
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 II OF III

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

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July 20, 2023

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TABLE OF CONTENTS

VOLUME I:

Opinion, <i>Barber v. Governor of Ala.</i> , 23-12242 (11th Cir. July 19, 2023)	1a
Memorandum Opinion and Order, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. July 7, 2023), Dkt. No. 51.....	71a
Complaint, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. May 25, 2023), Dkt. No. 1.....	94a
Exhibit A to Complaint, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. May 25, 2023), Dkt. No. 1-1	123a
Exhibit B to Complaint, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. May 25, 2023), Dkt. No. 1-2	129a
Exhibit C to Complaint, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. May 25, 2023), Dkt. No. 1-3	149a
Motion for Preliminary Injunction to Enjoin Defendants From Executing James Edward Barber Via Lethal Injection, <i>Barber v.</i> <i>Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. June 5, 2023), Dkt. No. 25	152a
Exhibit B to Motion for Preliminary Injunction to Enjoin Defendants From Executing James Edward Barber Via Lethal Injection, <i>Barber</i> <i>v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. June 5, 2023), Dkt. No. 25-2	170a
Reply in Support of Motion for Injunction to Enjoin Defendants from Executing James Barber Via Lethal Injection, <i>Barber v. Ivey</i> , 2:23- cv-00342-ECM (M.D. Ala. June 27, 2023), Dkt. No. 38	175a
Exhibit E to Reply in Support of Motion for Injunction to Enjoin Defendants from Executing James Barber Via Lethal Injection, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. June 27, 2023), Dkt. No. 38-1	191a
Exhibit G to Reply in Support of Motion for Injunction to Enjoin Defendants from Executing James Barber Via Lethal Injection, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. June 27, 2023), Dkt. No. 38-3	201a
Exhibit H to Reply in Support of Motion for Injunction to Enjoin Defendants from Executing James Barber Via Lethal Injection, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. June 27, 2023), Dkt. No. 38-4	229a

Exhibit J to Reply in Support of Motion for Injunction to Enjoin Defendants from Executing James Barber Via Lethal Injection, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. June 27, 2023), Dkt. No. 38-6.....	244a
Exhibit L to Reply in Support of Motion for Injunction to Enjoin Defendants from Executing James Barber Via Lethal Injection, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. June 27, 2023), Dkt. No. 38-8.....	248a
Plaintiff's Exhibit 39, AP News, <i>Alabama Man's Execution Was Botched, Advocacy Group Alleges</i> , <i>Barber v. Ivey</i> , 2:23-cv-00342- ECM (M.D. Ala. July 5, 2023), Dkt. No. 50-5.....	250a
Plaintiff's Exhibit 41, Alabama Department of Forensic Sciences, Autopsy of Joe James, Jr., <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. July 5, 2023), Dkt. No. 50-7.....	256a
Plaintiff's Exhibit 45, Affidavit of Alan Eugene Miller, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. July 5, 2023), Dkt. No. 50-10.....	265a
Plaintiff's Exhibit 46, Hamm, <i>Miller v. Hamm</i> , No. 22-cv-506 (M.D. Ala. Sept. 15, 2022), <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. July 5, 2023), Dkt. No. 50-11	272a
VOLUME II:	
Plaintiff's Exhibit 48, Second Amended Complaint, <i>Smith v. Hamm</i> , No. 22-cv-497 (M.D. Ala. Dec. 6, 2022), <i>Barber v. Ivey</i> , 2:23-cv- 00342-ECM (M.D. Ala. July 5, 2023), Dkt. No. 50-13.....	273a
Plaintiff's Exhibit 49, Declaration of Kenneth Eugene Smith, <i>Barber v.</i> <i>Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. July 5, 2023), Dkt. No. 50-14	327a
Hearing Transcript, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. July 10, 2023), Dkt. No. 53.....	329a
Affidavit of Terry Raybon, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. July 10, 2023), Dkt. No. 54-2.....	491a
Hearing Transcript, <i>Barber v. Governor of Ala.</i> , 23-12242 (11th Cir. July 7, 2023), Dkt. No. 25.....	493a

VOLUME III:

Defendants' Response in Opposition to Plaintiff's Motion for a Preliminary Injunction, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. June 20, 2023), Dkt. No. 35.....	566a
Plaintiff's Motion to Compel Production of Documents and Answers to Interrogatories, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. June 30, 2023), Dkt. No. 45.....	583a
Exhibit A to Plaintiff's Motion to Compel Production of Documents and Answers to Interrogatories, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. June 30, 2023), Dkt. No. 45-1	599a
Exhibit B to Plaintiff's Motion to Compel Production of Documents and Answers to Interrogatories, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. June 30, 2023), Dkt. No. 45-2	608a
Plaintiff's Exhibit 37, Montgomery Advertizer, <i>Department of Corrections Denies Request for Joe Nathan James Jr. Execution Records</i> , <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. July 5, 2023), Dkt. No. 50-3.....	619a
Plaintiff's Exhibit 54, Certifications and Licenses Produced By Alabama Department of Corrections, <i>Barber v. Ivey</i> , 2:23-cv-00342-ECM (M.D. Ala. July 5, 2023), Dkt. No. 50-16.....	623a

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

KENNETH EUGENE SMITH,)	
)	
Plaintiff,)	
)	Case No. 2:22-cv-00497-RAH
v.)	
)	CAPITAL CASE
JOHN Q. HAMM, in both his individual)	
capacity and in his official capacity as)	
Commissioner, Alabama Department of)	
Corrections;)	
)	
TERRY RAYBON, in both his individual)	
capacity and in his official capacity as)	
Warden, Holman Correctional Facility;)	
)	
STEVE MARSHALL, in both his)	
individual capacity and in his official)	
capacity as Attorney General, State of)	
Alabama;)	
)	
MICHAEL WOOD, in both his individual)	
capacity and in his official capacity as)	
Deputy Warden, G.K. Fountain)	
Correctional Facility;)	
)	
JOHN DOES 1–3,)	
)	
Defendants.)	

SECOND AMENDED COMPLAINT

Plaintiff Kenneth Eugene Smith alleges as follows:

INTRODUCTION

1. Plaintiff Kenneth Eugene Smith is in the custody of the Alabama Department of Corrections (ADOC) at William C. Holman Correctional Facility (“Holman”) under a death sentence imposed by the State of Alabama despite the jury’s recommendation by a vote of 11 to 1 that he be sentenced to life imprisonment without the possibility of parole. As the Eleventh Circuit

Court of Appeals has recognized, “if Smith’s trial had occurred today, he would not be eligible for execution because, in 2017, Alabama amended its capital-sentencing scheme,” which had allowed elected state court judges to override a jury’s sentencing determinations. *See Smith v. Comm’r*, 850 F. App’x 726, 726 n.1 (11th Cir. 2021). But because Alabama’s amendment applied only prospectively, Mr. Smith has been denied relief from his death sentence, even though that same sentence could not be imposed today if—as happened in Mr. Smith’s case—a jury of his peers recommended life in prison.

2. On August 18, 2022, Mr. Smith filed this action under 42 U.S.C. § 1983 to enjoin an imminent deprivation of his rights and privileges secured by the Constitution and laws of the United States. He alleged that if Defendants were allowed to execute him by lethal injection, there was a substantial likelihood that he would be subjected to an intolerable risk of torture, cruelty, or substantial pain in violation of his Eighth and Fourteenth Amendment rights.

3. Mr. Smith feared that he would be tortured based on publicly available information suggesting that Defendants’ execution of Joe Nathan James just weeks earlier had gone horrifyingly awry. Mr. James’s execution was one of the longest in history—dragging on for more than three hours, almost all of which was hidden from public view. Eyewitnesses have reported that when the curtains to the execution chamber were finally opened three hours after the execution had begun, Mr. James did not appear to be conscious and did not open his eyes or respond when asked to give his final words, even though he allegedly had planned on making a final statement. Mr. James’s body bore signs of numerous puncture wounds on his arms and hands. A physician who participated in an independent autopsy of Mr. James’s body found evidence of an attempted “cutdown”—a procedure in which an incision is made with a scalpel directly into the skin in an

attempt to find a vein—as well as evidence suggesting that Mr. James was given an intramuscular injection.

4. Upon information and belief, Defendants took no steps to investigate why Mr. James was subjected to a three-plus-hour execution or to prevent similar occurrences in the future. Instead, Defendants sought to carry out more executions.

5. On September 22, 2022, Defendants tried and failed to execute Alan Miller, who has provided a first-hand account of his ordeal by way of his own lawsuit. *See Miller v. Hamm*, No. 2:22-cv-506-RAH, DE 79-1 (M.D. Ala.). According to Mr. Miller, he was strapped to a gurney in a stress position with his arms outstretched and over his head while three men in scrubs poked, prodded, and punctured his arms, hands, and feet for nearly two hours, resulting in what he described as “excruciating” pain. *Id.* ¶¶ 112–29. The execution gurney was then lifted to an upright position so that Mr. Miller was left hanging vertically in a crucifixion position—with his chest and outstretched arms strapped to the gurney—for 20 minutes while blood leaked from his wounds. *Id.* ¶ 134. Then just before midnight, an ADOC employee told Mr. Miller that his execution had been “postponed,” and he was taken to the medical unit where ADOC documented a “body chart” exam but offered no medical assistance for Mr. Miller’s pain. *Id.* ¶¶ 135, 140.

6. Upon information and belief, Defendants again took no steps to review what happened when they tried and failed to execute Mr. Miller or prevent similar occurrences. They instead rushed forward to carry out still more executions, and Mr. Smith’s was scheduled to be next.

7. On November 17, 2022, at 7:45 p.m.¹, ADOC’s counsel emailed Mr. Smith’s counsel to say that they had “recently spoke[n] with emergency clerks at the Supreme Court and

¹ All times noted in this Second Amended Complaint are U.S. Central Time.

Eleventh Circuit and notified them that we are preparing Mr. Smith for execution.” At that time, Mr. Smith’s request to stay the execution was pending at the U.S. Court of Appeals for the Eleventh Circuit. Nonetheless, minutes later, guards entered Mr. Smith’s holding cell, where he had been waiting on the phone with his wife, and told him, “We need the phone, Kenny.” The call was ended at 7:57 p.m., after which a swarm of guards placed Mr. Smith in handcuffs and leg irons, took him to the execution chamber, and began strapping him tightly to the gurney. They did so even though the Eleventh Circuit Court of Appeals had held just hours before that Mr. Smith’s federal lawsuit stated a viable claim that his execution by lethal injection would violate the Eighth Amendment’s prohibition on cruel and unusual punishments and even though a stay application was pending before the Eleventh Circuit. *See Smith v. Comm’r, Ala. Dep’t of Corr.*, No. 22-13781, 2022 WL 17069492 (11th Cir. Nov. 17, 2022).

8. At 7:59 p.m., the Eleventh Circuit stayed the execution. ADOC’s attorneys—Deputy Solicitor General Thomas Wilson and Assistant Attorney General Richard Anderson—received direct notice of the order from the Eleventh Circuit, but Mr. Smith’s attorneys also notified them of that stay within minutes, at 8:02 p.m., and told them to stop the execution pursuant to the Eleventh Circuit’s order. The response from ADOC’s counsel was only, “Noted.” But the execution continued on in defiance of the Eleventh Circuit’s stay, with Mr. Smith remaining strapped to a gurney until nearly midnight. Mr. Smith was not notified that a federal court had stayed his execution as he lay immobilized for hours by the tight straps all across his body, nor was he allowed to communicate with his counsel as his appeals were being submitted and litigated. All told, Mr. Smith was tightly and painfully strapped to the gurney in the execution chamber for approximately four hours.

9. As the night went on, Mr. Smith’s worst fears began to play out much as his federal lawsuit had alleged they would. Mr. Smith endeavored to maintain his composure and focus throughout the ordeal for the sake of his family members and long-time attorney who would be his witnesses at the execution. But those family members and witnesses were never brought to Holman. And as the night progressed, as Mr. Smith was subjected to ever-escalating levels of pain and torture, no one responded to his pleas to stop the pain, told him of the Eleventh Circuit’s stay, or answered his questions about what they were doing to him. They were—and he thought they were—executing him.

10. At around 10:00 p.m., an IV team entered the execution chamber and began repeatedly jabbing Mr. Smith’s arms and hands with needles, well past the point at which the executioners should have known that it was not reasonably possible to access a vein.² Even when Mr. Smith told them they were sticking the needle in his muscle, which was causing pain, they retorted back, “No I’m not.”

11. Mr. Smith was then tilted in an inverse crucifixion position while strapped to the gurney and left there for several minutes while the IV team left the room. When they returned, he was injected with an unknown substance that, as alleged below and on information and belief, was some sort of sedative and/or anesthetic. He specifically objected to this injection, as he was aware that the State had represented that it “does not deliver intramuscular injections as part of the execution process” and had been ordered not to use “intramuscular sedation” during his execution. Docket Entry No. (“DE”) 32 at 9; DE 22 at 15. After this injection, a person of unknown medical credentials wearing a face shield started repeatedly stabbing his collarbone area with a large needle

² A little after 10 p.m., the United States Supreme Court vacated the stay of execution. It is not clear when, in relation to that event, the IV team entered the execution chamber.

in an attempt to begin a central line IV in his subclavian vein. Against Mr. Smith's will, a prison official physically grabbed and held his head away from the area where the needle was being inserted. Mr. Smith writhed in pain and agony as the executioner repeatedly jabbed him with the large needle, which he could feel going underneath his collarbone. He felt sharp and intense pain, as though he were being "stabbed" in the chest. Those attempts at establishing intravenous access in the collarbone area went well past the point that the executioner should have known he would not achieve access. Throughout the ordeal, Mr. Smith's cries of pain were ignored, as were his requests that officials in the room contact his counsel and the Court because his constitutional rights and the orders of the Court were being violated.

12. At or around 11:20 p.m., unverified reports that the execution had been called off started circulating from media witnesses who were covering the execution on the internet and social media. Shortly thereafter, Mr. Smith's counsel emailed ADOC attorneys Mr. Anderson and Mr. Wilson asking them to confirm that the execution was called off and to provide information about Mr. Smith's whereabouts and physical condition. They never responded.

13. At some point before midnight, Defendants stopped their attempted execution of Mr. Smith, but not before inflicting grave physical pain and emotional trauma, the likes of which the human brain is not able to process.

14. Taken together, ADOC's execution of Mr. James and its failed attempt to execute Mr. Miller and Mr. Smith have made clear that once ADOC is allowed to begin an execution (and perhaps even before federal courts allow it to do so), it will attempt to carry out the execution and not stop until it becomes clear that they are likely to run out of time under the death warrant, and during that time, will do anything to obtain intravenous access, without regard to its own lethal injection protocol ("the Protocol") or the constitutional rights of the condemned.

15. All three events underscore that the Protocol is, in practice at least, entirely illusory—meaning executions are being carried out by individuals who are either unable or unwilling to follow the Protocol. And even if ADOC were to follow the Protocol (which it does not), it is still likely that ADOC will subject the condemned to a lingering death that superadds pain far above the pain necessary to carry out the sentence by repeatedly jabbing the condemned with needles for prolonged periods of time.

16. On November 21, 2022, Alabama’s Governor Kay Ivey announced a temporary suspension of executions pending a “top-to-bottom review” of the Protocol.

17. Whatever the outcome of Governor Ivey’s review, Defendants had their chance to execute Mr. Smith: he was strapped to a gurney for almost four hours and subjected to intense physical and emotional pain as executioners tried and failed to execute him using both methods of intravenous access listed in the Protocol. They did so despite a federal appeals court holding that Mr. Smith had stated a viable claim that his execution by lethal injection would violate the Eighth Amendment’s prohibition on cruel and unusual punishment. And they did so despite repeated calls from numerous sources that they investigate the reasons why the previous two executions had been botched. Just as Mr. Smith alleged in his August 18, 2022 federal lawsuit, Defendants subjected him to hours of torture while trying to execute him and exposed him to the severe mental anguish of a mock execution. The attempted execution of Mr. Smith on November 17, 2022 was cruel and usual and in violation of the Eight Amendment. Further, to subject Mr. Smith to another execution would be cruel and unusual, in violation of the Eighth and Fourteenth Amendment.

JURISDICTION AND VENUE

18. This is an action for declaratory and injunctive relief, money damages, and any other relief available from the Court.

19. The Court has subject matter jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343(a)(3), and 2201(a).

20. Venue is proper in the Middle District of Alabama under 28 U.S.C. § 1391(b).

PARTIES

21. Plaintiff Kenneth Eugene Smith, a citizen of the United States and resident of the State of Alabama, is an inmate at Holman under Defendants' supervision and subject to execution under a State court judgment of conviction for capital murder.

John Q. Hamm

22. Defendant John Q. Hamm, Commissioner of the Alabama Department of Corrections, is sued in his official and individual capacity. The Alabama Department of Corrections is an administrative Department of the State responsible for administering and exercising the direct and effective control over penal and corrections institutions within the State, including for administering the lethal injection process by which Defendants attempted to execute Mr. Smith. At all relevant times, Defendant Hamm has been acting under color of law and as the agent and official representative of ADOC, pursuant to ADOC's official policies and procedures.

23. Defendant Hamm is the alternate statutory executioner of all death row inmates at Holman. *See* Ala. Code § 15-18-82 ("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 id.* ("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.").

24. Defendant Hamm must be present at Holman for each execution, was present at Mr. Smith's attempted execution on November 17, 2022, and Defendant Hamm is responsible for maintaining an open telephone line to the Governor and Defendant Marshall.

25. 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.

26. 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.

Terry Raybon

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

28. Defendant Raybon is the statutory executioner of all Holman death row inmates. *See* Ala. Code § 15-18-82 ("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.").

29. Defendant Raybon plays a direct role in each execution that takes place at Holman. Defendant Raybon organizes the execution team. He is responsible for ensuring on the night of an execution that the execution does not violate any court order or order from the Governor's office. Defendant Raybon reads the death warrant to the inmate being executed and administers the lethal injection.

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

31. Defendant Raybon was present and participated in the attempted execution of Mr. Smith on November 17, 2022.

Steve Marshall

32. Defendant Steve Marshall, Attorney General of the State of Alabama, is sued in his official and individual 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.

33. 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.

34. Defendant Marshall is responsible for initiating the execution process in Alabama in a constitutional manner by identifying individuals for whom he moves to set an execution date. 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.

35. During each execution, Defendant Marshall is responsible for maintaining an open telephone line to Commissioner Hamm, who attends each execution.

36. On information and belief, Defendant Marshall plays an active role in "clearing" each execution in the State of Alabama to begin.

37. On information and belief, Defendant Marshall made the decision to proceed with Mr. Smith's execution even when a motion to stay the execution—which was later granted—was pending in the Eleventh Circuit Court of Appeals. Upon information and belief, Defendant Marshall also made or otherwise participated in the decision to leave Mr. Smith strapped to the gurney even after the Eleventh Circuit Court of Appeals had stayed the execution.

Deputy Warden Michael Wood

38. Michael Wood is a deputy warden at G.K. Fountain Correctional Facility. He is sued in his individual capacity.

39. During the attempted execution of Mr. Smith, Deputy Warden Wood actively participated in violating Mr. Smith's constitutional rights by holding down Mr. Smith's head while an unidentified executioner injected Mr. Smith with an unknown substance and repeatedly jabbed his collarbone area with a large needle.

John Does 1–3

40. John Does 1–3 are members of the intravenous (IV) team who actively participated in Mr. Smith's execution. They are sued in their individual capacities. Because none of these individuals ever identified themselves or their credentials to Mr. Smith, they are named as Doe defendants and described herein as follows:

41. Doe 1 is the individual described in paragraph 134 as "Green Scrubs."

42. Doe 2 is the individual described in paragraph 173 as "Blue Scrubs."

43. Doe 3 is the individual described in paragraph 174 as "Red Scrubs."

Additional John Does 4–6

44. As discovery develops, Mr. Smith may seek leave to further amend his complaint to add allegations against three other individuals, described generally below, who were present

during the execution, along with any other individuals who are revealed to have actively participated in torturing Mr. Smith. Those three individuals did not identify themselves or their credentials to Mr. Smith. Because they were wearing business formal attire, they are described herein as “The Suits.”

CASE OR CONTROVERSY

45. There is a real and justiciable case or controversy between the parties. Defendants have not communicated an intent not to attempt to execute Mr. Smith again.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

46. Plaintiff has no available administrative remedies because State law exempts “[t]he policies and procedures of the Department of Corrections for executions of persons sentenced to death . . . from the Alabama Administrative Procedure Act, Chapter 22 of Title 41.” Ala. Code § 15-18-82.1(g).³

FACTUAL ALLEGATIONS

A. ADOC’s Lethal Injection Protocol

47. ADOC has never publicly released its Protocol in its entirety. Only a redacted version has been made available to the public, and even then, only recently. *See* DE 12-1, Ex. A (“Protocol”). The sections most pertinent to Mr. Smith’s claims are summarized below.

³ In a previous litigation, the State has “[a]dmitted” that “[n]o administrative grievance process is available for . . . death row inmates to challenge the procedures to be employed during their executions.” *In re Ala. Lethal Injection Protocol Litig.*, No. 12-cv-316 (M.D. Ala. 2012) Doc. 348 at ¶ 22, Doc. 354 at ¶ 22.

i. Compliance with Court Orders and Stays

48. The Protocol provides that before the condemned is taken to the execution chamber, “[t]he Commissioner’s telephone line to the Governor’s and/or Attorney General’s staff will be opened.” *See id.* § IX.H.

49. The obvious purpose of that requirement is to ensure that orders from the courts or the Governor can be rapidly communicated to ADOC staff to avoid violating those orders.

50. Upon information and belief, Defendant Marshall is responsible for giving ADOC staff permission to proceed with the execution.

51. The Protocol further provides that the Warden will “check with the Commissioner or his/her designee to see if there has been a last minute stay” before proceeding with his role in the execution, *id.* § IX.O, further demonstrating that the Protocol requires ADOC staff to abide by court orders at all times in carrying out an execution.

52. Defendants’ attempted execution of Alan Miller underscores that before Mr. Smith’s execution attempt, Defendants interpreted the Protocol to prevent them from proceeding with an execution where a federal court has stayed the execution. A federal court order staying Mr. Miller’s execution was in place until approximately 9:00 p.m. *See Miller v. Hamm*, __ F. Supp. 3d __, 2022 WL 16720193, at *2 (M.D. Ala. Nov. 4, 2022). On information and belief, ADOC officials did not move Mr. Miller into the execution chamber until 9:55 p.m., almost an hour after the U.S. Supreme Court lifted the stay of execution, *id.*, and, upon information and belief, after Attorney General Marshall had given ADOC officials permission to proceed.

ii. The Use of Sedative Injections Is Prohibited

53. The Protocol does not specify that any type of sedative injections will be given during the execution.

54. In light of allegations that Mr. James may have been given an intramuscular sedative that rendered him unconscious before he was executed, this Court has previously sought clarification from ADOC's attorney Richard Anderson about whether any type of injection is permitted by the Protocol, as ADOC interprets it.

55. During an October 13, 2022 hearing on Mr. Smith's claims, the Court asked Mr. Anderson, "[W]ould the use of an intramuscular sedation be off protocol?" DE 32 at 10. Mr. Anderson responded, "That would be off protocol, yes, Your Honor." *Id.*

56. The Court then asked Mr. Anderson, "[w]ould the use of lidocaine be an intramuscular sedation?" *Id.*

57. Mr. Anderson responded, "No . . . [l]idocaine is a topical anesthetic." *Id.*

58. The Court clarified the reason for its question, explaining that in the Court's experience, when a person needs stitches, for example, they may receive "lidocaine shots around the incision site." *Id.*

59. Mr. Anderson confirmed that he understood the Court's question and that "there was not an injection of a sedative or painkiller" used in Mr. James's execution. *Id.* at 11.

60. Mr. Anderson stated that ADOC was stipulating that "no intramuscular sedative would be administered" during Mr. Smith's execution and "the reason for that is we don't do it. We don't do it historically. We have no intention of doing it in the future." *Id.*

61. After further discussion, and to avoid any doubt on the topic, the Court again asked Mr. Anderson whether lidocaine shots were permitted by the Protocol. The Court stated, "And so when we talk about an intramuscular sedative . . . I'm still not 100 percent confident I understand what that term is. A topical cream would be okay, but a shot would not?" *Id.*

62. Mr. Anderson’s unequivocally confirmed the Court’s understanding by responding, “Yes, Your Honor.” *Id.*

63. Shortly thereafter, the Court asked Defendant Hamm, who was present at the hearing, as follows: “Mr. Hamm, you’ve heard Mr. Anderson talk about what [A]DOC will agree not to do, and his representation to the Court is that [A]DOC will not employ or use a cutdown procedure during the course of Mr. Smith’s execution nor will it implement or use intramuscular sedation during the course of an execution by lethal injection as it concerns Mr. Smith. Do you agree with that?” *Id.* at 12. Defendant responded, “Judge, yes, I do.” *Id.*

64. Thus, both Defendant Hamm and his counsel previously represented to the Court that a lidocaine (or similar) injection was not used in the James execution, is not permitted by the Protocol, and would not be used on Mr. Smith.

65. The Court later ordered that ADOC “are to strictly adhere to, and not deviate from, ADOC’s established lethal injection protocol during Smith’s execution. In particular, the Commissioner and his agents shall not perform a cutdown procedure or use intramuscular sedation on Smith.” DE 22 at 15.

66. The Court warned, “Sanctions will be swift and serious if counsel and the Commissioner do not honor or abide by their representations and stipulations.” *Id.* at 11–12.

67. And in denying Mr. Smith’s motion to alter or amend that judgment, the Court held, among other things, that “Smith has not demonstrated that the gravity of the potential sanctions, including criminal sanctions, is insufficient to deter any conduct violative of the Court’s order.” DE 33 at 19.

iii. Procedures for Establishing Intravenous Access

68. The Protocol authorizes only two methods for establishing intravenous access in a condemned inmate.

69. According to the Protocol: “The standard procedure for inserting IV access will be used. If the veins are such that intravenous access cannot be provided, [REDACTED] will perform a central line procedure to provide an intravenous access.” See Protocol, Annex C, ¶ c (redaction in original).

70. The execution of Mr. James, the botched execution of Mr. Miller, and now the botched execution of Mr. Smith establish that the Protocol serves only an advisory function or at worst, is entirely illusory. Once an execution begins—and to be clear, it begins, both literally and emotionally, the moment the condemned is shackled and forcibly moved from “the death cell” towards the execution chamber, and certainly includes being strapped tightly to a gurney—ADOC has apparently reserved for itself the right to deviate from the Protocol to attempt to establish intravenous access as long as that is accomplished before the warrant expires at midnight. And even if ADOC does strictly follow the Protocol, it still may subject an inmate to a lingering death that superadds pain above and beyond what is necessary to carry out the sentence by jabbing needles into the condemned for a prolonged period of time. If the result is the death of the condemned person, there are no witnesses to what occurred other than ADOC personnel. And ADOC is not forthcoming about that process.

B. ADOC’s Execution of Mr. James and Aborted Execution of Mr. Miller Established a Pattern of Superadding Pain During the Execution Process

i. Mr. James’s Execution Lasted More Than Three Hours

71. On June 13, 2022, the Alabama Supreme Court scheduled Mr. James’s execution for 6 p.m. on July 28, 2022.

72. ADOC's lethal injection process subjected Mr. James to at least a three- and one-half-hour ordeal, including torture, cruelty, or substantial pain. That process was replete with violations of the Protocol which amply demonstrate that the "Protocol" is merely advisory in nature, and ADOC officials, whether through incompetence or maleficence, are apparently free to deviate from its provisions to accomplish its end of executing the condemned before the warrant expires.

73. At the scheduled time, there were no legal obstacles that prevented ADOC from proceeding with Mr. James's execution. But ADOC did not administer its lethal drug cocktail to Mr. James at or around 6 p.m., as scheduled.

74. Instead, without explanation from ADOC and without public observation, Mr. James's execution extended for more than three hours. He did not appear to observers until approximately 9 p.m., and even then he appeared to be unconscious and unresponsive, and was not pronounced dead until 9:27 p.m.

75. During the three hours of the process that was not open to the public, ADOC strapped Mr. James to a gurney and poked, prodded, and cut him, attempting multiple times to access a vein for intravenous injection of the lethal drug cocktail. Declaration of Joel B. Zivot, MD, FRCP(C), MA ("Zivot Decl.") ¶ 5 (DE 24-1, Ex. A); *see also* Declaration of David C. Pigott, MD, dated October 12, 2022 ("Pigott Decl.") ¶¶ 4–6 (DE 24-1, Ex. B).

76. Dr. Joel B. Zivot, a professor and senior member of the Departments of Anesthesiology and Surgery at Emory University School of Medicine in Atlanta, Georgia arranged and participated in an independent autopsy following the execution. Zivot Decl. ¶ 8. Dr. Zivot concluded that "[u]pon examination of the body, I found signs that strongly suggested [Mr. James] had been subjected to a torturous process during his execution," meaning "the process

caused unnecessary pain in advance of [his] death.” *Id.* The autopsy revealed multiple punctures sites in both arms and both hands. *Id.* ¶ 9.

77. It should not have taken anywhere near three hours for the IV team to either establish IV access by the procedures allowed by the Protocol or to determine that neither was achievable. *Id.* ¶ 5.

78. The Protocol provides that if IV access cannot be achieved through the standard procedure, a central line procedure should be performed. *See* Protocol, Annex C, ¶ c. Even though it should have been apparent to the IV team within a short period of time—certainly much less than three hours—that the standard procedure was not possible, there is no evidence that a central line procedure was ever attempted. Instead, rather than follow the Protocol, the IV team made multiple unsuccessful attempts through the standard procedure before seemingly moving to a different, unauthorized procedure, as described below.

79. The independent autopsy and photos taken during that autopsy provide evidence suggesting that ADOC staff attempted a cutdown procedure to access a vein. Zivot Decl. ¶¶ 9–12; *see also* Pigott Decl. ¶¶ 4–5.

80. Venous cutdown is an emergency procedure whereby a physician surgically exposes a patient’s vein after applying local anesthesia when rapid access is required for intravenous therapy and other less-invasive procedures have failed. That procedure is not authorized by the Protocol. Furthermore, in medical practice generally, cutdowns have fallen out of favor because of the potential for bleeding and because such procedures require surgical expertise. *See* Declaration of Robert Jason Yong, MD, dated October 18, 2022 (“Yong Decl.”) at 8 (DE 24-1, Ex. C).

81. A photograph taken during the James autopsy shows the attempted cutdown:



82. The deeper laceration in the pit of the elbow in the photograph above is indicative of the attempted cutdown procedure. *See* Pigott Dec. ¶ 5; Zivot Dec. ¶¶ 10, 12. The photograph shows what appear to be tissue response and blood in and around the laceration, suggesting that it was made while Mr. James was still alive, as post-mortem wounds do not bleed. *Id.*

83. The independent autopsy further revealed evidence of puncture wounds in areas of Mr. James' arm that are not in an area where a vein would typically be located, which suggest that Mr. James was administered an intramuscular injection during the three-hour attempt to access a vein. *See* Zivot Decl. ¶ 9. Intramuscular injections are not permitted by the Protocol.

84. On information and belief, in the two minutes Mr. James was visible to observers before the administration of the lethal drugs, Mr. James did not open his eyes or move and did not respond when asked if he had any last words. Reportedly, Mr. James had confided in a fellow condemned person that he intended last words, suggesting, consistent with Dr. Zivot's observation of a possible intramuscular injection, that he had been rendered unconscious or otherwise unable to respond before witnesses were permitted to observe by injection with a sedative. *See* Elizabeth

Bruenig, *Dead to Rights, What did the State of Alabama do to Joe Nathan James in the three hours before his execution*; The Atlantic (Aug. 14, 2022), available at <https://www.theatlantic.com/ideas/archive/2022/08/joe-nathan-james-execution-alabama/671127/>; Evan Mealins, *ADOC 'cannot confirm if Joe Nathan James Jr. was fully conscious before his execution*, Montgomery Advertiser (Aug. 2, 2022); available at <https://www.montgomeryadvertiser.com/story/news/2022/08/02/joe-nathan-james-jr-execution-adoc-cannot-confirm-if-conscious/10168003002/>.

85. The Protocol states that the Warden “will read the warrant to the condemned offender” and that the “condemned offender will be allowed to make any last remarks.” Protocol § IX.L; IX.M. Neither of those steps can be completed if the condemned is unconscious. Accordingly, upon information and belief, the James execution deviated from those Protocol provisions.

86. ADOC did not disclose what happened during the three hours that Mr. James was not visible to observers. At a press conference after Mr. James’s execution, Commissioner Hamm simply offered the vague explanation that ADOC is “very deliberate in our process of making sure everything goes according to plan” without further elaboration. Kim Chandler, *Man executed despite calls from victim’s family to spare him*, Associated Press (July 28, 2022), available at <https://www.newstimes.com/news/article/Alabama-execution-set-over-opposition-from-17334136.php>.

87. Later ADOC issued another vague statement regarding the execution: “ADOC’s execution team strictly followed the established protocol. The protocol states that if the veins are such that intravenous access cannot be provided, the team will perform a central line procedure.

Fortunately, this was not necessary and with adequate time, intravenous access was established.” Elizabeth Bruenig, *Dead to Rights*, *supra*.

88. ADOC did not provide any information about what steps it took to establish an intravenous line, what complications arose that prevented it from doing so for more than three hours, how many attempts it made to establish an intravenous line, whether the process caused bleeding or any other physical or emotional harm to Mr. James, whether the ADOC execution team included people qualified and/or trained to perform the various procedures on Mr. James, whether qualified medical professionals were on hand to perform or supervise those procedures, or anything else about what transpired during those three hours.

89. Nor has ADOC disclosed that information since. It has denied a press request for information shedding light on what occurred during Mr. James’ execution. Bryan Lyman, *Department of Corrections denies request for Joe Nathan James, Jr. execution records*, *Montgomery Advertiser* (Aug. 16, 2022), available at https://www.montgomeryadvertiser.com/story/news/2022/08/16/joe-james-jr-execution-adoc-denies-advertiser’s-request-records/10333449002/?utm-source=montgomeryadvertiser-DailyBriefing&utm_medium=email&utm_campaign=daily_briefing&utm_term=list_article_headline&utm_content=PMOY-1123MA-E-NLETTER65.

90. And, although Commissioner Hamm stated at the press conference after Mr. James’s execution that Mr. James had not been sedated before the lethal drug cocktail was administered, the following day ADOC admitted that it “cannot confirm that” Mr. James was fully conscious when he was executed. Evan Mealins, *ADOC ‘cannot confirm if Joe Nathan James Jr. was fully conscious before his execution*, *supra*.

91. That is telling. As one commentator put it: “If the department does not know whether a prisoner is conscious or unconscious at the time of the execution, then they are incompetent to carry an execution out. If the department does know but will not say, then they cannot be trusted.” *Id.*

92. Given ADOC’s lack of transparency, Mr. James’s sister called for an investigation into Mr. James’s execution, pointing out that “[o]nly the ADOC employees know what occurred during those three hours.” Evan Mealins, *Sister of Joe Nathan James: Circumstances surrounding execution warrant an investigation*, Montgomery Advertiser (Aug. 3, 2022), available at <https://www.montgomeryadvertiser/story/news/2022/08/03/joe-james-sister-calls-investigation-execution/10219862002/>.

ii. Mr. Miller’s Aborted Execution Lasted For Nearly Two Hours

93. Mr. Miller was scheduled to be executed on September 22, 2022.

94. On information and belief, due to pending court proceedings in which a federal court had issued a stay of execution, Mr. Miller’s execution began at about 10 p.m. when he was walked to the execution chamber and strapped into the gurney at about 10:15 p.m. *See Miller v. Hamm*, No. 2:22-cv-00506, Doc. No. 79-1 ¶¶ 100–04 (Oct. 6, 2022) (“Miller Second Am. Compl.”).

95. On information and belief, thereafter, while he was strapped in the gurney in a stress position, two unidentified men in medical scrubs with unknown medical credentials, if any, made a tour of his body, repeatedly slapping, poking, prodding, and puncturing Mr. Miller for approximately 90 minutes. They started in his left arm, and then moved sequentially to his right hand, left hand, inner left arm, right foot, and left foot in a futile attempt to establish intravenous

access. *See id.* ¶¶ 109–26. Having failed to establish intravenous access, the two unidentified men resorted to simultaneously puncturing his left and right arm, respectively, *See id.* ¶ 127.

96. On information and belief, a third unidentified man in medical scrubs entered the execution chamber and began slapping the skin on Mr. Miller’s neck. *See id.* ¶ 129. There was no basis to slap the skin on Mr. Miller’s neck to perform any procedure that is authorized under the Protocol. Zivot Decl. ¶ 14.

97. On information and belief, guards in the execution chamber then raised the gurney from a horizontal to vertical position, leaving Mr. Miller hanging vertically from the gurney by his arms, feet and chest. Miller Second Am. Compl. ¶ 132.

98. On information and belief, all the while, ADOC personnel ignored Mr. Miller’s verbal expressions of excruciating pain and his questions about their efforts. *See id.* ¶¶ 109–26.

99. On information and belief, just before midnight when the warrant for his execution expired, ADOC personnel informed Mr. Miller that his execution had been postponed without further explanation, despite Mr. Miller’s requests for one. *See id.* ¶ 135.

100. On information and belief, even then, Mr. Miller’s ordeal did not end as he has continued to suffer emotional and physical pain from the trauma of his aborted execution. *See id.* ¶¶ 144–53.

101. ADOC gave only a vague explanation of what occurred during Mr. Miller’s aborted execution: “Due to the time constraints resulting from the lateness of the court proceedings the execution was called off once it was determined the condemned’s veins could not be accessed in accordance with our protocol before the expiration of the deadline.” *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/alabama-alan-miller-execution-halted-medical-concerns/8088788001/>.

102. Subsequently, the State moved on an expedited basis to reschedule Mr. Miller’s execution without any assurance that it will be able to establish intravenous access by a procedure authorized in the Protocol.

103. This Court already has concluded that Mr. Miller’s allegations about what happened to him in the execution chamber state a claim for violations of the Eighth Amendment. *See Miller*, 2022 WL 16720193, at *13–14.

D. Mr. Smith’s Lawsuit to Enjoin Imminent Violations of His Eighth Amendment Right to be Free from Cruel and Unusual Punishment.

104. On August 18, 2022, Mr. Smith filed a complaint under 42 U.S.C. § 1983 seeking, among other things, a “preliminary and permanent injunction prohibiting Defendants from executing Plaintiff by lethal injection absent a change in Defendants’ lethal injection process to reduce the intolerable risk of torture, cruelty, or substantial pain.” DE 1 at 18.

105. Mr. Smith also sought a “declaration that executing Mr. Smith by Defendants’ current lethal injection process would constitute cruel and unusual punishment in violation of Mr. Smith’s rights under the Eighth and Fourteenth Amendments to the U.S. Constitution.” *Id.*

106. On August 26, 2022, ADOC moved to dismiss Mr. Smith’s complaint, arguing among other things that his Eighth Amendment claim was a “wholesale challenge” to the lethal injection process and therefore was time-barred. DE 10 at 4.

107. On September 19, 2022, Mr. Smith filed his opposition to that motion pursuant to this Court’s briefing schedule. DE 11, 12.

108. On September 30, 2022, the Alabama Supreme Court issued an order setting Mr. Smith’s execution for November 17, 2022 at 6 p.m. DE 13.

109. On October 10, 2022, Mr. Smith served discovery, to which ADOC never responded. DE 17-1, 17-2, 17-3. He also moved to expedite discovery and to set a scheduling order for Mr. Smith's anticipated preliminary injunction motion. DE 17.

110. On October 13, 2022, the Court held a hearing on ADOC's pending motion to dismiss and Mr. Smith's motion to expedite discovery.

111. At that hearing, the Court and the parties discussed a schedule for preliminary injunction briefing and hearing. Counsel for Mr. Smith represented that he intended to file a preliminary injunction motion by October 19, and the Court discussed setting November 4 as a hearing date on that motion. DE 32 at 48–50.

112. But on October 16, 2022, Mr. Smith's request for expedited discovery and a briefing schedule for a preliminary injunction was mooted when the Court dismissed the complaint with prejudice. DE 22, 23.

113. In response to Mr. Smith's assertion that ADOC was likely to violate its own Protocol during the execution, as it had done in the James execution, the Court ordered as follows: "The Commissioner and his agents, which include all ADOC employees involved in Kenneth Eugene Smith's execution, are to strictly adhere to, and not deviate from, the ADOC's established lethal injection protocol during Smith's execution. In particular, the Commissioner and his agents shall not perform a cutdown procedure or use intramuscular sedation on Smith." DE 22 at 15. The Court warned, "Sanctions will be swift and serious if counsel and the Commissioner do not honor or abide by their representations and stipulations." *Id.* at 11–12.

114. On October 19, 2022, Mr. Smith moved to alter or amend the judgment under Federal Rule of Civil Procedure 59, requesting, among other relief, that the judgment be altered to grant him leave to amend his complaint. DE 24. He included with his motion a proposed amended

complaint, which was supported by declarations from physicians who, among other things, explained why it would be extremely difficult for the IV team to access Mr. Smith's veins, as had been the case in the James execution and Miller attempted execution. *See* DE 24-1. Given his approaching execution date, Mr. Smith requested expedited resolution of his motion.

115. The Court then requested supplemental briefing on whether Mr. Smith should be granted leave to amend, even after ADOC already had responded to Mr. Smith's motion to alter or amend. DE 27.

116. Three weeks elapsed from the time Mr. Smith moved to alter or amend and when the Court entered its order denying Mr. Smith's requested relief. *See* DE 33. The Court reversed course on the timeliness of his claim, ultimately holding that it was timely, but nevertheless concluded that leave to amend would be "futile" because his allegations did not state an Eighth Amendment claim. *Id.*

117. On November 10, 2022, Mr. Smith appealed that November 9, 2022 order to the U.S. Court of Appeals for the Eleventh Circuit. Mr. Smith filed his opening brief on November 11, 2022, and requested an expedited briefing schedule and stay pending appeal, as his execution was now one week away.

118. The Eleventh Circuit granted Mr. Smith's request for an expedited briefing schedule and set argument to allow Mr. Smith's appeal to be decided before the execution, making its decision less than four days after briefing was completed and one day after hearing oral argument on Wednesday, November 16 to accommodate Mr. Smith's request for expedited consideration.

119. At approximately 3:00 p.m. on November 17, 2022, the Eleventh Circuit issued its decision reversing and remanding the Court's dismissal of Mr. Smith's Eighth Amendment claim.

Smith v. Comm’r, Ala. Dep’t of Corr., No. 22-13781, 2022 WL 17069492 (11th Cir. Nov. 17, 2022).

120. The Eleventh Circuit held that Mr. Smith “plausibly alleged that there will be extreme difficulty in accessing his veins. Because 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, he will face superadded pain as the execution team attempts to gain IV access.” *Id.* at *5.

121. The Court also held that Mr. Smith had plausibly pleaded that nitrogen hypoxia was an available alternative method that would reduce the risk of severe pain, explaining that ADOC’s continued argument to the contrary “completely misses [the] point” of the Circuit Court’s existing precedent on that precise issue. *Id.*

122. The Court further held that Mr. Smith’s Eighth Amendment claim was not time barred because “[i]t is the emergence of ADOC’s pattern of superadding pain through protracted efforts to establish IV access in two previous execution attempts that caused Smith’s claim to accrue. This pattern emerged at the onset of Miller’s attempted execution.” *Id.*

123. The Court thus concluded, “the district court erred in denying Smith’s motion for leave to amend his complaint on the ground that amendment would be futile.” *Id.* at *5.

124. Having finally obtained reversal of the Court’s dismissal of his Eighth Amendment claim, Mr. Smith immediately sought a stay of execution in this Court until such time as his contemporaneously filed motion for preliminary injunction could be decided.

125. This Court denied that relief at approximately 5:55 p.m., minutes before the execution was scheduled to begin.

126. Mr. Smith immediately appealed to the Eleventh Circuit Court of Appeals.

127. At 7:59 p.m., the Eleventh Circuit unanimously granted a stay. Even the judge who had dissented from the Court’s earlier decision finding that Mr. Smith stated an Eighth Amendment claim concluded that a temporary stay was appropriate in light of the majority’s holding that Mr. Smith had indeed stated a claim. DE 57.

128. In its order, the Eleventh Circuit found that Mr. Smith “has continuously sought to rectify [the] dismissal” of his complaint, that he “has pursued his claims diligently through the district court and here,” and that other factors also favored a stay. *Id.* at 3.

129. At approximately 10:20 p.m., the U.S. Supreme Court vacated the Eleventh Circuit’s stay in a bare order that did not provide any reasoning. Three justices dissented.

E. ADOC Tortured Mr. Smith for Hours During Its Failed Attempt to Execute Him

130. Mr. Smith experienced substantial mental and physical pain and agony on the night of November 17 and in the days that have followed.

131. The events of November 17 substantiate new claims under the Eighth Amendment to the U.S. Constitution and further evidence the injury Defendants caused Mr. Smith in attempting to execute him by lethal injection, all while deviating from its Protocol at various points.

132. Mr. Smith sets forth here the timeline of Defendants’ failed execution to the extent currently possible, given that much of the information and evidence about what took place that night is still in Defendants’ sole custody and control. Mr. Smith will diligently pursue discovery through various means as soon as possible.

i. November 16, 2022: The Day Before the Execution

133. At around 5:00 p.m. on November 16, Mr. Smith had just been returned to a holding cell outside the execution chamber, known to residents of Holman as “the death cell.” Mr. Smith was attempting to collect his thoughts after visiting with family. To Mr. Smith’s surprise, Warden

Raybon appeared outside of the cell with a man who Mr. Smith would later learn is a member of the execution IV team.

134. The man with Warden Raybon never identified himself and never disclosed his credentials to Mr. Smith. Instead, the man stood silently before the cell, popping a tourniquet that he held in his hands. He was wearing teal- or green-colored scrubs. Because the man never identified himself or his credentials, he will hereinafter be referred to as “Green Scrubs.”⁴

135. Because no one had previously told Mr. Smith that the Warden and Green Scrubs would be visiting his cell, Mr. Smith asked with understandable confusion, “What’s this about?”

136. Warden Raybon told Mr. Smith they needed to “check his veins.” Mr. Smith told them that while he did not intend to fight ADOC’s efforts to execute him, he could not participate in ending his own life.

137. Warden Raybon and Green Scrubs left, and they never returned.

ii. November 17, 2022: Execution Day

138. Mr. Smith spent most of the day on November 17 visiting with his family and friends. At around 4:00 p.m., Mr. Smith’s last meal of fried catfish and fried shrimp arrived in the visitation area. With Mr. Smith were his wife, mother, son, daughter-in-law, and spiritual advisor. Corrections officers told Mr. Smith’s visitors to leave at around 4:30 p.m.

139. From the visitation area, Mr. Smith was taken to the infirmary where a nurse created a “body chart.” No member of the execution IV team was present during this visit.

140. At about 5:00 p.m., Mr. Smith was returned to the death cell.

⁴ Physical descriptions of the unidentified IV team members can be provided to the Court under seal.

141. Approximately ten corrections officers were stationed in chairs directly across from the death cell. Because the front of that cell is made of metal bars, the ten corrections officers could see and hear everything Mr. Smith did while in the death cell.

142. Once Mr. Smith was returned to the cell, his spiritual advisor was allowed inside to sit with him while he waited.

143. While Mr. Smith was meeting with his spiritual advisor, the corrections officers outside his door had a virtual picnic, eating sandwiches from a deli tray, tearing opening packages of chips, and cracking open cans of soda. Because the death cell door is made of open bars, Mr. Smith's efforts to emotionally and spiritually prepare for what lay ahead in the coming hours were disrupted by the sights and sounds of the guards' eating and drinking.

144. Sometime between 6:00 p.m. and 7:00 p.m., the corrections officers made Mr. Smith's spiritual advisor leave, leaving Mr. Smith alone in his cell.

145. Unbeknownst to Mr. Smith, his appeals were still being considered by federal courts at this time: after this Court had denied his stay request at about 6:00 p.m., his attorneys had immediately sought a stay from the Eleventh Circuit Court of Appeals.

146. At 7:45 p.m.—while the Eleventh Circuit was still considering Mr. Smith's stay request—Deputy Solicitor General Thomas Wilson emailed Mr. Smith's counsel stating, "We recently spoke with emergency clerks at the Supreme Court and Eleventh Circuit and notified them that we are preparing Mr. Smith for execution. We explained that we would provide notice to you, as well."

147. Mr. Smith's counsel immediately informed Mr. Wilson that proceeding with the execution before the Eleventh Circuit had ruled was inappropriate and raised a potential violation of the Protocol.

148. Mr. Wilson did not respond to Mr. Smith's lawyers, and Mr. Smith's counsel were not informed and were not aware of where Mr. Smith was or what was being done to him, even as a federal appeals court was still considering his stay request. All the while, Mr. Smith also was unaware that courts were still considering whether his execution should be stayed.

149. At around 7:50 p.m., Mr. Smith was able to call his wife while he waited in the death cell. Shortly thereafter, Corrections Officer Earle said, "We need the phone, Kenny." Mr. Smith told his wife goodbye, and the call was ended at 7:57 p.m.

150. After Mr. Smith hung up the phone, the officers who had been stationed outside the death cell swarmed the cell in a mass. They directed Mr. Smith to sit on the edge of the bed and to not move. He did not resist, and told the officers that he did not intend to fight them. They responded, "We know you aren't, Kenny."

151. Officer Earle and Sergeant Gillis handcuffed Mr. Smith, and two other corrections officers put him in leg irons. They told him to stand up and escorted him to the execution chamber with officers surrounding him on all sides. He did not resist.

152. At 7:59 p.m., the Eleventh Circuit Court of Appeals entered an order staying the execution.

153. Upon information and belief, the direct telephone line from the Attorney General's Office to Commissioner Hamm—which the Protocol specifies is to be opened before the condemned is taken to the execution chamber—was either not open, or it was not used to convey that the Eleventh Circuit had stayed the execution, or the Eleventh Circuit's order was disregarded by ADOC staff, whether acting alone or at the direction of the Attorney General and his subordinates.

154. Instead, given that Mr. Smith ended the call with his wife at 7:57 p.m. and the Eleventh Circuit’s stay came just two minutes later—at 7:59 p.m.—it is likely that the officers took Mr. Smith out of the death cell and into the execution chamber at or shortly after 8:00 p.m., after the federal appeals court had already stayed the execution.

155. Once in the execution chamber, the guards told Mr. Smith to sit on the gurney, turn around, and lie down. He complied and did not resist.

156. The swarm of guards then strapped Mr. Smith to the table by his arms, legs and feet. The straps were painfully tight and Mr. Smith could not move. He did not resist the guard’s efforts to strap him down.

157. Mr. Smith saw two men and a woman who were formally dressed standing at his left; one was holding an accordion-type folder and the other two had a notepad and pen. Because none of those individuals ever identified themselves to Mr. Smith, they will hereinafter be referred to as “the Suits.”

158. At 8:02 p.m.—when, upon information and belief, ADOC was already strapping Mr. Smith into a gurney to be killed—his counsel emailed Mr. Wilson to notify Attorney General Marshall’s office of the Eleventh Circuit stay, although as counsel for ADOC in the appeal, both Mr. Wilson and Mr. Anderson would have received notification of the stay as soon as it was issued. Mr. Smith’s counsel also asked that ADOC stop the ongoing “preparations” associated with the execution in light of the stay.

159. Mr. Wilson tersely responded, “Noted, thank you.” Neither Mr. Wilson nor Mr. Anderson ever confirmed that Defendants had ceased their execution attempt.

160. Indeed, Defendants did not stop their execution attempt, in defiance of the Eleventh Circuit's order staying the execution, which remained in effect until approximately 10:20 p.m. when it was vacated by the U.S. Supreme Court.

161. Instead, Defendants left Mr. Smith strapped tightly to the execution gurney. He was never told that the Eleventh Circuit had stayed his execution, and he believed that when he was taken into the execution chamber, all of his appeals had been exhausted (as had been the case with Alan Miller), and that the execution would begin as soon as he was strapped to the gurney. Thus, when Mr. Smith was taken into the execution chamber he believed that there was nothing preventing the State from executing him and that he was to be killed in the coming hours.

162. But then approximately seven of the guards and the three Suits to his left exited the room, leaving only Officer Quarles, Officer McKenzie, and Deputy Warden Wood remaining in the room with Mr. Smith.

163. As Mr. Smith lay strapped to the gurney, nobody spoke to him, and he had no idea what was happening.

164. There was a clock in the execution chamber. Mr. Smith could not see the clock the entire time but could sometimes see it if he raised his head from the gurney.

165. Believing he would be executed, Mr. Smith tried to mentally prepare for the next few minutes or hours. Directly above the execution gurney was a light fixture with two lights forming the shape of a cross. Mr. Smith, as a man of faith, focused on the glowing, cross-shaped lights and sought to maintain his dialogue with God. He thanked God for the week he had just had with his family. He wanted to maintain his composure for his family—his wife, son, and daughter-in-law—who would be there as witnesses. He sang, "I'm not alone" quietly, as he did not want to disturb the three guards who were in the room with him.

166. As he lay strapped to the gurney, he felt as though his circulation was being cut off. He also started to become concerned because time was passing and his witnesses still were not there.

167. He asked the guards where his witnesses were, and they responded that they would be picked up when it was time. Mr. Smith began panicking, fearing that his family would not make it in time.

168. By 9:00 p.m., Mr. Smith had been strapped to the gurney for an hour. He asked the three officers in the room what was happening, and they said they didn't know either.

169. As he continued to lay strapped to the gurney, Mr. Smith started descending into hopelessness and despair. He believed that he would die soon and that there was nothing more that could be done to stop it. He was also extremely distressed because he feared that his witnesses would not make it in time, as they still were not there after over an hour of waiting.

170. At around 10:00 p.m., Mr. Smith heard a rap on the door. The three Suits walked back into the execution chamber and stood at Mr. Smith's left side. At that point, Mr. Smith had already been strapped to the gurney, unable to move, for two hours.

171. At the same time, three men wheeling a medical cart entered the room. Upon information and belief, those three men were the "IV team" referred to in the Protocol.

172. Mr. Smith recognized one of the men as Green Scrubs, who had appeared at his cell door the evening before popping a tourniquet. Green Scrubs was wearing the same color scrubs as the previous day.

173. The second man was wearing dark blue scrubs. Because he never identified himself or his credentials to Mr. Smith, this man will be referred to hereinafter as "Blue Scrubs." Mr. Smith recalled having seen blue Scrubs "chain smoking" outside of Holman after other executions.

174. The third man tried to stay out of Mr. Smith's field of vision for most of the execution attempt. He was wearing red pants and a dark top, and appeared to be directing Green Scrubs and Blue Scrubs. Because this person never identified himself or his credentials to Mr. Smith, he will be referred to hereinafter simply as "Red Scrubs."

175. The IV team, the officials in the room, and Defendants all knew or should have known based on the difficulties that occurred during the James execution and the Miller attempted execution that the IV team would have great difficulty establishing IV access, resulting in severe pain to Mr. Smith.

176. They further knew or should have known that what had allegedly been done to Alan Miller—as described in his Second Amended Complaint—stated a claim for violations of the Eighth Amendment right to be free from cruel and unusual punishment. *See Miller*, 2022 WL 16720193, at *14–15.

177. Despite knowing all of that, they recklessly and knowingly charged ahead at or around 10 p.m. in a rush to execute Mr. Smith before midnight.

178. Green Scrubs stationed himself on Mr. Smith's right, and Blue Scrubs was standing on the left.

179. At some point, EKG wires were placed on Mr. Smith's chest.

180. Blue Scrubs tied a tourniquet around Mr. Smith's upper arm and placed a pad under his arm. Blue Scrubs began sticking a needle in Mr. Smith's arm, and Mr. Smith cried out that Blue Scrubs was in his muscle, which caused him pain. Blue Scrubs retorted, "No I'm not." Red Scrubs, who was standing behind Mr. Smith, told Blue Scrubs that he "need[ed] to back it up." Blue Scrubs did so, and then proceeded to hook up tubing to the needle.

181. As Blue Scrubs was working, one of the Suits appeared to be taking photos with his phone.

182. By then, Mr. Smith was experiencing extreme emotional distress, believing he would imminently die.

183. Green Scrubs then started examining Mr. Smith's right hand and slapping it to find a vein. Green Scrubs began puncturing Mr. Smith's skin with needles in several places on his hand. With each jab, Mr. Smith could feel the needle going in and out multiple times and moving around under his skin, causing him great pain. Everyone in the room ignored Mr. Smith's pleas that he was in pain as Green Scrubs continued to jab needles into him.

184. Mr. Smith asked the Suits to his left if they had any authority to call the Court to report that his constitutional rights were being violated; they did not respond.

185. Blue Scrubs then walked down to Mr. Smith's feet and removed his shower shoes (the only shoes he was permitted to wear) and socks. Blue Scrubs and Green Scrubs looked at each of Mr. Smith's feet but then shook their heads at each other.

186. At that point, Blue Scrubs shone a device that emitted a ghostly blue light over Mr. Smith's arms and hands. Either Blue Scrubs or Green Scrubs started jabbing needles in Mr. Smith's right arm again, sliding it back and forth multiple times with each stick. Mr. Smith was not attempting to fight, but he was crying out in pain because he felt the needles going into his muscle. He asked to speak to his lawyers or to the Court and gave his district court case number.

187. Red Scrubs, who claimed he didn't need the blue light, then started jabbing Mr. Smith's right arm with a needle and did so numerous times. Red Scrubs, like the others, ignored Mr. Smith's repeated pleas that the needle jabs were causing severe pain. By that point,

Mr. Smith's pain was so intense that he had entirely lost his composure, which he had desperately wanted to maintain for his family, for the witnesses, and for expressing his final words.

188. The IV team's efforts to establish access through the standard procedure were prolonged, involving numerous needle jabs in Mr. Smith's arms and hands over an extended period of time, and continued well past the point at which it should have been apparent to them that IV access through that method was not possible.

189. Various persons within the Death Chamber appeared to take photographs of this procedure and Mr. Smith with their cellular phones.

190. Blue Scrubs then asked the corrections officers to tilt the gurney backwards so that Mr. Smith's feet were pointing upwards. The corrections officers complied, which left Mr. Smith hanging from the gurney in an inverse crucifixion position with his feet elevated, which caused pain in his neck, shoulders, and back.

191. Mr. Smith asked the officers and others in the room what was happening, but no one responded or explained why he was being suspended upside down. Nothing in the Protocol allows an inmate to be suspended from the execution gurney in this manner.

192. The IV team and the suits then left the execution chamber, with Mr. Smith still suspended upside down. Once again, Mr. Smith asked what was happening, and no one responded.

193. Thereafter, the IV team and the suits came back into the execution chamber.

194. Red Scrubs then entered Mr. Smith's field of vision on his right side. He was wearing a blue paper surgical gown, a face mask, and a clear plastic face shield. Before that time, none of the IV team had been wearing face masks or face shields. Upon information and belief, Red Scrubs wore a clear plastic face shield to protect against spraying blood from the procedure he was about to attempt.

195. The guards raised the gurney until it was about chest high for Red Scrubs. Someone then started unbuttoning Mr. Smith's shirt and pulled it back away from his chest.

196. Red Scrubs asked Mr. Smith to turn his head to the left. Mr. Smith did not resist, but he indicated that he could not participate in his own execution. Red Scrubs then stepped back, and Deputy Warden Wood approached Mr. Smith from behind.

197. Someone rubbed a cold solution on Mr. Smith's neck and collarbone region. He again asked what they were doing, and no one responded.

198. Red Scrubs put blue paper drape over Mr. Smith's face. The drape had a clear plastic insert in the face region that allowed Mr. Smith to see some of what was being done to him.

199. By that point, Mr. Smith was very fearful because he did not know what was happening, and no one in the room would tell him.

200. He then saw a clear syringe with a needle coming toward him. Mr. Smith was terrified at the sight of what appeared to be an injection because he had heard reports that Mr. James may have been sedated as part of his execution and did not appear to be conscious when the curtains to the chamber were opened. This caused Mr. Smith great emotional distress because it was important to him that he be composed and focused for his family and witnesses when they saw him for the last time. He was terrified that the nameless people of unknown credentials subjecting him to severe pain were also about to rob him of that final dignity.

201. Mr. Smith told the IV team to stop and pleaded for someone to call the Court, whose order they were violating.

202. Mr. Smith felt multiple needle jabs in his neck or collarbone region, causing him severe pain. He again stated that he needed to speak with the Court and his counsel. No one responded. Mr. Smith, in anguish, asked, "Is there no one who can stop this?" Again, there was

only silence. Mr. Smith was distraught and completely devoid of hope because he believed that no one in the room had any regard for his constitutional rights. Upon information and belief, Mr. Smith was injected with a sedative and/or anesthetic.

203. Administering an injection to Mr. Smith was inconsistent with the Protocol and violated both ADOC's commitment to the Court and the Court's order—on penalty of sanctions—that the State not inject Mr. Smith with a sedative and/or anesthetic.

204. After Red Scrubs had stuck Mr. Smith with a needle five or six times, he stepped back.

205. The next thing Mr. Smith saw was a large gauge needle. It was bigger than any needle he had ever seen before.

206. Deputy Warden Wood, who was holding Mr. Smith's head in both his hands, torqued it to the side, saying, "Kenny, this is for your own good." Mr. Smith forcefully expressed his disagreement with that statement but did not resist.

207. Red Scrubs started inserting the large gauge needle into Mr. Smith's collarbone region. Mr. Smith felt like he was being stabbed in the chest and could feel the needle sliding under his collarbone. Upon information and belief, Red Scrubs was attempting a central line procedure.

208. Mr. Smith's body contorted away from the pain and against the restraints, injuring his right shoulder. He was in such physical pain that he had difficulty breathing and his voice weakened.

209. Blue Scrubs snarled, "You can't feel that" even as Mr. Smith was writhing and shaking uncontrollably, eventually causing his shower shoes to come off and become wrapped in the sheet at his feet. Mr. Smith responded forcefully that he did feel pain.

210. Red Scrubs then repeatedly jabbed Mr. Smith's chest with the large needle. Mr. Smith's pain was so intense that he could hardly breathe and was sweating so profusely from the torture he was experiencing that he feared he had urinated on himself. For Mr. Smith, the needle jabs to his chest area "felt like an eternity."

211. The IV team's deeply inept efforts to establish a central line were prolonged and continued well past the point at which it should have been apparent that it would not be successful.

212. No one in the room ever told Red Scrubs or other members of the IV team to stop what they were doing.

213. But eventually, Red Scrubs removed the paper drape from Mr. Smith's face, and the IV team and the Suits left the execution chamber again.

214. Mr. Smith remained strapped to the gurney. His heart was pounding, and he was hyperventilating and crying. And he was terrified of what they might do next.

215. Officer McKenzie was pacing around the execution chamber. Mr. Smith asked Officer McKenzie what was going on, but just then, the IV team came back into the execution chamber and started to pick up items off the floor.

216. Mr. Smith still had not been told what has happening or whether the execution was still going forward.

217. Outside of Holman and unbeknownst to Mr. Smith, unverified reports that the execution may have been called off started circulating on the internet at or around 11:20 p.m. Reporters contemporaneously noted in their media reports that they had boarded a van at the Holman Media Center but that the van never moved before they were unloaded from the van. None of Mr. Smith's requested witnesses were ever taken to, or summoned to, Holman. On

information and belief, it is unlikely that the witnesses and media could have been positioned into the viewing room and the execution completed by midnight when the death warrant expired.

218. At 11:36 p.m., Mr. Smith's attorney Robert Grass emailed Mr. Wilson, Mr. Anderson, and Solicitor General Edmund LaCour, requesting that they "[p]lease confirm that the execution has been called off and advise as to the whereabouts and physical well-being of Mr. Smith." None of them ever responded.

219. Back in the execution chamber, at some point before midnight, Green Scrubs placed a hand on Mr. Smith and asked if his pain had eased up at all yet. Mr. Smith responded, "No, sir." Green Scrubs stood over Mr. Smith and said, "everything is going to be alright." Mr. Smith was still terrified about what they might do next.

220. Mr. Smith asked again what was going on, and Green Scrubs said, "It's over with."

221. Even then, Mr. Smith still was not sure if he had survived the execution attempt because there was still a needle in one of his arms.

222. But then Blue Scrubs started removing the needle, carefully explaining what he was doing. Green Scrubs offered Mr. Smith some water, held his hand, and told him that he would be praying for him. Meanwhile, Red Scrubs continued trying to hide his face from Mr. Smith.

223. Mr. Smith was still confused and disoriented from his terrifying ordeal over the past four hours—not to mention the IV team's sudden and complete change in demeanor. He asked again what was going on. One of the people in the execution chamber said they thought it was "over" because of "legal stuff." Of course, there had been no legal developments in the courts since the U.S. Supreme Court had vacated the Eleventh Circuit's stay of execution at 10:20 p.m.

224. Mr. Smith continued to be strapped into the gurney for about 10 more minutes. He was still hyperventilating from the extreme physical and emotional pain and distress he had just endured.

225. The other seven guards who had moved him into the execution chamber returned and, along with Deputy Warden Wood, Officer McKenzie, and Officer Quarles, began removing the straps from Mr. Smith's body.

226. The guards asked Mr. Smith to lift his arms and put his hands together so that they could put him in handcuffs, but he was unable to move his arms. The officers had to support his arms so that they could place him in handcuffs.

227. The officers asked Mr. Smith to sit up, but he was unable to do so on his own. The officers had to support his body to help him get upright, and he immediately became dizzy and felt like he would faint. The officers told him to sit on the table for a minute.

228. Mr. Smith was unable to stand up on his own, and the officers did not put leg irons on him. Instead, Sergeant Gillis and Officer Earle supported him on either side to get him back to the death cell. There, Mr. Smith sat on the bed for a moment and tried to make sense of what had just happened.

229. He was then taken to the infirmary, where Officer Earle and Sergeant Gillis had to help him onto the examination table. He could not unbutton his shirt, so officers assisted him with that too. Mr. Smith reported to Nurse Bell that his shoulder was "killing him," that his neck hurt, and that he was dizzy. Nurse Bell created a "body chart."

230. Mr. Smith was taken back to the death cell right outside the chamber where he had just been tortured for four hours. He was still trembling and sweating. Prison officials wanted to confiscate the prison uniform Mr. Smith had been wearing during the botched execution, and he

was unable to undress and dress without assistance from Sergeant Gillis. No one offered him anything to drink or eat. He was shocked, disoriented, and experiencing post-traumatic stress. He was unable to sleep for most of the night.

231. At a press conference held just before midnight, Commissioner Hamm told the assembled reporters that the “execution team” had made “several” attempts to establish IV access and “attempted a central line” before the execution was halted. He refused to identify the qualifications of any “medical” personnel allegedly on site at Holman during the attempted execution. Governor Ivey would later state that the execution could not be carried out “because of last minute legal attempts to delay or cancel the execution.” *See* Jarvis Robertson, *Another execution halted because of difficulties with intravenous lines*, <https://www.wvtm13.com/article/stay-of-execution-granted-to-kenneth-smith/41999280#> (Nov. 18, 2022).

232. Mr. Smith was awoken for breakfast the next morning and paced around the death cell until about 5:55 a.m., when prison officials returned him back to his block and prior cell on Holman’s death row.

233. Mr. Smith continues to be in a great deal of physical and emotional pain from the attempted execution.

234. Mr. Smith has experienced lingering pain in his arm from repeated needle jabs, and he often keeps it curled close to his body. Mr. Smith has also experienced lingering pain in the area around his collarbone where, upon information and belief, a central line procedure was attempted numerous times. He now has back spasms from being tightly strapped to the gurney for about 4 hours.

235. Mr. Smith struggles to sleep, sometimes sleeping only a few hours per night. He is often overcome with emotions. On the morning of Saturday, November 19, officers found Mr. Smith crying in his cell. They were so concerned about his level of distress that they took him for immediate medical treatment and observation. He is likely experiencing post-traumatic stress disorder.

236. Defendants subjected Mr. Smith to precisely the unnecessary and wanton infliction of pain that the Eighth Amendment was intended to prohibit, the same treatment he sought to enjoin by filing this lawsuit on August 18, 2022.

237. In proceeding with their attempt to execute Mr. Smith despite their knowledge from past experience with Mr. James and Mr. Miller that they would have difficulty establishing intravenous access, well past the time that it was obvious that they could not establish two intravenous lines in Mr. Smith, and ignoring Mr. Smith's expressions of severe physical pain and emotional anguish, Defendants acted with deliberate indifference to Mr. Smith's constitutional rights.

238. On information and belief, Mr. Smith and Mr. Miller are the only living execution survivors in the United States. Mr. Smith now lives with psychological trauma that the human brain is not able to process, causing him great distress.

F. ADOC's Lethal Injection Process is Shrouded in Secrecy

239. The State exercises no greater power than when it executes condemned people. Consequently, the process by which the State does so demands maximum transparency to ensure that it is consistent with the Constitution and the values of the State's citizens. ADOC's lethal injection process, however, is anything but transparent.

240. ADOC conceals from public observation critical portions of the lethal injection process, including the establishment of an intravenous line in the condemned person.

241. ADOC conceals who is responsible for establishing an intravenous line in the condemned person and does not provide information to ensure that those responsible are qualified for the task.

242. The only witnesses to that process are unidentified ADOC personnel and the condemned person who (with the rare exceptions of Mr. Miller and Mr. Smith) ordinarily do not live to describe it.

243. Mr. James's execution, Mr. Miller's and Mr. Smith's aborted executions, and other history establish that ADOC cannot be trusted to provide accurate information about what happens during its lethal injection process.

244. For example, during the scheduled execution of Doyle Lee Hamm on February 22, 2018, there was a two-and-a-half-hour delay while ADOC staff attempted to establish an intravenous line. During that time, ADOC "[s]taff punctured Hamm at least 11 times in his limbs and groin, causing him to bleed profusely on the gurney." Evan Mealins, *ADOC 'cannot confirm' if Joe Nathan James Jr. was fully conscious before his execution*, Montgomery Advertiser (Aug. 2, 2022). ADOC stopped the execution, on information and belief, only when the warrant was about to expire.

245. Despite having subjected Mr. Hamm to torture, cruelty, and/or substantial pain, then-ADOC Commissioner Jefferson Dunn afterwards said that Mr. Hamm's execution was called off "out of an abundance of caution" due to "a time issue" and that "I wouldn't necessarily characterize what we had tonight as a problem." Liliana Segura, *Another Failed Execution: The Torture of Doyle Lee Hamm*, The Intercept (Mar. 3, 2018).

246. Following this horrific event, the State agreed not to subject Mr. Hamm to any further execution attempts. Defendants never moved to set a subsequent execution date for Mr. Hamm, and he later died of natural causes. *See* The New York Times, *Doyle Hamm, Who Survived a Bungled Execution, Dies in Prison at 64* (Nov. 29, 2021), <https://www.nytimes.com/2021/11/29/us/doyle-hamm-dead.html>.

247. While ADOC could not establish intravenous access in Mr. Hamm, that did not put other condemned inmates on notice that the Protocol is advisory only.

248. On information and belief, unlike Mr. James (and Mr. Miller and Mr. Smith), Mr. Hamm was a cancer patient and had a prior history of intravenous drug use, which compromised the ability to access his veins. *See Hamm v. Comm’r, Ala. Dep’t of Corrs.*, 725 F. App’x 836, 837–38 (11th Cir. 2018) (“Hamm alleges in his complaint that he suffers from lymphoma (a type of blood cancer) and lymphadenopathy (enlarged lymph nodes), which combined with years of intravenous drug use, have rendered his veins inaccessible for the use of a catheter without a complicated procedure carrying the risk of ‘a bloody and excruciating experience.’”). And the State agreed not to attempt to execute Mr. Hamm again, suggesting that it would take steps to ensure that it did not subject other condemned persons to the same cruel and painful treatment. In contrast, the State moved on an expedited basis to reschedule Mr. Miller’s execution just days after its botched execution attempt.

249. Given ADOC’s history of evasion and lack of transparency, there was no way for a condemned person to know that the Protocol is only advisory until that was demonstrated by the facts surrounding Mr. James’ execution and Mr. Miller’s aborted execution—and now, Mr. Smith’s aborted execution.

E. Nitrogen Hypoxia is a Feasible and Readily Available Alternative that Would Significantly Reduce the Intolerable Risk to Mr. Smith from Lethal Injection

250. As a matter of law, nitrogen hypoxia is an available and feasible alternative method of execution. *Price v. Dunn*, 920 F.3d 1317, 1328–29 (11th Cir. 2019).

251. Execution by inhalation of nitrogen gas would eliminate the need to establish intravenous access, Zivot Decl. ¶ 27, and, therefore, would eliminate the intolerable risk that ADOC will deviate from the Protocol in attempting to do so as it did in Mr. James’ execution and Mr. Miller’s aborted execution, and now, Mr. Smith’s aborted execution. In addition, execution by inhalation of nitrogen gas would reduce the risk that a condemned person would suffer pulmonary edema, which autopsies show has occurred in condemned people executed by lethal injection, and which would cause the condemned inmate to experience the sensation of choking or drowning if conscious.

CLAIMS FOR RELIEF

First Claim for Relief

Violation of Mr. Smith’s Rights Under the U.S. Constitution’s Eighth Amendment to be Free from Cruel and Unusual Punishment

(Against all Defendants in their Individual and Official Capacities)

252. Mr. Smith incorporates paragraphs 1 through 250.

253. The Eighth Amendment to the U.S. Constitution prohibits “cruel and unusual punishments.” U.S. Const. amend VIII.

254. A method of execution violates the Eighth Amendment if “the risk of pain associated with the State’s method is substantial when compared to a known and available alternative.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) (citations and internal quotation marks omitted).

255. The U.S. Supreme Court has previously described punishments to be unconstitutionally cruel “when they involve torture or a lingering death,” *In re Kemmler*, 136 U.S. 436, 447 (1890), or when they “involve the unnecessary and wanton infliction of pain,” *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). The Eighth Amendment forbids “forms of punishment that intensified the sentence of death with a (cruel) “ ‘superadd[ition]’ ” of “ ‘terror, pain, or disgrace.’ ” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019).

256. The U.S. Supreme Court has also stated that “a series of abortive attempts” at execution raise an Eighth Amendment claim. *Baze v. Rees*, 553 U.S. 35, 50 (2008); *see also Glass v. Louisiana*, 471 U.S. 1080, 1085-86 (1985)

257. Both Defendants’ botching of Mr. Smith’s execution on November 17, and any future attempt to execute Mr. Smith again, constitute cruel and unusual punishment under the Eighth Amendment.

258. Before the execution attempt on November 17, Defendants were aware of serious constitutional problems with their implementation of the Protocol. Indeed, just hours before they began their execution attempt, the Eleventh Circuit Court of Appeals had held that Mr. Smith had stated a viable Eighth Amendment claim based on his assertion that ADOC would likely have “extreme difficulty in accessing Smith’s veins,” which would cause him to face “superadded pain as the execution team attempts to gain IV access.” *Smith*, 2022 WL 17069492, at *5.

259. Moreover, Defendants should have been aware of the likelihood that they would violate Mr. Smith’s Eighth Amendment rights in light of the botched James execution and Miller attempted execution.

260. In light of that knowledge, Defendants had an opportunity to take reasonable steps before November 17, 2022 to ensure that they could access Mr. Smith’s veins.

261. The executioners presumably made their best efforts to access Mr. Smith's veins during the four hours that Mr. Smith was strapped to a gurney on November 17, 2022.

262. Despite their prolonged efforts, the executioners were unable to achieve the IV access necessary to execute Mr. Smith by lethal injection on November 17, 2022.

263. Defendants' treatment of Mr. Smith does not fall within society's standards for a constitutional execution. The botched execution was terrifying and extremely painful for Mr. Smith. With deliberate indifference to Mr. Smith's constitutional rights, Defendants undertook repeated attempts to establish veinous access despite their knowledge of their own difficulty establishing IV access and a more humane alternative of nitrogen hypoxia.

264. Mr. Smith is thus in a rare position of having proof that an execution by lethal injection caused him severe pain, despite a feasible and available alternative—nitrogen hypoxia—that would have entirely avoided the veinous access issue, and assuming proper administration, would cause an individual to lose consciousness within seconds, and experience no pain or discomfort while dying within minutes. That feasible and available alternative method of execution significantly reduces the intolerable risk of torture, cruelty, or substantial pain associated with Defendants' lethal injection process.

265. To subject Mr. Smith to a second execution by lethal injection would subject him to a torturous experience of unnecessary physical and psychological pain, as has been established through Alabama's last three execution attempts. Therefore, any further attempts to execute Mr. Smith would violate the Eighth Amendment.

266. Plaintiff will suffer irreparable harm in the absence of an injunction.

Second Claim for Relief

Violation of Mr. Smith's Right to Equal Protection Under the Law

(Against Defendants Hamm, Raybon, and Marshall in their Official Capacities)

267. Mr. Smith incorporates paragraphs 1 through 250.

268. Seeking a second attempt to execute Mr. Smith would treat Mr. Smith differently than Mr. Doyle Hamm, whose execution by lethal injection Defendants also botched due to their failure to establish venous access. After Defendants botched Mr. Hamm's lethal injection, they entered a confidential settlement and jointly dismissed Hamm's pending civil rights litigation. On information and belief, Defendants agreed to not attempt to execute Mr. Hamm again.

269. Defendants' disparate treatment of Mr. Smith would not be rationally related to a legitimate government interest.

270. Mr. Smith has the right to be treated the same as all other Holman death row inmates who survived botched lethal injection executions by Defendants.

Third Claim for Relief

Violation of the Court's Order

(Against All Defendants in their Individual Capacities)

271. Mr. Smith incorporates paragraphs 1 through 250.

272. This Court entered the following Order: "The Commissioner and his agents, which include all ADOC employees involved in Kenneth Eugene Smith's execution, are to strictly adhere to, and not deviate from, the ADOC's established lethal injection protocol during Smith's execution. In particular, the Commissioner and his agents shall not perform a cutdown procedure or use intramuscular sedation on Smith." DE 22 at 15.

273. The Order further provided: "Sanctions will be swift and serious if counsel and the Commissioner do not honor and abide by their representations and stipulations." *Id.* at 11–12.

274. Despite the Court's Order, Defendants subjected Mr. Smith to intramuscular sedation.

275. As a result of Defendants' violation of this Court's Order, Mr. Smith experienced severe physical pain and emotional harm, entitling him to compensatory and punitive damages.

PRAYER FOR RELIEF

WHEREFORE, Mr. Smith respectfully requests that this Court grant the following relief:

1. With respect to the First Claim for Relief,
 - a. A declaration that Defendants' attempt to execute Mr. Smith on November 17, 2022 violated his Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment.
 - b. A declaration that making a second attempt to execute Mr. Smith would constitute cruel and unusual punishment in violation of Mr. Smith's rights under the Eighth and Fourteenth Amendments to the U.S. Constitution, or alternatively, that making a second attempt to execute Mr. Smith by lethal injection would constitute cruel and unusual punishment in violation of Mr. Smith's rights under the Eighth and Fourteenth Amendments to the U.S. Constitution.
 - c. An award of compensatory and punitive damages against all Defendants for their intentional infliction of pain and their deliberate indifference to Mr. Smith's suffering as a result of his botched lethal injection execution in an amount to be determined at trial;
 - d. A preliminary and permanent injunction prohibiting Defendants from making a second attempt to execute Mr. Smith, or alternatively, prohibiting

Defendants from making a second attempt to execute Mr. Smith by lethal injection.

2. With respect to the Second Claim for Relief,
 - a. A declaration that any second attempt to execute Mr. Smith would violate his rights to equal protection under the Fourteenth Amendment, or alternatively, that a second attempt to execute Mr. Smith by lethal injection would violate his rights to equal protection under the Fourteenth Amendment; and
 - b. A preliminary and permanent injunction prohibiting Defendants from making a second attempt to execute Mr. Smith, or alternatively, prohibiting Defendants from making a second attempt to execute Mr. Smith by lethal injection.
3. With respect to the Third Claim for Relief,
 - a. An award of compensatory and punitive damages for the injuries caused by Defendants' violation of this Court's order prohibiting them from using an intramuscular sedation during Mr. Smith's failed execution.
4. Such other relief as this Court deems just and proper.

Respectfully submitted, this 6th day of December 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2022, I electronically filed the foregoing with the Clerk of the Court using the Pacer system, which will send notification to the following:

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Of Counsel

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

JAMES EDWARD BARBER,	-----X	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. 2:23-cv-00342-ECM
	:	
KAY IVEY, Governor of the State of	:	
Alabama, <i>et al.</i> ,	:	
	:	
Defendants.	:	
	-----X	


DECLARATION OF KENNETH EUGENE SMITH

KENNETH EUGENE SMITH declares under penalty of perjury that:

1. I am over the age of twenty-one (21) and this declaration is based on my personal knowledge.
2. I am incarcerated at W.C. Holman Correctional Facility under a judgment of conviction for capital murder and subject to a death sentence.
3. On November 17, 2022, the Alabama Department of Corrections ("ADOC") attempted to execute me but aborted the execution after ADOC personnel were unable to set two intravenous lines by either method authorized by ADOC's lethal injection protocol.
4. ADOC's unsuccessful attempts to establish intravenous access caused me severe physical pain and emotional trauma as described in paragraphs 138 through 235 of the Second Amended Complaint in my pending litigation styled *Smith v. Hamm, et al.*, No. 2:22-cv-00497-RAH, Doc. 71 (M.D. Ala.), which are incorporated by reference.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 27, 2023


Kenneth Eugene Smith

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE MIDDLE DISTRICT OF ALABAMA
3 NORTHERN DIVISION
4 JAMES EDWARD BARBER,
5 Plaintiff,
6 Vs. CASE NO.: 2:23cv342-ECM
7 JOHN Q. HAMM, et al.,
8 Defendants.
9 * * * * *
10 ORAL ARGUMENT
11 * * * * *
12 BEFORE THE HONORABLE EMILY COODY MARKS, UNITED STATES
13 DISTRICT JUDGE, at Montgomery, Alabama, on Wednesday, July 5,
14 2023, commencing at 1:06 p.m.
15 APPEARANCES
16 FOR THE PLAINTIFF: Mr. Stephen Spector
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6 * * * * *

7 EXAMINATION INDEX

8 LYNN HADAWAY

9 DIRECT BY MR. SPECTOR 52
 CROSS BY MR. ANDERSON 81
 10 REDIRECT BY MR. SPECTOR 101

11 JAMES BARBER

12 DIRECT BY MR. BATDORF-BARNES 103
 CROSS BY MR. ANDERSON 106
 13

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15 Proceedings reported stenographically;

16 transcript produced by computer

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18 (The following proceedings were heard before the Honorable
 19 Emily Coody Marks, United States District Judge, at Montgomery,
 20 Alabama, on Wednesday, July 5, 2023, commencing at 1:06 p.m.:)

21 (Call to Order of the Court.)

22 THE COURT: Good afternoon.

23 MR. BARBER: Good afternoon.

24 THE COURT: And this is Mr. Barber here with us
 25 electronically?

PATRICIA G. STARKIE, RDR, CRR, OFFICIAL COURT REPORTER
 U.S. District Court, Middle District of Alabama
 One Church Street, Montgomery, AL 36104 334.322.8053

1 MR. BARBER: Yes, ma'am.

2 THE COURT: Hello, Mr. Barber. This is the case --

3 MR. BARBER: I would like to thank you for allowing
4 this, ma'am. It saved me a lot of undue pain.

5 THE COURT: Can y'all hear him okay? You can?

6 This is the case of Barber versus Ivey, et al., case
7 number 23cv342.

8 Who do we have here for Mr. Barber?

9 MS. HINTON: Your Honor, I'm Paula Hinton with the law
10 firm of Winston & Strawn for Mr. Barber, and I'll allow the
11 lawyers from Sidley Austin to each introduce himself.

12 MR. GREEN: Your Honor, Jeffrey Green from Sidley
13 Austin, the Washington, D.C. office, Your Honor. Admitted pro
14 hac.

15 THE COURT: Good afternoon.

16 MR. SPECTOR: Good afternoon. Stephen Spector on
17 behalf of Mr. Barber from Sidley Austin in the Chicago office.

18 MR. BATDORF-BARNES: Christopher Batdorf-Barnes on
19 behalf of Mr. Barber from the Sidley Chicago office, also
20 admitted pro hac.

21 THE COURT: Very good. And who do we have here for the
22 State defendants?

23 MR. ANDERSON: Richard Anderson, Your Honor, for the
24 Attorney General's Office, representing all defendants.

25 MS. SIMPSON: Good afternoon, Your Honor. Lauren

1 Simpson for the defendants.

2 MR. JOHNSON: And Henry M. Johnson, Your Honor.

3 THE COURT: Good afternoon.

4 All right. And as I stated earlier, we have Mr. Barber
5 with us by video teleconference.

6 Mr. Barber, can you hear me?

7 MR. BARBER: Yes, ma'am.

8 THE COURT: All right. Thank you.

9 All right. I had set this for an oral argument on all
10 pending motions. I have reviewed the motion to dismiss filed by
11 the State defendants and Mr. Barber's response.

12 Does the State intend to file a reply brief?

13 MR. ANDERSON: Your Honor, frankly, I haven't made that
14 assessment yet, we've been so busy preparing for this hearing.
15 I know Mr. Johnson has looked at the reply, but I don't think at
16 this time we intend to file a reply.

17 THE COURT: All right. I've reviewed the pending
18 motion and the response. I don't feel like I need any oral
19 argument on that today unless either side feels strongly that
20 you want to be heard on the motion. I think it's pretty
21 straightforward, your arguments, so why don't we just get to the
22 motion for preliminary injunction. I think that's a better use
23 of our time. I would like to hear arguments on that.

24 All right. Who's going to take the lead for Mr. Barber
25 on the motion for preliminary injunction?

1 MR. SPECTOR: Your Honor, Stephen Spector.

2 THE COURT: All right. You can approach the podium.

3 MR. SPECTOR: Your Honor, two things before I begin.

4 We have a demonstrative. It will be shown on the screen, but if
5 you would also like a hard copy, I could present you with one as
6 well.

7 THE COURT: I'll take the hard copy. If we have the
8 demonstrative up, I think Mr. Barber can continue to see us. We
9 will not be able to see him. I can see him on the screen up
10 here, but you will not. Just be aware of that.

11 MR. SPECTOR: Okay.

12 THE COURT: But we still have his feed.

13 MR. SPECTOR: And then what we also have for you is a
14 binder of our exhibits. May I approach?

15 THE COURT: You may.

16 MR. SPECTOR: Your Honor, I have some brief
17 introductory remarks and then I would turn to our arguments, if
18 that's all right with you.

19 THE COURT: Yes. Go ahead.

20 MR. SPECTOR: Your Honor, we are here today because the
21 State of Alabama has proven itself incapable at carrying out
22 lethal injection executions. Last year the State botched a
23 lethal injection not once, not twice, but three times in a row.
24 And in doing so, Your Honor, Alabama made history as being the
25 only state in the nation to botch three consecutive executions.

1 Each botched execution suffered from the same
2 underlying problem: Protracted efforts at establishing IV
3 access. Indeed, the IV team repeatedly punctured Joe James over
4 the course of three hours, repeatedly punctured Alan Miller over
5 the course of 90 minutes, and repeatedly punctured Kenny Smith
6 over the course of two hours.

7 Recognizing this incompetency and the need to correct
8 its procedures, Governor Ivey ordered a halt to all lethal
9 injection executions in the state in November 2022 and ordered
10 Commissioner Hamm to conduct a "top to bottom review of the
11 State's execution procedures." Governor Ivey also ordered
12 Attorney General Marshall to withdraw all pending motions to set
13 execution dates in the Alabama Supreme Court, including
14 Mr. Barber's.

15 Unfortunately, no meaningful changes came from the
16 State's "top to bottom review." It only lasted a few short
17 months, it was shrouded in secrecy, and defendants concluded,
18 despite failing to release any reports or records, that no
19 deficiencies were found in Alabama's execution procedures.

20 That conclusion, which appears in defendants' responses
21 to interrogatory number one in this litigation, should give this
22 Court serious pause. And more than that, it shows that
23 Mr. Barber's likely to succeed on the merits of his claim.

24 Defendants have not just botched three executions in a
25 row, they have now admitted that they have made no meaningful

1 changes to address what went wrong last year, and they have not
2 offered this Court any evidence to date that even suggests that
3 Mr. Barber's scheduled execution, which is in about two weeks,
4 Your Honor, will be any different than those before him.

5 To make out his claim, Mr. Barber must show two things.
6 First, he must show that the State's method of execution poses a
7 "substantial risk of serious harm," and second, that the
8 alternative method of execution is feasible, readily
9 implemented, and, in fact, significantly reduces a substantial
10 risk of severe pain. Mr. Barber can make this showing under the
11 Eleventh Circuit's decision in *Smith v. Commissioner*.

12 Mr. Barber can also show irreparable injury. In fact,
13 defendants do not even contest as much in their briefing.

14 THE COURT: Is the Eleventh Circuit decision in *Smith*
15 binding precedent on this Court?

16 MR. SPECTOR: Under the Eleventh Circuit's appellate
17 rules, it's persuasive. And the reason why this Court should be
18 persuaded by that decision is twofold: One, it involves
19 extremely similar factual circumstances as in this case. And
20 second, as we discussed in our reply brief, Your Honor, the
21 arguments the defendants are making in this case are very
22 similar to the arguments that they made on appeal to the
23 Eleventh Circuit. So the Eleventh Circuit has already
24 considered many of the very same arguments that they're making
25 in this case.

1 THE COURT: Well, the *Smith* case was on a motion to
2 dismiss and a motion to amend the complaint, and the panel for
3 the Eleventh Circuit found that Mr. Smith plausibly alleged
4 there would be extreme difficulty accessing his veins, both
5 generally and specifically. This case is different. Mr. Barber
6 is making a claim more generally, but he's not making any
7 specific claims that the State would likely have any difficulty
8 accessing his veins for the purpose of establishing an IV.
9 Isn't that a pretty significant difference between this case and
10 the *Smith* case?

11 MR. SPECTOR: We don't think so, and let me explain
12 why. There's a few reasons.

13 First, the relevant metric that the Eleventh Circuit
14 used in determining whether there might be difficulty in
15 accessing Mr. Smith's veins was body mass index. As we
16 articulate in our reply brief, the body mass index of Mr. Barber
17 is actually almost identical to the body mass index of
18 Mr. Smith, and it's actually higher than the body mass index of
19 Mr. Joe James. So if body mass index is the relevant metric
20 that the Eleventh Circuit was using, then it's almost certain
21 that the same painful and tortuous conduct that occurred to the
22 previous last inmates will also occur to Mr. Barber.

23 You'll also hear from Mr. Barber today about specific
24 multiple instances in which ADOC officials had difficulty
25 accessing his veins in the past. And --

1 THE COURT: Where is that in the complaint?

2 MR. SPECTOR: It's not in the complaint itself, Your
3 Honor. One of the reasons this came up is because on the
4 opposition brief to the motion for preliminary injunction was
5 the first time that the State said that, well, this case is
6 unlike the other ones because of body mass index issues or
7 weight issues. And so given that, Mr. Barber has -- and will be
8 ready to testify about those specific indexes.

9 But even beyond that, Your Honor, even if you take that
10 away, that still doesn't explain what happened to Joe James.
11 After the Joe James execution, there were no instances or
12 explanations or statements from ADOC that Mr. James had
13 difficult veins to access or that he was overweight or his BMI
14 was higher than somebody else's.

15 THE COURT: Well, why don't we talk about Mr. James?
16 How do you account for your reliance on an article in the
17 *Atlantic* for your allegations in the complaint that
18 Mr. Barber -- I'm sorry -- that Mr. James had had a lengthy
19 death or multiple needle marks when the autopsy actually shows
20 only two needle marks and no evidence of a cut-down procedure?

21 MR. SPECTOR: Sure.

22 THE COURT: How do you respond to that?

23 MR. SPECTOR: So the State's own autopsy report shows
24 that he was -- there were needle marks all throughout his body.
25 And if I could point you to that specific -- right here, Your

1 Honor. It's hearing Exhibit 41. And you'll see, Your Honor,
2 that this is the State's own autopsy. It says, "There is
3 evidence of medical equipment consistent with history of
4 judicial execution. Includes EKG pads, intravenous access to
5 the medial left antecubital fossa and dorsum of the right foot,
6 and additional needle puncture marks in the antecubital fossa at
7 wrists and hands." So it suggests that his execution was
8 similar to the attempted execution of Mr. Miller, the attempted
9 execution of Mr. Smith, and that they repeatedly made punctures
10 across these inmates' bodies.

11 On your point regarding the cut-down procedure, I want
12 to clarify. Mr. Barber's claim does not rise or fall on this
13 cut-down procedure. What Mr. Barber's claim is based on is the
14 repeated punctures throughout the inmates' bodies over
15 significant period of time. And we see the cut down as a
16 separate issue.

17 I want to turn back to my remarks. We were discussing
18 Mr. Barber's claim. And as you know, for his motion the first
19 thing he needs to show is a substantial likelihood of success on
20 the merits. The Supreme Court has explained, Your Honor, that a
21 punishment is cruel and "superadds pain" to the execution when
22 it involves unnecessary pain. And in the *Smith* decision, as you
23 know, Your Honor, the Eleventh Circuit found that Mr. Smith
24 plausibly alleged that he will face "superadded pain" as the
25 execution team attempts to gain IV access.

1 So what this all means in the context of Mr. Barber's
2 claim, I want to take a step back and look at what the evidence
3 shows in the record regarding IV access in the three executions
4 last year. So what Mr. Barber has done is submitted two
5 affidavits from nurses.

6 The first one is Tina Roth, and you can find that at
7 tab 31 which is in the record. So Ms. Roth is a registered
8 nurse who resides in Indiana and has been a registered nurse for
9 43 years, 39 of which she has spent as a critical care nurse
10 where starting and maintaining IV lines have been an important
11 part of her responsibilities. According to Ms. Roth, a
12 reasonable and appropriate amount of time to start an IV access
13 line is approximately five to 10 minutes. That includes the
14 time explaining to the patient what's going to occur and
15 securing the IV with dressing and tape.

16 Ms. Roth also said in her affidavit that her hospital
17 follows what's called a two-stick limit for IV attempts, meaning
18 that after two unsuccessful IV attempts, she's required to call
19 another RN to attempt the IV or use more advanced technology.
20 Ms. Roth also said that a difficult IV can take up to 30
21 minutes.

22 In her professional opinion, Your Honor, continually
23 attempting to puncture a person with a needle multiple times
24 over a course of 60 minutes is both unprofessional and, in her
25 words, a breach of the standard of care owed to patients. Your

1 Honor, this affidavit and its conclusions are uncontroverted by
2 the State.

3 THE COURT: Is this really a method of execution claim
4 regarding the protocol itself, or is this a claim more of the
5 manner in which it's being carried out?

6 MR. SPECTOR: So it's more of the manner in which it's
7 carried out. That's how the Eleventh Circuit has understood it.
8 It's the protracted efforts in which the ADOC has been unable to
9 carry out their method of execution.

10 I will say, Your Honor, through the course of this
11 litigation, we think there are also instances of the State
12 violating their own protocol. And let me explain to you why.
13 The protocol says that the IV team is to first try the standard
14 procedure in terms of accessing the vein, and if that doesn't
15 work, then they should resort to the central access line. We
16 asked the State what does the standard procedure mean in this
17 litigation, that was an interrogatory we served, and they said
18 the standard procedure is the ordinary procedures that medical
19 professionals follow in setting IV lines.

20 Well, if that's the case, then there are two affidavits
21 from registered nurses who have said what the ordinary
22 procedures are, and later this afternoon you're also going to
23 hear from our expert witness who will also explain what the
24 ordinary procedures are. So if the ordinary procedures are
25 there's a two-stick limit and it shouldn't take longer than 15

1 minutes, maybe 30, and never more than 60, then the State is
2 violating its own procedures.

3 The other affidavit that Mr. Barber submitted in this
4 case is from Lisa St. Charles from Tennessee. She's been a
5 nurse for about 35 years, and you can find her affidavit at tab
6 24. Ms. St. Charles has set more a thousand IVs throughout the
7 course of her career, and she said that it normally takes no
8 longer than 15 minutes to set an IV line. Ms. St. Charles also
9 said that for a patient with compromised veins, nurses and
10 physicians have access to equipment that can facilitate locating
11 those veins. Notably Ms. St. Charles said that "The longer it
12 takes to set an IV line, the greater discomfort and pain a
13 patient experiences." And that she has never spent nor has she
14 ever seen or heard any nurse who spent 60 minutes or longer to
15 set an IV line.

16 THE COURT: Have any of your expert witnesses ever set
17 an IV line in a carceral setting?

18 MR. SPECTOR: In a --

19 THE COURT: Carceral setting with a noncompliant
20 patient?

21 MR. SPECTOR: So as to Ms. Roth and Ms. St. Charles, I
22 simply don't know. I do know that our expert witness has set an
23 IV line on a noncooperative patient before, and she'll be able
24 to testify about that. I don't know whether it's been in an
25 incarcerated facility.

1 So like the affidavit of Ms. Roth, the affidavit of
2 Ms. St. Charles and its conclusions are also uncontroverted by
3 the State.

4 So against this backdrop, I want to now turn to the
5 executions of Joe James, Alan Miller, and Kenneth Smith.
6 Starting with Mr. Smith, the State attempted to -- or the State
7 did execute him on July 28th, 2022, and that was less than a
8 year ago.

9 Mr. James was strapped to the execution gurney at
10 six p.m. He remained there for the next three hours or so. And
11 when ADOC eventually opened the public curtain around nine p.m.
12 in order to allow Mr. James to say his final words, Mr. James
13 could not do so because he appeared to be unconscious.

14 And we discussed earlier, Your Honor, the State's own
15 autopsy performed after the execution shows that Mr. James had
16 punctures all over his body, including, as you recall, his elbow
17 joints, his right foot, his forearm, wrists, and hands.

18 THE COURT: When you say all over his body, how many
19 puncture marks are you talking about?

20 MR. SPECTOR: We don't know necessarily because the
21 autopsy report doesn't say. However, I think it would be
22 reasonable to infer that if he was strapped to the gurney for
23 three hours and there were marks all over his body, then there
24 were certainly more than two, which is the two-stick limit
25 that's discussed in the affidavits. More closer probably to the

1 amount that we know about from Mr. Miller's attempted execution
2 and Mr. Smith's as well.

3 THE COURT: Which is what?

4 MR. SPECTOR: Well, in Mr. Miller's attempted
5 execution, our understanding is it's close to a dozen. That's
6 similar to Mr. Smith's as well. Mr. Smith submitted an
7 affidavit in this case, which we'll get to in a little bit, but
8 it's consistent with his second amended complaint in which he
9 details how many punctures he experienced.

10 So following the execution, which lasted about three
11 hours and involved punctures across his body, Commissioner Hamm
12 curiously told reporters that in his words, "Nothing out of the
13 ordinary happened." He also said -- and this is important, Your
14 Honor -- that he was not aware of Mr. James fighting or
15 resisting officers. That's what he told reporters.

16 The State later acknowledged that the delay was due to
17 difficulties establishing an IV line. And, again, Your Honor,
18 defendants in this litigation have not offered any evidence
19 controverting this specific account.

20 About two months after this botched execution, the
21 State attempted to execute Mr. Alan Miller on September 22nd,
22 2022.

23 THE COURT: Let's go back to Mr. James. You've
24 referred to it as a botched execution. Be specific. What about
25 that execution was botched?

1 MR. SPECTOR: Sure.

2 THE COURT: Obviously, I know you've said more than two
3 puncture marks. What else?

4 MR. SPECTOR: The other part that was botched was the
5 fact that he appeared to be unconscious at the time that the
6 State lifted the public curtain. At that point the drugs had
7 not -- and were not, according to protocol, supposed to be
8 flowing, so he should not have been unconscious at that time.

9 The whole point of the lifting the curtain is twofold.
10 One, to give an opportunity to say his final words, and also for
11 the public to witness the execution.

12 THE COURT: The independent autopsy or the second
13 autopsy did not find any evidence that he had been sedated. Do
14 you have any information -- I haven't had an opportunity to
15 review the State's autopsy, but do you have any evidence in any
16 of these documents to show that he had been sedated?

17 MR. SPECTOR: What we have is evidence in the documents
18 that members of the media were present, and they documented the
19 fact that when asked to speak his final words, his lips did not
20 move and it did not seem as though he was even in a position to
21 be able to share his final words.

22 THE COURT: So members of the media who were present at
23 the autopsy is the evidence you have to refute the autopsy
24 results that there was no sedation?

25 MR. SPECTOR: No. I'm sorry. Members of the media who

1 were present when the curtain lifted, so they saw in real time
2 what he looked like when the curtain was lifted. And I think
3 that's very valuable because those are third parties who were
4 able to witness Mr. James before he was executed.

5 THE COURT: And you think that that evidence refutes
6 the autopsy results?

7 MR. SPECTOR: I don't know if it refutes it. Just
8 because he was sedated doesn't necessarily mean -- let me
9 clarify. He might have still been unconscious and also not
10 sedated. It's unclear what happened to him. I think there's
11 ongoing discovery in his civil case. But I think what is
12 unrefuted and what the State has not presented any evidence to
13 account for is why, when the public curtain opened, he did not
14 move his lips and did not appear to be responsive.

15 THE COURT: Go ahead.

16 MR. SPECTOR: So two months later after this execution,
17 the State attempted to execute Mr. Miller on September 22nd,
18 2022. And just days before this execution, Commissioner Hamm
19 personally guaranteed in a sworn affidavit in his case that ADOC
20 was ready to carry out Mr. Miller's execution by lethal
21 injection. And that's at tab 46, Your Honor.

22 Despite that representation, ADOC went on to botch
23 Mr. Miller's execution. Mr. Miller has submitted an affidavit
24 in this case, and that's at tab 45. In that affidavit
25 Mr. Miller walks the Court through what he experienced,

1 explaining that he was repeatedly punctured over the course of
2 90 minutes. Mr. Miller says that the IV team tried to establish
3 an IV line in his right elbow, then his right hand, then his
4 left elbow, then his right foot, then his right inner forearm,
5 then his left arm, and then his right arm. Mr. Miller also
6 attests how a member of the IV team struck one of his nerves
7 with a needle and how doing so caused him excruciating pain,
8 like "he had been electrocuted in his foot."

9 By the time the execution was eventually called off
10 before midnight, blood was leaking from some of Mr. Miller's
11 wounds. And after the attempted execution, the trauma of the
12 experience stayed with Mr. Miller. He describes in his
13 affidavit how he experiences flashbacks and disassociates from
14 reality.

15 And in the immediate aftermath of the failed execution,
16 Your Honor -- and this is important -- the State told Judge
17 Huffaker at a hearing that, "There was just not sufficient time
18 to gain vein access in the appropriate manner in this case, and
19 we just ran out of time." The State also confirmed for Judge
20 Huffaker that about 90 minutes were spent to access a vein,
21 which is consistent with Mr. Miller's account as well. And
22 those transcripts are at 42. Again, Your Honor, in this
23 litigation, defendants have not offered any evidence
24 controverting Mr. Miller's account.

25 Now, despite these two botched executions of both

1 Mr. James and Mr. Miller, the State nonetheless decided to
2 attempt another lethal injection execution on Kenneth Smith just
3 a few weeks later, on November 17th, 2022. But before doing so,
4 the Eleventh Circuit issued its opinion in *Smith v.*
5 *Commissioner*. In that decision, which defendants do not even
6 address in their opposition brief, the Eleventh Circuit ruled
7 that Mr. Smith had plausibly alleged an Eighth Amendment claim
8 due to ADOC's "pattern of superadding pain through protracted
9 efforts to establish IV access." In reaching that conclusion,
10 Your Honor, the Eleventh Circuit discussed the amount of time
11 that ADOC spent trying to execute Mr. James and the amount of
12 time ADOC spent trying to execute Mr. Miller as well.

13 THE COURT: Isn't that portion that you just read --
14 that's not a finding by the Court, is it? Isn't that dicta?

15 MR. SPECTOR: Well, they were citing a number of
16 things. And one of the footnotes actually, Your Honor, is --
17 and I want to point you to the actual footnote, so if you would
18 just give me one second.

19 In one of the footnotes the Eleventh Circuit said that
20 the time spent executing Mr. James is actually a verifiable
21 fact. It is at tab 38, the cases. Oh, I'm sorry. It is at --
22 I apologize. Yes, 38. If you look at --

23 THE COURT: Footnote nine.

24 MR. SPECTOR: Exactly. I'll read it into the record.
25 "Based on many news articles reporting on James' execution, the

1 time spent behind the curtain is a verifiable true fact.
2 Further, Miller's length of time has been supported by Miller's
3 own declaration in his lawsuit against the commissioner for the
4 torture he experienced during that time frame."

5 Importantly, the Eleventh Circuit also found that
6 Mr. Smith's claim was based, like I said, on the pattern of
7 superadding pain following the botched execution of James and
8 Mr. Miller.

9 And in following this decision, Your Honor, as you
10 know, ADOC went on to botch its third execution in a row. Like
11 Mr. Miller, Mr. Smith has also submitted an affidavit in this
12 case, and that is at tab 49.

13 Mr. Smith was strapped down to the execution gurney at
14 eight p.m. He stayed there, Your Honor, for the next four hours
15 while the IV team spent almost two hours jabbing needles into
16 him.

17 A member of the IV team jabbed a large needle, after
18 trying elsewhere, into Mr. Smith's collarbone in an attempt to
19 set a central line procedure. According to Mr. Smith, he felt a
20 sharp and intense pain as the needle was repeatedly inserted
21 into his collarbone area.

22 And eventually before midnight and after the repeated
23 attempts all failed, the IV team finally stopped their execution
24 of Mr. Smith. Like Mr. Miller, Mr. Smith also continues to
25 experience trauma from his experience.

1 Also notable, Your Honor, is that following the
2 execution of Mr. Smith, Commissioner Hamm held a press
3 conference and said that the execution team made several
4 attempts to establish an IV but simply "ran out of time."

5 Your Honor, this trio of historic failures, the botched
6 executions of Mr. James, Mr. Miller, and Mr. Smith, made
7 national headlines. Within days after Mr. Smith's execution,
8 and recognizing the incompetency on display, Governor Ivey
9 correctly demanded that ADOC halt all lethal injection
10 executions. She also ordered Commissioner Hamm to conduct "a
11 top-to-bottom review of the State's execution procedures." This
12 top-to-bottom review lasted only a few short months and, as we
13 know, did not result in any report or meaningful changes.

14 And with this litigation, Your Honor, we now know why.
15 If you turn to Exhibit 28, in this litigation we asked the State
16 to identify the deficiencies found during the investigation.
17 The State said in response to the first one, no deficiencies
18 were found in Alabama's execution procedures.

19 THE COURT: Well, are you using procedures synonymous
20 with protocol?

21 MR. SPECTOR: Well, I think what procedures includes is
22 more of an umbrella term that also encapsulates the protocol.

23 THE COURT: Well, are there any portions of the actual
24 protocol, the written protocol, that you are basing your
25 claims -- your Eighth Amendment claim on?

1 MR. SPECTOR: So our claim is on the repeated and
2 failed attempts to establish IV access.

3 THE COURT: So is that a no, you're not?

4 MR. SPECTOR: No, you're not. But I will say, Your
5 Honor, that through the course of this litigation it's becoming
6 clear that they have violated their protocol, and it's the part
7 that I was discussing earlier about whether the standard
8 procedure is actually being followed or not.

9 THE COURT: So when in the complaint or in your motion
10 for preliminary injunction you take issue with medical personnel
11 or the training that's required or the lack of specificity in
12 the protocol regarding the certifications, that's not a basis of
13 your Eighth Amendment claim?

14 MR. SPECTOR: Correct. And let me give you a little
15 bit more context as to why we point to those areas. It's
16 because, one, we think that those deficiencies are the reason
17 why these -- Mr. Barber's claim -- why the repeated efforts to
18 establish IV access have failed. We think that it's because the
19 individuals who are on the IV team are not adequately trained.

20 But to give you a little more context, Your Honor, in
21 the Supreme Court's decision in *Baze*, Chief Justice Roberts
22 identified several safeguards that are in place in Kentucky's
23 protocol that gives that Court belief that that protocol did not
24 violate the Constitution. And there were many protocol
25 provisions that are simply absent in this protocol, and I'll

1 give you a couple of examples.

2 One is that the execution team must have at least 10
3 rehearsals throughout the year. There's no such provision in
4 this protocol.

5 He also says that the IV team I believe also must have
6 at least one year of experience before being on the team.

7 And then there's also language in there about how
8 there's a one-hour cap that the IV team can spend on
9 establishing an IV access.

10 And all of those --

11 THE COURT: Well, *Baze* didn't say that's required by
12 the Constitution, did it?

13 MR. SPECTOR: It did not. No, Your Honor.

14 THE COURT: And to the extent that you're saying that
15 those are problems with the protocol, isn't that barred by the
16 statute of limitations?

17 MR. SPECTOR: No, I don't think so, Your Honor. But
18 it's also the case that the claim isn't based on those specific
19 provisions. It's based on the recent events that have occurred
20 in less than a year, the State repeatedly failing to establish
21 the IV.

22 THE COURT: All right. So would you agree with me that
23 to the extent that you are bringing claims that the protocol
24 itself is inadequate, that those claims would be barred by the
25 statute of limitations?

1 MR. SPECTOR: No, I don't.

2 THE COURT: Okay. How is it not?

3 MR. SPECTOR: Sure. So simply because the -- well, for
4 example, one of the recent additions to the protocol is that the
5 members of the IV team be certified in the United States. So
6 that specific provision, which was recently added, would not be
7 barred under the two-year --

8 THE COURT: Well, is that a substantial change to the
9 protocol that opens that timing door back up to you?

10 MR. SPECTOR: No, but --

11 THE COURT: It has to be a substantial change, right,
12 to reset the statute of limitations?

13 MR. SPECTOR: If you were challenging that specific
14 provision of the protocol, but we don't believe that's what --
15 that is not what we're doing. And there's also case law that we
16 have cited in the *McNair* case, Your Honor, where the relevant
17 inquiry is whether the facts supporting the claim have become
18 apparent to a reasonably prudent person. And we think that over
19 the course of the last year, those facts supporting Mr. Barber's
20 claim have certainly become apparent.

21 And most importantly, Your Honor, the Eleventh Circuit
22 in the *Smith* decision squarely addressed this question. The
23 State was advancing the same exact arguments to the Eleventh
24 Circuit that they advanced here, and the Eleventh Circuit
25 rejected that and said it's actually the protracted efforts from

1 the pattern of the first two executions that allowed his claim
2 to accrue. And notably, following --

3 THE COURT: Well, but in *Smith*, they didn't say that it
4 resets the statute of limitations on portions of the protocol.
5 The Court said, this is at a motion to dismiss. They should
6 have been permitted to amend the complaint. And if I'm hearing
7 you say that you have problems with the protocol, to the extent
8 that -- you've got the protocol, and then you've got what the
9 Eleventh Circuit referred to in *Smith* as an emerging pattern of
10 superadding pain. Those are two different things, aren't they?
11 If you are attacking the written protocol, I think that would be
12 barred by the statute of limitations; correct? That's what
13 Judge Grant said in her dissent in that case.

14 MR. SPECTOR: No, not necessarily, because it could be
15 the way that the State is actually implementing those provisions
16 itself. For example, you could have a situation where the
17 protocol says that the needles must be a certain, you know,
18 diameter. They must contain certain types of safety mechanisms.
19 And let's say that the needle -- that the provision doesn't say
20 that the needles can't be rusty. Well, let's say the State now
21 uses rusty needles. Well, of course, that claim wouldn't be
22 time barred because we wouldn't know until the State actually
23 started implementing that provision that the claim accrued.

24 THE COURT: Right. But in that case, you're not
25 attacking the protocol itself.

1 MR. SPECTOR: It would depend on what the actual
2 language in the protocol said, Your Honor.

3 THE COURT: So to the extent that you're bringing an
4 Eighth Amendment claim as to the protocol itself, that would be
5 barred; correct? To the extent that you're talking about the
6 manner in which the State is following through on the executions
7 is superadding pain, that's, I think, where you are; is that
8 correct?

9 MR. SPECTOR: That is the basis of our claim, but I
10 want to clarify something for you. So the protocol has always
11 said, or at least since 2019, that there's no time limit. And
12 the protocol has also always said that the standard procedures
13 should be followed in carrying out the IV access.

14 Well, it's not until the State actually carries out
15 that protocol and violates it by not following the standard
16 procedure that it becomes clear that taking too long, for
17 example, 90 minutes, two hours, three hours, that those facts
18 have emerged. So even though the protocol itself says there's
19 no time limit, a person seeing the protocol and saying, okay,
20 well, it's the standard procedure. From what I know, the
21 standard procedure shouldn't take longer than 15 to 30 minutes.
22 That doesn't necessarily mean that your claim accrued as soon as
23 you saw that there was only -- that there was no time limit. If
24 you know that the standard procedure should only take 30
25 minutes, then it's not until the facts emerge that it's taking

1 much longer does your claim accrue.

2 THE COURT: So you're saying any time there is an issue
3 with the implementation of the protocol, it resets the statute
4 of limitations for you to say that the protocol itself is
5 violative of the Constitution?

6 MR. SPECTOR: What I'm saying is what the Eleventh
7 Circuit has said, is that the statute of limitations for 1983
8 claims begins to accrue when the facts supporting the claim
9 become clear to a reasonably prudent person. I think that's the
10 relevant inquiry.

11 THE COURT: When you say the Eleventh Circuit, you mean
12 in the *Smith* case, that persuasive case, not binding precedent.

13 MR. SPECTOR: No, in the --

14 THE COURT: Do you have any binding precedent from the
15 Eleventh Circuit or the United States Supreme Court that says
16 any time that you didn't understand that a protocol may violate
17 the Eighth Amendment, as soon as you are aware of that, you
18 reset the statute of limitations and you can file an Eighth
19 Amendment claim based on the protocol?

20 MR. SPECTOR: The *McNair* case, Your Honor, is the case
21 that is where the Court in the Eleventh Circuit said that for
22 1983 purposes, the statute of limitations begins to accrue, like
23 I said, when the facts -- and this isn't the exact wording, but
24 the facts supporting the claim become apparent to a reasonably
25 prudent person.

1 THE COURT: All right.

2 MR. SPECTOR: So we were just discussing how in this
3 litigation the defendants did not identify any deficiencies in
4 their execution procedures. That the State did not -- does not
5 believe that there are any deficiencies confirms, Your Honor,
6 that Mr. Barber faces a substantial risk of serious harm. The
7 State botched three executions in a row.

8 THE COURT: Right. I know they did. Let's get back --
9 I want to try to stay away from the emotional language. Let's
10 get to the legal issues a little bit more directly.

11 MR. SPECTOR: Sure.

12 THE COURT: I know what's happened. I know where we
13 are. What I'm not as clear on is --

14 Let me ask you this: If the State were able to access
15 an IV line quickly on Mr. Barber, would your claim be moot?

16 MR. SPECTOR: Well, I don't think so.

17 THE COURT: Why not?

18 MR. SPECTOR: Because the Eleventh Circuit said that he
19 faces the risk of substantial risk of serious harm. So it's not
20 that the injection itself happens and there's no problems. It's
21 that he faces the substantial risk. That's the relevant Eighth
22 Amendment inquiry.

23 THE COURT: So it's the future harm -- the fear of
24 future harm is what establishes the Eighth Amendment violation?

25 MR. SPECTOR: Well, the language that the Eleventh

1 Circuit has used is that he faces a substantial risk. I think
2 otherwise, then it would become a little bit confusing because
3 then you would only necessarily be able to bring an Eighth
4 Amendment claim if the State first attempted to follow the
5 method of execution and seeing if it works or not. That
6 wouldn't do anybody any good.

7 THE COURT: Well, what if the State is able to -- what
8 if the State were able to demonstrate that it can get an IV line
9 with the first attempt? Wouldn't that satisfy you?

10 MR. SPECTOR: No, and that's because there's a
11 difference between -- there's a lot of reasons why, and one of
12 them is because the situation in which the State repeatedly
13 botched the executions is that there was an inmate strapped to
14 the gurney, and the IV team came in and purportedly followed the
15 protocol, and in all three instances there were botched
16 attempts -- or at least in Mr. James' execution it actually went
17 through. So just because they were able to get IV access on
18 Mr. Barber within a time frame that's called for under the
19 professional standards doesn't mean that in the moment, by
20 following the protocol, they would be able to do it on execution
21 day.

22 THE COURT: No. I don't think you understand my
23 question. Say they have an intervening execution, and it goes
24 without problem. No issues whatsoever. That would be evidence
25 that the State has demonstrated that it can set the IV line

1 quickly. Wouldn't that be a relief to Mr. Barber? Wouldn't his
2 Eighth Amendment claim evaporate at that point because of a
3 demonstration of an ability to follow the protocol, and his
4 Eighth Amendment claim would be moot?

5 MR. SPECTOR: Well, I will say that unlike other
6 states, the State of Alabama conducts most of the execution
7 procedures behind closed doors. So even if the State came
8 forward and said this execution was successful according to the
9 State's own representations, it's not necessarily the case that
10 that is true. There have been multiple instances where the
11 State has said after the execution that something did or did not
12 happen, and following those events other information came out
13 that was inconsistent with those public statements.

14 THE COURT: So you're saying unless the State makes
15 executions more public, they can never execute an individual in
16 such a way that it comports with the Eighth Amendment?

17 MR. SPECTOR: No, Your Honor. What I'm saying is I
18 don't think in this situation the State deserves the benefit of
19 the doubt that they would be able to carry out an execution and
20 tell the public that there were no instances without more
21 transparency into the process.

22 THE COURT: Well, the State would probably come back
23 and say, but what about all of our successful executions before
24 that? Your response is, I don't believe you?

25 MR. SPECTOR: No. Mr. Barber -- we're not contesting

1 the 45 executions that occurred before, but there's obviously
2 something that happened between the 45 and the last three. And
3 we know that, not just because the last three were all botched.
4 They were all botched in the same way. So something obviously
5 happened between 45 and 48.

6 THE COURT: All right. Well, I've seen the State's
7 responses to interrogatories, and in their interrogatory
8 responses they say no member of the IV team for Mr. Barber was
9 on an IV team for those previous executions. So isn't that
10 enough to satisfy you that a change has been made? Maybe not to
11 the protocol itself, but that's a pretty significant change.

12 MR. SPECTOR: We disagree, and I'll explain the two
13 reasons why. One, they might have said that there are new team
14 members, but they also said that no deficiencies were found and
15 no meaningful changes to the protocol were made. So if you're
16 just swapping in new people, those people are presumably going
17 to follow the same procedures and protocol that was in place --

18 THE COURT: Isn't that speculative? Doesn't that kind
19 of play into exactly what their argument is, and that is that
20 your claim is speculative?

21 MR. SPECTOR: I don't think so, because it's them who
22 have said that there were no changes in the procedures.

23 THE COURT: They said no deficiencies were found.

24 MR. SPECTOR: And they've said there's no meaningful
25 changes to the protocol, I believe. And so if that's the case,

1 you don't -- I think -- it wouldn't make sense to a reasonable
2 person to put three people into an execution chamber and say, do
3 whatever you want to do. You would follow the procedures and
4 the protocol. And if the procedures and the protocol still
5 don't address the deficiencies from the last three executions,
6 then you're not really doing -- you're not fixing the underlying
7 problem.

8 THE COURT: Why did you wait until May 25th to bring
9 this lawsuit?

10 MR. SPECTOR: So, Your Honor, can I make one more point
11 before addressing that?

12 THE COURT: Go ahead.

13 MR. SPECTOR: So the State also -- yes, they said that
14 they've replaced the three people. But what we've learned
15 through the course of this litigation is that one of the members
16 of the IV team, based on our brief and preliminary criminal and
17 civil background check, has been arrested multiple times for
18 incidents involving fraud, has other criminal citations on their
19 record, and has civil judgments against them for debts owed.

20 And we think that's relevant, Your Honor, because it
21 speaks to judgment. It speaks to judgment, not just of the
22 member of the IV team --

23 THE COURT: Are we looking at, though, when we're
24 looking at the IV team whether or not they have a criminal
25 history, or are we looking at their ability to set an IV line?

1 MR. SPECTOR: Well, the actual history that she -- or
2 this individual has been arrested for is for fraud-related
3 incidents. And I think that's actually very relevant here, Your
4 Honor, for two reasons. One, if she has been arrested for
5 fraud-related instances, it suggests that maybe her credentials
6 are not necessarily what they are or what she represents them to
7 be.

8 But I want to get back to the judgment point, which is
9 that she might not be the best person who you want in the
10 execution chamber carrying out an extremely important task,
11 which is ending some person's life. And if she has not
12 necessarily exercised judgment because that person has been
13 arrested for fraud-related instances, I don't think you could
14 necessarily give that person the benefit of the doubt when it
15 comes to carrying out such an important task.

16 THE COURT: Has the identity of this particular IV team
17 been revealed?

18 MR. SPECTOR: It has not because we are very cognizant
19 of the State's sensitivities around the identify of this person.
20 So we have the records with us, and we're more than happy to
21 present it to Your Honor, either in camera or under seal.

22 THE COURT: Well, how did you come to speculate as to
23 who this individual is?

24 MR. SPECTOR: Sure. And I'm happy to say this, and I
25 want to also preface that we've explained this to the State, so

1 this is not the first time they're hearing this.

2 Part of our requests for production in this case were
3 for certificates and other licenses of the members of the IV
4 team. They produced certain certificates and licenses, and in
5 their production, under one of the pieces of paper, which was
6 white, you could see the name of the -- what we believed to be
7 the member of the IV team. So it was based on their production
8 to us that it became apparent --

9 MR. ANDERSON: Your Honor, if I may interject at this
10 point with an objection to the use of information gained from
11 inadvertent discovery. Pursuant to Rule 26(b)(5)(B) of the
12 rules of civil -- federal civil procedure, we made a request to
13 claw back that document based on its privilege and confidential
14 nature. They agreed to return it. We found out late Friday
15 night that they intended to continue using the document in
16 violation of the rule when they filed their motion to compel.
17 So we would object to any use or consideration of evidence or
18 information gained from that inadvertent disclosure until such
19 time as the Court has made a ruling on whether that material is
20 properly disclosed.

21 THE COURT: What's your response?

22 MR. SPECTOR: I would need to look at the actual rule
23 that he's citing. But I will say that we agreed to claw back
24 the actual production, but we can't unlearn the name and we
25 can't unlearn that person's history. And to me it's not clear

1 why that information -- the person's name would be confidential
2 or -- excuse me -- privileged. It doesn't strike me as
3 privileged, Your Honor. In terms of its confidentiality, we --

4 THE COURT: You're saying the names of the members of
5 the IV team is not confidential?

6 MR. SPECTOR: No. Not privileged, Your Honor. I would
7 recognize that there is -- there could be a reason why it's
8 confidential, and that's why we didn't put it on the public
9 docket. And we're welcome -- we're more than happy to show it
10 to you in chambers or under seal. And we offered on the State's
11 meet and confer on Friday to enter into a protective order, and
12 we didn't really get much of a response there.

13 MR. ANDERSON: If I may, Your Honor.

14 THE COURT: Go ahead.

15 MR. ANDERSON: Very briefly. 26(b)(5)(B) provides if
16 information produced in discovery is subject to a claim of
17 privilege or of protection as trial preparation material, the
18 party making the claim may --

19 THE COURT: You're going to have to slow down for me
20 and the court reporter, please.

21 MR. ANDERSON: I apologize, Your Honor.

22 The party may notify -- let me see -- may notify any
23 party that received the information of the claim and the basis
24 for it. After being notified, the party must promptly retain,
25 sequester, or destroy the specified information and any copies

1 it has; must not use or disclose the information.

2 And our objection is based on the use of the
3 information. We appreciate that they have not disclosed the
4 person's name or put it in any public documents. However, we do
5 think that until that claim -- the State's security interest,
6 which we have included in all of our responses, until that is
7 settled, that information learned from an inadvertent disclosure
8 should not be used to bootstrap petitioner's way into additional
9 disclosure.

10 MR. SPECTOR: If I'm hearing the State correctly, their
11 objection is to the confidential nature of it, and I don't
12 believe that we have -- we haven't disclosed the name. We've
13 offered to file it under seal or to provide it to --

14 THE COURT: Well, let me short circuit this. I'm not
15 particularly impressed with speculation about what someone may
16 or may not have in their past or be currently. I imagine it's
17 this type of thing which is what makes individuals reluctant to
18 have their name publicly revealed, that they're going to be
19 subjected to background checks. I think we can move on from
20 that argument.

21 I want to go back to the question about why you waited
22 until May 25th to bring this lawsuit. If, as you are relying so
23 heavily on the *Smith* case, the panel there said that the
24 emerging pattern was revealed at least at the time of the Miller
25 attempted execution, which was September of 2022, why did you

1 wait until May 25th to bring your lawsuit?

2 MR. SPECTOR: Your Honor, after the botched execution
3 of Mr. Smith, the State proceeded to withdraw the then pending
4 motion to set an execution date for Mr. Barber. So between
5 November and February 24th, I believe, 2023, there was no
6 pending execution date against Mr. Barber.

7 Then on the same day that the -- the so-called
8 investigation wrapped up, they moved to set an execution date in
9 the Alabama Supreme Court, and at that time Mr. Barber and his
10 legal team immediately responded by filing a number of motions
11 in that court and objecting to the motion. Also notably one of
12 the requests that were filed in the Alabama Supreme Court was a
13 motion to compel discovery. So we've been -- Mr. Barber has
14 been very timely in seeking to remedy his claim and the
15 problems. On May -- I think the 3rd is when the Alabama Supreme
16 Court ruled, and about a few weeks later, I want to say, maybe
17 two and a half weeks later, Mr. Barber filed his complaint in
18 this case.

19 And I want to note, Mr. Barber filed his complaint
20 before the State set his execution date. So when the complaint
21 was on file, the State then decided to create a time crunch by
22 setting an execution date for when it did. State had
23 complete -- the governor specifically had complete power to pick
24 any date that was available.

25 THE COURT: What's your claim against the governor?

1 MR. SPECTOR: It's twofold, Your Honor. Are you asking
2 like why is she in this? Yes. It's twofold, Your Honor.

3 One, she's intimately involved because now under the
4 Alabama appellate rules, she sets the time frame.

5 THE COURT: Right, and she's already done that. So
6 wouldn't any claim about setting the time frame for the
7 execution be moot since she's already done it?

8 MR. SPECTOR: No. One reason why is because the time
9 frame has now been extended. And so over that period of time,
10 which is now 30 hours according to the State, the IV team can
11 continually puncture Mr. Barber. And so it's her decision to
12 create that 30-hour time frame that is allowing the
13 unconstitutional conduct to continue.

14 And then also on the date --

15 THE COURT: Well, let me ask you that. Are you then
16 suing the governor for her past action of setting the time frame
17 or for injunctive relief going forward for some potential future
18 act?

19 MR. SPECTOR: Future act as well, Your Honor. And more
20 specifically, the governor has an open line on the day of the
21 execution in which I believe the governor's communicating with
22 the ADOC commissioner and I believe also the attorney general.
23 And during that time the governor is communicating and has the
24 power to end the execution. And so if there's been repeated
25 punctures to the inmate, she could call an end to the execution.

1 And if she's letting it proceed, we think that would be
2 unconstitutional.

3 THE COURT: But what injunctive relief could I enter
4 that would affect the future acts of the governor in that
5 situation? Are you asking this Court to set a number of
6 punctures that are permitted or a time frame?

7 MR. SPECTOR: No. We're asking this Court to rule
8 that -- well, on the motion that he's substantially likely to
9 succeed, but we're asking this Court to require the State of
10 Alabama to execute Mr. Barber by nitrogen hypoxia, not legal
11 injection.

12 THE COURT: Well, why does that involve the governor?

13 MR. SPECTOR: Because under the current protocol for
14 lethal injection, the governor is involved on the day and the
15 night of the execution. So you would be enjoining her by not --
16 she is part of the team.

17 THE COURT: Well, sounds like you want me to mandate
18 that she stop the execution if he's not executed by nitrogen
19 hypoxia.

20 MR. SPECTOR: Correct.

21 THE COURT: Why does the governor need to be in the
22 lawsuit when an order like that would be sufficient as to the
23 commissioner?

24 MR. SPECTOR: Well, it's possible that the order could
25 be sufficient to the commissioner, but because of her role in

1 the execution itself, she also is a necessary party to this
2 case.

3 THE COURT: She's necessary to stop an execution? The
4 governor is?

5 MR. SPECTOR: She has the power to stop it. Yes, Your
6 Honor.

7 THE COURT: So you want a federal court to order the
8 governor to stop an execution, to use her discretion -- she has
9 the discretion to stop an execution or not. You want me to
10 order the governor to exercise her discretion to stop the
11 execution?

12 MR. SPECTOR: No, Your Honor. We want the Court to
13 enter an order requiring the State to carry out Mr. Barber's
14 execution by nitrogen hypoxia, not lethal injection.

15 THE COURT: And you think the governor has to be
16 involved in that lawsuit for that to take place?

17 MR. SPECTOR: I think she does, but I think you could
18 also reasonably find that she doesn't need to and that the order
19 could still be filed and carried out by the State of Alabama.

20 THE COURT: Did Mr. Barber elect nitrogen hypoxia?

21 MR. SPECTOR: He did not, no.

22 THE COURT: So how can I order him executed by nitrogen
23 hypoxia if he did not comply with the statutory mandate that he
24 make that election within 30 days of entry of the statute?

25 MR. SPECTOR: Sure. The *Price* case, Your Honor, the

1 Eleventh Circuit's case in *Price* addressed that exact question
2 in which they said that simply because an inmate doesn't elect
3 within the 30 days doesn't remove the availability of that
4 alternative from the inmate.

5 THE COURT: Well, they said it's an available method of
6 execution, but where in the *Price* case did they say an inmate
7 who did not elect nitrogen hypoxia may do so at any time?

8 MR. SPECTOR: Well, I don't know if ordering the State
9 to carry out the execution by nitrogen hypoxia would equate to
10 the inmate electing to. So there's a difference between
11 electing to and a court order saying that you must be executed
12 by nitrogen hypoxia.

13 THE COURT: Do you have any authority other than what
14 you're saying, the *Price* case --

15 I'm aware of the *Price* case.

16 MR. SPECTOR: Sure.

17 THE COURT: -- that I can order an inmate who did not
18 elect nitrogen hypoxia in compliance with the statutory mandate
19 that it be done in a particular way, that I can order the State
20 to not execute that inmate by any other means?

21 MR. SPECTOR: I don't have any other authority, but I
22 do -- the *Price* case is binding precedent.

23 THE COURT: I understand what the *Price* case says. It
24 says nitrogen hypoxia is an available method.

25 MR. SPECTOR: Yes.

1 THE COURT: But the State has set the statutory method
2 by which an inmate can elect to be executed by nitrogen hypoxia.
3 It didn't say it's available now to every inmate; correct?

4 MR. SPECTOR: Correct.

5 THE COURT: Okay. And Mr. Barber did not elect
6 nitrogen hypoxia.

7 MR. SPECTOR: Correct.

8 THE COURT: Okay.

9 MR. SPECTOR: So the other things that we've also
10 learned in discovery in this case, Your Honor, is concerning.
11 Despite the fact that defendants have improperly withheld swaths
12 of information, which my colleague will get to at the motion to
13 compel, the information that they have produced to date we think
14 should give this Court pause. And this is beyond the IV team
15 issue.

16 First, the State has said that the only equipment they
17 added following the investigation was more straps to the
18 execution gurney. And that's at 28, tab 28. Yet the State
19 never said that more straps were needed or that the previous
20 three inmates were noncompliant.

21 THE COURT: Did they have to?

22 MR. SPECTOR: Well, let me point you to contemporaneous
23 statements made by the State. After the James execution,
24 Commissioner Hamm said that he was not aware of Mr. James
25 resisting or fighting. That's at tab 39. Mr. Miller's

1 affidavit said he did not resist, and same with Mr. Smith's
2 complaint. And I will say the State has yet to introduce any
3 evidence controverting those accounts.

4 So putting this all together, Your Honor --

5 THE COURT: Well, let me -- you've brought up multiple
6 times in the motion for preliminary injunction and in the
7 complaint that these inmates have been strapped to a gurney for
8 multiple hours. Are you claiming that that alone violates the
9 Eighth Amendment?

10 MR. SPECTOR: No, Your Honor.

11 THE COURT: Okay. So at what point -- is it the
12 multiple attempts to find a vein is what violates the Eighth
13 Amendment?

14 MR. SPECTOR: Yes. It's the repeated attempts that go
15 far beyond what the ordinary medical procedures require. That
16 is the violation of the Eighth Amendment.

17 And to put a little bit more of a legal definition on
18 it, that's the superadded pain. The superadded pain is the
19 unnecessary pain that is involved in the execution. And it's
20 unnecessary because the repeated attempts should not have
21 occurred in the first place in order to carry out the execution.

22 THE COURT: So at what point, then, does an attempt to
23 find a vein cross the line from constitutional to
24 unconstitutional? Is it more than two?

25 MR. SPECTOR: It's tough to draw the line, admittedly,

1 but I do think that all three instances that have been
2 demonstrated publicly regarding the execution of Joe James,
3 Mr. Miller, and Mr. Smith all far exceed that line. We're not
4 talking about a difference between what the standard procedure
5 calls for, two, and these gentlemen had four. All of them had
6 significantly more punctures than where the standard procedures
7 reasonably lie.

8 So we think, Your Honor, that the first prong of this
9 claim, the substantial risk of serious harm, is met and that
10 Mr. Barber is likely to succeed on his claim.

11 THE COURT: In the *Smith* case the panel talked about an
12 emerging pattern of superadding pain because of at that point
13 two executions, Mr. James' and Mr. Miller's, where they had
14 difficulty accessing a vein for the purposes of setting the IV.
15 What effect does the intervening investigation have on that
16 pattern? Doesn't that create sort of a stop to that pattern?
17 And at what point would the State ever be able to get back to
18 executions under your theory of this case?

19 MR. SPECTOR: Sure. So I think in -- under a different
20 set of facts you would think that the investigation would put a
21 stop to it, but the facts that we know are that the
22 investigation was short lived. The State has not produced --

23 THE COURT: Well, how long of an investigation would
24 satisfy you?

25 MR. SPECTOR: Well, I can give you an example of

1 another state. For example, I believe it was Tennessee where
2 they had similar issues, and they brought in an outside
3 independent investigator. It was a former U.S. Attorney.

4 THE COURT: I understand that there are other states
5 that have done it differently, and you might point to those and
6 say those are best practices, but I'm concerned with what the
7 Constitution mandates. And best practices for an investigation,
8 I don't know that that's mandated by the Constitution. So what
9 if Alabama's investigation was as long as it needed to be under
10 the circumstances? They have switched out the IV team and
11 they're ready to go. How can you then seek intervention from a
12 federal court to stop Alabama based on the fact that you thought
13 Tennessee did it better?

14 MR. SPECTOR: Sure. I think what you would then want
15 to look at is what conclusions were drawn from the report. And
16 here, one, there's no report. But two, through discovery we
17 have learned that the State does not believe that there are any
18 deficiencies in their execution procedures.

19 I think that is what connects the last three executions
20 to the findings of the investigation. There's three botched
21 executions, all the same way. And then the State comes out and
22 they say, there's no deficiencies, yet they don't release to the
23 public any formal report, they don't explain why they found no
24 deficiencies, and they barely address what very minimal changes
25 have been made.

1 THE COURT: Are they required to reveal the results of
2 their investigation? And if so, what's your authority for that
3 requirement?

4 MR. SPECTOR: I don't think they're necessarily
5 required, but I will say that the State, and more specifically
6 Governor Ivey, in her public statement announcing the halt --
7 and I will find that statement for you, Your Honor. She said it
8 was, essentially, we've got to get this right for the victims
9 and their family. So I think it's her own recognition that
10 there needs to be changes made. She recognized that the last
11 three were problematic and called for a halt herself. And in
12 her public statement she said, we've got to get this right. So
13 I think --

14 THE COURT: Right. And so why would you think that she
15 doesn't believe they got it right?

16 MR. SPECTOR: You mean in the results of their
17 investigation?

18 THE COURT: I do.

19 MR. SPECTOR: Because I don't think it's the case that
20 you call for an investigation, saying, we've got to get this
21 right, and then saying, there were no deficiencies found. I
22 don't think that those two things are reasonable.

23 THE COURT: Well, I get that that's what you think.
24 How does that support an Eighth Amendment claim in this context?

25 MR. SPECTOR: Because -- well, first, I'll point you

1 back to the *Smith* decision in which they found there are
2 protracted efforts after two botched attempts. After the *Smith*
3 decision, now there's three botched attempts. The State said
4 they did some sort of investigation. They found no deficiencies
5 in their protocols.

6 I think the relevant inquiry is, is he likely to face a
7 substantial risk of severe pain? Well, based on the last three
8 executions, the fact that there were no deficiencies found, the
9 same procedure is going to follow and he does, in fact, face a
10 substantial risk. The same things that happened to Mr. James,
11 Mr. Miller, and Mr. Smith will happen to Mr. Barber.

12 I also want to address -- we talked a little bit about
13 nitrogen hypoxia. We talked about how *Price* held that nitrogen
14 hypoxia is available for purposes of an Eighth Amendment claim.
15 And the *Smith* decision, as you likely know, Your Honor,
16 reiterated that ruling. Quote, "We find that nitrogen hypoxia
17 is an available alternative method."

18 THE COURT: Right. So that goes to your second
19 element.

20 MR. SPECTOR: Correct. Yes. I apologize. I've moved
21 on.

22 THE COURT: We don't need to spend much time on the
23 second element.

24 MR. SPECTOR: Understood. So we think, looking at both
25 the first and the second element, Mr. Barber is likely to

1 succeed on the merits of his claim.

2 I want to then turn to the other elements of -- the
3 other factors of the motion, Your Honor. In addition to the
4 first prong, the other factors also weigh in favor of an
5 injunction.

6 Regarding irreparable harm, defendants do not dispute
7 that Mr. Barber will suffer such a harm if an injunction is
8 entered. And for that reason alone, you should find that this
9 factor weighs in his favor.

10 And then turning to the balance of harms and the public
11 interest, defendants cannot disagree that his harm outweighs
12 any harm that the State might face. Mr. Barber, and I want to
13 be very clear on this, has never disputed the validity of his
14 impending execution. He is simply challenging the method of his
15 execution in light of recent concerning events.

16 And finally, I think there could be little question
17 that the public's interest weighs in Mr. Barber's favor. The
18 historic failures made national headlines around the country,
19 bringing much unwanted attention on the State. Citizens of this
20 state, Your Honor, deserve to know that their government leaders
21 comply with the Constitution and do not botch another execution.
22 And we discussed this more in our reply brief, but we've cited
23 various examples of members of the public repeatedly asking the
24 State for improvements. Additionally, and as I mentioned
25 earlier, Governor Ivey herself stated in halting executions in

1 November 2022 that we've got to get this right, and it was her
2 own admission that we've got to get this right. And I think to
3 some extent, she's correct. We must do better as a state, and
4 we think the State has failed in that regard.

5 So that's the end of the oral argument that I've
6 prepared. We do have two --

7 THE COURT: I have a question.

8 MR. SPECTOR: Sure.

9 THE COURT: In paragraph 77 of your complaint, you
10 assert that Miller experienced, and you quote, "extreme pain and
11 suffering, both physical and psychological, as execution team
12 members repeatedly poked, prodded, and slapped various parts of
13 his body for approximately 90 minutes to try to establish venous
14 access." And you cite to a judicial opinion for that citation,
15 but you omitted a pretty important portion of the quote from
16 that judicial opinion where the Court noted that those are
17 actually Miller's allegations. Why did you leave that portion
18 of the quote out?

19 MR. SPECTOR: I would need to -- I take your
20 representation. I do think, though, that we don't
21 necessarily -- are citing this for the proposition that that's
22 what the Court found. It's that this quote was part of the
23 *Miller* opinion itself. We don't say that the Court found that
24 he experienced extreme pain and suffering.

25 THE COURT: What's the -- in paragraph 12 of the

1 complaint, you talk about Mr. Barber's religious practices.

2 What's the relevance of that for the purposes of this lawsuit?

3 MR. SPECTOR: You're going to hear Mr. Barber testify.

4 And I don't want to get ahead of his testimony, but he -- as
5 this allegation says, he's a deeply religious man. And so he
6 is -- he's not afraid to die, Your Honor, and part of that is
7 tied to his religious beliefs. So we want to be very clear to
8 the Court that Mr. Barber is not seeking to have his execution
9 be vacated or we're not challenging the validity of it. It's
10 simply the method.

11 THE COURT: You've also claimed that the botched
12 executions were the result of the defendants' deliberate
13 decisions to proceed by methods they knew or should have known
14 would be unsuccessful. Do you have evidence that when the State
15 started the executions of Mr. James, Mr. Miller, and Mr. Smith,
16 they knew that they would be unsuccessful in getting the IV?
17 And if so, what's your factual basis for that?

18 MR. SPECTOR: Sure. So for Mr. James, I don't believe
19 he was represented, so I don't know if there was a hearing or
20 any sort of court proceeding before. I don't know about
21 Mr. James.

22 I can say for Mr. Miller and Mr. Smith, yes, that is
23 definitely the case. I'll point to you specific instances.

24 In Mr. Miller's case, Mr. Miller testified in his 1983
25 action in front of Judge Huffaker in which he described that the

1 ADOC officials had repeatedly had a difficult time accessing his
2 veins in the past. And so that was an instance in which ADOC
3 officials were on notice that that would be a difficult
4 procedure to perform on him. And I believe --

5 THE COURT: So you're saying the State would not be
6 able to execute an individual for whom vein access is difficult
7 by lethal injection without violating the Eighth Amendment?

8 MR. SPECTOR: No. I'm saying that they were on notice
9 that it would have been difficult to establish IV access.

10 THE COURT: Well, the allegation is they made
11 deliberate decisions to proceed by methods they knew or should
12 have known would be unsuccessful.

13 MR. SPECTOR: Yes. And the method is the lethal -- the
14 actual application of the needle.

15 So I was saying, Your Honor, we have two witnesses. We
16 have Mr. Barber, and then we also have our expert witness.
17 We're more than happy to call them. I don't know if you had a
18 preference on how to proceed.

19 THE COURT: I still have some questions.

20 MR. SPECTOR: Of course.

21 THE COURT: You fault the State for -- during their
22 investigation for failing to interview Mr. Miller and Mr. Smith.
23 Could they have interviewed them? Aren't they represented by
24 counsel?

25 MR. SPECTOR: They are represented by counsel, but I

1 don't think that necessarily prevents them from interviewing
2 them.

3 THE COURT: In your prayer for relief, you sought an
4 injunction or you seek an injunction prohibiting the governor
5 from setting a time frame for the lethal injection execution.
6 Is that request now moot?

7 MR. SPECTOR: She has now set that time frame.
8 Correct.

9 THE COURT: All right. Go ahead. Present your
10 evidence.

11 MR. SPECTOR: Our witness?

12 THE COURT: Yes.

13 MR. SPECTOR: Okay. Mr. Barber would like to call
14 Ms. Lynn Hadaway, who is a registered nurse.

15 LYNN HADAWAY

16 The witness, having first been duly sworn to speak the
17 truth, the whole truth and nothing but the truth, testified as
18 follows:

19 DIRECT EXAMINATION

20 BY MR. SPECTOR:

21 Q. Can you please state your full name for the record.

22 A. Lynn Hadaway.

23 Q. And where do you live?

24 A. Milner, Georgia.

25 Q. And what is your profession, Ms. Hadaway?

1 A. I'm a registered nurse.

2 Q. And have you testified in court before?

3 A. Yes.

4 Q. I'm going to hand you a copy of what's been marked hearing
5 Exhibit 63.

6 May I approach?

7 THE COURT: You may.

8 Q. Do you recognize this document?

9 A. I do.

10 Q. And what is it?

11 A. It is my curriculum vitae.

12 Q. And is it a complete and accurate copy of your CV?

13 A. Yes.

14 MR. SPECTOR: I would like to enter the CV into
15 evidence.

16 THE COURT: Any objection?

17 MR. ANDERSON: No objection, Your Honor.

18 THE COURT: All right. It's admitted.

19 Q. So we're not going to walk through every part of the CV,
20 it's quite lengthy, but we'll just talk a little bit about your
21 educational history. Where did you go for secondary education?

22 A. First I went to the Georgia Baptist Hospital School of
23 Nursing. Graduated in 1972 with a diploma in nursing.

24 Q. And did you obtain your registered nursing license after
25 graduation?

1 A. Yes.

2 Q. And are you still a registered nurse today?

3 A. Yes.

4 Q. And where did you work after becoming a registered nurse?

5 A. Several hospitals in the Atlanta area. It was Georgia
6 Baptist Hospital at that time. Then South Fulton. Both of
7 those hospitals are no longer here. They're closed. Dekalb
8 Medical Center, now part of Emory. Several other places around
9 Atlanta. Kennestone.

10 Q. And can you explain for the Court what exactly it means to
11 be on an IV team.

12 A. An IV team is the cream of the crop, if you will. They are
13 the health care professionals that are the most skilled, the
14 most knowledgeable with all infusion therapy and vascular
15 access. They insert a variety of vascular access devices, care
16 for those devices, manage complications, and deal with the
17 infusion of various drugs.

18 Q. And you were on the IV team at Georgia Baptist?

19 A. Yes.

20 Q. After working on the IV team at Georgia Baptist, where did
21 you work next?

22 A. South Fulton.

23 Q. And what was your role there?

24 A. I actually started the team at that hospital. They did not
25 have one, and I started the team and was the head nurse manager.

1 I think the title at that time was only assistant head nurse,
2 but I was the one who started the team.

3 Q. And I believe your CV says that starting in about 1981, you
4 became an IV therapy team instructor; is that correct?

5 A. Yes. That was at Clayton General. That is now known as
6 Southern Regional Medical Center, south of the Atlanta airport.
7 I worked on that team for seven years, starting as a staff nurse
8 and then became the educator for that team.

9 Q. And how long were you in that position, the IV therapy team
10 instructor?

11 A. I don't remember precisely the year that I got that
12 position, but it was either -- well, probably around '83, '84, I
13 would think.

14 Q. And around this time did you go back to school for more
15 education?

16 A. I did.

17 Q. And where did you go?

18 A. During that time, that was the College of St. Francis to
19 complete my degree in health arts.

20 Q. And that was around 1986 that you graduated; is that
21 correct?

22 A. Yes.

23 Q. And what did you do after receiving that degree in health
24 arts?

25 A. Continued working in nursing on that team.

1 Q. Did you go anywhere else from 1989 to 1996 besides Southern
2 Regional Medical Center?

3 A. Yes. I was the clinical nurse educator for a start-up
4 manufacturer that had a new type of catheter, a new type of
5 catheter material, and I was one of the three educators across
6 the country that taught nurses how to do this new catheter.

7 Q. And did you obtain additional graduate-level degrees around
8 this time?

9 A. Yes.

10 Q. And what degree was that?

11 A. A master's degree in education, focusing on adult education,
12 from the University of Georgia.

13 Q. And what did you do after getting that degree?

14 A. That was about the time that I was -- the company I was
15 working for was acquired by a larger company. I stayed for a
16 year after that acquisition, was about a year after I finished
17 my degree, and then I started a consulting and education
18 business.

19 Q. And what's that business called?

20 A. Lynn Hadaway Associates, Inc.

21 Q. And have you published any literature?

22 A. Yes.

23 Q. And have you written peer-reviewed articles in medical
24 journals?

25 A. I'm sorry. Written peer review?

1 Q. Yes.

2 A. Yes.

3 Q. And can you give a few examples for the Court of what
4 peer-reviewed medical journals you've written.

5 A. The journals where they were published or the names of the
6 articles?

7 Q. The types of articles.

8 A. It's all been about infusion therapy and vascular access.
9 Complication management, the types of catheters, infection
10 prevention, all aspects of peripheral and central venous
11 catheters.

12 Q. You're using the term infusion therapy. Can you explain to
13 the Court what that means.

14 A. Infusion therapy is now what we call the -- it's the broader
15 term rather than intravenous, because we're now involved with
16 infusing into arteries, subcutaneous spaces, bones, epidural
17 spaces. Anywhere we can infuse anything, then this team is the
18 one that is doing it.

19 Q. And are you also a CRNI?

20 A. I am.

21 Q. And what does that stand for?

22 A. That's a board certification from the Infusion Nurses
23 certification corporation, and that certification indicates that
24 I've mastered the advanced body of knowledge in this nursing
25 specialty.

1 Q. So to summarize, it's correct that you're both an RN and a
2 CRNI?

3 A. Yes.

4 MR. SPECTOR: Your Honor, I'd like to tender this
5 witness as an expert.

6 THE COURT: In what?

7 MR. SPECTOR: In setting and administering IV lines.

8 THE COURT: Any objection?

9 MR. ANDERSON: No objection, Your Honor.

10 THE COURT: All right. She's accepted.

11 Q. So you were explaining for the Court what infusion therapy
12 is. Is it fair to say that's another way of saying
13 administering medicine through IV lines?

14 A. IV is included, yes.

15 Q. And is it fair to say that that's your area of expertise?
16 Correct?

17 A. It is.

18 Q. Okay. And what exactly -- you've used this term before.
19 What exactly is a peripheral IV?

20 A. This is a short catheter, usually about an inch to an inch
21 and a quarter long, that is inserted through veins of what we
22 refer to as the peripheral extremities -- the hands, the arms,
23 the feet, the legs, peripheral veins -- as opposed to veins in
24 the torso of the body.

25 Q. And what exactly is a cannula?

1 A. A cannula just refers to the plastic tube that resides in
2 the vein.

3 Q. And how does the size of the cannula relate to IV access?

4 A. Oh, it's quite important because the size of the catheter
5 must fit inside the lumen of the vein, and different people have
6 different size veins. We need -- to reduce complications, we
7 should choose the smallest gauge catheter capable of delivering
8 the prescribed therapy.

9 Q. Do you know what size cannula is common for EMTs and
10 emergency medical response personnel to use?

11 A. That would be an 18 would be their preferred size. That's a
12 large size. They might choose a 20. Usually it's an 18 or a 20
13 gauge.

14 Q. And you're saying 18 or 20 gauge is on the larger scale --
15 on the larger side of the scale?

16 A. An 18 is larger than a 20.

17 Q. Ms. Hadaway, did you bring any examples of cannula or any
18 other peripheral IV equipment to court today?

19 A. I did.

20 MR. SPECTOR: I'd defer to the Court whether the Court
21 would like to see these materials. They're the catheters that
22 are used to establish IV access.

23 THE COURT: What's the relevance?

24 MR. SPECTOR: Ms. Hadaway would be able to walk the
25 Court through the IV equipment that is used in setting IV lines

1 during execution procedures.

2 MR. ANDERSON: Your Honor, I would object to the
3 relevance unless she's going to be able to demonstrate that what
4 she's talking about is what is actually used or will be --
5 actually, more specifically, will be used in the execution of
6 Mr. Barber.

7 THE COURT: I'm not clear on the relevance as it
8 relates to this claim without you tying it to what the State has
9 done or will do.

10 MR. SPECTOR: Sure. The State has said in discovery
11 that the standard procedure is the ordinary procedures that
12 medical personnel follow in setting IV access, so the ordinary
13 procedures would be reflected in the equipment that Ms. Hadaway
14 has brought today.

15 THE COURT: I'm still not clear on the relevance, but I
16 will allow it. We don't have a jury here. I'll listen to it,
17 but I'm going to need you to tie it into how it supports your
18 claim that the State is not following these particular
19 standards.

20 MR. SPECTOR: Understood.

21 A. Okay. The 18 gauge -- well, all of these catheters have
22 three basic parts or three components. This is an 18 gauge.
23 The catheter, the plastic tube is built on the top or the
24 outside of the metal needle. The metal needle goes through the
25 middle of the plastic tube and extends out the tip end of it

1 with a sharp bevel cut. The back end is where we see the blood
2 return and where the needle is actually housed to protect the
3 health care worker from accidental needle stick injuries.

4 So you make your venipuncture, and then you would advance
5 the catheter into the vein by pushing this plastic tube into the
6 vein. That's what resides in the vein. And then the metal
7 needle is retracted back into the plastic tube to house it.

8 Q. Ms. Hadaway, there was an affidavit that was discussed
9 earlier today about a two-stick limit. What is your
10 understanding of what the two-stick rule is?

11 A. That's a standard of practice from the Infusion Nurses
12 Society's document on the standard for infusion therapy. Two
13 attempts to start a peripheral IV is the standard because after
14 that there's too much risk of frustration on the part of the
15 patient, the health care worker. Everybody is frustrated with
16 the situation, so you're only going to cause more damage when
17 you continue. At that point you need to stop and escalate to
18 either a different, more skillful person, or to use of vascular
19 visualization technology or to a different type of catheter,
20 which in this case would be a central venous catheter.

21 Q. And you were saying that this is -- the two-stick approach
22 is what the standards of practice call for; is that correct?

23 A. That's correct.

24 Q. And is there a book or some sort of publication that
25 documents the standards of practice?

1 A. Yes.

2 Q. And have you brought that book today?

3 A. I have.

4 Q. Okay. And what is the book called?

5 A. Infusion Therapy Standards of Practice. This is the Eighth
6 Edition.

7 Q. And is there a committee that oversees the standards of
8 practice?

9 A. Yes. A committee that writes them, yes.

10 Q. And have you sat on that committee?

11 A. Yes.

12 Q. And how many years were you on that committee?

13 A. Twenty years, four different editions of this document.

14 Q. And what was your role on that committee?

15 A. I was a committee member. We were all assigned specific
16 standards to work on to research and to write the standard.

17 Q. So if I understand correctly, you helped write the standards
18 of practice?

19 A. I did.

20 Q. And are the standards of practice evidence based?

21 A. Strongly evidence based, yes.

22 Q. And I want to clarify something about the two-stick rule.

23 Is the two-stick rule the number of places on the body that
24 attempts can be made, or is it the number of attempts, period?

25 A. I'm not sure I understand the difference between those.

1 Q. Sure. So is the two-stick rule you could try in two
2 different areas of the body to gain IV access, or that two
3 needles can be used before seeking additional help?

4 A. Two needles. Two attempts. Yes, two needles.

5 Q. Are you familiar with the fact that the State of Alabama
6 carries out executions by lethal injection?

7 A. Yes.

8 Q. And are you familiar with the fact that Alabama administers
9 its lethal injections by IV lines?

10 A. Yes.

11 Q. I'm going to represent to you that the Alabama Department of
12 Corrections call the people who start the IV lines for the
13 executions the IV team.

14 A. Okay.

15 Q. In your professional experience, does the term IV team have
16 a generally understood meaning in the medical community?

17 A. Yes. That's the team of dedicated, designated
18 professionals. Either registered nurses, respiratory
19 therapists, or radiology technologists can all be on this team.
20 They service the entire hospital. They are the highest level
21 skill and perform the highest level of invasiveness on the types
22 of catheters that we are placing. They're the experts that
23 troubleshoot complications and answer questions and serve as
24 resources for the med-surg staff nurses.

25 Q. And should the members of the IV team under the standards of

1 practice, should their competency be documented?

2 A. Yes.

3 Q. I'll represent to you that Alabama's lethal injection
4 protocol provides for two types of IV access. The first is the
5 IV team attempts to establish peripheral IV access through what
6 the protocol calls the standard procedure. And if they are
7 unable to establish such access, they can attempt to establish
8 the central line access. Can you explain for the Court the
9 difference between peripheral and central IV access.

10 A. As I mentioned, peripheral access is when we're using the
11 veins of the peripheral extremities: The hands, the feet, the
12 legs, the arms. Central access is when we are going into a
13 larger vein in the torso and advancing a longer catheter to the
14 superior vena cava right before it enters the heart. We can use
15 the jugular vein in the neck, the subclavian vein under the
16 collarbone, or the femoral vein in the groin.

17 Q. And setting peripheral access compared to central IV access,
18 is one harder than the other?

19 A. One carries more risk. The central venous catheter, being
20 inserted into larger veins, carries more risk, and it is a
21 higher level skill to develop, yes.

22 Q. So we were talking about peripheral IV access and central.
23 I want to go back to peripheral. Okay?

24 A. Okay.

25 Q. Are there different stages involved in performing that

1 procedure, peripheral IV access?

2 A. Yes.

3 Q. What's the first stage?

4 A. Before you go to the bedside, you would need to know why the
5 person is needing the IV, what medications are going through it,
6 how long this would be needed, any medical history that the
7 patient may have. Then once you have a clear understanding of
8 the purpose and the length of time this is needed, then you
9 would go to the patient's bedside and introduce yourself,
10 explain what you're going to do, place a tourniquet on the arm,
11 and start looking to assess for the venipuncture site.

12 Q. And you've been a nurse for 40 to 50 years; correct?

13 A. 51.

14 Q. Okay. And on average, how long does that assessment piece
15 take on average?

16 A. Depending upon the amount of medical records you need to
17 look through, it would be anywhere -- usually it's two to three
18 minutes that you can gain all this information, and then you go
19 to the patient and introduce yourself and start assessing the
20 arms.

21 Q. And what's the next step in setting the IV line after the
22 assessment?

23 A. After that you -- you've chosen your site. This is a
24 procedure that requires the health care worker to put on gloves.
25 So you would wash your hands, put on gloves, and then open up

1 all the pieces and parts for the procedure. Apply skin
2 antiseptic agent to the skin to remove any organisms that you
3 possibly can, and then make the venipuncture by advancing the
4 catheter through the skin and into the vein.

5 Q. And on average, how long does that process take?

6 A. Usually another two to three minutes.

7 Q. And is there a third final step?

8 A. Yes. Then you've got to secure the catheter. There are
9 several mechanisms for securing the catheter to the skin. And
10 then putting a dressing on it and assessing the site. You've
11 connected a short extension to it during the insertion process
12 to keep from blood pouring everywhere. So you would flush it
13 with a syringe filled with saline to make sure that the catheter
14 is in the vein and it is patent and you've got a blood return
15 and everything is fine.

16 Q. And on average, how long does that take?

17 A. Another three minutes or so.

18 Q. Okay. So I think, if I understand your testimony correctly,
19 there's three steps. And you're saying on average, each step is
20 about two to three minutes on average?

21 A. On average for a skilled person, yes.

22 Q. So over the course of your career and based on your
23 experience, it could take on average anywhere between six to
24 nine minutes to establish the IV access?

25 A. It could, yes.

1 Q. If you had to estimate over the course of your career, how
2 many successful peripheral IV lines have you started?

3 A. Thousands.

4 Q. Thousands?

5 A. Yes.

6 Q. And have you ever seen a case where it takes 90 minutes to
7 three hours to set a peripheral IV line?

8 A. No.

9 Q. We were discussing earlier the two-stick rule; correct?

10 A. Yes.

11 Q. Can you explain for the Court how the two-sick rule relates
12 to the pain a patient may be experiencing?

13 A. Yes. Well, any time you stick a needle through your skin,
14 it's going to hurt. Usually when you're successful, you get it
15 into the vein. By the time you are putting your securement
16 device on and the dressing, that pain is gone. You've
17 cannulated the vein. The pain is gone. But if you have
18 trouble, if you do a lot of subcutaneous probing around where
19 you're taking the needle and going in different directions
20 trying to locate that vein, you're going to increase the
21 likelihood of complications.

22 Veins and nerves are anatomically located very close
23 together. So it's very likely that when you're doing all that
24 subcutaneous probing, the needle is going to come in contact
25 with a nerve.

1 Q. And if the needle comes in contact with a nerve, what does
2 that feel like?

3 A. It feels like an electrical shock moving up and down your
4 arm. It can be a tingling, burning pain in addition. Some
5 people complain of numbness as well. Difficulty moving your
6 fingers below the site. But mainly that direct needle-to-nerve
7 contact feels like an electrical shock.

8 Q. And how do you know that?

9 A. Well, it's documented in a lot of studies and reports and
10 complications that have been -- I've seen in other cases where
11 patients describe it and other patients that I've seen in
12 clinical practice where they've described it.

13 Q. Ms. Hadaway, I'll represent to you in this case that the
14 State of Alabama has taken the position in this litigation that
15 it's easier to obtain IV access in a "normal medical setting"
16 because patients in a normal medical setting are "compliant."
17 Is it true that over the course of your 50 years of experience,
18 patients are always cooperative in setting IV lines?

19 A. No. Not at all. They're not always cooperative.

20 Q. And have you ever dealt with setting IV lines on a
21 noncooperative patient?

22 A. Yes.

23 Q. And what kind of patients have been uncooperative in your
24 experience?

25 A. Usually they're confused, disoriented, usually patients with

1 some type of dementia or some other type of trauma that has
2 caused them to be confused and not oriented to time and place.
3 They don't know what's going on.

4 Q. And in some of those instances can the patient be strapped?

5 A. They can be restrained, yes.

6 Q. And can you still establish IV access even in those
7 situations?

8 A. Yes, you can.

9 Q. And in such a case, could it take a few minutes longer to
10 establish peripheral IV access?

11 A. It might because the veins may be obscured by where the
12 restraints are placed, especially around the wrist area maybe or
13 the antecubital elbow area if they're placed there. Usually in
14 the hospital, it's going to be the wrist area where we have the
15 restraints.

16 Q. But is it correct, if I understand your testimony, that even
17 in such a situation it would take a couple of minutes longer to
18 set an IV line as opposed to 30 minutes, 45 minutes, an hour?

19 A. Yes.

20 Q. Okay. And in your expert opinion, is it reasonable for a
21 medical professional to spend over an hour attempting to start
22 an IV line on a person?

23 A. Not a peripheral IV, no. It's not reasonable.

24 Q. And do you know who Alan Miller is?

25 A. The name is familiar because of reading the records. He's

1 one of the former people who have been through this execution
2 process.

3 MR. SPECTOR: Your Honor, I'd like to show the witness
4 the affidavit of Mr. Miller. May I proceed in showing her?

5 THE COURT: Yes. Go ahead.

6 Q. This is an affidavit signed by Mr. Miller. If you turn to
7 the last page, do you see Mr. Miller's signature?

8 A. Yes. Alan Eugene Miller.

9 Q. And I'll represent to you that in this affidavit, Mr. Miller
10 describes his experience during the execution attempt on
11 September 22nd, 2022. Can I ask you to turn to the second page
12 and paragraph 17.

13 A. Yes.

14 Q. Are you there?

15 A. Yes.

16 Q. Can you read that sentence aloud.

17 A. Aqua Scrubs punctured my right elbow pit in multiple
18 different points trying to find a vein. I could feel the needle
19 being injected into my skin and then turned in various
20 directions as Aqua Scrubs tried to place the needle inside a
21 vein.

22 Q. I'll represent to you that Aqua Scrubs, according to
23 Mr. Miller, is a member of the IV team.

24 A. Okay.

25 Q. Based on what you just read, is there anything that stands

1 out?

2 MR. ANDERSON: Your Honor, I'm sorry. I'm going to
3 object to the relevance of a statement -- an untested statement
4 from another party in another case, actually from a plaintiff in
5 another case, to issues that are actually before the Court
6 today.

7 THE COURT: Are you offering this affidavit as an
8 exhibit?

9 MR. SPECTOR: Yes, Your Honor.

10 THE COURT: How are you going to authenticate it?

11 MR. SPECTOR: So if you -- after the attempted
12 execution on Mr. Miller, he filed an amended complaint, and the
13 statements that are in this affidavit are almost verbatim from
14 the statements that were made back in September 2022. So they
15 have not changed.

16 THE COURT: Well, is the complaint that Mr. Miller
17 brought a verified complaint?

18 MR. SPECTOR: It is not, but he has made this
19 affidavit.

20 THE COURT: Right. How are you going to
21 authenticate -- she's identified that's a signature, but who is
22 going to authenticate that that's his signature?

23 MR. SPECTOR: Well, if there's any question about
24 whether that's his signature, we're more than happy to take the
25 necessary steps to prove that Mr. Miller did, in fact, sign

1 that.

2 I will say, Your Honor, that -- I don't know if this is
3 where you're going, but at a motion for preliminary injunction
4 hearing the rules of evidence are relaxed a bit, so I would ask
5 that the Court do admit it.

6 MR. ANDERSON: Your Honor, I would say -- I want to add
7 to my statement. The State is not making an authenticity
8 objection. I don't have any information to suggest that it's
9 not Mr. Miller's.

10 THE COURT: All right. On that representation, I will
11 admit it into evidence, and I'll give you some leeway on
12 allowing the witness to opine as to the allegations made by
13 Mr. Miller. Go ahead.

14 Q. So you read that statement out loud. Can you identify for
15 the Court anything that stood out?

16 A. Yes. There is -- well, first of all, he's talking about
17 multiple different points of trying to find a vein. That would
18 indicate multiple puncture sites, as he's mentioned, multiple
19 punctures in the right elbow. There's also the phrase turning a
20 needle in various directions. That describes the subcutaneous
21 probing where you've got the needle and the catheter under the
22 skin, you can't get in the vein, and you back up a little bit
23 and you go in another direction or you back up and go in the
24 opposite direction. You're doing a lot of probing around with
25 that needle, trying to locate the vein. And remember veins and

1 nerves are located close together, so that technique increases
2 the risk that nerves will be damaged.

3 Q. So let's turn to paragraphs 19 and 20 of the affidavit. Are
4 you there?

5 A. Yes.

6 Q. I'll ask you to read those two paragraphs aloud.

7 A. "One of the men wearing scrubs then pulled out a small
8 pocket flashlight in an attempt to better see my veins. The
9 pocket flashlight did not help the men in scrubs. Someone in
10 the room then offered the men in scrubs the use of bright
11 flashlight application on his smart phone. The men in scrubs
12 tried using the phone but then abandoned it after some time."

13 Q. Is there anything in those paragraphs that stands out to
14 you?

15 A. Yes. Definitely.

16 Q. And what is that?

17 A. Flashlights are not appropriate for finding veins on adults.
18 This is a type of visible light device. It can produce heat.
19 It's only appropriate to use a visible light device on a
20 neonate, which means a newborn baby, less than 30 days old,
21 because the size of their arm is so much smaller. It's the
22 circumference of the arm in an adult or a larger child, even,
23 that prevents the light from a regular flashlight from passing
24 through the skin and helping you identify veins. It's just not
25 possible to do it with a flashlight.

1 Q. I'm going to point you to the last paragraph that we're
2 going to look at, paragraph 30.

3 A. Okay.

4 Q. And can you read that one out loud.

5 A. "I could then feel the men in scrubs tie a tourniquet on my
6 right foot and begin massaging and slapping the foot to increase
7 blood flow. One of the men in scrubs proceeded to insert a
8 needle in my right foot which caused sudden and severe pain. It
9 felt like I had been electrocuted in my foot and my entire body
10 shook in the restraints."

11 Q. So is the pain that Mr. Miller is describing consistent with
12 a needle hitting a nerve?

13 A. It is.

14 Q. And that's because earlier you testified that a needle
15 hitting a nerve could feel like electrocution?

16 A. It can feel like an electrical shock moving up and down your
17 arm, yes, or your leg.

18 Q. And is what is being stated in this affidavit consistent
19 with ordinary procedures in setting IV lines?

20 A. Inconsistent?

21 Q. Is it consistent?

22 A. Is it consistent? No, it's not. The discussion about
23 slapping the foot to increase blood flow, that doesn't increase
24 blood flow at all. Hard slapping of the extremity is only going
25 to cause venous constriction, not venous dilation. You can

1 lightly tap on top of the vein and it might pop up a little bit,
2 but when you're taking the flat of your hand and slapping
3 somebody in their extremity, that is not going to bring up a
4 vein.

5 Q. We're going to move on to another set of questions. There's
6 been a lot of talk in this case about the term medical personnel
7 that serve on the IV team at ADOC. As a preliminary question I
8 would like to ask you, does the term medical personnel have a
9 defined meaning?

10 A. It is usually referring to everybody within health care.
11 It's common for that term to be used for everybody within health
12 care, any discipline within health care.

13 Q. So is it correct that it's a broad term?

14 A. It's a very broad term. Yes.

15 MR. SPECTOR: Your Honor, I would like to show the
16 witness Exhibit 54, which we would also like to enter into the
17 record, which is discovery responses that the State has produced
18 in this case.

19 THE COURT: Any objection?

20 MR. ANDERSON: No objection, Your Honor.

21 THE COURT: All right. They're admitted. I say
22 "they're" because it's a multipage, looks like composite
23 exhibit, but that's Exhibit 54.

24 Q. (Mr. Spector, continuing:) I'll represent to you,
25 Ms. Hadaway, that these are redacted images of various

1 certifications of Alabama's IV team that were produced in the
2 course of this litigation. You'll see on the first page a
3 redacted image of a paramedic license. Do you see that?

4 A. I do.

5 Q. Is there anything about this license that could tell you
6 about whether the person whose license it is is competent to
7 start a peripheral IV line?

8 A. No.

9 Q. Is there anything about this paramedic license that could
10 tell you about whether the person whose license it is can start
11 a central IV line?

12 A. No.

13 Q. Is it possible that somebody who holds a paramedic license
14 doesn't know how to start a central line?

15 A. I don't believe that is included in their legal scope of
16 practice in Alabama.

17 Q. I'm going to ask you to turn to the second page of the
18 exhibit. You'll see a redacted image of advanced EMT license.
19 Do you see that at the bottom?

20 A. I do.

21 Q. Is there anything about this EMT license that could tell you
22 whether the person whose license it is can competently set a
23 peripheral IV line?

24 A. No.

25 Q. Is there anything about this EMT license that could tell you

1 about whether the person whose license it is knows how to start
2 a central IV line?

3 A. No, other than the fact that it's not in their legal scope
4 of practice.

5 Q. Is it true that few EMT jobs involve setting central lines?

6 A. That is correct.

7 Q. Can you give some examples of what type of job a person with
8 an EMT license might have?

9 A. What type of jobs they may have?

10 Q. Yes.

11 A. Usually they're on ambulance services, going out to calls
12 that come in from any type of incident, accidents, fires,
13 anything that needs the medical personnel to handle the
14 emergency situation at the scene. They're going to the scenes
15 to take care of these things.

16 Practice for EMT personnel has expanded to the other
17 community services, like going out to help check blood pressures
18 and blood sugars, but that's new and coming. Most of the time
19 they're riding the ambulance to the scenes of calls.

20 Q. Is it possible that somebody has an EMT license but actually
21 does not work in health care or medicine?

22 A. Sure it's possible.

23 Q. I would like to turn your attention to Bates 310, which is a
24 couple pages down. The Bates numbers should be at the bottom
25 right-hand corner.

1 A. Yes.

2 Q. Do you see there's a certification from the National
3 Registry of Emergency Medical Technicians?

4 A. I do.

5 Q. And does that tell you anything about whether the person
6 certified is competent at setting IV lines?

7 A. No. Certification does not -- and licensure does not equal
8 competency.

9 Q. And if we look to the next page and then 312 and 313, do you
10 see those pages?

11 A. 311 you mean?

12 Q. Yes, 311. And then you see 312 and you see 313?

13 A. Yes.

14 Q. These appear to be from the American Heart Association?

15 A. Yes.

16 Q. Do these documents tell you anything about whether the
17 person or persons certified are competent at setting IV lines?

18 A. No.

19 Q. Now I'm going to ask you to turn to 314. Can you explain to
20 the Court what kind of license this is.

21 A. This is a license from a registered nurse in Florida.

22 Q. And is there anything about this license that could tell you
23 whether the person whose license it is knows how to set a
24 peripheral IV line?

25 A. No.

1 Q. And why is that?

2 A. Because nurses are not competent to start IVs when they
3 graduate from nursing school. This is a big problem that we
4 have in this country now that you just don't graduate with the
5 high level of skill that you need, and that is up to the
6 individual to gain that skill through their first employer.

7 Q. And is it correct that not every registered nurse actually
8 sets peripheral IV lines?

9 A. That is correct.

10 Q. There could be a nurse at an elementary school, for example,
11 whose job responsibilities do not include setting IV lines?

12 A. That's right.

13 Q. And looking at this specific license, is there anything
14 about this registered nurse license that could tell you about
15 whether the person whose license it is knows how to start a
16 central IV line?

17 A. No.

18 Q. And is it possible that somebody who has an active RN,
19 registered nurse license, doesn't know how to start a central
20 line?

21 A. It is not within the scope of practice for most registered
22 nurses. If you look, this says license original issue date is
23 2019, so this person has very little experience overall in the
24 grand scene of things. She's got two and a half, three years of
25 experience. But the nurses, the registered nurses that are

1 allowed to enter the training and insert central venous
2 catheters have much more experience and have high -- higher
3 levels of skill and knowledge than somebody with less than three
4 years experience.

5 Q. And you were testifying earlier, the reason for that is
6 because setting a central line is more complicated and has more
7 risk than setting a peripheral IV line?

8 A. That's true.

9 Q. Okay. In your professional opinion, do you believe that a
10 person whose body is punctured with needles between 90 minutes
11 and three hours is being subjected to unnecessary pain?

12 A. I do.

13 Q. And in your professional opinion, do you believe it's
14 possible to start an IV line for purposes of lethal injection
15 execution without subjecting that person to unnecessary pain?

16 A. Yes.

17 MR. ANDERSON: Your Honor, I'm going to object. We've
18 agreed that this person is an expert in setting IV lines in
19 health care settings. We haven't established that she has any
20 expertise whatsoever in the field of capital punishment, which
21 is not a medical field. We haven't heard any experience that
22 she has in assisting with executions or preparations for
23 executions in Alabama or any other state, so we would object to
24 her testifying on that.

25 THE COURT: I'll allow that question. Overruled.

1 MR. SPECTOR: I don't have any other questions at this
2 time.

3 THE COURT: Cross-examination?

4 MR. ANDERSON: Yes, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. ANDERSON:

7 Q. Ms. Hadaway, my name is Rich Anderson. I'm going to have a
8 few questions for you today.

9 I'm going to start kind of from the back to the front here.
10 You were just being asked -- do you still have those exhibits up
11 in front of you?

12 A. I do.

13 Q. Let's look at the page we were just talking about, this
14 nursing license, DOC 000314.

15 A. Okay.

16 Q. How many IV lines has this person set in their -- let's
17 see -- about four-year career now? Do you know?

18 A. Four-year degree?

19 Q. Four-year career.

20 A. Four-year career. There's no way I would be able to tell
21 that.

22 Q. Sure. Fair enough.

23 In your experience, how many nurses don't know how to set IV
24 lines? Most of them? Peripheral IV lines.

25 A. That depends upon where they've worked and the years of

1 experience.

2 Q. Okay.

3 A. So you can't apply that to all the millions of nurses across
4 the board.

5 Q. So you don't know what percentage, say, of nurses know how
6 to set an IV line?

7 A. There's no way to answer that question.

8 Q. Okay. So looking at someone's license, is it fair to say
9 that you have no idea whether that person can set an IV line or
10 not. Is that what you're saying?

11 A. Licensure is entry into practice. It means you've mastered
12 the minimum amount of knowledge and skill. It does not say
13 you're competent to do any particular procedures.

14 Q. Were you taught how to set an IV line in nursing school?

15 A. I was 50 years ago when things were much different.

16 Q. Do you think they're still teaching nurses how to do that?

17 A. No, I do not. I know they're not.

18 Q. Let's look at -- I think you were asked -- well, I'll save
19 some time here. You were asked about some of the other licenses
20 and certifications you see here, the paramedic license, an
21 advanced EMT license, another paramedic license. Same
22 questions. Nothing about any of those documents tells you that
23 these people are incompetent to set IV lines, does it?

24 A. Correct.

25 Q. It's your testimony that they possibly could be?

1 A. If these were the people that were involved in the previous
2 attempts and all the discussion, they are not competent.

3 Q. Well, that's good, because I was actually going to ask you
4 about that. A few minutes ago you were asked about some of the
5 allegations that Mr. Miller has made about what supposedly
6 happened to him, and you were asked about what the men in scrubs
7 did. Do you recall that?

8 A. Yes.

9 Q. And it is your testimony today that those specific actions
10 that Mr. Miller said would not be within a medical standard of
11 care?

12 A. That is correct.

13 Q. I want to ask you, you were -- testified a little bit about
14 a document called the Infusion Therapy Standards of Practice.

15 A. Yes.

16 MR. ANDERSON: Could we use the Elmo? Is that
17 something --

18 THE COURTROOM DEPUTY: Do you want him to see it as
19 well? I'll just have to move --

20 MR. ANDERSON: I really need it for the witness more
21 than anything else.

22 If y'all want him to see the Elmo, this is what I want
23 to show her.

24 Q. I want to just show you a document and ask if you recognize
25 it.

1 A. Yes.

2 Q. Okay. And is that the cover page of the Infusion Therapy
3 Standards of Practice?

4 A. Can you push it up a little bit to make sure this is the
5 right edition? Yes. The Eighth Edition, yes. 2021.

6 Q. In fact, that's your name.

7 A. That's correct.

8 Q. I did want to follow up with one thing. You testified
9 earlier that in assembling this -- these standards, the various
10 members were given -- let me see if I can back up to exactly
11 what you said. You were assigned specific standards to work on.
12 Which standards were you assigned to work on?

13 A. In this document I was assigned to work on -- hold on. Let
14 me get to the index. I wrote the number three, the scope of
15 practice; number four, organization of infusion and vascular
16 access services; number five, competency and competency
17 assessment; 36 -- 35, filtration; 36, needleless connectors; 41,
18 flushing and locking; thrombosis -- I think I did that one,
19 too -- catheter associated deep vein thrombosis.

20 In previous editions of this document --

21 Q. I'm just asking you about this one.

22 A. This one? Okay.

23 In addition to doing the original research and writing the
24 first draft, then each committee member sends our drafts to the
25 other committee members. We discuss it thoroughly, every other

1 committee member gets a chance to comment and critique, and then
2 we go back and forth on the content and the analysis of the
3 evidence.

4 Q. So there's a discussion amongst this group of people --
5 maybe I'm calling them the authors -- after you have each
6 handled your assigned section?

7 A. Correct.

8 Q. Okay.

9 A. Followed by a review of the whole document. The whole
10 document goes out to a hundred or more people in the general
11 community of health care associated with this to review and
12 critique it. We take those comments back and spend another few
13 months working through all those comments to create the final
14 document.

15 Q. Okay. So the long process to get you to the final document
16 that is this Eighth Edition; right?

17 A. Yes.

18 Q. So I want to ask you, if you would, towards the front on
19 page S-8 of the document, there is a methodology for developing
20 the standards of practice.

21 A. Right.

22 Q. And I guess I just want to see if I can paraphrase
23 accurately. This is describing how -- maybe describing to some
24 extent that process you've just talked about, how y'all came to
25 decisions and what they mean.

1 A. That's right.

2 Q. And this is meant to help people understand your standards.

3 Is that fair to say?

4 A. Understand the fact that we relied upon evidence and the
5 quality of that evidence.

6 Q. Okay. Well, let me ask you -- this same page -- actually,
7 looking at page S-9. So in talking about evidence for the
8 findings and suggestions and things in your guidelines, you have
9 a rating scale; is that correct?

10 A. That's right.

11 Q. And if you would, read for me this highlighted line that I'm
12 pointing to right here if you can.

13 A. "The rating scale ranges from the highest rank of I,
14 representing a meta-analysis or other research on research, to
15 the lowest level of V."

16 Q. And then under practice recommendations, if you would read
17 that first sentence for me.

18 A. "When there is a large body of evidence based on robust
19 research with consistent findings, the strength of the body of
20 evidence reflects the highest ratings, such as a I or II, and
21 the practice recommendation is strong."

22 Q. Okay. Thank you. So you can have various levels of
23 recommendations based on what evidence you have to support them;
24 true?

25 A. Based on the strength of the evidence. Right.

1 Q. I want to ask you about section 34 or standard 34 of the
2 standards. And I'll show you a document on the Elmo here and
3 just ask if you recognize that as being the standard 34.

4 A. I believe it is.

5 Q. If I represent to you that I've taken this page out of --
6 this is page S-97 of the Eighth Edition, would you have any
7 reason to dispute me? I guess if you have a copy, you can turn
8 to page S-97.

9 A. Yes. S-97. That's what I'm trying to do. S-97, standard
10 34, vascular access device placement.

11 Q. Yes, ma'am. Okay. And you were asked earlier about the,
12 quote, two-stick rule; right?

13 A. Yes.

14 Q. It's not actually a rule, is it? It's a practice
15 recommendation.

16 A. Correct.

17 Q. And I want to refer you to -- in standard 34 you have the
18 standard, which is 34.1, 2, 3, 4, and then you have following
19 that practice recommendations. Are you following me?

20 A. Yes.

21 Q. And then in practice recommendations, there's a subsection G
22 that says -- I guess if you would read for me the first sentence
23 of subsection G.

24 A. "Restrict PIVC insertion attempts to no more than two
25 attempts per clinician at PIV insertion."

1 Q. And PIV, that's peripheral intravenous catheter?

2 A. Correct.

3 Q. And that then goes on to describe -- I guess go ahead and
4 just read for me the rest of that Section G.

5 A. "Multiple unsuccessful attempts cause pain to the patient,
6 delay treatment, limit future vascular access, increase cost,
7 and increases the risk of complications." Those numbers
8 represent the references, and the Roman numeral IV is the
9 ranking.

10 Q. And the Roman numeral IV would be the second to lowest
11 ranking; right?

12 A. That is the ranking of quasi experimental studies, of not
13 randomized studies, but they're different cohorts of studies
14 with some method of comparison but not a full randomized trial.

15 Q. So if you have a -- making sure I understand the way the
16 practice recommendations work. If this was -- if it was rated
17 as a I or II, there would be a, quote, large body of evidence
18 based on robust research with consistent findings; right?

19 A. That's the definition of Roman numeral I. But in the
20 absence of those higher levels, then we have to rely upon quasi
21 experimental research.

22 Q. And that's why you denote the IV, to show that it's a lower
23 level of evidence to support it.

24 A. Correct.

25 Q. Okay. Let me ask you about the -- so the Journal of

1 Infusion Nursing, which this is published by; correct?

2 A. Yes.

3 Q. And that is an arm of the Infusion Nurses Society that
4 you're a member of; is that right?

5 A. It's a journal published every other month by the Infusion
6 Nurses Society, yes.

7 Q. Is the Infusion Nurses Society a licensing body in any
8 state?

9 A. No.

10 Q. It's a professional organization; true?

11 A. Correct.

12 Q. And you can govern your membership; true?

13 A. Yes.

14 Q. But you don't govern who's admitted to practice medicine in
15 any state, anything like that?

16 A. Practice medicine?

17 Q. Well, let me rephrase that. Work in the medical field.

18 A. We don't govern?

19 Q. If someone wants to work -- let's just say as a nurse or EMT
20 or paramedic or physician's assistant, they don't have to have a
21 license from the Infusion Nursing Society?

22 A. They don't -- INS doesn't issue licenses.

23 Q. Yes. That's what I wanted to clarify. Because there are
24 other fields of medical professionals; correct?

25 A. Other than nursing?

1 Q. Other than infusion nurses.

2 A. Sure.

3 Q. And other medical professionals who set IVs; true?

4 A. Yes. And that is why they're all addressed in the scope of
5 practice standard, number three --

6 Q. That's actually where I was going.

7 A. Okay.

8 Q. So you're ahead of me.

9 In scope of practice section 3.1, do you recognize that from
10 your standards?

11 A. Yes.

12 Q. And if you would, read 3.1 for me.

13 A. "Clinicians" --

14 We changed the word. When we changed from infusion nursing
15 standards many years ago to infusion therapy standards, we
16 changed the word nurse to clinicians so that we could encompass
17 all clinicians who are involved in this practice. So that's why
18 we're using the word clinician.

19 "Clinicians prescribing and/or administering infusion
20 therapy and performing vascular access insertion and management
21 are qualified and competent to perform these services based on
22 their licensure and certification and practice within the
23 boundaries of their identified scope of practice."

24 Q. Thank you. And I think -- let's see. That was page S-15;
25 correct?

1 A. Yes.

2 Q. A few pages later, on page S-20, if you could turn there
3 with me. I'm going to turn this on its side because it's
4 printed in landscape and not --

5 A. Yes.

6 Q. Okay. Do you recognize that?

7 A. Yes.

8 Q. And what's the title of that table?

9 A. This is Other Clinical Disciplines Involved with Infusion
10 Therapy and Vascular Access.

11 Q. And is one of the categories described in that table EMS
12 personnel?

13 A. Yes.

14 Q. And if you would look with me under the general scope of
15 practice, I've highlighted a section of that table. Would you
16 read that for me.

17 A. "Holds a license from the regulatory agency in the
18 state/province and/or certification from the national certifying
19 board, and be authorized by a local emergency service medical
20 director to perform the skills or role."

21 Q. Okay. And in the next table over, role responsibilities for
22 infusion therapy/vascular access, would you read what it says
23 advanced emergency medical technicians may do.

24 A. "Advanced emergency medical technicians may insert short
25 PIVCs and IO or intraosseous devices in adults and children."

1 Q. And with paramedics, can they also insert short PIVCs?

2 A. Paramedics may insert short PIVCs and IO devices, yes.

3 Q. Thank you.

4 A. Which refers to their legal scope of practice.

5 Q. Sure. Is it fair to say, Ms. Hadaway, that if someone has
6 gone to the trouble of getting a paramedic's certification and
7 license, they probably practice in the medical field?

8 A. Well, probably that's where they're going to seek their
9 employment, yes.

10 Q. You were asked earlier whether it was possible they didn't
11 even work in a medical setting, and you said it was. I just
12 wanted to ask -- clarify that.

13 A. It's possible.

14 Q. Yes. It's possible but not likely.

15 A. Depends on the individual and their career goals.

16 Q. Sure. I want to return back -- and I may just be able to
17 shortcut this. I want to turn back to Exhibit 54. This is
18 document 000307. It's one of the redacted paramedic's licenses.
19 You don't dispute, do you, that a paramedic in the state of
20 Alabama is authorized to obtain venous access?

21 A. It's included in their legal scope of practice.

22 Q. Right. Okay. That's what I wanted to make sure I
23 understood correctly.

24 MR. ANDERSON: Just a moment.

25 (Brief pause in the proceedings)

1 Q. I'm going to kind of move on from that. Ms. Hadaway, do you
2 have an opinion on the death penalty?

3 A. I'm sorry. On the death penalty?

4 Q. Yes, ma'am.

5 A. I am not in favor of the death penalty.

6 Q. Okay. Would you be willing to assist a state in obtaining
7 IV access for carrying out an execution?

8 A. I've never thought about that. I've never been faced with
9 that issue, so I don't really know how to answer that.

10 Q. Okay. And you testified a little bit earlier about that you
11 have had some patients who were uncooperative; correct?

12 A. Yes.

13 Q. And when you're faced with an uncooperative patient, is one
14 of the strategies you can employ kind of talking them down,
15 explaining the process, calming their nerves, that sort of
16 thing?

17 A. Yes.

18 Q. Have you ever attempted to obtain IV access on someone who
19 knew that the result of your obtaining IV access was going to be
20 their lawful execution?

21 A. No.

22 Q. Do you suppose that you would be able to talk that one --
23 that person down?

24 A. I would certainly make every attempt to convey the fact that
25 I was going to meet the standard of practice that every other

1 person receiving IV therapy in this country should be receiving;
2 that they -- that the care that I gave was following the
3 standards.

4 Q. What's the purpose of IV therapy?

5 A. The purpose?

6 Q. Yes, ma'am. Is it to heal illness, treat illnesses?

7 A. To deliver fluids, medications, parenteral nutrition, blood
8 and blood components, to treat and diagnosis various diseases.

9 Q. And when you are engaged in intravenous therapy or infusion
10 therapy, is one of the concerns you have vein preservation?

11 A. Yes.

12 Q. Because if someone is sick, you may need to access their
13 veins again in the future; correct?

14 A. No may about it. There's lengthy courses of therapy that we
15 have to give patients.

16 Q. And that's one of the reasons why you wouldn't want to wear
17 out a vein, I guess I might say, with multiple --

18 A. We do not want to wear out a vein. Yes.

19 Q. Now, you wouldn't dispute that with a patient who is
20 noncooperative, it's going to take longer to get IV access?

21 A. A little longer, yes.

22 Q. How many patients have you dealt with who were physically
23 resisting you?

24 A. There's no way for me to give an educated, reasonable guess
25 about that. There's plenty of patients with dementia, with all

1 kinds of causes for their disorientation and confusion that
2 would offer resistance when we're trying to start an IV.

3 Q. And that resistance can vary in the level of resistance
4 they're putting forth?

5 A. Could be anywhere from moving their arm to screaming,
6 yelling, fighting, kicking, screaming. Anything.

7 Q. And I think you indicated that stress could make obtaining
8 venous access harder too because of vasoconstriction?

9 A. Yes.

10 Q. What about dehydration?

11 A. It can.

12 Q. Have you ever been faced with needing to obtain IV access on
13 a dehydrated patient?

14 A. Yes.

15 Q. What do you do?

16 A. Well, today you would use either near-infrared light or an
17 ultrasound device to locate the vein. You would not -- in a
18 patient that has dehydration, the tourniquet alone, with being
19 able to palpate the vein, is not sufficient to actually locate
20 the vein because there's decreased fluid flowing through the
21 veins and there's not enough fluid to distend them.

22 Q. Would you consider attempting rehydration?

23 A. You don't have that luxury of time because the rehydration
24 has got to come from the IV fluids you're going to give. They
25 may not be able to drink fluids for whatever reason they're in

1 the hospital for, so you've got to start the IV. You don't have
2 any option.

3 Q. You've got to start the IV because it's life or death,
4 critical situation; correct?

5 A. Yes, it can be.

6 Q. Okay. So you're in a hospital -- hypothetical for you.
7 You're in a hospital setting and you've attempted two IVs and
8 didn't work. Do you quit at that point or do you get someone
9 else or --

10 A. You would call someone else on the IV team. Not another
11 staff nurse but someone else on that IV team.

12 Q. At what point would you just say, I'm not going to get IV
13 access on this person?

14 A. You wouldn't. You're not able to.

15 Q. Thank you. You testified earlier about Mr. Miller's
16 allegations about slapping, and you characterized them as hard
17 slapping. What information do you have about the forcefulness
18 with which people made contact with --

19 A. The word slap.

20 Q. Okay.

21 A. That causes venous constriction, not venous dilation. If
22 you just use a couple of fingers and tap lightly, that might
23 bring up a vein and cause it to distend. But when you're
24 actually slapping, full hand, that causes venous constriction.

25 Q. So it's not the fact that someone is making contact with his

1 skin, but the way that they're doing it.

2 A. Yes.

3 Q. True?

4 A. Yes.

5 Q. Or the way that they're allegedly doing it.

6 A. Which indicates their lack of knowledge.

7 Q. Ms. Hadaway, when was the last time that you personally set
8 an IV line?

9 A. That was when I was working clinical back in I think '96.

10 Q. So 27 years ago?

11 A. Yes.

12 Q. When was the last time that you set an IV line against your
13 patient's will?

14 A. I've never done that.

15 Q. Okay.

16 A. Because that's assault and battery against their will.

17 Q. Are you familiar with the Trendelenburg position?

18 A. I am.

19 Q. Is that describing when you elevate someone's feet to use
20 gravity to distend veins?

21 A. Put the head down.

22 Q. Head down?

23 A. Head down, yes. That's for central venous catheters when
24 you're trying to stick the jugular or the subclavian vein.

25 Q. I want to ask you about another article from the Journal of

1 Infusion Nursing. And this is from May/June of 2005.

2 A. Yes.

3 Q. And the title is Cost Containment and Infusion Services.

4 You've testified about the number of IV attempts that can
5 happen. You talked about the two-stick issue. We've gone over
6 that. But it's true, isn't it, that in a hospital setting,
7 even, in a medical setting, patients are often subjected to more
8 than two sticks?

9 A. That was the case years ago. Now with the vascular
10 visualization technology, that problem is getting better.

11 Q. Are patients still sometimes subjected to more than two
12 sticks in medicine?

13 A. Unfortunately, it does happen.

14 Q. Okay. Let me ask you -- I'm going to turn to page S-26 of
15 this. I want to ask you if you just agree or disagree -- or
16 have any reason to disagree, rather -- with what the author says
17 here, discussing a study by Barton. Barton stated that patients
18 experienced one to 14 insertion attempts, with 27 percent of
19 patients requiring three or more insertion attempts. Does that
20 sound like something that could happen?

21 A. It was reported by Barton, and I believe that study -- I
22 know it was from the University of Florida, and I believe it was
23 published in the late '90s. Therefore, that was before the
24 technology of vascular visualization was available to us. We
25 were dependent upon the landmark technique, which means seeing

1 veins and palpating veins. And we had -- we were taught special
2 techniques or nurses on the IV teams were taught special
3 techniques to palpate, which med-surg and other nurses are not
4 taught how to do. So, yes, unfortunately, patients back then
5 did get stuck that many times.

6 Q. And is it your testimony that no one today is being stuck
7 more than, say, five times?

8 A. I would -- from the other hospital policies and procedures
9 that I reviewed --

10 Q. I'm not asking you about policies and procedures, ma'am.

11 A. I'm telling you that the hospital policies and procedures
12 include the two-stick minimum as their direction to their staff.
13 Does it happen when people violate hospital policies and
14 procedures? I'm sure on occasion it does. But for the most
15 part, in the majority of people, majority of patients, that
16 two-stick rule is followed. And it is -- if they're
17 unsuccessful at two, then you're escalating the situation to
18 somebody with more skill, different technology, different
19 techniques, different --

20 Q. So you might want to have another person with a higher level
21 of skill available?

22 A. There would be another person with a higher level of skill
23 available. Yes.

24 Q. Maybe even multiple levels of skill? You could end up with
25 a doctor doing something or --

1 A. A doctor would not necessarily have a higher level of skill.
2 In fact, their level of skill would not be as high because they
3 don't do as much.

4 Q. Right. All right. Let me ask you, is -- just a moment.

5 Ms. Hadaway, you have served as an expert witness in a
6 number of cases; correct?

7 A. Yes.

8 Q. Medical malpractice type cases?

9 A. All of them.

10 Q. And do you typically deal with things like extravasation
11 where medicine escapes from a vein and damages a patient,
12 something like that?

13 A. That's one of the major complications that ends up in court,
14 yes.

15 Q. And when was the last time -- let me see how I want to ask
16 that.

17 Have you ever been retained by a plaintiff in a case that
18 was purely about being struck too many times with a needle? As
19 in no further injuries from it, but I just -- I suffered a lot
20 of pain from being stuck more than two times, and I want to sue
21 my doctor. Has that ever happened?

22 A. No, not that I can recall in the cases I've reviewed.

23 Q. Okay.

24 MR. ANDERSON: That's all I have, Your Honor.

25 THE COURT: Any redirect?

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REDIRECT EXAMINATION

BY MR. SPECTOR:

Q. I don't have too many questions. Just a few.

A. Okay.

Q. Ms. Hadaway, how many years have you been a registered nurse?

A. Fifty-one.

Q. And in those 51 years, you've practiced in different parts of the country; is that correct?

A. Clinically, in Georgia and the Middle East. Teaching, all over the United States and the world.

Q. And you now teach how to set IV lines; correct?

A. Yes.

Q. And in your professional opinion, based on all these experiences and over the 51 years, is the two-stick rule widely followed in the medical community?

A. Yes.

Q. You were shown earlier a redacted version of a license from a paramedic and I believe an advanced paramedic. Do you recall that?

A. Yes.

Q. Even if that person is trained to set an IV line, do they still need to be competent at doing so?

A. Yes. Competency assessment and documentation is the responsibility of the employer. Obtaining and maintaining your

1 competency is the responsibility of the individual clinician,
2 but the employer is the one that does the assessment and
3 documentation of that competency.

4 Q. And that would be true both for the advanced paramedic and
5 the paramedic?

6 A. Yes.

7 Q. And if I understand your testimony and your CV, you teach
8 how to set IV lines now, today?

9 A. Yes.

10 Q. And do you teach people from around the country?

11 A. Yes.

12 Q. And do your teachings follow the standards of procedure that
13 you were shown earlier today?

14 A. Yes.

15 Q. And in your experience over 51 years and in your teachings,
16 has anybody that you have taught or conferred with in the
17 medical community challenged the two-stick rule?

18 A. No, not that I can ever recall anybody questioning that.

19 MR. SPECTOR: I have no further questions.

20 THE COURT: All right. Any recross?

21 MR. ANDERSON: No, Your Honor.

22 THE COURT: All right. You can step down. Thank you.
23 Do you have any other witnesses?

24 MR. SPECTOR: My colleague will present one.

25 MR. BATDORF-BARNES: Thank you, Your Honor. Plaintiff

1 would like to call James Barber.

2 THE COURT: Mr. Barber, we're going to need for you to
3 raise your right hand so the courtroom deputy can swear you in.

4 THE COURTROOM DEPUTY: Can you hear me, Mr. Barber?

5 THE WITNESS: Yes, ma'am.

6 JAMES BARBER

7 The witness, having first been duly sworn to speak the
8 truth, the whole truth and nothing but the truth, testified as
9 follows:

10 DIRECT EXAMINATION

11 BY MR. BATDORF-BARNES:

12 Q. Hello, Mr. Barber. I'd just like to confirm that you can
13 hear me okay.

14 A. Yes, I can hear you.

15 Q. Could you please state and spell your name for the record.

16 A. James Barber. J-A-M-E-S, B-A-R-B-E-R.

17 Q. Thank you, Mr. Barber.

18 Mr. Barber, are you afraid to die?

19 A. No.

20 Q. Why not?

21 A. Well, a little over two decades ago, I was made a promise,
22 and through that promise I have no fear of death. God promised
23 that I would receive eternal life, so death is just a transition
24 for me.

25 Q. Mr. Barber, are you aware of what happened to Joe James?

1 A. Yes.

2 Q. Could you please describe your understanding.

3 A. Well, there was some problem -- I don't know what the
4 problem was, but they seemed like they couldn't find a vein.
5 They did a cut down, I guess it's called, two cut downs on him,
6 and when they opened the curtains of the death chamber to start
7 the execution for the witnesses, it said that he was already out
8 of it. He was not awake, not responsive, did no talking. So
9 something happened before the scheduled execution. I don't know
10 what it is. I'm -- you know, I just got everything secondhand.

11 Q. Mr. Barber, are you aware of what happened to Alan Miller?

12 A. Yes.

13 Q. Could you please --

14 A. Yes.

15 Q. Could you please describe your understanding of what
16 happened to Mr. Miller.

17 A. Well, from what I understand, they had problems locating a
18 vein and invaded him several times, tried different positions
19 with him, and he said it caused him some great pain. A lot of
20 mental anguish.

21 Q. Mr. Barber, are you aware of what happened to Kenny Smith?

22 A. Yes.

23 Q. And could you please describe your understanding of what
24 happened to Mr. Smith.

25 A. I think, again, it was trouble locating a vein. And then I

1 believe they set one catheter, but the second one they were
2 having a problem with, and I guess it was a big needle because
3 when he came back, underneath his collar bone there was a really
4 bad looking wound there and he could barely raise his arms up
5 and stuff. He looked kind of shell shocked, and he said it was
6 a pretty awful experience.

7 Q. Mr. Barber, has there ever been an instance in which someone
8 encountered difficulty locating your veins during a blood draw?

9 A. When I first came into the prison in 2004 at Donaldson, they
10 bring you in the infirmary and do a body chart on you and you're
11 supposed to stay in there for a few days so they can observe you
12 and make sure you're all right. A guy brought me up there that
13 day, and they were going to draw blood. And the needle went in
14 probably eight times, all different places, and he couldn't do
15 it. And I finally told him, I respectfully refuse to let you do
16 that again. You'll have to wait until the doctor is available.
17 Because it was pretty painful.

18 Q. Thank you.

19 MR. BATDORF-BARNES: No further questions.

20 THE COURT: Any cross-examination?

21 MR. ANDERSON: Yes, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. ANDERSON:

24 Q. Mr. Barber, my name is Rich Anderson. I'm going to -- just
25 a few questions for you.

1 Did you file a civil rights action in 2004 against Donaldson
2 when you were stuck eight times?

3 A. No.

4 Q. Have you had -- well, strike that. No, I guess I will ask.
5 Have you had any trouble since then giving blood?

6 A. A few times. Another time or two at Donaldson. And then
7 when I first got here, the lady that was doing it couldn't get
8 it done.

9 Q. And have there been times where you haven't had a problem
10 giving blood?

11 A. Yes, sir.

12 Q. Okay. And different experiences with different people? Is
13 that fair to say?

14 A. I imagine it is.

15 MR. ANDERSON: Just a moment.

16 Nothing further, Your Honor.

17 THE COURT: All right. Any redirect?

18 MR. BATDORF-BARNES: Nothing further, Your Honor.

19 THE COURT: All right. Thank you, Mr. Barber.

20 Do you have any other witnesses?

21 MR. SPECTOR: We do not have any other witnesses.

22 THE COURT: It's about 3:47. Why don't we take a quick
23 break, about ten minutes.

24 THE WITNESS: Your Honor, would it be all right if I
25 was excused? I wasn't feeling well when I came up here, and

1 sitting in this chair has really aggravated my hip bad. I need
2 to go lay down.

3 THE COURT: Any objection?

4 MR. SPECTOR: No.

5 THE COURT: All right. Yes, you can be excused. Thank
6 you, Mr. Barber.

7 THE WITNESS: And may I tell my attorney I'll give them
8 a call later?

9 THE COURT: Certainly. He'll give you a call later.
10 All right. Thank you, Mr. Barber.

11 We'll take a ten-minute recess.

12 THE WITNESS: Thank you for letting me do this by
13 video.

14 THE COURT: Certainly. Glad to accommodate you.

15 All right. We'll take a quick recess.

16 (Recess was taken from 3:48 p.m. until 4:02 p.m., after
17 which proceedings continued, as follows:)

18 THE COURT: I have a question for you, Mr. Spector, or
19 whoever wants to field it. In multiple submissions, whether
20 it's your complaint or your motion for preliminary injunction,
21 you mention the execution has been taking a lengthy period of
22 time. It's the longest in history. What is the execution? At
23 what point are you claiming the execution begins and at what
24 point are you claiming it becomes unconstitutional based on the
25 last three?

1 MR. SPECTOR: So --

2 THE COURT: Why don't you come to the podium.

3 MR. SPECTOR: Sure.

4 So I think it begins when the inmate is strapped to the
5 execution gurney. And the reason why, Your Honor, is because
6 the Supreme Court and the Eleventh Circuit has never understood
7 punishments to be different when it comes to the prep for the
8 intravenous access -- excuse me -- the prep for the
9 administration of the drugs and the administration of the drugs
10 themselves. It's the punishment that is considered. And so I
11 think it begins when the inmate is strapped to the execution
12 gurney.

13 THE COURT: I'm not sure I understand what you mean
14 about punishment. Are you saying it's punitive to strap the
15 inmate to the gurney?

16 MR. SPECTOR: No, Your Honor, it's not. What I'm
17 saying is I think maybe where your question is coming from is in
18 some of the representations that the State has made in their
19 briefs, they've separated the difference between preparing for
20 the execution and the execution itself.

21 THE COURT: No. My question comes from your
22 representation that Alabama has the distinction of having the
23 longest executions in history.

24 MR. SPECTOR: Yes.

25 THE COURT: What is your starting point for making that

1 determination?

2 MR. SPECTOR: When they start attempting to make IV
3 access.

4 THE COURT: Okay. So not when they're strapped to the
5 gurney?

6 MR. SPECTOR: Correct. Yes.

7 THE COURT: Okay. In the case where they are
8 attempting IV access, you have made representations that James
9 and Miller and Smith were punctured all over their body. Can
10 you be specific about what you mean?

11 MR. SPECTOR: Sure. So in the James execution, the
12 State's own autopsy report says there were needle sticks in
13 different parts of his body that would suggest that that was
14 where the puncture marks were being made.

15 THE COURT: Right. How do you equate different parts
16 of his body with all over his body?

17 MR. SPECTOR: In my mind they're very similar because
18 it's not just that the execution -- the IV team is attempting to
19 make IV access in the elbow pit or the -- or, say, where the
20 wrist is. There's also examples where the execution team is
21 attempting to make IV access in, for example, Mr. Miller's case,
22 his leg or his foot, I should say.

23 THE COURT: So if it were the arm, the hand, the foot,
24 that's what you are referencing when you say all over their
25 body?

1 MR. SPECTOR: Correct. Yes. Multiple places on their
2 body.

3 THE COURT: All right. Are you offering the exhibits
4 that you gave me in the binder in total, or are you offering a
5 few selective exhibits?

6 MR. SPECTOR: We are offering all of the exhibits to
7 enter into the record. We shared the exhibits with the State
8 before this hearing. I'm not sure if the State has objections
9 to any of them.

10 MR. ANDERSON: We don't have any objections, Your
11 Honor.

12 THE COURT: All right. So that would mean that
13 Exhibits 1 through 63 -- and I haven't counted them all, but I
14 assume they're all sequentially numbered?

15 MR. SPECTOR: Correct.

16 MR. ANDERSON: There are actually some, Your Honor,
17 that I think on the exhibit list were marked as intentionally
18 left blank, so there may be numbers in that sequence that don't
19 correspond to actual exhibits. My point being there may not be
20 actually 63 exhibits.

21 MR. SPECTOR: Yes. So to clarify, Your Honor, at the
22 front of your binder you have an index, and you'll see for a few
23 of the entries it says intentionally left blank. Those were
24 exhibits that were removed after the printing of the binders.
25 So there's no exhibit for that number.

1 THE COURT: Well, then you're going to need to go
2 through and offer them -- I don't want to put in an exhibit that
3 is not going to exist. I want to make sure that the record is
4 clear.

5 MR. SPECTOR: Understood. So --

6 THE COURT: Well, you don't need to offer as an exhibit
7 the complaint; right? That's already in the record.

8 MR. SPECTOR: Correct.

9 THE COURT: So you need to make a list for me -- you
10 don't have to do it now. I can ask the State some questions.
11 But I'm going to need for you to be specific about what exhibits
12 you are offering. And if they are already in the record, you
13 don't need to offer them again. I don't want to flood our
14 docket for any appellate court purposes with documents multiple
15 times.

16 MR. SPECTOR: Understood.

17 THE COURT: All right. Let me hear from --

18 Well, let me ask you this. Have you completed your
19 argument?

20 MR. SPECTOR: We are complete with our argument on the
21 motion for preliminary injunction. Two just quick things. Our
22 expert witness lives about three hours away. Does she have
23 permission to leave for the afternoon or do you need her for
24 anything?

25 THE COURT: Is she released?

1 MR. ANDERSON: As far as we're concerned.

2 THE COURT: She can go. Thank you.

3 MR. SPECTOR: And then the other item -- this is more
4 housekeeping. We finished our argument on the motion for
5 preliminary injunction, but we also have a pending motion to
6 compel, which we're prepared to discuss if Your Honor would be
7 interested after the motion for preliminary injunction is
8 discussed.

9 THE COURT: Well, to the extent it's a discovery
10 motion, that would be before the magistrate judge, not before
11 the district court. So you would need to make those -- any
12 arguments in documents filed before the magistrate judge.

13 MR. SPECTOR: Okay.

14 THE COURT: All right.

15 MR. ANDERSON: Thank you, Your Honor.

16 THE COURT: Mr. Anderson, let me start with a question.
17 Is the State ready to carry out executions by nitrogen hypoxia?

18 MR. ANDERSON: No, Your Honor.

19 THE COURT: All right. Then why did the State
20 defendants ask me to order Mr. Barber executed on July 20th by
21 nitrogen hypoxia?

22 MR. ANDERSON: Your Honor, we've done the same thing
23 previously in previous cases. And what we're doing is asking
24 the Court to draw any -- if an injunction is granted, to draw it
25 as narrowly as possible.

1 THE COURT: That's pretty narrow if it's impossible;
2 right?

3 MR. ANDERSON: Understood, Your Honor. But I don't
4 want to tie my clients down to a broader injunction than need
5 be. It is my understanding as I sit here today that that's not
6 a possibility on the 20th. But, you know --

7 THE COURT: What would you have done if I had granted
8 your motion?

9 MR. ANDERSON: Well, if it proved to be impossible, it
10 wouldn't have happened on the 20th, Your Honor.

11 THE COURT: All right. Would you agree that the panel
12 of the Eleventh Circuit in the *Smith* case forecloses your
13 statute of limitations argument as it would apply not
14 necessarily to the protocol itself but to what they referred to
15 as the emerging pattern of superadding pain?

16 MR. ANDERSON: Well, no, Your Honor. First, because
17 it's not a controlling decision. It has some persuasive
18 authority, but as Your Honor noted, there are some distinctions
19 between that case and this case.

20 For one, Mr. Barber's complaint, the heart of his
21 complaint is about the protocol. He doesn't talk about, you
22 know -- all of his arguments are couched in terms of the
23 failings of the protocol and how it doesn't specify certain
24 qualifications; how it doesn't specify time limits. And he
25 doesn't allege that, like Mr. Miller, I suffer from X, and so I

1 will have less likelihood of getting good venous access. He
2 couches it in terms of the protocol is insufficiently specific
3 in its requirements for who will be doing the needle stick. And
4 that is a claim that has been available to him for a long time.

5 You know, we would rest on the binding precedent from
6 the Eleventh Circuit in other cases that have dealt with
7 challenges to protocols where it's very clear that if a
8 protocol-based challenge was available more than two years ago,
9 then it is time barred.

10 And one important thing to note here that -- I heard
11 some arguments from Mr. Barber's counsel about -- trying to
12 argue for a new tolling based on these -- the allegations about
13 the Miller, Smith, and James executions or preparations for
14 executions, about the time it took. And he notes in his
15 complaint that there's no time limit, and the review didn't
16 establish any time limit.

17 Well, Your Honor, there has been -- there's never been a
18 time limit in a protocol. In fact, you can go back to the Doyle
19 Hamm execution in 2018, which Mr. Miller and some others have
20 relied on but that Mr. Barber does not cite, and that was a two
21 and a half hour execution or attempt -- you know, preparation,
22 attempt for execution. Mr. Hamm was not in the end executed
23 because we were not able to get venous access.

24 But certainly Mr. Barber was aware long ago that there
25 was no time limit in the Alabama protocol and that attempts to

1 gain venous access could go on for longer than apparently the
2 ten minutes that he seems to think is a limit according to his
3 expert. And because that's been available for more than two
4 years, it's clearly time barred, Your Honor.

5 THE COURT: But you understand why the last three
6 executions caused concern --

7 MR. ANDERSON: I do --

8 THE COURT: -- and brings us here.

9 MR. ANDERSON: I do, Your Honor. And you know, I
10 think -- one thing I'd like to say about that is Mr. Barber's
11 counsel seems to be conflating procedures or protocol and
12 personnel. And he says that there were no material changes to
13 the protocol. But as Your Honor has seen from the exhibits
14 we've been referring to today and from the interrogatory
15 responses, there has been -- as Defendant Hamm referred to in
16 his letter to the governor, there has been a significant change
17 in the pool of personnel available for carrying out the
18 preparations for the lethal injection execution.

19 And in this case we have provided to the plaintiff the
20 credentials for four -- actually, I think five personnel, four
21 personnel and an alternate, who have varying degrees of
22 credentials, from paramedic certificates, advanced EMT
23 certificates, nursing licenses.

24 And I would also offer to the Court --

25 THE COURT: So those licensure documents that they

1 discussed, we discussed with the witness earlier, those are the
2 current IV team that would be used for Mr. Barber?

3 MR. ANDERSON: Yes, Your Honor. Those are the current
4 IV team. The ones who -- and I guess, Your Honor, I forget that
5 Your Honor doesn't have before you -- or they haven't been filed
6 with you the voluntary discovery responses. But it's been made
7 clear to Mr. Barber in our discovery responses that the IV team
8 that will be making efforts to obtain venous access in his
9 execution is not the same as the one that took part --

10 THE COURT: I have seen that. Somebody attached it to
11 a document that was filed.

12 MR. ANDERSON: Okay. So I would like to offer to the
13 Court for this hearing Defendants' Exhibit 1, which is an
14 affidavit from Warden Terry Raybon. And I'll provide a copy to
15 opposing counsel.

16 THE COURT: This is something that's not already in the
17 record?

18 MR. ANDERSON: Yes, Your Honor.

19 THE COURT: All right.

20 MR. ANDERSON: If I may approach, Your Honor?

21 THE COURT: You may.

22 MR. ANDERSON: I may need a couple more stickers here.
23 Sorry. In this affidavit Warden Raybon describes the efforts
24 that were undertaken to interview and assess the --

25 Actually, this one doesn't have a staple in it, so

1 that --

2 THE COURTROOM DEPUTY: Okay. Thank you.

3 MR. ANDERSON: Warden Raybon participated in the
4 interviews, that they reviewed the credentials of these
5 individuals, and he does reference the credentials that were
6 produced to the plaintiff in voluntary discovery. In number
7 four, section number four of the affidavit, Warden Raybon says,
8 I recently reviewed the certifications and licenses of the
9 personnel who will be members of the IV team who set the two IV
10 lines necessary to prepare for execution, produced in voluntary
11 discovery and reverified they all have valid and current
12 licenses and certifications.

13 And Warden Raybon also testifies in his affidavit that
14 as part of the interview process, candidates were asked about
15 their relevant experience, licenses, and certifications.
16 Candidates' licenses and certifications were reviewed at that
17 time and ADOC verified that all were current. The candidates
18 selected all had extensive and current experience with setting
19 IV lines.

20 And that's important, Your Honor, because so much of
21 what Mr. Barber has argued today and has presented testimony
22 about from his expert is the specific actions carried out by
23 people involved in previous executions.

24 MR. SPECTOR: Your Honor, can I make an objection?

25 THE COURT: Yes. You need to stand while you're

1 addressing the Court.

2 MR. SPECTOR: Sure. As you know, we've gone through
3 discovery -- expedited discovery in this case. And one of the
4 requests for discovery was information related to the IV team
5 members, and defendants have not previously produced information
6 that's contained in this affidavit that should have been
7 produced before today.

8 THE COURT: What's being produced in this affidavit
9 that was not -- that you asked for that you are saying you
10 didn't get?

11 MR. SPECTOR: Sure. Specifically paragraph three
12 refers to part of the interview process, candidates were asked
13 about the relevant experiences, licenses, and certifications.
14 Candidates' licenses and certifications were reviewed at that
15 time and ADOC verified that they were all current. The
16 candidates all have extensive and current experience with
17 setting IVs. And four is also information that would fall into
18 a request for discovery that we made and did not receive any
19 responsive information reflecting the information contained in
20 this affidavit.

21 MR. ANDERSON: Your Honor, there's a good reason for
22 that, because we objected to those requests pursuant to
23 deliberative process privilege. As Your Honor is aware, there
24 is --

25 You know, we entered into voluntary discovery in this

1 case without requiring the Court's intervention to try to
2 advance this case. And the -- what Warden Raybon is testifying
3 here to is part of that process that the ADOC went through in
4 selecting these people. We objected to the discovery request
5 for this. One, this affidavit didn't exist at the time. This
6 is a result of counsel's work in this case since -- as it's been
7 ongoing. So that would be why it was not produced in discovery.
8 One, it didn't exist, and two, there was a valid objection to
9 that which we waive by putting it into the record.

10 MR. SPECTOR: If I understand counsel's testimony, it's
11 that conveniently at the time he chose to lodge an objection,
12 which we have filed a motion to compel about, and then now he
13 has conveniently waived that objection. If that's the case,
14 then my understanding is he's waived the objection for the other
15 documents related to the deliberative process objection.

16 THE COURT: Is it an interrogatory you're talking
17 about?

18 MR. SPECTOR: Yes, Your Honor.

19 THE COURT: Which interrogatory?

20 MR. BATDORF-BARNES: Your Honor, this objection was
21 lodged both in terms of document requests that requested
22 information related to the vetting procedures for the IV team as
23 well as --

24 THE COURT: Well, Mr. Anderson is saying this document
25 didn't exist until June 29th, so it would have been impossible

1 to produce an affidavit before then. So are we talking about
2 the information contained in the affidavit that you've requested
3 through an interrogatory?

4 MR. BATDORF-BARNES: Yes, Your Honor. We're also
5 talking about an interrogatory that requested exactly that
6 information. And the fact that the document itself --
7 allegations of privilege notwithstanding, information in that
8 document can't possibly be privileged.

9 THE COURT: And Mr. Anderson is saying they're waiving
10 it by giving it to you now.

11 MR. BATDORF-BARNES: Well, they're giving it to us now
12 as a selective waiver of privilege to their advantage. That's
13 using privilege as a sword and a shield simultaneously. They're
14 gaining an advantage from selectively disclosing pieces of their
15 investigation, the conclusions of their investigation, saying
16 that you don't need to worry about the fact that -- you know,
17 these three consecutively botched executions because we did an
18 investigation. But not providing any discovery whatsoever to
19 date about what happened in that investigation unless it is a
20 selective waiver to their benefit, that is not --

21 THE COURT: What in this affidavit indicates that this
22 was part of the investigation process as opposed to a
23 personnel process?

24 MR. SPECTOR: There's a one and a half page letter that
25 Commissioner Hamm authored on February 24th, 2023, and he said

1 part of the -- one of the outcomes of the investigation was
2 vetting new personnel for the IV team.

3 MR. ANDERSON: And, Your Honor, the letter from
4 Defendant Hamm represents the conclusion of one deliberative
5 process and, as you pointed out, a personnel decision subsequent
6 to that. The decision was made to expand the pool of personnel
7 and a subsequent decision was made about which personnel to
8 select. And that's what Warden Raybon's affidavit touches on.

9 MR. SPECTOR: Your Honor, we would ask that this
10 affidavit be stricken from the record.

11 MR. ANDERSON: And we would move to admit the affidavit
12 since we haven't done that, yet, Your Honor.

13 THE COURT: When was the discovery request sent
14 where -- and I'm just speaking about the interrogatory because
15 to the extent that there was a request for production of
16 documents. Because this affidavit was not executed until June
17 29th, it could not have been produced.

18 MR. SPECTOR: June 23rd, 2023.

19 THE COURT: The interrogatory request was sent June
20 23rd?

21 MR. ANDERSON: Our responses were filed June 23rd.

22 MR. SPECTOR: Oh, I'm sorry. That's correct. So our
23 requests were June 7th.

24 THE COURT: All right. I'm going to admit the
25 document. That is a relatively short period of time that this

1 document and this information was withheld or not produced.

2 MR. SPECTOR: And just to be clear, Your Honor, it's
3 the information itself. We don't object to the fact that the
4 affidavit -- it was obviously dated later, but the information
5 was withheld.

6 THE COURT: I understand. And what I'm saying is the
7 prejudice to Mr. Barber receiving this a few days after the
8 responses were filed does not counsel against admission of the
9 information that's probative in this case. The issue of the
10 extent of the waiver is something that you-all can work out in
11 your -- with your discovery disputes, but this is information
12 that's probative in this case. And if the discovery responses
13 were submitted six days prior to the execution of this document
14 and it's being presented today, I'm going to allow it.

15 Although, Mr. Anderson, you should have produced this
16 to the other side as soon as you had the affidavit instead of
17 springing it to them in the middle of a hearing. I understand
18 their anger and frustration over that.

19 MR. ANDERSON: Yes, Your Honor.

20 THE COURT: That seems purposeful.

21 MR. ANDERSON: The biggest thing that this points to
22 and that we've pointed to in our -- both in our motion to
23 dismiss and in our opposition to preliminary injunction is how
24 much speculation is the absolute centerpiece of Mr. Barber's
25 complaint. The complaint --

1 THE COURT: Well, it's not complete speculation. It is
2 based on history. If the last -- if the problems with the last
3 three executions had not occurred, then I think the argument
4 regarding the highly speculative, hypothetical nature of a claim
5 like this would be stronger. However, the claim that Mr. Barber
6 is potentially facing an unconstitutional execution because the
7 last three executions had significant problems, two of them had
8 to be halted, you understand that that does remove a lot of the
9 argument that it's actually speculative.

10 MR. ANDERSON: Correct, Your Honor. But the
11 speculation comes in with his assumption that the review and
12 decisions that were made didn't address those problems. And I
13 think Your Honor kind of pointed to this earlier during
14 Mr. Barber's arguments that we have had something of an
15 interruption in the alleged sequence of failed executions, or
16 botched executions as they've been characterized, in that ADOC
17 did a review and one of the decisions through that review was to
18 retain new personnel.

19 We've produced to Mr. Barber their qualifications.
20 He's presented a witness who's speculated, well, maybe those
21 people don't actually have any IV experience.

22 That's why it was necessary for me to proffer this
23 affidavit at this point to counter that speculation, the
24 speculation that the State would not -- would just pick somebody
25 off the street. That seems to be what the complaint is saying,

1 is that because the protocol doesn't specify what people have to
2 be licensed in, then it could just be anyone. And we produced
3 the appropriate licenses in voluntary discovery to address
4 Mr. Barber's concern that the State might use insufficiently
5 credentialed people. That's part of his complaint. So we tried
6 to address that.

7 Mr. Barber took that as an opportunity to speculate
8 further in live testimony today about, well, maybe those
9 people -- maybe those licenses don't really mean anything.
10 Forget what I said about they could be licensed in anything.
11 Maybe now we should look a little further and see, maybe the
12 State just hired somebody who has the appropriate license that,
13 as my own witness has conceded, authorizes them to perform these
14 procedures, but maybe they really haven't ever done it. So that
15 is --

16 THE COURT: What was the problem accessing an IV line
17 for the last three executions? Was it a physical issue with the
18 three inmates or was it as, apparently, the State has indicated,
19 the time crunch?

20 MR. ANDERSON: Well, I can -- I'm not a witness, Your
21 Honor. I can testify as an attorney that the time crunch is
22 very real and that, you know, we're making last-minute
23 arguments. I argued in the Eleventh Circuit in Mr. Smith's case
24 from a Holiday Inn parking lot in Atmore. So the last-minute
25 time pressure thing is very real.

1 Speaking to medical complications and things of that
2 nature, I couldn't begin to offer any real speculation about
3 that -- or real testimony about that. Strike that.

4 THE COURT: Why has the State not revealed details
5 regarding the investigation?

6 MR. ANDERSON: Well, Your Honor, as we pointed out in
7 our discovery responses, one of the biggest concerns that any
8 department of corrections or state body responsible for
9 executions has is that there are people out there who are very,
10 very opposed to the death penalty and will mount pressure
11 campaigns on suppliers of products, on witnesses, on experts.
12 We've seen all of those things affect the state of Alabama.
13 We've lost a consulting expert for nitrogen based on a pressure
14 campaign when his identity was inadvertently disclosed.

15 So that is a very real concern, that if states -- if
16 sovereign states are going to be able to carry out executions,
17 which the Supreme Court has said in general we can do, one of
18 the things necessary for that is security and confidentiality.
19 It goes to the State's very ability to carry out its duty to its
20 citizens.

21 And I guess maybe that -- that may be a broader answer,
22 but more specifically, disclosing the names of people we spoke
23 to or suppliers we spoke to or individuals who participated in
24 it is all, in our view, exposing people to that sort of pressure
25 that we want to avoid.

1 THE COURT: If this execution is permitted to go
2 forward, would the protocol be followed in the same manner that
3 it has been followed previously? And I'm not just talking about
4 the last three, I'm talking about generally speaking.

5 MR. ANDERSON: There have been 45 successful executions
6 in Alabama by lethal injection. And I would count among that
7 number the Joe James execution, despite some of the hyperbolic
8 claims that have been raised about it. As we pointed out in our
9 submissions to the Court, the very pathologist who was retained
10 by Mr. James' family disagrees vehemently with some of the
11 conclusions that *The Atlantic* and other people have reached
12 about what happened there.

13 So the protocol for -- the protocol has remained
14 largely the same over the years, and we would follow the
15 protocol. Part of that is, you know, entrusting an IV team to
16 obtain access. And the defendants believe that specifically
17 Defendant Hamm and Defendant Raybon of the ADOC have made a
18 responsible effort to review the personnel available and to make
19 sure that they would have a large enough pool of medical
20 personnel there to be able to obtain venous access on
21 Mr. Barber.

22 THE COURT: When you look at the protocol and just
23 based on, I think, past practices or experiences, generally the
24 protocol starts in the morning with how you deal with the inmate
25 during the day with visitations and meals.

1 MR. ANDERSON: That's correct, Your Honor. That's
2 correct.

3 THE COURT: And then so really when you've set a
4 time -- the governor has set a time frame of 30 hours, that's
5 just really six additional hours. Isn't that correct?

6 MR. ANDERSON: Yes, that's correct, Your Honor. It is
7 my understanding -- I want to be very hesitant about what I say
8 because I'm telling -- you know, communicating facts to the
9 Court. But it is my understanding that it is Defendant Hamm's
10 intention to continue starting executions at six p.m., which
11 would -- as you say, that would necessarily be on the --
12 six p.m. on the 20th, continuing to no later than six p.m. -- or
13 six a.m., I'm sorry, on the 21st. And depending -- when the
14 start time actually was would depend on the state of litigation,
15 of course.

16 THE COURT: In your interrogatory responses -- and I
17 mean you, the defendants, the State defendants -- you said no
18 deficiencies were found during investigation, but you're also
19 arguing that the not insignificant change of the IV team has
20 been made. How do you square those two statements?

21 MR. ANDERSON: So it lies in the distinction or the
22 definition of procedures. And I wanted to note -- I made a note
23 to myself earlier that you asked fellow counsel about what does
24 procedures mean. What does that encompass? And he said it was
25 a broad definition. But there was no definition of execution

1 procedures in the interrogatory. I'll tell you, I took it to
2 mean the protocol. What are the -- you know, what is the
3 written procedures we have?

4 Which as they've argued, you know, he's alleged in
5 several places that there's been no material change to the
6 protocol, and there has not been a large change to the protocol.
7 It has been a personnel issue. There has been a significant
8 change with the personnel who will be involved in preparing for
9 the execution. So it's both a larger number of medical
10 personnel and new medical personnel.

11 THE COURT: In response to the motion for preliminary
12 injunction, the defendants attached the autopsy report conducted
13 by -- the second autopsy report conducted by an independent --

14 MR. ANDERSON: Dr. Datnow -- yes.

15 THE COURT: Yes. Doctor.

16 The State's autopsy report is different. How do you
17 explain the difference in the two autopsies with the number of
18 puncture marks particularly?

19 MR. ANDERSON: Experts aren't fungible. We all know,
20 every attorney, everyone who's ever practiced law knows that
21 different experts, reviewing the same facts, can come up with
22 different opinions. I will note that the State's autopsy does
23 not affirmatively identify a number of puncture marks. And
24 Dr. Datnow, as he says in his affidavit and in his autopsy, that
25 he was only able to -- what was the word? What did he say?

1 Conclusively, I think, maybe? Conclusively identify either two
2 or three puncture marks. I think it's just a matter of his
3 choice of phrasing.

4 If the State's autopsy indicated that there were IVs
5 set in both hands or something like that, I wouldn't have a
6 reason to dispute it. I don't have direct knowledge of that.
7 But I would note that no piece of evidence has indicated, you
8 know, dozens of punctures or anything like that.

9 MS. SIMPSON: Your Honor, if I may read from his
10 affidavit.

11 THE COURT: Go ahead.

12 MS. SIMPSON: On Dr. Datnow's affidavit, document 35-1,
13 paragraph 10 on page 2, it says, "I was able to positively
14 identify only two needle punctures."

15 THE COURT: All right. Thank you.

16 Tell me, what is the State's position as to what
17 constitutes the execution? Mr. Barber's attorneys have said
18 they're the longest in history.

19 MR. ANDERSON: Under Alabama law, the State's
20 executioner is Warden Raybon, Defendant Raybon. And it's the
21 State -- our position has always been that the execution begins
22 when all the preparations have been completed and the State's
23 executioner begins dispensing the drugs that will effect the
24 execution.

25 THE COURT: So is that after the public curtain opens

1 and the IV -- after the IV has been set?

2 MR. ANDERSON: Correct, Your Honor. That would be at
3 least shortly after the -- because after the curtain opens, the
4 condemned is given the opportunity to make last words. He's not
5 required to do so. And certainly, you know, I would argue that
6 with regard to the James case, an inmate may also decide not to
7 give last words. Not every inmate does give last words.

8 But that was -- that is when we would say that the
9 execution actually begins is when the drugs begin to be
10 administered. That will be after the death warrant is read
11 and -- that point.

12 THE COURT: Is that anywhere in the protocol?

13 MR. ANDERSON: I don't know if it says the execution --
14 let me take that back. I think it may actually -- pardon me,
15 Your Honor.

16 THE COURT: All right.

17 (Brief pause in the proceedings.)

18 MR. ANDERSON: I'll see if I can answer your question,
19 Your Honor. So, Your Honor, I would point to -- in the redacted
20 protocol on page 9 at subsection K. The protocol provides that
21 the warden will be informed when the condemned is prepared for
22 execution. Which in our reading, I would say that is -- this is
23 after the execution preparations, including setting of the IV,
24 has been carried out. The warden would then be told, he's ready
25 for execution, and that's the point at which they go forward.

1 THE COURT: But you would agree with me that the Eighth
2 Amendment protections exist prior to the beginning of the
3 execution?

4 MR. ANDERSON: Oh, yes, Your Honor. Cruel and unusual
5 punishment is not restricted solely to execution. I would agree
6 with that. I would, however, hurry to point Your Honor to
7 binding precedent from the Eleventh Circuit in -- specifically
8 most recently in *Nance*, addressing whether needle punctures
9 necessary for carrying out an execution constitute an Eighth
10 Amendment violation. And in *Nance*, the Eleventh Circuit found
11 that it did not.

12 And there have been other courts who have reached
13 similar conclusions somewhat recently, in 2018, in *Bible v.*
14 *Davis*, which was a district court decision from Texas. 2018,
15 Westlaw 3068804 at Star 8 where the Court stated that any pain
16 experienced by IV insertion in the top of Bible's hands or by
17 repeated attempts to find a vein elsewhere hardly matches,
18 quote, wanton exposure to objectively intolerable risk, but
19 instead involves, quote, the possibility of pain. Quoting from
20 *Baze* there, Your Honor.

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

25 MR. ANDERSON: Hypothetically, Your Honor, you know, I

1 think that the deciding line is necessity. We heard some
2 testimony earlier about attempting to gain IV access in a
3 hospital setting. You don't stop because you have to do it.

4 You know, hypothetically if an inmate was actually
5 being punctured, quote, all over his body in locations where you
6 couldn't obtain IV access, it wouldn't be necessary. If we
7 obtained IV access and we continued puncturing the condemned,
8 that would not be necessary. But it's the State's position that
9 the attempts to gain IV access necessary -- you know, it's the
10 necessity that really matters.

11 I couldn't possibly speak to the discretion that
12 resides with Defendant Hamm to decide whether it's possible, and
13 we have certainly in previous cases decided to cease efforts to
14 obtain IV access. But I couldn't speak to where that line would
15 be as I stand here right now, Your Honor.

16 THE COURT: Anything further?

17 MR. ANDERSON: If I may, I think -- nothing further,
18 Your Honor.

19 THE COURT: All right. Have you all identified the
20 exhibits from the binder that you would like to admit into
21 evidence?

22 MR. SPECTOR: Yes. Your Honor, it's Exhibits 1 through
23 41.

24 THE COURT: Well, Exhibit 1 is the complaint.

25 MR. SPECTOR: Okay.

1 THE COURT: So like I said earlier, I don't want to
2 admit anything that's already in the record. We don't need to
3 have the complaint in the record twice.

4 MR. SPECTOR: Sure. Can you give us one more minute?

5 THE COURT: Sure.

6 MR. SPECTOR: In the meantime, may I present rebuttal?

7 THE COURT: Yes, please.

8 And I will say, I'm looking through some of these
9 documents. It does appear as though several of them I've seen
10 because they're already in the record. And with an eye towards
11 not over papering this docket for other judges who will be
12 reviewing this case in all likelihood, let's not give them
13 multiple copies of the same document to have to slog through.

14 MR. GREEN: Understood, Your Honor. Jeffrey Green for
15 Mr. Barber, if I might. We will avoid the duplication problem
16 that Your Honor identifies, and we'll supply an additional list
17 and, if necessary, a binder or folio of the exhibits that have
18 been admitted here today as we understand it to both Your Honor
19 and our colleagues on the other side of the podium.

20 THE COURT: All right. So why don't we put on the
21 record, then, that the State defendants do not object to the
22 admission of any of the documents contained in this binder? And
23 then if you want to just file a notice with the Court about
24 which of those exhibits should be entered in the record, I'm
25 happy to do it that way if you need some time. I'll

1 conditionally admit all of them, but let's pare down that list
2 and be specific about which ones are going to be admitted, and I
3 can make sure that they're admitted into the record in a way
4 that's not duplicative.

5 MR. GREEN: We're happy to do that, Your Honor.

6 THE COURT: All right. Thank you. Go ahead.

7 MR. SPECTOR: Thank you, Your Honor.

8 Your Honor, there are several points that I want to
9 address, so I'll address them in turn.

10 The first is that the State still has not produced any
11 evidence or documents or records that rebut the statements in
12 the affidavits of the two registered nurses. The State has also
13 not produced an expert witness to rebut any of the statements
14 that she made on the witness stand today. And in regards to the
15 executions of Mr. Miller and Mr. Smith, the State has yet to
16 produce any evidence, any records, any documents that rebut the
17 statements in those affidavits describing what happened to them.

18 Your Honor, the State mentioned the execution of Doyle
19 Hamm, and my understanding is that the State considers that part
20 of the 45 previous executions. I don't think by any stretch of
21 the imagination that would --

22 MR. ANDERSON: That would be an incorrect
23 characterization, Your Honor.

24 THE COURT: Is it not?

25 MS. SIMPSON: Doyle Hamm was not executed.

1 THE COURT: I think Mr. Hamm passed away while he was
2 incarcerated from an illness, if I remember correctly.

3 MR. SPECTOR: The Eleventh Circuit in *Smith* says that
4 it's the pattern that emerged following the execution of
5 Mr. James and the botched execution of Mr. Miller. So the fact
6 that there was that one-off execution of Mr. Hamm does not
7 establish the pattern.

8 THE COURT: Actually, I think the Eleventh Circuit said
9 it was the pattern emerged at the onset of Mr. Miller's
10 attempted execution.

11 MR. SPECTOR: That's what I'm saying. The pattern was
12 after those two. The Eleventh Circuit did not consider the Hamm
13 execution attempt for purposes of the *Smith* decision.

14 THE COURT: Do you disagree with the State defendants'
15 description of what constitutes the execution? Meaning when the
16 preparations are done for -- the execution doesn't start until
17 the IV has been set?

18 MR. SPECTOR: Yes. We disagree.

19 THE COURT: Okay. And your point, your starting point
20 is when the inmate is placed on the gurney?

21 MR. SPECTOR: Well, the execution itself starts I
22 believe when the inmate is placed on the gurney, but the actual
23 unconstitutional conduct begins when the IV team attempts over a
24 significant period of time, multiple times, to try to establish
25 IV access.

1 THE COURT: I'm just really -- I know the Eighth
2 Amendment applies, no matter at what point we are. I want to be
3 clear about that. I'm just trying to square your statements in
4 your submissions to the Court about the execution, what you're
5 talking about versus what the State may be talking about.

6 MR. SPECTOR: Understood.

7 THE COURT: So go ahead.

8 MR. SPECTOR: Your Honor, the State also pointed to the
9 licenses that purport to be belonging to the current members of
10 the execution team. As you heard from our expert witness today,
11 who has over 50 years of experience in this field, simply
12 because you are licensed doesn't necessarily mean that you are
13 competent at setting an IV line or a central line.

14 I think you're also right to ask the State about
15 speculation, and I don't think this case presents anything of
16 the sort. It's actually based on, as you correctly pointed out,
17 history. There's documented history of what happened in the
18 last three instances. And I will stress the fact that what has
19 been asserted and admitted into evidence in this case continues
20 to be uncontroverted by the State in regards to Mr. Miller's
21 attempted execution and Mr. Smith's attempted execution.

22 And on top of that, in regards to the Joe James
23 execution, the State has still yet to produce any evidence or
24 any documents regarding why Mr. James appeared to be unconscious
25 at the time that the public window was revealed.

1 The State also said that the problem with the last two
2 executions was time crunch. Your Honor, the Eleventh Circuit in
3 the *Smith* decision pointed out that the State in Mr. Miller's
4 execution had 90 minutes, and the State in the *Smith* decision
5 had two hours to set an IV line. So it cannot be that the issue
6 is the time crunch. It is recognized by the Eleventh Circuit
7 itself how much time the State had to set IV lines during those
8 two executions.

9 You also heard from the expert witness today that within
10 that time period, an IV line should be able to be set. So I
11 don't think that the State's representation that it's the time
12 crunch --

13 THE COURT: Well, do you know -- because I don't. Do
14 you know at what point after the appellate courts have ruled,
15 the United States Supreme Court, and the execution has been
16 cleared that the IV is set?

17 MR. SPECTOR: So we know what is in the complaints.
18 And so at least in the Miller case, there was a status hearing
19 after the failed execution, and ADOC represented to Judge
20 Huffaker that there was about 90 minutes from the time that I
21 believe the execution started to when it was called off, from
22 about ten p.m. to I believe she said 11:20, 11:30. And then in
23 the Smith situation I believe he alleges that he was strapped to
24 the gurney at eight p.m., notwithstanding the fact that there
25 was an Eleventh Circuit stay in effect, which I believe,

1 according to his allegations, that was communicated to the
2 State, and that at around ten p.m., I believe, according to his
3 allegations, they attempted to start the execution.

4 THE COURT: So the IV attempts were not made until
5 after the appellate courts had ruled that the execution could go
6 forward?

7 MR. SPECTOR: My understanding, based off of the Smith
8 allegations, is that is correct.

9 THE COURT: Okay.

10 MR. SPECTOR: You also asked the State why it has not
11 revealed details about its investigation. The State, in my
12 opinion, didn't really answer your question. Instead, he said
13 that there's sensitivities around releasing identities of people
14 who are involved in the execution.

15 Your Honor, the State does not dispute that it has not
16 released any formal records or reports about its investigation
17 itself. That is very different. And a report doesn't
18 necessarily need to reveal the identity of people who are
19 involved in the execution.

20 THE COURT: Well, do you have any authority that
21 they're required to reveal a report, draft a report, reveal the
22 contents of its internal investigation? Because, again, there's
23 what's legally required and there's what's -- what people
24 believe would be a best practice.

25 MR. SPECTOR: Sure.

1 THE COURT: Those two things are not necessarily the
2 same.

3 MR. SPECTOR: I don't disagree, and I'm not arguing it
4 is. I think the fact that there was no report and the fact that
5 the State has said that there are no deficiencies found in the
6 procedures speaks to the strength of Mr. Miller's Eighth
7 Amendment claim that he will face substantial risk of serious
8 harm because the same things that have happened in the past
9 three executions will likely occur for his execution.

10 THE COURT: For Mr. Barber?

11 MR. SPECTOR: Yes.

12 THE COURT: Is that based on a credibility issue?
13 You're saying that the State's not credible because they won't
14 reveal the contents --

15 MR. SPECTOR: Well, I think --

16 THE COURT: -- of the investigation?

17 MR. SPECTOR: I think you can draw a credibility
18 argument if you wish, Your Honor, but I think that it also
19 speaks to the fact that the question really is, is he likely to
20 face the substantial risk? And the State hasn't proffered any
21 evidence to suggest that the procedures that they actually
22 followed in the last three executions have changed. So it is to
23 suggest that, yes, he will be substantially at risk of serious
24 harm because they're going to be following the same procedures
25 that caused the last three executions to go awry.

1 THE COURT: Well, the State defendant said it was a
2 significant personnel change; that the IV team is completely
3 different. How is that not -- how does that not cut off the
4 pattern?

5 MR. SPECTOR: Sure. I think two reasons. One is --
6 and I sort of got at this earlier, Your Honor. Simply replacing
7 the members of the IV team but then telling them to carry out
8 the same procedures is not going to result in a better outcome
9 or a different outcome. If you're just swapping in people but
10 telling them to follow the same procedures, the same result is
11 going to occur.

12 Your Honor --

13 THE COURT: Wait. Let me go back. Which procedures
14 are you talking about?

15 MR. SPECTOR: Well, it's both the protocol, but it's
16 also -- we understand procedures to be more --

17 THE COURT: Okay. Well, stop there, then. What's the
18 protocol? What's the aspect of the protocol that you think that
19 if these members of the IV team follow will violate Mr. Barber's
20 Eighth Amendment rights?

21 MR. SPECTOR: Sure. It's the part of the protocol that
22 says the standard procedure for setting an IV access and that
23 there's no -- there's no time limit by which that they -- or
24 there's no limit about the amount of pricks or insertions that
25 could be made on the inmate.

1 THE COURT: But isn't that barred by the statute of
2 limitations? Because that has always been the protocol, at
3 least for the last 24 months.

4 MR. SPECTOR: I don't think so, Your Honor. And the
5 reason why is it's the implementation of that that allowed the
6 claim to accrue. Again I would point you to the *McNair* case in
7 the Eleventh Circuit in which the Court says the facts that
8 become apparent to a reasonably prudent person. So we're
9 arguing it's the implementation of the protocol that has allowed
10 these claims to accrue.

11 THE COURT: Go ahead.

12 MR. SPECTOR: Your Honor, you also mentioned to the
13 State that it's your understanding and it's the State's
14 understanding that even though there's a 30-hour time frame,
15 it's six hours more. I would get back to the point that the
16 *Smith* court made, which is that they repeatedly -- they did
17 reference the amount of time that the State took to attempt IV
18 access on the two previous individuals. So I don't think the --
19 I don't think the fix here is more time. If anything, all the
20 evidence that continues to be uncontroverted in this case would
21 be that it should be less time.

22 My understanding, Your Honor, is that the State says
23 that they submitted the autopsy report conducted by Mr. Datnow,
24 Dr. Datnow. If I'm looking at things correctly, I'm only seeing
25 the affidavit. I don't see a report.

1 THE COURT: I've seen the autopsy report. It's
2 document 35-1.

3 MR. SPECTOR: Is it? Okay.

4 THE COURT: It's in the record.

5 MR. SPECTOR: Okay. Thank you.

6 Your Honor, they also -- the State also says there's
7 nothing in the record to suggest that there's dozens of
8 punctures. There actually are. It's the affidavits of the two
9 inmates who experienced that. Again, I will stress this, there
10 is nothing in the record to suggest that that is incorrect or
11 wrong. The State still refuses to produce any evidence
12 suggesting otherwise.

13 The State also called the execution of Joe James -- I
14 believe they said that -- I don't want to mischaracterize what
15 the State said in regard to Joe James, but let me stress what
16 happened in Joe James. And Mr. Barber firmly believes and at
17 least the Eleventh Circuit seems to also conclude that there
18 were issues in that execution. That seems to be especially with
19 the footnote that the Eleventh Circuit included saying that's a
20 verifiable fact for how long he spent behind the curtain. I
21 don't think any -- I don't think the Eleventh Circuit believes
22 that there were no issues there.

23 THE COURT: Well, but it's a verifiable fact of how
24 long he was behind the curtain, but there's not a verifiable
25 fact about what happened behind the curtain.

1 MR. SPECTOR: Correct. But we do know from at least
2 the State's autopsy that the person conducting the autopsy saw
3 that there were puncture marks at various points in the
4 individual's body.

5 THE COURT: But are you -- and I've only just had a
6 chance to view it quickly. Is there anywhere in that document
7 where the number of puncture marks -- where is that in that
8 document?

9 MR. SPECTOR: Exhibit 41. And if you looked at page 3,
10 the doctor -- the person who is drafting this report identifies
11 the various places where there was intravenous access.

12 THE COURT: Are you talking about the heading Evidence
13 of Medical Equipment?

14 MR. SPECTOR: Yes, Your Honor.

15 THE COURT: So we've got intravenous access to the
16 medial left antecubital fossa and dorsum of the right foot?

17 MR. SPECTOR: Uh-huh.

18 THE COURT: So is that one or is that --

19 MR. SPECTOR: I believe that's two, Your Honor.

20 THE COURT: All right. Additional needle puncture
21 marks in the antecubital fossa, wrists and hands. How many is
22 that?

23 MR. SPECTOR: Well, the author uses the plural word for
24 wrists and hands, so that's two for each. And an additional one
25 for the antecubital fossa. It could be the case that there's a

1 way to read it so that the antecubital fossa wrists is plural,
2 and that's a single part of the body, and that -- but it is in
3 the plural, so that would suggest two just right there.

4 Your Honor, you were also asking about --

5 THE COURT: Well, I want to go back. So antecubital
6 fossa and dorsum of the right foot. That's the foot, wrists,
7 and hands?

8 MR. SPECTOR: Yes.

9 THE COURT: That's three parts of the body.

10 MR. SPECTOR: Yes. But -- exactly. So there are
11 multiple parts of the body identified here.

12 THE COURT: Uh-huh. Three.

13 MR. SPECTOR: But it's not the case that it's -- just
14 because there's three parts of the body that there were only
15 three needles.

16 THE COURT: No, I understand that. Okay.

17 MR. SPECTOR: The last thing I would like to point out,
18 Your Honor, is that the State has put heavy reliance on a case
19 called *Nance*. As we describe in our opposition brief to the
20 motion to dismiss and in our reply brief to the motion for
21 preliminary injunction, *Nance* is completely distinguishable.

22 For one, it had nothing to do with the State of
23 Alabama. There were no allegations in that case about the State
24 of Alabama. It had to do with the State of Georgia, and the
25 plaintiff in that case did not allege a history of protracted

1 efforts.

2 Two, the Eleventh Circuit did not foreclose the claim
3 that it recognized in *Smith*. It didn't even address *Smith*.

4 And most notably, Your Honor, and this is something
5 that we plan on filing after this case, our understanding today
6 is that in the Kenny Smith case, which is currently pending in
7 front of Judge Huffaker, he denied the State's motion to dismiss
8 today, and he dispenses with the *Nance* case specifically and
9 addresses why that case does not govern. We intend to file
10 Judge Huffaker's order as soon as we're able to, but our
11 understanding is that that order came out today.

12 THE COURT: All right. And that's also persuasive?

13 MR. SPECTOR: Yes, I believe so. And the reason why is
14 because it deals with an extremely similar set of facts, and the
15 State is making very, very similar arguments in that case.

16 THE COURT: And that's on the motion to dismiss?

17 MR. SPECTOR: I believe so. Yes, Your Honor.

18 THE COURT: Mr. Smith has not been set for an
19 execution, has he?

20 MR. SPECTOR: I would defer to the State.

21 MR. ANDERSON: No, Your Honor.

22 THE COURT: Based on the information you've heard
23 today, do John Does one through three -- do you still have
24 claims against those individuals? It looks like you've named
25 those as the prior members of the IV team. Since you're only

1 seeking injunctive relief here, would they still be proper
2 parties?

3 MR. SPECTOR: I just want to see exactly how they were
4 defined, if you don't mind.

5 THE COURT: Document 1, page 9, paragraph 35.

6 MR. SPECTOR: Your Honor, if I'm reading this
7 correctly, it says, Defendant John Does one through three are
8 members of the IV team who set the two IV lines required for
9 lethal injection execution in Alabama.

10 It doesn't say that these individual John Does were the
11 same John Does --

12 THE COURT: The previous?

13 MR. SPECTOR: Yes.

14 THE COURT: So they're not the ones who previously set
15 the IV lines, they're the ones who would set the IV lines for
16 Mr. Barber?

17 MR. SPECTOR: Correct.

18 THE COURT: Okay. All right. Anything further?

19 MR. SPECTOR: I just want to reserve something for the
20 record. I understand that you admitted the affidavit of
21 Commissioner Hamm. Not contesting that. We would just reserve
22 our request to cross-examine Commissioner Hamm. We continue to
23 object to that admission and would reserve our right to
24 cross-examine him since this was the first time we learned of
25 his statements in his affidavit and the information contained

1 therein.

2 THE COURT: All right. Your objection is noted.
3 Anything further?

4 MS. SIMPSON: Your Honor, to clarify the record, that
5 was the affidavit of Warden Terry Raybon and not Commissioner
6 John Hamm.

7 MR. SPECTOR: Still -- yes.

8 THE COURT: Same objection, different person.

9 MR. SPECTOR: Exactly.

10 THE COURT: Understood. All right.

11 Anything further from either side?

12 MR. ANDERSON: No, Your Honor. Thank you.

13 THE COURT: Go ahead, Mr. Green.

14 MR. GREEN: If I might very briefly.

15 We have a little bit of a conundrum with respect to the
16 discovery disputes here. And I understand that Your Honor wants
17 to send us to the magistrate to do it, but our respectful
18 position is that we are in -- and as Judge Huffaker said today,
19 we are in a position where there is a substantial risk to our
20 client, Mr. Barber.

21 The State has offered only the self-serving affidavit
22 of the warden today to say that things will be different. But I
23 would point out to Your Honor that the State hasn't, for
24 example, said that the team that executed James Jones and the
25 team that tried to execute Alan Miller and the team that tried

1 to execute Kevin Smith were all the same team, and now we've got
2 a new team.

3 We don't know whether Jones' team was different than
4 Miller's team was different than Kevin Smith's team. So it
5 could be that the State's offered, you know, what I would
6 respectfully call a nothing burger in terms of saying, we've got
7 new paramedics and new EMTs to execute Mr. Barber. That's small
8 consolation. To be honest with you, given the self-serving
9 nature and late arriving nature, we would maintain that it is no
10 consolation whatsoever to us.

11 And in order for the State to demonstrate that it's
12 capable of meeting the constitutional standard in a posture
13 where it has demonstrated, at least according to Judge Huffaker,
14 that there is a present substantial risk, we need more
15 discovery. And respectfully, I think Your Honor would want to
16 have some reassurance based upon additional information about
17 what the State did during its investigation and about what the
18 State intends to do with Mr. Barber's execution that reduces or
19 mitigates that risk.

20 And I don't know how we're going to get to the
21 magistrate judge before July 20th. And then we're going to have
22 to get back in front of Your Honor in order to say, this is what
23 we got from the State. Either we have problems with this, too,
24 or we don't have problems with it. But we're in a time crunch.

25 And I want --

1 THE COURT: Well, if the State had answered the
2 interrogatory with the information that's contained in the
3 affidavit, wouldn't you be in the exact same position you are
4 right now?

5 MR. GREEN: I think so, Your Honor, in that sense.

6 THE COURT: So you wouldn't have cross-examined him if
7 that response had been in response to an interrogatory.

8 MR. GREEN: Certainly we would have asked to
9 cross-examine him. We would have sought a deposition of him.

10 THE COURT: Right. I'm just saying -- I want to make
11 clear for the record, I've admitted the affidavit. In light of
12 the fact that -- had they given that same response in response
13 to an interrogatory a few days ago, we would be in the same
14 exact position today as we were with the submission of the
15 affidavit. As opposed to striking it, at that point they could
16 go and just say, okay, well, we're going to update our
17 interrogatories to reflect that answer. We would still be back
18 here. I know time is of the essence. So that's why I ruled the
19 way that I did, was to expedite what was probably inevitable.

20 But at the same time, if you want to discuss the
21 aspects of your discovery, I'm happy to do it today in an effort
22 to expedite things and to -- in civil cases our practice is our
23 magistrate judges handle all of our discovery problems for us.
24 I have the preliminary injunction and the motion to dismiss to
25 handle. But if there's something that you're saying I have to

1 decide quickly because it is necessary to my ruling on those
2 things, I'm happy for you to discuss them today or even, better
3 yet, allow both of you to stay in the courtroom and work out
4 those problems. But to the extent that you're at an impasse, if
5 you want to argue that now, I'm happy to hear it.

6 MR. GREEN: Well, and respectfully -- and I don't want
7 to delay the Court personnel and Your Honor especially, but I do
8 think we need to do that. Because the State -- and I say this
9 charitably. The State has said they're not going to do it
10 without an order. So that's where we are.

11 THE COURT: All right. If you're entitled to an order,
12 let's hear what those requests are that you think will get us
13 there.

14 MR. GREEN: Thank you, Your Honor.

15 MR. BATDORF-BARNES: Thank you, Your Honor.

16 Your Honor, I think the importance of the discovery
17 dispute here goes to the heart of this -- the substance of the
18 claims because what the defendants are asking this Court to do
19 is to look at the investigation that was done with the
20 backdrop --

21 THE COURT: Let's short -- let's streamline. I'm
22 looking at the motion to compel. What are you saying the State
23 is withholding informationwise that you are entitled to?

24 MR. BATDORF-BARNES: The State has produced almost
25 nothing in discovery thus far. They've produced 63 documents.

1 They withheld an additional 170 documents on the basis of
2 discovery.

3 THE COURT: On the basis of privilege?

4 MR. BATDORF-BARNES: On the basis of privilege.

5 And from the log that they have provided and the
6 documents they have provided, those documents indicate serious
7 deficiencies with the investigation that was done. And they are
8 relying on this investigation to create a stop. Right? We have
9 three consecutive botched executions. Then they say there's
10 this interceding investigation, and that's why we don't need to
11 worry. That's why this pattern is less important. There have
12 been changes that have been made. But we have received nothing
13 on those changes. We've received nothing on that investigation.

14 And to just give an example, request for production
15 number 14, we asked for any documents that are related to the
16 rehearsals of the execution procedure that were done. They
17 produced zero documents, and their privilege log reflects an
18 additional zero documents on that.

19 So that tells us that this rehearsal that they
20 apparently did that is part of what is supposed to ensure that
21 the procedure -- that the execution proceeds smoothly, no
22 documents exist. That creates serious concerns around the
23 investigation unless there are additional documents out there
24 that are also being withheld on the basis of confidentiality.
25 They haven't made that clear to us.

1 THE COURT: So if they did a rehearsal and didn't
2 document that, that would not satisfy you?

3 MR. BATDORF-BARNES: I think it's -- I think there
4 are -- if that were the case, then they could have answered as
5 such in their interrogatories.

6 They also failed -- we requested in our interrogatories
7 that they describe the results of those rehearsals. They
8 provided no answer, no substantive answer whatsoever. They
9 simply said, those rehearsals occurred. We asked for what they
10 showed. We know nothing about this investigation effectively at
11 this point.

12 The first information that we received to date about
13 who these people are on the IV team -- what do they have other
14 than that they have some certifications, what are their
15 backgrounds, have they ever set an IV before in their life --
16 was today when we received that affidavit. They flatly refused
17 to provide any interrogatory answer whatsoever on the basis of
18 confidentiality and privilege, which, of course, an answer to
19 that interrogatory could be crafted without invading a
20 privilege. Of course there are facts which could have been
21 given to us about what their procedures are for selecting this
22 IV team without invading a privilege. And yet they flatly
23 refused to do so.

24 And what they appear to be doing is playing a have your
25 cake and eat it too game where they're selectively releasing

1 conclusions related to their investigation. They're selectively
2 releasing pieces of information, in this case delayed pieces of
3 information, sandbagging us with these pieces of information,
4 that allow them to paint a picture that they did an
5 investigation without allowing for any sort of verification or
6 investigation into what that investigation entailed and whether
7 there was any robustness to it whatsoever.

8 We have no idea right now what that investigation
9 looked like. We've received no documents on it. And frankly,
10 the privilege claims that they have made are ridiculous.
11 They're making broad sweeping privilege claims that could not
12 possibly apply.

13 For instance, they've alleged work product privilege in
14 response to every single interrogatory for which they have
15 alleged any sort of privilege. And work product is, of course,
16 not, generally speaking, a privilege which can be applicable to
17 an interrogatory response. It's not a tangible thing. It's not
18 a document.

19 They are throwing privilege allegations at the wall and
20 seeing what sticks in order to, it appears, delay the documents
21 from being produced until it's too late. And it has looked like
22 a bad faith effort thus far, and what we've seen -- what we saw
23 with the affidavit that was released today suggests that even
24 more strongly.

25 And frankly, with respect, Your Honor, I don't believe

1 this Court should credit anything with respect to this -- the
2 investigation that was done as a reason to believe that anything
3 will be different this time because it has been completely
4 untested. And it's been untested because of their discovery
5 failures. And their discovery failures have every appearance of
6 bad faith. So if we --

7 MR. JOHNSON: Your Honor, would it help if I should
8 respond for a second for the State to the specific interrogatory
9 that --

10 MR. GREEN: Henry, you need to turn your mic on.

11 MR. JOHNSON: Can you hear me now?

12 THE COURT: That's better. Yes.

13 MR. JOHNSON: Apologize, Your Honor.

14 Very briefly. Opposing counsel has been I believe
15 talking about interrogatory number eight, which Your Honor I'm
16 sure has read it, "Identify the results of the multiple
17 rehearsals of our execution process that Defendant Hamm
18 referenced in his letter to Defendant Ivey dated February 24,
19 2023."

20 Defendants did object and assert several privileges.
21 However, defendant also responded to that by saying -- and this
22 is document 45-3 at page 9 at the top right: Without waiving
23 these or any other privileges, defendants respond as follows:
24 Rehearsals for executions following Alabama's lethal injection
25 protocol were carried out.

1 That is the response to that interrogatory. I mean, I
2 don't understand. I mean, I can elaborate simply by saying
3 they're practicing and they're getting better every day. I
4 mean, I don't understand -- we've responded to the way that that
5 interrogatory -- I mean, it's privileged, but I can say I don't
6 understand what the results of the multiple -- what documents --

7 I think Your Honor may understand what I'm saying. The
8 way that interrogatory is phrased is nonsensical. What do you
9 mean, the results? Identify the results of practices?

10 So we have acted in good faith. We are continuing to
11 act in good faith. We entered this voluntarily, and we're doing
12 our best.

13 And, again, we also are acting mindful of the well
14 settled precedent from the Eleventh Circuit, going back to 1997,
15 the case Chudasama, C-H-U-D-A-S-A-M-A, versus Mazda Motor
16 Corporation. It's 123 F.3d 1353, Eleventh Circuit, 1997. The
17 Eleventh Circuit -- and this remains good law and has been cited
18 repeatedly by the Eleventh Circuit -- that while district
19 courts, of course, have discretion to manage their dockets,
20 resolution -- the exact quote -- it's at pinpoint cite 1367 --
21 "Facial challenges to the legal sufficiency of a claim or
22 defense such as a motion to dismiss based on failure to state a
23 claim for relief should, however, be resolved before discovery
24 begins. Such a dispute always presents a purely legal question.
25 There are no issues of fact because the allegations contained in

1 the pleading are presumed to be true. Therefore, neither the
2 parties nor the Court have any need for discovery before the
3 Court rules on the motion."

4 And I'll just cite one other case because it's the
5 most recent one that I found that's published, *Isaiah v. J.P.*
6 *Morgan Chase Bank*, 960 F.3d 1296, Eleventh Circuit, 2020. The
7 Court again says the same thing, basically just quoting itself
8 at pinpoint cite 1308, 1309. "Facial challenges to the legal
9 sufficiency of a claim or defense, such as a motion to dismiss
10 based on failure to state a claim for relief, should be resolved
11 before discovery begins."

12 That said, we did engage voluntarily. But we stand on
13 the Eleventh Circuit case law.

14 And to the extent that we're dealing with this motion
15 to compel, you know, we would still argue, Your Honor, that the
16 proper course is for resolution on the dispositive motions, one
17 of which we have filed, and then we can address discovery. But,
18 I mean, we're into the minutiae now of the discovery. I mean,
19 we have acted in good faith, and we have voluntarily turned over
20 what we can. And that's all I can say on that.

21 THE COURT: What's your response to that?

22 MR. BATDORF-BARNES: My first response to that is this
23 is at a preliminary injunction hearing. And evidence is sought,
24 and we have sought through discovery evidence on issues of fact
25 in connection with a preliminary injunction. I think that's

1 very different from the purely legal questions that are at issue
2 in a motion to dismiss. I don't see the relevance of that.

3 THE COURT: Would you ordinarily be entitled to do
4 discovery on a motion for preliminary injunction? I'm not
5 saying -- once the State voluntarily submitted to discovery,
6 they have an obligation to answer truthfully.

7 I am looking at that interrogatory: "Identify the
8 results of the multiple rehearsals of our execution process."

9 MR. BATDORF-BARNES: Your Honor --

10 THE COURT: I don't see that their answer is deficient.

11 MR. BATDORF-BARNES: Your Honor, if I may, I used that
12 as an example to point back to an RFP in which no documents were
13 produced, but that's not the only interrogatory answer where no
14 information was provided.

15 Defendants provided no description whatsoever, as
16 discussed previously, when asked what the vetting process for
17 the IV team is. They provided nothing in response to that
18 interrogatory except their objections on the basis of privilege
19 and confidentiality. They refused in their interrogatory to
20 provide any name of any member of the IV team, and they refused
21 to identify any of the execution procedures from other states
22 that ADOC had reviewed as part of its investigation. For each
23 of those they provided no answer whatsoever.

24 And if I may, Your Honor, I would request that we be
25 able to present in front of a magistrate judge tomorrow if that

1 is at all possible.

2 I would also like to say that defendants have put
3 forward 140 privilege log entries where the privilege claimed
4 involves at least in part deliberative process privilege. And
5 deliberative process privilege in particular is a qualified
6 privilege that may be overcome where the parties' need for
7 discovery of the information outweighs the State's interest in
8 withholding that information. And the factors that courts
9 consider in such a claim I believe all favor disclosure in this
10 case.

11 And because of the fact that it is qualified
12 privilege, an in camera review, as courts have held, is
13 particularly appropriate. And in order for us -- that is the
14 privilege that they have raised in order to hide this
15 investigation.

16 What happened in this investigation? That is the core
17 of this case, is what happened in this investigation that
18 they're saying is the reason we don't need to worry about this
19 pattern of failed executions. And given the importance of that,
20 given the importance of what that investigation entailed, we
21 think it's very important that the Court conduct an in camera
22 review of the documents that have been withheld on the basis of
23 deliberative process privilege. It's very -- it would be very
24 difficult to evaluate otherwise what the investigation entailed.

25 MR. ANDERSON: Your Honor, if I may respond briefly.

1 THE COURT: Go ahead.

2 MR. JOHNSON: Deliberative process privilege and
3 weighing that --

4 THE COURT: Can you speak in the microphone, please?

5 MR. ANDERSON: Regarding deliberative process privilege
6 and the weighing whether the plaintiff needs the information
7 more than the defendant needs to keep it secret, one thing I
8 would point out is, again, this case is about -- his allegations
9 are about who is going to be putting needles into his arms and
10 other parts of his body when he's executed. That is what it is
11 about. It's not about the process. The process is a red
12 herring. What matters for him is -- and what matters to his
13 allegations is who is going to be doing the work and what their
14 qualifications are. We have provided licenses voluntarily to
15 try to allay his concerns in that regard, and it's not been
16 satisfactory to him, not surprisingly. But he has no need
17 for -- or very little need for anything regarding the
18 deliberative process that led to that personnel change. What
19 matters for the claim of the Eighth Amendment violation is who
20 is going to be doing the work, and we've provided that
21 information.

22 MR. BATDORF-BARNES: I'd just like to push back on
23 that, that this claim is about who pokes Mr. Barber with the
24 needle, because that's not what this claim is about. This claim
25 is about whether Mr. Barber suffers a substantial risk of

1 superadded pain. And what we have seen is that we have seen
2 three instances where superadded pain occurred as part of the
3 execution, the totality of the execution process. We've seen
4 that occur three times in a row. Now they say there was an
5 investigation. You don't need to worry anymore. We changed out
6 the IV team. We learned for the first time anything of
7 substance about the IV team today, but it is as yet untested.

8 THE COURT: Didn't you already have their
9 certifications?

10 MR. BATDORF-BARNES: We had their certifications. I
11 don't consider that something of substance. All we know is that
12 they received an EMT certification.

13 Defense counsel asked a good question earlier: Does
14 somebody who gets an EMT certification usually work in the
15 medical field? We don't know that answer. We don't know
16 whether that person works in the medical field.

17 He asked, how many IVs has this nurse that he's
18 provided this certification done? I have no idea because I have
19 not received that information until -- and even the affidavit
20 that was provided today doesn't provide that information. It
21 provides a piece of untested information. And that is what
22 they're relying on to create this break between a series, a
23 pattern of superadded pain, and Mr. Barber's execution.

24 And the process that they underwent as part of that
25 investigation -- if the investigation is something that matters

1 from their perspective, and it appears to as far as their
2 argument that there is no substantial risk here because we
3 looked into it and we investigated it, then they can't just give
4 us the conclusion of the investigation and say, trust us based
5 on only the conclusion that we reached, but also -- which is --
6 they can't self-servingly give us just the conclusion and then
7 say, you're not allowed to look at any of the process for how we
8 got there to determine that, in fact, there were no issues in
9 the execution procedure more broadly.

10 THE COURT: Anything further on the motion to compel?

11 MR. BATDORF-BARNES: No, Your Honor.

12 THE COURT: Anything further from the State?

13 MR. JOHNSON: No, Your Honor.

14 THE COURT: All right. I have your arguments. Thank
15 you. To those of you who have traveled, safe travels home. I'm
16 hearing some rain, so welcome to our weather patterns.

17 (Proceedings concluded at 5:32 p.m.)

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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 10th day of July, 2023.

/s/ Patricia G. Starkie
Registered Diplomat Reporter
Certified Realtime Reporter
Official Court Reporter

PATRICIA G. STARKIE, RDR, CRR, OFFICIAL COURT REPORTER
U.S. District Court, Middle District of Alabama
One Church Street, Montgomery, AL 36104 334.322.8053

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

JAMES EDWARD BARBER,

Plaintiff,

v.

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

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.

**STATE OF ALABAMA
COUNTY OF JEFFERSON**

AFFIDAVIT OF TERRY RAYBON

Before me, the undersigned notary, personally appeared Terry Raybon, who after being duly sworn did depose and say:

1. My name is Terry Raybon. I am over nineteen years of age, and I am of sound mind. I am currently the Warden of Holman Correctional Facility and am statutorily charged with carrying out executions in the State of Alabama.
2. After Commissioner Hamm notified Governor Ivey that the Alabama Department of Corrections (hereinafter “ADOC”) had concluded its review of Alabama’s lethal injection procedures, I participated in the

interviews with candidates for the expanded pool of medical personnel discussed in Commissioner Hamm's February 24, 2023 letter to Governor Ivey.

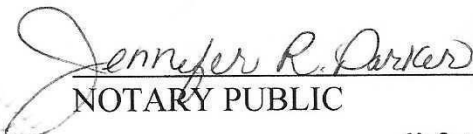
3. As part of the interview process, candidates were asked about their relevant experience, licenses, and certifications. Candidates' licenses and certifications were reviewed at that time and ADOC verified that all were current. The candidates selected all had extensive and current experience with setting IV lines.
4. I have recently reviewed the certifications and licenses of the personnel who will be "members of the IV Team who set the two IV lines" necessary to prepare for an execution, produced to Plaintiff in voluntary discovery, and have re-verified that they remain valid and current. (Doc 1 at 9.)
5. Those personnel did not participate in the preparations for any of the scheduled executions discussed in Mr. Barber's Complaint, *i.e.* those of Mr. James, Mr. Miller, or Mr. Smith. (Doc 1 at 14-18.)

Further affiant sayeth not.



Terry Raybon
Warden, Holman Correctional
Facility

Subscribed and sworn to before me on this the 29th day of June, 2023.



NOTARY PUBLIC

My Commission Expires March 26, 2024

My commission expires _____.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO.: 22-12242

JAMES EDWARD BARBER,

Plaintiff/Appellant,

vs.

GOVERNOR OF THE STATE OF ALABAMA, ET AL.,

Defendants/Appellees.

REMOTE PROCEEDINGS BEFORE THE HONORABLE

WILLIAM H. PRYOR, JR.
ELIZABETH L. BRANCH
ROBERT J. LUCK

DATE TAKEN: JULY 17, 2023

TRANSCRIBED BY: DELCI DETTERMAN

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P R O C E E D I N G S

THE BAILIFF: Hear ye, hear ye, hear ye. The United States Court of Appeals for the Eleventh Circuit is now open according to law. God save the United States and this Honorable Court.

JUDGE PRYOR: Good afternoon, Counsel. Judges Branch and Luck and I appreciate you making yourselves available on such short notice to have oral argument.

So we'll get right to it and I will call the case for the benefit of the recording. It's Number 22-12242, James Edward Barber, Petitioner/Appellant, vs. Governor of the State of Alabama, et al., Respondents/Appellees.

Counsel for Mr. Barber, you may begin when you're ready.

MS. KLEBANER: Good afternoon. May it please the Court. Mara Klebaner from Sidley Austin for Appellant James Barber.

Mr. Barber's case presents exactly the conditions that the Supreme Court has articulated are required to succeed on an Eight Amendment method of execution claim.

First, there is uncontroverted evidence that Mr. Barber faces a substantial risk of serious harm.

JUDGE PRYOR: Before you get to the merits of

1 the argument, the appellees argue that Mr. Barber is not
2 entitled to a stay of execution because he unreasonably
3 delayed seeking relief in federal court.

4 They say that he had all the information
5 necessary to file this claim no later than November 17,
6 2022, which is when Mr. Smith's execution was halted.

7 So how do you explain the fact that he did not
8 file in federal court until May the 25th of 2023, and
9 then the rest of the timeline that brings us up to
10 today?

11 MS. KLEBANER: Sure. Yeah. I would be happy
12 to talk about timing in this case and to address what I
13 think may be the Court's concern here.

14 This is not a lying in wait claim that was
15 intentionally brought at the eleventh hour. What
16 happened is, Alabama botched three executions in a row
17 last year, then imposed a moratorium and started an
18 investigation into lethal injection executions to remedy
19 its problems.

20 Mr. Barber did not know that he was next in
21 line for execution in Alabama until February 24th of
22 this year, when the State moved Alabama Supreme Court to
23 set his execution warrant on the same date that it
24 announced it was ending its moratorium and
25 investigation.

1 JUDGE LUCK: Counsel, why does that matter?
2 In other words, there's no requirement, as I understand
3 under the statute of limitations or for bringing it,
4 that he has to have a pending execution warrant.

5 If he knew the facts, and the facts accrued,
6 and I think you and I would all agree that, at least at
7 the latest, it was November of 2022 that his claim
8 accrued. We can agree on that, and that's when the
9 claim accrued, and that seems to be how I read Nance.
10 Then, why is it not a delay, even if he was waiting for
11 his turn to come up?

12 MS. KLEBANER: Understood. So in this case,
13 there were a very unusual circumstance, given the
14 moratorium and the investigation.

15 Mr. Barber and his legal team did not know if,
16 at the end of this moratorium and investigation, the
17 State would continue to attempt lethal injection
18 executions or if it would move on to the available
19 alternative of nitrogen hypoxia, given the problems it's
20 been having with lethal injection.

21 So in that interim period, when it wasn't
22 clear how or whether the State would proceed with
23 executions, it did not make sense for Mr. Barber to
24 bring a claim based on lethal injection executions.

25 JUDGE LUCK: Counsel, that's a little hard to

1 believe, given the state of Alabama law.

2 I would imagine that if the State had come
3 back and said, you know what, we're doing away with
4 lethal injection and we're forcing everybody now, even
5 though you explicitly chose not to, to use nitrogen
6 hypoxia, I imagine we'd be here, but be here under very
7 different circumstances.

8 And so, it just seems to me that if Alabama
9 law required lethal execution, and it did, and it only
10 accepted it if it was an affirmative election for
11 nitrogen hypoxia, which your client, different than
12 about 50 or so others, explicitly did not select, then
13 it seems to me that wouldn't a careful litigant want to
14 litigate that claim as soon as possible if they knew
15 that claim accrued?

16 MS. KLEBANER: Yes, Your Honor. And to
17 clarify, Mr. Barber filed a motion in opposition to the
18 State's motion to set his execution date in the Alabama
19 Supreme Court in September of 2022. So as soon as he
20 saw what happened in Mr. James's botched execution, he
21 jumped on his rights in the Alabama Supreme Court.

22 There was a period of time, you're right, when
23 the State was investigating its issues with legal
24 injection, that Mr. Barber could have brought a claim
25 but didn't, given that he had litigated it in the

1 Alabama Supreme Court and the State had withdrawn its
2 motion for his execution date from the Alabama Supreme
3 Court.

4 JUDGE PRYOR: Just one more thing about
5 timing, and then we can move on. You suggest in your
6 briefing that Governor Ivy caused the time crunch by
7 seeking the execution date when she did, but that didn't
8 affect when you chose to file, right, because it was
9 after May 25th?

10 MS. KLEBANER: Well, Your Honor, just for a
11 little context on that point, as soon as the State moved
12 to set an execution warrant for Mr. Barber in the
13 Alabama Supreme Court on February 24th, Mr. Barber
14 immediately began litigating very similar merits to the
15 claim that he's litigating in this Court in the Alabama
16 Supreme Court.

17 So he filed a motion for a stay of execution
18 based on the pattern of botches. He filed a motion for
19 discovery, and he requested other relief.

20 JUDGE LUCK: But Counsel, you agree with me
21 there's no exhaustion requirement with regard to this,
22 at least with regard to a 1983 Eight Amendment claim,
23 correct?

24 MS. KLEBANER: I would agree with you, Your
25 Honor. The state of Alabama has argued otherwise in

1 Federal District Court, but I agree with you. There's
2 no exhaustion requirement. It was possible for us to
3 have filed in District Court.

4 JUDGE LUCK: Why wouldn't you? Why not just
5 bring both in February and just say, hey, District
6 Court, we're litigating this below, hold onto this for a
7 moment?

8 I can't imagine any district court not staying
9 it or going on parallel tracks, given where this thing
10 was headed.

11 MS. KLEBANER: Well, in the circumstance that
12 we had filed a lawsuit based on lethal injection and
13 then effectively immediately asked for a stay, I think
14 we would be in a very similar position to what we are in
15 now, which is that discovery could really only start
16 happening once the State concluded its investigation and
17 its moratorium.

18 And that timeline is what the timeline is now
19 because of Governor Ivy's decision to set the execution
20 timeframe to begin when it does.

21 So just days after Mr. Barber filed his
22 lawsuit in the Middle District of Alabama, Governor Ivy
23 decided to set an execution date that left less than two
24 months for litigation.

25 The State manufactured this emergency, and it

1 would be perverse to punish Mr. Barber for the
2 Governor's decision.

3 Governor Ivy's choice of execution date was an
4 attempt to take advantage of Supreme Court precedent
5 that frowns upon last minute court challenges, and it
6 was an attempt to pull the rug out from federal review
7 of this extremely serious constitutional problem.

8 If there are no further questions on delay --

9 JUDGE PRYOR: Yes, you may move on. Thank
10 you.

11 MS. KLEBANER: Okay. Thank you. As I was
12 saying, this case presents exactly the factors that the
13 Supreme Court looks for in an Eighth Amendment method of
14 execution claim.

15 First, there's uncontroverted evidence that
16 Mr. Barber faces a substantial risk of serious harm.

17 Second, there is equally uncontroverted
18 evidence that there is an alternative available method
19 of execution that substantially reduces the risk of
20 harm; that's nitrogen hypoxia.

21 Third, with respect to a stay, and as we were
22 just discussing, the equities weigh in Mr. Barber's
23 favor. The emergency nature of these proceedings is not
24 Mr. Barber's fault.

25 I intend to elaborate on all three points, but

1 at the outset, I want to highlight that there is no
2 dispute about one of them. Nitrogen hypoxia is an
3 available alternative, and the State does not dispute
4 that.

5 I'll start with the first point, risk of harm,
6 because it's the basis of the District Court's decision.
7 The evidentiary record on the risk of serious harm to
8 Mr. Barber is undisputed. The State does not contest
9 that it spent multiple hours during each of the 2022
10 execution proceedings of Joe James, Alan Miller, and
11 Kenneth Smith, puncturing all over the men's bodies with
12 needles while trying and failing to establish IV access.

13 JUDGE BRANCH: Counsel, how do you get around
14 our opinion in Nance v. Commissioner, Georgia Department
15 of Corrections, where we said that the District Court
16 correctly rejected the argument that a futile attempt to
17 locate a vein would give rise to a constitutionally
18 intolerable level of pain? The Eighth Amendment does
19 not guarantee a prisoner a painless death.

20 MS. KLEBANER: That's right. And we certainly
21 are aware that Mr. Barber is not guaranteed a painless
22 death.

23 Nance is distinguishable from the case at
24 hand, given that the plaintiff in Nance was alleging
25 pain that might be caused by attempts to find a vein

1 with no pattern of State issues in attempting to find a
2 vein.

3 JUDGE LUCK: Counsel, can I say, why does the
4 pattern matter? In other words, why does the nature of
5 the futility matter? If the futility is because of
6 personal medical issues or because they botched it the
7 last three times, and they know they're not going to be
8 able to do it, how does that matter to the holding of
9 Nance?

10 In other words, why does the underlying fact
11 of the futility matter? Isn't what's legally important
12 is that it's futile and still does not cause an Eighth
13 Amendment problem?

14 MS. KLEBANER: I want to make sure I
15 understand your question. I'm sorry. Could you repeat
16 it?

17 JUDGE LUCK: Sure. Judge Branch read you the
18 holding of Nance, which you agreed with?

19 MS. KLEBANER: Yes.

20 JUDGE LUCK: And you said it's distinguishable
21 because Mr. Nance did not show a pattern of botched
22 executions like the plaintiff here, like your client
23 did.

24 I guess my question to you is, why does that
25 matter? What does the nature of the futility matter to

1 the holding in Nance? In Nance, you're right, in that
2 case, he had weak veins that could not have a needle in
3 it. That was what we said was plausibly alleged. And
4 still, we said that that futility doesn't matter.

5 If Nance had said you couldn't do it because
6 you haven't done it the last three times, and so you're
7 not going to do it now, wouldn't the holding be the same
8 that whatever futility is there is not an Eighth
9 Amendment problem?

10 MS. KLEBANER: Okay. Understood. Thank you
11 for the clarification. The reason why what happened
12 last year matters, is that it goes very directly to the
13 substantial risk of serious harm prong under the Eighth
14 Amendment.

15 And we know, from the very limited admissions
16 that defendants have made in this case, that defendants
17 did their best to investigate what happened last year,
18 and the State concluded they did nothing wrong, and they
19 don't need to make any changes to their execution
20 procedures.

21 So under the facts we have now, we're able to
22 seem, from what happened last year, we have a very
23 strong chance of substantial harm, given that we know
24 the substantial harm took place last year.

25 And the State has conceded that it is not

1 attempting to remedy any of the things that went wrong
2 last year, although, unfortunately, because the State
3 has refused to produce discovery or explain itself, in
4 those three executions, we do not know fundamentally the
5 nature of what went wrong in those executions.

6 JUDGE BRANCH: What is your authority for
7 obtaining the results of the internal investigation?

8 MS. KLEBANER: So to clarify, I don't think we
9 have any specific legal entitlement to the results of
10 the investigation other than the civil discovery rules
11 in this case.

12 I think the information about what they
13 learned and what they changed and why is very probative
14 to Mr. Barber's Eighth Amendment claims. The State has
15 really refused to produce any meaningful information
16 about that investigation, but there isn't a separate
17 cause of action for being entitled to the results of it.

18 JUDGE BRANCH: But You also keep saying they
19 made no changes, but that's not accurate, because you
20 know, for instance, that the IV team personnel is
21 completely different, and, so, even with looking at that
22 change alone, why isn't that change, where nobody who
23 was performing those needle sticks before is on the team
24 now -- why isn't that change alone enough to disrupt the
25 pattern that you're pointing to in the prior executions

1 of the difficulty gaining IV access?

2 MS. KLEBANER: Thank you, Judge Branch. I'd
3 be happy to speak to the turnover in the IV team. So a
4 new IV team does not solve ADOC's execution problems
5 because the State never said the protracted IV attempts
6 in the 2022 execution proceedings were the result of
7 insufficient vetting of the IV team or the credentials
8 of the IV team or anything to do with the IV team.

9 To the contrary, the State said only that the
10 amount of time was the problem, not the IV team. The
11 District Court, in its opinion, was crediting the
12 State's decision to hire a different IV team for fixing
13 a problem that the State does not agree exists.

14 So there is no evidence that the State changed
15 their method for choosing people on the IV team. The
16 State has given us no particular information about any
17 of them, just redacted images of EMT licenses. On this
18 record, all the people the State chooses to staff the IV
19 team are fungible and the same.

20 It's like picking up a different can of soda
21 off the shelf from a factory that isn't passing safety
22 inspections. The State used the same standards of
23 quality control, and they're going to get the same
24 product.

25 JUDGE PRYOR: Let me ask you though, to Judge

1 Branch's question, in the letter that the commissioner
2 wrote to the Governor, he explains in paragraph 3, "I
3 pledged everything is on the table, from our legal
4 strategy dealing with last minute appeals to how we
5 train and prepare for the order and timing of events on
6 execution day, to the personnel and equipment involved;
7 each of these has been considered."

8 And then on the following page, he says, "The
9 Department has also decided to add to its pool of
10 available medical personnel for executions."

11 So even though the investigation doesn't say
12 the personnel was the problem, doesn't that imply from
13 the letter where, after the investigation, they're
14 making personnel changes?

15 MS. KLEBANER: Unfortunately, Your Honor, it's
16 just not clear still if that was the problem. I agree.
17 It seems to be one of the possible problems, but the
18 State refuses to say whether the IV team was a problem.
19 And we asked specifically in this litigation whether the
20 State found any deficiencies whatsoever in its execution
21 procedures as a result.

22 JUDGE LUCK: But Counsel, the State's
23 acknowledgment is not really the issue, right? I mean,
24 the issue is whether it's more likely than not that
25 there's going to be substantial increase in pain.

1 And isn't an acknowledgement that, A), we're
2 using new people, those people are licensed and
3 certified, I've interviewed those people, each one of
4 them is experienced in putting IVs -- is it not
5 unreasonable for the District Court to conclude that
6 there's less of a likelihood of a substantial risk of
7 pain under those factors?

8 MS. KLEBANER: So I think it was unreasonable,
9 given the paucity of evidence that the State actually
10 introduced in the preliminary injunction evidentiary
11 hearing for the District Court to conclude that
12 sufficient change had been made to the IV team to
13 interrupt the pattern. Let's talk a little bit, if
14 we --

15 JUDGE LUCK: But the letter that Judge Pryor
16 mentioned was in evidence, correct?

17 MS. KLEBANER: I believe it was, yes.

18 JUDGE LUCK: Right. That letter specifically
19 had those things I just stated, right, that I
20 interviewed them, that it's a new pool, and that these
21 people have experience doing that, right? I'm talking
22 about independent of the affidavit.

23 MS. KLEBANER: So that language about someone
24 being interviewed and vetted and having the experience,
25 that comes from the Warden Raybon affidavit, not from

1 the letter between the Commissioner to the Governor.

2 JUDGE LUCK: Doesn't the letter specifically
3 state that -- one of the Warden's letters that was
4 introduced in evidence state that those that were going
5 to be doing it are more experienced or have extensive
6 experience in putting IVs in?

7 MS. KLEBANER: Yes. I think I know what
8 document you're referring to. It was an affidavit
9 signed by a defendant in this litigation, Warden Terry
10 Raybon, that the defendant introduced for the first time
11 into evidence during the July --

12 JUDGE LUCK: I'm not talking about the
13 affidavit, though. I'm talking about the letter. The
14 letter, I thought, specifically stated that those who
15 were doing IVs had more extensive experience or had
16 extensive experience putting in IVs;;; is that correct
17 or not?

18 MS. KLEBANER: My best recollection, I don't
19 have the document in front of me, is that letter from
20 the Commissioner to Governor Ivy on February 24th did
21 not say that the current members of the IV team had
22 better experience than the members of last year's team.
23 But I can't say for sure. I wouldn't want to make a
24 misrepresentation.

25 I can speak to the contents of Warden Raybon's

1 affidavit because I think it gets to a similar point of
2 what you're asking about.

3 JUDGE LUCK: Well, let's go to something else.
4 You mentioned about time. So it's absolutely clear,
5 with regard to the Smith and the Miller executions, that
6 time was a significant factor.

7 I happen to have a little experience with the
8 Miller execution because I was on the panel during the
9 Supreme Court litigation there, and there, the Supreme
10 Court, as I recall, didn't rule until either 9:00 or
11 10:00 at night until they had the go-ahead to go. And
12 at that point, the execution team then starts the
13 beginning of its protocol, which includes the IV part.

14 And then with regard to Smith, it went
15 something similar. I think it was 9:00 or 10:00 at
16 night until the Supreme Court ruled. That's been done
17 away with. They now have about 30 hours in which to do
18 it, so you no longer have the midnight deadline problem.

19 Why is it not more reasonable to conclude
20 that that problem going away -- why is not more
21 reasonable for the District Court to conclude, with that
22 problem going away, that there's less of a likelihood of
23 a substantial risk of a problem with the IV team?

24 MS. KLEBANER: So ADOC having more time to
25 execute Mr. Barber is not a logical basis to decide that

1 the State has made a meaningful change for the better
2 because, if anything, more time is worse under the
3 Eighth Amendment, given ADOC's track record. This
4 Court --

5 JUDGE LUCK: Counsel, you assume that more
6 time means that they're going to have more time to do
7 the IV. More time means doing the entire protocol from
8 soup to nuts.

9 In other words, there's a lot more to it than
10 just inserting an IV. There's bringing him to this
11 particular part. There's putting him there. There's
12 reading certain parts of the warrant.

13 MS. KLEBANER: Yes.

14 JUDGE LUCK: There's a lot of things that go
15 into this, as you know.

16 So the question is not more time to do the IV,
17 it's more time to do all of it will take less pressure
18 off of that part of it. Is that not a reasonable
19 inference for the District Court to draw?

20 MS. KLEBANER: So the uncontroverted evidence
21 in this case shows that ADOC had more than sufficient
22 time. Indeed, they had multiple hours to start the IV
23 lines on Mr. James, Mr. Miller, and Mr. Smith last year.
24 And that's taking into account all the aspects of the
25 protocol that Your Honor just mentioned.

1 So, for example, taking him from the holding
2 cell down to the execution chamber, strapping into the
3 gurney, running through the checklists, bringing in the
4 IV team, swabbing for sanitation, all those things.
5 That's including with all that, they still had multiple
6 hours for all three of those men, which shows that
7 they --

8 JUDGE LUCK: How could it be multiple hours?
9 For one of these, I believe, the Supreme Court didn't
10 rule until like 10:30 at night, and the execution
11 deadline was at midnight. I mean, by definition, that
12 could not be multiple hours.

13 MS. KLEBANER: Well, maybe I could just give
14 you the example of Alan Miller, because that's the case
15 I worked on. It's the one I'm most familiar with.

16 So in Mr. Miller's case, the Supreme Court
17 ruled at 9:00, and he was strapped down to the execution
18 bed at 10:00.

19 So while there are intervening steps, as you
20 say, to getting him from the holding cell down to the
21 gurney, and there are procedures that the prison has to
22 follow to make sure that that's done properly: he's put
23 into leg irons, he's walked by a large group of guards
24 to the gurney; all of those things happen, but they
25 don't take a very long time, particularly in these cases

1 where there has been no allegation by the State
2 whatsoever that any of these men resisted.

3 So walking someone down from their holding
4 cell to the gurney, you know, it takes the time that it
5 takes, but it doesn't take hours, and so that did
6 genuinely leave, in Mr. Miller's case, we think a full
7 90 minutes when they were puncturing his body with
8 needles.

9 In Mr. James's case, he was strapped down to
10 the gurney for three hours while they were puncturing
11 his body with needles. And in Mr. Smith's case, we know
12 that they were puncturing him for two full hours.

13 So based on the uncontroverted evidence from
14 three medical experts in this case, we know that it is
15 not reasonable to take multiple hours to try to start IV
16 access, even if, and there's no allegation that this
17 took place last year, but even if there was an
18 uncooperative or difficult patient.

19 JUDGE LUCK: Could I ask you about the second
20 prong? So the second prong of the Eighth, whichever
21 case you want rely on -- so I agree with you there isn't
22 a dispute that it's a reasonable available alternative:
23 nitrogen hypoxia.

24 What evidence was there introduced in the
25 record that there's a significant reduction in pain from

1 nitrogen hypoxia, which is also part of that test?

2 MS. KLEBANER: So the evidence on that front
3 is fairly self explanatory, that is that nitrogen
4 hypoxia is a gas. The Alabama Department of
5 Corrections, that which they have revealed about their
6 nitrogen hypoxia, reveals that they will not be using IV
7 lines or anything that would involve inserting a
8 catheter into a vein.

9 They haven't wanted to say much about what
10 that process will actually entail, but we believe it
11 involves placing a gas mask over the face of an inmate
12 and starting the flow of pure nitrogen.

13 JUDGE LUCK: In Price, though, didn't we say
14 that that -- and I get the claim in Price was a little
15 different here, but didn't we say that that didn't
16 necessarily indicate a significant reduction, given that
17 there's 20 to 30 seconds of essentially suffocating from
18 poisonous gas as you're being executed versus someone
19 who is essentially sedated before they put poison in
20 their veins?

21 MS. KLEBANER: I think more on point than
22 Price in this case is this Court's recent holding in
23 Smith, where the Court held that nitrogen hypoxia,
24 because it completely eliminates the risk of the
25 problems ADOC is having with IV access -- nitrogen

1 hypoxia does substantially reduce that risk of harm.

2 JUDGE LUCK: The problem is -- sorry, I
3 apologize.

4 JUDGE BRANCH: No, go ahead.

5 JUDGE LUCK: No. Please, go ahead, Judge
6 Branch.

7 JUDGE BRANCH: Are you suggesting that when
8 Alabama has nitrogen hypoxia up and running that we're
9 not going to face any challenges to it as cruel and
10 unusual?

11 MS. KLEBANER: You know, I certainly can't
12 speak for what everybody in the state of Alabama is
13 going to do when the State gets ready on nitrogen. I
14 can say that in this litigation, from the beginning,
15 Mr. Barber has been asking for one thing, and that is
16 that his execution be carried out by nitrogen hypoxia.

17 Of course, no one wants to agree to be
18 experimented on. If the State does something to
19 demonstrate that it's patently rushing itself or it's
20 obviously not ready to do a procedure, that it wants to
21 try experimenting on, that presents obvious problems for
22 men in Holman and for the courts, but that is generally
23 the relief we are seeking in this case.

24 If I could continue, unless there any other
25 questions? Okay. So there is no evidence to support

1 the District Court's conclusions regarding the State
2 interrupting its own pattern of failures.

3 I'd like to just take a little more time to
4 talk about how the other factors in this case, aligned
5 with Supreme Court precedent, are the equities of the
6 situation.

7 There will be irreparable harm to Mr. Barber.
8 Death is final and there is no remedy for the needless
9 pain and suffering Mr. Barber will experience on
10 Thursday. The State does not contest that this factor
11 weighs in Mr. Barber's favor.

12 There will be no prejudice to the State if
13 this Court grants a stay. Mr. Barber is not contesting
14 his death sentence and the State is almost ready to
15 proceed with nitrogen hypoxia. Just this February,
16 Commissioner of the ADOC, Hamm, said that they would be
17 ready to proceed with nitrogen hypoxia by the end of
18 this year. So the State can execute Mr. Barber by the
19 end of this year in the State's own estimation.

20 And the public interest is aligned with the
21 relief Mr. Barber seeks. There is record evidence in
22 this case of the public of Alabama pleading with
23 Governor Ivy to introduce more transparency and
24 accountability into Alabama's execution process.

25 Put simply, this is not the typical method of

1 execution challenge. The public interest is
2 significantly heightened in this case due to the
3 historic and unprecedented nature of the ADOC's
4 failures.

5 I'll reserve the rest of my time unless there
6 are any questions.

7 JUDGE PRYOR: Thank you, Ms. Klebaner.

8 Mr. Anderson, you may begin when you're ready.

9 MR. ANDERSON: Thank you, Your Honor. May it
10 please the Court. I'm Richard Anderson on behalf of the
11 Appellees.

12 History didn't begin in July of 2022 and it
13 didn't end in November of 2022, but that's what Barber
14 would like for this Court to believe after failing to
15 convince the District Court of that.

16 You see, Barber's arguments, and the entire
17 claim he presented to the District Court, rested on the
18 idea that what allegedly happened to James, Miller, and
19 Smith was the rule, not the exception.

20 Barber couches his arguments in that fashion
21 because he hopes to show that the defendants are
22 incompetent, brutal, uncaring ogres who are deliberately
23 superadding pain to the execution process. The problem
24 is that history doesn't support that effort.

25 What history does show, is that over two

1 decades, the state of Alabama has successfully carried
2 out dozens of lawful, humane executions by lethal
3 injection with only one case of Doyle Hamm in 2018, in
4 which IV access couldn't be obtained.

5 JUDGE PRYOR: The unfortunate fact for you,
6 Mr. Anderson, is that the last several executions, all
7 the ones before this, three, I think it is, there have
8 been problems.

9 MR. ANDERSON: That's correct, Your Honor.

10 JUDGE PRYOR: How do you explain that?

11 MR. ANDERSON: There were certainly two
12 executions in the fall of 2022 in which the State wasn't
13 able to gain IV access, but those two can't be looked at
14 in excluding all of the rest of history, because history
15 shows that that's an aberration and not the rule.

16 And it also shows -- and this is important in
17 dealing with Barber's claims -- because his
18 fundamentally speculative arguments can only hope to get
19 traction by pretending that the execution procedures
20 that have been largely unchanged for two decades, are
21 responsible for what happened in the Miller and Smith
22 cases, and that because of that, the same thing's going
23 to happen to him.

24 To be sure, as I say, Your Honor, we don't
25 dispute that there were problems with the Miller and

1 Smith executions. They weren't successful. But we do
2 dispute some of the factual allegations regarding those,
3 just as we have shown that some of the hyperbolic
4 allegations about Joe Nathan James really can't be
5 credited.

6 JUDGE PRYOR: But you would concede that after
7 the last three executions, there was public outcry, and
8 it was serious enough that the Governor ordered a
9 review.

10 MR. ANDERSON: Yes, Your Honor, and that's
11 critical because, while the complaint is couched in
12 terms of an attack on the protocol, he doesn't
13 acknowledge the fact or really deal with the fact that
14 the defendants treated this, not as par for the course
15 or just a, oh, well, we've cruelly and unusually
16 executed a couple of people, they took action, and the
17 State did commence a review.

18 They looked at a number of factors that we've
19 discussed, and I've heard discussed this afternoon,
20 including the time pressure. As the defendant, Hamm,
21 pointed out in his letter, they looked at personnel, and
22 they made concrete changes both to the way in which we
23 schedule executions in order to create more room for
24 that last minute litigation, though, of course, we hope
25 to avoid that, but also changes to the personnel.

1 And that's critical because so many of
2 Barber's allegations in his complaint, that is the
3 complaint that was actually before the District Court,
4 rely on what the IV team did or allegedly did during the
5 Miller and Smith preparations for execution.

6 JUDGE PRYOR: Let me ask you this,
7 Mr. Anderson.

8 MR. ANDERSON: Yes, Your Honor.

9 JUDGE PRYOR: I think your argument sort of
10 evidences this, but the Department has consistently
11 denied that anything went wrong during the executions
12 of, or attempted executions of, James, Miller, and
13 Smith. And in fact, in your interrogatory response, you
14 said no deficiencies were found in the review.

15 So my question is, has the Department ever
16 provided and an explanation for the difficulties in
17 those incidents?

18 MR. ANDERSON: Well, Your Honor, the
19 interrogatory response that you referred to was whether
20 there were any changes to the procedures. That's the
21 way the interrogatory was couched to us and in the
22 defendant's mind, we took that to mean the protocol and
23 the actual procedures that we employed.

24 JUDGE PRYOR: All right. Well, then my
25 question is, have you ever -- well, answer my question

1 first.

2 MR. ANDERSON: Okay.

3 JUDGE PRYOR: Has an explanation ever been
4 given for the difficulties?

5 MR. ANDERSON: Those two preparations for
6 execution that were unsuccessful, as Defendant Hamm
7 pointed out, we ran out of time. And every case, even
8 in a medical setting in which you're trying to gain
9 intravenous access, has a number of different factors
10 that can come into play.

11 That was one of the reasons why the ADOC
12 decided to expand the pool and, you know, get a more
13 diverse group of experience for the medical personnel.
14 So they have, now, advanced EMTs, paramedics, and a
15 nurse.

16 JUDGE PRYOR: All right. Well, before we get
17 to that, though --

18 MR. ANDERSON: Yes, Your Honor.

19 JUDGE PRYOR: -- it was acknowledged publicly,
20 wasn't it, by the Department, that there was difficulty
21 in setting IV lines over a period of time? Isn't that
22 right?

23 MR. ANDERSON: I believe that that's fair
24 enough, Your Honor, that with the Miller and Smith
25 cases, we had difficulty or DOC had difficulty setting

1 IV lines with those two men, and that's ultimately why
2 the executions were unsuccessful is time ran out.

3 And I would note also that, of course, the IV
4 team, ADOC, did not continue puncturing either of those
5 men with needles up until 11:59. At some point, the
6 decision was made that we can't get it done before the
7 end of the night because the -- and it's always been the
8 ADOC's view, our view, defendant's view, state of
9 Alabama's view, that obtaining IV access is a separate
10 process from the execution itself.

11 JUDGE PRYOR: All right. I understand your
12 argument in that regard, but were there problems with
13 the personnel's training or experience that contributed
14 to the difficulties in setting IV lines?

15 MR. ANDERSON: I can't speak to that, Your
16 Honor.

17 JUDGE PRYOR: Well, who can? I mean, because
18 I haven't seen where that's ever been provided in this
19 litigation.

20 MR. ANDERSON: In the letter that Defendant
21 Hamm sent to the Governor at the conclusion of the
22 review, he indicates that one of the decisions that was
23 made was to have a broader pool of new personnel who are
24 available, and, as we've indicated in our discovery
25 responses in this case so far, that pool of personnel

1 who were going to be available for this execution, does
2 not include anyone who participated in those two prior
3 executions. And that's the best way I can answer that.

4 JUDGE PRYOR: All right. So here's my
5 problem.

6 MR. ANDERSON: Yes, Your Honor.

7 JUDGE PRYOR: If no explanation has ever been
8 given, how can you establish the causal link between the
9 personnel changes and stopping the difficulties that
10 have occurred in the pattern?

11 MR. ANDERSON: Well, Your Honor, I would say
12 that really the problem here is a problem for Barber, in
13 that he is the movant with the burden. And what he has
14 to show is a substantial likelihood of success on the
15 merits.

16 In the view of the District Court, the
17 emerging pattern that this Court discussed in Smith,
18 gave Barber a window through which he could avoid the
19 limitations period that would ordinarily have barred all
20 of his claims about the protocol.

21 The problem is, that by using that window,
22 Barber has linked himself really inextricably to the
23 allegations about what happened with Mr. Miller and
24 Mr. Smith, and those allegations are very personnel
25 specific. They are allegations that particular people

1 did particular things. And from that, he speculates
2 that those people will do the same thing in the
3 preparation for his execution.

4 Now, the interruption, the severing of that
5 link, is really fatal to his claims because the State
6 has, one, looked at what happened, has decided to employ
7 a broader pool of new personnel who have relevant
8 experience and qualifications, and there's simply not
9 anything that Barber can point to that's going to show
10 either that that was a bad faith effort, or that he has
11 a substantial likelihood of success on the merits in
12 this case --

13 JUDGE BRANCH: Mr. Anderson?

14 MR. ANDERSON: -- because that link is
15 severed. Yes, Your Honor.

16 JUDGE BRANCH: Mr. Anderson, let me ask you,
17 you were talking about the experience of the people who
18 are now in the IV team pool. And I just was unable to
19 determine this from the record. Is the requirement that
20 the IV team personnel be licensed or certified in the
21 United States, a new requirement? Was there any such
22 requirement in the old protocol?

23 MR. ANDERSON: Yes, Your Honor. That is one
24 of the changes that's been made to the protocol and that
25 it now states that those personnel have to be licensed

1 and certified. In fact, in Mr. Barber's complaint, one
2 of the things that he argues is that that requirement is
3 insufficiently specific. That's why, or one of the
4 reasons why, the defendants wanted to provide, in
5 voluntary discovery, the licensures and certifications
6 of the members of the IV team to try to allay that
7 concern that he had expressed in his complaint.

8 Of course, that was not satisfactory, as we
9 expected, so at the evidentiary hearing before the
10 District Court, Mr. Barber continued to speculate and
11 offered, you know, speculation that well, perhaps, those
12 people don't have any experience.

13 At that point, we were compelled to offer in
14 rebuttal an affidavit from Mr. Hamm in which he laid out
15 what really should be an unsurprising fact, that when
16 the state of Alabama was employing someone to do a job,
17 they asked if they had relevant experience. We just
18 don't think it's credible that anyone could be surprised
19 by that fact. But because of the speculations in the
20 hearing, we had to put that in.

21 And that is, you know -- so, again, the new
22 protocol, I suppose, the latest version, had that new
23 requirement of licensure and certification. And I can't
24 remember if it -- I don't believe it says appropriate,
25 but it says licensure and certification in the United

1 States, and we introduced evidence of exactly what that
2 certification was.

3 So to get back to what I was explaining to
4 Judge Pryor, the change in personnel is really in a
5 material way -- one, it's demonstrated a good faith
6 effort by the State to make a material change as a
7 result of those two incidents in the fall of 2022, and
8 it really severs that causal link between what was
9 described as the emerging pattern and what we are
10 actually looking at going forward.

11 And the District Court plainly did not abuse
12 its discretion when it was looking at evidence, which
13 it, of course, has broad discretion over, in determining
14 that Mr. Barber simply didn't have a substantial
15 likelihood of success on the merits there.

16 JUDGE PRYOR: Let me ask you --

17 MR. ANDERSON: Yes, Your Honor.

18 JUDGE PRYOR: -- since you brought up the
19 abuse of discretion, let me ask you, you say in your
20 response to the motion that the standard is abuse of
21 discretion --

22 MR. ANDERSON: Yes, Your Honor.

23 JUDGE PRYOR: -- but under Price, isn't the
24 issue or the standard whether Mr. Barber has shown a
25 substantial likelihood of success on the merits of his

1 claim or is it on the merits of his appeal?

2 MR. ANDERSON: Well, essentially, it is the
3 same standard. This Court has expressed it in other
4 cases that the chances of success on appeal really
5 depend on the chances of success in the District Court.

6 So we've kind of got -- we're kind of in an
7 odd position here because we have, one, a motion for
8 stay, and we have, two, an appeal from a denial of a
9 preliminary injunction, and the standard for the denial
10 of the preliminary injunction is abuse of discretion.

11 For the stay, Mr. Barber has to show that he
12 has a substantial likelihood of success in this appeal,
13 which also depends on him showing the substantial
14 likelihood of success below. So it may be something of
15 a distinction without a difference, Your Honor.

16 I would actually like to turn, Judge Pryor, to
17 your question to Mr. Barber about timeliness, and speak
18 on that briefly, because I think there are some
19 important points there, the first being the
20 pre-axiomatic point that it's always in the plaintiff's
21 control when he brings a complaint once he has the
22 information he needs. That's a decision the plaintiff
23 has.

24 In this case, we can look back at history in
25 the fall of 2022, and we see that Mr. Smith filed a

1 complaint based on the Joe James execution, as did
2 Mr. Miller. Mr. Smith then amended his complaint based
3 on the allegations of what happened in the Miller
4 situation.

5 Mr. Barber had a pending motion to set an
6 execution date at the time, and, of course, he didn't do
7 anything.

8 We have the review period and what's been
9 categorized or described as a moratorium. It was a
10 pause, I think, is the way the Governor put it. And
11 once that was concluded --

12 JUDGE LUCK: Has it been the State's position,
13 as your opposing counsel said, that a plaintiff has to
14 exhaust State remedies in the Alabama Supreme Court
15 before bringing a method of execution Eighth Amendment
16 claim?

17 MR. ANDERSON: No, Your Honor. And it's
18 actually something I had noted down to speak on is that
19 opposition to a motion to set an execution date is
20 typically not an area -- historically, I'm not aware of
21 any case in which the Alabama Supreme Court has granted
22 relief or discovery or engaged in any kind of
23 proceedings in that opposition.

24 That typically would happen in a State Rule
25 32, and I think there may have been arguments in

1 previous cases that a federal litigant should have
2 gone -- in a 1983 case could have in the state court,
3 but I don't know of any cases that have really decided
4 that one way or the other.

5 What I would point to, is that Mr. Barber --

6 JUDGE LUCK: Is that argument made an
7 opposition to Mr. Barber's motion when he filed it in
8 first, I think, July of last year and then, again, in
9 February of this year?

10 MR. ANDERSON: We did not file a response to
11 either of the oppositions to the motion to set an
12 execution date. So that would not have been something
13 that was said.

14 But you just look historically in the case
15 law, and I'm not aware of any case in which the Alabama
16 Supreme Court has engaged in discovery or anything of
17 that nature in opposition to a motion to set an
18 execution date.

19 So whether that's really a reasonable basis on
20 which to delay filing a federal action, I can't speak to
21 that, but what I can speak to -- yes, Your Honor.

22 JUDGE LUCK: So your opposing counsel's
23 response was that, but the other response and, I think,
24 the main one both in the papers and here, was the delay
25 is your fault. In other words, you, being the State.

1 The Governor has full discretion on when to
2 set this thing, and the Governor could have set this six
3 months off, knowing that a lawsuit had been filed, to
4 allow it to come to its conclusion, rather than setting
5 a date, what was it, two months or 45 days after the
6 authorization was given by the Alabama Supreme Court,
7 right?

8 MR. ANDERSON: Your Honor, what I would point
9 to is that there's no case law, there's no principle
10 that a state, which is charged with carrying out a
11 lawful execution to get justice for the citizens of the
12 state and the victims, that a state can be indefinitely
13 delayed in seeking that justice because a federal
14 prisoner happens to file a lawsuit.

15 JUDGE LUCK: Counsel, I don't think, and I
16 don't hear opposing counsel to be saying, that the
17 State's hands are tied in any way from setting the
18 execution date.

19 I think what I hear your opposing counsel
20 saying is that, having set it, you can't argue delay to
21 us. Those are different things.

22 MR. ANDERSON: Well, Your Honor, if you
23 actually look at the way the timeline worked out here,
24 we filed the motion to set the execution date on
25 February 24. That's certainly a point at which

1 Mr. Barber could have pursued these claims.

2 Then, the Alabama Supreme Court granted the
3 motion which put the ball in the Governor's court, in
4 Defendant Ivy's court, and then Mr. Barber continued to
5 wait, and, presumably, had Governor Ivy, you know, just
6 decided to sit on her hands after Mr. Barber filed his
7 complaint, would still be waiting.

8 I mean, that's the problem is that the
9 precedent for allowing a complainant, a petitioner, in a
10 1983 case to indefinitely delay justice by filing an
11 action, it would really obviate all of the case law that
12 Starket (phonetic) and The Supreme Court has put out
13 there about last minute stays of execution, because it
14 would make that unnecessary.

15 If you could get your action filed before your
16 execution was scheduled, then you would automatically
17 obtain a stay, if that were the principle that worked
18 here, Your Honor. So that's why --

19 JUDGE LUCK: Let's say I agree with you for
20 the moment on delay, at least as to some extent. How
21 does that weigh into the equities here?

22 Does that mean that automatically the State
23 wins and the plaintiff loses, or does it mean that we
24 consider that as part of the larger equitable balancing
25 along with substantial likelihood of success in the

1 merits and public interest and all of those sorts of
2 things?

3 MR. ANDERSON: I would say, Your Honor, that
4 the Supreme Court's precedent say in Bucklew gives us
5 some good advice on that, that that's one of the factors
6 the Court can consider where the Supreme Court said that
7 last minute stays should be the extreme exception and
8 not the norm. And that's what the State is arguing
9 here.

10 We believe that the substantial likelihood of
11 success prong that factor strongly argues against
12 granting either the stay or reversing the denial of
13 preliminary injunction.

14 We believe that the delay is a factor that
15 this Court should consider and certainly plays into the
16 equities of it. We don't hang our hat on that by any
17 means, Your Honor. We think that on the merits, this is
18 a clear absence of abuse of discretion here.

19 JUDGE PRYOR: Let me ask you about a slightly
20 different aspect of the timeline.

21 MR. ANDERSON: Yes, Your Honor.

22 JUDGE PRYOR: And my understanding is that as
23 soon as the motion was made in the Alabama Supreme
24 Court, Mr. Barber filed discovery requests. The State
25 said, we will not give you any substantive responses.

1 They moved to compel, and that was denied.

2 Then, he comes to Federal Court and the State
3 agrees to give expedited responses, but really doesn't
4 give much of substance.

5 So speaking only for myself, not for the
6 panel, I see a pattern of the State withholding all the
7 information that would help satisfy both the litigants
8 and the courts about what has happened and what's likely
9 to happen in the future, and then coming in at the last
10 minute with an affidavit that says, trust us, everything
11 will be okay.

12 In fact, that very thing happened after
13 Mr. Smith filed his claim and he said, here's what's
14 going to happen to me. State said, it's fine. We're
15 prepared. And then basically that same thing happened.

16 So if you're so in the right here, why isn't
17 the information being produced about the investigation,
18 about what the cause was, about what specifically is
19 being done to alleviate the problems?

20 MR. ANDERSON: Well, Your Honor, all I can say
21 is that, certainly, different states have taken
22 different approaches here in a number of ways.

23 Mr. Barber relies heavily on the fact that the
24 state of Tennessee decided to do a report. Of course,
25 that's really just window dressing because it's the

1 results that matter.

2 JUDGE PRYOR: I agree. I agree with you on
3 that, but I'm just saying, why not just give a bunch of
4 information.

5 And I believe that Mr. Barber has consistently
6 agreed to enter into a protective order or
7 confidentiality order to protect information that might
8 put the personnel in danger, so why not be more
9 forthcoming.

10 MR. ANDERSON: Well, Your Honor, there are
11 very strong concerns that states have with security over
12 executions because of documented incidents where, once
13 someone's name is out there, the person, whether through
14 fear of retribution or actual retribution or threats of
15 retribution, will withdraw from the process.

16 We have previously lost an expert regarding
17 nitrogen hypoxia on that basis. Other states have had
18 other problems where people have been threatened.
19 Suppliers of various kinds have been threatened. And
20 the State, we think that we -- we attempted to do a very
21 reasonable middle ground here.

22 After Mr. Barber made these allegations about
23 unlicensed, uncredentialed people that made it sound as
24 if we were bringing somebody off the street, we
25 provided, voluntarily, without having the Court have to

1 intervene, the certifications and licensure for those
2 folks in a way that would protect their identity and
3 their privacy.

4 JUDGE PRYOR: But you see, we don't know
5 whether the people who did it before had the same or
6 similar credentials. We don't know whether they were
7 licensed, whether they were also EMTs or nurses, as
8 shown in the licenses and certifications.

9 And the problem is, here, the State has the
10 ability to moot this case by executing Mr. Barber before
11 he ever has a chance to get discovery.

12 MR. ANDERSON: Well, one of the things I would
13 say in response to that, Your Honor, is that it goes
14 back to what I said at the beginning of this case, that
15 we can't only look at what happened in two executions
16 where IV access wasn't obtained. We have to look at
17 history, too.

18 And if Alabama really was cavalier about who
19 they were retaining to do this work, I would expect a
20 much longer pattern than the one this Court observed in
21 its unpublished decision in Smith.

22 Because, you know, what we have is the State
23 made a good faith effort to review what looked -- what
24 went wrong in the eyes of the plaintiff, Mr. Barber, to
25 address some of those concerns with evidence about what

1 the qualifications of the people were, and we saw that
2 that was not satisfactory, that the speculation
3 continued.

4 And here we are once again. The inevitable
5 result seems to be we're in the Eleventh Circuit on
6 execution week under a briefing schedule that, had
7 Mr. Barber had his way, would have had briefing conclude
8 tomorrow and, presumably, oral argument being held on
9 Wednesday.

10 That is precisely what the State has been
11 trying to avoid, that time crunch, this last minute
12 eleventh hour litigation. We tried to do that by
13 disclosing what we thought was some relevant information
14 about the execution team -- the IV team, rather. And
15 here we are.

16 I understand Your Honor's concern. Sovereign
17 states handle things in different ways is all I can say.
18 And in this instance, the judgment was made that we
19 would do a review and not, you know, a hearing process
20 or something like that. We have done that. We have
21 addressed issues that were identified as a result of
22 that review that Defendant Hamm spoke to in his letter:
23 personnel, training, timeline.

24 And as the District Court properly found in
25 exercising discretion, that severed the causal link. It

1 broke that pattern that was there when, you know, at
2 least allegedly was there, when Mr. Barber filed -- I'm
3 sorry, when Mr. Smith filed, when Mr. Miller filed.

4 Now, history has moved on. We have done this
5 review. We have made material changes, but the protocol
6 hasn't changed in a material way except for that
7 reference to licenses. You know, it's a different group
8 of people.

9 So, you know, we believe that that causal
10 chain is broken and that's really fatal to the claim,
11 unless you just wish to -- you know, that Mr. Barber
12 wants to speculate more, which this Court and the
13 Supreme Court have said, speculation is not a ground for
14 a preliminary injunction.

15 I want to speak to something that we haven't
16 really talked on or spoken about, but it was in
17 Mr. Barber's reply brief and that I feel needs to be
18 addressed. And that is he continues to rely in his
19 briefing on allegations that are outside of the
20 complaint that was actually before the District Court.

21 And Mr. Barber argues that the District Court
22 isn't bounded by the four corners of the complaint as it
23 would be in a 12(B)(6) situation, and that's absolutely
24 correct. When it comes to a preliminary injunction, the
25 District Court can and should look at the evidence

1 before it, but it is bound by the four corners of the
2 complaint when it comes to what claims are actually
3 before it.

4 And the movant has to be able to show that the
5 evidence, the affidavits or hearsay or whatever the
6 Court looks at, that that expanded pool of evidence has
7 to speak to the claims in the complaint. In this case,
8 there were no claims about Barber's individual
9 characteristics that he's made a feature of his
10 briefing.

11 And I wanted to speak briefly to that
12 individual factor. I'll call it issue. Mr. Barber has
13 pointed to supposed evidence of individual factors.

14 When you actually break it down and look at
15 what that evidence is, it was very sparse: four
16 printouts regarding height and weight with no date or
17 indication of when they were taken, how they were taken,
18 and that Barber, twice in 20 years, has had difficulty
19 giving blood, and not had difficulty on other occasions.

20 So in short, Barber just hasn't presented the
21 District Court with evidence that would support those
22 claims or that would justify an abuse of discretion for
23 not granting the preliminary injunction.

24 JUDGE LUCK: Was there evidence, Counsel, that
25 someone with a certain body mass index would have

1 trouble getting a vein and that doing so would cause
2 that person to superadd pain as part of the IV process?

3 MR. ANDERSON: No, Your Honor. While there
4 was testimony from a nurse, she didn't speak to anything
5 regarding BMI. And even if those claims had been before
6 the Court, they wouldn't be an abuse of discretion.

7 But now I see my time is closing, so, in
8 conclusion, unless the Court has any questions, I want
9 to say that the people of Alabama and the victims of
10 Barber's crime have waited long enough to obtain justice
11 for the death of Dorothy Epps.

12 This Court should not reward Barber's efforts
13 to delay with granting him a stay or reversing the
14 denial of preliminary injunction.

15 If there are no questions, I'll rest.

16 JUDGE PRYOR: Thank you, Mr. Anderson.

17 Ms. Klebaner, rebuttal.

18 MS. KLEBANER: Sure. Thank you. If I could
19 just start with the last point you just discussed, the
20 issue of evidence in the record on Mr. Barber's personal
21 risk factors.

22 So as the State concedes, the District Court
23 can and must look at the evidence submitted in favor of
24 a preliminary injunction when making its decision.

25 The evidence that we submitted regarding

1 Mr. Barber's BMI compared to the BMI of the men whose
2 executions were botched last year and the evidence that
3 we submitted of the at least two prior occasions of
4 outright failure to find Mr. Barber's veins by ADOC
5 personnel who were supposedly qualified to do so, that
6 evidence was properly before the Court at the time of
7 the preliminary injunction.

8 And the fact that this --

9 JUDGE LUCK: There was no evidence, though, in
10 what the proper body mass index is, right? In other
11 words, there's no evidence of what the cutoff is for
12 when it's easier to get vein access for a body mass
13 index of 29 percent as opposed to 35 percent.

14 MS. KLEBANER: That's correct. The State will
15 not tell us what threshold of BMI it is struggling with,
16 so we don't know for sure. But I could just --

17 JUDGE LUCK: But Counsel, you have an expert
18 who's an expert on IV who you simply could have had --
19 you had a live expert. You simply could've asked, at
20 what body mass index does it become more difficult to
21 insert IV. I mean, that's a simple question.

22 MS. KLEBANER: You're right. It is a fairly
23 simple question, and it's one that the Court noted in
24 its recent Smith opinion when it found that elevated
25 body mass --

1 JUDGE LUCK: But Counsel, that was based on
2 the complaint. I mean, there's no way we could take
3 that as a found fact in any way whatsoever. And, again,
4 I can only speak for myself, but I don't see how a
5 pleading in one complaint could somehow bind us as a
6 matter of fact in someplace else.

7 And without that, it seems to me that we're
8 left with just evidence of body mass without --
9 potential evidence of body mass without understanding
10 how that plays into the larger problem here.

11 MS. KLEBANER: Sure. So two points on that,
12 Your Honor. First, that we are not left with just
13 evidence of Mr. Barber's body mass. Mr. Barber
14 testified at the hearing about two prior occasions where
15 ADOC personnel failed, after multiple repeated attempts,
16 to access his vein. One included a vein access attempt
17 while in ADOC custody that was halted after eight
18 consecutive failures and at least one other complete
19 failure of vein access in Holman.

20 My second point on your question is that we
21 don't need --

22 JUDGE LUCK: But that doesn't create a
23 substantial risk, right? I mean, the District Court
24 could say there was two incidents, among many others,
25 where they did find -- and I find, as a matter of fact,

1 that's not a substantial risk. I mean, we couldn't
2 reverse on that basis; could we?

3 MS. KLEBANER: The District Court could have
4 made that conclusion, but that's not the conclusion she
5 drew. She specifically said that the fact that
6 Mr. Barber did not allege a specific medical condition
7 in his complaint is the reason why she couldn't credit
8 his testimony about the prior vein access issues.

9 And if I could, I'll just move on to some of
10 the other points that were brought up in Mr. Anderson's
11 presentation.

12 So one thing that really stood out to me about
13 the State's presentation just now is that Mr. Anderson
14 could not or would not explain what went wrong in any of
15 the last three botched executions. He was asked
16 directly what the problem was with Mr. James,
17 Mr. Miller, and Mr. Smith, and the closest we got to an
18 answer was the comment that those executions were
19 unsuccessful because they ran out of time.

20 Of course, this means that if time was the
21 only problem or the only problem the State is willing to
22 explain on the record, then changing the IV team
23 personnel is not a solution.

24 So if the State is not willing to give an
25 explanation, it cannot itself establish any kind of

1 causal link in stopping the problem.

2 If I could also just respond to the point
3 about delay.

4 JUDGE LUCK: Counsel, can I go back? I just
5 want to push back on the question that we asked. I'm
6 looking at page 18 of the District Court's order.
7 "Barber did not express that these difficulties," the
8 prior ones, "were related to a medical condition, and
9 Barber also testified that medical personnel have
10 accessed his veins without issues in other instances.
11 This testimony is insufficient to establish that Barber
12 presents the individual risks, which were present in
13 Smith, that would complicate establishing IV access in
14 his case."

15 That's not a matter of pleading. That's a
16 matter of finding of insufficiency. How could we
17 reverse that based on the testimony and evidence that
18 was before the District Court?

19 MS. KLEBANER: Okay. I'm just looking at that
20 language right now, Your Honor. So to me, the operative
21 phrase here is, "Barber did not express that these
22 difficulties were related to a medical condition."

23 JUDGE LUCK: Right.

24 MS. KLEBANER: I think that logic is reading
25 in a requirement that is simply not present in the

1 Eighth Amendment. If we take a step back --

2 JUDGE LUCK: No, it just means they're not
3 permanent. In other words, unlike in Nance, for
4 example, where he had a medical condition that made his
5 veins "weak," there was nothing like that here. So what
6 you just had is two people who maybe weren't that good
7 at it and weren't able to get it.

8 In other words, the District Court heard
9 evidence and made a finding. I'm having a hard time
10 understanding how we could find that that's clearly
11 erroneous such that we would find a substantial
12 likelihood of success by your position.

13 MS. KLEBANER: So I think the problem with the
14 District Court's finding about the specific risk factors
15 is that she tied it to the need to allege those risk
16 factors in the complaint.

17 Obviously, this is a very fast moving
18 proceeding, and we introduced evidence as quickly as
19 possible as we got ramped up to go into the evidentiary
20 hearing.

21 But we now have uncontroverted evidence on the
22 record. The State has never submitted anything to
23 controvert this, that Mr. Barber has an elevated BMI,
24 near identical to Mr. Smith's BMI, higher than Mr.
25 James's BMI, and the evidence is also uncontroverted

1 that ADOC personnel had had trouble accessing his veins
2 in the past.

3 JUDGE BRANCH: Are you pointing to the amended
4 complaint here?

5 MS. KLEBANER: I'm sorry?

6 JUDGE BRANCH: Are you pointing to the amended
7 complaint here?

8 MS. KLEBANER: No, I'm pointing to evidence
9 that was introduced in the record for purposes of the
10 evidentiary hearing.

11 JUDGE PRYOR: But did any of the plaintiff's
12 experts say if a person, or something to the effect of,
13 if a person has a higher BMI, it's more difficult to
14 obtain IV access?

15 MS. KLEBANER: Yes.

16 JUDGE PRYOR: Which witness was that?

17 MS. KLEBANER: Lynn Hadaway.

18 JUDGE PRYOR: Okay.

19 MS. KLEBANER: And I believe we also --

20 JUDGE PRYOR: Thank you.

21 MS. KLEBANER: Okay. So just a quick
22 follow-up on the point I was making before. The State
23 has said they replaced the IV team members, but they
24 also said they found no deficiencies in their IV team.
25 That strongly suggests that the replaced IV team isn't a

1 solution to last year's problems.

2 Barring relief on Thursday evening, a grave
3 constitutional violation is going to take place that
4 cannot be taken back or cured by any ex post facto
5 means.

6 We know this will happen because it happened
7 the last three times Alabama DOC tried the exact same
8 procedure. And by DOC's own admission, it believes it
9 did nothing wrong in those three executions, and it has
10 no problems to solve.

11 For these reasons, I ask that you grant our
12 motion for stay of execution and reverse the judgment of
13 the District Court. Thank you.

14 JUDGE PRYOR: Thank you for your help,
15 Counsel. Court will be adjourned.

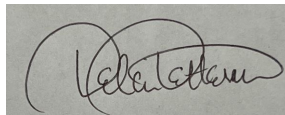
16 (The proceeding was concluded.)
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I, DELCI DETTERMAN, do hereby certify that I was authorized to transcribe the foregoing recorded proceeding; and that the transcript is a true and accurate transcription, to the best of my ability, taken while listening to the provide recording.

I FURTHER CERTIFY that I am not of counsel or attorney for either or any of the parties to said proceedings, nor in any way interested in the events of this cause, and that I am not related to any of the parties thereto.

Dated this 18th day of July 2023



DELICI DETTERMAN

Remote Proceedings
July 17, 2023

<hr/> <p style="text-align: center;">1</p> <hr/> <p>10:00 17:11,15 19:18 10:30 19:10 11:59 29:5 12(B)(6) 44:23 17 3:5 1983 6:22 36:2 38:10</p>	<hr/> <p style="text-align: center;">3</p> <hr/> <p>3 14:2 30 17:17 21:17 32 35:25 35 47:13</p>	<p>45:22 46:6 accepted 5:10 access 9:12 13:1 20:16 21:25 25:4,13 28:9 29:9 42:16 47:12 48:16, 19 account 18:24 accountabilit y 23:24 accrued 4:5,8,9 5:15 accurate 12:19 acknowledge 26:13 acknowledged 28:19 acknowledgeme nt 15:1 acknowledgmen t 14:23 action 12:17 26:16 36:20 38:11, 15 actual 27:23 41:14 add 14:9 address 3:12 42:25 addressed 43:21 44:18 admissions 11:15 ADOC 17:24 18:21 21:25 23:16 28:11 29:4</p>	<p>47:4 48:15, 17 ADOC's 13:4 18:3 24:3 29:8 advanced 28:14 advantage 8:4 advice 39:5 affect 6:8 affidavit 15:22,25 16:8,13 17:1 32:14 40:10 affidavits 45:5 affirmative 5:10 afternoon 2:6,16 26:19 agree 4:6,8 6:20, 24 7:1 13:13 14:16 20:21 22:17 38:19 41:2 agreed 10:18 41:6 agrees 40:3 ahead 22:4,5 Alabama 2:12 3:16, 21,22 5:1,8, 18,21 6:1,2, 13,15,25 7:22 21:4 22:8,12 23:22 25:1 32:16 35:14, 21 36:15 37:6 38:2 39:23 42:18</p>
<hr/> <p style="text-align: center;">2</p> <hr/> <p>20 21:17 45:18 2018 25:3 2022 3:6 4:7 5:19 9:9 13:6 24:12,13 25:12 33:7 34:25 2023 3:8 22-12242 2:11 24 37:25 24th 3:21 6:13 16:20 25th 3:8 6:9 29 47:13</p>	<hr/> <p style="text-align: center;">4</p> <hr/> <p>45 37:5</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>50 5:12</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>90 20:7 9:00 17:10,15 19:17</p> <hr/> <p style="text-align: center;">A</p> <hr/> <p>aberration 25:15 ability 42:10 able 10:8 11:21 25:13 45:4 absence 39:18 absolutely 17:4 44:23 abuse 33:11,19,20 34:10 39:18</p>	<p><small>US Legal Support www.uslegalsupport.com</small></p>	

46:9	18,23 29:15,	arguments	aware
Alabama's	20 30:6,11	24:16,20	9:21 35:20
23:24 29:9	31:13,14,16,	25:18 35:25	36:15
Alan	23 33:17,22	around	
9:10 19:14	34:2 35:17	9:13	
aligned	36:10 37:8,	articulated	B
23:4,20	22 39:3,21	2:20	
allay	40:20 41:10	asked	back
32:6	42:12 46:3,	7:13 14:19	5:3 33:3
allegation	16	32:17 47:19	34:24 42:14
20:1,16	announced	asking	bad
allegations	3:24	17:2 22:15	31:10
26:2,4 27:2	answer	aspect	BAILIFF
30:23,24,25	27:25 30:3	39:20	2:2
35:3 41:22	anyone	aspects	balancing
44:19	30:2 32:18	18:24	38:24
alleged	apologize	assume	ball
11:3	22:3	18:5	38:3
allegedly	appeal	attack	Barber
24:18 27:4	34:1,4,8,12	26:12	2:11,14,18,
44:2	appeals	attempt	24 3:1,20
alleging	2:3 14:4	4:17 8:4,6	4:15,23
9:24	Appellant	9:16 48:16	5:17,24
alleviate	2:18	attempted	6:12,13 7:21
40:19	appellees	27:12 41:20	8:1,16 9:8,
allow	3:1 24:11	attempting	21 17:25
37:4	appreciate	10:1 12:1	22:15 23:7,
allowing	2:7	attempts	9,13,18,21
38:9	approaches	9:25 13:5	24:13,20
alternative	40:22	48:15	30:12,18,22
4:19 8:18	appropriate	Austin	31:9 32:10
9:3 20:22	32:24	2:17	33:14,24
amended	area	authority	34:11,17
35:2	35:20	12:6	35:5 36:5
Amendment	argue	authorization	38:1,4,6
2:21 6:22	3:1 37:20	37:6	39:24 40:23
8:13 9:18	argued	automatically	41:5,22
10:13 11:9,	6:25	38:16,22	42:10,24
14 12:14	argues	available	43:7 44:2,
18:3 35:15	32:2 39:11	2:8 4:18	11,21 45:12,
amount	44:21	8:18 9:3	18,20 48:13
13:10	arguing	14:10 20:22	Barber's
Anderson	39:8	29:24 30:1	2:19 8:22,24
24:8,9,10	argument	avoid	12:14 23:11
25:6,9,11	2:8 3:1 9:16	26:25 30:18	24:16 25:17
26:10 27:7,	27:9 29:12	43:11	27:2 32:1
8,18 28:2,5,	36:6 43:8		36:7 44:17
			45:8 46:10,
			12,20 47:1,4

48:13	bodies	broken	catheter
barred	9:11	44:10	21:8
30:19	body	brought	causal
based	20:7,11	3:15 5:24	30:8 33:8
4:24 6:18	45:25 47:10,	33:18	43:25 44:9
7:12 20:13	12,20,25	brutal	caused
35:1,2 48:1	48:8,9,13	24:22	6:6 9:25
basically	botched	Bucklew	cavalier
40:15	3:16 5:20	39:4	42:18
basis	10:6,21 47:2	bunch	cell
9:6 17:25	botches	41:3	19:2,20 20:4
36:19 41:17	6:18	burden	certain
bed	bound	30:13	18:12 45:25
19:18	45:1		certainly
began	bounded		9:20 22:11
6:14	44:22		25:11 37:25
begin	Branch		39:15 40:21
2:14 7:20	2:7 9:13	call	certification
24:8,12	10:17 12:6,	2:9 45:12	32:23,25
beginning	18 13:2	careful	33:2
17:13 22:14	22:4,6,7	5:13	certification
42:14	31:13,16	carried	s
behalf	Branch's	22:16 25:1	32:5 42:1,8
24:10	14:1	carrying	certified
believe	break	37:10	15:3 31:20
5:1 15:17	45:14	case	32:1
19:9 21:10	brief	2:10,19 3:12	chain
24:14 28:23	44:17	4:12 8:12	44:10
32:24 39:10,	briefing	9:23 11:2,16	challenge
14 41:5 44:9	6:6 43:6,7	12:11 18:21	24:1
below	44:19 45:10	19:14,16	challenges
7:6 34:14	briefly	20:6,9,11,	8:5 22:9
benefit	34:18 45:11	14,21 21:22	chamber
2:10	bring	22:23 23:4,	19:2
best	4:24 7:5	22 24:2 25:3	chance
11:17 16:18	bringing	28:7 29:25	11:23 42:11
30:3	4:3 18:10	31:12 34:24	chances
better	19:3 35:15	35:21 36:2,	34:4,5
16:22 18:1	41:24	14,15 37:9	change
bind	brings	38:10,11	12:22,24
48:5	3:9 34:21	42:10,14	15:12 18:1
bit	broad	45:7	33:4,6
15:13	33:13	cases	changed
blood	broader	19:25 25:22	12:13 13:14
45:19	29:23 31:7	28:25 34:4	44:6
BMI	broke	36:1,3	changes
46:5 47:1,15	44:1	categorized	11:19 12:19
		35:9	

14:14 26:22, 25 27:20 30:9 31:24 44:5 characteristics 45:9 charged 37:10 checklists 19:3 choice 8:3 chooses 13:18 choosing 13:15 chose 5:5 6:8 Circuit 2:3 43:5 circumstance 4:13 7:11 circumstances 5:7 citizens 37:11 civil 12:10 claim 2:22 3:5,14 4:7,9,24 5:14,15,24 6:15,22 8:14 21:14 24:17 34:1 35:16 40:13 44:10 claims 12:14 25:17 30:20 31:5 38:1 45:2,7, 8,22 46:5 clarification 11:11 clarify 5:17 12:8	clear 4:22 14:16 17:4 39:18 client 5:11 10:22 closing 46:7 come 4:11 5:2 28:10 37:4 comes 15:25 40:2 44:24 45:2 commence 26:17 commissioner 9:14 14:1 16:1,20 23:16 compared 47:1 compel 40:1 compelled 32:13 complainant 38:9 complaint 26:11 27:2,3 32:1,7 34:21 35:1,2 38:7 44:20,22 45:2,7 48:2, 5 complete 48:18 completely 12:21 21:24 concede 26:6 conceded 11:25 concedes 46:22 concern 3:13 32:7 43:16	concerns 41:11 42:25 conclude 15:5,11 17:19,21 43:7 concluded 7:16 11:18 35:11 conclusion 29:21 37:4 46:8 conclusions 23:1 concrete 26:22 conditions 2:20 confidentiali ty 41:7 consecutive 48:18 consider 38:24 39:6, 15 considered 14:7 consistently 27:10 41:5 constitutiona l 8:7 constitutiona lly 9:17 contents 16:25 contest 9:8 23:10 contesting 23:13 context 6:11 continue 4:17 22:24 29:4	continued 32:10 38:4 43:3 continues 44:18 contrary 13:9 contributed 29:13 control 13:23 34:21 convince 24:15 corners 44:22 45:1 correct 6:23 15:16 16:16 25:9 44:24 47:14 Corrections 9:15 21:5 correctly 9:16 couched 26:11 27:21 couches 24:20 could've 47:19 counsel 2:6,14 4:1, 25 6:20 9:13 10:3 14:22 18:5 35:13 37:15,16,19 45:24 47:17 48:1 counsel's 36:22 couple 26:16 course 22:17 26:14, 24 29:3 32:8 33:13 35:6 40:24
--	---	--	--

Remote Proceedings
July 17, 2023

court 2:3,5,17,20 3:3,8,22 5:19,21 6:1, 3,13,15,16 7:1,3,6,8 8:4,5,13 9:15 13:11 15:5,11 17:9,10,16, 21 18:4,19 19:9,16 21:23 23:5, 13 24:10,14, 15,17 27:3 30:16,17 32:10 33:11 34:3,5 35:14,21 36:2,16 37:6 38:2,3,4,12 39:6,15,24 40:2 41:25 42:20 43:24 44:12,13,20, 21,25 45:6, 21 46:6,8, 12,22 47:6, 23 48:23 Court's 3:13 9:6 21:22 23:1 39:4 courts 22:22 40:8 create 26:23 48:22 credentials 13:7 42:6 credible 32:18 credited 26:5 crediting 13:11 crime 46:10	critical 26:11 27:1 cruel 22:9 cruelly 26:15 crunch 6:6 43:11 current 16:21 custody 48:17 cutoff 47:11 <hr/> D <hr/> danger 41:8 date 3:23 5:18 6:2,7 7:23 8:3 35:6,19 36:12,18 37:5,18,24 45:16 day 14:6 days 7:21 37:5 deadline 17:18 19:11 deal 26:13 dealing 14:4 25:17 death 9:19,22 23:8,14 46:11 decades 25:1,20 decide 17:25 decided 7:23 14:9 28:12 31:6	36:3 38:6 40:24 decision 7:19 8:2 9:6 13:12 29:6 34:22 42:21 46:24 decisions 29:22 defendant 16:9,10 26:20 28:6 29:20 38:4 43:22 defendant's 27:22 29:8 defendants 11:16 24:21 26:14 32:4 deficiencies 14:20 27:14 definition 19:11 delay 4:10 8:8 36:20,24 37:20 38:10, 20 39:14 46:13 delayed 3:3 37:13 deliberately 24:22 demonstrate 22:19 demonstrated 33:5 denial 34:8,9 39:12 46:14 denied 27:11 40:1 Department 9:14 14:9 21:4 27:10, 15 28:20	depend 34:5 depends 34:13 described 33:9 35:9 determine 31:19 determining 33:13 difference 34:15 different 5:7,11 12:21 13:12,20 21:15 28:9 37:21 39:20 40:21,22 43:17 44:7 difficult 20:18 47:20 difficulties 27:16 28:4 29:14 30:9 difficulty 13:1 28:20, 25 45:18,19 directly 11:12 disclosing 43:13 discovery 6:19 7:15 12:3,10 29:24 32:5 35:22 36:16 39:24 42:11 discretion 33:12,13,19, 21 34:10 37:1 39:18 43:25 45:22 46:6 discussed 26:19 30:17 46:19
--	--	--	---

<p>discussing 8:22</p> <p>dispute 9:2,3 20:22 25:25 26:2</p> <p>disrupt 12:24</p> <p>distinction 34:15</p> <p>distinguishable 9:23 10:20</p> <p>district 7:1,3,5,8,22 9:6,15 13:11 15:5,11 17:21 18:19 23:1 24:15, 17 27:3 30:16 32:10 33:11 34:5 43:24 44:20, 21,25 45:21 46:22 48:23</p> <p>diverse 28:13</p> <p>DOC 28:25</p> <p>document 16:8,19</p> <p>documented 41:12</p> <p>doing 5:3 15:21 16:5,15 18:7 46:1</p> <p>Dorothy 46:11</p> <p>Doyle 25:3</p> <p>dozens 25:2</p> <p>draw 18:19</p> <p>dressings 40:25</p>	<p>due 24:2</p> <hr/> <p>E</p> <hr/> <p>easier 47:12</p> <p>Edward 2:11</p> <p>effectively 7:13</p> <p>effort 24:24 31:10 33:6 42:23</p> <p>efforts 46:12</p> <p>eight 2:21 6:22 48:17</p> <p>Eighth 8:13 9:18 10:12 11:8, 13 12:14 18:3 20:20 35:15</p> <p>either 17:10 29:4 31:10 36:11 39:12</p> <p>elaborate 8:25</p> <p>election 5:10</p> <p>elevated 47:24</p> <p>eleventh 2:3 3:15 43:5,12</p> <p>eliminates 21:24</p> <p>emergency 7:25 8:23</p> <p>emerging 30:17 33:9</p> <p>employ 31:6</p>	<p>employed 27:23</p> <p>employing 32:16</p> <p>EMT 13:17</p> <p>EMTS 28:14 42:7</p> <p>end 4:16 23:17, 19 24:13 29:7</p> <p>ending 3:24</p> <p>engaged 35:22 36:16</p> <p>entail 21:10</p> <p>enter 41:6</p> <p>entire 18:7 24:16</p> <p>entitled 3:2 12:17</p> <p>entitlement 12:9</p> <p>Epps 46:11</p> <p>equally 8:17</p> <p>equipment 14:6</p> <p>equitable 38:24</p> <p>equities 8:22 23:5 38:21 39:16</p> <p>essentially 21:17,19 34:2</p> <p>establish 9:12 30:8</p> <p>estimation 23:19</p> <p>et al 2:12</p>	<p>events 14:5</p> <p>everybody 5:4 22:12</p> <p>evidence 2:23 8:15,18 13:14 15:9, 16 16:4,11 18:20 20:13, 24 21:2 22:25 23:21 33:1,12 42:25 44:25 45:5,6,13, 15,21,24 46:20,23,25 47:2,6,9,11 48:8,9,13</p> <p>evidences 27:10</p> <p>evidentiary 9:7 15:10 32:9</p> <p>exactly 2:19 8:12 33:1</p> <p>exception 24:19 39:7</p> <p>excluding 25:14</p> <p>execute 17:25 23:18</p> <p>executed 21:18 26:16</p> <p>executing 42:10</p> <p>execution 2:22 3:2,6, 21,23 4:4 5:9,18,20 6:2,7,12,17 7:19,23 8:3, 14,19 9:10 11:19 13:4,6 14:6,20 17:8,12 19:2,10,17</p>
--	--	--	---

22:16 23:24 24:1,23 25:19 27:5 28:6 29:10 30:1 31:3 35:1,6,15,19 36:12,18 37:11,18,24 38:13,16 43:6,14 executions 3:16,18 4:18,23,24 10:22 12:4, 5,25 14:10 17:5 25:2,6, 12 26:1,7,23 27:11,12 29:2 30:3 41:12 42:15 47:2 exercising 43:25 exhaust 35:14 exhaustion 6:21 7:2 exists 13:13 expand 28:12 expanded 45:6 expect 42:19 expected 32:9 expedited 40:3 experience 15:21,24 16:6,15,16, 22 17:7 23:9 28:13 29:13 31:8,17 32:12,17	experienced 15:4 16:5 experimented 22:18 experimenting 22:21 expert 41:16 47:17, 18,19 experts 20:14 explain 3:7 12:3 25:10 explaining 33:3 explains 14:2 explanation 27:16 28:3 30:7 explanatory 21:3 explicitly 5:5,12 expressed 32:7 34:3 extensive 16:5,15,16 extent 38:20 extreme 39:7 extremely 8:7 eyes 42:24 <hr/> F <hr/> face 21:11 22:9 faces 2:24 8:16 fact 3:7 10:10	25:5 26:13 27:13 32:1, 15,19 40:12, 23 47:8 48:3,6,25 factor 17:6 23:10 39:11,14 45:12 factors 8:12 15:7 23:4 26:18 28:9 39:5 45:13 46:21 factory 13:21 facts 4:5 11:21 factual 26:2 failed 48:15 failing 9:12 24:14 failure 47:4 48:19 failures 23:2 24:4 48:18 fair 28:23 fairly 21:3 47:22 faith 31:10 33:5 42:23 fall 25:12 33:7 34:25 familiar 19:15 far 29:25 fashion 24:20 fatal 31:5 44:10	fault 8:24 36:25 favor 8:23 23:11 46:23 fear 41:14 feature 45:9 February 3:21 6:13 7:5 16:20 23:15 36:9 37:25 federal 3:3,8 7:1 8:6 36:1,20 37:13 40:2 feel 44:17 file 3:5,8 6:8 36:10 37:14 filed 5:17 6:17,18 7:3,12,21 34:25 36:7 37:3,24 38:6,15 39:24 40:13 44:2,3 filing 36:20 38:10 final 23:8 find 9:25 10:1 47:4 48:25 fine 40:14 first 2:23 8:15 9:5 16:10 28:1 34:19 36:8 48:12 fixing 13:12
--	--	---	--

flow 21:12 folks 42:2 follow 19:22 following 14:8 forcing 5:4 forthcoming 41:9 forward 33:10 found 14:20 27:14 43:24 47:24 48:3 four 44:22 45:1, 15 front 16:19 21:2 frowns 8:5 full 20:6,12 37:1 fundamentally 12:4 25:18 fungible 13:19 futile 9:16 10:12 futility 10:5,11,25 11:4,8 future 40:9	gas 21:4,11,18 gave 30:18 generally 22:22 genuinely 20:6 Georgia 9:14 getting 19:20 46:1 give 9:17 19:13 39:25 40:3,4 41:3 given 4:13,19 5:1, 25 7:9 9:24 11:23 13:16 15:9 18:3 21:16 28:4 30:8 37:6 giving 45:19 go-ahead 17:11 God 2:4 goes 11:12 42:13 going 7:9 10:7 11:7 13:23 14:25 16:4 17:20,22 18:6 22:9,13 25:22 30:1 31:9 33:10 40:14 good 2:6,16 33:5 39:5 42:23 Governor 2:12 6:6 7:19,22 8:3 14:2 16:1,20	23:23 26:8 29:21 35:10 37:1,2 38:5 Governor's 8:2 38:3 granted 35:21 38:2 granting 39:12 45:23 46:13 grants 23:13 ground 41:21 44:13 group 19:23 28:13 44:7 guarantee 9:19 guaranteed 9:21 guards 19:23 guess 10:24 gurney 19:3,21,24 20:4,10	happen 17:7 19:24 25:23 35:24 40:9,14 happened 3:16 5:20 11:11,17,22 24:18 25:21 30:23 31:6 35:3 40:8, 12,15 42:15 happening 7:16 happy 3:11 13:3 hard 4:25 harm 2:24 8:16,20 9:5,7 11:13, 23,24 22:1 23:7 hat 39:16 headed 7:10 hear 2:2 37:16,19 heard 26:19 hearing 15:11 32:9, 20 43:19 48:14 hearsay 45:5 heavily 40:23 height 45:16 heightened 24:2 held 21:23 43:8 help 40:7
<hr/> G		<hr/> H	
gain 25:13 28:8 gaining 13:1		halted 3:6 48:17 Hamm 23:16 25:3 26:20 28:6 29:21 32:14 43:22 hand 9:24 handle 43:17 hands 37:17 38:6 hang 39:16	

hey 7:5 highlight 9:1 hire 13:12 historic 24:3 historically 35:20 36:14 history 24:12,24,25 25:14 34:24 42:17 44:4 hold 7:6 holding 10:8,18 11:1,7 19:1, 20 20:3 21:22 Holman 22:22 48:19 Honor 5:16 6:10,25 14:15 18:25 24:9 25:9,24 26:10 27:8, 18 28:18,24 29:16 30:6, 11 31:15,23 33:17,22 34:15 35:17 36:21 37:8, 22 38:18 39:3,17,21 40:20 41:10 42:13 46:3 48:12 Honor's 43:16 Honorable 2:5 hope 25:18 26:24 hopes 24:21	hour 3:15 43:12 hours 9:9 17:17 18:22 19:6, 8,12 20:5, 10,12,15 humane 25:2 hyperbolic 26:3 hypoxia 4:19 5:6,11 8:20 9:2 20:23 21:1, 4,6,23 22:1, 8,16 23:15, 17 41:17 <hr/> <div style="text-align: center;"> I <small>US Legal Support www.uslegalsupport.com</small> </div> <hr/> idea 24:18 identified 43:21 identity 42:2 images 13:17 imagine 5:2,6 7:8 immediately 6:14 7:13 imply 14:12 important 10:11 25:16 34:19 imposed 3:17 incidents 27:17 33:7 41:12 48:24 include 30:2 included 48:16	includes 17:13 including 19:5 26:20 incompetent 24:22 increase 14:25 Indeed 18:22 indefinitely 37:12 38:10 independent 15:22 index 45:25 47:10, 13,20 indicate 21:16 indicated 29:24 indicates 29:22 indication 45:17 individual 45:8,12,13 inevitable 43:4 inextricably 30:22 inference 18:19 information 3:4 12:12,15 13:16 34:22 40:7,17 41:4,7 43:13 injection 3:18 4:17, 20,24 5:4,24 7:12 25:3 injunction 15:10 34:9, 10 39:13 44:14,24 45:23 46:14,	24 47:7 inmate 21:11 insert 47:21 inserting 18:10 21:7 inspections 13:22 instance 12:20 43:18 insufficient 13:7 insufficientl y 32:3 intend 8:25 intentionally 3:15 interest 23:20 24:1 39:1 interim 4:21 internal 12:7 interrogatory 27:13,19,21 interrupt 15:13 interrupting 23:2 interruption 31:4 intervene 42:1 intervening 19:19 interviewed 15:3,20,24 intolerable 9:18 intravenous 28:9
--	--	---	---

Remote Proceedings
July 17, 2023

introduce 23:23	32:6 42:16 43:14 46:2	33:4,16,18, 23 34:16	22:11 24:7 46:17,18
introduced 15:10 16:4, 10 20:24 33:1	47:18,21 IVS 15:4 16:6, 15,16	35:12 36:6, 22 37:15 38:19 39:19, 22 41:2 42:4 45:24 46:16	47:14,22 48:11 knew 4:5 5:14
investigate 11:17	Ivy 6:6 7:22	47:9,17 48:1,22	know 3:20 4:15 5:3 10:7
investigating 5:23	16:20 23:23 38:5	Judges 2:6	11:15,23 12:4,20 16:7
investigation 3:18,25 4:14,16 7:16 12:7,10,16 14:11,13 40:17	Ivy's 7:19 8:3 38:4	judgment 43:18	18:15 20:4, 11,14 22:11 28:12 32:11, 21 36:3 38:5 42:4,6,22 43:19 44:1, 7,9,11 47:16
involve 21:7	<hr/> J <hr/>	July 16:11 24:12 36:8	knowing 37:3
involved 14:6	James 2:11,18 9:10 18:23 24:18 26:4 27:12	jumped 5:21	<hr/>
involves 21:11	35:1 James's 5:20 20:9	justice 37:11,13 38:10 46:10	L
irons 19:23	job 32:16	justify 45:22	<hr/>
irreparable 23:7	Joe 9:10 26:4 35:1	<hr/> K <hr/>	laid 32:14
issue 14:23,24 33:24 45:12 46:20	Judge 2:6,25 4:1, 25 6:4,20 7:4 8:9 9:13 10:3,17,20 12:6,18 13:2,25 14:22 15:15, 18 16:2,12 17:3 18:5,14 19:8 20:19 21:13 22:2, 4,5,7 24:7 25:5,10 26:6 27:6,9,24 28:3,16,19 29:11,17 30:4,7 31:13,16	keep 12:18 Kenneth 9:11 kind 34:6 35:22 kinds 41:19 Klebaner 2:16,17 3:11 4:12 5:16 6:10,24 7:11 8:11 9:20 10:14,19 11:10 12:8 13:2 14:15 15:8,17,23 16:7,18 17:24 18:13, 20 19:13 21:2,21	language 15:23 large 19:23 largely 25:20 larger 38:24 48:10 latest 4:7 32:22 law 2:4 5:1,9 36:15 37:9 38:11 lawful 25:2 37:11 lawsuit 7:12,22 37:3,14 learned 12:13
issues 5:23 10:1,6 43:21			
IV 9:12 12:20 13:1,3,4,5, 7,8,10,12, 15,18 14:18 15:12 16:21 17:13,23 18:7,10,16, 22 19:4 20:15 21:6, 25 25:4,13 27:4 28:21 29:1,3,9,14 31:18,20			

leave 20:6	line 3:21	21 31:6 42:23	38:14
left 7:23 48:8,12	lines 18:23 21:7 28:21 29:1, 14	looking 12:21 33:10, 12	making 2:7 14:14 46:24
leg 19:23	link 30:8 31:5,14 33:8 43:25	looks 8:13 45:6	manufactured 7:25
legal 4:15 5:23 12:9 14:3	linked 30:22	loses 38:23	Mara 2:17
legally 10:11	litigant 5:13 36:1	lost 41:16	mask 21:11
lethal 3:18 4:17, 20,24 5:4,9 7:12 25:2	litigants 40:7	lot 18:9,14	mass 45:25 47:10, 12,20,25 48:8,9,13
letter 14:1,13 15:15,18 16:1,2,13, 14,19 26:21 29:20 43:22	litigate 5:14	Luck 2:7 4:1,25 6:20 7:4 10:3,17,20 14:22 15:15, 18 16:2,12 17:3 18:5,14 19:8 20:19 21:13 22:2,5 35:12 36:6, 22 37:15 38:19 45:24 47:9,17 48:1,22	material 33:5,6 44:5, 6
letters 16:3	litigated 5:25	lying 3:14	matter 4:1 10:4,5, 8,11,25 11:4 41:1 48:6,25
level 9:18	litigating 6:14,15 7:6		matters 11:12
licensed 15:2 31:20, 25 42:7	litigation 7:24 14:19 16:9 17:9 22:14 26:24 29:19 43:12	M	mean 14:23 19:11 27:22 29:17 38:8,22,23 47:21 48:2, 23
licenses 13:17 42:8 44:7	little 4:25 6:11 15:13 17:7 21:14 23:3		meaningful 12:15 18:1
licensure 32:23,25 42:1	live 47:19		means 18:6,7 39:17
licensures 32:5	locate 9:17	made 11:16 12:19 15:12 18:1 26:22 29:6, 23 31:24 36:6 39:23 41:22,23 42:23 43:18 44:5 45:9	medical 10:6 14:10 20:14 28:8, 13
likelihood 15:6 17:22 30:14 31:11 33:15,25 34:12,14 38:25 39:10	logical 17:25	main 36:24	members 16:21,22 32:6
limitations 4:3 30:19	long 19:25 46:10	make 4:23 10:14 11:19 16:23 19:22 33:6	men 19:6 20:2 22:22 29:1,5 47:1
limited 11:15	longer 17:18 42:20		men's 9:11
	look 34:24 36:14 37:23 42:15, 16 44:25 45:14 46:23		
	looked 25:13 26:18,		

Remote Proceedings
July 17, 2023

mentioned 15:16 17:4 18:25 merits 2:25 6:14 30:15 31:11 33:15,25 34:1 39:1,17 method 2:21 8:13,18 13:15 23:25 35:15 middle 7:22 41:21 midnight 17:18 19:11 Miller 9:10 17:5,8 18:23 19:14 24:18 25:21, 25 27:5,12 28:24 30:23 35:2,3 44:3 Miller's 19:16 20:6 mind 27:22 minute 8:5 14:4 26:24 38:13 39:7 40:10 43:11 minutes 20:7 misrepresenta tion 16:24 moment 7:7 38:20 months 7:24 37:3,5 moot 42:10 moratorium 3:17,24 4:14,16 7:17 35:9	motion 5:17,18 6:2, 17,18 33:20 34:7 35:5,19 36:7,11,17 37:24 38:3 39:23 movant 30:13 45:4 move 4:18 6:5 8:9 moved 3:22 6:11 40:1 44:4 multiple 9:9 18:22 19:5,8,12 20:15 48:15 <hr/> <div style="text-align: center;">N</div> <hr/> name 41:13 Nance 4:9 9:14,23, 24 10:9,18, 21 11:1,5 Nathan 26:4 nature 8:23 10:4,25 12:5 24:3 36:17 necessarily 21:16 necessary 3:5 need 11:19 48:21 needle 11:2 12:23 needles 9:12 20:8,11 29:5 needless 23:8	needs 34:22 44:17 never 13:5 night 17:11,16 19:10 29:7 nitrogen 4:19 5:5,11 8:20 9:2 20:23 21:1, 3,6,12,23,25 22:8,13,16 23:15,17 41:17 norm 39:8 note 29:3 noted 35:18 47:23 notice 2:8 November 3:5 4:7 24:13 number 2:10 26:18 28:9 40:22 nurse 28:15 46:4 nurses 42:7 nuts 18:8 <hr/> <div style="text-align: center;">O</div> <hr/> observed 42:20 obtain 38:17 46:10 obtained 25:4 42:16 obtaining 12:7 29:9	obviate 38:11 obvious 22:21 obviously 22:20 occasions 45:19 47:3 48:14 occurred 30:10 odd 34:7 offer 32:13 offered 32:11 ogres 24:22 okay 8:11 11:10 22:25 28:2 40:11 once 7:16 34:21 35:11 41:12 43:4 one 6:4 9:2 14:17 15:3 16:3 19:9,15 22:15,17 25:3 28:11 29:22 31:6, 23 32:1,3 33:5 34:7 36:4,24 39:5 42:12,20 47:23 48:5, 16,18 ones 25:7 open 2:4 opinion 9:14 13:11 47:24
---	---	--	---

opposed 47:13 opposing 35:13 36:22 37:16,19 opposition 5:17 35:19, 23 36:7,17 oppositions 36:11 oral 2:8 43:8 order 14:5 26:23 41:6,7 ordered 26:8 ordinarily 30:19 outcry 26:7 outright 47:4 outset 9:1 outside 44:19	14:2 parallel 7:9 paramedics 28:14 part 17:13 18:11, 18 21:1 38:24 46:2 participated 30:2 particular 13:16 18:11 30:25 31:1 parts 18:12 passing 13:21 patently 22:19 patient 20:18 pattern 6:18 10:1,4, 21 12:25 15:13 23:2 30:10,17 33:9 40:6 42:20 44:1 paucity 15:9 pause 35:10 pending 4:4 35:5 people 13:15,18 15:2,3,21 26:16 30:25 31:2,17 32:12 41:18, 23 42:5 43:1 44:8 46:9 percent 47:13 performing 12:23	period 4:21 5:22 28:21 30:19 35:8 person 41:13 46:2 personal 10:6 46:20 personnel 12:20 14:6, 10,12,14 26:21,25 28:13 29:23, 25 30:9,24 31:7,20,25 33:4 41:8 43:23 47:5 48:15 personnel's 29:13 perverse 8:1 petitioner 38:9 Petitioner/ appellant 2:11 phonetic 38:12 picking 13:20 place 11:24 20:17 placing 21:11 plainly 33:11 plaintiff 9:24 10:22 34:22 35:13 38:23 42:24 plaintiff's 34:20 plausibly 11:3 play 28:10	plays 39:15 48:10 pleading 23:22 48:5 please 2:16 22:5 24:10 pledged 14:3 point 6:11 9:5 17:1,12 21:21 29:5 31:9 32:13 34:20 36:5 37:8,25 46:19 48:20 pointed 26:21 28:7 45:13 pointing 12:25 points 8:25 34:19 48:11 poison 21:19 poisonous 21:18 pool 14:9 15:20 28:12 29:23, 25 31:7,18 45:6 position 7:14 34:7 35:12 possible 5:14 7:2 14:17 potential 48:9 pre-axiomatic 34:20 precedent 8:4 23:5 38:9 39:4
<hr/> <p style="text-align: center;">P</p> <hr/> page 14:8 pain 9:18,25 14:25 15:7 20:25 23:9 24:23 46:2 painless 9:19,21 panel 17:8 40:6 papers 36:24 par 26:14 paragraph			

<p>precisely 43:10</p> <p>prejudice 23:12</p> <p>preliminary 15:10 34:9, 10 39:13 44:14,24 45:23 46:14, 24 47:7</p> <p>preparation 31:3</p> <p>preparations 27:5 28:5</p> <p>prepare 14:5</p> <p>prepared 40:15</p> <p>presented 24:17 45:20</p> <p>presents 2:19 8:12 22:21</p> <p>pressure 18:17 26:20</p> <p>presumably 38:5 43:8</p> <p>pretending 25:19</p> <p>previous 36:1</p> <p>previously 41:16</p> <p>Price 21:13,14,22 33:23</p> <p>principle 37:9 38:17</p> <p>printouts 45:16</p> <p>prior 12:25 30:2 47:3 48:14</p> <p>prison 19:21</p> <p>prisoner 9:19 37:14</p>	<p>privacy 42:3</p> <p>probative 12:13</p> <p>problem 8:7 10:13 11:9 13:10, 13 14:12,16, 18 17:18,20, 22,23 22:2 24:23 30:5, 12,21 38:8 42:9 48:10</p> <p>problems 3:19 4:19 13:4 14:17 21:25 22:21 25:8,25 29:12 40:19 41:18</p> <p>procedure 22:20</p> <p>procedures 11:20 14:21 19:21 25:19 27:20,23</p> <p>proceed 4:22 23:15, 17</p> <p>proceedings 8:23 9:10 13:6 35:23</p> <p>process 21:10 23:24 24:23 29:10 41:15 43:19 46:2</p> <p>produce 12:3,15</p> <p>produced 40:17</p> <p>product 13:24</p> <p>prong 11:13 20:20 39:11</p>	<p>proper 47:10</p> <p>properly 19:22 43:24 47:6</p> <p>protect 41:7 42:2</p> <p>protective 41:6</p> <p>protocol 17:13 18:7, 25 26:12 27:22 30:20 31:22,24 32:22 44:5</p> <p>protracted 13:5</p> <p>provide 32:4</p> <p>provided 27:16 29:18 41:25</p> <p>Pryor 2:6,25 6:4 8:9 13:25 15:15 24:7 25:5,10 26:6 27:6,9,24 28:3,16,19 29:11,17 30:4,7 33:4, 16,18,23 34:16 39:19, 22 41:2 42:4 46:16</p> <p>public 23:20,22 24:1 26:7 39:1</p> <p>publicly 28:19</p> <p>pull 8:6</p> <p>puncturing 9:11 20:7, 10,12 29:4</p>	<p>punish 8:1</p> <p>pure 21:12</p> <p>pursued 38:1</p> <p>put 19:22 21:19 23:25 32:20 35:10 38:3, 12 41:8</p> <p>putting 15:4 16:6,16 18:11</p> <hr/> <p>Q</p> <hr/> <p>qualification s 31:8 43:1</p> <p>qualified 47:5</p> <p>quality 13:23</p> <p>question 10:15,24 14:1 18:16 27:15,25 34:17 47:21, 23 48:20</p> <p>questions 8:8 22:25 24:6 46:8,15</p> <hr/> <p>R</p> <hr/> <p>ran 28:7 29:2</p> <p>Raybon 15:25 16:10</p> <p>Raybon's 16:25</p> <p>read 4:9 10:17</p> <p>reading 18:12</p>
---	---	---	--

ready 2:15 22:13, 20 23:14,17 24:8 reason 11:11 reasonable 17:19,21 18:18 20:15, 22 36:19 41:21 reasons 28:11 32:4 rebuttal 32:14 46:17 recall 17:10 recent 21:22 47:24 recollection 16:18 record 9:7 13:18 18:3 20:25 23:21 31:19 46:20 recording 2:10 redacted 13:17 reduce 22:1 reduces 8:19 reduction 20:25 21:16 reference 44:7 referred 27:19 referring 16:8 refused 12:3,15 refuses 14:18	regard 6:21,22 17:5,14 29:12 regarding 23:1 26:2 41:16 45:16 46:5,25 rejected 9:16 relevant 31:7 32:17 43:13 relief 3:3 6:19 22:23 23:21 35:22 relies 40:23 rely 20:21 27:4 44:18 remedies 35:14 remedy 3:18 12:1 23:8 remember 32:24 repeat 10:15 repeated 48:15 reply 44:17 report 40:24 requested 6:19 requests 39:24 required 2:21 5:9 requirement 4:2 6:21 7:2 31:19,21,22 32:2,23	reserve 24:5 resisted 20:2 respect 8:21 Respondents/ appellees 2:13 response 27:13,19 33:20 36:10, 23 42:13 responses 29:25 39:25 40:3 responsible 25:21 rest 3:9 24:5 25:14 46:15 rested 24:17 result 13:6 14:21 33:7 43:5,21 results 12:7,9,17 41:1 retaining 42:19 retribution 41:14,15 revealed 21:5 reveals 21:6 reversing 39:12 46:13 review 8:6 26:9,17 27:14 29:22 35:8 42:23 43:19,22 44:5 reward 46:12	Richard 24:10 right 2:9 5:22 6:8 9:20 11:1 14:23 15:18, 19,21 27:24 28:16,22 29:11 30:4 37:7 40:16 47:10,22 48:23 rights 5:21 rise 9:17 risk 2:24 8:16,19 9:5,7 11:13 15:6 17:23 21:24 22:1 46:21 48:23 room 26:23 row 3:16 rug 8:6 rule 17:10 19:10 24:19 25:15 35:24 ruled 17:16 19:17 rules 12:10 running 19:3 22:8 rushing 22:19 <hr/> s <hr/> safety 13:21 sanitation 19:4
--	---	---	---

satisfactory 32:8 43:2	9:7 11:13 26:8	similar 6:14 7:14 17:1,15 42:6	sparse 45:15
satisfy 40:7	set 3:23 5:18 6:12 7:19,23 35:5,19 36:11,17 37:2,20,24	simple 47:21,23	speak 13:3 16:25 22:12 29:15 34:17 35:18 36:20,21 44:15 45:7, 11 46:4 48:4
save 2:4	setting 28:8,21,25 29:14 37:4, 17	simply 23:25 31:8 33:14 47:18, 19	speaking 40:5
saying 8:12 12:18 37:16,20 41:3	several 25:6	sit 38:6	specific 12:9 30:25 32:3
says 14:8 32:24, 25 40:10	severed 31:15 43:25	situation 23:6 35:4 44:23	specifically 14:19 15:18 16:2,14 40:18
schedule 26:23 43:6	severing 31:4	slightly 39:19	speculate 32:10 44:12
scheduled 38:16	severs 33:8	Smith 9:11 17:5,14 18:23 21:23 24:19 25:21 26:1 27:5,13 28:24 30:17, 24 34:25 35:2 40:13 42:21 44:3 47:24	speculates 31:1
second 8:17 20:19, 20 48:20	shelf 13:21	Smith's 3:6 20:11	speculation 32:11 43:2 44:13
seconds 21:17	short 2:8 45:20	soda 13:20	speculations 32:19
security 41:11	show 10:21 24:21, 25 30:14 31:9 34:11 45:4	solve 13:4	speculative 25:18
sedated 21:19	showing 34:13	someone's 41:13	spent 9:9
see 24:16 34:25 40:6 42:4 46:7 48:4	shown 26:3 33:24 42:8	someplace 48:6	spoke 43:22
seeking 3:3 6:7 22:23 37:13	shows 18:21 19:6 25:15,16	sort 27:9	spoken 44:16
seeks 23:21	Sidley 2:17	sorts 39:1	staff 13:18
select 5:12	signed 16:9	sound 41:23	standard 33:20,24 34:3,9
sense 4:23	significant 17:6 20:25 21:16	soup 18:8	standards 13:22
sentence 23:14	significantly 24:2	Sovereign 43:16	Starket 38:12
separate 12:16 29:9			start 7:15 9:5 18:22 20:15
September 5:19			
serious 2:24 8:7,16			

46:19 started 3:17 starting 21:12 starts 17:12 state 2:12 3:22 4:17,22 5:1, 2,23 6:1,11, 25 7:16,25 9:3,8 10:1 11:18,25 12:2,14 13:5,9,13, 14,16,18,22 14:18,20 15:9 16:3,4 18:1 20:1 22:12,13,18 23:1,10,12, 14,18 25:1, 12 26:17 29:8 31:5 32:16 33:6 35:14,24 36:2,25 37:10,12 38:22 39:8, 24 40:2,6, 14,24 41:20 42:9,22 43:10 46:22 47:14 State's 5:18 13:12 14:22 23:19 35:12 37:17 stated 15:19 16:14 states 2:3,5 31:21, 25 33:1 40:21 41:11, 17 43:17 statute 4:3	stay 3:2 6:17 7:13 8:21 23:13 34:8, 11 38:17 39:12 46:13 staying 7:8 stays 38:13 39:7 steps 19:19 sticks 12:23 stopping 30:9 strapped 19:17 20:9 strapping 19:2 strategy 14:4 street 41:24 strong 11:23 41:11 strongly 39:11 struggling 47:15 submitted 46:23,25 47:3 substance 40:4 substantial 2:24 8:16 11:13,23,24 14:25 15:6 17:23 30:14 31:11 33:14, 25 34:12,13 38:25 39:10 48:23 substantially 8:19 22:1	substantive 39:25 succeed 2:21 success 30:14 31:11 33:15,25 34:4,5,12,14 38:25 39:11 successful 26:1 successfully 25:1 suffering 23:9 sufficient 15:12 18:21 suffocating 21:17 suggest 6:5 suggesting 22:7 superadd 46:2 superadding 24:23 Suppliers 41:19 support 22:25 24:24 45:21 suppose 32:22 supposed 45:13 supposedly 47:5 Supreme 2:20 3:22 5:19,21 6:1, 2,13,16 8:4, 13 17:9,16 19:9,16 23:5 35:14,21 36:16 37:6 38:2,12	39:4,6,23 44:13 sure 3:11 10:14, 17 16:23 19:22 25:24 46:18 47:16 48:11 surprised 32:18 swabbing 19:4 <hr/> T <hr/> table 14:3 take 8:4 18:17 19:25 20:5, 15 23:3 48:2 taken 40:21 45:17 takes 20:4,5 taking 18:24 19:1 talk 3:12 15:13 23:4 talked 44:16 talking 15:21 16:12, 13 31:17 team 4:15 12:20, 23 13:3,4,7, 8,10,12,15, 19 14:18 15:12 16:21, 22 17:12,23 19:4 27:4 29:4 31:18, 20 32:6 43:14
---	--	---	--

Remote Proceedings
July 17, 2023

tell 47:15	threatened 41:18,19	tracks 7:9	unable 31:18
Tennessee 40:24	threats 41:14	traction 25:19	uncaring 24:22
terms 26:12	three 3:16 8:25	train 14:5	unchanged 25:20
Terry 16:9	10:7 11:6	training 29:13 43:23	uncontroverte
test 21:1	12:4 19:6	transparency 23:23	d 2:23 8:15,17
testified 48:14	20:10,14	treated 26:14	18:20 20:13
testimony 46:4	25:7 26:7	trouble 46:1	uncooperative 20:18
Thank 8:9,11 11:10	threshold 47:15	trust 40:10	uncredentiale
13:2 24:7,9	Thursday 23:10	try 20:15 22:21	d 41:23
46:16,18	tied 37:17	trying 9:12 28:8	underlying 10:10
thing 6:4 7:9	time 5:22 6:6	43:11	understand 4:2 10:15
22:15 31:2	13:10 16:10	turn 4:11 34:16	29:11 43:16
37:2 40:12,15	17:4,6,24 <small>Remote Proceedings July 17, 2023</small>	turnover 13:3	understanding 39:22 48:9
thing's 25:22	18:2,6,7,16,17,22 19:25	twice 45:18	Understood 4:12 11:10
things 12:1 15:19	20:4 23:3	two 7:23 20:12	undisputed 9:8
18:14 19:4,24 31:1 32:2	24:5 26:20	24:25 25:11,13,20 28:5	unfortunate 25:5
37:21 39:2	28:7,21 29:2	29:1 30:2	United 2:3,4 31:21
42:12 43:17	35:6 43:11	33:7 34:8	32:25
think 3:13 4:6	46:7 47:6	37:5 42:15	unlicensed 41:23
7:13 12:8,12	timeframe 7:20	47:3 48:11,14,24	unnecessary 38:14
15:8 16:7	timeline 3:9 7:18	typical 23:25	unprecedented 24:3
17:1,15 20:6	37:23 39:20	typically 35:20,24	unpublished 42:21
21:21 25:7	43:23	U	unreasonable 15:5,8
27:9 32:18	timeliness 34:17		unreasonably 3:2
34:18 35:10,25 36:8,23	times 10:7 11:6		unsuccessful 28:6 29:2
37:15,19	timing 3:12 6:5		unsurprising 32:15
39:17 41:20	14:5		
Third 8:21	today 3:10		
thought 16:14 43:13	tomorrow 43:8		
	track 18:3		

Remote Proceedings
July 17, 2023

unusual 4:13 22:10 unusually 26:15 <hr/> v <hr/> various 41:19 vein 9:17,25 10:2 21:8 46:1 47:12 48:16, 19 veins 11:2 21:20 47:4 version 32:22 versus 21:18 vetted 15:24 vetting 13:7 victims 37:12 46:9 view 29:8,9 30:16 voluntarily 41:25 voluntary 32:5 <hr/> w <hr/> wait 3:14 38:5 waited 46:10 waiting 4:10 38:7 walked 19:23 walking 20:3	want 5:13 9:1 10:14 16:23 20:21 44:15 46:8 wanted 21:9 32:4 45:11 Warden 15:25 16:9, 25 Warden's 16:3 warrant 3:23 4:4 6:12 18:12 way 26:22 27:21 30:3 33:5 35:10 36:4 37:17,23 42:2 43:7 44:6 48:2,3 ways 40:22 43:17 weak 11:2 Wednesday 43:9 week 43:6 weigh 8:22 38:21 weighs 23:11 weight 45:16 went 12:1,5 17:14 27:11 42:24 whatsoever 14:20 20:2 48:3 whichever 20:20 window 30:18,21	40:25 wins 38:23 withdraw 41:15 withdrawn 6:1 withholding 40:6 words 4:2 10:4,10 18:9 36:25 47:11 work 42:19 worked 19:15 37:23 38:17 worse 18:2 wrong 11:18 12:1,5 27:11 42:24 wrote 14:2 <hr/> y <hr/> ye 2:2 Yeah 3:11 year 3:17,22 11:12,17,22, 24 12:2 18:23 20:17 23:18,19 36:8,9 47:2 year's 16:22 years 45:18
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