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

JAMES EDWARD BARBER, Plaintiff, v. KAY IVEY, Governor of the State of Alabama, JOHN Q. Hamm, Commissioner of the Alabama Department of Corrections, TERRY RAYBON, Warden, Holman Correctional Facility, STEVE MARSHALL, Attorney General of the State of Alabama, and JOHN DOES 1–3, Defendants.	)	Case No. 2:23-cv-00342-ECM

Defendants' Response in Opposition to
Plaintiff's Motion for a Preliminary Injunction

Defendants oppose Plaintiff Barber's request for a preliminary injunction (Doc. 25). Defendants' opposition is based on two grounds: (1) Barber has not, and cannot, establish a likelihood of success on the merits, and (2) granting the requested relief would be contrary to the public interest.

I. The requested injunction should be denied.

Barber's 42 U.S.C. § 1983 lawsuit is predicated on a single core allegation: that the State of Alabama's lethal injection protocol ("the protocol") will subject him

to cruel and unusual punishment because the personnel entrusted in the protocol with obtaining the necessary intravenous access lack "sufficient relevant medical expertise" to successfully carry out that stage of the protocol. (Doc. 1 ¶ 35.) A district court may grant injunctive relief only if the moving party shows that (1) it has a substantial likelihood of success on the merits, (2) irreparable injury will be suffered unless the injunction issues, (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and (4) if issued, the injunction would not be adverse to the public interest. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). As shown below, Barber is not likely to succeed on the merits of this claim, and granting his request for an injunction would be adverse to the public interest.

II. Barber has not shown and cannot show that he is likely to succeed on the merits.

A. Barber's claim is time-barred.

i. Barber fails to identify a relevant change to the protocol within the twenty-four months prior to the filing of his complaint.

First, Barber's claim is time-barred pursuant to the applicable statute of limitation. Alabama inmates like Barber who challenge the method of judicial execution to be used to carry out their sentence must file suit within two years of either the date their direct review is completed by denial of certiorari or "the date on

which the capital litigant becomes subject to a new or substantially changed execution protocol." *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008); *see also Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 779 F.3d 1275, 1280–81 (11th Cir. 2015). A claim that accrues by virtue of an alleged "substantial change" in a state's execution protocol is limited to the particular aspect of the protocol that the plaintiff alleges has changed, but "a substantial change to one aspect of a state's execution protocol does not allow a prisoner whose complaint would otherwise be time-barred to make a 'wholesale challenge' to the State's protocol." *Gissendaner*, 779 F.3d at 1280–81. Where a plaintiff's claims "rely on factual conditions that have not changed in the past twenty-four months," they are time-barred. *Id*. at 1281.

Barber's action alleges that execution of his sentence through the protocol will violate his Eighth Amendment right to be free from cruel and unusual punishment. His claim incorporates the first ninety-eight paragraphs of his complaint as support. (Doc. 1 ¶ 99.) A review of those factual averments, even accepting them as true, establishes that Defendants are entitled to dismissal of this claim under the governing two-year statute of limitations.

Importantly, Barber does not allege that his speculative injuries would arise out of any substantive changes to the protocol. Instead, to establish the required Eighth Amendment element of a substantial risk that ADOC will cause him harm or

severe pain, Barber pleads his view of the alleged facts[1] regarding the execution of Joe Nathan James and the preparations for the executions of Alan Miller and Kenneth Smith to support his arguments that the personnel employed to obtain IV access to the condemned displayed insufficient expertise and took too long to obtain the two points of IV access required by the protocol. (*Id.* ¶¶ 65–88.) Barber alleges that "competent and trained" medical professionals can obtain IV access in "minutes," and "certainly [in] no more than 30 minutes." (*Id.* ¶¶ 54–55.) Of course, this argument both ignores the obvious differences between obtaining IV access in a normal medical setting—with a presumably compliant patient—and obtaining IV access in the context of an execution, and also conflates the total time required for preparing for or carrying out an execution with the amount of time actually spent obtaining IV access. (*See, e.g.*, *id.* ¶¶ 65–70.)

But while flawed in other ways, Barber's complaint is crystal clear in its core allegation—which the Defendants dispute—that the "IV Team members…have not been adequately trained or appropriately credentialed" and "lack[] the training and skill necessary to [obtain IV access] without imposing severe pain and suffering," and that "the Eighth Amendment does prohibit…a method of execution [Defendants] are not competent to carry out[.]" (*Id.* ¶¶ 97, 103.) This claim is

[1] Notably, Barber does not cite to any judicially tested fact regarding these executions. Rather, he relies solely on the "factual allegations" in the complaints filed by Smith and Miller. (*See, e.g.*, Doc. 25 at 6.)

untimely because it relies "on factual conditions that have not changed in the past twenty-four months." *Gissendaner*, 779 F.3d at 1281.

Barber's claim is comparable to that of Gissendaner, who alleged that "Georgia does not have adequate training and procedures to establish intravenous access[.]" *Id.* But Gissendaner's claim failed as untimely because she, like Barber, "[did] not identify any change in the past twenty-four months that Georgia has made either to the prescribed method for establishing intravenous access or to the requisite qualifications of the individuals on the IV Team." *Id.* To be sure, Barber does describe *improvements* to the protocol in order to criticize them as insufficient (Doc. 1 ¶¶ 95–96), but for the purposes of his complaint, the underlying problem is the same: the IV team's allegedly insufficient training and experience.[2] Indeed, in his motion for a preliminary injunction, Barber alleges that the protocol is "largely unchanged." (Doc. 25 at 16.) But a claim that the protocol does not require sufficient training or expertise has been available to Barber for many years, and he pleads no facts that would show why he could not have raised it in a timely fashion.

Indeed, Alabama death row inmates have previously raised such claims, even before the protocol was made public in 2019. *See, e.g.*, *Boyd v. Myers*, No. 2:14-CV-

[2] Moreover, Barber's complaint makes clear that his claims arise out of the original protocol and not any changes to it. According to Barber, "no meaningful effort has been made to fix the blatant issues plaguing the ADOC's lethal injection protocol." (Doc. 1 ¶ 6.)

01017, 2015 WL 5852948, at *1 (M.D. Ala. Oct. 7, 2015), *aff'd sub nom. Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853 (11th Cir. 2017) (Boyd raised "Eighth Amendment claim based on a substantial risk of 'maladministration' of Boyd's execution resulting from the inadequate training and qualifications of the execution squad"); *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 874 (11th Cir. 2017) ("Boyd alleges that the ADOC's lethal injection protocol subjects him to a substantial risk of serious harm in violation of the Eighth Amendment because the officers who will carry out his execution are inadequately trained.").

Taking as true Barber's allegations that the protocol allows for insufficient training and experience, Barber has been able to act on his view of the protocol's supposed deficiencies since April 2019, when it was first released to the public, placing his May 25, 2023, complaint well outside of the applicable two-year limitations period. *See* (Doc. 1, Ex. K, n.1.) There has been no substantial change as to this aspect of Alabama's policies or procedures in the twenty-four months preceding the filing of Barber's lawsuit, and Barber pleads no facts that would suggest otherwise. Though the protocol now specifies that the IV team personnel must be certified, Barber pleads no facts that would explain how that specification would subject him to superadded pain and suffering in a way that he could not have challenged previously.

The Eleventh Circuit has held that claims alleging insufficient training of ADOC personnel tasked with carrying out lethal injections are time-barred where a plaintiff alleges that the alleged likelihood of harm is due to "deficiencies" in the protocol that have been in place longer than the limitations period. *Boyd*, 856 F.3d at 874. Merely using new or added (or indeed, "certified") personnel is not a sufficient change to support a new cause of action. As noted in *Boyd*, "To allow each instance of employee turnover in a state's execution team to create a new Eighth Amendment violation would render the "significant change" requirement meaningless." *Id*. at 875. But Barber's motion for preliminary injunction makes it clear that in his view, "Defendants have not made any meaningful changes to their defective LI Protocol." (Doc. 25 at 12.) Thus, while Barber's complaint does not plead facts that would explain how the new "certification" requirement gives rise to a claim he could not have raised before, even a liberal reading of his factual pleadings to encompass such a claim would not prevent the application of the statute of limitations.

ii. Barber's argument regarding the time available for executions fails because Alabama has *never* limited the time available for obtaining IV access.

Barber also bases his Eighth Amendment claim on allegations that "there is no time limit" in the protocol limiting the amount of time the IV team has available to obtain IV access. (Doc. 1 ¶ 111.) Once again, Barber is basing his allegations on

factual conditions that have existed for more than two years. He repeatedly claims that prior executions or execution preparations have lasted for up to "three-and-a-half hours." (*Id.* ¶¶ 65–66, 69, 77, 81, 86, 111.) Indeed, Barber alleges that "[t]he current LI Protocol allows this practice to continue[.]" (*Id.* ¶ 112.) Given that Alabama's protocol has *never* stated any time limit for obtaining IV access, Barber does not allege any facts that would explain why he could not have brought this claim in a timely fashion, *i.e.*, within "two years" of the date on which he became subject to lethal injection. *McNair*, 515 F.3d at 1173. Consequently, Barber's claim is untimely.

iii. Barber could have raised his claim concerning nitrogen hypoxia as early as April 2019.

The facts pleaded in support of Barber's "alternate method" of nitrogen hypoxia—another required element of an Eighth Amendment claim—also reveal his claim is time-barred. Barber appears to base his assertion that nitrogen hypoxia is a readily available method of execution on the Eleventh Circuit's decision in *Price v. Commissioner, Department of Corrections*, 920 F.3d 1317 (11th Cir. 2019). Defendants assert that *Price*'s statements about the availability of nitrogen are dicta, and that if they are a holding, *Price* is inconsistent with clear Supreme Court precedent. *See Hamm v. Smith*, 143 S. Ct. 1188 (2023) (Thomas, J., dissenting from denial of certiorari). But assuming that Barber is correct in his reliance on *Price*, then he was aware or should have been aware of the alleged availability of nitrogen

hypoxia back when the decision was issued on April 10, 2019. Thus, his May 25, 2023, complaint was filed far outside of a two-year period after the alleged availability of the alternate method of execution that he relies upon.

In conclusion, because Barber's challenge to the protocol is time-barred, he is unlikely to succeed on the merits of his claim, and the preliminary injunction he seeks should not issue.

B. Barber's claim is impermissibly speculative.

The second flaw in Barber's motion for preliminary injunction is the fundamentally speculative nature of the claims that underlie it. From the outset, it is insufficient for a plaintiff raising a method-of-execution challenge to lethal injection to simply allege that he will be "repeatedly" stuck with a needle during the preparations for his execution. Indeed, the Eleventh Circuit recently affirmed the rejection of a similar claim, holding:

> Nance did not plausibly allege that a futile attempt to locate a vein would give rise to a constitutionally intolerable level of pain. After all, "the Eighth Amendment does not guarantee a prisoner a painless death," but rather it forbids the use of "long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) superaddition of terror, pain, or disgrace." *Bucklew*, 139 S. Ct. at 1124 (alteration adopted) (citation and internal quotation marks omitted).

Nance v. Comm'r, Ga. Dep't of Corr., 59 F.4th 1149, 1157 (11th Cir. 2023).

But Nance at least alleged some factual basis for his claim. *Id.* at 1156 ("Nance also alleged that the lethal drugs could not be administered through a standard

intravenous catheter due to his weak veins.") Barber does not even go that far. Instead, his action is based on his speculation that if the State of Alabama attempts to execute him by lethal injection, his execution will follow the allegedly flawed course of Joe Nathan James's execution and the unsuccessful preparations for two subsequent executions. But Barber's complaint does not allege any facts that would show he is similarly situated to any of those three men. Unlike Kenneth Smith, he alleges no history of difficult venous access, nor does he allege that, like Alan Eugene Miller, he is obese. *Cf. Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13781, 2022 WL 17069492, at *5 (11th Cir. Nov. 17, 2022), *cert. denied sub nom. Hamm v. Smith*, 143 S. Ct. 1188 (2023) (mem.) (Based on medical history and weight, Smith "alleged that there will be extreme difficulty in accessing his veins."); (Doc. 1 ¶¶ 76–78); Second Amended Complaint ¶¶ 98–99, *Miller v. Hamm*, No. 2:22-CV-00506 (M.D. Ala. Oct. 12, 2022), ECF No. 85 (referencing Miller's allegations that he weighed "351 pounds" and "doctors have long struggled to access Mr. Miller's veins"). Beyond his general allegations about the protocol, Barber alleges nothing that would explain why *his* execution would be like that of James, or why the preparations for his execution would be unsuccessful, as in the cases of Miller and Smith. Instead, Barber just argues generally that the protocol will subject him to a "botched" execution that will be cruel and unusual. But the history of lethal injection did not begin in the summer of 2022, and Barber's complaint presents nothing more

than sheer speculation to explain why his execution will not simply follow the course of the *forty-five* successful lethal injection executions that preceded James's successful execution.

Barber's motion for a preliminary injunction does nothing to remedy this deficiency. Instead, it simply repeats the baseless conclusion that Alabama's supposed "inability to carry out lethal injections" is "well-established"—presumably, he means by his account of the James execution and the unsuccessful preparations for the Miller and Smith executions. (Doc. 25 at 16.) But again, Barber's reliance on this limited number of scheduled executions merely demonstrates the tenuous and speculative nature of his claims.

The Supreme Court has long recognized that district courts should protect state-court judgments from claims that "are pursued in a 'dilatory' fashion or based on 'speculative' theories." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). As the Eleventh Circuit has recognized, this principle extends to method-of-execution cases. *See also Ferguson v. Warden, Fla. State Prison*, 493 F. App'x 22, 25 (11th Cir. 2012) ("Ferguson's speculation as to the parade of horribles that could *possibly* occur during his execution does not meet the burden of proof required by the Eighth Amendment."); *Pardo v. Palmer*, 500 F. App'x 901, 904 (11th Cir. 2012) ("mere speculation" was insufficient to warrant preliminary injunction in method-of-execution case).

Barber's failure to make any allegations at all about the forty-five successful lethal injections that preceded the James execution can perhaps be attributed to a fruitless attempt to avoid the limitations period on his action, but history demonstrates that Alabama's protocol works. Barber does not allege *anything* that would explain why it will be difficult to obtain veinous access in his case—beyond, that is, his time-barred assertion that the protocol does not require sufficient expertise on the part of the IV team. Thus, Barber's allegations about what happened during previous efforts to obtain veinous access—which Defendants dispute—show at most that the preparations for Barber's execution could *possibly* encounter similar difficulties. But when it comes to method-of-execution challenges, possibly is not good enough. As the Supreme Court explained in *Baze v. Rees*, that "an execution method may result in pain…by accident…does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." 553 U.S. 35, 50 (2008). Similarly, the Third Circuit has held that "speculating about what [] officials might do" is not sufficient to establish that a particular method of execution poses an "intolerable" risk of cruel and unusual punishment. *Jackson v. Danberg*, 594 F.3d 210, 227 (3d Cir. 2010); *see also Wackerly v. Jones*, 398 F. App'x 360, 363 (10th Cir. 2010) (court addressing a method-of-execution claim "need not address [a] hypothetical scenario" put forward by plaintiff). At bottom, Barber's complaint gives this Court nothing more than a "hypothetical scenario" in which the process of

obtaining intravenous access goes wrong or takes "too long." Because Barber's speculation is insufficient to state a claim upon which relief may be granted, he is unlikely to succeed on the merits of his claim.

Further, even Barber's claims that the protocol is prone to errors rests on a shaky factual foundation. While Barber points to a series of supposed errors, beginning with the execution of Joe Nathan James, he fails to acknowledge that his claims regarding James's execution are sharply denied by the pathologist who *actually performed* the autopsy of James on which Barber relies. Dr. Boris Datnow completed his autopsy report on or about August 15, 2022. *See* Attach. A, Affidavit of Dr. Boris Datnow. As the pathologist who conducted the James autopsy, Dr. Datnow speaks authoritatively on the results of that autopsy, and he strongly contests Dr. Zivot's account of the autopsy and its findings. *Id*. at 2–3. Moreover, as shown by Dr. Datnow's affidavit and the autopsy report attached thereto, the autopsy itself revealed "*no evidence* that a cutdown procedure was performed or attempted on Mr. James." *Id.* at 2 (emphasis added).

Astonishingly, despite basing his complaint on "Mr. James's autopsy," Barber never once mentions Dr. Datnow's findings. (*See* Doc. 1 ¶ 71.) Instead, to support his claim that a "cutdown" was performed on James, he relies on a *magazine article* by an author who never even provided Dr. Datnow the opportunity to comment prior to publication. (*Id.* ¶ 71 & n.12; Attach. A.) Had the author done so, Dr. Datnow

would have made clear that, as his autopsy report (Exhibit B to Attach. A) shows, no "cutdown" was performed on James at all. Indeed, as Dr. Datnow's autopsy shows, the "very superficial linear abrasions" identified "immediately adjacent" to Mr. James's "antecubital fossa" showed that "no vascular or subcutaneous tissue structures [were] exposed[.]" *Id.*

Dr. Datnow's affidavit demonstrates the extraordinarily speculative nature of Barber's pleadings, in turn underscoring the inevitable conclusion that Barber would fail to show "a substantial likelihood of success on the merits," *Siegel*, 234 F.3d at 1176.

III. The requested injunction would be contrary to the public interest.

The final consideration is whether preventing the State from carrying out Barber's lawfully imposed sentence would be adverse to the public interest. It would.

"Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Glossip v. Gross*, 576 U.S. 863 (2015) (inmates failed to establish unconstitutional risk of harm from three-drug protocol with midazolam). Barber has been on death row since 2004 because he robbed and murdered Dorothy Epps, brutally beating her to death with his fists and a claw hammer. Barber's actions are monstrous and worthy of his sentence.

As the Eleventh Circuit has explained:

> [W]hile "neither [the State] nor the public has any interest in carrying out an execution" based on a defective conviction or sentence, *see Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 702 (11th Cir. 2019), "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a [valid] sentence," *Hill* [*v. McDonough*, 547 U.S. 573, 584 (2006)]. Stays of executions where the conviction and sentence are valid impose a cost on the State and the family and friends of the murder victim. As we have stated many times, "[e]ach delay, for its span, is a commutation of a death sentence to one of imprisonment." *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir. 1983); *see McNair v. Allen*, 515 F.3d 1168, 1176 (11th Cir. 2008) (same); *Jones v. Allen*, 485 F.3d 635, 641 (11th Cir. 2007) (same); *Williams v. Allen*, 496 F.3d 1210, 1214 (11th Cir. 2007) (same); *Schwab v. Sec'y, Dep't of Corr.*, 507 F.3d 1297, 1301 (11th Cir. 2007) (per curiam) (same); *Rutherford v. McDonough*, 466 F.3d 970, 978 (11th Cir. 2006) (same); *Lawrence v. Florida*, 421 F.3d 1221, 1224 n.1 (11th Cir. 2005) (same).

Bowles v. Desantis, 934 F.3d 1230, 1248 (11th Cir. 2019).

Barber murdered Mrs. Epps over twenty years ago. His conventional appeals were fully litigated as of March 2022, and he has been represented by competent counsel at every stage of the proceedings. Barber's present challenge is meritless, and further delay to the execution of his just sentence would not serve the public interest. Therefore, the Court should deny Barber's motion for a preliminary injunction.

CONCLUSION

Defendants oppose the injunctive relief requested by Barber, and for the above-mentioned reasons, preliminary injunctive relief should be denied.

In the event the Court determines that preliminary injunctive relief is warranted, any injunction should be "narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2). In this case, such an injunction should be limited in scope so as to permit Barber's July 20, 2023, execution to be conducted by nitrogen hypoxia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2023, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system, which shall cause the same to be transmitted to all counsel of record.

Respectfully submitted,

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