EXHIBIT C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIE MCNAIR,	)	
	)	
Plaintiff/Counter-Defendant,	)	
	)	
v.	)	Case No. 2:06-cv-695-WKW
	)	
RICHARD ALLEN, et al.,	)	
	)	
Defendants/Counter-Plaintiffs.	)	
_____		
	)	
JAMES CALLAHAN,	)	
	)	
Plaintiff/Counter-Defendant,	)	
	)	
v.	)	Case No. 2:06-cv-919-WKW
	)	
RICHARD ALLEN, et al.,	)	
	)	
Defendants/Counter-Plaintiffs.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs Willie McNair ("McNair") and James Callahan ("Callahan") submit the following Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (the "Motion"), along with the Declaration of Vincent R. FitzPatrick, Jr., sworn to September 4, 2007 ("FitzPatrick Decl.") and a Counterstatement of Material Facts.

PRELIMINARY STATEMENT

The central issue in this case is whether the method of lethal injection employed by the Defendants exposes Plaintiffs to unnecessary pain and suffering in violation of the Eighth and Fourteenth Amendments. Defendants' contention that they are entitled to summary judgment rests on an incomplete and incorrect statement of the material facts and a mischaracterization of the standard of proof under Eighth Amendment jurisprudence. Although expert discovery is still outstanding (and summary judgment is thus inappropriate), the pleadings and all available evidence raise numerous material issues of fact as to the constitutionality of Alabama's method of execution by lethal injection, including whether:

- Defendants made any effort in developing Alabama's Execution Procedures[1] to avoid unnecessary risk of pain and suffering;
- Alabama's written Execution Procedures safeguard against unnecessary risk of pain and suffering;
- the execution team is required to be and is adequately trained to carry out a lethal injection execution without posing or creating an unnecessary risk that the inmate will suffer extreme pain and suffering;
- the execution team takes any care to reasonably ensure the condemned inmate will be adequately anesthetized;

[1] The defined term "Execution Procedures" refers to Alabama's written protocol for execution by lethal injection. *See* FitzPatrick Decl. Ex. 3.

- preparation of the chemicals by the virtually untrained DOCs presents an impermissible risk that a proper dose of anesthesia will not be delivered to the condemned inmate;
- the IV lines will not be successfully established and maintained and anesthesia will not be properly administered to the condemned inmate; and whether
- the drugs used in the execution process pose an unnecessary risk of pain and suffering in themselves and in the manner of their administration.

Defendants assert that summary judgment should be granted because if Alabama's Execution Procedures are properly administered, there will be no pain and suffering, and allegedly there have been no "mishaps" in any Alabama executions. But the factual record discloses that there is a real risk that problems with the administration of the lethal injection will arise in Alabama, and the only relevant inquiry under the Eighth Amendment is whether Alabama's Execution Procedures present an impermissible *risk* of unnecessary and wanton infliction of pain. Moreover, the record does not establish that there have been no "mishaps". Rather, the evidence shows that because of the gratuitous use of a paralyzing drug on condemned inmates, the State does not know if there have in fact been mishaps—meaning severe suffering by executed inmates. The testimony of Warden Grantt Culliver (at times, the "Warden"), who has been and continues to be in charge of every execution by lethal injection in Alabama, is that he does not know whether the inmates he has executed endured suffering and that they may have without his knowledge.

Because the evidence raises material issues of fact as to the constitutionality of Alabama's method of execution by lethal injection, summary judgment cannot be granted.

BACKGROUND

Procedural History

Plaintiffs McNair and Callahan filed separate actions under 42 U.S.C. § 1983 challenging the constitutionality of lethal injection as administered in Alabama on August 7, 2006 and October 11, 2006, respectively. At the time both Plaintiffs filed their claims, their federal habeas corpus claims had recently ended: Plaintiff McNair's when the United States Supreme Court denied certiorari on April 17, 2006, *McNair v. Allen,* 126 S. Ct. 1828 (2006), and Plaintiff Callahan's when the United States Supreme Court denied certiorari on October 10, 2006, *Callahan v. Allen*, 127 S. Ct. 427 (2006). This Court consolidated Plaintiffs' actions on November 1, 2006.

On May 15, 2007, Defendants filed Motions to Set an Execution Date with the Alabama Supreme Court for both McNair and Callahan. No execution dates have been scheduled.

Alabama's Method of Execution by Lethal Injection

Facts relating to Alabama's method of execution by lethal injection are set forth in the accompanying Counterstatement of Material Facts.

STANDARD FOR SUMMARY JUDGMENT

According to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). "The substantive law applicable to the case determines which facts are material." *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1115 (11th Cir. 1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"[A]ny doubt as to the existence of a genuine issue of material fact must be resolved against its entry." *Twiss v. Kury*, 25 F.3d 1551, 1555 (11th Cir. 1994) (internal citation omitted)

(affirming denial, in part, of summary judgment). All reasonable inferences should be drawn in favor of the non-moving party. *See Clark v. AmSouth Mortgage Co.*, __ F. Supp. 2d __, No. 1:05-cv-747-MHT (WO), 2007 WL 25485, at *1 (M.D. Ala. Jan. 3, 2007) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)) (finding "the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party"); *Morrison v. Washington County*, 700 F.2d 678, 682 (11th Cir. 1983) (affirming denial of summary judgment).

ARGUMENT

I. Alabama's Execution Procedures Violate the Eighth Amendment

A. Defendants Mischaracterize the Requirements of the Eighth Amendment

Defendants wrongly contend that to succeed on an Eighth Amendment method of execution challenge, Plaintiffs must prove "deliberate indifference" by the Defendants, *i.e.*, that the Plaintiffs "must come forward with evidence from which it can be inferred that correction officials "knowingly and unreasonably disregarded an objectively intolerable risk of harm." *See* Defs. Br. at 5, quoting *Farmer v. Brennan*, 511 U.S. 825, 846 (1994). Defendants' assertion that a subjective intent requirement that the State is deliberately indifferent to Plaintiffs' health or safety applies here is based on an erroneous conflation of "conditions of confinement" claims with method of execution challenges. Essentially, Defendants reason that because the Supreme Court adopted the deliberate indifference requirement for conditions of confinement claims brought under 42 U.S.C. § 1983 (*see* Defs. Br. at 4), and the Supreme Court determined in *Nelson v. Campbell*, 541 U.S. 637 (2004) and *Hill v. McDonough*, 126 S. Ct. 2096 (2006) that method of execution challenges may be brought under § 1983, any method of execution claim brought under § 1983 necessitates proof of deliberate indifference.

The Defendants' position is without basis. 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 called into question. Not so when dealing with whether a well-defined process constitutes cruel and unusual punishment because of the risks of great agony that it involves. Instead, Supreme Court precedent requires that challenges to capital punishment under the Eighth Amendment are to be decided based on whether the method of execution presents a risk of "unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). Such risk is assessed according to objective, not subjective, "evolving standards of decency." *See Atkins v. Virginia*, 536 U.S. 304, 311-12 (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 (1958)).

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." Consider the absurd results possible: if some State officials truly believed that electrocution caused minimal suffering, would that mean that electrocution did not violate the Eighth Amendment even if in other states officials concluded that electrocution caused 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? This is simply 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 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75 (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).

Defendants can point 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 Defendants attempt 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.*[2]

As discussed below, the facts in this record clearly demonstrate that Alabama's method of execution by lethal injection presents an objectively impermissible risk of unnecessary and wanton infliction of pain. While Plaintiffs dispute that deliberate indifference is a necessary element in this case, the facts also show deliberate indifference by the Defendants to such risk because the State knows the risk but refuses to change the execution process to avoid it when it could do so.

B. Alabama's Execution Procedures Present an Objectively Impermissible Risk of Unnecessary and Wanton Infliction of Pain

1. *Material Issues of Fact Exist As To Whether Defendants Made Any Effort in Developing Alabama's Execution Procedures To Avoid Unnecessary Risk of Pain and Suffering*

Defendants assert that Alabama's Execution Procedures were "specifically designed to avoid unnecessary pain." Defs. Br. at 1. Defendants appear to reason that this is because, like other states, Alabama uses three chemicals in executions by lethal injections. Defs. Br. at 5. But

[2] 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.

unlike in some states, there is no statutory requirement in Alabama that any particular chemical or number of chemicals be used in lethal injection (ALA. CODE § 15-18-82.1(a) (1975)), and there is nothing in the record to suggest that in designing the initial Execution Procedures, Defendants ever considered the risk of pain and suffering to the inmate, let alone the appropriateness of using a three-drug cocktail.[3] Indeed, the Warden, who participated in the development of the Execution Procedures (Defendants' Responses and Objections to Plaintiffs' First Set of Interrogatories, FitzPatrick Decl. Ex. 25, Response #1 ("Defs. Interrogatory Responses")) testified that no medical professionals were involved in their initial development. Deposition Testimony of Warden Grantt Culliver taken on March 27, 2007, FitzPatrick Decl. Ex. 21, 17:2-6 ("Culliver Dep."). The Warden testified that he did not even know the names of the drugs that were being used by other states that were visited in the course of developing the execution procedures. Culliver Dep., FitzPatrick Decl. Ex. 21, 19:7-10. *The Warden also testified that he did not know, and had never considered the possibility, that the injection of potassium chloride into a person who is conscious will cause pain.*[4] Culliver Dep., FitzPatrick Decl. Ex. 21, 25:19-25, 36:4-12. He testified that he never knew that it was important to ensure that the inmate reached a deep plane of anesthesia. Culliver Dep., FitzPatrick Decl. Ex. 21, 26:2-18. When one starts with these propositions, it is apparent that Defendants did not "specifically" take care in developing Alabama's Execution Procedures to prevent the condemned from suffering unnecessary pain. It is further apparent that the degree of risk of consciousness—and

[3] Moreover, because the mechanics of lethal injection differ among various jurisdictions (*e.g.*, there are variations concerning the dosage of chemicals used and the level of involvement of medical personnel), absent evidence concerning the methods employed by other states, the fact that other states use a three-drug cocktail is not probative of the constitutionality of Alabama's use of a three-drug cocktail.

[4] It is undisputed that an injection of potassium chloride into a conscious human being will cause excruciating pain akin to being burned alive from within.

thus of agony—is far greater than necessary. (Simple monitoring of the inmate's level of consciousness, which is not done in Alabama, would reduce that risk.)

Defendants contend through interrogatory responses that in 2006 the Department of Corrections "consulted with Dr. Dershwitz to confirm that the procedures, chemicals and dosages used by the State of Alabama were effective and did not present an unreasonable risk of unnecessary pain and suffering" (Defs. Interrogatory Responses, FitzPatrick Decl. Ex. 25, Response #3). This is suspect on its face because Defendants have contended that Dershwitz was "retained in anticipation of litigation" and claimed privilege as to his communications. This does not appear to be the retention of an objective physician designed to ensure that the method of execution is constitutional. In addition, there has been no expert deposition of Dr. Dershwitz to date, and thus a material issue of fact exists at least as to whether Defendants made any genuine effort subsequent to initial development of the protocol to avoid unnecessary pain and suffering by the condemned inmate. This is particularly so given that the Warden has testified that despite being aware of controversy about lethal injection in the United States over the last few years, he has done nothing to educate himself about the issues involved other than to read news articles concerning some executions. Culliver Dep., FitzPatrick Decl. Ex. 21, 96:9-21. Testimony of others involved in the process is to the same effect. This suggests that Defendants have not taken steps to inform themselves of known risks in the practice of execution by lethal injection and thus that Alabama's Execution Procedures were not, as Defendants contend, "specifically designed to avoid unnecessary pain."

2. *Material Issues of Fact Exist As To Whether Alabama's Written Execution Procedures Safeguard Against Unnecessary Risk of Pain and Suffering*

The Defendants assert that Alabama's Execution Procedures are "carried out by personnel with sufficient training" and that the Execution Procedures include "safeguards,

checks and balances to ensure that each party carries out his or her part correctly." Defs. Br. at 8, 9. Plaintiffs contend that this is simply not true; there certainly are disputed issues of material facts on this subject. For one thing, the Defendants fail to disclose to the Court that much of Alabama's alleged practices in carrying out executions—and hence the alleged safeguards, checks, balances and assurances concerning adequate training—are not required by Alabama's written Execution Procedures. *See* Execution Procedures, FitzPatrick Decl. Ex. 3. So, for example, while the Defendants rely on the qualifications, training and experience of those currently responsible for carrying out executions in Alabama (which are in any event minimal) (*see* Defs. Br. at 7-9), the involvement of those individuals in executions could change at any time (and has changed in the past; *see* DOC-2 Dep., FitzPatrick Decl. Ex. 2, 36:19-37:08; Defs. Interrogatory Responses, FitzPatrick Decl. Ex. 25, Response #5) and, for the most part, the qualifications, training and experience of those currently involved are not required by the Execution Procedures. In particular:

(a) The Execution Procedures do not require any review or screening of the qualifications, experience or training of prospective members of the execution team prior to their selection as team members.

(b) The Execution Procedures do not require 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.

(c) The Execution Procedures do not require that the placement of IV lines be part of the regular occupation or duties of the persons (EMTs) charged with that function.

(d) The Execution Procedures do not require 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.

(e) The Execution Procedures do not require that any member of the execution team possess relevant training or expertise necessary for reliable administration of anesthesia.

(f) The Execution Procedures do not require 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).

In addition to these failures to contain safeguards concerning the screening, training and expertise of the execution team, Alabama's written Execution Procedures do not safeguard against unnecessary risk of pain and suffering by the condemned inmate at least because:

(a) In the event that problems arise during the execution (*e.g.*, if the Warden encountered increasing resistance as the chemicals were injected), the Execution Procedures do not specify how such problems are to be addressed.

(b) In the event that the IV team is unsuccessful in providing intravenous access, the Execution Procedures do not describe how contract medical personnel will determine where or when to place a central line, what the procedures are for inserting a central line, what equipment is available and to be used for inserting a central line, or what equipment is available for treating the recognized and known complications of central line placement.

(c) The Execution Procedures do not describe how the execution team determines the method of finding a suitable blood vessel and maintaining necessary flow through that blood vessel.

(d) The Execution Procedures do not provide for any monitoring of the condemned inmate to ensure that he or she has been successfully anesthetized, although the Execution Procedures do refer to the existence of an EKG monitor (which, in fact, is not used).

(e) The Execution Procedures do not require that members of the execution team be able to see the inmate, the IV catheter sites or the full extent of the IV bags and tubing during the execution process.

(f) The Execution Procedures do not include a complete list of the equipment available during the execution process.

(g) The Execution Procedures do not specify when the Warden is to inject each chemical during the lethal injection process.

(h) The Execution Procedures do not require that all of the syringes used during the execution process be labeled.

In light of the above, material issues of fact exist as to whether Alabama's written Execution Procedures contain adequate safeguards, checks and balances to avoid impermissible risk of unnecessary pain and suffering by the condemned inmate. The same is true of the actual practice employed.

3. *Material Issues of Fact Exist As To Whether Alabama's Method of Execution As Currently Practiced Safeguards Against Unnecessary Risk of Pain and Suffering*

Defendants contend that "if Alabama's procedures are properly administered, an inmate is anesthetized prior to an execution and will not suffer unnecessary or wanton pain." Defs. Br. at 1. But, with all respect, to a large extent that is what Plaintiffs' claims are about. Certainly Plaintiffs contend that procedures are not properly administered and there are material issues of disputed fact on that score. In fact, the record shows that there are material issues of fact as to whether Alabama's method of execution will be properly administered, and thus whether, as

practiced, Alabama's method of execution safeguards against unnecessary risk of pain and suffering.

(i) The Execution Team Takes Virtually No Care To Reasonably Ensure the Condemned Inmate Will Be Adequately Anesthetized

Alabama's Execution Procedures involve sequential administration of three drugs. The drug that causes death, administered last, is potassium chloride. The intravenous administration of potassium chloride *is certain to cause excruciating pain unless the person has been deeply anesthetized.* Properly anesthetizing the inmate, therefore, is crucial and constitutionally mandatory. All of this is widely recognized and undisputed. Heath Decl., FitzPatrick Decl. Ex. 26, ¶¶ 24, 26. Moreover, there are other, painless drugs that could cause an inmate's death without creating a risk of pain. Heath Decl., FitzPatrick Decl. Ex. 26, ¶¶ 24, 25; *see also* Dershwitz Decl., FitzPatrick Decl. Ex. 27, ¶ 12. Defendants do not dispute this, arguing only that no other drug acts as fast as potassium chloride. Dershwitz Decl., FitzPatrick Decl. Ex. 27,¶ 31. Assuming that is true, Defendants cannot justify taking the constitutionally unreasonable risk of using potassium chloride when other drugs sufficient to the purpose exist.

The second drug is pancuronium bromide. Pancuronium bromide serves no valid purpose. Its use is gratuitous and uncivilized. It is not necessary to cause an inmate's death. Heath Decl., FitzPatrick Decl. Ex. 26, ¶ 21(a). It paralyzes the inmate (and slowly renders him unable to breathe) so that witnesses cannot see any movement, even though such movement might well be a sign of severe suffering. A human being injected with pancuronium bromide will suffer the agony of slow suffocation unless he is at the appropriate plane of deep anesthesia. Heath Decl., FitzPatrick Decl. Ex. 26, ¶¶ 31, 38. Pancuronium bromide also makes it impossible for executioners to recognize whether the inmate is in pain, as the Warden conceded at his

deposition. (*As an aside, since the drug serves no other purpose, if this does not evince deliberate indifference, what would?*)

The first drug administered is the anesthetic sodium pentothal. Defendants' own expert confirms that only if this drug is properly administered to induce anesthesia of sufficient depth and duration will the inmate avoid the certain pain and suffering caused by the subsequent doses of pancuronium bromide and potassium chloride. Dershwitz Decl., FitzPatrick Decl. Ex. 27,¶ 18. *The record shows, however, that there is an unreasonably high – but easily avoidable – risk that under the Execution Procedures Plaintiffs will not be properly anesthetized and therefore will die in agony*. Certainly there is an issue of fact here that precludes summary judgment.

The testimony of Grantt Culliver, the warden who has presided at every lethal injection execution in Alabama, shows that there is great risk that anesthesia will not be properly administered or maintained and that the inmate will suffer terribly as a result. *The testimony clearly establishes that any assumption that anesthesia will be properly administered is utterly unfounded.* The testimony is so telling that we cite it here at some length, while asking the Court to keep in mind that the use of pancuronium bromide and potassium chloride make agony *certain* if a deep plane of anesthesia is not reached and maintained:

> Q. . . . Have you been told at any time that it is important to assure that the inmate has reached a deep plane of anesthesia?
>
> [Form objection.]
>
> A. I have not been told that.

(Culliver Dep., FitzPatrick Decl. Ex. 21, 26:12-18.)

> Q. Did you, at any time, since you've been a warden involved in the lethal-injection executions, consider it your responsibility to assure that the inmate was not subjected to the unnecessary risk of physical pain in the process of the lethal injection?

[Form objection.]

A. As a warden and carrying out the order of an execution for the State of Alabama, I considered it my responsibility to carry it out by policy and in as humane manner as I possibly could.

Q. And in trying to assure that it was a humane method, did you consider the possibility that the potassium chloride could cause pain if the inmate was not sufficiently anesthetized?

[Form objection.]

A. I did not because I had no knowledge of that.

Q. When you're involved in the process of the execution, do you observe the inmate or in any other way seek to assure yourself that the inmate is under deep anesthesia?

[Form objection.]

A. I don't know of a manner that I would be able to do that.

Q. . . . And you have never received any training as to how you might do that; is that correct?

A. No, sir.

Q. Yes, it's correct? You have not received training?

A. I have not received training.

(Culliver Dep., FitzPatrick Decl. Ex. 21, 35:14-37:4.)

Q. You do know that the inmate is paralyzed, right?

A. I do know that we use pancuronium bromide.

Q. And if you assume with me that the inmate is paralyzed and, therefore, unable to show signs of pain, would you agree that the monitoring process you just described, the natural one that any human being would do [look for signs of pain by inmate], would not reveal to you whether . . . the inmate was in pain or not?

[Form objection.]

A. That's possible.

(Culliver Dep., FitzPatrick Decl. Ex. 21, 46:9-23.)

Q. And it's fair to say that it's certainly possible that something could go wrong . . . while you're performing the lethal-injection process; right?

[Form objection and discussion between counsel.]

A. It's possible. Every – I mean, every day there are things that happen every day. So it's quite possible, yes.

(Culliver Dep., FitzPatrick Decl. Ex. 21, 97:4-97:20.)

Even under Defendants' theory of the case it is of utmost importance that the inmate be properly anesthetized. But the person charged with that responsibility does not understand how crucial anesthesia is and does not take steps to assure that, or even ascertain whether, inmates undergoing execution under his supervision are properly anesthetized. He readily concedes that problems may be encountered. *He admits that in fact he does not know whether the inmates he has executed died in extreme pain*:

Q. Do you know whether in any of those eleven executions the inmate reached a level of consciousness such that he was in pain from the injection of potassium chloride?

[Form objection.]

A. I do not know.

Perhaps most significantly of all, the Warden also indicated that he would not respond should any problems actually arise:

Q. . . . Let's say you encountered a situation where the inmate showed signs of pain, visually you could observe the inmate and you drew the conclusion that the inmate was in pain. What would you do in that situation?

[Form objection.]

A. If I observed them -- If everything as I looked into the room, if everything was fine, if my push seemed to be fine, then I would continue to push.

(Culliver Dep., FitzPatrick Decl. Ex. 21, 87:19-88:6.) So Plaintiffs could die in agony under the Execution Procedures, and no one would know, as the Warden who will execute them admitted. Culliver Dep., FitzPatrick Decl. Ex. 21, 46:9-23.

Other members of Alabama's execution team also take no steps to ensure that the condemned inmate will be properly anesthetized prior to the injection of potassium chloride. DOC-1 testified that he[5] is unable to ascertain the depth of unconsciousness that the inmate has achieved prior to the injection of potassium chloride. DOC-1 Dep., FitzPatrick Decl. Ex. 5, 15:13-20. Likewise, DOC-2 testified that he takes no steps to ascertain whether the inmate achieves sufficient anesthetic depth. DOC-2 Dep., FitzPatrick Decl. Ex. 2, 32:06-21. EMT-1 and EMT-2, who are tasked with the establishment of IV lines for use in the executions, take no steps beyond establishing the IV lines and do not even view the execution as it occurs. EMT-1 Dep., FitzPatrick Decl. Ex. 4, 38:06-08; EMT-2 Dep., FitzPatrick Decl. Ex. 23, 21:21-24. Finally, although a heart monitor is hooked up to the inmate pursuant to the Execution Procedures, no one knows how to, or does, monitor it. Culliver Dep., FitzPatrick Decl. Ex. 21, 60:02-14; DOC-1 Dep., FitzPatrick Decl. Ex. 5, 27:20-28:05.

This factual record reveals that there are issues of material fact as to whether the Defendants take steps to reasonably ensure that the condemned inmate will be properly anesthetized. Nevertheless, in apparent recognition of the fact that the failure to monitor the inmate is a constitutional deficiency of Alabama's Execution Procedures, Defendants assert that it is illogical to conclude that an inmate may not be properly anesthetized when pancuronium bromide and potassium chloride can still be delivered by IV to the inmate and a lethal dose of anesthetic is used. *See* Defs Br. at 10. Yet this is indeed what has happened in Florida, Oklahoma and Ohio. *See* Heath Decl., FitzPatrick Decl. Ex. 26, ¶¶ 34, 35, 49(f), 49(h). The parties may seek a scientific explanation for this during upcoming expert discovery.

[5] Throughout this Memorandum of Law, Plaintiffs employ the masculine gender when referring to any witness who was deposed anonymously, without regard to actual gender.

(ii) Preparation of the Chemicals by the DOCs Presents an Impermissible Risk that a Proper Dose of Anesthesia Will Not Be Delivered to the Condemned Inmate

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, FitzPatrick Decl. Ex. 25, Response #5. Deposition testimony has 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., FitzPatrick Decl. Ex. 21, 69:12-19; DOC-2 Dep., FitzPatrick Decl., Ex. 2, 12:01-08; DOC-1 Dep., FitzPatrick Decl. Ex. 5, 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 that he has no experience in mixing sodium thiopental and could not even recall which drugs used in the execution process require mixing.* RN Dep., FitzPatrick Decl. Ex. 22, 20:24-21:06, 21:17-22:04. DOC-1's only training has been by his colleague DOC-2. DOC-1 Dep., FitzPatrick Decl. Ex. 5, 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., FitzPatrick Decl. Ex. 5, 22:05-21; DOC-2 Dep., FitzPatrick Decl. Ex. 2, 17:10-14; Culliver Dep., FitzPatrick Decl. Ex. 21, 94:2-17. "On the job training" in a situation as profound as the taking of human life is simply not sufficient to pass constitutional muster.

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., FitzPatrick Decl. Ex. 21, 70:14-71:8; DOC-2 Dep., FitzPatrick Decl. 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., FitzPatrick Decl. Ex. 21, 93:9-25**.** *And neither the Warden, nor anyone else, monitors the inmate afterward to see if a proper dose of anesthesia is delivered and the inmate becomes and remains unconscious.* Again, there is at the very least a disputed issue of material fact on this subject.

These facts reveal that the process by which the drugs used in executions by lethal injection in Alabama are prepared is one that poses an unjustifiable risk of error. The failure by the State to require the mixing of the drugs used in executions by individuals with sufficient training to do so invites the under-dosage of critical drugs and creates an unjustifiable risk of error in delivering a proper dose of anesthesia (which, in turn, will not be detected because of the lack of monitoring).

(iii) An Impermissible Risk Exists that the IV Lines Will Not Be Successfully Maintained and Anesthesia Will Not Be Properly Administered to the Condemned Inmate

Alabama's Execution Procedures call for the establishment of working IV lines by two emergency medical technicians ("EMTs"). Execution Procedures, FitzPatrick Decl. Ex. 3, at DEF000919. *See also* Culliver Dep., FitzPatrick Decl., Ex. 21, 41:10-21, 43:13-22. The factual record establishes that there is a significant risk of unnecessary pain and suffering by the condemned inmate due to difficulties in establishing and maintaining IV lines.

As an initial matter, the risk of unnecessary pain and suffering by the condemned inmate in the establishment of IV lines is apparent from the fact that for approximately two-thirds of the executions that have taken place in Alabama, the EMTs have failed to follow the requirement in

the Execution Procedures that they "view the offender's veins prior to the scheduled execution" to determine whether venous access will be possible. EMT-1 Dep., FitzPatrick Decl. Ex. 4, 22:21-23:07; Execution Procedures, FitzPatrick Decl. Ex. 3, at DEF000905**.** Presumably this requirement is one of the "safeguards" in the Execution Procedures, and yet it is not even followed in practice.

The factual record also establishes that EMT-1 and EMT-2 have had significant difficulty in establishing IV lines in past executions. First, several execution logs show that an abnormally long time was taken to establish IV lines in prior executions in comparison to the amount of time that the EMTs allege it should typically take to do so. Execution Log of James Barney Hubbard, FitzPatrick Decl. Ex. 7, at DEF000441; Execution Log of Michael Eugene Thompson, FitzPatrick Decl. Ex. 8, at DEF001155; Execution Log of Gary Leon Brown, FitzPatrick Decl. Ex. 9, at DEF000025. Second, several autopsy reports show multiple puncture wounds on condemned inmates, *i.e.*, they show multiple failed attempts to establish IV lines, even though the EMTs testified only one or two attempts have been required to locate usable veins in past executions.[6] Autopsy Report for Mario Centobie, FitzPatrick Decl. Ex. 10, at MCNAIR000866; Autopsy Report for Michael Eugene Thompson, FitzPatrick Decl. Ex. 17, at MCNAIR001290). Thus there is at least an issue of material fact as to whether the individuals currently responsible for establishing IV lines have the necessary expertise in establishing IV lines to avoid unnecessary pain and suffering by the condemned inmate. While EMT-1 and EMT-2 are Paramedics with 20 years of experience, the Execution Procedures do not require anything other than that an "EMT" fulfill the responsibility of establishing IV lines. Execution Procedures, FitzPatrick Decl. Ex. 3, at DEF000910**.** So persons with far less experience could be used for Plaintiffs' executions. Defendants imply that Plaintiffs' expert has previously indicated "EMTs"

[6] For this and other reasons there is a significant question as to the credibility of the EMTs.

have sufficient training. *See* Defs. Br. at 8. But Defendants leave out what Dr. Heath said EMTs have sufficient training to do. Dr. Heath does not dispute that EMTs may have sufficient training for certain tasks. Plaintiffs dispute that any "EMT" whatsoever, and EMT-1 and EMT-2 in particular, have sufficient training and expertise for their roles in Alabama executions. Again, the testimony of the EMTs raises credibility issues concerning their true experience and expertise in establishing IV lines.

The risk of unnecessary pain and suffering is heightened by a lack of monitoring of the IV lines. The Warden does nothing to supervise or even observe the EMTs or to ascertain whether they have established a properly flowing IV line. Culliver Dep., FitzPatrick Decl. Ex. 21, 41:10-42:10, 43:13-22. He does not observe the insertion of the IV line or examine the site of insertion, relying entirely on observing the inmate's arm from another room, ten feet away, through a small window, after the EMTs have left. Culliver Dep., FitzPatrick Decl. Ex. 21, 40:2-12, 41:10-42:10, 43:13-22, 64:21-25. The IV line is potentially compromised by a metal door that is closed on top of it. EMT-1 Dep., FitzPatrick Decl. Ex. 4, Exhibit One**.** Once the IV line is inserted, protocol dictates that the EMT personnel leave the immediate area. Execution Procedures, FitzPatrick Decl. Ex. 3, at DEF000911**.** According to execution logs, on at least one occasion, the EMTs left the building before the execution was completed. Execution Log of Anthony Keith Johnson, FitzPatrick Decl. Ex. 6, at DEF000629. While the State maintains the log is mistaken it concedes—as do the EMTs themselves—that the EMTs do not observe the IV site or IV lines during the execution. EMT-1 Dep., FitzPatrick Decl. Ex. 4, 38:06-08; EMT-2 Dep., FitzPatrick Decl. Ex. 23, 21:21-24. Yet the ability to view the IV line is a prerequisite for discovering any problems with the IV's proper maintenance. EMT-1 Dep., FitzPatrick Decl. Ex. 4, 16:14-17:05. Thus if they have made a mistake in inserting the IV, or

something goes wrong during the flow of drugs (such as the common phenomenon of "infiltration"), the EMTs are not in a position to know or do anything about it.

In apparent recognition of this fact, the Defendants assert that the EMTs remain on premises until the execution is complete in the event they are needed with regard to the IV lines. Defs. St. of Facts, ¶ 28. However, the EMTs testified they have no further responsibilities in the executions after initially establishing the IV lines. **Cite.** And no one else is in a position to closely observe the IV site for signs of infiltration (that is the anesthesia "infiltrating" tissue rather than going into the vein) or other IV problems. Further, as the EMTs are not authorized to administer anesthesia, it is questionable what they would do, if anything, if there were a problem with the flow of drugs after the IV lines were established (that by some miracle were noticed by a member of the execution team) and they were called upon by a member of the execution team to assist. **Cite.** Certainly the Warden, who does not understand infiltration problems with IVs (Culliver Dep., FitzPatrick Decl. Ex. 21, 84:17-20), cannot be counted on to detect and act on any IV problems that develop after the EMTs depart.

As Defendants trumpet their use of a high dose of anesthetic as proof that their method of execution is constitutionally sufficient, it is critical to that claim that a properly working IV be established and maintained throughout the execution. The size of the dose is irrelevant if it is not properly delivered, and there is a distinct possibility that will happen. The Defendants' own expert Dr. Mark 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", FitzPatrick Decl. Ex. 29, at 9-10 ("[I]f the right drugs are given at the right dose in the right order and into a working IV, there is, essentially, no chance that there could be any suffering or pain on the part of the inmate. . . . *[T]he major problem is having a working IV because if the IV is*

not working, these medications are not designed to delivered [sic] by any other route.")
(emphasis added).)

In fact, the failure of a non-working IV line leading to an inmate's consciousness during his execution has been starkly demonstrated by recent executions by lethal injection (using procedures similar to Alabama's) in the States of Florida (Angel Diaz), Oklahoma (Loyd LaFevers), and Ohio (Joseph L. Clark) where there was a failure of proper delivery of anesthesia due to failures in the IV lines all with horrible results. Heath Decl., FitzPatrick Decl. Ex. 26, ¶¶34, 35, 49(f), 49(h). As a result of the Diaz execution, Governor Jeb Bush of Florida immediately suspended execution by lethal injection and ordered a review of Mr. Diaz's execution and lethal injection in general. *Id.* at ¶ 35. The commission he established concluded that the "execution team failed to ensure that a successful IV access was maintained throughout the execution." *Id.* at 8. Accordingly, there are material issues of fact as to whether there is an unnecessary risk that a properly working IV will not be established and maintained throughout Plaintiffs' executions.

4. *Plaintiffs Do Not Contend Execution Procedures Must Satisfy the Standard of Care for Medical Procedures*

Defendants argue that Plaintiffs, via their expert witness, demand that "Alabama correction officials [be held] to the same standard of care that applies to surgeons operating in a hospital." Defs. Br. at 12. This is inaccurate. Plaintiffs explicitly do not contend that under the Constitution executions must meet the same standards as medical procedures. That is a straw man built by Defendants. Plaintiffs do argue that the Eighth Amendment, at a minimum, requires that so long as the State of Alabama executes people using potassium chloride and pancuronium bromide, the State's lethal injection process must be carried out by persons with reasonably sufficient training, such that an unnecessary risk of severe pain to the inmate is

avoided. This training is required especially in the administration and monitoring of the effect of anesthesia, and in injecting the chemicals that kill the inmate. But Alabama's written Execution Procedures do not require such training, and as discussed in the sections above, insufficient training has been provided to those currently involved with executions in Alabama.

Plaintiffs' expert, Dr. Heath, does not contend that the individuals involved in the Alabama execution process must be medical personnel. Rather, Dr. Heath opines that individuals with *sufficient training in anesthesiology* are required to ensure an acceptable level of pain management for the condemned. What an acceptable level of training is can be ascertained through expert discovery yet to be completed; nevertheless such training should be sufficient so that there is a reasonable likelihood that a sufficient plane of anesthesia will be reached and monitored and remedied if need be such that unnecessary risk of severe pain will be avoided.

Case law cited by Defendants in support of their straw man argument is inapposite. First, Defendants cite *Walker v. Johnson* for the notion that executions are not held to the same standards as medical procedures. 448 F. Supp. 2d 719, 723. The execution procedure in *Walker* (conducted in the State of Virginia) is materially superior to Alabama's procedures. In *Walker*, the district court noted that the IV team remained in the execution chamber during the execution and could "observe the inmate during the administration of the drugs." *Id.* at 721. In addition, "[t]he executioner has training to determine whether the IV line is flowing properly as he administers the drugs." *Id.* Qualities such as these are sorely lacking from Alabama's execution procedures.

Second, Defendants cite a Southern District of Indiana case for the proposition that Dr. Heath's recommendations need not be adopted to satisfy the Eighth Amendment, nor must a state do what is "optimally desirable" in a surgical setting. *Timberlake v. Buss*, No. 1:06-cv-

1859-RLY-WTL, 2007 WL 1280664 (S.D. Ind. May 1, 2007) (slip copy), aff'd 2007 WL 1302119 (7th Cir. May 3, 2007) (unpublished opinion) (denying motion for preliminary injunction). However, Indiana's execution procedures appear to be far more "desirable" than those used in Alabama. Notably, the State of Indiana confirms, through various means, that an inmate is sufficiently anesthetized before proceeding with an execution. *Id*. at *3. And while "speculation that something will go amiss" does not create a substantial risk of harm, *Id*. at *8, Plaintiffs have gone beyond speculation and presented considerable evidence that something will go wrong. It is beyond dispute that even in the most desirable of hospital situations, involving trained medical personnel, there is a high incidence of problems with IVs, including infiltration and the like. In fact, the statistics are such that problems with delivery of anesthesia during executions are certain. *See below*.

Finally, in relying on these cases, Defendants impermissibly attempt to preempt Dr. Heath's testimony in this case. The Court will hear that testimony at trial and consider its worth and persuasiveness at that time. Cherry-picking courts' observations about portions of testimony in other cases serves no purpose, and certainly cannot resolve disputed issues of fact.

5. *Plaintiffs' Claims Are Not Based on Mere Speculation*

Defendants argue that Plaintiffs' claims that Alabama's lethal injection process violates the Eighth Amendment are based on nothing more than speculation. *See* Defs. Br. at 15-16. Defendants support their argument by relying on an Eastern District of Virginia opinion which denied a preliminary injunction of an execution. *Reid v. Johnson*, 333 F. Supp. 543 (E.D. Va. 2004). In that case, however, the district court limited its review "to only those issues pertaining to the particular chemical combination to be used in [that] case." *Id.* at 548. The district court specifically refused to consider issues of execution personnel and their training. *Id.* at 549. In this case there is troubling evidence of inadequate personnel and training and evidence of

inadequate assurance that inmates are anesthetized properly. Thus, particularly where the motion at issue is one of summary judgment, *Reid v. Johnson* is not persuasive precedent.

Notwithstanding Defendants' unpersuasive case law, 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. Problems can and do arise. *See* Heath Decl., FitzPatrick Decl. Ex. 26, ¶ [51]. The State's own expert, Dr. Mark 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, FitzPatrick Decl. 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., FitzPatrick Decl. Ex. 26, ¶ 50. Another study shows that "drug-related errors occur in one out of five doses given to patients in hospitals." *Id.* Where IV problems are "particularly prevalent" even in hospitals it is simply wrong to categorize the risk of an IV problem in executions as mere speculation. To the contrary, it is a required inference that there will be times during executions when such problems arise and steps must be taken to minimize and correct those problems. But no such steps are taken in Alabama.

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 starkly demonstrated by recent executions by lethal injection in Florida (Angel Diaz), Oklahoma (Loyd 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).

While that mere fact without more may not be viewed by the Court as probative as to Alabama, expert testimony will reveal that it is in fact highly probative. Plaintiffs deserve an opportunity to present that expert testimony at trial. Plaintiffs' § 1983 claims thus rest on more than the off-chance that something may go wrong during their executions. The factual record indicates that there is a substantial risk of unnecessary pain under Alabama's current lethal injection protocol. Again, at the very least, there are disputed issues of material fact.

C. Defendants Have Deliberately Disregarded an Objectively Impermissible Risk of Harm

Defendants claim that "[t]here is no credible evidence that defendants knowingly and unreasonably disregard an objectively impermissible risk of harm." *See* Defs. Br. at 5. Deliberate indifference is not a necessary element of Plaintiffs' method-of-execution challenges, as shown above. Nevertheless, deliberate indifference is evident in the factual record.

First, since a neuromuscular blocking agent such as pancuronium bromide is not statutorily required to be used in execution by lethal injection in Alabama, nor is it necessary to execute the inmate, the use of such an agent by the Alabama Department of Corrections adds a severe and unnecessary risk of masking body movements that could signal the inmate's distress during execution. Heath Decl., FitzPatrick Decl. Ex. 26, ¶ 21a. This is the very essence of deliberate indifference. "Going out of your way to avoid acquiring unwelcome knowledge is a species of intent." *McGill v. Duckworth*, 944 F.2d 344, 351 (7th Cir. 1991). The Defendants' own expert concedes that pancuronium bromide is not used to assist in achieving the inmate's death. Dershwitz Decl., FitzPatrick Decl. Ex. 27, ¶ 29. He claims its purpose is to prevent onlookers from seeing possible signs of pain. Perhaps that is a worthy goal (although there are certainly policy reasons why society should not hide the realities of executing human beings). But it cannot be of sufficient importance to overcome the fact that it ensures that if something

does go wrong and an inmate experiences extreme suffering, no one will know it or act on it. Pancuronium bromide has been included in Alabama's Execution Procedures to ensure that anyone watching will not (and cannot) detect pain and distress. It is the very embodiment of deliberate indifference.

Second, despite admitted awareness of serious problems that other states have experienced in executions by lethal injection, Defendants have taken no steps to inform themselves or prevent similar problems in Alabama. Warden Culliver's testimony concerning his role in overseeing executions under Alabama's lethal injection protocol was, frankly, shocking. Despite admitting he was aware of controversy about lethal injection in the United States over the last few years, Warden Culliver stated that he did nothing to educate himself about the issues involved other than to read news articles concerning some executions. Culliver Dep., FitzPatrick Decl. Ex. 21, 96:9-21. The DOCs also admitted cursory knowledge of problems that have occurred in executions by lethal injection in other states, but have done nothing to investigate those "mishaps" in order to take concrete steps to avoid one occurring in Alabama. DOC-1 Dep., FitzPatrick Decl. Ex. 5, 32:08-13, 33:01-04; DOC-2 Dep., FitzPatrick Decl. Ex.2, 43:12-19. There is no evidence that any steps have been taken to prevent similar problems occurring in Alabama.

The practice of executions in this manner and failure by Defendants to inform themselves of known risks indicates deliberate indifference on the part of the Defendants to the risk that the Plaintiff will suffer extreme pain because he is improperly anesthetized. *See Farmer*, 511 U.S. at 843, n. 8 (defendant cannot escape liability for deliberate indifference "if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist.").

D. *Morales v. Tilton* Is Precisely on Point to the Issues Facing this Court

Defendants go out of their way to attack Plaintiffs' expert witness's reference to *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006), in an affidavit in a prior case. *See* Defs. Br. at 16-17. Again, the better practice is to await the actual testimony *in this case*, but Plaintiffs are not surprised by Defendants' hypersensitivity to *Morales*. The flaws that have been exposed in Alabama's lethal injection protocol are strikingly similar to the flaws that serve as the foundation of the finding in *Morales* that California's protocol governing executions by lethal injection (as of December 2006) violated the Eighth Amendment's prohibition against cruel and unusual punishment.

In *Morales*, Judge Fogel, after conducting an extensive evidentiary review of California's lethal injection protocol, held that without "effective remedial action" he would declare that "California's lethal-injection protocol—as actually administered in practice—create[s] an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment." 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006). Judge Fogel highlighted a lack of meaningful training of execution team members, improper preparation of the anesthetic and the inability of execution team members to effectively observe the inmate during the execution. *Id.* at 979-81. These issues read like a carbon copy of the troubling evidence discovered here. Indeed, after Judge Fogel issued his opinion, California launched an extensive review of its lethal injection protocol.

While it is true that "no Circuit Court of Appeal has struck down a three-drug protocol" (Defs. Br. at 17), Defendants are remiss in failing to acknowledge that in the past year, courts have held that there are constitutional problems with the three-drug cocktail and have ordered states to revise deficient protocols. In North Carolina, a federal judge prompted the state to revise its lethal injection protocol after finding that there were "substantial questions as to

whether North Carolina's execution protocol creates an undue risk of excessive pain." *See Brown v. Beck*, 455 F.3d 752, 753 (4th Cir. 2006) (Michael, J. dissenting) (detailing procedural history). And likewise, the State of Missouri filed a revised protocol after a district court finding that Missouri's then existing protocol violated the Eighth Amendment. *See Taylor v. Crawford*, 457 F.3d 902, 903-904 (8th Cir. 2006), *appeal after remand*, No. 06-3651 (8th Cir. Jun. 4, 2007) (finding revised lethal injection protocol constitutional). Courts *are* now finding constitutional problems with lethal injection protocols.

II. Plaintiffs' Claims Are Not Time-Barred As This Court Previously Recognized in a Similar Case

A. This Court Has Already Declined to Adopt Defendants' Statute of Limitations Theory Arising out of *Cooey v. Strickland*

Perhaps to preserve the argument for appeal, Defendants again raise a statute of limitations argument despite two recent decisions of this Court to the contrary. *See* Defs. Br. at 18-25. But this is not an open issue. As this Court (and Judge Thompson before it in *Jones v. Allen*) has previously held, "a statute of limitations cannot attach to an act that has yet to occur and a tort that is not yet complete." *Grayson v. Allen*, 2007 WL 1491009 at *5 n. 9 (M.D. Ala. May 21, 2007). *See also Jones v. Allen*, 483 F. Supp. 2d 1142 (M.D. Ala. 2007). Both decisions reject the precise arguments Defendants trot out again here. And at least one other district court in the Eleventh Circuit has agreed with the analysis in *Jones* and *Grayson*. *See 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), FitzPatrick Decl. Ex. 28.

Thus it is established law in this case that Plaintiffs' claims are not barred by the statute of limitations, and Defendants cannot justify any departure here from this sound analysis.

III. Plaintiffs' Claims Are Not Barred by Laches

Defendants also fallback on their laches argument. Defs. Br. at 25-29. On April 24, 2007, Defendants moved for summary dismissal based on the doctrine of laches. Doc. 53. Plaintiffs opposed on May 1, 2007. Doc. 56. Although Defendants' Motion is still pending, this Court subsequently dismissed a § 1983 challenge on grounds of laches. *See Grayson*, 2007 WL 1491009, *aff'd* 491 F.3d 1318 (11th Cir. 2007). Defendants now seek to analogize the facts which led to the dismissal of Mr. Grayson's action to the cases of Messrs. McNair and Callahan. Try as Defendants might, the factual circumstances surrounding Plaintiffs' initiation of their § 1983 claims are fundamentally different than that of Darrell Grayson.

Most fundamentally, no execution date has been set in these cases, and there is no risk that "expedited litigation" might prevent a full consideration of Plaintiffs' claims in a timely and measured manner. In addition, Defendants have failed to show that they have suffered undue prejudice as a result of the timing of this litigation. Moreover, and Defendants' rhetoric notwithstanding, the Eleventh Circuit has not eliminated the requirement that undue prejudice be shown prior to the application of laches.

A. No Execution Date Has Been Set

No execution date has been set for either Plaintiff. The entire reasoning of the Court in *Grayson* (and of other courts in dismissing method-of-execution cases) was premised on the nearness of an execution date. *See Grayson v. Allen*, No. 2:06-cv-1032-WKW, 2007 WL 1491009 (M.D. Ala. May 21, 2007). No such factor is present here. (In fact, given the existing schedule of executions in Alabama it is highly unlikely, and certainly speculative, that a date will be set until well after a trial of this matter has been completed and ruled upon.) Every court that has refused to hear a § 1983 method-of-execution case post *Hill* has premised its holding on the

nearness of an execution date. Nothing in *Hill* can be seen as even remotely allowing for dismissal of such claims on "equitable" bases when there is no execution date.

In *Grayson*, this Court clearly was concerned that the imminence of an execution date could distort the adversarial and decision-making process. *Grayson v. Allen*, No. 2:06-cv-1032-WKW, 2007 WL 1491009, at *11 (M.D. Ala. May 21, 2007). Given the profound nature of the issues before it, this Court was reluctant to consider that case under those circumstances. But those circumstances do not exist here. Fact discovery is complete. Expert discovery will be complete in a few weeks at most. Pre-trial work is well under way, and trial is scheduled to begin in less than a month. The considerations that troubled the Court in *Grayson* simply are not present here.

B. Plaintiffs Instituted Their § 1983 Claims in a Timely Fashion

The factual circumstances which surround the institution of Plaintiffs' § 1983 claims are demonstrably different than the factual circumstances that this Court reviewed in the *Grayson* action. In *Grayson*, the Plaintiff did not file his § 1983 claim until well over four years after the United States Supreme Court denied his petition for habeas corpus. *See Grayson*, 2007 WL 2027903 at *1. In comparison, Plaintiff Callahan filed his § 1983 claim the day after the Supreme Court denied his petition for habeas relief. *See* Defs. Br. at 3. Plaintiff McNair filed his § 1983 claim only a few months after the Supreme Court denied his petition for habeas relief. *See Id.* at 4. Furthermore, unlike Darrell Grayson, Plaintiffs have not previously filed § 1983 claims. *See Grayson*, 2007 WL 2027903 at *2 (noting that Darrell Grayson had filed a § 1983 claim relating to murder conviction over four years prior to filing § 1983 claim concerning Alabama's method of execution). Key factors that this Court held were fatal to Darrell Grayson's litigation thus are not present in the instant actions.

C. Defendants Have Failed To Show that Plaintiffs Have Caused Undue Prejudice to the State

In their brief, Defendants argue vociferously against the requirement that they show Plaintiffs have caused Alabama undue prejudice by their institution of their § 1983 claim.[7] The reason for their line of argument is obvious—Defendants cannot show undue prejudice. The factors that led this Court to find undue prejudice in *Grayson v. Allen*, do not exist in the instant actions.[8]

Again, it must be pointed out that unlike Darrell Grayson, no execution date has been set for Plaintiffs Callahan and McNair. The State of Alabama moved for an execution date well over three months ago and still the Alabama Supreme Court has not set a date. Putting aside what may or may not be the Alabama Supreme Court's intentions in not setting an execution date, the issue that led this Court to find undue prejudice in *Grayson*—fast track litigation—is not an issue in the *Callahan* and *McNair* actions. Fact discovery is complete; dispositive motions are being decided; expert disclosure and discovery will be completed shortly. A trial on the merits is but a few weeks away. The alleged undue prejudice caused by expedited litigation is not present in these actions.

Nor can Defendants credibly raise the specter of a long appellate process as a bar to Plaintiffs' claims. If this Court determines after trial that Alabama's method of execution is constitutional, *and if* execution dates are set in the interim (a questionable assumption at this

[7] Defendants cite a recent decision in the Southern District of Alabama, *Arthur v. Allen*, 2007 WL 2320069 (S.D. Ala. Aug. 10, 2007). In *Arthur*, Judge William H. Steele held on the basis of his reading of *Grayson v. Allen* that the Eleventh Circuit had removed the element of undue prejudice from lethal injection challenges. *Id.* at *5. With due respect to Judge Steele, the Eleventh Circuit did not remove undue prejudice from its analysis of laches. Instead it relied on the eve of execution cases that, as shown, are inappropriate here. Moreover, Judge Steele's opinion is not binding on this Court. Judge Steele's opinion might be applicable to an "eve of execution" request for a stay; here, again, no execution date is pending.

[8] It goes without saying that the usual requirements of undue prejudice such as a change in position based upon a reliance on the plaintiff's failure to sue, or because valuable evidence in the form of documentation or testimony is no longer available due to the passage of time, such that it is not possible to fairly determine the dispute, are not present in these actions.

point), it is unlikely that the Eleventh Circuit will grant stays of execution. Only if the Court finds after a full hearing on the merits that Alabama's method of execution is unconstitutional could Plaintiffs' executions be postponed, and only until such time as the State chose to amend its execution protocol to comply with constitutional standards. *Of course, there are as yet no pending execution dates and any postponement of executions due to unconstitutionality of the protocol would not be attributable to Plaintiffs.*

D. General Equitable Grounds Do Not Justify Dismissal of Plaintiffs' Claims

The Eleventh Circuit based its decision in *Grayson* on the Supreme Court's language in *Hill v. McDonough*, 126 S.Ct. 2096 (2006). In *Hill*, the Supreme Court made clear that the "strong equitable presumption against the grant of a stay" applies only when "the 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*, 541 U. S. at 650). Here, there is no basis to apply the presumption because Plaintiffs' cases were filed months before the State sought execution dates, no execution dates are pending, and the parties are prepared to proceed with trial within less than one month. Consideration of the merits without entry of a stay is thus fully possible.

IV. Plaintiffs Have Not Filed Impermissible Successive Habeas Petitions

Defendants' assertion that Plaintiffs' claims are impermissible successive habeas petitions is baseless. Plaintiffs challenge the circumstances of their sentences (§ 1983 claims), and not the sentences themselves (habeas claims). Plaintiffs' claims fall squarely within the scope of *Hill* and *Nelson*. *Hill v. McDonough*, 126 S.Ct. 2096, 2101 (2006) (noting that Hill's complaint did not challenge lethal injection generally but sought only to enjoin defendants from executing Hill in the matter they currently intended); *Nelson v. Campbell*, 541 U.S. 637, 645-647 (acknowledging that Nelson's challenge did not challenge an execution procedure required by

law, such that granting relief would imply the unlawfulness of his sentence). Just like the plaintiffs in *Hill* and *Nelson*, Mr. McNair and Mr. Callahan do not contest that the State may execute them by lethal injection. *Hill*, 126 S.Ct. at 2102; *Nelson*, 541 U.S. at 645-46. What Plaintiffs contest is the State's use of certain practices and procedures that are not statutorily mandated, again like the plaintiffs in *Hill* and *Nelson*. *Hill*, 126 S.Ct. at 2102; *Nelson* 541 U.S. at 645-47. Nonetheless, Defendants rely on *Hill* to argue that Plaintiffs' claims are procedurally barred.

Defendants premise this claim on the fact that Plaintiffs have not to date provided the State with a constitutionally compliant execution protocol. In other words, because Mr. McNair and Mr. Callahan have not done the work of the Alabama Department of Corrections, their complaints should be recharacterized as impermissible successive habeas petitions. This is contrary to *Hill*, which did not impose heightened pleading requirements for a § 1983 action. The Supreme Court held that any challenge to an execution procedure, including to a lethal injection protocol, can be brought as a § 1983 claim, regardless of whether the prisoner provides an alternative resolution to the challenged procedure. *Hill*, 126 S.Ct. at 2103. Federal courts are not free to impose heightened pleading standards. *Hill*, 126 S.Ct. at 2103; *Evans v. Saar*, 412 F.Supp.2d 519, 527 (citing *Reid v. Johnson*, 205 Fed.Appx. 500, 503 (4th Cir. 2004) (noting that the Fourth Circuit has not imposed a heightened pleading standard for § 1983 method of execution claims). The court in *Harris v. Johnson* did not deviate from this principle, despite what Defendants may imply. 376 F.3d 414, 417-418 (5th Cir. 2004) (remarking that the state faced a difficult choice because the plaintiff did not specify what execution procedures he found acceptable).

Finally, Judge Coody has in effect disposed of this argument. Defendants moved to compel Plaintiffs to spell out what they contend would be a constitutional method of execution, despite the fact that Plaintiffs have set forth their contentions as to the flaws in the current method in great detail. Judge Coody flatly rejected that motion, holding that Plaintiffs were not required to set forth such a contention at least at this time. Judge Coody also observed that, "[t]he law is clear that identifying an alternative, constitutional method of execution is not an essential element of a capital litigant's § 1983 claim. *See Hill v. McDonough*, __ U.S. __, __, 126 S. Ct. 2096, 2103 (2006). Order, Doc. 86.

Given this record, Defendants' arguments are specious. Plaintiffs do not contend that it is impossible to devise a constitutional method of execution by lethal injection. Thus there is absolutely no basis for treating Plaintiffs' § 1983 actions—explicitly authorized by the Supreme Court in *Hill*—as habeas petitions (an argument specifically rejected by the Supreme Court in *Hill*).

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the Court deny the Defendants' Motion for Summary Judgment and grant such further and other relief as it deems appropriate.

Date: September 4, 2007

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CERTIFICATE OF SERVICE

I certify that on September 4, 2007, a copy of the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: J. Clayton Crenshaw, James W. Davis, Corey Maze and Jasper Roberts

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