APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF ALABAMA

1990427

[Filed November 7, 2023]

Ex parte Casey A. McWhorter.)
_____)

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS. (In re: Casey A. McWhorter v. State of Alabama). (Marshall Circuit Court: CC-93-77; Criminal Appeals: CR-93-1448).

ORDER

The "Motion to Vacate Execution Date" filed by Casey A. McWhorter on October 25, 2023, having been fully considered,

IT IS ORDERED that the Motion is DENIED.

Shaw, Bryan, Sellers, Mendheim, Stewart, Mitchell, and Cook, JJ., concur.

Wise, J. recuses.

Witness my hand and seal this 7th day of November, 2023.

/s/ Megan B. Rhodebeck
Clerk of Court,
Supreme Court of Alabama

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

Case No. 1990427

CAPITAL CASE

[Filed October 25, 2023]

EX PARTE:	)
CASEY A. MCWHORTER	)
	)
CASEY A. McWHORTER,	)
	)
Petitioner,	)
	)
-v.-	)
	)
STATE OF ALABAMA,	)
	)
Respondent	)

MOTION TO VACATE EXECUTION DATE

Mr. McWhorter's current execution time frame complies with neither Alabama statutory law nor this Court's rules. If permitted to stand, it will lead to absurd and unconstitutional results. The Governor's inadequate notice violates Mr. McWhorter's constitutional rights to due process and equal protection. This Court should act to ensure it retains

control over, and consistency in, its rulemaking power and exercises its supervisory authority over executions.

FACTS

On October 13, 2023, this Court issued Mr. McWhorter's execution warrant, authorizing Department of Corrections Commissioner Hamm to carry out his execution within a time frame to be set by the Governor. On October 18, 2023, by letter to Commissioner Hamm, the Governor set Mr. McWhorter's execution for a 30-hour period beginning at 12:00 a.m. on November 16 and ending at 6:00 a.m. on November 17, 2023. That letter provides Mr. McWhorter with only 29 days of notice of the execution date.

On October 20, 2023, Mr. McWhorter notified the Governor of the notice issue and requested the date be reset to provide the minimal notice required.[1] On the same day, Will Parker, General Counsel to the Governor, responded that the Governor "has decided not to change the existing execution time frame."[2]

On information and belief, since the first modern era execution—that of John Louis Evans III, on April 22, 1983—through the 71st—that of James Edward Barber, on July 21, 2023—no condemned prisoner has received fewer than 30 days' notice of an execution date.

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[1] Ex. 1 (B. Rosenberg letter to Governor Ivey (Oct. 20, 2023)).

[2] Ex. 2 (W. Parker letter to B. Rosenberg (Oct. 20, 2023)).

LAW & ARGUMENT

I. Rule 8(d)(1), Ala. R. App. P., Ala. Code § 15A-18-82(a), and custom require at least 30 days' notice of an execution date.

In Alabama, capital defendants are entitled to 30 days' notice of their execution date. This right is derived from Alabama statute, Court rules, and longstanding practice.

Ala. Code § 15A-18-82(a), in relevant part, provides, "[w]hen the sentence of death is pronounced against a convict, the sentence shall be executed at any hour on the day set for the execution, not less than 30 nor more than 100 days from the date of sentence as the court may ajudge[.]" The plain language of the statute contemplates that a death sentence will be carried out within 30 to 100 days of its being levied against the defendant. If this statute were the only law relevant to setting the date of execution, Alabama could not carry out Mr. McWhorter's execution, as it has obviously been more than 100 days since he was first sentenced to death in 1994, and also more than 100 days since Mr. McWhorter exhausted his appeal on his federal habeas petition, *see McWhorter v. Dunn,* 141 S. Ct. 2757 (2021) (declining certiorari on June 24, 2021).

Recognizing that Ala. Code § 15A-18-82(a) sets a deadline that is nearly impossible to meet, this Court has adopted Rule 8(d)(1), Ala. R. App. P. As recently amended, the Rule, in relevant part, provides:

> [t]he supreme court shall at the appropriate time enter an order authorizing the Commissioner of the Department of Corrections

> to carry out the inmate's sentence of death within a time frame set by the governor, which time frame shall not begin less [sic] than 30 days from the date of the order. . . The supreme court's order authorizing the Commissioner of the Department of Corrections to carry out the inmate's sentence of death shall constitute the execution warrant.

The Rule contemplates that this Court's order authorizing the execution will serve as the execution warrant, and that the defendant will receive at least 30 days' notice of the execution date. The comments to this Court's adoption of the original version of Rule 8(d)(1), which this Court acknowledged conflicted with Ala. Code § 15A-18-82(a), explain, "the supreme court is in the best position to set *an execution date* and enter any necessary stays." Rule 8(d)(1), Ala. R. App. P. cmt. (emphasis added).

Since the death penalty was reinstated following *Gregg v. Georgia*, 428 U.S. 153 (1976), neither this Court nor the Governor has provided an execution date with notice of fewer than 30 days. Even where an execution warrant has expired and needed to be reset, as occurred with Christopher Price in 2019, Alabama has provided at least 30 days' notice of an execution date. In Mr. Price's case, this Court declined the State's invitation to suspend the 30-day notice requirement for his second execution warrant; it provided 31 days' notice. More recently, the first—and thus far only—execution under the amended version of Rule 8(d)(1), that of James Barber, the Governor

provided 50 days of notice.[3] This custom is consistent with both Rule 8(d)(1) and Ala. Code § 15A-18-82(a). *See, e.g.*, *Zimmern v. Southern Ry. Co.*, 96 So. 226, 227 ("'It is the well-settled general rule that in order that a custom or usage may be regarded as binding, it is essential that it be legal, and that a custom will not be recognized which is contrary to established law, inconsistent with good morals or in conflict with the general or public policy of the law.' . . The usage must be reasonable, and not 'oppose or alter established legal principles, and upon a given statement of facts make the rights or liabilities of individuals other than they are at common law.'") (citations omitted).

The only way to read Ala. Code § 15A-18-82(a) and Rule 8(d)(1), Ala. R. App. P., in harmony with each other and the Alabama Constitution is that the condemned prisoner must be provided with at least 30 days' notice of the execution date (or beginning of the execution time frame). To hold otherwise would modify the substantive rights provided under the statute, in violation of the Alabama Constitution. Ala. Const. art. VI, § 6.11 ("The supreme court shall make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts; provided, however, that such rules shall not abridge, enlarge or modify the substantive right of any party[.]").

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[3] In Mr. Barber's case, the Governor issued her letter on May 30, 2023, and set Mr. Barber's execution time frame to begin at 12:00 a.m. on July 20 and end at 6:00 a.m. on July 21, 2023. Mr. Barber was ultimately executed at 1:56 a.m. on July 21.

While this Court issued an Order on October 13, 2023 authorizing the Commissioner to carry out Mr. McWhorter's death sentence, that Order did not provide notice of the execution date. It served as the execution warrant – i.e., the authorizing instrument that facilitates the Governor's order setting the actual date. This Court's October 13, 2023 Order therefore did not give Mr. McWhorter notice of his execution date.

Thus, when the Governor issued her letter setting Mr. McWhorter's execution time frame, she was required to set the date no earlier than 30 days from the date notice was given to Mr. McWhorter. Because the Governor issued her letter on October 18, 2023 and Mr. McWhorter was given notice that same day, that means the execution time frame could not begin until 12:00 am on Friday, November 17. Instead, the Governor has deprived Mr. McWhorter of one day of his notice period, and set the execution time frame to begin at 12:00 am on Thursday, November 16.

The requirement of 30 days' notice is not academic, and the Governor's deprivation of one day is not merely a technical injury. Mr. McWhorter is facing execution. In the period leading up to the date, he is entitled to certain accommodations, including visitors from family and friends, and sessions with a spiritual advisor. To deprive Mr. McWhorter of a day to which he is entitled – a day that he could spend receiving spiritual advice or with family and friends, – is unnecessarily cruel. It

also gives him – and any reviewing courts – one day less to exhaust any legal challenges to his execution.[4]

While the Governor has deprived Mr. McWhorter of one day here, without the Court's intervention the next capital defendant may face an even greater reduction of notice. Indeed, if all that is necessary for the Governor to meet the notice requirement is to set an execution date at least 30 days after this Court issues the execution warrant, she could meet that requirement by providing same day notice of an execution so long as that execution time frame begins at least on the 31st day or thereafter. That is the sort of absurd result that this Court's jurisprudence seeks to avoid. *See, e.g.*, *Horton v. Alexander*, 977 So. 2d 462, 468 (Ala. 2007).

This Court should vacate the Governor's order as failing to abide by the 30-day notice period that Mr. McWhorter is entitled to under statute, Court rule, and past practice.

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[4] Counsel for Mr. McWhorter noted the 30-day problem in a letter to the Governor, asking that the governor issue a new notice, with the full 30-days' notice period. *See* Ex. 1. The Governor refused to do so, explaining that Mr. McWhorter was convicted many years ago, and has therefore "had sufficient notice of his execution." Ex. 2. But, of course, Mr. McWhorter was challenging his conviction and sentence in the courts, as he was entitled to do, and in no sense could he have been expected to prepare himself, his family, and his friends, for his execution until the date was actually set.

II. The shortened notice violates Mr. McWhorter's rights to due process and equal protection.

The Fourteenth Amendment, in relevant part, provides, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Governor's failure to provide 30-days' notice violates both Mr. McWhorter's rights to due process and equal protection.

Mr. McWhorter has a legal interest in receiving the minimum required legal notice of his execution date. *Cf. Hall v. Barr*, 830 Fed. App'x 8, 9 (D.C. Cir. 2020) (finding no due process violation where Federal Bureau of Prisons reduced execution notice period from 90 to 50 days because it was a non-binding procedural rule and prisoner received the 20 days' notice required by regulation). In *Hall*, there were two notice periods. The first, an internal, "non-binding procedural rule" that was modified to reduce the notice period from 90 to 50 days was in a protocol that expressly provided that it "does not create any legally enforceable rights or obligations." *Id.* (citations and quotation marks omitted). The second, a duly-enacted federal regulation—28 C.F.R. § 26.4(a)—required a minimum of 20 days' notice. *Id.* Because the binding regulation was satisfied, Hall had no substantive due process claim. Here, the statute and rule and rule require 30 days' notice, making them more akin to the binding regulation in *Hall*, and the Governor's failure to

provide that notice violates Mr. McWhorter's right to due process.

The Governor, without explanation, has treated Mr. McWhorter differently from every one of the 71 people the State of Alabama has executed since it resumed executions in 1983. Even under rational basis review, this violates Mr. McWhorter's right to equal protection. *See, e.g.*, *Gideon v. Alabama State Ethics Comm'n*, 379 So. 2d 570, 574 (Ala. 1980) ("Under the rational basis test the Court asks: (a) Whether the classification furthers a proper governmental purpose, and (b) whether the classification is rationally related to that purpose."). There can be no rational basis for classifying Mr. McWhorter as a condemned prisoner entitled to fewer than 30 days' notice because doing so is neither a "proper governmental purpose" nor rationally related to such a purpose.

CONCLUSION

This Court should vacate the execution date set by the Governor and issue a Court Order requiring that the Governor set any future execution date with at least 30 days' notice from the Governor's office.

October 25, 2023

Respectfully submitted,

/s/ Samuel H. Franklin
Samuel H. Franklin (Counsel of Record)
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**Not admitted in Alabama*

[*Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.*]

EXHIBIT 1

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October 20, 2023

VIA EMAIL

The Office of Alabama Governor Kay Ivey
600 Dexter Avenue
Montgomery, AL 36130
liz.filmore@governor.alabama.gov
will.parker@governor.alabama.gov

Re: Inmate Casey McWhorter
AIS No.: 00Z562

Dear Governor Ivey:

I write on behalf of my client, Casey McWhorter, to ask that you reschedule his execution date to comply with Alabama law and custom and ensure that his constitutional right to due process is not violated. Given the time sensitive nature of this issue, I ask that

you provide a response no later than Tuesday, October 24.

Alabama Code § 15A-18-82(a), in relevant part, provides, "[w]hen the sentence of death is pronounced against a convict, the sentence shall be executed at any hour on the day set for the execution, not less than 30 nor more than 100 days from the date of sentence, as the court may ajudge[.]" Rule 8(d)(1), Alabama Rules of Appellate Procedure, in relevant part, provides,

> [t]he supreme court shall at the appropriate time enter an order authorizing the Commissioner of the Department of Corrections to carry out the inmate's sentence of death within a time frame set by the governor, which time frame shall not begin less [sic] than 30 days from the date of the order. . . The supreme court's order authorizing the Commissioner of the Department of Corrections to carry out the inmate's sentence of death shall constitute the execution warrant.

In commentary to Rule 8, the Alabama Supreme Court explained its decision to abrogate because "the supreme court is in the best position to set *an execution date* and enter any necessary stays." Rule 8(d)(1), Ala. R. App. P. cmt. (emphasis added).

On October 13, 2023, the Alabama Supreme Court issued an order authorizing you to set a time frame within which to execute Casey McWhorter. On October 18, 2023, Mr. McWhorter was notified of that you had set his execution for a 30-hour period beginning at 12:00 a.m. on November 16 and ending at

6:00 a.m. on November 17. The period between October 28 and November 16 is 29 days. This is the shortest notice period provided to a condemned prisoner of his execution date in modern Alabama history.

There are several problems with Rule 8(d)(1) that provide context for the request Mr. McWhorter makes. First, the Alabama Supreme Court cannot delegate to you (or anyone) its authority to set a "day" for an execution. Ala. Const. art. III, § 43. Second, the amended rule purports to modify Mr. McWhorter's substantive right. Ala. Const. art. VI, § 6.11. Third, the commentary to the rule indicates the Alabama Supreme Court has abrogated the statute by giving you the authority to set a time frame for the execution, because the Supreme Court, not you, "is in the best position to set an execution date." Rule 8(d)(1), Ala. R. App. P. cmt.

If Rule 8(d)(1) is to be read in a manner that may render it constitutional, the minimum notice period of 30 days must be read as running from the Governor's order setting an execution time frame. That is, Mr. McWhorter's timeframe for execution must begin to run at least 30 days from the date of your Order, not the Supreme Court's ruling. Here, for the first time in modern Alabama history, a condemned prisoner has been provided with fewer than 30 days' notice of his execution date. As recently as 2019, the Alabama Supreme Court declined the Attorney General's request to set an execution date without 30 days' notice for Christopher Price, whose previous execution warrant had expired while awaiting a ruling from the United

States Supreme Court. You issued your order scheduling the execution of James Barber, the first under the new Rule 8(d)(1), on May 30, 2023, setting a 30-hour period covering all of July 20, 2023, and the first six hours of July 21, 2023.

Both law and precedent establish that Mr. McWhorter has a right to at least 30 days' notice of his execution date, as measured from the date of your Order. Before taking legal action to ensure his statutory and constitutional rights are respected, Mr. McWhorter respectfully requests that you reset his execution time frame to provide him with at least 30 days' notice of that time frame. This letter is not intended to waive any arguments or claims Mr. McWhorter may have regarding his rights other than his right to 30 days' notice.

Respectfully,

Benjamin E. Rosenberg

EXHIBIT 2

OFFICE OF THE GOVERNOR

KAY IVEY
GOVERNOR

GOVERNOR'S LEGAL OFFICE
STATE CAPITOL, SUITE N-203
MONTGOMERY, ALABAMA 36130

(334) 242-7120
FAX: (334) 242-2335

[SEAL]

STATE OF ALABAMA

October 20, 2023

Via e-mail: Benjamin.Rosenberg@Dechert.com
Benjamin E. Rosenberg
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036-6797

Re: Inmate Casey McWhorter
AIS No.: 00Z562

Dear Mr. Rosenberg:

I write in response to your letter dated October 20, 2023, in which you ask to reschedule Mr. McWhorter's upcoming execution. After reviewing this letter, Governor Ivey has decided not to change the existing execution time frame.

Mr. McWhorter was sentenced to death on May 13, 1994, and has spent the past almost thirty years unsuccessfully pursuing legal challenges to that sentence. Governor Ivey is confident that Mr. McWhorter has had sufficient notice of his execution and that the setting of his execution time frame was lawful in every respect.

Sincerely,
/s/ William G. Parker, Jr.
William G. Parker, Jr.
General Counsel

IN THE SUPREME COURT OF ALABAMA

No. 1990427

[Filed October 26, 2023]

EX PARTE:	)
CASEY A. MCWHORTER	)
	)
CASEY A. MCWHORTER,	)
Petitioner,	)
	)
v.	)
	)
STATE OF ALABAMA,	)
Respondent	)
	)

STATE OF ALABAMA'S RESPONSE TO MOTION TO VACATE EXECUTION DATE

The State of Alabama opposes Casey McWhorter's motion to vacate his November 13, 2023, execution date. McWhorter's motion should be denied because the State's preparations to execute his lawful sentence of death have not violated any laws or governing authorities. Additionally, the controlling rule regarding the procedure for executing a judicial sentence of death does not create a substantive right on the part of the condemned inmate. Finally, McWhorter's motion could be denied on the basis that, at best, it alleges error without injury.

Although McWhorter's motion opens with a citation to section 15-18-82(a) of the Code of Alabama,[1] he fails to cite, or otherwise acknowledge, the existence of section 15-1-1, which provides: "Any provisions of this title regulating procedure shall apply only if the procedural subject matter is not governed by rules of practice and procedure adopted by the Supreme Court of Alabama." The process of scheduling the execution of a lawful sentence of death is a procedural matter that this Court is statutorily permitted to establish by rule. McWhorter's motion essentially concedes this point when he recognizes that the Court adopted Rule 8(d) of the Alabama Rules of Appellate Procedure in response to the fact that the original statute failed to account for modern capital-litigation appellate practices in state and federal court. *See also* ALA. R. APP. P. 8 (committee comments to Feb. 4, 1985, amendment).

Although McWhorter's motion concedes the Court's authority to establish rules of procedure that differ from Title 15, his argument ignores the plain language of Rule 8(d). That rule requires that the time frame for executing a lawful sentence of death begin not "less than 30 days from the date of" this Court's order "authorizing the Commissioner of the Department of Corrections to carry out the inmate's sentence." ALA. R. APP. P. 8(d). In McWhorter's case, this Court's order was entered on October 13, 2023. McWhorter's execution is scheduled for November 16, 2023. Thus, the time frame established by the Governor is beyond thirty days from the date this Court authorized the

[1] McWhorter's motion cites to the non-existent Title 15A. It is clear from context, however, that his citation references Title 15.

Commissioner to execute McWhorter's sentence. There is no violation of Rule 8(d) on these facts. In short, McWhorter received any notice to which he was entitled by the Court's rules.

Additionally, the thirty-day period established by the original statute, and maintained by Rule 8(d), did not create a substantive right applicable to condemned inmates awaiting execution. In *Schoenvogel v. Venator Group Retail, Inc.*, 895 So. 2d 225 (Ala. 2004), this Court discussed the distinction between a substantive right and a procedural rule or matter. Among the factors considered by the Court included whether the statute affected the prelitigation conduct of a party. *Id.* at 253. Neither the original statute nor Rule 8(d) addressed prelitigation conduct of the condemned. Another consideration was the predominant and paramount purpose of the statute. *Id*. Here, the predominant and paramount purpose of the original statute (and Rule 8(d)) is execution of a lawful and final judicial sentence of death. Further indication of the procedural nature of the original statute can be found in its codification in Title 15, the portion of the code addressing "Criminal Procedure." In short, nothing in the original statute operated to create a substantive right on the part of a condemned inmate to receive thirty days' notice after the definitive setting of a date for the execution of sentence.

Ultimately, McWhorter's motion alleges an error without injury. *See* ALA. R. APP. P. 45. Whatever truth there may be to the saying "What a difference a day makes," the illustrations McWhorter cites as to the difference between having twenty-nine days versus

thirty days of certain knowledge of an execution date fail to identify a specific harm. For example, review of McWhorter's conviction and sentence have been final for over two years. The State asked this Court for authorization to execute his sentence of death over two months ago. During that time, McWhorter has pursued no additional legal challenges to his sentence, conviction, or method of execution.

Additionally, although McWhorter cites visitation and a spiritual advisor as grounds for finding harm, his claim rings hollow. McWhorter has completed his request to have a spiritual advisor present at his execution. He has not argued that he was somehow prevented from seeking spiritual advice during the time since this Court issued its order authorizing the Commissioner to proceed at the direction of the Governor. In fact, McWhorter has been communicating with his spiritual advisor as evidenced by a series of postings placed on the internet by the spiritual advisor on McWhorter's behalf.[2] Additionally, a condemned inmate's visitation schedule and hours do not change until the week of his scheduled execution, rendering his alternative argument unavailing.

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[2] "'Daddy Didn't Love Me' Kind of Kid": The Casey McWhorter Tapes (1): Scheduled for Execution on November 16, 2023 in Alabama, JEFF HOOD: ENGAGING RADICAL THEOLOGY, https://www.patheos.com/blogs/jeffhood/daddy-didnt-love-me-kind-of-kid-the-casey-mcwhorter-tapes-1-scheduled-for-execution-on-november-16-2023-in-alabama/ (October 19, 2023). At least five subsequent postings can be accessed from the cited URL. (last accessed on October 26, 2023.)

Because the original statute did not create a substantive right to thirty days' notice of the precise date that a sentence of death would be executed, and because the Governor's actions in this case complied with the plain language of Rule 8(d), there are no due process or equal protection implications in this case. Accordingly, there are no state-law or federal-law grounds for vacating the Governor's directive to the Commissioner of the Alabama Department of Corrections to carry out McWhorter's judicial sentence on November 16, 2023.

CONCLUSION

Based on the foregoing, the State respectfully requests that McWhorter's motion to vacate execution date be denied.

Respectfully submitted,

Steve Marshall
Attorney General
BY—

/s James R. Houts
James R. Houts *
Assistant Attorney General

Edmund G. LaCour Jr.
Solicitor General

Audrey Jordan
Cameron G. Ball
Assistant Attorneys General
* Counsel of Record

[*Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.*]

IN THE SUPREME COURT OF ALABAMA

Case No. 1990427

CAPITAL CASE

[Filed October 31, 2023]

EX PARTE:	)
CASEY A. MCWHORTER	)
	)
CASEY A. McWHORTER,	)
	)
Petitioner,	)
	)
-v.-	)
	)
STATE OF ALABAMA,	)
	)
Respondent	)

REPLY TO STATE OF ALABAMA'S RESPONSE TO MOTION TO VACATE EXECUTION DATE

The State of Alabama has responded to Mr. McWhorter's Motion to Vacate Execution Date ("Motion") by arguing, alternatively: (1) the 29 days' notice provided does "not violate[] any laws or governing authorities;" (2) Rule 8(d)(1) "does not create a substantive right on the part of the condemned inmate;" and (3) "at best," Mr. McWhorter "alleges

error without injury."[1] This brief reply is necessary to address some of the State's assertions and omissions.

The State does not dispute the facts set forth in the Motion, including that none of the 71 prisoners executed in the modern era received fewer than 30 days' notice of an execution date. And the State offers just a single sentence—devoid of citation—in response to Mr. McWhorter's claim that the inadequate notice violates his constitutional rights to due process and equal protection.[2]

Because the State has failed to rebut Mr. McWhorter's constitutional bases for his Motion, this Court should grant the Motion on one or both of those bases. *See* Section I. Further, despite the State's argument that this Court's execution-related orders are procedural and non-substantive, their argument fails. As explained below, the point is irrelevant, but in any event incorrect. *See* Section II. Finally, the State makes the unfounded argument that the Governor's failure to provide Mr. McWhorter with the requisite 30-day notice period does not result in any injury. Courts, however, have routinely found one-day deprivations of less significant rights to constitute a harm; surely the State's deprivation of one day of life therefore harms Mr. McWhorter. *See* Section III.

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[1] Response at 1.

[2] *Id.* at 5.

I. Mr. McWhorter has established violations of his rights to equal protection and due process.

It is undisputed that the Governor has treated Mr. McWhorter differently than those to whom he is similarly situated. All 71 people executed before Mr. McWhorter (in the modern era) have received at least 30 days' notice of their execution dates from the Governor. The State admits Mr. McWhorter has only received 29 days' notice of his execution date.

The State responds that "[b]ecause the original statute did not create a substantive right to thirty days' notice of the precise date that a sentence of death would be executed" and "the Governor's actions in this case complied with the plain language of Rule 8(d), there are no due process or equal protection implications in this case."[3] The State's argument appears to be that the original statute and Rule 8(d) are procedural, rather than substantive, and therefore they are irrelevant for any equal protection or due process claim.

The government cites to no authority in support of its argument, nor does it provide any explanation for Mr. McWhorter's disparate treatment. This Court should therefore vacate the execution period set by Governor Ivey for violating the Equal Protection Clause.[4]

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[3] Response at 5.

[4] Mr. McWhorter's due process argument is adequately presented in his Motion. This Court should grant relief on that claim because

Both this Court and the United States Supreme Court "have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (citations omitted). Nothing in the plain language of the Equal Protection Clause or case law limits it to some category of actions labeled as substantive. *See, e.g.*, *Gideon v. Ala. State Ethics Comm'n*, 379 So. 2d 570, 573 (Ala. 1980) ("The United States Supreme Court has established two tests to determine whether a statute draws a classification which violates the Equal Protection Clause of the Fourteenth Amendment *or* whether that statute denies a person substantive due process of law . . . Since the instant case involves neither a 'suspect class' nor a 'fundamental right,' the rational basis test is the proper test to apply to *either* a substantive due process challenge *or* an equal protection challenge.") (emphases added); *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918) ("The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by

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the State has not addressed, let alone rebutted, his citation to *Hall v. Barr*, 830 Fed. App'x 8, 9 (D.C. Cir. 2020), and the argument that "[h]ere, the statute and rule and rule require 30 days' notice, making them more akin to the binding regulation in *Hall*, and the Governor's failure to provide that notice violates Mr. McWhorter's right to due process." Motion at 9-10.

its improper execution through duly constituted agents.").

Moreover, an equal protection claim can arise out of the application of procedural rules. *See, e.g.*, *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.") (citations omitted); *Humphrey v. Cady*, 405 U.S. 504, 512 (1972) ("The equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was deprived of a jury determination, *or of other procedural protections*, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other.") (footnote omitted) (emphasis added).

Mr. McWhorter has established all the elements of an equal protection claim on undisputed facts. This Court should grant his Motion to ensure his constitutional rights are protected.

II. To the extent it matters, Rule 8(d)(1) is substantive.

The State makes much of Ala. Code § 15-1-1 and a claim that both Ala. Code § 15-18-82(a) and Rule 8(d)(1) are procedural and not substantive.[5] As set forth above, this distinction is not relevant to Mr. McWhorter's constitutional argument, but in any event it is wrong.

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[5] Response at 1-4.

This Court treats motions made under Rule 8(d)(1) as substantive. Rule 27, Ala. R. App. P., distinguishes between motions seeking "an order or other relief" and those that seek "procedural orders." Rule 27(a), in relevant part, provides: "Any party may file a response in opposition to a motion, other than one for a procedural order (for which see subdivision (b)), within 7 days (1 week) after service of the motion; but the court may shorten or extend the time for responding to any motion." Ala. R. App. P. 27(a). By contrast, Rule 27(b), in relevant part, provides that "motions for procedural orders . . . may be acted upon at any time, without awaiting a response thereto," and "[a]ny party adversely affected by such action may request reconsideration, vacation or modification of such action." Ala. R. App. P. 27(b).

The Court's treatment of Rule 8(d)(1) motions as substantive is demonstrated in this very docket. Here, when the State filed its motion to set an execution date on August 9, 2023, this Court initially permitted Mr. McWhorter seven days within which to file a response to the State's motion, as is its practice for substantive motions. On August 14, 2023, four days after the State filed its motion, Mr. McWhorter filed a Motion for Enlargement of Time to File Response to State's Motion to Set Execution Date.[6] The next day, the State filed an Opposition to McWhorter's Motion for an Enlargement of Time, and this Court issued an Order granting Mr. McWhorter an enlargement of time. Clearly, this Court (and the parties) treated the Rule 8(d)(1) motion as substantive, not procedural.

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[6] *This* was likely a procedural motion, covered by Rule 27(b).

III. Mr. McWhorter has established an injury because being deprived of one day of required notice and, thereby, one day of life is injurious.

The State also argues that, assuming the Governor erred in providing fewer than 30 days' notice of Mr. McWhorter's execution date, it was an "error without injury" because being executed a day earlier will not result in "a specific harm."[7] The State offers no authority for its argument, nor could it. Courts have found a one-day deprivation of something less significant than life sufficient to state an injury. *See, A.F. by Fenton v. Kings Park Central School Dist.*, 341 F. Supp. 3d 188, 196 (E.D. N.Y. 2018) (a one-day, out-of-school suspension was sufficient to state a deprivation of students' property right to education in violation of due process, because it "required exclusion from school premises and the students did not receive instruction for the day"); *Jefferson County Burial Soc. v. Scott*, 118 So. 644, 647 (Ala. 1928) ("If defendant improperly detained the body from Thursday to Friday, we cannot say that only nominal damages should be awarded."); *Koh v. Village of Northbrook*, 2020 WL 6681352 (N.D. Ill. Nov. 12, 2020), at *5 n.3 (discussing "comparators for the $100,000, each for the Kohs on the Fourth Amendment wrongful detention of around one day," as including "a plaintiff [who] received $125,000 for just over 24 hours in jail" and "another [who] received $100,000 for a six-hour false arrest detention"). Being executed with one day less notice (and one day less to live) constitutes a harm. *Cf. Moody*

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[7] *Id.* at 4.

v. Holman, 887 F.3d 1281, 1286 (11th Cir. 2018) (finding "injury-in-fact" where State's alleged wrongful conduct in retaining custody would lead "imminently" to "an injury—his scheduled execution"). As such, this Court should reject the State's argument that loss of a full notice period (and one day of life) is "harmless."

CONCLUSION

This Court should vacate the execution date set by the Governor and issue an Order that any future execution date be at least 30 days from the date of her order.

October 31, 2023

Respectfully submitted,

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**Not admitted in Alabama*

[*Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.*]