IN THE
Supreme Court of the United States

JAMES EDWARD BARBER,
Petitioner,

v.

GOVERNOR OF ALA., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION APPENDIX VOLUME I OF III

******EXECUTION SCHEDULED FOR JULY 20, 2023 AT 6:00 P.M.******

ROBERT N. HOCHMAN*
KELLY J. HUGGINS
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000
rhochman@sidley.com

JEFFREY T. GREEN
JOSHUA J. FOUGERE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

PAULA W. HINTON
WINSTON & STRAWN LLP
800 Capitol St., Suite 2400
Houston, TX 77002
(713) 651-2600

Counsel for Petitioner
* Counsel of Record

July 20, 2023

TABLE OF CONTENTS

VOLUME I:

VOLUME III:

[PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-12242

Non-Argument Calendar

JAMES EDWARD BARBER,

Plaintiff-Appellant,

versus

GOVERNOR OF THE STATE OF ALABAMA,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,
ATTORNEY GENERAL, STATE OF ALABAMA,
JOHN DOE 1,
JOHN DOE 2,
JOHN DOE 3,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:23-cv-00342-ECM

Before JILL PRYOR, BRANCH, and LUCK, Circuit Judges.

BRANCH, Circuit Judge:

James Edward Barber is an Alabama death row inmate scheduled to be executed by lethal injection on July 20, 2023. On May 25, 2023, Barber filed a 42 U.S.C. § 1983 complaint asserting that the manner in which Alabama executes its lethal injection protocol violates the Eighth Amendment's prohibition against cruel and unusual punishments. Specifically, he takes issue with the manner in which the execution team attempted to secure IV access[1] in the inmates during the preceding three executions that

[1] It is undisputed that a central component of Alabama's lethal injection protocol is establishing IV access to the inmate's veins so that the necessary drugs can be administered. *See* Redacted Execution Procedures (March 2023) ANNEX C (attached as Exhibit B to complaint). The protocol requires that "two (2) intravenous infusion devices [be] placed in veins of the condemned inmate" by the "IV Team." *Id.* All members of the IV Team must "be currently certified or licensed within the United States." *Id.* The protocol further provides that "[t]he standard procedure for inserting IV access will be used. If the condemned inmate's veins make obtaining venous access difficult

occurred in 2022, two of which were canceled due to the execution team's inability to secure the necessary IV access after making numerous attempts over an extended period of time. Despite the fact that Alabama has since conducted a full review of its execution procedures, Barber maintains that there is no evidence that the issues "that derailed the prior executions" have been fixed, and that he is at substantial risk of serious harm and "torture" because he "will likely be repeatedly punctured for hours with needles all over his body" while the execution team attempts to gain IV access.

Relatedly, Barber filed a motion for a preliminary injunction on the same grounds seeking to enjoin Alabama from executing him by any method other than nitrogen hypoxia.[2] Following additional briefing and an evidentiary hearing, the district court denied the motion.

---

or problematic, qualified medical personnel may perform a central line procedure to obtain venous access." *Id.*

[2] In 2018, Alabama added nitrogen hypoxia as a statutorily available execution method. *See* Ala. Code § 15-18-82.1(a) (2018). Barber acknowledges that inmates like himself who were sentenced prior to this statutory change were given a window of time in which to elect nitrogen hypoxia as their method of execution, and it is undisputed that Barber did not elect this option during the designated time frame. Alabama law provides that where, as here, an inmate fails to elect nitrogen hypoxia as their method of execution within the designated time frame, he waives the election. *Id.* § 15-18-82.1(b)(2). Nevertheless, Barber asserts that nitrogen hypoxia is an available alterative for purposes of his Eighth Amendment claim, and the State does not contest this assertion on appeal. Accordingly, for purposes of this appeal, we accept that notwithstanding Barber's failure to timely elect nitrogen hypoxia as his method of execution, it is an available alternative in this case.

Barber appeals the denial of that motion,[3] arguing that the district court abused its discretion in denying his motion because it clearly erred (1) in finding that he was not likely to succeed on his claim; (2) in finding that his claim was speculative; (3) in crediting the last-minute affidavit of Warden Terry Raybon; and (4) in finding that certain aspects of his claim were time-barred. After review and with the benefit of oral argument, we affirm.

I. Facts and Procedural History

Barber was convicted of the 2001 murder of Dorothy Epps. *Barber v. Comm'r, Ala. Dep't of Corr.*, 861 F. App'x 328, 329–30 (11th Cir. 2021), *cert. denied* 142 S. Ct. 1379 (2022). Barber knew his victim. *Id.* He had performed repair work on her home and "had a social relationship" with one of Epps's daughters. *Id.* at 330. At the advanced age of 75, Epps was murdered in her home after Barber, in an apparent attempt to rob her,[4] "struck [her] in the face with his fist, and at some point thereafter, obtained a claw hammer that he used to cause multiple blunt force injuries." *Id.* Epps's death was not a quick one—the autopsy revealed "bruises, cuts and fractures, bleeding over the brain, multiple injuries in [her] hand

[3] Barber has also filed an accompanying motion for stay of execution in this Court.

[4] Barber confessed to police, "admitting that he struck Mrs. Epps with a claw hammer, grabbed her purse, and ran out of the house." *Barber v. State*, 952 So. 2d 393, 402 (Ala. Crim. App. 2005). "There was no evidence of a forced entry by [Barber] into the Epps home, and it is more likely than not that [he] gained access to the home easily because of his acquaintance with Mrs. Epps." *Id.* at 401.

and arms, rib fractures and bruising in the front of her body, and bruising and rib fractures in the back of the body," as well as "nineteen different lacerations in the head and seven fractures in the head or skull, injuries to the neck and mouth and left eye . . . and her tongue was bruised and injured from a blow or blows to the head." *Id.* Evidence established that the attack "occurred over several parts of [her] house," and she had numerous defensive wounds from where she had tried to protect herself from the blows Barber inflicted. *Id.* The medical examiner testified that she would have been conscious when she received the injuries and defensive wounds. *Id.* at 331. The jury recommended 11 to 1 that Barber be sentenced to death, and the trial court followed that recommendation.[5] *Id.* at 333.

The Alabama Court of Criminal Appeals affirmed his conviction and sentence. *Barber v. State*, 952 So. 2d 393, 464 (Ala. Crim. App. 2005). The United States Supreme Court denied his petition for a writ of certiorari. *Barber v. Alabama*, 549 U.S. 1306 (2007). Following his direct appeal, Barber exhausted fully both his state and federal avenues for habeas relief. *See Barber*, 861 F. App'x at 333–37.

In February 2023, the State moved the Alabama Supreme Court to set an execution date for Barber, which the court granted, and Alabama Governor Kay Ivey set Barber's execution date for

[5] The trial court found two aggravating circumstances: (1) that the murder was committed during a robbery and (2) that the murder was especially heinous, atrocious, or cruel. *Barber*, 861 F. App'x at 333.

July 20, 2023, beginning at 12:00 a.m. and expiring at 6:00 a.m. on July 21, 2023.

On May 25, 2023, Barber filed the underlying § 1983 complaint raising his Eighth Amendment challenge to his execution by lethal injection. Eleven days later, on June 5, 2023, Barber filed a motion for a preliminary injunction, seeking to enjoin his execution by lethal injection. Barber's motion focused on the three allegedly "botched" execution proceedings performed by Alabama in 2022 due to protracted, repeated attempts to obtain IV access in the condemned inmate. The first of these execution proceedings was that of Joe Nathan James in July 2022. According to Barber, the IV Team in James's case tried to access James's veins for more than three hours, puncturing various places on James's body. Then, so Barber argues, unable to obtain IV access, the IV Team sedated James and performed a "cut-down" procedure[6] to try to obtain a vein.[7] When the public curtain opened, James

[6] In the context of another challenge to execution methodology, we explained that a "cut-down" procedure involves "making a deep incision into the subject's skin to find a blood vessel, which is then cut open to allow for the insertion of a catheter." *Nance v. Comm'r, Ga. Dep't of Corr.*, 59 F.4th 1149, 1156 (11th Cir. 2023) (quotations omitted).

[7] As noted at Barber's evidentiary hearing, two different doctors conducted an autopsy on James and reached different conclusions. One autopsy found only two confirmed puncture marks, "no signs of torture or other abuse," no evidence of sedation, and no evidence of a cut-down procedure. Another found multiple needle marks on various parts of James's body, and evidence of "[l]inear superficial abrasions" on the "left antecubital fossa and proximal forearm," measuring only "1 ¾ inches in length and less than $^{1}/_{16}$ inch in depth." The district court found that based on these reports Barber's

appeared already unconscious, and soon after officials pronounced him dead. The second execution proceeding cited by Barber was that of Alan Eugene Miller in September 2022. During this proceeding, the IV Team attempted unsuccessfully for approximately 90 minutes to obtain IV access, "slapping" and puncturing both of Miller's elbows, his right hand and foot, and right and left arms. [***Id.***] Barber included an affidavit from Miller in which Miller asserted that the process caused him extreme physical and psychological pain and suffering.[8] Ultimately, Miller's execution was called off because the team was not able to obtain IV access within the execution window.[9] Finally, the third execution proceeding was that of Kenneth Smith in November 2022. According to Barber, the IV Team spent over two hours

"[a]llegations of a cut-down on James" and his allegations of sedation "[were] not borne out by either autopsy."

[8] Miller maintained that he "could feel the needle being injected into [his] skin, and then turned in various directions" in the IV Team's attempts to find a vein. He stated that he "could feel [his] veins being pushed around inside [his] body by needles, which caused him great pain and fear." And when the IV Team attempted to insert a needle into Miller's right foot, it "caused sudden and severe pain" and "felt like [he] ha[d] been electrocuted in [his] foot."

[9] As the district court noted, the Alabama Department of Corrections ("ADOC") had a shorter window in which to complete Miller's execution because Miller had pending litigation in federal court seeking to enjoin ADOC from executing him, which was not resolved until around 9:00 p.m. on the evening of his set execution with the window expiring at midnight.

attempting to obtain IV access in Smith before calling off the execution due to the inability to set IV lines.[10]

Following the issues in Smith's attempted execution, Governor Ivey asked Alabama's Attorney General Steve Marshall to withdraw then-pending motions with the Alabama Supreme Court to set execution dates[11] for other death row inmates, and for the Alabama Department of Corrections ("ADOC") to conduct a full review of the State's execution process.

Barber acknowledged in his motion for a preliminary injunction that the ADOC conducted a review of its execution processes and procedures between November 2022 and late February 2023,[12] although he took issue with the length of the

---

[10] Barber also submitted an affidavit from Smith, who stated generally that "ADOC's unsuccessful attempts to establish [IV] access caused [him] severe physical pain and emotional trauma as described" in a complaint Smith filed in pending litigation of his own. Additionally, as in Miller's case, the ADOC also had a shorter window in which to complete Smith's execution because Smith also had pending litigation in federal court seeking to enjoin his execution that was not resolved until 10:20 p.m. on the evening of his set execution.

[11] At that time, Barber was one of the condemned inmates for which the State had a pending motion to set an execution date. Following the Governor's order, the State withdrew that motion.

[12] On February 24, 2023, the Commissioner for the ADOC, John Hamm, notified Governor Ivey that:

> [ADOC had] conducted an in-depth review of [the ADOC's] execution process that included evaluating: the Department's legal strategy in capital litigation matters, training procedures for Department staff and medical personnel involved in

> executions, increasing the number of personnel utilized by the Department for executions, assisting medical personnel participating in the process, and the equipment on-hand to support the individuals participating in the execution. During our review, Department personnel communicated with corrections personnel responsible for conducting executions in several other states. Our review also included thorough reviews of execution procedures from multiple states to ensure that our process aligns with the best practices in other jurisdictions.
>
> After discussing the matter with my staff, I am confident that the Department is as prepared as possible to resume carrying out executions consistent with the mandates of the Constitution. This is true in spite of the fact that death row inmates will continue seeking to evade their lawfully imposed death sentences.
>
> . . .
>
> The Department has also decided to add to its pool of available medical personnel for executions. The vetting process for these new outside medical professionals will begin immediately.
>
> . . .
>
> Finally, Department personnel have conducted multiple rehearsals of our execution process in recent months to ensure that our staff members are well-trained and prepared to perform their duties during the executions process.

Following receipt of this letter, Governor Ivey cleared Commissioner Hamm to move forward with scheduling executions for eligible death row inmates. The State then filed a motion with the Alabama Supreme Court to set an execution date for Barber.

investigation and the manner in which it was conducted. Barber asserted that the investigation did not resolve the issues plaguing Alabama's lethal injection protocol and the manner in which Alabama carries out the protocol. He maintained that "he [would] likely be subject to the same grisly fate" as James, Miller, and Smith "because [ADOC] ha[d] not made any meaningful changes to their defective [lethal injection] [p]rotocol" and "[t]he IV Team is still insufficiently credentialed." He asserted that a viable, less painful alternative method of execution was available—namely, nitrogen hypoxia. Accordingly, he requested that the district court enjoin Alabama from executing him by lethal injection.

Following the State's motion in opposition to the preliminary injunction and Barber's reply, the district court conducted an evidentiary hearing on the motion. Thereafter, the district court denied Barber's motion. First, the district court addressed the State's assertion that Barber's claims were time-barred and concluded that "to the extent Barber claim[ed] that specific provisions of the [lethal injection] protocol violate[d] the Eighth Amendment," his claims were barred by the two-year statute of limitations because "[t]he alleged deficiencies in the [lethal injection] [p]rotocol about which Barber complain[ed] ha[d] been present since the last significant change" to the protocol, which was over two years ago.[13] However, the court concluded

[13] We agree with the district court that Barber's challenges to specific aspects of Alabama's lethal injection protocol are time-barred because they accrued over two years ago. Specifically, no one disputes that there has been no substantial change to the medical process outlined in the execution protocol

that Barber's as-applied Eighth Amendment challenge to the manner in which Alabama carries out the protocol—"through an emerging pattern of prolonged attempts to establish IV access"—was timely.

The district court then explained that to obtain a preliminary injunction, Barber bore the burden to demonstrate that he has a substantial likelihood of success on the merits of his claim. To succeed on the merits, Barber had to (1) establish that he faced a substantial risk of serious harm from the challenged method of execution, and (2) identify an alternative feasible method of execution that would significantly reduce the substantial risk of severe pain. The district court found that he had satisfied the second element by "successfully identify[ing] nitrogen hypoxia as a feasible, readily implemented alternative method of execution." Accordingly, the district court focused its analysis on whether Barber met his burden to show that he faces a substantial risk of serious of harm if executed by lethal injection.

The district court noted that in *Smith v. Commissioner, Alabama Department of Corrections*, No. 22-13781, 2022 WL 17069492 (11th Cir. Nov. 17, 2022), *cert. denied sub. nom. Hamm v. Smith*, 143 S. Ct. 1188 (2023), we concluded in an unpublished opinion that,

---

in the last two years, and that the applicable statute of limitations is two years. *Brooks v. Warden*, 810 F.3d 812, 823 (11th Cir. 2016). Thus, to the extent that Barber takes issue with the protocol itself or the alleged lack of clarity or definitions in the protocol, those deficiencies have been present in the protocol since the last substantial change more than two years ago, and his claims are time-barred.

based on the ADOC's pattern of difficulty in obtaining IV access, and the condemned inmate's specific risk factors related to certain medical conditions, the condemned inmate had plausibly pleaded an Eighth Amendment claim for purposes of surviving a motion to dismiss and the district court should have granted him leave to amend his complaint. However, the district court also noted that in *Nance v. Commissioner, Georgia Department of Corrections*, 59 F.4th 1149, 1157 (11th Cir. 2023), we rejected a condemned inmate's Eighth Amendment claim based on allegations that futile attempts to locate a condemned inmate's veins would give rise to an unconstitutional level of pain. The district court then concluded that Barber's case was distinguishable from *Smith* and more like *Nance*. Specifically, the district court concluded that "intervening actions have disrupted the pattern discussed in *Smith*," noting that the ADOC had conducted an investigation, determined that there were no deficiencies in the protocol itself, and implemented IV Team "personnel changes." Indeed, evidence presented during the evidentiary hearing established that "[n]one of the members of the current IV [T]eam were involved in the previous three execution attempts." Furthermore, the State had since amended its procedural rules to provide for a longer time frame for executions than it had before.[14] Thus, Barber could not "show that the

[14] While the ADOC's investigation was pending, Governor Ivey requested that the Alabama Supreme Court amend Alabama Rule of Appellate Procedure 8(d)(1), which at that time provided that "[t]he supreme court shall at the appropriate time enter an order fixing a date of execution." *See* Ala. R. App. P. 8(d)(1) (1997). Governor Ivey explained that the "execution date" in the

investigation and corresponding changes [would] not address the pattern of prolonged efforts to obtain IV access" identified in *Smith*. Accordingly, "[i]n light of the investigation conducted by the ADOC, and [the] actions taken as a result thereof," the district court found that "Barber's allegations [were] too speculative to give rise to an Eighth Amendment claim upon which he [would be] substantially likely to prevail."

Additionally, the district court found that, unlike the condemned inmate in *Smith*, Barber made "no allegation in his complaint that he has a specific, physical condition or infirmity that makes it more difficult to access his veins." And although Barber testified at the hearing that the ADOC had difficulty on occasion

---

rule encompassed "a single-24 hour period," meaning that ADOC had to call off execution attempts at midnight on the set day. This requirement, coupled with ADOC's execution protocol that required that executions not start until 6:00 p.m. and last-minute appeals by the condemned inmate which often pushed the start time even later, created a "time crunch" for the completion of all of the necessary execution processes and procedures. Accordingly, Governor Ivey requested that Rule 8 be amended to allow for a longer time period of time, consistent with longer time periods provided for in some other states. Upon consideration, the Alabama Supreme Court amended Rule 8 so that it now provides that "[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." Ala. R. App. P. 8(d)(1) (2023). Consistent with the new rule, Governor Ivey set Barber's execution time frame "to occur beginning at 12:00 a.m. on Thursday, July 20, 2023, and expiring at 6:00 a.m. on Friday, July 21, 2023."

accessing his veins,[15] he also testified that the ADOC had been able to access his veins without issue in other instances. Thus, Barber failed to establish that he presented individualized risks that would complicate IV access. The district court also concluded that Barber's expert medical evidence did not establish that repeated IV attempts would cause unconstitutional levels of pain. Accordingly, the district court concluded that Barber's claim was more similar to the generic futile-attempts-to-access-veins claim rejected in *Nance*. Consequently, the district court concluded that Barber had not shown a substantial likelihood of success on the merits of his claim and denied the request for a preliminary injunction.

Two days later, Barber filed an amended complaint in the district court, incorporating evidence presented at the evidentiary hearing, and for the first time specifically alleging that he had individualized risk factors that could complicate vein access, including a high body mass index ("BMI") similar to that of inmates James and Smith, and citing the ADOC's past difficulties accessing Barber's veins on multiple occasions.[16]

---

[15] Specifically, Barber testified to one instance in 2004 when he first entered prison in which the ADOC had trouble accessing his veins. ADOC personnel in the infirmary attempted to draw blood and pricked Barber with a needle eight times but were unsuccessful. Barber said the experience was "pretty painful." Barber then stated on cross-examination that, since 2004, he had trouble giving blood "[a] few times," but he did not provide any details about those other instances.

[16] Because the initial complaint was the complaint before the district court when it determined whether Barber's claim had a substantial likelihood of success on the merits for purposes of a preliminary injunction, like the district

Two days after filing the amended complaint and four days after the district court denied the preliminary injunction, Barber filed a notice of appeal and a motion for stay of execution with this Court. We ordered expedited briefing and held oral argument.

With this procedural history in mind, we turn to the merits of Barber's appeal and his request for a stay of execution.

II. Standard of Review

We review a district court's decision to deny a preliminary injunction for abuse of discretion. *Scott v. Roberts*, 612 F.3d 1279, 1289 (11th Cir. 2010). "In so doing, we review the findings of fact of the district court for clear error and legal conclusions *de novo*." *Id.* "This scope of review will lead to reversal only if the district court applies an incorrect legal standard, or applies improper procedures, or relies on clearly erroneous factfinding, or if it reaches a conclusion that is clearly unreasonable or incorrect." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005); *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931–32 (1975) ("[W]hile the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is

---

court, we focus on the allegations in the initial complaint, rather than the allegations in the amended complaint that he filed following the evidentiary hearing. *Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1524 n.5 (11th Cir. 1994) ("Because the consolidated amended complaint was not submitted until after the district court had issued the preliminary injunction at issue in this appeal, however, our inquiry focuses on whether the district court had the authority to issue the preliminary injunction predicated upon the claims raised in the six original complaints . . . .").

stringent, the standard of appellate review simply is whether [the denial of] the injunction in light of the applicable factors constituted an abuse of discretion."); *Siegel v. LePore*, 234 F.3d 1163, 1175 (11th Cir. 2000) (en banc) (explaining that the district court's order denying injunctive relief could be reversed on appeal only "if there was a clear abuse of discretion").

Importantly, the abuse of discretion standard "recognizes the range of possible conclusions the [district court] may reach." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc). It "allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." *Id.* (quotations omitted).

Likewise, when it comes to factual findings, under the clearly erroneous standard, "[i]f the district court's view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* (quotations omitted). In other words, under this standard, we may not reverse "simply because we are convinced that we would have decided the case differently." *Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1323 (11th Cir. 2019); *see also Cooper v. Harris*, 581 U.S. 285, 293 (2017) ("A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern.").

III. Discussion

Even when life or death interests are at stake, a preliminary injunction or a stay of execution is an extraordinary remedy "not available as a matter of right." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Indeed, the issuance of a preliminary injunction is "the exception rather than the rule." *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983). And "[l]ast-minute stays should be the extreme exception." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). A movant is eligible for a preliminary injunction or a stay of execution only if he establishes that (1) he has a substantial likelihood of success on the merits, (2) he will suffer irreparable injury unless the injunction or stay issues, (3) the injunction or stay would not substantially harm the other litigant, and (4) if issued, the injunction or stay would not be adverse to the public interest. *Chavez v. Fla. SP Warden*, 742 F.3d 1267, 1271, 1273 (11th Cir. 2014). The first factor is considered one of "the most critical." *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Where a court concludes that the movant fails to establish a substantial likelihood of success on the merits, "it is unnecessary" for the court to determine whether the movant "satisfied the second, third, or fourth factors." *Grayson v. Warden, Comm'r, Ala.*, 869 F.3d 1204, 1238 n.89 (11th Cir. 2017). Additionally, "a court considering a stay must also apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill*, 547 U.S. at 584 (quotations omitted); *see also Bucklew*, 139 S. Ct. at 1134 (explaining that dilatory tactics and claims that "could have been

brought earlier . . . may be grounds for denial of a stay" (quotations omitted)). Like the district court, we agree that this case rises and falls on the first factor—whether Barber can show a substantial likelihood of success on the merits of his Eighth Amendment claim.

"The Eighth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the infliction of 'cruel and unusual punishments.'" *Glossip v. Gross*, 576 U.S. 863, 876 (2015). Capital punishment, however, including capital punishment by lethal injection, is constitutional. *See Baze v. Rees*, 553 U.S. 35, 47, 62 (2008) (plurality opinion).[17] As the Supreme Court has explained "[s]ome risk of pain is inherent in any method of execution," and the Eighth Amendment "does not demand the avoidance of all risk of pain in carrying out executions," particularly where the pain results "by accident or as an inescapable consequence of death." *Id.* at 47, 50. Likewise, the Eighth Amendment does not prohibit procedures that create an "unnecessary risk" of pain without more. *Id.* at 51. In other words, as the Supreme Court has emphasized, "the Eighth Amendment does not guarantee a prisoner a painless death—something that, of course, [is not] guaranteed to many people, including most victims of capital crimes." *Bucklew*, 139 S. Ct. at 1124. Instead, what the Eighth Amendment forbids are those "forms of punishment that intensif[y] the sentence of death with a (cruel) superaddition of terror, pain, or disgrace." *Id.* (alteration adopted) (quotations

[17] We have recognized that Chief Justice Roberts's plurality opinion "contains the holdings of the Court in [*Baze*]." *Chavez*, 742 F.3d at 1271 n.4.

omitted). Consequently, "[p]risoners cannot succeed on a method-of-execution claim unless they can establish that the challenged method presents a risk that is '*sure or very likely* to cause serious illness and needless suffering, and gives rise to sufficiently *imminent* dangers.'" *Price*, 920 F.3d at 1325 (emphasis in original) (quoting *Glossip*, 576 U.S. at 877).

Thus, to prevail on his Eighth Amendment challenge, Barber has to establish two things: (1) that the method of execution in question creates "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," and (2) that there is "an alternative that is feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.* at 1326 (quotations omitted). To be clear, Barber's claim "faces an exceedingly high bar" because the Supreme Court "'has yet to hold that a State's method of execution qualifies as cruel and unusual.'" *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020) (quoting *Bucklew*, 139 S. Ct. at 1124).

Here, the State does not contest that Barber identified a feasible alternative method of execution—nitrogen hypoxia.[18]

[18] Given that the State does not contest the district court's conclusion that Barber "successfully identified" nitrogen hypoxia as a feasible alternative method of execution, it is unnecessary for us to address Barber's points on appeal that quarrel with the district court's earlier characterization of his request for this alternative method as "problematic" because Alabama has not finalized a nitrogen hypoxia protocol and is not yet ready to proceed with executions by this method. However, Alabama's lack of a nitrogen hypoxia

Accordingly, we focus our analysis on whether the district court clearly erred in determining that Barber did not show that he faces a "substantial risk of serious harm" if executed by lethal injection.

Barber argues that the district court erred in finding that he did not show a "substantial risk of serious harm" in light of his evidence that Alabama "failed to carry out a lethal injection in a constitutional manner not once, not twice, but three times in a row" due to "protracted efforts to establish IV access." He maintains that Alabama's "repeated failures demonstrate a pattern of superadding pain to the execution." Further, he alleges that it is highly likely that he will experience the same "needless suffering" because under Alabama's newly amended rules, the State has a longer execution window—giving them more time to attempt IV access—and he presented evidence that he suffers from individual risk factors—namely, that he has a high BMI and that on prior occasions ADOC has had trouble accessing his veins for

---

protocol notwithstanding, Barber arguably faces another problem with his request for nitrogen hypoxia as an alternative method of execution. Barber failed to show a substantial likelihood that execution by nitrogen hypoxia would significantly reduce a substantial risk of pain when compared to execution by lethal injection. And establishing that the alternative method will "significantly reduce a substantial risk of severe pain" is a key element to a method-of-execution challenge. *See Bucklew*, 139 S. Ct. at 1130. "[A] minor reduction in risk is not enough; the difference must be clear and considerable." *Price*, 920 F.3d at 1329 (quotations omitted). But Barber presented no information related to execution by nitrogen hypoxia or pain risks associated with that method. Nevertheless, because the district court did not address this issue, we do not reach it.

procedures. But Barber's arguments suffer from a fatal flaw—they are premised on the assumption that protracted efforts to obtain IV access (*i.e.*, "repeatedly pricking him with a needle") would give rise to an unconstitutional level of pain. And we expressly concluded that such efforts would not rise to that level in *Nance*. Specifically, the condemned Georgia inmate in *Nance* argued that, due to a medical condition, he had "weak veins" that the execution team would likely have trouble accessing, and that "the state technicians would subject him to an unconstitutional level of pain by repeatedly pricking him with a needle." 59 F.4th at 1157. We explained that the district court correctly rejected the argument that "a futile attempt to locate a vein would give rise to a constitutionally intolerable level of pain," noting that "'the Eighth Amendment does not guarantee a prisoner a painless death.'" *Id.* (quoting *Bucklew*, 139 S. Ct. at 1124).

Barber argues that *Nance* does not control and that we should instead follow our unpublished decision in *Smith*, which also involved a § 1983 Eighth Amendment challenge to Alabama's lethal injection protocol based on protracted IV access issues. Like Barber, Smith filed a § 1983 action, alleging in relevant part that ADOC had "substantially deviated from its Execution Protocol to the point that it would subject Smith to intolerable pain and torture in violation of the Eighth Amendment." 2022 WL 17069492, at *1. The district court concluded that the claim was time-barred and granted the State's motion to dismiss. *Id.* Smith sought to amend his complaint to focus his Eighth Amendment claim on the repeated, protracted efforts to obtain IV access in the James and

Miller execution proceedings, which the district court denied, finding that amendment would be futile. *Id.* at *2. Exercising *de novo* review on appeal, we concluded that "[b]ecause of the difficulty in accessing Smith's veins, Smith plausibly pleaded that, considering ADOC's inability to establish difficult IVs swiftly and successfully in the past, [Smith would] face superadded pain as the execution team attempts to gain IV access," and remanded the case for further proceedings.[19] *Id.* at *5–6.

Thus, Barber argues that *Smith* conclusively establishes that he faces a "substantial risk of serious harm" and superadded pain due to repeated IV access attempts, particularly in light of Alabama's recent track record in execution proceedings. Barber's argument is unavailing. *Smith* is an unpublished case and "[o]ur

[19] We also note that, following our decision in *Smith*, we granted Smith a stay of execution so that he could further pursue his Eighth Amendment claim in the district court. *Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13846, 2022 WL 19831029 (11th Cir. Nov. 17, 2022). The State appealed, and the Supreme Court vacated the stay. *Hamm v. Smith*, 143 S. Ct. 440 (11th Cir. 2022). Although we do not know why the stay in *Smith* was vacated, we do know that a motion for a stay of execution involves a balancing of equities. *See Brooks*, 810 F.3d at 816, 824. By vacating the stay, the Supreme Court implicitly told us that the balance of equities in *Smith* weighed in favor of the State's and the victim's "strong interest in enforcing the criminal judgment without undue interference from the federal courts." *Brooks*, 810 F.3d at 824; *see also Hill*, 547 U.S. at 584 ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence."). And Smith's case was stronger than Barber's because Smith—unlike Barber—alleged that it would be difficult to access his veins due to "both general and specific risks." *Smith*, No. 22-13781, 2022 WL 17069492, at *4.

unpublished opinions are not precedential"; "they do not bind us or district courts to any degree." *Patterson v. Ga. Pacific, LLC*, 38 F.4th 1336, 1346 (11th Cir. 2022). To the extent that *Smith* may have constituted persuasive authority on the issue of whether repeated IV access attempts can constitute superadded pain and presents a "substantial risk of harm" for purposes of an Eighth Amendment claim, we squarely rejected that argument in *Nance*—a published case which binds us here. *United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) ("Under our prior precedent rule, a panel cannot overrule a prior one's holding even [if] convinced it is wrong."). Under *Nance*, Barber cannot show that his method of execution creates a "substantial risk of serious harm" and without that, he does not have a substantial likelihood of success on the merits of his Eighth Amendment challenge.[20]

[20] Barber takes issue with the fact that *Nance* involved a Georgia inmate and the Georgia Department of Corrections did not have a history of difficulties with IV access, unlike the ADOC. Thus, he argues that his case is different from *Nance*. Likewise, the dissent accuses us of misreading *Nance* because "there was no allegation in *Nance* that Georgia had a track record of past executions in which it subjected death-row prisoners to lengthy periods of multiple painful attempts to establish IV lines in the execution chamber"—and, according to the dissent, that distinction is key and makes Barber's case distinguishable. Our conclusion in *Nance*, however, was based on whether futile attempts to obtain IV access would cause an unconstitutional level of pain, and we concluded such attempts would not give rise to an Eighth Amendment claim, noting that "'the Eighth Amendment does not guarantee a prisoner a painless death.'" 59 F.4th at 1157 (quoting *Bucklew*, 139 S. Ct. at 1124). The cause of the futility—whether it be a medical condition or a pattern of difficulty by the IV Team in securing vein access—does not matter. What matters is that *Nance* held that repeatedly and futilely pricking an inmate

Accordingly, contrary to Barber's argument, the district court did not err in relying on *Nance*. Nor did it misapply *Nance*.

Nance notwithstanding, even if repeated, protracted attempts at IV access on a condemned inmate could create a substantial risk of serious harm, *Smith* does not establish that the district court abused its discretion in denying Barber's request for a preliminary injunction.[21] As the district court explained, Smith identified specific medical conditions and risk factors unique to him that made IV access difficult. Barber, on the other hand, did not. Nowhere in his initial complaint did Barber include allegations

---

with a needle does not rise to an unconstitutional level of pain—*i.e.*, it is not an Eighth Amendment violation. *Id.*

Additionally, Barber notes that *Nance* "was decided just months after *Smith* and did not purport to overrule *Smith* or call its holding into question. In fact, *Nance* did not even mention *Smith*." Barber is correct. *Nance* did not address *Smith*, but it did not have to do so. As noted previously, *Smith* is an unpublished case with no precedential value that is not binding on subsequent panels. Rather, an unpublished opinion is relevant only to the extent of its persuasive value, and the *Nance* court did not find *Smith* persuasive. Thus, the fact that *Nance* did not tackle any tension with *Smith* is inconsequential.

[21] We also note that *Smith*'s claims came to us in a different procedural posture and were subject to the lesser *de novo* review standard. In contrast, Barber's claims, are subject to the very deferential abuse of discretion standard. "Our review under this standard is very narrow and deferential." *Gonzalez v. Gov. of Ga.*, 978 F.3d 1266, 1270 (11th Cir. 2020) (quotations omitted). And "[w]e may reverse the district court's order only if there was a *clear* abuse of discretion." *Siegel*, 234 F.3d at 1175 (en banc).

about his BMI causing issues with vein access[22] or that the ADOC had past difficulties accessing his veins. Although at the evidentiary hearing, Barber's counsel asserted that Barber had a BMI "identical" to Smith and higher than James, Barber provided no details during his testimony concerning his BMI, and he presented no other evidence to establish that a particular BMI presents an elevated risk of complications with IV access to veins or that James's and Smith's BMIs gave rise to the difficulties in accessing their veins. Barber also testified at the evidentiary hearing that, on "a few" occasions[23] in the last two decades, the ADOC had issues accessing his veins and had to prick him multiple times. However, he also testified that on other occasions the ADOC had no issues

---

[22] Barber acknowledged during the evidentiary hearing that the issue of BMI was "not in the complaint itself," and that he had raised the issue for the first time in his reply brief in support of the motion for preliminary injunction.

[23] We note that Barber testified that the ADOC first had trouble accessing his veins in 2004. Therefore, Barber arguably knew about his specific vein access issue 19 years ago, which would present a time-bar issue because he arguably could have brought his method-of-execution challenge before now. Furthermore, Barber acknowledged in his complaint that ADOC attempted and failed to execute another inmate, Doyle Lee Hamm, in 2018 due to the same IV access issues of which Barber complains. Thus, Barber's Eighth Amendment claim related to ADOC's potentially protracted efforts to establish IV access in condemned inmates accrued back in 2018 and is arguably barred by the two-year statute of limitations. *See McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008) (explaining that "a federal claim accrues when the prospective plaintiff knows or has reason to know of the injury which is the basis of the action" (quotations omitted)). Nevertheless, for purposes of this appeal, we accept the district court's determination that Barber's challenge to the manner in which ADOC carries out its lethal injection protocol is timely.

accessing his veins. Based on the testimony and evidence presented, the district court determined that the evidence was insufficient to establish that Barber faced individualized risks that would complicate IV access to his veins, and that Barber's situation is therefore distinguishable from that in *Smith*.

Additionally, the evidence below established that since the allegedly "botched" executions, ADOC conducted a full review of its execution processes and procedures, determined that no deficiencies existed with the protocol itself,[24] and instituted certain

[24] Although Barber and the dissent take issue with the ADOC's determination that there were no deficiencies with Alabama's protocol and procedures and argue that the finding is not reasonable in light of the previous botched executions, nothing in the record supports the conclusion that the ADOC's finding was unreasonable. Rather, Barber and the dissent point to the fact that the ADOC has not disclosed any information about the investigation and the related findings; therefore, they argue, it follows that ADOC's "no deficiencies" finding is unreasonable. The logic underlying this premise is flawed. Neither Barber nor the dissent cite to any authority for the proposition that Barber is entitled to any information concerning the ADOC's internal investigation, much less that such a disclosure is constitutionally compelled. *Cf. Bucklew*, 139 S. Ct. at 1125 (noting that "the Constitution affords a measure of deference to a State's choice of execution procedures and does not authorize courts to serve as boards of inquiry charged with determining best practices for executions" (quotations omitted)). Indeed, Barber's counsel conceded at oral argument that she was unaware of any such authority. Regardless, the dissent maintains that "[i]t is difficult to see how personnel changes would cut off the pattern [of difficulty obtaining IV access] given the defendants' insistence that their review found "[n]o deficiencies," in personnel or otherwise." Thus, the dissent concludes that "[i]n the absence of any evidence about what caused the [prior] failures, there is simply no basis for concluding that any given changes will alleviate the failures." We disagree. Despite ADOC's "no deficiencies" finding, ADOC made changes to ensure that it

changes to help ensure successful constitutional executions. These changes included amending Alabama's procedural rules to allow for an extended time frame for the execution to help avoid time pressure issues,[25] expanding the pool of medical personnel eligible

---

could carry out successful executions, including implementing new certification requirements, expanding the pool of eligible medical personnel, and hiring a new IV Team. Thus, the no deficiencies finding is of no consequence. And, even without knowing the cause of the previous IV access failures, it was entirely reasonable for the district court to infer that these changes will have an effect and alleviate the IV access related issues—after all the changes were focused on the IV Team, and the IV Team is the one responsible for setting the IV lines in the inmate.

Additionally, Barber notes that "failed protocol and practices that the IV Team will presumably follow during the execution do not include the 'important safeguards' that the Supreme Court identified in *Baze*," which included, among other things, a requirement that members of the IV Team have a certain number of years of experience and practice sessions and a time limit on how long the team can take to attempt to establish an IV line. But the Supreme Court did not hold in *Baze*—nor in any case that followed—that such safeguards are constitutionally required.

[25] Barber and the dissent allege that this expanded time frame simply "affords the IV team *six additional hours* to attempt to establish an IV line, making it more, not less, likely that [he] would suffer additional pain. . . ." But there is much more to the required execution protocol than just setting an IV line. For instance, the equipment and supplies to be used in the lethal injection procedure must be inspected and the lethal injection solution must be prepared; an inventory of the condemned inmate's property must be conducted; the condemned inmate is permitted to make a will and have visitors; "the Warden and/or Commissioner will meet with the victims of the condemned inmate's crime"; a physical examination of the condemned inmate must occur prior to the execution; and the inmate must be escorted to the execution location, secured to the gurney, and a heart monitor applied. *See* Redacted Execution Procedures (March 2023) at 6, 9–10 (attached as

to serve on the IV Team, requiring that all members of the IV Team be currently certified or licensed in the United States, and hiring a new IV Team that was not involved with any of the three preceding executions to conduct Barber's execution.[26]

Exhibit B to complaint). All of that takes time and must happen even before the IV Team attempts to secure vein access. *Id.* at 10. And those events must necessarily be performed in conjunction with any time delays that occur as a result of pending litigation by the condemned inmate (which we know more often than not is a factor at play). Thus, contrary to Barber's and the dissent's assertion, the expanded time frame for the execution merely means that ADOC has more time to complete all of the steps and acts in the protocol which are necessary to carrying out a successful constitutional execution.

[26] During the evidentiary hearing, Barber's expert nurse reviewed redacted certifications and licensures for the new IV Team and testified that just because a person is certified or licensed as a paramedic, EMT personnel, or a nurse, does not mean that they know how to start IV lines properly, and that licensure or certification "does not equal competency." In response, the State, for the first time, proffered a sworn affidavit from Warden Terry Raybon. Warden Raybon averred in the affidavit that (1) he "participated in the interviews with candidates for the expanded pool of medical personnel"; (2) the "candidates were asked about their relevant experience, licenses, and certifications"; and (3) "[t]he candidates selected all had extensive and current experience setting IV lines." Barber objected to the admission of this affidavit, arguing that he had requested similar information in his discovery requests and the State had objected on privilege grounds. The State explained that it did not produce the information or the affidavit because at the time it provided its responses, it did not have the affidavit. Further, it only became necessary for the State to introduce the affidavit belatedly at the evidentiary hearing to counter Barber's witness's speculative testimony that the members of the IV Team may have no training or experience setting IV lines. The district court admitted the affidavit, finding that any prejudice Barber would suffer from receiving the affidavit a few days after the State's responses to Barber's discovery requests did not "counsel against admission of the information that's

Accordingly, based on the evidence presented, the district court did not clearly err in finding that the intervening changes made by the ADOC "have disrupted the pattern discussed in *Smith*," rendering Barber's claim that the same pattern would continue to occur purely speculative.[27]

Accordingly, based on the evidence presented, the district court did not abuse its discretion in determining that Barber did not have a substantial likelihood of success on the merits of his Eighth

probative in this case." Barber challenges on appeal the district court's decision to credit Warden Raybon's belated self-serving affidavit, but we need not concern ourselves with the district court's admission of the affidavit. As detailed in this opinion, even without the affidavit, the district court did not abuse its discretion in denying the motion for a preliminary injunction.

[27] The dissent takes issue with this conclusion but fails to explain how the district court's findings were clearly erroneous based on the record before it or how the district court's decision constitutes a clear abuse of discretion. *Brnovich*, 141 S. Ct. at 2349 ("If the district court's view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance."); *Price*, 920 F.3d at 1323 (explaining that we may not reverse "simply because we are convinced that we would have decided the case differently"). And those are the standards we are judicially tasked with applying in this case.

Amendment claim and in denying the motion for a preliminary injunction.[28] Consequently, we affirm the district court.[29]

---

[28] We also note that Barber waited until May 25, 2023, to file the underlying complaint, even though nothing prevented him from doing so prior to that date. Barber was aware that the State was prepared to execute him because the State had a pending motion in November 2022 to set his execution date at the time Governor Ivey requested ADOC review its execution process. Barber could have brought his challenge then, but he did not. The State then filed a renewed motion to set his execution date on February 24, 2023. Barber could have brought his challenge then, but he did not. Although the district court did not reach the issue of whether Barber's delay in bringing his challenge was the type of last-minute application that the Supreme Court strongly disfavors, we note that this delay also weighs in favor of denying Barber's request for a stay. *See Bucklew*, 139 S. Ct. at 1134 ("Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-minute stays should be the extreme exception, not the norm, and the last-minute nature of an application that could have been brought earlier, or an applicant's attempt at manipulation, may be grounds for denial of a stay." (quotations omitted)); *Woods v. Comm'r, Ala. Dep't of Corr.*, 951 F.3d 1288, 1293 (11th Cir. 2020) ("The Supreme Court has unanimously instructed the lower federal courts on multiple occasions that we must apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such time as to allow consideration of the merits without requiring entry of a stay." (quotations omitted)).

[29] Because Barber cannot satisfy the first preliminary injunction factor, we need not consider the other factors. *Grayson*, 869 F.3d at 1238 n.89. Nevertheless, those factors also weigh in the State's favor. *See Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 701 (11th Cir. 2019) (explaining that "[t]he remainder of the factors we apply when considering a stay amount to a weighing of the equitable interests of the petitioner, the government, and the public"). Because Barber cannot show that he faces a substantial risk of serious harm if he is executed by lethal injection, he cannot show that he faces an irreparable injury if the stay is not granted. And, if a stay is issued, it would

AFFIRMED.

---

substantially impair the State's strong interest in seeing Barber's lawfully imposed sentence carried out in a timely manner, and it would be adverse to the public's interest in seeing the sentence carried out as well. *See id.* ("[A]s the Supreme Court has recognized, the [S]tate, the victim, and the victim's family also have an important interest in the timely enforcement of [the inmate's] sentence."). Thus, the district court did not clearly abuse its discretion in denying Barber's request for a preliminary injunction. Finally, because the test for a preliminary injunction and a motion for stay of execution mirror one another, we **DENY** Barber's motion for a stay of execution from this Court.

JILL PRYOR, Circuit Judge, Dissenting:

Eight months ago, the State of Alabama botched the execution of Kenneth Eugene Smith. As the State would tell it, history showed this was an aberration—a regrettable, but isolated, event. Regrettably, the State is wrong. Mr. Smith's horrifying experience was not a singular event; it was just the latest incident in an uninterrupted pattern of executions by Alabama's Department of Corrections ("ADOC") that involved protracted, severely painful, and grisly efforts to establish the intravenous lines necessary to carry the lethal injection drugs into his body. Mr. Smith asked a panel of this Court—including myself—to stay his execution because he feared he would be subjected to superadded pain and terror as the State carried out his death sentence. The State called his claim speculative and asked us to trust that ADOC was prepared to perform the execution without incident. We now know that Mr. Smith was right. Alabama's last three consecutive executions, including his, went so badly that Governor Kay Ivey halted all executions and ordered ADOC to investigate the cause of the failures. After a three-month "review" of its procedures—conducted entirely internally, entirely outside the scope of any court's or the public's scrutiny, and without saying what went wrong or what it fixed as a result—ADOC swears it is ready to try again, with Mr. Barber as its guinea pig.

The district court gave ADOC the green light because Mr. Barber cannot know that the pattern will continue with him. After all, the State made some personnel changes after the review—

though it was careful to deny that its previous personnel caused or contributed to the prior failures. Today the panel majority waves away Mr. Barber's request that we stay his execution, denying him a yellow light to press his serious constitutional claim that the State will violate his Eighth Amendment rights. I dissent. In my view, Mr. Barber is entitled to a stay of execution. The district abused its discretion in denying him a preliminary injunction by finding that the unbroken pattern of botched executions has been interrupted, without evidence to support that inference. I believe that Mr. Barber is likely to succeed in his appeal and should be permitted to return to the district court for some discovery—which he has thus far largely been denied—into what has been causing ADOC to systematically botch executions, whether the changes ADOC has made actually address the cause of the problems, and what changes could be made to avoid an imminent violation of his Eighth Amendment right to be executed free of cruel and unusual treatment.

I. BACKGROUND

A jury convicted Mr. Barber of capital murder based on the brutal robbery and murder of Dorothy Epps in 2001. The jury recommended by a vote of 11 to 1 a sentence of death, and the trial judge adopted the jury's recommendation. The Alabama Court of Criminal Appeals affirmed Mr. Barber's conviction and sentence. Both the Alabama Supreme Court and the United States Supreme Court denied certiorari.

In 2019, a district court denied Mr. Barber's federal habeas corpus petition. This Court affirmed the district court's denial. The Supreme Court denied certiorari.

In this case, Mr. Barber challenges not his conviction and death sentence, but the lethal-injection method Alabama will use to execute him. He claims that Alabama's method of execution violates his Eighth Amendment rights. His claim is based on a recent pattern in which ADOC officials have struggled for prolonged periods of time to establish intravenous (IV) lines when attempting to execute death-row prisoners via lethal injection.

Alabama executed Joe Nathan James, Jr. on July 28, 2022. The execution lasted more than three hours, as ADOC's IV team struggled to establish IV lines with which to administer the lethal-injection drugs. By the time ADOC opened the curtain between the execution chamber and the observation room for Mr. James to say his final words, he appeared to be unconscious because he "did not open his eyes or move and did not respond when asked if he had any last words," even though he allegedly had planned on making a final statement. Doc. 50-13 at 19.[1] Because Mr. James's execution was completed, and the process of setting his IV lines took place behind the curtain hiding the proceedings from the view of witnesses, no one apart from the ADOC personnel in the chamber knows for certain what happened during the execution. But a State autopsy of Mr. James's body confirmed that he was

[1] "Doc." numbers refer to the district court's docket entries.

punctured multiple times, including in his elbow joints, right foot, forearm, both wrists and both hands during that three-hour period.[2] Following the execution, Commissioner Hamm told reporters that "nothing out of the ordinary" happened, but ADOC later acknowledged that it struggled to establish IV lines in Mr. James's body.[3]

Despite ADOC's acknowledgement that Mr. James's execution was significantly delayed due to its inability to set the IV lines, the defendants forged ahead with lethal injections. Just eight days later, Attorney General Marshall moved the Alabama Supreme Court to set Mr. Barber's execution date. Mr. Barber immediately opposed the motion, arguing that "[t]he uncertainties" around Mr. James's execution "demand[ed] that—before any additional executions are scheduled—the [S]tate conduct a thorough and complete investigation to determine what happened, or implement prophylactic measures to ensure it does not happen again." Doc. 1-11 at 2. No investigation occurred.

---

[2] The State actually had two forensic pathologists perform autopsies on Mr. James's body. The first pathologist found evidence of multiple punctures. The second pathologist was able to positively identify only two needle punctures.

[3] Evan Mealins, *Joe Nathan James' Execution Delayed More than Three Hours by IV Issues, ADOC Says*, Montgomery Advertiser, July 29, 2022, https://www.montgomeryadvertiser.com/story/news/2022/07/29/joe-nathan-james-execution-alabama-delayed-iv-issues/10187322002/ [https://perma.cc/N9ZE-XQ65].

While Attorney General Marshall's motion to set Mr. Barber's execution date was pending, the State tried—and failed—to execute two more death-row prisoners.

On September 22, 2022, the State attempted to execute Alan Eugene Miller. It failed, and, according to ADOC, "terminated its execution efforts because it had problems accessing" Mr. Miller's veins. *Miller v. Hamm*, No. 22-cv-506-RAH, 2022 WL 16720193, at *1 (M.D. Ala. Nov. 4, 2022). Before ADOC abandoned its attempt to execute Mr. Miller, ADOC personnel "slapp[ed]" his arms "for long periods of time" as the IV team tried to locate a vein and "punctured [his] right elbow pit" in multiple different points trying to find a vein; he could feel the needle as they "turned [it] in various directions" to obtain access. Doc. 50-10 at 2–3; *see* Doc. 51 at 4. Mr. Miller felt his "veins being pushed around inside [his] body by needles, which caused [him] great pain and fear." Doc. 50-10 at 3. After several attempts with needles "going deeper into [his] body than ever before, which caused intense physical pain," Mr. Miller told the IV team "that [he] could feel that they were not accessing [his] veins, but rather stabbing around [his] veins." *Id.* The IV team moved on to different parts of his body and "attempted multiple punctures to his right hand, his left elbow, and his right foot." Doc. 51 at 4. As the district court in this case noted, Mr. Miller described how one attempt to access a vein in his foot "caused sudden and severe pain like he had been electrocuted" because they likely hit a nerve, and his entire body shook in the restraints. *Id.* (alterations adopted) (internal quotation marks omitted). This process continued for one-and-half hours until the IV team abandoned the

attempt because the execution had been "postponed." Doc. 50-10 at 5.

This ordeal occurred despite Commissioner Hamm's prior assurance—in a sworn affidavit in Mr. Miller's lawsuit attempting to stop his execution based on what happened to Mr. James—that ADOC was "ready to carry out [Mr. Miller's] sentence by lethal injection." Doc. 50-11. The day after Mr. Miller's botched execution, the district judge in his case held an emergency hearing. At the hearing, ADOC's counsel represented that "there just was not sufficient time to gain vein access in the appropriate manner in this case, and we just ran out of time." Doc. 38-3 at 20. Yet, just 12 days later, Attorney General Marshall moved the Alabama Supreme Court to reset Mr. Miller's execution on an expedited basis. *Miller*, 2022 WL 16720193, at *1.

Next, on November 17, 2022, the State attempted to execute Kenneth Eugene Smith. ADOC strapped Smith to the execution gurney for four hours beginning at 8:00 p.m.—despite Mr. Smith's pending motion before this Court to stay his execution. Beginning at approximately 10:20 p.m.—two hours after they first strapped him to the gurney—the ADOC team spent approximately an hour inserting needles into Mr. Smith's body to establish IV lines, including multiple attempts in each of his elbows, arms, and hands, as well as repeated "stabbing" in his collarbone area.[4] Doc. 50-13 at

[4] The State's lethal-injection protocol authorizes two methods to establish IV access: "[t]he standard procedure," or "if the condemned inmate's veins make obtaining venous access difficult or problematic, qualified medical personnel

5. Just before midnight, Commissioner Hamm announced that the execution had been called off because ADOC personnel failed to establish IV access after "several" attempts, including by a "central line." *Id.* at 43.[5] Afterward, in his federal lawsuit, Mr. Smith stated under oath that he experienced "severe physical pain and emotional trauma" during the attempts to access his veins. Doc. 50-14 at 1.

In response to the three executions with documented failures, Governor Ivey ordered ADOC to conduct a "top-to-bottom review" of the lethal-injection execution process. Doc. 51 at 5 (internal quotation marks omitted). She simultaneously asked Attorney General Marshall to withdraw all pending motions to set execution dates, including Mr. Barber's, while ADOC conducted the investigation. Attorney General Marshall withdrew the motions. Commissioner Hamm stated that he "agree[d] with Governor Ivey that" ADOC had to "get [the lethal-injection protocol] right" and that "[e]verything [was] on the table" for review," including "train[ing] and prepar[ation]" and "personnel and equipment." Doc. 1-3 at 2.

---

may perform a central line procedure to obtain venous access." Doc. 1-2 at 18. The district court found that the medical personnel's attempt at a central line procedure on Mr. Smith was "in line with Alabama's execution protocol." Doc. 51 at 5.

[5] *See* Jarvis Robertson, *Another Execution Halted Because of Difficulties with Intravenous Lines*, WVTM, (Nov. 18, 2022), https://www.wvtm13.com/article/stay-of-execution-granted-to-kenneth-smith/41999280 [https://perma.cc/QK6D-WBUX].

A little less than three months later, on February 24, 2023, Commissioner Hamm sent Governor Ivey a one-and-a-half-page letter announcing that ADOC's review was "complete" Doc. 1-5 at 2. The letter stated that ADOC had investigated its own execution process. It reported that the review included "evaluating" its "legal strategy in capital litigation matters, training procedures for [ADOC] staff and medical personnel involved in executions, increasing the number of medical personnel utilized by [ADOC] for executions, assisting medical personnel participating in the process, and the equipment on-hand to support individuals participating in the execution." *Id.* The letter did not reveal anything about the review's methodology or results. Without describing any weaknesses or deficiencies or providing any explanation for the prior failures, the letter represented that ADOC had "decided to add to its pool of available medical personnel for executions" and had "ordered and obtained new equipment . . . for use in future executions."[6] *Id.* at 3. No other changes to the lethal-injection protocol or processes were noted.

On the same day Commissioner Hamm sent his letter to the governor, Attorney General Marshall moved for the second time to set an execution date for Mr. Barber. Mr. Barber immediately requested discovery from the defendants about ADOC's review.

[6] According to the defendants' limited discovery responses in this case, the only new equipment obtained was "[a]dditional straps for securing an inmate on the execution gurney." Doc. 38-1 at 8.

The defendants responded that "there will be no substantive response to your request[s]." Doc. 1-19 at 3.

Mr. Barber then filed a response in the Alabama Supreme Court opposing their motion to set his execution. He argued that ADOC's perfunctory investigation into its own execution process was too brief to meaningfully assess the deficiencies; that ADOC failed to disclose any results from the investigation beyond Commissioner Hamm's conclusory letter; and that ADOC made no meaningful changes to prevent, in Mr. Barber's execution, the prolonged, painful efforts to establish IV access experienced by Mr. James, Mr. Miller, and Mr. Smith. Concurrently, he filed a motion to stay his execution, a motion to compel the defendants to respond to his discovery requests, and a motion to preserve evidence of his own execution.

The Alabama Supreme Court denied without opinion or oral argument all of Mr. Barber's motions and granted Attorney General Marshall's motion for an execution warrant. The May 3 order authorized ADOC, under a newly-amended Alabama Rule of Appellate Procedure, to execute Mr. Barber "within a time frame set by the Governor." Doc. 1-7 at 2.[7]

---

[7] Before ADOC's investigation was completed, Governor Ivey sent a letter to the Alabama Supreme Court, urging that court to amend Alabama Rule of Appellate Procedure 8(d)(1) to expand the time in which ADOC could complete an execution. The letter included proposed new language that would allow ADOC more time, specifically if a prisoner's litigation—like Mr. Barber's constitutional challenge, and those filed by Mr. Miller and Mr. Smith in advance of their failed executions last fall—delayed the execution's

Mr. Barber sued the defendants in district court on May 25, 2023, asserting under 42 U.S.C. § 1983 an as-applied Eighth Amendment challenge to Alabama's lethal-injection method of execution. Mr. Barber's Eighth Amendment claim alleged that he would experience prolonged, severe, added pain if the State were permitted to execute him by lethal injection because, among other reasons:

> Despite their repeated failure to establish IV access, Defendants have not instituted any known and meaningful safeguards to date. Nor have they undertaken any effort to ensure that the impending execution of Mr. Barber does not result in another prolonged, severely painful, and ultimately botched attempt. The key problems causing the repeated failures therefore remain in effect, which places Mr. Barber in substantial risk of serious harm.

---

progress. The Court responded by amending the rule. It removed the provision that "[t]he supreme court shall at the appropriate time enter an order fixing a date of execution," Ala. R. App. P. 8(d)(1) (1997), and replaced it with the following language:

> The 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 . . . .

Ala. R. App. P. 8(d)(1) (2023). Thus, the Alabama Supreme Court would no longer set a date of execution when issuing an execution warrant; instead, the amended rule authorized the governor to set a "time frame" for the execution. *Id.*

Doc. 1 at 23.

Five days after Mr. Barber filed his complaint alleging that Alabama's lethal injection would be unconstitutional as applied to him, Governor Ivey set Mr. Barber's execution for the 30-hour period between July 20, 2023 at 12:00 a.m. and July 21, 2023 at 6:00 a.m.—less than two months away.

As soon as Governor Ivey set the execution date, making clear that the State would proceed to carry out Mr. Barber's execution by lethal injection despite his pending legal challenge, Mr. Barber sought a preliminary injunction on June 5. He did not seek to stay his execution but instead sought an order enjoining the State from executing him by lethal injection and requiring it to carry out his execution by nitrogen hypoxia.[8]

Two days after filing his preliminary injunction motion, Mr. Barber served his first set of requests for production and interrogatories in the federal case. The defendants agreed to expedite discovery due to the compressed timeline. Among other things, Mr. Barber posed interrogatories concerning ADOC's review of its execution procedures in Commissioner Hamm's letter and requested documents regarding the same. When the defendants responded on June 23, the bulk of their responses were

[8] The district court construed Mr. Barber's motion as a motion that "for all intents and purpose . . . operates as a motion to stay his execution" because "such an order would effectively stay his execution for an indefinite period since the Defendants are not prepared to conduct executions by this method." Doc. 51 at 9.

privilege-based objections.[9] They did, however, include a response stating that the investigation found "[n]o deficiencies." Doc. 45-3 at 2. On June 30, Mr. Barber's attorneys filed a motion to compel responses to their discovery requests. That motion is still pending before the district court.

On July 5, 2023, the district court heard oral argument "on all pending motions," including Mr. Barber's motion for a preliminary injunction, the defendants' motion to dismiss, and Mr. Barber's motion to compel. Doc. 53 at 4. At the hearing, in support of the motion for a preliminary injunction, Mr. Barber presented live testimony from one witness, an experienced registered nurse, and also introduced sworn affidavits from two additional witnesses, as well as dozens of exhibits.

At the hearing, the defendants introduced a single piece of evidence to oppose Mr. Barber's motion: an affidavit by Warden Raybon dated June 29, 2023. This was the first time Mr. Barber learned about the affidavit or its contents, and he moved to strike it. He argued that the defendants had "not previously produced information [] contained in th[e] affidavit that should have been produced before today" in response to their discovery requests. *Id.* at 118. Further, by introducing the surprise affidavit—without any supporting information—he argued, the defendants were "gaining an advantage from selectively disclosing pieces of their

[9] Mr. Barber has repeatedly and consistently offered to agree to enter a protective order with the defendants to mitigate security and confidentiality concerns.

investigation." *Id.* at 120. Essentially, they were saying that Barber did not need to worry about the "three consecutively botched executions" because of the investigation while "not providing any discovery whatsoever . . . about what happened in that investigation unless it is a selective waiver to their benefit." *Id.*

Despite describing the defendants' choice to "spring" the affidavit on Mr. Barber "in the middle of a hearing" as "purposeful," the district court admitted the affidavit. *Id.* at 122. In the affidavit, Warden Raybon averred that the personnel who would perform Mr. Barber's execution "did not participate in the preparations for" the executions of Mr. James, Mr. Miller, and Mr. Smith. Doc. 50-27 at 2. Warden Raybon represented that he "participated in the interviews with candidates for the expanded pool of medical personnel" and in the interviews "candidates were asked about their relevant experience, licenses, and certifications." *Id.* at 1–2. He also stated in conclusory fashion that those selected "had extensive and current experience with setting IV lines." *Id.* at 2. There was no additional supporting detail, even though such information was covered by Mr. Barber's discovery requests about the credentials and qualifications of the IV team members. Warden Raybon was not present at the hearing; Mr. Barber's attorneys had no opportunity to cross-examine him.

After the hearing, the district court denied Mr. Barber's motion for a preliminary injunction. The district court found that, following its internal review, ADOC made "meaningful" changes to the execution protocol and procedures including "a longer time

frame for the execution set by the Governor and a new IV team consisting of individuals who did not participate in any prior execution or execution attempt." Doc. 51 at 6, 22. The district court concluded that, as a result, ADOC's "intervening actions have disrupted the pattern" of prolonged execution attempts, and therefore Mr. Barber could not demonstrate a substantial risk of serious harm warranting a preliminary injunction. *Id.* at 16–17. The district court did not address the remaining preliminary-injunction factors.[10]

Mr. Barber filed a notice of appeal challenging the district court's denial of his motion for a preliminary injunction. He moves this Court to stay his execution pending appeal.

II. LEGAL STANDARD

We review the district court's denial of a motion for preliminary injunction for abuse of discretion. *See Long v. Sec'y, Dep't of Corr.*, 924 F.3d 1171, 1175 (11th Cir. 2019). "A district court abuses its discretion if, among other things, it applies an incorrect legal standard, follows improper procedures in making the

[10] To succeed on a motion for a preliminary injunction, a movant must show: "(1) a substantial likelihood of success on the merits; (2) that the preliminary injunction is necessary to prevent irreparable injury; (3) that the threatened injury outweighs the harm the preliminary injunction would cause the other litigant; and (4) that the preliminary injunction would not be averse to the public interest." *Chavez v. Fla. SP Warden*, 742 F.3d 1267, 1271 (11th Cir. 2014). Having concluded that Mr. Barber failed to satisfy the first requirement, the district court was not required to address the other three factors. *See Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005).

determination, or makes findings of fact that are clearly erroneous." *Id.* (internal quotation marks omitted). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Ferguson v. Comm'r, Ala. Dep't of Corr.*, 69 F.4th 1243, 1254 (11th Cir. 2023) (alteration adopted) (internal quotation marks omitted). We have explained that under this standard, "[a]t a minimum, there must be substantial evidence" to support a finding. *United States v. Ellisor*, 522 F.3d 1255, 1273 n.25 (11th Cir. 2008).

In deciding a motion to stay execution, we must determine whether the movant has established that "(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." *Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1323 (11th Cir. 2019) (emphasis omitted) (internal quotation marks omitted). "The first and most important question regarding a stay of execution is whether the petitioner is substantially likely to succeed on the merits of his claim." *Id.* (internal quotation marks omitted).

III. DISCUSSION

Mr. Barber argues on appeal that the district court abused its discretion by denying his motion to preliminarily enjoin the defendants from executing him by lethal injection because the court relied on clearly erroneous factual findings to conclude that

he had not demonstrated a substantial likelihood of success on the merits. And in his motion to stay his execution pending appeal, Mr. Barber argues that he is likely to succeed on the merits of his Eighth Amendment claim, that the other stay-of-execution factors also weigh in his favor, and that he has not caused unnecessary delay that weighs against his entitlement to a stay.

Because I agree with Mr. Barber that the district court's findings—that the changes ADOC made after its investigation interrupted the pattern of botched executions on which Mr. Barber's claim relies—were clearly erroneous, I would reverse the district court's order denying the motion for a preliminary injunction. Further, because I agree with Mr. Barber that he has satisfied the stay-of-execution factors and has not caused unnecessary delay, I would grant his motion to stay his execution.

I first address the merits of Mr. Barber's appeal. Next, I consider each of the stay-of-execution factors.

A. The district court abused its discretion in denying Mr. Barber's motion for preliminary injunction.

In his § 1983 lawsuit, Barber claims that his impending execution by lethal injection is substantially likely to violate the Eighth Amendment's prohibition on cruel and unusual punishment. To succeed on his claim, Mr. Barber must show, first, that the method of execution he challenges poses "a substantial risk of serious harm," meaning "an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment."

Baze v. Rees, 553 U.S. 35, 50 (2008) (internal quotation marks omitted). Second, he must identify "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019). Because Mr. Barber has shown a substantial likelihood that he will succeed on this claim, the district court abused its discretion by denying his motion for a preliminary injunction.

The district court concluded that Mr. Barber had not shown a substantial likelihood of success on the merits of his Eighth Amendment claim because he failed to establish the first element of his Eighth Amendment method-of-execution claim, a substantial risk of serious harm. The district court's denial of Mr. Barber's motion for a preliminary injunction rested on its finding that "ADOC's investigation and the corresponding changes were designed to address the issues seen in the previous three execution attempts and demonstrate an attempt to remedy the emergent pattern recognized in" *Smith v. Commissioner, Alabama Department of Corrections*, No. 22-13781, 2022 WL 17069492 (11th Cir. Nov. 17, 2022) (unpublished). Doc. 51 at 17; *see id.* at 16–17 (finding that "in Barber's case, intervening actions have disrupted the pattern discussed in *Smith*"); *see also id.* at 18 (finding that ADOC's "investigation interrupt[ed] the emergent pattern seen in recent execution attempts"). Thus, the court concluded, Mr. Barber failed to establish the first prong of his Eighth Amendment claim because he "cannot show the investigation and corresponding changes will

not address the prolonged efforts to obtain IV access detailed in *Smith*." *Id.* at 17.

As I explain below, the district court relied on clearly erroneous factual findings that ADOC's "intervening actions have disrupted the pattern discussed in *Smith*" in concluding that Mr. Barber cannot demonstrate a substantial risk of serious harm. Doc. 51 at 16–17.

1. Mr. Barber faces a substantial risk of serious harm.

A "substantial risk of serious harm" for Eighth Amendment purposes can involve "a lingering death," *Baze*, 553 U.S. at 49 (internal quotation marks omitted), or the "superaddition of terror [or] pain" to the death sentence. *Bucklew*, 139 S. Ct. at 1124 (alteration adopted) (internal quotation marks omitted). Mr. Barber maintains that he faces such a risk because ADOC's three previous attempts to carry out executions by lethal injection have suffered from serious problems that will also plague his own execution: "protracted efforts to establish IV access." Appellant's Br. at 19 (internal quotation marks omitted).

We recognized in *Smith* that a prolonged period of painful, unsuccessful attempts to obtain IV access could amount to cruelly "superadd[ing] pain to the death sentence" in violation of the Eighth Amendment.[11] *Bucklew*, 139 S. Ct. at 1127; *Smith*, 2022 WL

[11] Mr. Barber also argues that a prolonged execution attempt including unsuccessful multiple attempts to access his veins will likely cause him to suffer a "lingering death." *Baze*, 53 U.S. at 49 (internal quotation marks

17069492, at *4. In my view, given the pattern that has emerged from Alabama's last three executions of protracted, painful, and in two of the three cases, ultimately unsuccessful attempts to establish IV access, Mr. Barber has shown a substantial likelihood of success on the merits. I would reach this conclusion for the reasons set forth in this Court's recent unpublished opinion in *Smith*. In that case, we held that Mr. Smith stated an Eighth Amendment claim based on the same pattern of lethal-execution failures—a pattern which now includes Mr. Smith's own failed execution attempt since our *Smith* decision issued.

Mr. Smith appealed the district court's dismissal of his § 1983 Eighth Amendment challenge to Alabama's lethal-injection method of execution. *Smith*, 2022 WL 17069492, at *5. In his proposed amended complaint, he alleged that Alabama's "Execution Protocol [did] not expressly prevent the hours-long attempt to establish intravenous access that allegedly resulted in superadded pain during James's execution and Miller's attempted execution." *Id.* at *3. A panel of this Court reversed the district court's denial of Mr. Smith's motion for leave to amend. We explained that the allegations in the proposed amended complaint "show[ed] a pattern of difficulty by ADOC in achieving IV access with prolonged attempts." *Id.* at *4. Based on the pattern of ADOC's failures, and Mr. Smith's allegations that his body mass index, among other things, would make establishing IV access

omitted). Establishing either a substantial risk of superadded pain or a lingering death will suffice; he is not required to establish both.

difficult, we concluded that he had "plausibly pleaded that, considering ADOC's inability to establish difficult IVs swiftly and successfully in the past, he will face superadded pain as the execution team attempts to gain IV access." *Id.* at *5. I acknowledge that as an unpublished opinion, *Smith* is not binding precedent, and unlike this case, it was at the motion to dismiss stage. But *Smith* is highly persuasive authority on whether prolonged attempts to gain IV access through standard IVs or through a central-line procedure can rise to the level of an Eighth Amendment violation given that Mr. Barber makes essentially the same claim.[12]

---

[12] Following Mr. Smith's failed attempted execution, the defendants in Mr. Smith's § 1983 case moved to dismiss his complaint, arguing that "difficulty establishing IV access and the pain resulting from being poked and prodded with needles [did] not rise to the level of cruel and unusual punishment." *Smith v. Hamm*, No. 2:22-CV-497-RAH, 2023 WL 4353143, at *7 (M.D. Ala. July 5, 2023). District Judge Austin Huffaker denied the motion to dismiss and rejected this argument, observing that Mr. "Smith d[id] not claim that the use of needles to establish venous access is per se cruel and unusual punishment." *Id.* at *7. Instead, the court explained that Mr. Smith was claiming that "multiple needle insertions over the course of one-to-two hours into muscle and into the collarbone in a manner emulating being stabbed in the chest . . . goes 'so far beyond what is needed to carry out a death sentence that it could only be explained as reflecting the infliction of pain for pain's sake.'" *Id.* at *7 (alterations adopted) (quoting *Bucklew*, 139 S. Ct. at 1124). Judge Huffaker concluded that these allegations were sufficient to state a claim for relief. *Id.* Using reasoning similar to Judge Huffaker's, I would conclude, based on Mr. Barber's evidence showing a pattern of multiple executions involving painful protracted efforts to establish IV access, that he has shown a substantial likelihood of success on his claim.

The majority concludes that Mr. Barber cannot carry his burden of showing that he faces a substantial risk of serious harm during his execution because our decision in *Nance v. Commissioner, Georgia Department of Corrections*, 59 F.4th 1149 (11th Cir. 2023), forecloses the claim that a prolonged period of unsuccessful attempts to obtain IV access amounts to cruelly superadding pain to the death sentence. *See* Maj. Op. at 23–24 & n.20 ("What matters is that *Nance* held that repeatedly and futilely pricking an inmate with a needle does not rise to an unconstitutional level of pain . . . it is not an Eighth Amendment violation."). The majority misreads *Nance*.

Michael Nance, a Georgia death-row prisoner, filed a § 1983 action challenging the constitutionality of Georgia's lethal-injection protocol as applied to him. 59 F.4th at 1152. In his complaint, Mr. Nance alleged, among other things, that his veins were compromised and that, as a result, when the Department of Corrections prepared him for execution by lethal injection, he might "blow" a vein "and leak the drug into the surrounding tissue." *Id.* He also alleged that the Department's "repeated[] attempt[s] to insert needles into unidentifiable and/or inaccessible veins" would subject him to an unconstitutional level of pain. *Id.* at 1156 (internal quotation marks omitted). This Court reversed the district court's dismissal of his claim that due to the poor condition of his veins, lethal injection was likely to cause him serious pain. *Id.* But we concluded that the district court properly rejected Nance's claim that he would be subjected to an unconstitutional level of pain if he were "repeatedly prick[ed] with a needle." *Id.* at 1157. We

said, "Nance did not plausibly allege that a futile attempt to locate a vein would give rise to a constitutionally intolerable level of pain." *Id.*

Importantly, there was no allegation in *Nance* that Georgia had a track record of past executions in which it subjected death-row prisoners to lengthy periods of multiple painful attempts to establish IV lines in the execution chamber. *Nance* merely recognized that, without more, a bare allegation that a death-row prisoner would be subjected to a constitutionally intolerable level of pain due to repeated attempts to establish an IV line is not plausible. *See id.* Here, though, we have more. Mr. Barber alleged in his complaint—and later came forward with evidence of—a pattern based on previous executions in which ADOC superadded pain through its prolonged attempts to establish IV access.

Because there was no allegation of such a pattern in *Nance*, there was no holding that controls this case. *See United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000) (explaining that "[t]he holdings of a prior decision can reach only as far as the facts and circumstances presented to the Court in the case which produced that decision" (internal quotation marks omitted)); *see also United States v. Files*, 63 F.4th 920, 929 (11th Cir. 2023) (explaining that "legal conclusions predicated on facts that aren't actually at issue" are dicta); *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) ("We have pointed out many times that regardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case.").

Here, the district court's order and the evidence in the record undoubtedly show that there is a pattern of ADOC superadding pain during executions throughout its prolonged attempts to establish IV access. The unrebutted evidence from Mr. Barber's three expert witnesses establishes that IV access should take only a few minutes and never more than an hour, even with a resisting and uncooperative subject. The defendants offered no evidence to refute this testimony. And the essential facts of the execution failures in the cases of Mr. James, Mr. Miller, and Mr. Smith are largely undisputed. In each case, there were prolonged attempts—spanning from one to several hours—to gain IV access that were made in various parts of the prisoners' bodies, resulting in multiple, visible injuries. Mr. Miller testified by affidavit in this case that during the repeated, protracted efforts, he felt his "veins being pushed around inside [his] body by needles, which caused [him] great pain and fear." Doc. 50-10 at 3. One of the many attempts to access a vein in in his foot likely hit a nerve and "caused sudden and severe pain" like he "had been electrocuted," which made his "entire body shake in the restraints." *Id.* at 4. And Mr. Smith described (under oath) that he experienced "severe physical pain and emotional trauma" during the attempts to access his veins. Doc. 50-14 at 1. Those efforts included including repeated needle insertions in his collarbone area to gain access through a central line which he said felt like "stabbing." Doc. 50-13 at 5. As members of the IV team moved on from attempts in his extremities to the collarbone-area insertions, Mr. Smith was "very fearful because he did not know what was happening." *Id.* at 38. These collarbone

"needle jabs . . . caus[ed] him severe pain." *Id.* Given this pattern, any difficulty establishing IV access in Mr. Barber's execution could not be described as an "isolated mishap" that is merely "regrettable." *Baze*, 553 U.S. at 50. Rather, the pattern demonstrates that Alabama's procedure "gives rise to a substantial risk of serious harm" in Mr. Barber's case. *Id.* (internal quotation marks omitted).

The district court found that Mr. Barber failed to demonstrate a substantial risk of serious harm because he could not "show that the investigation and corresponding changes will not address the pattern of prolonged efforts to obtain IV access detailed in *Smith*." Doc. 51 at 17. In the district court's and the defendants' view, ADOC's review of its own execution protocol and procedures and the subsequent changes ADOC made have intervened and disrupted the pattern of prolonged execution efforts.

Mr. Barber's execution is the first that Alabama will attempt since its failed executions of Mr. Miller and Mr. Smith. As the district court explained, after Mr. Smith's execution was called off, Governor Ivey called for a "top-to-bottom' review" of the State's legal injection policies and procedures to determine what had gone wrong and how to fix it. *Id.* at 5 (internal quotation marks omitted). In addition, Commissioner Hamm promised that "[e]verything [was] on the table for review." Doc. 1-3 at 2. And yet the only information the defendants have disclosed about the review is Commissioner Hamm's one-and-a-half-page letter to Governor

Ivey concluding that he was "confident that the Department is as ready as possible" to perform executions. Doc. 1-5 at 3. The defendants' inexplicable position in this case—despite the pattern of execution failures so serious that it caused the governor to call for an investigation and ask the State's Attorney General to halt executions pending the outcome—is that "[n]o deficiencies were found" during the review. Doc. 38-1 at 3.

This denial and conclusory reassurance resemble the defendants' public comments made after the execution of Mr. James and the attempted executions of Mr. Miller and Mr. Smith. After the State spent three hours trying to gain IV access to execute Mr. James, Commissioner Hamm told reporters that "nothing out of the ordinary happened" during the execution. Doc. 50-5 at 2. Of Mr. Miller's attempted execution, an ADOC representative told the district judge in his case that "there just was not sufficient time to gain vein access." Doc. 38-3 at 19. This failure occurred *after* Commissioner Hamm assured the court, in a sworn affidavit, that ADOC was "ready to carry out [Mr. Miller's] sentence by lethal injection on September 22, 2022." Doc. 50-11. And when ADOC tried and failed to set Mr. Smith's IV lines, Commissioner Hamm's press conference again explained that the IV team simply ran out of time.[13]

[13] *See* Video of Defendant Hamm's press conference, available online at https://twitter.com/i/broadcasts/1YqJDorPpmwGV.

Given the minimal evidence that ADOC provided about its review beyond its position in this case that "[n]o deficiencies were found," Doc. 38-1 at 3, and ADOC's own refusal to link the changes to any findings in its review, there was no reasonable basis for the district court to find that the investigation and subsequent changes by ADOC severed the causal chain between the lethal-injection procedures and the pattern of botched execution efforts. The first change the district court identified was "a personnel change." Doc. 51 at 6. ADOC represented that "no person who will be responsible for setting IV lines during Mr. Barber's execution participated in any previous execution." *Id.* (alteration adopted) (internal quotation mark omitted). The district court also credited and relied upon Warden Raybon's statements in the affidavit the defendants introduced for the first time at the hearing, that he "participated in the interviews with candidates from an expanded pool of medical personnel eligible to place the IV." *Id.* (internal quotation marks omitted). The second change was that the governor is now permitted "to set an extended time frame to conduct executions." *Id.* at 7. The district court found that this change was significant because "[t]he extended time permits the medical personnel to set the IV without the time pressure caused by legal challenges on the execution date." *Id.* The district court found that together "[t]hese intervening actions cut off" the pattern of executions requiring protracted efforts to establish IV access. *Id.* at 22.

The district court clearly erred because there was no evidence in the record to support its inference that the investigation led to any meaningful change in Alabama's practices

and procedures that would disrupt the pattern of prolonged efforts to obtain IV access. I address in more detail why, for each purported change, the record does not support the district court's causal inference.

a. Personnel Changes

After finding "[n]o deficiencies" with the execution protocol, Doc. 38-1 at 3, and without saying what weaknesses the changes were designed to address, ADOC maintains that it made some personnel-related changes to the IV team for lethal-injection executions that the district court found made Mr. Barber's allegations that he will suffer the same fate as Mr. James, Mr. Miller, and Mr. Smith "speculative." Doc. 51 at 22. Thus, Mr. Barber has failed to meet his burden to establish a substantial risk of serious harm.[14] The defendants concede that the new IV team "could possibly encounter similar difficulties," Doc. 35 at 12 (emphasis omitted), during Mr. Barber's execution; however, they maintain that this possibility does not present a substantial risk. I disagree.

To prove the changes ADOC made after its review, the defendants introduced only a single piece of evidence: a two-page affidavit—never disclosed to Mr. Barber's counsel—by Warden Raybon containing four paragraphs about the personnel changes. The affidavit stated that the personnel who would be responsible

[14] The district court's order describes "three meaningful changes" made by ADOC. Doc. 51 at 6. The list includes changes in personnel and changes in the selection of personnel as two separate changes. For clarity, we address the district court's findings regarding personnel together.

for setting the IV lines for Mr. Barber's execution "did not participate in the preparations for" the executions of Mr. James, Mr. Miller, or Mr. Smith; that Warden Raybon "participated in the interviews with candidates for the expanded pool of medical personnel"; that in the interviews "candidates were asked about their relevant experience, licenses, and certifications," and that those selected "had extensive and current experience with setting IV lines." Doc. 50-27 at 1–2. The district court admitted the affidavit over Mr. Barber's objections that he previously was unaware of the affidavit and in fact had requested in discovery and moved to compel the defendants to produce the very information it contained. Based on the affidavit, the district court inferred that the new IV team and Warden Raybon's participation in the interviews with candidates cut off the pattern we described in *Smith*. But in the absence of any evidence about the cause of the prior failures, in the affidavit or anywhere in the record, the district court's finding that the change in the IV team interrupted the pattern was clearly erroneous.

As an initial matter, it is difficult to see how personnel changes would cut off the pattern given the defendants' insistence that their review found "[n]o deficiencies," in personnel or otherwise. Doc. 38-1 at 3. In the absence of any evidence about what caused the failures, there is simply no basis for concluding that any given changes will alleviate the failures. Here, for example, there is no evidence in the record from which this Court or the district court could glean whether the "expanded pool of medical personnel" have the same or similar credentials as the former IV

team members who participated in the previous execution attempts.[15] Hiring a new IV team does not ensure a more effective team without knowing facts about the old team for comparison. And Warden Raybon's representation that the expanded pool of personnel all had "extensive . . . experience in setting IV lines" proves nothing unless we know how their experience compares to that of the former team, or even whether a lack of experience contributed to the prior problems. And no evidence reveals whether the ADOC Commissioner previously participated in interviews for the IV team pool. And as far as I can tell from the record, Commissioner Hamm is not a medical professional or expert; there is no evidence to suggest that his participation in personnel interviews was likely to have any meaningful impact.

Ultimately, the Raybon affidavit raises more questions than it purports to answer. And it is worth mentioning that we lack answers to these questions because the defendants refused to produce documents or information regarding the investigation, the selection process for the new IV team, or details about the group's qualifications compared with former team members. Neither Mr. Barber nor any court has had the chance to test Warden Raybon's

---

[15] The defendants produced in discovery redacted copies of licenses and certifications as emergency medical technicians (EMTs), paramedics, and one registered nurse. This documentation said nothing about their experience in setting IV lines, and Mr. Barber's unrebutted expert testimony established that although nurses and EMTs might be qualified to set IV lines, whether they were qualified would depend on their individual training and experience, none of which is revealed in the documents the defendants produced.

assertions. The affidavit offered selective, conclusory statements in a summary and self-serving fashion while the defendants were unwilling to provide any supporting information other than redacted copies of licenses and certifications. Without more, the statements in the Raybon affidavit simply do not support the district court's inference that the personnel changes the defendants made were likely to break the pattern of execution failures at the heart of Mr. Barber's method-of-execution claim.

b. Expanded time frame

The district court also relied upon the expanded time in which the State may complete the execution (from 6:00 p.m.–12:00 a.m. to 6:00 p.m.–6:00 a.m.) as a factor that cuts off the pattern on which Mr. Barber's claim relies. I fail to see how that change reduces the likelihood that Mr. Barber will suffer a prolonged period of painful attempts to obtain IV access. To the contrary, I agree with Mr. Barber that it increases it increases the risk that he will suffer a constitutional violation. The district court's inference was unsupported by the record and thus an abuse of discretion.

Under Alabama's newly-amended Rule of Appellate Procedure 8(d)(1), the Alabama Supreme Court no longer sets the date or time frame for an execution. Instead, the Court authorizes the governor to set a time frame. Ala. R. App. P. 8(d)(1). Governor

Ivey set the time frame for Mr. Barber's execution as July 20, 2023, at 12:00 a.m. through July 21, 2023, at 6:00 a.m.[16]

Mr. Miller and Mr. Smith each recounted their own experiences during which ADOC personnel spent one hour and one-and-a-half hours, respectively, attempting to establish IV lines. They testified by affidavit that they experienced severe pain owing to the prolonged period and multiple punctures before their executions were halted as the expiration of their warrants was approaching.

It may be that the expanded execution time frame will allow the State to complete Mr. Barber's execution before the warrant expires. But it is unreasonable to conclude it will do anything to prevent Mr. Barber from suffering superadded pain. The expanded time frame merely affords the IV team *six additional hours* to attempt to establish an IV line, making it more, not less, likely that Mr. Barber will suffer additional pain inflicted through prolonged attempts to access his veins. This is particularly true given the evidence in the record in which Mr. Miller and Mr. Smith each recounted their own experiences during which ADOC personnel spent 90 minutes and around one hour, respectively, attempting to establish IV lines. Each alleged he experienced severe pain owing

---

[16] Though the expanded time frame is 30 hours, instead of 24 hours, the effective scheduled time of Mr. Barber's execution is the 12-hour period between July 20, 2023, at 6:00 p.m. and July 21, 2023, at 6:00 a.m. *See* Doc. 53 at 127 (defendants stating that Commissioner Hamm planned to start "executions at six p.m.," and "continuing to no later than . . . six a.m.").

to the prolonged period of time spent attempting to establish IV access through multiple punctures before his execution was halted as the expiration of his warrant was approaching.

The defendants blame the botched executions on last-minute legal challenges—which are, of course, commonplace in the execution-warrant setting. The district court accepted as fact ADOC's representation that "single-day execution warrant[s] that would expire at midnight . . . caused unnecessary deadline pressure for [ADOC] personnel." Doc. 1-5 at 2. But ADOC has never said, and the record contains no evidence, that decreased time pressure will increase the IV team's ability to achieve IV access. I see no evidence of a causal link supporting an inference that making it "harder for inmates to run out the clock" ensures the IV team will be able to establish IV access without subjecting the prisoner to prolonged, painful attempts to do so. *Id.* The district court clearly erred by concluding the expanded time frame would alleviate that problem.

Further, the defendants have taken the position that they can, consistent with the Eighth Amendment, persist in painful attempts to establish IV access as long as they find it "necessary":

> THE COURT: Well, would you agree with me that at some point it could cross the line into an Eighth Amendment violation? That the attempts to find a vein to access for IV placement, that there has to be a line?

> COUNSEL: Hypothetically, Your Honor, you know, I think that the deciding line is necessity. We heard some testimony earlier about attempting to gain IV access in a hospital setting. You don't stop because you have to do it.
>
> You know, hypothetically if an inmate was actually being punctured, quote, all over his body in locations where you couldn't obtain IV access, it wouldn't be necessary. If we obtained IV access and we continued puncturing the condemned, that would not be necessary. But it's the State's position that the attempts to gain IV access necessary—you know, it's the necessity that really matters.
>
> I couldn't possibly speak to the discretion that resides with Defendant [Commissioner] Hamm to decide whether it's possible, and we have certainly in previous cases decided to cease efforts to obtain IV access. But I couldn't speak to where that line would be as I stand here right now, Your Honor.

Doc. 53 at 131–32. Under the defendants' view, if they deem it "necessary," ADOC could use the additional six hours to attempt IV access on Mr. Barber.

In the absence of other meaningful changes, the additional six hours of time for ADOC personnel to attempt to set IV lines, through the standard procedure or through the more complicated central line procedure, and administer the lethal injection makes it more likely that Mr. Barber will experience prolonged, painful efforts to establish IV lines. The district court's finding that this

"meaningful change" disrupts the pattern, defeating Mr. Barber's likelihood of succeeding on his Eighth Amendment claim, is not supported by substantial evidence, and is therefore clearly erroneous.[17]

2. Mr. Barber has identified an alternative method of execution.

Mr. Barber has also satisfied the second prong of his Eighth Amendment claim. I agree with the district court that he "successfully identified nitrogen hypoxia as a feasible, readily implemented alternative method of execution." Doc. 51 at 14. Our binding precedent in *Price* establishes that nitrogen hypoxia is an alternative method of execution in Alabama as a matter of law. 920 F.3d at 1328; *see also Smith*, 2022 WL 17069492, at *5 (holding nitrogen hypoxia is an available alternative).

---

[17] The district court made another distinct error in concluding that Mr. Barber failed to demonstrate a substantial risk of serious harm. The court concluded that Mr. Barber's Eighth Amendment claim failed because he made "no allegation in his complaint that he has a specific, physical condition or infirmity that makes it more difficult to access his veins." Doc. 51 at 17–18. Although in *Smith* this Court noted Mr. Smith's allegations that his medical condition would make IV access more difficult, we have never held that such allegations are required. Put differently, we have never held that a pattern such as Mr. Smith and now Mr. Barber alleged would not suffice to state a claim. But, even assuming Mr. Barber must provide some evidence of personalized risk that the IV team will struggle to access his veins, he provided documentary evidence of his own high body-mass index and testimony at the preliminary injunction hearing that ADOC personnel have struggled in the past to access his veins.

B. Mr. Barber satisfies the stay-of-execution factors.

I dissent, too, from the majority's decision to deny Mr. Barber's motion to stay his execution. I would conclude that he satisfied the relevant factors and the equities weigh in favor of granting him a stay.

1. Mr. Barber is likely to succeed on the merits.

As explained above, I would conclude that the district court abused its discretion by denying Mr. Barber's motion to preliminarily enjoin the State from executing him by lethal injection. For the same reasons, he is likely to succeed on the merits of his Eighth Amendment claim. As I see it, this factor weighs heavily in favor of granting Mr. Barber's motion to stay his execution pending the resolution of his constitutional challenge.

2. Mr. Barber faces irreparable injury if a stay is not granted.

Having determined that Mr. Barber faces a substantial risk of "superadd[ed] pain" if the State attempts to execute him by lethal injection, I would conclude Mr. Barber would be irreparably harmed if we do not grant him a stay-of-execution. The defendants do not contest that this factor weighs in Mr. Barber's favor.

3. A stay would not substantially injure the defendants.

I also would conclude that a stay would not cause the defendants substantial injury. Throughout this litigation, Mr. Barber has sought narrow, limited relief: to stay his execution *by lethal injection* until his Eighth Amendment claim is adjudicated. This means that the defendants remain free to execute him by

other means, including nitrogen hypoxia, which Commissioner Hamm and Attorney General Marshall have repeatedly stated is "close" to being available, perhaps as soon as the end of the year.[18] The defendants' own representations during this litigation have caused confusion on this very issue. In their brief opposing Mr. Barber's motion for a preliminary injunction, the defendants asked the district court to craft Mr. Barber's relief such that the State could still proceed with his execution by nitrogen hypoxia *on July 20, 2023*. When asked during the preliminary injunction hearing if the State was, in fact, ready to perform executions using nitrogen hypoxia, counsel for the defendants demurred and said they were not.

And the fact that Governor Ivey waited until May 30 and then chose a 30-hour warrant period commencing on July 20, knowing that Mr. Barber had filed this lawsuit, demonstrates that the State's time frame is arbitrary and the need to execute Mr. Barber immediately has been manufactured or manipulated. A minimal delay in the face of a serious constitutional claim does not amount to substantial injury to the defendants.

4. *The public interest weighs in favor of a stay.*

The final factor—whether the stay would be adverse to the public interest—weighs firmly in Mr. Barber's favor. *See Price*,

---

[18] *See, e.g.*, Kim Chandler, *Alabama 'Close' to Finishing Nitrogen Execution Protocol*, Associated Press, Feb. 15, 2023, https://apnews.com/article/crime-alabama-5818261f3209a332bb4badf280960ca1 [https://perma.cc/4NLY-6SD9].

920 F.3d at 1323. We have held that "the public interest is served when constitutional rights are protected." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019). "[N]either Alabama nor the public has any interest in carrying out an execution in a manner that violates . . . the laws of the United States." *Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 702 (11th Cir. 2019). The public interest would not be harmed by a delay.

5. Because Mr. Barber has not unreasonably delayed seeking relief, the equities do not weigh against a stay.

Mr. Barber has pursued his Eighth Amendment claim with reasonable diligence. The defendants argue that we should deny Mr. Barber's stay motion because he "intentionally delayed" suing the defendants "as long as he possibly could." Appellees' Br. at 6. They contend that delay merits denial of the motion to stay because "[l]ast-minute stays should be the extreme exception, not the norm, and the last-minute nature of an application that could have been brought earlier or an applicant's attempt at manipulation may be grounds for denial of a stay." *Bucklew*, 139 S. Ct. at 1134 (internal quotation marks omitted). But I am not persuaded that Mr. Barber has engaged in "dilatory litigation tactics," Appellees' Br. at 9, that turn the equities against a stay of execution.

Attorney General Marshall moved the Alabama Supreme Court to authorize Mr. Barber's execution on February 24, 2023—the same day Commissioner Hamm announced that ADOC's review was complete. In the defendants' version of events, Mr. Barber "did nothing" to challenge his execution by lethal injection

for three months between February and when he filed his federal lawsuit on May 25. *Id.* at 7. But their timeline is misleading. Mere days after Attorney General Marshall filed his motion to set Mr. Barber's execution date as March 31, Mr. Barber opposed the motion in the Alabama Supreme Court and sought discovery regarding ADOC's investigation. The Alabama Supreme Court did not issue its order authorizing Mr. Barber's execution until May 3. Mr. Barber was not doing "nothing" between February and May—he was litigating his case in state court.

When Mr. Barber initiated this action in district court on May 25, Governor Ivey had not yet set his execution date. Five days later, she announced that the State would execute Mr. Barber during the 30-hour time frame beginning July 20, 2023, at 12:00 a.m. Governor Ivey set that date—less than two months away—despite knowing that Mr. Barber had sued the defendants (including Governor Ivey) in federal court. Thus, the compressed timeline is a result of Governor Ivey's actions rather than of Mr. "Barber's own creation." *Id.* at 5.

As to the defendants' argument that Mr. Barber could have filed his lawsuit at any time after the failed execution of Mr. Smith on November 17, 2022, they conveniently ignore Governor Ivey's order that the State pause its executions while ADOC conducted a thorough review of its execution protocol and process. Had Mr. Barber sued the defendants while the investigation was pending, the defendants surely would have responded that Commissioner Hamm's promise to review the State's lethal-injection protocol and

processes would remedy the issues that plagued the executions of Mr. James, Mr. Miller, and Mr. Smith.

Mr. Barber has diligently pursued his Eighth Amendment claim such that the equities weigh in his favor.

CONCLUSION

Three botched executions in a row are three too many. Each time, ADOC has insisted that the courts should trust it to get it right, only to fail again. Mr. Barber has raised a serious and substantial Eighth Amendment claim that the pattern will continue to repeat itself. The district court clearly erred, and therefore abused its discretion, in finding that changes in IV team personnel and amendments to the procedural rule giving ADOC extra time to complete executions will stop this pattern without any evidence of what caused the past problems or how these changes will address those specific causes. Meanwhile, ADOC has refused to answer discovery designed to answer these very questions. I respectfully dissent because I would stay Mr. Barber's execution and reverse the district's denial of a preliminary injunction so that the State may not moot his claims before ever having to answer for its extraordinary and systemic failures.

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

JAMES EDWARD BARBER, Plaintiff, v. KAY IVEY, Governor of the State of Alabama, *et al.*, Defendants.	)	CIVIL ACT. NO. 2:23-cv-342-ECM (WO)

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Over twenty years ago, Plaintiff James Edward Barber ("Barber") murdered Dorothy Epps, a seventy-five-year-old woman, by beating her and striking her with a claw hammer. Now, facing his imminent execution for committing this crime, he is before the Court arguing that his execution by lethal injection will violate the Eighth Amendment's prohibition against cruel and unusual punishment. According to Barber, the State Defendants have demonstrated a pattern of difficulty accessing the veins of inmates during executions. Barber asserts that he faces excessive needle punctures by the IV Team for the Alabama Department of Corrections ("ADOC") as they attempt to gain intravenous ("IV") access.

Barber brings a one-count complaint alleging that his impending execution by lethal injection violates his Eighth Amendment right to be free from cruel and unusual punishment. The Defendants are Kay Ivey ("Ivey"), Governor of Alabama; John Q. Hamm

("Hamm"), Commissioner of the ADOC; Terry Raybon ("Raybon"), Warden of Holman Correctional Facility, where the execution is set to occur; Steve Marshall ("Marshall"), the Alabama Attorney General; and three John Does (collectively, "the Defendants").[1] This matter is now before the Court on Barber's motion for preliminary injunction (doc. 25), wherein he seeks an order enjoining the Defendants from executing him by lethal injection. For the reasons that follow, Barber's motion is due to be DENIED.

II. JURISDICTION AND VENUE

The Court has original subject matter jurisdiction of this case pursuant to 28 U.S.C. § 1331. Personal jurisdiction and venue are uncontested, and the Court concludes that venue properly lies in the Middle District of Alabama. *See* 28 U.S.C. § 1391.

III. THE CURRENT STATE OF EXECUTIONS IN ALABAMA

Lethal injection is the default method of execution in the State of Alabama. ALA. CODE § 15-18-82.1(a). Nitrogen hypoxia is an alternative method of execution in Alabama.[2] *Id.* Death row inmates are afforded one opportunity to elect execution by nitrogen hypoxia. Otherwise, an inmate waives the right to elect the alternative method and will be executed by lethal injection. ALA. CODE § 15-18-82.1(b)(2).

As support for his Eighth Amendment claim, Barber points to the Defendants' recent difficulty in establishing IV access to perform lethal injection executions. Barber

[1] Ordinarily, "fictitious party pleading is not permitted in federal court." *Richardson v. Johnson*, 598 F.3d 734, 738 (11th Cir. 2010) (per curiam). However, it may be appropriate when, as it is here, the plaintiff's description of the fictitious defendants is so specific that the parties may be identified for service of process. *See id.* (citing *Dean v. Barber*, 951 F.2d 1201, 1215–16 (11th Cir. 1992)).

[2] Electrocution is also an alternative method of execution.

first highlights the July 28, 2022, execution of Joe Nathan James, Jr. ("James"). The U.S. Supreme Court denied James' motion to stay his execution shortly before he was strapped to the execution gurney after 6:00 p.m. Attorney General Marshall did not clear the execution to commence until 9:04 p.m. due to difficulty in establishing IV access. (Doc. 1-8 at 2). James was pronounced dead by lethal injection at 9:27 p.m. (*Id.*).

Two pathologists conducted autopsies on James' body after the execution. A pathologist for the Alabama Department of Forensic Sciences ("ADFS") found evidence of "intravenous access to the medial left antecubital fossa and dorsum of the right foot, and additional needle puncture marks in the antecubital fossae, wrist, and hands." (Doc. 50-7 at 7). The second pathologist found "no signs of excessive needle punctures, and no signs of torture or other abuse." (Doc. 35-1 at 3). This pathologist "was able to positively identify only two needle punctures." (*Id.*). Neither autopsy reported an intramuscular sedative found in James' body following the execution. (*Id.*).[3]

Barber also points to the next execution attempt by the Defendants on September 22, 2022. The Defendants called off the execution of Alan Eugene Miller ("Miller") due to problems accessing Miller's veins to administer the lethal injection drugs. At the time of his execution attempt, Miller weighed around 351 pounds, making venous access more

[3] Barber's complaint alleges there was evidence in James' autopsy of a "cut-down" procedure. A cut-down procedure, which is not included in Alabama's lethal injection protocol, occurs when medical personnel slice through the skin of the condemned to expose direct access to a vein to set an IV line. Allegations of a cut-down on James, however, are not borne out by either autopsy report. The ADFS report noted "[l]inear superficial abrasions" on the "left antecubital fossa and proximal forearm," measuring only "1 ¾ inches in length and less than $^{1}/_{16}$ inch in depth." (Doc. 50-7 at 6). The second pathologist who conducted an autopsy on James concluded that he "saw no evidence that a cutdown procedure was performed or attempted on Mr. James." (Doc. 35-1 at 3).

difficult. (Doc. 50-20 at 2). Like Barber, Miller filed a lawsuit prior to his scheduled execution asking the federal court to enjoin the Defendants from executing him by any method other than nitrogen hypoxia. (Doc. 50-10 at 1). Around 9:00 p.m., on the day of Miller's scheduled execution, the U.S. Supreme Court denied this relief, permitting the execution to proceed. (*Id.*). Miller was placed on the execution gurney around 10:15 p.m. (*Id.* at 2). Medical personnel then began attempts to find a vein by puncturing Miller's "right elbow pit in multiple different spots." (*Id.*). After failing to find a vein there, personnel attempted multiple punctures to his right hand, his left elbow, and his right foot. (*Id.* at 2–3). A puncture in Miller's foot "caused sudden and severe pain . . . like [he] had been electrocuted." (*Id.* at 4). After attempts at these spots failed, before midnight, the Defendants called off the execution.

On November 17, 2022, Alabama again tried lethal injection by IV, this time on Kenneth Eugene Smith ("Smith"). Smith also moved the federal court to enjoin the Defendants from executing him by lethal injection. Minutes before his execution was to begin at 6:00 p.m., the district court denied his motion for a preliminary injunction. (Doc. 50-13 at 27). The Eleventh Circuit reversed the district court, staying the execution at 7:59 p.m. (*Id.* at 28). At 10:20 p.m., however, the U.S. Supreme Court vacated the Circuit's stay and permitted the execution to go forward. (*Id.*). Shortly after 8:00 p.m., while the Circuit's stay was being reviewed by the Supreme Court, Smith was strapped to the execution gurney. (*Id.* at 33). After the Supreme Court lifted the stay, medical personnel began attempts to find a vein to begin lethal injection. They repeatedly punctured Smith's right arm and hand, causing pain. (*Id.* at 36–37). Eventually, Smith's gurney was tilted

backward, bringing his feet above his head. (*Id.* at 37). As attempts to find a vein failed, Smith reported that medical personnel began injecting an unknown clear substance into his neck area with a syringe. (*Id.* at 38). They then attempted a central line procedure, which is in line with Alabama's execution protocol.[4] (*Id.* at 39). Around 11:20 p.m., less than an hour after attempts to set an IV line began, the Defendants informed the media on-site that they called off the execution.

Following this second failed attempt to complete an execution by lethal injection, Governor Ivey asked Attorney General Marshall "to withdraw the state's two pending motions to set execution dates" so that the ADOC could "undertake a top-to-bottom review of the state's execution process." (Doc. 1-3 at 2). One of these pending motions pertained to Barber's execution date. On November 21, 2022, the State withdrew its motion to set Barber's execution date (doc. 1-12), and the ADOC began an internal review of its execution procedures.

On February 24, 2023, Commissioner Hamm informed Governor Ivey that the ADOC's review was complete "and that the Department is as prepared as possible to carry out death sentences going forward, consistent with the Constitution." (Doc. 1-6). Governor Ivey asked Attorney General Marshall to move the Alabama Supreme Court to issue an execution warrant for an eligible death row inmate. (*Id.*). He moved to set Barber's

[4] Barber's expert witness testified at the evidentiary hearing that a central line procedure takes place when medical personnel enter into a larger vein in the torso and advance a longer catheter to the superior vena cava right before it enters the heart.

execution first. (Doc. 1-7 at 2).[5] The Alabama Supreme Court granted the State's motion and ordered that Governor Ivey shall "set a time frame . . . within which the Commissioner of the Department of Corrections shall carry out James Barber's sentence of death." (*Id.*). Governor Ivey subsequently scheduled Barber's execution to be carried out within "a thirty-hour time frame . . . beginning at 12:00 a.m. on Thursday, July 20, 2023, and expiring at 6:00 a.m. on Friday, July 21, 2023." (Doc. 11-1).

Despite indicating that "[n]o deficiencies were found" by the ADOC's review "in Alabama's execution procedures," the ADOC made three meaningful changes to the method by which it attempted the three previous lethal injection executions. (Doc. 45-3 at 3). First, the ADOC made a personnel change, replacing the members of the IV team who worked on past executions, noting that "[n]o person who will be responsible for setting IV lines during Mr. Barber's execution participated in any previous execution." (Doc. 45-3). Second, Warden Raybon personally "participated in the interviews with candidates" from an expanded pool of medical personnel eligible to place the IV. (Docs. 50-27 at 1–2, 1-5 at 3). "As part of the interview process," Warden Raybon asked candidates "about their relevant experience, licenses, and certifications. Candidates' licenses and certifications were reviewed at that time and ADOC verified that all were current. The candidates selected all had extensive and current experience with setting IV lines." (Doc. 50-27 at 2).

[5] Barber filed an opposition to the motion raising the same issues and making the same arguments as those he raises before this Court. (Doc. 1-14). He also asked the Alabama Supreme Court to compel the State to produce information regarding its investigation and to hold the Defendants' motion in abeyance until "the State has had time to employ an independent third-party to investigate the failings of ADOC's lethal injection protocol." (Doc. 1-15 at 2). Barber alternatively asked the Alabama Supreme Court to order the Defendants to "preserve evidence of any execution protocol used on Mr. Barber." (Doc. 1-17 at 5). The Alabama Supreme Court denied all of Barber's motions. (Doc. 1-18).

As of June 29, 2023, Warden Raybon "re-verified that" the IV Team members' certifications and licenses "remain valid and current." (*Id.*).

A third meaningful change to Alabama's execution method permits the Governor to set an extended time frame to conduct executions. Compared to past execution attempts, the new time frame here essentially extends by six hours the window in which the State has to carry out Barber's execution. This extension is the result of the ADOC's review, which noted that "a single-day execution warrant that would expire at midnight . . . caused unnecessary deadline pressure for Department personnel as courts issued orders late into the night in response to death-row inmates' last-minute legal challenges." (Doc. 1-5 at 2). The extended time permits the medical personnel to set the IV without the time pressure caused by legal challenges on the execution date. Notwithstanding these changes, Barber argues that the ADOC's review was insufficient.

IV. PROCEDURAL HISTORY AND BACKGROUND

A jury convicted Barber of "one count of capital murder for the killing of Dorothy Epps" on or about May 20 or 21, 2001, during a robbery or attempted robbery. *Barber v. State*, 952 So. 2d 393, 400 (Ala. Crim. App. 2005). Barber "knew Mrs. Epps during her lifetime, had done repair work at the Epps home, and had had a social relationship with one of Mrs. Epps' daughters." *Barber v. Comm'r, Ala. Dep't of Corr.*, 861 F. App'x 328, 330 (11th Cir. 2021), *cert. denied Barber v. Hamm*, 142 S. Ct. 1379 (2022). Evidence showed that Barber "struck Mrs. Epps in the face with his fist, and at some point thereafter, obtained a claw hammer that he used to cause multiple blunt force injuries to Mrs. Epps

which caused her death." *Id.* The trial court followed the jury's eleven to one recommendation in favor of imposing a sentence of death. *Id.* at 329.

The Alabama Court of Criminal Appeals affirmed Barber's conviction and sentence. *Barber*, 952 So. 2d 393. Thereafter, both the Alabama Supreme Court and the U.S. Supreme Court denied certiorari. *See id.* (noting the Alabama Supreme Court's denial of certiorari); *Barber v. Alabama*, 549 U.S. 1306 (2007) (mem.). On March 8, 2019, a federal district court denied a habeas corpus petition filed by Barber pursuant to 28 U.S.C. § 2254. *Barber v. Dunn*, 2019 WL 1098486, at *54 (N.D. Ala. Mar. 8, 2019). The Eleventh Circuit affirmed the denial, *Barber*, 861 F. App'x at 336, and the U.S. Supreme Court subsequently denied certiorari on March 21, 2022. *Barber*, 142 S. Ct. 1379.

Upon completion of Barber's post-conviction appeals, on August 5, 2022, Attorney General Marshall moved the Alabama Supreme Court to set Barber's execution date. (Doc. 1-10). Barber opposed the State's motion. (Doc. 1-11). However, on November 21, 2022, at the request of Governor Ivey, the State withdrew its motion to set an execution date. (Doc. 1-12). After the ADOC's internal review, Attorney General Marshall again moved the Alabama Supreme Court to set Barber's execution date; Barber again opposed the motion. (Doc. 1-14). On May 3, 2023, the Alabama Supreme Court permitted Governor Ivey to set Barber's execution, and she scheduled his execution to begin on July 20, 2023. (Doc. 1-7).

Barber filed this action on May 25, 2023, pursuant to 42 U.S.C. § 1983, alleging that execution by lethal injection violates his Eighth Amendment right to be free from cruel and unusual punishment. (Doc. 1). Execution by lethal injection, as it currently stands in

Alabama, according to Barber, would cause superadded and unnecessary pain gratuitously imposed by the Defendants. (*Id.* at 22). Barber alleges facts regarding the execution of James and the execution attempts of Miller and Smith to support his claim. The ADOC's internal review, according to Barber, failed to "institute[] any known and meaningful safeguards" against "another prolonged, severely painful, and ultimately botched [execution] attempt." (*Id.* at 23). In his complaint, due of the alleged risk imposed by lethal injection, Barber asks this Court to prohibit the State from executing him by any method other than nitrogen hypoxia. (*Id.* at 27).

Additionally, on June 5, 2023, Barber moved this Court to enjoin the State from executing him via lethal injection. (Doc. 25). Barber does not seek a stay of his execution. Instead, he seeks an order from the Court enjoining his execution by any method other than nitrogen hypoxia. The problem with this request is two-fold: (1) Barber did not timely elect nitrogen hypoxia as his method of execution in compliance with Alabama law; and (2) the Defendants are not currently prepared to perform executions by nitrogen hypoxia. (*See* doc. 38-2 at 2). Barber offers no authority for his request that the Court order his execution by a method he did not elect, and thus has waived, under Alabama law. *See* ALA. CODE § 15-18-82.1(b)(2). Further, even if the Court were to order that Barber could only be executed by nitrogen hypoxia, such an order would effectively stay his execution for an indefinite period since the Defendants are not prepared to conduct executions by this method. Thus, for all intents and purposes, Barber's motion for preliminary injunction operates as a motion to stay his execution.

V. DISCUSSION

Barber is entitled to a preliminary injunction only if he demonstrates that (1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the threatened injury outweighs the harm the injunction would cause the other litigants; and (4) if issued, the injunction would not be adverse to the public interest. *Chavez v. Fla. SP Warden*, 742 F.3d 1267, 1271 (11th Cir. 2014); *see also Powell v. Thomas*, 641 F.3d 1255, 1257 (11th Cir. 2011). Barber, as the movant, must, "by a clear showing," carry the burden of persuasion on all four requirements. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). A preliminary injunction is an "extraordinary and drastic remedy not to be granted unless the movant clearly establishe[s] the burden of persuasion for each prong of the analysis." *America's Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1329 (11th Cir. 2014) (quotations and citation omitted).

The Court turns first to whether Barber can demonstrate a "substantial likelihood of success on the merits" of his underlying Eighth Amendment claim. *Carillon Imps., Ltd. v. Frank Pesce Int'l Grp. Ltd.*, 112 F.3d 1125, 1126 (11th Cir. 1997). Barber alleges that he faces a substantial risk of serious harm if the Defendants are permitted to attempt to execute him by lethal injection. Barber contends that he faces the risk that he will suffer "superadded pain" as the IV team attempts to gain venous access. The manner in which the ADOC personnel are implementing the Lethal Injection ("LI") Protocol forms the basis of Barber's claim.

A. Statute of Limitations

The Defendants maintain that Barber cannot establish a substantial likelihood of success on the merits because his claim is barred by the statute of limitations. According to the Defendants, Barber challenges the LI Protocol itself, which has been in place for several years. Because Barber did not file his complaint within two years of Alabama's adoption of the LI Protocol, the Defendants argue that his claim is barred by the statute of limitations. On the other hand, Barber contends that his claim regarding the LI Protocol is not barred because the facts supporting his claim only became apparent in 2022 when the Defendants had difficulty establishing IV access in the past three execution attempts. Barber points to the execution of James and the execution attempts of Miller and Smith to support his assertion that the pattern of superadding pain only recently became clear.

A claim pursuant to § 1983 "is subject to the state statute of limitations governing personal injury actions." *Nance v. Comm'r, Ga. Dep't of Corr.*, 59 F.4th 1149, 1153 (11th Cir. Jan. 30, 2023). In Alabama, the applicable statute of limitations is two years. *Brooks v. Warden*, 810 F.3d 812, 823 (11th Cir. 2016); *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008). However, "federal law determines the date on which a cause of action accrues. In Section 1983 cases, the statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Nance*, 59 F.4th at 1153 (quotations omitted).

In his complaint, Barber challenges aspects of the LI Protocol that fail to specify the requisite training and certification necessary for individuals to participate on the IV team. Barbour also alleges that the LI Protocol does not define the "standard procedure" for

establishing IV access. (Doc. 1 at 13). He further alleges that the LI Protocol does not "include time parameters under which the IV team establish IV access." (*Id*.). Barber also faults the LI Protocol because it does not specify "what *entity* must certify or license the members of the IV team or *in what specialty* members of the IV team must be 'certified or licensed.'" (*Id*. at 21) (emphasis in original). According to Barber, "[t]his is critically important because the IV team members who have performed the last three executions have not been adequately trained or appropriately credentialed to establish IV access." (*Id*.).

To the extent that Barber challenges these aspects of the LI Protocol itself, his claims are barred by the statute of limitations. For purposes of the statute of limitations, Barber's claim accrued when he had "a complete and present cause of action, that is, when [he could have] file[d] suit and obtain[ed] relief." *McNair*, 515 F.3d at 1174 (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)). The alleged deficiencies in the LI Protocol about which Barber complains have been present since the last significant change in Alabama's lethal injection protocol, over two years ago. Consequently, to the extent Barber claims that specific provisions of the LI Protocol violate the Eighth Amendment, those claims are barred by the statute of limitations.

To the extent that Barber asserts that the manner in which the LI Protocol is carried out—through an emerging pattern of prolonged attempts to establish IV access—violates the Eighth Amendment, this claim is not barred by the statute of limitations. In his complaint, based upon the circumstances surrounding the executions of James and attempted executions of Miller and Smith, Barber alleges that it is "reasonably foreseeable that over the course of several hours, [he] will be punctured with needles all over his body

by an unqualified IV team that repeatedly fails to establish IV access." (Doc. 1 at 2–3). Relying on the unpublished opinion in *Smith v. Commissioner, Alabama Department of Corrections*, Barber asserts that the "emergence of ADOC's pattern of superadding pain through protracted efforts to establish IV access" in the prior execution attempts is the fulcrum on which his claim rests. 2022 WL 17069492, at *5 (11th Cir. Nov. 17, 2022).

The Eleventh Circuit has held that when, as here, a plaintiff pursues an "as-applied method-of-execution claim," the limitations period "does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Nance*, 59 F.4th at 1153 (quoting *McNair*, 515 F.3d at 1173). As the Eleventh Circuit held in *Nance*, to the extent that Barber brings an as-applied challenge to the LI Protocol, the statute of limitations has not expired because he could not have known until 2022 "his unique personal circumstances [that] would render his execution unconstitutional." *Id.* The facts Barber alleges in support of his as-applied challenge first emerged in 2022 after James' execution and the execution attempt of Miller. Thus, Barber's claim based on the Defendants' emerging pattern of experiencing difficulty securing IV access is not barred by the statute of limitations. The Court now turns to the merits of this claim.

B. Eighth Amendment Claim

The U.S. Supreme Court's decision in *Glossip v. Gross*, 576 U.S. 863, 877 (2015), sets forth the relevant two-pronged standard Barber must meet to succeed on his Eighth Amendment lethal injection method-of-execution claim.

First, Barber must establish that execution by lethal injection presents a risk that is "'*sure or very likely* to cause serious illness and needless suffering,' and gives rise to 'sufficiently *imminent* dangers.'" *Id.* (emphasis in original) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality opinion); *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993)). In *Baze*, the Court noted that the simple fact that "an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual" punishment prohibited by the Eighth Amendment. *Baze*, 553 U.S. at 50. Thus, Barber must show 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.'" *Glossip*, 576 U.S. at 877 (citing *Baze*, 553 U.S. at 50, quoting *Farmer v. Brennan*, 511 U.S. 825, 846 & n.9 (1994)).

Second, Barber must also "identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Glossip*, 576 U.S. at 877 (quoting *Baze*, 553 U.S. at 52). Barber has successfully identified nitrogen hypoxia as a feasible, readily implemented alternative method of execution. *See Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1326–28 (11th Cir. 2019), *cert. denied sub nom. Price v. Dunn*, 139 S. Ct. 1542 (2019).

Having satisfied the second prong of the standard, Barber argues that he has likewise satisfied his burden of showing that he is sure or very likely to experience needless suffering because the IV team is incapable of establishing the venous access necessary to carry out an execution by lethal injection. The Eleventh Circuit has recognized concerns

surrounding the ADOC's recent difficulties establishing IV access in execution attempts. In *Smith*, the plaintiff made a constitutional challenge to Alabama's lethal injection method of execution. *Smith*, 2022 WL 17069492, at *5. After the district court dismissed Smith's complaint, he requested leave to amend. *Id.* at *2. Smith's proposed amended complaint alleged that he would likely suffer an Eighth Amendment violation because Alabama's "Execution Protocol does not expressly prevent the hours-long attempt to establish intravenous access that allegedly resulted in superadded pain during James's execution and Miller's attempted execution." *Id.* at *3. Smith argued that the ADOC would likely have difficulty accessing his veins because anxiety surrounding an impending execution may constrict blood vessels in an inmate, making them more difficult to access. *Id.* at *5. Additionally, Smith alleged that his recent medication for depression and insomnia, as well as his borderline obesity, would increase the risk that the ADOC may struggle to access his veins. *Id.*

The Eleventh Circuit panel determined that Smith's allegations "show[ed] a pattern of difficulty by ADOC in achieving IV access with prolonged attempts." *Id.* at *4. Taking this pattern in conjunction with Smith's alleged specific risk factors, the Circuit held that Smith "plausibly pleaded that . . . he will face superadded pain as the execution team attempts to gain IV access." *Id.* at *5. Thus, the Circuit determined the district court erred in denying Smith leave to amend his complaint. *Id.* at *6. In rejecting the ADOC's statute of limitations argument, the Circuit noted that Smith's claim accrued at the ADOC's emergent "pattern of superadding pain through protracted efforts to establish IV access." *Id.* at *5.

However, the Eleventh Circuit has also rejected Eighth Amendment claims based on allegations that an execution will involve futile attempts to locate a vein when the plaintiff has not established a pattern of that particular conduct. In *Nance*, the plaintiff sought to enjoin the State of Georgia from executing him by lethal injection. *Nance*, 59 F. 4th at 1152. Nance made an as-applied challenge to Georgia's execution protocol on the basis that his veins were "severely compromised." *Id.* Accordingly, Nance alleged that he would experience excruciating pain when medical personnel "repeatedly attempt[] to insert needles into unidentifiable and/or inaccessible veins." *Id.* at 1156. The district court rejected this argument and found that Nance did not have a basis for asserting that the State would subject him to excruciating pain through fruitless and repeated efforts to locate a vein. *Id.* Although the Eleventh Circuit held that Nance stated a claim on other grounds, it noted that the district court correctly rejected his argument that the State "would subject him to an unconstitutional level of pain by repeatedly pricking him with a needle." *Id.* at 1157. The Circuit reasoned that Nance did not plausibly allege that futile attempts to locate a vein "would give rise to a constitutionally intolerable level of pain," further noting that "the Eighth Amendment does not guarantee a prisoner a painless death." *Id.* (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019)).

Here, because Barber is scheduled to be executed by Alabama, he urges the Court to follow *Smith*, a case which arose under Alabama's execution protocol. Barber argues that the attempt to execute Smith further repeated the ADOC's alleged pattern of superadding pain through extended efforts to establish IV access. However, Barber's circumstances differ from Smith's in key respects. First, in Barber's case, intervening

actions have disrupted the pattern discussed in *Smith*. After the ADOC's unsuccessful attempt to execute Smith, it conducted an investigation into its execution procedures. Following the conclusion of this investigation, the ADOC implemented personnel changes to the IV team with personal oversight from Warden Raybon. None of the members of the current IV team were involved in the previous three execution attempts. The Defendants have also represented that the investigation did not find any deficiencies in the protocol itself.

Barber cannot show that the investigation and corresponding changes will not address the pattern of prolonged efforts to obtain IV access detailed in *Smith*. Rather, Barber challenges the sufficiency of the ADOC's investigation because it was conducted internally and, in his opinion, too quickly. In support of this argument, Barber points to external execution protocol investigations conducted by other states over greater spans of time. However, Barber's arguments hinge on what he views as "best practices," not what is mandated under the U.S. Constitution. In this case, the ADOC's investigation and the corresponding changes were designed to address the issues seen in the previous three execution attempts and demonstrate an attempt to remedy the emergent pattern recognized in *Smith*.

Barber is further unlike the plaintiff in *Smith* because he does not allege in his complaint that individual risk factors increase the likelihood that he will face prolonged efforts to establish IV access. While Smith alleged medical conditions that increased his personal risk for difficult IV access, Barber makes no allegation in his complaint that he has a specific, physical condition or infirmity that makes it more difficult to access his

veins. At the evidentiary hearing, Barber testified that medical personnel within the ADOC have experienced difficulty accessing his veins on a few occasions. Barber recounted one experience where a clinician made approximately eight unsuccessful attempts to access his veins in an effort to draw blood. However, Barber did not express that these difficulties were related to a medical condition, and Barber also testified that medical personnel have accessed his veins without issues in other instances. This testimony is insufficient to establish that Barber presents the individual risks, which were present in *Smith*, that would complicate establishing IV access in his case.

With the ADOC's investigation interrupting the emergent pattern seen in recent execution attempts, Barber's argument more closely resembles that which was rejected by the Eleventh Circuit in *Nance*. As *Nance* involved an execution by lethal injection to be conducted by the State of Georgia, the plaintiff in *Nance* did not face the risks contemplated in *Smith*. Against that backdrop, which is similar to Barber's present circumstances, the Circuit rejected Nance's argument that futile attempts to locate his veins would lead to constitutionally impermissible levels of pain.

To address the medical aspects of his claim, Barber presented Lynn Hadaway ("Hadaway") as an expert witness at the evidentiary hearing. Hadaway has been a registered nurse for over fifty years and holds board certification from the Infusion Nurses Certification Corporation. Hadaway testified that on average, it takes a skilled medical professional between six and nine minutes to establish peripheral IV access.[6] Hadaway

[6] A peripheral IV involves gaining venous access to the peripheral extremities, such as the arms, hands, feet, or legs.

acknowledged that IV access may take longer if the patient is in restraints but testified that a difficult IV should take no longer than thirty minutes. Hadaway testified that she has never seen a case where it took between ninety minutes and three hours to set a peripheral IV. In her opinion, a person who has been punctured with needles for that length of time has been subjected to unnecessary pain.

Hadaway also testified that the standard practice in the medical community is to follow the "two-stick" approach. Under this approach, the medical professional seeking IV access should make only two attempts with a needle to start a peripheral IV. If the medical professional cannot establish IV access after two attempts, then a more skilled professional should attempt to set the IV or vascular visualization technology, such as an ultrasound, should be used to assist in locating a vein.[7] Hadaway testified that subcutaneous probing from repeated efforts to locate a vein increases the likelihood that the needle contacts a nerve, causing tingling or burning pain.

Hadaway's testimony, however, does not establish that efforts to locate Barber's veins would cause him constitutionally impermissible pain. Here, Barber's claim is weaker than the plaintiff's claim in *Nance*, as Barber does not allege a condition with his veins that would complicate IV access. Further, Hadaway's own testimony about the two-stick approach contemplates situations in which multiple attempts to set an IV are medically

[7] In support of his motion, Barber also offers the affidavit of certified surgical nurse, Lisa St. Charles. She stated that, in her experience, a more skilled person should be called in to set an IV after three unsuccessful needle sticks. (Doc. 25-2 at 3–4, para. 11).

necessary. Thus, repeated attempts to set an IV, which may cause pain, do not necessarily constitute "needless suffering" under the Constitution.

The Court finds that Barber fails to demonstrate, on this record, that he is substantially likely to succeed on the merits of his claim that his execution by lethal injection violates the Eighth Amendment. An allegation of *some* risk alone fails to meet the Supreme Court's high standard; "[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Baze*, 553 U.S. at 50. Indeed, as the Supreme Court noted in *Bucklew*, "[t]he Constitution allows capital punishment" and "does not guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people, including most victims of capital crimes." 139 S. Ct. at 1124 (referencing *Glossip*, 576 U.S. at 869).

At the evidentiary hearing, Barber suggested that the Defendants are violating their execution protocol—which provides that the IV team will first try the standard procedure to access a vein—because the Defendants clarified in an interrogatory that the standard procedure is the ordinary procedure that medical professionals follow in setting IV lines. Given that medical professionals follow a two-stick limit, Barber argues, the Defendants are violating their own procedures by making more than two needle sticks over an extended period of time. However, this argument misconstrues the two-stick limit to which Hadaway testified. Hadaway did not testify that a maximum of two needle sticks could be made before efforts at IV access are abandoned; rather, Hadaway testified that medical personnel should seek a more skilled clinician or more effective technology if the two-stick

limit is reached. Thus, the Court does not find Barber's argument that the Defendants have violated their own protocol compelling.

Barber also cites to the memorandum opinion and order in *Smith v. Hamm*, 2023 WL 4353143 (M.D. Ala. July 5, 2023), as supplemental authority, presumably for his motion for preliminary injunction. (Docs. 48, 48-1). Barber points out that the district court, on remand, in denying in part the defendants' motion to dismiss, found that Smith asserted a plausible Eighth Amendment claim. *Smith*, 2023 WL 4353143 at *9. Barber provides no analysis of the case, meaningful or otherwise. This Court, however, undertook an analysis of the case and finds it distinguishable. First, the opinion is on a motion to dismiss, where the standard is different than the standard on a motion for preliminary injunction. On a motion to dismiss, the well-pled allegations in the complaint are accepted as true, and courts generally cannot consider extrinsic evidence. Not so on a motion for preliminary injunction. While "the well-pleaded allegations [in a] complaint and uncontroverted affidavits filed in support of the motion for a preliminary injunction are taken as true," the "court may also consider supplemental evidence, even hearsay evidence, submitted by the parties." *Alabama v. U.S. Dep't of Com.*, 546 F. Supp. 3d 1057, 1063 (M.D. Ala. 2021) (citations and quotations omitted). Further, the court in *Smith* noted that "Smith does not claim that the use of needles to establish venous access is per se cruel and unusual punishment." *Smith*, 2023 WL 4353143 at *7. Rather,

> Smith claims that a second attempt to execute him by lethal injection would amount to cruel and unusual punishment given the extreme pain and suffering he says he experienced during the first execution attempt, along with the State's prior unsuccessful attempt to execute Alan Miller in September

> 2022 and the alleged problems with the State's execution of Joe Nathan James in July 2022; and the absence of allegations that the State has made changes to its execution procedures, aside from the public assertion of a 'top-to-bottom review of the protocol.

Id. The court went on to note: "[a]dditional factual development may reveal that what Smith experienced is unlikely to recur because of, for example, changes made as a result of the 'top-to-bottom review' of Alabama's execution protocol." *Id.*

This Court has before it evidence that shows an investigation was, in fact, performed by the ADOC regarding its execution protocols and procedures after the attempted execution of Smith. Barber argues that this investigation was too brief, perfunctory, and should have been performed by an independent investigatory body. Notwithstanding Barber's allegations to the contrary, there is evidence before the Court that changes were made to the lethal injection procedures as a result of the investigation, namely, a longer time frame for the execution set by the Governor and a new IV Team consisting of individuals who did not participate in any prior execution or execution attempt. These intervening actions cut off the emerging pattern of past practices that could have elevated Barber's claims from purely speculative to actionable. In light of the investigation conducted by the ADOC, and actions taken as a result thereof, the Court finds Barber's allegations are too speculative to give rise to an Eighth Amendment claim upon which he is substantially likely to prevail.

"Controlling precedent is clear that injunctive relief may not be granted unless the plaintiff establishes the substantial likelihood of success criterion." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005) (per curiam). Because Barber

has not shown a substantial likelihood of success on the merits of his Eighth Amendment claim, he has not met his burden of establishing his right to a preliminary injunction. Because this failure is dispositive, the Court pretermits discussion of the other three requirements to warrant a preliminary injunction.[8]

VI. CONCLUSION

Accordingly, and for good cause, it is

ORDERED that Barber's motion for preliminary injunction (doc. 25) is DENIED.

DONE this 7th day of July, 2023.

/s/ Emily C. Marks
EMILY C. MARKS
CHIEF UNITED STATES DISTRICT JUDGE

[8] Notwithstanding the Court's rulings as to certain aspects of Barber's claims being barred by the statute of limitations, those claims, had they not been time-barred, would also fail on the merits for the reasons set forth above.

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

JAMES EDWARD BARBER,

Plaintiff,

v.

KAY IVEY, Governor of the State of Alabama, JOHN Q. HAMM, Commissioner of the Alabama Department of Corrections, TERRY RAYBON, Warden, Holman Correctional Facility, STEVE MARSHALL, Attorney General of the State of Alabama, and JOHN DOES 1-3,

Defendants.

Case No. _____

CAPITAL CASE – GOVERNOR TO SET EXECUTION TIME FRAME

JURY DEMAND

COMPLAINT

1. Plaintiff James Edward Barber brings this action against Defendants Kay Ivey, John Q. Hamm, Terry Raybon, Steve Marshall, and John Does 1-3 (collectively, "Defendants") pursuant to 42 U.S.C. § 1983 based on Defendants' violation of Mr. Barber's rights and privileges under the Eighth Amendment to the U.S. Constitution.

PRELIMINARY STATEMENT

2. In 2022, the State of Alabama made history. Not the good kind. Never before in America had a state botched an execution not once, not twice, but three times in a row. The failed executions lasted hours longer than intended as unqualified "medical personnel" repeatedly punctured the inmates with needles before resorting to other painful techniques in hopes of setting an intravenous ("IV") line.

3. Two of the executions were eventually called off before midnight, but only after the inmates suffered physical and psychological trauma from their lingering deaths as the team

responsible for setting IV lines ("IV Team") in the execution chamber continuously tried but failed to carry out the executions. The third inmate died after the IV Team attempted to set an IV line for ***three hours***, making his execution one of the longest in American history. An autopsy performed after the execution exposed several concerning issues which are currently being brought to light in litigation by the inmate's estate.

4. The State's inability to carry out these executions in a constitutional manner has set off a firestorm of public attention and scrutiny, and has made headlines around the world.

5. But rather than engage in a meaningful investigation into these repeated failures and implement policies to prevent them in the future, Defendants rushed through a perfunctory "investigation" that lasted only a few short months and that yielded no meaningful changes. In fact, the only significant change Defendants have made since botching the three executions has been to amend the relevant rules to ***give themselves more time for executions***, which recent history portends will only prolong the suffering of future condemned inmates. Indeed, under the newly-amended Alabama Rule of Appellate Procedure 8(d)(1), the amount of time available for the Alabama Department of Corrections ("ADOC") to execute an inmate has changed from one day to an unlimited "time frame" set by the Governor. *See* Ala. R. App. P. 8(d)(1); *see also* Ex. A (Dec. 12, 2022 Letter from Governor Ivey to Alabama Supreme Court requesting amendment to Alabama Rule of Appellate Procedure 8(d)(1)).

6. As Mr. Barber awaits the Governor's announcement of his execution date, all available evidence suggests that he will suffer the same grisly fate as the last three inmates that Alabama tried to execute. Based on the results of those three botched executions, and the fact that the problems causing those executions still remain in place, it is reasonably foreseeable that over the course of several hours, Mr. Barber will be punctured with needles all over his body by an

unqualified IV Team that repeatedly fails to establish IV access. Mr. Barber will be kept strapped to the execution gurney during this drawn out process while the IV Team makes increasingly invasive and painful attempts to establish IV lines for a potentially unlimited period of time. And Mr. Barber will feel the terror of knowing that the IV Team botched the last three executions, and that no meaningful effort has been made to fix the blatant issues plaguing ADOC's lethal injection protocol ("LI Protocol").

7. Under these circumstances, attempting to execute Mr. Barber without first fixing the issues that derailed the prior executions violates the U.S. Constitution, and more specifically, the right to be free from cruel and unusual punishment under the Eighth Amendment. The LI Protocol leads to botched executions; the protocol has not been fixed despite the last three blunders; and Mr. Barber will likely be repeatedly punctured for hours with needles all over his body. This puts Mr. Barber in a substantial risk of serious harm.

8. If Defendants were serious about ensuring that their LI Protocol complied with the Constitution, they would not have conducted an internal and cursory investigation, and then refused to disclose the results. To the contrary, Defendants would have made reasonable changes to the LI Protocol to address the underlying problems with the last three executions. For example, the updated LI Protocol would include clear, transparent standards requiring that the IV Team members be trained medical professionals who are qualified to set IV lines, rather than the meaningless requirement that IV Team members be "certified or licensed within the United States." *See* Ex. B, March 2023 ADOC Execution Protocol at 17. The updated LI Protocol would also include a time limitation for an execution attempt to ensure that the IV Team does not spend several drawn-out hours trying and failing to establish an IV, torturing Mr. Barber in the process.

9. Yet the heavily redacted and extraordinarily vague LI Protocol that will supposedly govern Mr. Barber's execution confirms that none of these changes have been made. *See* Ex. B. The LI Protocol does not so much as mention ADOC's investigation, let alone reflect what that investigation uncovered or how the new protocol will prevent Mr. Barber's execution from being botched like those before him.

10. Mr. Barber accordingly seeks to be executed by the readily available alternative method of a nitrogen hypoxia, and asks this Court for injunctive and declaratory relief to prevent ADOC from executing him by lethal injection.

PARTIES

James Barber

11. Plaintiff James Edward Barber, a citizen of the United States and resident of the State of Alabama, is an inmate at Holman Correctional Facility under Defendants' supervision and subject to execution under a State court judgment of conviction for capital murder.

12. Mr. Barber is a deeply religious man who regularly exercises his faith while in prison. *See* The Atlantic, *What it Means to Forgive the Unforgivable* (May 25, 2023), *https://www.theatlantic.com/ideas/archive/2023/05/james-barber-alabama-death-row-forgiveness/674181/.*

Kay Ivey

13. Defendant Kay Ivey, the Governor of Alabama at all times relevant to this Complaint, is sued in her official capacity. Defendant Ivey resides in the Middle District of Alabama.

14. In response to the recent spate of botched executions in 2022, Governor Ivey asked the Alabama Attorney General on November 21, 2022 to withdraw the then-pending motion to set an execution date for Mr. Barber, and further requested that the Attorney General not move for

any new execution dates for any death row inmates. Ex. C, Press Release, *Governor Ivey Orders Top-to-Bottom Review of Execution Protocol for Victims' Sake* (Nov. 21, 2022).

15. Governor Ivey then ordered that ADOC undertake a "top-to-bottom review of the state's execution process." *See id*. ADOC's "review" lasted just a few months. During this short time period, Governor Ivey petitioned the Alabama Supreme Court to amend Alabama Rule of Appellate Procedure 8(d)(1) to change the amount of time available for ADOC to attempt an execution from one day to an unlimited period of time to be dictated by the Governor. *See* Ex. D. The Alabama Supreme Court granted this request. *See* Ala. R. App. P. 8(d)(1). Under the newly amended Alabama Rule of Appellate Procedure Rule 8(d)(1), Defendant Ivey is responsible for setting the "time frame" under which an inmate's sentence of death shall be carried out by the Commissioner of ADOC.

16. On February 24, 2023, the ADOC Commissioner sent Governor Ivey a 1.5 page letter announcing that ADOC's "review" was complete and that it was "as prepared as possible" to attempt another lethal injection. Ex. E, Letter from Commissioner Hamm to Governor Ivey (Feb. 24, 2023).

17. Within hours, Governor Ivey instructed the Attorney General to move for a new execution date for Mr. Barber. Ex. F, Letter from Governor Ivey to Attorney General Marshall (Feb. 24, 2023). The Alabama Supreme Court granted the ensuing motion and authorized the State to execute Mr. Barber "within a time frame set by the governor." *See* Ex. G, Order, *Ex parte Barber*, CC-02-1794 (Ala. May 3, 2023).

18. The decision regarding Mr. Barber's execution "time frame" now rests solely with Defendant Ivey.

Terry Raybon

19. Defendant Terry Raybon, Warden of the Holman Correctional Facility, is sued in his official capacity. Defendant Raybon has been acting under color of law and as the agent and official representative of the Holman Correctional Facility and ADOC.

20. Defendant Raybon is the statutory executioner of all Holman death row inmates. *See* Ala. Code § 15-18-82(c) ("The warden of the William C. Holman unit . . . shall be the executioner. In the case of execution by lethal injection, the warden . . . may designate an employee of the unit to administer the lethal injection.").

21. Defendant Raybon plays a direct role in each execution that takes place at Holman. *See, e.g.*, Ex. B (March 2023 ADOC Execution Protocol) at 11 (Holman Warden reads the execution warrant and administers the lethal injection solution). Defendant Raybon organizes the execution team. He is responsible for ensuring that, on the night-of an execution, the execution team does not violate any court order or Governor issued orders. *See id*. at 11. Defendant Raybon reads the execution warrant to the inmate being executed and administers the lethal injection. *See id*.

22. Defendant Raybon is responsible for implementing ADOC policies and procedures governing executions, managing the preparations for executions, and supervising the execution site during executions. Defendant Raybon also is responsible for protecting the constitutional rights of all persons incarcerated at the Holman Correctional Facility.

John Q. Hamm

23. Defendant John Q. Hamm, Commissioner of ADOC, is sued in his official capacity. At all relevant times, Defendant Hamm has been acting under the color of law and as the agent and official representative of ADOC, pursuant to ADOC's official policies and procedures.

24. ADOC is the state agency charged with the incarceration, care, custody, and treatment of all state prisoners, including prisoners sentenced to death. Ala. Code § 14-1-1.2.

25. Defendant Hamm is the alternate statutory executioner of all death row inmates at Holman. *See* Ala. Code § 15-18-82(c) ("In the event of the death or disability or absence of both the Warden and Deputy, the executioner shall be that person appointed by the Commissioner of the Department of Corrections."). Moreover, Defendant Hamm is statutorily charged with providing the materials necessary to execute death row inmates. *See* Ala. Code § 15-18-82(b) ("It shall be the duty of the Department of Corrections of this State to provide the necessary facilities, instruments, and accommodations to carry out the execution.").

26. Defendant Hamm must be present at Holman for each execution, and he is responsible for maintaining an open telephone line to the Governor and the Attorney General. *See* Ex. B (March 2023 ADOC Execution Protocol) § IX(H).

27. Defendant Hamm is responsible for ensuring that all prisoners committed to the custody of ADOC are treated in accordance with the United States and Alabama Constitutions. He is also responsible for the development and implementation of the protocol and procedures governing the execution of death-sentenced inmates in Alabama.

28. Defendant Hamm has the authority to alter, amend, or make exceptions to the protocol and procedures governing the execution of death-sentenced inmates in Alabama. Furthermore, Defendant Hamm has the ability to remedy problems that arise due to ADOC's lack of adequate procedures.

29. Defendant Hamm has the ultimate authority to determine whether and when ADOC will execute an inmate by nitrogen hypoxia rather than lethal injection.

Steve Marshall

30. Defendant Steve Marshall, Attorney General of the State of Alabama, is sued in his official capacity. At all relevant times, Defendant Marshall has been acting under color of law and as the agent and official representative of the Attorney General's office.

31. Defendant Marshall has the power, authority, and obligation to implement, interpret, and enforce Alabama state law, including Ala. Code. § 15-18-82.1, the Alabama Constitution, and the U.S. Constitution.

32. Defendant Marshall initiates the execution process in Alabama by asking the Alabama Supreme Court to set execution dates for inmates sentenced to death. Defendant Marshall has the obligation and responsibility to withdraw motions to set an execution date that are unconstitutional, including when the conditions of the proposed execution are unconstitutional. He also has the obligation and responsibility to ensure that ADOC complies with all state and federal law, including federal court orders, during an execution.

33. During each execution, Defendant Marshall is responsible for maintaining an open telephone line to Commissioner Hamm, who attends each execution. *See* Ex. B (March 2023 ADOC Execution Protocol) at 9.

34. Defendant Marshall plays an active role in "clearing" the commencement of each execution. *See* Ex. H, News Release, Alabama Office of the Attorney General, *Alabama Attorney General Steve Marshall Statement on the Execution of Murderer Joe James* (July 28, 2022) ("Attorney General Marshall cleared the execution to commence at 9:04 p.m."); Ex. I, News Release, Alabama Office of the Attorney General, *Alabama Attorney General Steve Marshall Statement on the Execution of Murderer Matthew Reeves* (Jan. 27, 2022) ("Attorney General Marshall cleared the execution to commence at 9:05 p.m.").

John Does 1–3

35. Defendants John Does 1–3 are members of the IV Team who set the two IV lines required for a lethal injection execution in Alabama. They are sued in their individual and official capacities. On information and belief, one member of the IV Team is or was a physician, and two members of the IV Team are or were Emergency Medical Technicians ("EMTs"). On information and belief, no member of the IV Team has sufficient relevant medical expertise to set IV lines in a humane manner, and they knowingly and willingly subject condemned men to needless suffering due to their own incompetence. Because Defendants conceal the identities of the members of ADOC's IV team, they are named as Doe defendants.

JURISDICTION AND VENUE

36. Mr. Barber's claim arises under the Constitution and the laws of the United States, and the laws of the State of Alabama. This Court has federal question jurisdiction over those claims arising under the Constitution and laws of the United States pursuant to 28 U.S.C. §§ 1331, 1343. This Court has the authority to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201-2202 and Fed. R. Civ. P. 57 and 65. The federal rights asserted by Mr. Barber are enforceable under 42 U.S.C. § 1983.

37. Venue lies in this District pursuant to 28 U.S.C. § 1391(b)(1) and (b)(2).

38. No administrative grievance is available at Holman Correctional Facility for Mr. Barber or other death-sentenced inmates to challenge the way in which Defendants have implemented Ala. Code § 15-18-82.1. Nor is any available to challenge Defendants' failure to correct the LI Protocol that has caused ADOC to botch its last three execution attempts.

FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Mr. Barber's Criminal Sentencing and Appeals

39. In December 2003, Mr. Barber was found guilty of capital murder. The jury recommended by a vote of 11-1 that Mr. Barber receive the death penalty. The trial judge sentenced Mr. Barber to death.

40. Following a direct appeal of his conviction and sentence, Mr. Barber unsuccessfully sought state post-conviction and federal habeas relief.

41. Mr. Barber's state and federal appeals of his conviction and sentence were completed when the U.S. Supreme Court denied certiorari on March 21, 2022.

42. In Alabama, lethal injection is the default method of execution. Ala. Code § 15-18-82.1(a).

43. When Alabama added nitrogen hypoxia as an available method of execution in 2018, death row inmates were given a 30-day window in which to decide whether to elect nitrogen hypoxia as their method of execution. *See id.* at § 15-18-82.1(b). Because Mr. Barber did not elect nitrogen hypoxia during this 30-day window, ADOC will attempt to execute him by lethal injection.

Mr. Barber's Proceedings in the Alabama Supreme Court

44. On August 5, 2022, the Alabama Attorney General first moved the Alabama Supreme Court to set Mr. Barber's execution date. *See* Ex. J, State's Mot. to Set Execution Date (Aug. 5, 2022).

45. Mr. Barber filed his opposition brief on September 9, 2022. In that brief, Mr. Barber argued that it was not an appropriate time to set an execution date, as the State had not yet determined—nor taken any steps to correct—what went wrong in the botched execution of Mr.

Joe Nathan James, Jr. *See* Ex. K, Barber Opp. to State's Mot. to Set Execution Date & Mot. to Preserve Evidence of Execution Process (Sept. 9, 2022).

46. This argument was prescient. Soon after Mr. Barber filed his opposition brief, ADOC went on to botch two lethal injection executions in quick succession: that of Alan Eugene Miller, on September 22, 2022, and that of Kenneth Smith, on November 17, 2022.

47. A few days later, on November 21, 2022, the Attorney General moved to withdraw his motion to set an execution date for Mr. Barber. *See* Ex. L, State's Withdrawal of Mot. to Set Execution Date (Nov. 21, 2022).

48. On February 24, 2023, after Defendants' short-lived "review" of Alabama's execution process, the Attorney General moved again in the Alabama Supreme Court for an execution date for Mr. Barber. *See* Ex. M, State's Mot. to Set Execution Date (Feb. 24, 2023).

49. On March 31, 2023, Mr. Barber filed his opposition to that motion, arguing, among other things, that Alabama conducted a flawed investigation into its lethal injection protocol, and failed to disclose what if any changes it made to prevent future botched executions. Mr. Barber argued that the Alabama Supreme Court should not schedule an execution date until Alabama addressed these issues. *See* Ex. N, Barber Opp. to State's Mot. to Set Execution Date (Mar. 31, 2023).

50. Mr. Barber also filed a motion for a stay, a motion for discovery into what deficiencies ADOC uncovered in its "investigation," and a motion to preserve evidence of his own execution. *See* Ex. O, Barber Mot. to Hold State's Mot. to Set Execution Date in Abeyance or Stay These Proceedings (Mar. 31, 2023); Ex. P, Barber Mot. to Compel (Mar. 31, 2023); and Ex. Q, Barber Mot. in the Alternative to Preserve Evidence of Execution Process (Mar. 31, 2023).

51. On May 3, 2023, without issuing any written opinion, the Alabama Supreme Court summarily denied all of Mr. Barber's motions and granted the State's motion for an execution warrant. *See* Ex. G, Order, *Ex Parte Barber* (Ala. May 3, 2023) (denying Mr. Barber's motions); Ex. R, Order, *Ex Parte Barber* (Ala. May 3, 2023) (granting State's motion).

52. The Supreme Court of Alabama entered an order, under the newly amended Alabama Rule of Appellate Procedure Rule 8(d)(1), authorizing the State to execute Mr. Barber "within a time frame set by the governor." Ex. G, Order, *Ex parte Barber*, CC-02-1794 (Ala. May 3, 2023).

Alabama's Constitutionally Deficient Lethal Injection Protocol and Practices

53. A key component of the LI Protocol is establishing IV access.

54. For a competent and trained medical professional, establishing IV access is a common medical procedure that should be accomplished within minutes.[1]

55. Even in cases where the subject has a medical condition that makes establishing IV access more difficult, qualified medical professionals are generally able to complete the procedure in a few minutes—and certainly in no more than 30 minutes.[2]

56. Multiple attempts to set an IV results in "increased and potentially significant pain."[3]

57. The LI Protocol requires the IV Team to place two IV infusion devices in the veins of the condemned individual. Ex. B at 17.

[1] Emergency Nurses Association, *Clinical Practice Guideline: Difficult Intravenous Access* 3 (2018).
[2] Bernd A. Leidel et al., *Comparison of intraosseous versus central venous vascular access in adults under resuscitation in the emergency department with inaccessible peripheral veins*, 83 Resuscitation 40, 40 (2012); Emergency Nurses Association, *Clinical Practice Guideline: Difficult Intravenous Access* 3 (2018).
[3] J. Matthew Fields et al., *Association between multiple IV attempts and perceived pain levels in the emergency department*, 15 J. Vascular Access 514, 517 (2014).

58. The LI Protocol authorizes two methods that the IV Team can use to establish IV access: "[t]he standard procedure," or "if the veins are such that intravenous access cannot be provided [redacted] . . . a central line procedure." *Id.* at 9, 17. The LI Protocol does not define "the standard procedure."

59. The LI Protocol also does not include time parameters under which the IV Team must establish IV access, but only provides that "[i]f the execution is to be carried out by lethal injection, the IV Team will complete its task." *Id.* at 10.

60. Time and again, ADOC's IV Team has been unable to complete this task without violating the constitutional rights of the condemned. The last three lethal injection executions under Defendants' watch have all failed as the IV Team has either been unable to make IV access after attempting to do so for hours, or has made IV access but only after rendering the condemned inmate unconscious.

61. The first of these recent failures involved Joe Nathan James Jr. The IV Team repeatedly tried to access a vein on Mr. James for more than three hours, making his execution one of the longest in American history. The team eventually accessed Mr. James's veins, but only after he appeared unconscious.

62. Shortly after Mr. James's botched execution, Defendants tried again—this time on Alan Eugene Miller. But this execution, and the one that followed shortly thereafter of Kenneth Smith, were both called off before midnight after the IV Team again struggled to establish IV access despite trying for hours.

63. These well-documented failures under Defendants' watch generated significant public attention, and made Alabama the only state in recent history to halt an execution in progress.[4]

64. To hear Defendants tell it, nothing unforeseeable—no accident, no mishap—led to the three botched executions last year. ADOC has been adamant that nothing went wrong in those attempts.[5] Yet these botched executions were the result of Defendants' deliberate decisions to proceed by methods they knew or should have known would be unsuccessful. And Defendants are now undertaking the same deliberate and intentional act to try to execute Mr. Barber with no regard for how much unnecessary pain it causes.

The Botched Execution of Joe Nathan James, Jr.

65. The first of the three recent attempts occurred on July 28, 2022, when the IV Team took more than three hours to establish access to the veins of Joe Nathan James, Jr.[6]

66. Mr. James was first strapped to the execution gurney shortly after 6:00 pm. He remained strapped to the gurney ***for the next three-and-a-half hours***.[7] As part of their efforts to establish an IV line, the IV Team punctured Mr. James's elbows, wrists, hands, and right foot with needles, and made multiple incisions in his left arm.[8] Mr. James was subjected to unnecessary pain and suffering after being repeatedly punctured with needles.[9]

---

[4] *See* The Associated Press, *Alabama pausing executions after 3rd failed lethal injection* (Nov. 21, 2022), https://apnews.com/article/alabama-executions-kay-ivey-fd61fdbef131c192958758ae43a8c34a.
[5] See USA Today, *'Veins Could Not be Accessed': Alabama Halts Man's Execution for Time, Medical Concerns* (Sept. 23, 2022), https://www.usatoday.com/story/news/nation/2022/09/23/alabamaalan-miller-execution-halted-medical-concerns/8088788001/ (Defendant Hamm stating that Mr. Miller's execution failed "due to the time constraints resulting from the lateness of the [prior] court proceedings"); *see also* The Atlantic, *Dead Man Living* (Oct. 2, 2022), https://www.theatlantic.com/ideas/archive/2022/10/alabama-inmate-execution-alan-miller/671620/
[6] *See* Compl. ¶¶ 4, 58-67, *Estate of Joe James, Jr. v. Ivey et al.,* 2:23-cv-00293-SMD (M.D. Ala. May 3, 2023).
[7] *Id.* ¶¶ 60, 75.
[8] *Id.* ¶¶ 61-62.
[9] *Id.* ¶ 66.

67. On information and belief, the IV Team also performed an illegal "cut-down," slicing through Mr. James's skin in order to expose the vein to set an IV line.

68. On information and belief, the IV Team forcibly and illegally sedated Mr. James in order to place the necessary IV lines for the lethal injection execution.

69. When ADOC officials eventually opened the public curtain to the execution chamber around 9:00 pm—over three hours after Mr. James' execution began—Mr. James appeared unconscious as a result of the forcible sedation. He was pronounced dead shortly thereafter.[10]

70. Following the execution, ADOC confirmed that the reason for the delay was the IV Team's inability to establish IV access.[11]

71. Mr. James's autopsy revealed that he "suffered a long death," that he had "pool[s] of deep bruising," and that he had a "cutdown"—an incision over a vein on his arm—that showed "the IV team was unqualified for the task in the most dramatic way."[12]

72. On May 3, 2023, Mr. James's estate filed a lawsuit in the Middle District of Alabama asserting, among other things, violations of Mr. James's constitutional rights under the Eighth and Fourteenth Amendments. *See* Compl., *Estate of Joe James, Jr. v. Ivey et al.,* 2:23-cv-00293-SMD, Dkt. 1 (M.D. Ala. May 3, 2023).

73. Discovery in that action will further reveal, beyond the facts that have already been made public, Defendants' inability to carry out executions by lethal injection in a constitutional manner.

---

[10] *Id.* ¶¶ 67-73.
[11] *Id.* ¶ 77.
[12] *See* The Atlantic, *Dead to Rights: What did the State of Alabama do to Joe Nathan James in the Three Hours Before his Execution?* (Aug. 14, 2022), https://www.theatlantic.com/ideas/archive/2022/08/joe-nathan-james-execution-alabama/671127.

The Failed Attempt to Execute Alan Eugene Miller

74. Approximately two months after the botched execution of Mr. James, Defendants attempted on September 22, 2022 to carry out the execution Alan Eugene Miller, but failed due to "problems accessing Miller's veins to administer the lethal injection drugs." *Miller v. Hamm*, No. 2:22-CV-506-RAH, 2022 WL 16720193, at *1 (M.D. Ala. Nov. 4, 2022).

75. On September 15, 2022, just days before Mr. Miller's botched execution, Defendant Hamm personally guaranteed in a sworn affidavit that ADOC was ready to carry out Mr. Miller's execution by lethal injection.[13]

76. Defendants Raybon, Hamm, Ivey, and Marshall knew that it would be difficult to access Mr. Miller's veins in advance but chose to attempt the execution anyway.[14]

77. During the execution attempt, Mr. Miller experienced "extreme pain and suffering, both physical and psychological, as execution team members repeatedly poked, prodded, and slapped various parts of his body for approximately 90 minutes to try to establish venous access." *Miller*, 2022 WL 16720193, at *1.

78. The IV Team tried to establish IV access first in Mr. Miller's right elbow, then in his right hand, and then in his left elbow. All of these attempts were unsuccessful. The IV Team then tried to establish an IV line in Mr. Miller's right foot and then in his right inner forearm.[15] But these attempts were also unsuccessful.[16]

79. Next, the IV Team made simultaneous efforts to establish IV access in Mr. Miller's left arm and right arm. Neither attempt was successful.[17]

[13] *See* Hamm Affidavit, *Miller v. Hamm*, No. 2:22-CV-506-RAH, Dkt. 59-1 (M.D. Ala. Sept. 15, 2022).
[14] *See* Sec. Am. Compl. ¶ 99, *Miller v. Hamm*, No. 2:22-CV-506-RAH, Dkt. 85 (M.D. Ala. Oct. 12, 2022).
[15] *Id.* ¶¶ 124, 126.
[16] *Id.* ¶¶ 113-21.
[17] *Id.* ¶¶ 127-29.

80. ADOC staff then, without explanation to Mr. Miller, manually adjusted the execution gurney—to which Mr. Miller remained strapped—into an upright position so that Mr. Miller was hanging in the air. While hanging in this way, Mr. Miller felt pain and throbbing in the IV sites, and across his body, and noticed blood leaking out of some of the puncture wounds.[18]

81. After roughly 90 minutes of punctures and prodding, Mr. Miller was finally informed that his execution had been called off. In the course of the botched execution, Mr. Miller experienced significant pain in his foot and his arms from the repeated attempts to access his veins.

82. He continued to experience significant pain in his arms, as well as psychological trauma, for long after.[19]

The Failed Attempt to Execute Kenneth Smith

83. Despite botching the execution of Mr. James via lethal injection, and despite being unable to execute Mr. Miller via lethal injection, Defendants attempted another lethal injection execution just a few weeks later—and again they failed.

84. At 8:00 pm on November 17, 2022, ADOC guards strapped Kenneth Smith to the execution gurney.

85. At about the same time—7:59 pm—the Eleventh Circuit stayed Mr. Smith's execution. ADOC's attorneys received direct notice of the stay order from the Eleventh Circuit, and Mr. Smith's attorneys also contacted ADOC's attorneys to inform them within minutes.[20]

86. Despite knowing that the execution was stayed by court order, ADOC decided to proceed with the execution attempt. As a result, Mr. Smith was left strapped to the execution

[18] *Id.* ¶¶ 132-34.
[19] *Id.* ¶¶ 139-40, 145.
[20] *See* Sec. Am. Compl. ¶¶ 7-8, *Smith v. Hamm*, No. 2:22-cv-00497-RAH, Dkt. 71 (M.D. Ala. Dec. 6, 2022).

gurney for four hours, while the IV Team spent almost two hours inserting needles all over his body. *See id.* ¶¶ 8-11.

87. In a last-ditch attempt to find a vein, the IV Team inserted a thick needle under Mr. Smith's collarbone. *Id.* ¶ 11. This failed too, though not before it caused "pain and agony" to Mr. Smith. *Id.*

88. Eventually, Mr. Smith's execution was called off due to the IV Team's inability to set an IV line.

Defendants' Short-Lived "Investigation"

89. In response to this spate of botched executions, Governor Ivey asked Attorney General Marshall on November 21, 2022 to withdraw then-pending motions in the Alabama Supreme Court for the execution dates of Mr. Miller and Mr. Barber, and further requested that the Attorney General not move for any new execution dates for any other death row inmates. Ex. C, Press Release, *Governor Ivey Orders Top-to-Bottom Review of Execution Protocol for Victims' Sake* (Nov. 21, 2022).

90. Governor Ivey then ordered that ADOC undertake a "top-to-bottom review of the state's execution process." Ex. C. The ADOC Commissioner immediately agreed, stating that in his review, "[e]verything is on the table – from our legal strategy in dealing with last minute appeals, to how we train and prepare, to the order and timing of events on execution day, to the personnel and equipment involved."[21]

91. Unfortunately, the subsequent review was shrouded in extreme secrecy, conducted by ADOC rather than an external, independent investigatory body,[22] and, based on all available

[21] See AL.com, *Gov. Kay Ivey Orders Moratorium on Executions in Alabama* (Nov. 22, 2023), https://www.al.com/news/2022/11/gov-kay-ivey-orders-moratorium-on-executions-in-alabama.html.

[22] Among the states that practice the death penalty, Alabama stands alone in its decision to investigate itself, with no transparency or accountability regarding the findings of the investigation. For example, the State

evidence, was utterly perfunctory. Even before the investigation commenced, Governor Ivey made clear that she did not think that ADOC bore any responsibility for the botched executions. Instead, she stated her belief that "legal tactics and criminals hijacking the system [we]re at play here." *See* Ex. C.

92. ADOC's "review" of its death penalty protocol lasted a few short months. On February 24, 2023, the ADOC Commissioner sent Governor Ivey a 1.5 page letter announcing that ADOC's "review" was complete and that it was "as prepared as possible" to attempt another lethal injection. Ex. E, Letter from Commissioner Hamm to Governor Ivey (Feb. 24, 2023). Within hours, Governor Ivey instructed Attorney General Marshall to move for a new execution date for Mr. Barber. Ex. F, Letter from Governor Ivey to Attorney General Marshall (Feb. 24, 2023).

93. In connection with their sham investigation, Defendants declined to interview witnesses with critical information about the three botched executions. Nobody from the State attempted to interview: (1) Dr. Joel Zivot, the doctor who supervised the independent autopsy of Joe Nathan James, Jr. and who concluded that Mr. James had been subjected to an illegal "cutdown" to expose his veins; (2) Alan Eugene Miller, who has detailed, intimate knowledge about what went wrong during his execution; (3) or Kenneth Smith, who, like Mr. Miller, could describe what went wrong during his attempted execution.

---

of Tennessee appointed a former U.S. Attorney to investigate its injection protocol after failures to test lethal drugs. *See* Office of the Governor of Tennessee, *Governor Lee Calls for Independent Review Following Smith Reprieve* (May 2, 2022), https://www.tn.gov/governor/news/2022/5/2/gov--lee-calls-for-independent-review-following-smith-reprieve.html. In another state—Arizona—the Governor halted all executions in February 2023, acknowledging that Arizona has a "history of mismanaged executions," and appointed a retired U.S. magistrate judge to conduct an independent investigation into the Arizona Department of Correction's lethal injection and gas chamber protocols. *See* Office of the Governor of Arizona, *Gov. Hobbs Appoints Judge David Duncan as Death Penalty Independent Review Commissioner* (Feb. 24, 2023), https://azgovernor.gov/office-arizona-governor/news/2023/02/governor-hobbs-appoints-judge-david-duncan-death-penalty.

94. Meanwhile, this Court, Mr. Barber, and the public remain in the dark as to how Alabama has changed its lethal injection protocol to correct for its recent failures. If anything, the information available to date[23] strongly suggests that no substantive changes have been made and that Defendants plan to proceed with Mr. Barber's execution as though the last three executions attempts that caused severe harm to the condemned inmates and significant outcry and blowback from the public never occurred.

95. Indeed, the following chart illustrates the insufficiency of the redacted protocol for the purpose of assessing whether ADOC is now capable of constitutionally carrying out a lethal injection execution after failing three times in a row:

So-called changes mentioned in ADOC's letter to the Governor[24]	**Explanation of those changes in ADOC's current redacted protocol[25]**
ADOC's execution protocol now "aligns with the best practices in other jurisdictions."	None.
The Governor will now issue an order setting a "time frame" in which an execution can occur.	None.
ADOC will "add to its pool of available medical personnel for executions."	None.
ADOC will use "new equipment" in "future executions."	None.
ADOC has "conducted multiple rehearsals of [its] execution process . . . to ensure our staff members are well-trained and prepared to perform their duties during the execution process."	None.
ADOC will "update [its] rehearsal and training procedure to ensure that Department personnel are in the best possible position to carry out their responsibilities during the execution process."	None.
ADOC will have a "vetting process for these new outside medical professionals."	No explanation of who will be vetting outside "medical professionals," or what the vetting process will consist of. The only change in the protocol related to this topic is a new requirement that members of the IV team "be

[23] *See* Ex. S, Email Chain Between Counsel for Mr. Barber and the Attorney General's Office (Mar. 27, 2023). *See also* Ex. B, March 2023 ADOC Execution Protocol; Ex. T, Redline of March 2023 ADOC Execution Protocol Against March 2021 ADOC Execution Protocol.
[24] *See* Ex. E, Letter from Commissioner Hamm to Governor Ivey (Feb. 24, 2023).
[25] *See* Ex. B, March 2023 ADOC Execution Protocol.

	currently certified or licensed"—without any explanation of what certification or license these team members must possess.

96. Moreover, while Annex C of the LI Protocol vaguely asserts that the execution team will be comprised of "more professionals" and that "members of the IV Team shall be currently certified or licensed within the United States,"[26] the LI Protocol never specifies *what entity* must certify or license the members of the IV Team or *in what specialty* members of the IV Team must be "certified or licensed."

97. This is critically important because the IV Team members who have performed the last three executions have not been adequately trained or appropriately credentialed to establish IV access. And nothing in the LI Protocol suggests that those individuals will not be involved in Mr. Barber's potential execution or in future executions.

98. Mr. Barber therefore finds himself in an uniquely cruel situation. He will be strapped to a gurney for a prolonged period of time and subjected to medical procedures by an IV Team that lacks the training and skill necessary to accomplish the tasks without imposing severe pain and suffering. Mr. Barber faces superadded terror and pain as a result of these extreme circumstances.

CLAIM

VIOLATION OF MR. BARBER'S RIGHT UNDER THE EIGHTH AMENDMENT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT

AGAINST ALL DEFENDANTS

99. Mr. Barber realleges and reincorporates by reference the allegations set forth in Paragraph 1-98 above.

[26] *See id.* at Annex C.

100. The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishments." U.S. Const. Amend. VIII.

101. The "cruelty" proscribed by the Eighth Amendment includes unnecessary pain or suffering gratuitously imposed by the government. *See Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) ("[P]unishments of torture . . . and all others in the same line of ***unnecessary*** cruelty, are forbidden by that amendment to the Constitution.") (emphasis added); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) ("[T]he punishment must not involve the unnecessary and wanton infliction of pain.").

102. Punishments are cruel and thus violate the Eighth Amendment when they involve a "lingering death," *Baze v. Rees*, 553 U.S. 35, 49 (2008), or the "super[adding]" of "terror, pain, or disgrace," *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019).

103. The Eighth Amendment does not prohibit pain in executions that results from an "isolated mishap," an "accident … for which no man is to blame … with no suggestion of malevolence." *See Baze*, 553 U.S. at 50 (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (concerning a one-time mechanical malfunction of an electric chair)). But the Eighth Amendment does prohibit what has become Defendants' regular practice—trying, again and again, a method of execution that they are not competent to carry out, inflicting severe and preventable pain on the condemned man in the process. *See id.* Mr. Barber's impending execution attempt by lethal injection is therefore an unconstitutionally cruel punishment.

104. In each of the last three instances that the LI Protocol has been used, the executions ended in failure as Mr. James, Mr. Miller, and Mr. Smith each endured hours of countless punctures across their bodies as unqualified personnel attempted to establish IV access. This

resulted in extreme pain and suffering, both physical and psychological, as each hour that slowly passed during these drawn-out execution attempts contributed to a lingering death.

105. Despite their repeated failure to establish IV access, Defendants have not instituted any known and meaningful safeguards to date. Nor have they undertaken any effort to ensure that the impending execution of Mr. Barber does not result in another prolonged, severely painful, and ultimately botched attempt. The key problems causing the repeated failures therefore remain in effect, which places Mr. Barber in substantial risk of serious harm.

Unqualified IV Team Members for IV Access

106. Under the LI Protocol, IV Team members only need to be "certified or licensed within the United States." But the protocol is silent as to what type of certifications or licenses the IV Team members must possess, which certifying and licensing entities are acceptable, and who (if anyone) is responsible for verifying the accuracy of the certificates and licenses of the team members.

107. On information and belief, the members of the IV Team that botched the executions of Mr. James, Mr. Miller, and Mr. Smith are or were EMTs. If the IV Team members continue to be EMTs, the generic requirement that they be "certified or licensed within the United States" does nothing to remedy the recurring problems with establishing IV access. Indeed, the EMTs that attempted to establish IV access failed the past three times they tried, and nothing in the LI Protocol suggests that the IV Team moving forward will be staffed with medical professionals that are better qualified to carry out the procedure.

108. Other states with lethal injection protocols require that IV team members responsible for setting IV lines actually have a certificate or license to perform the particular procedure. For example, the protocol for the State of Arizona requires IV team members to be "certified or licensed" "to place IV lines," and further requires that the member's "licensing and

criminal history" be reviewed before the member is hired, in addition to the member's "qualifications, training, [and] experience."[27]

Unqualified IV Team Members for the Central Line Procedure

109. The current protocol states that if the IV Team is having difficulty gaining IV access, "qualified medical personnel may perform a central line procedure," but there is no guidance for determining what medical personnel may be qualified.

110. By contrast, the State of Florida's protocol specifies that only "an advanced practice registered nurse" or "physician or physician's assistant" licensed under Florida law is permitted to achieve and monitor central venous access.[28]

No Reasonable Time Limit to Set an IV

111. There is no time limit to carry out the IV attempts under the LI Protocol. As a result, Mr. James's execution ***lasted nearly 3.5 hours***, Mr. Miller's execution attempt lasted ***around 1.5 hours***, and Mr. Smith's execution attempt lasted ***nearly 2 hours***. The repeated punctures that these individuals endured across their bodies during this extended period of time contributed to the cruel nature of their executions.

112. The current LI Protocol allows this practice to continue, which will likely lead to Mr. Barber being strapped to the execution gurney for hours, while an unqualified IV Team punctures him over and over again trying unsuccessfully to access his veins, superadding terror, pain, and disgrace to his death sentence.

113. Other states' protocols include reasonable safeguards to ensure that the time to set IV access is not unnecessarily long. For instance, the protocol for the State of Louisiana provides

[27] *See* Arizona Department of Corrections' Lethal Injection Protocol (Amended April 20, 2022), Chapter 700, Order 710, Sections 3.2.5.1 & 3.2.5.2.
[28] *See* Florida Department of Corrections' Lethal Injection Protocol, Section 3(b).

that "if the IV Team cannot secure one or more sites within one hour, the Governor's Office shall be contacted by the Secretary and a request shall be made that the execution be scheduled for a later date."[29]

114. The Arizona protocol similarly states that "[a]ny failure of a venous access line shall be immediately reported" to the director, who may later "stop the proceedings and take all steps necessary" before proceeding further.[30]

115. Arizona's protocol also allows witnesses to observe the IV Team as they attempt to establish IV access, and likewise states that microphones in the execution chamber must be turned on throughout the execution so that witnesses can hear the IV Team members and inmate speak.[31] Alabama's LI Protocol does not provide the same.

An Alternative Method of Execution is Available

116. Defendants can significantly reduce the substantial risk that Mr. Barber faces through the LI Protocol by executing him via a feasible and readily implemented alternative method execution: nitrogen hypoxia.

117. In March 2018, Alabama added nitrogen hypoxia as an statutory execution method. *See* Ala. Code § 15-18-82.1(b). Nitrogen hypoxia is an execution method in which death is caused nearly instantaneously by forcing a person to breathe pure nitrogen. Nitrogen hypoxia does not require the setting of any IV lines, and therefore entirely avoids the medical procedure that the IV Team has proven itself incapable of performing.

[29] *See* Louisiana Department of Public Safety's Lethal Injection Protocol, Department Regulation No. C-03-001, Attachment E at Section J(2).
[30] *See* Arizona Department of Corrections' Lethal Injection Protocol (Amended April 20, 2022), Chapter 700, Order 710, Attachment D at Sections E(3) and E(5).
[31] *Id.* at Attachment D, Sections D(3) and D(6).

118. Representatives for the State have for years, including in recent months, made representations to the media and to judges in the Middle District of Alabama that ADOC is very near ready to use nitrogen hypoxia as a method of execution. *See, e.g.,* Associated Press, *Alabama 'Close' to Finishing Nitrogen Execution Protocol* (Feb. 15, 2023) (Defendant Hamm telling the press that ADOC is "close" to finalizing its nitrogen hypoxia protocol, and nitrogen hypoxia should be ready for use by the end of 2023 at the latest) (https://apnews.com/article/crime-alabama-5818261f3209a332bb4badf280960ca1); *see also* Sept. 12, 2022 Hr'g Tr. at 7:12-15, *Miller v. Hamm et al.*, No. 2:22-CV-506-RAH (M.D. Ala. Sept. 12, 2022) (Assistant Attorney General James Houts explaining that ADOC has a gas mask ready to use in a nitrogen hypoxia execution); *see also id*. at 8:8 (Mr. Houts states, "the [nitrogen hypoxia] protocol is there."); *id*. at 6:24-7:4 (emphasis added) (Mr. Houts: "I will say if the Court enters a narrowly drawn, tailored injunction saying go forth only with nitrogen hypoxia, that it is ***very, very likely that Miller would be executed by nitrogen hypoxia.***" Court: "***On September 22nd***?" Mr. Houts: "***Correct***.").

119. The Eleventh Circuit has twice held that nitrogen hypoxia is an available method of execution in Alabama. *See Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1328 (11th Cir. 2019) (per curiam) (holding that Alabama's statutorily authorized method of nitrogen hypoxia could not be considered unavailable simply because Alabama had not finalized a mechanism to implement the procedure); *Smith v. Comm'r, Ala. Dep't of Corr*., No. 22-13781, 2022 WL 17069492, at *5 (11th Cir. Nov. 17, 2022) ("We find that nitrogen hypoxia is an available alternative method for method-of-execution claims."). Late last year, the State petitioned the U.S. Supreme Court to grant a writ of certiorari to overturn the Eleventh Circuit's ruling that nitrogen hypoxia is an available method of execution in Alabama. *See John Q. Hamm, Comm'r, Ala. Dep't of Corr. v. Kenneth Eugene Smith*, Petition for a Writ of Certiorari, No. 22-580, 2022 WL

17885158 (U.S. Dec. 20, 2022). On May 15, 2023, the Supreme Court denied the State's request. *See Hamm v. Smith*, No. 22-580, 2023 WL 3440556 (U.S. May 15, 2023). The Eleventh Circuit's ruling that nitrogen hypoxia is an available method of execution in Alabama stands.

JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a trial by jury on all the triable issues within this pleading.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

i. Permit expedited discovery, including document production and depositions, in light of Mr. Barber's forthcoming execution "time frame" of unspecified duration;

ii. Enter an injunction: (1) prohibiting Defendant Ivey from setting an execution "time frame" for a lethal injection execution; and (2) prohibiting Defendants from attempting to carry out an execution of Mr. Barber by lethal injection, and requiring Defendants to carry out the execution of Mr. Barber only by nitrogen hypoxia;

iii. Enter a declaratory judgment that Defendants' intent to execute Mr. Barber via their current lethal injection protocol would violate Mr. Barber's Eighth Amendment rights, and order instead that Defendants employ the readily available alternative method of nitrogen hypoxia execution;

iv. Require Defendants to maintain and preserve all evidence of their attempts to execute Mr. Barber, to prevent spoliation;

v. Such other and further legal and equitable relief as this Court deems just and proper.

Dated: May 25, 2023

Respectfully submitted,

/s/ *Paula W. Hinton*
Paula W. Hinton (AL Bar No. 5586N77P)
Winston & Strawn LLP

800 Capitol St. Suite 2400
Houston, TX 77002
Tel: (713) 651-2600
Fax: (713) 651-2700
Email: phinton@winston.com

Kelly Huggins (IL Bar No. 6274748) (*pro hac vice* forthcoming)
Benjamin Brunner (IL Bar No. 6312432) (*pro hac vice* forthcoming)
Mara E. Klebaner (IL Bar No. 6323847) (*pro hac vice* forthcoming)
Stephen Spector (IL Bar No. 6333391) (*pro hac vice* forthcoming)
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
Tel: (312) 853-7000
Fax: (312) 853-7036
Email: khuggins@sidley.com
Email: bbrunner@sidley.com
Email: mklebaner@sidley.com
Email: sspector@sidley.com

Jeffrey T. Green (CA Bar No.: 141073, D.C. Bar No. 426747) (*pro hac vice* forthcoming)
Joshua Fougere (D.C. Bar No. 1000322, NY Bar No. 4805214) (*pro hac vice* forthcoming)
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
Tel: (202) 736-8000
Fax: (202) 736-8711
Email: jgreen@sidley.com
Email: jfougere@sidley.com

Attorneys for Plaintiff James Barber

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed with the Clerk on this 25th day of May, 2023, and will be served on the following parties:

Kay Ivey
Office of the Governor of Alabama
600 Dexter Avenue
Montgomery, AL 36130

John Q. Hamm
Alabama Department of Corrections
301 South Ripley Street
Montgomery, AL 36130-1501

Terry Raybon
Holman Correctional Facility
866 Ross Road
Atmore, AL 36503

Steve Marshall
Attorney General's Office
501 Washington Avenue
Montgomery, AL 36104

/s/ *Paula W. Hinton*
Paula W. Hinton

Exhibit A

OFFICE OF THE GOVERNOR

KAY IVEY
GOVERNOR

STATE CAPITOL
MONTGOMERY, ALABAMA 36130

(334) 242-7100
FAX: (334) 242-3282

STATE OF ALABAMA

December 12, 2022

Members of the Alabama Supreme Court
c/o Chief Justice Tom Parker
300 Dexter Avenue
Montgomery, AL 36104

Dear Mr. Chief Justice and Associate Justices of the Supreme Court:

I write on an urgent basis to propose an amendment to a court rule that will improve the administration of capital punishment in Alabama.

As you may be aware, our State has been unable to complete two recent executions. For that reason, on November 21, 2022, Corrections Commissioner John Hamm and I announced that we would be undertaking a "top-to-bottom" review of the State's execution process to ensure that the State can successfully deliver justice going forward.

At the time of this announcement, Commissioner Hamm expressed his view that "everything is on the table—from our legal strategy in dealing with last minute appeals, to how we train and prepare, to the order and timing of events on execution day, to the personnel and equipment involved." I agreed, promising to give the Department all necessary resources to ensure those guilty of perpetrating the most heinous crimes in our society receive their just punishment.

In that spirit, Commissioner Hamm has requested assistance in increasing the amount of time available to carry out an execution. In several recent executions, last-minute gamesmanship by death row inmates and their lawyers has consumed a lot of valuable time, preventing the Department from carrying out its execution protocol between the conclusion of all legal challenges in the federal courts and the expiration of the death warrant issued by your court.

One aspect of this "time crunch" is the 6:00 p.m. start time for executions required by the Department's current execution protocol. Commissioner Hamm reports that he is evaluating options to change the protocol in this regard and will be making a recommendation to me shortly.

But perhaps the most significant aspect of this problem is a longstanding court rule limiting the execution warrants you issue to a single "execution date"—that is, a single 24-hour period. This court rule is what requires Department of Corrections officials to stop all execution attempts at midnight on the scheduled execution day.

My legal staff informs me that many States and the federal government take a different approach, allowing a longer period for the execution to be carried out or allowing the period to be extended in the event of a court-imposed stay of execution. I prefer this second option, and accordingly asked my lawyers to prepare for you a proposal to this end. Enclosed, you will find both this proposal as well as some of their initial legal research regarding this issue.

Ultimately, I trust your judgment as to the specifics of the amendment. My only request is that you move as expeditiously as prudent given the importance of this rule change to the administration of justice in our State. Every day that goes by without this important amendment is another day that a capital murder victim's family must wait to obtain justice.

In my November 21st announcement, I emphasized the importance of getting this issue right for the sake of murder victims' families, who have often waited decades for justice only to have it snatched away at the last minute. Working together across our respective branches of government, I have every confidence that we can deliver on that promise.

Sincerely,

Kay Ivey

Kay Ivey
Governor

Enclosures

CC: Hon. Mike Bolin
Hon. Greg Shaw
Hon. Kelli Wise
Hon. Tommy Bryan
Hon. Will Sellers
Hon. Brad Mendheim
Hon. Sarah Stewart
Hon. Jay Mitchell
Hon. Steve Marshall
Hon. John Hamm

PROPOSED AMENDMENT TO ALABAMA
RULE OF APPELLATE PROCEDURE 8(D)(1)

Current language

When pronouncing a sentence of death, the trial court shall not set an execution date, but it may make such orders concerning the transfer of the inmate to the prison system as are necessary and proper. The supreme court shall at the appropriate time enter an order fixing a date of execution, not less than 30 days from the date of the order, and it may make other appropriate orders upon disposition of the appeal or other review. The supreme court order fixing the execution date shall constitute the execution warrant.

Proposed new language

When pronouncing a sentence of death, the trial court shall not set an execution date, but it may make such orders concerning the transfer of the inmate to the prison system as are necessary and proper. The supreme court shall at the appropriate time enter an order fixing a date of execution, not less than 30 days from the date of the order, and it may make other appropriate orders upon disposition of the appeal or other review. The supreme court order fixing the execution date shall constitute the execution warrant. <u>If the date designated in the execution warrant passes by reason of a stay of execution, or due to a delay in the execution process caused by a stay of execution, then a new date shall be designated promptly by the Commissioner of Corrections.</u>

SELECTED LEGAL AUTHORITIES GOVERNING
THE ISSUANCE OF EXECUTION WARRANTS

28 C.F.R § 26.3 (Federal Government)

"(a) Except to the extent a court orders otherwise, a sentence of death shall be executed:

(1) On a date and at a time designated by the Director of the Federal Bureau of Prisons, which date shall be no sooner than 60 days from the entry of the judgment of death. ***If the date designated for execution passes by reason of a stay of execution, then a new date shall be designated promptly by the Director of the Federal Bureau of Prisons when the stay is lifted*** . . . ."

California Penal Code § 1227(a)

"If for any reason other than the pendency of an appeal pursuant to subdivision (b) of Section 1239 of this code a judgment of death has not been executed, and it remains in force, the court in which the conviction was had shall, on application of the district attorney, or may upon its own motion, make and cause to be entered an order specifying ***a period of 10 days*** during which the judgment shall be executed. The ***10-day period*** shall begin no less than 30 days after the order is entered and shall end no more than 60 days after the order is entered. Immediately after the order is entered, a certified copy of the order, attested by the clerk, under the seal of the court, shall, for the purpose of execution, be transmitted by registered mail to the warden of the state prison having the custody of the defendant; provided, that if the defendant be at large, a warrant for his apprehension may be issued, and upon being apprehended, he shall be brought before the court, whereupon the court shall make an order directing the warden of the state prison to whom the sheriff is instructed to deliver the defendant to execute the judgment within ***a period of 10 days***, which shall not begin less than 30 days nor end more than 60 days from the time of making such order."

Georgia Code Section § 17-10-34

"When a person is sentenced to the punishment of death, the court shall specify the time period for the execution in the sentence. The time period for the execution fixed by the court shall be ***seven days in duration*** and shall commence at noon on a specified date and shall end at noon on a specified date. The time period shall commence not less than 20 days nor more than 60 days from the date of sentencing."

Kentucky Revised Statute § 431.218

When a judgment sentencing the defendant to death has been affirmed, the mandate shall fix the day of the execution as the fifth Friday following the date of the mandate of

the court. The clerk of the Supreme Court shall transmit either by special messenger or by certified mail, return receipt requested, a certified copy of the mandate to the proper officer which shall be the authority of such officer to carry the mandate into effect. The officer receiving the copy shall report his action both to the governor and to the circuit court. ***If from any cause the execution does not take place on the day appointed in the mandate, the governor may from time to time appoint another day for execution until the sentence is carried into effect.***

New York Correction Law § 651

The ***week of execution*** appointed in the warrant shall be not less than thirty days and not more than sixty days after the issuance of the warrant. The ***date of execution within said week*** shall be left to the discretion of the commissioner, but the date and hour of the execution shall be announced publicly no later than seven days prior to said execution.

Exhibit B

EXECUTION PROCEDURES
March 2023

I. General

A. This procedure establishes the responsibilities and procedures for the reception of a condemned inmate, for confinement, and for execution and day of execution preparation. Approval authority for changes or amendments to this protocol is the Commissioner of the Alabama Department of Corrections ("ADOC").

B. This procedure identifies the responsibilities associated with an execution.

C. This procedure outlines the forms used to ensure a professional and chronological order for executions.

D. A permanent log will be kept by the [redacted] beginning on Monday of the week of the execution. This log will reflect any practice, maintenance, and other preparations for the execution.

E. Alabama Code Section 15-18-82.1(f) clearly states that, notwithstanding any law to the contrary, the "prescription, preparation, compounding, dispensing, and administration of a lethal injection shall not constitute the practice of medicine, nursing, or pharmacy."

II. Reception of Condemned Inmate

Once an inmate has received a sentence by the court to be executed, the condemned inmate will be transferred directly from the committing county to the W. C. Holman Correctional Facility ("Holman"), W. E. Donaldson Correctional Facility ("Donaldson"), or the Julia Tutwiler Prison for Women ("Tutwiler"). In the future, other ADOC facilities may be identified and utilized to house condemned inmates at the direction of the Commissioner. Any such directive shall not affect the validity of this procedure.

Upon arrival, a condemned inmate will be processed through regular admission procedures, to include [redacted] and other activities associated with the reception of non-condemned inmates as required by ADOC policy or as otherwise determined by the receiving institution's warden.

III. Confinement

Section 15-18-82(b) of the Code of Alabama, 1975, establishes Holman as the statutory location for the conduct of executions. Holman is the ADOC facility possessing "the necessary facilities, instruments, and accommodations to carry out" an execution.

Upon receipt of an execution warrant and notice from the Governor setting a time frame for the execution of a condemned inmate confined at a location other than Holman, the wardens of Holman and of the correctional facility at which the condemned inmate is confined will coordinate transport of the condemned inmate to Holman. If the condemned inmate is confined at another ADOC male facility, arrangements will be made [redacted] to have the inmate transferred to Holman. If the condemned inmate is confined at an ADOC female facility, the condemned inmate will be moved to Holman [redacted] prior to the execution.

Upon the receipt of a condemned inmate at Holman, the inmate shall be confined in a cell designated by the Warden until the time his/her execution arrives. Appropriate safeguards and security measures will be maintained as directed by the Warden. Prior to the start of the Death Watch observation period, the condemned inmate will be confined and maintained in accordance with ADOC Rules and Regulations.

IV. Warrant Notification

Pursuant to Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, the Alabama Supreme Court shall at the appropriate time enter an order authorizing the Commissioner to carry out the condemned inmate's sentence of death within a time frame set by the Governor.

A. Once an execution warrant has been received by the ADOC and the ADOC has received notice from the Governor setting the time frame for the condemned inmate's execution, the Holman Warden will advise the condemned inmate as soon as possible. All efforts should be made to notify the condemned inmate prior to any announcement by news media.

B. If the condemned inmate is confined at an ADOC facility other than Holman, the ADOC will notify the Warden of the other facility and request the inmate be notified.

C. On the day the condemned inmate is advised of the execution warrant and time frame for his/her execution, the Warden will inform the condemned inmate that:

1. The condemned inmate may select a spiritual advisor. That advisor may be present in the execution chamber at the time of the execution, except in the event the inmate has elected electrocution as his/her method of execution. In the event that an inmate has elected electrocution as his/her method of execution, the spiritual advisor will

be required to exit the execution chamber after the condemned inmate has been provided the opportunity to make a final statement.

2. The inmate may select one alternate spiritual advisor to serve in the event that the originally named spiritual advisor will not/cannot serve at the time of the execution.

3. The choice of spiritual advisor and alternate spiritual advisor must be made and communicated to the Warden within five days.

4. The condemned inmate will further be informed that any spiritual advisor and alternate spiritual advisor identified will be required to submit a written plan to the Warden setting forth how the spiritual advisor intends to assist the condemned inmate in the exercise of his/her religious beliefs for the purpose of ensuring that such assistance will not interfere with the conduct of the execution. The condemned inmate shall be further advised that this written plan must be submitted to the Warden for approval within fourteen days.

V. Preparations (Prior to Execution week)

A. On a day designated by the Warden, prior to execution week, the Holman Warden will meet with the Execution Team.

1. Team members will be given the opportunity to resign from the team.

2. Details of the scheduled execution will be discussed to bring everyone up to date.

B. If lethal injection is to be the means of execution, the Warden will notify members of the IV Team that they will be needed and schedule a time for a member of the IV Team to view the condemned inmate's veins prior to the scheduled execution.

C. If electrocution is to be the means of execution, the Warden will arrange and facilitate inspection of the [redacted] equipment used for the execution.

D. The Warden and/or [redacted] shall inventory the equipment and supplies on hand and verify that all items required to carry out the execution are available. Any deficiencies shall be made known to the Warden immediately.

E. The Holman Warden will notify the facility head at G. K. Fountain Correctional Center ("Fountain") of the upcoming execution. The Holman Warden will request that the staff at Fountain have the Media Center checked for cleanliness, make sure the grounds are groomed, and ensure that the telephone lines are operational.

F. The Holman Warden will meet with the condemned inmate and advise him/her of the general schedule for execution week. The Warden will attempt to answer any questions the condemned inmate may have in reference to the execution. The condemned inmate will be informed of his/her ability to submit to the Warden for approval an extended visitation list for the week of the execution.

G. After confirming that the spiritual advisor and alternate spiritual advisor submitted a written plan within fourteen days after the condemned inmate received notice of the execution warrant and time frame for the execution, the Warden or his/her designee shall meet with the spiritual advisor and alternate spiritual advisor to review such plan, and conduct orientation and training of the spiritual advisor and alternate in advance of the execution.

H. The Warden or his/her designee will contact [redacted] to determine whether they are willing and available to attend the execution and pronounce the condemned inmate's time of death on the date the execution is scheduled.

I. Prior to the start of the Death Watch observation period, the [redacted] shall ensure that all functions of the holding cell are working. In the event that deficiencies are noted, the Warden shall be notified immediately, and all necessary steps shall be taken to rectify and repair such deficiencies prior to the Death Watch observation period.

VI. Preparations (Execution Week)

A. Members of the Execution Team will meet [redacted] to walk through the steps of the execution to include the removal of the condemned inmate from [redacted] to the [redacted] and the [redacted] The Warden and all members of the Execution Team will rehearse their roles in the execution process at this time. Members of the IV Team participating in the upcoming execution shall attend and participate in at least one rehearsal [redacted] At least one member of the IV Team shall take an inventory of the supplies and equipment on hand while present at the facility for a rehearsal. Any deficiencies in the supplies and/or equipment shall be identified to the Warden immediately.

B. On a day designated by the Warden, the [redacted] will make assignments of [redacted] for the Death Watch observation period.

C. On a day designated by the Warden, the Warden [redacted] will meet with the Outside Security Team.

1. The Warden will brief the team on the number of offender and victim witnesses to expect and who they are, if known at that time, as well as the number of additional visitors to expect, the names of whom will be provided to [redacted] The Warden will also advise the team about media attention, if any is expected.

2. The [redacted] will make post assignments for [redacted] The [redacted] will also assign an escort for the offender's witnesses and security for the Training Center.

D. The Warden or his/her designee will check the telephone in the Commissioner's viewing room to ensure that the line is working properly. Additionally, the Warden or his/her designee will verify that the microphone inside the execution chamber is working properly and can be heard inside each viewing room.

E. Before [redacted], the Warden's designee will contact [redacted] to witness the execution and pronounce the time of death.

F. Also before [redacted], the Warden or his/her designee will notify local law enforcement officials of the pending execution, including the State Troopers, Sheriff, and local authorities.

G. Equipment

1. If lethal injection is to be the means of execution, [redacted] shall be inspected and tested [redacted] until the day of the execution.

2. If electrocution is to be the means of execution, the electric chair, [redacted] shall be inspected [redacted], in accordance with established procedures, [redacted] the equipment will be inspected and tested [redacted]. (See Annex A for procedures and steps for testing the electric chair and equipment) (See Annex B for instructions on sponge preparation)

VII. Placement of Condemned Inmate in the Holding Cell

A [redacted] officers shall be assigned to observe the condemned inmate at all times during the Death Watch observation period preceding the execution. If the condemned inmate is a female, female security personnel will maintain security. No other correctional staff or civilian personnel, except medical personnel, shall be allowed in the vicinity of the holding cell without

approval of the Warden or the Warden's designee. No other inmates are allowed in the vicinity of the holding cell during this time.

A. The condemned inmate will be moved to the holding cell [redacted], unless the Warden determines he/she should be moved there sooner.

B. [redacted], the Execution Team will begin the Death Watch observation period. [redacted] will post outside the condemned inmate's cell. The cell to be used will be that cell [redacted].

1. The cell will be thoroughly inspected for any contraband prior to initial placement of the condemned inmate.

2. The [redacted] will ensure that all functions of the cell are working.

3. The officers assigned to this watch will ensure, during their time on duty, that the condemned inmate is under constant observation, regardless of the inmate's location.

4. If an emergency should occur, one of the of officers assigned to the constant observation Death Watch shall initially contact [redacted]. As soon as possible thereafter, the Captain of the Execution Team and the Warden will be contacted.

5. All activity will be recorded on the permanent log. Information to be placed in the log will include, but will not be limited to, the following: [redacted]

C. The condemned inmate will have a bed, necessary linens, and one uniform of clothing. All other items of the condemned inmate will be kept outside the holding cell. The condemned inmate will be allowed access to personal hygiene items which will be passed to him/her and returned to the officers when he/she has completed use of the items.

1. The condemned inmate will be allowed a television in the area that will sit outside the cell.

2. The condemned inmate will be allowed access to the telephone. The condemned inmate will advise the officer of the number he/she wishes to call, and the officer will place the call. [redacted]

3. The condemned inmate will be allowed access to his/her mail. The mail will be passed back to the officers when the condemned inmate has finished reading it. All legal mail will be opened in the presence of the condemned inmate.

4. The condemned inmate will be allowed access to a Bible, or its equivalent, and any other reading material approved by the Warden.

5. [redacted] will bring the condemned inmate's medication to him/her. Sick call will be in accordance with institutional Rules and Regulations. Sick call will be held in [redacted].

6. The condemned inmate's meals will be delivered to him/her by [redacted]

VIII. Visitation During the Execution Week

A. Prior to execution week, the condemned inmate may submit an extended visitation list to the Warden for approval. That portion of the extended visitation list approved by the Warden will be provided to the officers assigned to visitation and/or the Death Watch observation period.

B. The condemned inmate shall be allowed contact visits during execution week with family, friends, private clergy, and his/her legal representatives, as approved by the Warden. Visitation will be limited by the Warden in his/her discretion if necessary to maintain the orderly operation of the facility or to comply with the Governor's notice setting the time frame for the execution of the sentence of death.

Visitation will ordinarily be at the following times:

[redacted]

C. There will be no more than fifteen (15) visitors allowed in the visitation area at any given time.

D. The condemned inmate may receive a meal in the visitation area. The visitors may purchase items from the vending machines for the condemned inmate's consumption. Visitors will not be permitted to bring food or beverages into the facility.

E. As security conditions permit, visitors will be allowed to leave the facility and return. They will be processed for admission every time they enter the facility.

F. The [redacted] will be available for the condemned inmate and his/her family. The [redacted] should visit with the condemned inmate [redacted]

IX. Day of the Execution

A. The [redacted] will deliver the condemned inmate's breakfast meal to the door of the Death Chamber. The [redacted] on that post will receive the meal and serve it to the condemned inmate in [redacted]

1. The [redacted] will prepare the condemned inmate's institutional meals. No inmate will handle the condemned's meals on the date of the execution.

2. The [redacted] will ask the condemned inmate if he/she wishes to have a last meal prepared and explain what items are available.

B. At a time designated by the Warden, the officers assigned to the Death Watch will inventory the condemned inmate's property. The condemned will have an opportunity to designate who he/she wishes his/her property to be given following the execution of the sentence of death.

1. This information will be written out as a last will and testament and the condemned inmate will sign the document in front of a notary public.

2. [redacted]

C. Visitation may begin at [redacted] and proceed until approximately [redacted] subject to change by the Warden for security purposes or to accommodate the time frame of the execution as set by the Governor.

D. The Warden or his/her designee will obtain the funeral arrangements of the condemned. Specific information needed will be a next of kin, [redacted] This information will be made available to the coroner's office and to the Alabama Department of Forensic Sciences.

E. After [redacted] will prepare the necessary lethal injection solution when lethal injection is the method of execution.

F. The Warden and/or Commissioner will meet with the victims of the condemned inmate's crime [redacted]

G. At [redacted] the condemned inmate will be escorted from the visitation yard [redacted]

1. An examination of the condemned inmate will be completed, and the results recorded on a Medical Treatment Record or Body Chart.

2. If the condemned inmate has a spiritual advisor, that person may be escorted to [redacted] and remain with the condemned inmate until the condemned is escorted [redacted], at which time the spiritual advisor will be escorted [redacted] while the condemned inmate is prepared for the execution. Once the condemned inmate is prepared, the spiritual advisor will be escorted to the execution chamber [redacted].

H. The Commissioner's telephone line to the Governor's and/or Attorney General's staff will be opened.

I. The condemned inmate will be escorted to the execution chamber by the Execution Team and strapped to the gurney.

1. If lethal injection is the means of execution, the IV Team will be escorted into the execution chamber to start the IV. The heart monitor leads will be applied to the condemned. If the condemned inmate's veins make obtaining venous access difficult or problematic, [redacted] may perform a central line procedure.

2. When electrocution will be the method of execution, the inmate will be escorted to the execution chamber and placed in the chair at approximately [redacted] The condemned inmate will be strapped in with the electrode attached to the offender's left leg and head.

J. The witnesses will be escorted to the appropriate execution witness rooms. The following persons may be present at the execution and none other:

1. The Warden and such persons as may be necessary to assist him in conducting the execution

2. The Commissioner of Corrections or his/her representative

3. Two (2) physicians

4. The condemned's spiritual advisor

5. The Chaplain of Holman

6. Such news media as may be admitted by the Warden, not to exceed five (5) in number

7. Any relatives or friends of the condemned offender that he/she may request, not to exceed six (6) in number (No inmate shall be permitted to witness the execution)

8. Witnesses for the victim will be limited to immediate family members over the age of 19, not to exceed eight (8) in number. "Immediate family member" is defined to include parent(s), sibling(s), and/or children of the victim.

   If the condemned is being executed for a capital murder in which he/she killed two (2) or more people, each of the victims will be entitled to have no more than eight (8) immediate family members over the age of 19 witness the execution. If the total number of witnesses exceeds 12, however, the seats are to be apportioned equally among the victims.

   If fewer than six (6) immediate family members of a victim wish to view the execution, AND the condemned has OTHER murder and/or manslaughter conviction(s) for which he was NOT sentenced to death, then the remaining witness slots can be made available to immediate family members of that other victim(s).

   Because of restricted space, however, no more than a TOTAL of 12 immediate family members of the victim(s) will be allowed to actually view an execution.

K. The Warden will be informed when the condemned inmate is prepared for execution.

If the execution is to be carried out by lethal injection, the IV Team will complete its task and [redacted]. The Warden will report to the execution area at this time. The IV Team will brief the Warden as to [redacted] The curtains to the witness rooms will be opened.

L. The Warden will enter the execution chamber [redacted]. The microphone will be turned on and the Warden will read the execution warrant to the condemned inmate.

M. The condemned inmate will be allowed to make any last remarks. Remarks should be kept to about two (2) minutes.

N. The Warden and [redacted] will depart the execution chamber to the [redacted] Two (2) members of the Execution Team will remain in the execution chamber until notified to leave by the Warden.

O. The Warden will check with the Commissioner or his/her designee to see if there has been a last-minute stay. If there has been no last-minute stay, the two (2) members from the Execution Team remaining in the execution chamber will receive the signal to depart.

1. These two team members will make last minute checks of the IV lines in the case of lethal injection. One team member will exit the chamber and will [redacted] to the [redacted] signaling it is okay to proceed. The second officer, designated by the Warden, will remain in the chamber and will position himself/herself at the condemned inmate's left side.

2. In the case of electrocution, the two (2) officers will make last minute adjustments to the restraining straps. The officers will place the headgear on the offender and the covering over the face. When their tasks have been completed, [redacted] will [redacted] to the [redacted] signaling it is okay to proceed.

P. When the signal to proceed has been received, the following will occur:

1. In the case of lethal injection, the Warden will begin administering the lethal injection solution to the condemned inmate. The lethal injection solution will consist of:

   a. 100 mL of midazolam hydrochloride – two (2) 50mL syringes
   b. 20 mL of saline
   c. 60 mL of rocuronium bromide
   d. 20 mL of saline
   e. 120 mL of potassium chloride – two (2) 60 mL syringes

2. In the case of lethal injection, after the Warden administers the 100 mL's of midazolam hydrochloride and 20 mL's of saline but before he/she administers the second and third chemicals, the one (1) team member who remained in the execution chamber will assess the consciousness of the condemned inmate by applying graded stimulation, as follows: The team member will begin by saying the condemned inmate's name. If there is no response, the team member will

gently stroke the condemned inmate's eyelashes. If there is no response, the team member will then pinch the condemned inmate's arm.

In the unlikely event that the condemned inmate is still conscious, the Warden will use the secondary IV line to administer the 100 mL's of midazolam hydrochloride in the back up set of syringes. After all 100 mL's of midazolam hydrochloride and 20 mL's of saline are administered, the team member in the execution chamber will repeat the graded stimulation process set out above. When the secondary IV line is used for midazolam hydrochloride it is also used to administer the remaining chemicals.

After confirming that the condemned inmate is unconscious, such will be documented and the Warden will continue with administering the second and third chemicals.

3. When electrocution is the means of execution, the Warden will push the button which will begin the process of 2200 volts of electricity flowing through the offender's body for a period of 20 seconds. The amount of electricity will decrease to 220 volts for the next 100 seconds.

Q. When the execution has been carried out, the [redacted] will be notified [redacted]. In the case of lethal injection, members of the [redacted] will be [redacted].

1. [redacted] will enter the execution chamber and close the curtains.

2. The [redacted] will be escorted from the [redacted].

3. The [redacted] will be escorted to the [redacted].

4. Witnesses of the execution will be escorted from the [redacted]

5. The Warden will escort the [redacted] into the [redacted]. The [redacted] will do a thorough check and pronounce a time of death.

6. The [redacted] will be escorted from the [redacted].

R. [redacted] will enter the execution chamber.

1. In the case of lethal injection, the IV lines and straps will be detached. The body will be placed in a body bag and onto a stretcher to be taken by van to the Department of Forensic Sciences for a postmortem examination.

2. In the case of electrocution, the electrodes will be detached and the transformer will be disconnected and locked. The body will be placed in a body bag and onto a stretcher to be taken by van to the Department of Forensic Sciences for a postmortem examination

S. [redacted] will attach a tag to the body bag and have the representatives of the Department of Forensic Sciences sign for receipt of the body.

T. Members of the Execution Team will do a brief clean-up of the execution chamber and [redacted]. [redacted] several members of the execution team will conduct a more thorough clean-up of the execution chamber.

X. Actions after the Execution

A. Press Conference - The Public Information Officer ("PIO") for the Department of Corrections will advise the news media that the sentence of death has been carried out.

1. The PIO will provide the time of death, any last words the condemned inmate may have had, and if any unusual incidents occurred during the execution.

2. News media who were unable to witness the execution will have an opportunity to ask questions of the news media members that were witnesses.

3. Members of the condemned's family will have an opportunity to meet the press and make a statement. The victim's witnesses will also have an opportunity to appear before the news media. At no time will these two (2) groups be allowed to intermingle with each other.

B. Interment - The body may be released to the condemned's relatives at their expense or, if the body is not claimed by friends or relatives, it will be the Department of Corrections' responsibility to bury the remains.

C. Staff participants will be afforded the opportunity to meet with Critical Incident Debriefing Team members if they so desire.

D. Permanent logs will be typed by the [redacted] and sent back for signatures. Once all signatures have been obtained, the log will be forward to the Warden for review and his/her signature. No copies of the log will be made without permission of the Commissioner.

Annex A

Procedures and Steps for Testing the Electric Chair and Equipment

The electrocution equipment should be tested twice (2) monthly, no sooner than the [redacted] of the month and no later than the [redacted] of the month, with at least [redacted] between tests. Each test will be logged. If electrocution is to be the means of execution, the electrocution equipment will be tested [redacted] from the time the execution warrant is received until [redacted] the equipment will be tested [redacted] until the day of the execution. [redacted], the equipment will be tested [redacted] prior to the time of the execution.

1. [redacted] will be present during any testing.

2. The Warden [redacted] will be present and will select [redacted] to be present during any testing.

3. No other personnel should be present during testing without the permission of the Warden [redacted].

4. All testing equipment [redacted] will be checked to ensure they are all in operating order.

5. All power switches will be in the "off" position.

6. All jacks and connections will be checked for cleanliness and to ensure they are free of corrosion. All leads will be checked to ensure they are intact and have no visible signs or cracking or any signs of frail ends.

7. The leads will be connected to the load bank register.

8. The [redacted] will be connected with the [redacted] connected to the [redacted]

   a. [redacted]
   b. [redacted]
   c. [redacted]

9. Make sure everyone is ready to test the equipment.

10. [redacted] will turn the power on in the equipment room.

11. [redacted] will then enter the [redacted] and turn on the [redacted]

12. [redacted] will turn on the power for the equipment.

13. After making sure that everyone is clear, the switch will be thrown and the meters will be read and recorded.

14. [redacted] will be located in [redacted]. They will read [redacted] and [redacted] from the [redacted].

15. [redacted] will be located in the [redacted]. They will read the [redacted] on the [redacted].

16. The process will be repeated again after a [redacted] wait on generator power.

17. After testing is completed, the [redacted] will turn off all power switches and padlock all disconnect panels in the "off" position. [redacted] will check all padlocks to ensure they are locked.

Each time the chair is tested, all other equipment will undergo a check or test to ensure that all is in working order and could be used if needed. Sponges will be checked for durability to ensure they are not torn, shrunken, or weak in texture and that they are free from any salt from a prior execution. Electrodes will be checked to ensure they are clean and free from any deterioration of the wires that connect to the power source. Also, all connections will be checked to insure they are tight. Security straps will also be checked to ensure they are free from cracking and that buckles are clean and in good working order.

Annex B

Procedures for Preparation and Maintenance of Sponges

1. Sponges will be soaked in a salt and water solution for a [redacted] prior to the time of execution. The sponges should be taken from the salt water solution approximately [redacted] prior to the execution.

2. Sponges will be temporarily tacked lightly to the electrodes for proper positioning. When positioned, remove the tacking stitches. When ready for use, soak the sponges in fresh water and squeeze dry. Sew sponges with black carpet thread to the screening, placing stitches not [redacted] apart and following around the outer edges, down the center, and around the binding posts. The object is to get a good firm contact. Do not pull the stitches too tight, thereby preventing the sponge from soaking up the solution.

3. The leg electrode will go on the left calf below the knee, placed so the binding post is on the outside making it more easily seen and reached for attaching the electrical wire. The shortened strap should be on this same side so the buckle can also be reached. When placing in position, pass the long strap around the leg and insert loosely through the buckle. Raise into position with the right hand and tighten the strap through the self-tightening buckle with the left hand. Draw the strap fairly tight but not so tight that when muscle contractions take place during electrocution there would be danger of breakage.

4. The headset will be made prior to use to approximately fit the condemned inmate's head. Adjustment will be done by means of sliding straps on each side. Place the head set on the head, being careful not to come down too far on the forehead if possible. Position the short strap with the buckle on it on the side that the operator will be working on. Pass the long strap under the chin and fasten snugly. Connect the wire to the binding post. Use number [redacted] insulation for both the head and leg wires. Solder the ends so they won't separate and so the barred ends will go into the hole in the posts. Use the sponges saturated in the salt solution. Squeeze enough solution out with the flat of the hand so excessive dripped will be avoided. In making electrical current contact, be careful not to burn the sponge and the outer skin of the condemned inmate.

5. After use, cut the black threads, remove the sponges, and rinse carefully in fresh water. Be very careful not to cut the tan thread that the pieces of sponge are sewn together with. Remove any black thread pieces and rinse the screws thoroughly to remove all traces of salt water or corrosion will ensue. Keep the straps soft [redacted].

6. Only saltwater sponges are to be used. Sponges should be stored in a clean dry place.

Annex C

IV Team – Detailed Instructions

The Warden or his/her designee will have two (2) intravenous infusion devices placed in veins of the condemned inmate and a saline solution available for an infusion medium. Those persons engaged in this activity will be referred to as the IV Team. For these purposes, [redacted] more [redacted] professionals will make up this team. The members of the IV Team shall be currently certified or licensed within the United States. One of the [redacted] professionals on the IV Team [redacted] prior to the execution.

a. An IV administration set shall be inserted into the outlet of the bag of normal saline solution. Two (2) IV bags will be set up in this manner.

b. The IV tubing shall be cleared of air and made ready for use.

c. The standard procedure for inserting IV access will be used. If the condemned inmate's veins make obtaining venous access difficult or problematic, qualified medical personnel may perform a central line procedure to obtain venous access.

d. The IV tubing for both set-ups will be connected to the receiving port of the IV access - one (1) for the primary vein and the other for the secondary vein.

e. At this point, the administration sets shall be running at a slow rate of flow (KVO), and ready for the insertion of syringes containing the lethal agents. The Warden, or his designee, shall maintain observation of both set-ups to ensure that the rate of flow is uninterrupted. NO FURTHER ACTION shall be taken until the Warden has consulted with the Commissioner regarding any last-minute stay by the Governor or the courts.

Annex D

Syringe Preparation

The following is the syringe sequence:

Syringe 1	midazolam hydrochloride	50 mL – 250 mg
Syringe 1A	midazolam hydrochloride	50 mL – 250 mg
Syringe 2	saline (sodium chloride)	20mL
Syringe 3	rocuronium bromide	60 mL – 600 mg
Syringe 4	saline (sodium chloride)	20 mL
Syringe 5	potassium chloride	60 mL – 120 mEq
Syringe 5A	potassium chloride	60 mL – 120 mEq

Any team member participating in the syringe preparation process shall wear medically approved gloves to ensure the safety of each team member and the preparation process.

I. Syringes 1 and 1A, midazolam hydrochloride procedure:

1. Remove piercing pin from pouch
2. Remove cover from piercing pin
3. Remove flip top from vial of midazolam hydrochloride
4. Insert piercing pin into the stopper with a downward twisting motion
5. Insert sixty cubic centimeter (60cc) syringe into piercing pin and twist until secure
6. Pull back on the syringe to transfer the midazolam hydrochloride into the syringe
7. For each syringe (1 and 1A), conduct items 1 through 6 five (5) times. Each vial of midazolam hydrochloride contains 50 mg of the drug in 10mL.

II. Syringe 2, sodium chloride (saline) procedure:

1. Remove piercing pin from pouch
2. Remove cover from piercing pin
3. Remove flip top from sodium chloride vial or any protective packaging from sodium chloride bag
4. Insert piercing pin into the stopper with a downward twisting motion
5. Insert syringe into piercing pin and twist until secure
6. Pull back on the syringe to transfer the sodium chloride into the syringe until 20 mL are drawn into the syringe

III. Syringe 3, rocuronium bromide procedure:

1. Remove piercing pin from pouch
2. Remove cover from piercing pin
3. Remove flip top from vial of rocuronium bromide
4. Insert piercing pin into the stopper with a downward twisting motion
5. Insert sixty cubic centimeter (60cc) syringe into piercing pin and twist until secure
6. Pull back on the syringe to transfer the rocuronium bromide into the syringe
7. Conduct items 1 through 6 twelve (12) times. Each vial of rocuronium bromide contains 50 mg of the drug in 5 mL.

IV. Syringe 4, sodium chloride (saline) procedure:

Repeat procedures for syringe 2.

V. Syringe 5 and 5A, potassium chloride procedure:

1. Remove piercing pin from pouch
2. Remove cover from piercing pin
3. Remove flip top from vial of potassium chloride vial
4. Insert piercing pin into the stopper with a downward twisting motion.
5. Insert sixty cubic centimeter (60cc) syringe into piercing pin and twist until secure
6. Pull back on the syringe to transfer the potassium chloride into the syringe
7. For each syringe (5 and 5A), conduct items 1 through 6 three (3) times. Each vial of potassium chloride contains 40 mEq of the drug in 20 mL.

Repeat the above procedures for a backup tray of syringes.

Exhibit C

Governor Ivey Orders Top-to-Bottom Review of Execution Protocol for Victims' Sake

Governor Kay Ivey on Monday asked Attorney General Steve Marshall to withdraw the state's two pending motions to set execution dates in the cases of Alan Eugene Miller and James Edward Barber, the only two death row inmates with such motions currently pending before the Alabama Supreme Court.

Working in conjunction with Alabama Department of Corrections Commissioner John Hamm, Governor Ivey is asking that the Department of Corrections undertake a top-to-bottom review of the state's execution process, and how to ensure the state can successfully deliver justice going forward.

Governor Ivey issued the following statement:

"For the sake of the victims and their families, we've got to get this right. I don't buy for a second the narrative being pushed by activists that these issues are the fault of the folks at Corrections or anyone in law enforcement, for that matter. I believe that legal tactics and criminals hijacking the system are at play here.

"I will commit all necessary support and resources to the Department to ensure those guilty of perpetrating the most heinous crimes in our society receive their just punishment. I simply cannot, in good conscience, bring another victim's family to Holman looking for justice and closure, until I am confident that we can carry out the legal sentence."***– Governor Kay Ivey***

The governor also requests that the attorney general not seek additional execution dates for any other death row inmates until the top-to-bottom review is complete. Governor Ivey appreciates the hard work of Attorney General Steve Marshall and his team to pursue justice in these cases and looks forward to receiving the input of his office, as appropriate, as the review moves forward.

Commissioner Hamm added the following comment:

"I agree with Governor Ivey that we have to get this right for the victims' sake. Everything is on the table – from our legal strategy in dealing with last minute appeals, to how we train and prepare, to the order and timing of events on execution day, to the personnel and equipment involved. The Alabama Department of Corrections is fully committed to this effort and confident that we can get this done right."***– Commissioner John Hamm***

Gina Maiola
Communications Director

Office of Governor Kay Ivey
600 Dexter Avenue • Montgomery, AL • 36130
Office: 334-242-0493 • Fax: 334-242-4495

Gina.Maiola@governor.alabama.gov
https://governor.alabama.gov

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

JAMES EDWARD BARBER,

Plaintiff,

v.

KAY IVEY, Governor of the State of Alabama, *et al.*,

Defendants.

Case No. 2:23-cv-00342-ECM

CAPITAL CASE –EXECUTION "TIME FRAME" BEGINS 12:00 A.M. ON JULY 20, 2023

HEARING REQUESTED

MOTION FOR PRELIMINARY INJUNCTION TO ENJOIN DEFENDANTS FROM EXECUTING JAMES EDWARD BARBER VIA LETHAL INJECTION

Imagine being forced to undergo a medical procedure performed by a team of people who lack the appropriate credentials and who botched the procedure the last three times they tried it. This is James Barber's reality. The State of Alabama seeks to execute Mr. Barber by lethal injection within a "time frame" set by Governor Kay Ivey. But the last three times the Defendants in this case attempted to carry out such an execution, the unqualified team responsible for setting the intravenous lines ("IV Team") failed to do so in the most painful of ways. In all three instances, the IV Team strapped a condemned person to a gurney and punctured him with needles all over his body ***for several hours*** in an attempt to find a vein. Two of the executions were eventually called off before midnight, while the third ended after the IV Team improperly employed a cutdown procedure and forced the inmate into unconsciousness.

This "pattern of superadding pain through protracted efforts to establish IV access" is the basis of Mr. Barber's claim under the Eighth Amendment. *Smith v. Comm'r, Ala. Dep't of Corr.*,

No. 22-13781, 2022 WL 17069492, at *5 (11th Cir. Nov. 17, 2022), *cert. denied sub nom. Hamm v. Smith*, No. 22-580, 143 S. Ct. 1188 (U.S. 2023) (Mem.). Defendants have not made any meaningful improvements to their lethal injection protocol ("LI Protocol") since the three failed attempts, and instead are trying to proceed with Mr. Barber's execution as though nothing went wrong the last time they tried. In fact, the only substantial change Defendants have made since botching the last three executions is to give the IV Team ***even more time*** to puncture condemned persons with needles all over their bodies. And, critically, the same problems that plagued the previous executions remain unaddressed: the IV Team still lacks the appropriate credentials, there is still no reasonable time limit on how long the team can puncture the condemned person, and there is still no meaningful change in place to address the "pattern of difficulty by [the IV Team] in achieving IV access." *Id.* at *4. Mr. Barber therefore faces a substantial risk of intolerable pain and torture.

That risk can be avoided by requiring Defendants to employ what the Eleventh Circuit has already found to be a feasible and readily implemented alternative method of execution: nitrogen hypoxia. Execution by nitrogen hypoxia does not involve an IV Team, nor does it require spending several hours searching hopelessly for a vein. Nitrogen hypoxia will therefore significantly reduce the severe and unnecessary pain that Mr. Barber is likely to endure by lethal injection.

All of this demonstrates that Mr. Barber is likely to succeed on his Eighth Amendment claim. Mr. Barber is also likely to suffer irreparable injury if the Court does not grant a preliminary injunction—most notably, he will likely be forced to endure a lingering death as an unqualified IV Team spends hours trying to execute him. And that irreparable injury far outweighs the minimal harm that a preliminary injunction may have on Defendants, who can still seek to execute Mr. Barber by nitrogen hypoxia. The public interest is also at stake to ensure that another botched

execution violating the constitutional rights of an Alabama resident does not occur. Defendants have chosen to keep the public in the dark about their short-lived internal investigation, and rather than release a written report detailing the findings, as other States in similar situations have done, Defendant Ivey wrote a vague 1.5 page letter that fails to acknowledge the underlying problems with the past three executions. For all these reasons, a preliminary injunction is warranted.

Defendants have made the need for a preliminary injunction especially clear in recent days, as the ***very first steps*** they took to initiate Mr. Barber's execution violated their own LI Protocol. Under the protocol, after Defendant Ivey decides the execution "time frame" and relays it to Defendant Hamm, Defendants are not supposed to share the news with the media without first informing Mr. Barber "as soon as possible." *See* Ex. B to Compl. (Dkt. 1-2) at 2. Rather than follow that clear rule, Defendant Ivey announced Mr. Barber's execution "time frame" first to the press, public, and Defendant Hamm on May 30, 2023, *see* Dkt. 11-1, while Defendant Raybon ***waited an entire day*** before informing Mr. Barber. By then, Mr. Barber and his loved ones had already learned about Defendant Ivey's announcement from the local news. In this way, Defendants violated not just their own LI Protocol, but a relatively straightforward provision entirely within their control. Defendants simply cannot, or will not, carry out their own LI Protocol.

The Court should grant Mr. Barber's request for a preliminary injunction, enjoin Defendants from executing him by lethal injunction, and require them to carry out the available alternative of execution by nitrogen hypoxia.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Alabama's Lethal Injection Protocol and Practices.*

In Alabama, lethal injection is the default method of execution. Ala. Code § 15-18-82.1(a). An alternative method of execution—nitrogen hypoxia—was added in 2018. *See id.* at § 15-18-

82.1(b). Inmates were previously given 30 days to elect execution by nitrogen hypoxia instead of lethal injection. *Id.* Mr. Barber did not elect nitrogen hypoxia during the 30-day window.

Lethal injection executions are governed by the LI Protocol. *See* Ex. B to Compl. (Dkt. 1-2). A key component of the LI Protocol is establishing IV access. Compl. ¶ 53. The LI Protocol requires the IV Team to place two IV infusion devices in the veins of the condemned individual. Ex. B to Compl. (Dkt. 1-2) at 17. The LI Protocol authorizes two methods that the IV Team can use to establish IV access: (1) "the standard procedure," or (2) a "central line procedure" if "the condemned inmate's veins make obtaining venous access difficult or problematic." *Id*. The LI Protocol does not include time parameters under which the IV Team must establish IV access, but only provides that "[i]f the execution is to be carried out by lethal injection, the IV Team will complete its task." *Id.* at 10.

For a competent and trained medical professional, establishing IV access is a common medical procedure that should be accomplished within minutes.[1] Compl. ¶ 54. Even in cases where the subject has a medical condition that makes establishing IV access more difficult, qualified medical professionals are generally able to complete the procedure in a few minutes—and certainly in no more than 30 minutes.[2] *Id.* ¶ 55. Multiple attempts to set an IV results in "increased and potentially significant pain."[3] *Id.* ¶ 56. Those repeated attempts can arise in situations where the subject is experiencing "increased anxiety," which may occur when the person is nervous or frightened. Ex. A (Declaration of Dr. Robert Yong ("Yong Decl.")) at 6, 9.[4]

[1] *See* Emergency Nurses Association, *Clinical Practice Guideline: Difficult Intravenous Access* 3 (2018).
[2] *See* Bernd A. Leidel et al., *Comparison of intraosseous versus central venous vascular access in adults under resuscitation in the emergency department with inaccessible peripheral veins*, 83 Resuscitation 40, 40 (2012); Emergency Nurses Association, *Clinical Practice Guideline: Difficult Intravenous Access* 3 (2018).
[3] J. Matthew Fields et al., *Association between multiple IV attempts and perceived pain levels in the emergency department*, 15 J. Vascular Access 514, 517 (2014).
[4] The declarations of Drs. Robert Yong and David C. Pigott were filed in connection with a similar motion for preliminary injunction in *Smith v. Hamm et al.*, 22-cv-00497, Dkt. 47 (M.D. Ala.). Mr. Barber's legal team has not retained, or consulted, Drs. Yong or Pigott.

According to Lisa St. Charles, a surgical nurse who spent 35 years setting IV lines on a wide variety of body types, if the same person cannot set an IV line after three needle sticks (which typically takes about 15 minutes in total), a more experienced person should take over the process. *See* Ex. B ¶¶ 9, 11 (Affidavit of Lisa St. Charles ("St. Charles Aff.")). Ms. St. Charles, who estimates that she has likely set over 1,000 IV lines in the course of her career, has never seen nor heard of an instance in which it was medically necessary or appropriate to spend 60 minutes or more setting an IV line. *See id*. ¶ 9. Ms. St. Charles opines that spending 60 minutes or more attempting to set an IV line in a person creates unnecessary pain and suffering. *Id.* ¶¶ 17-19.

B. *Defendants Botch Three Consecutive Executions.*

The last three lethal injection executions under Defendants' watch have all failed as the IV Team has either been unable to set an IV line after attempting to do so for hours, or has set an IV line but only after rendering the condemned inmate unconscious. Compl. ¶ 60.

Joe Nathan James, Jr. The first of these recent failures occurred on July 28, 2022, during the botched execution of Joe Nathan James Jr. *Id.* ¶ 61. The IV Team repeatedly tried to access a vein on Mr. James for more than three hours, making his execution one of the longest in American history. *Id.* In their attempts to set an IV, the team punctured Mr. James's elbows, wrists, hands, and right foot with needles, and made multiple incisions in his left arm. *Id.* ¶ 66.

Unable to establish IV access, the IV Team decided to forcibly sedate Mr. James and use "some type of knife or scalpel" to perform a "cut-down" procedure, which is not authorized by the LI Protocol. *See* Ex. C (Declaration of Dr. David C. Pigott ("Pigott Decl.")) at 2-3 (describing the cut-down procedure and including photographic evidence of the cut-down performed on Mr. James). A "cut-down" procedure involves an incision into the skin until a vein is directly visualized and catheter can be inserted under direct vision. *See* Ex. A (Yong Decl.) at 8. This procedure has

"fallen out of favor given the surgical expertise required, potential for bleeding and failure to adequately visualize the vein." *Id.*

When the execution team finally opened the public curtain to the execution chamber after attempting for hours to find a vein, Mr. James appeared unconscious as a result of the sedation. Compl. ¶ 69. He was pronounced dead shortly thereafter. *Id.* Following the execution, the Alabama Department of Corrections ("ADOC") confirmed that the reason for the hours-long delay was the IV Team's inability to establish IV access. *Id.* ¶ 70.

Alan Eugene Miller. About two months after this botched execution, Defendants attempted on September 22, 2022 to carry out the execution of Alan Eugene Miller, but failed again due to "problems accessing Miller's veins to administer the lethal injection drugs." *Miller v. Hamm*, No. 2:22-cv-506-RAH, 2022 WL 16720193, at *1 (M.D. Ala. Nov. 4, 2022). During the attempt, Mr. Miller experienced "extreme pain and suffering, both physical and psychological, as execution team members repeatedly poked, prodded, and slapped various parts of his body for approximately 90 minutes to try to establish venous access." *Id.* This involved punctures to Mr. Miller's right and left elbows, right hand, right foot, right inner forearm, and right and left arms. Compl. ¶¶ 78-80. At one point, Mr. Miller noticed that blood was leaking from his puncture wounds. *Id.* ¶ 80. The execution was eventually called off, but not before Mr. Miller experienced significant pain and trauma from the experience. *Id.* ¶¶ 81-82.

Kenneth Smith. Despite botching the execution of Mr. James via lethal injection, and despite being unable to execute Mr. Miller via lethal injection, Defendants attempted another lethal injection execution just a few weeks later—and failed yet again. *Id.* ¶ 83. At 8:00 pm on November 17, 2022, Kenneth Smith was strapped to the execution gurney. *Id.* ¶ 84. At about the same time, the Eleventh Circuit stayed Mr. Smith's execution. *Id.* ¶ 85. Attorneys for ADOC received direct

notice of the stay order from the Eleventh Circuit, and Mr. Smith's attorneys also contacted the ADOC attorneys within minutes to inform them of the order. *Id.* Nonetheless, ADOC decided to proceed with the execution attempt. *Id.* ¶ 86. As a result, Mr. Smith was left strapped to the execution gurney for four hours while the IV Team spent almost two hours inserting needles all over his body, including under his collarbone. *Id.* ¶¶ 86-87. Eventually, and like Mr. Miller's execution, Mr. Smith's execution was called off due to the IV Team's inability to set an IV line. *Id.* ¶ 88.

C. *Defendants' Short-Lived Investigation and Failure to Address Underlying Problems.*

In response to this spate of botched executions, Governor Ivey asked Attorney General Marshall on November 21, 2022 to withdraw then-pending motions in the Alabama Supreme Court for the execution dates of Mr. Miller and Mr. Barber, and further requested that the Attorney General not move for any new execution dates for any other death row inmates. *See* Ex. C to Compl. (Dkt. 1-3). Governor Ivey then ordered ADOC to undertake a "top-to-bottom review of the state's execution process." *Id.* The ADOC Commissioner immediately agreed, stating that in his review, "[e]verything is on the table – from our legal strategy in dealing with last minute appeals, to how we train and prepare, to the order and timing of events on execution day, to the personnel and equipment involved." *Id.*[5]

Unfortunately, the subsequent review was shrouded in extreme secrecy, conducted by ADOC rather than an external, independent investigatory body,[6] and, based on all available

[5] *See* AL.com, *Gov. Kay Ivey Orders Moratorium on Executions in Alabama* (Nov. 22, 2023), https://www.al.com/news/2022/11/gov-kay-ivey-orders-moratorium-on-executions-in-alabama.html.

[6] Among the states that practice the death penalty, Alabama stands alone in its decision to investigate itself, with no transparency or accountability regarding the findings of the investigation. For example, the State of Tennessee appointed a former U.S. Attorney to investigate its injection protocol after failures to test lethal drugs. *See* Office of the Governor of Tennessee, *Governor Lee Calls for Independent Review Following Smith Reprieve* (May 2, 2022), https://www.tn.gov/governor/news/2022/5/2/gov--lee-calls-for-independent-review-following-smith-reprieve.html. In another state—Arizona—the Governor halted all executions in February 2023, acknowledging that Arizona has a

evidence, was utterly perfunctory. Compl. ¶ 91. Even before the investigation commenced, Governor Ivey made clear that she did not think that ADOC bore any responsibility for the botched executions. Instead, she stated her belief that "legal tactics and criminals hijacking the system [we]re at play here." Ex. C to Compl. (Dkt. 1-3).

ADOC's "review" of its death penalty protocol lasted only a few short months. On February 24, 2023, ADOC Commissioner Hamm sent Governor Ivey a 1.5 page letter announcing that ADOC's "review" was complete and that it was "as prepared as possible" to attempt another lethal injection. Ex. E to Compl. (Dkt. 1-5) at 1. Yet based on the information available to date, no substantive changes to the LI Protocol have been made as the issues that plagued the last three executions remain unaddressed. Indeed, the minimal credentials required for IV Team members are still woefully insufficient as they only need to "certified or licensed within the United States." Compl. ¶ 106. The LI protocol is otherwise silent as to what type of certifications or licenses the IV Team members must possess, which certifying and licensing entities are acceptable, and who (if anyone) is responsible for verifying the accuracy of the certificates and licenses of the team members. If ADOC's IV team members continue to be, as before, emergency medical technicians ("EMTs") that are unqualified and unable to set IV lines or perform a central line procedure, the requirement that the EMTs possess a "current certification" is likely meaningless to remedy ADOC's recurring problems with establishing venous access. *See Id*. ¶ 8. Moreover, the fact that a person may possess under the protocol a "current certification" does not address the issue of members of the IV team who may have a history of disciplinary proceedings, or have disciplinary

"history of mismanaged executions," and appointed a retired U.S. magistrate judge to conduct an independent investigation into the Arizona Department of Correction's lethal injection and gas chamber protocols. *See* Office of the Governor of Arizona, *Governor Hobbs Appoints Judge David Duncan as Death Penalty Independent Review Commissioner* (Feb. 24, 2023), https://azgovernor.gov/office-arizona-governor/news/2023/02/governor-hobbs-appoints-judge-david-duncan-death-penalty.

proceedings currently pending against them—and whose "certification" or "license" may be revoked by the relevant governing body.[7]

Other issues also remain: the training required to carry out a "central line procedure" still falls awfully short, and a reasonable cap on the amount of time that IV access can be attempted still does not exist. The key problems that caused the three botched executions are therefore still in effect. *See* Ex. B to Compl. (Dkt. 1-2).

D. *Mr. Barber's Proceedings Before the Alabama Supreme Court.*

On February 24, 2023, after Defendants' short-lived "review" of Alabama's execution process, Attorney General Marshall moved again in the Alabama Supreme Court for an execution date for Mr. Barber. *See* Ex. M to Compl. (Dkt. 1-13). On March 31, 2023, Mr. Barber filed his opposition to that motion, arguing, among other things, that Alabama conducted a flawed investigation into its lethal injection protocol and failed to disclose what (if any) changes it made to prevent future botched executions. Mr. Barber argued that the Alabama Supreme Court should not schedule an execution date until Alabama addressed these issues. *See* Ex. N to Compl. (Dkt. 1-14). Mr. Barber also filed a motion for a stay, a motion for discovery into what deficiencies ADOC uncovered in its "investigation," and a motion to preserve evidence of his own execution. *See* Exs. O, P, Q to Compl. (Dkts. 1-15, 1-16, 1-17).

[7] This issue was of critical importance in the litigation that surrounded the State's failed execution on Alan Eugene Miller last year. Indeed, Judge Huffaker granted Mr. Miller's request for discovery into the credentials of the IV Team members who tried and failed to execute him. Judge Huffaker ordered discovery on the basis that that some IV Team members may be individuals who lost their license in another State but were nonetheless hired to perform executions in Alabama despite being "the last person in the world that should be attempting to tap a vein on somebody." Ex. D, Nov. 9, 2022 Hr'g Tr. 39:14-40:4, *Miller v. Hamm et al.,* Case No. 2:22-cv-506-RAH (M.D. Ala.); *see also* Dkt. 98 (granting motion for expedited discovery into the identities of IV Team members), *Miller v. Hamm et al.,* Case No. 2:22-cv-506-RAH (M.D. Ala.).

On May 3, 2023, without issuing any written opinions, the Alabama Supreme Court denied all of Mr. Barber's motions and granted the State's motion for an execution warrant. *See* Ex. G to Compl. (Dkt. 1-7). The Court entered an order, under the newly amended Alabama Rule of Appellate Procedure Rule 8(d)(1), authorizing the State to execute Mr. Barber "within a time frame set by the governor." *Id.* at 1.

On May 25, 2023, Mr. Barber filed his Complaint in this Court naming Governor Kay Ivey, Department of Corrections Commissioner John Q. Hamm, Warden Terry Raybon, Attorney General Steve Marshall, and John Does 1-3 (members of the IV Team) as Defendants. *See* Dkt. 1. In this Complaint, Mr. Barber alleges that his impending execution attempt by lethal injection is an unconstitutionally cruel punishment in violation of the Eighth Amendment.

LEGAL STANDARD

A court may grant a preliminary injunction if the plaintiff establishes "(1) a substantial likelihood of success on the merits; (2) that irreparable injury would result unless the injunction were issued; (3) that the threatened injury to him outweighs whatever damage the proposed injunction might cause the defendants; and (4) that, if issued, the injunction would not be adverse to the public interest." *See, e.g.*, *Reeves v. Comm'r, Ala. Dep't of Corr.*, 23 F.4th 1308, 1319-20 (11th Cir. 2022). While such relief is not available as a matter of right, the Supreme Court has granted a preliminary injunction where, as here, the totality of equities favor doing so. *See, e.g.*, *Bucklew v. Precythe*, 139 S. Ct. 1112, 1118 (2019) (noting the inmate "received a stay of execution and five years to pursue the argument" that Missouri's lethal injection protocol was unconstitutional as applied to him); *Bucklew v. Lombardi*, 572 U.S. 1131 (2014) (granting stay).

ARGUMENT

In moving for a preliminary injunction, Mr. Barber seeks only to preserve the status quo while he litigates his Eighth Amendment claim. Mr. Barber is likely to prevail on the merits of his claim for the reasons described below. Moreover, without relief, Mr. Barber will suffer irreparable harm—namely, an attempted execution by lethal injection. A preliminary injunction would not substantially injure Defendants because they will still be able to carry out their execution of Mr. Barber via nitrogen hypoxia. And, finally, the public interest counsels in favor of a preliminary injunction to prevent Defendants from once again violating a person's constitutional rights. The Court should accordingly grant Mr. Barber's motion.

I. Mr. Barber Is Substantially Likely to Succeed on the Merits of His Eighth Amendment Claim.

Mr. Barber's impending lethal injection execution violates the Eighth Amendment's prohibition on "cruel and unusual punishment." U.S. Const. amend. VIII. To state his claim, Mr. Barber must (1) show that the method of execution poses "a substantial risk of serious harm" that "prevents [Defendants] from pleading that they were subjectively blameless," and (2) identify an "alternative" method of execution that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Price v. Commissioner*, 920 F.3d 1317, 1326 (11th Cir. 2019) (cleaned up). Mr. Barber is likely to satisfy both elements.

A. *Mr. Barber Faces a Substantial Risk of Serious Harm.*

A method of execution can present a "substantial risk of serious harm" where it involves a "lingering death," *Baze v. Rees*, 553 U.S. 35, 49 (2008), or the "super[adding]" of "terror, pain, or disgrace," *Bucklew*, 139 S. Ct. at 1124.

Both instances are present here. Defendants have failed to carry out a lethal injection execution not once, not twice, but three times in a row. And all three failures suffered from the

same underlying problem: an incompetent IV Team. "The skill and experience of the person setting an IV line is one of the most important factors in whether the patient will experience pain during the process." *See* St. Charles Aff., Ex. B ¶ 16. Defendants have provided their own evidence of the IV Team's lack of skill and experience. The execution of Mr. James lasted "for over three hours while the execution team tried to access a vein." *Smith*, 2022 WL 17069492, at *4. The botched execution of Mr. Miller similarly lasted "for over two hours as the execution team attempted IV access." *Id.* And the attempted execution of Mr. Smith likewise lasted several hours as the IV team repeatedly tried to find a vein. Compl. ¶ 86. These repeated failures demonstrate a "pattern of superadding pain through protracted efforts to establish IV access." *Smith*, 2022 WL 17069492, at *5.

Mr. Barber will likely be subjected to the same grisly fate because Defendants have not made any meaningful changes to their defective LI Protocol. In fact, the only substantial change Defendants have seemingly made since botching the last three executions has been to amend the relevant rules to ***give themselves more time to try to establish IV access***. Under the newly-amended Alabama Rule of Appellate Procedure 8(d)(1), the amount of time available for ADOC to execute Mr. Barber has changed from one day to a "time frame set by the governor." *See* Ala. R. App. P. 8(d)(1). On May 30, 2023, Defendant Ivey set a 30-hour "time frame" beginning at "12:00 a.m. on Thursday, July 20, 2023, and expiring at 6:00 a.m. on Friday, July 21, 2023." *See* Dkt. 11-1.

Based on the past three executions, it is likely that over the course of those hours, Mr. Barber will be punctured with needles across his body by an unqualified IV Team that repeatedly fails to establish IV access. *See Smith*, 2022 WL 17069492, at *5. His death will linger as he faces "superadded pain" from the repeated attempts "to gain IV access," *id.*, and "superadded terror" from knowing that no meaningful changes have been made to the protocol to date. Generally

speaking, the longer it takes to set an IV line, the greater the physical pain and mental distress the patient experiences. *See* St. Charles Aff., Ex. B ¶¶ 15-16. The unacceptably high risk that Mr. Barber will experience "needless suffering" constitutes a "substantial risk of serious harm." *Baze*, 553 U.S. at 49-50; *see also Bucklew*, 139 S. Ct. at 1123 (describing "cruel and unusual" punishments as those that are "unrelenting," "barbar[ic]," and "inhuman").

It makes no difference that Defendants engaged in a short-lived "review" of their execution procedures. That internal review lasted only a few months and does not appear to have yielded any meaningful improvements to the LI Protocol. What's worse, the same problems that plagued the last three executions remain unaddressed. The IV Team is still insufficiently credentialed. The central line procedure can still be performed by improperly-trained individuals. And the LI Protocol still does not contain a limit on how many times, or for how long, IV access can be attempted. *See generally* Ex. B to Compl. (Dkt. 1-2); *see also Smith*, 2022 WL 17069492, at *4 n.10 (noting that the Supreme Court "approved" in *Baze* a one-hour time limit to obtain IV access). Under the current LI Protocol, the IV Team can spend ***30 consecutive hours*** puncturing Mr. Barber with needles in an attempt to establish IV access. All this portends an exceedingly high likelihood that Mr. Barber will suffer the same torture as the three men before him.

B. *An Alternative Method of Execution Is Available.*

An alternative method of execution is available in Alabama that is feasible, readily implemented, and reduces all the risks of unnecessary pain caused by the LI Protocol: nitrogen hypoxia. In March 2018, Alabama added nitrogen hypoxia as a statutory execution method. *See* Ala. Code § 15-18-82.1(b). Nitrogen hypoxia is an execution method in which death is caused nearly instantaneously by forcing a person to breathe pure nitrogen. Nitrogen hypoxia does not require the setting of any IV lines, and therefore entirely avoids the medical procedure that the IV Team has proven itself incapable of performing.

The Eleventh Circuit has twice held that nitrogen hypoxia is an available method of execution in Alabama—a ruling which the U.S. Supreme Court very recently declined to review. *See Price*, 920 F.3d at 1328 (holding that Alabama's statutorily-authorized method of nitrogen hypoxia could not be considered unavailable simply because Alabama had not finalized a mechanism to implement the procedure); *Smith*, 2022 WL 17069492, at *5 ("We find that nitrogen hypoxia is an available alternative method for method-of-execution claims.").

Nitrogen hypoxia also significantly reduces the risk of pain and suffering posed by the LI Protocol. Indeed, the Eleventh Circuit found that a plaintiff facing a similar set of factual circumstances to Mr. Barber had "sufficiently pleaded that nitrogen hypoxia will significantly reduce his pain" as compared to a lethal injection execution. *Smith*, 2022 WL 17069492, at *5. The court based this finding on several plausible allegations, including a "pattern of difficulty by ADOC in achieving IV access with prolonged attempts," the predictable consequences that a condemned prisoner's anxiety will cause their veins to constrict and make IV access more difficult, and the relatively more limited IV training for "the execution team at Holman" compared to "medical professionals who establish IV's regularly." *Id.*

Thus, Mr. Barber is likely to satisfy both prongs of his Eighth Amendment claim. The LI Protocol clearly poses a substantial risk of serious harm to Mr. Barber as Defendants have botched the last three executions and have made no meaningful efforts to address the problems underlying those attempts. Nitrogen hypoxia is a feasible and readily-implemented alternative method of execution that will significantly reduce this risk.

II. Mr. Barber Will Suffer Irreparable Injury if a Preliminary Injunction Is Not Granted.

Mr. Barber will suffer irreparable harm if the Court denies his request for a preliminary injunction. Defendants will attempt to carry out the same failed procedures on Mr. Barber that

resulted in the botched executions of Mr. James, Mr. Miller, and Mr. Smith. As a result, Mr. Barber will suffer a needlessly painful execution attempt in violation of his constitution rights all while a viable alternative exists. This injury is irreparable as it "cannot be undone through monetary remedies." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990); *see also Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016) ("In a capital case, the possibility of irreparable injury weighs heavily in the movant's favor, especially when his claim has some merit.") (cleaned up).

III. A Preliminary Injunction Will Not Substantially Harm Defendants or Be Adverse to the Public Interest.

Compared to the irreparable harm Mr. Barber will suffer if his request is denied, the harm to Defendants is slight. While Defendants have an interest in the execution of the State's judgments, any minimal delay resulting from granting relief sought here will have little adverse effect upon that interest. *See Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting) ("The state will get its man in the end. In contrast, if persons are put to death in a manner that is determined to [violate the Eighth Amendment], they suffer injury that can never be undone, and the Constitution suffers an injury that can be never be repaired.").

Additionally, Defendants and the public have an interest in conducting executions in a manner that does not violate Mr. Barber's constitutional rights. *See Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 702 (11th Cir. 2019) ("[N]either Alabama nor the public has any interest in carrying out an execution in a manner that violates . . . the laws of the United States."); *Arthur v. Myers*, No. 2:11-cv-438–WKW, 2015 WL 668007, at *5 (M.D. Ala. Feb. 17, 2015) (the State has an interest in "carrying out criminal judgments, particularly executions, in a constitutionally acceptable manner"). It is in the public's interest to ensure that Defendants—who oversee the

execution process in Alabama and who are charged with carrying out state and federal law—have complied with the protections afforded to Mr. Barber in the U.S. Constitution.

It is also in the public's interest to ensure that Defendants do not botch yet another execution attempt. Indeed, the public and press in Alabama have been crying out for improvements to the State's failed lethal injection procedures.[8] And the public cannot take solace in knowing that the State conducted an internal "investigation" following the trio of failed attempts last year. That short-lived investigation lasted only a few months, and resulted in a 1.5 page-long conclusory letter that vaguely announced certain developments without acknowledging that any problems ever existed. Among the States that practice the death penalty, Alabama stands alone in its decision to investigate itself, with no transparency or accountability regarding the findings of the investigation. Other States, when facing very similar circumstances, use independent third-party investigators, and explain the results of the investigations to the public in thorough reports.[9]

* * *

Defendants ask the Court and the public to trust that a largely unchanged LI Protocol will yield different results. They do so despite their well-established inability to carry out lethal injection executions in a constitutional manner. Rushing to execute Mr. Barber—when all evidence indicates another botched execution will result—violates his rights under the Eighth Amendment to be free from cruel and unusual punishment.

---

[8] *See* AL.com, *Why is Alabama so bad at executions? They do a terrible job, and they just hide it* (Oct. 4, 2022) https://www.al.com/news/2022/10/why-is-alabama-so-bad-at-executions-they-do-a-terrible-job-and-they-just-hide-it.html.

[9] For example, in April 2022, the State of Tennessee called off an execution by lethal injection. Following that announcement, the Governor of Tennessee halted all executions in the State, and appointed a former U.S. Attorney to lead an independent investigation. Eight months later, after having thoroughly investigated every execution performed in Tennessee since 2018, the investigative team published a 166-page report alongside over 500 pages of text messages, emails, and internal memos. The Governor then acted on the findings and implemented recommended lethal injection protocol changes. *See* Office of the Governor of Tennessee, Gov. Lee Announces Decisive Action to Ensure Proper Protocol at TDOC (Dec. 28, 2022), https://www.tn.gov/governor/news/2022/12/28/gov--lee-announces-decisive-action-toensure-proper-protocol-at-tdoc.html.

CONCLUSION

For all these reasons, the Court should grant Mr. Barber's motion for a preliminary injunction and enjoin Defendants from executing Mr. Barber by lethal injection.

Dated: June 5, 2023

Respectfully submitted,

/s/ *Paula W. Hinton*
Paula W. Hinton (AL Bar No. 5586N77P)
Winston & Strawn LLP
800 Capitol St., Suite 2400
Houston, TX 77002
Tel: (713) 651-2600
Fax: (713) 651-2700
Email: phinton@winston.com

Kelly Huggins (*pro hac vice*)
Benjamin Brunner (IL Bar No. 6312432) (*pro hac vice pending*)
Mara E. Klebaner (*pro hac vice*)
Stephen Spector (*pro hac vice*)
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
Tel: (312) 853-7000
Fax: (312) 853-7036
Email: khuggins@sidley.com
Email: bbrunner@sidley.com
Email: mklebaner@sidley.com
Email: sspector@sidley.com

Jeffrey T. Green (CA Bar No.: 141073, D.C. Bar No. 426747) (*pro hac vice forthcoming*)
Joshua Fougere (D.C. Bar No. 1000322, NY Bar No. 4805214) (*pro hac vice pending*)
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
Tel: (202) 736-8000
Fax: (202) 736-8711
Email: jgreen@sidley.com
Email: jfougere@sidley.com

Attorneys for Plaintiff James Barber

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2023, I served a copy of the foregoing via the Court's CM/ECF system, which shall cause the same to be electronically transmitted to all counsel of record.

/s/ *Paula W. Hinton*

Exhibit B

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

JAMES EDWARD BARBER, *Plaintiff*, v. KAY IVEY, Governor of the State of Alabama, JOHN Q. HAMM, Commissioner of the Alabama Department of Corrections, TERRY RAYBON, Warden, Holman Correctional Facility, STEVE MARSHALL, Attorney General of the State of Alabama, and JOHN DOES 1-3, *Defendants*.	Case No. 2:23-cv-00342-ECM **CAPITAL CASE – EXECUTION "TIME FRAME" TO BEGIN ON JULY 20, 2023**

AFFIDAVIT OF LISA ST. CHARLES

I declare, under penalty of perjury, the following:

1. My name is Lisa St. Charles. I reside in Chattanooga, Tennessee.

2. I am a semi-retired certified liver transplant coordinator and a certified surgical nurse.

3. I graduated from Purdue University School of Nursing in 1987. As part of my nursing training, I was trained in proper, clinically proven ways to start and maintain intravenous (IV) line access.

4. After graduating from nursing school, I spent five years working as an intensive care unit (ICU) nurse and liver transplant coordinator in the Indiana University hospital system. As part of my work as a surgical ICU nurse and liver transplant coordinator, I started and maintained multiple IV access points per patient. Many patients required both central and peripheral IV lines. Often the patients I treated were difficult "sticks" (i.e., it was difficult to successfully insert a needle into one of their veins)

because they had drug and/or alcohol abuse issues, were trauma victims, or were chemotherapy patients.

5. My husband is a physician, and we moved to Chattanooga, Tennessee, once he finished his residency in Indiana. I began working at CHI Memorial Hospital as a surgical nurse. In this role, I was responsible for assisting with all aspects of surgery, including pre-op, intra-op, and post-op. This work involved starting IVs and helping physicians place central lines prior to the beginning of a surgical procedure. I spent 15 years in this role.

6. I also completed two years of post-graduate work at the University of Tennessee at Chattanooga in their clinical nursing specialist program. I did not finish my rotation due to a family loss.

7. I spent the second half of my nursing career—a period of about 15 years—working for a plastic surgery practice in its outpatient operating room. In this role, I participated in pre-op, intra-op, and post-op procedures. Again, this work involved starting and maintaining IV access throughout the entire surgical process for each and every patient. Plastic surgery patients are often difficult "sticks" because of prior health issues.

8. Since last year, I have continued to practice nursing part-time in a plastic surgery office in Chattanooga. In this role I set IVs and assist with pre-op and post-op procedures.

9. In my 35-year long nursing career, establishing intravenous (IV) access in patients has been one of my primary responsibilities. I have set more IVs than I could possibly count, but the number likely exceeds 1,000 IV lines.

10. In my experience, it is usually easier to set IV lines in men than in women. This is because men's veins tend to be larger and easier to find.

11. Aside from instances where a patient has some kind of physical condition that compromises their veins—such as being a chemotherapy patient or an intravenous drug user—it should never take longer than 15 minutes to set an IV line. In my experience, if a nurse was unable to set an IV line in a patient after 15 minutes and three needle sticks,

that nurse would need to find a better experienced person to set the line, and/or employ enhanced equipment such as ultrasound.

12. A rule of thumb I am accustomed to amongst experienced nurses is that a nurse gets up to three attempts at setting an IV line, or three needle "sticks," before that nurse needs to get help from someone more experienced. Personally, after two unsuccessful needle sticks on the same patient, I get a physician to help.

13. On a normal healthy patient, each IV stick attempt could take up to five to ten minutes; after fifteen minutes and no IV access, a physician or more qualified person should take control.

14. When a patient's veins are significantly compromised, there are several ways to establish IV access efficiently and so that the patient experiences as little pain as possible. In a medical setting, nurses and physicians have access to equipment that can facilitate locating veins. Some techniques to find and access veins require the use of appropriate pain control medication.

15. For almost all patients, setting an IV line can be anything from an uncomfortable experience to a very painful one. The longer it takes to set an IV line, the greater discomfort and pain a patient experiences.

16. The skill and experience of the person setting an IV line is one of the most important factors in whether the patient will experience pain during the process.

17. I have never spent, nor have I ever seen or heard of any nurse who has spent, 60 minutes or longer attempting to set an IV line. Based on my many years as a practicing nurse, I imagine that a duration of 60 minutes or longer would cause significant undue pain and distress.

18. I have never encountered a situation where it was medically necessary to spend 60 minutes or longer establishing IV access.

19. I understand that in the past year, the Alabama Department of Corrections has spent more than 60 minutes

attempting to set IV lines during lethal injection execution attempts. In my professional and personal opinion, this amount of time spent setting IV lines creates unnecessary pain and suffering.

20. I am neither for nor against the death penalty. I understand both sides of the argument about whether we should have a death penalty. I simply want to provide my opinion about the process of setting IVs based on my 35 years of experience as a full-time nurse, who regularly set IVs as part of patient care.

Date: June 4, 2023

Lisa St. Charles, RN BSN

Lisa St. Charles, RN, BSN
Chattanooga, Tennessee

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

JAMES EDWARD BARBER,

Plaintiff,

v.

KAY IVEY, Governor of the State of Alabama, *et al.*,

Defendants.

Case No. 2:23-cv-00342-ECM

CAPITAL CASE –EXECUTION "TIME FRAME" BEGINS 12:00 A.M. ON JULY 20, 2023

REPLY IN SUPPORT OF MOTION FOR INJUNCTION TO ENJOIN DEFENDANTS FROM EXECUTING JAMES BARBER VIA LETHAL INJECTION

Defendants' opposition brief ("Opp.") is more notable for what it concedes than what it contends. Defendants do not dispute that the State of Alabama botched three executions in a row last year. Defendants also do not dispute that all three executions suffered from problems involving IV access. And Defendants concede that Defendant Ivey ordered a temporary halt to lethal injection executions in November 2022, that Defendants engaged in a short-lived internal "investigation" that resulted in a 1.5 page vague letter, and that nothing meaningful has been done to address the problems which plagued the last three executions.

Indeed, it is Defendants' position that their review of the three botched executions in 2022 led them to the following conclusion: "No deficiencies were found in Alabama's execution procedures." *See* Ex. E, Defs.' Resp. to Interrogatory No. 1. That is so despite the fact that Defendants recently ***made history as being the only state in the nation to botch three executions in a row***. In fact, Defendants recently admitted that as a result of their "top-to-bottom" "investigation" in which "everything [was] on the table," they only found it necessary to add a

single new piece of equipment: "Additional straps for securing an inmate on the execution gurney." *See id.* at Defs.' Resp. to Interrogatory No. 7. And while the State claims it has "vetted" the "outside medical professionals" serving on the IV Team, *see* Dkt. 1-5, Ex. E to Compl., Hamm's Letter to Ivey (Feb. 24, 2023), Mr. Barber's counsel believes they may have identified one of the individuals on the IV Team, and a preliminary criminal and civil background check shows that this IV Team member has been arrested multiple times for incidents involving fraud, has various other criminal citations on their record, and has civil judgments against them for debts owed.[1]

In light of the fact that Defendants claim to have found "no deficiencies" in their procedures, only added more straps to the execution gurney as their sole new piece of equipment, and apparently did not conduct background checks on the members of their IV Team, there is little question that Mr. Barber faces a substantial risk of serious harm from the same cruel punishment as those before him.

Defendants attempt to argue that Mr. Barber's claim is "speculative" and "untimely." Opp. at 2, 9. Neither argument has merit. Mr. Barber faces a substantial risk of serious harm because, as the Eleventh Circuit already recognized, the Alabama Department of Corrections ("ADOC") has demonstrated a recent "pattern of superadding pain through protracted efforts to establish IV access." *Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13781, 2022 WL 17069492, at *5 (11th Cir. Nov. 17, 2022), *cert. denied*, 143 S. Ct. 1188 (2023). As noted above, Defendants have not done anything to sufficiently address that pattern in advance of Mr. Barber's execution. Moreover, the Eleventh Circuit has twice ruled as a matter of law that nitrogen hypoxia is an alternative method of execution available in Alabama—rulings which the U.S. Supreme Court has declined

[1] If the Court would like to see supporting documentation, Plaintiff can submit the records *in camera*, or file them under seal.

to review. *See* Dkt. 25 ("Motion" or Mot.") at 14. Defendants themselves admit that nitrogen hypoxia is available, stating that any injunction should be "limited in scope so as to permit Barber's July 20, 2023, execution to be conducted by nitrogen hypoxia." Opp. at 16.

On this point specifically, ***Defendants have already tied themselves in knots***. After making the above representation to the Court on June 20, 2023, the Attorney General's office wrote in an email dated June 26, 2023 that the nitrogen hypoxia protocol "has not been finalized." *See* Ex. F, Email from L. Simpson. A representative for ADOC confirmed this point in an article published the same day: "The protocol for carrying out executions by [nitrogen hypoxia] is not yet complete." *See Alabama agencies disagree on using nitrogen hypoxia in James Barber execution; would be first in nation*, AL.com, June 26, 2023, https://www.al.com/news/2023/06/alabama-agencies-disagree-on-using-nitrogen-hypoxia-in-james-barber-execution-would-be-first-in-nation.html. The ADOC representative added: "Once the nitrogen hypoxia protocol is complete, ADOC personnel will need sufficient time to be thoroughly trained before an execution can be conducted using this method." *Id.* According to the article, the Attorney General's office "did not respond" when asked to explain why the court filing said that the July 20, 2023 execution could be carried out by nitrogen hypoxia. *Id.*

Defendants' inconsistencies aside, Mr. Barber's claim is also timely. As the Eleventh Circuit has made clear, ADOC's recent "pattern of superadding pain . . . caused [Mr. Barber's] claim to accrue." *Smith*, 2022 WL 17069492, at *5. Defendants make no effort to distinguish *Smith*, nor do they argue that it is wrongly decided. That is because they cannot—Mr. Barber's claim is timely as he filed it less than a year after the "pattern" emerged (Compl. ¶¶ 65, 74, 84), and shortly after Defendants moved to execute him after having previously withdrawn their then-

pending motion in the Alabama Supreme Court as a direct result of botching three execution attempts (*id.* ¶¶ 89, 92).

All of this points to the conclusion that Mr. Barber is likely to succeed on the merits. He will also suffer irreparable harm if a preliminary injunction is not granted, and his harm will be far greater than any short-term injury Defendants may face. Defendants also ignore the public's interest in ensuring that the State conducts executions in a constitutional manner and prevents another failed execution from occurring.

The Court should grant Mr. Barber's motion.

ARGUMENT

I. Mr. Barber Is Likely to Succeed on the Merits of His Claim.

A. *Mr. Barber's Eighth Amendment Claim Is Not "Speculative."*

Defendants' sole substantive argument is that Mr. Barber's claim is "speculative." *See, e.g.*, Opp. at 10-11 (arguing that Mr. Barber's reliance on three botched executions rather than "forty-five successful lethal injection executions" demonstrates the "tenuous and speculative nature" of his claim). This argument is not rooted in law or fact, and ignores the crisis currently confronting Alabama's lethal injection processes. The relevant question is not what happened decades ago, or even two years ago. Instead, the relevant question is whether ADOC has established in the past year a pattern of superadding pain by spending several hours inserting needles all over the bodies of condemned inmates in hopes of finding a vein. *See Smith*, 2022 WL 17069492, at *4-5 (noting "a pattern of difficulty by ADOC in achieving IV access with prolonged attempts"); *see also id.* ("[C]onsidering ADOC's inability to establish difficult IVs swiftly and successfully in the past, [Mr. Smith] will face superadded pain as the execution team attempts to gain IV access."). Following the botched executions of Mr. James, Mr. Miller, and Mr. Smith, and

in light of the fact that Defendants do not believe that there are any "deficiencies" in their execution procedures, the answer to that question is a resounding yes.

Mr. Barber's claim is even stronger than the method of execution claim recognized in *Smith*. At the time that *Smith* was decided, ADOC had botched two executions in a row. Immediately following *Smith*, ADOC botched the third. After rushing through a perfunctory investigation that resulted in no meaningful changes, Mr. Barber now stands next in line following this trio of historic failures. To suggest that Mr. Barber is speculating about a remote possibility—when in fact ***the last three executions*** have all failed the same way—is to ignore reality. For that reason, Defendants' reference to forty-five previous executions entirely misses the point. A patient undergoing a medical procedure is understandably concerned if the procedure was botched the last three times it was performed, regardless of how many times the procedure was successful in the past.

Similarly unavailing is Defendants' argument that Mr. Barber's claim cannot succeed because he does not allege "any facts" to show how he is physically alike to Mr. James, Mr. Miller, and Mr. Smith. Opp. at 10. This encapsulates how Defendants seek to shield themselves from accountability, by keeping secret any information about what specifically caused the IV Team to spend multiple hours trying and failing to start IV lines. Defendants ***will not say*** what it is about Mr. James's, Mr. Miller's, and Mr. Smith's bodies that presented such great challenges to their IV Team. Yet Defendants complain that Mr. Barber cannot identify which challenging physical characteristics he shares in common with the men whose executions they botched. Defendants apparently want Mr. Barber to play a terrible sort of guessing game, in which he must imagine what the IV Team was doing behind closed doors that made the IV process take such a painful and

prolonged course. This would require actual speculation, which Defendants are so keen on avoiding.

More to this point, following the botched executions of Mr. James, Mr. Miller, and Mr. Smith, Defendants' public comments and actions suggested that it was *not* the inmates' physical characteristics that stifled the executions. Indeed, after the execution of Mr. James, Defendant Hamm told reporters that "nothing out of the ordinary happened"[2]; after the execution of Mr. Miller, an ADOC representative told Judge Huffaker that "there just was not sufficient time to gain vein access,"[3] while Defendant Marshall quickly moved to set a new execution date for Mr. Miller[4]; and after the execution of Mr. Smith, Defendant Hamm held a press conference and made no mention of Mr. Smith's body and instead said that the IV team ran out of "time".[5]

Defendants now suggest in passing that ADOC was unable to start IV lines with Mr. Miller and Mr. Smith because of their weight, and that Mr. Barber's weight is not comparable. *See* Opp. at 10. As an initial matter, that is inconsistent with Defendants' comments and actions immediately after the botched executions. In any event, the ADOC website publicly lists[6]:

- Mr. James' height and weight as 5'9 and 193 pounds for a BMI of 28.5;
- Mr. Miller's height and weight as 5'11 and 351 pounds for a BMI of 48.9;
- Mr. Smith's height and weight as 5'10 and 207 pounds for a BMI of 29.7; and
- Mr. Barber's height and weight as 5'6 and 180 pounds for a BMI of 29

[2] *See Joe Nathan James' execution delayed more than three hours by IV issues, ADOC says*, Montgomery Advertiser, July 29, 2022, https://www.montgomeryadvertiser.com/story/news/2022/07/29/joe-nathan-james-execution-alabama-delayed-iv-issues/10187322002/.
[3] *See* Ex. G, *Miller v. Hamm, et al.*, No. 22-cv-506-RAH (M.D. Ala. Sept. 23, 2022), Dkt. 77 Hr'g Trans. at 19:16.
[4] *See Alabama requests new chance to execute Alan Miller, who survived first attempt*, Montgomery Advertiser, October 6, 2022, https://www.montgomeryadvertiser.com/story/news/2022/10/06/alabama-second-execution-date-alan-miller-failed-attempt/69543897007/.
[5] *See* Video of Defendant Hamm's press conference, available online at https://twitter.com/i/broadcasts/1YqJDorPpmwGV.
[6] *See* ADOC, Inmate Search, http://www.doc.state.al.us/inmatesearch; *see* NIH BMI Calculator, https://www.nhlbi.nih.gov/health/educational/lose_wt/BMI/bmicalc.htm

Mr. Barber's BMI is almost ***identical*** to Mr. Smith's and is ***higher*** than Mr. James's.[7] If weight is the reason that the IV Team has been unable to start IV lines, then Mr. Barber will almost certainly be subjected to the same torturous process as those before him.

Defendants also argue that while the IV Team "could possibly encounter similar difficulties" in Mr. Barber's execution as those last year, "possibly is not enough" to state a claim. *See* Opp. at 12. That is nonsense—Defendants themselves recognized in November 2022 that there is a problem with their execution procedures when Defendant Ivey called for a halt to all lethal injection executions, ordered Defendant Marshall to withdraw then-pending motions to set execution dates, and ordered Defendant Hamm to conduct a "top-to-bottom" review of the State's processes. That review was short, conducted in secrecy, and resulted in an unsettling conclusion: "No deficiencies were found in Alabama's execution procedures." *See* Ex. E, Defs.' Resp. to Interrogatory No. 1. Defendants refuse to release the records supporting that conclusion (perhaps out of concern for what they would show), and instead insist that nothing will go awry with Mr. Barber's execution. Yet recent history says otherwise.

Grasping for straws, Defendants cite a handful of cases, but none involve the facts alleged here. Indeed, *Nance v. Commissioner, Georgia Department of Corrections* involved a Georgia inmate who alleged—in the absence of ***any*** allegations that the Georgia Department of Corrections struggled to set IV lines in the past—that the IV Team would nonetheless have problems finding his veins. 59 F.4th 1149 (11th Cir. 2023). *Nance* would be relevant if ADOC had no issues starting IV lines for lethal injection executions. That is obviously not the case.

In *Bucklew v. Precythe*, an inmate argued that large tumors in his neck would obstruct his airway while lying flat on the execution gurney. 139 S. Ct. 1112, 1130-31 (2019). Mr. Barber's

[7] BMI is the same metric that the *Smith* court considered in its analysis of the issue. *See Smith*, 2022 WL 17069492, at *5.

situation bears no resemblance, given that his claim is based on the State's "pattern of superadding pain" through protracted efforts to establish IV access. *Smith*, 2022 WL 17069492, at *5. And, Defendants admit that they have not made any meaningful changes to fix that problem. Opp. at 6.

Another case, *Ferguson v. Warden, Florida State Prison*, involved a challenge to the use of certain drugs in Florida's three-drug cocktail. 493 F. App'x 22, 24 (11th Cir. 2012). The Eleventh Circuit found the challenge "speculati[ve]" because the plaintiff did not explain how the drugs subjected him to a substantial risk of serious harm. *Id.* at 25; *see also Pardo v. Palmer*, 500 F. App'x 901, 903 (11th Cir. 2012) (a "nearly identical" case to *Ferguson*). In contrast, Mr. Barber has identified the IV Team's repeated failures in setting IV lines, described how those failures "superadd pain" to the execution process, submitted affidavits from expert witnesses explaining that IV access should generally take no longer than 15 minutes and never longer than an hour, and explained that the level of pain increases with each successive attempt to find a vein. *See, e.g.*, Compl. ¶¶ 2-4, 6, 60-88, 103-04; Ex. B to Mot. ¶¶ 11, 15, 17 (Lisa St. Charles Affidavit); Ex. H ¶¶ 16-20 (Tina Roth Affidavit).

Similarly unavailing for Defendants is *Jackson v. Danberg*, an out-of-circuit decision involving a class action brought by Delaware death row inmates, who argued that Delaware's execution team was likely to disobey or violate the State's new execution protocol, creating an intolerable risk of harm to the condemned man. 594 F.3d 210, 214-15 (3d Cir. 2010). The Third Circuit noted, "[t]here is perhaps always an ethereal risk that a rogue execution team could deviate from a written protocol and depart on a whimsical frolic." *Id.* at 228 n.18. *Jackson* is counterfactual to this case. Mr. Barber has shown that he faces a substantial risk of serious harm from the IV Team ***continuing to do what they have been doing for the past year***—gratuitously subjecting inmates to pain by puncturing their bodies with needles over the course of several hours.

The last case Defendants cite in support of their "speculation" argument is *Wackerly v. Jones*, 398 F. App'x 360 (10th Cir. 2010). That out-of-circuit case is no more applicable than the others. Indeed, the Tenth Circuit held that the plaintiff had no "particular basis for questioning" the integrity of lethal injection drugs used by the State of Oklahoma. *Id.* at 363. No similar allegations are asserted here.

Lost in Defendants' efforts to rely on inapposite cases from Oklahoma, Georgia, Florida, and Delaware is the grim fact that Alabama stands alone as the sole state in the county to botch three executions in the past year. Defendants have not cited—and cannot cite—a single case that refutes Mr. Barber's argument that he faces a substantial risk of serious harm. And they do not contest (because they cannot) that nitrogen hypoxia is a method of execution that would significantly reduce the risk of pain and suffering posed by the IV Team's repeated failures. *See Smith*, 2022 WL 17069492, at *5 (finding that Mr. Smith had adequately alleged that "nitrogen hypoxia will significant reduce his pain" compared to lethal injection).

Mr. Barber is likely to satisfy both prongs of his Eighth Amendment claim. The Court should grant the injunction.

B. *Mr. Barber's Claim Is Timely.*

Perhaps recognizing that Mr. Barber's claim is likely to succeed on the merits, Defendants dedicate much of their brief to arguing that Mr. Barber's claim is time-barred. Opp. at 2-8. Defendants are wrong. Mr. Barber's motion makes clear that his claim is based on the State's recent "pattern of superadding pain through protracted efforts to establish IV access." Mot. at 1 (citing *Smith*, 2022 WL 17069492, at *5); *see also, e.g.*, Compl. ¶¶ 60-64, 100-05. This pattern arose following the botched executions of Mr. James in July 2022, Mr. Miller in September 2022, and Mr. Smith in November 2022. *See* Compl. ¶¶ 65-88. These "execution attempts . . . caused [Mr. Barber's] claim to accrue." *Smith*, 2022 WL 17069492, at *5.

Defendants ignore *Smith* entirely. *See* Opp. at 2-9. That is likely because the *Smith* court already considered Defendants' argument and rejected it. *Compare* Opp. at 2-9, *with Smith v. Comm'r*, No. 22-13781, Dkt. 12 at 27-29 (11th Cir. Nov. 14, 2022) (Appellees' Brief) (Defendants arguing on appeal that Mr. Smith's claim was time-barred because he did not allege a substantial change to the lethal injection protocol). Indeed, in finding Defendants' argument unpersuasive, the Eleventh Circuit explained that Mr. Smith's claim accrued based on the State's "pattern of superadding pain" in the executions of Mr. James and Mr. Miller. *Smith*, 2022 WL 17069492, at *5. That holding is consistent with the well-recognized principle that limitation periods begin to run when "the facts which would support a cause of action should have been apparent to any person with a reasonably prudent regard for his rights." *McNair v. Allen*, 515 F.3d 1168, 1177 (11th Cir. 2008). *Smith* proved prescient as the State later botched Smith's execution by once again failing to obtain IV access.

Aside from being foreclosed by *Smith*, another problem with Defendants' argument is that it misunderstands Mr. Barber's claim. His claim is not based on a particular change to the State's protocol. After all, following the historic failures of the previous executions, Defendants still believe there are "[n]o deficiencies" in their "execution procedures." *See* Ex. E, Defs.' Resp. to Interrogatory No. 1. Mr. Barber's claim is based instead on the fact that the last three executions all involved the IV team spending hours unsuccessfully puncturing inmates with needles all over their bodies. Compl. ¶¶ 2-4, 6, 60-88, 103-04. This fact is not only ***undisputed*** by Defendants, but they also do not put forth any evidence to show (or suggest) that the underlying problems with those executions have been addressed. To the contrary, Defendants ***admit*** that they have done nothing meaningful to ensure that Mr. Barber does not suffer the same grisly fate as those before

him. Opp. at 6. Mr. Barber filed his complaint less than a year after the botched executions and shortly after the State moved for his execution. *See* Compl. ¶¶ 48, 65, 74, 84. His claim is timely.

Defendants' reliance on *Gissendaner v. Commissioner, Georgia Department of Corrections*, 779 F.3d 1275 (11th Cir. 2015) is misplaced. *See* Opp. at 3-5. That case concerns an Eighth Amendment claim based on "factual conditions that have not changed in the past twenty-four months" as well as alleged changes to Georgia's protocol. *Gissendaner*, 779 F.3d at 1281-82. Mr. Barber's claim is based on Alabama's recent, repeated, and well-documented failures to establish IV access in the past year. That important distinction makes the "substantial change in protocol" principle inapplicable. Indeed, unlike *Gissendaner*, whose claim was not based on "any of the recent executions [Alabama] has carried out," *id.*, Mr. Barber's complaint is based on exactly that—the State superadding pain in the botched executions of Mr. James, Mr. Miller, and Mr. Smith, *see Smith*, 2022 WL 17069492, at *5.

Defendants' citation to *Boyd v. Warden, Holman Correctional Facility*, 856 F.3d 853 (11th Cir. 2017) fares no better. Similar to *Gissendaner*, *Boyd* involved an Eighth Amendment claim based on "seemingly longstanding facets of the ADOC lethal injection protocol." *Id.* at 874. By contrast, the State's "pattern of superadding pain" emerged late last year, and Mr. Barber brought his claim soon after Defendants moved to execute him by the same failed method.

For that reason, Defendants' argument that Mr. Barber could have brought his claim in April 2019 makes no sense. *See* Opp. at 8-9. In April of 2019, Defendants had not yet engaged in a pattern of botching the process of setting IV lines as they were the midst of "forty-five successful lethal injection executions" (Opp. at 11), so Mr. Barber could not have known that he faced a substantial risk of harm at that time. His claim had therefore not accrued. *See Smith*, 2022 WL 17069492, at *5. Defendants' reference to the availability of nitrogen hypoxia in April 2019 does

not change that conclusion. Opp. at 8-9. Defendants do not cite a single case stating that an Eighth Amendment claim accrues when an alternative method of execution becomes available. That is because no such case exists.

Instead, Defendants question whether the Eleventh Circuit actually concluded in *Price v. Commissioner, Department of Corrections*, 920 F.3d 1317 (11th Cir. 2019), that nitrogen hypoxia is an alternative method of execution. *See* Opp. at 8-9. That argument is frivolous: the Eleventh Circuit re-affirmed in *Smith* what it previously concluded in *Price*—that "nitrogen hypoxia is an available alternative method for method-of-execution claims." *Smith*, 2022 WL 17069492, at *5 (citing *Price*, 920 F.3d at 1328). And Defendants offer no explanation for why a lone dissenting opinion from a denial of certiorari constitutes "clear Supreme Court precedent." Opp. at 8. It does not. *See Singleton v. Comm'r of Internal Revenue*, 439 U.S. 940, 944-45 (1978) (Stevens, J.) (explaining that dissents from denial of certiorari are "the purest form of dicta").

Because Mr. Barber's claim is timely and he is likely to succeed on the merits, the Court should grant the injunction.

II. Mr. Barber Will Suffer Irreparable Injury If a Preliminary Injunction Is Not Granted.

Defendants do not dispute that Mr. Barber will suffer irreparable harm without a preliminary injunction. In fact, Defendants do not even mention the irreparable injury prong in their brief. That is because they cannot offer any serious arguments on this point—Mr. Barber will unquestionably suffer irreparable harm if Defendants are not enjoined from executing him by lethal injection before this Court can resolve the merits of his claim. *See* Mot. at 14-15. Mr. Barber stands to suffer a cruel execution when a viable alternative exists. This factor counsels in favor of granting the injunction.

III. A Preliminary Injunction Will Not Substantially Harm Defendants or Be Adverse to the Public Interest.

Defendants also do not dispute that: (i) the harm to them is slight compared to the irreversible harm that Mr. Barber will suffer if his injunction is denied, and (ii) the public has an interest in conducting executions in a manner that does not violate Mr. Barber's constitutional rights or result in another botched attempt. *See* Mot. at 15-16. On the first point specifically, Defendants seemingly state that nitrogen hypoxia is ready to be used for Mr. Barber's scheduled execution, Opp. at 16, so there presumably would be no delay in carrying out the execution. On the second point, the public's interest is heightened here given the trio of recent executions that set off a firestorm of public criticism, and in light of the State's short-lived "investigation" that lasted only a few short months and resulted in no meaningful changes.

Indeed, the very limited document production that Defendants have made in this case to date is replete with examples of members of the Alabama public pleading with Governor Ivey to take seriously the issues ADOC is having with IV access, and urging her and ADOC to conduct a fulsome and transparent investigation. *See, e.g.,* Ex. I at DOC_000433-34 (Dec. 6, 2022 letter from the *Montgomery Advertiser* to Governor Ivey, stating: "Alabama appears unable to perform the most serious and permanent form of government action—the taking of human life—in a manner that protects the citizens of this country in accordance with their Constitutional rights to be free from cruel and unusual punishment . . . I humbly request on behalf of the *Advertiser* that the top to bottom review of the execution process be done in the open and not hidden behind layers of bureaucracy"); Ex. J at DOC_000071 (Feb. 23, 2023 letter from coalition of attorneys and policy experts to Governor Ivey, urging Ivey and ADOC to resolve the following questions in their investigation: "What is the selection process (is it merit- or skill-based) for execution team members? What are the qualifications of the people in charge of . . . setting the I.V.s for the

execution?"); Ex. K at DOC_000422-23 (March 7, 2023 letter from the *Montgomery Advertiser* to Defendant Ivey's office stating that Defendant Hamm's 1.5 page vague letter "leaves the *Advertiser* and the public in general with few answers regarding the top to bottom review of such an important issue").

But evidence suggests ADOC's investigation was neither robust nor conducted by experts in the field of IV access. As just one example, on December 31, 2022, Governor Ivey received an unsolicited letter from a person in Ohio titled "IDEA CONCERNING DEATH ROW INMATES." *See* Ex. L at DOC_000020. In this letter, the individual, who has no professional background in IV access and is a lawyer by practice, recommends applying a warm compress to the forearm and suggests that ADOC's IV Team use this strategy for better luck starting IV lines in lethal injection executions. *See id*. This letter was elevated to the highest officials at the Office of the Governor and the Office of the Attorney General, and was sent directly to Defendant Hamm, the Commissioner of ADOC. *See* Ex. M at DOC_000232. It is unclear why Defendant Hamm would need the unsolicited advice of an attorney in Ohio about a medical procedure. Defendants' decision to elevate the letter calls into question whether government officials in Alabama take seriously their responsibility to uphold the rights afforded under the Constitution. The Court should grant the injunction.

CONCLUSION

For all these reasons, the Court should grant Mr. Barber's motion for a preliminary injunction, enjoin Defendants from executing Mr. Barber by lethal injection, and require them to execute him by the available alternative of nitrogen hypoxia.

Dated: June 27, 2023

Respectfully submitted,

/s/ *Paula W. Hinton*

Paula W. Hinton (AL Bar No. 5586N77P)
Winston & Strawn LLP
800 Capitol St., Suite 2400
Houston, TX 77002
Tel: (713) 651-2600
Fax: (713) 651-2700
Email: phinton@winston.com

Kelly Huggins (*pro hac vice*)
Benjamin Brunner (*pro hac vice*)
Mara E. Klebaner (*pro hac vice*)
Stephen Spector (*pro hac vice*)
Christopher D. Barnes (*pro hac vice*)
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
Tel: (312) 853-7000
Fax: (312) 853-7036
Email: khuggins@sidley.com
Email: bbrunner@sidley.com
Email: mklebaner@sidley.com
Email: sspector@sidley.com
Email: cbarnes@sidley.com

Jeffrey T. Green (*pro hac vice*)
Joshua Fougere (*pro hac vice*)
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
Tel: (202) 736-8000
Fax: (202) 736-8711
Email: jgreen@sidley.com
Email: jfougere@sidley.com

Attorneys for Plaintiff James Barber

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2023, I served a copy of the foregoing via the Court's CM/ECF system, which shall cause the same to be electronically transmitted to all counsel of record.

/s/ *Paula W. Hinton*
Paula Hinton

Exhibit E

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

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

Responses to Plaintiff James Barber's First Set of Interrogatories by Defendants Ivey, Hamm, Raybon, and Does 1–3

Defendants Ivey, Hamm, Raybon, and John Does 1–3, by and through their undersigned counsel, respond to Plaintiff James Barber's first set of interrogatories as follows:

1. Identify the deficiencies found during the investigation into the State of Alabama's execution procedures.

Defendants object to this interrogatory because it calls for information subject to the deliberative process privilege, the official information privilege, and the attorney-client and work-product privileges.

Defendant Ivey further objects to this interrogatory because it calls for information subject to the chief executive communications privilege. Defendant Ivey has no independent knowledge of the information sought.

Without waiving this or any other objections, Defendants respond as follows: No deficiencies were found in Alabama's execution procedures.

2. Identify the current medical licenses, certifications, or degrees of the individuals responsible for setting the two IV lines required for a lethal injection execution in Alabama.

Defendants object to this interrogatory because it calls for information subject to the deliberative process privilege, the official information privilege, and the attorney-client and work-product privileges.

Defendant Ivey further objects to this interrogatory because it calls for information subject to the chief executive communications privilege. Defendant Ivey has no independent knowledge of the information sought.

Without waiving this or any other objections, Defendants respond as follows: As shown in Defendants' responses to Plaintiff's First Request for Production, the individuals responsible for setting IV lines during Mr. Barber's execution will be licensed medical personnel.

3. Identify whether John Does 1–3 were involved in setting the IV lines during the executions or execution attempts of any of the following individuals: Joe Nathan James, Jr., Alan Eugene Miller, and Kenneth Smith.

Defendants object to this interrogatory because it calls for information subject to the deliberative process privilege, the official information privilege, and the attorney-client and work-product privileges.

Defendant Ivey further objects to this interrogatory because it calls for information subject to the chief executive communications privilege. Defendant Ivey has no independent knowledge of the information sought.

Without waiving this or any other objections, Defendants respond as follows: No person who will be responsible for setting IV lines during Mr. Barber's execution participated in any previous execution.

4. Identify and describe the vetting process that Defendants employ in hiring or retaining any person responsible for establishing IV access during a lethal injection execution in the State of Alabama.

Defendants object to this interrogatory because the information sought is not relevant to Barber's claim that he will be executed in an unconstitutional manner. Additionally, Defendants object to this interrogatory because it calls for information subject to the deliberative process privilege, the executive privilege, the official information privilege, and the attorney-client and work-product privileges.

Defendant Ivey further objects to this interrogatory because it calls for information subject to the chief executive communications privilege, and the attorney-client and work-product privileges. Defendant Ivey has no independent knowledge of the information sought.

5. Identify the names of the "corrections personnel responsible for conducting executions in other states" that Defendant Hamm referenced in his letter to Defendant Ivey dated February 24, 2023.

Defendants object to this interrogatory because the information sought is not relevant to Barber's claim that he will be executed in an unconstitutional manner. Additionally, Defendants object to any request seeking identifying information regarding those persons who participate in lawful executions in the State of Alabama or in any other state. The courts have recognized that Alabama has a legitimate interest in protecting the identities of "people involved in the execution of death sentences.[]" *Hamm v. Dunn*, 2:17-cv-02083, 2018 WL 2431340, at *7 (N.D. Ala. May 30, 2018), *aff'd sub nom. Comm'r, Ala. Dep't of Corr. v. Advance Loc. Media, LLC*, 918 F.3d 1161 (11th Cir. 2019). Indeed, as the Eleventh Circuit has recognized, threats and intimidation of identified suppliers of goods necessary for conducting lawful executions have risen to the level of bomb threats. *Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1332 (11th Cir.), *cert. denied sub nom. Jordan v. Ga. Dep't of Corr.*, 141 S. Ct. 251 (2020) (quoting threat that "it only takes one fanatic with a truckload of fertilizer to make a real dent in business as usual").

Defendants object to this interrogatory because it calls for information subject to the deliberative process privilege, the executive privilege, the official information privilege, and the attorney-client and work-product privileges.

Defendant Ivey further objects to this interrogatory because it calls for information subject to the chief executive communications privilege. Defendant Ivey has no independent knowledge of the information sought.

6. Identify the "execution procedures from multiple states" that Defendant Hamm referenced in his letter to Defendant Ivey dated February 24, 2023.

Defendants object to any request seeking identifying information regarding those persons who participate in lawful executions in the State of Alabama or in any other state. The courts have recognized that Alabama has a legitimate interest in protecting the identities of "people involved in the execution of death sentences.[]" *Hamm v. Dunn*, 2:17-cv-02083, 2018 WL 2431340, at *7 (N.D. Ala. May 30, 2018), *aff'd sub nom. Comm'r, Ala. Dep't of Corr. v. Advance Loc. Media, LLC*, 918 F.3d 1161 (11th Cir. 2019). Indeed, as the Eleventh Circuit has recognized, threats and intimidation of identified suppliers of goods necessary for conducting lawful executions have risen to the level of bomb threats. *Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1332 (11th Cir.), *cert. denied sub nom. Jordan v. Ga. Dep't of Corr.*, 141 S. Ct. 251 (2020) (quoting threat that "it only takes one fanatic with a truckload of fertilizer to make a real dent in business as usual").

Defendants object to this interrogatory because the information sought is not relevant to Barber's claim that he will be executed in an unconstitutional manner. Additionally, Defendants object to this interrogatory because it calls for information subject to the deliberative process privilege, the executive privilege, the official information privilege, and the attorney-client and work-product privileges.

Defendant Ivey further objects to this interrogatory because it calls for information subject to the chief executive communications privilege. Defendant Ivey has no independent knowledge of the information sought.

7. Identify the "new equipment that is now available for use" that Defendant Hamm referenced in his letter to Defendant Ivey dated February 24, 2023.

Defendants object to any request for the identity of suppliers or sellers of equipment or supplies used in executions. Further, the courts have recognized that Alabama has a legitimate interest in protecting the identities of "people involved in the execution of death sentences.[]" *Hamm v. Dunn*, 2:17-cv-02083, 2018 WL 2431340, at *7 (N.D. Ala. May 30, 2018), *aff'd sub nom. Comm'r, Ala. Dep't of Corr. v. Advance Loc. Media, LLC*, 918 F.3d 1161 (11th Cir. 2019). Indeed, as the Eleventh Circuit has recognized, threats and intimidation of identified suppliers of goods necessary for conducting lawful executions have risen to the level of bomb threats. *Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1332 (11th Cir.), *cert. denied sub nom. Jordan v. Ga. Dep't of Corr.*, 141 S. Ct. 251 (2020)

(quoting threat that "it only takes one fanatic with a truckload of fertilizer to make a real dent in business as usual").

Defendants object to this interrogatory because it calls for information subject to the deliberative process privilege, the official information privilege, and the attorney-client and work-product privileges.

Defendant Ivey further objects to this interrogatory because it calls for information subject to the chief executive communications privilege. Defendant Ivey has no independent knowledge of the information sought.

Without waiving this or any other objections, Defendants respond as follows: Additional straps for securing an inmate on the execution gurney are available for use.

8. Identify the results of the "multiple rehearsals of our execution process" that Defendant Hamm referenced in his letter to Defendant Ivey dated February 24, 2023.

Defendants object to this interrogatory because it calls for information subject to the deliberative process privilege, the executive privilege, the official information privilege, and the attorney-client and work-product privileges.

Defendant Ivey further objects to this interrogatory because it calls for information subject to the chief executive communications privilege. Defendant Ivey has no independent knowledge of the information sought.

Without waiving these or any other privilege, Defendants respond as follows: Rehearsals for executions following Alabama's lethal injection protocol were carried out.

9. Identify what the "standard procedure" entails for setting IV access, as referenced in Annex C of the State of Alabama's lethal injection protocol.

Defendants object to this interrogatory because it calls for information subject to the deliberative process privilege, the executive privilege, the official information privilege, and the attorney-client and work-product privileges.

Defendant Ivey further objects to this interrogatory because it calls for information subject to the chief executive communications privilege. Defendant Ivey has no independent knowledge of the information sought.

Without waiving these or any other privilege, Defendants respond as follows: The "standard procedure" includes any of the ordinary procedures used by trained medical personnel to obtain IV access.

10. Identify the person or persons at ADOC who oversaw the investigation of the State of Alabama's execution process.

As directed by Defendant Ivey, Defendant Hamm oversaw the "top-to-bottom" review described in the Hamm and Ivey letters.

11. Identify the circumstances during which attempts to carry out an inmate's sentence of death within the "time frame" set by Defendant Ivey would be called off, and identify the individual or individuals responsible for making the decision to call off the execution in those circumstances.

Defendants object to this interrogatory because it calls for information subject to the deliberative process privilege, the executive privilege, the official information privilege, and the attorney-client and work-product privileges.

Defendant Ivey further objects to this interrogatory because it calls for information subject to the chief executive communications privilege. Defendant Ivey has no independent knowledge of the information sought.

Without waiving these or any other privilege, Defendants respond as follows: Defendant Hamm is responsible for any decision to cease preparations for an execution.

FOR DEFENDANTS IVEY, HAMM, RAYBON, and DOES 1–3:

STEVE MARSHALL
ALABAMA ATTORNEY GENERAL

s/ Richard D. Anderson
Richard D. Anderson
Assistant Attorney General

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Richard.Anderson@AlabamaAG.gov

June 23, 2023

Exhibit G

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

ALAN EUGENE MILLER,

Plaintiff,

Vs. CASE NO.: 2:22cv506-RAH

JOHN Q. HAMM, et al.,

Defendants.

* * * * * * * * * * * * * * * * *

TELEPHONE CONFERENCE

* * * * * * * * * * * * * * * * *

BEFORE THE HONORABLE R. AUSTIN HUFFAKER, JR., UNITED STATES DISTRICT JUDGE, at Montgomery, Alabama, on Friday, September 23, 2022, commencing at 10:32 a.m.

APPEARANCES

FOR THE PLAINTIFF: Ms. Mara Klebaner
Mr. Stephen Spector
Mr. Daniel J. Neppl
Attorneys at Law
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603

Mr. James Bradley Peterson
Attorney at Law
BRADLEY ARANT BOULT CUMMINGS
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35304

APPEARANCES, Continued:

FOR THE DEFENDANTS: Ms. Beth Jackson Hughes
Mr. Richard Dearman Anderson
Attorneys at Law
Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130

APPEARING ON BEHALF OF ADOC: Ms. Mary-Coleman Roberts
Attorney at Law
Alabama Department of Corrections
301 South Ripley Street
Montgomery, Alabama

* * * * * * * * * * * * * * *

Proceedings reported stenographically;

transcript produced by computer

* * * * * * * * * * * * * * *

(The following proceedings were heard before the Honorable R. Austin Huffaker, Jr., United States District Judge, at Montgomery, Alabama, on Friday, September 23, 2022, commencing at 10:32 a.m.:)

(Call to Order of the Court)

THE COURT: Good morning. I wanted to touch base with you all on this motion that had been filed this morning, emergency motion for access to preserve evidence. I don't know who's going to speak for the plaintiff on this, but tell me what exactly you want, what you need. And the question I had, it vaguely references equipment, so give me some detail on what it is you propose to do.

MS. KLEBANER: Good morning, Your Honor. This is Mara

Klebaner from Sidley Austin on behalf of Alan Miller.

What we would like to do, we would like to go into Holman, meet with Mr. Miller, take photos and video, which I can do pretty easy on my iPhone, as well as use evidence labels, like stickers, for comparison to the size of the injuries on his body, so place an evidence sticker on his body and take a picture of his body with the sticker on it.

We would like to have a medical doctor in to examine Mr. Miller's injuries. And then we also would ask the Court to enter an order stating that Holman, ADOC, and all defendants preserve all evidence from Mr. Miller's failed execution last night. And that would include physical evidence from the execution chamber, so things like empty syringes, swabs, things of that nature. And of course, the preservation of evidence like notes, contemporaneous documents, voice mails, texts, and emails. So that's the short version of what we're hoping to do in pretty short order.

THE COURT: Okay. As it concerns -- let's break that down a little bit.

The number of people that you are talking about, one would be yourself?

MS. KLEBANER: That's correct.

THE COURT: You said a medical doctor. Do you already have somebody in mind?

MS. KLEBANER: This is happening pretty quickly, so we

are looking into that right now. We are trying to find someone local who could get here within the next 24 hours or so.

THE COURT: And you want to bring your iPhone in so that you can take videos and photographs, and I would assume probably a statement of some sort?

MS. KLEBANER: That's correct.

THE COURT: The evidence that you want preserved is -- I've got syringes, swabs, any notes that may have been taken, emails. Any other categories of things that you can think of?

MS. KLEBANER: I would just say broadly we would like all physical evidence of the execution. It's hard for us to know what all that would entail because I --

I was present last night. And I was not allowed, obviously, to see Mr. Miller or anything that was happening in the execution chamber. The curtain was drawn the entire time. So I can't specify what exactly they had in there, but any sort of instruments that they used to effectuate the failed execution or any aspects of the process of execution, we would ask be retained, obviously, as well as all communications around what happened last night.

THE COURT: Well, that could be -- that's very broad. I don't know whether there was a cutdown procedure last night or not, but that could involve scalpels; that could involve more than just a syringe and a swab. The leftover -- presumably leftover IV lines, all kinds of things. So are you talking

about preserving those materials as well?

MS. KLEBANER: Yes, Your Honor.

THE COURT: Okay. Let me hear from -- I know I've got attorneys -- AG Office's attorneys and then somebody from DOC. Let me hear from your side.

MS. HUGHES: Judge, this is Beth Hughes. I just want to first say we attempted to work this out this morning, but we were not able to do that.

I don't -- I don't -- I think DOC attorneys would be able to better let you know what physical evidence does or does not exist. I will tell you that a cutdown is not part of the DOC protocol, so that would not have been attempted. That is not part of our protocol.

I think the DOC objects to a cell phone, though they would agree to allow a camera in there. We attempted to allow Ms. Klebaner to come in with her cell phone on airplane mode as long as she wouldn't -- she would just take still pictures. And no videos. They would object to any videos or audios. They can certainly get Mr. Miller's statement. And we would also need to know the identity of the doctor and a list of people other than the doctor and Ms. Klebaner.

This will have to take place in the warden's conference room, which is not a large room, so it's limited. And if there are any shackles that have to be removed, it will have to be correctional officers present for security reasons.

They have to -- you know, security -- they don't allow cell phones in the prison as a matter of course. And they can explain why. I will let my colleagues from DOC speak to those issues.

MR. ANDERSON: Your Honor, this is Rich Anderson. Just a note I wanted to add about preservation of evidence, the request for that.

I do not know, but a lot of what would have been used last night would essentially be medical waste. We talked about swabs, we talked about needle covers, things like that, that could very well already have been disposed of in a Sharps container that would be commingled with other things.

I just want -- I want to prepare the Court for the very distinct possibility that medical waste was treated like medical waste, and it's no longer available. I don't know that, but this -- from common knowledge of how medical refuse, medical waste, is treated in the ordinary business, it is entirely possible this stuff has been disposed of.

THE COURT: Let me hear from the DOC lawyers.

MR. ROBERTS: Your Honor, this is Mary-Coleman Roberts from the Alabama Department of Corrections. With regard to the preservation order and the medical equipment, it is my understanding that that was placed in a biohazard container last night. And I am unaware -- I was not in the back last night, I was up in the front admin part of the facility, and so I would

imagine that has been disposed of by this morning in the proper biohazard containers.

MS. KLEBANER: Your Honor, if I could briefly respond to that.

THE COURT: Go ahead, Ms. Klebaner.

MS. KLEBANER: Klebaner. Sorry, I know it's an unusual last name.

So to the point that whatever medical equipment was dealt with last night would have been disposed of in the proper course, I think it really ignores the reality of what was happening last night on the ground. And I can speak to that a bit if you would like.

But basically from the moment I was brought onto the premises of Holman, I was asking for more information about what was happening from the guards; from the lawyers who were in the witness chamber. And obviously, as soon as the execution was called off at the last moment, everyone on Mr. Miller's legal team was making an effort to get any information from ADOC about what happened. And so the idea that they wouldn't have been on notice that there had been a problem -- obviously, the execution hadn't gone through. All of Mr. Miller's lawyers were calling, asking for an explanation and trying to understand what's happened. And that they would have destroyed the evidence in spite of that is very alarming.

THE COURT: Well, Ms. Klebaner, let me just tell you

this. I want you to put together an order, a draft order. Email it to my chambers. I will take a look at it. Mr. Anderson and Ms. -- I've got it noted as Roberts. As soon as we hang up, you both can make phone calls to find out what happened to the medical waste bag, so to speak. And if it is still there or somewhere where it can be retrieved, you can undertake efforts and instructions to make sure it is preserved until I've told you otherwise.

MS. HUGHES: Judge, this is Beth Hughes again. DOC has a lot of visitors coming in this weekend, and I just -- I understand your order can be whatever it is, and they will comply, but they would like -- they have seven to nine Saturday morning and Sunday morning, which would be the best time for the Department of Corrections and for the correctional officers and the staff that they have on the weekends for these visits to happen.

THE COURT: So are you saying you cannot make him available today if the lawyers and the medical doctor --

MS. HUGHES: No, we will, but they have people coming in -- they have a lot of visitors come in -- Judge, they'll do whatever you order, but we had offered from -- up until 12 today, because then they start visitation after 12, and I understand that puts them on a short time frame. But they also have availability -- their preference would be from seven to nine Saturday and seven to nine Sunday because of visitors and

their staffing shortage on the weekends.

THE COURT: Okay. Let's talk about -- first let's talk about the telephone or the video needs.

Ms. Hughes, as I understand, was there an agreement or at least an offer that she could bring her iPhone in as long as it was on airplane mode?

MS. HUGHES: And she did not make any audio or video recordings using the iPhone.

THE COURT: What's the problem or concern with audio or video recordings?

MS. HUGHES: I'll let Ms. Coleman -- Ms. Roberts answer that.

MS. ROBERTS: Yes, sir. The issue with the video recordings is that it's not provided for in our AR. AR 303, which is our visitation reg. It doesn't address video camera footage.

An issue is physically in any of our -- any time we've ever let anyone in with a camera --

(Reporter interrupts for clarification.)

MS. ROBERTS: In the past whenever we've let anyone in with a camera, we have allowed either an ADOC official, whether it's the warden or an attorney or the warden's designee, to look at the photos prior to the individual leaving the facility to make sure there is no security risks to the facility that was photographed.

And our fear is that if we let in a video camera, there's no ability to -- while we could go through the footage, there is no real way to delete footage that would present a security concern.

THE COURT: Let me stop you right there. Where would you allow them to be photographed? Is it the warden's office? Is there a lunchroom? Is there a visitation room? Where would be the location for that?

MS. ROBERTS: Well, Your Honor, it would depend on the day, but assuming it is today or tomorrow, it would likely be in the warden's conference room, which is a -- I mean, you can clearly see, you know, the fence and the perimeter -- part of the perimeter fence from outside the windows. And the tower.

So there are some security risks. Of course, we could close the blinds, but, you know, there are some security risks in this room. But we don't have a lot of options for visitation.

THE COURT: There is concern that the video would capture some sort of view going outside the windows into the yard where you could, in fact, see the guard towers and the security fence and so forth?

MS. ROBERTS: Yes, sir. Absolutely.

I mean, there is, you know, documentation on the walls of the facility, schedules and names, doors' locking mechanisms, things of that nature. I mean, as you can imagine in a prison,

all of that would be a concern for us if it got out.

THE COURT: Well, is there not -- can you not just bring him into the warden's office, close the door behind you, and then have him sit in a chair with the door behind him, and then that way you don't have any background that would be depicted in -- whether it's a photograph or a video?

MS. ROBERTS: I don't know if we could do the warden's office, but, yes, sir. If you so order, we will find a room that does not present the same security risks.

THE COURT: And from the -- is it acceptable that if Ms. Klebaner brings her phone in, has it on airplane mode, that she can take video and photographs?

MS. ROBERTS: Your Honor, we will do whatever you order, but we typically do not let anyone have cell phones in our facilities. So that is our hang up with the phone itself. It's not necessarily the video, it's the fact that it is a cell phone, and we do not let individuals into our facilities with cell phones.

THE COURT: Any other concerns from DOC?

MS. ROBERTS: We do have -- as Ms. Hughes mentioned, we do have a number of visitors that were prescheduled this weekend. We tried, as we said, to work around those challenges, and also two hours in the morning, two hours Saturday morning, and two hours Sunday morning. We're trying to get this done. This is not because we don't want to be accommodating. It's

because general visitation was already prescheduled, and we don't have attorney visits on the same day that we have general visitation. So I just wanted the Court to be aware of that.

THE COURT: What two-hour window did you offer up today and tomorrow?

MS. ROBERTS: Today was ten a.m. until noon, and tomorrow -- tomorrow being Saturday and Sunday -- were seven to nine a.m. Visitation starts today at noon.

THE COURT: All right. That's my next question. Those are typical or standard visitation hours, or are these -- is this a special window that you've offered up just for him?

MS. ROBERTS: The general visitation hours are standard. These hours that we have offered Ms. Mara were special hours; accommodations made for Mr. Miller and his attorneys.

THE COURT: Ms. Klebaner, are there any other questions that you have on your end as to what you propose that you want?

MS. KLEBANER: Yes, Your Honor. One thing I would like to circle back to, counsel for the defendants had mentioned that they believe the warden should inspect the contents of my phone before leaving. I think, for obvious reasons, it would be inappropriate for one of the named defendants in this lawsuit to examine and have the power to delete whatever evidence and record I'm able to make on my phone.

And I can represent that, you know, as an officer of

the Court, I am not going to Holman prison to take videos or photos of fences or posters on doors or locks on doors or anything of that sort. I am going for the specific purpose of documenting Mr. Miller's injuries.

MR. ANDERSON: Your Honor, if I may. This is Rich Anderson.

I was actually -- when I spoke up earlier, I was going to address that. We don't expect that Ms. Klebaner is going to violate security. But the rationale for reviewing photographs taken by visitors is to prevent inadvertent -- certainly to prevent overt security breaches, but also to prevent inadvertent breaches; things that are captured unintentionally or inadvertently that ADOC needs to be able to control for security. We think it's a reasonable compromise to allow ADOC officials to review -- not -- you know, we're not going to do a search of the whole phone, but be able to look at what was videotaped and what was recorded, you know, photographed, during that visit. That --

THE COURT: Let me stop you right there. It's one thing to just take a look at it and see if there's a picture that has concerning background information. Are you also saying that your ADOC officials -- presumably, let's say, it's a warden -- if he doesn't like what the picture depicts, would he have the ability in your proposal to then delete that video or picture?

MR. ANDERSON: That would be the ordinary course in a visit, you know, when a photograph is taken, that ADOC has the power to delete.

In this circumstance, you know, if the Court is concerned about that and believes it -- have it referred to the Court and submitted to the Court under seal with whatever security concerns there are, you know, and -- Ms. Klebaner's representations as an officer of the Court that photographs and recordings clearly identified by ADOC personnel would not be distributed or used until such time as the Court has had the opportunity to take up our objections.

Now, this is -- we think this is a low probability scenario, Your Honor, given that we're going to be trying to take -- you know, to make sure there isn't something photographable that is a security concern. But, you know, I think that would be a way to handle it that would both alleviate the concern about preservation of evidence and also the ADOC's concerns about security.

THE COURT: Well, my concern, again, is somebody on your end, Mr. Anderson, seeing a picture that they don't like, and it may be a security risk, maybe it's a depiction of Mr. Miller in a light that is not overly flattering in some way or another, and once the picture is deleted, it is forever gone. And so I don't want there to be some sort of verbal tussle, so to speak, as to what picture may have been there one moment and

is now gone the next.

So I don't mind those being -- I don't want there to be any pictures deleted; any video deleted. If there is a dispute about what a picture depicts and I need to get involved, I'll be more than happy to get involved in making a decision on that.

MR. ANDERSON: That satisfies us, Your Honor.

THE COURT: Ms. Klebaner, any other concerns on your end?

MS. KLEBANER: No, Your Honor. That sounds good. I just want to review what our options are, then, in terms of actually getting in and seeing Mr. Miller in terms of time frames that would be allowed either this afternoon or first thing tomorrow morning.

THE COURT: Well, some of that depends on your end, Ms. Klebaner. Who are you trying to mobilize and when do you think you can get them mobilized? I don't know where you're based from, but I assume you can get down there pretty quickly. But if you're trying to locate a medical doctor to see him, that is very much of an open-ended issue that you may not be able to get done today or tomorrow.

MS. KLEBANER: Exactly, Your Honor. And maybe to that point, what might make sense to do is to have me come in today and take the pictures and the statement and the video and all of that, and then if we can get a doctor, we do that tomorrow morning from the seven to nine time slot if that makes sense.

THE COURT: Seven to nine -- is that tonight or tomorrow morning? I forget.

MS. KLEBANER: I believe tomorrow morning is what they meant by that.

Just one other thing I would ask, Your Honor, that -- you know, we didn't anticipate any of this happening. I don't currently have evidence stickers on me, but I would like to use, like, two or three hours to get those and then get to Holman. So if we could accommodate some sort of late afternoon visit, I think that would be ideal.

THE COURT: Okay. Ms. Roberts, can that be done, just sometime late this afternoon?

MS. ROBERTS: Your Honor, we could do like four to six today if that would work.

THE COURT: Ms. Klebaner?

MS. KLEBANER: Four to six sounds good, Your Honor.

THE COURT: Okay. Let's talk about if I do issue a preservation order as it concerns needles, swabs, whatever, presumably there's going to be a bag, a medical hazard bag, that has all of these materials and items in it. And let's assume it is located.

Ms. Klebaner, what is your proposal of what needs to be done with that bag? Who keeps custody of it, under what circumstances, under what conditions?

MS. KLEBANER: Your Honor, that's an interesting

question. You know, we have local counsel in the area in Montgomery. It could be stored in a locked room in their office if that would be acceptable.

MS. HUGHES: Judge, the DOC can keep custody of that. We would object to them taking that evidence --

THE COURT: Let's do that. Something I wanted you all to think about because, again, it is medical waste. There will be needles, sharp items in there, and so forth. And it's not something I would want in my office, and I doubt that you lawyers would want it in your office as well.

MS. KLEBANER: That's a good point. Well, Your Honor, maybe --

THE COURT: Go ahead.

MS. KLEBANER: I apologize.

Perhaps on this issue of where it should be stored, we could confer with counsel for defendants and try to come to an agreement on that.

THE COURT: I would encourage you-all to talk as much as you can.

MR. ANDERSON: Your Honor, Rich Anderson again. You know, we've already discussed the fact that we've got to be able to rely upon each other as officers of the Court in our representations, specifically in reference to photographs. If there are disputes, they're going to be on Ms. Klebaner's phone, under her total control. You know, we don't have a problem with

that. She's an officer of the Court. We can represent to the Court and to the plaintiff that if this bag -- you know, if there is a bag of supplies or spent supplies, we will segregate it and preserve it, you know, pursuant to an order from this Court. It wouldn't seem to me, given that principle of respecting officers of the Court, that we would need to have some third party take care of it or something like that. It's an ordinary preservation of evidence situation.

THE COURT: Well, I will get a written order out at some point today.

Ms. Klebaner, if you will make a first run at a draft. I don't mind you sharing it with Mr. Anderson's end before you submit it, if you want to, and then just email it to my proposed order box. If there's an agreement, let me know. If there's not, let me know.

As it concerns right now, just consider this an oral order to preserve any evidence associated with last night.

Mr. Anderson, I want you and your end to make an effort as soon as we hang up and call down to Holman to locate that bag. I would expect it still to be somewhere on the premises or somewhere where it could be located.

MR. ANDERSON: Yes, Your Honor.

THE COURT: It may have been you, Ms. Hughes, that said it, that a cutdown procedure was not used last night, so tell me --

MS. HUGHES: What I said is it's not part of the DOC protocol, so it wouldn't be possible for a cutdown to have been attempted.

THE COURT: So what was the delay? I know the Supreme Court issued its order shortly after nine. The release from the Attorney General's Office was around 11:30, so what happened in between?

MS. HUGHES: Ms. Roberts, would you like to answer that or would -- this is a DOC matter.

MS. ROBERTS: Yes, I will be glad to.

Your Honor, part of the delay was we got the order around 10:00. It takes us around an hour generally to pull the drugs. And then we also have to gain access, and that, obviously, takes some time. And as Ms. Hughes says, we follow our protocol to the letter, and so it takes time to walk through those steps. And there just was not sufficient time to gain vein access in the appropriate manner in this case, and we just ran out of time.

THE COURT: So we're not talking about a window from about nine or ten until 11:30, we're talking about a window from ten to about 11?

MS. ROBERTS: Ten to closer -- I would say closer -- from 10 to 11 maybe 20.

MS. KLEBANER: Your Honor --

THE COURT: Ms. Klebaner, let me ask you this: You

said there was some -- you had some information as well?

MS. KLEBANER: Yes, Your Honor. I was on the premises last night. I can go into as much or as little detail as you would like.

But just to respond to the immediate point that was just made about how the window ended around 11:20, that's not my understanding at all. We were segregated into Mr. Miller's witness room on the other side of a curtain from the execution chamber, but -- so there was no clock or any sort of timekeeping device on the wall, and my earlier request to bring a watch into the prison had been denied by the warden, so I was relying on asking a guard in the room for the time periodically as we were getting closer and closer to midnight.

The last time check that I got from the guard was 11:45 p.m., and I would approximate that we were told to leave the witness area around five to ten minutes after that, 11:45 p.m. So I think it was very near midnight.

THE COURT: Okay. I assume, Ms. Klebaner, you never saw Mr. Miller last night?

MS. KLEBANER: I'm sorry?

THE COURT: You never saw him last night?

MS. KLEBANER: No, we were not allowed -- I was not allowed access to him in any way last night. I asked repeatedly.

THE COURT: Okay. All right. Let's talk about the

lawsuit.

MS. ROBERTS: Your Honor, may I correct something? I just want to make it clear for the record that I was not in the back, but I'm, like, 99 percent certain that the time that we started was around the 10:00 hour. And I do not know how long that he was on the gurney, but I do know that we stopped trying to access veins around the time that I mentioned, which was somewhere around 11:20 to 11:30. But I was not there. I just don't want to make any misrepresentations to the Court.

THE COURT: So when you say accessing veins, I've read the protocol before, but it's been a while. Was this just veins in the arm, or were there other locations as well where you were trying to access veins?

MS. ROBERTS: Yes, sir. It's my understanding that they look in multiple locations, not just the arms. You know, I wasn't there, so I didn't see them last night. But it's my understanding, as far as the protocol, that they look, you know, all over the body, not just on the arms.

THE COURT: Okay. And they were unsuccessful in all of those efforts?

MS. ROBERTS: They weren't able to get one accessed through the skin last night.

THE COURT: The lawsuit -- I've got pending motions to dismiss. Obviously, we had a lot of things happen in the last couple of weeks, the last week.

Ms. Klebaner, on your end, am I going to see an amended complaint?

MS. KLEBANER: Yes, Your Honor. We would like to file an amended complaint, obviously, given everything that's happened. We do anticipate using a bit of time to collect evidence, as we were discussing today on the phone. Without knowing what that evidence would be, what the scope of it is, what they've destroyed so far, what they've retained, it's hard to know how long it would take us to go through it. But, yes, we do anticipate filing an amended complaint.

THE COURT: Okay. And in light of the motions to dismiss that are pending, does either side believe that those -- that the arguments need to be supplemented in light of what's happened with the Eleventh Circuit and with the U.S. Supreme Court?

MS. KLEBANER: Your Honor, I believe the motions can be dismissed on the papers that we submitted and the oral arguments that we had on September 12. All of the legal arguments in favor of dismissal are just as invalid today as they were when those motions were filed.

MS. HUGHES: Judge, we would, obviously, disagree about that.

THE COURT: All right. Anything else we need to talk about?

MS. HUGHES: Judge, this is Beth Hughes. No, sir.

MS. KLEBANER: Not from Mr. Miller's perspective at this time, Your Honor.

THE COURT: Okay. So as it concerns today, DOC can make Mr. Miller available from four to six this afternoon and then again from seven to nine a.m. in the morning. Am I correct in that?

MS. ROBERTS: Yes, Your Honor.

THE COURT: And Ms. Klebaner, you've been -- you certainly can be present from four to six and seven to nine tomorrow. And as it concerns a medical doctor, that's just up in the air, and that's just something you're going to have to continue to work on; is that correct?

MS. KLEBANER: That's correct, Your Honor.

THE COURT: All right.

MS. KLEBANER: And I just --

THE COURT: Other than yourself and potentially a medical doctor, would there be anybody else that you would be bringing with you?

MS. KLEBANER: No, I do not anticipate that.

I just wanted to clarify that I would also expect there to be some sort of need to take -- if we can get a doctor by tomorrow morning, that there would also be -- I would have the same rules in terms of taking pictures and videos on my phone of whatever that doctor is doing if we need to preserve that evidence as well.

THE COURT: As it concerns any photos or videos that are taken, I assume, Ms. Klebaner, that you are willing and will, in fact, give a copy to the Attorney General's office and DOC?

MS. KLEBANER: Your Honor, I think that is not attorney work product. Certainly that will be evidence in this case, and we would turn that over. But I just note that ADOC, obviously, has Mr. Miller in their custody, and if they want to take pictures of him in a humane way, they are also able to do that.

THE COURT: So they do not need to get your clearance in order to take videos and pictures of Mr. Miller; is that correct?

MS. KLEBANER: It's hard to say that, Your Honor, without knowing what methods they will use.

We are very concerned, based on what happened last night, that Mr. Miller is not being treated in accordance with the U.S. Constitution and Alabama law. I certainly would be happy to observe the person supervising the picture taking on their part. I wouldn't want to give defendants additional opportunities to do anything physically to Mr. Miller.

THE COURT: Ms. Roberts, let me ask you this. Ms. Roberts.

MS. ROBERTS: Yes.

THE COURT: Is he scheduled to be seen by a nurse or a doctor today, a prison nurse or doctor?

MS. ROBERTS: Your Honor, he received a body chart both before the scheduled execution last night and then again after the execution was canceled, so I don't know that there's any plans to see medical staff today based on that.

THE COURT: Okay. So I will -- you-all have my verbal orders, so to speak, and then I will be expecting a written proposed order in my email box.

Is there anything else before I end the call?

MR. NEPPL: Your Honor, this is Dan Neppl on behalf of Mr. Miller. I just want to understand, in terms of the examinations done before and after the attempt last night, are there reports on those? And if so, I would ask that they be turned over to Mr. Miller's legal team.

THE COURT: Well, some of this, Mr. Neppl, is maintaining the status quo at present. As I view it, in light of last night and where we are today, there is an active lawsuit that's pending, and there will be some information that you'll be able to get in discovery in the routine course of things. So we're not going to have just an informal exchange of information.

But DOC, the Attorney General's office, they certainly are under an obligation to preserve any and all medical documentation, including body charts, et cetera, that were put together either yesterday before, or yesterday and this morning afterwards.

MR. NEPPL: Thank you, Your Honor. Appreciate the acknowledgment.

THE COURT: Anything else?

MS. KLEBANER: Your Honor --

THE COURT: Yes, go ahead.

MS. KLEBANER: I apologize. I know we've been taking up a lot of your time this morning.

One final point of clarification on the evidence preservation order. We are concerned about text messages getting deleted; emails getting deleted. If your oral order right now could clarify that defendants and their staff and agents are not to delete any sort of communications, any sort of written communications, including text messages. We think that's important to do now.

THE COURT: Let's maintain the status quo. That means nobody is deleting any texts, any emails, pending further order from me.

Ms. Hughes, Mr. Anderson, Mr. Roberts, you understand?

MS. ROBERTS: Yes, sir.

THE COURT: And Ms. Klebaner, be sure to address that in the proposed order.

MS. KLEBANER: Thank you. I will.

THE COURT: And any other concerns and possibilities that I need to take a look at and consider.

MS. KLEBANER: Thank you, Your Honor.

THE COURT: All right. Good enough.

Well, I appreciate it. I will go ahead and end the call, and I'll keep a lookout. If something else comes up, please file something. Okay?

MS. HUGHES: Thank you, Judge.

(Proceedings concluded at 11:12 a.m.)

* * * * * * * * * * * * *

COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

This 23rd day of September, 2022.

/s/ Patricia G. Starkie
Registered Diplomate Reporter
Certified Realtime Reporter
Official Court Reporter

Exhibit H

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

JAMES EDWARD BARBER,

Plaintiff,

v.

KAY IVEY, Governor of the State of Alabama, *et al.*,

Defendants.

CAPITAL CASE – EXECUTION TIME FRAME BEGINS ON JULY 20, 2023 AT 12:00 A.M.

Case No. 2:23-CV-342-ECM

AFFIDAVIT OF TINA ROTH, RN

I declare, under penalty of perjury, that the following is true and correct:

1. My name is Tina M. Roth. I reside in Schererville, Indiana. I am over the age of eighteen, fully capable and competent of making this Affidavit and have personal knowledge of the facts set forth herein.

2. I have been an actively licensed and practicing Registered Nurse ("RN") since receiving my Associate's Degree in Nursing in 1980 from the Nursing Program at Thornton Community College (which is now named South Suburban College).

3. I have been a nurse for 43 years, including 39 years of critical care bedside nursing at Ingalls Memorial Hospital (which is now part of the University of Chicago network of hospitals) in Harvey, Illinois and Community Hospital in Munster, Indiana.

4. As a critical care RN, my duties were many. My responsibilities included caring for septic patients, post-trauma patients, post-critical surgery patients, as well as cardiac and neurological patients.

5. I held Advanced Cardiovascular Life Support (ACLS) and Basic Life Support (BLS) certifications. While working in the Critical Care Unit, I was a "Code Blue Leader" and Acute Response RN.

6. In my 39 years as a critical care nurse, starting and maintaining patients' peripheral IVs was an important part my daily responsibilities.

7. As a critical care RN, I have extensive experience in starting a peripheral IV in intense and difficult situations which include, but are not limited to, Code Blue events (in which a patient experiences sudden cardiac or respiratory arrest and requires resuscitation); combative patients experiencing drug or alcohol withdrawal; poor vein access related to the patient being

elderly or in debilitating health; one arm restriction (in which one of the patient's arms is unavailable for an IV attempt); and edematous extremities (in which the body's extremities are swollen due to excess fluid retention).

8. I currently work on the nurse IV Team at Community Hospital in Munster, Indiana. I have held this position for the past four years. In this role, my responsibilities include starting peripheral IV lines on adult and pediatric patients in the Emergency Room and throughout various units at the hospital. I am responsible for starting peripheral IV insertions which range from routine to difficult and challenging.

9. As an experienced critical care RN and member of the IV Team, I have extensive experience and history dealing with difficult peripheral IV starts, which includes one arm restriction, obese patients, combative and confused patients, and limited peripheral vein access due to a patient's cardiac disease, dialysis treatment, and/or drug abuse.

10. In addition to peripheral IV starts, I am responsible for accessing and de-accessing IV ports (a subcutaneous device used when long-term IV access is needed), troubleshoot clotted central lines, dialysis catheters, and PICC lines. I am also responsible for sterile dressing changes for central lines, dialysis catheters, and PICC lines.

11. I estimate that over the course of my 43 year career as a RN, I have likely started over 1,000 IV peripheral IVs.

12. There are three general categories of IV lines, all of which are used to administer fluids and medications to patients in need of medical care:

(1) A central venous catheter (a "central line"), which a large tube is placed in one of the large central veins in the body, in the neck, upper chest, or groin.

(2) A peripherally inserted central catheter (a "PICC line"), which is a long, flexible catheter that is inserted into a vein generally in the upper arm, and then threaded through that vein to a larger vein near the heart.

(3) An intravenous catheter (an "IV" line), also known as a peripheral intravenous line, which is the most common type of catheter we deal with in the medical profession. A peripheral IV line is a small, short plastic catheter that is placed through the skin into a vein, usually in the hand, forearm, antecubital or upper arm, and rarely, the foot (this is generally only done with a doctor's order permitting foot IV insertion).

13. It is my understanding that the people starting IV lines for the Alabama Department of Corrections (the "ADOC IV Team"), in accordance with Alabama's execution protocol, use two of the three methods mentioned above: first, the ADOC IV Team attempts to start a peripheral IV line, and if they are unable to do so, they attempt to start a central line.

14. A reasonable and appropriate amount of time required to start an "easy" peripheral IV access line is approximately 5 to 10 minutes. That time includes explaining to the

patient what is going to occur, proper prepping of the skin, starting the actual IV, and securing the IV with a dressing and tape.

15. The standard of care at my hospital is a ***two-stick limit*** for peripheral IV attempts. After two unsuccessful peripheral IV attempts, we are required to call another IV Team RN to attempt the IV. The second IV Team RN may retrieve the IV ultrasound machine located in the IV office. The IV ultrasound is used on difficult IV access patients, when a vein cannot be visualized with the naked eye or palpated (the process by which you gently and firmly push down on a vein with your finger(s) and then slowly release the pressure, in order to get a better understanding of the location of the vein).

16. A difficult IV start can take up to 30 minutes. Usually, a majority of the time spent on a difficult peripheral IV start is searching for a good vein prior to attempting the stick. Again, ***the two-stick rule prevails*** regardless of the time spent.

17. The reason medical professionals limit the amount of time and attempts that can be spent starting a peripheral IV line on one person is because inserting a needle into the human body in an attempt to locate a vein is painful. From my education, experience, and expertise, I have learned that the longer one spends attempting to establish IV access, the more pain the individual patient experiences. It can be an excruciating procedure for some patients.

18. It is my professional opinion as a critical care RN and IV Team RN that continually attempting to puncture a person with a needle multiple times spanning 60 minutes or more in an attempt to start a peripheral IV lines is inexcusable, unprofessional, and a breach of the standard of care owed to patients and human beings generally. Such a process causes the person unnecessary pain and suffering.

19. The numerous unsuccessful attempts to start peripheral IV lines by the ADOC IV Team are cause for concern.

20. The Infusion Nurses Society (the "INS") sets guidelines and standards for IV inserts. Per the INS, there should be a limit of two attempts per experienced, proficient registered nurse. *See* Ex. A, INS, Infusion Therapy Standards of Practice, Ch. 34, *Vascular Access Device Placement*, 8th ed. (2021) ("Restrict [peripheral IV] insertion attempts to no more than 2 attempts per clinician at [peripheral IV] insertion. Multiple unsuccessful attempts can cause pain to the patient… After 2 unsuccessful attempts, escalate to a clinician with a higher skill level and/or consider alternative routes of medication administration.").

21. I believe that executions should not be used as an opportunity for an inexperienced Emergency Medical Technician or registered nurse to gain experience by starting IVs on inmates receiving lethal injections for death penalty. In my opinion as a medical professional, each ADOC IV Team member should be required to have successfully started a significant number of IV lines before attempting to do so at an execution, and each ADOC IV Team member should be required to undergo competency training and education on the process of starting peripheral IV lines.

22. It is painful and inhumane to subject anyone to multiple IV punctures above what is reasonable and prudent in the IV guideline standards.

June 23, 2023
Tina M. Roth RN

Tina M. Roth, RN
Schererville, Indiana

Exhibit A

Infusion Therapy Standards of Practice

Lisa A. Gorski, MS, RN, HHCNS-BC, CRNI®, FAAN
Lynn Hadaway, MEd, RN, NPD-BC, CRNI®
Mary E. Hagle, PhD, RN-BC, FAAN
Daphne Broadhurst, MN, RN, CVAA(C)
Simon Clare, MRes, BA, RGN
Tricia Kleidon, MNSc (Nurs. Prac), BNSc, RN
Britt M. Meyer, PhD, RN, CRNI®, VA-BC, NE-BC
Barb Nickel, APRN-CNS, CCRN, CRNI®
Stephen Rowley, MSc, BSc (Hons), RGN, RSCN
Elizabeth Sharpe, DNP, APRN-CNP, NNP-BC, VA-BC, FNAP, FAANP, FAAN
Mary Alexander, MA, RN, CRNI®, CAE, FAAN

8TH EDITION

REVISED 2021

INFUSION NURSES SOCIETY
SETTING THE STANDARD FOR INFUSION CARE®

One Edgewater Drive, Norwood, MA 02062
www.ins1.org

REFERENCES

1. Gorski LA, Hadaway L, Hagle ME, et al. Infusion therapy standards of practice. *J Infus Nurs*. 2021;44(suppl 1):S1-S224. doi:10.1097/NAN.0000000000000396
2. Worthington P, Gura KM, Kraft MD, et al. Update on the use of filters for parenteral nutrition: an ASPEN position paper. *Nutr Clin Pract*. 2021;36(1):29-39. doi:10.1002/ncp.10587
3. Mirtallo J, Canada T, Johnson D, et al. Safe practices for parenteral nutrition. *JPEN J Parenter Enteral Nutr*. 2004;28(6):S39-S69. doi:10.1177/0148607104028006s39
4. Ayers P, Adams S, Boullata J, et al. A.S.P.E.N. Parenteral nutrition safety consensus recommendations. *JPEN J Parenter Enteral Nutr*. 2014;38(3):296-333. doi:10.1177/0148607113511992
5. Lumpkin MM. Safety alert: hazards of precipitation associated with parenteral nutrition. *Am J Hosp Pharm*. 1994;51(11):1427-1428.
6. ASPEN Parenteral Nutrition Safety Committee. Update on the use of filters for parenteral nutrition. American Society for Parenteral and Enteral Nutrition; 2021. Accessed May 7, 2021. https://www.nutritioncare.org/uploadedFiles/Documents/Guidelines_and_Clinical_Resources/IV-Filters-For%20PN-Factsheet.pdf

ADDITIONAL CORRECTIONS

Abbreviations and Acronyms

ILE [Page S10]

The corrected definition for ILE should be injectable lipid emulsion.

Standard 33, *Vascular Access Site Preparation and Skin Antisepsis*

Practice Recommendation D [Page S96]

The original statement reads:

Use a single-use sterile applicator containing sterile solution, not a multiple use product (eg, bottle of antiseptic solution).[3,5] (IV)

In the corrected statement below, the word *sterile* has been removed:

Use a single-use applicator containing antiseptic solution, not a multiple use product (eg, bottle of antiseptic solution).[3,5] (IV)

Standard 46, *Phlebitis*

Table 2. Visual Infusion Phlebitis Scale [Page S139]

The corrected scale should range from 0 to 5 as shown here:

TABLE 2

Visual Infusion Phlebitis Scale

Score	Observation
0	IV site appears healthy
1	One of the following is evident: Slight pain near IV site OR slight redness near IV site
2	Two of the following are evident: • Pain at IV site • Erythema • Swelling
3	All of the following signs are evident: • Pain along path of cannula • Induration
4	All of the following signs are evident and extensive: • Pain along path of cannula • Erythema • Induration • Palpable venous cord
5	All of the following signs are evident and extensive: • Pain along path of cannula • Erythema • Induration • Palpable venous cord • Pyrexia

Abbreviation: IV, intravenous.

Reprinted with permission from: Jackson A. Infection control–a battle in vein: infusion phlebitis. *Nurs Times*. 1998;94(4):68 -71.

REFERENCE

Gorski LA, Hadaway L, Hagle ME, et al. Infusion therapy standards of practice. *J Infus Nurs*. 2021;44(suppl 1):S1-S224. doi:10.1097/NAN.0000000000000396

Contents

Note: The "S" in page numbers denotes supplement issue and does not refer to a specific standard.

The Art and Science of Infusion Nursing

Contents

Note: The "S" in page numbers denotes supplement issue and does not refer to a specific standard.

The *Journal of Infusion Nursing* is a member benefit of the Infusion Nurses Society (INS). INS is a professional association dedicated to enhancing infusion practices that will improve patient outcomes. Through its many member benefits, INS offers access to the latest infusion research, technology, and education. For more information about the benefits of INS membership, visit www.ins1.org.

34. VASCULAR ACCESS DEVICE PLACEMENT

Standard

34.1 A new, sterile VAD is used for each catheterization attempt, including use of introducers.
34.2 The VAD is not altered outside the manufacturers' directions for use.
34.3 Proper tip location for CVADs is verified prior to use.
34.4 The patient and caregiver are educated about the rationale for VAD insertion and expectations during the procedure.

Practice Recommendations

I. PIVCs: Short PIVCs, Long PIVCs, and Midline Catheters

A. Consider implementation of a PIVC insertion bundle to improve insertion success or reduce complications. High-level synthesis studies investigated bundled PIVC insertion and management interventions; no clear evidence emerged to support a specific intervention bundle.[1-5] (I)
B. Consider early referral to an infusion/vascular access specialist if patient assessment yields no visible or palpable veins.[6-11] (IV)
   1. Consider use of a population-specific DIVA assessment tool to guide early referral to an infusion/vascular access specialist if indicated. In several published reviews, some tools are better at identifying children and adults with DIVA; each tool has limitations, and further study is needed.[4,5,12-19] (I)
C. Assess the need for measures to reduce pain of insertion (refer to Standard 32, *Pain Management for Venipuncture and Vascular Access Procedures*).
D. Use visualization technology to aid in peripheral vein identification and selection for patients with DIVA (refer to Standard 22, *Vascular Visualization*).
   1. Choose a long PIVC as follows:
      a. When all aspects of a short PIVC are met, but the vessel is difficult to palpate or visualize with the naked eye; ultrasound guidance/near infrared technology is recommended.
      b. Evaluate depth of vessel when choosing a long PIVC to ensure two-thirds of catheter lies within vein.[20-24] (III)
E. Use an appropriate method to promote vascular distention when inserting a short PIVC, including:
   1. Use of gravity or impeding venous flow with the use of a blood pressure cuff or tourniquet (while maintaining arterial circulation).
   2. Use of controlled warming.[25] (V)
F. Adhere to principles of Standard-ANTT or Surgical-ANTT with PIVC insertion based upon the assessment of the complexity of insertion.
   1. Use Standard-ANTT for simple PIVC insertion.
      a. Don a new pair of disposable, nonsterile gloves in preparation for PIVC insertion; do not touch/palpate the insertion site after skin antisepsis.[26-31] (IV)
      b. If repalpation of the vein is required after skin antisepsis, use sterile gloves for palpation and insertion and adhere to the principles of Surgical-ANTT to prevent recontamination of the insertion site. Contamination of nonsterile gloves is well documented.[3,32-35] (I)
   2. Use Surgical-ANTT for more complex insertion techniques (eg, accelerated/Seldinger) and/or need to touch Key-Sites and/or Key-Parts directly (refer to Standard 18, *Aseptic Non Touch Technique*).
G. Restrict PIVC insertion attempts to no more than 2 attempts per clinician at PIVC insertion. Multiple unsuccessful attempts cause pain to the patient, delay treatment, limit future vascular access, increase cost, and increase the risk for complications.[2,5,11,18,36-38] (IV)
   1. After 2 unsuccessful attempts, escalate to a clinician with a higher skill level and/or consider alternative routes of medication administration. (Committee Consensus)
H. Use single-patient-use tourniquets.[39-41] (I)
I. Long PIVCs and midline catheters: use the safest available insertion technique, including the Seldinger, modified Seldinger technique (MST), or accelerated Seldinger technique (AST), to reduce the risk for insertion-related complications such as air embolism, guidewire loss, embolism, inadvertent arterial cannulation, and bleeding.[42-48] (IV)
   1. Use a maximal sterile barrier with VAD insertion using MST.[43,44,48] (V)
   2. Consider a partial barrier with VAD insertion using AST.[49] (IV)
J. Ensure appropriate midline catheter length for selected vessel and for proper tip location.
   1. Adult: tip location should be at level of axilla.[44,46,50-52] (IV)
   2. Neonates and pediatric patients: select an upper arm site using the basilic, cephalic, and brachial veins. Additional site selections include veins in the leg (eg, saphenous, popliteal, femoral) with the tip below the inguinal crease and in the scalp with the tip in the neck above the thorax (refer to Standard 27, *Site Selection*).
K. Immediately remove the PIVC in the following situations:
   1. If nerve damage is suspected, such as when the patient reports severe pain on insertion (ie, electrical shock-like pain) or paresthesias (eg, numbness or tingling) related to the insertion; promptly notify the provider (refer to Standard 48, *Nerve Injury*).
   2. If an artery is inadvertently accessed, remove the catheter and apply pressure to the peripheral site until hemostasis is achieved. Assess circulatory status and, if impaired, notify the provider promptly.[16] (V)

L. Midline catheters: consider measuring arm circumference at insertion to establish a baseline and monitor arm circumference on a regular basis due to risk of CA-DVT (see Standard 53, *Catheter-Associated Deep Vein Thrombosis*).[53,54] (IV).

II. CVADs

A. Implement the central line bundle when placing CVADs, which includes the following interventions: hand hygiene, skin antisepsis using alcohol-based chlorhexidine, maximal sterile barrier precautions, preference for upper body insertion site to reduce risk of infection (see Standard 18, *Aseptic Non Touch Technique*; Standard 33, *Vascular Access Site Preparation and Skin Antisepsis*).[27,36,55-62] (IV)

B. Use ultrasound when inserting CVADs to increase success rates and decrease insertion-related complications (refer to Standard 22, *Vascular Visualization*).
   1. For tunneled, cuffed CVADs and implanted vascular access port insertion: use an ultrasound-guided MST rather than venous cutdown or landmark percutaneous technique to improve insertion success and reduce postinsertion complication rates in both adult and pediatric patients.[63-65] (I)

C. Ensure adherence to proper technique through use of and completion of a standardized checklist performed by an educated health care clinician and empower the clinician to stop the procedure for any breaches in aseptic technique. Completion of a checklist should be done by someone other than the inserter of the CVAD.[58,61,66-71] (III)

D. Use a standardized supply cart or kit that contains all necessary components for the insertion of a CVAD.[61] (IV)

E. Measure midarm circumference between insertion site and axilla to obtain baseline measurement upon insertion of a PICC; the rationale for baseline measurement is for comparison in assessment for CA-DVT (see Standard 53, *Catheter-Associated Deep Vein Thrombosis*).[53] (IV)

F. Use the safest available insertion technique for neck and chest placement, including the Seldinger or MST and Trendelenburg position, to reduce the risk for insertion-related complications such as air embolism, guidewire loss, embolism, inadvertent arterial cannulation, and bleeding.[60,71-78] (IV)

G. Implement appropriate actions upon complications associated with CVAD insertion as follows:
   1. Inadvertent arterial puncture can typically be managed by catheter removal and digital pressure when promptly recognized.
      a. If location of the catheter is unclear, measuring intraluminal pressure with a transducer may indicate catheter position.
      b. Inadvertent arterial puncture during insertion of a large-bore CVAD or dilator may be a life-threatening complication with recommendations to leave the device in place and immediately consult with a surgeon or interventional radiologist. Treatment options include open operative approach and repair and, more commonly, endovascular management (see Standard 54, *Central Vascular Access Device Malposition*).[57,71,78-84] (V)
   2. Cardiac arrhythmias, often due to manipulation of the guidewire, typically resolve with reposition of guidewire or catheter. If arrhythmias persist, notify the provider.[57,79,82] (V)
   3. Medial subclavian insertion is associated with the highest risk of pneumothorax.
      a. The jugular site is preferred in the patient with pre-existing respiratory compromise.
      b. If significant unilateral lung disease is present, ipsilateral insertion is recommended for jugular or subclavian cannulation to prevent further respiratory compromise with pneumothorax in lungs without injury or disease.[59,78,79,85] (V)
   4. Potential related symptoms of nerve damage include diaphragmatic paralysis, hoarseness, impaired muscle strength, dysfunction of sympathetic nervous system (refer to Standard 48, *Nerve Injury*).
   5. Air embolism (refer to Standard 52, *Air Embolism*).
   6. Catheter malposition (refer to Standard 54, *Central Vascular Access Device Malposition*).

H. Ensure proper placement of the CVAD tip, within the lower one-third of the superior vena cava (SVC) or CAJ (refer to Standard 23, *Central Vascular Access Device Tip Location*).
   1. For lower body insertion sites, the CVAD tip should be positioned in the IVC above the level of the diaphragm.
   2. Before use of the CVAD for infusion, if required, the inserter should properly reposition the CVAD and obtain a confirmation of correct location (refer to Standard 23, *Central Vascular Access Device Tip Location*; Standard 54, *Central Vascular Access Device Malposition*).

I. Evaluate and assess patients who have a cardiovascular implantable electronic device (eg, subcutaneous implantable device, epicardial leads, or a leadless pacemaker) in place or planned insertion for the most appropriate catheter and insertion site.
   1. Consider the contralateral side as preferred for CVAD insertion, but if the ipsilateral side must be used (eg, the patient has bilateral implanted leads in place), a PICC may be the safest option.[59,86,87] (V)
   2. Consider options that preserve vessel health in the patient with CKD who requires insertion of a CVAD and a cardiovascular implantable electronic device. Nontunneled catheters should be avoided, with rapid progression to fistula/graft creation recommended.[59,86-92] (IV)
   3. Determine the integrity of a pre-existing pacemaker unit and leads before and after CVAD insertion. There are currently no practice guidelines developed related to pacemakers and CVADs.[90,91] (V)

III. Arterial Catheters

A. Use ultrasound to aid in artery identification and selection (refer to Standard 22, *Vascular Visualization*).
B. Wear a cap, mask, sterile gloves, and eyewear and use a small fenestrated sterile drape when placing a peripheral arterial catheter.[27,31,93-95] (III)
C. Employ maximal sterile barrier precautions when placing pulmonary artery and arterial catheters via the axillary or femoral artery.[31,94,95] (III)

REFERENCES

Note: All electronic references in this section were accessed between May 11, 2020, and August 30, 2020.

1. DeVries M, Strimbu K. Short peripheral catheter performance following adoption of clinical indication removal. *J Infus Nurs*. 2019;42(2):81-90. doi:10.1097/NAN.0000000000000318
2. Steere L, Ficara C, Davis M, Moureau N. Reaching one peripheral intravenous catheter (PIVC) per patient visit with lean multimodal strategy: the PIV5Rights™ Bundle. *J Assoc Vasc Access.* 2019;24(3):31-43. https://doi.org/10.2309/j.java.2019.003.004
3. Ray-Barruel G, Xu H, Marsh N, Cooke M, Rickard CM. Effectiveness of insertion and maintenance bundles in preventing peripheral intravenous catheter-related complications and bloodstream infection in hospital patients: a systematic review. *Infect Dis Health*. 2019;24(3):152-168. doi:10.1016/j.idh.2019.03.001
4. Parker SI, Benzies KM, Hayden KA, Lang ES. Effectiveness of interventions for adult peripheral intravenous catheterization: a systematic review and meta-analysis of randomized controlled trials. *Int Emerg Nurs*. 2017;31:15-21. doi:10.1016/j.ienj.2016.05.004
5. Kleidon TM, Cattanach P, Mihala G, Ullman AJ. Implementation of a paediatric peripheral intravenous catheter care bundle: a quality improvement initiative. *J Paediatr Child Health*. 2019;55(10):1214-1223. doi:10.1111/jpc.14384
6. Carr PJ, Rippey JCR, Cooke ML, et al. Factors associated with peripheral intravenous cannulation first-time insertion success in the emergency department: a multicentre prospective cohort analysis of patient, clinician and product characteristics. *BMJ Open*. 2019;9(4):e022278. doi:10.1136/bmjopen-2018-022278
7. Armenteros-Yeguas V, Gárate-Echenique L, Tomás-López MA, et al. Prevalence of difficult venous access and associated risk factors in highly complex hospitalised patients. *J Clin Nurs*. 2017;26 (23-24):4267-4275. doi:10.1111/jocn.13750
8. McCarthy ML, Shokoohi H, Boniface KS, et al. Ultrasonography versus landmark for peripheral intravenous cannulation: a randomized controlled trial. *Ann Emerg Med*. 2016;68(1):10-18. doi:10.1016/j.annemergmed.2015.09.009
9. van Loon FH, Puijn LA, Houterman S, Bouwman AR. Development of the A-DIVA scale: a clinical predictive scale to identify difficult intravenous access in adult patients based on clinical observations. *Medicine (Baltimore)*. 2016;95(16):e3428. doi:10.1097/MD.0000000000003428
10. Sou V, McManus C, Mifflin N, Frost SA, Ale J, Alexandrou E. A clinical pathway for the management of difficult venous access. *BMC Nurs*. 2017;16:64. doi:10.1186/s12912-017-0261-z
11. Hallam C, Weston V, Denton A, et al. Development of the UK Vessel Health and Preservation (VHP) framework: a multi-organisational collaborative. *J Infect Prev*. 2016;17(2):65-72. doi:10.1177/1757177415624752
12. Whalen M, Maliszewski B, Baptiste DL. Establishing a dedicated difficult vascular access team in the emergency department: a needs assessment. *J Infus Nurs*. 2017;40(3):149-154. doi:10.1097/NAN.0000000000000218
13. Fiorini J, Venturini G, Conti F, et al. Vessel health and preservation: an integrative review. *J Clin Nurs*. 2019;28(7-8):1039-1049. doi:10.1111/jocn.14707
14. Rippey JC, Carr PJ, Cooke M, Higgins N, Rickard CM. Predicting and preventing peripheral intravenous cannula insertion failure in the emergency department: clinician 'gestalt' wins again. *Emerg Med Australas*. 2016;28(6):658-665. doi:10.1111/1742-6723.12695
15. Schults J, Rickard C, Kleidon T, Paterson R, Macfarlane F, Ullman A. Difficult peripheral venous access in children: an international survey and critical appraisal of assessment tools and escalation pathways. *J Nurs Scholarsh*. 2019;51(5):537-546. doi:10.1111/jnu.12505
16. Kaur P, Rickard C, Domer GS, Glover KR. Dangers of peripheral intravenous catheterization: the forgotten tourniquet and other patient safety considerations. In: Stawicki SP, Firstenberg MS, eds. *Vignettes in Patient Safety: Volume 4*. IntechOpen Limited; 2019. doi:10.5772/intechopen.83854
17. Carr PJ, Higgins NS, Cooke ML, Rippey J, Rickard CM. Tools, clinical prediction rules, and algorithms for the insertion of peripheral intravenous catheters in adult hospitalized patients: a systematic scoping review of literature. *J Hosp Med*. 2017;12(10):851-858. doi:10.12788/jhm.2836
18. Hartman JH, Baker J, Bena JF, Morrison SL, Albert NM. Pediatric vascular access peripheral iv algorithm success rate. *J Pediatr Nurs*. 2018;39:1-6. doi:10.1016/j.pedn.2017.12.002
19. Ehrhardt BS, Givens KEA, Lee RC. Making it stick: developing and testing the difficult intravenous access (DIVA) tool. *Am J Nurs*. 2018;118(7):56-62. doi:10.1097/01.NAJ.0000541440.91369.00
20. Scoppettuolo G, Pittiruti M, Pitoni S, et al. Ultrasound-guided "short" midline catheters for difficult venous access in the emergency department: a retrospective analysis. *Int J Emerg Med*. 2016;9(1):3. doi:10.1186/s12245-016-0100-0
21. Blanco P. Ultrasound-guided peripheral venous cannulation in critically ill patients: a practical guideline. *Ultrasound J*. 2019;11(1):27. doi:10.1186/s13089-019-0144-5
22. Paladini A, Chiaretti A, Sellasie KW, Pittiruti M, Vento G. Ultrasound-guided placement of long peripheral cannulas in children over the age of 10 years admitted to the emergency department: a pilot study. *BMJ Paediatr Open*. 2018;2(1):e000244. doi:10.1136/bmjpo-2017-000244
23. Badger J. Long peripheral catheters for deep arm vein venous access: a systematic review of complications. *Heart Lung*. 2019;48(3):222-225. doi:10.1016/j.hrtlng.2019.01.002
24. Bahl A, Hijazi M, Chen NW, Lachapelle-Clavette L, Price J. Ultralong versus standard long peripheral intravenous catheters: a randomized controlled trial of ultrasonographically guided catheter survival. *Ann Emerg Med*. 2020;S0196-0644(19)31383-6. doi:10.1016/j.annemergmed.2019.11.013
25. Horigan A, VanHoy M, Kaiser H, et al. *2018 ENA Clinical Practice Guideline: Difficult Venous Access* [position statement]. Emergency Nurses Association; 2018.
26. Clare S, Rowley S. Implementing the Aseptic Non Touch Technique (ANTT®) clinical practice framework for aseptic technique: a pragmatic evaluation using a mixed methods approach in two London hospitals. *J Infect Prev*. 2018;19(1):6-15. doi:10.1177/1757177417720996
27. Centers for Disease Control and Prevention. Summary of recommendations, guidelines for the prevention of intravascular catheter-related infections (2011). Updated February 2017. https://www.cdc.gov/infectioncontrol/guidelines/bsi/recommendations.html
28. Rowley S, Clare S. *Guidance Document: Standardizing the Critical Clinical Competency of Aseptic, Sterile, and Clean Techniques With A Single International Standard: Aseptic Non Touch Technique (ANTT®).* Association for Vascular Access; 2019. https://www.avainfo.org/resource/resmgr/files/position_statements/ANTT.pdf
29. National Institute for Health and Care Excellence (NICE). Healthcare-associated infections: prevention and control in primary and community care. NICE; 2012. Revised February 2017. https://www.nice.org.uk/guidance/cg139

30. Carr PJ, Rippey JCR, Cooke ML, et al. From insertion to removal: a multicenter survival analysis of an admitted cohort with peripheral intravenous catheters inserted in the emergency department. *Infect Control Hosp Epidemiol*. 2018;39(10):1216-1221. doi:10.1017/ice.2018.190
31. Bell T, O'Grady NP. Prevention of central line-associated bloodstream infections. *Infect Dis Clin North Am*. 2017;31(3):551-559. doi:10.1016/j.idc.2017.05.007
32. DeVries M, Valentine M, Mancos P. Protected clinical indication of peripheral intravenous lines: successful implementation. *J Assoc Vasc Access.* 2016;21(2):89-92. http://dx.doi.org/10.1016/j.java.2016.03.001
33. Hall M, Trivedi U, Rumbaugh K, Dissanaike S. Contamination of unused, nonsterile gloves in the critical care setting: a comparison of bacterial glove contamination in medical, surgical and burn intensive care units. *The Southwest Respiratory and Critical Care Chronicles.* 2014;2(5):3-10. https://pulmonarychronicles.com/index.php/pulmonarychronicles/article/view/106
34. Assadian O, Leaper DJ, Kramer A, Ousey KJ. Can the design of glove dispensing boxes influence glove contamination? *J Hosp Infect*. 2016;94(3):259-262. doi:10.1016/j.jhin.2016.09.005
35. Moran V, Heuertz R. Cross contamination: are hospital gloves reservoirs for nosocomial infections? *Hosp Top*. 2017;95(3):57-62. doi:10.1080/00185868.2017.1300484
36. Moureau NL, Carr PJ. Vessel health and preservation: a model and clinical pathway for using vascular access devices. *Br J Nurs*. 2018;27(8):S28-S35. doi:10.12968/bjon.2018.27.8.S28
37. Simin D, Milutinović D, Turkulov V, Brkić S. Incidence, severity and risk factors of peripheral intravenous cannula-induced complications: an observational prospective study. *J Clin Nurs*. 2019;28(9-10):1585-1599. doi:10.1111/jocn.14760
38. Fields JM, Piela NE, Au AK, Ku BS. Risk factors associated with difficult venous access in adult ED patients. *Am J Emerg Med*. 2014;32(10):1179-1182. doi:10.1016/j.ajem.2014.07.008
39. Salgueiro-Oliveira AS, Costa PJDS, Braga LM, Graveto JMGN, Oliveira VS, Parreira PMSD. Health professionals' practices related with tourniquet use during peripheral venipuncture: a scoping review. *Rev Lat Am Enfermagem*. 2019;27:e3125. doi:10.1590/1518-8345.2743-3125
40. Culjak M, Gveric Grginic A, Simundic AM. Bacterial contamination of reusable venipuncture tourniquets in tertiary-care hospital. *Clin Chem Lab Med*. 2018;56(8):e201-e203. doi:10.1515/cclm-2017-0994
41. Mehmood Z, Mubeen SM, Afzal MS, Hussain Z. Potential risk of cross-infection by tourniquets: a need for effective control practices in Pakistan. *Int J Prev Med*. 2014;5(9):1119-1124.
42. Caparas JV, Hu JP. Safe administration of vancomycin through a novel midline catheter: a randomized, prospective clinical trial. *J Vasc Access*. 2014;15(4):251-256. doi:10.5301/jva.5000220
43. Yokota T, Tokumine J, Lefor AK, Hasegawa A, Yorozu T, Asao T. Ultrasound-guided placement of a midline catheter in a patient with extensive postburn contractures: a case report. *Medicine (Baltimore)*. 2019;98(3):e14208. doi:10.1097/MD.0000000000014208
44. Dickson HG, Flynn O, West D, Alexandrou E, Mifflin N, Malone M. A cluster of failures of midline catheters in a hospital in the home program: a retrospective analysis. *J Infus Nurs*. 2019;42(4):203-208. doi:10.1097/NAN.0000000000000330
45. Thaut L, Weymouth W, Hunsaker B, Reschke D. Evaluation of central venous access with accelerated Seldinger technique versus modified Seldinger technique. *J Emerg Med*. 2019;56(1):23-28. doi:10.1016/j.jemermed.2018.10.021
46. Adams DZ, Little A, Vinsant C, Khandelwal S. The midline catheter: a clinical review. *J Emerg Med*. 2016;51(3):252-258. doi:10.1016/j.jemermed.2016.05.029
47. DeVries M, Lee J, Hoffman L. Infection free midline catheter implementation at a community hospital (2 years). *Am J Infect Control*. 2019;47(9):1118-1121. doi:10.1016/j.ajic.2019.03.001
48. Caparas J, Hung H. Vancomycin administration through a novel midline catheter: summary of a 5-year 1086-patient experience in an urban community hospital. *J Assoc Vasc Access.* 2017;22(1):38-41. https://doi.org/10.1016/j.java.2016.10.092
49 Caparas J. Maximal sterile barrier vs. partial-body drape for midline Insertion. *J Assoc Vasc Access*. 2016;21(4):253-254. https://doi.org/10.1016/j.java.2016.10.040
50. Simonov M, Pittiruti M, Rickard CM, Chopra V. Navigating venous access: a guide for hospitalists. *J Hosp Med*. 2015;10(7):471-478. doi:10.1002/jhm.2335
51. Seo H, Altshuler D, Dubrovskaya Y, et al. The safety of midline catheters for intravenous therapy at a large academic medical center. *Ann Pharmacother*. 2020;54(3):232-238. doi:10.1177/1060028019878794
52. Chopra V, Kaatz S, Swaminathan L, et al. Variation in use and outcomes related to midline catheters: results from a multicentre pilot study. *BMJ Qual Saf*. 2019;28(9):714-720. doi:10.1136/bmjqs-2018-008554
53. Bahl A, Karabon P, Chu D. Comparison of venous thrombosis complications in midlines versus peripherally inserted central catheters: are midlines the safer option? *Clin Appl Thromb Hemost*. 2019;25:1076029619839150. doi:10.1177/1076029619839150
54. Lisova K, Hromadkova J, Pavelková K, Zauška V, Havlin J, Charvat J. The incidence of symptomatic upper limb venous thrombosis associated with midline catheter: prospective observation. *J Vasc Access*. 2018;19(5):492-495. doi:10.1177/1129729818761276
55. Loveday HP, Wilson JA, Pratt RJ, et al. epic3: national evidence-based guidelines for preventing healthcare-associated infections in NHS hospitals in England. *J Hosp Infect*. 2014;86(Suppl 1):S1-S70. doi:10.1016/S0195-6701(13)60012-2
56. Duesing LA, Fawley JA, Wagner AJ. Central venous access in the pediatric population with emphasis on complications and prevention strategies. *Nutr Clin Pract*. 2016;31(4):490-501. doi:10.1177/0884533616640454
57. Ares G, Hunter CJ. Central venous access in children: indications, devices, and risks. *Curr Opin Pediatr*. 2017;29(3):340-346. doi:10.1097/MOP.0000000000000485
58. Lorente L. What is new for the prevention of catheter-related bloodstream infections? *Ann Transl Med*. 2016;4(6):119. doi:10.21037/atm.2016.03.10
59. Heffner A, Androes MP. Overview of central venous access in adults. Up-to Date.com. Updated March 19, 2020. https://www.uptodate.com/contents/overview-of-central-venous-access-in-adults
60. Campagna S, Gonella S, Berchialla P, et al. A retrospective study of the safety of over 100,000 peripherally-inserted central catheters days for parenteral supportive treatments. *Res Nurs Health*. 2019;42(3):198-204. doi:10.1002/nur.21939
61. Marschall J, Mermel LA, Fakih M, et al. Strategies to prevent central line-associated bloodstream infections in acute care hospitals: 2014 update. *Infect Control Hosp Epidemiol*. 2014;35(7):753-771. doi:10.1086/676533
62. Ling ML, Apisarnthanarak A, Jaggi N, et al. APSIC guide for prevention of central line associated bloodstream infections (CLABSI). *Antimicrob Resist Infect Control*. 2016;5:16. doi:10.1186/s13756-016-0116-5
63. Hsu CC, Kwan GN, Evans-Barns H, Rophael JA, van Driel ML. Venous cutdown versus the Seldinger technique for placement of totally implantable venous access ports. *Cochrane Database Syst Rev*. 2016;2016(8):CD008942. doi:10.1002/14651858.CD008942.pub2
64. Vierboom L, Darani A, Langusch C, Soundappan S, Karpelowsky J. Tunnelled central venous access devices in small children: a comparison of open vs. ultrasound-guided percutaneous insertion in children weighing ten kilograms or less. *J Pediatr Surg*. 2018;53(9):1832-1838. doi:10.1016/j.jpedsurg.2018.03.025
65. Tagliari AP, Staub FL, Guimarães JR, Migliavacca A, Mossmann Dda F. Evaluation of three different techniques for insertion of totally implantable venous access device: a randomized clinical trial. *J Surg Oncol*. 2015;112(1):56-59. doi:10.1002/jso.23962

66. Franco-Sadud R, Schnobrich D, Mathews BK, et al. Recommendations on the use of ultrasound guidance for central and peripheral vascular access in adults: a position statement of the society of hospital medicine. *J Hosp Med*. 2019;14:E1-E22. doi:10.12788/jhm.3287
67. Hugill K. Vascular access in neonatal care settings: selecting the appropriate device. *Br J Nurs*. 2016;25(3):171-176. doi:10.12968/bjon.2016.25.3.171
68. Chopra V, O'Horo JC, Rogers MA, Maki DG, Safdar N. The risk of bloodstream infection associated with peripherally inserted central catheters compared with central venous catheters in adults: a systematic review and meta-analysis. *Infect Control Hosp Epidemiol*. 2013;34(9):908-918. doi:10.1086/671737
69. Wichmann D, Belmar Campos CE, Ehrhardt S, et al. Efficacy of introducing a checklist to reduce central venous line associated bloodstream infections in the ICU caring for adult patients. *BMC Infect Dis*. 2018;18(1):267. doi:10.1186/s12879-018-3178-6
70. Centers for Disease Control and Prevention. Central Line Insertion Practices (CLIP) adherence monitoring. National Healthcare Safety Network, Centers for Disease Control and Prevention. Published January 2020. https://www.cdc.gov/nhsn/pdfs/pscmanual/5psc_clipcurrent.pdf
71. Practice guidelines for central venous access 2020: an updated report by the American Society of Anesthesiologists Task Force on central venous access. *Anesthesiology*. 2020;132(1):8-43. doi:10.1097/ALN.0000000000002864
72. Schmidt GA, Blaivas M, Conrad SA, et al. Ultrasound-guided vascular access in critical illness. *Intensive Care Med*. 2019;45(4):434-446. doi:10.1007/s00134-019-05564-7
73. Calvache JA, Rodríguez MV, Trochez A, Klimek M, Stolker RJ, Lesaffre E. Incidence of mechanical complications of central venous catheterization using landmark technique: do not try more than 3 times. *J Intensive Care Med*. 2016;31(6):397-402. doi:10.1177/0885066614541407
74. Noonan PJ, Hanson SJ, Simpson PM, Dasgupta M, Petersen TL. Comparison of complication rates of central venous catheters versus peripherally inserted central venous catheters in pediatric patients. *Pediatr Crit Care Med*. 2018;19(12):1097-1105. doi:10.1097/PCC.0000000000001707
75. Wang YC, Lin PL, Chou WH, Lin CP, Huang CH. Long-term outcomes of totally implantable venous access devices. *Support Care Cancer*. 2017;25(7):2049-2054. doi:10.1007/s00520-017-3592-0
76. Blanco-Guzman MO. Implanted vascular access device options: a focused review on safety and outcomes. *Transfusion*. 2018;58 (Suppl 1): 558-568. doi:10.1111/trf.14503
77. Williams TL, Bowdle TA, Winters BD, Pavkovic SD, Szekendi MK. Guidewires unintentionally retained during central venous catheterization. *J Assoc Vasc Access*. 2014;19(1):29-34. https://doi.org/10.1016/j.java.2013.12.001
78. Hoffman T, Du Plessis M, Prekupec MP, et al. Ultrasound-guided central venous catheterization: a review of the relevant anatomy, technique, complications, and anatomical variations. *Clin Anat*. 2017;30(2):237-250. doi:10.1002/ca.22768
79. Kornbau C, Lee KC, Hughes GD, Firstenberg MS. Central line complications. *Int J Crit Illn Inj Sci*. 2015;5(3):170-178. doi:10.4103/2229-5151.164940
80. Tasopoulou KM, Argyriou C, Mantatzis M, Kantartzi K, Passadakis P, Georgiadis GS. Endovascular repair of an inadvertent right vertebral artery rupture during dialysis catheter insertion. *Ann Vasc Surg*. 2018;51:324.e11-324.e16. doi:10.1016/j.avsg.2018.02.022
81. Akkan K, Cindil E, Kilic K, Ilgit E, Onal B, Erbas G. Misplaced central venous catheter in the vertebral artery: endovascular treatment of foreseen hemorrhage during catheter withdrawal. *J Vasc Access*. 2014;15(5):418-423. doi:10.5301/jva.5000267
82. Lee KA, Ramaswamy RS. Intravascular access devices from an interventional radiology perspective: indications, implantation techniques, and optimizing patency. *Transfusion*. 2018;58(Suppl 1):549-557. doi:10.1111/trf.14501
83. Young M, You T. Overview of complications of central venous catheters and their prevention. UpToDate.com. Updated May 20, 2020. https://www.uptodate.com/contents/overview-of-complications-of-central-venous-catheters-and-their-prevention
84. Stefaniak JJ, Wujtewicz MA, Wujtewicz M. Inadvertent cannulation of vertebral artery with a dialysis catheter. *J Vasc Access*. 2017;18(5):e71-e72. doi:10.5301/jva.5000701
85. Parienti JJ, Mongardon N, Mégarbane B, et al. Intravascular complications of central venous catheterization by insertion site. *N Engl J Med*. 2015;373(13):1220-1229. doi:10.1056/NEJMoa1500964
86. Sun W, Ma Y, Liu B, Ge R, Wang K, Song Q. Two successful insertions of peripherally inserted central catheter in a super elderly patient with bilateral pacemaker placement. *J Vasc Access*. 2017;18(1):e1-e2. doi:10.5301/jva.5000582
87. Liu B, Sun W, Wang K. A successful insertion of PICC in patient with cardiac angiosarcoma and neoplasty of right atrium and pacemaker: a case report. *Medicine (Baltimore)*. 2017;96(51):e9225. doi:10.1097/MD.0000000000009225
88. Sainathan S, Hempstead M, Andaz S. A single institution experience of seven hundred consecutively placed peripherally inserted central venous catheters. *J Vasc Access*. 2014;15(6):498-502. doi:10.5301/jva.5000248
89. Aurshina A, Hingorani A, Alsheekh A, Kibrik P, Marks N, Ascher E. Placement issues of hemodialysis catheters with pre-existing central lines and catheters. *J Vasc Access*. 2018;19(4):366-369. doi:10.1177/1129729818757964
90. Bhadauria D, Chellappan A, Gurjar M, Kaul A, Sharma RK, Prasad N. The "dilemma of double lifelines": central venous catheter co-existence with transvenous cardiac pacemaker. *J Vasc Access*. 2017;18(1):e3-e5. doi:10.5301/jva.5000622
91. Kusztal M, Nowak K. Cardiac implantable electronic device and vascular access: strategies to overcome problems. *J Vasc Access*. 2018;19(6):521-527. doi:10.1177/1129729818762981
92. Maradey JA, Jao GT, Vachharajani TJ. Leadless pacemaker placement in a patient with chronic kidney disease: a strategy to preserve central veins. *Hemodial Int*. 2018;22(4):E57-E59. doi:10.1111/hdi.12665
93. Miller AG, Bardin AJ. Review of ultrasound-guided radial artery catheter placement. *Respir Care*. 2016;61(3):383-388. doi:10.4187/respcare.04190
94. O'Horo JC, Maki DG, Krupp AE, Safdar N. Arterial catheters as a source of bloodstream infection: a systematic review and meta-analysis. *Crit Care Med*. 2014;42(6):1334-1339. doi:10.1097/CCM.0000000000000166
95. Schults JA, Long D, Pearson K, et al. Insertion, management, and complications associated with arterial catheters in paediatric intensive care: a clinical audit. *Aust Crit Care*. 2019;S1036-7314(18)30349-7. doi:10.1016/j.aucc.2019.05.003

Exhibit J

February 23, 2023

The Honorable Kay Ivey and Commissioner John Hamm;

We the undersigned individuals write to share some valuable information about the potential scope and reach of Alabama's investigation into current execution protocols. There is much information that can be learned from other conservative states that have done the important work of examining how our justice system carries out executions. We hope that this can be used to supplement whatever additional considerations are already in place for the investigation that was announced in November 2022.

Following serious issues brought to Governor Bill Lee's attention just before a scheduled execution, Tennessee launched an independent and thorough investigation into its execution protocols, the results of which were recently released. Tennessee's approach is a model for Alabama, and we encourage you to reach out to Governor Lee for assistance in crafting an independent review process in which Alabamians, including crime victims' family members, can be confident. An examination of Tennessee's recent report [1] provides a good guide. Some of the basic questions Alabama's independent review should consider include:

1. What is the selection process (is it merit- or skill-based) for execution team members? What are the qualifications of the people in charge of: (a) procuring the drugs and equipment (including needles and I.V. setting equipment); (b) evaluating a condemned prisoner's veins in the days leading up to an execution); (c) setting the I.V.s for the execution?

2. Are any of these people evaluated after the fact to determine whether they should continue to be members of the team?

3. Alabama law permits "[t]wo physicians, including the prison physician"[2] to be present at an execution. If the people who set the I.V.s are not physicians, why not? Has ADOC considered including, as a contract provision, for healthcare services for ADOC facilities, the provision of qualified personnel for conducting executions?[3]

4. Who is ADOC's Drug Procurer? What training and guidance do they have from ADOC?

   In the past, TDOC tasked a staff member with being the "Drug Procurer" without requiring that person to have medical or pharmacology training or necessary professional guidance, resources, or assistance. Because TDOC did not have any policies in place for procuring lethal injection chemicals, "the Drug Procurer began conducting Google searches and making cold calls to active pharmaceutical ingredient ("API") suppliers in the United States." The Drug Procurer's task initially was to find Pentobarbital, but they couldn't. In late 2016 to early 2017, the Drug Procurer cold-called a compounding pharmacy that was willing to help look for Pentobarbital and agreed to compound the drug if found (that process didn't work out due to the inability to locate Pentobarbital but this pharmacy ultimately became the drug supplier for TDOC's three-part cocktail).

5. Is Alabama using compounded drugs or their commercially manufactured counterparts? If Alabama is using compounded drugs, is the state following the appropriate guidelines? Is the state getting test results from the pharmacy supplying the drugs? How is the state disposing of drugs after their shelf life expires?

---

[1] https://app.box.com/s/cxeblwhscz6a8mbngp6cylwbcsz2c7jx/file/1102145253665
[2] Ala. Code § 15-18-83(a)(3).
[3] Alabama recently announced a contract with YesCare to provide all prison healthcare services.

Tennessee uses the following drugs in executions: Midazolam, Vecuronium Bromide, and Potassium Chloride. According to the independent investigation into Tennessee's process, "the Pharmacy Owner voiced 'concern with Midazolam,' stating that '[b]eing a benzodiazepine, it does not elicit strong analgesic effects," meaning "[t]he subjects may be able to feel pain from the administration of the second and third drugs." TDOC's Drug Procurer agreed to "pass this information on to the higher ups," but they went forward with this method anyway. When TDOC began efforts to acquire Midazolam in 2018, "the Pharmacy was no longer able to obtain it in a commercially manufactured form due to suppliers requesting assurances that the drug would not be used for executions. As a result, TDOC began ordering Midazolam in its API form to be compounded by the Pharmacy…[C]ompounded drugs–in contrast to their commercially manufactured counterparts–should undergo certain testing under pharmaceutical guidelines, have different storage and preparation requirements, and have a much shorter shelf life." The Pharmacy was also compounding the Potassium Chloride used for the third step in TDOC's lethal injection protocol.

Lethal injection chemicals need to be tested for potency, sterility, and endotoxins according to TDOC's execution protocol, but that protocol was not shared with the pharmacy supplying the drugs and the pharmacy was not testing for endotoxins. Though the pharmacy did test for potency and sterility on some occasions, some of those test results only became available after executions had already occurred. Additionally, there were instances in which the potency of Midazolam and Potassium Chloride were below or above range, which would impact their effects.

6. Corrective action recommended in Tennessee that could be applied in Alabama.

The Tennessee report is lengthy and provides some specific potential corrective action for the department. Some of this may well be applicable in Alabama and could be applied in any investigation. This includes:

- Considering hiring a full-time employee or retaining a consultant with pharmaceutical background to provide guidance in connection with the lethal injection process.
    - Conducting an exhaustive review of the current Protocol.
    - Reviewing the current Protocol's testing requirements.
    - Establishing testing guidelines for any compounded LIC with procedures for confirming that the appropriate tests are being performed.
    - Establishing a procedure for storing and maintaining test results.
    - Establishing a procedure for storing and maintaining LIC, including recommendations regarding suitable equipment for storage.
    - Assisting with locating LIC sources and communicating pertinent information to same.
- Ensuring that a copy of any current or future version of the TDOC Protocol is provided to the LIC provider.
- Evaluating the roles and outline the duties of all TDOC employees, as well as any third parties, tasked with participating in the lethal injection process.
- Considering hiring a full-time employee or retaining a consultant with healthcare background to provide scheduled guidance and training to the Execution Team.
    - Determining whether any Execution Team members should be required to obtain any certifications and/or licenses.
- Establishing a team/committee to review all relevant testing data prior to each scheduled execution to ensure that there are no deviations from the Protocol.

- Considering incorporating deadlines to obtain testing results in sufficient time to ensure that failing LIC are not made available or used during a scheduled execution.
- Considering annual audits to ensure compliance and to evaluate Protocol efficiencies and best practices.

Though this is just a summary of some of the results and findings from the Tennessee study, there is much value that Alabama could glean in following our northern sister's lead. It is of utmost importance to Alabamians that the state use the time afforded by Governor Ivey's order to get this right. We believe that this can best be aided through the thorough review of an independent investigatory body. We hope you will take this into consideration and we stand ready to provide assistance in any way we can.

Signed,

Ramona Albin
Associate Professor, Cumberland School of Law

Akiesha Anderson
Policy & Advocacy Director, Alabama Arise

Jackie Aranda-Osorno
Attorney

Hannah Baggett
Associate Professor, Auburn University

Matthew Bailey
Attorney

Danielle Blevins
Attorney

Brett Bloomston
Attorney

Gary Blume
Attorney

Hunter Carmichael
Attorney, Jefferson County Public Defender

Richard Carmody
Attorney, Adams and Reese LLP

Will Clay
Attorney, LaPlante, Merritt, Faulkner, Wilson & Clay LLC

Susanne Cordner
Attorney, McGuire & Associates

Michael Crespi
Attorney

Carla Crowder
Executive Director, Alabama Appleseed

Adam Danneman
Jefferson County Public Defender

Eric Davis
Attorney

Russell Drake
Retired Attorney

Bryan Fair
Professor, University of Alabama School of Law

Lauren Faraino
Director, The Woods Foundation

E. Peyton Faulk
Executive Director, MVLP

Kiara Fiegi
Attorney, Montgomery County Public Defender

Christine Freeman
Middle District of Alabama Federal Defender

Scott Fuqua
Attorney, Alabama Appleseed

Nick Gaede
Attorney, Bainbridge Mims Rogers & Smith

Exhibit L

ROBERT C. PAXTON COMPANY, L.P.A.
Attorney and Counselor at Law
2142 Riverside Drive
Columbus, Ohio 43221

Robert C. Paxton (1919-1999)
Robert C. Paxton, II

Telephone: (614) 485-9670
Facsimile: (614) 485-9671
Email: Robert.Paxton@sbcglobal.net
Cell: (614) 226-4716 ** Best Number

Of Counsel:
Neal J. Barkan

December 31, 2022

The Honorable Kay Ivey
Governor of the State of Alabama
State Capital
600 Dexter Avenue
Montgomery, Alabama 36130

PERSONAL AND CONFIDENTIAL

RE: IDEA CONCERNING
DEATH ROW INMATES

Dear Governor Ivey:

I am a practicing lawyer in Columbus, Ohio. On November 2 of this year, I celebrated 50 years as a practicing lawyer. I am in good standing with the Ohio Supreme Court and have practiced and am admitted to the U.S. Supreme Court and all Federal Courts and have agued at least 10 cases before the Ohio Supreme Court and also before all Ohio Courts of Appeal and the Courts of Common Pleas. I am just giving you this background so you don't think I am an "off-the-street" do gooder.

I am going on 76 years of age (March 2, 2023), and last year I was diagnosed with B Cell Non-Hodgkins Lymphoma, a specific form of cancer. This is the reason that I write this letter to you. I have undergone chemotherapy many times since I was diagnosed with cancer in 2021 and the nursing staff at The Ohio State University, James Cancer Clinic ,quite naturally has to be able to find a vein to infuse the chemotherapy. The last time I had this infusion, it took five times for the nurses to find a vein. Then, a more sophisticated and older nurse said she could do it. She brought into the infusion room a very hot towel and placed it over my left forearm for about 10 to 15 minutes. The veins popped right up away and the problem was solved

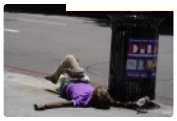
You probably have some very talented doctors or technicians that are assisting in this procedure but, I thought I would just throw this out, I remain

Very truly yours,

Robert C. Paxton II

RECEIVED
JAN 2023
Governor's Office

DOC_000020


Excessive heat warnings

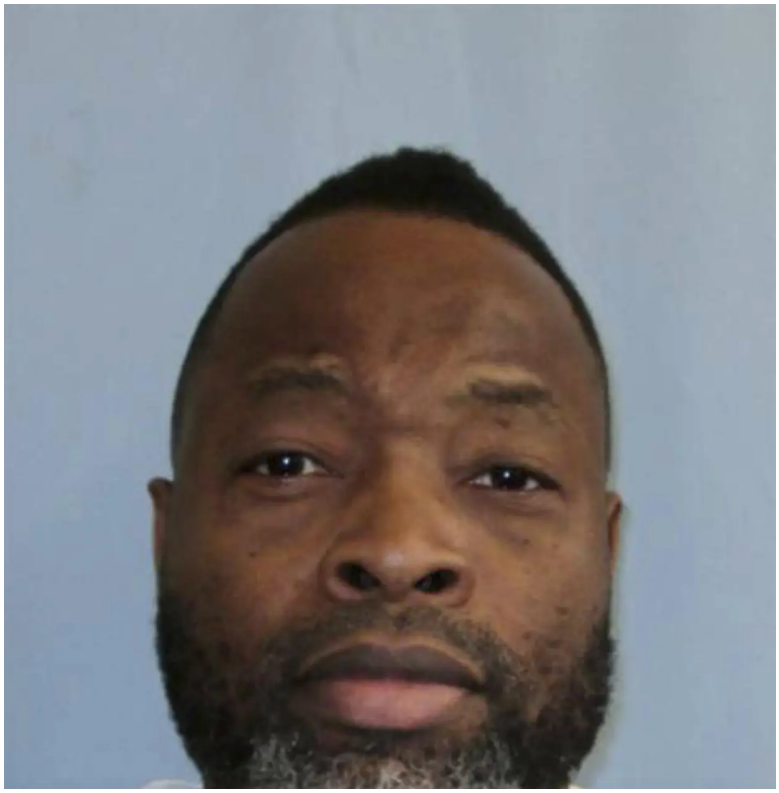

Baltimore block party shooting


Riots in France


What do presidents do on the Fourth of July?


Wimbledon

Alabama man's execution was botched, advocacy group alleges


AP

BY KIM CHANDLER
Published 2:32 PM CDT, August 30, 2022
Share

MONTGOMERY, Ala. (AP) — Alabama corrections officials apparently botched an inmate's execution last month, an anti-death penalty group alleges, citing the length of time that passed before the prisoner received the lethal injection and a private autopsy indicating his arm may have been cut to find a vein.

Joe Nathan James Jr. was put to death July 28 at an Alabama prison for the 1994 shooting death of his former girlfriend. The execution was carried out more than three hours after the U.S. Supreme Court denied a request for a stay.

EXHIBIT
39

"Subjecting a prisoner to three hours of pain and suffering is the definition of cruel and unusual punishment," Maya Foa, director of Reprieve US Forensic Justice Initiative, a human rights group that opposes the death penalty, said in a statement. "States cannot continue to pretend that the abhorrent practice of lethal injection is in any way humane."

OTHER NEWS

US measure would ban products containing mineral mined with child labor in Congo

Peter Hellyer, prolific writer who chronicled the UAE's rise over nearly five decades, dies at 75

Accuser describes Oscar-winning actor Kevin Spacey as 'slippery, snaky difficult person'

What's 'Bidenomics'? The president hopes a dubious nation embraces his ideas condensed into the term

The Alabama Department of Forensic Science declined a request to release the state's autopsy of James, citing an ongoing review that happens after every execution. Officials have not responded to requests for comment on the private autopsy, which was first reported by The Atlantic.

At the time of the execution, Alabama Corrections Commissioner John Hamm told reporters that "nothing out of the ordinary" happened. Hamm said he wasn't aware of the prisoner fighting or resisting officers. The state later acknowledged that the execution was delayed because of difficulties establishing an intravenous line, but did not specify how long it took.

Dr. Joel Zivot, a professor of anesthesiology at Emory University and an expert on lethal injection who witnessed the private autopsy, said it looked like there were numerous attempts to connect a line.

Zivot said he saw "multiple puncture sites on both arms" and two perpendicular incisions, each about 3 to 4 centimeters (1 to 1.5 inches) in length, in the middle of the arm, which he said indicated that officials had attempted to perform a "cutdown," a procedure in which the skin is opened to allow a visual search for a vein. He said the cutdown is an old-style medical intervention rarely performed in modern medical settings, and that it would be painful without anesthesia. He also said he saw evidence of intramuscular injections not in the vicinity of a vein.

The Alabama Department of Corrections prison system issued a written statement in which it noted that "protocol states that if the veins are such that intravenous access cannot be provided, the team will perform a central line procedure," which involves placing a catheter in a large vein. "Fortunately, this was not necessary and with adequate time, intravenous access was established," the statement said.

Alabama does not allow witnesses from news outlets to watch the preparations for a lethal injection. They get their first glimpse of the execution chamber when an inmate is already strapped to the gurney with the IV line connected.

A reporter for The Associated Press who attended the execution observed that James did not respond when the warden asked if he had final words. His eyes remained closed except for briefly fluttering at one point early in the procedure.

Lawyers who spoke with James by telephone said they were disturbed by his reported lack of movements and raised questions about what happened before the lethal injection. Hamm said James was not sedated.

“That wasn’t the Joe that I knew. He always had something to say. He always wanted to be in control,” said James Ransom, the attorney who helped James file his appeal with the U.S. Supreme Court. “The fact that he did not give any sort of reaction ... and that he didn’t open his eyes, tells me something was up,” Ransom said.

John Palombi, a federal defender who spoke with James twice on the day of his execution, said James, “was certainly alert” earlier in the day.

The Atlantic quoted a friend of James as saying that the inmate had planned to make a final statement.

Robert Dunham, executive director of the Death Penalty Information Center, a national nonprofit organization that analyzes issues concerning capital punishment, said the delay between the Supreme Court’s go-ahead and the execution, combined with the autopsy, points to a “botched execution, and it is among the worst botches in the modern history of the U.S. death penalty.”

“This execution is Exhibit A as to why execution secrecy laws are intolerable,” Dunham wrote in an email to the AP. “The public is entitled to know what went on here — and what goes on in all Alabama executions — from the instant the execution team begins the process of physically preparing the prisoner for the lethal injection until the moment the prisoner dies.”

—

This story has been edited to correct the spelling of James Ransom’s name.

AP

Advancing the Power of Facts

The Associated Press is an independent global news organization dedicated to factual reporting. Founded in 1846, AP today remains the most trusted source of fast, accurate, unbiased news in all formats and the essential provider of the technology and services vital to the news business. More than half the world's population sees AP journalism every day.

THE ASSOCIATED PRESS

AP.ORG

CAREERS

ACCESSIBILITY STATEMENT

YOUR PRIVACY RIGHTS

TERMS OF USE

MANAGE MY PERSONAL DATA

MORE FROM AP NEWS

ABOUT

AP NEWS VALUES AND PRINCIPLES

AP'S ROLE IN ELECTIONS

AP LEADS

AP DEFINITIVE SOURCE BLOG

AP IMAGES SPOTLIGHT BLOG

AP STYLEBOOK

ALABAMA
DEPARTMENT OF FORENSIC SCIENCES

2026 Valleydale Road
Hoover, AL 35244-2095

Telephone (205) 982-9292
Facsimile (205) 403-2025

TOXICOLOGICAL ANALYSIS REPORT

Shante Hill, MD
Alabama Department of Forensic Sciences
P. O. Box 7925 Crichton Station
2451 Fillingim Street
Mobile, AL 36670-7925

ADFS Case Number 22ME02767
Case Initiated Date 07/29/2022
Start Date 08/08/2022
Report Date 09/08/2022
Report ID 120424182
Agency Case Number

Subject James, Jr., Joe

Evidence analyzed (Including sub-items)

Item	Specimen	Analyte	Result	Method(s)	Notes
1J1	Blood, femoral	Ethanol	ND	HS/GC/MS	
1J1	Blood, femoral	Midazolam	3400 ng/mL	EIA, LC/MS/MS	
1J2	Blood, femoral		NA		
1J3	Blood, cardiac	Ethanol	ND	HS/GC/MS	
1J3	Blood, cardiac	Midazolam	2400 ng/mL	EIA, LC/MS/MS	
1J4	Blood, cardiac		NA		
1J5	Urine		NA		
1J6	Urine		NA		
1J7	Vitreous humor		NA		

Footnotes

NA - Not analyzed/Not applicable
ND - None detected

ADFS Case Number 22NE02267-
TOXICOLOGICAL ANALYSIS REPORT
Report ID 120424182

Comments

Evidence was received in a plastic bag.

SCOPE OF ANALYSIS WAS LIMITED TO THE FOLLOWING:
Ethanol, acetone, isopropanol, methanol, meth/amphetamine class, barbiturate class, benzodiazepine class, buprenorphine, cannabinoids, carisoprodol/meprobamate, cocaine and/or metabolite(s), cyclobenzaprine, dextromethorphan, fentanyl, methadone, opiates/opioids, phencyclidine (PCP), tramadol, tricyclic antidepressants, zolpidem.

For a more detailed description of scope of analysis, please visit the ADFS website at:
https://adfs.alabama.gov/services/tox/toxicology-testing

An additional report will follow at a later date to include reference laboratory results.

Remaining evidence will be disposed 24 months from the date of this report unless storage space becomes limited or alternate arrangements are made prior thereto.

Kristin Tidwell 09/08/2022
Kristin Tidwell, D-ABFT-FT
Toxicology Section Chief

ALABAMA
DEPARTMENT OF FORENSIC SCIENCES

2026 Valleydale Road
Hoover, AL 35244-2095

Telephone (205) 982-9292
Facsimile (205) 403-2025

TOXICOLOGICAL ANALYSIS REPORT - ADDITIONAL

Shante Hill, MD
Alabama Department of Forensic Sciences
P. O. Box 7925 Crichton Station
2451 Fillingim Street
Mobile, AL 36670-7925

ADFS Case Number 22ME02767
Case Initiated Date 07/29/2022
Start Date 08/08/2022
Report Date 09/21/2022
Report ID 120431817
Agency Case Number

Subject James, Jr., Joe

Evidence analyzed (Including sub-items)

Item	Specimen	Analyte	Result	Method(s)	Notes
1J1	Blood, femoral	Midazolam	P	GC/MS	
1J2	Blood, femoral	Reference laboratory analysis			3
1J4	Blood, cardiac	Reference laboratory analysis			3

Footnotes

P - Present but not quantified
3 - Analysis was conducted by a reference laboratory; report is attached.

Comments

Evidence was received in a plastic bag.

A complete report include two 3-page reference reports.

This additional report includes analyses for midazolam and rocuronium with the enumerated item(s), and should be appended to the previous report issued on 09/08/2022.

Remaining evidence will be disposed 24 months from the date of this report unless storage space becomes limited or alternate arrangements are made prior thereto.

ADFS Case Number 22ME02767
TOXICOLOGICAL ANALYSIS REPORT - ADDITIONAL
Report ID 120431817

Curt E. Harper 09/21/2022
Curt E. Harper, Ph.D., F-ABFT
Chief Toxicologist

ALABAMA
DEPARTMENT OF FORENSIC SCIENCES

P.O. Box 7925
Mobile, AL 36670
Tel. (251) 470-9912

2 Forensic Drive
Mobile, AL 36617

AMENDED REPORT OF AUTOPSY

ADFS CASE NUMBER: 22ME02767

DATE: July 29, 2022
TIME: 0740 hours

NAME(S): JOE JAMES, JR.

COUNTY OF DEATH: Escambia

DATE OF DEATH: July 28, 2022

AGE: 50 years **RACE:** B **SEX:** M **LENGTH:** 70 inches **WEIGHT:** 198 pounds

FINAL DIAGNOSES

I. Mixed drug toxicity due to judicial execution:
   A. The decedent was an inmate at Holman Prison scheduled for execution on July 28, 2022; pronounced at scene.
   B. Postmortem femoral blood toxicology significant for midazolam (3400 ng/mL) and rocuronium (17000 ng/mL), see comment.
   C. See separate toxicology reports.
   D. Postmortem examination shows cerebral and pulmonary edema and generalized visceral congestion.

CAUSE OF DEATH: Mixed drug toxicity due to judicial execution

MANNER OF DEATH: Homicide

COMMENT: This report has been amended to include additional toxicology results from NMS Labs. The cause and manner of death remain unchanged.

Case #1 **22ME02767**
Name **Joe James, Jr.**

EVIDENCE OF INJURY

Linear superficial abrasions are present on the left antecubital fossa and proximal forearm, measuring up to 1 ¾ inches in length and less than $^{1}/_{16}$ inch in depth.

EXTERNAL EXAMINATION

The following excludes any previously described injuries.

The body is viewed unclad after the removal of prison clothing. The personal effects are inspected and listed separately.

The body is that of a well-developed, well-nourished adult Black male appearing the stated age of 50 years. The body measures 70 inches in length and weighs 198 pounds. The body mass index (BMI) is 28.4 kilograms per meter squared.

The unembalmed body is well preserved and cool to touch due to refrigeration. Rigor mortis is fully developed in the major muscle groups. Livor mortis is fixed posteriorly except over pressure points. The skin is clean.

The scalp hair is black, short, and curly. Facial hair consists of a black and gray mustache and beard. The irides are brown, and there is arcus senilis. The pupils are unequal, measuring 5 millimeters on the right and 4 millimeters on the left. The corneae are clear, and the sclerae and conjunctivae have no petechiae or other abnormalities. The nasal bones are intact by palpation. The nares are patent and contain no foreign matter. The natural teeth are in good repair. The frenula are intact. The mucosa and tongue are free of injuries. There is no foreign material in the mouth. The external ears have no injuries.

The symmetrical neck has no masses or injuries. The trachea is in the midline.

The shoulders, chest, and back are symmetrical and free of trauma.

The abdomen is flat with no fluid wave or palpable masses.

The external genitalia are those of a normally developed adult male with descended testes. The anus is unremarkable.

The extremities are symmetrical and of equal diameter. There are no distinctive scars of intravenous narcotism or hesitation marks. The fingernails are cyanotic, short, and clean. The toenails are pale, thickened, short, and clean. There is no edema or venous stasis changes of the lower extremities.

Passive motion of the neck, shoulders, elbows, wrists, fingers, hips, and ankles fails to elicit any bony crepitus or abnormal motion.

Identifying features include tattoos on the abdomen and bilateral upper extremities. Irregular scars are present on the posterior right shoulder, left lower back, and bilateral knees. Horizontal linear scars are present lateral to the right eye.

Case #1 **22ME02767**
Name **Joe James, Jr.**

EVIDENCE OF MEDICAL EQUIPMENT

Evidence of medical equipment, consistent with history of judicial execution, includes EKG pads, intravenous access to the medial left antecubital fossa and dorsum of the right foot, and additional needle puncture marks in the antecubital fossae, wrists, and hands.

INTERNAL EXAMINATION

The following excludes any previously described injuries.

SEROSAL CAVITIES: The right and left pleural cavities have no free fluid or adhesions. The mediastinum is in the midline. The pericardial sac has a normal amount of serous fluid. The diaphragm is in the normal anatomical position and grossly unremarkable. The subcutaneous abdominal fat measures 1 ½ inches in thickness at the umbilicus. The abdominal cavity is lined with glistening serosa and has no collections of free fluid. The organs are normally situated and congested. The mesentery and omentum are unremarkable.

CENTRAL NERVOUS SYSTEM: There is no scalp or subgaleal hemorrhage. The calvarium is intact. There is no epidural, subdural, or subarachnoid hemorrhage. The brain is of the normal convolutional pattern and weighs 1450 grams. The meninges are clear. There is mild edema with flattening of the gyri. There is no uncal or tonsillar herniation. The cerebral arteries are patent with no significant atherosclerosis. The cut surfaces of the brain have normal relations of gray and white matter. There are no intraparenchymal hemorrhages or evidence of neoplasm. The dura mater is free of stains and discolorations. There are no fractures of the base of the skull. The brainstem and cerebellum are intact and have no lesions. The spinal cord is not examined.

NECK: The soft tissues and strap muscles of the neck have no hemorrhage. The hyoid bone and the cartilages of the larynx and thyroid are intact and show no evidence of injury. The larynx and trachea are lined by smooth pink mucosa, are patent, and contain no foreign material. The epiglottis and vocal cords are without swelling or hemorrhage. The cervical vertebral column is intact. The carotid arteries and jugular veins are unremarkable.

CARDIOVASCULAR SYSTEM: The heart weighs 330 grams. The epicardial surface has a normal amount of glistening, yellow adipose tissue. The heart is of the usual configuration. The coronary ostia are in their usual location and give rise to normally distributed arteries. The coronary circulation is right dominant with the posterior descending arising from the right coronary artery. The major coronary arteries display no significant atherosclerosis. The circumferences of the valves are within normal range. The endocardium is tan. The valvular tissues are thin and pliable. The mural and valvular endocardia have no vegetations or thrombi. The papillary muscles and projecting myocardial muscle bundles are of normal prominence. The chordae tendineae have no abnormalities.

The cut surfaces of the red-brown myocardium have no hemorrhage, necrosis, or scars. The ventricular walls are of normal thickness.

The pulmonary trunk and arteries have no thromboemboli. The intimal surface of the aorta exhibits moderate atherosclerosis distally. The ostia of the major branches are of normal distribution and dimension. The right common iliac artery displays severe complicated atherosclerosis. The inferior vena cava and tributaries have no antemortem clots.

Case #1 **22ME02767**
Name **Joe James, Jr.**

RESPIRATORY SYSTEM: The right and left lungs weigh 660 grams and 500 grams, respectively. There is minimal subpleural anthracotic pigment deposition. The pleural surfaces are thin and free of exudates. The tracheobronchial tree is lined by smooth tan epithelium and contains pink frothy fluid. The cut surfaces of the lungs are dark-red and have moderate congestion and edema. The lung parenchyma is of the usual consistency and elasticity. No neoplasms are seen. There is no bronchopneumonia, consolidation, fibrosis, or calcification.

DIGESTIVE TRACT: The tongue has no injuries. The esophagus contains regurgitated gastric contents, and the mucosa is unremarkable. The stomach contains approximately 5 milliliters of dark brown fluid. No capsules or tablets are identified. The gastric mucosa has no inflammation or ulceration. The rugal pattern is regular. The remaining gastrointestinal tract has no major alterations to external inspection and palpation. The vermiform appendix is identified.

HEPATOBILIARY SYSTEM: The liver weighs 1370 grams. The capsule is intact. The cut surfaces are red-brown and of normal consistency. There are no focal lesions. The gallbladder contains 5 milliliters of dark-green bile. There are no stones. The mucosa is green and velvety. The large bile ducts are patent and non-dilated.

ENDOCRINE SYSTEM: The tan-maroon thyroid gland has no gross alterations. The tan, lobulated pancreas has no neoplasia, calcification, or hemorrhage. The adrenal glands have a normal configuration with the golden yellow cortices, well demarcated from the underlying medullae. The pituitary gland is unremarkable.

HEMATOPOIETIC SYSTEM: The thymus is involuted, appropriate for age. The spleen weighs 160 grams. The blue-gray capsule is smooth and intact. The cut surfaces are dark-red, soft, and congested. The lymphoid tissue in the spleen is within a normal range. The lymph nodes throughout the body are not enlarged.

GENITOURINARY SYSTEM: The right and left kidneys weigh 140 grams and 130 grams, respectively. The capsules are intact and strip with ease. The cortical surfaces are smooth and red-brown. The cut surfaces reveal a well-defined corticomedullary junction. There are no structural abnormalities of the medullae, calices, or pelves. The ureters are slender and patent. The urinary bladder contains approximately 400 milliliters of clear yellow urine. The mucosa is unremarkable.

The prostate gland is slightly enlarged. The cut surfaces are nodular. The testes have no gross abnormalities on palpation.

MUSCULOSKELETAL SYSTEM: The musculoskeletal system is normally-formed. The muscles are normal in color and consistency. The sternum, clavicles, ribs, vertebral column, and pelvis have no recent injuries.

ANCILLARY STUDIES

TOXICOLOGY: See separate Toxicological Analysis Report and toxicology reports from NMS Labs.

Case #1 **22ME02767**
Name **Joe James, Jr.**

LOGISTICS

AUTHORIZATION: Act No.97-571, Acts of Alabama.

IDENTIFICATION: The body is identified by Dr. Daniel Raulerson – Escambia County Coroner.

PERSONS PRESENT: Mr. Nguyen and Ms. Wells – ADFS.

EVIDENCE: Photographs, fingerprints, palm prints, bloodstain cards, blood, urine, vitreous, and tissue.

The facts stated herein are correct to the best of my knowledge and opinion at the time of report completion.

Tissue evidence will be disposed 12 months from the date of the original report unless alternate arrangements are made prior thereto.

Toxicology evidence, not tested, will be disposed 24 months from the date of the examination unless alternate arrangements are made prior thereto.

Shante Hill, MD
Medical Examiner

September 27, 2022
Date Signed

SAH/ddw/zw

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

JAMES EDWARD BARBER,

Plaintiff,

v.

KAY IVEY, Governor of the State of Alabama, *et al.*,

Defendants.

Case No. 2:23-cv-00342

CAPITAL CASE – EXECUTION TIME FRAME BEGINS 12:00 A.M. ON JULY 20, 2023

AFFIDAVIT OF ALAN EUGENE MILLER

I declare under penalty of perjury that the following is true and correct:

Background Information

1. My name is Alan Eugene Miller. I am currently incarcerated at Holman Correctional Facility in Atmore, Alabama. My inmate number is Z-627.

2. Because I have been sentenced to death, I am incarcerated on Holman's death row.

3. In July 2022, the Alabama Supreme Court set the date of my execution for September 22, 2022.

4. Before that date, I filed a lawsuit in federal court to stop the State of Alabama from executing me by any method other than nitrogen hypoxia.

5. I testified at a hearing in front of Judge Huffaker. I told him that I didn't like needles and that I elected to be executed by nitrogen hypoxia because it would not involve needles.

6. Even though I won relief from Judge Huffaker and the 11th Circuit affirmed, around 9:00 pm on the night of September 22, 2022, the U.S. Supreme Court issued an order allowing the State to execute me by lethal injection.

EXHIBIT 45

Entering the Execution Chamber

7. Following this decision by the U.S. Supreme Court, and at around 10:00 pm on September 22, 2022, a large group of guards arrived at my holding cell and escorted me to the execution chamber at Holman.

8. There were many people in the chamber when I arrived. I did not know most of them, and nobody introduced themselves to me.

9. At around 10:15 p.m., the guards began to strap me down to the execution gurney.

10. The straps on the gurney are arranged at a fixed height. Because I am shorter than the height that the gurney was designed for, the guards slid my body down the gurney in order to secure my feet into the feet straps. My arms were therefore raised into a stress position in which my arms were higher than perpendicular to my torso.

11. While this position immediately caused pain in my chest, neck, and arms, I did not resist being strapped down.

12. I noticed that there was a clock in the execution chamber. Since my body was tightly constricted on the gurney, and because people in the execution chamber were moving around, I could sometimes, but not always, see the time on the clock.

13. I also noticed that there were bright fluorescent lights immediately above the gurney. There was no cover on the fluorescent lights as there typically is on fluorescent lighting, so the light burned very brightly into my eyes. I had difficultly looking away from the fluorescent lights due to my tight physical restraints.

14. After being strapped into the gurney, I heard the doors to the execution chamber open, and saw two men wearing medical scrubs walk in. I asked these men if they were doctors. Neither man answered. They likewise refused to identify themselves or explain whether they had any sort of medical credentials.

15. Because the men would not identify themselves, I will refer to them by the colors of the scrubs they were wearing—Green and Aqua Scrubs.

The Botched Execution

16. Green Scrubs first tied a torniquet on my right bicep, and began slapping my inner right arm inside my elbow. The slapping went on for long periods of time as Green Scrubs tried to find a vein. The tourniquets were tied extremely tightly and caused pain.

17. Aqua Scrubs punctured my right elbow pit in multiple different points trying to find a vein. I could feel the needle being injected into my skin, and then turned in various directions, as Aqua Scrubs tried to place the needle inside a vein.

18. This process was painful and traumatic. After one of the needle punctured my arm, I told the men in scrubs that what they had just done was "excruciating". No one responded.

19. One of the men wearing scrubs then pulled out a small pocket flashlight in an attempt to better see my veins. The pocket flashlight did not help the men in scrubs.

20. Someone in the room then offered the men in scrubs the use of the bright flashlight application on his smartphone. The men in scrubs tried using the phone but then abandoned it after some time.

21. All the while, Aqua Scrubs continued to probe my right elbow pit with needles. I could feel my veins being pushed around inside my body by needles, which caused me great pain and fear.

22. Eventually, after repeated attempts, the men in scrubs abandoned their efforts to find a vein in my right elbow pit, and moved to my right hand. Green Scrubs tied a torniquet around my right hand, and repeatedly and firmly slapped the top of my right hand. Aqua Scrubs punctured my skin with needles in several places on my right hand.

23. At some point while the men in scrubs were using needles on my right hand, I was able to see that the clock on the wall read 11:00 p.m.

24. Unable to find a vein in my right hand, the men in scrubs abandoned that effort as well, and moved to my left hand. After a visual inspection, the men determined it would be impossible to find a vein in my left hand, and abandoned that injection site too.

25. Throughout this process, I attempted to speak to, and ask questions of, the men in scrubs. They refused to respond to almost all of my comments and questions.

26. During this time I thought fearfully about what happened to Doyle Hamm and Joe James, Jr. I feared that the men in scrubs would attempt to establish a central line via my groin, as had been done with Doyle Hamm. I also feared that the men in scrubs would perform a cut-down into my vein, as had been done with Joe James, Jr.

27. The men in scrubs then moved to my left arm. Green Scrubs tied the torniquet, and Aqua Scrubs began puncturing my left elbow pit with needles. I felt the needles going deeper into my body than ever before, which caused intense physical pain. I told the men in scrubs that I could feel that they were not accessing my veins, but rather stabbing around my veins. The men did not respond.

28. After many punctures on my left elbow pit, the men in scrubs walked away from the execution gurney and spoke to each other in whispers. I could not hear what they said to each other.

29. The men in scrubs then told guards in the chamber that they wanted to try to puncture my right foot. One of the guards removed the strap from my right foot.

30. I could then feel the men in scrubs tie a torniquet on my right foot, and begin massaging and slapping the foot to increase blood flow. One of the men in scrubs proceeded to insert a needle in my right foot, which caused sudden and severe pain. It felt like I had been electrocuted in this foot, and my entire body shook in the restraints.

31. Due to the severity of this pain, I believe the men in scrubs likely hit a nerve in my right foot.

32. The pain from this needle puncture was so bad that it reminded me of the intense physical pain I felt as a child when my father severely beat my private parts.

33. The men in scrubs withdrew the needle from this painful site, and continued to puncture many other locations on my right foot until they eventually abandoned that area and moved to my left foot and leg.

34. One of the men in scrubs shook his head in frustration after inspecting my left foot and leg. After that occurred, the men in scrubs returned to my right arm. This time, Aqua Scrubs inserted needles into my right inner forearm.

35. Next, and for the first time during the execution, Aqua and Green Scrubs split up, and each began working on puncturing different parts of my body. Aqua Scrubs began puncturing my left arm, while Green Scrubs began puncturing my right arm.

36. At this point, a new man in scrubs entered the execution chamber, wearing navy scrubs. Navy Scrubs did not identify himself or explain whether he had any medical credentials.

37. Navy Scrubs walked around my body and examined all the puncture sites that Green and Aqua Scrubs had made. Navy Scrubs then moved up to my head and started feeling and slapping the skin on my neck.

38. I physically recoiled out of intense fear of the men trying to insert a needle in my neck. I asked urgently whether the men were going to try to insert a needle into my neck. All refused to answer.

39. Very soon thereafter, there was a loud knock on the window pane that borders the execution chamber and the observation room.

40. All three men in scrubs left the execution chamber after hearing this knock.

41. The guards who were still in the execution chamber with me then placed a large strap across my chest. One guard proceeded to operate a foot pump at the base of the execution gurney, which gradually raised the gurney from a horizontal to vertical position.

42. At this time, I was still strapped into the gurney by my arms, feet, and chest, and was left hanging vertically from the gurney.

43. No one explained to me why I was being raised into a vertical position or why the men in scrubs had left the room. I explained to the guards in the room that the position I was hanging in was "giving me hell," and that my elbows, arms and back were in pain, and that my foot was "killing me."

44. I noticed at this time that the clock on the wall said 11:40 p.m.

45. I believe I was left hanging vertically from the gurney for 20 minutes. I experienced a lot of pain while left hanging: in my many puncture wounds, particularly in my right foot, which was throbbing with pain; and in my arms, chest, and neck, from having been extended into a painful stress position for around 90 minutes.

46. I also felt nauseous, disoriented, confused, and fearful about whether I was about to be killed, and was deeply disturbed by my view of state employees silently staring at me from the execution observation room while I was hanging vertically from the gurney.

47. Blood was leaking from some of my wounds at this time.

The Botched Execution is Called Off

48. Around midnight, an ADOC employee told me that the execution had been postponed. I found this comment very confusing, and asked for an explanation, but was largely ignored.

49. One of the guards in the execution chamber then slammed the execution gurney back into a horizontal position while I was still strapped to it.

50. The guards in the execution chamber then asked me to get off the table. My arms were so stiff and pained from having been extended above my head for 90-plus minutes that I was not able to bend them on my own. I had to ask one of the guards to bend my arms for me.

51. The guards then took me to the medical unit where a nurse wipe blood off of my body. I told the nurse that my right foot in particular was in great pain. The nurse made note of this comment but did not offer any medical assistance.

The Physical and Psychological Harm

52. Following the execution, I spent much of my time curled in the fetal position on my bed, reliving the execution attempt. I continue to be deeply disturbed by the botched execution and suffer from a great deal of emotional pain.

53. I sometimes go into a "twilight mode" where I lose track of time and dissociate from reality. I also experience intrusive thoughts of the execution, even when I am trying not to think about it. I dwell on thoughts of being stabbed with needles. I have to twitch or tap my hands together to try to calm down.

54. My sleep has also been affected. After the execution attempt, I did not sleep more than a few hours at night and suffered many intrusive thoughts about the experience.

55. For a long time after the botched execution, I did not feel comfortable extending my arms away from my body. Doing so gave me flashbacks to the execution, when my arms were painfully strapped down and punctured repeatedly with needles.

56. As a result, I often keep my arms and hands curled up tight on my chest.

57. The pain I experienced during and after the execution reminded me of the physical abuse I suffered as a child at the hands of my father. That painful association continues to this day.

58. My family members are also experiencing pain. In the immediate aftermath of the botched execution, nobody from the State of Alabama informed my family members what happened or told them whether I was alive.

The State of Alabama's Review of Execution Procedures

59. My understanding is that following the botched executions of Joe James, Jr., Kenneth Smith, and myself, the State of Alabama supposedly reviewed its execution procedures.

60. Nobody from ADOC or the State of Alabama interviewed me in connection with this supposed review.

Wherefore I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Alan Eugene Miller

Alan Eugene Miller

6-19-23

Date

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

ALAN EUGENE MILLER	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2:22-CV-506-RAH**
	)	
JOHN Q. HAMM, Commissioner, Alabama Department of Corrections, *et al.*,	)	
	)	
Defendants.	)	

AFFIDAVIT OF JOHN Q. HAMM

Before me, the undersigned notary, personally appeared John Q. Hamm, who after being duly sworn did depose and say:

1. My name is John Q. Hamm. I am over nineteen years of age, and I am of sound mind. I am the Commissioner of the Alabama Department of Corrections ("ADOC").

2. The ADOC cannot carry out an execution by nitrogen hypoxia on September 22, 2022.

3. The ADOC remains ready to carry out Plaintiff's sentence by lethal injection on September 22, 2022.

Further affiant sayeth not.

John Q. Hamm, Commissioner
Alabama Department of Corrections

Subscribed and sworn to before me on this the 15th day of September, 2022.

NOTARY PUBLIC
My commission expires: 10-29-25

EXHIBIT
46