No. 08-10100

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: RICHARD ALLEN,
Commissioner, Alabama Department of Corrections, et al.,
Defendants/Appellants

v.

JAMES CALLAHAN,
Plaintiff/Appellee.

On Appeal from the United States District Court
for the Middle District of Alabama
Civil Action 2:06-cv-695-WKW/ 2:06-cv-919-WKW

APPELLEE'S BRIEF IN OPPOSITION

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January 18, 2008

EXECUTION SET FOR JANUARY 31, 2008

In Re: Richard Allen
(*Callahan v. Allen, et al.*)

No. 08-10100

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 the Alabama Department of Corrections, Defendant/Appellant;
2. James Callahan, Plaintiff/Appellee;
3. Stephanie Cohen, Counsel for Plaintiff/Appellee;
4. Charles S. Coody, United States Magistrate Judge;
5. J. Clayton Crenshaw, Counsel for Defendant/Appellant;
6. Grantt Culliver, Warden of Holman Correctional Facility, Defendant/Appellant;
7. James W. Davis, Counsel for Defendant/Appellant;
8. Vincent R. FitzPatrick, Jr., Counsel for Plaintiff/Appellee;
9. Troy King, Alabama Attorney General;
10. Corey Maze, Counsel for Defendant/Appellant;
11. Heather K. McDevitt, Counsel for Plaintiff/Appellee;
12. Willie McNair, Co-Plaintiff;

13. Randall S. Susskind, Counsel for Plaintiff/Appellee;

14. Cathleen I. Price, Counsel for Plaintiff/Appellee;

15. Jasper B. Roberts, Jr., Counsel for Defendants/Appellant; and

16. W. Keith Watkins, United States District Judge.

/s Vincent R. FitzPatrick, Jr.
Vincent R. FitzPatrick, Jr.
Counsel for Appellee James Callahan

STATEMENT REGARDING ORAL ARGUMENT

Appellee James Callahan respectfully requests the opportunity to present oral argument pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Eleventh Circuit Rule 34-3(c). This is a capital case. Mr. Callahan believes that oral argument would assist the Court in resolving this appeal.

STATEMENT OF JURISDICTION

The Appellants have stated accurately the basis for jurisdiction.

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STATEMENT OF THE ISSUES

This appeal arises from a December 14, 2007 Memorandum Opinion and Order by the United States District Court for the Middle District of Alabama, which granted Appellee James Callahan's motion for a stay (the "Stay Motion") of his execution scheduled for January 31, 2008, pending a trial on the merits of his lawsuit under 42 U.S.C. § 1983 challenging the constitutionality of Alabama's method of execution by lethal injection as violative of the Eighth Amendment's prohibition of cruel and unusual punishment (the "Order")[1]. The appeal presents the following questions:

1. Did the District Court (Watkins, J.) abuse its discretion by granting the Stay Motion where it concluded, after "a careful review of the evidence," that the case was "unusual in the stay-of-execution context" and "neither speculative nor untimely"?
2. Did the District Court abuse its discretion by granting the Stay Motion and rejecting the Appellants' (often, the "State" or the "Defendants") "timeliness" argument where the stay became necessary solely because at a pre-trial conference on the eve of the scheduled October 3, 2007 trial (when Mr. Callahan was ready for trial *and when no*

[1] *McNair v. Allen et al.*, Nos. 2:06-cv-695-WKW, 2:06-cv-919-WKW, 2007 WL 4463489, Mem. Op. and Order (M.D.Ala. Dec. 14, 2007).

execution date had been set) the State announced that it would be changing its Execution Procedures in an undefined way, thus necessitating an adjournment of the trial by Judge Watkins?

3. Did Judge Watkins abuse his discretion by finding a substantial likelihood of success on the merits where it found, after "a careful review of the evidence," including the depositions of those involved in Alabama executions, expert reports and expert deposition testimony, that "there is substantial but disputed evidence that Alabama's protocol contains constitutional deficiencies in the monitoring of the procedure, the training of certain participants, and the use of potentially unconstitutionally painful drugs"?

STATEMENT OF THE CASE

In a thoughtful opinion below, Judge Watkins, who for the first time in the lethal injection litigation in this Court had before him a full record adduced in discovery, carefully considered the law and facts and correctly held that Mr. Callahan had met the requirements for a stay of execution. Such evidence included deposition testimony of both sides' expert witnesses and their expert reports, deposition testimony from Warden Grantt Culliver (at times, the "Warden") who carries out all lethal injection executions in Alabama, deposition testimony from the prison corrections officers who, among other duties, mix the drugs and prepare

the syringes used in the executions, deposition testimony from the EMT technicians who are responsible for setting up the IV lines, and deposition testimony of the nurse who trained the prison personnel, including Warden Culliver. The Court also had substantial documentary evidence, including autopsy reports of inmates executed by lethal injection in Alabama, highly detailed execution logs describing the executions that have taken place, and photos of the execution chamber and devices.

It is apparent that Judge Watkins exhaustively reviewed this evidence and rendered a carefully reasoned (and correct) decision. Of course, he did not finally decide the case on the merits. There remain factual disputes; there is a trial to be had. But that trial and final decision, and those factual determinations, are for the future. Mr. Callahan did not have to prove his case now. He needed only meet the requirements for a stay, such as a *prima facie* showing of substantial *likelihood* (not a guarantee) of success on the merits. Judge Watkins found as a factual matter that Mr. Callahan made such a showing by presenting the foregoing evidence. There is no basis for claiming that Judge Watkins abused his discretion in doing so. To the contrary, his findings are fully supported by the evidence.

Perhaps – though it is most unlikely – on a full trial record the State's evidence and arguments ultimately might carry the day, and Mr. Callahan will not prevail. But that is not what is at issue on this appeal, despite the State's attempt to

have this Court in effect conduct a trial on the merits and substitute its factual findings for those of the trial judge. That is not this Court's function. This Court cannot have the command of the evidence that Judge Watkins has. This Court's function on this appeal is to determine if Judge Watkins abused his discretion in granting a stay so that a full trial – delayed solely because of the State's action – could be held before Alabama executes Mr. Callahan. In fact, Judge Watkins did not abuse his discretion, and this Court should affirm his decision below.

In its attempt to get this Court to act as a trier of fact on this appeal, the State, in its Opening Brief (the "State's Brief"), distorts the relevant facts. First – and distinguishing the case from all the cases relied on by Defendants (and indeed most cases of this sort that come before this Court) – in this case, discovery had been completed, and a trial was scheduled for October 3, 2007, at a time when no execution date had been set. Callahan was ready, willing and able to go to trial at that time and wished to do so. The Court had set aside time and made all necessary arrangements. Because no execution date had been set, had the trial proceeded as scheduled no stay would have been necessary. The trial, estimated to last three days, would have ended months ago, and, if there were to be one, an appeal could already be pending in this Court.

In its Brief, the State ignored all this. It relies on cases that differ on their individual facts – facts entirely dissimilar to those present here. Moreover, the

United States Supreme Court has signaled that the State's absolute argument is simply wrong by granting all stays requested post Baze (except one decided on the same day as Baze), even though some of those cases involved dilatoriness far greater than anything that can be ascribed to Mr. Callahan.

Of course, the scheduled October trial here did not take place, but that was through no doing of Mr. Callahan. At a pre-trial conference in Judge Watkins' chambers on September 27, just 8 days before the trial was to begin, counsel for the State informed Judge Watkins and the Plaintiffs' counsel that the State was going to make changes to the Execution Procedures to be used on Mr. Callahan and others. The entirety of the actual changes were not specified by the State (despite prodding from the Court and Plaintiffs' counsel) and would not be for several weeks (ultimately being published on October 26).

As a result, the Court concluded that it had to adjourn the trial, because Judge Watkins did not know what Execution Procedures would actually be used when the State executed Mr. Callahan. He simply could not know what he should be trying.

Thereafter, an execution date was set for Mr. Callahan. When the changes in the Execution Procedures were announced, it became apparent that a stay likely would be needed for the trial to take place. (It also became apparent that the Supreme Court of the United States was staying all executions by lethal injection

until after its decision on the lethal injection case pending before it, *Baze v. Rees* (*cert. granted* at _____ U.S. ____, 128 S. Ct. 34 (2007)). (*See* below.) The trial to be held before Judge Watkins obviously could be impacted by the decision in *Baze*. So, after the change to the Procedures was announced and an execution date set, Judge Watkins held a telephonic conference with the parties and informed them that he was indefinitely adjourning the trial date. Plaintiffs of course understood the Court's considerations, but they did not request the adjournment.

These factors alone change completely the usual debate in these cases about timeliness, etc., and make this case unique and worthy of the stay, considering also the powerful evidentiary showing by Mr. Callahan of probable success on the merits. (*See* below.) Moreover, upholding the stay under these circumstances does not create precedent for cases not involving these unique facts.

The State's Brief is also quite misleading in its repeated assertions that the record in this case establishes that there have been no "mishaps" in Alabama executions (*see, e.g.,* State's Brief at 34-36). That is not true. Instead, the evidence shows that because of the use of a paralyzing drug on condemned inmates (pancuronium) and the failure to adequately monitor inmates for levels of consciousness, "mishaps," meaning severe suffering by executed inmates, in fact may have occurred, but the State does not know one way or the other and admits as much. The entire testimony of Warden Culliver, who has been and continues to be

in charge of every execution by lethal injection in Alabama was to the effect that he does not know whether the inmates he has executed endured suffering and that they may have done so without his knowledge given the lethal injection practices in Alabama. (Deposition Testimony of Grantt Culliver, taken on March 27, 2007 ("Culliver Dep."), Doc. 82, Tab A, pp. 36:4-21, 44:22-45:5).

I. PROCEDURAL HISTORY

In light of the District Court's finding that Mr. Callahan did *not* unreasonably delay in bringing suit (Summ. J. Op., Doc. 146, at 12, 4; Order, Doc. 154, at 4), the procedural history leading up to the stay is highly relevant. Yet that history is largely untold and thus misleadingly described by the State. *See* State's Brief at 2-3. But the District Court aptly summarized the highlights:

> The trial in this matter was scheduled to begin on October 3, 2007. Eight days before the trial date, on September 25, 2007, defense counsel announced that the defendants would be making changes to the State's execution protocol – the constitutionality of which comprises the subject matter of this litigation. On the same date, the United States Supreme Court granted certiorari in the *Baze* case. *Baze v. Rees*, ___ U.S. ___, 128 S. Ct. 34 (2007).[2] On September 27, 2007, Governor Bob Riley granted a forty-five day reprieve to another condemned prisoner "to allow the Alabama Department of Corrections sufficient time to make modifications to its lethal injection protocol." (Doc. # 124-2.)
>
> The parties were ready for trial, but on September 28, 2007, the court was compelled to continue the case. (Doc. # 130.) A new trial date

[2] The questions presented in *Baze* include the correct standard by which the constitutionality of methods of execution should be adjudged and whether Kentucky's three-drug protocol, which is similar to Alabama's lethal injection protocol at issue here, violates that standard.

> was tentatively set because it was not known when the State would complete the modification to its protocol, whether the plaintiffs would agree that the modification alleviated any constitutional violation, and, frankly, what effect the grant of certiorari in *Baze* would or should have on pending challenges to lethal injection.
>
> On October 26, 2007, the defendants filed a revised lethal injection protocol. Five days later, on October 31, 2007, the Alabama Supreme Court set Callahan's execution date for January 31, 2008. After holding a status conference with the parties, the trial was continued generally in anticipation of additional limited discovery and the filing of the instant motion.

(Order, Doc. 154, at 1-3.)

II. STATEMENT OF FACTS

A. Summary of Mr. Callahan's Claim

Mr. Callahan's claim concerning the unconstitutionality of Alabama's Execution Procedures can be summarized briefly. Pancuronium bromide and potassium chloride, if administered to a conscious person in the amounts required under Alabama's Execution Procedures, will cause that person extreme pain and suffering, indeed agony. The State (and its expert) admits that and admits that it is therefore crucial that the inmate be properly anesthetized before pancuronium bromide or potassium chloride is administered. (Pls.' Mem. of Law in Opp'n to Defs.' Mot. for Summ. J., Doc. 89, at 12). As the record below shows, because of the use of untrained personnel and the failure to adequately monitor the inmate's level of consciousness, coupled with the set up of the "execution chamber," there is, however, a substantial and unnecessary risk that inmates will not be sufficiently

anesthetized before those drugs are administered. That is not changed by the addition in the new Procedures of a cursory, amateurish, consciousness check. (*See* below).

B. Summary of the Record Below

As mentioned above, in ruling on the Stay Motion, Judge Watkins had the benefit of substantial evidence adduced in discovery that included deposition testimony of both sides' expert witnesses and their expert reports, deposition testimony from the Warden who carries out all lethal injections in Alabama, deposition testimony from the prison and EMT personnel who participate in the executions, and deposition testimony from the nurse who trained the Warden and prison personnel. Judge Watkins also had substantial documentary evidence, such as autopsy reports, execution logs, and photos of the execution chamber and equipment. To avoid undue repetition, salient highlights of the evidentiary record are summarized at pages 22-27 and 31-32 below.

III. STANDARD OF REVIEW AND THE LEGAL STANDARD

This Court reviews a district court's grant of preliminary injunctive relief under an abuse of discretion standard. "This scope of review will lead to reversal only if the district court applies an incorrect legal standard, or applies improper procedures, or relies on clearly erroneous factfinding, or if it reaches a conclusion that is clearly unreasonable or incorrect." *Siebert v. Allen*, 506 F.3d 1047, n.2

(11th Cir. 2007) (internal citations and quotations omitted). None of these factors is present here.

It is undisputed on this appeal that the District Court correctly stated the factors to be analyzed in deciding whether to grant a stay of execution:

> (1) whether there is a substantial likelihood of success on the merits; (2) whether the requested action is necessary to prevent irreparable injury; (3) whether the threatened injury outweighs the harm the stay or injunction would inflict upon the non-movant; and (4) whether the requested action would serve the public interest.

(Order, Doc. 154, at 3, *citing Rutherford v. McDonough*, 466 F.3d 970, 979 (11th Cir. 2006) (Rutherford II) (Wilson, J., dissenting); *Hill v. McDonough*, __ U.S. __, 126 S. Ct. 2096, 2104 (2006); Fed. R. Civ. P. 65 (internal quotations omitted)). *See also* State's Brief at 9-10. It also is undisputed that in considering a stay, the Court below was required to consider, and did consider, whether to "apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Hill*, 126 S. Ct. at 2104 (quoting *Nelson v. Campbell*, 541 U.S. 637, 650, 124 S. Ct. 2117, 2126 (2004)). (*See also* Order, Doc. 154 at 4, n.3). So there is no basis for claiming legal error by the District Court, much less for finding an abuse of discretion.

SUMMARY OF THE ARGUMENT

According to the State, the District Court abused its discretion in finding Mr. Callahan met the standard for a stay because the record allegedly shows that Mr. Callahan's claim is based on "speculation relating to possible mishaps." State's Brief at 36. But the Court below, after examining the evidence, found to the contrary. In effect, then, the State asks this Court of Appeals to substitute its factual findings for the findings of a trial judge who exhaustively examined the evidence.

This argument is baseless. The fact that the District Court's analysis here was careful and deliberate is best exemplified by the fact that Judge Watkins when faced with a record lacking the type of evidence and expert analysis that was developed below, held in *Grayson* that the condemned inmates' lethal injection claim was speculative. *Grayson v. Allen*, 499 F. Supp. 2s 1228, 1244 (M.D. Ala. 2007). But unlike *Grayson*, here Mr. Callahan was able to present an extensive evidentiary record that included documents, deposition testimony of all those involved in Alabama executions, expert reports and expert deposition testimony. That record, not before the District Court in *Grayson*, convinced the Court below that the claims are *not* speculative and that there are meaningful issues of fact that need to be tried. The evidentiary record in this case fully supports that conclusion, and the Court below has unparalleled knowledge of the law and facts at issue here.

The State also argues that Judge Watkins abused his discretion and clearly erred in finding a substantial likelihood of success on the merits because he applied the wrong Eighth Amendment standard. That is not true. The correct standard in an execution case is objective, not subjective, contrary to the State's position. (*See* discussion below.)

Finally, the State again raises its statute of limitations argument, even though the Court below has at least two times held that it is wrong. Summ. J. Op., Doc. 146, at 9-10; *see also Grayson v. Allen*, 2007 WL 1491009 at *5 n. 9 (M.D. Ala. May 21, 2007). But the statute of limitations issue simply is not before this Court on this appeal. This is an appeal based on 1292(a) and no other ground. The District Court considered the State's statute of limitations arguments in denying the State's *summary judgment motion*. It did not do so in connection with the motion for a stay of execution upon which this appeal is based. Indeed, the words "statute of limitations" do not even appear in the Order, and the State did not raise the argument below. So the issue is not before this Court on this appeal. There is no "final order" on the issue of the statute of limitations, and this Court does not have jurisdiction over a *de facto* interlocutory appeal from a denial of summary judgment. The statute of limitations argument, apart from simply being wrong, is not properly raised now.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THERE IS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

The crux of the State's appeal is that the District Court abused its discretion and clearly erred in finding a substantial likelihood of success on the merits. But there is no basis for such a ruling here. The District Court's finding is supported, *inter alia*, by:

- the extensive evidence in this case, including the deposition testimony of all those who participate in Alabama executions, expert reports and, perhaps most importantly, expert deposition testimony including that of the State's own expert, Dr. Dershwitz;
- the State's modification of its Execution Procedures (although minimally and inadequately) to attempt to address its critical failure to monitor the inmate's consciousness and thereby avoid unnecessary and severe pain; and
- recent findings by other courts that similar lethal injection protocols are unconstitutional.

A. The District Court Correctly Applied the Threshold Standard

The State asserts clear error because Mr. Callahan allegedly did not "*establish* an Eighth Amendment Claim". State's Brief at 11 (emphasis added). The State misstates Mr. Callahan's threshold burden on a motion to stay.

Satisfaction of the "substantial likelihood of success" factor, which has been cast in terms of both a "significant possibility"[3] and a "likelihood" or "substantial likelihood" of success on the merits,[4] does not require that the District Court find that the evidence guarantees a final decision for Mr. Callahan. *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) ("To support a preliminary injunction, a district court need not find that the evidence positively guarantees a final verdict in plaintiff's favor."); *J.E. Hanger, Inc. v. Scussel*, 937 F. Supp. 1546, 1551 (M.D. Ala. 1996) (same); *Home Oil Co. v. Sam's East, Inc.*, 199 F. Supp. 2d 1236, 1239 (M.D. Ala. 2002) ("at the preliminary-injunction stage, the question is not whether the plaintiff will prevail in the litigation – rather, the question is whether it is substantially likely that the plaintiff will prevail"); *Gartrell v. Knight*, 546 F. Supp. 449, 455 (N.D. Ala. 1982) ("The party seeking a preliminary injunction need not show with absolute certainty that he will prevail on the merits."). "In determining whether the plaintiff should prevail, the court balances the evidence proffered for each element. Hence, a heavier showing on one or more of the criteria will reduce the weight of proof required for the other

[3] *Hill*, 126 S. Ct. at 2104.

[4] The Eleventh Circuit has recognized that qualifiers such as "substantial" do not alter the quantum of proof necessary to satisfy this requirement. *Shatel Corp. v. Mao Ta Lumber & Yacht Corp.*, 697 F.2d 1352, 1356 n.2 (11th Cir. 1983) (finding the district court's failure to use the word "substantial" in finding a "likelihood of success on the merits" below to be harmless error, stating that "'substantial' means real, valuable, material, or of substance. Black's Law Dictionary 1280 (rev. 5th ed. 1979). In our opinion the word 'substantial' does not add to the quantum of proof required to show a likelihood of success on the merits.") (citation omitted).

factors." *Mark Dunning Indus., Inc. v. Perry*, 890 F. Supp. 1504, 1510 (M.D. Ala. 1995) (granting a preliminary injunction, finding that the plaintiff had shown a probability of success on the merits); *see also Gartrell*, 546 F. Supp. at 455 ("Moreover, the relative degree of likelihood of success is not alone determinative. 'Rather it must be considered and balanced with the comparative injuries of the parties.'"). (*See also* Order, Doc. 154, at 6.)

To show a substantial likelihood of success on the merits, plaintiffs need only establish a prima facie case justifying a more deliberate investigation into the merits of their claims. *Gartrell*, 546 F. Supp. at 455 (ordering an injunction where the plaintiffs had "established a prima facie case justifying a more deliberate investigation into the merits of his claim"); *Am. Fed'n of Gov't Employees v. Callaway*, 398 F. Supp. 176, 196 (N.D. Ala. 1975) (granting a preliminary injunction, stating that '"all courts agree that plaintiff must present a prima facie case but need not show that he is certain to win'" and concluding that "plaintiffs have established a prima facie case justifying a more deliberate investigation into the merits of their claims") (quoting Wright & Miller § 2948 at 452 [now § 2948.3])). That is what happened here.

B. The District Court Employed the Correct Eighth Amendment Standard

The State's second line of attack on the District Court's determination that Mr. Callahan established a substantial likelihood of success on the merits is that

the District Court "erroneously ignored binding Circuit precedent establishing the standard for an Eighth Amendment violation." State's Brief at 11. In fact, the District Court concluded that Mr. Callahan met his burden of persuasion under the "unnecessary risk of pain standard' referred to, but not analyzed or expressly adopted [by this Court] in *Schwab*." (*See* Order, Doc. 154, at 7, citing *Schwab v. Sec'y, Dept. of Corr*., 507 F.3d 1297, 1299 (11th Cir. 2007)). Thus, far from ignoring relevant Eleventh Circuit precedent, the District Court expressly relied upon it.

Moreover, contrary to the State's position, it is clear that when a method of execution is at issue, the applicable legal standard is objective and has no subjective element. While the standard has been articulated as whether the method presents a risk of "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925 (1976), that formulation, including the use of the word "wanton," cannot be read to impose any subjective element.

Indeed, as the case law has developed, it indicates that if the risk is significant and unnecessary, the standard is violated. No subjective element is required, and a better way of phrasing it is articulated by one of the questions presented on the *Baze* petition: "Does the Eighth Amendment . . . prohibit means for carrying out a method of execution that creates an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?"

Petition for Writ of Certiorari at ii, *Baze v. Rees*, __ S. Ct. __, 2007 WL 2781088 (No. 07-5439) (July 11, 2007). Without completely parsing what "unnecessary" means, any severe pain (or risk of such pain) that can be avoided by reasonable care or readily-available, non-painful alternatives is unnecessary and in violation of the Eighth Amendment. Here experts for both sides testified that a one drug protocol could be used and would substantially reduce the risks at issue in three-drug cases. *See* Deposition Testimony of Dr. Mark Dershwitz, M.D., taken on September 21, 2007, Doc. 161 at 63:3-5 ("Dershwitz. Dep."); Deposition Testimony of Dr. Mark J.S. Heath, M.D., taken on September 23, 2007, Doc. 160 at 19:18-20:6 ("Heath Dep.").

This approach recently was adopted in *Harbison*, in which Judge Trauger, in finding that Tennessee's three-drug protocol violated the Eighth Amendment, stated "where the conduct at issue – such as a lethal injection protocol – does purport to be an official penalty, there appears to be no rationale for requiring a plaintiff to demonstrate an additional culpable mental state on behalf of any individual state actors." *Harbison v. Little*, 511 F. Supp. 2d 872, 874 (M.D. Tenn. 2007). The objective component is satisfied if the risk is great enough and the risk is inherent to the written protocol itself. *Id.* at 881.

The State's position that the relevant Eighth Amendment jurisprudence is so-called "conditions of confinement" cases is wrong. State's Brief at 14-19.

There may be good reasons to inquire as to intent when, in essence, the State's administration of a prison, with all the details and complexities that involves, is the issue. Not so when dealing with whether a well-defined official execution process constitutes cruel and unusual punishment because of the unnecessary risks of great agony that it inherently involves.

To adopt the State's "deliberate indifference" standard would be to inject the subjective state of mind of various state officials into the unifying and *objective* standard of "evolving standards of decency." *See Atkins v. Virginia*, 536 U.S. 304, 311-12, 122 S.Ct. 2242, 2247 (2002) (stating "'[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of maturing society'") (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598 (1958)). Consider the absurd results possible otherwise: if, in a given state, officials truly believed that electrocution caused minimal suffering, would that mean that electrocution did not violate the Eighth Amendment when carried out in that state but did when carried out in other states where officials had concluded that electrocution caused avoidable agony but were deliberately indifferent to that fact? Would the constitutionality of a method of execution vary from state to state depending on the thought processes of the persons involved in a given state? This obviously is untenable.

Rather, it is well-established that a review of the proportionality of a punishment "under those evolving standards should be informed by 'objective factors to the maximum possible extent . . . . '" *Atkins*, 536 U.S. at 312, 122 S.Ct. at 2242 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1000, 111 S. Ct. 2680, 2704 (1991) and quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75, 100 S. Ct. 1133, 1139 (1980)). *See also Taylor v. Crawford*, 487 F.3d 1072, 1081 (8th Cir. 2007) ("The propriety of this proposed protocol . . . depends upon whether the protocol as written would inflict unnecessary pain, *aside from any consideration of specific intent on the part of a particular state official*.") (emphasis added).

The State points to no Supreme Court or Eleventh Circuit authority establishing that Plaintiffs must prove deliberate indifference to succeed on an Eighth Amendment method of execution challenge; no such authority exists. Despite the impression that the State attempts to create, in neither *Nelson* nor *Hill* did the Supreme Court state (or intimate) that the elements of a claim challenging a method of execution as cruel and unusual in violation of the Eighth Amendment include proof of deliberate indifference, or any other intent requirement. The words "deliberate indifference" are not even mentioned in *Hill*.[5] *Hill v.*

[5] The words "deliberate indifference" are mentioned in *Nelson* because the plaintiff specifically alleged deliberate indifference, but the Supreme Court did not consider whether deliberate indifference is an element of an Eighth Amendment method of execution challenge. *Nelson*, 541 U.S. at 641.

McDonough, __ U.S. __, 126 S. Ct. 2096 (2006); *Nelson v. Campbell*, 541 U.S. 637 124 S. Ct. 2117 (2004).

Finally, given the readily available single-drug method (the single drug being a massive dose of thiopental) for eliminating or severely reducing the real risks of severe suffering present here, even if there were a subjective standard it would be met by the State's failure to adopt the alternative. While Mr. Callahan disputes that deliberate indifference is a necessary element of his claim, the facts also show deliberate indifference by the State to such risk because the State knows the risk well (and admits that) but refuses to change its Execution Procedures to avoid it when it could easily do so. (The changes as to monitoring of consciousness that the State did recently implement are minimal and inadequate.)

C. Callahan Has Shown A Substantial Likelihood of Success on the Merits

The record below is clear that Mr. Callahan has shown a substantial likelihood of success on the merits. The facts clearly demonstrate that Alabama's method of execution by lethal injection presents an objectively impermissible risk of unnecessary infliction of pain.

1. Mr. Callahan's Claim Survived the State's Summary Judgment Motion

The denial of the State's motion for summary judgment further supports the appropriateness of the stay because it further demonstrates the District Court's

knowledge of the record and correct reasoning. The Court below declared that this case "presents vitally important issues" and that it should "proceed to a full trial." Summ. J. Op., Doc. 146 at 16. The Court also identified several disputed issues of material fact, including:

> the sufficiency of monitoring of the inmate and the intravenous ("IV") drug delivery system during the execution procedure, and the present nature and extent of such monitoring; whether the three-drug protocol, in light of the existence of alternatives, is constitutional; and whether constitutional considerations require better screening, training, and credentialing of the members of the execution team.

Id. As the Court below concluded, while the "existence of genuine issues of material fact does not guarantee ultimate success on the merits . . . surviving summary judgment is confirmation that there is indeed a likelihood of success on the merits and that Callahan's claims are not merely questionable." (Order, Doc. 154, at 7.) While it appears that the State is making a veiled attack at the District Court's findings denying summary judgment (findings that are not before the Court here because part of an interlocutory order from which the State has not appealed from); *see also* discussion in Section 4 below with respect to why the State's statute of limitation arguments are not properly raised on the appeal), the State cites no evidence or authority establishing that this finding was clear error. To the contrary, as discussed in the following section, there is ample evidence supporting Judge Watkins' findings and thus no basis for this Court to find an abuse of discretion.

2. Mr. Callahan's Claim Is Not Speculative

The State contends that the District Court erred in finding substantial likelihood of success on the merits because Mr. Callahan's claim allegedly is "based entirely on speculation that mishaps may occur during his execution." State's Brief at 11. That is the State's mantra, and it is sticking to it no matter what the evidence shows. But this argument does not hold water. Judge Watkins' determination that Mr. Callahan's claims are not speculative was made after a "careful review" of the extensive evidence produced in discovery in this action which amply supports Judge Watkins' determination that there is a substantial likelihood of success on Mr. Callahan's claims. Among other things, the evidence showed that because of the use of untrained personnel and the failure to adequately monitor the inmate's level of consciousness, coupled with the set up of the "execution chamber," there is a substantial and unnecessary risk that inmates will not be sufficiently anesthetized before those drugs are administered. Furthermore, the State knows of this risk but refuses to change the Execution Procedures to avoid it when it could easily do so. We summarize here salient highlights of the evidentiary record.

According to testimony by both sides' experts, pancuronium bromide is unnecessary to cause the death of an inmate. (Dershwitz Dep., Doc. 161, at 63:9-15; Heath Dep., Doc. 160, at 19:23-20:10). The State's expert witness, Dr.

Dershwitz, also testified that the State's use of pancuronium bromide would prevent an inmate from signaling that he was in pain during the execution process. (Dershwitz Dep., Doc. 161, at 71:7-12). Moreover, there are other, painless drugs that could cause an inmate's death without creating a risk of pain. (Heath Decl., Doc. 91, Ex. 26, at ¶¶ 24, 25; *see also* Dershwitz Decl., Doc. 91, Ex. 27, at ¶ 12). Both sides' experts testified that a large enough dose of thiopental alone (a one-drug protocol) would not only reduce the risk of inadequate anesthetic depth but would kill an inmate without the need for the other two (painful) drugs used in the current execution protocol. (Dershwitz Dep., Doc. 161, at 63:9-15; Heath Dep., Doc. 160, at 19:17-20:8). The State argues only that no other drug acts as fast as potassium chloride, but even that has scant support in the record. (Dershwitz Decl., Doc. 91, Ex. 27, at ¶ 31).

The need for adequate anesthetic depth prior to the injection of excruciatingly painful chemicals into an inmate is uncontested. (Dershwitz Dep., Doc. 161, at 23:3-10; Heath Dep., Doc. 160, at 15:16-22). The only assessment of anesthetic depth prior to the injection of the last two drugs now is a cursory consciousness check (never before actually employed in an Alabama execution to date, as it is part of the State's October revisions to the Execution Procedures), which, as discussed with reference to the evidentiary record in Section I(c)(3) below, does not come close to ensuring that the condemned inmate is adequately

sedated prior to and during administration of the second and third drugs. (Mr. Callahan has not yet had discovery on the changes.)

Dr. Dershwitz also admitted that infiltration (which would affect the absorption of the injected chemicals) can occur after drugs are injected into the inmate. (Dershwitz Dep., Doc. 161, at 41:18-24). However, in Alabama an inmate is not monitored for infiltration because the EMTs tasked with establishing the IV lines leave the execution chamber immediately after the initial establishment of the IV lines. (Deposition Testimony of EMT-1, taken on August 13, 2007, Doc. 91, Ex. 4, at 38:6-8; Deposition Testimony of EMT-2, taken on August 13, 2007, Doc. 91, Ex. 23, at 21:21-24). The Warden, who actually injects the drugs into the inmate, cannot effectively monitor for infiltration because he stands in a different room than the execution chamber. (Culliver Dep., Doc. 82, Tab A, at 61:22-62:7).

Two Department of Corrections personnel ("DOC-1" and "DOC-2") are tasked with mixing the drugs and placing them in the properly labeled syringes. Defs. Interrogatory Responses, Doc. 91, Ex. 25, Response #5. Deposition testimony revealed that there is a significant risk that there will be a failure to deliver a proper dose of anesthesia to the condemned inmate by virtue of the DOCs' insufficient training and expertise in preparing the chemicals used in execution. The Warden's testimony, as confirmed by the depositions of the DOCs, shows that the DOCs have no medical or pharmaceutical training. Culliver Dep.,

Doc. 82, Tab A, at 69:12-19; DOC-2 Dep., Doc. 91, Ex. 2, at 12:01-08; DOC-1 Dep., Doc. 91, Ex. 5, at 31:12-16. Moreover, minimal training received by the DOCs in how to prepare the chemicals was at the hands of individuals who themselves lack adequate expertise in preparing the chemicals involved in executions. *Indeed, the Registered Nurse ("RN") who trained DOC-2 in the drug preparation process testified as to having no experience in mixing sodium thiopental, and could not even recall which drugs used in the execution process require mixing*. RN Dep., Doc. 91, Ex. 22, at 20:24-21:06, 21:17-22:04. DOC-1's only training has been by his colleague DOC-2. DOC-1 Dep., Doc. 91, Ex. 5, at 8:17-9:08. The anesthesia, sodium thiopental, consists of a liquid and a powder that must be precisely measured and mixed, but the DOCs have virtually no training in these tasks, having worked only briefly with saline solutions and not with the actual drugs involved, except in actual executions. DOC-1 Dep., Doc. 91, Ex. 5, at 22:05-21; DOC-2 Dep., Doc. 91, Ex. 2, at 17:10-14; Culliver Dep., Doc. 81, Tab A, at 94:2-17. The Warden does not in any way observe, supervise or do anything to assure that the DOCs have properly mixed the drugs and labeled the syringes. Culliver Dep., Doc. 82, Tab A, at Ex. 21, 70:14-71:8; DOC-2 Dep., Doc. 82, Tab A, at Ex. 2, 26:19-23 He does not check the appearance of the fluid in the syringes before he injects their contents into the veins of the condemned. Culliver Dep., Doc. 82, Tab A, at Ex. 21, 93:9-25**.**

While the State asserts that executions are carried out by properly trained individuals (*see* State's Brief at 22-23), the evidence is to the contrary and the involvement of those individuals responsible for carrying out executions could change at any time, and has changed in the past. (DOC-2 Dep., Doc. 82, Tab A, at Ex. 2, 36:19-37:08; Defs. Interrogatory Responses, Doc. 82, Tab A, at Ex. 25, Response #5). Moreover, for the most part, the qualifications, training and experience of those currently involved are not required by the Execution Procedures.[6]

[6] We refer the Court to the written Execution Procedures (Doc. 91 Ex. 3), which do not require any of the following:

- any review or screening of the qualifications, experience or training of prospective members of the execution team prior to their selection as team members;
- that the individuals responsible for drug mixing and syringe preparation possess relevant training or expertise necessary for reliable preparation and dispensation of the drugs and syringes;
- that the placement of IV lines be part of the regular occupation or duties of the persons (EMTs) charged with that function;
- that the contract medical personnel on hand to perform a central line procedure if normal venous access is not possible possess relevant training or expertise necessary for reliable peripheral or central line placement;
- that any member of the execution team possess relevant training or expertise necessary for reliable administration of anesthesia; or
- that execution team members possess relevant training or expertise necessary to respond to problems that may arise during the execution (and have arisen in executions carried out elsewhere in similar circumstances; *see, e.g.*, THE GOVERNOR'S COMMISSION ON ADMINISTRATION OF LETHAL INJECTION, FINAL REPORT WITH FINDINGS AND RECOMMENDATIONS, at 8 (Mar. 1, 2007) ("Florida Commission's Final Report"), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/Florida/lethalinjection finalreport.pdf), Doc. 91, Ex. 29.

The record also shows that the risk that administration of the lethal injection cocktail (particularly the anesthetic) will not be properly administered is real, not speculative, and commonly occurs even in medical settings. *See* Heath Decl., Doc. 82, Tab A, at Ex. 26, ¶ [51]. The State's own expert, Dr. Dershwitz, has acknowledged that problems arise in lethal injection and that "the major problem is having a working IV." *See* Florida Testimony of Mark Dershwitz, Doc. 82, Tab A, at Ex. 29, 9-10. In addition, scientific studies have shown that even in medical settings drug administration problems involving highly trained personnel are common. The National Academy of Sciences Institute on Medicine has issued a report that concludes that, "[e]rrors in the administration of IV medications appear to be particularly prevalent." Heath Decl., Doc. 82, Tab A, at Ex. 26, ¶ 50. Another study shows that "drug-related errors occur in one out of five doses given to patients in hospitals." *Id.*

The fact that there is a substantial risk that grave error will occur in Alabama's lethal injection process and that an inmate will suffer unnecessary pain is also starkly demonstrated by recent executions by lethal injection in Florida (Angel Diaz), Oklahoma (Lloyd LaFevers), and Ohio (Joseph L. Clark) where there was a failure of proper delivery of anesthesia due to IV line failures all with horrible results. *Id.* at ¶¶ 34, 35, 49(f), 49(h).

All of this evidence establishes that there is no basis for this Court to substitute its own findings of fact for the findings of Judge Watkins, which were made after his careful review of the record summarized briefly above, and in his sound discretion.

3. The District Court Correctly Held that Findings by Other Courts that Similar Protocols Are Unconstitutional Establish that Mr. Callahan Has a Substantial Likelihood of Success on the Merits

In addition to the evidentiary record before the District Court, the Court below correctly concluded that findings of constitutional problems with similar execution protocols establish that Mr. Callahan has a substantial likelihood of success on the merits. (*See* Order, Doc. 154, at 8 ("[i]t is notable that three-drug lethal injection protocols similar to Alabama's have been found to be unconstitutional by at least two other trial courts. Not so dissimilarly, one of the protocols that survived constitutional review, Florida's protocol at issue in *Schwab*, did so after having been revamped as a result of public and scientific comment, culminating in features not found in Alabama's protocol.")).

Given the strong similarity between Alabama's Execution Procedures and the protocols used in other states (*see Beardslee v. Woodford*, 395 F.3d 1064, 1073-74 (9th Cir. 2005) ("The procedure used in most states for lethal injections originated in Oklahoma . . . . Twenty-seven states use the three-drug protocol."), the identification of constitutional deficiencies in other state protocols by courts

and other bodies is indicative of the substantial likelihood that Mr. Callahan will succeed on the merits of his action. The deficiencies in the Execution Procedures employed by Alabama and alleged by Mr. Callahan are the same types of constitutional deficiencies that have been found in other states' lethal injection protocols.

In September 2007, Judge Trauger of the United States District Court for the Middle District of Tennessee held that Tennessee's lethal injection protocol, which that state had revised following an executive order staying executions pending such revision, was unconstitutional. *See Harbison*, 511 F. Supp. 2d 872; Tenn. Exec. Order No. 43 (Feb. 1, 2007), *available at* http://www.state.tn.us/sos/pub/execorders/exec-orders-bred43 *(last visited Jan. 18, 2008)*. Judge Trauger concluded, *inter alia*, that "Tennessee's decision not to check for consciousness is compounded by Tennessee's choice of individuals to mix and inject the drugs and monitor the IV lines during executions" and that "the failure to utilize adequately trained executioners increases the plaintiff's risk of unnecessary pain." *Harbison*, 511 F. Supp. 2d at 886, 891.[7] Judge Trauger reached these conclusions following a

[7] The issue of training of execution team members has been an important concern in other states as well. In *Morales v. Tilton*, 465 F. Supp. 2d 972, 979 (N.D. Cal. 2006), the court found there was "[a] lack of meaningful training, supervision, and oversight of the execution team," in that "the team members almost uniformly have no knowledge of the nature or properties of the drugs that are used or the risks or potential problems associated with the procedure." *See also Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at *4-6 (June 26, 2006 W.D. Mo.) ((discussing the lack of qualifications of the dyslexic surgeon in charge of mixing the chemicals). Lack of training was also a central theme in the Florida Commission's Final Report, which found

four-day bench trial involving testimony by all prospective participants in Mr. Harbison's execution and numerous expert witnesses, including a court-appointed impartial expert. *Harbison*, 511 F. Supp. 2d at 874.

On appeal, the State does not even mention *Harbison*. In many ways, this is not surprising since the State failed to convince the Court below on summary judgment that *Harbison* can be distinguished (because it cannot). The State did claim that, with its recent change to the Execution Procedures, it now has addressed the "most glaring omission" identified by Judge Trauger in Tennessee's protocol, the failure to check for consciousness before the pancuronium bromide is administered. (*See* Defs.' Supplement [*sic*] Brief in Supp. of Mot. Summ. J. dated November 13, 2007 (docket number not yet available)); *Harbison*, 511 F. Supp. 2d at 884. In reality, however, the State's addition of a cursory consciousness check fails utterly to overcome the serious risk that an inmate may be conscious when injected with drugs that all concede will cause agony in a conscious person.

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that there was a "[f]ailure of the training of the execution team members" and a "[f]ailure of the training to provide adequate guidelines when complications occur[red]" during Angel Diaz's execution on December 13, 2006. *See* Florida Commission's Final Report, Doc. 91, Ex. 29. The Commission charged the Florida Department of Corrections with developing and implementing written procedures "requiring all team members who participate in an actual execution to have completed, to the satisfaction of the Warden or designee, any and all training necessary to ensure the team member is qualified to perform the specific function or task in a lethal injection." *Id*. at 12. The Commission also recommended that the Florida Department of Corrections "[i]mplement written policies, practices, and procedures related to ensuring optimal supervision and management of every lethal injection procedure by the appropriate officials, including the selection of personnel involved in each part of the lethal injection procedure." *Id.* at 9. Such written procedures are noticeably absent from Alabama's Execution Procedures.

Rather, the change is a *de facto* admission that the methods the State employs during lethal injection executions run an unnecessary and unconstitutional risk that inmates will not be sufficiently anesthetized prior to administration of pancuronium bromide or potassium chloride.

What the State itself characterizes as a "minor" change does not come close to remedying the failure to ensure that the condemned inmate is adequately sedated prior to and during administration of the second and third drugs. (*See* discussion of the change to the Execution Procedures in Pls.' Supplemental Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. dated November 13, 2007 (docket number not yet available), at 5-8.) To wit:

- The Execution Procedures do not employ any of the readily available safeguards that can be taken to ensure the inmate has reached a sufficient depth of anesthesia so that he will not be subject to the pain and suffering caused by the subsequent drugs. These include a BIS monitor, EKG machines and a blood pressure cuff and EEG. *See* Dershwitz Dep., Doc. 161 at 33:16-34:14, 102:10-25; Heath Dep., Doc. 160 at 7:10-21, 13:5-9, 18:5-13, 183:19-184:19.

- Unlike the protocols of other states that have added consciousness checks, the Execution Procedures do not contemplate the involvement of a medical professional to assess consciousness. *See, e.g.*, *Taylor*, 487 F.3d at 1084 (under Missouri's execution procedures "[t]he physician, nurse, or EMT" is required to assess consciousness); California Department of Corrections and Rehabilitation, *State of California Lethal Injection Protocol Review*, Appendix C: Revised Three-Chemical Lethal Injection Protocol ("Revised Protocol") at 15-20, *available at* http://www.cdcr.ca.gov/News /2007_Press_ Releases/docs/ReportToCourt.pdf (last visited Jan. 18. 2008) (consciousness check performed by Intravenous Team member with training necessary to maintain a current certification and licensure for, *inter alia*, placement of ECG leads and ECG monitoring); *Lightbourne v.*

McCollum, 969 So. 2d 326, 352 (Fla. 2007) (noting Warden's testimony that under Florida execution procedures, he would consult with medically qualified members of the execution team in making consciousness check).

- The Execution Procedures do not require that DOC-2, the execution team member who will test for consciousness, have any training in assessing anesthetic depth. (And currently he does not. *See* Deposition Testimony of DOC-2, taken on August 7, 2007, Doc. 91, Ex. 2, at 32:6-21.)
- The Execution Procedures do not specify what the response to the proposed stimuli should or should not be. *See Harbison*, 511 F. Supp. 2d at 884-86.
- The Execution Procedures do not make any provision for continuous monitoring of the IV site, an essential step. *See Harbison*, 511 F. Supp. 2d at 891-92 (failure to adequately monitor the IV site increases risk of unnecessary pain).

Other courts have determined that the ability to monitor the inmate's level of consciousness during execution and to ensure proper anesthetic depth is critical to whether an execution procedure complies with the Eighth Amendment. *See*, *e.g.*, *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047 (N.D. Cal. 2006) (requiring that use only anesthetic or that a "person with formal training and experience in the field of general anesthesia" monitor the plaintiff's level of sedation); *Brown v. Beck*, No. 5:06CT03018, 2006 WL 3914717, at *8 (E.D.N.C. Apr. 7, 2006) (requiring that execution personnel with sufficient training be present at all times during plaintiff's execution to monitor his sedation level and to "immediately provide appropriate medical care so as to [e]nsure Plaintiff is immediately returned to an unconscious state" if plaintiff is insufficiently sedated). (*See also* Florida Commission's Final Report, at 11 (recommending that Florida's Department of

Corrections "[d]evelop and implement procedures to ensure that the condemned inmate is unconscious after the administration of the first lethal chemical, sodium pentothal, before initiating administration of the second and third lethal chemicals.") Because, inter alia, the record below shows that the State does not adequately monitor levels of consciousness during executions by lethal injection despite its "minor" change to add a superficial "consciousness check," the District Court correctly concluded that Mr. Callahan carried his burden of persuasion as to substantial likelihood of success on the merits.

4. Statute of Limitations

The State contends that Mr. Callahan's lethal injection challenge is barred by the statute of limitations, and that it was thus clear error to hold that Mr. Callahan has a substantial likelihood of success on the merits. This argument is not properly before this Court on appeal and is wrong in any event.

First, the State did not raise the statute of limitations defense in the course of litigating the Stay Motion. In fact, the statute of limitations was not addressed by either party in the context of Mr. Callahan's Stay Motion and thus was not before the District Court. The District Court did not mention the statute of limitations in the Order appealed from. The State, not having raised it below, cannot now raise it on this appeal. (Its chance to raise it will come later.)

Moreover, the State appeals only from the Order granting Mr. Callahan's motion for a stay of execution under 28 U.S.C. § 1292(a). No other appeal (including an appeal from the summary judgment determination) is permissible because there is no final judgment in this matter. The Court's findings on the State's statute of limitations defense were made in its decision denying the State's summary judgment motion. The State's back door attempt to appeal a denial of summary judgment (a classic interlocutory ruling) should be summarily dismissed, and the arguments on that issue set forth in the State's Brief ignored. *See* State's Brief at 36-49.

Denial of a motion for summary judgment is not a "final order" subject to appeal. *Gray v. Bostic*, 458 F.3d 1295, 1303 (11th Cir. 2006) (noting that "the denial of summary judgment generally is not a final appealable order"); *Valdes v. Crosby*, 450 F.3d 1231, 1235 (11th Cir. 2006); *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1344 n.3 (11th Cir. 2000); *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1368 (11th Cir. 1983). The final judgment rule is followed scrupulously because it is essential to the effective functioning of the appellate courts, preventing what would otherwise be a flood of interlocutory appeals to the Circuit Courts and avoiding piecemeal appellate litigation. *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 203-04, 119 S.Ct. 1915, 1919-20 (1999) ("the final judgment rule serves several salutary purposes. . . . [Including] 'the important

purpose of promoting efficient judicial administration.'") (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374, 101 S. Ct. 669, 673 (1981)).

Nor is the District Court's denial of the State's summary judgment motion "inextricably intertwined" with the State's appeal of Mr. Callahan's stay of execution so as to permit appellate review of both of the District Court's decisions. *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1260-61 (11th Cir. 2006). A nonappealable interlocutory order is considered "inextricably intertwined" with an appealable order only when review of the nonappealable order is essential to the resolution of the properly appealable order. *See Summit Medical Assocs. v. Pryor*, 180 F.3d 1326, 1335 (11th Cir. 1999). In this instance, the denial of summary judgment on the State's statute of limitations defense is not inextricably intertwined with a proper appeal of a denial of a motion to stay. A statute of limitations defense is a statutory construct that acts as a complete bar to a cause of action; a motion to stay is an equitable device that is grounded in an entirely different body of law – equity – and involves analyses of facts having no pertinence to the statute of limitations, but dealing with whether a stay should issue so a full trial can be held. A review of the denial of the summary judgment motion is not *essential*, as required, to the review of the denial of the stay motion. This Court can conduct a meaningful review of the equitable grant of Mr. Callahan's stay motion without reviewing the State's statute of limitations argument.

Finally, while we hesitate to address the substance because we believe that it is not properly before this Court, the State's position is fatally flawed. The District Court's sound rejection of the State's statute of limitation arguments is consistent with the analysis of other district courts that reject the precise arguments that the State trots out again here. *See Jones v. Allen*, 483 F. Supp. 2d 1142 (M.D. Ala. 2007); *Alderman v. Donald*, No. 1:07-cv-1474-BBM (N.D. Ga. July 30, 2007) (Martin, J.) (denying Pre-Answer Motion to Dismiss on the basis of statute of limitations). *See also Grayson*, 2007 WL 1491009 at *5 n. 9. Mr. Callahan relies on those decisions and their reasoning.

5. Summary

In all of these circumstances, there can be no reasonable dispute that Mr. Callahan is litigating a serious and meritorious federal claim in the District Court and that there is a substantial likelihood that Mr. Callahan will succeed on the merits of that claim. As demonstrated by the record below, the issues he raises are far from frivolous, a fact further made clear by the manner in which this same issue is being treated by numerous courts and/or governmental bodies in other states, *including the United States Supreme Court*, which granted certiorari to take care of the issue. Thus there was no clear error or abuse of discretion by the District Court, and this Court is bound to affirm Mr. Callahan's stay of execution. This

conclusion is affirmed by consideration of the other factors usually considered by courts in determining whether to grant a stay.

II. THE DISTRICT COURT CORRECTLY BALANCED THE EQUITIES OF THE REMAINING CRITERIA OF THE STAY ANALYSIS

After concluding that there is a substantial likelihood of success on the merits, the District Court correctly proceeded to "weigh the competing harms" related to the "remaining criteria of the stay analysis." (Order, Doc. 154, at 9). None of the traditional four factors that must be considered on a stay motion, universally applied by every circuit, necessarily outweighs the other. As a general matter, some circuits consider that "[t]he irreparable harm to the plaintiff and the harm to the defendant are the two most important factors," *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991), to the degree such that if the balancing of hardships favor the plaintiff, a lesser showing on the merits is required. "In determining whether the plaintiff should prevail, the court balances the evidence proffered for each element. Hence, a heavier showing on one or more of the criteria will reduce the weight of proof required for the other factors." *Mark Dunning Indus., Inc.*, 890 F. Supp. at 1510. The greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be established by the party. *See Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003).

In a sound exercise of its discretion, the District Court concluded that "threatened irreparable injury to Callahan outweighs the harm a stay of execution would work on the [State] or the public interest." (Order, Doc. 154, at 9.) None of the arguments raised by the State provides a basis to overturn the District Court's sound exercise of discretion, particularly in light of the particular facts of this case, the pendency of *Baze* and the Supreme Court's now extensive record in granting stays while *Baze* is pending.

A. The District Court Correctly Held that Callahan Would Suffer Irreparable Harm Without a Stay of Execution

The District Court held that "[b]ecause of the nature of the case, a possibility of success on the merits also points to irreparable injury without a stay. That is, an unconstitutional execution would impair the Court's ability to grant an effective remedy." (Order, Doc. 154, at 9.) Although the State asserts that the District Court's ultimate finding of irreparable injury is clear error, the State does *not* take issue with the District Court's underlying conclusion that the irreparable injury prong of the preliminary injunction standard is closely tied to the likelihood of success on the merits. *See* State's Brief at 49-53 (attacking the sufficiency of the record to support a finding of irreparable injury). In the context of § 1983 claims regarding lethal injection, the inmate is subject to irreparable harm in the form of unnecessary excruciating pain if he is insufficiently sedated before the second two chemicals are injected. *Reid v. Johnson*, 333 F. Supp. 2d 543, 551 (E.D. Va. 2004)

(defining irreparable harm as being "unnecessary pain that [the plaintiff] is likely to experience [during the course of his execution] which is 'serious' or 'significant'"). Here it is certain that Mr. Callahan will suffer such pain if a sufficient depth of unconsciousness is not both attained and sustained throughout the execution. *See* Heath Dep. at 7:10-21; 51:13-21; 85:4-14; 205:19-25; Dershwitz Dep. at 14:23-15:9; 16:22-17:6; 82:18-22. Courts recognize this. *See, e.g.*, *Brown*, 2006 WL 3914717, at *7 ("*If the alleged deficiencies do, in fact, result in inadequate anesthesia prior to execution, there is no dispute that [the plaintiff] will suffer excruciating pain as a result of the administration of pancuronium bromide and potassium chloride.")* (emphasis added); *Harbison*, 511 F. Supp. 2d at 883 ("It is undisputed that, without proper anesthesia, the administration of pancuronium bromide and potassium chloride, either separately or in combination, would result in a terrifying, excruciating death."). Moreover, the evidence is clear that any attempt by the State to monitor consciousness is woefully inadequate.

As the District Court correctly held, the irreparable injury or harm prong of the preliminary injunction standard therefore is closely tied to the plaintiff's likelihood of success on the merits, for if the plaintiff shows a substantial likelihood that the relevant protocol is constitutionally deficient, he has shown that it is likely he will suffer irreparable harm during the course of the execution. (*See*

Order, Doc. 154, at 9.) The record shows that there is a substantial likelihood that Mr. Callahan will prove that Alabama's method of imposing death by lethal injection, especially in light of readily available alternatives, creates an unnecessary risk of severe pain and suffering that easily could be avoided by adopting different methods.

Moreover, and as the District Court also correctly observed, if the State executes Mr. Callahan in accordance with the Execution Procedures before a full and fair trial on this issue, Mr. Callahan will not only be denied the right to bring his federally cognizable claim and have it decided on the merits, he obviously will not be able to seek redress for any constitutionally impermissible harm inflicted during the execution process. (Order, Doc. 154, at 9.) *See also Doe v. Pryor*, 61 F. Supp. 2d 1224, 1234 (M.D. Ala. 1999) (discussing irreparable harm to reputation faced by civil rights claimant).[8] Thus, the District Court soundly exercised its discretion in holding that Mr. Callahan would suffer irreparable harm but for a stay of execution.

[8] It bears noting that Mr. Callahan's inability to seek monetary redress from the State in a § 1983 action diminishes the showing necessary to establish irreparable harm. *Rum Creek*, 926 F.2d at 362 (remanding to district court to determine if preliminary injunction should be entered). As the court in *Rum Creek* explained, since the only apparent remedy available under § 1983 is an injunction and declaration against the state, the showing necessary to meet the irreparable harm requirement for a preliminary injunction is less than in instances where future monetary remedies are available. *Id*.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE BALANCE OF HARM FAVORS A STAY OF EXECUTION

The State's contention that the District Court clearly erred in its application of the third factor, which requires a balancing of the harm to Mr. Callahan of being denied a stay against the harm to the State if one is granted, again rests on the unfounded assertion that Mr. Callahan's claim is based on speculation and "nothing more than surmise relating to possible mishaps." State's Brief at 54. However, there is no clear error by the District Court because it is already established above that Mr. Callahan's claim is neither speculative nor based on "nothing but possible mishaps". Indeed, the balance of harm rests decidedly on Mr. Callahan, who seeks merely to maintain the status quo until his action can be resolved on its merits. This is the very purpose of a preliminary injunction. *Summit Med. Ctr. of Ala., Inc. v. Siegelman*, 227 F. Supp. 2d 1194, 1197 (M.D. Ala. 2002).

Moreover, as the District Court observed and the State misleadingly neglects to mention in its Brief, "the State itself jeopardized the timely enforcement of the sentence by delaying for seven months its request for Callahan's execution date and another five months in setting it." (Order, Doc. 154, at 9). Over one year ago, Mr. Callahan filed this action under 42 U.S.C. § 1983 challenging the constitutionality of Alabama's method of execution by lethal injection under the Eighth Amendment. No execution date had been set or requested. Discovery

proceeded, and this Court set the matter for trial to commence on October 3, 2007. Mr. Callahan was ready and willing to go to trial at that time. Just days before the trial was to commence, however, the State announced that it would be amending its Execution Procedures. As discussed above, only because of this was a trial not held months ago without need of a stay. The State thus derailed trial of this case by amending the Execution Procedures only days before trial was scheduled to begin in early October, when no execution date had been set and Mr. Callahan was ready and willing to go to trial. That same day, the United States Supreme Court granted certiorari in *Baze*.

Considering all of these circumstances, and subsequent to a November 7, 2007 status conference, the District Court continued trial of the action "generally". On October 31, 2007, the Alabama Supreme Court set an execution date for Mr. Callahan of January 31, 2008. Mr. Callahan now faces an execution date with his Eighth Amendment claim unheard, which is a claim upon which the United States Supreme Court will render guidance in a matter of months, and a claim that has been shown to have a substantial likelihood of success on the merits, notwithstanding recent changes to the Execution Procedures. Yet he was ready for trial last October.

IV. THE DISTRICT COURT CORRECTLY HELD THAT THE PUBLIC INTEREST FAVORS A STAY OF EXECUTION

Not surprisingly, the State's contention that the District Court clearly erred in finding that the public interest favors a stay rests, again, on the already established fallacy that Mr. Callahan's claim is based only on possible mishaps. Accordingly, there can be no doubt that the District Court did not abuse its discretion in finding that the "public interest will be better served by a resolution of the constitutional challenge." (Order, Doc. 154, at 9.) The Order rightly recognizes that the citizens of Alabama have a significant interest in assuring that executions are carried out constitutionally, and that delay in Callahan's execution "might indeed be construed as beneficial to the interests of the State in allowing—for the first time—an orderly consideration of the lethal injection protocol."). (Order, Doc. 154, at n. 12.)

The public interest in delaying Mr. Callahan's execution pending resolution of *Baze* is further evidenced by the national pattern of delaying executions by lethal injection which has emerged following the Supreme Court's granting of certiorari in *Baze*. The Supreme Court has granted, or refused to vacate, stays of execution in every case post-*Baze* that has raised a lethal injection challenge (except for one case where the condemned was scheduled to be executed the same day as certiorari was granted in *Baze*). *See, e.g.*, *Arthur v. Allen*, No. 07-0342-WS-C, 2007 WL 2320069 (S.D. Ala. Aug. 10, 2007), *aff'd* No. 07-13929, 2007 WL

2709942 (11th Cir. Sept. 17, 2007), *stay granted pending disposition of petition for writ of certiorari* 128 S. Ct. 740, No. 07395, 2007 WL 4248619 (Dec. 5, 2007); *Schwab v. Florida*, 128 S. Ct. 644, No. 07A383, 2007 WL 3380059 (Nov. 15, 2007) (stay of execution granted pending disposition of petition for writ of certiorari); *Berry v. Epps*, 128 S. Ct. 531, No. 07-7348 (07A367), 2007 WL 3156229 (Oct. 30, 2007) (same); *Turner v. Texas*, 128 S. Ct. 37, No. 07A272, 2007 WL 2803693 (Sept. 27, 2007) (same); *Emmett v. Johnson*, ___ S. Ct. ___, No. 07A304, 2007 WL 3018923 (Oct. 17, 2007) (stay of execution granted pending final disposition of appeal by the Fourth Circuit or further order of the Court); *Norris v. Jones*, ___ S. Ct. ___, No. 07A311, 2007 WL 2999165 (Oct. 16, 2007) (denying application to vacate a stay granted by the Eighth Circuit). *See also In re Richard*, 128 S.Ct. 37 (Sept. 25, 2007) (denying stay of execution and petitions for writs of habeas corpus and mandamus and/or prohibition). Further, courts in Arizona, Georgia, Nevada, Texas, Delaware and Arkansas all have stayed executions in light of *Baze*, while state officials in Texas and Oklahoma are voluntarily holding off in seeking execution dates. Pl's. Mem. of Law in Supp. of Mot. for Stay of Exec., Doc. 147, at 7-9.

While this Court has held that the grant of certiorari in *Baze* is not in and of itself grounds for a stay of execution (*see Schwab*), that is not to say, as the District Court noted, that *Baze* does not and should not be factored into any balancing of

the equities. In fact, justice demands that courts do just that. Consider the implications for the appearance of justice and fairness if Mr. Callahan were to be hastily executed after the State caused a delay of the trial on his claim, and it were to be found in *Baze* that the same three-drug cocktail employed by Alabama violates the Eighth Amendment, or if the Supreme Court determined that a different standard for adjudicating Eighth Amendment claims should be used than the standard employed by this Court for Mr. Callahan's claim. Mr. Callahan has as strong an interest in having his claims adjudicated with the benefit of the Supreme Court's ruling in *Baze* as other condemned inmates challenging the constitutionality of their states' lethal injection protocols whose executions already have been delayed pending *Baze*.

Furthermore, where the very issue that is before the court is the method of execution itself, the public interest in meeting the execution date cannot override the interest in first determining whether that method is constitutionally permissible, especially where Alabama courts have never before addressed this issue on the merits and matters impacting Mr. Callahan's trial will be addressed by the United States Supreme Court in *Baze* between now and the end of June. *See, e.g.*, *Timberlake v. State*, 859 N.E.2d 1209, 1212 (Ind. 2007) (granting stay of execution because the Supreme Court had granted certiorari in *Panetti v. Quarterman*, 127 S. Ct. 852 (2007) to address the application of the Eighth Amendment to claims that

mental illness bar execution) ("If the Supreme Court interprets the Eighth Amendment in a manner significantly different from Justice Powell's concurrence in *Ford*, Timberlake's execution may prove to be prohibited by the Eighth Amendment. We grant a stay to prevent learning the answer to that question after it is too late").

V. THE DISTRICT COURT CORRECTLY HELD THAT CALLAHAN PURSUED HIS CAUSE OF ACTION WITH DILIGENCE

The State asserts that the District Court's finding that Mr. Callahan did not unreasonably delay in filing suit because there is allegedly "binding precedent from this Court stating that a stay of execution should not be granted when an inmate files a method-of-execution challenge after his federal habeas proceedings have concluded." *See* State's Brief at 58, citing *Jones v. Allen*, 485 F.3d 635, n. 2 (11th Cir.), *cert denied*, __ U.S.__, 127 S.Ct. 2160 (2007). The State mischaracterizes this Court's precedent. As the *Jones* Court itself stated, "*the equitable considerations in each case are naturally different*." *Id*. at 641, n. 4 (emphasis added). Contrary to the State's assertion, there is no bright line rule that a stay of execution should not be granted whenever an inmate files a method-of-execution challenge after his federal habeas proceedings have concluded.

Moreover, there can be no doubt that Mr. Callahan's case is, as Judge Watkins found, "unusual in the stay-of-execution context", and thus that Judge Watkins did not abuse his discretion in granting a stay. Order, Doc. 154, at 4. As

the October trial date approached, *there was no execution date*, and *but for the State's action*, the trial would have been completed before an execution date was set. (Summ. J. Op., Doc. 146, at 8). Judge Watkins thus found that the "strong equitable presumption against a stay [did] not come into play here where the claim was brought with sufficient time to allow consideration of the merits without requiring the entry of a stay." *See* Order, Doc. 154, at 4, n. 3.

Among other distinguishing factors between Mr. Callahan's case and others where stays have been denied, Judge Watkins expressly noted: "Callahan's motion is not an emergency filing; Callahan has not had the benefit of extensive state court hearings establishing a factual record; Callahan did not wait until two days before his execution to file his case; Callahan's claim is not barred by laches . . ." Order, Doc. 154, at 5, n. 5. *See also Nooner v. Norris*, No. 5:06-cv-00110-SWW at 5-6 (E.D. Ark. June 26, 2006) (plaintiff did not unjustifiably delay in bringing his § 1983 claims where he "moved to intervene in this case before the State set his execution date and shortly after he exhausted all means for challenging his conviction"); *Cooey v. Taft*, 2:04-cv-1156, 2006 WL 3762133, slip op. at 2-3 (S.D. Ohio Dec. 21, 2006) (granting preliminary injunctive relief where plaintiff moved to intervene in §1983 litigation less than six weeks before his execution date was set), *negative history on other grounds*, 2007 WL 623482 (6th Cir 2007); *Oken v. Sizer*, 321 F. Supp. 2d 658, 668 (D. Md. 2004) (court granted plaintiff's motion for

a stay of his execution in a § 1983 litigation based upon lethal injection, despite the fact that plaintiff's execution date had already been set); *Taylor v. Crawford*, 445 F.3d 1095 (8th Cir. 2006) (court of appeals permitted continuation of evidentiary hearing, made possible by en banc panel's grant of a stay of plaintiff's execution, in a § 1983 lethal injection litigation filed before plaintiff's death warrant had been issued).

VI. THE DISTRICT COURT CORRECTLY HELD THAT FACTORS OTHER THAN THE TRADITIONAL FOUR-PART TEST FOR A PRELIMINARY INJUNCTION ALSO JUSTIFY A STAY OF EXECUTION

A. All Writs Act

The District Court can stay the execution in and of its own jurisdiction under the "All Writs Act." *See* 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). The District Court indeed granted a stay on that alternative ground and there is no showing that it erred. *See* Order, Doc. 154, at 9, n. 12. That is an independent basis for rejecting this appeal.

CONCLUSION

For all of the reasons stated above, this Court should affirm the Order of the District Court granting Mr. Callahan's stay of execution.

Date: January 18, 2008

Respectfully submitted,

__/s Vincent R. FitzPatrick, Jr. _____

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CERTIFICATE OF COMPLIANCE

I, Vincent R. FitzPatrick, Jr., relying on the word processing system word count, hereby certify that this brief contains 12, 148 words and complies with the requirements of Fed. R. App. P. 32(a)(7)(B)(ii).

/s Vincent R. FitzPatrick, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2008, I filed the foregoing with the United States Court of Appeal by uploading an electronic copy of the foregoing on the Court's "EDF" system and by sending a copy of the foregoing via Federal Express to:

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