No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

JAMIE MILLS,

Petitioner,

v.

JOHN HAMM,
Commissioner of the
Alabama Department of Corrections, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

PETITIONER'S APPENDIX

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[PUBLISH]

In the United States Court of Appeals For the Eleventh Circuit

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No. 24-11689

JAMIE MILLS,

Plaintiff-Appellant,

versus

JOHN Q. HAMM,
Commissioner of the Alabama Department of Corrections sued in his official capacity,
TERRY RAYBON,
Warden of the Holman Correctional Facility sued in his official capacity,
KAY IVEY,
Governor of the State of Alabama sued in her official capacity,
STEVEN MARSHALL,
Attorney General for the State of Alabama sued in his official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:24-cv-00253-ECM

Before WILLIAM PRYOR, Chief Judge, and LUCK and ABUDU, Circuit Judges.

WILLIAM PRYOR, Chief Judge:

Jamie Mills, an Alabama inmate scheduled to be executed on May 30, 2024, for committing two murders in 2004, moves for a stay of execution pending this appeal. Mills appeals the denial of his motion for a preliminary injunction based on his complaint that the State's practice of restraining its condemned prisoners on a gurney before execution will violate his constitutional rights to access the courts, to counsel, to due process, and against cruel and unusual punishment. *See* U.S. CONST. amends. I, V, VI, VIII, XIV; 42 U.S.C. § 1983. Because Mills has not established that he is substantially likely to succeed on the merits of his appeal or that the equities favor a stay of execution at this late stage, we deny his motion.

I. BACKGROUND

Jamie Mills was sentenced to death in 2007 for the murders of Floyd and Vera Hill, an elderly couple whom he bludgeoned to

death with a "machete, tire tool, and ball-peen hammer." The Alabama Court of Criminal Appeals and the Supreme Court of Alabama affirmed, *Mills v. State*, 62 So. 3d 553, 574 (Ala. Crim. App. 2008); *Ex parte Mills*, 62 So. 3d 574, 601 (Ala. 2010), and the Supreme Court of the United States denied certiorari, *Mills v. Alabama*, 133 S. Ct. 56 (2012) (mem.). Mills also sought, and the trial court denied, postconviction relief under Alabama Rule of Criminal Procedure 32. The Alabama Court of Criminal Appeals and Supreme Court of Alabama affirmed. Mills then filed a federal petition for a writ of habeas corpus, which the district court denied in 2020. This Court denied a certificate of appealability in 2021, and the Supreme Court denied certiorari in 2022.

On March 27, 2024, the Supreme Court of Alabama issued a warrant for Mills's execution for May 30 and May 31, 2024. Mills then launched a flurry of filings in federal courts. On April 5, 2024, he moved the district court that had denied his habeas petition for relief under Federal Rule of Civil Procedure 60 and for a stay of execution. The district court denied relief, denied a stay, and denied a request for a certificate of appealability. In that action, Mills applied to this Court for a certificate of appealability and for a stay of execution, both of which we denied.

On April 26, 2024, a month after his execution date was set, Mills filed this action against the Commissioner and other State officials. Mills alleged that the State would strap him to the gurney in the execution chamber for an undue length without access to counsel in violation of his rights to access the courts, to counsel, to due

process, and against cruel and unusual punishment. He sought declaratory and injunctive relief. When, by May 1, 2024, Mills had not moved for injunctive relief or expedited discovery, the district court, "for good cause," ordered him to file any motions no later than May 3, 2024. Mills moved for a preliminary injunction on May 3, and the district court held a hearing on the motion on May 14.

On May 21, 2024, the district court denied the motion for a preliminary injunction. It ruled that Mills had not established that he was substantially likely to succeed on the merits or that the equities weighed in favor of granting a preliminary injunction or stay of execution. Three days later—on May 24, 2024—Mills appealed that ruling. He asks this Court to reverse and remand with instructions to enter a preliminary injunction or for a stay of execution if his case remains pending. The parties have briefed the issues. We take up Mills's request for a stay pending appeal.

II. STANDARD OF REVIEW

We review the denial of a preliminary injunction for abuse of discretion. *See Powell v. Thomas*, 641 F.3d 1255, 1257 (11th Cir. 2011). Under that deferential standard, the district court may reach a "range" of permissible conclusions. *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc). We review legal conclusions *de novo* and factual findings for clear error. *See Jones v. Governor of Fla.*, 950 F.3d 795, 806 (11th Cir. 2020). We must accept the findings of fact if they are "plausible," even if we would weigh the evidence differently. *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980

F.3d 821, 835 (11th Cir. 2020) (citation and internal quotation marks omitted).

III. DISCUSSION

A court may grant a stay of execution only if the movant establishes that he is substantially likely to succeed on the merits, he will suffer irreparable injury absent the stay, and the stay would not substantially harm the opposing party or the public interest. *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016). Mills argues that the district court abused its discretion in ruling that he failed to establish that he is substantially likely to succeed on the merits or that the equities favor a stay. We reject each argument in turn.

A. Mills Is Not Likely to Succeed on the Merits.

Mills argues that he is likely to succeed on the merits of his claims under the Sixth, Eighth, and Fourteenth Amendments. We disagree.

Mills is unlikely to succeed on the merits of his claim under the Sixth Amendment, which guarantees the right to assistance of counsel in all "criminal prosecutions." U.S. CONST. amend. VI. The right attaches to "all critical stages" of "criminal proceedings." *Missouri v. Frye*, 566 U.S. 134, 140 (2012) (citation and internal quotation marks omitted). Critical stages are "trial-like confrontations" between the State and the accused. *Rothgery v. Gillespie County*, 554 U.S. 191, 212 n.16 (2008) (citation and internal quotation marks omitted). The right to counsel does not extend beyond the first appeal, and Mills is far past that stage. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Mills is no longer a party to a proceeding to

which the Sixth Amendment extends the right to counsel. Our sister circuit has reached the same conclusion. *See Whitaker v. Collier*, 862 F.3d 490, 501 (5th Cir. 2017) (holding that a claim to the right to counsel "during . . . execution" is "without merit" because the Sixth Amendment right to counsel extends only to the first appeal of right (internal quotation marks omitted)).

Mills is also unlikely to succeed on the merits of his claim under the Eighth Amendment, which prohibits the "infl ict[ion]" of "cruel and unusual punishments," U.S. CONST. amend. VIII, and forbids the "unnecessary and wanton infliction of pain," *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (citation and internal quotation marks omitted). Infliction of pain is unnecessary and wanton only if it "totally" lacks penological justification. *Id.* (citation and internal quotation marks omitted). The Amendment does not mandate the "avoidance of all risk of pain in carrying out executions," *Baze v. Rees*, 553 U.S. 35, 47 (2008) (plurality), and painful conduct that "does not purport to be punishment at all" must involve more than "ordinary lack of due care for the prisoner's interests," *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Mills is unlikely to establish that the district court exceeded the "range" of permissible conclusions, *see Frazier*, 387 F.3d at 1259, in ruling that his execution is not substantially likely to involve "unnecessary, wanton, or torturous" pain.

Mills's claim rests on unsupported premises. For one thing, the State does not unconstitutionally punish an inmate merely by placing him on a gurney in preparation for execution. For another, the district court credited the plausible testimony of the Commissioner

that the State would not restrain Mills on the gurney while a stay is in effect and that the State would remove Mills from the gurney if a stay were later issued. As the district court found, "legitimate penological reasons" explain why several inmates have recently been strapped to the gurney for longer durations, including the difficulty of gaining intravenous access and delays in transporting witnesses to the chamber. In any event, those delays have dwindled: for the most recent execution, the inmate spent less than an hour on the gurney, in part, the district court found, on account of improvements the State has made to decrease delays. Mills denounces these findings as "unreasonable," but they are more than "plausible," *see City of Mobile*, 980 F.3d at 835 (citation and internal quotation marks omitted).

Mills is also unlikely to succeed on the merits of his due-process claim for access to counsel while in the execution chamber. Mills has no constitutionally protected interest in having counsel present throughout his execution. He argues that he has a right to counsel because violations of his rights in the execution chamber would be "unreviewable" otherwise. But that argument is mistaken because, as the Commissioner points out, a lawsuit, like this one, offers Mills the opportunity to review the constitutionality of the expected procedures in the execution chamber. And Mills's argument proves too much because, if sound, it would entail that prisoners *always* have a due-process right to the presence of counsel for the purpose of policing and litigating potential violations.

Last, Mills is unlikely to succeed on the merits of his claim for access to courts. This claim must be pleaded as "ancillary" to a "substantive underlying claim." *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003). It "vindicat[es]" a "separate and distinct right" to seek judicial relief. *Barbour v. Haley*, 471 F.3d 1222, 1226 (11th Cir. 2006). Because Mills is not substantially likely to succeed on the merits of his other claims, he is not substantially likely to succeed on the merits of this one.

B. The Equities Do Not Favor a Stay.

Mills argues on two grounds that the district court clearly erred in finding that his delay in seeking a preliminary injunction and a stay was "unnecessary and inexcusable." *See Brooks*, 810 F.3d at 824 (reviewing for clear error a finding of inexcusable delay). First, he argues that the district court "misapplied the equities analysis" in assessing whether to grant injunctive relief. The district court assessed whether Mills was entitled to a stay, but Mills insists that he "does not need a stay of execution in this case." Second, he argues that he lacked a cause of action and standing to bring this action any sooner than he did.

A party's "inequitable conduct" can foreclose equitable relief like a stay. *Ramirez v. Collier*, 142 S. Ct. 1264, 1282 (2022). Equity "strongly disfavors inexcusable delay." *Woods v. Comm'r, Ala. Dep't of Corr.*, 951 F.3d 1288, 1293 (11th Cir. 2020). So "last-minute claims" that arise from "long-known facts" counsel the denial of "equitable relief in capital cases," *Ramirez*, 142 S. Ct. at 1282, and "[l]ast-minute stays" of execution should be "the extreme

exception," *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). If a prisoner who seeks a stay of execution could have sued early enough "to allow consideration of the merits" *without* "requiring the entry of a stay," equity disfavors the stay. *See Jones v. Allen*, 485 F.3d 635, 641 (11th Cir. 2007) (citation and internal quotation marks omitted).

Mills protests that the district court should not have considered whether a *stay* was warranted. But Mills himself argues, on appeal, that he *is* "entitled to" a stay, and he *asked* the district court for a stay if injunctive relief were denied—as it was. The district court correctly recognized that the same analysis governs both whether to grant a preliminary injunction and whether to grant a stay. *Compare, e.g.*, *Brooks*, 810 F.3d at 818 (stay), *with Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1277 (11th Cir. 2024) (preliminary injunction). That Mills insists that he does not "*need*" a stay of execution is irrelevant. He sought one, in the alternative, and the district court correctly applied the "equities analysis" for that request.

The district court also reasonably found that Mills could have sought a stay in January 2024, when the State moved to set his execution date, or on March 27, 2024, when the State set his execution schedule. Mills instead waited a month, until April 26, to file this action—and then waited another week, until May 3, to seek injunctive relief or a stay. He might have waited longer had the district court not ordered him to file any motions by that deadline. Mills's assertion that he brought this action when "it first became apparent to him" that the night of his execution might be "long" on account

of what the district court called his "flurry" of legal filings snaps credulity. It is no surprise, as the Commissioner notes, that execution days are "*often* long," on account of "last-minute appeals"—like Mills's, which was lodged less than a week before his execution, on the cusp of a three-day-holiday weekend. A reasonably diligent plaintiff would have sought a stay much sooner, and the district court did not clearly err in finding that Mills's "inequitable conduct," *see Ramirez*, 142 S. Ct. at 1282, weighed against a stay.

Last, we reject Mills's argument that the district court abused its discretion in ruling that other equities weigh against a stay. Here, the State's interest and harm "merge with"—they *are*—"the public interest." *See Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020). The State has "an important interest in the timely enforcement" of Mills's sentence, *see Woods*, 952 F.3d at 1293 (citation and internal quotation marks omitted); Mills murdered his elderly victims nearly 20 years ago and has been sentenced to death since 2007. Further "interference" with the State's "strong interest" in enforcing its criminal judgments would be "undue." *Bowles v. DeSantis*, 934 F.3d 1230, 1247 (11th Cir. 2019) (citation and internal quotation marks omitted). And the public's interest in seeing its "moral judgment," embodied in Mills's sentence, carried out promptly is the State's interest too. *See Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

IV. CONCLUSION

We **DENY** Mills's motion for a stay of execution.

ABUDU, Circuit Judge, Concurring:

While I concur in the denial of Mills' motion to stay his execution based on Circuit precedent, I write separately to ensure Mills' concerns regarding Alabama's execution process are appropriately acknowledged. Mills points to the botched executions of four inmates from Alabama's death row—Joe James, Alan Miller, James Barber, and Kenneth Smith.

In James' case, he was placed on the execution gurney two hours before IV access was established to begin the lethal injection procedure. An independent autopsy determined that James suffered multiple puncture wounds, bruising, and cuts prior to the execution, and he was unable to give his last statement due to being unconscious when the curtain opened.

Miller also laid on the execution gurney for almost two hours before officials attempted to put in the lethal injection IV. Then, after the IV was inserted and the injection ready to be administered, officials called off the execution. Miller remained strapped to the IV for an additional 28 minutes before the IV was removed. During this over two-hour affair, Miller alleged that his gurney was tilted vertically, resulting in him hanging from the gurney's straps.

Smith went through Alabama's execution procedure twice. In the first instance, officials had Smith strapped to the execution gurney despite the existence of a stay of execution. For two hours, Smith awaited his execution without knowing a stay had been issued. Then, once the stay was vacated, officials attempted to

establish IV access to no avail. In the second instance, Smith was executed via nitrogen hypoxia. Witnesses expressed dismay at the effects nitrogen hypoxia had on Smith during the execution.

Finally, at Barber's execution, he was placed on the execution gurney—with the IV in place—for over an hour to allow for execution witnesses to be transported to the viewing area.

While precedent does not establish that these conditions are unconstitutional *per se*, Alabama's pattern of delay during executions is troubling. Mills has a valid fear that he will be unnecessarily placed on the execution gurney if a stay is in place, while the IV team is not attempting to establish IV access, or while officials transport witnesses to the viewing area, without being given any updates from officials on the status of his cases or the ongoing execution protocol.

In its filings to this Court, the State has assured us that should Mills be granted a stay while he is on the execution gurney, he will be returned to a holding cell. The State also indicated it has taken steps to accelerate its preparation process to ensure witnesses are transported to the viewing area sooner to limit delays.

Although those on death row are considered the most detested members of society, our humanity remains dependent on carrying out the most severe penalty in the least barbaric way.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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May 28, 2024

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Appeal Number: 24-11689-P
Case Style: Jamie Mills v. John Hamm, et al
District Court Docket No: 2:24-cv-00253-ECM

The enclosed published order has been ENTERED.

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MOT-2 Notice of Court Action

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

JAMIE MILLS, Plaintiff, v. JOHN HAMM, Commissioner, Alabama Department of Corrections, *et al.*, Defendants.	))))))))))	CIVIL ACT. NO. 2:24-cv-253-ECM [WO]

MEMORANDUM OPINION and ORDER

I. INTRODUCTION

The State of Alabama is scheduled to execute Jamie Mills by lethal injection between 12:00 a.m. on May 30, 2024, and 6:00 a.m. on May 31, 2024, almost seventeen years after Mills was sentenced to death for the capital murders of Floyd and Vera Hill. Fewer than five weeks before his execution date, Mills filed this 42 U.S.C. § 1983 action against John Hamm ("Commissioner Hamm"), Commissioner of the Alabama Department of Corrections ("ADOC"); Terry Raybon ("Warden Raybon"), Warden of Holman Correctional Facility ("Holman"), where the execution is set to occur; Kay Ivey ("Governor Ivey" or "Governor"), Governor of Alabama; and Steve Marshall ("Attorney General Marshall" or "Attorney General"), the Alabama Attorney General (collectively, "Defendants"), in their official capacities. Mills claims that his impending execution will violate his rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution based on allegations that during executions, the Defendants

unnecessarily restrain inmates on the execution gurney for prolonged periods and deprive inmates of their rights to counsel and access to the courts. Mills seeks declaratory and injunctive relief.

Fewer than four weeks before his execution date, Mills moved this Court for a preliminary injunction, or in the alternative a stay of execution, in which he seeks to enjoin the Defendants from (1) placing him on the execution gurney while his federal court litigation is pending; (2) unnecessarily restraining him on the execution gurney "without legitimate reason and with wanton disregard for his suffering"; (3) excluding his counsel from the execution chamber or otherwise limiting his ability to communicate in person with his counsel while in the execution chamber; and (4) denying his counsel access to a phone line. (Doc. 7 at 1–2).[1] In the alternative, Mills asks the Court to issue a stay of execution "in the event the State refuses Mr. Mills these basic constitutional protections, injunctive relief is not granted or in the event this litigation remains pending at the time of Mr. Mills' scheduled execution." (*Id.* at 2). Mills also moved the Court for leave to file discovery and for expedited discovery, in which he requests permission to serve the Defendants with sixteen requests for production of documents and nine interrogatories and for the Court to order the Defendants to respond within two weeks of the motion being filed—a date which has now passed. (Doc. 8). The Defendants oppose both motions.

The Court held an evidentiary hearing and oral argument on the motions on May 14, 2024. Upon careful consideration of the parties' arguments, evidence presented,

[1] References to page numbers are to those generated by the Court's CM/ECF electronic filing system.

relevant caselaw, and for the reasons below, the Court concludes that Mills' motion for a preliminary injunction (doc. 7) and his motion for expedited discovery (doc. 8) are due to be denied.

II. JURISDICTION AND VENUE

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

III. PROCEDURAL HISTORY AND BACKGROUND[2]

On the rainy afternoon of June 24, 2004, Jamie and JoAnn Mills drove to the home of Floyd and Vera Hill, a well-regarded elderly couple in the Marion County community of Guin, Alabama. *Mills v. Dunn*, 2020 WL 7038594, at *1 (N.D. Ala. Nov. 30, 2020) (quoting *Mills v. State*, 62 So. 3d 553, 557–61 (Ala. Crim. App. 2008)). There, Jamie Mills wielded a machete, tire tool, and ball-peen hammer to bludgeon and rob the Hills. *Id.* at *1, *4. Floyd Hill died that day; however, it was not until September 12, 2004, that Vera Hill died in hospice as the result of complications stemming from the head trauma she sustained during the June 2004 attack. *Id.* at *2.

[2] "When ruling on a preliminary injunction, 'all of the well-pleaded allegations [in a movant's] complaint . . . are taken as true.'" *Alabama v. U.S. Dep't of Com.*, 2021 WL 2668810, at *1 (M.D. Ala. June 29, 2021) (alteration in original) (quoting *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976)). Moreover, "[t]he [C]ourt may also consider supplemental evidence, even hearsay evidence, submitted by the parties." *Id.* (citing *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995)). To that end, in addition to the factual allegations in Mills' complaint, the Court also considered the evidence presented at the May 14, 2024 evidentiary hearing, in the Defendants' responses to Mills' motions, and in Mills' reply. With that said, the facts recited here are not exhaustive of the facts presented in the parties' filings, evidentiary submissions, or the May 14, 2024 evidentiary hearing; rather, the Court presents the facts which it finds relevant in ruling on Mills' motions.

An investigation ensued and "[o]n December 14, 2004, Mills was indicted by a grand jury in Marion County, Alabama, on three counts of capital murder for the killings of Floyd Hill and Vera Hill. Count I charged him with the robbery-murder of Floyd, *see* § 13A–5–40(a)(2), Ala. Code 1975; Count II charged him with the robbery-murder of Vera, *see* § 13A–5–40(a)(2), Ala. Code 1975; and Count III charged him with murder made capital because he killed Floyd and Vera by one act or pursuant to one scheme or course of conduct, *see* § 13A–5–40(a)(10), Ala. Code 1975." *Id.* at *4. A jury convicted Mills of all three counts on August 23, 2007. *Id.* at *5. Thereafter, on September 14, 2007, the trial court sentenced Mills to death, which was the jury's recommendation by a vote of 11–1. *Id.*

Mills appealed to the Alabama Court of Criminal Appeals ("ACCA"), where his case was remanded with instructions to amend the sentencing order on June 27, 2008. *Mills*, 62 So. 3d at 572. Upon return from remand, the ACCA affirmed Mills' convictions and death sentence. *Id.* at 573–74. Mills then sought review by the Alabama Supreme Court, which affirmed Mills' convictions and death sentence on September 4, 2010. *Ex parte Mills*, 62 So. 3d 574, 601 (Ala. 2010). The United States Supreme Court denied Mills' petition for a writ of certiorari on June 29, 2012. *Mills v. Alabama*, No. 10-10180 (2012).

Mills also filed indirect appeals in state court. On November 21, 2011, Mills timely filed a petition pursuant to Alabama Rule of Criminal Procedure 32, which was eventually denied by the Marion County Circuit Court. *Mills*, 2020 WL 7038594, at *7. Both the ACCA and the Alabama Supreme Court affirmed the Circuit Court's denial of Mills' Rule

32 petition. *Mills v. State*, No. CR-13-0724 (Ala. Crim. App. Dec. 11, 2015); *Ex parte Mills*, No. 1150588 (Ala. May 25, 2016).

Then, having exhausted state remedies, Mills sought relief in federal court. To that end, Mills petitioned for habeas relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Alabama. The district court denied Mills' § 2254 petition in a lengthy opinion on November 30, 2020. *See generally Mills*, 2020 WL 7038594. The Eleventh Circuit denied a certificate of appealability on August 12, 2021, *Mills v. Comm'r, Ala. Dep't of Corr.*, 2021 WL 5107477 (11th Cir. Aug. 12, 2021), and the United States Supreme Court denied certiorari on April 18, 2022, *Mills v. Hamm*, 142 S. Ct. 1680 (2022).

On January 29, 2024, with Mills' appeals exhausted, Attorney General Marshall filed a motion asking the Alabama Supreme Court to authorize Mills' execution by lethal injection. (Doc. 7 at 5). Then, on March 4, 2024, Mills filed a second petition for Rule 32 relief in the Marion County Circuit Court, citing allegedly new evidence of conduct by state prosecutors in his case. (*Id.* at 6). Shortly thereafter, Mills filed a response to Attorney General Marshall's motion in which Mills requested denial of the motion, or in the alternative, that the court wait to authorize his execution until after his new Rule 32 claims could be addressed. (*Id.*). Notwithstanding Mills' opposition, on March 20, 2024, the Alabama Supreme Court authorized Mills' execution by lethal injection, and on March 27, 2024, Governor Ivey set Mills' execution timeframe for 12:00 a.m. on Thursday, May 30, 2024, through 6:00 a.m. on Friday, May 31, 2024. (*Id.*; doc. 1 at 23, para. 87).

Following Governor Ivey setting Mills' execution timeframe, a flurry of legal filings blanketed the courts. On April 5, 2024, Mills filed a motion in the Northern District of Alabama, pursuant to Federal Rule of Civil Procedure 60, for the court to revisit its prior decision on his § 2254 habeas petition, citing allegedly new evidence of conduct by state prosecutors—the same claims raised in his renewed Rule 32 motion in state court.[3] (*See* doc. 42 in *Mills v. Hamm*, Case No. 6:17-cv-789-LSC (N.D. Ala. Apr. 5, 2024)). The Northern District of Alabama denied Mills' motion on May 17, 2024. (Doc. 48 in *Mills v. Hamm*, Case No. 6:17-cv-789-LSC (N.D. Ala.)).[4] In parallel to the Rule 60 motion in federal court, Mills litigated his renewed Rule 32 motion in Marion County Circuit Court, which that court denied on April 16, 2024. (*See* doc. 7 at 6–7).

Then, on April 26, 2024, ten days after the Rule 32 denial, Mills filed this action. (*See* doc. 1). And now, nearly a month and a half after Governor Ivey set his execution date, Mills asks this Court to enjoin the Defendants from: (1) "placing Mr. Mills on the execution-gurney while litigation in this case or in [*Mills v. Hamm*], Case No. 6:17-cv-00789-LSC (N.D. Ala.) is pending"; (2) "unnecessarily restraining Mr. Mills on the execution-gurney without legitimate reason and with wanton disregard for his suffering"; (3) "excluding Mr. Mills' legal counsel from the execution chamber or otherwise limiting Mr. Mills' ability to communicate in person with his counsel while in the execution chamber"; and (4) "denying legal counsel's access to a phone line to communicate with his

[3] The merits of such claims are not before this Court; thus, these claims will not be discussed in this Opinion.

[4] Mills also filed a motion for stay of execution in the Northern District, which that court also denied.

legal team and the courts." (Doc. 7 at 1–2). In the alternative, Mills asks the Court to issue a stay of execution "in the event the State refuses Mr. Mills these basic constitutional protections, injunctive relief is not granted or in the event this litigation remains pending at the time of Mr. Mills' scheduled execution." (*Id.* at 2). At the evidentiary hearing, Commissioner Hamm testified that Mills would not be moved to the execution chamber if a stay order or agreement to stay was in place, and that Mills would be removed from the execution chamber if such an order or agreement was issued after Mills moved to the chamber. These assurances did not assuage Mills' concerns about his upcoming execution, and accordingly, he still seeks the injunctive relief requested in his motion.

Mills asserts that recent executions carried out by the State establish a pattern of "torturous and unconstitutional conduct." (*Id.* at 10). Mills contends that this conduct subjects "condemned people to a prolonged, unnecessary execution process" wherein condemned prisoners are strapped "to the execution-gurney for hours" while the State "prohibits the condemned inmate from having any access to counsel or the courts and withholds from the condemned any information about, and any means of learning about, the status of their appeals." (*Id.* at 9–10). Mills further contends that most of this process is conducted in "secret" due to the absence of any witnesses who could provide an "accurate and reliable record of the execution," since "State officials have misstated and misrepresented what has happened to condemned prisoners during this [execution] process." (*Id.* at 10, 29). In support of these assertions, Mills offers allegations regarding the executions, or attempted executions, of Joe James, Kenneth Smith, Alan Miller, and James Barber. (Doc. 1 at 11–21, 29–32, paras. 28–52 (Kenneth Smith's 2022 attempted

execution); paras. 53–67 (Alan Miller's attempted execution); paras. 68–72, 110–11 (Joe James' execution); paras. 73–76 (James Barber's execution); paras. 77–81, 103–05 (Kenneth Smith's 2024 execution); *see also* doc. 7 at 10–13 (summarizing each execution or execution attempt)). Accordingly, the Court will briefly describe each.[5]

Joe James

The State executed Joe James by lethal injection on July 28, 2022. (Doc. 15-2). Per ADOC's log of his execution day, James received a phone call from his attorney at 5:07 p.m. while in the holding cell awaiting execution. (*Id.* at 2). Then, at 6:23 p.m., ADOC staff escorted James to the execution chamber. (*Id.*). By 8:52 p.m., the IV team[6] successfully established the requisite lines, the witnesses were brought in at 8:56 p.m., and Warden Raybon read the death warrant at 9:03 p.m. (*Id.*). Thus, according to ADOC records, James spent two hours and forty minutes on the gurney prior to his execution. (*See id.*). Mills contends that this process took "over three hours," citing contemporaneous media reports. (Doc. 1 at 31, paras. 109–10 (citing an article from the *Montgomery Advertiser*)). In addition, Mills alleges that "an independent autopsy found that [James] likely suffered a long death and that his body showed multiple puncture wounds, pools of deep bruising, and cuts indicative of a cut-down procedure,"[7] and further asserts that James

[5] In his complaint, Mills did not allege facts about the execution of Casey McWhorter, the most recent inmate to be executed by lethal injection in Alabama. (*See* doc. 15 at 28). The Court, nonetheless, will discuss McWhorter's execution.

[6] The IV team comprises the execution team members who set the intravenous ("IV") lines.

[7] A cut-down procedure, which is not included in the State's lethal injection protocol, occurs when medical personnel cut through the skin of the condemned to expose direct access to a vein to set an IV line.

was unconscious when the curtains of the execution chamber opened. (*Id.* at 31–32, paras. 110–11).[8]

Alan Miller

On September 22, 2022, two months after James' execution, the State attempted to execute Alan Miller by lethal injection. (Doc. 15-3). As detailed in ADOC's log of Miller's attempted execution, Miller spoke to his attorney at 5:22 p.m., with additional calls initiated at 6:32 p.m. and 8:02 p.m. (*Id.* at 2). Then, at 9:55 p.m., ADOC staff escorted Miller to the execution chamber. (*Id.*). ADOC's log indicates that the IV lines were secured by 11:20 p.m. but were removed at 11:48 p.m., with Miller exiting the execution chamber minutes later because of insufficient time before the death warrant's midnight expiration. (*Id.*; doc. 1 at 17–18, paras. 64–66; doc. 15-8 at 4, para. 10). Thus, ADOC records indicate that Miller spent one hour and fifty-five minutes on the execution gurney. (*See* doc. 15-3 at 2).

Mills contends that the State acted improperly during Miller's attempted execution. Mills alleges that the State, without explanation given, raised Miller into a "vertical position" on the execution gurney for twenty minutes after the IV team was called out of the execution chamber. (Doc. 1 at 16–17, paras. 57–60). Miller allegedly expressed physical pain and confusion to state officials present, who offered no response to Miller's

[8] In 2023, James' estate ("Estate") filed a § 1983 lawsuit asserting claims that state officials, including the Defendants here, violated James' Eighth Amendment rights in carrying out his execution. (*See generally* doc. 1 in *Estate of Joe Nathan James v. Ivey et al.*, 2:23-cv-293-ECM (M.D. Ala. May 3, 2023)). This Court dismissed the Estate's claims on qualified immunity grounds. (Doc. 43 in *Estate of Joe Nathan James v. Ivey et al.*, 2:23-cv-293-ECM (M.D. Ala. May 3, 2023)). The Estate appealed, and the appeal is currently pending before the Eleventh Circuit. (*See* No. 24-11273-B).

pleas. (*Id.* at 17, paras. 59–60, 63). The Defendants deny this version of events and offer the affidavit of Cynthia Stewart Riley ("Riley"), a Regional Director at ADOC and former warden of Holman—the position designated as Alabama's statutory executioner. (Doc. 15 at 51; *see* doc. 15-8 at 2–3, paras. 1–3); ALA. CODE § 15-18-82(c). In her affidavit and at the evidentiary hearing, Riley testified that the execution gurney cannot tilt into a full vertical position—*i.e.*, 90 degrees—as Miller alleged. (Doc. 15-8 at 4, para. 8 (affidavit); doc. 25 at 89, lines 21–25 (evidentiary hearing)). Riley also testified that the gurney is tilted at a lesser angle for the condemned to give their final words. (Doc. 25 at 93, lines 6–9).

Kenneth Smith (2022)

Following the aborted execution of Alan Miller, the State attempted to execute Kenneth Smith by lethal injection two months later. (*See* doc. 15-4). Per ADOC's execution log for November 17, 2022, Smith made several phone calls to family members from the holding cell for condemned inmates between 4:48 p.m. and 7:25 p.m. (*Id.* at 2). Thirty-six minutes later, at 8:01 p.m., ADOC staff escorted Smith to the execution chamber. (*Id.*). Between 8:25 p.m. and 10:18 p.m., the log repeatedly notes that Smith was strapped down to the gurney, save a single entry at 8:50 p.m., which recorded that an execution team member provided Smith a blanket. (*Id.*). It is during this period in which Mills alleges that the execution team tilted Smith into a reverse crucifixion position for an unspecified length of time, and that Smith's requests to speak to his lawyers or the court were refused or ignored. (Doc. 1 at 14–15, paras. 41–43, 48–49).

At 10:20 p.m., the execution team successfully established an IV in Smith's left arm, but at 10:27 p.m., the log notes the team's failure to set an IV in Smith's right arm. (Doc. 15-4 at 3). The next entry, at 11:15 p.m., records an attempt to establish an IV in Smith's neck area, which is known as a "central line procedure," and Smith jerking his head—presumably in response to the attempted placement of a central line. (*See id.*; doc. 15 at 52–53). But, at 11:32 p.m., ADOC staff escorted Smith out of the chamber for a medical assessment, and state officials called off the execution because of an inability to establish the needed IV lines before the expiration of the death warrant. (Doc. 15-4 at 3; doc. 15 at 53; doc. 1 at 15, para. 50; doc. 15-8 at 4, para. 10). In total, Smith spent three hours and thirty-one minutes on the execution gurney, according to ADOC records. (*See* doc. 15-4 at 2–3).

In addition to recounting Smith's subjective experience during this ordeal—as alleged in Smith's own lawsuit—Mills relays Smith's allegations that the State undertook these steps while a stay issued by the Eleventh Circuit was in effect. (*See* doc. 1 at 12, para. 31; *id.* at 11–16, paras. 28–52). As described by Mills and confirmed by the Defendants, the Eleventh Circuit issued a stay at 7:59 p.m., which was just two minutes after ADOC's execution log details ADOC staff escorting Smith to the execution chamber. (Doc. 1 at 12, para. 31; doc. 15 at 52; *see* doc. 15-4 at 2). The United States Supreme Court eventually vacated the Eleventh Circuit's stay at 10:20 p.m.—the exact time that ADOC records indicate successful placement of an IV line in Smith's left arm. (Doc. 1 at 13, para. 38; doc. 15-4 at 3). In the approximately two hours between entry of the stay and its vacatur,

officials in the execution chamber did not communicate any information about the stay to Smith. (Doc. 1 at 12, paras. 33–34 (citing Smith's second amended complaint)).

The State's Review and Subsequent Changes

In November 2022, after the events recited above, Governor Ivey called for a "top-to-bottom" review of ADOC's execution procedures. (Doc. 1 at 21, para. 83; doc. 15-8 at 4, para. 11). As a result of this review, several changes were made. First, on December 12, 2022, Governor Ivey asked the Alabama Supreme Court to amend the Alabama Rules of Appellate Procedure to expand the length of the execution process. (Doc. 1 at 22–23, para. 85). The Alabama Supreme Court obliged, and in January 2023, the court amended Rule 8 of the Alabama Rules of Appellate Procedure to eliminate the twenty-four-hour period for an execution and to instead allow the Governor to set the timeframe. (*Id.* at 23, para. 86). In practice, the execution timeframe expanded to thirty hours. (*See*, *e.g.*, doc. 11-1 at 2 in *Barber v. Ivey, et al.*, 2:23-cv-342-ECM (M.D. Ala. July 7, 2023); *see also* doc. 1 at 23, paras. 87–88; doc. 7 at 6). Mills alleges that although the execution timeframe is thirty hours, "the effective scheduled time" of his execution "is the 12-hour period between May 30 at 6:00 p.m. and May 31 at 6:00 a.m." (Doc. 1 at 23, para. 88). Second, ADOC retained a new IV team, who worked on Barber's and McWhorter's executions and are set to work on Mills' execution. (Doc. 15-8 at 4, para. 11). Following these changes, Commissioner Hamm informed Governor Ivey on February 24, 2023 that ADOC's review was complete and that ADOC was "as prepared as possible to resume carrying out executions consistent with the mandates of the Constitution." (Doc. 1-5 at 2 in *Barber v. Ivey, et al.*, 2:23-cv-342-ECM (M.D. Ala. July 7, 2023)).

James Barber

Pursuant to the revised rules, Governor Ivey set the timeframe for the execution of James Barber in a letter dated May 30, 2023. (Doc. 11-1 at 2 in *Barber v. Ivey, et al.*, 2:23-cv-342-ECM (M.D. Ala. July 7, 2023)). His execution took place on July 21, 2023, by lethal injection. (Doc. 1 at 19–20, paras. 73, 76; doc. 15 at 53). According to ADOC records, Barber arrived at the holding cell to await execution at 4:38 p.m. on July 20, 2023. (Doc. 15-5 at 2). Thereafter, at 4:41 p.m., 5:10 p.m., 6:40 p.m., 7:10 p.m., 11:20 p.m., and 11:55 p.m., Barber initiated phone calls to his attorney. (*Id.*). Then, at 12:14 a.m. on July 21, 2023, ADOC staff escorted Barber to the execution chamber. (*Id.*). The requisite IV lines were installed by 12:30 a.m., but witnesses did not start arriving until 1:21 a.m.—delaying the reading of the death warrant until 1:31 a.m. (*Id.* at 2–3). Therefore, according to ADOC records, Barber spent one hour and seventeen minutes on the execution gurney. (*See id.*).

After Barber's execution, ADOC undertook another reform. Recognizing the impact that delays in witness transportation had on the timing of executions, ADOC altered its transportation protocols so that witnesses are moved into the designated witness rooms as soon as the inmate is prepared in the execution chamber. (Doc. 15-8 at 4–5, para. 12). As detailed below, this reform reduced the condemned inmate's time on the gurney. (*Id.*).

Casey McWhorter

Casey McWhorter is the most recent person the State executed by lethal injection, though neither Mills' complaint nor his motion for preliminary injunction mentions McWhorter. (*Compare* doc. 15 at 50, *with* docs. 1 and 7). The State executed McWhorter

on November 16, 2023. (Doc. 15-6). Per ADOC's execution log, McWhorter arrived in the holding cell to await execution at 4:40 p.m. (*Id.* at 2). There, McWhorter sat and spoke with his spiritual advisor until he was escorted to the execution chamber at 5:42 p.m. (*Id.* at 3). At 6:02 p.m., the IV lines were set, and witnesses arrived between 6:24 p.m. and 6:29 p.m. (*Id.*). Warden Raybon read the death warrant at 6:30 p.m. (*Id.*). In total, McWhorter spent forty-eight minutes on the gurney. (*See id.* at 2–3).

Kenneth Smith (2024)

A little over two months later, on January 25, 2024, the State executed Kenneth Smith by nitrogen hypoxia. (Doc. 1 at 20, para. 77; doc. 15 at 53–54). ADOC's log of Smith's execution shows him entering the holding cell to await execution at 4:43 p.m. (Doc. 15-7 at 2). There, Smith made a series of phone calls to his family and attorney over the course of a little over an hour. (*Id.* at 2–3). Then, at 7:20 p.m., ADOC staff escorted Smith to the execution chamber, where his spiritual advisor prayed and anointed Smith with oil.[9] (*Id.* at 3). At 7:37 p.m. the mask was placed on Smith, witnesses arrived twelve minutes later, and at 7:54 p.m., Warden Raybon read the death warrant. (*Id.*). Smith spent thirty-four minutes on the gurney. (*See id.* at 2–3). [10]

[9] In his complaint, Mills alleges that Smith was not apprised of a decision by the United States Supreme Court "to vacate the stay of execution" for his 2024 execution. (Doc. 1 at 20, para. 79). However, Mills' counsel acknowledged at the May 14, 2024 evidentiary hearing that this was a misstatement, as no stay was entered during litigation over Smith's 2024 nitrogen hypoxia execution.

[10] At the evidentiary hearing, Mills offered several exhibits pertaining to Smith's nitrogen hypoxia execution, including reports from Smith's experts regarding nitrogen gas executions and witness accounts of Smith's execution. The Defendants objected on relevance and hearsay grounds, which the Court overruled. Having reviewed the exhibits, the Court finds them minimally relevant to the resolution of the issues here because Smith was executed not by lethal injection but by nitrogen hypoxia. In any event, the exhibits do not alter the Court's analysis or conclusions.

Now, the State is scheduled to execute Mills by lethal injection between 12:00 a.m. on May 30, 2024, and 6:00 a.m. on May 31, 2024, almost seventeen years after Mills was sentenced to death for the capital murders of Floyd and Vera Hill.

IV. LEGAL STANDARDS

A. Preliminary Injunction

To be entitled to the entry of a preliminary injunction or stay of execution, Mills must demonstrate: (1) a substantial likelihood of success on the merits; (2) a likelihood of suffering irreparable injury without the injunction; (3) that the threatened injury to him outweighs the harm the injunction would cause the other litigants; and (4) that the injunction would not be adverse to the public interest. *Woods v. Comm'r, Ala. Dep't of Corr.*, 951 F.3d 1288, 1292 (11th Cir. 2020). Where, as here, "the [State] is the party opposing the preliminary injunction, its interest and harm merge with the public interest," and thus the third and fourth elements are the same. *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Such relief is "'not to be granted unless the movant clearly established the "burden of persuasion"' for each prong of the analysis." *Am.'s Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1329 (11th Cir. 2014) (citation omitted). Mills, as the movant, must satisfy his burden on all four elements "by a clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted).

B. Expedited Discovery

Generally, "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except . . . when authorized by these rules, by stipulation, or by court order." FED. R. CIV. P. 26(d)(1). "[E]xpedited discovery should be granted only in exceptional instances." *Mullane v. Almon*, 339 F.R.D. 659, 663 (N.D. Fla. 2021) (citation omitted).[11] Expedited discovery allows a party "to obtain specific, limited, and identifiable pieces of information, particularly when there is some risk of spoliation," "when the suit cannot reasonably proceed without the information," or "when some unusual circumstances or conditions exist that would likely prejudice the party if he were required to wait the normal time." *Id.* (citations omitted).

"Although the Eleventh Circuit Court of Appeals 'has not adopted a standard for allowing expedited discovery, . . . many district courts within the Eleventh Circuit have expressly used a general good cause standard when confronted with expedited discovery requests.'" *Brown v. Dunn*, 2021 WL 4523498, at *1 (M.D. Ala. Oct. 4, 2021) (quoting *Rivera v. Parker*, 2020 WL 8258735, at *3 (N.D. Ga. Aug. 28, 2020)). "[T]he party requesting expedited discovery has the burden of showing the existence of good cause." *Id.* (quoting *In re Chiquita Brands Int'l, Inc.*, 2015 WL 12601043, at *3 (S.D. Fla. Apr. 7, 2015)).

"Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *TracFone*

[11] Here, and elsewhere in this Opinion, the Court cites to nonbinding authority. While the Court recognizes that these cases are nonprecedential, the Court finds them persuasive.

Wireless, Inc. v. SCS Supply Chain LLC, 330 F.R.D. 613, 615 (S.D. Fla. 2019) (citation omitted). In deciding whether a party has shown good cause, courts often consider the following factors: "(1) whether a motion for preliminary injunction is pending; (2) the breadth of the requested discovery; (3) the reason(s) for requesting expedited discovery; (4) the burden on the opponent to comply with the request for discovery; and (5) how far in advance of the typical discovery process the request is made." *Socal Dab Tools, LLC v. Venture Techs., LLC*, 2022 WL 19977793, at *1 (M.D. Ala. Apr. 25, 2022) (citation omitted). Courts also consider whether a motion to dismiss is pending. *Mullane*, 339 F.R.D. at 663.

V. DISCUSSION

Mills brings four claims pursuant to § 1983. In Count I, Mills claims that subjecting a condemned person to prolonged restraint on the execution gurney "without legitimate reason and without access to counsel causes 'unnecessary and wanton pain and suffering,' and constitutes cruel and unusual punishment in violation of the Eighth Amendment." (Doc. 1 at 33, para. 116). In Count II, Mills asserts that the Defendants' exclusion of his counsel from the execution chamber violates his due process rights under the Fifth and Fourteenth Amendments.[12] In Count III, Mills claims that the Defendants' exclusion of his counsel from the execution chamber violates his constitutional right to meaningful access to the courts under the First, Sixth, Eighth, and Fourteenth Amendments. According to Mills, he requires his counsel's presence the entire time he is in the execution chamber

[12] At the evidentiary hearing, Mills' counsel acknowledged that the Fifth Amendment applies to the federal government, not the states, and thus is inapplicable here.

to "effectuate his right of access to the courts and to enforce his Eighth Amendment rights." (*Id.* at 38, para. 131). In Count IV, Mills asserts that the Defendants' exclusion of his counsel from the execution chamber violates his right to counsel and to due process under the Sixth and Fourteenth Amendments. Mills argues he is entitled to preliminary injunctive relief on all claims.

The Defendants filed a combined motion to dismiss and response to Mills' motion for preliminary injunction (doc. 15) and a response in opposition to Mills' motion for expedited discovery (doc. 14). The Defendants argue that Mills is not entitled to a preliminary injunction or stay because (1) Mills lacks standing to sue Governor Ivey and Attorney General Marshall, and the claims against Governor Ivey are barred by sovereign immunity; (2) Counts II, III, and IV are barred by the statute of limitations—although at the evidentiary hearing, the Defendants seemingly abandoned their limitations argument as to Count III (doc. 25 at 75 lines 22–25; 76 lines 1–25); (3) Mills' claims all fail on the merits in any event; and (4) the equities weigh against the entry of a preliminary injunction. The Defendants also argue that Mills has not shown good cause for expedited discovery.

The Court concludes that Mills has standing to sue Governor Ivey and Attorney General Marshall and that Mills' claims against Governor Ivey are permitted under *Ex parte Young*.[13] Nonetheless, the Court concludes that Mills has not established entitlement to a preliminary injunction or stay of execution for two independent reasons. First, the balance of the equities militates strongly against granting injunctive relief because Mills

[13] 209 U.S. 123 (1908).

inexcusably delayed filing this action. Second, even if the equities were in his favor, he has failed to show a substantial likelihood of success on the merits—"the most important preliminary-injunction criterion." *See Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1127–28 (11th Cir. 2022); *see also Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005) (per curiam) ("Controlling precedent is clear that injunctive relief may not be granted unless the plaintiff establishes the substantial likelihood of success criterion."). The Court also concludes that Mills has not shown good cause for expedited discovery at this stage.

The Court's discussion will proceed in three parts. First, the Court will address the jurisdictional issues raised by the Defendants: standing and sovereign immunity. Second, the Court will address Mills' request for a preliminary injunction, beginning with the equities before turning to substantial likelihood of success on the merits. Third and finally, the Court will address Mills' request for expedited discovery.

A. Jurisdictional Issues

The Defendants argue that Mills lacks Article III standing to bring his claims against Governor Ivey and Attorney General Marshall because Mills' alleged injuries are neither traceable to those defendants nor redressable by an order against them. The Defendants also argue that Eleventh Amendment sovereign immunity bars injunctive relief against Governor Ivey and that the *Ex parte Young* exception does not apply. The Court addresses each argument in turn.

1. Standing

To have Article III standing, a plaintiff must establish three elements: "(1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). In conducting the standing inquiry, the Court must "assume that on the merits [Mills] would be successful" on his claims. *See Culverhouse v. Paulson & Co. Inc.*, 813 F.3d 991, 994 (11th Cir. 2016).

At this stage, accepting the complaint's allegations as true, Mills has sufficiently shown that he has Article III standing to sue Governor Ivey and Attorney General Marshall. Beginning with injury in fact, Mills alleges that he faces an imminent future injury during his upcoming execution because he will be unnecessarily restrained on the execution gurney for hours, even when a stay is in place. These allegations are sufficient to establish an injury in fact, which the Defendants do not dispute. *See Smith v. Comm'r, Ala. Dep't of Corr.*, 2021 WL 4817748, at *3 (11th Cir. Oct. 15, 2021); *Moody v. Holman*, 887 F.3d 1281, 1286 (11th Cir. 2018). Turning to traceability, Mills contends that Attorney General Marshall's role in the execution process includes determining "whether a stay of execution has been entered or is expected to be entered, or whether the execution has been voluntarily delayed at the request of the court," as well as clearing executions to commence, as shown by Alabama's execution protocol and the Attorney General's own public statements. (Doc. 23 at 11; *see also* doc. 1 at 8–9, paras. 20–22). Mills also asserts that Governor Ivey's role includes scheduling execution timeframes and that she set the thirty-hour timeframe for his

execution. (Doc. 1 at 7–8, paras. 17–19). Moreover, Mills contends that prolonged restraint on the execution gurney violates his constitutional rights, which, according to him, is at least partially caused or exacerbated by Governor Ivey's setting a thirty-hour timeframe for his execution. (*E.g.*, doc. 1 at 3, para. 2; *id.* at 7–8, para. 18). Thus, at this stage, Mills' alleged injuries from prolonged restraint on the gurney are fairly traceable to Governor Ivey's conduct in setting the timeframe for his execution and to Attorney General Marshall's conduct in clearing executions to proceed where inmates have been restrained on the gurney for hours unnecessarily *See Smith*, 2021 WL 4817748, at *3; *Moody*, 887 F.3d at 1286–87.

Finally, regarding redressability, Mills' requested relief includes a permanent injunction enjoining the Defendants from subjecting him "to the illegal and unconstitutional practices described in [his] complaint" and "such other relief as may be just and equitable." (Doc. 1 at 42, paras. c. & g.). The Court finds that Mills has sufficiently shown, at this stage, that he seeks a remedy which is likely to redress his injuries traceable to Governor Ivey and Attorney General Marshall. *See Smith*, 2021 WL 4817748, at *4; *Moody*, 887 F.3d at 1287; *see also Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) ("[T]he ability 'to effectuate a partial remedy' satisfies the redressability requirement." (citation omitted)). Consequently, at this stage, Mills has sufficiently established Article III standing to sue Governor Ivey and Attorney General Marshall.

2. Sovereign Immunity

The Court next considers the Defendants' argument that sovereign immunity bars Mills' claims against Governor Ivey and that the *Ex parte Young* exception does not apply.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Although the amendment expressly forbids only suits brought against a State by citizens of a different State, the Supreme Court has long held that it similarly prohibits suits brought against a State by the State's own citizens. *See Hans v. Louisiana*, 134 U.S. 1 (1890). "Because the Eleventh Amendment represents a constitutional limitation on the federal judicial power established in Article III, federal courts lack jurisdiction to entertain claims that are barred by the Eleventh Amendment." *McClendon v. Ga. Dep't of Cmty. Health*, 261 F.3d 1252, 1256 (11th Cir. 2001) (citation omitted).

The Eleventh Amendment bar extends to suits against state officials in their official capacities where "the state is the real, substantial party in interest." *Lane v. Cent. Ala. Cmty. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014) (per curiam) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984)). And "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). In *Ex parte Young*, the Supreme Court established an exception for suits against state officials seeking prospective equitable relief to end continuing violations of federal law. *See Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1336–37 (11th Cir. 1999).

The Defendants argue that *Ex parte Young* does not permit Mills' claims for injunctive relief against Governor Ivey because she has "nothing to do with the challenged

conduct." (Doc. 15 at 22). But the Defendants acknowledge that Governor Ivey sets execution timeframes, including Mills' timeframe. (*Id.* at 23). As explained earlier, Mills asserts that prolonged restraint on the execution gurney violates his constitutional rights, and he claims that this prolonged restraint is at least partially caused or exacerbated by Governor Ivey's setting a thirty-hour timeframe for his execution. (*E.g.*, doc. 1 at 3, para. 2; *id.* at 7–8, para. 18). The Court agrees with Mills that, at this stage, this case is not a challenge to Governor Ivey's "general executive power." *See Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003). Instead, it is a permissible suit for injunctive relief against a state official with responsibility for and "some connection" to the conduct alleged in Mills' complaint. *See Luckey v. Harris*, 860 F.2d 1012, 1015–16 (11th Cir. 1988). Thus, at this stage, *Ex parte Young* permits Mills to bring his claims for declaratory and injunctive relief against Governor Ivey.

B. Motion for Preliminary Injunction

Although there are no jurisdictional barriers to Mills' suit at this stage, he nonetheless has failed to establish entitlement to a preliminary injunction or stay of execution. As explained further below, the Court finds that Mills' inexcusable delay weighs heavily against the equitable remedy of an injunction or stay; the statute of limitations bars relief on Counts II and IV; and even if all his claims were timely, Mills still has not shown a substantial likelihood of success on the merits on any of them.

1. The Equities and Mills' Delay

"[A] stay of execution is an equitable remedy" which "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal

judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006).[14] This Court must "apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Id.* (citation omitted); *Woods*, 951 F.3d at 1293 (citation omitted); *Jones v. Allen*, 485 F.3d 635, 638 (11th Cir. 2007) (citation omitted). "Last-minute stays should be the extreme exception, not the norm, and 'the last-minute nature of an application' that 'could have been brought' earlier, or 'an applicant's attempt at manipulation,' 'may be grounds for denial of a stay.'" *Bucklew v. Precythe*, 587 U.S. 119, 150 (2019) (quoting *Hill*, 547 U.S. at 584). District courts "'can and should' protect settled state judgments from 'undue interference' by invoking their 'equitable powers' to dismiss or curtail suits that are pursued in a 'dilatory' fashion or based on 'speculative' theories." *Id.* at 151 (quoting *Hill*, 547 U.S. at 584–85).

Mills' delay in bringing Counts II and IV is especially acute because those claims are barred by the statute of limitations and should have been brought several years ago. By contrast, the statute of limitations does not bar Count I, and as explained further below, the Court assumes without deciding it does not bar Count III. Consequently, the Court focuses its analysis of the equities on Mills' delay in bringing Counts I and III and finds that the delay was inexcusable.

[14] Although Mills primarily frames his motion (doc. 7) as a request for a preliminary injunction and not a stay of execution, the Court finds that based on the relief he seeks, he is effectively requesting a stay of execution. In any event, the Court's analysis applies equally to the extent he requests a preliminary injunction, a stay of execution, or both.

The thrust of Mills' Eighth Amendment claim (Count I), which underlies his access to courts claim (Count III), is that since July 2022, the Defendants have, on several occasions, subjected inmates—including Joe James, Alan Miller, and Kenneth Smith—to prolonged executions or execution attempts during which those inmates were unnecessarily strapped to the execution gurney for periods ranging from one-and-a-half to four hours, including while a court-ordered stay was in place; and that the Governor's expansion of the timeframe afforded to ADOC to carry out executions will result in even longer periods where inmates are unnecessarily strapped to the gurney.

Mills filed this § 1983 action on April 26, 2024. He filed his motion for a preliminary injunction or stay of execution on May 3, 2024 (doc. 7), but only after this Court prompted him to do so (doc. 5). Mills' postconviction litigation timeline and other relevant developments reflect that Mills' request for a preliminary injunction or stay was filed: (1) twenty-four months after the United States Supreme Court denied certiorari on his habeas petition; (2) about twenty-one months after Joe James' execution and contemporaneous media reports concerning alleged delays during the execution; (3) eighteen months after Alan Miller's failed execution attempt and Miller's amended complaint alleging a nearly two-hour restraint on the gurney; (4) about fifteen months after Kenneth Smith's failed execution attempt and Smith's amended complaint alleging a four-hour restraint on the gurney; (5) fifteen months after Governor Ivey requested that the Alabama Supreme Court expand the timeframe for ADOC to carry out executions; (6) fourteen months after the Alabama Supreme Court amended Rule 8 permitting the Governor to set a timeframe for ADOC to carry out executions; (7) nearly eleven months

after Governor Ivey set James Barber's execution for a thirty-hour timeframe; (8) about nine months after Barber's execution; (9) about three months after the State moved the Alabama Supreme Court to set Mills' execution date; (10) more than six weeks after the Alabama Supreme Court granted the State's motion; (11) more than five weeks after Governor Ivey set the timeframe for Mills' execution; and (12) fewer than four weeks before the beginning of his May 30, 2024 execution timeframe.[15] Meanwhile, between March 4, 2024 and April 16, 2024, Mills has litigated in the Alabama Supreme Court, Marion County Circuit Court, and the United States District Court for the Northern District of Alabama.

The Court concludes that Mills' delay in filing suit and seeking a preliminary injunction or stay of execution was "unreasonable, unnecessary, and inexcusable." *See Brooks v. Warden*, 810 F.3d 812, 824 (11th Cir. 2016) (citation omitted). The Court finds that he knew or should have known of the facts giving rise to his challenges to the State's execution procedures "well before he filed suit." *See Jones*, 485 F.3d at 640 n.3. Since 2022, many events have occurred which should have triggered action by Mills, and yet he did not act. A reasonably diligent plaintiff likely could and should have filed suit after Kenneth Smith's execution attempt in November 2022, as that was the third lethal injection execution or attempted execution which allegedly involved the condemned inmate being

[15] The Court does not suggest that Mills would have been justified in waiting to file until the State moved to set his execution date, until the Alabama Supreme Court granted the motion, or until the Governor set his execution timeframe. The Court mentions these events to underscore the unreasonable nature of Mills' delay in waiting to file until thirty-four days before his scheduled execution.

strapped to the gurney for an extended period.[16] Even assuming that it was reasonable to wait until after the State reviewed and made changes to its execution procedures, a reasonably diligent plaintiff could and should have filed suit soon after May 30, 2023, when Governor Ivey set an execution timeframe of thirty hours for Barber's lethal injection execution. At *that* time at the latest, the facts giving rise to Mills' claims regarding prolonged restraint on the gurney were or should have been amply apparent to all reasonably diligent plaintiffs. *See Jones*, 485 F.3d at 640 n.3. "[L]ast-minute claims arising from long-known facts . . . can provide a sound basis for denying equitable relief in capital cases." *Ramirez v. Collier*, 595 U.S. 411, 434 (2022).

Not only did Mills fail to assert these claims soon after May 30, 2023, he waited another eleventh months. After Barber's execution in July 2023, Mills still did nothing. After the State moved to set his execution date in January 2024, Mills still did nothing.[17] After Governor Ivey set his execution timeframe on March 27, 2024, Mills still did nothing. He continued to sit on his hands for thirty days and waited to file this action until April 26, 2024—even though he has been litigating a successive Rule 32 petition in Marion County Circuit Court and a Rule 60 motion in the Northern District of Alabama since early March.

[16] The Court assumes without deciding that it was not unreasonable for Mills to decline to file suit after the James execution or the Miller attempted execution, since "an isolated mishap alone does not give rise to an Eighth Amendment violation," although "a series of abortive attempts" may "present a different case." *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality op.) (citation omitted).

[17] In an apparent attempt to downplay the significance of the delay, Mills' counsel argued at the evidentiary hearing that the Defendants did not contend that he could have sued before Governor Ivey set his execution timeframe. That is incorrect. In their response, the Defendants contend that Mills could have sued in January 2024 immediately after the State moved to set his execution date. (Doc. 15 at 61). In any event, the Defendants' position on Mills' delay is not dispositive given the Supreme Court's admonition that "[c]ourts should police carefully against attempts to use [execution] challenges as tools to interpose unjustified delay." *Bucklew*, 587 U.S. at 150.

Indeed, Mills' other litigation supports a finding that his legal team is able to advocate for Mills on separate fronts simultaneously. The Court thus finds that Mills' other litigation activity underscores the unreasonableness of his delay in filing this action.

Mills offers no reasonable explanation, either in his motion or at the hearing, for why he could not have filed this case earlier. At the evidentiary hearing, Mills argued that he could not have filed before the Governor set his execution date because the Defendants would have argued, based on arguments they purportedly made in other cases, that he did not have standing to sue at that point. However, Mills identified no authority for the proposition that he would have lacked standing to sue prior to the setting of his execution date. Moreover, even assuming for argument's sake that this explanation is reasonable, Governor Ivey set his execution timeframe on March 27, 2024, but Mills waited thirty additional days—until April 26, 2024—to file this action, which is thirty-four days before his execution date. He then waited another seven days to file his motions for injunctive relief and for expedited discovery. In any event, Mills has not identified any fact or circumstance which prohibited him from filing this action earlier. Consequently, this explanation is insufficient to justify Mills' delay.

Otherwise, Mills defends the timing of his filing by asserting that he filed this case more than thirty days before his scheduled execution, which he argues is "ample" time to remedy his concerns, and that his "requests are easily obtainable within that time period." (Doc. 7 at 26, 28). Meaning, according to Mills, the Defendants could easily implement his requests for relief prior to his May 30 execution. This argument misses the mark because it ignores that thirty-four days is woefully insufficient to fully litigate these issues,

and it reflects a lack of awareness or understanding about the litigation process and timeline for § 1983 actions where an execution date is set. When a condemned inmate files a § 1983 action and seeks a stay of execution or preliminary injunction, litigation first proceeds in the district court. The district court must afford time for the defendants to respond to the plaintiff's filings and for the court to review the parties' submissions, potentially hold an evidentiary hearing, conduct legal research, and draft an opinion. The district court's decision to grant or deny the requested stay or injunction then must be reviewed by the Eleventh Circuit. That court too must review the parties' submissions, potentially hold oral argument, conduct legal research, and draft an opinion. Finally, the United States Supreme Court must review the case and issue a decision before the State will proceed with the execution. Mills' assertion that this entire process could "easily" take place within the thirty-four days between when he filed suit and his execution date defies credulity.

In sum, Mills has failed to identify any impediment to filing this action and seeking injunctive relief after the State's three lethal injection executions or attempts in Fall 2022; after Governor Ivey sought to extend the timeframe for ADOC to carry out executions in December 2022; after Governor Ivey set Barber's execution for a thirty-hour timeframe on May 30, 2023; after Barber's July 2023 execution; or even earlier this year after the State moved to set his execution date. Mills' delay in filing this action until thirty-four days before his scheduled execution is all the more inexplicable given the repeated admonitions from the Supreme Court and the Eleventh Circuit to "apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *E.g.*, *Hill*, 547 U.S. at 584

(citation omitted). Based on the totality of the circumstances, the Court finds Mills' delay in filing this action and seeking a preliminary injunction inexplicable and inexcusable, and Mills has thus left "little doubt that the real purpose behind his claim is to seek a delay of his execution, not merely to effect an alteration of the manner in which it is carried out." *See Jones*, 485 F.3d at 640 (citation omitted).

The practice of filing lawsuits and requests for stay of execution at the last minute where the facts were known well in advance is ineffective, unworkable, and must stop. The unique circumstances of execution litigation and the attendant deadlines are precisely why such litigation should be filed at the earliest possible opportunity: to ensure that courts at all levels have as much time as possible to review the case and make a reasoned decision. This case seems to follow a continuing trend of lawyers filing last-minute § 1983 lawsuits to create an emergency situation in the hopes that the condensed timeframe will persuade courts to stay the execution to afford themselves more time to consider the matter. But this strategy is untenable given the Supreme Court's instruction that "[c]ourts should police carefully against attempts to use [execution] challenges as tools to interpose unjustified delay." *Bucklew*, 587 U.S. at 150. And again, sufficient time to consider the issues is essential given the nature of execution litigation. The Court acknowledges that lawyers representing death row inmates set to be executed unquestionably owe a duty to their clients. However, these lawyers are also officers of the court. The act of filing a civil action and then a request for injunctive relief after unjustified delay often appears to be legal manipulation rather than genuine legal advocacy.

To be sure, certain situations may justify an inmate's late filing of a § 1983 action challenging execution procedures. *See, e.g.*, *Ramirez*, 595 U.S. at 434–35 (rejecting the argument that a condemned inmate inequitably delayed litigation "by filing suit just four weeks before his scheduled execution" because the inmate "had sought to vindicate his rights for months" via the prison's internal grievance system). This case, however, does not come close to presenting circumstances sufficient to justify the significant delay in seeking relief. "While each death case is very important and deserves [the Court's] most careful consideration," the fact that Mills filed suit and sought a preliminary injunction or stay so late in the day, "and without adequate explanation," supports a finding that the equities do not weigh in his favor. *See Jones v. Comm'r, Ga. Dep't of Corr.*, 811 F.3d 1288, 1297–98 (11th Cir. 2016).

"Equity also weighs against granting the [preliminary injunction or] stay because 'the State and the victims of crime have an important interest in the timely enforcement of a sentence.'" *See Woods*, 951 F.3d at 1293 (quoting *Hill*, 547 U.S. at 584). Mills was convicted and sentenced to death for the murders of Floyd and Vera Hill in 2007. The State and the victims' family have a strong interest in seeing Mills' punishment exacted. *See Brooks*, 810 F.3d at 825; *Jones*, 485 F.3d at 641. Indeed, they have already waited seventeen years. Because Mills inexcusably delayed bringing this action, and because the State and the victims' family have a strong interest in the timely enforcement of his sentence, Mills has failed to show that equity favors entry of a preliminary injunction or stay of execution, and his motion is due to be denied for this reason alone.

2. Substantial Likelihood of Success on the Merits

Even if the Court found that the equities weigh in Mills' favor—which they do not—Mills must still demonstrate a substantial likelihood of success on the merits to be entitled to a preliminary injunction or stay of execution. Because he cannot do so, his motion is due to be denied for this additional, independent reason. The Court first will address Mills' Eighth Amendment claim in Count I before turning to Counts II, III, and IV together.

a. Count I—Eighth Amendment Claim

Mills contends that his Eighth Amendment rights likely will be violated during his upcoming execution because he likely will be restrained on the execution gurney for too long and unnecessarily. He asserts that in the last two years, ADOC officials have subjected condemned persons to a "prolonged, unnecessary execution process" by bringing them into the execution chamber and restraining them on the gurney for hours, including keeping them strapped to the gurney "even while court-ordered stays of execution were in place." (Doc. 7 at 9–10). According to Mills, this prolonged restraint is "without legitimate reason and with wanton disregard for the pain and suffering this causes," and it increases an inmate's psychological pain and suffering as he awaits his impending death. (*Id.* at 9). The Defendants contend there were legitimate reasons for the longer periods of restraint in prior executions, and that the State changed the IV team personnel from these prior executions and also changed certain procedures to shorten the time required to carry out executions. Additionally, Commissioner Hamm testified that Mills would not be taken into the execution chamber while a stay was in effect.

Mills insists that Count I is not a method of execution challenge but rather a general Eighth Amendment challenge to what he perceives as "punitive treatment amount[ing] to gratuitous infliction of 'wanton and unnecessary' pain." (*Id.* at 13) (quoting *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)). While the Court doubts that Count I is not a method of execution challenge, the Court will assume without deciding that it is not. Thus, the question before the Court is whether Mills has shown a substantial likelihood of success on the merits of his claim that restraining him on the execution gurney for hours, allegedly without legitimate reason and without access to counsel, constitutes the gratuitous infliction of wanton and unnecessary pain in violation of the Eighth Amendment. On this record, the answer is no.

"[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Hope*, 536 U.S. at 737 (alterations in original) (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). Among the forbidden "'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)). Moreover, "[t]he general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Whitley*, 475 U.S. at 320. "Some risk of pain is inherent in any method of execution," and "the Constitution does not demand the avoidance of all risk of pain in carrying out executions." *Baze*, 553 U.S. at 47. To show that exposure to a risk of future harm violates the Eighth Amendment, the plaintiff must show that "the conditions

presenting the risk [are] '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Id.* at 49–50 (emphases in the original) (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993)). "[T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 & n.9 (1994)).

Mills asserts that being restrained on the execution gurney for hours causes unnecessary and wanton pain and suffering. But "[t]o be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety." *Whitley*, 475 U.S. at 319. The Court doubts that simply restraining the condemned inmate on the execution gurney amounts to punishment because this restraint is a necessary part of the execution. Moreover, simply restraining a condemned inmate on the gurney is not inherently wanton or torturous. To the extent the pain and suffering about which Mills complains is the physical and/or psychological pain of being restrained on the execution gurney for several hours, the Court finds that, on this record, Mills has not shown a substantial likelihood that he will be subjected to pain and suffering during his execution which is unnecessary, wanton, or torturous for purposes of the Eighth Amendment. Mills has not met his burden to show that the circumstances of prior executions make it likely that he will be subjected to prolonged, unnecessary restraint on the gurney during his execution which violates the Eighth Amendment. And considering the State's changes since 2022, Mills also has not

established a substantial likelihood that *he* will be restrained on the gurney for a length of time similar to the prior executions about which he complains.

Mills alleges that because it takes "minutes" to secure an inmate to the gurney, the practice of restraining inmates to the gurney "for hours is without penological justification and is unnecessary." (Doc. 1 at 35, para. 120). He cites examples of prior executions and execution attempts, including the James and Barber executions and the Miller and Smith attempted executions which, according to Mills, evidence a pattern of unconstitutional conduct making it likely that he will experience similar unconstitutional conduct during his own execution. But as the Defendants explain, extended restraint on the gurney can be, and recently has been, caused by several factors. These factors include difficulty obtaining IV access, which Mills acknowledges occurred with Miller and Smith and can be exacerbated by an inmate's physical condition, such as with Miller; an inmate's resistance, which, according to the Defendants, occurred with Smith;[18] an inmate spending time with his spiritual advisor; and delays attendant to transporting witnesses from offsite locations to Holman.[19] The Court finds, on this record, that these explanations suffice as legitimate

[18] Execution log excerpts for Smith's November 2022 execution attempt reflect that at 11:15 p.m., the IV team attempted to set an IV in Smith's neck but he kept jerking his head. (Doc. 15-4 at 3). At that time, Smith had been on the gurney for nearly three hours. (*Id.* at 2–3).

[19] At the evidentiary hearing, Mills argued that delays in witness transportation did not justify extended restraint because, according to Mills, Alabama's execution protocol requires that the witnesses already be present in the viewing room when the condemned enters the execution chamber. (Doc. 25 at 26, lines 14–23). In support, Mills cited Section IX.L of Alabama's protocol. (*Id.* at 36, lines 5–25; 37, lines 1–8); *see also* doc. 15-1 at 16 (Alabama's protocol)). The Court finds, however, that this portion of the protocol does not support his argument. Moreover, the Defendants represented at the hearing that witnesses are never brought to Holman before the condemned is restrained on the gurney. (Doc. 25 at 75, lines 6–10).

penological reasons why inmates previously were restrained on the gurney for their respective durations.

While the record does not reveal why Smith remained restrained on the gurney while a stay was in effect, the lack of such explanation does not change the Court's conclusion. Even assuming there was no legitimate reason for that situation to have occurred, it would amount to a mere "isolated mishap," which "does not give rise to an Eighth Amendment violation" in the execution context. *See Baze*, 553 U.S. at 50 (citation omitted); *see also Jackson v. Danberg*, 594 F.3d 210, 226 (3d Cir. 2010) ("[A]ny blunder committed during [an earlier inmate's] execution does not suffice to show a substantial risk of serious harm in future executions."). And as explained further below, the Defendants presented sworn testimony that Mills will not be restrained on the gurney while any stay is in effect. Additionally, Mills' unsworn allegations concerning the use of stress positions during prior executions are undermined by Riley's sworn testimony that the execution gurney cannot tilt to a 90-degree angle. But even accepting as true Mills' version of events that Miller was tilted vertically on the gurney for twenty minutes and Smith was tilted in a reverse crucifixion position for an unspecified period, the Court is not persuaded on this record that any resulting pain amounts to torture or cruelly superadded pain in violation of the Eighth Amendment. *Cf. Bucklew*, 587 U.S. at 130 (listing founding-era examples of cruelly superadded pain).

The Court does not doubt that condemned inmates experience psychological stress leading up to their executions, or that this stress becomes particularly acute once they enter the execution chamber and are strapped to the gurney. However, on this record, Mills has

not shown a substantial likelihood of success on the merits of his claim that he will be restrained on the execution gurney for a length of time which is "totally without penological justification," and consequently, he fails to show that he will be subjected to an unnecessary and wanton infliction of pain. *See Hope*, 536 U.S. at 737. Thus, to the extent Mills relies on periods of restraint during past executions and execution attempts as evidence that his own execution likely will be unconstitutional, his reliance is unavailing.

Mills also is not substantially likely to succeed on his Eighth Amendment claim because of the State's changes to its execution procedures since 2022 and its subsequent lethal injection executions. Following the failed attempts to execute Miller and Smith, the State reviewed its execution procedures and made meaningful changes, including replacing the members of the IV team who worked on past executions. After this review, the State carried out two lethal injection executions—Barber in July 2023 and McWhorter in November 2023. The Defendants presented unrefuted evidence that Barber spent one hour and seventeen minutes, and McWhorter spent forty-eight minutes, on the execution gurney before their respective death warrants were read. Mills does not allege or suggest that the IV team had problems accessing Barber's or McWhorter's veins or that either was restrained to the gurney while a stay was in place. The Defendants also presented evidence that steps were taken recently to reduce delays in transporting witnesses. Specifically, Riley testified in her affidavit that after any stays are lifted, witnesses are transported to Holman and staged there so they may be "moved to the execution chamber as soon as the condemned is prepared." (Doc. 15-8 at 5, para. 12). Moreover, she testified that in Barber's execution, approximately one hour elapsed between setting the IV lines and the death

warrant being read, but in McWhorter's execution, that delay was cut in half. (*Id.*). Finally, Commissioner Hamm testified under oath at the evidentiary hearing that Mills will not be moved to the execution chamber while a stay is in place, and that Mills will be removed from the chamber and returned to the holding cell if a stay is entered while he is already in the chamber. This evidence undermines Mills' contention that he faces an imminent risk of unnecessarily prolonged restraint on the execution gurney in violation of the Constitution. *See Baze*, 553 U.S. at 49–50.

Mills cites *Hope v. Pelzer*, 536 U.S. 730 (2002), for the proposition that prolonged periods of restraint violate the Eighth Amendment. But *Hope* is an inapt comparator given the circumstances accompanying that plaintiff inmate's restraint. In *Hope*, the plaintiff was handcuffed to a hitching post outdoors for approximately seven hours in June in Alabama, during which the sun baked his skin because he was shirtless, he was denied bathroom breaks, and he was offered water only once or twice. 536 U.S. at 734–35. Moreover, a guard taunted the plaintiff about his thirst by "first [giving] water to some dogs" and then kicking the water cooler over in front of the plaintiff. *Id.* at 735. Guards had decided to restrain the plaintiff on the hitching post because he took a nap during the bus ride to a worksite, "was less than prompt in responding to an order to get off the bus," and got into a "wrestling match with a guard." *Id.* at 734. The Court reasoned that "[a]ny safety concerns had long since abated" when the plaintiff was handcuffed to the hitching post because he had already been subdued, restrained, and taken back to the prison. *Id.* at 738. The Court further concluded that prison officials gratuitously inflicted wanton and

unnecessary pain in violation of the Eighth Amendment because they undertook the following actions:

> Despite the clear lack of an emergency situation, [officials] knowingly subjected [the plaintiff] to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation.

Id.

The alleged pain attendant to prolonged periods of restraint on the execution gurney under the circumstances of this case falls well short of the gratuitous infliction of wanton and unnecessary pain addressed in *Hope*. Importantly, in *Hope*, the mere act of placing an inmate on the hitching post was, in itself, punishment. Here, by contrast, the mere act of restraining an inmate on the gurney to prepare for an execution is *not* punishment, but even if it were, it is not gratuitous or wanton because it is necessary to carry out the execution. And as explained above, Mills has failed to show that the prior executions involving restraint lasting up to three or four hours were "totally without penological justification," and thus those prior executions do not render it likely that he will be subjected to unnecessary and wanton pain during his own execution. *See id.* at 737. Additionally, there is insufficient evidence or allegation that any condemned inmate since Kenneth Smith in November 2022 has been restrained to the execution gurney for more than one hour and seventeen minutes, or that any of them experienced additional deprivations comparable to those which the *Hope* plaintiff suffered. Moreover, based on changes since November 2022 explained in more detail above, Mills has not shown a substantial likelihood that *he*

will be restrained to the gurney for hours or while a stay is in place. Consequently, *Hope* does not aid Mills in showing a substantial likelihood of success on the merits of his Eighth Amendment claim.

Mills also cites a decision of another judge in this district for the proposition that "being strapped to the gurney for up to four hours and at one point being placed in a stress position for an extended period of time, goes 'so far beyond what [is] needed to carry out a death sentence that [it] could only be explained as reflecting the infliction of pain for pain's sake.'" *Smith v. Hamm*, 2023 WL 4353143, at *7 (M.D. Ala. July 5, 2023) (alterations in original) (quoting *Bucklew*, 587 U.S. at 137). Mills' citation, however, omits relevant context of *Smith*.

First, in *Smith*, the court was tasked with determining whether Kenneth Smith stated a plausible claim that a second lethal injection execution attempt violated the Eighth Amendment. *Id.* at *6–7. Here, on a motion for preliminary injunction, the Court must determine whether Mills has shown a substantial likelihood of success on the merits—a higher burden. *See Am. Airlines, Inc. v. Spada*, 2023 WL 8001220, at *3 (S.D. Fla. Nov. 18, 2023) (observing that the "preliminary injunction standard is more stringent"). Second, and related to the first point about the different procedural posture, *Smith* observed that "additional factual development may reveal a legitimate reason why Smith was strapped to the gurney in this manner and for this duration" but that "such a reason [was] not apparent from" the operative complaint. *Smith*, 2023 WL 4353143, at *7. On a motion for preliminary injunction, the Court may consider evidence outside the complaint, and as detailed above, the Defendants have marshalled evidence explaining why Smith (and

others) whom the State executed or attempted to execute on or before November 2022 were restrained on the gurney for up to three-and-a-half hours.[20]

Additionally, although Smith's allegations that he was painfully strapped to the gurney for up to four hours factored into the court's analysis, those allegations were not the sole basis for the court's conclusion that Smith's claim was sufficiently plausible. Instead, the *Smith* court's conclusion rested on Smith's allegations that he suffered "multiple needle insertions over the course of one-to-two hours into muscle and into the collarbone in a manner emulating being stabbed in the chest, *in combination with being strapped to the gurney*." *Smith*, 2023 WL 4353143, at *7 (emphasis added). And again, Mills has not shown that the IV team will have difficulty accessing his veins, and given the changes since Smith's attempted execution, Mills has not shown a substantial likelihood that *he* will be restrained to the gurney for hours or while a stay is in place. Thus, *Smith* does not help him, either.

In sum, the State's review of and changes to its execution procedures, the recent executions of Barber and McWhorter, the recent changes implemented to reduce delays in transporting witnesses, and Commissioner Hamm's testimony at the evidentiary hearing, individually and collectively, strongly indicate that Mills will be restrained on the gurney for much less time than inmates such as Miller and Smith had been, and that Mills will not be on the gurney if a stay is in effect. Consequently, Mills has not shown a substantial

[20] Smith alleged that he was restrained on the gurney for up to four hours. However, ADOC's execution logs show that he was restrained for three hours and thirty-one minutes. (*See* doc. 15-4 at 2–3). In any event, this distinction does not alter the Court's analysis or conclusions.

likelihood that *he* would be restrained on the gurney for hours or while a stay was in place—assuming for argument's sake that these occurrences during executions, individually or collectively, amount to an unconstitutional level of severe pain. *Cf. Jackson v. Danberg*, 601 F. Supp. 2d 589, 598–600 (D. Del. 2009) (dismissing at summary judgment the plaintiff's Eighth Amendment method of execution claim and rejecting the plaintiff's argument that "future conduct by different [execution] personnel . . . will reflect past conduct by former personnel"), *aff'd*, 594 F.3d 210 (3d Cir. 2010). On this record, Mills "has not offered anything more than the speculative, conjectural possibility that something might go wrong during his execution which would subject him to cruel and unusual punishment in violation of the Eighth Amendment." *See Arthur v. Comm'r, Ala. Dep't of Corr.*, 680 F. App'x 894, 909 (11th Cir. 2017).

Mills' Eighth Amendment claim fairs no better when analyzed as a method of execution claim. "[T]he Eighth Amendment does not guarantee a prisoner a painless death . . . ." *Bucklew*, 587 U.S. at 132. Instead, the relevant Eighth Amendment inquiry is whether the State's chosen method of execution "'superadds' pain well beyond what's needed to effectuate a death sentence." *Id.* at 136–37. And "[t]o determine whether the State is cruelly superadding pain," the Supreme Court requires "asking whether the State had some other feasible and readily available method to carry out its lawful sentence that would have significantly reduced a substantial risk of pain." *Id.* at 138; *see also Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 858 (11th Cir. 2017) (explaining that a plaintiff asserting an Eighth Amendment method of execution challenge "must plausibly plead, and ultimately prove, that there is an alternative method of execution that is feasible,

readily implemented, and in fact significantly reduces the substantial risk of pain posed by the state's planned method of execution").

Mills has failed to establish a substantial likelihood that prolonged periods of restraint on the execution gurney under the circumstances of this case amounts to "'superadd[ed]' pain well beyond what's needed to effectuate a death sentence," for the same reasons he has failed to establish a gratuitous infliction of wanton and unnecessary pain. *See Bucklew*, 587 U.S. at 136–37; *Hope*, 536 U.S. at 737. He also has not shown a substantial likelihood of success on the merits of this claim because he has not sufficiently pled or presented evidence of a feasible, readily implemented alternative method of execution which "in fact significantly reduces the substantial risk of pain posed by the [S]tate's planned method of execution." *See Boyd*, 856 F.3d at 858; *Bucklew*, 587 U.S. at 37.

The Court does not suggest that prolonged restraint on the gurney could never amount to a constitutional violation. The Court need not and does not decide the point at which the period of restraint crosses from constitutional to unconstitutional. But on this record, Mills has failed to show a substantial likelihood of success on the merits of his Eighth Amendment claim.

b. Counts II, III, and IV

The Court now turns to Mills' remaining three claims. The Court begins with the statute of limitations because Mills is not substantially likely to succeed on the merits of a claim that is time-barred. *See Brooks*, 810 F.3d at 822. The Court then will address the

merits of Counts II, III, and IV, assuming for argument's sake that none of them is time-barred.

In Count II, Mills alleges that excluding his counsel "during the execution process" violates his due process rights. (Doc. 1 at 35, para. 123). In Count III, he alleges that the "exclusion of [his] counsel . . . during this critical stage violates" his right to access the courts. (*Id.* at 38, para. 130). Finally, in Count IV, Mills alleges that excluding his counsel "during the execution process" violates his Sixth Amendment rights. (*Id.* at 39, para. 137). Mills alleges that he "requires the presence of counsel to effectuate his right of access to the courts and to enforce his Eighth Amendment rights," and that his counsel will require access to a phone "to ensure these rights are protected and to petition the courts in the event the State proceeds as it has in the past." (*Id.* at 38, paras. 131–32). According to Mills, he requires his counsel in the execution chamber, and his counsel requires access to a phone, because he is at "imminent risk of being subject to an unnecessarily prolonged and tortuous execution at the hands of State officials with unreviewable authority," which violates his Eighth Amendment rights. (*Id.* at 4, para. 5).

i. Statute of Limitations

The Defendants argue that Counts II and IV are barred by the statute of limitations because the prohibitions against counsel and phones in the execution chamber have existed for more than two years prior to the filing of this action.[21] The Defendants contend that

[21] Although the Defendants argued in their response that the statute of limitations also bars Count III, the Defendants backed away from this position at the evidentiary hearing.

The Court discerns no clear answer as to whether Count III is time-barred. In Count III, Mills asserts that the State's prohibitions on counsel and phones in the execution chamber violates his rights to access the

since Mills' sentence became final, Alabama's execution protocol has not permitted the condemned inmate's counsel to be present in the execution chamber, let alone with a phone, during preparations for an execution. (Doc. 15 at 35). According to the Defendants, Mills knew, or reasonably should have known, of these prohibitions since at least 2017 following the decision in *Arthur*, 680 F. App'x 894.

Mills does not contend that either of these prohibitions were adopted within the two years before he filed this action. Instead, he contends that his claims were brought within the two-year limitations period because, beginning with Joe James' execution in 2022, a pattern of prolonged restraint on the execution gurney has emerged which, according to Mills, constitutes a "substantial change" to the State's execution process and thereby resets the statute of limitations. *See West v. Warden, Comm'r, Ala. Dep't of Corr.*, 869 F.3d 1289, 1298 (11th Cir. 2017). Mills further contends that, unlike *Arthur*, Mills has brought a Sixth

courts, and that this access is necessary to guard against Eighth Amendment violations during his execution. An access to courts claim is ancillary to a substantive underlying claim, "without which a plaintiff cannot have suffered injury by being shut out of court." *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). The Eleventh Circuit has explained that "the statute of limitations for denial of access may be different than that of the underlying claim, beginning to run only when the plaintiffs knew or should have known that they have suffered injury to their right of access and who caused it." *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003). Here, the question is whether Mills' right of access claim accrued when he should have known of the prohibition of attorneys and phones in the execution chamber, or if it accrued at the same time as his Eighth Amendment claim. This question does not have an easy answer. It is arguable that Mills knew, or should have known, the facts underlying his access to courts claim in 2017 when *Arthur* made clear that Mills would not be allowed to have his attorney or a phone in the execution chamber. On the other hand, because an access to courts claim is ancillary to a substantive underlying claim, it is arguable that Mills' right of access claim did not arise until his underlying Eighth Amendment claim arose. But because the Defendants' have disclaimed reliance on the statute of limitations with respect to Count III, and because Count III fails on the merits in any event, the Court need not resolve the statute of limitations issue as to Count III, and for the purposes of this Opinion, the Court assumes without deciding that Count III is not time-barred. *See id.* at 1283 (explaining that because the complaint alleged insufficient facts to support the right of access claim, the statute of limitations issue was moot).

Amendment claim, and his claims are "not tied to the visitation or cell phone policy enacted previously and litigated" in *Arthur*. (Doc. 23 at 32–33).

The parties agree that Counts II and IV are subject to a two-year statute of limitations. *See Brooks*, 810 F.3d at 823; *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008). The contested issue is when the limitations period began to run on these claims. "In Section 1983 cases, the statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Nance v. Comm'r, Ga. Dep't of Corr.*, 59 F.4th 1149, 1153 (11th Cir. 2023) (citation omitted). In other words, the question is when Mills knew, or reasonably should have known, "of the injury which is the basis of the action." *McNair*, 515 F.3d at 1174 (quoting *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990)).

The Court finds that Mills knew, or reasonably should have known, by no later than 2017 that his counsel is not permitted in the execution chamber and that visitors, including counsel, are not permitted to bring phones into Holman. In 2017, the Eleventh Circuit decided *Arthur*, in which the court explained that ALA. CODE § 15-18-83, which lists the persons who may be present at an execution, "does not provide an option for the inmate's attorney to be present in his or her capacity as legal counsel." 680 F. App'x at 898. As for access to a phone, the Eleventh Circuit panel stated that Alabama's "long-standing rule against visitors bringing cell phones into prison facilities . . . was undisputedly in place no later than August 1, 2012." *Id.* at 906 (emphasis in original). As noted earlier, Mills does not contend that either of these policies was adopted within the two years before he filed

this action. Thus, Mills should have known by no later than 2017 that his counsel would neither be allowed in the execution chamber nor allowed to bring a phone inside Holman.

Mills' allegations concerning the State's executions and execution attempts since 2022 are insufficient to transform Counts II and IV into timely claims. While those events may have elucidated the reasons for Mills' desire to have his counsel present in the execution chamber with a phone, it is the State's *policies* which he challenges and which give rise to his claims in Counts II and IV. *See Grayson v. Dunn*, 221 F. Supp. 3d 1329, 1336 (M.D. Ala. 2016) (reaching a similar conclusion regarding an inmate's claim that his counsel should be permitted to have a phone while witnessing his execution), *aff'd sub nom. Grayson v. Warden*, 672 F. App'x 956 (11th Cir. 2016) (per curiam). Moreover, those executions and execution attempts do not change the reality that the State's policies prohibiting counsel in the execution chamber and phones in prison facilities have existed for much longer than two years. *See id.* Thus, Counts II and IV are time-barred because they accrued more than two years prior to Mills' filing this action. Consequently, Mills is not substantially likely to succeed on the merits of Counts II and IV. *See Brooks*, 810 F.3d at 822.

But even if Counts II and IV were not time-barred, for the reasons discussed below, Mills still cannot establish that he is substantially likely to succeed on the merits.

ii. Merits

The Court now proceeds to the merits of Counts II, III, and IV. These three counts all center around one common issue: Mills' alleged lack of access to counsel during his entire execution process (or more specifically, in the execution chamber).

The Court begins with a point of clarification. Each of Counts II, III, and IV allege a lack of access to counsel in the execution chamber. As explained above, the Defendants represent to the Court that Mills will not be taken to the chamber while a stay is in place, and should a stay be granted while he is in the chamber, Mills will be removed from the chamber. Additionally, Riley's testimony and the execution logs show that inmates have phone access to their attorneys in the holding cell (doc. 15-2; doc. 15-3, doc. 15-5, doc. 15-7; doc. 15-8 at 5–6, para. 14), and Mills does not dispute that he will have phone access to his counsel in the holding cell. Thus, a central issue in Counts II, III, and IV—the time during which Mills would experience a lack of access to counsel—is limited to a discrete period on his execution day: his time in the execution chamber. Consequently, Mills must show a substantial likelihood of success on the merits of his claims that he has a constitutional right to have his counsel present in the execution chamber to guard against potential constitutional violations during his execution. On this record, Mills fails to do so. The Court begins its analysis with Count IV, followed by Counts II and III.

First, in Count IV, Mills contends that the Sixth Amendment grants him a right to have counsel present with him in the execution chamber. The Sixth Amendment guarantees criminal defendants "the Assistance of Counsel for [their] defence," from "all criminal prosecutions." U.S. CONST. amend. VI. This right "applies only to criminal proceedings," *Barbour v. Haley*, 471 F.3d 1222, 1231 (11th Cir. 2006), and more specifically, it "guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Missouri v. Frye*, 566 U.S. 134, 140 (2012) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009)). A critical stage is a proceeding that

amounts to a "trial-like confrontation." *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 n.16 (2008). A critical stage may occur formally or informally and may take place in or out of court. *Id.* Importantly, the Sixth Amendment's right to counsel "extends to the first appeal of right, and no further." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

Mills acknowledges that there is no ongoing judicial proceeding against him under which the right to counsel would arise. (Doc. 23 at 47). Rather, in his view, his execution is a critical stage of a proceeding, one in which an adversarial nature is created by the presence of the Defendants' attorneys who offer legal advice to state officials involved in the execution. He cites *United States v. Ash*, 413 U.S. 300 (1973), arguing that whether the Sixth Amendment's right to counsel applies calls for "examination of the event in order to determine whether the accused require[s] aid in coping with legal problems or assistance in meeting his adversary." *Id.* at 313.

In contrast, the Defendants argue that Mills has no constitutional right to have counsel present in the execution chamber with him. (Doc. 15 at 59). In support, the Defendants cite *Whitaker v. Collier*, 862 F.3d 490 (5th Cir. 2017), in which the Fifth Circuit held that death-sentenced inmates' claims that they had a Sixth Amendment right to counsel "during the events leading up to and during the execution" were "without merit." *Id.* at 501. The Defendants also contend that, in order to find that Mills' execution is a critical stage, the Court must first find that there is an ongoing state judicial proceeding against Mills, at which point the Court should abstain from adjudicating the claim under *Younger v. Harris*, 401 U.S. 37 (1971).

Mills acknowledges that he is no longer subject to a criminal prosecution, and on this record, the Court agrees. Mills is not an "accused requir[ing] aid in coping with legal problems or assistance in meeting his adversary." *See Ash*, 413 U.S. at 313. He is no longer subject to long-recognized critical stages of a criminal proceeding such as "arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea." *Frye*, 566 U.S. at 140. And his sentencing, another critical stage, *Gardner v. Florida*, 430 U.S. 349, 358 (1977), has long concluded. Rather, here, Mills is a plaintiff in a civil § 1983 action surrounding the enforcement of his death sentence. *Cf. Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999) ("A plaintiff in a civil case has no constitutional right to counsel."). Moreover, Mills cites no binding authority supporting his contention that the imposition of a death sentence is a proceeding to which the right to counsel extends at every stage. Without such authority, and because Mills is no longer subject to a criminal prosecution, the Court finds that Mills has not shown a substantial likelihood of success on the merits of Count IV.

Second, because Mills has not shown a substantial likelihood that the Sixth Amendment extends as far as allowing his counsel's presence in the execution chamber, he cannot establish that he has a substantial likelihood of success on the merits on Count II, his due process claim. The Due Process Clause of the Fourteenth Amendment prohibits the Defendants from depriving Mills of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "The Supreme Court's interpretation of this clause explicates that the amendment provides two different kinds of constitutional protection:

procedural due process and substantive due process." *McKinney v. Pate*, 20 F.3d 1550, 1555 (11th Cir. 1994) (en banc).

In Count II, Mills alleges that carrying out the execution without his counsel's presence in the execution chamber violates his procedural due process rights.[22] To succeed on this claim, Mills must show "(1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally inadequate process." *Woods*, 951 F.3d at 1293 (citation omitted). The Defendants assert that Mills, who is not arguing that his interest stems from the deprivation of liberty inherent in an execution, has no constitutionally-protected interest in having his counsel present with him in the execution chamber. At this stage in the litigation, the Court finds that Mills has not adequately shown that this interest is constitutionally protected. Mills' claim in Count II fails because he relies on the same interest he identifies in Count IV—the right to counsel in the execution chamber—and the Court has determined he is not substantially likely to succeed on his claim that his right to counsel has been unconstitutionally infringed. Moreover, Mills cites no binding authority for the proposition that condemned inmates have a constitutionally-protected interest in having their counsel present in the execution chamber. By premising his due process claim on his counsel's inability to enter the execution chamber, Mills is not substantially likely to show a deprivation of a constitutionally-protected liberty or property interest. Therefore, for reasons similar to those discussed above regarding Count IV, Count II fails to warrant preliminary injunctive relief.

[22] Mills' counsel represented at the evidentiary hearing that Count II sounds in procedural due process alone. (Doc. 25 at 51, lines 4–10).

Third, Mills has not shown a substantial likelihood of success on the merits on Count III, in which Mills seeks to "effectuate his right of access to the courts and to enforce his Eighth Amendment rights." (Doc. 1 at 38, para. 131). "[I]t is well established that [Mills] ha[s] a constitutional right of access to the courts." *See Akins v. United States*, 204 F.3d 1086, 1090 (11th Cir. 2000). Yet this right is not "an abstract, freestanding right." *Lewis v. Casey*, 518 U.S. 343, 351 (1996). Rather, a right of access claim "is an ancillary claim, requiring that [Mills] also plead a substantive underlying claim." *See Chappell*, 340 F.3d at 1283 (citing *Christopher v. Harbury*, 536 U.S. 403, 415 (2002)). This is because "[t]he purpose of recognizing an access claim is to provide vindication for a separate and distinct right to seek judicial relief." *Barbour*, 471 F.3d at 1226.

On this record, Mills' right of access claim in Count III is not substantially likely to succeed on the merits because his substantive underlying claim, the Eighth Amendment claim in Count I is not colorable on this record. As explained above, Mills "has not offered anything more than the speculative, conjectural possibility that something might go wrong during his execution which would subject him to cruel and unusual punishment in violation of the Eighth Amendment." *See Arthur*, 680 F. App'x at 909. Without a colorable Eighth Amendment claim, Mills is not substantially likely to succeed on his right of access claim because he has no substantive claim for which he needs court access to vindicate. In other words, "absent an underlying violation of a fundamental right," Mills' right to access the courts has not been infringed. *See id.* (first citing *Lujan*, 504 U.S. at 560; then citing *Lewis*, 518 U.S. at 349). Count III, therefore, is not substantially likely to succeed on the merits.

Mills has not shown a substantial likelihood of success on Count III for an additional reason: he cannot overcome the factors in *Turner v. Safley*, 482 U.S. 78, 87 (1987). Assuming the prohibition against Mills' counsel in the execution chamber infringes on his constitutional rights—which Mills has not adequately established—such prohibition would be "an actionable constitutional violation only if the regulation is unreasonable." *Hakim v. Hicks*, 223 F.3d 1244, 1247 (11th Cir. 2000) (citing *Turner*, 482 U.S. at 89); *see Pope v. Hightower*, 101 F.3d 1382, 1384 (11th Cir. 1996) ("[W]hen a prison regulation impinges upon on inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."). In *Turner*, the Supreme Court "adopted a deferential standard for determining whether a prison regulation violates an inmate's constitutional rights." *Hakim*, 223 F.3d at 1247. The Eleventh Circuit has further opined on the *Turner* factors as follows:

> The *Turner* Court identified several factors that serve to channel the reasonableness inquiry: (1) whether there is a "valid, rational connection" between the regulation and a legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the asserted constitutional right that remain open to the inmates; (3) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, inmates, and the allocation of prison resources generally; and (4) whether the regulation represents an "exaggerated response" to prison concerns.

Pope, 101 F.3d at 1384 (first citing *Turner*, 482 U.S. at 89–91; then citing *Harris v. Thigpen*, 941 F.2d 1495, 1516 (11th Cir. 1991)).

Mills argues that the Defendants' security concerns do not justify barring his counsel's presence from the execution chamber with a phone. (Doc. 7 at 19). He cites other

jurisdictions which "have maintained security and decorum while allowing counsel to be present throughout the execution process and with access to a phone to petition the court." (*Id.* at 20). The Defendants, on the other hand, argue that they have valid interests in prohibiting Mills' counsel (with or without a phone) in the execution chamber, including interests in concealing the identities of the IV team to protect their safety, maintaining security in the chamber, and conserving ADOC resources. (Doc. 15 at 48). At the evidentiary hearing, the Defendants explained that measures would need to be taken to accommodate an attorney, especially with a phone, in the execution chamber. The Defendants represented that the execution is a choreographed process which would require significant restructuring of resources to accommodate an attorney—particularly one with a cellphone capable of capturing photos and videos—in the execution chamber. The Defendants also described threats which individuals involved in the execution process have faced, citing examples from other jurisdictions in which suppliers of lethal injection drugs and other necessary goods were threatened, hence the asserted need for strict confidentiality of the execution team members' identities. (Doc. 25 at 82, lines 15–25; 83, lines 1–25; 84, lines 1–13). The Defendants contend that allowing an attorney in the execution chamber, especially one with a phone, would jeopardize their efforts to keep confidential the execution team members' identities.

The first, third, and fourth *Turner* factors all favor the Defendants. Mills has not shown that the prohibition of his counsel from the execution chamber holds no valid, rational connection to the Defendants' asserted interests in security, confidentiality, and conserving resources. Moreover, he has not shown that prohibiting his counsel from the

execution chamber, with or without a phone, is an "exaggerated response" to the State's penological concerns. *See Pope*, 101 F.3d at 1384. And the fact that other jurisdictions allow counsel in the execution chamber does not mean that the State of Alabama is constitutionally required to do so. *Cf. Turner*, 482 U.S. at 93 n.* ("[T]he Constitution 'does not mandate a "lowest common denominator" security standard, whereby a practice permitted at one penal institution must be permitted at all institutions.'" (quoting *Bell v. Wolfish*, 441 U.S. 520, 554 (1979))). Thus, even if Mills had overcome the multiple other hurdles to Count III, he has not overcome the *Turner* factors and the deference owed to prison officials' judgments as required to establish that the Defendants' prohibition of his counsel from the execution chamber is not "reasonably related to legitimate penological interests." *See Pope*, 101 F.3d at 1384. Consequently, Mills has not shown a substantial likelihood of success on the merits of Count III for this additional reason.

In sum, even if the claims are not time-barred, Mills has not shown that he is substantially likely to succeed on the merits of Counts II, III, or IV. Because the equities weigh against him, and because he has not shown a substantial likelihood of success on the merits of any of his claims, Mills has not met his burden of establishing entitlement to the extraordinary remedy of a preliminary injunction or stay of execution, and his motion is due to be denied. *See Winter*, 555 U.S. at 24.

C. Motion for Expedited Discovery

The Court now turns to Mills' motion for expedited discovery, of which he seeks two forms. First, he seeks expedited discovery under Rules 26 and 34 for the production of certain documents in the Defendants' possession. (*See* doc. 8-1). The proposed requests

include "[a]ll documents and communications documenting or describing each execution or attempted execution on or since July 28, 2022"; all relevant communications, including texts or emails, sent by or received by the Defendants and their agents on the nights of each execution or attempted execution since July 28, 2022; and "all documents on which [the] Defendants intend to rely to defend against the claims and allegations [Mills] makes in the Complaint." (*Id.* at 8, 10–11). Second, Mills seeks to serve expedited interrogatories under Rule 33. (*See* doc. 8-2). The interrogatories include the identification of each person present in the execution chamber or observation room during each execution or attempted execution since July 28, 2022, descriptions of the processes that the Defendants use to provide security and confidentiality at all executions, and descriptions of the events in the execution chamber for all executions or attempted executions since July 28, 2022. (*Id.* at 6–8).

Mills contends that absent expedited discovery, his claims "may be mooted before they can be judicially resolved." (Doc. 8 at 1). He argues that there is good cause for expedited discovery because his execution date is weeks away, there is a pending motion for a preliminary injunction, the discovery he seeks is relatively limited, and it is not unduly burdensome to produce. Finally, Mills asserts that expedited discovery is warranted in light of the lack of transparency surrounding the execution process in Alabama. The Defendants argue in turn that Mills engaged in undue delay in bringing his claims and this emergent motion, and thus any need for expedited discovery is self-imposed. Further, the Defendants contend that Mills' claims are not meritorious, the burden on the Defendants to respond to the requests is high, and the scope of the discovery is overly broad. For the

reasons stated below, the Court finds that Mills has not shown good cause for expedited discovery at this stage.

Mills points to the time constraints in this case as good cause for expedited discovery. However, as explained earlier, the time constraints are entirely of Mills' creation. Moreover, his contention that thirty days is "ample" time for the Court to evaluate and rule on his motion (doc. 7 at 28) is at odds with his position that expedited discovery is now necessary to prevent his claims from being "mooted before they can be judicially resolved" (doc. 8 at 1). Mills' delay in filing this action and this motion counsels against a finding that any time constraints constitute good cause. Further, although a pending motion for a preliminary injunction may indicate that "expedited discovery is more likely to be appropriate," this Court has already found that the motion for a preliminary injunction is due to be denied. *See Mullane*, 339 F.R.D. at 663.

Mills also asserts that the burden on the Defendants to comply with these discovery requests is minimal. The Court disagrees, as a review of his requests reveals that they are quite broad. For example, he seeks all documents and communications regarding multiple aspects of the execution process for all executions scheduled since July 28, 2022, as well as detailed descriptions of these executions. (*See generally* doc. 8-1, doc. 8-2). Further, Mills requests that the Defendants produce all of the documents that they intend to rely on in their defense in this case. (Doc. 8-1 at 10, para. 16). Expedited discovery is intended to allow a party "to obtain specific, limited, and identifiable pieces of information." *Mullane*, 339 F.R.D. at 663 (citation omitted). Mills' requests go beyond this standard. *See id.* at 664 ("Plaintiff has placed no limitation on the discovery he seeks and has not proposed a

set of narrowly-tailored discovery requests."). Moreover, Mills requests that the Defendants answer his requested discovery by May 17, 2024, a date which has now passed. The burden on the Defendants to respond to these discovery requests is high, especially considering the time constraints created by Mills' unjustified delay in filing. The Court thus finds that the prejudice to the Defendants outweighs Mills' discovery interest and militates strongly against a finding of good cause.

Mills argues that another judge in this district has granted motions for expedited discovery in similar cases, including *Miller v. Hamm et al.*, 2022 WL 12029102 (M.D. Ala. Oct. 20, 2022) and *Smith v. Hamm et. al.*, 2:23-cv-656 (M.D. Ala. Nov. 24, 2023). Both of those cases involved unique circumstances which are not present in this case at this stage. In *Miller*, the court granted some expedited discovery where the plaintiff—who, at that time, alleged he was the only living execution survivor in the United States—faced an expedited, second execution date. *Miller*, 2022 WL 12029102, at *2. While the defendants argued that expedited discovery was not warranted because the plaintiff's claims were either barred by the statute of limitations or failed on the merits, the court was "not persuaded" that the claims were "so clearly barred by the statute of limitations" or "so implausible" that it counseled against granting expedited discovery given the "virtually unprecedented" circumstances of the case. *Id.* at *2–*3. Here, as described earlier in this Opinion, this Court finds that Mills is not substantially likely to succeed on the merits of his claims and that the circumstances do not warrant expedited discovery. In *Smith*, the court found that the defendants' "plan to use a novel method of execution, the looming execution date, and the pending motion for preliminary injunction, counsel[ed] in favor of

allowing some expedited discovery." (Doc. 28 at 3 in *Smith v. Hamm et al.*, 2:23-cv-656 (M.D. Ala. Nov. 24, 2023)). Here, the pending motion for preliminary injunction is due to be denied, and the circumstances present are not sufficiently comparable to a novel method of execution to warrant expedited discovery.

Accordingly, the Court finds that Mills has not shown good cause at this stage and that the motion for expedited discovery is due to be denied.

VI. CONCLUSION

Because the equities weigh against Mills, and because he has not shown a substantial likelihood of success on the merits, Mills has not established entitlement to the extraordinary remedy of a preliminary injunction or stay of execution. Moreover, Mills has failed to show good cause at this stage for expedited discovery.

Accordingly, it is

ORDERED that Mills' motion for preliminary injunction (doc. 7) is DENIED. It is further

ORDERED that Mills' motion for expedited discovery (doc. 8) is DENIED.

DONE this 21st day of May, 2024.

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

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

JAMIE MILLS,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	**Case No.** 2:24-cv-00253-ECM
	*	
JOHN HAMM,	*	**CAPITAL CASE**
Commissioner, Alabama	*	
Department of Corrections,	*	**Execution Scheduled for**
	*	**May 30, 2024**
TERRY RAYBON,	*	
Warden, Holman Correctional	*	
Facility,	*	
	*	
KAY IVEY,	*	
Governor of the State of	*	
Alabama,	*	
	*	
STEVE MARSHALL,	*	
Attorney General, State of	*	
Alabama,	*	
	*	
Defendants.	*	

COMPLAINT

PRELIMINARY STATEMENT

1. Jamie Mills is scheduled to be executed by the State of Alabama between 6:00 p.m. on May 30, 2024 and 6:00 a.m. on May 31, 2024. In the last two years, Alabama correctional officials have been subjecting condemned people to a prolonged, unnecessary execution process, bringing the condemned prisoner to the execution chamber and strapping him to the execution-gurney for hours.[1] The State has left the condemned person in painful positions for prolonged periods with no access to counsel. The State has begun the execution process, cruelly holding prisoners in distressed positions, while stay litigation was pending and even while court-ordered stays of execution were in place. During this process, which can last hours, the State withholds from the condemned any information about, and any means of learning about, the status of their appeals. The condemned is subjected to painful physical procedures without any notice, forewarning, explanation or communication, including injections of unknown fluids and being physically placed in stress positions. Defendants conduct this extended period—a period that constitutes the bulk of the execution process—in secret, with no witnesses other than Defendants and their agents. While these executions have been carried out in secret without counsel for the condemned, evidence of this unnecessarily cruel

[1] Executions, whether by means of nitrogen hypoxia, lethal injection, or electrocution, commence once the condemned prisoner is brought to the execution chamber and placed on the gurney. Ala. Dep't. of Corr. Execution Procedures, at 15-19 (Aug. 2023).

execution process has come to light through survivor stories and independent autopsies. This practice has turned an execution, an event that has historically taken a relatively short period of time, often only minutes, into an event the State can now cruelly extend for hours.

2. In 2023, at the urging of the Governor and the Alabama Attorney General, the Alabama Supreme Court implemented a rule change allowing the Alabama Department of Corrections to *increase* the amount of time that the State was permitted to subject a condemned person to the execution-gurney from 12 hours to 24 hours, thereby effectively doubling the time that the State has to subject condemned prisoners to unnecessary cruelty and potential torture by keeping them in execution positions for potentially hours.

3. At the same time that State officials have more time to subject the condemned to this process, the attorney for the condemned is prohibited from being physically present or having access to the client. This unconstitutional treatment has been aggravated by the State's intentional withholding from the condemned any information about, and any means of learning about, the status of their appeals.

4. State officials have misstated and misrepresented what has happened to condemned prisoners during this process which has made discovery of critical facts concerning the constitutionality of the execution process or interventions to

address cruel and unusual punishment impossible, in violation of the condemned person's constitutional rights. Without the presence of counsel, the State, whose lawyers are present throughout the time period leading up to the opening of the curtain, has unreviewable authority to engage in conduct related to the execution process and to make legal and factual determinations implicating fundamental rights.

5. Without this Court's intervention, Mr. Mills is at imminent risk of being subject to an unnecessarily prolonged and torturous execution at the hands of State officials with unreviewable authority, without the presence of counsel or access to the courts, in violation of the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

PARTIES

Jamie Mills

6. Plaintiff Jamie Mills is a United States citizen and a resident of the State of Alabama. He is a prisoner sentenced to death under Defendants' supervision. At all relevant times, Mr. Mills has been and continues to be incarcerated at Holman Correctional Facility in Atmore, Alabama, and is scheduled to be executed by the State of Alabama during the time period from 6:00 p.m. on May 30, 2024 to 6:00 a.m. on May 31, 2024.

John Q. Hamm

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

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

9. Defendant Hamm is the alternate statutory executioner of all death row prisoners at Holman. See Ala. Code § 15-18-82(c). Moreover, Defendant Hamm is statutorily charged with providing the facilities and materials necessary to execute death row prisoners. See Ala. Code § 15-18-82(b) ("It shall be the duty of the Department of Corrections of this state to provide the necessary facilities, instruments, and accommodations to carry out the execution.").

10. Defendant Hamm must be present at Holman for each execution, and Defendant Hamm is responsible for maintaining an open telephone line to Defendant Ivey and Defendant Marshall. See Ala. Dep't. of Corr. Execution Procedures, at 15 (Aug. 2023). Defendant Hamm confers with Defendant Raybon

prior to the execution "to verify that there has been no last-minute stay of execution." Id. at 17.

11. Defendant Hamm is responsible for ensuring all prisoners committed to the custody of ADOC are treated in accordance with the U.S. Constitution. He is also responsible for the development and implementation of the protocol and procedures governing the execution of death-sentenced prisoners in Alabama.

12. Defendant Hamm has the authority to alter, amend, or make exceptions to the protocol and procedures governing the execution of death-sentenced prisoners in Alabama. Further, Defendant Hamm has the ability and obligation to remedy problems that arise due to ADOC's procedures. Defendant Hamm participates in the decision to pause or call off an execution.

Terry Raybon

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

14. Defendant Raybon is the statutory executioner of all Holman death row prisoners. See Ala. Code § 15-18-82(c).

15. Defendant Raybon plays a central role in each execution that takes place in the State of Alabama. See Ala. Dep't. of Corr. Execution Procedures (Aug.

2023). Defendant Raybon organizes the execution team. Id. at 15, 17-18. 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. Id. at 15, 17. In the event of a stay of execution, or other determination that the execution should be paused, "the Warden may adjust the times for actions required by [the Protocol]" such as when a prisoner is escorted to the execution chamber and restrained to the execution-gurney. Id.

16. 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 is also responsible for protecting the constitutional rights of all persons incarcerated at Holman Correctional Facility.

Kay Ivey

17. Defendant Kay Ivey, the Governor of Alabama at all times relevant to this Complaint, is sued in her official capacity. She is an elected official. Under the newly amended Alabama Rule of Appellate Procedure 8(d)(1), Defendant Ivey is responsible for setting the "time frame" under which a prisoner's sentence of death shall be carried out by the Commissioner of ADOC. Ala. R. App. P. 8(d)(1).

18. In Mr. Mills' case, Defendant Ivey authorized Defendant Hamm to carry out Mr. Mills' execution to occur beginning at 12:00 a.m. on Thursday, May

30, 2024, and expiring at 6:00 a.m. on Friday, May 31, 2024. See Letter from Governor Ivey to Commissioner Hamm (Mar. 27, 2024).

19. Defendant Ivey, in addition to Defendants Marshall and Hamm, is part of the decision making process as to whether a stay of execution has been entered or is expected to be entered and whether an execution should proceed or pause due to this. See Ala. Dep't. of Corr. Execution Procedures, at 15 (Aug. 2023) (Prior to the start of the execution, the "Commissioner's telephone line" is established to Defendant Ivey and Defendant Marshall, or their representatives, to determine status of execution's ability to proceed). Defendant Ivey has the ability to pause or call off an execution and institute a review of execution protocols. See Press Release, "Governor Ivey Orders Top-to-Bottom Review of Execution Protocol for Victims' Sake" (Nov. 21, 2022).

Steve Marshall

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

21. Defendant Marshall is responsible for ensuring that ADOC complies with the orders of the court. He is responsible for consulting with Defendants Ivey, Hamm and Raybon regarding whether a stay of execution has been entered or is

expected to be entered and whether the execution should proceed as scheduled or pause. See Ala. Dep't. of Corr. Execution Procedures, at 15 (Aug. 2023). Defendant Marshall or his official representatives have been present at past executions to confer with Defendant Raybon and Defendant Hamm regarding steps to take in the event of a stay of execution or issues experienced with the execution.

22. 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.

JURISDICTION AND VENUE

23. This is an action for a declaratory judgment, injunctive relief, and any other relief available from the Court.

24. The Court has subject matter jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343(a)(3), and 2201(a). Mr. Mills' claims arise under the Constitution and the laws of the United States. The federal rights asserted by Mr. Mills are enforceable under 41 U.S.C § 1983.

25. Venue is proper in the Middle District of Alabama under 28 U.S.C. § 1391(b)(1) and (b)(2).

FACTUAL ALLEGATIONS

A. Defendants Have Subjected Condemned Prisoners to Unnecessarily Prolonged Torture on the Execution-Gurney With Wanton Disregard to the Suffering this Creates.

26. Historically, the most overwhelming part of the execution process, when the condemned enters the execution chamber until the time of death, has taken a relatively short period of time, often only minutes. See Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 301 (Tenn. 2005) ("Finally, Bell testified that the lethal injection protocol had been used in the execution of Robert Glen Coe in April of 2000. Coe entered the execution chamber at 1:07 a.m. and the IV catheters were inserted by 1:21 a.m. After Bell spoke to the Commissioner to determine that the execution had not been stayed, the lethal injection drugs were injected at 1:32 a.m. Coe was pronounced dead at 1:37 a.m."); see also California First Amend. Coal. v. Woodford, 299 F.3d 868, 881 (9th Cir. 2002) ("During the Bonin execution, 17 minutes passed between the time Bonin entered the execution chamber and the time the saline solution was set and running, which is the point at which execution staff leave the chamber. Similarly, during the Williams execution, it took 17 minutes to escort Williams into the chamber, secure him to the gurney and insert the intravenous lines. For the Siripongs execution, the same process took only 10 minutes, and it took about six minutes for the Babbitt execution."); see also Baze v. Rees, 553 U.S. 35, 68 (2008), Alito, J. concurring (lethal injection process takes

three to 15 minutes); Zagorski v. Parker, 139 S. Ct. 11 (2018), Sotomayor, J. dissenting (lethal injection process can take up to 18 minutes).

27. In the last two years, however, the State of Alabama has extended the execution process, bringing the condemned prisoner to the execution chamber and strapping him to the execution-gurney for hours.[2] Placing and holding a condemned individual on the execution-gurney, the site of the execution, for extended periods of time without any legitimate justification is unnecessarily cruel. While these executions have been carried out in secret without access to counsel, evidence of this extended execution process has come to light through survivor stories and independent autopsies.

Kenneth Smith

28. During the State's first attempt to execute Kenneth Smith, the State placed Mr. Smith on a gurney for over two hours while stay litigation was ongoing, failed to notify Mr. Smith that he had received a stay from the Eleventh Circuit, and further failed to remove him from the gurney after State was ordered to stop his execution.

29. At 7:45 p.m. on November 17, 2022, while Mr. Smith's motion to stay his execution was still pending at the U.S. Court of Appeals for the Eleventh

[2] Executions, whether by means of nitrogen hypoxia, lethal injection, or electrocution, commence once the condemned prisoner is brought to the execution chamber and placed on the gurney. Ala. Dep't. of Corr. Execution Procedures, at 15-19 (Aug. 2023).

Circuit, ADOC counsel emailed Mr. Smith's counsel that they were "preparing Mr. Smith for execution." Second Amended Complaint, ¶ 7, Smith v. Hamm, Case No. 2:22-cv-00497 (M.D. Ala. Dec. 6, 2022).

30. At **7:57 p.m**. guards entered the holding cell where Mr. Smith was waiting by himself without counsel, placed Mr. Smith in handcuffs and leg irons, took him to the execution chamber, and began strapping him to the execution-gurney. Id.

31. **At 7:59 p.m., the Eleventh Circuit stayed the execution.** Id. at ¶ 8. Attorneys for ADOC, Deputy Solicitor General Thomas Wilson and Assistant Attorney General Richard Anderson, received direct notice from the Eleventh Circuit of the court's order. Id.

32. Mr. Smith's counsel also emailed them at 8:02 p.m. and told them to stop the execution pursuant to the Circuit Court's order. Id.

33. ADOC's counsel responded "Noted" but continued the execution: Mr. Smith remained strapped to the gurney until nearly midnight and Mr. Smith was never notified that the Eleventh Circuit had issued a stay. Id.

34. The stay remained in place for over two hours during which time Mr. Smith remained strapped to the execution-gurney, Id. at ¶ 8, 169-70, even though Mr. Smith never indicated any attempt at resistance, as the officers acknowledged. Id. at ¶¶ 150-51.

35. While Mr. Smith was strapped to the execution-gurney for over two hours while the stay was in place, he was unable to move his body, arms, legs, or feet and was unaware a stay was in place. Id. at ¶¶ 152-61.

36. He "believed that when he was taken into the execution chamber, all of his appeals had been exhausted," and that he would be killed imminently. Id. at ¶ 161. Mr. Smith became increasingly distressed due to the lack of circulation and extreme discomfort caused by the restraints and the fear that he would be killed without the ability to address his family or the victim's family as planned. Id. at ¶¶ 166-69.

37. He was then held in this position for another two hours after the IV team entered the chamber. Id. at ¶¶ 170, 219.

38. At approximately 10:20 p.m. the U.S. Supreme Court vacated the stay. Id. at ¶ 10, n. 2, ¶ 223. The IV team entered the execution chamber at around 10:00 p.m. and began repeatedly jabbing Mr. Smith to attempt to establish IV access. Id. at ¶¶ 170-71. Critically, this potentially began prior to the U.S. Supreme Court's decision to vacate the stay. Id. at ¶ 10, n. 2.

39. Upon information and belief, during this process, representatives of the State, at least one of which was likely an attorney, were observing the process and were in and out of the execution chamber. See also Id. at ¶¶ 157, 170, 192-93.

40. State representatives in the execution chamber had phones and appeared to be recording images with the phones during this excruciating process, which was particularly distressing to Mr. Smith. Id. at ¶¶ 181-82, 189.

41. While the IV team was sliding needles continuously in and out of Mr. Smith's arms and hands, Mr. Smith asked the State's representatives "if they had any authority to call the Court to report that his constitutional rights were being violated; they did not respond." Id. at ¶¶ 183-84. He asked to speak to his lawyers or the court and provided his district court case number. Id. at ¶ 186.

42. The IV team then tilted the execution-gurney into a reverse crucifixion position with Mr. Smith's head below his feet. Id. at ¶¶ 188-91.

43. No one explained what was happening but several of the State representatives in the chamber appeared to begin recording images with phones. Id.

44. The IV team then began attempting to establish a central line through Mr. Smith's collarbone area, stabbing Mr. Smith multiple times with a large gauge needle, although no one explained this process to Mr. Smith. Id. at ¶¶ 197-207.

45. During this process, a member of the IV team approached Mr. Smith with a syringe containing clear liquid. Id. at ¶ 200.

46. In a prior order from the district court, the court cited and adopted Commissioner Hamm's stipulation that ADOC would not employ a cutdown procedure or intramuscular sedation during Mr. Smith's execution and warned that

"[s]anctions will be swift and serious if counsel and the Commissioner do not honor or abide by their representations and stipulations." Smith v. Hamm, No. 2:22-CV-497-RAH, 2022 WL 10198154, at *5 (M.D. Ala. Oct. 16, 2022).

47. Mr. Smith believed this injection to be similar to the injection that had reportedly caused Joe James to be sedated and unconscious before the start of his execution, and the injection that was prohibited by the district court. See Second Amended Complaint, at ¶ 200.

48. **Mr. Smith repeatedly asked for his counsel and asked the representatives for the State who were present in the chamber to contact the district court. Id. ¶¶ 201-02.**

49. **The representatives refused and ignored his repeated pleas. Id. at ¶¶ 201-02.**

50. After multiple attempts to establish an IV failed, a decision was made to stop the execution. Id. at ¶¶ 210-21.

51. From the prolonged time on the execution-gurney, Mr. Smith was unable to stand, move his arms, walk, or dress himself without assistance when he was released from the restraints shortly before midnight. Id. at ¶¶ 226-30.

52. At 11:36 p.m., Mr. Smith's counsel emailed State attorneys Richard Anderson and Thomas Wilson, as well as Solicitor General Edmund LaCour, asking for confirmation as to whether the execution had been called off and to

provide information about Mr. Smith's whereabouts and physical condition. Id. at ¶ 218. The State never responded. Id.

Alan Miller

53. During the State's September 22, 2022 attempt to execute Alan Miller, Mr. Miller was held on the execution-gurney for over an hour and a half before his execution was called off.

54. Mr. Miller was first strapped to the gurney "without resistance" around 10:15 p.m. See Second Amended Complaint, ¶ 104, Miller v. Hamm, Case No. 2:22-cv-00506 (M.D. Ala. Oct. 12, 2022).

55. Representatives for the State, including two individuals in business attire, at least one of whom may have been an attorney, were in the execution chamber. Id. at ¶ 103.

56. Defendant's representatives also observed the IV team's attempts to establish an IV from an adjacent observation room. Id. at ¶¶ 130, 134.

57. At one point during the process, after Mr. Miller had been on the gurney for over an hour, someone in the observation room knocked on the window and called the IV team out of the room. Id. at ¶¶ 130-34.

58. After the IV Team left the execution chamber, an officer began operating a foot pump at the base of the execution gurney, which gradually raised the gurney from a horizontal to vertical position. Id. at ¶¶ 132-34. Mr. Miller was

strapped into the gurney by his arms, feet, and chest, and was left hanging vertically from the gurney. Id. No one explained to Mr. Miller why he was being raised into a vertical position or why the IV Team had left the room. Id. at ¶ 132. He experienced pain in his elbows, arms, and back, and felt nauseous, disoriented, confused. Id. at ¶¶ 132-34.

59. He was left hanging vertically on the execution gurney for approximately twenty minutes. Id. at ¶ 134.

60. During this time, State representatives observed him but no one explained what was happening. Id. at ¶ 134.

61. This was "deeply disturb[ing]" to Mr. Miller and he worried the execution process would proceed without an opportunity to give his last statement. Id. at ¶¶ 133-34.

62. Mr. Miller asked an officer present to pass on his final words to some of his friends on death row. Id. The officer did not respond. Id.

63. Mr. Miller also told the officer and captain present that the position he was hanging in was "giving [him] hell," his elbows, arms and back were in pain. Id. at ¶ 132. No one told Mr. Miller what was happening. Id.

64. Around this time, Defendants and their representatives made a decision to call off the execution. Id. at ¶¶ 134-35.

65. An officer entered the chamber, slammed the gurney back to the horizontal position and Mr. Miller was told his execution had been postponed. Id. at ¶¶ 134-36.

66. Officers asked Mr. Miller to get off the table, which he was unable to do because he had lost circulation in his limbs. Id. at ¶ 139-40. As Mr. Miller attempted to restore circulation, guards handcuffed Mr. Miller and removed him from the execution chamber. Id.

67. No "legitimate reason" was revealed for the State's actions in leaving Mr. Miller hanging from the gurney for at least 20 minutes. Miller v. Hamm, 640 F. Supp. 3d 1220, 1242 (M.D. Ala. 2022).

Joe James

68. In Joe James' July 28, 2022 execution, Mr. James remained hidden behind a curtain for over three hours. See Complaint, ¶¶ 59-65, Est. of James by & through James v. Ivey, Case No. 2:23-cv-293 (M.D. Ala. May 3, 2023); see also Ala. Dep't. of Corr. Execution Procedures, at 11, 13, 15 (Aug. 2023). Mr. James had not sought a stay of litigation and had no pending litigation that caused this delay.

69. On information and belief, Mr. James remained on the gurney for three hours before the curtains were opened.

70. During this time his extremities were punctured multiple times. See Complaint, ¶¶ 81-85, Est. of James; Smith v. Comm'r, Ala. Dep't of Corr., No. 22-13781, 2022 WL 17069492, at *2 (11th Cir. Nov. 17, 2022).

71. When the curtains were opened, it appeared to witnesses that Mr. James was unconscious. Complaint, ¶¶ 68, 71-73, Est. of James.

72. An independent autopsy concluded that a cut-down procedure was attempted twice. See Elizabeth Bruenig, "Dead to Rights" The Atlantic (Aug. 14, 2022), https://www.theatlantic.com/ideas/archive/2022/08/joe-nathan-james-execution-alabama/671127/ (hereinafter, Bruenig, "Dead to Rights").

James Barber

73. During James Barber's July 21, 2023 execution, he was held on the execution-gurney for over an hour and a half prior to the opening of the curtains.

74. Upon information and belief, Mr. Barber was taken to the execution chamber and strapped to the execution-gurney at approximately 12:00 a.m.

75. The curtains were not opened to the public, however, until 1:30 a.m. See Marty Roney, "Alabama executes James Edward Barber after divided Supreme Court sides with state," Montgomery Advertiser (July 21, 2023), https://www.montgomeryadvertiser.com/story/news/crime/2023/07/21/alabama-executes-james-edward-barber/70435521007/.

76. According to Defendant Hamm, it took staff "three sticks in six minutes" to establish IV access, id., making the prolonged period Mr. Barber spent on the execution-gurney prior to the opening of the curtains unnecessary. Mr. Barber was declared dead at 1:56 a.m. Id.

Kenneth Smith

77. During Kenneth Smith's January 25, 2024 execution using nitrogen gas, he was again subjected to a prolonged period restrained to the execution-gurney.

78. Upon information and belief, Mr. Smith was separated from counsel just after 4:15 p.m. See also Ala. Dep't. of Corr. Execution Procedures, at 11, 13 (Aug. 2023).

79. Upon information and belief, during this time, after his separation from counsel, Mr. Smith was not apprised of the U.S. Supreme Court's decision to vacate the stay of execution. See, e.g., Smith v. Hamm, 144 S. Ct. 414 (2024); see also Id., Sotomayor, J. dissenting ("Smith has suffered from posttraumatic stress. Reliving those hours strapped to the gurney, his medical records confirm worsening bouts of nausea and vomiting over the past few weeks.").

80. Upon information and belief, Mr. Smith was then taken to the execution chamber and restrained on the execution-gurney at 6:00 p.m. See "Media Advisory: Execution set for Alabama death row inmate Kenneth Eugene Smith"

Ala. Dep't. of Corr. (Jan. 2, 2024) (start time set for 6:00 p.m.); see also Ala. Dep't. of Corr. Execution Procedures, at 11, 13 (Aug. 2023).

81. The curtains opened at 7:53 p.m. showing Mr. Smith restrained on the gurney and a gas mask had been strapped to his head. See Kim Chandler, "What happened at the nation's first nitrogen gas execution: An AP eyewitness account," AP News (Jan. 27, 2024), https://apnews.com/article/death-penalty-nitrogen-gas-alabama-kenneth-smith-54848cb06ce32d4b462a77b1bb25e656.

B. Defendants Have Doubled the Time a Condemned Prisoner Can Be Subjected to Unnecessary and Prolonged Torture On the Execution-Gurney.

82. Prior to November 2022, the execution of a condemned person in Alabama was scheduled for a 24-hour period on a date set by the Alabama Supreme Court. Because ADOC policy set the execution for 6:00 p.m., this meant that ADOC effectively had six hours to complete an execution. See Letter from Governor Ivey to the Alabama Supreme Court (Dec. 12, 2022).

83. After the State was unable to complete the executions of Mr. Miller and Mr. Smith, on November 21, 2022, Governor Ivey ordered that ADOC undertake a review of the state's execution process. See Press Release, "Governor Ivey Orders Top-to-Bottom Review of Execution Protocol for Victims' Sake" (Nov. 21, 2022).

84. During this mandated review, Defendant Marshall, the legal representative of ADOC, blamed the botched executions of Alan Miller and Kenneth Smith on "what he called frivolous legal claims by lawyers for the inmates." See Mike Cason, "Alabama AG Steve Marshall says review of execution procedures should be 'expedited quickly,'" AL.com (Dec. 5, 2022), https://www.al.com/news/2022/12/alabama-ag-steve-marshall-says-review-of-execution-procedures-should-be-expedited-quickly.html ("Marshall noted that Alabama has executed 12 inmates since he became attorney general in February 2017 and said he is confident the state can carry out the procedure. He blamed recent problems on what he called frivolous legal claims by lawyers for the inmates.").

85. On behalf of ADOC, in a letter dated December 12, 2022, Governor Ivey asked the Alabama Supreme Court to amend Rule 8(d)(1) of the Alabama Rules of Appellate Procedure to expand the length of time of the execution process, citing Defendant Hamm's assertion that "last minute gamesmanship" has been the cause of any issues in recent executions. See Letter from Governor Ivey to the Alabama Supreme Court (Dec. 12, 2022) ("Commissioner Hamm has requested assistance in increasing the amount of time available to carry out an execution. In several recent executions, last-minute gamesmanship by death row inmates and their lawyers has consumed a lot of valuable time, preventing the Department from

carrying out its execution protocol between the conclusion of all legal challenges in the federal courts and the expiration of the death warrant issued by your court.").

86. One month later, on January 12, 2023, the Alabama Supreme Court amended Rule 8 to provide that "[t]he supreme court shall at the appropriate time enter an order authorizing the Commissioner of the Department of Corrections to carry out the inmate's sentence of death within a time frame set by the governor." Ala. R. App. P. 8(d)(1) (2023). The new rule makes two changes: first, the new rule cedes the Supreme Court's authority to set the execution date to the Governor; second, the new rule eliminates the 24 hour period for an execution and leaves the time frame up to the Governor. Id.; Ala. R. App. P. 8(d)(1) (1997).

87. On March 27, 2024, Governor Ivey set Mr. Mills' execution time frame "to occur beginning at 12:00 a.m. on Thursday, May 30, 2024, and expiring at 6:00 a.m." the following day. See Letter from Governor Ivey to Commissioner Hamm (Mar. 27, 2024).

88. Though the expanded time frame is 30 hours, instead of 24 hours, the effective scheduled time of Mr. Mills' execution is the 12-hour period between May 30 at 6:00 p.m. and May 31 at 6:00 a.m. See Ala. Dep't. of Corr. Execution Procedures, at 13 (Aug. 2023).

C. Defendants Exclude Counsel for the Condemned From A Critical Moment During the Execution Process Without Legitimate Reason.

89. During the most final, irrevocable, and extraordinary use of the State's power to extinguish a person's life, the State of Alabama has provided no protection to ensure that fundamental rights are respected: counsel is excluded from the entire execution process, from the moment the condemned is removed from the visitation room until the curtain is opened and counsel is permitted to witness the execution as a visitor. See Ala. Code § 15-18-83(a)(7).

90. It is only because of the rare accounts of Kenneth Smith and Alan Miller—both of whom survived their execution attempt—that evidence that the bulk of the execution process takes place in secret has come to light.[3]

91. The State has no legitimate reason for excluding counsel for the condemned at the execution. Any security concerns involved in the presence of attorneys are easily accommodated.

92. Upon information and belief, attorneys representing Defendants are permitted to and have attended recent executions.

93. The U.S. Supreme Court has recognized that the presence of State counsel supports the need for counsel to represent the interests and rights of the prisoner. Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973) (citing the presence of a

[3] Kenneth Smith, Alan Miller, and Doyle Hamm are the only execution survivors since 1975 in Alabama.

prosecutor in proceedings to increase the adversarial nature of a proceeding and the need for defense counsel).

94. Other jurisdictions allow counsel to be present throughout the execution and provide counsel access to a telephone. See, e.g., Associated Press v. Otter, 682 F.3d 821, 826 (9th Cir. 2012) (requiring the State to allow witnesses, including counsel, to observe the entire execution from the time the condemned enters the chamber); Hoffman v. Jindal, No. CIV.A. 12-796-JJB, 2014 WL 130981, at *7 (M.D. La. Jan. 10, 2014) (without access to counsel during the execution or immediately prior, "attorneys are not there to ensure that the protocol is carried out as directed . . . or that the inmate did not suffer pain and suffering while conscious"); Cooey v. Strickland, No. 2:04-CV-1156, 2011 WL 320166, at *10-12 (S.D. Ohio Jan. 28, 2011) (finding counsel must have access to the client after the visitation period, from the beginning of the execution process, because this is the precise "time when events may occur that present a constitutional injury under the Eighth or Fourteenth Amendments" and have access to a phone to petition the courts); see also Arizona Department of Corrections Rehabilitation and Reentry, "Department Order Manual: 710 - Execution Procedures," at 17, 13.5.1.3 (April 20, 2022) ("While the attorney witness is in the witness room, a member of the Witness Escort Team shall hold one mobile phone designated by the attorney, to be made available to the attorney in exigent circumstances."); Idaho Department of

Correction, "Execution Chemicals Preparation and Administration," at 6 (Mar. 30, 2021) (providing witnesses may observe from the time the condemned enters the execution chamber).

95. These policies have not prevented these states from safely and securely carrying out executions and have not overly burdened the prison or prison staff. See, e.g., Coe v. Bell, 89 F. Supp. 2d 962, 966-67 (M.D. Tenn.), vacated on other grounds, 230 F.3d 1357 (6th Cir. 2000) ("given society's (and the state's) interest in assuring that capital punishment is carried out in a humane manner and the minimal inconvenience to the state, this court finds the plaintiff's position [that condemned prisoner has the right to access to his counsel during the last hour before the execution and to have counsel witness the execution with access to a telephone] well taken" and finding "[t]he state certainly has no legitimate interest in depriving the Plaintiff of access to the courts to assert a claim of cruel and unusual treatment"); see also Zagorski v. Haslam, No. 3:18-CV-01205, 2018 WL 5454148, at *4 (M.D. Tenn. Oct. 29, 2018), aff'd, 741 F. App'x 320 (6th Cir. 2018) (enjoining the State "from proceeding with the plaintiff's execution unless his attorney-witness is provided with immediate access to a telephone during the time preceding and during the execution" to ensure right of access to the courts); Cooey, 2011 WL 320166, at *7 (finding "there is unquestionably a right to access the courts involved in the context of executions that inherently injects the issue of

access to counsel into this discussion" and that the ability to communicate with counsel throughout the execution is what "makes the presence of counsel of any potential value" and "renders meaningful the ability of counsel to access a court on an inmate's behalf").

96. Without counsel in the room, Mr. Mills will have no access to the courts, or to his counsel, for over 12 hours on the night of his execution.

97. The harm at issue here has been demonstrated through prior executions, such as the State's November 17, 2022, attempt to execute Kenneth Smith, that the State has proceeded with executions while a stay was in place and has prevented the prisoner from communicating with his counsel about ongoing stay litigation, or to be notified that a new stay was put in place by a federal court. Second Amended Complaint, ¶¶ 7-10, Smith v. Hamm, Case No. 2:22-cv-00497 (M.D. Ala. Dec. 6, 2022). During this attempt, while the IV team repeatedly jabbed his collarbone in attempting to establish a central line, Mr. Smith explicitly requested that someone contact the court or his counsel. ADOC refused to do so. Id. at ¶¶ 184, 186, 200-02.

98. "It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts." Lewis v. Casey, 518 U.S. 343, 349 (1996). "*[M]eaningful* access to the courts is the touchstone." Id. at 351 (quoting Bounds v. Smith, 430 U.S. 817, 823 (1977)) (emphasis added).

99. Where counsel loses access to the prisoner up to 12 hours before the execution, "attorneys are not there to ensure that the protocol is carried out as directed . . . or that the inmate did not suffer pain and suffering while conscious." Hoffman, 2014 WL 130981, at *7 (finding viable access to courts claim where policy prohibits attorneys from being with the prisoner in hours before execution or to witness the execution as an attorney).

100. As demonstrated by the State's refusal to contact counsel or the court when requested by Mr. Smith, prisoners "only have this fundamental access to the courts if they have access to their counsel because it is not Plaintiffs but their counsel who would contact a court if needed during the events immediately preceding and constituting the actual execution." Cooey, 2011 WL 320166, at *9; see also Id. at *11 ("Passive observation without necessary communication undercuts meaningful access to the courts.").

D. The State Has Concealed, Disputed, and Misrepresented Critical Facts About the Execution Process.

101. In recent years, the State has concealed, disputed, and misrepresented critical facts about the execution process.

102. Prior to Mr. Smith's execution by nitrogen gas in January 2024, the State asserted that the nitrogen gas would render Mr. Smith unconscious in a matter of seconds. See Nicholas Bogel-Burroughs, "A Select Few Witnessed Alabama's Nitrogen Execution. This is What They Saw." N.Y. Times (Feb. 1, 2024),

https://www.nytimes.com/2024/02/01/us/alabama-nitrogen-execution-kenneth-smith-witnesses.html.

103. Witness accounts, however, established this was not the case. The victim's family corroborated the horror of the prolonged process, "We were told by some people that worked [in the prison system] that he'd take two or three breaths and he'd be out and gone. That ain't what happened . . . With all that struggling and jerking and trying to get off that table, more or less, it's just something I don't ever want to see again." Id.

104. Reporter Marty Roney, who witnessed the execution, documented that it took approximately four to five minutes for Mr. Smith to lose consciousness, from 7:57 p.m. to 8:02 p.m., during this time Mr. Smith was convulsing, shaking, and gasping for air. See Marty Roney, "Nitrogen gas execution: Kenneth Smith convulses for four minutes in Alabama death chamber," Montgomery Advertiser (Jan. 25, 2024), https://www.montgomeryadvertiser.com/story/news/local/alabama/2024/01/25/four-minutes-of-convulsions-kenneth-smith-executed-with-nitrogen-gas/72358038007 (hereinafter, Roney, "Nitrogen gas").

105. Kim Chandler, another reporter who witnessed the execution, documented that Mr. Smith's shaking and thrashing continued for several minutes after the gas began to flow and that his gasping breaths could be seen for at least 10

minutes. See Kim Chandler, "What happened at the nation's first nitrogen gas execution: An AP eyewitness account," AP News (Jan. 27, 2024) https://apnews.com/article/death-penalty-nitrogen-gas-alabama-kenneth-smith-54848cb06ce32d4b462a77b1bb25e656.

106. In direct contradiction to eyewitness accounts, however, Defendant Marshall misleadingly described Mr. Smith's execution as "textbook," id., and Defendant Hamm described it as "expected." See Roney, "Nitrogen gas."

107. After Kenneth Smith's botched execution in November 2022, Defendant Ivey blamed the IV team's inability to establish IV access on litigation: "justice could not be carried out tonight because of last minute legal attempts to delay or cancel the execution." See Kim Chandler, "Alabama calls off execution after difficulties inserting IV," AP News (Nov. 18, 2022) https://apnews.com/article/alabama-executions-fd4937918b0529c07c005ace7a357b84.

108. The IV team, however, entered the execution chamber at approximately 10:00 p.m., after Mr. Smith had already been on the execution-gurney in the execution chamber for over two hours, to attempt to establish IV access. See Second Amended Complaint, ¶ 7, 10, Smith v. Hamm, Case No. 2:22-cv-00497 (M.D. Ala. Dec. 6, 2022). This left ample time to establish an IV. California First Amend. Coal., 299 F.3d at 881 ("[I]t takes only

about one minute for ordinary medical personnel to insert an intravenous line. Thus, the individuals who insert the intravenous lines into the inmates should not have to be present in the room for much longer than that amount of time.").

109. Following Mr. Joe James' execution, Defendant Hamm reported that "nothing out of the ordinary" happened. See Evan Mealins, "Joe Nathan James' execution delayed more than three hours by IV issues, ADOC says," Montgomery Advertiser (July 29, 2022) https://www.montgomeryadvertiser.com /story/news/2022/07/29/joe-nathan-james-execution-alabama-delayed-iv-issues/10 187322002/.

110. However in reality, Mr. James spent over three hours on the execution-gurney prior to the administration of the lethal injection drugs. During this time, an independent autopsy found that he likely suffered a long death and that his body showed multiple puncture wounds, pools of deep bruising, and cuts indicative of a cut-down procedure. See Bruenig, "Dead to Rights."

111. Further, on the evening of Mr. James' execution, Defendants told reporters that Mr. James was not sedated prior to opening the curtain, after it appeared from visual observation that Mr. James was unconscious. See Brian Lyman, "Department of Corrections denies request for Joe Nathan James Jr. execution records," Montgomery Advertiser (Aug. 16, 2022) https://www.montgomeryadvertiser.com/story/news/2022/08/16/joe-james-jr-execu

tion-adoc-denies-advertisers-request-records/10333449002/. However, since this time, ADOC has stated it "cannot confirm" whether Mr. James was fully conscious before the execution. Id.

112. Defendants' accounts are not consistent with witness accounts of the portion of the execution subject to public review and have been shown to be false or misleading where independent accounts exist, through an independent autopsy in Mr. James' case or Alan Miller and Kenneth Smiths' survival. The U.S. Supreme Court has recognized the need for accuracy, fairness, and reliability in the process around taking a human life. Ford v. Wainwright, 477 U.S. 399, 414 (1986) ("consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate"); see also Id. at 417 ("the lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination.").

CAUSES OF ACTION

COUNT I

Subjecting Condemned Prisoners to Torturous and Prolonged Suffering Unnecessarily and Without Access to Counsel Violates the Eighth and Fourteenth Amendments

113. Mr. Mills repeats and realleges paragraphs 1 through 112 as though fully set forth herein.

114. The Eighth Amendment prohibits "cruel and unusual punishments." U.S. Const. Amend. VIII.

115. Defendants subject condemned prisoners to cruel and unusual punishment that deprives them of rights, privileges, and immunities secured and protected by the Eighth and Fourteenth Amendments to the United States Constitution causing such prisoners to suffer grievous harm. At all relevant times, Defendants have been acting under color of state law.

116. "[T]he Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty." Ford v. Wainwright, 477 U.S. 399, 405 (1986). Subjecting a condemned prisoner for prolonged periods to the execution-gurney without legitimate reason and without access to counsel causes "unnecessary and wanton pain and suffering," and constitutes cruel and unusual punishment in violation of the Eighth Amendment.

117. "[B]eing strapped to the gurney for up to four hours and at one point being placed in a stress position for an extended period of time, goes 'so far beyond what [is] needed to carry out a death sentence that [it] could only be explained as reflecting the infliction of pain for pain's sake.'" Smith v. Hamm, No. 2:22-CV-497-RAH, 2023 WL 4353143, at *7 (M.D. Ala. July 5, 2023) (internal citation omitted); see also Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("The use of the hitching post" for hours on end "unnecessar[ily] and wanton[ly] inflicted pain, . . . and thus was a clear violation of the Eighth Amendment.") (internal citations and quotations omitted); Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974) (finding that "handcuffing inmates to the fence and to cells for long periods of time . . . forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods" violates the Eighth Amendment).

118. The use of the execution-gurney "under these circumstances violate[s] the 'basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man.' . . . This punitive treatment amounts to gratuitous infliction of 'wanton and unnecessary' pain that [U.S. Supreme Court] precedent clearly prohibits." Hope, 536 U.S. at 738 (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)); see also Estelle v. Gamble, 429 U.S. 97, 102 (1976) ("[T]he primary concern of the drafters was to proscribe 'torture(s)' and other 'barbar(ous)' methods of punishment.") (internal citations omitted).

119. Defendants have exhibited deliberate indifference to the serious risk of substantial harm caused by unnecessary restraint on the execution-gurney, depriving prisoners of privileges or immunities secured or protected by the Eighth and Fourteenth Amendments.

120. Because it takes a matter of minutes to secure a prisoner to the execution-gurney, the practice of restraining the condemned to the gurney for hours is without penological justification and is unnecessary.

121. Unless this Court orders Defendants to comply with the Eighth and Fourteenth Amendments to the United States Constitution, Defendants will subject Mr. Mills to conduct that deprives him of the privileges or immunities secured or protected by the Eighth and Fourteenth Amendments.

COUNT II

Conducting the Execution Process Without Counsel Violates the Due Process Clause

122. Mr. Mills repeats and realleges paragraphs 1 through 112 as though fully set forth herein. At all relevant times, Defendants have been acting under color of state law.

123. Defendants' exclusion of counsel during the execution process violates Mr. Mills' Due Process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

124. State executions must comply with the Due Process Clause of the Fourteenth Amendment which expressly provides that no State has the power to "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV; U.S. Const. Amend. V; see also Gardner v. Fla., 430 U.S. 349, 358 (1977) (holding that "the sentencing process . . . must satisfy the requirements of the Due Process Clause"). The Due Process Clause requires at a minimum that the State allow Mr. Mills to be accompanied by his counsel throughout the execution process.

125. The decisions made during the execution process, including the decisions to pause or call off an execution, decisions to subject or release the condemned from the execution-gurney, or to petition the court for relief, are critical and require the presence of counsel. See Gagnon v. Scarpelli, 411 U.S. 778, 788, 791 (1973) (finding counsel to be necessary in revocation proceedings where rights and "version of a disputed issue can fairly be represented only by a trained advocate"); Morrissey v. Brewer, 408 U.S. 471, 482 (1972) ("liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process"); Ford v. Wainwright, 477 U.S. 399, 414 (1986) ("consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from

presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate").

126. The State has no interest in depriving Mr. Mills of his life without some procedural guarantees. Morrissey, 408 U.S. at 483 ("the State has no interest in revoking parole without some informal procedural guarantees").

127. Allowing counsel to be part of these proceedings will not overly burden the State, but will help ensure Mr. Mills' Eighth Amendment protections are guaranteed, that he is apprised of stay litigation, and that the factual record is clarified and subject to checks on the State's misrepresentations throughout the ultimate deprivation of liberty—an execution.

128. Unless this Court orders Defendants to comply with the Fifth and Fourteenth Amendments to the United States Constitution, Defendants will subject Mr. Mills to conduct during his execution that deprives him of his right to Due Process protected by the Fifth and Fourteenth Amendment and to be free from unnecessary and cruel punishment protected by the Eighth Amendment.

COUNT III

Right to Access to the Courts in violation of the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

129. Mr. Mills repeats and realleges paragraphs 1 through 112 as though fully set forth herein. At all relevant times, Defendants have been acting under color of state law.

130. Defendants' exclusion of counsel for Mr. Mills during this critical stage violates Mr. Mills' fundamental constitutional right to meaningful access to the courts in violation of the First, Sixth, and Fourteenth Amendments to the United States Constitution. Bounds v. Smith, 430 U.S. 817, 821 (1977).

131. Mr. Mills requires the presence of counsel to effectuate his right of access to the courts and to enforce his Eighth Amendment rights. Counsel, and access to a telephone, are necessary to ensure these rights are protected and to petition the courts in the event the State proceeds as it has in the recent past.

132. The total prohibition against counsel for the accused during the execution process, or a means to petition the court, is an "exaggerated response" to any security concerns the State may have. Turner v. Safley, 482 U.S. 78, 98 (1987) ("exaggerated response" demonstrated by the availability of alternatives). Other jurisdictions have maintained security and decorum while allowing counsel to be present throughout the execution process and with access to a phone to petition the court to protect Eighth Amendment and Due Process rights.

133. Further, the State can no longer be entrusted to protect Mr. Mills' Constitutional rights without access to a mechanism to hold the State accountable, such as through access to this Court.

134. Actual and imminent injury will occur to Mr. Mills in the absence of the ability to hold the State accountable and petition the courts.

135. Without intervention by this Court, Mr. Mills will be denied his fundamental right to access the courts and denied the ability to protect his Eighth Amendment and Due Process rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments.

COUNT IV

Sixth Amendment Right to Counsel

136. Mr. Mills repeats and realleges paragraphs 1 through 112 as though fully set forth herein.

137. Defendants' exclusion of counsel during the execution process violates Mr. Mills' right to counsel and due process rights under the Sixth and Fourteenth Amendments to the United States Constitution. At all relevant times, Defendants have been acting under color of state law.

138. A defendant's right to counsel is a fundamental component of our criminal legal system. For that reason, the right to counsel has been extended by the Supreme Court to any "stage of a criminal proceeding where substantial rights

of a criminal accused may be affected." Mempa v. Rhay, 389 U.S. 128, 134 (1967); United States v. Ash, 413 U.S. 300, 313 (1973) (recognizing right to counsel where the accused required "aid in coping with legal problems or assistance in meeting his adversary"); Gardner v. Fla., 430 U.S. 349, 358 (1977) (finding sentencing process "is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel").

139. Counsel is necessary to ensure that a defendant's procedural and substantive rights during the execution process are protected. If counsel is excluded from the execution, the State has unreviewable authority to conduct unnecessarily torturous and prolonged executions and make determinations implicating fundamental rights.

140. Unless this Court orders Defendants to comply with the Sixth and Fourteenth Amendments to the United States Constitution, Defendants will subject Mr. Mills to conduct that deprives him of his right to counsel protected by the Sixth and Fourteenth Amendments.

PRAYER FOR RELIEF

On the basis of the foregoing, Mr. Mills respectfully request that this Court grant the following relief:

(a) Permit expedited discovery in this case, including but not limited to evidence regarding the transfer of the condemned prisoner to the execution chamber, placement on the gurney, and initiation of IV access during each execution over the past two years; "be prepared to" orders issued during the course of executions scheduled over the past two years; Defendants', and Defendants' representatives', contemporaneous decision making to call off Alan Miller and Kenneth Smiths' September and November 2022 executions; the names and positions of all State representatives present in the execution chamber or observation room prior to the opening of the curtain during the course of executions scheduled over the past two years, and whether each representative was permitted to maintain a phone in these areas; the "permanent log" and "execution log" from each execution scheduled over the past two years; the times condemned individuals were removed from the holding cell and placed on the gurney, as well as a list of times IV access was first attempted, for each execution over the past two years if not included in the "permanent log" or "execution log";

(b) Declare that the policies, practices, acts and omissions of the Defendants described in this complaint are in violations of Mr. Mills' rights of access to counsel and the courts, to assistance of counsel, to due process of law, and against cruel and unusual punishment as guaranteed by the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution;

(c) Permanently enjoin Defendants from subjecting Mr. Mills to the illegal and unconstitutional practices described in this complaint;

(d) Order Defendants to implement policies to allow counsel to be present with Mr. Mills during the execution process beginning from the time he is brought to the execution chamber;

(e) Order Defendants to provide meaningful access to the courts, including presence of counsel and direct access to a phone line, during the execution process;

(f) Retain jurisdiction of this matter until the unlawful and unconstitutional conditions and practices alleged herein no longer exist and the Court is satisfied that they will not recur; and

(g) Grant such other relief as may be just and equitable.

Respectfully Submitted,

CHARLOTTE R. MORRISON (ASB-5897-T80M)
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April 26, 2024

Counsel for Mr. Mills

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

JAMIE MILLS,

Plaintiff,

vs. **CASE NO.: 2:24-cv-253-ECM**

JOHN HAMM, Commissioner, Alabama Department of Corrections, et. al.,

Defendants.

*** * * * * * * * * * * * * * * * ***

EVIDENTIARY HEARING

*** * * * * * * * * * * * * * * * ***

BEFORE THE HONORABLE EMILY C. MARKS, UNITED STATES DISTRICT JUDGE, at Montgomery, Alabama, on Tuesday, May 14, 2024, commencing at 1:32 p.m.

APPEARANCES

FOR THE PLAINTIFF: **Ms. Charlotte Randolph Morrison**
Ms. Sophia Ruth Henager
Mr. Randall S. Susskind
EQUAL JUSTICE INITIATIVE OF ALABAMA
122 Commerce Street
Montgomery, Alabama 36104

FOR THE DEFENDANT: **Ms. Lauren Ashley Simpson**
Mr. Henry Mitchell Johnson
ALABAMA ATTORNEY GENERAL'S OFFICE
501 Washington Avenue
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Proceedings reported stenographically; transcript produced by computer.

EXAMINATION

(The following proceedings were heard before the Honorable Emily C. Marks, United States District Judge, at Montgomery, Alabama, on Tuesday, May 14, 2024, commencing at 1:32 p.m.)

(Call to order of the Court.)

THE COURT: Good afternoon. We are here in the case of Jamie Mills versus John Hamm, et al., Case Number 24-cv-253.

Who do we have here for Mr. Mills?

MS. MORRISON: Charlotte Morrison, Your Honor.

THE COURT: Good afternoon.

MR. SUSSKIND: Randy Susskind, Your Honor.

MS. HENAGER: Sophia Henager, Your Honor.

THE COURT: Good afternoon.

And who do we have here for the defendants?

MS. SIMPSON: Lauren Simpson, Your Honor.

MR. JOHNSON: And Henry Johnson.

THE COURT: Good afternoon.

I've read all of the submissions by the parties in advance of this hearing, and I'd like to focus on the plaintiff's motion for preliminary injunction. Who is going to speak on that?

MS. MORRISON: I will, Your Honor.

THE COURT: All right. Go ahead and approach the podium, please.

All right. I've read your motion, certainly, and your

complaint. Why -- I want you to speak, first, to the timeliness of the filing of this action. Why was this action not filed earlier than April 26?

MS. MORRISON: Your Honor, we filed more than 30 days before the scheduled execution date. And the relief requested in this is different from any of the cases cited by defendants. In those cases, the plaintiff requested an entirely new method of execution. We're not asking for that here. We're asking for something that is very feasible and really readily implemented, which is an injunctive relief preventing Mr. Mills from being restrained on the gurney while litigation is pending and the presence of counsel to ensure his -- his rights.

This is immediately -- something that can be immediately implemented, and this distinguishes it from the other cases relied on by -- by the State. There's also an important public interest here that this order would protect, and that's the public interest in accurate information as we've alleged in our complaint. There has been -- you know, the Alabama death penalty has been dominated by reports of unnecessary suffering over the last executions, and --

THE COURT: Right. Which is why, if it's such an important question, is it your position that 30 days is ample time for this litigation to play out? Because the injunctive relief you're seeking is that the execution not move forward as long as this case is pending. You have asked for that

alternative relief, that in the event that the Court does not enjoin the actions that you have -- any of the four actions that you've requested -- specifically, you're asking me to enjoin the placement of Mr. Mills on the execution gurney while this case or his case pending in the Northern District are still ongoing. So isn't this really a stay of execution that was filed?

MS. MORRISON: No, Your Honor. It's a -- it's a motion for preliminary injunction relating to a very feasible remedy which is to not place him on the gurney until the litigation is resolved and to allow counsel to be present to monitor --

THE COURT: But this litigation can't be resolved in 30 days.

MS. MORRISON: We believe it can. We believe it can be resolved expeditiously.

THE COURT: You think that a four-count federal lawsuit can, from start to finish, be completed and all appeals completed in 30 days?

MS. MORRISON: We believe that a preliminary injunction can be entered in this case, and the Court can -- the defendants can move forward with the execution under the terms of that injunction, yes.

THE COURT: But you're asking -- okay. Isn't --

MS. MORRISON: So we don't --

THE COURT: Doesn't the fact that you've asked for injunctive relief and expedited discovery undercut that position? You don't need injunctive relief if the litigation can play out in the amount of time allotted by the late filing of the lawsuit.

MS. MORRISON: The preliminary injunctive relief the Court can issue today. We believe that the State's submissions have corroborated our factual allegations and support issuance of a preliminary injunction today. And it -- while it's feasible for this litigation to play out, it's not necessary to do so in order to move forward with the execution on May 30th.

We don't think that the defendants are entitled to the presumption under *Bucklew,* the equitable presumption about undue delay, because we have not sought a stay. The stay is only necessary if we are denied preliminary injunctive relief, but that is not the request today. The request today is for preliminary injunctive relief.

THE COURT: Do you acknowledge this lawsuit could have been brought earlier?

MS. MORRISON: No, Your Honor. We brought this lawsuit as soon as we could. We have --

THE COURT: You're going to have to explain that. Why could you have not brought this lawsuit earlier than roughly 30 days before the execution?

MS. MORRISON: The Governor issued the date for the

execution on May 27. We filed a Rule 60 motion in federal court on April 5. We believe that -- and very good reason to believe that the Court will stay the execution in this case based on that filing. The Court issued a scheduling order for the briefing in that case. The --

THE COURT: Which case are you talking about?

MS. MORRISON: This is our Northern District case.

THE COURT: Okay.

MS. MORRISON: Based on the -- our claims that the State has perpetrated fraud in the case by asserting that no deal was made with the principal witness in this case. When, in fact, there was a deal. For 17 years, we've been seeking that evidence, and now we have learned that the State misrepresented to the Court, to defense counsel, to the jury that no deal existed.

So we believe we will get a stay in that case. As the State has said in their responsive pleadings, they also believe we're in for a long night of litigation around that case, and that's why --

THE COURT: So you have filed a motion to stay the execution in the Northern District as well?

MS. MORRISON: We are awaiting the Court's order in that case. Briefing is complete.

THE COURT: So that's a, no, you've not filed a motion in that case to stay the execution?

MS. MORRISON: Your Honor, we don't believe that we are going to need to. We believe a ruling is coming from the Court any day now, but we don't -- we may be filing a motion for a stay if we haven't received that.

THE COURT: So the answer is no?

MS. MORRISON: No, we have not.

THE COURT: Okay. Go back to why this -- tell me -- you're still going to have to explain to me why you could not have brought this lawsuit earlier. Is there something that prevented you from filing this lawsuit earlier?

MS. MORRISON: Your Honor, we have brought this claim in a timely manner. Again, this is --

THE COURT: You're not answering my question. Was there any reason why you could not have brought this lawsuit earlier than you did?

MS. MORRISON: That we were pursuing valid claims challenging his execution. That was our priority, to stop this execution.

THE COURT: In the Northern District?

MS. MORRISON: In the Northern District.

THE COURT: Where you have not filed a motion to stay the execution?

MS. MORRISON: Where we have not filed the motion to stay the execution; where we filed the requested briefing from the Court early on April 16. Briefing concluded early in that

case. Then we turned to this. It's particularly given that the horrific treatment that was suffered by Kenny Smith being restrained on the gurney while a court-ordered stay was in place was likely to happen to our client. So then we prepared --

THE COURT: But this could have been brought earlier.

MS. MORRISON: I disagree --

THE COURT: I'm not hearing --

MS. MORRISON: -- Your Honor.

THE COURT: -- of any reason why you could not have brought this case a year ago, for example.

MS. MORRISON: Oh, well, certainly -- the State doesn't even contend that we could have brought this case before May 27 when Governor Ivey set the execution date.

THE COURT: From when?

MS. MORRISON: The date -- the Governor set the execution date on May 20- -- on March 27.

THE COURT: Why could you have not brought this case --

MS. MORRISON: The State --

THE COURT: -- a year ago?

MS. MORRISON: -- is challenging the standing. We would not have -- there would be no injury to pursue this claim until the Governor set the execution date.

THE COURT: So are you saying that any inmate on death

row cannot bring a lawsuit regarding the execution protocols until the Governor has set their execution date?

MS. MORRISON: That has been the State's contention, is that there is no harm -- no likelihood of harm without a pending execution date. Until we had a pending execution date, there's no substantial likelihood of Mr. Mills being restrained on the gurney while the court-ordered stays are in place.

Moreover, the pattern that we are identifying in our case relies on the series of executions that occurred within the last two years and including the executions of James Barber in July of last year and the execution of Kenny Smith in January of this year. Those facts were not known until this year.

So, you know, we -- this claim could not have been raised, as you suggested, a year or more ago. The pattern that we've identified in this case of restraining condemned prisoners to the gurney for prolonged periods of time without access to counsel, without access to courts, and with wanton disregard for the suffering that being in a suspended state of terror of --

THE COURT: I understand the factual allegations. I'm still -- I haven't heard that there's any prohibition on you having brought this case --

MS. MORRISON: Well, Your Honor, these facts --

THE COURT: -- earlier.

MS. MORRISON: -- did not exist until the -- the latest fact of Kenny Smith's execution in January. Moreover, the Court -- I'm sorry -- the Alabama Supreme Court amended Rule 8 in 2023 -- I'm sorry. In 2023, I think -- in 2023, extending the period that the defendants can hold a person on the gurney from 6 to 12 hours. That is a fact that, again, only emerged with the Alabama Supreme Court's amendment of that rule.

THE COURT: And I'm not talking about statute of limitations. I'm talking about waiting until the last minute to bring a lawsuit -- you could have brought this lawsuit before April 26.

MS. MORRISON: Well, Your Honor, we -- we disagree with that, again, because the execution date wasn't scheduled until March 27 and because we are fighting to stay -- or fighting to stop Mr. Mills' execution. And we filed this lawsuit with ample time to achieve a very feasible and readily implemented remedy, and that distinguishes this case from the other cases where this equitable presumption has been deemed to outweigh other considerations.

THE COURT: Why didn't you file the motion for preliminary injunction when you filed the complaint?

MS. MORRISON: Your Honor, I -- we filed this -- the motion for preliminary injunction within days of filing our complaint.

THE COURT: After the Court ordered you to file it by a particular time.

MS. MORRISON: Yes, Your Honor. I think we -- we -- and we did so. These are factors in the Court's equitable determination of -- in issuing a stay. We believe that we have met all the requirements. We've shown that there's a substantial likelihood that we prevail on our counts. There is no harm to defendants. We're not asking to stay the execution. There's no harm to the public interest whatsoever by granting the relief that we seek in this case.

THE COURT: Isn't the harm, though, in waiting so long when you could have brought the lawsuit earlier?

MS. MORRISON: Well --

THE COURT: And not recognizing that the defendants have an op- -- should have an opportunity to review your complaint, be served, file an answer. The Court enters a scheduling order. The Court has -- must have a hearing on the motion, if the facts are in dispute, and then the Court has to draft an opinion. And then you have to have time to appeal it, whatever the ruling is, to the Eleventh Circuit Court of Appeals. The Eleventh Circuit has to review the briefing; the submissions by the parties; perhaps, hold oral argument. And then the United States Supreme Court has to have time to consider all of the submissions.

And it's your position that 30 days is ample time for

that to have occurred when you didn't file your motion for preliminary injunction at the time the complaint was filed and it was only after the Court ordered you to do so if you were going to by a certain date and time? And I've not heard you give me any actual prohibition of you filing this lawsuit before April 26. I understand you didn't. I understand you had other things going on in Mr. Mills' other litigation, but I've not heard anything that has prevented you from filing this, even in January of 2024, when the State moved to set the execution. You could have --

MS. MORRISON: Your --

THE COURT: -- filed this lawsuit then.

MS. MORRISON: We disagree, Your Honor, that we had standing to file a lawsuit. The State would have taken the position we have no standing, we have no injury to file a lawsuit before an execution date was scheduled.

THE COURT: Do you have any authority for that?

MS. MORRISON: We have pleadings where the State has taken that very position.

THE COURT: Do you have a case where a court has said an inmate on death row does not have standing to bring a lawsuit under the Sixth Amendment, the Eighth Amendment, the First Amendment, the Fourteenth Amendment, unless and until his execution date has been set by the Governor?

MS. MORRISON: I believe we can produce that, Your

Honor. But because this was not a disputed issue, the State hasn't even raised the possibility that we could file before March 27, I'm not prepared to cite to those at this moment.

THE COURT: All right. You did not attach any evidence to your motion for preliminary injunction. Is there a reason for that?

MS. MORRISON: The evidence that we cite, Your Honor, in the preliminary injunction itself is public record. And we can produce that today, but they are all -- everything that we cite is either the State's own submissions or documents in the public record; news articles, media releases from the defendants themselves, media advisories from the defendants themselves.

THE COURT: Well, you did attach evidence to your reply brief.

MS. MORRISON: Yes, Your Honor.

THE COURT: Why didn't you attach that evidence with your initial motion?

MS. MORRISON: Well, I don't think we thought that the State would dispute that the -- holding a prisoner unnecessarily on the gurney for prolonged periods of time was violative of the Eighth Amendment, and many of the items that we cited in response are, again, items that were cited but were provided for courtesy to the actual attachments to that pleading.

THE COURT: Well, generally, the courts either prohibit or frown upon the submission of evidence in a reply brief. You understand that?

MS. MORRISON: Yes, Your Honor. And it was -- it -- also a means of giving the State the opportunity to view the evidence, which -- the evidence the defendants have already submitted in this case, Your Honor. We're relying on defendants' submissions that their own execution logs corroborate the facts alleged in our complaint. Those logs establish that Kenny Smith was held on the gurney for over three and a half hours, that --

THE COURT: Well, let's get to that. Let's get to your Eighth Amendment claim. You are alleging that prolonged restraint on the execution gurney is unconstitutional.

Are you alleging that the placement of your client on the execution gurney in and of itself constitutes punishment?

MS. MORRISON: Your Honor, we're alleging that the unnecessary restraint on the gurney for a prolonged period of time without counsel and with wanton disregard -- those are all elements -- wanton disregard for the suffering this creates. Those are all elements of our Eighth Amendment claim.

THE COURT: What facts are alleged in your complaint that point to an inference of wanton conduct?

MS. MORRISON: The fact that defendants refused to provide information when requested by the condemned prisoners.

Mr. Smith asked to access counsel and the courts. Defendants concede that Mr. Smith asked to communicate with the court, asked if what they were doing was violative of the court order entered in that case, and they refused to respond. We believe that's inconsistent with the fundamental requirement of respect for human dignity that the Eighth Amendment requires.

We allege that holding Mr. Barber on the gurney after IV has been established and after the IV team left the room for no reason, again, is -- demonstrates wanton disregard for the suffering that the condemned prisoner faces while they're in the suspended state of terror waiting for a certain death that will come at any moment or in hours.

THE COURT: Well, isn't that -- how do you attribute any of that suffering -- which I'm hearing you say is psychological suffering?

MS. MORRISON: Yes.

THE COURT: How do you separate that from just the general nature of the proceeding itself?

MS. MORRISON: Until Joe James' execution, there was an expectation that executions would take place in minutes, not hours. Defendants' own media advisory told witnesses, who were invited to attend the execution, that the execution would start at 6:00 and would end at 6:30, that they would return to the media center at 6:30. There was an expectation that these would last 30 minutes, and now we've established that, in fact,

the execution begins and takes place over the course of hours. The execution --

THE COURT: Aren't those hours, though, attributable to things like court proceedings where we're waiting for either the Eleventh Circuit Court of Appeals or the United States Supreme Court to issue rulings?

MS. MORRISON: No, Your Honor. Joe James had no pending litigation. He was on the gurney for over -- over two and a half hours.

James Barber was on the gurney for an hour after the IV was established, after his litigation was denied at the U.S. Supreme Court.

Kenny Smith was on the gurney for two and a half hours -- almost two and a half hours while a court-ordered stay was in place. This restraint is not due to resistance. The resistance cited in -- by defendants only begins within minutes of them ending the execution of Kenny Smith's execution after he had been held on the gurney for over three hours with no resistance recorded.

THE COURT: At what point does placement on the gurney become unconstitutional in your pos- -- on your position? Is 30 minutes too long? 60 minutes? How long? And how would that be gauged?

MS. MORRISON: Your Honor, I -- the defendants' burden at this point is to establish that the restraint is necessary.

It cannot -- they cannot establish that it's necessary while a court-ordered stay is in place.

THE COURT: Well, they've said they're not going to do that that Mr. Mills would not be placed on the execution gurney if there is a court-ordered stay and that if for some reason he has been placed on the gurney and a stay is issued, that he will be removed from the execution chamber.

MS. MORRISON: Your Honor, they still have not addressed placement of the condemned on the gurney while litigation is pending and they will not be pushed -- you know, ready to push until the litigation is terminated. They more importantly have no -- nothing in their protocol that provides for review of this affirmation of a practice that they have deviated from in the past. But for these survivor accounts, we would not know that they had restrained the condemned in violation of a court order.

And so the presence of counsel is necessary when the State has -- and executions in Alabama are unique. Other states provide for the presence of counsel, like Tennessee, in the chamber along with counsel for the State. Other states provide that from the moment the accused -- or sorry -- the condemned walks into the chamber, the curtains are opened to witnesses. The entire process is reviewed. So this is of the State's making that we have an event that takes place in secret, that can take place now up to 12 hours where the

defendants are prohibiting any access to counsel or the courts during that time.

And without the presence of counsel, the State's authority to conduct this execution and wander from the protocol is unreviewable. It makes discovery of this impossible, and -- and this is why injunctive relief is necessary in this case.

THE COURT: You state your Eighth Amendment claim in Count 1 as arising out of what you were saying are prolonged periods on the execution gurney without reasonable access to counsel. Are those hand in hand; meaning, if an inmate is placed on the execution gurney but his counsel is present, that would satisfy the Eighth Amendment, or is it time on the execution gurney and access to counsel are two separate issues?

MS. MORRISON: They are two separate but connected issues. Preventing the unlawful restraint -- unlawful restraint, unnecessary restraint on the gurney requires that counsel be present in order to ensure compliance with the Court's order. The presence of counsel is also necessary because the condemned has an interest in reliable information about the status of his appeals -- reliable and timely information about the status of appeals and the substance of those -- that litigation.

THE COURT: But in this case, wouldn't the appeals have been completed if you had filed the lawsuit earlier and

there wouldn't be any reason to be waiting for the courts to rule? Isn't that an avoidable situation that we are now in because the lawsuit was not filed until April 26?

MS. MORRISON: No, Your Honor. We were not able to file our *Brady* claim for the past 17 years because the State has denied that it existed.

THE COURT: Right. I'm not talking about the Northern District case. Those facts are not before this Court. I'm talking about the Eighth Amendment right -- access to counsel. We wouldn't be waiting at the last minute on the Supreme Court to rule on an appeal had the case been filed earlier.

MS. MORRISON: Mr. Mills will be likely waiting on information about his appeals regardless of what happens in this case. We -- and I just -- on -- the Eighth Amendment, the right to counsel issue, connects to him being informed of ongoing litigation, but it also is necessary to ensure compliance with the Eighth Amendment.

We have -- the State has lawyers present in the chamber. They are making statements about what did and did not happen. They're telling Mr. Smith, No, you are not feeling pain. They are making a record, a factual record, which he has no ability to defend or advocate for himself. As part of the protocol, he's disabled from doing so. And so they have made this into an event that is adversarial and -- which he will have no recourse to the courts, and that is the nature of

the -- this execution event that we are asking for the Court to protect Mr. Mills from.

THE COURT: Do you have any authority to support your position that you have a Sixth Amendment right or that Mr. Mills has a Sixth Amendment right to counsel during his execution?

MS. MORRISON: Yes, Your Honor. In Ash v. State, the Court acknowledged that the test is an examination of the event in issue in order to determine whether the accused requires the aid of counsel in coping with the legal problems and assistance in meeting his adversary. The presence of counsel in the chamber --

THE COURT: Can you slow down just a little for the court reporter.

MS. MORRISON: Sorry.

THE COURT: And can you give me the citation.

MS. MORRISON: To Ash v. State?

THE COURT: Please.

MS. MORRISON: It's at Page --

THE COURT: Or show me -- or point to the document number where it's cited. I can get the --

MS. MORRISON: It's in our complaint, Your Honor, and also in our motion for preliminary injunction under the fourth claim for relief.

THE COURT: All right.

MS. MORRISON: It's 413 U.S. 300.

This is not true in every state across the country, but it is true in Alabama, that the State conducts these proceedings as an adversarial event over the course of hours where factual determinations are made about whether the condemned is unnecessarily suffering and whether to vary from the protocol.

These determinations are made without consideration of what the condemned prisoner has to say, and without consideration -- without advocacy from counsel, he has no ability to defend against the -- the State's determinations and fact findings. And this is exactly what the Court was considering in *United States versus Ash*. This is the kind of event that requires the assistance of counsel for the condemned who is unable to advocate for himself.

THE COURT: The State has responded with information that inmates are able to communicate with their counsel until they've entered the execution chamber. Is that not adequate to satisfy their Sixth Amendment rights?

MS. MORRISON: No, Your Honor. In Kenny -- their logs establish that in Kenny Smith's case, he last communicated with counsel at 5:35. The United States Supreme Court did not rule on his application for a stay until approximately 7:00 when he was brought into the chamber. He was not informed of the denial of the stay. He had previously been held while a stay

was in place on the execution gurney. So he did not know what had happened. Counsel could not call Mr. Smith, and he had no way of knowing at what time to call counsel to obtain this information.

The -- and critically, there's no -- counsel is not present while the condemned is on the execution gurney. The State does not dispute that there is no access whatsoever to counsel or the courts for the 12 hours -- up to 12 hours after the condemned is brought into the execution chamber. Even before 6:00 --

THE COURT: Where has an inmate been in the execution chamber for 12 hours?

MS. MORRISON: The protocol has been changed to allow the State to begin the execution at 6:00 p.m. and end the execution at 6:00 a.m. the following morning. The evidence that we have is the State has held a person up to three and a half hours.

THE COURT: But not 12.

MS. MORRISON: But there's no reason to believe that the State would not exercise its ability to do so, and even --

THE COURT: But they've said they won't. That's not --

MS. MORRISON: They have not said that they will not use the 12 hours in the chamber. They have said that they will not if a court-ordered stay is in place. They have not

asserted that they would not bring him in while litigation is pending. And the State has refused requests by the United States Supreme Court to stay proceedings without a formal entry of a stay to give them two hours before they commence the execution.

Without a court-ordered stay, we believe -- we have every reason to believe they will bring him into the chamber even while litigation is pending, even if the U.S. Supreme Court has asked them not to.

THE COURT: You say if the Supreme Court has asked the State --

MS. MORRISON: Yes, Your Honor.

THE COURT: -- not to move forward --

MS. MORRISON: To give them --

THE COURT: -- with an execution --

MS. MORRISON: -- time to review the appeals and to give them several hours, and this has forced the U.S. Supreme Court to issue stays because the State would not agree to this. In Mr. McWhorter's case, they brought him in before 6:00. Again, this is arbitrariness of deviating from the policy which provides that he be brought in at 6:00 and deviating from that policy bringing him in early.

The condemned has no idea when to make that final call to counsel, and it's that very lack of care, lack of precision, lack of faithfulness to the protocol that the State is allowed

to engage in because they know that there is no process for review of the conduct that occurs in the chamber. There is no accountability for the decisions made from the deviations from protocol without the presence of counsel.

Again, we think that this -- that there's no harm to the State, they're not required to stay the execution by allowing counsel to be present, and these -- that the presence of counsel would eliminate these sort of factual disputes, these uncertainties that have -- and, you know, much of the problems that the State encounters because it would provide them with that reviewability and accountability that would ensure stricter compliance with their own protocol.

THE COURT: You have likened the placement of an inmate on the execution gurney to the facts in *Hope versus Pelzer*. Can you explain that?

MS. MORRISON: Yes, Your Honor. It is -- it established that the -- being helpless in the face of certain death is a form of torture. When necessary, it -- when unnecessary is violative of the -- we contend is violative of the Eighth Amendment. Restraining without penological justification, without reason, as demonstrated in the Kenny Smith -- the IV team was not even in the chamber. For two and a half hours, the IV team was not in the chamber, not attempting IV access.

And the -- you know, holding a prisoner in that state

without understanding why because execution -- he's expecting to be killed at any moment, and this goes on for hours. He's not given any information about what is happening, what is happening with his appeals, being refused any communication, that that amounts to -- amounts to terror, and it meets no penological justification as the restraint of the prisoner in *Hope versus Pelzer* does.

THE COURT: You keep going back to Mr. Smith, but you would agree with me that after Mr. Smith's situation, that the Governor put a moratorium on executions to allow for a review of the processes and protocols and that changes were made, and since those changes were made, there have been, I think, two lethal injection executions where those facts are not present.

MS. MORRISON: Well, Your Honor, in James Barber's case, he was held on the execution gurney for an hour without any penological justification, without any legitimate reason after IV access was established. The State has contended that it was something to do with the witnesses not having been brought yet. That was a deviation from protocol. He should have been taken off the execution gurney at that point.

The execution protocol requires that the witnesses be brought to the observation room before he's brought into the chamber. So, no, the -- there has been no remedy for the -- the disregard for their own protocol, the lack of accountability, and the --

THE COURT: So you're saying that placement on the execution gurney for one hour is cruel and unusual punishment in violation of the Eighth Amendment?

MS. MORRISON: When done unnecessarily and without access to counsel, without any information as to why he's being restrained, yes. Yes. He's in the state of suspended terror expecting death to come at any minute. That is the most stressful part of the execution. Absolutely the most stressful part of the execution. And to prolong that period unnecessarily violates the Eighth Amendment.

THE COURT: What about Mr. McWhorter?

MS. MORRISON: Mr. McWhorter did not involve these facts but is not a deviation. There is no explanation why his did not involve this -- well, actually, I take that back, Your Honor. There was a deviation in Mr. McWhorter's case. He was brought to the chamber before 6:00. And again, that lack of certainty, the deviation from protocol --

THE COURT: What time was he brought to the execution chamber?

MS. MORRISON: I believe it was 5:37.

THE COURT: Okay.

MS. MORRISON: But it demonstrates a disregard and a lack of faithfulness to their own protocol that we've only discovered because the State submitted these execution logs, but the State's --

THE COURT: And he was on the execution gurney for 30 minutes?

MS. MORRISON: Excuse me?

THE COURT: Wasn't he on the gurney for 30 minutes?

MS. MORRISON: I believe so, Your Honor.

THE COURT: Okay. Was that unconstitutional?

MS. MORRISON: Your Honor, we have not raised that as a fact in our complaint. I point to the *McWhorter* as -- execution as another example of deviation from protocol that the State has no accountability for, and it does not disrupt this pattern.

We have Mr. Smith, and his execution in January, again, involves a procedure where he was never informed about the status of his appeals. He was brought to the chamber with every reason to believe that he would be held and a stay might be issued. He never was informed about the status of appeals, and he has a protected interest in learning about the status of his litigation.

THE COURT: But Mr. Smith in 2024 did not have a stay of execution.

MS. MORRISON: He had -- he had litigation pending.

THE COURT: But there was never a stay issued for him in 2024.

MS. MORRISON: No, Your Honor. And -- but we are -- you know, our allegation is that holding a prisoner on the

execution gurney while stay litigation is pending is unnecessary and violative of the Eighth Amendment. The State has made public statements that it would not proceed to push the final stage of the execution protocol. They would begin it but not, you know, enter the final stage of the execution while litigation is pending.

There's no reason when Mr. Smith was restrained on the gurney and the mask placed within minutes, Mr. McWhorter restrained, IV established within minutes. There's no reason to begin that process while stay litigation is pending. So we think the State has no legitimate interest in doing that, no legitimate reason for --

THE COURT: Well, in paragraph 79 of your complaint, which is Document 1, at page 20, you allege on the night of his 2024 execution, Kenneth Smith was not apprised of a decision by the Supreme Court of the United States to vacate a stay of execution. But there was no stay of execution in his 2024 execution by nitrogen hypoxia.

MS. MORRISON: That's correct, Your Honor. That is an error in our pleading.

THE COURT: Okay. If there is -- if an inmate files a lawsuit to assert Eighth Amendment rights and it's brought in enough time that it could go all the way through the Supreme Court and the Supreme Court can make a ruling and on the day of execution, there's no litigation pending, how does that affect

your calculus about being restrained on an execution gurney?

Do your Eighth Amendment concerns go away? Because there is no litigation pending. Because a lot of what you're saying is it is torturous to have someone on the gurney while they're waiting to hear if there's a stay of execution or no stay of execution or even during a period where a stay has been entered but is later lifted. It sounds like there's a very significant intertwining of ongoing litigation that adds to the pain and suffering you're claiming is added to this process.

Wouldn't that be alleviated if all litigation is brought in enough time for it to be completed well in advance of the day of execution?

MS. MORRISON: No. Mr. Barber experienced this super added suffering despite the fact that he had no litigation pending. It was because they deviated from their protocol and didn't bring witnesses to the observation room. Yet they forced him to remain on the gurney for an hour beyond the time that the IV team had established access. Joe James was on the execution gurney for over two and a half hours when no stay litigation was pending.

So, no, Your Honor. The access to -- the nexus to counsel in that instance is the need for counsel to be present to advocate for the condemned in this otherwise secret proceeding that has no accountability for deviations from the execution protocol.

THE COURT: So in a case like that where there's no litigation pending, you're not waiting on a ruling from the Eleventh Circuit Court of Appeals or the United States Supreme Court, and an inmate has been brought in and placed on the execution gurney, at what point does the lawyer make a phone call to the Court and say, He's been on the gurney for too long? What's your Eighth Amendment threshold in that case?

MS. MORRISON: Your Honor, I -- with Mr. Barber, it would be when the witnesses are not there, he should be taken off. Counsel would ask that he be removed from the gurney, which is easily accommodated. He had the IV in him. He can walk away from the gurney, back to the holding cell until the witnesses are ready and then come back. There's no allegation that he was fighting or otherwise resisting. If there was, then they would have necessity for restraining him.

THE COURT: So it's the location of the inmate in the execution chamber as opposed to being in a holding area adjacent to the execution chamber?

MS. MORRISON: Yes. At that moment, when the prisoner is -- the condemned person is restrained to the gurney awaiting certain death at any minute, that is the terror that the defendants have an obligation to minimize and not extend that period. There is -- in the holding chamber, there is no threat of imminent death in the same way that a prisoner faces that at any minute, their execution could be finalized.

THE COURT: All right. Tell me about why the right to have your -- have counsel in the chamber is not barred by the statute of limitations. And I'll -- speak specifically to the *Arthur* case where -- it's an unpublished opinion, but it is persuasive authority -- that in that case, Mr. Arthur brought a claim that his attorney should be permitted to have a cell phone in the viewing room and the Eleventh Circuit went through the fact that that rule of not allowing an attorney in a representative capacity to be present in an execution but instead is a visitor and not permitted to have a cell phone was time-barred.

MS. MORRISON: Yes, Your Honor. This claim arose once the State had defense counsel -- or sorry -- counsel for defendants in the chamber. This is what turns this event into an adversarial process, which the -- the de- -- defendants having counsel present in the chamber without Mr. Mills having his own counsel present places him in this adversarial situation where he is not able to advocate for himself.

The facts from which our claim arise also emerge from the new evidence that these -- this period in the chamber, otherwise believed to have taken 30 minutes, now takes hours in addition to the extended time period that the State now has, up to 12 hours that they are permitted to prevent him from accessing counsel and the courts. This is -- was not considered in *Arthur*. It wasn't considered in *Grayson*. In

those cases, the presumption was that this would be a proceeding that took minutes to happen, not hours.

THE COURT: Where in *Arthur* is it presumed that the execution would take minutes?

MS. MORRISON: There's been no evidence that the State has restrained condemned prisoners in the execution chamber. That evidence -- for hours. That evidence first emerged with the Joe James -- the Joe James execution. The State had -- it was believed by other parties that that likely took place, and we did not have corroboration of that fact until much -- much later.

We first learned about the State's practice of holding condemned prisoners in the execution chamber for hours from the unlikely survivors of -- Mr. Miller and Mr. Smith. That is the first notice that we had that the State engaged in this practice of restraining prisoners in the execution chamber for hours -- hours at a time.

THE COURT: So you're saying that it wasn't until -- this case is not like *Arthur* because you've only learned that the State has its attorneys or representatives or both in the execution chamber with cell phones?

MS. MORRISON: For hours at --

THE COURT: Well, Mr. McWhorter's not -- he was not on the execution chamber for hours. There's been -- you keep going back to Mr. Smith particularly. But isn't that

post-mor- -- or premoratorium and you're not speaking to the post-moratorium review of execution protocols --

MS. MORRISON: James Barber is post-moratorium.

THE COURT: I know that. But the majority of your submissions to the Court and your argument today have been around Mr. Smith.

MS. MORRISON: Because of the unique feature of Mr. Smith that he survived, and so we have a record of what happened in his case that we cannot have in these other cases.

THE COURT: Right. But you know Mr. McWhorter was only on the execution gurney for 30 minutes.

MS. MORRISON: Yes, Your Honor.

THE COURT: Okay. And you know Mr. James was on the execution gurney for an hour.

MS. MORRISON: Over an hour.

THE COURT: So the time from Mr. James' execution to Mr. McWhorter's execution, that time was cut in half.

MS. MORRISON: There is no sort of linear progress --

THE COURT: Right. But you're talking about a pattern. You're talking about the pattern of Mr. James, Mr. Smith, but you're ignoring the post review pattern of a reduction in the amount of time on the execution gurney and not recognizing the changes that were made during the review. And I'm just -- it seems to me you're going far back in time and not looking at the pattern that has emerged post review, and

doesn't that address your concerns --

MS. MORRISON: No, Your --

THE COURT: -- about the -- whether it's speculative or certain that Mr. Mills would be on the execution gurney for longer than necessary?

MS. MORRISON: No, Your Honor. Every execution has involved a deviation from protocol or a violation of the prisoner's rights. Every single one. And so, no, we don't think that there's been a disruption of the pattern that we established in our complaint. And given the gravity of the rights at stake and the ease with which defendants can accommodate our requests, we think that it's incumbent upon this Court to protect Mr. Mills from this unnecessary suffering.

THE COURT: Does your access to the courts claim rise and fall with your underlying Eighth Amendment claim? In other words, to bring an actionable Sixth Amendment access to courts claim, there has to be a right that is being addressed or that you need to go to court to address.

So is the survival of your Sixth Amendment access to court claim dependent on your Eighth Amendment claim?

MS. MORRISON: No, we don't think that it is, Your Honor, because of the unique circumstances of the execution procedures in Alabama that can last up to 12 hours. There are issues that only become -- only emerge during the execution

procedure. These issues will be completely unreviewable if there is not the presence of counsel during this period. So while it is tied into our other counts, it doesn't necessarily rise or fall on those counts.

THE COURT: Where in the protocol -- and it's in the record -- does it say that witnesses are supposed to be present at the facility when an inmate is brought into the execution chamber?

MS. MORRISON: Your Honor, this is at page 15, Section L, right before the procedure outline for the execution.

THE COURT: Is there a document number you have for the exhibit?

MS. MORRISON: It is 15-1.

THE COURT: All right. I'm sorry. And what page?

MS. MORRISON: Page 15.

THE COURT: All right. Thank you.

All right.

MS. MORRISON: Right -- Section L, right before the execution of sentence section. It says, At the time designated by the warden, the witnesses will be transported to the Holman execution facility and escorted to the appropriate witness rooms. Following that, the execution begins with -- on page 17, the procedures for lethal injection -- the execution begins with the condemned inmate being escorted to the chamber

and placed on the gurney.

THE COURT: Well, Section L says, At the time designated by the warden and you're saying that in the protocol, if you read it as chronological, that would have to occur before?

MS. MORRISON: Yes, Your Honor. This is outlining what happens prior to the judicial execution procedures outlined in Section 10.

THE COURT: All right. Speak to the defendants' invocation of *Younger* abstention. As I understand their argument, this is a civil action. Mr. Mills does not have a Sixth Amendment right to civil -- to an attorney in a civil action.

So if we're talking about a Sixth Amendment right to counsel, it must be in the underlying criminal case for which this execution is his sentence, and that if that's the case, then this Court should abstain from hearing that Sixth Amendment claim because it's really arising out of a state court criminal action. What's your response?

MS. MORRISON: Yes, Your Honor. There is no ongoing proceeding that this Court is -- must defer to in this case. The --

THE COURT: Well, if there's no ongoing proceeding, where does his Sixth Amendment right to counsel arise?

MS. MORRISON: In the execution procedure itself. And

so the Sixth Amendment that -- we rely on *United States versus Ash* that that -- this has become an adversarial event that requires -- that -- where the condemned requires the assistance of counsel. That --

THE COURT: So the execution in and of itself is a stand-alone process that gives rise to an independent Sixth Amendment right to counsel?

MS. MORRISON: Yes. Under the protocol established in Alabama.

THE COURT: And you said that Ash versus State is your authority for that proposition?

MS. MORRISON: *United States versus Ash*, yes.

THE COURT: All right. You've asked the Court to alternatively stay the execution if the State refuses to agree to the four bases of your motion for an injunction, if this Court does not grant injunctive relief, or if this litigation is pending at the time of execution; correct?

MS. MORRISON: Yes, Your Honor.

THE COURT: So you're saying, I want the Court to enjoin placement on the gurney while this case or the case in the Northern District are pending, enjoin unnecessary restraint on the execution gurney without a legitimate reason and with wanton disregard for suffering. You asked me to enjoin the exclusion of Mr. Mills' attorney from the execution chamber or otherwise limiting his ability to communicate in person with

his attorney while he's in the execution chamber and enjoin the denial of Mr. Mills' attorneys' access to phone lines to communicate with his legal team and courts.

Have I stated --

MS. MORRISON: Yes.

THE COURT: -- that correctly?

And then your alternative is if I don't -- if the Court does not enter an injunction or if the State does not agree to do those things or if this litigation is pending, you want me to stay the execution?

MS. MORRISON: Yes, Your Honor. We think that those are considered consecutively and that the Court first -- we ask the Court, first, to consider the motion for a preliminary injunction before considering the motion for the stay.

THE COURT: If -- well, the State has taken the position that Counts 2 through 4 are barred by the statute of limitations. Do you have anything else, other than what you've told me, that saves those claims from a statute of limitations defense?

MS. MORRISON: Yes, Your Honor. The --

THE COURT: Go ahead.

MS. MORRISON: The facts did not emerge and were not known -- knowable until the survivor accounts of Kenneth Smith and Alan Miller.

THE COURT: But you've known that the attorney can't

attend in his or her capacity as an attorney, and you've known that they can't have a cell phone.

MS. MORRISON: Yes, Your Honor.

THE COURT: What has changed?

MS. MORRISON: The change has come from a process that was extended from minutes to hours, and the --

THE COURT: How does that process alter the protocol about attorneys attending as witnesses and not having a cell phone?

Obviously, there may be a change of facts about why someone may want an attorney or want their attorney to have a cell phone. But is the fact that Mr. Mills -- the basis of Mr. Mills' Eighth Amendment claim is different than Mr. Arthur's Eighth Amendment claim --

MS. MORRISON: Well, yes --

THE COURT: -- that fact alone -- doesn't that reset the statute of limitations, though, every time a fact pattern emerges for an Eighth Amendment claim?

MS. MORRISON: Well, Your Honor, the facts of unnecessarily, as we allege, torturing condemned prisoners, we don't think -- it happens all the time. It has not happened in other states. Alabama is under this sort of unique era where the -- there have been this series of horrific executions and these survivor accounts. This is not ordinary. It's extremely unusual.

THE COURT: But is it the unusual nature of those facts that you're alleging that resets the statute of limitations clock?

MS. MORRISON: Your Honor, the change is from in *Arthur* and *Grayson*, a procedure that lasted half an hour. There's no -- you know, as the Court in *Arthur* says, that there's no hypothetical under which in a matter of minutes, counsel is going to reach the court and be able to protect any violation of rights in that moment. That happens in minutes.

But when we're talking about a procedure that extends for hours, where the State is deviating from protocol, disputing the condemned person's, you know, statements about being in pain, we think that there is a role for counsel here and a requirement of access to counsel here that the Court needs to enforce. And this emerges from these new facts, from the extension of the process, to lasting minutes to hours as demonstrated in these cases.

THE COURT: Do you have any --

MS. MORRISON: It's also --

THE COURT: -- authority that an emerging fact pattern like that resets the statute of limitations on a claim that's been --

MS. MORRISON: Yes. I think that that is, you know, established under, you know, the two-year statute of limitations, that these are precisely the kinds of facts that

give rise to a cause of action as to which the plaintiff has two years statute of limitation. I don't have case law here today. I think, you know, we would be able to brief that. But I think that that is precisely what the two-year statute of limitations is about.

THE COURT: Well, the statute -- a federal claim accrues when a plaintiff knows or has reason to know of the injury which is the basis of the action; correct?

MS. MORRISON: Yes, Your Honor.

THE COURT: And so even as -- back as far as the *Arthur* case where the plaintiff there made the claim, I need access to my attorney in his or her representative capacity and they need a phone to ensure that my Eighth Amendment rights are not violated during the execution, that's precisely the claim you're making here. It's -- the facts of the Eighth Amendment claim are different, but it's the same legal claim.

MS. MORRISON: It is not the claim that the *Arthur* court addressed.

THE COURT: All right. Tell me how.

MS. MORRISON: The *Arthur* court said that they were addressing the right of a friend to have a cell phone in the observation chamber. That is -- it -- they -- the Court explicitly said they are not addressing the right to counsel, which was not raised in that case.

THE COURT: Right -- well, they said you're not

bringing a Sixth Amendment right to counsel claim, but they did say it's been the protocol for some time that an attorney cannot attend the execution in his or her capacity as an attorney. They have to attend as a witness/friend, and as a witness/friend, can't have their phone.

MS. MORRISON: Yes. And the issue there was the attorney being -- witnessing a procedure that took minutes, and now we've established through these survivor stories that their -- this is a procedure that actually carries on for potentially hours. And we -- it has been established that counsel for the State attends this process, that they are making factual determinations about whether or not to believe the prisoner when he says that he's suffering, they are making decisions to withhold information about the status of appeals. All of that is new evidence that gives rise to this claim.

THE COURT: And I had gotten off track a little. I want to get back to *Hope versus Pelzer*. If I find that the facts here are not as egregious as the facts in *Hope versus Pelzer*, does that doom your Eighth Amendment claim?

MS. MORRISON: No, Your Honor. We think that the -- that it doesn't demark our claim. But the facts here are more egregious. We have the prisoner facing a certain death being held in this state of terror unnecessarily for a prolonged period of time. That is --

THE COURT: But you're conflating the execution itself

with the facts of this case. In *Pelzer*, the inmate there, for the purpose of punishment, was placed on a hitching post for seven hours. He was made to remove his shirt in the hot Alabama sun where he was handcuffed, and his handcuffs were super heated in the sun and were burning his wrists. He was denied bathroom breaks. He was denied water, and he was taunted when the guards gave dogs water in front of him and then pushed over a container of water in front of him. And you're telling me that the facts here are more egregious because your client would be placed on an execution gurney for a longer period than you think he should be in advance of an execution?

MS. MORRISON: For -- the facts of holding a prisoner in violation of a State -- a court order for hours, the disregard for the prisoner's complaints about needing to use the bathroom --

THE COURT: Okay. Well, are we requiring a court order be in place? Because you're going back to an inmate who had been on the gurney during a stay. The State has said that will not happen to Mr. Mills. So how are you separating the execution itself?

I understand you don't want him to be executed, but that's not what I'm being asked to consider. I'm being asked to consider whether an inmate who is being executed, his placement on the execution gurney for longer than a certain

period of time violates in and of itself the Eighth Amendment.

MS. MORRISON: With wanton disregard for the suffering this creates, so --

THE COURT: And where do we get facts that point to wantonness?

MS. MORRISON: In Alan Miller and in Kenneth Smith, the -- we uniquely have a record of what they allege happened to them, which was they said they needed to use the bathroom, they asked for information about whether they would have their last statement relayed because they thought they were falling unconscious, they were asked about whether the State was complying with the court order in the case, all of this met to no response. They were not informed about ongoing litigation in their case.

THE COURT: But again, you're going back post execution procedure review. The State has come back and said, We've looked at our processes. We have ensured that the IV team has changed, which will help us expedite matters. We have given more time to allow for last-minute appeals to be determined before we will bring an inmate to the execution chamber. We --

MS. MORRISON: They have not said that. They have not said that they will wait until the appeals are finalized to bring them to the chamber, and they have made --

THE COURT: Well, I think they said -- and they can

correct me if I'm wrong -- in their submissions to this Court that if there's a stay, an inmate who was already in the execution chamber will be removed.

MS. MORRISON: Yes, Your Honor. Which is not to say that they won't bring him to the chamber while stay litigation is pending, which means that he could be on the gurney for hours.

THE COURT: Isn't that speculative based on the trend of the last two lethal injection executions that you just are not speaking to with any regularity?

MS. MORRISON: No, Your Honor. I don't think that -- that the one lethal injection that they've -- they executed in *McWhorter* provides any reassurance that the State follows its protocols. They didn't follow it there. They didn't follow it in *Barber*. They didn't inform Mr. Smith about the status of his appeals before they brought him to the chamber.

So in none of these three is the State's affirmation of protocols that they have sometimes followed and sometimes not in the past over the last five executions. That is the pattern that we have here, and why -- the presence of counsel, a very feasible readily implemented remedy for this pattern exists.

There's no cost to the State in having counsel present. There's a greater likelihood that they will comply with their own -- with faithfulness to their own protocols if

counsel is present. They have other attorneys present, which demonstrates the ready feasibility of having a lawyer in the chamber. This is the kind of accommodation they can make to their protocol quickly. Any security concerns can be taken care of. This is a -- the process that's acknowledged in Tennessee. They've been able to accommodate this without any risk to decorum or security. And the State has not explained why that's not feasible here.

THE COURT: All right. Anything else?

MS. MORRISON: Your Honor, we do have a pending discovery motion, but we believe that we're entitled to relief on our preliminary injunction claim. If the Court is inclined not to grant that, we would ask for an opportunity to tender our submissions to this Court and to grant discovery.

THE COURT: I'm sorry. I didn't hear that last part.

MS. MORRISON: We would ask the Court to issue -- to grant our motion for expedited discovery, but we think that we're entitled to a preliminary injunction based on the submissions thus far.

THE COURT: If I were to grant your motion for expedited discovery, it's already May 14. How would that procedurally -- how would you contemplate that being effectuated in time?

MS. MORRISON: The --

THE COURT: Because I assume what would happen is if I

ordered expedited discovery, the State would have to have a reasonable period of time to respond to the discovery requests. They would produce to you, which I'm sure would include objections that would have to be ruled on by the Court. They would produce documents or responses to interrogatories to plaintiff's counsel, and then you would have to then come back to the Court with additional briefing or arguments based on those produced -- that produced information, which would delay the Court's ruling in all likelihood on the motion for preliminary injunction, which would delay an appeal to the Circuit, which would delay an appeal to the United States Supreme Court, and we're two weeks out. How would that look? I mean, do you see how I'm saying there's not ample time --

MS. MORRISON: Your --

THE COURT: -- for this litigation to continue?

MS. MORRISON: The court ordered expedited discovery in the case of *Miller* and *Smith*.

THE COURT: I know it could be done. I'm asking you about this case. In this case, we are two weeks out. How would expedited discovery do anything other than further delay this litigation that you have told me in your submissions you have allowed ample time for the Court?

Isn't the fact that you brought a motion for expedited discovery a recognition that there is anything other than ample time? There's just not. I don't see how in 14 days the State

has a reasonable amount of time to respond, you have a reasonable amount of time to read and digest and then make additional arguments to the Court based on that evidence. And then I have -- I then have to review it and then draft what is going to be probably a lengthy opinion, which is then going to be reviewed by the Circuit, which will then be reviewed by the Supreme Court, all before May 14 -- or May 30.

MS. MORRISON: The fact that the State immediately was able to produce the execution logs, I think -- you know, the discovery that we're seeking around the communications defendants had during the hours that the condemned was in the chamber, this is not difficult to produce. I think it can be produced within 48 hours and -- which would allow us to be back to this Court for an evidentiary hearing within the time.

THE COURT: Well, I -- today was the only day I could fit in an evidentiary hearing. Honestly, you underestimate the Court's calendar availability. I've got -- I don't have a clear calendar. I know this is of utmost importance, but it underscores the problem that I have with this lawsuit being filed on April 26. And now the case is on fire because it's emergent, and you're trying to fit in what is generally speaking in a civil lawsuit a year's worth of work into 30 days.

MS. MORRISON: Your Honor, then, I think we would look to offer our submissions to -- our evidentiary submissions

again, which have been largely cited and attached to previous pleadings in this case, but we want to ensure that those are considered in support of our motion. We can do that now or we can do that after you hear from the State.

THE COURT: You're talking about the evidence that you attached to your reply brief?

MS. MORRISON: And the evidence that's attached in the State's response, and we have some other exhibits as well.

THE COURT: You're going to produce some exhibits today?

MS. MORRISON: We are prepared to, Your Honor, yes.

THE COURT: All right. I do actually have an additional question. You have -- in Count 2 -- well, first of all, in Count 2, you bring the claim for violation of due process under the Fifth and Fourteenth Amendment. What's the Fifth Amendment due process claim?

MS. MORRISON: Your Honor, our claim there is that he has a due process interest in protecting his -- in his protected interest to be free from the Eighth Amendment -- cruel and unusual treatment under the Eighth Amendment, to the enforcement of court orders.

THE COURT: But the Fifth Amendment is as to the Federal Government and not the State. Is that just an add-on --

MS. MORRISON: Yes.

THE COURT: -- claim? It's really a Fourteenth Amendment --

MS. MORRISON: Yes, Your Honor.

THE COURT: -- due pro- -- is it substantive due process or procedural due process?

MS. MORRISON: It is procedural process.

THE COURT: All right.

So you're -- just to be clear. Your not bringing a substantive due process claim?

MS. MORRISON: No.

THE COURT: All right. Do you want to offer exhibits --

MS. MORRISON: Yes, Your Honor.

THE COURT: -- now?

Has the State had an opportunity to review them --

MS. MORRISON: No, Your Honor.

THE COURT: -- or do we have any objection?

MS. SIMPSON: Your Honor, if these are the exhibits that were attached to the reply, we have seen the exhibits.

MS. MORRISON: Your Honor, if I could walk through these exhibits. I think that will give -- the -- Exhibit 1 is the -- was attached to the defendants' submission as the Alabama Department of Corrections protocol.

THE COURT: All right. And I think that shows up in the record as Document 15-1 --

MS. MORRISON: Yes.

THE COURT: -- you made reference to earlier?

All right.

MS. MORRISON: Exhibit 2, I believe, is cited in our pleadings, but this is the ADOC press release for Mr. James, which we rely on to establish the expectation that the execution would take a matter of minutes. This execution was set for 6:00 p.m. the media was told, and at approximately 6:30, the media was told they would return to the media room after the execution.

Exhibits 3, 4, 5, 6, and 7 were attached to defendants' response -- sorry -- defendants' motion to dismiss. These are the execution logs.

Exhibit 8 is not attached to previous pleadings. This is the State's answer to Mr. Smith's second amended complaint, which is Exhibit 9. We rely on this exhibit to establish the State's concession that they continued to restrain Mr. Smith on the gurney for two hours after the stay was entered and that Mr. Smith was brought to the chamber without being informed that his appeals -- I'm sorry -- and that -- without being informed about the stay in his case. That is at paragraphs 150- -- in the State's answer, paragraphs 152, 154, 145, 148, and 163.

We are also relying on the report of Dr. Porterfield, which was introduced in the case of Kenneth Smith. The State

did have an opportunity to cross-examine Dr. Porterfield. And we rely on this to support our claim that prolonged restraint on the gurney constituted a traumatic event.

THE COURT: I think you also had a second amended complaint in the Eugene Smith case in the documents that appears before Dr. Porterfield's --

MS. MORRISON: That was the -- that was introduced just solely to make sense of the State's answer.

THE COURT: Understood. All right.

MS. MORRISON: Exhibit 12 is the -- we provide because it establishes that the defendants' attorneys confirm that they are able to be in the chamber during the execution. And that is at pages 52 through 53.

Exhibit 13 is the Tennessee protocol that establishes that defense counsel -- counsel for the condemned and counsel for the State are present in the chamber.

THE COURT: Well, you have -- actually, I want to go back. You have two transcripts from the Eugene Smith case. You said one you're referring to pages --

MS. MORRISON: Oh, yes, Your Honor.

THE COURT: -- 50- --

MS. MORRISON: Sorry. Sorry. The -- in one sort of chunk of exhibits here is everything relating to Dr. Porterfield.

THE COURT: Okay.

MS. MORRISON: So it's her report, and the State's cross-examination. And it's -- so it's just the excerpts from that hearing that relate to her cross-examination.

THE COURT: I see. All right.

MS. MORRISON: The transcript at -- that is marked 12 is, at page 52, 53, what we rely on to establish that the State's attorneys can be in the execution -- at the execution.

THE COURT: All right.

MS. MORRISON: Exhibit 13 is the Tennessee protocol, at page 65, describing the process of defense counsel being present in the chamber.

THE COURT: I'm sorry. What page?

MS. MORRISON: That is at page 65.

THE COURT: And where does it reference the attorney? Sorry.

MS. MORRISON: At 7:00 p.m. -- beginning at 7:00 p.m., the only staff authorized to be in the execution chamber are the warden, Tennessee Department of Corrections' employees designated by him to carry out the execution, the attorney general designee, and the defense counsel witness.

THE COURT: All right.

MS. MORRISON: Exhibit 14, Your Honor, is a video recording of Steve Marshall's press conference, which we can play or we can mark the minutes that are relevant here, which is 6:58 through 7:08.

In this portion of the media conference, the -- Defendant Marshall states that the execution of Kenney Smith was just as Mr. Smith's own experts said it would be, that it took place just as they said it would take place. And --

THE COURT: That was the nitrogen hypoxia?

MS. MORRISON: Yes, Your Honor.

THE COURT: Okay.

MS. MORRISON: Exhibit 15 is --

THE COURT: Do you have the video to submit to the Court?

MS. MORRISON: Yes.

THE COURT: Okay. And do you have a copy for the defense?

Thank you.

MS. MORRISON: Exhibit 15 is what Mr. Smith's experts said would happen during nitrogen hypoxia execution, and so we wanted to contrast what Defendant Marshall, who had an attorney present, stated with what was -- what his experts said would happen since he's saying it followed what his excerpts said would happen. And so -- and Exhibit 15 --

THE COURT: Are you saying that those go to the State's credibility?

MS. MORRISON: This -- it establishes that these issues -- the way that the State has set up the protocol for the execution is that these disputed facts, as to which the

condemned prisoner has no ability to advocate for himself, with respect to these findings of facts are established and unreviewable because of the way the State protocol provides for the presence of counsel for the State but not presence of counsel for the condemned.

And so Defendant Marshall is stating a fact relevant to a determination of whether that execution was consistent with his right to be free of cruel and unusual punishment, and he says that it followed the protocol that his own experts outlined. And so for comparison, we've provided what his experts said. This was -- this is our Exhibit 15, but it was attached as an exhibit to one of the State's pleadings in the -- I believe it was in the Kenny Smith case.

At page 23 -- at the bottom of page 23, his experts say that the literature indicates that within eight to ten seconds, the subjects will experience a dimming vision. At 15 to 16 seconds, they will experience a clouding of consciousness, and at 17 to 20 seconds, they will lose consciousness. There is no evidence to indicate any substantial physical discomfort.

The following exhibits are media reports about what happened at Mr. Smith's execution that dispute what the attorney general said happened. These include -- Exhibit 16 documents what the victims who -- family members who witnessed the execution, how they described what happened. They said, We

were told by some people that he'd take two or three breaths and he'd be gone and out. That ain't what happened. After about two or three breaths, that's when the struggling started. Other people kept saying he was trying to raise himself up. With that stru- -- all that struggling and jerking and trying to get off the table more or less, it's just something I don't ever want to see again.

And then we also rely on -- at 17 -- the markers 17 and 18 are the press accounts that are similar to the victim witness accounts. Kim Chandler -- and this is the second to last page of her article under thrashing and gasping breaths -- Smith began to shake and writhe violently in thrashing spasms and seizure-like movements.

THE COURT: I understand. You don't have to read --

MS. MORRISON: Okay.

THE COURT: -- the documents --

MS. MORRISON: And so the same --

THE COURT: -- to me. What's -- the purpose of these, again, is to show that the State is --

MS. MORRISON: That these are --

THE COURT: -- to support your allegation that the State is not following its own protocols or that they're not credible in their explanations as to what happens?

MS. MORRISON: And that there are disputed facts with which the State's protocol makes it impossible to -- for

plaintiff to prove or contest or even discover evidence about.

And so our final example of that is what happened is at markers 20 and 21, where the defendants released a press statement saying that he -- you know, that this was, again, another textbook execution, that he declined to give his last statement when there are media accounts that he appeared unconscious. And so those are the kinds of disputed facts as to which counsel is required in the chamber; otherwise, there is a complete unreviewable authority of the State to conduct these executions over the process of hours without any accountability or ability for plaintiffs to challenge this conduct or discover this evidence.

THE COURT: All right. Is there any objection to these exhibits?

MS. SIMPSON: Yes, Your Honor. Exhibits 15, 16, 17, and 18 on relevance grounds. What happened to Kenneth Smith after his execution began is not germane to what's before the Court. The period we're talking about is before the execution begins, and so we would object to those on relevance grounds.

And also the facts of the Smith execution in 2024 and these witness accounts have not been subjected to any sort of court proceeding, any sort of sworn testimony. We have some scattered accounts. There are other suppositions from Mr. Smith's own expert, Dr. Nitschke, online that we did not bring today because it was not germane to the proceedings. But

we would just object to those on relevance grounds.

THE COURT: All right. What's your response?

MS. MORRISON: Your Honor, we think it is absolutely relevant to establish that these disputed facts require the presence and advocacy of counsel in the chamber. There is no ability of Mr. -- of the condemned person to advocate for themselves, to record and observe the facts as he is under the threat of imminent death, and the attorneys [sic] have the presence of counsel. They are documenting and recording this, and Mr. -- you know, Mr. Mills is entitled to the same in the chamber.

There's -- the disputed facts with Joe James also establish that it's what's happened in the chamber before the curtains open that these disputed facts are essential to establishing and protecting the condemned person's Eighth Amendment rights.

THE COURT: All right. I'm going to overrule the objection. I will allow their admission with the understanding of the relevance being asserted by the plaintiff, and certainly the State can put in their own evidence and speak to it as well. All right.

MS. MORRISON: Thank you, Your Honor. That's all from --

THE COURT: All right. We've been going for a little over an hour and a half. I think everybody will benefit from a

short break. It is 3:11. We will reconvene at 3:30.

(A recess was taken from 3:11 p.m. until 3:30 p.m.)

COURTROOM DEPUTY SANDERS: Please remain seated. Court will come to session.

THE COURT: All right. Who would like to speak for the State defendants?

Go ahead.

MS. SIMPSON: Thank you, Your Honor.

Before I begin, Your Honor, Commissioner Hamm is here if Your Honor would like to hear from him, but he will certainly affirm that ADOC will not move Mr. Mills to the execution chamber until all stays of execution have been lifted and that if a stay of execution comes down while he is on the gurney, he will be removed from the gurney and taken back to the holding cell.

THE COURT: I think it would be helpful to have testimony to that effect as opposed to just an attorney representation.

MS. SIMPSON: Yes, Your Honor. May we call our first witness, then?

THE COURT: Go ahead.

JOHN HAMM,

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

DIRECT EXAMINATION

BY MS. SIMPSON:

Q. **Sir, could you please state your name for the record.**

A. **John Hamm.**

Q. **And where do you work?**

A. **Alabama Department of Corrections.**

Q. **What is your job title?**

A. **I am the commissioner of corrections.**

Q. **Okay. How long have you been the commissioner?**

A. **January 1, 2022.**

Q. **Okay. So you are the chief executive at the Alabama Department of Corrections?**

A. **Yes, ma'am.**

Q. **Okay. If you give an order to a warden or to any other subordinate employee, will it be obeyed?**

A. **Yes, ma'am.**

Q. **All right. You've heard the claims that Mr. Mills has made, his concerns about being taken to the gurney prematurely and being left on the gurney if a stay is in place?**

A. **Yes, ma'am.**

Q. **All right. What will -- well, will ADOC take Mr. Mills to the gurney if there is a stay of execution in place?**

A. **No, ma'am.**

Q. **Okay. And will you communicate that to the warden?**

A. **Yes, ma'am.**

Q. **Okay. And if Mr. Mills is on the gurney when a stay of execution comes down, will you have him removed from the gurney and returned to the holding cell?**

A. **Yes, ma'am.**

Q. **Okay. And you would communicate that to the warden as well?**

A. **Yes, ma'am, I would.**

Q. **Okay.**

MS. SIMPSON: That's all the questions I have for the witness.

THE COURT: All right. Does the plaintiff have any questions for the witness?

MS. MORRISON: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. MORRISON:

Q. **Good afternoon, Commissioner Hamm.**

A. **Good afternoon.**

Q. **Will you affirm that Mr. Mills will not be moved to the execution chamber while stay litigation is pending?**

MS. SIMPSON: Objection. Clarify "stay litigation."

THE COURT: Sustained. If you could explain what you mean.

Q. **While there are appeals in this case or in his Northern District case pending at the Eleventh Circuit or the United States Supreme Court, will -- if they are pending after**

6:00, will Mr. Mills be moved to the execution chamber?
A. If there are stays in place, no, I will not.
Q. Without a stay in place but while litigation is pending in those cases, so if Mr. Mills seeks a stay from the Eleventh Circuit or from the United States Supreme Court and the Court's consideration of that, the Court has not ruled on that request yet, will Mr. Mills be -- will you affirm that Mr. Mills will not be moved to the execution chamber?
A. Yes.
Q. And where is this stated in ADOC protocol?
A. I don't have the protocol in front of me, ma'am, so I would -- I don't have it memorized. I'd have to refer to the document.
Q. How has this been communicated to the -- your agents who are at the -- at Holman and performing the protocol? How are they informed that they are not to move him and the warden is not to authorize his movement to the execution chamber while litigation is in place absent a court order staying that litigation -- staying the case?
A. I'm pre- -- I'm present at Holman during the execution.
Q. Are you at the execution chamber?
A. Not in the chamber, no, ma'am.
Q. If the -- the protocol provides that the warden has the discretion to decide when the person is brought to the execution chamber, you're saying you will prevent him from

doing that while litigation is pending how?
A. Verbally tell him. If there's litigation pending, we will not bring him to the chamber.
Q. If -- and how will you establish that litigation is pending?
A. I rely on counsel from Alabama Department of Corrections and the liti- -- Capital Litigation unit from the attorney general's office.
Q. Okay. So this is an affirmation that you are making about protocol that is not in the Alabama Department of Corrections' pro- -- execution protocol, it's not in any of the submissions that your attorneys have made up unto this point, it's not part of the affidavit of Cynthia Stewart-Riley. So you're making a new affirmation here to not move Mr. Mills to the execution chamber as long as he has litigation in this case or in his Northern District case pending. This is not something that you have previously affirmed before.
MS. SIMPSON: Objection. Clarification. Litigation or stay litigation?
Q. A motion to stay pending at the -- in the District Court, in the Eleventh Circuit, or the United States Supreme Court?
A. Can I get one question, please, ma'am?
Q. Yes. I'd defer to --
THE WITNESS: I'm not following her, Judge, on what her exact question is.

THE COURT: Can you be a little more clear about in what circumstances you're asking --

MS. MORRISON: Yes.

THE COURT: -- at what point in litigation would he -- would Mr. Mills not be moved to the execution chamber.

MS. MORRISON: Yes.

Q. (Ms. Morrison, continuing:) So in your -- Agent Cynthia Stewart-Riley's affidavit, she affirmed that if the Court issues a stay ordering that the execution be stayed, that Mr. Mills will not be moved to the execution chamber or that if it is issued -- if a stay is issued while he's in the chamber, he will be removed.

That assumes that a stay motion was pending for him to be moved to the execution chamber. He would not need to be removed from the execution chamber if you are agreeing not to bring him to the execution chamber while a motion is pending. So they're not consistent.

A. I'm still not following you, ma'am.

Q. A --

A. If there is a stay in place, we will not move him to the execution chamber. If a stay becomes while he's in the chamber, we will take him out and put him back in the holding cell.

Q. And I'm talking about Mr. Mills asking for a stay. He doesn't -- and when he does not have one yet. To get a stay,

he has to ask for one. And at some point, the Court rules, either denies a stay or grants a stay. And so what you have previously affirmed is when a ruling comes granting a stay, then he's removed from the gurney?

A. Correct.

Q. And what I'm talking about is when we are asking the Court for the stay, when we have filed a motion and that motion is pending and the Court hasn't decided it yet, during that period of time, will you permit your agents to move him to the execution chamber? Which is -- your previous affirmation assumed that you would because you said you would remove him from the chamber after it had been ruled on.

A. Yeah. If there's no stay in place, we will proceed.

Q. Okay. I think that this establishes that while stay litigation is pending, you will move him -- you will not prohibit your agents from moving him to the chamber. Only if the Court has issued a stay prohibiting the -- proceeding with the execution will you then remove him from the chamber.

A. All right. Going back. Are you saying "stay litigation" or "state litigation"?

Q. Stay.

A. S-t-a-y?

Q. Yes. So there is no state order issued. The Court is just considering this request, this motion.

THE COURT: When you say "the Court," it would help me

if you would be more specific. Do you mean District Court, Eleventh Circuit Court of Appeals, or the Supreme Court?

MS. MORRISON: Yes, Your Honor.

THE COURT: Can you just ask with specificity so I'm clear. Do you mean if Mr. Mills files a motion to stay in a District Court versus a District Court ruling has been entered and he's at the Circuit versus the Supreme Court? I just want to make sure the record is clear.

MS. MORRISON: Yes.

Q. So if -- we'll go backwards -- there has been -- so if the District Court denies a stay -- and, you know, this is -- you know, anyways.

If the District Court denies a stay, the Eleventh Circuit in a divided opinion denies a stay over a dissent, and the U.S. Supreme Court is asked to consider the motion for a stay, at any point during that process would you permit defendants to bring Mr. Mills to the execution chamber?

A. While the Courts are rule- -- considering the stay?

Q. Yes.

A. If there's no stay in place, then we will move him to the execution chamber.

Q. I think that's a clear answer establishing that your protocol prohibits movement -- restraint in the chamber when a stay is in place but not while stay litigation is pending at the Supreme Court, the Eleventh Circuit, and the District

Court.

MS. MORRISON: No more questions, Your Honor.

THE COURT: Redirect?

MS. SIMPSON: That's all the questions we have for the -- oh. I'm sorry, Your Honor. Just one moment.

I'm sorry, Your Honor. I did have one question.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MS. SIMPSON:

Q. Commissioner, are you aware that of late when there is a Supreme Court stay in place, that the State will agree to stay an execution without having a formal stay agreement -- stay order from the Supreme Court in place?

A. Yes, ma'am.

Q. And is that as binding on ADOC as a piece of paper stay order would be?

A. Yes, ma'am.

Q. All right. So to be absolutely clear. If the Supreme Court has entered an administrative stay, whether verbally, by agreement, or in the form of a paper stay order, ADOC will not allow the inmate to be taken to the execution chamber; correct?

A. That is correct.

Q. All right.

MS. SIMPSON: No further questions, Your Honor.

THE COURT: All right. You can step down -- oh. I'm

sorry. Did you have any follow-up questions?

MS. MORRISON: No, Your Honor.

THE COURT: All right. You can step down. Thank you.

MS. SIMPSON: Your Honor, the only other exhibit we wanted to introduce was the affidavit of Ms. Stewart-Riley, which is already attached as Document 15-1 or we can certainly resubmit it today. Ms. Stewart-Riley is here as well should Your Honor have additional questions about that or if not, I'll certainly proceed to argument.

THE COURT: All right. Which document was her affidavit? It looks like 15-1 is the --

MS. SIMPSON: Yes, Your Honor -- oh. I'm -- I'm sorry, Your Honor.

THE COURT: -- execution procedures.

MS. SIMPSON: It's 15-8.

THE COURT: 8.

MS. SIMPSON: My bad.

THE COURT: I see it.

All right. Any objection to that being admitted for the purposes of this hearing?

MS. MORRISON: No, Your Honor.

THE COURT: All right. It's admitted.

The plaintiff attached documents to a reply brief. Does the State request any or need any opportunity -- generally, when documents are attached to a reply brief, I like

to offer the other side an opportunity to respond or provide additional responsive documents.

Is the State satisfied?

MS. SIMPSON: The State is satisfied, especially considering the emergency posture of this proceeding.

Just again, I would also ask Your Honor -- as to Plaintiff's Exhibits 16 through 18, I understand that Your Honor has introduced those, but we would also just lodge an objection to the hearsay statements therein. They are self-authenticating, but to any hearsay statements as to what may have actually happened at Mr. Smith's execution, we would object to that since, again, these statements have not been subjected to cross-examination.

THE COURT: All right. Does the plaintiff want to speak to that objection?

MS. MORRISON: Yes, Your Honor. I would just cite the Court to the U.S. Supreme Court case of *Elrod versus Burns*. When ruling on a preliminary injunction, all of the well-pleaded allegations in a movant's complaint and uncontroverted affidavits filed in support of the motion for preliminary injunction are taken as true. The Court may also consider supplemental evidence, even hearsay evidence, submitted by the parties.

And that that is -- I'd cite to *Levi Strauss and Company versus Sunrise Intern. Trading*, Eleventh Circuit, 1995.

The case cite is 51 F.3d 982 at 985.

THE COURT: Anything further?

MS. SIMPSON: Only that it is a may and not a shall, Your Honor. But that is just -- we're just lodging an objection for the record.

THE COURT: All right. Your objection is noted and overruled.

MS. SIMPSON: Thank you, Your Honor.

THE COURT: All right. Go ahead. Can you speak first to the plaintiff's position that they would not have had standing to bring this lawsuit before they did?

MS. SIMPSON: Yes, Your Honor. The plaintiff would absolutely have had standing to bring this lawsuit before he did. I think an excellent example is the case of David Wilson. I believe that's before Your Honor right now. I believe the caption is 2:24-cv-00111.

Mr. Wilson has filed a 1983 method of execution challenge. He is not subject to execution at this point. He -- there has been no movement from the State to set an execution date. There is no execution warrant, but he is bringing his 1983 claims prior to that so that they may be heard and addressed outside of an emergency posture.

To that end, Mr. Mills absolutely could have brought this claim before he did. He could have brought it years before he did, if he just wanted to contest having an attorney

with a cell phone in the execution chamber, let alone as a witness. But even just looking at the timeline of this execution litigation, again, as Your Honor is well aware, the State moved for execution on January 29, which was after Mr. Smith's execution on January 25.

After that point, Mr. Mills' counsel filed a successive Rule 32 in state court on March 4. They filed their Rule 60 motion in the Northern District on April 5, and it wasn't until April 26 that they filed a 1983 in this Court, which is almost playbook for execution litigation in Alabama, is a 1983 suit brought in the Middle District.

The fact that they've waited three months -- almost three months from the time the State moved for Mr. Mills' execution until now, this speaks of manipulation. He could have brought this sooner. But because he did not and because he has thrust this Court into an emergency posture in which we are now before the Court on motions for preliminary injunction and motions for expedited discovery, and that -- we will almost inevitably be before the Supreme Court on execution night. Because as Your Honor noted, we are a little over two weeks from the execution date.

The Eleventh Circuit and the Supreme Court will both take time to consider whatever rulings this Court makes. So we will almost certainly be before the Supreme Court on the night of Mr. Mills' execution. This will almost inevitably delay his

execution past the traditional 6:00 p.m. starting time. This may lead to him sitting in his cell for hours -- the holding cell for hours while the Supreme Court or possibly even the Eleventh Circuit consider his applications for stay or the State's motions to vacate, whichever happens. But in any case, this could have been brought sooner. And because Mr. Mills sat on his hands and instead has been pursuing his *Brady* claims in the Circuit Court and in the Northern District, we are here today.

As for his other litigation, he has not -- as Your Honor noted, he has not pursued a stay in the Northern District. His state proceedings -- the Circuit Court of Marion County, they dismissed his Rule 32 on April 16. To my knowledge, he has not filed any sort of -- an appeal of that decision, any sort of stays to the -- stay applications to the Alabama Supreme Court. So this could have been brought sooner but was not.

THE COURT: All right.

MS. SIMPSON: More than that, Your Honor, there's been the specter raised that the Alabama Department of Corrections has 12 hours and will strap Mr. Mills down to a gurney for 12 hours and leave him there. Nothing could be further from the truth. The Alabama Department of Corrections has affirmed they will not take him until the stays are lifted; they will remove him if a stay is granted. When an inmate is brought to the

gurney, he is -- he's brought in. The IV team works to get his IVs established, and the witnesses are brought in at that time.

As Ms. Stewart-Riley's affidavit testified, there have been some delays with getting witnesses in, and ADOC has taken steps to speed up that process. I will -- that is Document 15-8, paragraph 12. She states, One facet of the execution that can take significant time is transporting the execution witnesses from their offsite staging locations to Holman Correctional Facility. Skipping a sentence, There have been delays in witness transportation in past executions, but ADOC has taken measures to speed up the process.

And this --

THE COURT: The plaintiff says you violated your own protocol by not having the witnesses in the viewing room prior to, in a previous execution, that inmate being brought in. Is that required by your protocol, and if --

MS. SIMPSON: No, Your --

THE COURT: -- if not, why is that Section L that they pointed us to chronologically before the inmate being brought into the execution chamber enough to establish the timing requirement?

MS. SIMPSON: Yes, Your Honor. The witnesses are never brought in before the inmate is restrained and ready to go. That is -- that is ADOC practice. Why that particular paragraph is there, it is something that happens in all three

execution types: Lethal injection, nitrogen hypoxia, or electrocution. I suppose for drafting purposes, it was probably put there at the beginning. I am -- I am assuming at this point just reading the text, but it does say, At a time appointed by the warden.

There is -- there is -- the witnesses are never brought in before the inmate is restrained, has his IVs established, or now is fully masked, or is in the electric chair and ready to go. Only at that point are witnesses brought in. And this can take some time, but ADOC has taken steps to speed up that process as is evidenced by the most recent execution, Mr. Smith, in 2024. He was -- I believe from the time he was taken to the gurney until the time the death warrant was read, it was only 34 minutes.

So DOC is aware, and they are trying their best to make sure that the inmate is not on the table any longer than is absolutely necessary. But this idea that because the Governor has given us a longer period for the death warrant, that he will somehow be put on the table for 12 hours, that -- there's -- that is not supported, and DOC would have no reason to do that.

THE COURT: You have raised the statute of limitations as an affirmative defense to Counts 2 through 4. The plaintiff says the Sixth Amendment right to court access does not rise and fall with the Eighth Amendment, and I'm not sure that's

true.

If there's a timely Eighth Amendment claim and there's a Sixth Amendment right to access to the courts, because you have to have an underlying viable claim in order to make a Sixth Amendment access to courts claim, doesn't that make the access-to-courts claim timely as well? If the Eighth Amendment claim is timely, in other words, that Sixth Amendment right to access the court is timely because it could not have been brought until there was a triggering underlying constitutional claim.

MS. SIMPSON: That is reasonable, Your Honor. But in this case, we would argue there is no viable Eighth Amendment claim, nor is there a viable Sixth Amendment claim to this case; that this is not any sort of a critical stage for Sixth Amendment purposes as is set forth in our pleadings, that --

THE COURT: So you really wouldn't be relying, then, on the statute of limitations for the Sixth Amendment access-to-courts claim if the Eighth Amendment claim is timely, which I think you have already acknowledged?

MS. SIMPSON: Yes, Your Honor. But we would say at least, as far as the claim goes, that the inmate has a right to have his counsel present with a phone. That is certainly something he could have brought at any point in the past, certainly after 2012, and he has failed to do so. He has sat on his rights there.

There has also been discussion today about whether there is attorneys present from the ADOC with phones. There is -- most times, there is a case of an ADOC employee, someone from ADOC legal, who has a phone on hand to communicate with the attorney general's office to receive updates from the Supreme Court or any other court in which stay litigation is pending so that this information may be properly communicated and quickly communicated to the warden, to the commissioner, and to anyone else involved in operations at DOC and so that they may make the appropriate determinations as to whether an execution may proceed.

There is one instance in which an attorney from the attorney general's office was present. I believe that was mentioned in Smith 22. That was on the court order from Judge Huffaker to make sure that his directives had been carried out, but that was -- that was purely court order. Normally it is an attorney from the Department of Corrections legal who is present to receive legal information and to pass on legal advice to the executives at the prison.

I would point out also, Your Honor, there's been some questions raised about the James Barber execution, which was the first one in 2023, after the new IV team was brought in and the review was completed. Mr. Barber, from the time that he was brought to the gurney until the death warrant was read, it was one hour and 17 minutes. There was a 51-minute delay from

the time the IV was established until the time that the death warrant was read. That was due to witnesses again. As the log shows, there is a gap there. That is witness movement.

Again, as Ms. Stewart-Riley testified in her affidavit, that is something that DOC is aware of and that they have taken steps to ameliorate for future executions, but they are aware of that. Mr. Mills has also talked about while litigation is pending theoretically. If DOC were to agree to stop any sort of execution while litigation is pending, he could file a stay motion at 5:59, he could file a stay motion at 11:59, and litigation would be pending. There's no particular stopping point for when -- and through this, he could stop an execution indefinitely.

One of the things he's requested in his motion for preliminary injunction is that DOC not be permitted to go forward while litigation in this Court or the Northern District is pending. Northern District, there has been no movement in that case since Mr. Mills' attorneys filed their reply brief. The Court has not done anything since April 8. So this is setting up for this -- for an indefinite series of last-minute litigation filed to stop -- purely to stop an execution. This is not tenable.

But what the -- again, what the State has agreed to do is if there is a stay, he will not be executed. If there is a stay that is put in place while he's on the gurney, he will be

removed. But just while exe- -- just while litigation is pending is too broad and is subject to abuse.

THE COURT: Can you speak to your assertion that this Court should abstain under *Younger*. As I understand your argument -- and I articulated it earlier. Correct me if I'm wrong -- your argument is there's no Sixth Amendment right to counsel in this case. It's a civil action. There is a Sixth Amendment right to counsel in criminal actions, and to the extent Mr. Mills is making the argument the execution is a continuation of the underlying criminal action giving rise to the Sixth Amendment right to counsel, this Court should abstain because that is in state court litigation.

MS. SIMPSON: Yes, Your Honor.

THE COURT: Am I stating that argument correctly?

MS. SIMPSON: Yes -- yes, Your Honor.

THE COURT: Wouldn't that mean, though, in any execution case, a federal court would not have the right to step in and ensure the Sixth Amendment rights of an inmate are protected, that an inmate would be forced to then go to state court to assert a federal claim under the Sixth Amendment?

MS. SIMPSON: Well, Your Honor, in this case, he is saying that his Sixth Amendment right arises because this is a critical stage. If it is a crit ical stage, then that arises purely from a prosecution. That is a state prosecution, and the proper venue for that would be a state court. He had an

opportunity. He could have raised constitutional claims before the Alabama Supreme Court when he answered the State's motion to set his execution date. He didn't do any of that. Instead, he waited and brought to this Court a 1983 civil posture.

So, first, the defendants would say that this is not a critical stage at all for Sixth Amendment purposes, that the preparatory period between the time the last stay is lifted and the inmate is executed is a period of preparation for execution. All adversarial processes have ended. At that time, the Supreme Court has decided it is either -- it is not going to grant a stay or has lifted a stay and it will hear nothing further on the matter.

The adversarial process is over, and at this point, it is simply the State -- or in this case, the Department of Corrections -- preparing the inmate to be executed, getting him on the gurney, establishing IV access, bringing in the witnesses, and then proceeding with the actual execution.

THE COURT: But the plaintiff would say that would create -- I would assume. I don't want to speak for the plaintiffs. But I would say -- how about that? -- I would say that has me concerned that there's a window where there's no protection of an inmate's Eighth Amendment rights. If you're saying the adversarial process at that point is ended, then the State can act unfettered with respect to the carrying out of the execution.

MS. SIMPSON: I think *Arthur* is illustrative here, Your Honor, where the Court said there's no reason to have an attorney witness sitting there with a cell phone because there's simply not time to get to the Court to raise something. What we're essentially saying here is this is not a critical stage for Sixth Amendment purposes. If it is a critical stage, then we believe *Younger* abstention should apply and that the Court should leave this to the state courts to determine whether he is being denied counsel during a critical stage of his prosecution.

THE COURT: Doesn't that create, though, a period of time where an inmate just wouldn't have representation, because he either has to go to the state court or we -- he doesn't have access to a federal court in order to ensure his Eighth Amendment rights are not violated?

MS. SIMPSON: Let me -- conceivably, if there were some sort of Eighth Amendment violation during that period, that might be problematic, but again, at this point, every court has decided they're not going to stay the execution. It is simply preparing the inmate to be executed. This can be a matter of minutes to -- well, again, in the 2022 aborted executions, it went over two hours. But normally it is a matter of minutes to an hour or -- and change that an inmate is simply being prepared to have his sentence carried out.

THE COURT: The plaintiffs have pointed out there are

other jurisdictions where attorney representatives are permitted to be there at the execution in their capacity as an attorney.

MS. SIMPSON: Yes, Your Honor.

THE COURT: Why does the State -- well, is that constitutionally mandated? What's your response to the fact that if it's done in other states, it sounds like it's feasible, why not in Alabama?

MS. SIMPSON: Your Honor, they have pointed to no constitutional provision mandating the presence of counsel, especially counsel with a telephone, in the execution chamber. While Tennessee and possibly -- I know they talked to a couple other jurisdictions, possibly Idaho, have allowed this to happen. It is not constitutionally mandated.

Alabama and the ADOC have valid security concerns about giving an attorney access to the execution chamber with a cell phone. During the time that the inmate is being prepared, members of the execution team who do not have their identities typically revealed are moving around. Members of the IV team whose identities are very carefully protected are also present. This is allowing a lay witness with access to a phone which has recording capabilities to be present.

Moreover, executions are a choreographed process, and the correctional officers who are on the execution team, once they have the inmate established, have to move on to other

posts. This would take someone off a post to sit there with the attorney and make sure that the attorney did not take improper recordings or have improper contact with the inmate.

And also just -- in terms of also exposing identities of members of the execution team, of members of the IV team. The Eleventh Circuit has certainly recognized that threats and intimidation can happen to people involved in executions. *Jordan*, 947 F.3d at 1332, talked about --

THE COURT: Wait. Can you slow down. What was that cite again?

MS. SIMPSON: I beg your pardon.

THE COURT: Sure.

MS. SIMPSON: It was *Jordan*, 947 F.3d at 1332, talking about how threats and intimidation of suppliers of goods necessary for conducting executions had risen to the level of bomb threats. There was also a citation, *In Re: Ohio Execution Protocol Litigation*, which is an ongoing District Court case in the Southern District of Ohio.

I know it's cited in our briefs, but I can give you the citation as well here. It is 2015 Westlaw 644-6093 at Star 3, in which they discuss an Oklahoma compounding pharmacy that received an email from a citizen threatening them with a truckload of fertilizer unless they were able to affirm that they were taking no part in producing the compounded drugs needed.

Individuals involved in executions face risks, sometimes to their lives, if their identities are revealed, and ADOC takes that very seriously both to the ADOC employees, who work there, who carry out executions, and also to the members of the IV team, medical personnel. Anyone involved with executions, ADOC takes steps to protect. Having an attorney in there with a phone produces an additional level of risk.

So that would be why ADOC -- and also, just in general, it is a highly sensitive, highly secure time. The inmate does not always go as quietly as Mr. Mills would have the Court believe, that this is a time of high emotion, and having additional people standing around is a matter of safety and a matter of security. ADOC likes this choreographed.

THE COURT: And ADOC has accommodated spiritual advisors. How is that different from accommodating attorneys?

MS. SIMPSON: Yes, Your Honor. So a spiritual advisor for the State of Alabama serves a purpose. A spiritual advisor is there for an inmate of faith who may be about to die who wants to, perhaps, get right with God, if you will. The spiritual advisor is there, and the Supreme Court has recognized the need for it. Several other states recognized the need for it, and Alabama agreed, seeing the trend that the Supreme Court had set forward.

But the spiritual advisor is there. He doesn't have a phone. He doesn't have access to anyone else. He is simply

there in his capacity to minister to the inmate. Also, there's a correctional officer watching the spiritual advisor to make sure that he does things in accordance with DOC regulations, that he doesn't interfere in the execution. Adding an attorney adds another body to the room, adds another person to be watched, but it also adds in this case a cell phone because if the attorney doesn't have a phone, then the attorney is simply one more witness standing there.

The spiritual advisor serves a purpose without a phone as a minister. An attorney with a phone -- without a phone is just a witness; ergo, the attorney would have to have a phone, and that creates a security risk.

THE COURT: All right. Go ahead.

MS. SIMPSON: We would also just say that there is no substantial threat to -- of irreparable harm in terms of the equities to Mr. Mills here. The State does not do cognizable harm when it carries out a lawful and just sentence. Mr. Mills has been on death row since 2007. He talks about the torture of being on a padded execution gurney in a climate-controlled room. He beat an 87-year-old man to death with a machete, a tire iron, and a ball-peen hammer. He beat his 72-year-old disabled wife so badly that she was in the hospital and in hospice care lingering for 12 weeks before she finally succumbed to her injuries.

THE COURT: Well, but we expect more of the State.

MS. SIMPSON: We do expect more of the State, Your Honor. But we would say that the Hills, Mr. Floyd and Vera Hill, and their families certainly deserve justice in this case. It is time for Mr. Mills' execution to be carried out. The State and the victims of crime have an important interest in the timely enforcement of sentence as the Supreme Court has repeatedly emphasized.

THE COURT: The plaintiff has alleged that other inmates who have been in the execution chamber were held in stress positions. I've reviewed the affidavit from previous Warden Cynthia Riley --

MS. SIMPSON: Stewart-Riley. Yes, Your Honor.

THE COURT: -- where she says that the gurney cannot tilt in a vertical position but it can tilt -- can you explain that?

MS. SIMPSON: Yes, Your Honor. Or -- so the gurney is a medical bed. It is a padded medical bed with a pair of extra boards added out to the side for the arms to be on. The gurney can be raised and lowered. It can also be tilted some in either direction, head or foot. But the idea that it can be tilted fully vertically so that an inmate is standing almost in a crucifix position, that is not possible. The gurney is not designed for that, and especially if a particularly heavy inmate were being held like that, the gurney would fall over.

The State does dispute some of the details in the,

quote/unquote, "survivor stories" of Mr. Miller and Mr. Smith.

THE COURT: Well, they -- I accept the undisputed facts in the complaint as true, and they're suggesting or saying that that can lead to an inference of wantonness. Are you -- because that's my standard reviewing the facts of the complaint, do you have evidence that would refute wantonness?

MS. SIMPSON: Your Honor, we could put on Ms. Stewart-Riley to testify about her knowledge of the gurney. She is certainly well informed of the gurney. She was the warden there for four years and is familiar with how the gurney functions.

THE COURT: Well, I'll leave it to you --

MS. SIMPSON: Okay. All right.

THE COURT: -- to decide whether to call her as a witness.

MS. SIMPSON: Our defendants call Ms. Stewart-Riley.

THE COURT: All right.

CYNTHIA STEWART-RILEY,

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

DIRECT EXAMINATION

BY MS. SIMPSON:

Q. Good afternoon, ma'am.

A. Good afternoon.

Q. **Would you please state your name for the record.**
A. **Cynthia Stewart-Riley.**
Q. **And where do you work?**
A. **Alabama Department of Corrections.**
Q. **What is your current job title?**
A. **Regional director.**
Q. **And how long have you held that position?**
A. **Since 2020.**
Q. **Okay. Prior to that position, did you hold another position at ADOC?**
A. **I did.**
Q. **And what was that position?**
A. **Correctional warden III.**
Q. **At any particular facility?**
A. **At Holman.**
Q. **Okay. And what is the warden III?**
A. **It's the overseer of the facility. The head of the facility.**
Q. **The head of the facility. In your capacity as the correctional warden III at Holman Correctional Facility, were you the statutory executioner for the State of Alabama?**
A. **I was.**
Q. **Okay. How long did you hold that position?**
A. **From 2016 -- August of 2016 through May of 2020.**
Q. **Thank you. During that time as warden, did you oversee**

any executions during your tenure?
A. Yes.
Q. Okay. Are you familiar with the execution gurney at Holman Correctional Facility?
A. I am.
Q. All right. What is the gurney?
A. It's a medical bed.
Q. Okay. Could you -- can you describe it any further?
A. Uh-huh. It's a medical bed. It has straps at the bottom near the ankles, straps over the legs. It has some boards that we call armboards that extend out to the side of it, but it's basically a medical bed.
Q. Okay. You said the inmate's arms are out to the side. Can you estimate at about what angle those armboards are? Are they at a 90 degree angle, are they at a less then 90 degree angle, or are they at a more than 90 degree angle?
A. Less than 90.
Q. Okay. So the inmate's holding out with his arms closer to his feet than to his head, I guess pointed toward his feet?
A. Correct.
Q. Okay. Can the gurney be tilted?
A. Yes.
Q. Okay. How much can it be tilted?
A. I can only show you with my hand because I don't know which degree it was. But the gurney can be tilted like in

this (indicating) type of position.
Q. So it can be tilted, I guess -- well, can it ever be vertically tilted, fully vertically tilted?
A. No.
Q. Okay. So you would never have a situation where an inmate is vertical on the gurney, like facing the windows?
A. No.
Q. Okay. Is that possible on that gurney?
A. Not on that gurney, no.
Q. Okay.
MS. SIMPSON: That is all I have for the witness.
THE COURT: All right. Any cross-examination?

CROSS-EXAMINATION

BY MS. MORRISON:

Q. Good afternoon, Ms. Riley.
A. Good afternoon.
Q. Who makes the decision about whether the execution process is comporting with the requirements of the Eighth Amendment?
MS. SIMPSON: Objection. Scope.
THE COURT: This is beyond the scope of direct.
Q. I'd like to just get clearer about the angles that you reference. We can see them, but for the record, I just want to get a more precise written record to reflect what you've shown us physically.
With the -- the tilting of the execution gurney, if we

have the circumference of a circle with a flat line being the -- where the gurney typically rests, a flat line. And if we're tilting it up vertically, this (indicating) would be a 90 degree angle from the floor, that (indicating) would be a 90 degree angle for the gurney in relationship to the floor; is that correct?

A. We do not tilt the gurney 90 -- if you -- that's what you're calling 90 degrees?

Q. Yes.

A. That gurney is never tilted 90 degree.

Q. Okay.

A. It's not -- never vertically.

Q. Okay.

A. I think that's the best way for me to say that. It's never vertically.

Q. So that is -- the gurney will not tilt to a 90 degree angle?

A. It's never vertically. That's going to be my best answer to explain how the gurney is designed and it works.

Q. Okay. So I am showing you a 90 degree angle, and you are --

A. And that seems to be vertical --

Q. Yes.

A. -- to me.

Q. Okay.

A. So it's never vertical.
Q. But if -- can the gurney tilt to what I am demonstrating is a 45 degree angle with the floor?
A. It's less than 45. If that's what you're calling 45, it's less than 45.
Q. Okay. So what about there (indicating)?
A. It's less than that.
Q. If the -- so if -- this (indicating) is about 30 degrees?
A. The best way for me to explain it is that we do not use -- tilt the gurney to a vertical position. I can't continue to go on angles. We do not do it vertically. That's the best way that I can explain it.
Q. Okay. Well, how do you explain to your staff where to stop in raising -- and is your testimony that it cannot be raised to vertical or that you do not raise it to vertical?
A. It cannot. And we do have a protocol in which we use to -- to raise the bed. We do have a protocol.
Q. A written protocol?
A. No. We have -- it's practice. We practice. And we do have a standard that we raise the bed. We have a certain amount of steps that we do with that protocol for that bed.
Q. Somewhere short of vertical -- the bed can be raised to some point short of vertical, then?
A. My best way to explain it is that we do not raise the bed vertical.

Q. I don't think I have any further questions. Thank you.

THE COURT: Any redirect?

MS. SIMPSON: Just briefly.

REDIRECT EXAMINATION

BY MS. SIMPSON:

Q. Ms. Stewart-Riley, what's the purpose of tilting the gurney at all?

A. So that the condemned will have a -- for his last words. So he can be able to face the viewing rooms for his last words.

MS. SIMPSON: That's all I have.

THE COURT: Any other questions?

MS. MORRISON: Yes, Your Honor.

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MS. MORRISON:

Q. Is there any other reason why the condemned would be raised tilted?

A. No, ma'am.

Q. And this is done in every execution, the -- they are -- the condemned is tilted?

A. Every one that I have been participating in, yes, ma'am.

Q. And remains in a tilted position until the execution is over?

A. I'm -- I -- I can't recall. I -- I don't know that part.

Q. Okay. Thank you.

A. **Uh-huh.**

MS. SIMPSON: No further questions of this witness, Your Honor.

THE COURT: You can step down. Thank you.

MS. SIMPSON: Your Honor, if the Court has no further questions, defendants will rest on our motion and ask the Court to deny the motion for preliminary injunction and the motion for expedited discovery.

THE COURT: Before you sit down, speak to the expedited discovery.

MS. SIMPSON: Yes, Your Honor.

THE COURT: I have a hard time believing discovery can be completed in the amount of time we have left, but you may say otherwise, so --

MS. SIMPSON: I have a difficult time as well, Your Honor. I've done some civil discovery, and it does -- it is time consuming, particularly in this case where they are asking for what would amount to discovery. Working among multiple agencies to get all the relevant email, to make sure that it is done as thoroughly as possible, could be time consuming.

We did request the execution logs. I know where those are kept at Holman and who the custodian is at Holman, and I was able to procure those fairly quickly. But more of what they want, particularly getting into things like the identities of people involved in executions, that's certainly something

that would be -- I would have to be -- come back before the Court and be litigated because that is something that the defendants would object to, would not turn over as protected.

We have no protective order in place, no confidentiality order in place, and so -- also, we would argue that this scope is overly broad, particularly as to Defendants Marshall and Ivey, but --

THE COURT: Let me ask you about your standing argument about Governor Ivey and Attorney General Marshall.

MS. SIMPSON: Yes, Your Honor.

THE COURT: Because the Court accepts the allegations in the complaint as true at this stage of the litigation unless they are contradicted by evidence that's been presented at this hearing, under the allegations, isn't there a world in which the Court could order Governor Ivey to not set a particularly lengthy time frame for an execution that would address the allegations made by the plaintiff about the length of time on the execution gurney?

MS. SIMPSON: I think that would be, to some extent, interfering into the State Executive, Your Honor. But at least in this case -- you know, the people who are actually involved in the execution have said it's not going to happen like Mr. Mills is alleging it will happen. We would just say that Governor Ivey's role is very limited. She sets an execution date and because she sets the extra window for which it's going

to occur, and after that point, her involvement is simply granting or denying clemency. That is Governor Ivey's role in this. She does not state when the inmate should go to the gurney. That is something that she leaves to the Alabama Department of Corrections.

The same for Mr. Marshall. While the attorney general's office does represent DOC in execution litigation, much like this case, the attorney general does not decide when the inmate goes to the gurney. All the attorney general's office does is communicate to ADOC that stays are in place or stays have been lifted and there -- whether there is a legal impediment to going forward. At that time, all decisions, operational matters -- whether to go to the gurney, whether to call off the execution -- that lies within the discretion of the Alabama Department of Corrections.

THE COURT: Well, if I were to enter an injunction saying they've asked for an alternative injunctive relief, stay the execution while litigation is pending -- if the Court enters that order and enjoins in the execution pending litigation, wouldn't Attorney General Marshall then turn around and be the one to direct others not to move forward with the execution?

In other words, if I accept the allegations as true, it sounds like they would have -- I would have jurisdiction over the governor and the attorney general because the Court

could direct them to stop an execution, and if they order that an execution not move forward, those orders would be followed.

MS. SIMPSON: If the governor ordered that an execution not move forward, that would be within her purview. The attorney general, in his role as chief law enforcement, would certainly convey that to his client -- the State of Alabama in the person of the governor and the warden and the commissioner -- that there was a legal impediment to going forward. But again, the attorney general does not make those determinations as to whether an execution goes forward or not. That is within the purview of the ADOC.

THE COURT: All right. Thank you.

MS. SIMPSON: Thank you, Your Honor.

THE COURT: Anything further from the plaintiff?

MS. MORRISON: Yes, Your Honor. What we're asking for is just a minimal remedy. The State is offering assurances that it will comply with this Court's orders and with the Constitution, and we're just seeking to be present to monitor compliance. The Court -- the defendants are seeking to do this without any reviewability and any option or opportunity for reviewing its conduct in carrying out this execution.

The security interest can -- the State identified can be accounted for through a court order, a protective order. The phone doesn't have to be a cell phone with recording capabilities, just the ability to communicate with the legal

team and the courts.

As to the -- you know, I just also want to point out that we are now learning today that the State is -- you know, that witnesses are not brought to Holman until after the person is restrained. This -- you know, the transportation of witnesses from the hotel takes a lot of time. It takes more than minutes, and I just -- I think that this is -- this is a new fact that, you know, explains, I guess, why they brought Mr. McWhorter to the chamber early, before 6:00. And the weighing of these interests here, why it is not reasonable to wait to put him on the gurney, given the stress of that being strapped down to the gurney awaiting this certain death at some time that will come is -- it just -- it further demonstrates the disregard for the suffering that this process creates.

And then finally on the statute of limitations versus delay issue, those are just two separate issues. On the statute of limitations issue, we would point the Court -- the Court asked for case law, and I'd point the Court to *West versus Warden*, 869 F.3d 1289, Eleventh Circuit 2017, where the Court acknowledged that extended patterns constitute a substantial change to Alabama's execution process such that the statute of limitations accrue from that pattern. I would also direct the Court to *Smith versus Dunn*, a Middle District of Alabama case, 19-cv-927. The Westlaw cite is 2021 Westlaw 433189 at Eighth.

And I -- I also just --

THE COURT: What was -- you're directing me to *Smith versus Dunn* for what proposition?

MS. MORRISON: For -- for the support that a substantial change is -- creates the moment of accrual for the cause of action.

Finally, as to the presumption the State seeks to invoke of delay, I'd just point the Court to *Smith versus Alabama* -- Commissioner of Alabama, Department of Corrections, 844 F. App'x 286 2021, that a delay is not dispositive. It merely weighs -- is a factor that this Court weighs.

Finally, the Court has referred to this review that Governor Ivey ordered. Governor Ivey has referred to this and defendants have referred to this as a top-to-bottom review. That's an allegation that no one has seen evidence of that being a meaningful review other than that it has actually, if anything, made this problem worse by extending the period of time the State has to restrain Mr. Mills on the gurney.

And with that, we would rest, Your Honor.

THE COURT: All right. Anything further from the State?

MS. SIMPSON: No, Your Honor.

THE COURT: All right. I will get an opinion out as quickly as possible. Thank you for your time. We're adjourned.

(The proceedings concluded at 4:30 p.m.)

COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

This 17th day of May, 2024.

/s/ Katie Silas

Official Court Reporter

Registered Professional Reporter