IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACK E. ALDERMAN, Plaintiff, v. JAMES E. DONALD, in his capacity as Commissioner of the Georgia Department of Corrections; et al., Defendants.	CIVIL ACTION FILE NO. 1:07-CV-1474-BBM

ORDER AND OPINION

This matter challenging the constitutionality of Georgia's lethal injection protocol is before the court on the Motion for Summary Judgment [Doc. No. 99], filed by Plaintiff Jack E. Alderman ("Mr. Alderman"), as well as the Motion for Summary Judgment [Doc. No. 130], and the Motion for Reconsideration or in the Alternative to Set Aside Order [Doc. No. 119] (the "Motion for Reconsideration"), both filed by Defendants. Mr. Alderman has filed Requests for Oral Argument on his Motion for Summary Judgment and on the Defendants' Motion for Reconsideration [Doc. Nos. 101, 121].[1] Also before the court are a Motion for Leave to File Supplemental Motion in Opposition to Motion for Reconsideration [Doc. No.

[1]The Motions for Oral Argument are GRANTED.

124],[2] a Motion for Leave to File Supplemental Exhibit in Support of Motion for Summary Judgment [Doc. No. 142],[3] and a Motion for Leave to File Supplemental Brief in Support of Plaintiff's Motion for Summary Judgment [Doc. No. 143],[4] all filed by Mr. Alderman. Finally, before the court are a Motion for Reconsideration Out of Time [Doc. No. 118] and a Motion for Miscellaneous Relief [Doc. No. 132], filed by Defendants.[5]

I. Background

Mr. Alderman is a death row inmate imprisoned at the Georgia Diagnostic and Classification Prison ("GDCP") in Jackson Georgia. Defendant James Donald ("Mr. Donald") is the Commissioner of the Department of Corrections ("the Department"), and Defendant Hilton Hall ("Mr. Hall") is the Warden at GDCP (the

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[2]The court GRANTS this Motion, though it easily rejects the arguments contained within the supplemental filing, in short that the statute of limitations should be tolled as a result of Defendants' fraud in representing that Georgia's lethal injection protocol is constitutional.

[3]The court GRANTS this Motion, based on the Supreme Court's recent decision in Baze v. Rees, 128 S. Ct. 1520 (2008) (plurality opinion).

[4]The court GRANTS this Motion, based on the Supreme Court's recent decision in Baze v. Rees, 128 S. Ct. 1520 (2008) (plurality opinion).

[5]The court has reviewed the parties' briefs on the Motion for Miscellaneous Relief, in which Defendants seek to clarify whether they should file record excerpts. The court sees no need for Defendants to file additional material in conjunction with their Motion for Summary Judgment. The Motion for Miscellaneous Relief should be marked as GRANTED.

"Warden"). On a summary judgment motion, justifiable factual inferences are construed in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Plaintiff and Defendants have cross-moved for summary judgment. Unless otherwise noted, the following material facts are not in dispute.[6]

A. Mr. Alderman's Conviction and Post-Conviction Review

Mr. Alderman was originally sentenced to death for the murder of his wife in 1975. Alderman v. State, 254 Ga. 206, 206, 327 S.E.2d 168, 170 (1985). He obtained federal habeas relief on the ground that three prospective jurors had been excused erroneously. Id. Another sentencing trial was conducted in 1984, resulting in another death sentence on March 31, 1984. Id. at 206 n.1, 327 S.E.2d at 170 n.1. Mr. Alderman appealed that sentence. The Georgia Supreme Court denied his appeal on February 28, 1985, and denied rehearing on March 28, 1985. Alderman v. State, 254 Ga. 206, 327 S.E.2d 168. Mr. Alderman then filed writs of habeas corpus which were denied in both the state and federal courts. The United States Supreme Court denied his petition for certiorari review. Following the Supreme Court's

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[6]After thoroughly reviewing the parties' Statements of Material Fact, the court concludes that very few *facts* regarding the implementation of Georgia's death penalty protocol are actually in dispute. However, both parties make numerous objections that their opponent's "characterization of the facts" is inaccurate. The court has considered both parties' phrasing of the underlying facts and does its best to "characterize" the facts in what it considers to be a neutral manner. The court recognizes the parties' preference for their own characterization, however finds there to be no real dispute about any *material* fact in this case.

denial of certiorari, Mr. Alderman's execution was set for October 19, 2007. However, on October 18, 2007, the Georgia Supreme Court granted a stay of Mr. Alderman's execution because the Supreme Court had granted certiorari in Baze v. Rees, a case involving Kentucky's similar lethal injection protocol. As of the date of this Order, that stay is still in effect.

B. Georgia's Lethal Injection Protocol

Execution by lethal injection replaced electrocution as the method of court-ordered execution in Georgia and became effective as of October 5, 2001. See O.C.G.A. § 17-10-38. Georgia adopted a written protocol for implementing lethal injection in 2000. (Ga. Dep't of Corr., Lethal Injection Procedure, June 7, 2007, Ex. C to Pl.'s Compl. (the "Protocol").) In brief, a Georgia inmate sentenced to death is executed by injection of three chemicals in order: first, sodium pentothal, also referred to as sodium thiopental,[7] an anesthetic; next, pancuronium bromide, a paralytic agent; and last, potassium chloride, which stops the inmate's heart. The Protocol has undergone two minor revisions in 2002 and 2007, neither of which provided for substantive changes to the procedure.

[7]The briefs in this case use the term "sodium pentothal." The Supreme Court in Baze uses "sodium thiopental" as well. Both terms refer to the same chemical, and the court will use them interchangeably.

1. Staff Present

The Protocol provides that certain staff members shall be present at each execution. (Protocol § 11.1.) The Intravenous Team, or IV Team, must consist of two or more trained personnel, including at least one nurse, "to provide intravenous access." (Id. § 11.1.5.) In practice, the IV Team consists of two nurses. (See Defs.' Statement of Material Facts ("Defs.' SMF") ¶ 103.) The Injection Team must consist of three trained staff members "to inject solutions into the intravenous port(s) during the execution process." (Protocol § 11.1.7.) One physician must be present to provide medical assistance during the execution process, and two physicians must be present to determine when death occurs. (Id. §§ 11.1.3-.4.) Various other personnel must also be present, including the Warden or Deputy Warden, correctional officers, security personnel, and a Chaplain. (Id. §§ 11.1.1, .6, .8, .9.)

2. Facilities

The facilities for an execution in Georgia include the Execution Room and the adjacent Injection Room. Between the two rooms is a tinted one-way window such that the Execution Room can be seen from the Injection Room, but not vice versa. The Execution Room measures 19 feet 2 inches by 11 feet 4 inches. In the center of the Execution Room is the gurney where the inmate will ultimately be executed, about 7 feet long and 2 feet 10 inches wide. The gurney is secured with bolts to the

floor. A heart monitor is located in a part of the Execution Room separated from the gurney by a curtain. In the wall between the Execution Room and the Injection Room, there are two holes, each approximately 1.5 inches in diameter. The IV tubes run from the Injection Room to the Execution Room through these holes.

3. Preparation for Execution

Prior to commencement of the execution, the Protocol calls for multiple checks of communication equipment, sound equipment, medical equipment, and the conditions of the Execution Room. The condemned inmate is examined and offered a sedative. Two nurses check for potential problems obtaining access to the inmate's vein, and apply an anesthetic ointment to the inmate's skin.

The drugs are purchased pursuant to a DEA license and maintained in the pharmacy until the Deputy Warden retrieves them two hours before an execution. The drugs come in pre-measured containers and are stored in the pharmacy as provided on the packaging. A nurse observes[8] other individuals mixing the pre-measured sodium pentothal into pre-measured saline solution, drawing all the drugs into syringes, and placing the drugs into a labeled syringe holder. Each syringe used during the execution has a capacity of 60 ccs, and is fitted with a printed label to specify the number, but not the contents, of the syringe. In addition

[8]As Mr. Alderman points out, "observes" is not to be confused with "supervises."

to the primary set of drugs, a second set is prepared, and a third is on hand if needed.

The nurses comprising the IV Team assemble new IV tubing, inspect the cart containing medical supplies, and test the heart monitor. They check for leaks or kinks in the line. Once the inmate is secured onto the gurney, the nurses establish two IV sites on the inmate so that if the primary site fails for any reason, the secondary site may be utilized.[9] If they are unable to provide access, a physician will determine the best method for intravenous access, possibly utilizing a central venous cannulation, also known as a "central line." The IV tubes run from the inmate in the Execution Room through the two holes in the wall to the Injection Room.[10] The nurses connect the heart monitor to the inmate. The doctors check and

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[9]Although the Protocol does not expressly require that this procedure be performed within one hour, it does indicate that this task is accomplished "Within One (1) Hour of Execution." (Protocol § 17.3.) Georgia's protocol leaves discretion to the nurses to use their medical discretion to insert the IV catheter at optimal IV sites, which the court views as superior to Kentucky's stated preference for particular IV locations on all inmates.

[10]The parties dispute the length of the IV tubing. Mr. Alderman claims the tubing is 15 feet long. Defendants dispute this contention as "speculation" but provide no estimate of their own. Even assuming a 15 foot long IV tube, the court finds that this difference between the Georgia and Kentucky procedures does not create a "substantial" difference between the two.

The parties also dispute the resistance of the IV at the vein versus in the tubing set. Mr. Alderman contends that the resistance at the vein is sixteen times higher than it is at the tubing set, and Defendants contend that it is only eight times higher. Defendants do not dispute Mr. Alderman's statement in the abstract that "[i]ncreased resistance at the vein increases the probability that the drug will flow back in the tubing and away from the (continued...)

observe the heart monitor.

4. Execution Process

Once the Warden orders that the execution begin, the Injection Team, also in the Injection Room, begins the injection process. One team member injects the first two syringes each containing one gram of sodium pentothal. After the sodium pentothal is administered, the first team member injects saline solution to clear the IV tubing.[11] The second team member then injects the next syringe containing 50 milligrams of pancuronium bromide, followed by another syringe containing saline solution. The third team member then injects the next syringe containing 120 milliequivalents of potassium chloride followed by another syringe containing saline solution. The Protocol states that the Injection Team must "ensur[e] a steady, even flow of the chemical[s]" (Protocol § 17.3.20.2), but provides for no pause

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[10](...continued)
vein." (Defs.' Resp. to Pl.'s Statement of Material Facts ¶ 171.) The parties agree that in clinical settings, this problem is mitigated by running the IVs at a rate of 50-100 milliliters per hour. Plaintiff contends that for the executions, the Department utilizes a rate of approximately 1 milliliter per hour. Defendants dispute this as an "inaccurate characterization" and note that the rate of 1 milliliter per hour is applicable only to the saline drip used to keep the IV lines open prior to the actual execution process. The court does not find any of this dispute to be material so as to preclude summary judgment.

[11]At oral argument, Defendants indicated that the amount of saline solution is 60 ccs (an amount larger than that used in Kentucky). However, Mr. Alderman appeared to dispute that in his response to Defendants' Statement of Material Facts (¶ 114), where Mr. Alderman states that the amount is unspecified. Again, however, the court does not find this dispute to be material.

between any of the injections. One nurse observes the injections and measures the time by tapping her foot to ensure that the Injection Team administers the drugs evenly. The drugs are pushed at a rate of approximately 50 to 60 seconds per syringe. The Injection Team cannot see into the Execution Room from where they stand in the Injection Room.

The other nurse remains in the Execution Room next to the inmate.[12] She monitors the inmate for signs of consciousness or problems with intraveneous flow. Additionally, two doctors stand in the Execution Room to observe the heart monitor during the injections. The doctors cannot see the inmate, as the inmate is on the other side of a curtain. As the sodium pentothal is injected, the doctors can see the heart rate decrease on the heart monitor. During the injections, the Warden watches the Injection Team, and observes the inmate through the window. When properly administered, the sodium pentothal anesthetizes the inmate, the pancuronium bromide paralyzes the inmate, and the potassium chloride stops the inmate's heart. Two grams of sodium pentothal, four to seven times the amount used in a clinical setting, renders the inmate unconscious and unable to feel pain. Fifty milligrams of pancuronium bromide, approximately five times the clinical amount, gradually

[12]The Protocol requires that the individual in the Execution Room with the inmate be a nurse. (Protocol § 17.3.20.5.)

causes paralysis a few minutes after it is administered. Once the 120 milliequivalents of potassium chloride reaches the heart, it causes the heart to stop.

After the heart rate monitor flat lines, the doctors examine the inmate for signs of life. If the inmate exhibits residual signs of life within a reasonable period after all injections are complete, the Protocol provides that all seven syringes are to be repeated. Once the doctors determine that the inmate is deceased, the Warden pronounces that the order of the court has been carried out. An autopsy is conducted the next day.

5. Selection and Training of Staff

In practice, the physicians and nurses present during the execution are selected based on their experience with the tasks they will perform, or may be required to perform, during the execution. For example, the physicians currently involved with the execution process have experience with central venous cannulation and either emergency medicine or critical care. The nurses currently involved, one registered nurse and one licensed practical nurse, likewise have extensive experience with IV lines. The physicians and nurses are currently licensed

and employed in their respective professions.[13] However, the current medical professionals do not have training in anesthesiology.

The Warden selects the Injection Team. That team consists of Peace Officer Standards and Training certified correctional officers employed at the prison, who undergo screening and random drug testing. The team of officers taking part in lethal injections has largely remained the same since the institution of the Protocol, though there have been retirements. The officers are not required to have outside medical training.

6. Initial Training Exercises

When the Department adopted lethal injection, it set up initial training exercises, conducted sometime in 2000 or 2001, in which officials from another state utilizing lethal injection assisted. The initial training exercises taught officers how to mix the sodium pentothal and how to use the syringes to inject the drugs. A nurse demonstrated mixing the sodium pentothal. The officers present at the training were required to repeatedly mix the drug under the nurse's observation. A nurse demonstrated how to depress the syringe in a smooth even manner, timing the injection to discharge the syringe within 45 to 60 seconds. For demonstration

[13]Mr. Alderman does not dispute this statement, but notes that Defendants' citations in its Statement of Material Facts do not establish that Dr. Musso is currently licensed or employed as a physician.

purposes, the nurse used an artificial arm with simulated veins. The officers present were required to depress the syringe repeatedly under the nurse's observation.

7. Maintenance Training Exercises

While the Protocol requires that the IV Team and the Injection Team be trained, it does not specify what kind of training is required. The Department engages in practices prior to a scheduled execution, including those executions that are scheduled, but ultimately stayed, postponed, or commuted.[14] Three or four practice days are scheduled before an execution, each lasting a few hours and containing multiple sessions. No set number of practice sessions are required. During each session, the officers and nurses usually go through the entire procedure more than once. The participants mix simulated drugs (real drugs are not used), draw them into syringes, and inject them through IV tubing with a catheter on the end, which drains into a bucket. The participants do not utilize a human, either alive or dead, for training on administering the injection, and the artificial arm used in the initial training is no longer used. The participants also prepare to some

[14]Defendants claim that if no executions are scheduled, the Warden or Deputy Warden is to schedule about two practices per year. Deputy Warden Duffey testified to this effect. However, Mr. Alderman apparently disputes that a practice would be scheduled in absence of an execution, and claims that "other witness[es] recall no training sessions other than the practice run-throughs that take place before executions." (Pl.'s Statement of Material Facts ¶ 83.) Even accepting Mr. Alderman's characterization, it is not disputed that every scheduled execution prompts multiple walk-throughs of the execution procedure in each of at least two days just prior to the planned execution.

degree for various contingencies such as a recalcitrant inmate, a blown vein, or problems with tubing. However, the training sessions do not cover every possible contingency. The sessions are mandatory for officers, including alternates in the event that one of the Injection Team members is unable to perform his or her duties. (See Pl.'s Resp. to Defs.' SMF ¶ 110.) Occasionally one of the physicians will also attend a training session.

C. The Present Lawsuit

On April 20, 2007, while pursuing collateral review of his conviction and sentence, Mr. Alderman filed a complaint pursuant to 42 U.S.C. § 1983 ("Section 1983"). He later withdrew that complaint and filed the present action on June 22, 2007 on the same grounds, namely that the Protocol violates the Eighth Amendment's prohibition against cruel and unusual punishments.

1. Defendants' Pre-Answer Motion to Dismiss

On July 16, 2007, Defendants filed a Motion to Dismiss. Defendants argued that the statute of limitations barred Mr. Alderman's Section 1983 action. In an Order dated July 30, 2007 (the "July 30, 2007 Order"), the court denied Defendants' Motion to Dismiss. At the time, the Eleventh Circuit had not ruled on when a cause of action accrues for purposes of a Section 1983 challenge to a state's lethal injection protocol. In the July 30, 2007 Order, this court declined to rely on Cooey v.

Strickland, 479 F.3d 412, 422 (6th Cir. 2007), a case in which the Sixth Circuit found that the cause of action accrued at either (1) the conclusion of direct appeals, or (2) in circumstances where the method of execution did not exist at the conclusion of a direct appeal, when that method was adopted. The court noted that two district courts in the Eleventh Circuit had disagreed with the Cooey rationale. Ultimately, the court concluded that the statute of limitations could not have run "on a suit to prevent an unconstitutional act that has not yet occurred," in this case, the administration of the lethal injection to execute Mr. Alderman. (July 30, 2007 Order 7 (citation and internal quotations omitted).)

2. The Motion for Reconsideration

Discovery concluded on February 1, 2008. On February 5, 2008, Defendants moved for reconsideration of the July 30, 2007 Order, or in the alternative, to set aside that Order, based on the Eleventh Circuit's decision in McNair v. Allen, 515 F.3d 1168 (11th Cir. 2008).[15] When considering possible accrual dates for a Section 1983 challenge to a method of execution brought by a death row inmate, the McNair court rejected the date of execution and the date of completion of federal habeas review. Instead, it held that the two-year statute of limitations begins to run on that type of claim when the inmate's death sentence becomes final following direct

[15]Defendants simultaneously filed a Motion to File for Reconsideration Out of Time.

appeal or when the protocol becomes applicable to the inmate, whichever is later. It stated that "absent a significant change in the state's execution protocol" that had not occurred in that case, an inmate would be required to file an Eighth Amendment challenge within two years of the state's adoption of lethal injection. Id. at 1177. Defendants argue that because the court did not have the benefit of the McNair ruling when it issued the July 30, 2007 Order, it should reconsider that Order pursuant to Federal Rule of Civil Procedure 59 or set aside that Order pursuant to Federal Rule of Civil Procedure 60.

3. The Summary Judgment Motions

On February 1, 2008, the date discovery ended, Mr. Alderman moved for summary judgment. On February 6, 2008, the parties filed a Consent Motion to file excess pages and to consolidate Defendants' Motion for Summary Judgment with its response to Plaintiff's Motion for Summary Judgment. The court granted the Consent Motion on February 8, 2008. On March 3, 2008, Defendants filed their consolidated Motion for Summary Judgment and response to Plaintiff's Motion for Summary Judgment.

II. Summary Judgment Standard

Summary judgment is appropriate only when the pleadings and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A dispute over a fact will preclude summary judgment if the dispute "might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. A court must deny summary judgment "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

Although in considering a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor," id. at 255, the nonmovant must do more than "simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Indeed, the nonmovant must present affirmative evidence beyond mere allegations to show that a genuine issue of material fact does exist. Anderson, 477 U.S. at 256-57. "Only factual disputes that are material under the substantive law governing the case will preclude entry of summary judgment." Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 809 (11th Cir. 2004). The court must evaluate the evidence "through the prism of the substantive evidentiary burden" at trial. Anderson, 477 U.S. at 254.

III. Motion for Reconsideration

Under McNair v. Allen, 515 F.3d 1168, 1176-78 (11th Cir. 2008), the statute of limitations bars Mr. Alderman's action. Accordingly, the court grants Defendants' Motion to Reconsider Out of Time and the Motion for Reconsideration. The court vacates the July 30, 2007 Order to the extent that Order found that the statute of limitations could not apply to bar Mr. Alderman's lawsuit.[16] Mr. Alderman's action is therefore subject to dismissal because it was not timely filed.

The court emphasized in the July 30, 2007 Order that its ruling on the statute of limitations was based on the lack of binding Eleventh Circuit precedent. While the court ultimately found in favor of Mr. Alderman at that time, its decision was not a simple one, nor was the result a certainty. Rather, Eleventh Circuit law was not settled. As among the conflicting authorities, none of which was binding on the court, the court found the sources holding that the statute of limitations had not run to be more persuasive. McNair did not overrule existing precedent, but clarified an unsettled issue. See McNair, 515 F.3d at 1173 (describing the question as "one of

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[16]The court takes this action pursuant to Federal Rule of Civil Procedure 60(b). See Annunziata v. Sch. Bd. of Miami-Dade County, No. 04-12560, 2005 WL 591205, at *2 (11th Cir. Mar. 4, 2005) (explaining that Rule 60(b) gives the court a statutory basis to reconsider its previous decisions in a case based on intervening changes in the law); see also Fernandez v. Bankers Nat'l Life Ins. Co., 906 F.2d 559, 569 (11th Cir. 1990) (noting that a district court may rule on a second motion for summary judgment after denying the first where the circumstances make it appropriate, for example, there has been an intervening change in controlling law).

first impression in this Circuit"). Contra Harris v. Carter, 515 F.3d 1051, 1052 (9th Cir. 2008) (equitably tolling statute of limitations where petition was timely under prior Ninth Circuit precedent subsequently overruled by the Supreme Court). Now that McNair has settled the issue definitively, the proper course of action is to apply that holding.

Mr. Alderman's arguments to the contrary do not persuade the court. The Eleventh Circuit has rejected Mr. Alderman's contention "that he could not have filed a challenge to the lethal injection protocol until the Supreme Court's decision in Hill v. McDonough." Williams v. Allen, 496 F.3d 1210, 1213, 1215 (11th Cir. 2007) (concluding that "that the district court did not abuse its discretion in dismissing Williams's § 1983 action due to his unnecessary delay, especially given the strong presumption against the grant of equitable relief"). In the same case, the Eleventh Circuit rejected the plaintiff's "evolving standards of decency" rationale for delaying the filing of his claim. Id. at 1214. The circumstances of this case are indistinguishable from those in Williams or McNair.[17]

[17]In fact, Williams and McNair, both Alabama cases involving death sentences imposed many years ago, are closer cases than this one. Alabama adopted its lethal injection protocol in 2002, whereas Georgia's was effective earlier, in 2001. Therefore, the statute of limitations expired on Mr. Alderman's claim before the statute of limitations expired on the claims by Mr. Williams and Mr. McNair. The McNair plaintiff filed his complaint on October 11, 2006, months before Mr. Alderman filed his first complaint. The Williams plaintiff filed his complaint on April 20, 2007, the same day as Mr. Alderman.

Nor has Mr. Alderman convinced the court that equitable tolling should apply here. See Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005) (noting that a party seeking equitable tolling must establish that he has pursued his rights diligently and that an extraordinary circumstance stood in his way). Williams makes clear that the fact that Eleventh Circuit had precluded Section 1983 challenges to lethal injections prior to Hill v. McDonough, 547 U.S. 573 (2006), is not an extraordinary circumstance that would justify equitable tolling. See Williams, 496 F.3d at 1211, 1215 (upholding dismissal based on the statute of limitations, or in the alternative, laches). Furthermore, Mr. Alderman's argument that the statute of limitations should be tolled due to Defendants' fraudulent conduct in "representing . . . that they conduct executions in a constitutional manner, with trained professionals" (Pl.'s Supplemental Opp'n to Defs.' Mot. for Recons. 3) is unavailing. This argument also fails because Mr. Alderman has waived any equitable tolling defense by failing to plead it in his Complaint. See Wasco Prods., Inc. v. Southwall Techs., Inc., 435 F.3d 989, 991 (9th Cir. 2006) ("[F]ederal courts have repeatedly held that plaintiffs seeking to toll the statute of limitations on various grounds must have included the allegation in their pleadings; this rule applies even where the tolling argument is raised in opposition to summary judgment."); Larson v. Northrop Corp., 21 F.3d 1164, 1173 (D.C. Cir. 1994) ("[A]llegations of fraudulent concealment, which toll the

statute of limitations, must meet the [particularity] requirements of Fed. R. Civ. P. 9(b)."). Even if the court were to excuse Mr. Alderman's failure to assert his tolling argument at the outset, he also failed to raise his claims of equitable tolling in opposition to Defendants' original Motion to Dismiss, or even in his first brief in opposition to Defendants' Motion for Reconsideration. Indeed, Mr. Alderman provides no reason for waiting this long to raise the equitable tolling issue other than "the discovery of additional relevant case law." (Pl.'s Mot. for Leave to File Pl.'s Supp. Opp'n to Mot. for Recons. 1.) These tardy contentions do not sway the court to find that his desired result is "equitable."

"At every stage in the proceedings, the court must 'stop, look, and listen' to determine the impact of changes in the law on the case before it." Naturist Soc'y, Inc. v. Fillyaw, 958 F.2d 1515, 1520 (11th Cir. 1992). After doing so here on Defendants' Motion, it is clear that the statute of limitations bars Mr. Alderman's Section 1983 Action. The court declines to exercise any discretion Mr. Alderman argues it has not to apply McNair retroactively. Mr. Alderman's claim is time-barred.

IV. Motions for Summary Judgment

Although dismissal is warranted on grounds of untimeliness, the court alternatively rules that Defendants are entitled to summary judgment because this

case is controlled by the Supreme Court's recent decision in Baze v. Rees, 128 S. Ct. 1520 (2008) (plurality opinion).[18]

As an initial matter, the court notes that its decision is based both on Georgia's written Protocol and on the record of what happens as a matter of practice during executions. It is clear that the Baze court did not limit its consideration of Kentucky's procedures to its written protocol. The Baze court emphasized the trial judge's detailed factfindings. Id. at 1526. It found relevant not only the written protocol's requirement that the individuals inserting the IV catheters have a year of experience, but that "[c]urrently, Kentucky uses a certified phlebotomist and an emergency medical technician" to perform that function. Id. at 1528. The court is also aware that the Fifth Circuit found that Texas's lack of *any* written guidelines or protocols was not itself an Eighth Amendment violation where nothing indicated that problems occurred because of a lack of written procedure as opposed to human error. Richardson v. Johnson, 248 F.3d 1139, 2001 WL 85895, at *4-*5 (5th Cir. 2001) (table case).

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[18]As Defendants point out, other courts have upheld Georgia's lethal injection as constitutional. See, e.g., Crowe v. Terry, 426 F. Supp. 2d 1310, 1351-1354 (N.D. Ga. 2005) (Evans, J.) (habeas petition), aff'd, Crowe v. Hall, 490 F.3d 840 (11th Cir. 2007); Williams v. State, 281 Ga. 87, 90, 635 S.E.2d 146, 149 (2006) (motion to remand on criminal appeal); Walker v. State, 281 Ga. 157, 161, 635 S.E.2d 740, 745 (2006) (on criminal appeal, upholding trial court's rejection of claim that lethal injection was unconstitutional); Nance v. State, 280 Ga. 125, 127, 623 S.E.2d 470, 474 (2005) (same), cert. denied, 127 S. Ct. 168 (2006).

A. Baze v. Rees

The United States Supreme Court decided Baze v. Rees on April 16, 2008. At issue was Kentucky's lethal injection protocol, a three-drug combination similar to the protocol in use in at least thirty states, including Georgia. In a plurality opinion, the Supreme Court described the protocol as follows:

> The first drug, sodium thiopental (also known as Pentathol), is a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection. The second drug, pancuronium bromide (also known as Pavulon), is a paralytic agent that inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration. Potassium chloride, the third drug, interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest. The proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs.

Baze, 128 S. Ct. at 1527 (citations omitted). Kentucky's protocol originally provided for the injection of "2 grams of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride." Id. at 1528. In 2004, Kentucky increased the amount of sodium thiopental from 2 grams to 3 grams. "Between injections, members of the execution team flush the intravenous (IV) lines with 25 milligrams of saline to prevent clogging of the lines by precipitates that may form when residual sodium thiopental comes into contact with pancuronium bromide." Id. Under Kentucky's protocol, qualified personnel having at least one

year of professional experience must insert the IV catheter. Currently, this function is performed by a certified phlebotomist and an emergency medical technician, who "have up to one hour to establish both primary and secondary peripheral intravenous sites in the arm, hand, leg, or foot of the inmate." Id. Other personnel mix the solutions containing the drugs and load them into the syringes.

During the execution, the prison warden and deputy warden remain in the execution chamber with the inmate, who is strapped to a gurney. The execution team administers the drugs from a room separated by a one-way window through five feet of IV tubing. If the inmate "is not unconscious within 60 seconds following the delivery of the sodium thiopental to the primary IV site, a new 3-gram dose of thiopental is administered to the secondary site before injecting" the second and third drugs. Id. The warden and deputy warden determine the inmate's consciousness through visual inspection. They also "watch for any problems with the IV catheters and tubing." Id. A physician is present but only to revive the inmate in case of a last-minute stay of execution and to certify the cause of death.

The petitioners in Baze, much like Mr. Alderman, "claim[ed] that there is a significant risk that [Kentucky's] procedures will *not* be properly followed–in particular, that the sodium thiopental will not be properly administered to achieve its intended effect–resulting in severe pain when the other chemicals are

administered." Id. at 1530. They advocated a protocol wherein only the first drug, sodium thiopental, would be administered in a quantity sufficient to cause death, and the two other drugs would be omitted. They also urged "additional monitoring by trained personnel to ensure that the first dose of sodium thiopental has been adequately delivered." Id. at 1531.

The Court first decided which legal standard governs Eighth Amendment challenges to a state's mode of execution. Importantly, the Court rejected the standard proposed by the petitioners, who contended that the Eighth Amendment prohibited procedures "that create an 'unnecessary risk' of pain." Id. at 1529. The Court found the petitioners' standard unsatisfactory, and held that "to prevail on [an Eighth Amendment] claim, there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" Id. at 1531 (quoting Farmer v. Brennan, 511 U.S. 825, 842, 846 & n.9 (1994)). The Court emphasized that "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." Id. It continued:

> Instead, the proffered alternatives must effectively address a 'substantial risk of serious harm.' To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an

> alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment.

Id. at 1532 (citation omitted). Citing its previous decision in Gregg v. Georgia, 428 U.S. 153, 175 (1976), the Supreme Court noted that this burden was a heavy one. Baze, 128 S. Ct. at 1533.

The Court then concluded that petitioners had not met this burden. The court rejected the petitioners' contentions that

> there is a risk of improper administration of thiopental because the doses are difficult to mix into solution form and load into syringes; because the protocol fails to establish a rate of injection, which could lead to a failure of the IV; because it is possible that the IV catheters will infiltrate into surrounding tissue, causing an inadequate dose to be delivered to the vein; because of inadequate facilities and training; and because Kentucky has no reliable means of monitoring the anesthetic depth of the prisoner after the sodium thiopental has been administered.

Id. The Court cited the trial court's finding that there would be minimal risk of improper mixing of sodium thiopental if the manufacturer's simple instructions were followed. It also stressed that "Kentucky has put in place several important safeguards to ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner." Id. It relied largely on Kentucky's requirement that "members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman."

Id. It also noted that 10 training sessions a year are required, and that the IV team establishes both primary and backup lines and prepares a backup set of the lethal injection drugs. Id. at 1534. Finally, the Court stated that the presence of the warden and deputy warden in the execution chamber allows them to watch for IV problems. Id.

Notably, the Court also rejected petitioners' proposed alternatives to the Kentucky protocol. It concluded that Kentucky's "continued use of the three-drug protocol cannot be viewed as posing an 'objectively intolerable risk' when no other State has adopted the one-drug method and petitioners proffered no study showing that it is an equally effective manner of imposing a death sentence." Id. at 1535. It specifically noted that the inclusion of the second drug, pancuronium bromide, "does not offend the Eighth Amendment," despite petitioners' argument that it "serves no therapeutic purpose while suppressing muscle movements that could reveal an inadequate administration of the first drug." Id. It found petitioners' analogy to euthanasia of animals unpersuasive, and rejected the petitioners' contention that Kentucky "lack[s] a systematic mechanism for monitoring the 'anesthetic depth' of the prisoner." Id. at 1536. The Court noted that the risk from Kentucky's failure to implement a specific system to monitor the inmate's

consciousness level was too remote and attenuated to constitute an Eighth Amendment violation, especially in light of Kentucky's other precautions.

The Baze court concluded:

> A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

Id. at 1537. For the reasons set forth below, the court finds that Georgia's lethal injection protocol is substantially similar to the protocol the Supreme Court upheld in Baze, and Defendants are entitled to summary judgment.

B. If Properly Administered, Protocol Is Constitutional

As in Baze, Mr. Alderman concedes that if the Protocol is properly administered it is humane and does not constitute an Eighth Amendment violation. See id. at 1530. The three drugs are the same in Kentucky and Georgia, and are administered in the same order, but two of the drugs are injected in different quantities. In Kentucky, three grams of sodium thiopental are administered whereas in Georgia two grams are administered. Similarly, in Kentucky 240 milliequivalents of potassium chloride are injected, whereas in Georgia 120 milliequivalents of potassium chloride are injected. Mr. Alderman does not base

his challenge to the Protocol on the mere quantities of the drugs.[19] As the Baze court noted, "proper administration of the first drug, sodium thiopental, eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections of pancuronium and potassium chloride." Id. Conversely, there is no real dispute that "failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." Id. at 1533. Therefore, just as in Baze, the court's decision is limited to whether there is a substantial risk that the procedures "will *not* be properly followed." Id. at 1530.

C. Safeguards Substantially Similar to Kentucky's

Defendants are entitled to summary judgment because the Protocol provides safeguards such that the risk of harm is not objectively intolerable. Id. at 1531 (noting that an Eighth Amendment violation is not established "[s]imply because an execution method may result in pain, either by accident or as an inescapable

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[19]Mr. Alderman characterizes Kentucky's use of three grams of sodium pentothal as a "safeguard" absent in Georgia, but concedes that two grams of sodium pentothal are sufficient if properly administered. Indeed, he concedes that provided proper administration, the Protocol is constitutional in its entirety. To the extent Mr. Alderman claims that the absence of an additional gram of sodium pentothal itself means that the two protocols are not substantially similar, the court rejects that argument. As explained below, the existing safeguards in Georgia ensure that the risk that the full two grams will not be administered is an extremely attenuated one. See Baze, 128 S. Ct. at 1536.

consequence of death"). Indeed, many of Georgia's safeguards are arguably *more* effective than those employed in Kentucky.

1. Medical Professionals Are Present

Importantly, Georgia allows for the presence of medical professionals where Kentucky does not. The Protocol requires at least one nurse and two physicians. In practice, two doctors and two nurses are present at each execution. During the actual execution, the participation of those medical professionals is limited to observation unless something goes wrong. Nonetheless, the presence of four medical professionals provides an important safeguard in case of unexpected problems.

2. Nurses Perform IV Insertion

Additionally, Georgia's Protocol exceeds what Baze called the "most significant" safeguard (id. at 1533)—it utilizes a trained, experienced IV Team comprised of two licensed nurses. In Kentucky, the written protocol required "that members of the IV team . . . have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman." Id. In Georgia, nurses with extensive experience inserting IVs perform this function. The IV Team in Georgia is thus even more qualified than in Kentucky.

3. Two IV Sites

Like Kentucky, Georgia's Protocol provides for the IV Team to establish two IV sites. The Supreme Court identified this as one of the relevant safeguards in Kentucky's procedures. It noted that "[t]hese redundant measures ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected." Id. at 1534. Georgia does not specifically provide for any length of time for the IV Team to establish the two IVs, but a physician is available to assist the IV Team in obtaining IV access in the event the IV Team has trouble. Indeed, the physician may perform a central venous cannulation if peripheral access cannot be obtained.

4. Nurse Present in Execution Chamber

As in Kentucky, someone is present in the execution chamber to monitor for issues that may arise. The Supreme Court explained that in Kentucky, "the presence of the warden and deputy warden in the execution chamber with the prisoner allows them to watch for signs of IV problems." Id. at 1534. In Georgia, a nurse, rather than a layperson, stands in the execution chamber with the prisoner to monitor for consciousness and watch for problems.

5. Training of Officers

Finally, as in Baze, the officers mixing the chemicals and administering the injections are trained to do so. Mr. Alderman argues that Georgia's protocol is missing necessary safeguards regarding the training of officers. As explained, the presence of medical professionals at a Georgia execution provides a safeguard absent in the protocol upheld in Baze. Nonetheless, in Georgia the execution team as a whole is at least as qualified, if not more qualified, than the execution team in Baze. Therefore, the quantity and nature of Georgia's training does not establish an Eighth Amendment violation.

a. Amount of Training

Georgia provides a sufficient number of practices for its execution team. In Baze, the Supreme Court noted that Kentucky's written protocol required 10 practice sessions per year. However, a member of the IV team in Kentucky need only have participated in *two* practices before participating in an actual execution. (See Pl.'s Ex. 63, Ky.'s Execution Team Qualifications.) Georgia's written protocol does not provide for any particular number of practice sessions per year. In practice in Georgia, there are several days of training preceding each scheduled execution, each of which contains more than one complete walk-through. Practices take place in connection with every scheduled execution, even those ultimately commuted or

stayed. This could amount to several walk-throughs per year, depending on the number of actual executions that are scheduled. It is by no means clear that the participants in a Kentucky execution have attended more practice sessions than the non-medical professional participants in a Georgia execution. Additionally, although the doctors and nurses are already well trained and experienced in performing the necessary functions, the nurses attend the practice sessions, and occasionally a doctor will as well. Finally, in addition to the maintenance training, several members of the current execution team underwent an initial lethal injection training when the Protocol was adopted.

b. Nature of Training

The nature of Georgia's training activities adequately prepare the execution team for their duties. Each day of practice generally consists of multiple walk-throughs, and at least to some degree, performing exercises to prepare for contingencies. The Baze opinion does not detail the activities of Kentucky's practice sessions beyond that a complete walk-through of the execution takes place. The Court emphasized only that the training includes the siting of catheters into human volunteers. In Georgia, real humans are not used during the practice sessions. However, the use of real humans for the siting of IVs is unnecessary because it is nurses that perform the IV insertion on a Georgia inmate.

Mr. Alderman points out other ways in which the training could be improved, but none are within the scope of the Eighth Amendment's prohibition against cruel and unusual punishments. Mr. Alderman argues that pushing syringes through an IV tube not connected to a human does not train the Injection Team to perform their duties due to the difference in pressure that results when the drugs are injected into a human as opposed to an IV tube that drains into a bucket. He also contends that the Injection Team may not be trained on how quickly they should start the next injection once the previous injection has been administered. The evidence to support these conclusions amounts to little more than speculation. In any event, where so many other safeguards are in place, this does not create a genuine issue of material fact as to whether the Protocol violates the Eighth Amendment. See Baze, 128 S. Ct. at 1531 (noting that the mere fact that an execution method may result in accidental pain does not qualify that method as cruel and unusual).

Based on the undisputed facts, the court cannot say that this scheme creates more of a substantial risk than the scheme in Baze.[20] Thus, the court must grant

[20]Mr. Alderman claims that practice for contingencies "involves little more than the warden identifying the problem to be practiced and the injection team practicing how to report the problem to the warden." (Pl.'s Resp. to Defs.' Statement of Material Facts ¶ 94.) Defendants dispute this statement, and argue that "[w]hile the team does practice communicating problems to the warden, the team also is tested on whether they can (continued...)

summary judgment in favor of Defendants.

D. Risk Not Substantial When Compared to Proposed Alternatives

Defendants are also entitled to summary judgment because Mr. Alderman has not shown that the risk of harm is substantial when compared with the alternatives he proposes. As the Baze Court pointed out, such alternatives must be "feasible, readily implemented, and [must] in fact significantly reduce a substantial risk of severe pain." Id. at 1532. None of Mr. Alderman's proposed alternatives meet this standard.

1. One drug protocol

Mr. Alderman first suggests that the Department could switch to a massive dose of sodium pentothal or a similar drug. The Baze Court comprehensively dealt with, and rejected, Mr. Alderman's arguments in this regard. It rejected the same proposed one-drug protocol, noting that no other state had adopted it. Without taking a position on the effectiveness of that option, it stated that "the comparative

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[20](...continued)
recognize problems on their own." (Defs.' Resp. to Pl.'s Statement of Material Facts ¶ 128.) The court is not persuaded by Mr. Alderman's argument that the execution team does not practice for certain complications that may arise. Even without specific training for contingencies the Protocol contains sufficient safeguards so as not to violate the Eighth Amendment. Notably, the Protocol provides for the presence and observation of medical professionals, whose training and experience likely encompasses many more such contingencies than any isolated training could. The court agrees with Defendants that no written Protocol or training could cover every theoretical possibility. In any case the Supreme Court did not find this issue relevant enough to remark on it in Baze.

efficacy of a one-drug method of execution is not so well established that Kentucky's failure to adopt it constitutes a violation of the Eighth Amendment." Id. at 1535. It did so even given petitioners' contention that pancuronium bromide "serves no therapeutic purpose while suppressing muscle movements that could reveal an inadequate administration of the first drug." Id. It cited the state trial court's findings that Kentucky has an "interest in preserving the dignity of the procedure" and that the drug "stops respiration, hastening death." Id. Finally, it found the petitioners' evidence of the use of a barbiturate-only protocol to euthanize animals unpersuasive, noting that "veterinary practice for animals is not an appropriate guide to humane practices for humans." Id. at 1536.

2. Consciousness Checks

Next, Mr. Alderman contends that the Department must "*confirm* unconsciousness *before* administering" the second drug. (Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. 32.) In Georgia, there is no specific system for determining whether or how the nurse in the execution room monitors the inmate for signs of consciousness or other problems. In addition to the nurse's constant vigilance, several individuals involved can hear the inmate snore following the first injection, and the snoring stops shortly after the pancuronium bromide is injected. The Baze plurality rejected consciousness checks the petitioners and the dissent proposed,

stating that "[t]he risks of failing to adopt additional monitoring procedures are . . . even more 'remote' and attenuated than the risks posed by the alleged inadequacies of Kentucky's procedures designed to ensure the delivery of thiopental." Baze, 128 S. Ct. at 1536. In declining to require "a systematic mechanism for monitoring the 'anesthetic depth' of the prisoner," id., the Supreme Court found that the presence of the warden and deputy warden in the execution chamber to monitor for signs of consciousness was sufficient. The court again notes that in this case, a *licensed nurse* performs that function, so Georgia's procedure for monitoring consciousness is arguably better than Kentucky's.

3. Properly Trained Personnel

The final alternative Mr. Alderman proposes in his Motion for Summary Judgment is that the Department utilize properly trained personnel. As already explained, the court rejects Mr. Alderman's argument that the execution team is not properly trained. The Protocol provides that at least three medical professionals be present at executions. In practice the Department uses four, two physicians and two nurses. The Injection Team undergoes multiple walk-throughs of the execution procedure before each execution.

In any case, it is important to note that Mr. Alderman's alternative, that "doctors and nurses conduct the executions" (Mem. of Law in Supp. of Pl.'s Mot.

for Summ. J. 39), is not as feasible as Mr. Alderman suggests. Justice Alito, separately concurring in Baze, explained that "[p]rominent among the practical constraints that must be taken into account in considering the feasibility and availability of any suggested modification of a lethal injection protocol are the ethical restrictions applicable to medical professionals." Baze, 128 S. Ct. at 1539 (Alito, J., concurring). Justice Alito cited guidelines issued by the American Medical Association ("AMA") and the American Nurses Association ("ANA"). Both organizations provide that participation in executions is a breach of the ethical obligations of the respective professions. Id. (Alito, J., concurring). Even if not all doctors and nurses consider themselves bound by the opinions of those organizations, the court agrees that "a suggested modification of a lethal injection protocol cannot be regarded as 'feasible' or 'readily' available if the modification would require participation-either in carrying out the execution or in training those who carry out the execution-by persons whose professional ethics rules or traditions impede their participation." Id. at 1540 (Alito, J., concurring). Georgia's procedures already provide for participation of medical professionals whereas other states' procedures do not. Requiring their involvement to be even *more* extensive may not be feasible in light of the ethical standards of the AMA and the ANA.

E. Appropriateness of Summary Judgment

Baze requires the entry of summary judgment in this case even though the Baze trial court conducted a seven-day bench trial. Id. at 1529. The court may only deny summary judgment where there are "factual disputes . . . material under the substantive law governing the case." Lofton, 358 F.3d at 809. Both parties have asserted that this case can be resolved on summary judgment, and the court agrees. The vast majority of the matters debated by the parties are not genuine questions about material facts, but disagreements over the opposing party's characterization of details that the Baze court did not dwell on. In light of Baze's clear statement, the disputes that exist at the margins of this case are not material under the governing law. Baze controls this case as a matter of law. The court must enter summary judgment in Defendants' favor.

V. Summary

For the foregoing reasons, Defendants' Motion for Miscellaneous Relief [Doc. No. 132] is GRANTED with the clarification that Defendants need not file anything further with the court on their Motion for Summary Judgment.

Mr. Alderman's Motion for Leave to File Supplemental Motion in Opposition to Motion for Reconsideration [Doc. No. 124], Mr. Alderman's Motion for Leave to File Supplemental Exhibit in Support of Motion for Summary Judgment [Doc. No.

142], and Mr. Alderman's Motion for Leave to File Supplemental Brief in Support of Plaintiff's Motion for Summary Judgment [Doc. No. 143] are GRANTED.

Mr. Alderman's Requests for Oral Argument [Doc. Nos. 101, 121] are GRANTED.

Mr. Alderman's Motion for Summary Judgment [Doc. No. 99] is DENIED. Defendants' Motion for Reconsideration Out of Time [Doc. No. 118] and Defendants' Motion for Reconsideration or in the Alternative to Set Aside Order [Doc. No. 119] are GRANTED. The court DISMISSES this case because the statute of limitations had run before Mr. Alderman filed this lawsuit. In the alternative, Defendants' Motion for Summary Judgment [Doc. No. 130] is GRANTED.

IT IS SO ORDERED, this 2nd day of May, 2008.

s/Beverly B. Martin
BEVERLY B. MARTIN
UNITED STATES DISTRICT JUDGE