

1. The federal courts that have reviewed Arthur's request for DNA testing have determined that the results of such testing would not demonstrate his innocence. In 2001, Arthur requested DNA testing during federal habeas proceedings. Arthur v. King, et al., 500 F.3d 1335, 1338 (11th Cir. 2007) (citing Arthur v. Haley, No. CV-01-N-0983-S (N.D. Ala. Jun. 5, 2003)). Arthur "sought the clothing that Troy Wicker [the victim] was wearing on the day of the murder, the rape kit created that same day, the hair samples and wig recovered from Judy Wicker's car, the hair sample and vacuum sweepings recovered from the Wickers' residence, spent cartridge casings and a pillowcase found near Troy Wicker's body, the bullet recovered from Troy Wicker, and photographs of the crime scene." Id. The federal district court denied Arthur's request, "finding that it would, at best, impeach Judy Wicker's testimony but would not establish Arthur's actual innocence claim." Id. The Eleventh Circuit affirmed this ruling, adding that Arthur was not diligent in his request for DNA testing, as evidenced by his not making such request "during his three trials or during state court postconviction proceedings[.]" Id. Arthur again requested DNA testing of these items in a

federal lawsuit filed under 42 U.S.C. § 1983 but the district court and the Eleventh Circuit again determined that any test results would not demonstrate Arthur's innocence. Id., 500 F.3d at 1341 n.4. Thus, Arthur's contention that DNA testing would demonstrate his factual innocence has been rejected by every court that has addressed it and should not serve as a basis for further delay in the administration of his sentence.

2. Arthur next contends that the United States Supreme Court's recent decision in Baze has no application to Alabama's execution protocol. Arthur's argument ignores the fact that Alabama, like all of the States that use lethal injection, has a three-drug sequence to induce death: (1) a rapid-acting anesthetic (sodium pentothal); (2) a drug inducing muscle paralysis (pancuronium bromide); and (3) a drug administered to stop the heart (potassium chloride). Arthur v. Allen, No. 07-0722-WS, 2007 WL 4105113, *1 (Nov. 15, 2007). In Baze, the Supreme Court definitively held that Kentucky's lethal injection protocol does not violate the Eighth Amendment's prohibition of cruel and unusual punishment. Baze, 128 S.Ct. at 1532-38.

The United States Supreme Court, in ruling that "a lethal injection protocol substantially similar to the protocol we uphold today" complies with the Constitution, removed any question as to the constitutionality of Alabama's lethal injection protocol. Baze, 128 S.Ct. at 1537. It is indeed possible that all nine United States Supreme Court Justices would hold that Alabama's execution protocol is constitutional. Justice Ginsburg's dissent in Baze emphasized that Alabama, among several other States, has adopted the safeguard of assessing consciousness after the anesthesia is injected. Baze, 128 S.Ct. at 1571 (quoting that portion of Alabama's execution protocol). The dissent noted that the lack of a consciousness assessment check in Kentucky's lethal injection was a constitutional deficiency. Id. Thus, Arthur is wrong when he contends that Baze has no application to Alabama's execution protocol.

3. Finally, Arthur contends that an execution should not be set until his second § 1983 lethal-injection lawsuit is "fully and finally adjudicated." *Arthur's memorandum at p. 2.* Arthur filed his second § 1983 lethal-injection

challenge "[u]sing the identical language employed in his first lawsuit." Arthur, 2007 WL 4105113 *2. Although Arthur mentioned the recently adopted consciousness assessment check added to Alabama's protocol, Arthur did not "allege that the modifications to the protocol cause or exacerbate an Eighth Amendment violation." Id. The federal district court dismissed Arthur's second-filed lethal-injection lawsuit, see id., and Arthur appealed that action to the Eleventh Circuit where the appeal remains pending.

There is no legitimate reason to delay setting Arthur's execution until the appeal from his second-filed lethal-injection ends. Indeed, Arthur's litigious history indicates that he may possibly file additional federal lawsuits, thus the pendency of federal litigation should not deter this Court from setting Arthur's execution. Arthur's appeals from his capital murder conviction ended several years ago, thus the time is past due for his execution to be set. Arthur, 500 F.3d at 1337-38 (summarizing background history of Arthur's appeals).