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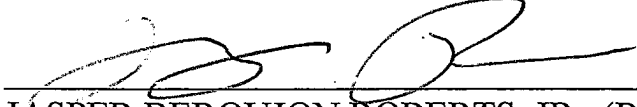
THOMAS D. ARTHUR V. RICHARD ALLEN, ET AL.

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel certifies that the following persons may have an interest in the outcome of this case:

1. Richard Allen, Commissioner of Alabama Department of Corrections;
2. Gary Alverson, former District Attorney;
3. Thomas D. Arthur, plaintiff;
4. Sultana L. Bennett, counsel for Arthur;
5. J. Clayton Crenshaw, Assistant Attorney General;
6. Grantt Culliver, Warden, Holman Correctional Facility;
7. James W. Davis, Assistant Attorney General;
8. Ruben Fogel, counsel for Arthur;
9. Qian A. Gao, counsel for Arthur;
10. Suhana S. Han, counsel for Arthur;
11. Sara L. Manaugh, counsel for Arthur;
12. Corey L. Maze, Assistant Attorney General;
13. Jennifer L. Parkinson, counsel for Arthur;
14. Jordan T. Razza, counsel for Arthur

15. Jasper B. Roberts, Jr., Assistant Attorney General;
16. William H. Steele, United States District Judge;
17. Theresa Trzaskoma, counsel for Arthur;
18. Charles Vercelli, counsel for Arthur; and
19. Troy Wicker, Jr., capital murder victim.



JASPER BEROUJON ROBERTS, JR. (ROB157)
Alabama Assistant Attorney General

JURISDICTIONAL STATEMENT

The plaintiff-appellant has accurately stated the statement of jurisdiction.

STATEMENT REGARDING ORAL ARGUMENT

The defendants-appellees believe that the briefs have adequately elucidated the issues in this case and that oral argument is unnecessary.

CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in this brief is fourteen (14) point Times New Roman.

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STATEMENT OF THE ISSUES

1. Whether the district court correctly dismissed Arthur's complaint on equitable grounds because he unjustifiably delayed in filing it, a conclusion supported by the fact that Arthur filed the instant lawsuit over five years after he elected to be executed by lethal injection.

2. Whether Arthur's second § 1983 action challenging the same execution procedures that he challenged in his first lethal injection lawsuit is precluded under the doctrine of res judicata.

3. Whether Arthur's § 1983 action challenging Alabama's lethal injection procedures is barred by the applicable statute of limitations when he filed this action over five years after he elected to be executed by lethal injection.

STATEMENT OF THE CASE AND FACTS

This is an appeal of the dismissal of Arthur's third civil rights action filed pursuant to 42 U.S.C. § 1983 (hereinafter "§ 1983"). The district court dismissed Arthur's newest § 1983 action on November 15, 2007, twenty-one days before Arthur's scheduled December 6, 2007 execution. (Doc. #19, Exhibit I); Arthur v. Allen, Civil Action 07-0722-WS-M, 2007 WL 4105113, at *1 (S.D. Ala. Nov. 15, 2007). Arthur was originally convicted in 1982 for the capital offense of murdering Troy Wicker after having been convicted of a previous murder within 20 years preceding the instant murder. See Ala. Code § 13A-5-40(a)(13)(2006

Replacement Volume). Arthur has been on Alabama's Death Row for approximately 16 years after being convicted of capital murder and sentenced to death in 1992 (for the third time). Arthur v. State, 711 So. 2d 1031 (Ala. Crim. App. 1996); Ex parte Arthur, 711 So. 2d 1097 (Ala. 1997). Arthur exhausted his state and federal appeals when the Supreme Court denied certiorari review of his habeas proceedings on April 16, 2007. Arthur v. Allen, 127 S. Ct. 2033 (2007).

At or near the conclusion of his federal habeas proceedings, when he knew the State would seek to carry out his sentence of death, Arthur sprang into action and filed two § 1983 actions, one in the Federal District Court for the Middle District of Alabama seeking access to physical evidence from his crime (DNA) and the other in the Federal District Court for the Southern District of Alabama challenging the constitutionality of lethal injection (lethal injection).¹ Arthur v. King, 500 F.3d 1335, 1337-38, n.*1 (11th Cir. 2007) (noticing Arthur's two § 1983 actions). Presumably, Arthur chose to file his two belated actions in two different federal courts to increase his odds of obtaining a stay of execution and forcing the defendants into lengthy litigation, thus, staving off his execution for at least a few more years.

¹ In addition to the three § 1983 actions, Arthur's daughter, Sherri Stone, filed a § 1983 action seeking to enjoin the State from performing an autopsy, Stone v. Allen, Civil Action No. 07-0681-WS-M., 2007 WL 4209262 (S.D. Ala. Nov. 27, 2007), and Debbie Murphree, a resident of Prattville, Alabama, filed a civil rights action seeking DNA testing of evidence collected in connection with Arthur's crime. Murphree v. Riley, No. 2:07-cv-1047-MHT, 2008 WL 45414 (M.D. Ala. Jan. 2, 2008).

On June 22, 2007, the Alabama Supreme Court set Arthur's execution date for September 27, 2007. Arthur, 2007 WL 2381992, at *4 (DNA). Due to Arthur's decision to wait until the conclusion of his federal habeas proceedings to file his § 1983 actions (when he felt such actions would serve him best), both of his previous § 1983 actions were dismissed based on equitable principles. See Arthur v. Allen, No. 07-0342, 2007 WL 2320069 (S.D. Ala. Aug.10, 2007) (lethal injection); Arthur v. King, No. 07-cv-319-WKW, 2007 WL 2381992 (M.D. Ala. Aug.17, 2007) (DNA). This Court affirmed the dismissal of both previous actions holding that the defendants were entitled to dismissal because Arthur unreasonably delayed in filing the actions and due to that delay, the merits could not have been reached without staying his September 27, 2007 execution. Arthur v. King, 500 F.3d 1335, *1340-41 (11th Cir. 2007) ("appl[ing] 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" and affirming the dismissal of Arthur's § 1983 DNA action); Arthur v. Allen, 248 Fed. Appx. 128, *131, 2007 WL 2709942, at *3-4 (11th Cir. Sept. 17, 2007) (holding that Arthur's § 1983 action challenging the constitutionality of Alabama's lethal injection procedure was properly dismissed due to Arthur's unreasonable delay).

On September 21, 2007, Arthur petitioned the Supreme Court of the United States for a writ of certiorari to review this Court's affirmance of the dismissal of his § 1983 action challenging Alabama's lethal injection procedures.² (Doc. #19, Exhibit B) Shortly after Arthur filed his petition for certiorari, his counsel were informed that the defendants intended to slightly modify the execution procedure to add a consciousness assessment. (Doc. #19, Exhibit D) 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." (Doc. #19, 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 lethal injection case styled Baze v. Rees, 07-5439. Id. The following day, Arthur filed a second "Supplemental Brief In Further Support Of His Petition For A Writ Of Certiorari And Motion For A Stay." (Doc. #19, Exhibit D) Arthur's second supplemental brief was based on the proposed revisions to Alabama's lethal injection protocol.

On September 27, 2007, Governor Bob Riley granted Arthur a 45 day reprieve to allow the Department of Corrections to institute the minor modification to Alabama's execution protocol. See (Doc. #1 at 5); (Doc. #19, Exhibit E) The

² On September 25, 2007, Arthur petitioned the Supreme Court for certiorari review of the dismissal of his DNA § 1983 action. The Court denied Arthur's petition on November 26, 2007. Arthur v. King, 128 S. Ct. 660, 169 L. Ed. 2d 511 (2007).

following day, the State moved the Alabama Supreme Court to set another execution date for Arthur. (Doc. #19, Exhibit F) Thereafter, on October 18, 2007, the Alabama Department of Corrections added a consciousness assessment to its lethal injection protocol. See Siebert v. Allen, 2:07-cv-295-MEF-WC, (Doc. # 56); (Doc. #19, Exhibit H) “The modifications to the protocol consist of the following additions to the preexisting procedures: (1) examination of the prisoner by an execution team member, following administration of the sodium pentothal but before administration of the pancuronium bromide, to assess his consciousness (by calling his name, gently stroking his eyelashes, and pinching his arm); and (2) administration of a second dosage of sodium pentothal if the preceding examination reveals consciousness. (Doc. 19, Exhibit H, ¶ 2).” Arthur v. Allen, Civil Action 07-0722-WS-M, 2007 WL 4105113, at *2 (S.D. Ala. Nov. 15, 2007). With the consciousness assessment now in place, on October 31, 2007, the Alabama Supreme Court re-set Arthur’s execution for December 6, 2007. (Doc. #19, Exhibit I)

Meanwhile, on October 9, 2007, Arthur filed a second § 1983 action challenging Alabama’s method of execution. Although his pending petition for certiorari challenged the drugs used during executions, the personnel performing executions, and the facilities utilized during executions, he filed a second action challenging those same procedures. (Doc. # 1; Doc. #19, Exhibit A-B) In his

complaint, Arthur acknowledged that he was aware that Alabama would add a consciousness assessment to its execution procedure; however, he did not challenge the constitutionality of that additional safeguard. (Doc. #1) In fact, the only substantive allegation Arthur made 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. #1 at 15)

Because Arthur's second § 1983 action only challenged the procedures that have been in place in Alabama since 2002, those same challenges have already been dismissed in a previous action on equitable principles, and those the same allegations are currently pending before the Supreme Court, the defendants moved the district court to dismiss Arthur's most recent civil rights action. Specifically, the defendants moved the district court to dismiss Arthur's newest § 1983 action on the following grounds: 1) the court lacks jurisdiction over the case because the same challenge is pending before the Supreme Court; 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. (Doc. #19)

After reviewing Arthur's complaint, the defendants' motion to dismiss, and various other pleadings, the district court dismissed Arthur's most recent action. The district court ruled that Arthur, "[u]sing the identical language employed in his

first lawsuit, [filed his] complaint alleg[ing] that the constitutional violation arises from the risk that the plaintiff will be conscious during his execution and thus experience excruciating pain from the potassium chloride. (Doc. 1 at 12, ¶ 45; id. at 16, ¶ 65).” Arthur, 2007 WL 4105113, at *2. The district court further found that:

[Arthur failed to] allege that the modifications to the protocol cause or exacerbate an Eighth Amendment violation. Rather, he alleges only that they “do not mitigate” the allegedly unconstitutional risk already posed by the protocol in effect at the time of his previous lawsuit. (Doc. 1 at 16, ¶ 63; accord id. at 15, ¶ 56; id. at 2 (execution is cruel and unusual “in spite of any modifications” to the protocol). The modifications, in short, do not provide the basis, or even part of the basis, for the [Arthur’s] constitutional challenge.

Arthur, 2007 WL 4105113, at *2. Based on the fact that Arthur’s complaint challenges the same procedures he previously challenged, the district court found that Arthur is “in precisely the same situation as he was in August, and his current lawsuit must be dismissed on precisely the same grounds as was its predecessor.”

Id.

Specifically, the district court dismissed Arthur’s complaint because he “has not overcome the strong presumption against the grant of injunctive relief that arose because he unreasonably delayed in bringing this action. . . .” Id. (citing Arthur, 2007 WL 2320069 at *2-4 (DNA). The district court did not, however, address the defendants’ alternative grounds for dismissal. Arthur, 2007 WL 4105113, at *n.7.

On November 26, 2007, after the district court dismissed this lethal-injection challenge, Arthur filed an application in the Supreme Court seeking a stay of his December 6, 2007 execution. Arthur v. Allen, No. 07-395. Arthur's stay application was based on the pendency of his petition for certiorari in his first lethal-injection challenge. Id. On December 5, 2007, the Court "granted [Arthur's application for a stay] pending the disposition of the petition for a writ of certiorari." Id. Although Arthur argues that he is challenging a "new" execution protocol in this action, at no time has he moved the Supreme Court to withdraw or dismiss as moot his petition for writ of certiorari in his first lethal-injection challenge.

STANDARD OF REVIEW

The district court's dismissal of a death row inmate's method-of-execution challenge is reviewed for an abuse of discretion. Grayson v. Allen, 491 F.3d 1318, 1326 (11th Cir. July 16, 2007); Williams v. Allen, 496 F.3d 1210, *1215 (11th Cir. 2007). "The district court's judgment may be affirmed if it is correct for any reason." Hempel v. United States, 14 F.3d 572, 576 (11th Cir. 1994).

SUMMARY OF THE ARGUMENT

The district court correctly dismissed Arthur's complaint because Arthur unjustifiably delayed in filing his lethal-injection challenge. The district court followed this Court's decisions in Rutherford, Grayson, Williams, and Arthur in

dismissing Arthur's late-filed claim. In Rutherford and Grayson, this Court concluded that the inmate's unreasonable and unexcused delay in waiting until late in the litigation day to file their § 1983 lethal-injection challenges disentitled them from equitable relief. The district court here correctly dismissed Arthur's complaint on equitable grounds because it was filed with unjustifiable delay, a conclusion supported by the fact that Arthur filed the instant lawsuit over five years after he elected to be executed by lethal injection.

If Arthur had filed this lawsuit earlier then his case would have been allowed to proceed; however, he filed it too late. As a result of Arthur's actions, the district court properly applied the strong equitable presumption against granting injunctive relief when an inmate unreasonably delays in filing his lawsuit, and due to that delay, the merits of the suit cannot be reached without a stay of execution. As such, the district court's dismissal of this action was proper.

Furthermore, the district court's decision dismissing this action should be affirmed because Arthur's action is precluded under the doctrine of res judicata. His current § 1983 action challenging Alabama's method of execution is materially and substantively indistinguishable from his prior § 1983 action challenging Alabama's method of execution. Consequently, Arthur's most recent § 1983 lethal-injection challenge is precluded.

Finally, the district court's dismissal of this action should be affirmed because Arthur filed it over three years after the applicable statute of limitations expired. On July 31, 2002, Arthur chose lethal injection as his method of execution. Thus, the time to file suit for statute of limitations purposes accrued on July 31, 2002 and expired on July 31, 2004. Arthur, however, did not file his current § 1983 action until October 9, 2007, over three years after the statute of limitations expired. Therefore, this action is barred and the district court's decision should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED ARTHUR'S SECOND LETHAL-INJECTION CHALLENGE BECAUSE IT WAS FILED WITH INEXCUSABLE AND UNJUSTIFIABLE DELAY.

The district court correctly applied precedent this Court in dismissing Arthur's § 1983 lawsuit because it was not filed in sufficient time to allow full adjudication of the merits without staying his December 6, 2007 execution. Arthur v. Allen, Civil Action 07-0722-WS-M, 2007 WL 4105113 (S.D. Ala. Nov. 15, 2007). Applying this Court's holdings in Grayson v. Allen, 491 F.3d 1318, 1322 (11th Cir. 2007); Rutherford v. McDonough, 466 F.3d 970, 976 (11th Cir. 2006); Williams v. Allen, 496 F. 3d 1210, 1212 (11th Cir. 2007); and Arthur v. Allen, 248 Fed. Appx. 128, 2007 WL 2709942, (11th Cir. Sept. 17, 2007), the district court correctly held that Arthur unreasonably delayed in filing this action, and, due to

that delay, the court could not reach the merits of his second lethal-injection challenge without a stay of execution. Arthur, 2007 WL 4105113, at *2. Arthur, 2007 WL 4105113, at *2. Consequently, the district court's dismissal of Arthur's second lethal-injection challenge was proper under the strong equitable presumption detailed by the Grayson Court, and Arthur cannot establish that the district court abused its discretion by granting the defendants' motions to dismiss. This Court, therefore, should affirm the dismissal of this action.

A. Under This Court's Binding Precedent, The District Court Correctly Dismissed Arthur's Most Recent Lethal-Injection Challenge Due To His Unreasonable Delay In Filing It.

Like his previous two § 1983 actions, Arthur unreasonable delayed in filing this one, and due to that delay, the merits could not have been reached without a stay of execution. Accordingly, the district court properly applied Rutherford, Grayson, Williams, and Arthur in dismissing Arthur's late-filed § 1983 action.³ Arthur, 2007 WL 2320069 at *1-4. Because the district court properly applied this Court's binding precedents, Arthur cannot establish that it abused its discretion and its decision should be affirmed.

"In considering the dismissal of a § 1983 challenge, courts are to apply equitable principles which mandate dismissal when the plaintiff 'delayed

³ Grayson v. Allen, 491 F.3d 1318, 1322 (11th Cir. 2007); Rutherford v. McDonough, 466 F.3d 970, 976 (11th Cir. 2006); Williams v. Allen, 496 F. 3d 1210, 1212 (11th Cir. 2007); Arthur v. Allen, 248 Fed. Appx. 128, 2007 WL 2709942, (11th Cir. Sept. 17, 2007)

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, 500 F.3d 1335, 1341 (11th Cir. 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."). Arthur could have filed this action at any time after July 31, 2002, when he elected to die by lethal injection. See Ala. Code § 15-18-82.1 (2006 Cumulative Supp.); McNair v. Allen, No. 08-10100, 2008 WL 227945, at *8 (11th Cir. Jan. 29, 2008) (citing Jones v. Allen, 485 F.3d 635 (11th Cir. 2007)). As the Jones Court explained:

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. 'It was during that period-in which the execution was not so much an imminent or impending danger as it was an event reasonably likely to occur in the future-that Jones needed to file this challenge.'

Jones, 485 F.3d at 640 (quoting Harris v. Johnson, 376 F.3d 414, 418 (5th Cir. 2004)); see also id. at n.2 (“Waiting to file suit until the Supreme Court has denied certiorari review of an inmate's federal habeas petition ... is simply too late to avoid the inevitable need for a stay of execution.”).

Although Arthur could have filed this action (as well as his previous lethal-injection challenge) at any time after July 31, 2002, he chose to wait until such an action would benefit him the most: when a stay of execution would be necessary to litigate the merits of his claim.⁴ At this point, after the conclusion of federal habeas proceedings, “[t]he strong interest of the State and the victim's families in the timely enforcement of a sentence,’ [has acquired] ‘an added moral dimension.’” Arthur, 2007 WL 2744884, at *4 (internal citations omitted). Arthur, however, chose to wait to file his action until he felt it would serve him best, when a stay would be necessary to litigate his claims. Arthurs’ true intent (thwarting the State’s interest in justice and staving off his justly deserved sentence) is established, not only by his delay, but also by the flood of civil lawsuits he and his supporters have filed since the conclusion of his habeas proceedings. See Arthur v. King, 500 F.3d 1335 (11th Cir. 2007) (detailing Arthur’s lengthy litigation); Arthur v. Allen, 248 Fed. Appx. 128, *131, 2007 WL 2709942, at *3-4 (11th Cir. Sept.

⁴ So far, Arthur’s strategic decision has served him well. As noted above, the Supreme Court of the United States stayed his execution pending a decision on his petition for writ of certiorari relating to his first lethal-injection challenge.

17, 2007); Arthur v. Allen, Civil Action 07-0722-WS-M, 2007 WL 4105113, at *2 (S.D. Ala. Nov. 15, 2007); Stone v. Allen, Civil Action No. 07-0681-WS-M., 2007 WL 4209262 (S.D. Ala. Nov. 27, 2007); Murphree v. Riley, No. 2:07-cv-1047-MHT, 2008 WL 45414 (M.D. Ala. Jan. 2, 2008). This Court's precedent, however, mandates that the district court dismiss Arthur's action on equitable grounds due to his decision to wait to file it until October 9, 2007, when a merits determination could not be reached before his December 6, 2007 execution. Arthur, 500 F.3d at 1340-41 ("equitable principles . . . 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"). Accordingly, Arthur cannot establish that the district court abused its discretion by following this Court's binding precedent and dismissing his late filed action.

In summary, this Court has twice found that Arthur unreasonably delayed in filing his two previous § 1983 complaints; thus, the district courts properly dismissed those actions. Arthur v. King, 500 F.3d 1335, *1340-41 (11th Cir. 2007) ("appl[ing] 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" and affirming the dismissal of Arthur's § 1983 DNA action); Arthur v. Allen, 248 Fed. Appx. 128, *131, 2007 WL 2709942, at *3-4 (11th Cir. Sept. 17, 2007) (holding that Arthur's § 1983 action challenging the constitutionality of Alabama's lethal injection procedure was properly dismissed due to Arthur's unreasonable delay). These decisions establish that Arthur unreasonably delayed in filing this – his third – § 1983 complaint. Because he unreasonably delayed in filing this action, this Court should apply Arthur, 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 affirm the District Court's dismissal of this action.

B. The District Court Properly Found That The Safeguard Recently Added To Alabama's Lethal Injection Protocol Did Not Excuse Arthur's Unreasonable Delay.

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 the minor revision to Alabama's lethal injection protocol has created a new protocol, that "he has made a new challenge to a new protocol, and [that] the modifications in this new protocol are central to his

constitutional challenge. . . .” (Blue Br. at 16) (emphasis added)⁵ Stated plainly, these arguments are false.

The minor revision to Alabama’s lethal injection protocol does not constitute a substantial change or create a new protocol. As the district court correctly detailed, the revision merely added the following safeguard:

(1) examination of the prisoner by an execution team member, following administration of the sodium pentothal but before administration of the pancuronium bromide, to assess his consciousness (by calling his name, gently stroking his eyelashes, and pinching his arm); and (2) administration of a second dosage of sodium pentothal if the preceding examination reveals consciousness. (Doc. 19, Exhibit H, ¶ 2).

Arthur, 2007 WL 4105113, at *2. The defendants addition of this safeguard does not, as Arthur argues, create a new protocol or substantially alter the pre-existing protocol.⁶ This Court’s recent decision in McNair v. Allen, establishes this point. No. 08-10100, 2008 WL 227945, at *3-8 (11th Cir. Jan. 29, 2008). In McNair, this Court was well aware of the minor revision recently instituted by the defendants and held that James Callahan’s § 1983 lethal-injection challenge was untimely

⁵ Arthur stated 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). This statement is egregiously false. The Department of Correction’s decision to add an additional safeguard 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.

⁶ On page 16 of his brief to this Court, Arthur argues that he would be entitled to file a new § 1983 action challenging the State’s lethal injection protocol if the State changed from a three drug protocol to a one drug protocol. While this statement may or may not be accurate, the fact remains that Alabama utilizes the same three drug protocol (other than the minor revision discussed in McNair) that it has utilized since 2002.

because he failed to file it within two years of his election of lethal injection as the method by which he would be executed. 2008 WL 227945, at *3-8 . The McNair Court found that the State’s “revised lethal injection protocol . . . differ[s] only minimally from prior procedures.” id. at 3; see also id. at 3-8 (“We hold a method of execution claim accrues on the later of the date on which state review is complete, or the date on which the capital litigant becomes subject to a new or substantially changed execution protocol. . . . There is no doubt Callahan, too, was free to challenge the method of his execution beginning July 31, 2002, by which time the facts which would support a cause of action should have been apparent to any person with a reasonably prudent regard for his rights.”). As this Court has recognized, the minor safeguard recently added to Alabama’s lethal injection protocol was a minimal change and does not create a new protocol or excuse Arthur’s untimely filing.

Furthermore, Arthur’s most recent § 1983 complaint action only 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. (Doc. #1) Arthur’s complaint alleges that the defendants will undertake “to execute [him] 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) (emphasis added); 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 challenge to the assessment of consciousness. In fact, the only allegation Arthur made 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 his 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. As the district court correctly found, Arthur “alleges only that [the revisions] ‘do not mitigate’ the allegedly unconstitutional risk already posed by the protocol in effect at the time of his previous lawsuit. (Doc. 1 at 16, ¶ 63; accord id. at 15, ¶ 56; id. at 2 (execution is cruel and unusual “in spite of any modifications” to the protocol). The

modifications, in short, do not provide the basis, or even part of the basis, for the plaintiff's constitutional challenge.” Arthur, 2007 WL 4105113, at *2. Consequently, Arthur statement that “he has made a new challenge to a new protocol, and the modifications in this new protocol are central to his constitutional challenge,” (Blue Br. at 16) (emphasis added), is belied by his complaint and does not excuse his dilatoriness in filing this action.

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. Thus, this complaint was properly dismissed for the same reasons that his first lethal injection was dismissed, and this Court should affirm the district court’s decision.

C. The District Court Did Not Abuse Its Discretion By Dismissing Arthur’s Most Recent § 1983 Action Prior To Granting Discovery.

On pages 17 through 19 of his brief, Arthur argues that the district court erred by dismissing his action prior to granting him discovery. (Blue Br. at 17-19) According to Arthur, dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure was inappropriate because he was unaware of the extent and scope of the revision absent discovery. This argument fails for at least three reasons: 1) Arthur’s complaint does not allege any cause of action based on the recent

revision; 2) he was made aware of the extent of the recent revision and never moved to amend his complaint, (Doc. #19, Exhibit H); and 3) from the face of the complaint, it is apparent that Arthur unreasonably delayed in filing it.

First, as detailed throughout this brief, Arthur's complaint does not allege any cause of action based on or supported by the defendants' addition of a consciousness assessment to their lethal injection protocol. (Doc. #1) Instead, he used the minor addition as an opportunity to re-file his previously dismissed complaint alleging the same constitutional challenges to the same procedures. See Arthur v. Allen, Civil Action 07-0722-WS-M., 2007 WL 4105113, at *2 (S.D. Ala. Nov. 15, 2007) ("Using the identical language employed in his first lawsuit, the complaint alleges that the constitutional violation arises from the risk that the plaintiff will be conscious during his execution and thus experience excruciating pain from the potassium chloride. (Doc. 1 at 12, ¶ 45; id. at 16, ¶ 65)."); id. ("The modifications, in short, do not provide the basis, or even part of the basis, for the plaintiff's constitutional challenge."). Because Arthur did not allege any cause of action based on the addition of a conscious assessment to the State's lethal injection protocol, discovery relating to that minor addition was irrelevant to his cause of action.

Next, Arthur's statement in his brief that he is unaware of the scope of the defendants' revision is categorically false. With the defendants' motion to dismiss,

they filed an exhibit detailing the consciousness assessment. (Doc. # 19, Exhibit H.); see also id. at *2 (“The modifications to the protocol consist of the following additions to the preexisting procedures: (1) examination of the prisoner by an execution team member, following administration of the sodium pentothal, but before administration of the pancuronium bromide, to assess his consciousness (by calling his name, gently stroking his eyelashes, and pinching his arm); and (2) administration of a second dosage of sodium pentothal if the preceding examination reveals consciousness. (Doc. 19, Exhibit H, ¶ 2).”). After the defendants’ detailed their minor addition, Arthur did not move to amend his complaint to include an allegation that the consciousness assessment is unconstitutional. Presumably, Arthur failed to amend his complaint because no credible constitutional challenge could be made to the addition safeguard. See id. at *2, n.4 (“The modifications, in short, do not provide the basis, or even part of the basis, for the plaintiff’s constitutional challenge. . . . This is not surprising, since it would be difficult to conceive how adding the safeguards of physical confirmation of unconsciousness (even by an unqualified individual) and additional anesthetic could affirmatively increase the chances of inflicting unconstitutional pain.”). At the end of the day, Arthur was (contrary to his representation to this Court) well aware of the scope and extent of the defendants’ recent revision; however, he did not move to amend his complaint to include a

challenge to the revision's constitutionality. Therefore, his lack of knowledge argument is without merit.

Finally, dismissal at this stage was proper because the district court could determine from the face of Arthur's complaint that affirmative defenses bar relief. 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."). From the face of Arthur's complaint, the district court could determine that his current § 1983 action did not raise any issues relating to Alabama's recent revision to its lethal injection protocol. It is apparent from the complaint that Arthur merely 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) As such, the district court could determine from the face of Arthur’s complaint that he was “in precisely the same situation as he was in August, and his current lawsuit must be dismissed on precisely the same grounds as was its predecessor.”

Furthermore, this Court has affirmed numerous district court decisions dismissing lethal-injection challenges on equitable defenses. See Arthur v. Allen, 248 Fed. Appx. 128, 2007 WL 2709942 (11th Cir. Sept. 17, 2007) (affirming the district court’s dismissal of Arthur’s previous § 1983 action challenging Alabama’s lethal injection procedures); Arthur v. King, 500 F.3d 1335 (11 th Cir. 2007) (affirming the district court’s dismissal of Arthur’s previous § 1983 action seeking access to evidence); Williams v. Allen, 496 F.3d 1210 (11th Cir. 2007) (affirming the district court’s dismissal of Williams’s § 1983 action challenging Alabama’s lethal injection procedures); Grayson v. Allen, 491 F.3d 1318 (11th Cir. 2007) (affirming the district court’s dismissal of Grayson’s § 1983 action challenging Alabama’s lethal injection procedures). This Court should follow these well reasoned opinions and affirm the district court’s dismissal of Arthur late-filed action.

II. DISMISSAL OF ARTHUR'S SECOND LETHAL-INJECTION CHALLENGE WAS PROPER BECAUSE IT IS PRECLUDED BY RES JUDICATA.

Although not ruled upon by the district court, its dismissal of Arthur's current § 1983 action was proper because this action is precluded under the doctrine of res judicata. See Hempel v. United States, 14 F.3d 572, 576 (11th Cir. 1994) ("The district court's judgment may be affirmed if it is correct for any reason."). Therefore, this Court should affirm the district court's decision.

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 in which he sought to enjoin the defendants from executing him by lethal injection. 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) ; (Doc. #19, Exhibit 1) He alleged (both now and then) that Alabama's lethal injection protocol violates the Eighth 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, Exhibit A) As the district court correctly noted, "[u]sing the identical language employed in his first lawsuit, the complaint alleges that the constitutional violation arises from the risk that the plaintiff will be conscious during his

execution and thus experience excruciating pain from the potassium chloride.

(Doc. 1 at 12, ¶ 45; *id.* at 16, ¶ 65).” Arthur, 2007 WL 4105113, at *2.

“[Arthur] does not allege that the modifications to the protocol cause or exacerbate an Eighth Amendment violation. Rather, he alleges only that they “do not mitigate” the allegedly unconstitutional risk already posed by the protocol in effect at the time of his previous lawsuit. (Doc. 1 at 16, ¶ 63; accord *id.* at 15, ¶ 56; *id.* at 2 (execution is cruel and unusual “in spite of any modifications” to the protocol). The modifications, in short, do not provide the basis, or even part of the basis, for the plaintiff’s constitutional challenge.”

Id. Consequently, Arthur’s current action is the same as his previous action.

Next, the district court dismissed Arthur’s previous lawsuit based on the equitable principle that he unnecessarily delayed and, thus, was not entitled to injunctive relief. Arthur v. Allen, Civil Action No. 07-0342-WS-C, 2007 WL 2320069, *1-5 (S.D. Ala. Aug. 10, 2007). In a well reasoned opinion, this Court affirmed the district court’s dismissal of that earlier action. Arthur v. Allen, No. 07-13929, 2007 WL 2709942, at *1-4 (11th Cir. Sept. 17, 2007). The district court’s dismissal of Arthur’s previous § 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). Finally, there can be no question that the parties to both of Arthur's § 1983 actions are the same.

Arthur's two actions do not arise from two distinguishable sets of facts; instead, his 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, the previous action was dismissed on the merits, and the parties are the same, his current challenge to Alabama's method on execution is barred by res judicata and was properly dismissed.

III. THE DISTRICT COURT'S DISMISSAL OF ARTHUR'S MOST RECENT § 1983 ACTION CHALLENGING ALABAMA'S METHOD OF EXECUTION WAS PROPER BECAUSE THAT ACTION IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

Although not ruled upon by the district court, its dismissal of Arthur's current § 1983 action was proper because it was filed over three years after the expiration of the applicable statute of limitations. See Hempel v. United States, 14 F.3d 572, 576 (11th Cir. 1994) ("The district court's judgment may be affirmed if it is correct for any reason."). Therefore, this Court should affirm the district court's decision.

The Supreme Court has held that § 1983 claims are best characterized as tort actions for personal injury and that federal courts must borrow the statute of

limitations governing personal injury actions from the State in which the § 1983 actions was brought. Wilson v. Garcia, 471 U.S. 261, 275-76, 105 S. Ct. 1938 (1985). In Alabama, the general statute of limitations for personal injury actions is two years. Ala. Code § 6-2-38; Jones v. Preuit & Mauldin, 876 F.2d 1480, 1483 (11th Cir. 1989) (en banc). Therefore, in order to have his claim heard, Arthur was required to bring the claim within two years from the date the limitations period accrued.

In McNair v. Allen, this Court, reviewing an identical challenge in the same procedural posture, held that “a method of execution claim accrues on the later of the date on which state review [on direct appeal] is complete, or the date on which the capital litigant becomes subject to a new or substantially changed execution protocol.” No. 08-10100, 2008 WL 227945, at *4 (11th Cir. Jan. 29, 2008); see also Cooney v. Strickland, 479 F.3d 412, 422 (6th Cir. 2007) (holding that 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). Like Callahan, Arthur’s state court proceedings concluded prior to the State’s adoption of lethal injection as its method of execution. Ex parte Arthur, 711 So. 2d 1097 (Ala. 1997). Thus, under this Court’s holding in McNair, the statute of limitations for filing his lethal-injection challenge accrued on July 31, 2002, when Arthur

chose to be executed by lethal injection and expired on “July 31, 2004-more than [three] years before his complaint was filed.” McNair, 2008 WL 227945, at *8; See Ala. Code § 15-18-82.1 (2006 Cumulative Supplement). Consequently, Arthur’s current lethal-injection challenge was properly dismissed because it is barred by the applicable statute of limitations.

Any argument that the statute of limitations on Arthur’s lethal-injection challenge did not accrue on July 31, 2007 because Alabama recently revised its execution protocol should be rejected. As stated above, the McNair Court reviewed a procedurally indistinguishable lethal-injection challenge and was well aware of the fact that the State had recently added a safeguard to its lethal injection protocol. Id. at 3. With full knowledge of the State’s recent revision, the McNair court found that the “revised lethal injection protocol . . . differ[s] only minimally from prior procedures,” and that, despite the minimal revision, the statute of limitations applicable to Callahan’s lethal-injection challenge expired on July 31, 2004. Id. at 3-8. Thus, under McNair, Alabama’s recent revision to its lethal injection protocol does not reset the statute of limitations, and Arthur’s current action is barred.

“[T]here is no doubt [Arthur] was free to challenge the method of his execution beginning July 31, 2002, by which time the facts which would support a cause of action should have been apparent to any person with a reasonably prudent


regard for his rights.” Id. at 8. Accordingly, the applicable statute of limitations expired July 31, 2004, over three years before Arthur filed his current § 1983 action. As such, this Court should affirm the district court’s dismissal.

CONCLUSION

For the above-mentioned reasons, this Court should affirm the decision of the district court dismissing Arthur’s § 1983 action.

Respectfully submitted,

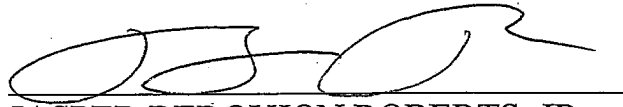
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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,970 words, including all “headings, footnotes, and quotations,” and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).



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