11th Cir. 2003) (holding that the statute of limitations on a § 1983 action challenging the State’s decision to change its parole policy to eliminate a parole review every three years begins to accrue when the policy is changed, not when the prisoner is denied his three year review (the future harm)); 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”); Lesley v. David, 186 Fed. Appx. 926, 2006 WL 1760816, at \*1 (11th Cir. (June 28, 2006) (unpublished opinion) (same). Arthur’s silence is as telling as it is deafening.

As the defendants' detailed in their motion to dismiss, the Eleventh Circuit recently reviewed when the statute of limitations principles begin to run on a future harm. 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. Thus, the State would not consider Leslie for parole in 2005 (a future harm). 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 that the change affected him, not in 2005 when the future harm occurred. Id. at \*2-3.

Applying the Eleventh Circuit’s holdings in Brown, 335 F.3d at 1261-62; Lovett, 327 F.3d at 1182-83; and Lesley, 2006 WL 1760816, at \*1, Arthur’s § 1983 action challenging lethal injection began to accrue in 2002 when Alabama changed its method of execution to lethal injection and expired in 2004. See Cooney v. Strickland, 479 F.3d 412 (6th Cir. 2007) rehearing denied, Cooney v. Strickland, --- F.3d ----, 2007 WL 1574663 (6th Cir. June 1, 2007) (“look[ing] to the event that should have alerted the typical lay person to protect his or her rights.”). Thus, Arthur’s October 9, 2007, § 1983 action is barred by the applicable two year statute of limitation and should be dismissed. Rozar v. Mullis, 85 F.3d 556, 561 (11th Cir. 1996); Ala. Code § 6-2-38(1) (2005).

## CONCLUSION

For the forgoing reasons and for the reasons raised in the Defendants' original motion, Arthur's current § 1983 action should be dismissed.

Respectfully submitted,

Troy King  
*Alabama Attorney General*

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

## CERTIFICATE OF SERVICE

This is to certify that on the 9th day of November, 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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