

## **APPENDIX**

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## **APPENDIX A**



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

ALAN EUGENE MILLER,

*Plaintiff,*

v.

JOHN Q. HAMM,  
in his official capacity as  
Commissioner, Alabama Department  
of Corrections

TERRY RAYBON,  
in his official capacity as Warden,  
Holman Correctional Facility

STEVE MARSHALL,  
in his official capacity as Attorney  
General, State of Alabama

Civil Action: 2:22-cv-00506-RAH

**CAPITAL CASE – EXECUTION  
SCHEDULED SEPTEMBER 22, 2022**

**AMENDED COMPLAINT**

1. In Alabama, lethal injection is the default method of execution.
2. In March 2018, Alabama added nitrogen hypoxia as an alternative execution method. *See* Ala. Code § 15-18-82.1(b).
3. Under the statute, death-row inmates have “one opportunity to elect that his or her death sentence be executed by . . . nitrogen hypoxia.” Ala. Code § 15-18-82.1(b). If an inmate’s certificate of judgment from the Alabama Supreme Court affirming a sentence of death was “issued before June 1, 2018, the election must be made and delivered to the warden within 30 days of that

date.” *Id.* § 15-18-82.1(b)(2). The statute does not specify the type or manner of writing required to elect.

4. Mr. Miller fully complied with the statute, timely submitting in writing his intent to be executed via nitrogen hypoxia. His election should be honored.

5. Defendants refuse to do so. Instead, Defendants seek to execute Mr. Miller on September 22, 2022 via lethal injection, claiming that Mr. Miller did not make an election for nitrogen hypoxia. That is incorrect. And, it is not the first time Defendants have made this type of grievous error.

6. Defendants have mistakenly sought to execute another individual, Jarrod Taylor, who—like Mr. Miller—also opted for execution via nitrogen gas. The State of Alabama, in filings signed by the Attorney General, moved to set an execution date for Mr. Taylor, but after counsel for Mr. Taylor informed the Attorney General’s office that he had in fact opted for nitrogen gas, the State withdrew its request.

7. Although Mr. Miller and his counsel have informed the Attorney General’s office that he too timely submitted an election form, Defendants continue to seek to execute Mr. Miller through lethal injection.

8. Through their own actions, Defendants are depriving Mr. Miller of his Fourteenth Amendment rights to procedural due process and equal protection under the law, as well as his Eighth Amendment right not to be subject to “cruel and unusual” punishment.

9. Mr. Miller brings this action pursuant to 42 U.S.C. § 1983 to vindicate his rights under the United States Constitution, the Alabama Constitution, and Alabama law.

**PARTIES**

10. Plaintiff Alan Eugene Miller is a United States citizen and a resident of the State of Alabama. He is an inmate sentenced to death under Defendants’ supervision. At all relevant times, Mr. Miller has been and continues to be incarcerated at the Holman Correctional Facility in Atmore, Alabama.

*John Q. Hamm*

11. 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.

12. 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 (2018).

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

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

*Terry Raybon*

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

16. Defendant Raybon is responsible for implementing ADOC policies and procedures governing executions, managing the preparations for an execution, and for turning over the execution site to the State Executioner to perform the execution. Defendant Raybon also is responsible for protecting the constitutional rights of all persons incarcerated at the Holman Correctional Facility.

*Steve Marshall*

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

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

19. Defendant Marshall and his staff are responsible for initiating the execution process in Alabama in a constitutional manner by identifying individuals for whom they move to set an execution date and also have the obligation and responsibility to withdraw motions to set an execution date that are unconstitutional.

**JURISDICTION AND VENUE**

20. Mr. Miller's claims arise under the Constitution and the laws of the United States, as well as under the Constitution and laws of the State of Alabama. This Court has federal

question jurisdiction over those claims arising under the Constitution and laws of the United States pursuant to 28 U.S.C. § 1331, 1343.

21. This Court has the authority to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201-2202 and Fed. R. Civ. P. 57 and 65. The federal rights asserted by Mr. Miller are enforceable under 42 U.S.C. § 1983.

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

23. No administrative grievance is available at Holman Correctional Facility for Mr. Miller or other death-sentenced inmates to challenge the way in which Defendants have implemented Ala. Code § 15-18-82.1.

## **FACTUAL ALLEGATIONS**

### **Procedural Background**

24. In June 2000, Mr. Miller was convicted of capital murder.

25. Mr. Miller's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals. The Alabama Supreme Court and the United States Supreme Court denied certiorari.

26. On May 19, 2006, Mr. Miller filed a petition under Alabama Rule of Criminal Procedure 32 for postconviction relief, and subsequently filed an amended petition on April 4, 2007. The circuit court dismissed Mr. Miller's claims under the amended petition except for his claims of ineffective assistance of appellate counsel.

27. On February 11-14, 2008, and August 7, 2008, an evidentiary hearing was conducted on Mr. Miller's claims of ineffective assistance of appellate counsel. On May 5, 2009, the circuit court denied Mr. Miller's petition with regard to those claims, which the Alabama

Court of Criminal Appeals later affirmed. After initially granting certiorari, the Alabama Supreme Court quashed the grant and denied certiorari on June 22, 2012.

28. Mr. Miller then filed a petition for habeas corpus in the District Court for the Northern District of Alabama in January 2013. The district court denied Mr. Miller's petition in March 2017. Mr. Miller then moved for a certificate of appealability in the U.S. Court of Appeals for the Eleventh Circuit. While the Eleventh Circuit granted a certificate on a number of claims, the court affirmed the district court's denial of habeas relief in August 2020. The United States Supreme Court denied certiorari in October 2021.

29. On April 19, 2022, the State of Alabama, by and through the Office of the Attorney General, moved the Alabama Supreme Court to set Mr. Miller's execution date. Mr. Miller filed a brief in opposition, attesting in a sworn affidavit that he had completed and returned the election form, choosing to be executed by nitrogen hypoxia in accord with the statutory requirements for doing so. Defendant Marshall responded to Mr. Miller's opposition on May 27, 2022. Through an affidavit signed by Defendant Raybon, the State claimed that it has not found a record of Mr. Miller's form, though it had no affirmative or contemporaneous evidence that Mr. Miller had or had not submitted it to the warden. Mr. Miller then filed a reply brief, emphasizing that the State's response had created a quintessential factual dispute regarding the existence of Mr. Miller's form that must be resolved by an Alabama trial court before he can be executed by lethal injection.

30. On July 18, 2022, the Alabama Supreme Court granted the State's motion over Chief Justice Parker's dissent without making any findings with respect to the factual dispute, and set Mr. Miller's execution for September 22, 2022.

## Factual Background

### The nitrogen hypoxia election

31. In March 2018, Alabama added nitrogen hypoxia as an alternative execution method. Ala. Code § 15-18-82.1(b). The statute became effective on June 1, 2018. Under the statute, death-row inmates have “one opportunity to elect that his or her death sentence be executed by . . . nitrogen hypoxia.” Ala. Code § 15-18-82.1(b). If an inmate’s certificate of judgment from the Alabama Supreme Court affirming a sentence of death was “issued before June 1, 2018, the election must be made and delivered to the warden within 30 days of that date.” *Id.* § 15-18-82.1(b)(2).

32. Importantly, however, the statute does not specify the type or manner of writing required for an inmate to elect nitrogen hypoxia. Nor does it delineate a process for distributing, collecting or storing records of an election.

33. Defendants did not establish a process or procedure delineating a method for distributing, collecting or storing records of an election or determining whether an election had been made, either prior to or after June 1, 2018.

34. In the absence of such guidance—and notwithstanding the fact that ADOC has declined to promulgate any accompanying regulations—the time at Holman during which the election period was underway has been publicly described as extremely disorganized. *See, e.g.,* Melissa Brown, *In 2018, Alabama approved death by nitrogen for executions. When did it inform its inmates?*, The Montgomery Advertiser, June 25, 2019, <https://www.montgomeryadvertiser.com/story/news/crime/2019/06/25/alabama-says-didnt-have-inform-its-inmate-new-execution-method/1276330001/>.

35. Mr. Miller was incarcerated at Holman during the entire election period in 2018.

36. Cynthia Stewart was the warden of Holman during the entire election period in 2018.

37. At some point between June 26, 2018, and June 30, 2018, Warden Stewart obtained an election form created by the Federal Defenders for the Middle District of Alabama. *See Reeves v. Comm’r, Alabama Dep’t of Corr.*, 23 F.4th 1308, 1314 (11th Cir.), *application granted sub nom. Hamm v. Reeves*, 142 S. Ct. 743 (2022).

38. Warden Stewart received instructions from ADOC to distribute the election form to the inmates at Holman.

39. Warden Stewart directed Captain Jeff Emberton to distribute the election form to every person on death row at Holman. *Id.* Furthermore, Warden Stewart told Captain Emberton that he was not to keep track of who took the form and who didn’t, and who returned the form and who did not.

40. A few days before the election period came to a close, Captain Emberton distributed more than one hundred copies of the election form with over one hundred envelopes. *Id.* at 1315.

41. Captain Emberton also made an announcement regarding the form on each tier where people are housed on death row. *Id.* Captain Emberton has testified that inmates who were not present or were sleeping would not have received his explanation. *Id.* Per instructions from Warden Stewart, Captain Emberton did not create a list logging the names of the individual from whom he collected an election form. He returned a box with the forms to the custody of Warden Stewart.

42. Reflecting the chaotic process, and upon information and belief, ADOC did not record which inmates received the election forms. In fact, one inmate has alleged that several individuals on death row never received an election form, and that the inmates who did were not



notified of the impending deadline. *See Saunders v. Hamm*, No. 20-CV-456-WKW, 2022 WL 493693, at \*2 (M.D. Ala. Feb. 17, 2022).

43. United States Circuit Judge Jill Pryor has described as “feckless” the way in which ADOC, having taken “on the responsibility to inform prisoners about their right to elect death by nitrogen hypoxia within 30 days, did so.” *Smith v. Comm’r, Ala. Dep’t of Corr.*, 2021 WL 4916001, at \*5 (11th Cir. Oct. 21, 2021) (Pryor, J., concurring).

44. The collection of the forms was also extremely disorganized.

45. Despite the gravity of the election decision—a time-sensitive and irreversible election concerning the manner in which inmates were to be executed—Defendants failed to create a reliable system for collecting and recording the election forms.

46. Having undertaken to distribute and collect the forms, and upon information and belief, Defendants did not create a list or otherwise log or memorialize the names of people who turned in the forms.

47. Nor did Defendants memorialize a process for storing the forms.

*Defendants Lose Mr. Miller’s Submitted Election Form*

48. Against this backdrop, Mr. Miller received an election form in June 2018 as his certificate of judgment was issued prior to June 1, 2018. *See Ex. A, Affidavit of Alan Eugene Miller* (May 10, 2021).<sup>1</sup>

49. Mr. Miller completed and signed the election form, indicating that he opted into execution by nitrogen hypoxia. *Id.*

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<sup>1</sup> Exhibit A is attached to this Complaint and incorporated by reference as if fully set forth herein.

50. Mr. Miller then returned the form to the prison official who was collecting completed forms from other inmates. *Id.* The official collected Mr. Miller's form at the same time that he collected election forms from others. *Id.*

51. When Mr. Miller gave the election form to the official, Mr. Miller asked the official that the form be copied and notarized so as to record his election. *Id.* The official refused both of Mr. Miller's requests. *Id.*

52. Mr. Miller followed the instructions he was given for submitting his election form to the warden.

53. Mr. Miller does not know what the official did with the election form after collecting it from Mr. Miller. *Id.*

54. In a filing made on May 27, 2022, Defendant Marshall claimed that Defendant Raybon has no record of Mr. Miller's election form. *See* Ex. C, State's Resp. to Miller's Objection to State's Mot. to Set an Execution Date, *Miller v. State*, Case No. 1040564 (Ala. May 22, 2022).<sup>2</sup> Even though Mr. Miller provided a sworn-affidavit attesting that he timely elected to be executed by nitrogen hypoxia, Defendants refused to honor Mr. Miller's election. The State has now set an execution date by lethal injection on September 22, 2022, instead of complying with Mr. Miller's statutory-protected election to be executed by nitrogen hypoxia.

*Defendants Have Lost or Misplaced Election Forms Submitted by Other Inmates*

55. Forms were distributed and collected from inmates, but Defendants entirely failed to implement any written process for providing notice, distributing, collecting, or storing election forms, and as a result, ADOC has lost election forms submitted by Mr. Miller and other people on death row at Holman.

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<sup>2</sup> Exhibit C is attached to this Complaint and incorporated by reference as if fully set forth herein.

56. In addition to Mr. Miller's form, ADOC also lost Jarrod Taylor's form.

57. Like Mr. Miller's form, the situation involving Mr. Taylor's form came to light after Defendant Marshall moved the Alabama Supreme Court to schedule Mr. Taylor's execution. As part of that motion filed on July 29, 2019, Defendant Marshall represented that Mr. Taylor had not made a timely election of death by nitrogen hypoxia. *See* Ex. B, State's Mot. to Withdraw Mot. to Set Execution Date, *Taylor v. State*, Case No. 1991307 (Ala. Aug. 2, 2019).<sup>3</sup>

58. On July 30, 2019, Mr. Taylor's counsel informed Defendant Marshall that Mr. Taylor had, in fact, timely elected death by nitrogen hypoxia. *Id.*

59. On August 2, 2019, Defendant Marshall moved to withdraw the motion to set Mr. Taylor's execution date in part because counsel for Mr. Taylor provided Defendant Marshall copies of attorney-client communications in or around the time that Mr. Taylor submitted his election form. *Id.*

60. In the withdrawal motion, Defendant Marshall represented that neither the Attorney General's office nor counsel for ADOC had Mr. Taylor's election form in their files. *Id.*

61. Defendant Marshall further represented that the State nevertheless intended to honor Mr. Taylor's election even though neither the Attorney General nor ADOC had a written election from him. *Id.*

62. Defendant Marshall represented that the documentation provided by Mr. Taylor's counsel supported the "assertion that he made a timely election of nitrogen hypoxia." *Id.*

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<sup>3</sup> Exhibit B is attached to this Complaint and incorporated by reference as if fully set forth herein.

63. If Mr. Miller's election is not honored, he faces an immediate risk of being executed via Defendants' arbitrary and capricious process, which fails to honor Mr. Miller's statutory right to execution via nitrogen hypoxia.

*Troubling Examples of Alabama Administering Its Lethal Injection Protocol*

64. As alleged, lethal injection is the default method of execution in Alabama. Recent examples illustrate the deeply troubling nature of the State's lethal injection protocol and underscore the gravity of the decision to opt into execution by nitrogen hypoxia.

65. In February 2018, the team responsible for carrying out Doyle Lee Hamm's execution failed to access any peripheral or central veins. *See* Melissa Brown, *Doyle Lee Hamm punctured at least 11 times in execution attempt, report states*, The Montgomery Advertiser, March 5, 2018, <https://www.montgomeryadvertiser.com/story/news/2018/03/05/execution-attempt-so-painful-inmate-hoped-get-over-report-states/397304002/>. As a result, the team stopped the execution after hours of trying. *Id.* By then, however, the damage had already been done as the execution team had punctured Mr. Hamm at least 11 times in his limbs and groin, causing him to bleed profusely. *Id.*

66. After the execution was terminated, Mr. Hamm was unable to stand on his own and collapsed as he was being taken off the gurney.

67. Following this horrific event, the State agreed not to subject Mr. Hamm to any further execution attempts. He later died of natural causes. *See* Sam Roberts, *Doyle Hamm, Who Survived a Bungled Execution, Dies in Prison at 64*, The New York Times, Nov. 29, 2021, <https://www.nytimes.com/2021/11/29/us/doyle-hamm-dead.html>.

68. More recently, Joe Nathan James Jr. was executed on July 28, 2022, following an initially unexplained three-hour delay during which ADOC's execution personnel repeatedly failed to establish an intravenous line for the lethal injection.

69. Witnesses to Mr. James's execution have publicly stated that before his execution began, Mr. James did not open his eyes and did not move on the gurney. *See* Evan Mealins, *ADOC 'cannot confirm' if Joe Nathan James Jr. was fully conscious before his execution*, The Montgomery Advertiser, Aug. 2, 2022, <https://www.montgomeryadvertiser.com/story/news/2022/08/02/joe-nathan-james-jr-execution-adoc-cannot-confirm-if-conscious/10168003002>. The witnesses have also said that Mr. James was silent when asked for his final words. *Id.*

70. Defendant Hamm has recently claimed that Mr. James was not sedated prior to the flow of the lethal injection, and other prison officials have said that they "cannot confirm" whether Mr. James was fully conscious before his execution began. *Id.*

71. Moreover, despite ADOC's public statements that "nothing out of the ordinary" happened in the course Mr. James's execution, an autopsy showed that he "suffered a long death" and that his body showed "pool[s] of deep bruising" as well as a deep incision on his arm called a "cutdown" that indicated "that the IV team was unqualified for the task in a most dramatic way." *See* Elizabeth Bruenig, *Dead to Rights: What did the state of Alabama do to Joe Nathan James in the three hours before his execution?*, The Atlantic, Aug. 14, 2022, <https://www.theatlantic.com/ideas/archive/2022/08/joe-nathan-james-execution-alabama/671127/>.

72. The State's lethal injection protocol has come under intense scrutiny in other cases as well, including because the first drug administered in the three-drug protocol, midazolam, has

been found to not reliably keep recipients unconscious. See Brian Lyman, *A history of execution methods in Alabama, and the controversies around them*, The Montgomery Advertiser, Oct. 14, 2021, <https://www.montgomeryadvertiser.com/story/news/2021/10/14/history-execution-methods-alabama/8425445002/>.

73. To date, neither ADOC nor any of the Defendants have explained the discrepancy between their statement that “nothing out of the ordinary” happened in Mr. James execution by lethal injection and the facts revealed at Mr. James’s autopsy. Neither ADOC nor any of the Defendants explained what steps they are taking to ensure that what transpired in Mr. Hamm’s attempted execution and Mr. James’s execution from transpiring in Mr. Miller’s execution.

### **CAUSES OF ACTION**

#### **COUNT ONE: VIOLATION OF MR. MILLER’S RIGHT TO PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT**

##### **AGAINST ALL DEFENDANTS**

74. Mr. Miller repeats and realleges paragraphs 1 through 73 as though fully set forth herein.

75. The Fourteenth Amendment prohibits the deprivation of life, liberty or property without due process of law.

76. Alabama Code § 15-18-82.1(b)(2) contains a state-created liberty interest for death-sentenced inmates in Alabama to choose one of two state-sanctioned execution methods.

77. Mr. Miller completed and signed his election form during the election period in June of 2018, indicating that he opted into execution by nitrogen hypoxia rather than lethal injection.

78. Mr. Miller timely returned the form to the prison official at Holman who was collecting completed forms from other inmates.

79. Warden Stewart specifically instructed Captain Emberton not to log the names of individuals who returned an election form. ADOC similarly did not create a list or otherwise log or memorialize the names of people who turned in the election forms.

80. Defendants subsequently lost or misplaced Mr. Miller's form and have refused to recognize Mr. Miller's meritorious election.

81. Defendants now intend to deprive Mr. Miller of his election by executing him through lethal injection.

82. Defendants are responsible for ensuring that executions in Alabama comport with constitutional requirements. Defendants respective roles are described in paragraphs 11 to 19.

83. Defendants violated Mr. Miller's due process rights by failing to ensure an adequate procedure for protecting his election to be executed by nitrogen hypoxia.

84. Defendants failed to create and maintain an accurate accounting of who timely submitted election forms and failed to implement a reviewable process for determining whether an election had been made.

85. When presented with Mr. Miller's sworn affidavit attesting that he timely elected to be executed by lethal gas, Defendants refused to honor his election.

86. Defendants had no (and currently have no) process for evaluating whether Mr. Miller made an election in accordance with the statute.

87. To disregard Mr. Miller's election reflects Defendants' total failure to put in place any written rules or guidance whatsoever governing the election process. No written rules or guidance existed for distributing election forms. No written rules or guidance existed for collecting such forms. And no written rules or guidance existed for storing such forms. Multiple

election forms have been lost by the State, and there is no coherent process for honoring some misplaced forms, while disregarding others.

88. Defendants also failed to create a coherent process for determining which elections would be honored when Defendants lost the election form.

89. Mr. Miller has also been harmed by the lack of process surrounding his request to have a court resolve any factual disputes arising from his election. Like Mr. Jarrod Taylor, Mr. Miller would not have an execution date at this time if Defendants had created and followed execution procedures for nitrogen hypoxia. In opposition to having his execution via lethal injection be set, Mr. Miller filed a sworn-affidavit before the Alabama Supreme Court attesting that he completed and timely returned his election form. In response, Defendant Raybon filed his own affidavit stating that, contrary to Mr. Miller's own sworn statement, he has not found a record of Mr. Miller's form. In doing so, Defendants created a quintessential factual dispute that can only be resolved by a trial court after an evidentiary hearing. The Alabama Supreme Court ignored that dispute, declined to remand the issue to a lower court, and granted the State's motion to set an execution date.

90. The complete lack of process involving Mr. Miller's election form is a flagrant violation of Mr. Miller's due process rights. Defendants had no (and currently have no) process in place for this Court to evaluate whether Mr. Miller made an election in accordance with the statute.

**COUNT TWO: VIOLATION OF MR. MILLER'S RIGHT TO EQUAL PROTECTION  
UNDER THE LAW**

**AGAINST ALL DEFENDANTS**

91. Mr. Miller repeats and realleges paragraphs 1 through 73 as though fully set forth herein.



92. Defendants are responsible for ensuring that executions in Alabama comport with constitutional requirements. Defendants respective roles are described in paragraphs 11 to 19.

93. Pursuant to the Fourteenth Amendment, Mr. Miller is entitled to equal protection under the law.

94. Mr. Miller is subject to disparate treatment as compared to similarly-situated death-row inmates at Holman who, like Mr. Miller, submitted election forms indicating their preference to be executed by nitrogen hypoxia.

95. More specifically, Mr. Jarrod Taylor and Mr. Miller are both death-row inmates at Holman who submitted election forms. Defendants have lost or misplaced election forms submitted by both men.

96. Rather than treat Mr. Taylor and Mr. Miller equally, Defendants are recognizing Mr. Taylor's election (and not Mr. Miller's election) in part because Defendant Marshall received copies of attorney-client communications from around the time of Mr. Taylor's election.

97. Nowhere in Ala. Code § 15-18-82.1(b) are Defendants permitted to replace a missing election form with attorney-client communications.

98. Defendants' decision to recognize Mr. Taylor's election but not Mr. Miller's has no rational basis. Both Mr. Taylor and Mr. Miller complied with Ala. Code § 15-18-82.1(b) by submitting their elections in writing within the 30-day window. Both Mr. Taylor's form and Mr. Miller's form were lost by ADOC. Yet Defendants are arbitrarily treating Mr. Miller differently because he has not shown them attorney-client communications at the time of his election.

99. This disparate treatment is not rationally related to a legitimate government interest.

100. As a result of the violation of Mr. Miller’s Fourteenth Amendment rights, Mr. Miller is scheduled for execution by lethal injection on September 22, 2022. Defendants’ respective roles in the execution process are described in paragraphs 11 to 19.

**COUNT THREE: VIOLATION OF MR. MILLER’S RIGHTS UNDER THE EIGHTH AMENDMENT**

**AGAINST ALL DEFENDANTS**

101. Mr. Miller repeats and realleges paragraphs 1 through 73 as though fully set forth herein.

102. The Eighth Amendment, among other things, prohibits “cruel and unusual punishments.” U.S. Const. amend. VIII.

103. The execution of an inmate may be “cruel and unusual” when it is carried out arbitrarily or capriciously. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

104. Each Defendant therefore has a “constitutional responsibility” to “apply its [capital punishment statutes] in a manner that avoids the arbitrary and capricious infliction of the death penalty.” *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

105. As part of that responsibility, “procedures” are to be in place that prevent the arbitrary execution of an inmate. *Foster v. Strickland*, 707 F.2d 1339, 1347 n.16 (11th Cir. 1983). The State must also “make rationally reviewable the process for imposing a sentence of death.” *Godfrey*, 446 U.S. at 428.

106. Defendants are responsible for ensuring that executions in Alabama comport with constitutional requirements. Defendants’ respective roles in the execution process are described in paragraphs 11 to 19.

107. The decision to execute Mr. Miller by lethal injection rather than nitrogen hypoxia is unconstitutionally arbitrary. The only basis for executing Mr. Miller by lethal injection instead of nitrogen hypoxia is that the Defendants failed to retain his election form. If the Defendants had not lost Mr. Miller's form, Mr. Miller would otherwise be executed by nitrogen hypoxia.

108. Defendants lost Mr. Miller's election form because they failed to create, no less implement, adequate procedures for distributing, collecting, and storing such forms. Now, some inmates who elected to be executed by nitrogen hypoxia will have their elections honored by Defendants, while other inmates—who also elected to be executed by nitrogen hypoxia—will not. Even worse, among the group of inmates whose forms have been lost (*e.g.*, Mr. Miller and Mr. Taylor), Defendants are picking and choosing who will be executed by nitrogen hypoxia.

109. Defendants' failure to put any reliable procedures in place regarding the election process also prevents courts from rationally reviewing Defendants' efforts to carry out executions.

110. All of these actions run afoul of the Eighth Amendment's mandate that Alabama apply its capital punishment statutes in a manner that is not arbitrary and capricious.

### **PRAYER FOR RELIEF**

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

- (i) Schedule an evidentiary hearing focused on Mr. Miller's election form, including Mr. Miller's sworn statements that he completed and timely submitted the form to a prison official at Holman;
- (ii) Enter a declaratory judgment that:
  - a. Mr. Miller timely submitted his election form pursuant to Ala. Code § 15-18-82.1(b) and opted into execution by nitrogen hypoxia;
  - b. Defendants' decision to seek execution of Mr. Miller and subject him to lethal injection rather than nitrogen hypoxia violates Mr. Miller's Eighth and Fourteenth Amendment rights;
- (iii) Enter an injunction against Defendants requiring them to honor Mr. Miller's election under Ala. Code § 15-18-82.1(b);

- (iv) Enjoin Defendants from executing Mr. Miller with the current lethal injection protocol; and
- (v) Such other and further legal and equitable relief as this Court deems, just, and proper.

Dated: August 29, 2022

Respectfully submitted,

/s/ J.Bradley Robertson

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*Attorneys for Plaintiff Alan Eugene Miller*

# **Amended Complaint**

## **EXHIBIT A**

No. 1040564 (Death Penalty)

**IN THE SUPREME COURT OF ALABAMA**

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EX PARTE: ALAN EUGENE MILLER)

ALAN EUGENE MILLER )

Petitioner, )

v. )

STATE OF ALABAMA, )

Respondent )

---

**AFFIDAVIT OF ALAN EUGENE MILLER**

I, Alan Eugene Miller, under penalty of perjury affirm that the following is true and correct to the best of my ability:

1. I am currently incarcerated at Holman Correctional Facility in Atmore, Alabama. My inmate number is Z-672.
2. Because I have been sentenced to death, I am incarcerated on Holman's death row.
3. In June or July of 2018, a correctional officer at Holman passed out forms to individuals on death row concerning an election to be executed by nitrogen hypoxia.

4. The correctional officer said we could sign or not sign the forms. He said they would be back to pick up the forms later. I understood that to mean that a correctional officer would pick it up later.
5. I completed the form and signed it.
6. I gave my signed form to the correctional officer who was collecting the forms.
7. I gave the correctional officer my form at the same time that he was collecting forms from everyone else. The correctional officer collected my form on the same day that it was distributed to me.
8. I do not know what the correctional officer did with my form after I gave it to him.
9. I asked the correctional officer for a copy of my completed form, but the correctional officer refused to make a copy for me.
10. I also asked the correctional officer if I could have the form notarized, but he said no. I know that some other guys had their forms notarized, so I don't know why he would not permit me to get my form notarized.

Wherefore I swear under penalty of perjury, that the foregoing is true and correct to the best of my knowledge.

Alan Eugene Miller  
Alan Eugene Miller

5-10-21  
Date

State of Alabama  
County of Escambia

SUBSCRIBED and SWORN TO before me this 10<sup>th</sup> day of May, 2022.

(Seal)

Jennifer R. Parker  
NOTARY PUBLIC

My Commission Expires: My Commission Expires March 26, 2024



# **Amended Complaint**

## **EXHIBIT B**

E-Filed  
08/02/2019 01:37:00 PM  
Honorable Julia Jordan Weller  
Clerk of the Court

**IN THE SUPREME COURT OF ALABAMA**

EX PARTE: JARROD TAYLOR	)	
	)	
JARROD TAYLOR,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1991307
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

**STATE OF ALABAMA'S MOTION TO WITHDRAW  
MOTION TO SET AN EXECUTION DATE**

COMES NOW the State of Alabama and asks this Honorable Court to permit the State to withdraw its motion of July 29, 2019, requesting that Jarrod Taylor's execution be set. As grounds, the State provides as follows:

(1) On July 29, the State moved this Court to set Taylor's execution date. That motion represented that Taylor had not made a timely election of nitrogen hypoxia.

(2) Taylor's counsel called the undersigned on July 30, claiming that Taylor had, in fact, made a timely election. Counsel offered to send supporting documentation.

(3) On July 31, counsel sent the undersigned several documents, including a copy of Taylor's signed election form (dated June 28, 2018) and contemporaneous e-mails among counsel creating a record of conversations with

Taylor concerning the election. Taylor indicated to counsel on June 29, 2018, that he had signed two copies of the election form, returned one to counsel, and given the other to a particular ADOC employee to be given to Warden Stewart.

(4) The Attorney General's Office was never given this form, and counsel for the Alabama Department of Corrections did not have this form in their files. Nevertheless, the documentation provided by Taylor's counsel supports the assertion that he made a timely election of nitrogen hypoxia. The State intends to honor that election.

(5) As the ADOC is not yet prepared to proceed with an execution by nitrogen hypoxia, the State requests that it be allowed to withdraw its previous motion.

Respectfully submitted,

Steve Marshall  
*Attorney General*

**s/ Lauren A. Simpson**  
Lauren A. Simpson  
*Assistant Attorney General*  
Counsel of Record \*

Beth Jackson Hughes  
*Assistant Attorney General*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 2, 2019, a copy of the foregoing was served on counsel for Jarrod Taylor by e-mail:

Theodore V. Wells, Jr.	twells@paulweiss.com
Andrew J. Ehrlich	aehrich@paulweiss.com
Steven C. Herzog	sherzog@paulweiss.com
Justin D. Lerer	jlerer@paulweiss.com
Meredith A. Arfa	marfa@paulweiss.com
Joshua P. Myrick	josh@stankoskimyrick.com

**s/ Lauren A. Simpson**

Lauren A. Simpson  
*Assistant Attorney General*  
Counsel of Record \*

State of Alabama  
Office of the Attorney General  
501 Washington Avenue  
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Tel: (334) 353-1209  
Fax: (334) 353-8400  
lsimpson@ago.state.al.us

# **Amended Complaint**

## **Exhibit C**

**IN THE SUPREME COURT OF ALABAMA**

EX PARTE: ALAN EUGENE MILLER)	)	
	)	
ALAN EUGENE MILLER,	)	
	)	
Petitioner,	)	
	)	No. 1040564
v.	)	
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

**STATE’S RESPONSE TO MILLER’S OBJECTION TO STATE’S MOTION TO SET AN EXECUTION DATE**

Comes now the State of Alabama, by and through the Office of the Attorney General, and responds to Miller’s objection to the State’s motion to set an execution date as follows:

1. On April 19, 2022, the State moved to set an execution date for Miller, noting that his conviction and sentence are final because he has completed his direct appeal, state postconviction review, and federal habeas review.

2. On May 18, 2022, Miller filed an objection to the State’s motion, arguing that Miller timely elected to be executed by nitrogen hypoxia. In support of his objection, Miller submitted an affidavit asserting that a correctional officer at Holman passed out election forms

in June or July of 2018, that Miller completed and signed the form, and that the form was returned to a correctional officer “at the same time that he was collecting forms from everyone else.”<sup>1</sup> (Miller’s Aff. ¶ 7.)

3. But as noted by the attached affidavit from Terry Raybon, who is the Correctional Warden III at Homan Correctional Facility, there is no election form on file reflecting that Miller timely elected nitrogen hypoxia. (See Ex. A.) Further, there is no evidence offered, aside from Miller’s self-serving and uncorroborated affidavit, to show that he did, in fact, timely elect nitrogen hypoxia.

4. Miller appears to suggest his case is like that of Jarrod Taylor, attaching a copy of the State’s motion to withdraw its motion to set an execution date in that case. But the facts in *Taylor* are significantly different from Miller’s case. Most notably, there was supporting documentation—the completed and signed election form itself, plus contemporaneous emails from June 2018 that created a record of conversations counsel had with Taylor regarding election—outlining that

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1. Miller does not indicate whether the correctional officer who passed out the election forms was the same officer who collected the completed and signed forms, nor does he make any attempt to identify the individual(s) who distributed and/or collected the forms.

Taylor had, in fact, timely elected nitrogen hypoxia. (*See Ex. B.*) No such evidence has been offered here.

Therefore, given that there is no evidence before this Court demonstrating that Miller elected nitrogen hypoxia, that there are currently no pending challenges to the validity of his duly adjudicated capital murder conviction and death sentence, and that Miller has exhausted his direct appeal, his state postconviction remedies, and his federal habeas remedies, the State respectfully requests that, pursuant to Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, this Honorable Court “enter an order fixing a date of execution” for Miller.

Respectfully submitted,

Steve Marshall  
*Attorney General*

**/s/ Audrey Jordan**  
*Assistant Attorney General*  
Counsel of Record \*



**CERTIFICATE OF COMPLIANCE**

1. I certify that this response complies with the word limitation set forth in Ala. R. App. P. 27(d). According to the word-count function of Microsoft Word, the response contains 444 words, not including the parts exempted by Ala. R. App. P. 32(c).

2. I further certify that this response complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). The motion was prepared in 14-point Century Schoolbook font.

***/s/ Audrey Jordan***  
*Assistant Attorney General*  
*Counsel of Record \**

## CERTIFICATE OF SERVICE

I hereby certify that on this, the 27th day of May 2022, I electronically filed the foregoing and served a copy of the foregoing on the attorneys for Miller by electronic mail, addressed as follows:

Daniel J. Neppl  
Sidley Austin, LLP  
One Court Dearborn Street  
Chicago, Illinois 60603  
dneppl@sidley.com

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Birmingham, Alabama 35203  
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**/s/ Audrey Jordan**  
*Assistant Attorney General*  
Counsel of Record \*

State of Alabama  
Office of the Attorney General  
501 Washington Avenue  
Montgomery, Alabama 36130-0152  
Telephone: (334) 353-4338  
Email: Audrey.Jordan@AlabamaAG.gov

# EXHIBIT

# A

**AFFIDAVIT**

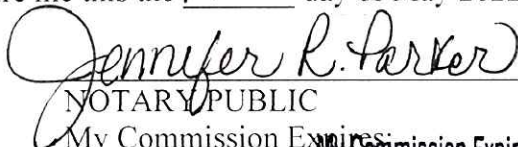
Before me, the undersigned authority, a Notary Public, in and for Escambia County and the State of Alabama at large, personally appeared Terry Raybon, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

1. My name is Terry Raybon. I am currently employed with the Alabama Department of Corrections as a Correctional Warden III at Holman Correctional Facility, Holman 3700, 866 Ross Road, Atmore, AL 36503.

2. Sometime earlier this year I reviewed the file where all of the Nitrogen Hypoxia elections forms have been maintained since June 2018 at Holman Correctional Facility to see if Inmate Alan Miller W/Z672 had submitted an election form. I found no record of Inmate Miller submitting a form. I had my administrative assistant to follow-up behind me, and she did not find any record as well. Today, May 19, 2022, after receiving an email from the Attorney General's Office, I instructed my administrative assistant to re-review our records for a submission form, after which I followed up behind her. Neither of us found a submission form from Inmate Miller.

  
WARDEN TERRY RAYBON

SWORN TO AND SUBSCRIBED before me this the 19<sup>th</sup> day of May 2022.

  
NOTARY PUBLIC  
My Commission Expires ~~My Commission Expires~~ March 26, 2024



# EXHIBIT

## B

(Filed under seal)

## **APPENDIX B**

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

ALAN EUGENE MILLER,

*Plaintiff,*

v.

JOHN Q. HAMM, COMMISSIONER  
OF ALABAMA DEPARTMENT OF  
CORRECTIONS; TERRY RAYBON,  
HOLMAN WARDEN; and STEVE  
MARSHALL, ALABAMA ATTORNEY  
GENERAL

Civil Action.: 2:22-cv-00506-RAH

**CAPITAL CASE  
SCHEDULED FOR EXECUTION ON  
SEPTEMBER 22, 2022**

**MOTION FOR PRELIMINARY INJUNCTION TO ENJOIN DEFENDANTS  
FROM EXECUTING MR. MILLER VIA LETHAL INJECTION**

Alan Eugene Miller did exactly what Alabama law allowed him to do: submit in writing his election to be executed by nitrogen hypoxia rather than lethal injection. Through no fault of his own, Defendants lost Mr. Miller's election form in the midst of a messy and chaotic period at Holman Correctional Facility in which no formal or reliable process was in place for distributing, collecting, or storing such forms. Defendants now refuse to honor Mr. Miller's election, even though they have honored the election of another person whose form was lost. Defendants plan to carry out Mr. Miller's execution on September 22, 2022 by lethal injection rather than nitrogen hypoxia.

In doing so, Defendants intend to deprive Mr. Miller of his constitutional rights. *First*, Mr. Miller's constitutionally protected interest under the Fourteenth Amendment to choose nitrogen hypoxia as the method of his execution will be deprived if he is executed by lethal injection on September 22. *Second*, Mr. Miller's equal protection rights under the Fourteenth Amendment will be deprived if he is not treated the same as another death-row inmate at Holman whose election

form was also lost by Defendants but whose decision to be executed by nitrogen hypoxia is nonetheless being honored. *Third*, Mr. Miller’s right under the Eighth Amendment to have his execution not carried out in an “arbitrary and capricious” manner will be violated if he is executed by lethal injection.

Defendants’ constitutional violations are especially egregious in light of the intense public scrutiny Defendants are facing for their responsibility in several botched executions, including the recent execution of Mr. James Nathan Jones, which lasted *three hours long*. The fallout from that execution continues to unfold as new developments surface nearly every day. The Alabama Department of Corrections very recently admitted that it “cannot confirm” whether Mr. Jones was fully conscious immediately before the execution, which would suggest that the execution violated the State’s own lethal injection procedures.<sup>1</sup> And more recently, the State refused to disclose autopsy records to the public, which would show how Mr. Jones’s execution is quickly becoming known as one of “the worst botches in the modern history of the U.S. death penalty.” See Ivana Hrynkiw, Montgomery Real-Time News, *Autopsy records on ‘botched’ Alabama execution of Joe Nathan James Jr. to remain secret for months*, Aug. 19, 2022, <https://www.al.com/news/montgomery/2022/08/autopsy-records-on-botched-alabama-execution-of-joe-nathan-james-jr-to-remain-secret-for-months.html>. The information that is publicly available to date shows that Mr. James’s body was in “great distress” during the execution as

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<sup>1</sup> More specifically, the Execution Procedures regarding lethal injection include several steps that require first speaking to a *conscious* inmate, including reading the warrant to the inmate, and asking if he has any last words. See Execution Procedures § IX(L-M), <https://files.deathpenaltyinfo.org/documents/AL-Execution-Protocol-April-2019.pdf>. The procedures at § IX(P)(2) state that after the inmate has had the opportunity to give his last words and it is clear no court had granted a last-minute stay, then the warden must administer midazolam hydrochloride to cause sedation, and then must perform a series of physical checks to ensure the inmate is unconscious, before administering the lethal drugs. Together these procedures show that the inmate is meant to be fully conscious before the execution begins.



executioners *sliced into his skin several times* to find a vein, and that he suffered many “unusual punctures” that do not normally appear on an executed body. *See* Joel Zivot, *Death by lethal injection: It is time for more transparency*, Aug. 22, 2022, <https://www.aljazeera.com/opinions/2022/8/22/death-by-lethal-injection-its-time-for-more-transparency>.

Despite these deeply concerning accounts—which raise serious questions about Defendants’ ability to competently carry out their lethal injection protocol—Defendants are moving forward with their plans to execute Mr. Miller by lethal injection in less than a month. Not only have Defendants not fixed the problems that caused Mr. James’s execution by lethal injection to go terribly wrong, but Defendants cannot execute Mr. Miller by lethal injection without violating his Constitutional rights since Mr. Miller timely elected to be executed by nitrogen hypoxia. Given the significant life interests at stake, the likelihood that Mr. Miller is entitled to relief, and Defendants’ minimal interest in moving forward with a constitutionally deficient execution, this Court should grant Mr. Miller’s motion and allow for resolution of his claims.<sup>2</sup>

## **BACKGROUND**

### **A. Procedural Background**

In June 2000, Mr. Miller was convicted of capital murder. Mr. Miller’s convictions and sentence were affirmed by the Alabama Court of Criminal Appeals. The Alabama Supreme Court and the United States Supreme Court later denied certiorari.

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<sup>2</sup> The Court can order briefing and a hearing on Mr. Miller’s Motion for Preliminary Injunction before Defendant Marshall’s Motion to Dismiss is resolved. *See* Dkt. 21. No federal or local rule prevents the Court from doing so. *See Kohmetscher v. NextEra Energy Res., LLC*, No. 19-80281-CIV, 2020 WL 5639950, at \*5 (S.D. Fla. Sept. 22, 2020) (“There is nothing ‘procedurally impossible’ about asking for a preliminary injunction while a motion to dismiss is pending.”). Indeed, a Motion for Preliminary Injunction is appropriately heard before a Motion to Dismiss when there is an immediate risk of irreparable harm. Since Defendants appear to be responding to Mr. Miller’s amended complaint in piecemeal, the most prudent course of action is to brief this Motion before waiting for all Defendants to respond to Mr. Miller’s amended complaint.

On May 19, 2006, Mr. Miller filed a petition under Alabama Rule of Criminal Procedure 32 for postconviction relief, and subsequently filed an amended petition on April 4, 2007. On May 5, 2009, the Alabama circuit court denied Mr. Miller's petition, which the Alabama Court of Criminal Appeals later affirmed. After initially granting certiorari, the Alabama Supreme Court quashed the grant and denied certiorari on June 22, 2012.

Mr. Miller then filed a petition for habeas corpus in the District Court for the Northern District of Alabama in January 2013. The district court denied Mr. Miller's petition in March 2017. *Miller v. Dunn*, 2017 WL 1164811, at \*3 (N.D. Ala. Mar. 29, 2017). Mr. Miller then moved for a certificate of appealability in the U.S. Court of Appeals for the Eleventh Circuit. While the Eleventh Circuit granted a certificate on a number of claims, the court affirmed the district court's denial of habeas relief in August 2020. *Miller v. Comm'r, Alabama Dep't of Corr.*, 826 F. App'x 743, 746 (11th Cir. 2020). The United States Supreme Court denied certiorari in October 2021. *See Miller v. Dunn*, 142 S. Ct. 123 (2021).

On April 19, 2022, the State of Alabama, by and through the Office of the State Attorney General, moved the Alabama Supreme Court to set Mr. Miller's execution date. Mr. Miller filed a brief in opposition, attesting in a sworn affidavit that he completed and returned the election form, choosing to be executed by nitrogen hypoxia. Defendant Attorney General Marshall responded to Mr. Miller's opposition on May 27, 2022. Through an affidavit signed by Defendant Raybon, the State claimed that it has not found a record of Mr. Miller's form. Mr. Miller then filed a reply brief, emphasizing that the State's response had created a quintessential factual dispute regarding the existence of Mr. Miller's form that must be resolved by an Alabama trial court before he can be executed by lethal injection. On July 18, 2022, the Alabama Supreme Court granted the State's motion (Chief Justice Parker dissented) and set Mr. Miller's execution for September 22, 2022.

## B. Factual Background

### 1. The Nitrogen Hypoxia Election

Lethal injection is Alabama's default method of execution. Ala. Code § 15-18-82.1(a). On June 1, 2018, Alabama amended its laws to allow death-sentenced inmates to choose the manner by which they would be executed: by Alabama's default method of lethal injection or by nitrogen hypoxia. *See id.* § 15-18-82.1(b)(2). Inmates whose death sentences had become final prior to the amendment's enactment, like Mr. Miller, were given 30 days to make this election. *Id.* After June 30, 2018, inmates who did not opt into death by nitrogen hypoxia would be deemed to have waived their right to make such election.

The statute providing for the election states that an inmate must make his election "in writing," but the statute does not specify the type or manner of writing required to elect nitrogen hypoxia, nor does it delineate a process for distributing, collecting or storing records of an election. *See id.* In the absence of such guidance—and given the fact that Defendants did not establish a process or procedure outlining a method for distributing, collecting, or storing records of an election form (or even determining whether an election had been made)—the 30-day election period at Holman in June 2018 has been publicly described as extremely disorganized. *See, e.g.,* Melissa Brown, *In 2018, Alabama approved death by nitrogen for executions. When did it inform its inmates?*, *The Montgomery Advertiser*, June 25, 2019, <https://www.montgomeryadvertiser.com/story/news/crime/2019/06/25/alabama-says-didnt-have-inform-its-inmate-new-execution-method/1276330001/>.

Indeed, the warden at Holman at the time, Cynthia Stewart, never made election forms for the people on death row. *See* Pl.'s First Am. Compl. ("FAC") ¶ 36. As a result, the Federal Public Defender's Office for the Middle District of Alabama created a form and distributed it to clients. *See Reeves v. Comm'r, Ala. Dep't of Corr.*, 23 F.4th 1308, 1315 (11th Cir.), *application granted*

*sub nom. Hamm v. Reeves*, 142 S. Ct. 743 (2022). After Warden Stewart obtained the Federal Defender's form, she received instructions from the Alabama Department of Corrections ("ADOC") to distribute the form to the people on death row at Holman, *see* FAC ¶ 38, and thereafter directed Captain Jeff Emberton to distribute the form accordingly, *Reeves*, 23 F.4th at 1314.

Within a few days of the election period coming to a close, Captain Emberton distributed more than one hundred copies of the election form with over one hundred envelopes. *Reeves*, 23 F.4th at 1315. But rather than track who received a form and when, neither Captain Emberton nor anyone else created a list or otherwise recorded the names of people who received a copy of the form. FAC ¶ 41. In fact, Warden Stewart explicitly told Captain Emberton not to log the names of the individuals from whom he collected a form. *Id.* Captain Emberton therefore simply returned a box with the forms to Warden Stewart, *id.*, and no Defendant ever put in place a reliable system to memorialize which inmates opted into execution by nitrogen hypoxia, *id.* ¶ 45.

Against this messy backdrop, Mr. Miller received an election form from a prison official in June 2018. *See* Ex. A to FAC ¶¶ 3-5. Mr. Miller completed and signed the form. *Id.* ¶ 5. Mr. Miller then returned the form to the official who was collecting completed forms from other inmates. *Id.* ¶ 6. The official collected Mr. Miller's form at the same time that he collected election forms from others. *Id.* ¶ 7.

When Mr. Miller gave the election form to the official, Mr. Miller asked the official that the form be copied and notarized so as to record his election. *Id.* ¶¶ 9-10. The official refused both of Mr. Miller's requests. *Id.* Mr. Miller does not know what the official did with the election form after collecting it from Mr. Miller, *id.* ¶ 8, and Defendants Marshall and Raybon now claim that the State has no record of Mr. Miller's form.

2. The State Has Lost or Misplaced Other Election Forms

Other election forms submitted by other people on death row have also been lost. More specifically, in addition to Mr. Miller’s form, Jarrod Taylor’s form has also been lost.

Like Mr. Miller’s form, the situation involving Mr. Taylor’s form came to light after Defendant Marshall moved the Alabama Supreme Court to schedule Mr. Taylor’s execution. *See* Ex. B to FAC. As part of that motion filed on July 29, 2019, Defendant Marshall represented that Mr. Taylor had not made a timely election of death by nitrogen hypoxia. *See id.* ¶ 1.

Mr. Taylor’s counsel responded to the motion by informing Defendant Marshall that Mr. Taylor had, in fact, timely elected death by nitrogen hypoxia, *id.* ¶ 2, and purportedly provided Defendant Marshall with attorney-client communications from around the time of the election period, *id.* ¶ 3. Defendant Marshall subsequently moved to withdraw the motion to set Mr. Taylor’s execution date. *Id.* ¶ 5.

In his withdraw motion, Defendant Marshall admitted that neither the Attorney General’s office nor counsel for ADOC had Mr. Taylor’s election form in their files. *Id.* ¶ 4. Defendant Marshall nevertheless decided to honor Mr. Taylor’s election because the documentation provided by Mr. Taylor’s counsel supported the “assertion that [Mr. Taylor] made a timely election of nitrogen hypoxia.” *Id.*

3. The State’s Execution of Inmates by Lethal Injection—the Alternative to Nitrogen Hypoxia—Has Proven Problematic

The State’s primary method of execution, lethal injection, has proven to be deeply problematic in recent years. In February 2018, the team responsible for carrying out Doyle Lee Hamm’s execution failed to access any peripheral or central veins. *See* Liliana Segura, *Another Failed Execution: The Torture of Doyle Lee Hamm*, *The Intercept*, March 3, 2018, <https://theintercept.com/2018/03/03/doyle-hamm-alabama-execution-lethal-injection>. The State

decided to stop the execution after several hours, but by then, the damage had already been done—the team punctured Mr. Hamm with a needle at least 11 times in his limbs and groin, and he bled profusely on the gurney. When he was finally relieved of the physical and mental torture, Mr. Hamm collapsed coming off the table. *Id.*

More recently, and as mentioned *supra*, Joe Nathan James Jr. was executed on July 28, 2022, following an initially *unexplained three-hour delay* during which the ADOC’s execution team repeatedly failed to establish an intravenous line. *See* Evan Mealins, *ADOC ‘cannot confirm’ if Joe Nathan James Jr. was fully conscious before his execution*, The Montgomery Advertiser, Aug. 2, 2022, <https://www.montgomeryadvertiser.com/story/news/2022/08/02/joe-nathan-james-jr-execution-adoc-cannot-confirm-if-conscious/10168003002/>. Witnesses to the execution have publicly stated that before his execution began, Mr. James did not open his eyes and did not move on the gurney. *Id.* The witnesses have also said that Mr. James was silent when asked for his final words. *Id.* Defendant Hamm has recently claimed that Mr. James was not sedated prior to the flow of the lethal injection, and other prison officials have said that they “cannot confirm” whether Mr. James was fully conscious before his execution began, *id.*, all of which suggests that the State’s own procedures were not followed, *see supra* at n.1.

In addition to those reports, *The Atlantic* has revealed that, despite ADOC’s public statements that “nothing out of the ordinary” happened in the course Mr. James’s execution, an independent autopsy showed that he “suffered a long death” and that his body showed “pool[s] of deep bruising” as well as a deep surgical incision on his arm called a vein “cutdown” that indicated “the IV team was unqualified for the task in a most dramatic way.” *See* Elizabeth Bruenig, *Dead to Rights: What did the state of Alabama do to Joe Nathan James in the three hours before his*

*execution?*, The Atlantic, Aug. 14, 2022, <https://www.theatlantic.com/ideas/archive/2022/08/joe-nathan-james-execution-alabama/671127/>.

To date, neither ADOC nor any of the Defendants have explained the discrepancy between the statement that “nothing out of the ordinary” occurred with Mr. James’s execution and the devastating facts revealed at Mr. James’s independent autopsy. Even worse, neither ADOC nor any of the Defendants have explained what steps they are taking to prevent what transpired in Mr. James’s execution from transpiring in Mr. Miller’s upcoming execution. Defendants are asking this Court, Mr. Miller, and the public to simply trust them that nothing will go wrong when they repeat the exact same procedure that they botched in July, even as new facts continue to emerge about Mr. James’s execution and as ADOC withholds critical information about what happened in the execution chamber.

### **LEGAL STANDARD**

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

## ARGUMENT

In moving for a preliminary injunction, Mr. Miller seeks only to preserve the status quo while he litigates his constitutional claims. Mr. Miller is likely to prevail on the merits of those claims for the reasons described below. Moreover, absent relief, he undoubtedly will suffer irreparable harm—namely, execution by lethal injection. A preliminary injunction would not substantially injure Defendants because they will still be able to carry out their execution of Mr. Miller via nitrogen hypoxia. Finally, the public interest counsels in favor of a preliminary injunction, since it would allow the Court to resolve Mr. Miller’s important and timely constitutional challenges while having minimal, if any, impact on Defendants’ interests. A preliminary injunction is also in the public’s interest to ensure that another botched execution via lethal injection does not occur. This Court should accordingly grant Mr. Miller’s motion.

### **I. Mr. Miller is Likely to Succeed on the Merits of His Claims.**

Mr. Miller’s claims against Defendants are brought under the Fourteenth and Eighth Amendments. Count I asserts that the execution of Mr. Miller via lethal injection will violate his right to procedural due process. Count II asserts that the execution of Mr. Miller via lethal injection will violate his right to equal protection under the law. And Count III asserts that the execution of Mr. Miller via lethal injection will violate his right not to be subject to an “arbitrary and capricious” execution. While all three claims are likely to succeed on the merits, Mr. Miller need only show that one claim is likely to succeed in order for the Court to grant his motion. *See Alabama v. U.S. Army Corps of Eng’rs*, 424 F.3d 1117, 1134 (11th Cir. 2005) (explaining that “a petitioner must demonstrate a substantial likelihood of prevailing on at least one of the causes of action he has asserted”).



A. The Procedural Due Process Claim Is Likely to Succeed

A claim alleging a denial of procedural due process includes three elements: “(1) a deprivation of a constitutionally protected liberty or property interest; (2) state action; and (3) constitutionally inadequate process.” *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). All three requirements are likely to be satisfied here.

*First*, Defendants intend to deprive Mr. Miller of his liberty interest to choose one of two state-sanctioned execution methods. The State of Alabama created that interest in enacting Ala. Code § 15-18-82.1(b)(2), which provides death-row inmates, including Mr. Miller, an opportunity to choose the means by which they are to be executed. *See Saunders v. Hamm*, 2022 WL 493693, at \*4 (M.D. Ala. Feb. 17, 2022) (finding that plaintiff had plausibly alleged that Ala. Code § 15-18-82.1(b)(2) created a protected interest under the Fourteenth Amendment). Mr. Miller signed a sworn affidavit explaining that he did everything required of him under the statute. *See Ex. A to FAC ¶¶ 3-7*. Specifically, he filled out the written form and returned it to the prison official at Holman. *Id.* ¶¶ 5-7. Mr. Miller even asked that a copy of the form be copied and notarized. *Id.* ¶¶ 9-10.

Defendants have now lost that form as the result of failing to create and maintain an accurate process for determining which inmates timely submitted election forms and whether an election had been made. Yet rather than correct this grievous error and honor Mr. Miller’s election of nitrogen hypoxia—as Defendant Marshall has for other inmates whose forms have been lost—Defendants are instead moving forward with execution by lethal injection on September 22, 2022. In doing so, Defendants are essentially putting Mr. Miller in the same position as an inmate who was never permitted to make a timely election in the first place, thereby depriving him of his protected interest to choose the method of his execution pursuant to the statute. Mr. Miller is entitled to have his liberty interest recognized. *See, e.g., Nance v. Ward*, 142 S. Ct. 2214, 2219

(2022) (explaining that inmates are entitled to select method of execution, particularly to reduce risk of severe pain). And while Defendant Marshall may insist that he sought Mr. Miller's execution date before his office was informed of Mr. Miller's election, he cannot escape the fact that he *continued to seek* Mr. Miller's execution even after learning about the missing form, *see* Ex. C to FAC, and that he has withdrawn similar motions in substantially the same circumstances, *see* Ex. B to FAC.

**Second**, the state action requirement is easily satisfied here because Defendants are responsible for initiating the execution process in a constitutional manner, setting up the election process at Holman, honoring Mr. Miller's election, and/or for carrying out Mr. Miller's execution. *See* FAC ¶¶ 11-19.

**Third**, the processes at issue in this case fall woefully short of what is required under the Constitution. *See Grayden v. Rhodes*, 345 F.3d 1225, 1242 (11th Cir. 2003) (explaining that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"). As explained in Mr. Miller's complaint, there were no written rules or guidance governing the nitrogen hypoxia election process. There were no written rules or guidance regarding the distribution of election forms. And there were no written rules or guidance for collecting or storing such forms. Defendants now refuse to honor Mr. Miller's election and have failed to put in place any notice or process concerning how that refusal should be resolved. *See Saunders*, 2022 WL 493693, at \*6 (questioning the adequacy of notice provided to death-row inmates at Holman regarding the election forms). The processes involved here are constitutionally inadequate.

Additionally, Defendants have no reliable process in place for determining whether to honor an election in cases where the election form was lost. As mentioned, Mr. Miller has

presented evidence in the form of a sworn-affidavit stating that he turned in his form. The statements in Mr. Miller's affidavit should be taken as true at this stage in the proceeding, as the Eleventh Circuit has repeatedly stressed in similar situations that an inmate's sworn-affidavit must be assumed as true at the pleading stage. *See, e.g., Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008); *Jenkins v. Sloan*, 826 F. App'x 833, 839-40 (11th Cir. 2020) (per curiam) (concluding that district court erred by failing to "credit[] the plaintiff's versions of events as true"); *White v. Staten*, 672 F. App'x 919, 923-24 (11th Cir. 2016) (per curiam) (similar); *Palmore v. Tucker*, 522 F. App'x 717, 719 (11th Cir. 2013) ("[T]he district court was required, at least initially, to take Mr. Palmore's version of events as true. But that does not appear to have happened in this case.") (citations omitted).

In response to Mr. Miller's affidavit, Defendant Marshall did not present a sworn statement from Captain Emberton disputing Mr. Miller's assertions. Nor did Defendant Marshall present anything from Warden Stewart disputing the same. Instead, Defendant Marshall merely presented an affidavit from Defendant Raybon, the current warden, stating that he couldn't locate Mr. Miller's form nearly four years after the fact. The State is not denying that Mr. Miller elected nitrogen hypoxia, and instead is simply proceeding with his execution without providing any reliable means to determine whether Mr. Miller's election should be honored.

All of this is occurring as Defendant Marshall has honored the nitrogen hypoxia election of inmates whose forms it did lose. And, in light of the recent examples of Mr. Hamm and Mr. James, Defendants are now exposing Mr. Miller to an increased risk that his scheduled execution via lethal injection will be botched, further adding to the arbitrary and capricious nature of the punishment. Indeed, Mr. Miller will be forced to undergo an extremely painful and unwarranted

execution, all while having properly elected to be executed by nitrogen hypoxia. There is simply no justification for proceeding with Mr. Miller’s execution under these circumstances.

B. The Equal Protection Claim Is Likely to Succeed

An equal protection claim requires showing that Defendants are treating Mr. Miller “disparately from other similarly situated persons,” and that the disparate treatment is not “rationally related to a legitimate government interest.” *Arthur v. Thomas*, 674 F.3d 1257, 1262 (11th Cir. 2012) (per curiam) (citation marks omitted). For two people to be “similarly situated” in contexts where the challenged government action is one-dimensional—that is, the action involves a single answer to a single question—the two people need not be absolutely identical. *See Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1264-65 (11th Cir. 2010); *see also id.* at n.36 (cautioning that “too narrow a definition of ‘similarly situated’ could exclude from the zone of equal protection those who are plainly treated disparately and without a rational basis”).

Mr. Taylor and Mr. Miller are both death-row inmates at Holman who submitted election forms. Defendants lost or misplaced the nitrogen hypoxia election forms that both men submitted. But rather than treat Mr. Taylor and Mr. Miller equally, Defendants are recognizing Mr. Taylor’s election (and not Mr. Miller’s election) because Defendant Marshall received a copy of privileged attorney-client communications from around the time of Mr. Taylor’s election. *See* Ex. B to FAC ¶ 3. Yet nowhere in Ala. Code § 15-18-82.1(b), or anywhere else for that matter, are Defendants permitted to replace a missing nitrogen hypoxia election form with privileged attorney-client communications. In fact, the statute makes it clear that the only relevant consideration in determining whether to honor an inmate’s election is if the inmate submitted that election in writing. *See* Ala. Code § 15-18-82.1(b). But now Defendants have changed that requirement by providing themselves with unlimited discretion to determine what quantum of evidence is sufficient to honor an election absent writing submitted to the warden. To treat Mr. Miller

differently because he has not submitted privileged attorney-client communications is unconstitutional. *See, e.g., Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (recognizing that plaintiff plausibly stated equal protection claim and explaining that “the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents”); *Price v. Comm’r, Dep’t of Corr.*, 920 F.3d 1317, 1325 (11th Cir. 2019) (per curiam) (implying that inmates who timely elected execution by nitrogen hypoxia would be similarly situated for purposes of equal protection claim); *Arthur v. Thomas*, 674 F.3d 1257, 1263 (11th Cir. 2012) (per curiam) (recognizing inmate had equal protection rights and had plausibly alleged equal protection claim based on the ways in which execution could deviate from established protocol).

Defendants’ decision to recognize Mr. Taylor’s nitrogen hypoxia election but not Mr. Miller’s has no rational basis. *See Arthur*, 674 F.3d at 1262 (reversing trial court’s dismissal of plaintiff’s equal protection claim and explaining that disparate treatment must be rationally related to legitimate government interest). The government does not gain or protect anything by requiring inmates to show privileged attorney-client communications while punishing those who do not. Moreover, Defendants’ actions invite perverse incentives by encouraging inmates to turn over attorney-client materials to the very same people who oversee their incarceration and execution. Under Defendants’ ad hoc rules, inmates who did everything that was required of them under the statute but whose nitrogen hypoxia forms were lost will nevertheless be executed via lethal injection unless they share with the State their privileged communications. There is no rational basis to support that action.

And while Mr. Miller does not deny that the State has an interest in the enforcement of its criminal judgements and sentences, the relief that he seeks—*e.g.*, an injunction preventing his execution by lethal injection and a declaration that his nitrogen hypoxia election must be honored—will not undermine that interest since the State will still have an opportunity to carry out its execution. Mr. Miller simply asks that he be treated the same as other similarly-situated inmates on death row who timely submitted their election forms, and that his execution be carried out via nitrogen hypoxia rather than lethal injection.

C. The Eighth Amendment Claim Is Likely to Succeed

The Eighth Amendment prohibits “cruel and unusual punishments.” The execution of an inmate may be “cruel and unusual” when it is carried out arbitrarily or capriciously. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153, 194-95 (1976). The State of Alabama therefore has a “constitutional responsibility” to “apply its [capital punishment statutes] in a manner that avoids the arbitrary and capricious infliction of the death penalty.” *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). As part of that responsibility, “procedures” are to be in place to prevent the arbitrary execution of an inmate. *Foster v. Strickland*, 707 F.2d 1339, 1347 n.16 (11th Cir. 1983). The State must also “make rationally reviewable the process for imposing a sentence of death.” *Godfrey*, 446 U.S. at 428.

The decision to execute Mr. Miller by lethal injection rather than nitrogen hypoxia is unconstitutionally arbitrary. The only basis for executing Mr. Miller by lethal injection instead of nitrogen hypoxia is that Defendants failed to retain his election form. If Mr. Miller’s form had not been lost, Mr. Miller would otherwise be executed by nitrogen hypoxia. Mr. Miller’s election form was lost because adequate procedures for distributing, collecting, and storing such forms were never created, let alone implemented. Now, some inmates who elected to be executed by nitrogen hypoxia will have their elections honored by Defendants, while other inmates—who also elected

to be executed by nitrogen hypoxia—will not. Even worse, among the group of inmates whose forms have been lost (*e.g.*, Mr. Miller and Mr. Taylor), Defendants are picking and choosing who will be executed by nitrogen hypoxia and who will be executed by lethal injection. The failure to put any reliable procedures in place regarding the election process also prevents courts, including this Court, from rationally reviewing Defendants’ efforts to carry out executions. *See Godfrey*, 446 U.S. at 428. Perhaps the most important responsibility Defendants undertake as stewards of the State is ensuring that executions meet the stringent requirements imposed under the Constitution. That includes creating and implementing procedures to avoid arbitrary or capricious results. Defendants have skirted their responsibilities by neglecting to produce anything that even vaguely resembles a reliable system for determining whether a timely nitrogen hypoxia election has been made, including by failing to create a reliable system for distributing, collecting, or storing forms that determine how an inmate’s life will come to an end. Defendants should not be permitted to further prevent courts from rationally reviewing—as they must—whether their efforts to carry out Mr. Miller’s execution satisfies the protections afforded to him under the Eighth Amendment.

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

If Defendants are not enjoined from executing Mr. Miller by lethal injection and are not required to recognize Mr. Miller’s election before this Court can resolve the merits of his claims, Mr. Miller will suffer irreparable harm. Most obviously, as a result of Defendants’ conduct, Mr. Miller will be executed by lethal injection rather than nitrogen hypoxia. Mr. Miller stands to suffer a needlessly painful execution when a viable alternative exists to which he is statutorily entitled. This is especially critical in light of the ongoing investigation into the State’s terribly-botched execution of Mr. James. While the State continues to withhold information from the public, this much is known:

- The execution lasted three hours and witnesses said that Mr. James did not open his eyes nor did he move on the gurney at the start of the execution;
- The State “cannot confirm” whether Mr. James was conscious at the start of the execution, which suggests that the State’s own lethal injection procedures were not followed;
- Defendant Hamm claims that Mr. James was not sedated prior to the flow of the injection;
- An independent autopsy has revealed that Mr. James’s body was in “great distress”;
- The State sliced into Mr. James’ skin several times in an attempt to find a vein;
- Mr. James suffered many “unusual punctures” from State executioners; and
- The State refuses to turn over information due to an investigation that may last until October.

Mr. Miller is next in line to be executed by the same exact method. A preliminary injunction will ensure that Mr. Miller does not needlessly suffer the same irreparable injury as Mr. James.

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

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

Additionally, Defendants and the public have an interest in conducting executions in a manner that does not violate Mr. Miller’s constitutional rights. *See Ray v. Comm’r, Ala. Dep’t*



*of Corr.*, 915 F.3d 689, 702 (11th Cir. 2019) (“[N]either Alabama nor the public has any interest in carrying out an execution in a manner that violates . . . the laws of the United States.”); *Arthur v. Myers*, 2015 WL 668007, at \*5 (M.D. Ala. Feb. 17, 2015) (the State has an interest in “carrying out criminal judgments, particularly executions, in a constitutionally acceptable manner”). Mr. Miller’s execution has been set despite not having afforded him due process and despite treating him disparately compared to other death-sentenced inmates. Thus, it is in the public’s interest to ensure that Defendants—who oversee the execution process in Alabama and who are charged with carrying out state and federal law—have complied with the protections afforded to Mr. Miller in the U.S. Constitution. It is also in the public’s interest to ensure that Mr. Miller is not executed by the very same method that Defendants recently botched, especially as terrifying facts about that execution continue to come to light.

### CONCLUSION

For all these reasons, the Court should grant Mr. Miller’s motion for a preliminary injunction, enjoin Defendants from executing Mr. Miller via lethal injection, and declare that his nitrogen hypoxia election be honored.

Dated: September 1, 2022

Respectfully submitted,

/s/ J. Bradley Robertson

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**CERTIFICATE OF SERVICE**

I hereby certify that, on September 1, 2022, I served a copy of the foregoing via the Court's CM/ECF system, which shall cause the same to be electronically transmitted to all counsel of record.

/s/ J. Bradley Robertson

J. Bradley Robertson

## **APPENDIX C**

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

ALAN EUGENE MILLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<b>Case No. <u>2:22-cv-00506-RAH</u></b>
	)	
JOHN Q. HAMM, Commissioner,	)	
Alabama Department of Corrections,	)	
<i>et al.</i> ,	)	
	)	
Defendants.	)	

**Defendants’ Response in Opposition to  
Plaintiff’s Motion for a Preliminary Injunction**

Defendants oppose Plaintiff Miller’s request for a preliminary injunction (Doc. 28). Defendants’ opposition is grounded (1) in the fact that Miller has not, and cannot, establish a likelihood of success on the merits, (2) in the doctrine of laches, and (3) in the fact that Miller has indicated that he seeks to stay his execution, even if this Court grants the requested relief of recognizing his nitrogen hypoxia election.

**I. The requested injunction should be denied because Miller has not shown, and cannot show, a substantial likelihood of success on the merits.**

Miller’s § 1983 lawsuit is predicated on a single allegation: that he elected nitrogen hypoxia during the election period in June 2018. But that allegation, even if true, does not entitle Miller to the relief he requested for the reasons set forth in Defendant Hamm’s motion to dismiss. (Doc. 35.) As explained therein (and hereby incorporated), the statute of limitations bars Miller’s claims, *see id.* at 6-13, and they

also fail on their merits, *id.* at 2-6, and 14-17, even assuming Miller did make a proper election.

But Miller's request for a preliminary injunction should also be denied because he is not substantially likely to show that he did make such an election. On September 7, 2022, Defendants deposed Miller at Holman Correctional Facility. His testimony establishes that preliminary injunctive relief is not warranted in this case.

In May 2022, Miller filed an affidavit in the Alabama Supreme Court claiming that he signed a nitrogen hypoxia election form in May 2022. (*See* Doc. 18-1.) Specifically, Miller attested that he completed and signed an election form and returned it to an unnamed correctional officer "at the same time [the officer] was collecting forms from everyone else." (*Id.* at 3.) When asked for the names of "everyone else" who submitted a form to the correctional officer during his deposition, Miller stated he had no personal knowledge of any other inmate providing a form to this unnamed correctional officer.<sup>1</sup> When asked how he knew that the officer "was collecting forms from everyone else," Miller stated that he was simply making an assumption. When asked for the names of any other inmate who

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1. Although Miller reserved the right to review and sign his deposition, Defendants informed his counsel that they would seek to use his deposition transcript to oppose the request for injunctive relief. Counsel for Defendants agreed they would inform this Court of Miller's reservation. It is expected that the transcript of Miller's deposition will be available on Friday and will be capable of being submitted to the Court at the hearing on Monday, September 12, 2022.

elected from the death row tier to which Miller was assigned in June 2018, Miller admitted he did not know if any other inmate elected.

The amended complaint makes factual allegations about election forms being distributed by ADOC Captain Jeff Emberton at the direction of then-Warden Cynthia Stewart. (Doc. 18 ¶¶ 38–41.) Importantly, the amended complaint does not allege that these factual averments apply to Miller’s claims; rather, the amended complaint cites *Reeves v. Commissioner, Alabama Department of Corrections*, 23 F.4th 1308, 1314 (11th Cir. 2022), *vacated*, *Hamm v. Reeves*, 142 S. Ct. 743 (2022), without further pleading that these facts directly apply to Miller’s claim. During his deposition on September 7, Miller indicated that his affidavit referred to “a correctional officer” because he could not identify the person who collected the nitrogen hypoxia election form he claims to have completed and signed. He testified that he was told the name “Captain Emberton” by death row inmate Bobby Wayne Waldrop *after* Miller signed and submitted his affidavit in the Alabama Supreme Court. Miller then admitted that Waldrop was not assigned to his death row tier in June 2018, and Miller could not testify under oath that Captain Emberton was the officer who distributed or collected forms on his death row tier.

When Miller was asked to describe the “correctional officer” he references in his affidavit and amended complaint, he could not (1) state whether the correctional officer was white or black; (2) describe the type of ADOC uniform worn by the

correctional officer; (3) describe whether the correctional officer was short or tall; (4) describe whether the correctional officer was fat, skinny, or muscular; or (5) provide an approximate age of the correctional officer. The best that Miller could do was to state that he “thought” the correctional officer was male. When Miller was asked to describe Captain Emberton, Miller admitted that he did not know Captain Emberton and could not describe his appearance.

Miller's amended complaint alleges that “[w]hen Mr. Miller gave the election form to the [corrections] official, Mr. Miller asked the official that the form be copied and notarized so as to record his election.” (Doc. 18 ¶ 51.) During his deposition, Miller testified that his requests were made to the official at the time the forms were handed out, not collected. This distinction is important because Miller testified that he did not pay attention to the official collecting the form. Instead, Miller says he placed the form in the bars of his cell to be picked up by the officer as he walked by. According to Miller, this partially explains why he can offer no description or information that would aid in the identification of the person he says collected his form.

During his deposition, Miller listened to the first phone call he made to his brother after being informed that the State had requested the date be set for his execution. In that conversation, neither Miller nor his brother discussed nitrogen hypoxia. At the two minute, forty-eight second mark, Miller’s brother asked Miller



if he was all right with what his lawyers told him. Miller responded, “Oh, yeah, there ain’t nothing else I can do about it. What can I do?”

Miller’s next phone call to his brother began, “Hey, I called those [expletive] lawyers, *some other inmates* signed a piece of paper about using some kind of gas stuff. I called my lawyers and told them they need to call the Equal Justice [Initiative] and stuff, and the public [Federal] defenders, that they might be able to halt, put a hold on that. I don’t know if they can or not, *but my lawyer did not even know what I was talking about.*”<sup>2</sup> This was the first time that execution by “some type of gas stuff” came up in conversation.

During his deposition, Miller indicated that he had not seen a copy of the complaint in his case until after it had been filed. When asked if he had read the news article cited in paragraph 34 of the complaint, Miller indicated that he had not. Asked if he could explain what aspects of that article applied to his claims, or his situation, Miller could not answer because he did not know what was reported in the article.

Miller indicated that the factual allegations in his lawsuit came from Jarrod Taylor, Milton Eugene Clemmons, and Bobby Wayne Waldrop, other death row inmates housed at Holman Correctional Facility. He testified that this information was provided to him *after* the State moved to set his execution date in the Alabama

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2. Miller went on to say, “I said [to my lawyers], ‘I told y’all a way long time ago.’” If this is true, it appears that Miller’s legal counsel also lost his nitrogen election information.

Supreme Court and, in one instance, after the Alabama Supreme Court issued the execution warrant.

Additionally, it is expected that Miller's deposition transcript will reflect that Miller subconsciously admitted the falsity of his claim to have elected nitrogen hypoxia in June 2018. While explaining why he did not think that a narrowly tailored injunction limiting the State to conducting his execution by means of nitrogen hypoxia would be "fair," Miller stated that he thought all of the inmates who elected nitrogen hypoxia "before" him should have to be executed first. Specifically, Miller said he believes that inmates such as Waldrop, Taylor, and Clemons—those inmates who provided Miller the factual information he asserts—should be executed before him because they elected "before" him. Miller, however, conceded that he had no personal knowledge of when any other inmate elected, and he did not know the date he claims to have elected. Thus, Miller cannot be referring to having personal knowledge of inmates who completed election forms before him but for the fact that Miller *knows* he did not complete an election form in 2018.

Further, Miller cannot show a likelihood of success on the merits because he has asserted the attorney–client privilege in response to questions regarding whether he communicated his nitrogen hypoxia election to his lawyers after the fact. While this reality applies most forcefully to Miller's equal protection claim, it also has application to his complete lack of evidence and testimonial specificity that would

establish his having made a nitrogen hypoxia election in June 2018. Miller's assertion of attorney–client privilege is a direct indication that if any such communication was made, it was with the expectation that it would remain confidential and not be communicated to third parties. As Miller bears the burden of proof in this case, and in his pursuit of injunctive relief, this means that legal communications will not be a source of evidence in this matter.

As to Miller's equal protection claim, the invocation of the privilege indicates his decision to refrain from making the type of limited waiver of the privilege in this case that inmate Jarrod Taylor made in the Alabama Supreme Court in 2019. This decision highlights and cements that Taylor's situation was markedly different than Miller's. Taylor had corroborating evidence of his claim of having made a timely election. Miller has none and has now indicated that even if he did have privileged evidence similar to Taylor, he does not intend to offer it in these proceedings.

Finally, Miller's equal protection and Eighth Amendment claims are due to be dismissed for the reasons set forth in the Defendants' motions to dismiss pending before the Court. (Doc. 21 at 14–24; Doc. 30 at 19–30; Doc. 35 at 14–17.) The entitlement of Defendants to dismissal of these claims for relief on Rule 12(b)(6) grounds illustrates that Miller cannot show a likelihood of success on the merits warranting injunctive relief.

**II. Miller’s request for injunctive relief is due to be denied under the doctrine of laches.**

Earlier this year, the Supreme Court once again emphasized that federal courts should not “for a moment countenance ‘last minute’ claims relied upon to forestall an execution.” *Nance v. Ward*, 142 S. Ct. 2214 (2022). The Court recognized that the statute of limitations governing § 1983 lawsuits, discussed in the previous section, is one important aspect of protecting states against manipulative inmates seeking to hinder the timely enforcement of their sentences. That recognition reaches back to the Court’s 2006 instruction to federal courts 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.’” *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

Miller’s lawsuit was brought thirty days prior to his scheduled execution. As noted in the State’s partial opposition to Miller’s request for expedited discovery (Doc. 33), in early August, Miller indicated that he was being told by his counsel that he would have to “wait” to file this legal challenge. (Docs. 33-1, 33-2, 33-3.) That fact alone suggests a dilatory filing that “leaves 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.” *Grayson v. Allen*, 491 F.3d 1318, 1326 (11th Cir. 2007) (quoting *Jones v. Allen*, 485 F.3d 635, 640 (11th Cir. 2007)).

Here, however, the Court should not be faced with even “little doubt” about Miller’s purpose. During his deposition, Miller authenticated a phone call made to his brother in April 2022. In that call, Miller told his brother that he had called his lawyers and “told them that they need to call the Equal Justice [Initiative] and stuff, and the public [Federal] defenders, that they might be able to halt, put a hold on” his execution. When directly asked if he would be satisfied with entry of a preliminary injunction that resulted in his execution by nitrogen hypoxia on September 22, 2022, Miller said he did not think such an outcome would be “fair.” Instead, he said he wanted all other inmates who elected nitrogen hypoxia “before” him to be executed. When asked if it would be a problem for ADOC employees to check the fit of a mask on his face, or whether he would voluntarily cooperate, Miller replied that it would be a problem. Miller indicated that he did not think he should be executed by nitrogen hypoxia until the State of Alabama received permission to proceed with such executions from an “independent” evaluator.

Miller’s responses are highly relevant to Defendants’ assertion of laches. Preliminary injunctive relief as to prison conditions “must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.” 18 U.S.C. § 3626(a)(2). In this case, the most narrowly drawn, least intrusive means to correct the alleged harm—the supposed negligent loss of Miller’s nitrogen

hypoxia election form—would be an order prohibiting Miller’s execution by any means other than nitrogen hypoxia. Miller, however, wants any injunction to respect his claimed election, but also to prohibit his execution by nitrogen hypoxia until inmates who elected “before” him are executed and until an “Independent” expert approves of Alabama’s nitrogen hypoxia system. In short, Miller wants to prevent his execution from occurring on September 22, 2022.

### CONCLUSION

Defendants oppose the injunctive relief requested by Miller and, for the above-mentioned reasons, preliminary injunctive relief should be denied. In the event the Court determines that preliminary injunctive relief is warranted, any injunction should be “narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.” 18 U.S.C. § 3626(a)(2). In this case, such an injunction would be limited in scope so as to permit Miller’s September 22, 2022, execution to be conducted by nitrogen hypoxia.

Respectfully submitted,

Steve Marshall  
*Attorney General*  
BY—

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

***/s Audrey Jordan*** \_\_\_\_\_  
Audrey Jordan  
*Assistant Attorney General*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 8, 2022, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system, which shall cause the same to be transmitted to all counsel of record.

*s/ James R. Houts* \_\_\_\_\_

James R. Houts

*Deputy Attorney General*

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## **APPENDIX D**

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

ALAN EUGENE MILLER, )  
 )  
 Plaintiff, )  
 )  
 v. ) **Case No. 2:22-cv-00506-RAH**  
 )  
 TERRY RAYBON, Warden, Holman )  
 Correctional Facility, )  
 *et al.*, )  
 )  
 Defendants. )

**Defendants' Post-Hearing Evidentiary Submission**

Pursuant to the Court's oral instructions at the conclusion of the September 12, 2022, evidentiary hearing and argument on Plaintiff Miller's motion for preliminary injunctive relief, Defendants provide the following evidentiary submission:

1. Four-per-page Copy of Defendants' Exhibit 1;
2. Exhibit B from State's Response in Alabama Supreme Court on Miller's Opposition to State's Request for Execution Date;

Respectfully submitted,

Steve Marshall  
*Attorney General*  
BY—

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

*/s Audrey Jordan*  
Audrey Jordan  
*Assistant Attorney General*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 12, 2022, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system, which shall cause a copy to be served upon counsel for the plaintiff via electronic means.

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Transcript of the Testimony of

**ALAN EUGENE MILLER**

**ALAN EUGENE MILLER**

**v**

**STATE OF ALABAMA**

CASE NO.: 22-cv-00506

**Date:** September 7, 2022

Boggs Reporting & Video LLC  
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**ALAN EUGENE MILLER**

**9/7/2022  
22-cv-00506**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
ALAN EUGENE MILLER,  
Plaintiff,  
CIVIL ACTION  
VS.  
FILE NO. 22-cv-00506  
JOHN Q. HAMM, in his official  
capacity as Commissioner,  
Alabama Department of Corrections;  
TERRY RAYBON, in his official  
capacity as Warden, Holman  
Correctional Facility;  
STEVE MARSHALL, in his official  
capacity as Attorney General,  
State of Alabama,  
Defendants.  
\*\*\*\*\*  
COPY  
\*\*\*\*\*  
DEPOSITION OF ALAN EUGENE MILLER, taken on  
behalf of the Defendants, pursuant to the  
stipulations set forth herein, before Jeana S.  
Boggs, Certified Court Reporter and Notary Public,  
at the offices of Holman Correctional Facility, 866  
Ross Road, Atmore, Alabama, commencing at  
approximately 1:03 p.m., Wednesday, September 7th,  
2022.

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Page 3

1 and  
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1                   \*\*\*

2                   STIPULATIONS

3                   It is hereby stipulated and agreed by and

4 between counsel for the respective parties and the

5 witness that the deposition of ALAN EUGENE MILLER is

6 taken pursuant to notice and stipulation on behalf

7 of the Defendants; that all formalities with respect

8 to procedural requirements are waived; that said

9 deposition may be taken before Jeana S. Boggs,

10 Certified Professional Reporter and Notary Public in

11 and for the State of Alabama At Large, without the

12 formality of a commission; that objections to

13 questions, other than objections as to the form of

14 the questions, need not be made at this time, but

15 may be reserved for a ruling at such time as the

16 deposition may be offered in evidence or used for

17 any other purpose as provided for by the Federal

18 Rules of Civil Procedure.

19                   It is further stipulated and agreed by and

20 between counsel representing the parties in this

21 case that the filing of the deposition of ALAN

22 EUGENE MILLER is hereby waived and that said

23 deposition may be introduced at the trial of this

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1                   THE COURT REPORTER: Okay. Usual

2 stipulations?

3                   MR. HOUTS: Yes, so stipulated.

4                   MS. HUGGINS: Yes. But we want to

5 make sure that we are also

6 reserving our right to review

7 and make corrections to the

8 transcript.

9                   THE COURT REPORTER: Okay. Would

10 you raise your right hand as

11 best you can.

12                   Do you solemnly swear,

13 or affirm --

14                   THE WITNESS: Speak a little louder.

15                   THE COURT REPORTER: Do you solemnly

16 swear, or affirm, that the

17 testimony you are about to give

18 in this cause will be the

19 truth, the whole truth and

20 nothing but the truth, so help

21 you God?

22                   THE WITNESS: Yes.

23                   THE COURT REPORTER: Okay.

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1 case or used in any other manner by either party

2 hereto provided for by the Statute, regardless of

3 the waiving of the filing of same.

4                   It is further stipulated and agreed by and

5 between the parties hereto and the witness that the

6 signature of the witness to this deposition is

7 hereby not waived.

8

9

10

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Page 8

1                   MS. HUGGINS: Before we get started,

2 can I just state on the record,

3 too, that Mr. Miller has

4 difficulty hearing. So, you

5 are going to have to speak very

6 loudly especially since we are

7 wearing masks.

8                   \*\*\*

9                   ALAN EUGENE MILLER,

10 was called as a witness, having first been duly

11 sworn by Jeana S. Boggs, Certified Court Reporter

12 and Notary Public in and for the State of Alabama

13 at Large, was examined and testified as follows,

14 to-wit:

15

16                   DIRECT EXAMINATION

17 BY MR. HOUTS:

18                   Q Yeah. And, Mr. Miller, it looks like

19 from this table we are about

20 three-and-a-half, four feet apart. If it

21 would help you to hear me better, do you

22 mind if I lower my mask a little bit?

23                   A No. I have no problem.

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1 Q Okay. As long as there's no COs in here,  
2 maybe I won't get a disciplinary for it.  
3 All right. As I said earlier,  
4 Mr. Miller, my name is James Houts,  
5 H-O-U-T-S. I am a deputy attorney  
6 general for the State of Alabama. And I  
7 am representing the Defendants named in  
8 your lawsuit.  
9 Have you ever been deposed  
10 before?  
11 A No.  
12 Q Okay. Have you ever testified in court  
13 before?  
14 A No.  
15 Q Okay. So, it looks like y'all have been  
16 talking with the Court Reporter  
17 beforehand. It's very difficult for  
18 court reporters to keep up with two  
19 people who talk at once.  
20 So, today, I am going to ask  
21 that you let me finish asking the  
22 question before beginning your answer.  
23 And, likewise, I will extend the courtesy

Page 11

1 afternoon. I don't think it will take  
2 four hours, but I am going to try to get  
3 us on the road. But after about an hour  
4 or an hour and 15 minutes, if you need a  
5 break, just let us know. And there's  
6 restrooms. We will get the correctional  
7 officers and take care of that.  
8 All right. Are you ready?  
9 A Yes, sir.  
10 MS. HUGGINS: Can I ask you one  
11 other thing for the record?  
12 MR. HOUTS: Sure.  
13 MS. HUGGINS: Mr. Miller is  
14 diabetic. I don't expect that  
15 to be an issued. But I just  
16 wanted to alert you to it now.  
17 Q Absolutely. I mean, if there's anything  
18 that you have concerns about as far as --  
19 A I am all right. I'm all right.  
20 Q All right. I show you how little I know  
21 about that, but I do think I have -- I  
22 thought I had some Altoids but maybe I  
23 didn't. Sorry.

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1 of waiting until I believe you are done  
2 before speaking. And if you are not,  
3 say, hey, Houts, stop talking.  
4 A Okay.  
5 Q She also has a difficulty translating  
6 non-verbal communication into the written  
7 word. So, if it calls for a yes or no,  
8 you know, say "yes" or "no". She can't  
9 really write down headshakes or nods.  
10 A Okay.  
11 Q The most important thing is, this only  
12 works if you truly understand what I am  
13 asking you before you provide an answer.  
14 So, if I ask you a question and you are  
15 not quite certain what I mean by  
16 anything, I would rather you ask me for  
17 clarification than just guess what I was  
18 trying to say.  
19 A Okay.  
20 Q It won't offend me if you ask me to  
21 clarify something.  
22 A Okay.  
23 Q And we have a limited amount of time this

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1 All right. So, prior to this  
2 deposition, have you talked to anyone who  
3 has assisted you with getting ready to be  
4 questioned today?  
5 A You mean like talked -- I talked to Kelly  
6 Huggins.  
7 Q Okay. Without disclosing the nature of  
8 any discussions, other than Kelly  
9 Huggins, has any other attorney helped  
10 you prepare for your deposition today?  
11 A No.  
12 Q Okay. Did you talk to any family members  
13 about your deposition today?  
14 A No, I did not.  
15 Q Okay.  
16 THE WITNESS: Sorry about that.  
17 Q What about any other inmates confined  
18 here at Holman?  
19 A I asked somebody last night named Sean,  
20 asked me, said he thought the 11th Court  
21 Circuit give me an appeal.  
22 I said, "No." I said, "I was  
23 talking to my lawyer, and I got a

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1 deposition tomorrow, and I can't talk  
2 about it." And that's all I said.

3 Q Okay. Did you look at any documents  
4 prior to your deposition to sort of help  
5 you prepare to testify?

6 A No. But I know they said something about  
7 emails, and I looked at the emails. I  
8 don't see nothing in there that's wrong  
9 with it.

10 Q Okay. Who -- The documents that you  
11 looked at, whose emails were they?

12 A Gabriela (phonetic) -- I don't know how  
13 to pronounce it.

14 Q So, your secured message is on the  
15 tablet?

16 A Yeah.

17 Q Okay.

18 A I would have to get them and go over it.  
19 And then Zoosman, he is a Rabbi.

20 THE COURT REPORTER: I'm sorry.  
21 Who?

22 THE WITNESS: His name is Zoosman,  
23 Z-O-O-S-M-A-N.

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1 Based on what you have seen, do  
2 you recognize that document at all?

3 A No.

4 Q Okay. So, keep looking.

5 A Okay. Keep on reading?

6 Q Well, I mean, I will ask it a different  
7 way.

8 Prior to a complaint being  
9 filed in Federal Court on your behalf,  
10 did you review the complaint underlying  
11 your lawsuit?

12 A I got something sent in the mail. I  
13 would have to relook at it again to see  
14 if it's like this. Because I don't  
15 remember it like that. Because I don't  
16 understand this legal jargon and stuff.  
17 So, I would have to compare it with -- I  
18 didn't bring anything with me. I left it  
19 up at the...

20 Q Okay. So, you remember reviewing a  
21 document. Was that before or after the  
22 lawsuit was filed?

23 A It was after.

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1 A He is a Rabbi that's against the death  
2 penalty and he always writes all the  
3 inmates, not just one inmate, telling you  
4 you're not alone and all that. And that  
5 there, he will show you -- send you  
6 pictures of pep rallies where people are  
7 protesting the death penalty. And that's  
8 about it.

9 Q Okay. Well, I am going to show you what  
10 I have marked for today's proceeding as  
11 Defendant's Exhibit One.

12 (At which time, the referred-  
13 to document was marked as  
14 Defendant's Exhibit No. 1 for  
15 identification.)

16 Q And it's the original complaint filed in  
17 Federal Court, you know, that started  
18 your lawsuit. Can you just take a minute  
19 to review it.

20 So, you just turned to the  
21 third page. If you need to review the  
22 rest of it, that's -- but let me just ask  
23 a question now.

Page 16

1 Q After the lawsuit?

2 A Yeah.

3 Q All right. If you will look at the  
4 second paragraph on the first page.

5 A What's that?

6 Q If you will look at the second paragraph  
7 on the first page of that document.

8 A Yep. Nitrogen hypoxia?

9 Q Yes. When is the first time that you  
10 gained personal knowledge of the fact  
11 that nitrogen hypoxia had been added to  
12 Alabama law as an alternate method of  
13 execution?

14 A I can't remember. I cannot remember.

15 Q All right. If I don't try to tie you  
16 down to a specific date, do you remember  
17 about when you first gained personal  
18 knowledge?

19 A It could have been around 2018 or  
20 something or prior to that on television  
21 and through Project Cope, or something  
22 like that, because just like these little  
23 teletype things that they send to let



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1 people know what's happening all over the  
 2 country. If it happened in Oklahoma or  
 3 if there's an execution date in Texas,  
 4 then they --  
 5 Q Okay. Are you aware that one of the  
 6 claims in your lawsuit relates to the  
 7 process of electing nitrogen hypoxia here  
 8 at Holman Correctional Facility?  
 9 A Yes, sir.  
 10 Q All right. In relation to that election  
 11 time, do you remember when that was?  
 12 A It was in 2018.  
 13 Q Do you remember when in 2018?  
 14 A Around June or July.  
 15 Q Okay. In relation to that time, how long  
 16 before then had you known that nitrogen  
 17 hypoxia had been added as an alternate  
 18 method of execution?  
 19 A I didn't really know if they certified it  
 20 or not until they came around with the  
 21 paper.  
 22 Q Okay. I am going to hand you another  
 23 document that has been marked as

Page 19

1 May 10, 2021. Was that --  
 2 A Oh, that was an error on my part.  
 3 Q This was this year, not last year?  
 4 A Yes.  
 5 Q Okay. All right. If you will look at  
 6 paragraph three of your affidavit, the  
 7 bottom of the first page, do you agree  
 8 with me that your third recitation in  
 9 your affidavit is that in June or July of  
 10 2018 a correctional officer at Holman  
 11 passed out forms to individuals on death  
 12 row concerning an election to be executed  
 13 by nitrogen hypoxia?  
 14 A Yeah. But it wasn't within 30 days.  
 15 They said they was going to pick it up  
 16 that day. Pick it up.  
 17 Q Okay.  
 18 A It wasn't no 30 days. They didn't say  
 19 you had 30 days nothing.  
 20 Q Okay. Well, I am going to start -- Do  
 21 you know who that correctional officer  
 22 was?  
 23 A No, not at the time.

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1 Defendant's Exhibit Two for purposes of  
 2 your deposition. If you will take a  
 3 minute to review that document.  
 4 (At which time, the referred-  
 5 to document was marked as  
 6 Defendant's Exhibit No. 2 for  
 7 identification).  
 8 MR. ROBERTSON: Yes. Thank you.  
 9 BY MR. HOUTS:  
 10 Q All right. Do you recognize that  
 11 document?  
 12 A Yes, sir.  
 13 Q Okay. And did you sign that document?  
 14 A Yes, sir.  
 15 Q Is everything contained in that affidavit  
 16 still true, accurate and correct based on  
 17 your personal knowledge?  
 18 A Yes, sir, from my recollection.  
 19 Q All right. Just to clear one thing up,  
 20 on the third page, if you will turn to  
 21 where you signed, if you will look, you  
 22 will see that the Notary provided a date  
 23 of May 10, 2022. You provided a date of

Page 20

1 Q You say not at the time. What about now?  
 2 A I mean, some guys said his name was  
 3 Emberidge (phonetic). I said, hey, I  
 4 said, man, there were so many captains.  
 5 I say, I can't remember.  
 6 Q Okay. So, you said Emberidge (phonetic)?  
 7 A Yeah. Emberidge (phonetic) or something  
 8 like that. They've got a guy named  
 9 Curfman (phonetic). And I guess -- I  
 10 don't keep up with them.  
 11 Q All right. And you said something in  
 12 your previous response. If I understood  
 13 you correctly, you used the term  
 14 "captain." You used the term "captain"?  
 15 A Yeah.  
 16 Q Does that apply to the individual you are  
 17 talking about?  
 18 A Yeah. It would be Captain Emberidge  
 19 (phonetic), or whatever. They changed so  
 20 many people down here.  
 21 Q Okay. So, walk me through. How did you  
 22 figure out -- If you didn't know  
 23 originally, how did you figure out who it

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1 was?  
 2 A Well, they told me later on. They said  
 3 when all this came up about setting the  
 4 dates, and that's it.  
 5 Q You said "they" told you later on. Who  
 6 are "they"?  
 7 A A dude named Bob Waldrop. He said his  
 8 name was Emberidge (phonetic). And I  
 9 told him I didn't remember. I said, "I  
 10 suggest you remember it better than I do.  
 11 I don't."  
 12 Q Okay. How did Bobby Waldrop know who it  
 13 was?  
 14 A Because you would have to ask him, sir.  
 15 Q Okay. So, you are basing the allegation  
 16 that it was a Captain Emberidge  
 17 (phonetic) on something you were told by  
 18 Inmate Bobby Waldrop?  
 19 A Yeah. That he testified in court -- that  
 20 he testified in Federal Court, or  
 21 something like that, on the stand that he  
 22 passed them out to every individual that  
 23 day and picked them up that same day,

Page 23

1 the -- when they tried to set my date,  
 2 and I told them I signed that paper. And  
 3 he said like that. And I told him I  
 4 don't know who the damn captain was. I  
 5 said, I don't remember four years ago.  
 6 And he said it was Captain Emberidge  
 7 (phonetic). He said he testified in  
 8 Federal Court.  
 9 Q So, it was before you signed your  
 10 affidavit?  
 11 A This right here, yes.  
 12 Q All right. So, why did you say a  
 13 correctional officer?  
 14 A Because I didn't know, and I still don't  
 15 know. But I know they said like that. I  
 16 haven't seen any kind of court report  
 17 that said that.  
 18 Q All right. So, still on paragraph three,  
 19 you say, June or July of 2018, can you  
 20 narrow down when you say you made  
 21 your election any further than that?  
 22 A Can you repeat that?  
 23 Q Are you able to narrow down the time that

Page 22

1 picked them up right after a certain  
 2 amount of time and picked them up. And I  
 3 said, I told him, I didn't remember who  
 4 the guy that picked it up.  
 5 Q So, you said earlier you signed your  
 6 affidavit on May the 10th of 2022,  
 7 correct? And you referred to a  
 8 correctional officer in paragraph three;  
 9 am I correct about that? So, does that  
 10 mean that you weren't informed of the  
 11 belief of Bobby Waldrop that it was  
 12 Captain Emberidge (phonetic) until after  
 13 you signed your affidavit?  
 14 MS. HUGGINS: Objection to the form.  
 15 Q In relation to the execution of your  
 16 affidavit, did Bobby Waldrop tell you  
 17 Captain Emberidge (phonetic) before or  
 18 after you signed your affidavit?  
 19 A Way after.  
 20 Q Way after?  
 21 A No, it would have been this right here --  
 22 you mean this little thing here I signed?  
 23 It was before. It was when -- when

Page 24

1 you say you elected nitrogen hypoxia more  
 2 than just June or July of 2018?  
 3 A No. No, I cannot.  
 4 Q And why is that?  
 5 A I can't remember something four years  
 6 ago, the exact date four years ago. I  
 7 can go by this.  
 8 Q Do you remember what day of the week it  
 9 was?  
 10 A No, I do not.  
 11 Q Do you remember any other event that  
 12 occurred around then that would help you?  
 13 A Nope. No, sir, I do not. Sorry about  
 14 that.  
 15 Q All right. If you will turn the page and  
 16 look at paragraph four and just review it  
 17 for me.  
 18 A Turn to page four?  
 19 Q Uh-huh (positive response). I am sorry.  
 20 Paragraph four. It's the next page.  
 21 Page two of your affidavit.  
 22 A Oh, okay.  
 23 Q Paragraph four of your affidavit,

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1 Mr. Miller.  
 2 A Okay. Okay.  
 3 Q Your affidavit.  
 4 A Oh, okay. Okay.  
 5 Q So, do I understand this correctly that  
 6 this correctional officer passed these  
 7 forms out and said they would be back to  
 8 collect them later?  
 9 A Yes. Yes.  
 10 Q Did they indicate that it would be them  
 11 personally that picked them up?  
 12 A No. Just said it would be picked up  
 13 later because they come on a tier, and  
 14 they yell out, and then they will pass  
 15 the forms out. Then they will come back  
 16 later, somebody would pick them up.  
 17 Q You say "they"?  
 18 A Be another correctional officer or the  
 19 trustees. So, I don't know. I just  
 20 stick my -- I know I just stick mine back  
 21 in the door and then go lay back down.  
 22 Q But in this case, it wasn't a trustee?  
 23 A Not that I have recollection of.

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1 recollection. Were you paying attention  
 2 when he did it?  
 3 A Yeah. He was just hollering out that you  
 4 had to sign this thing right here, and it  
 5 had to be turned in, and it had to be  
 6 picked up. And then when he came back  
 7 by, it had to be picked up, and you had  
 8 to have it signed.  
 9 Q Okay. And the next paragraph, paragraph  
 10 five, you indicate that you completed the  
 11 form and signed it. Can you tell me what  
 12 all you did between receiving the  
 13 election form and when you say you  
 14 completed and signed it?  
 15 A I probably read it. My recollection is I  
 16 read it and I signed it.  
 17 Q Based on your recollection, how long did  
 18 that take?  
 19 A I -- I couldn't tell you, sir. That's  
 20 four years ago. If you had of came four  
 21 years from now and asked me to remember  
 22 what we are doing right now, I wouldn't  
 23 even remember. I probably wouldn't even

Page 26

1 Q Are you familiar with the position of  
 2 tier runner?  
 3 A What's that?  
 4 Q Are you familiar with the position of  
 5 tier runner?  
 6 A It's a guy that passes out the ice and  
 7 the trays when they -- when it's feeding  
 8 time. And then he does -- you know, mops  
 9 the outside and sweeps it up, passes out  
 10 a broom and stuff and does what the  
 11 officers tell him to do.  
 12 Q What about legal forms?  
 13 A They will pass them out with the officers  
 14 standing there. He will walk down and  
 15 stick it in everybody's door while the  
 16 guy is hollering at the top of his lungs.  
 17 The correctional officer is hollering at  
 18 the top of his lungs.  
 19 Q Did the correctional officer who passed  
 20 out the form to you say anything else  
 21 about the form?  
 22 A Not that I have any recollection of.  
 23 Q You say not that you have any

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1 remember your name or anybody else's  
 2 name. That's why I said "correctional  
 3 officer" because I wasn't sure of the  
 4 name.  
 5 And, you know, just because he  
 6 told me the guy's name, it might not have  
 7 been the same person they came one  
 8 his tier. They might have had a  
 9 different officer on each tier. I wasn't  
 10 on each tier.  
 11 So, I could not tell you if it  
 12 was the same officer who went to each  
 13 tier. He said he did. But I have no  
 14 recollection because I am in a cell. So,  
 15 I don't go get to walk around the tiers.  
 16 Q So, today, you don't have the ability to  
 17 even say whether it took you longer than  
 18 an hour --  
 19 A No.  
 20 Q -- to make this decision or less than an  
 21 hour?  
 22 A No, sir.  
 23 Q Did you talk to anybody about that form

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1 before you completed and signed it?  
 2 A I don't remember.  
 3 THE WITNESS: Am I loud enough?  
 4 THE COURT REPORTER: (Nodding in the  
 5 affirmative).  
 6 Q Did you seek out legal advice about that  
 7 form?  
 8 A I would have to go back through the  
 9 records or have my records looked on the  
 10 form records to see if I did or not.  
 11 Q So, you have no recollection?  
 12 A No recollection. I am sorry. No  
 13 recollection, sir.  
 14 Q What about family? Did you ask your  
 15 family?  
 16 A It might have been later. I have no  
 17 recollection.  
 18 Q Do you recall speaking to anyone about  
 19 whether or not you should make an  
 20 election for nitrogen hypoxia?  
 21 MS. HUGGINS: Objection.  
 22 A Not that I have -- I don't have any  
 23 recollection.

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1 we can't find it; we don't know where  
 2 it's at, oh, excuse us.  
 3 Q Okay.  
 4 A Then it's my word against their word.  
 5 And that's my understanding of notarizing  
 6 something and asking for a copy.  
 7 Q So, if you will look at your paragraph  
 8 six of your affidavit, do you agree that  
 9 it says that you gave your signed form to  
 10 the correctional officer who was, quote,  
 11 collecting the forms?  
 12 A That would be my recollection. Like I  
 13 said, I stuck it in the door, and they  
 14 would come by and pick it up.  
 15 Q And if you look at number seven, you  
 16 stated that you did that at the same time  
 17 the correctional officer was collecting  
 18 forms from everyone else. Is that  
 19 accurate?  
 20 A That would be accurate. Well, it would  
 21 be accurate to my recollection because  
 22 they have got 14 cells up, 14 cells down.  
 23 So, he would walk down there and walk

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1 Q What do you remember about the form?  
 2 A Not really much. It's just -- you know,  
 3 I thought it was called "nitrous." And  
 4 it was nitrogen, and that's basically all  
 5 I remember. And then asking -- you know,  
 6 tell everybody asking. I said I wanted a  
 7 copy of it and it notarized. And that's  
 8 about it.  
 9 Q Okay. Why did you ask for the form to be  
 10 notarized?  
 11 A So, I can have legal documentation if  
 12 something would ever be asked.  
 13 Q Explain that to me how having the form  
 14 that you turned in notarized would be  
 15 legal documentation for you?  
 16 A Well, I really couldn't answer that. I  
 17 am not legal minded, but I am always  
 18 just -- I want it notarized, because I  
 19 figured it was, like, legal like that.  
 20 So, if they notarized it, they would have  
 21 to acknowledge that they did everything  
 22 they said they did. There would be some  
 23 kind of record. And they can't say, oh,

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1 back, walk upstairs, walk down and walk  
 2 back.  
 3 Q Okay. How did you know that he was  
 4 collecting the forms from everybody else?  
 5 A Huh?  
 6 Q How did you know that he was collecting  
 7 the forms from everybody else?  
 8 A Well, I was hoping he was. Because you  
 9 don't walk by somebody's cell because I  
 10 was up in -- I don't remember what cell  
 11 it was, but he was walking by everybody's  
 12 cell.  
 13 Q Okay.  
 14 A Walked down and walked back.  
 15 Q Okay. Who else's form did he collect  
 16 that you saw him collect?  
 17 A I don't even remember what tier I was on.  
 18 So, I cannot give you no recollection of  
 19 that. You would have to go through the  
 20 prison and ask them for that.  
 21 Q Can you provide me the name of a single  
 22 inmate who you saw provided an election  
 23 form to that correctional officer?

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1 A Not really, no. I just assumed.  
 2 Q All right. You just said that you don't  
 3 recall where you were housed at the time.  
 4 Let me see if I can help you out.  
 5 Do you know if you were housed  
 6 in F1-6A back in June of 2018?  
 7 A F1-6A?  
 8 Q Uh-huh (positive response). Let me show  
 9 you your Inmate Movement History and ask  
 10 if anything on that page helps refresh  
 11 your recollection.  
 12 A Oh, okay. Yeah. Because when they moved  
 13 me from F1-6A, my toilet exploded.  
 14 Q Okay. But that shows that from  
 15 January 4th of 2017 until September of  
 16 2018, you were in F1-6A; is that --  
 17 A Yeah.  
 18 Q Okay. So, knowing that you were in the F  
 19 tier at the time, does that help you  
 20 recollect the other inmates?  
 21 A There was -- I think there was a guy  
 22 named Kelly that was -- would have been  
 23 F5. But like I said, I'm not sure of my

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1 Q So, you say when you were in F1-6A --  
 2 A F1-3A.  
 3 Q When you were in F1-6A, you are saying  
 4 Christopher Hyde was never your next  
 5 door?  
 6 A No. I think it was -- I think it was a  
 7 guy named Kelly.  
 8 Q How certain are you of that?  
 9 A Huh?  
 10 Q How certain are you of that?  
 11 A I am not certain, sir.  
 12 Q What about Matthew Reeves; do you know  
 13 him?  
 14 A I know who you are talking about.  
 15 Q Do you recall whether he was housed in  
 16 F1-8A?  
 17 A I know he was in the cell. I never  
 18 walked down to the end. You go to your  
 19 cell. You go in your cell, and they shut  
 20 the doors.  
 21 Q Did you talk to any other inmates about  
 22 the nitrogen hypoxia election the day  
 23 that you say you got the form and filled

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1 recollection. And I think a guy named  
 2 Nicholas Smith was on the other side in  
 3 F7 -- F1-7.  
 4 Q Was there a period where F1-7A was empty?  
 5 A I have no recollection of that.  
 6 Q Okay. So, if during the entirety of  
 7 June 2018 F1-7A was an empty cell, you  
 8 have no recollection of that fact?  
 9 A F1-7A? Not really, no.  
 10 Q Okay. Do you know Christopher Hyde?  
 11 A Christopher Hyde?  
 12 Q Hyde.  
 13 A Yeah. I mean, I know him, but I know his  
 14 name.  
 15 Q Do you know him being assigned to F1-5A?  
 16 A He was -- It wouldn't have been while I  
 17 was next door to him. It would have been  
 18 when I was in F3. I'm not sure. I don't  
 19 have any recollection, but I know who you  
 20 are talking about, because he got in a  
 21 fight with somebody. There was a fight  
 22 or something, and they moved him from --  
 23 they was throwing poop on each other.

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1 it out and turned in it?  
 2 A Not that I have recollection of it.  
 3 Q Can you give me the name of a single  
 4 other inmate on your tier who elected  
 5 nitrogen hypoxia?  
 6 A No.  
 7 Q So, I want to be clear. When you say  
 8 that you turned the form in to a  
 9 correctional officer at the same time he  
 10 was collecting forms from everyone  
 11 else --  
 12 A It doesn't mean they signed the form.  
 13 You know, I didn't look at each form and  
 14 say, oh, he signed this form, and you can  
 15 turn the form back in because he wanted  
 16 the form either signed or not signed.  
 17 Q What was the length of the form?  
 18 A What's that?  
 19 Q What was the length of the form?  
 20 A I couldn't tell you that.  
 21 Q When you elected nitrogen hypoxia as a  
 22 means of a judicial execution when you  
 23 signed that form, what did nitrogen

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1 hypoxia mean to you?  
 2 A What did it mean to me? That I wouldn't  
 3 have to be stabbed with needles.  
 4 Q Okay. But as a mechanism of death, what  
 5 is nitrogen hypoxia?  
 6 A I thought it would be simpler. I  
 7 wouldn't be stabbed like that or have  
 8 allergic reactions to the chemicals that  
 9 they said was in the lethal injection.  
 10 Q I want you to explain why you thought  
 11 that. What allowed you to make that  
 12 decision?  
 13 A Because of other things that people said  
 14 about the other inmates who died of it of  
 15 lethal injection, how they -- I mean, how  
 16 other inmates, you know, had reactions or  
 17 they had, like, an allergic reaction to  
 18 it. And, again, like I said, they stab  
 19 you with needles and stuff.  
 20 Q I understand that. But you say you  
 21 elected nitrogen hypoxia. What did that  
 22 mean to you? How would you die if you  
 23 elected nitrogen hypoxia?

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1 anything to anybody that I know of. He  
 2 just said it needed to be signed and  
 3 turned in, and he was supposed to be back  
 4 to pick it up, my recollection.  
 5 Q So, this would have been at the time the  
 6 form was being handed out?  
 7 A What's that?  
 8 Q So, you are saying this was done at the  
 9 time the form was being handed out?  
 10 A Yes. Everybody was screaming it out.  
 11 Hey, I want a copy, or you ask for a copy  
 12 and asked that it to be notarized.  
 13 Q Describe how you turned the form in to  
 14 the correctional officer.  
 15 A Just stuck it in the door.  
 16 Q Like, as he was there? Before he got  
 17 there?  
 18 A Before he got there and stuck it in the  
 19 door, and they come by and they pick it  
 20 up. And then I yelled I wanted a copy.  
 21 And he just kept -- the guy kept walking  
 22 on by. And I said: When are they going  
 23 to get a copy and notarize it? Nothing.

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1 A I thought you just went to sleep.  
 2 Q Okay. And where did you get that  
 3 information from?  
 4 A I just guessed it. I thought it would be  
 5 you go to the dentist or something. I  
 6 mean, I wasn't sure.  
 7 Q If you weren't sure, what was it about it  
 8 that made you feel comfortable enough to  
 9 make the election that you say you made?  
 10 A I really couldn't tell you.  
 11 Q All right. If you will look at paragraph  
 12 nine of your affidavit, this kind of  
 13 relates back to when you said you had  
 14 asked for it to be notarized. I want to  
 15 talk about the part where you say you  
 16 asked for a copy and were denied a copy.  
 17 When did that exchange occur? Was it  
 18 after you had turned the form in or  
 19 before? At the same time? Can you put  
 20 that into context.  
 21 A Before I signed it, I said I wanted a  
 22 copy and I wanted it notarized, and I  
 23 wanted it back. And he never said

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1 Q Tell me about everybody screaming on the  
 2 tier. Like, what screaming?  
 3 A Some of them -- Some people wanted to  
 4 talk to their lawyers, wanted to have  
 5 time to talk to their lawyers. But,  
 6 like, there is only one phone for 28  
 7 guys.  
 8 Q All right. Who was doing that?  
 9 A Huh?  
 10 Q Who was doing that? Which --  
 11 A This guy is yelling. And I can't  
 12 distinguish an individual voice. I  
 13 couldn't have recollection, but I do know  
 14 that people were hollering.  
 15 Q After he distributed -- this correctional  
 16 officer distributed the form and left,  
 17 y'all didn't talk about it amongst  
 18 yourselves?  
 19 A No, I didn't. I just sat there and  
 20 looked at it. I didn't socialize with  
 21 people. I don't socialize with too many  
 22 people now.  
 23 Q Were you represented by counsel at the



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1 time?  
 2 A What's that?  
 3 Q Were you represented by counsel at the  
 4 time?  
 5 A To my recollection, yes.  
 6 Q Did you call them?  
 7 A I would have to go back over the records  
 8 and see. If I did, if they weren't  
 9 there, it would be on the records. My  
 10 recollection is I probably did.  
 11 Q Why do you say "probably did"?  
 12 A Because if anything wants me to sign, I  
 13 am going to call legal counsel.  
 14 Q Are you sure that?  
 15 A My recollection is that's what I usually  
 16 do.  
 17 Q So, you have no clear recollection of  
 18 doing it?  
 19 A No, sir. No, sir.  
 20 Q All right. Look at the same paragraph --  
 21 I am sorry -- paragraph ten of  
 22 Defendant's Exhibit Two. And am I  
 23 correct that you indicate under oath that

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1 tried to set my date.  
 2 Q What about Charles Burton? When did you  
 3 talk to him?  
 4 A I don't know if his name is Charles  
 5 Burton. But he came and told me that I  
 6 wasn't alone. Man, he said like that.  
 7 And he said, they signed mine. He said,  
 8 they notarized his. I said, okay. And  
 9 he just said that they just notarized  
 10 his. That's all he said.  
 11 Q When was that conversation?  
 12 A I couldn't tell you the exact date, but I  
 13 was in my cell. They had already locked  
 14 me down. It was after they had already  
 15 gave me the death sentence.  
 16 Q Was it already after they asked to have  
 17 your date set?  
 18 A No. It was after they -- they handed me  
 19 the --  
 20 Q After your date was actually set?  
 21 A After set, they came back and put me in  
 22 the -- they wouldn't let me walk. They  
 23 keep you in single walk.

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1 some other guys had their forms  
 2 notarized?  
 3 A Yes.  
 4 Q Who were those other guys?  
 5 A Well, I know Jarrod Taylor, and a guy  
 6 named Barton. But this was way after it  
 7 was formed after -- it was signed and it  
 8 was all signed and picked up.  
 9 Q Let's talk about Jarrod Taylor. How do  
 10 you know his was notarized?  
 11 A What's that?  
 12 Q How do you know Jarrod Taylor's was  
 13 notarized?  
 14 A He told me.  
 15 Q When did he tell you?  
 16 A Well, he told me, you know, prior. I  
 17 don't know the exact date, but he told  
 18 me, hey, do you remember I told you they  
 19 signed mine? I said, yeah. And I had to  
 20 ask how come they did not notarized  
 21 everybody else's.  
 22 Q So, when was this conversation?  
 23 A I couldn't tell you. It was after they

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1 Q All right. When you say some other guys,  
 2 is there any other guys than Jarrod  
 3 Taylor or the Barton or Burton that you  
 4 referred it?  
 5 A No. Those are the only ones.  
 6 Q And so, the basis of your knowledge that  
 7 their forms were notarized is what they  
 8 told you?  
 9 A Is what they told me. Yes. That is my  
 10 recollection.  
 11 Q I am going to show you what I marked as  
 12 Defendant's Exhibit Three.  
 13 (At which time, the referred-  
 14 to document was marked as  
 15 Defendant's Exhibit No. 3 for  
 16 identification.)  
 17 Q And this is the amended complaint that  
 18 was filed in your lawsuit.  
 19 MS. HUGGINS: Can I interrupt you  
 20 real quickly. Are we going to  
 21 mark this?  
 22 MR. HOUTS: Yeah. I just wanted to  
 23 use it to his recollection. If

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1 y'all would like for me to mark	1 looks like the same as this one.
2 it, I would be more than happy	2 Q Okay. So, you may not be able to answer
3 to.	3 this. But have you seen a copy of that
4 MS. HUGGINS: Can you mark it	4 document prior to today?
5 please? You keep a copy of it	5 A Not -- not that I know of.
6 anyway. The next one will be	6 Q So, if I asked you to identify the
7 11.	7 differences between the two documents,
8 So, just for purposes of	8 would you be able to answer that
9 the record, the transcript,	9 question?
10 when I showed him his Inmate	10 A No, sir, I could not.
11 Movement History, that will	11 Q All right. If you will turn to page
12 be a document that has been	12 34 -- I am sorry, paragraph 34. I'm
13 marked as Defendant's Exhibit	13 getting real bad about that.
14 11.	14 Paragraph 34 of Defendant's
15 (At which time, the referred-	15 Exhibit Three.
16 to document was marked as	16 A Okay.
17 Plaintiff's Exhibit No. 11	17 Q Okay. Do you see in paragraph 34 it
18 for identification.)	18 makes reference to a news article in the
19 BY MR. HOUTS:	19 Montgomery Advertiser back in 2019?
20 Q May I see that, Mr. Miller, the Movement	20 A You said 34?
21 History. Thank you. I am sorry.	21 Q Paragraph 34, yes, sir.
22 What were you saying, sir?	22 A It just says, "In the absence of such
23 A I didn't mean try to -- like that, it	23 guidance -- and notwithstanding the fact
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1 that ADOC has declined to" -- whatever	1 white guy was -- dang, I forgot his name.
2 that word is -- "promulgate any..." It	2 I think it was Watts. It was Captain
3 don't say nothing about --	3 Bishop.
4 Q If you'll look at the --	4 Q Is Captain Emberton tall or short?
5 A Okay. I see it now. Okay.	5 A I couldn't -- I have no recollection of
6 Q All right. Have you ever read that	6 that.
7 article?	7 Q Is he fat or skinny?
8 A No, sir, not to my recollection.	8 A I couldn't tell you. If I remembered
9 Q So, if I asked you to tell me what	9 that, I would remember anything else.
10 aspects of what is talked about in that	10 Q Is he muscular?
11 article apply to your situation, could	11 A Like I said, sir, I don't have a
12 you tell me the answer?	12 recollection.
13 A No, sir, I could not.	13 Q Do you remember what hairstyle he has?
14 Q All right. If you will turn the page and	14 A No. No, I do not.
15 look at paragraph 41, do you know who	15 Q So, to the extent the complaint talks
16 Captain Emberton is?	16 about Captain Emberton's alleged role in
17 A No, sir, I do not.	17 the process, that information did not
18 Q Describe him for me.	18 come from you at all?
19 A Describe him? I couldn't.	19 A What's that?
20 Q Is he a black man or a white man?	20 Q The information in here about Captain
21 A I couldn't tell you that. Probably be	21 Emberton did not come from you?
22 black because that's who all the last	22 A Nope, because I told them I did not -- I
23 captains were, were all black. The last	23 could not remember the guy's name.



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1 Q All right. If you will look at paragraph  
2 50, I just want to be clear about one  
3 thing.  
4 It looks like a masculine  
5 reference is being made to the prison  
6 official. Can you tell us whether the  
7 correctional officer that you are talking  
8 about was a male or a female?  
9 A No, sir, I have no recollection. I don't  
10 think it was a female, but like I said, I  
11 have no recollection of that.  
12 Q It could have been a female; you just  
13 don't know?  
14 A No. I would remember if it was a female.  
15 I don't believe it was a female. If it  
16 was, then she would have been a dyke.  
17 She would have been a muscular woman to  
18 look like a man.  
19 Q Can you remember anything peculiar about  
20 this person's appearance?  
21 A No, sir. As I told you, I have no  
22 recollection.  
23 Q How long have you been in the custody of

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1 Q All right. Let me show you --  
2 A The only reason I know that is I watched  
3 them pull a dead body out.  
4 Q Let me show what I have marked as  
5 Defendant's Exhibit Five.  
6 (At which time, the referred-  
7 to photograph was marked as  
8 Defendant's Exhibit No. 5 for  
9 identification.)  
10 Q Do you recognize the uniform that the  
11 individuals in that photograph are  
12 wearing?  
13 A Uh-huh (positive response).  
14 Q What kind of uniforms are those?  
15 A They just look like correctional  
16 officers. Just like those, they had  
17 changed them. But I couldn't tell you  
18 exactly when they changed them.  
19 Q Okay. One last picture, Defendant's  
20 Exhibit Six.  
21 (At which time, the referred-  
22 to photograph was marked as  
23 Defendant's Exhibit No. 6 for

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1 the Alabama Department of Corrections?  
2 A July of -- I think it was July 31st of  
3 2000.  
4 Q So, over 20 years?  
5 A 22 years. It would be about right at 22  
6 years.  
7 Q All right. I am going to show you what I  
8 have marked as Defendant's Exhibit Four.  
9 (At which time, the referred-  
10 to photograph was marked as  
11 Defendant's Exhibit No. 4 for  
12 identification.)  
13 Q Do you recognize the uniform that the  
14 individuals depicted in that photograph  
15 are wearing?  
16 A It just looks like a correctional thing.  
17 Q Are those Alabama Department of  
18 Correction's uniforms?  
19 A They look like it. I couldn't even tell  
20 you right now what they are wearing.  
21 They used to wear a different type. I  
22 think it was a button-up shirt. The old  
23 ones used to be buttoned up.

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1 identification).  
2 Q Do you recognize the uniforms that are  
3 being worn by the individuals in those  
4 photographs?  
5 A It looks like because they got that patch  
6 on the side. They had some that was dark  
7 colored because you have got, like,  
8 classification. You have got some that  
9 was -- I am not -- I don't want to go  
10 over an explanation. But some of them,  
11 they could not do nothing but set in a  
12 cube. I don't understand what they mean  
13 by that, but they said -- I asked before.  
14 I said, why she can't come out. She has  
15 to be escorted out and put back in. The  
16 only thing she does is push the buttons.  
17 I mean, that's my understanding and a  
18 different color. I think that was like  
19 that when I first got here. They had a  
20 different color like that.  
21 Q In your personal experience as an inmate  
22 in the custody of the Department of  
23 Corrections, do you have familiarity with

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1 seeing correctional officers in a uniform  
 2 that looks like the uniform in  
 3 Defendant's Exhibit Six?  
 4 A I believe when I first got here.  
 5 Q Okay. But not since then?  
 6 A My recollection ain't like this because I  
 7 don't keep up with it. But I know they  
 8 have changed uniforms like they changed  
 9 ours from white to this.  
 10 Q Just to be totally clear, not since you  
 11 first got here, have you seen the  
 12 uniforms in Defendant's Exhibit Six?  
 13 A I believe when they executed a guy, my  
 14 window is right out and I can look out  
 15 there when they bring the dead body out.  
 16 And I believe they are wearing that.  
 17 Q Okay. The individual that collected your  
 18 form, what kind of uniform were they  
 19 wearing?  
 20 A I told you I had no recollection of what  
 21 it looked like or what he was wearing or  
 22 anything like that, sir.  
 23 Q So, you can't describe the duty uniform

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1 you say collected your form?  
 2 A I couldn't remember, sir. If I did that,  
 3 I would have remembered the name and what  
 4 he looked like and all that.  
 5 Q All right. If you will turn to paragraph  
 6 45 of Defendant's Exhibit Three.  
 7 A You said 45?  
 8 Q Yes, sir. Did you personally consider  
 9 the election for nitrogen hypoxia a grave  
 10 decision?  
 11 A I don't really know how to answer that.  
 12 I really don't know how to answer that,  
 13 sir. You know, it's my life. And I know  
 14 I didn't want to be stabbed with needles  
 15 and everything like that.  
 16 And then at the time, I would  
 17 have thought it would have been a more  
 18 humane thing because I sort of did it  
 19 myself as it could be like you go to the  
 20 dentist, even though I have never been  
 21 under gas at a dentist. But I've heard  
 22 other people say that you just go under,  
 23 and you come back out. But this one you

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1 that they were wearing?  
 2 A No.  
 3 Q How did you know that the person was a  
 4 Captain?  
 5 A What was the person like that? I didn't  
 6 know it at the time. But afterwards like  
 7 that, they said -- like I said, Bobby  
 8 Waldrop said the captain said he did it.  
 9 And I said, I don't believe so. I said,  
 10 I don't remember him saying he was a  
 11 captain. I just remembered him yelling  
 12 out that you have got to sign these  
 13 forms, and they would have somebody come  
 14 by and pick them back up.  
 15 Q Okay. If you will look at those pictures  
 16 again, Defendant's Exhibits Four, Five  
 17 and Six, do you agree that each type of  
 18 uniform has the officer's last name  
 19 depicted on it?  
 20 A Some of them do. Not everybody. Even  
 21 right now some of them don't have their  
 22 name on it.  
 23 Q Okay. Well, what about the person that

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1 ain't going to come back out of.  
 2 Q What about the part that refers to it as  
 3 a time sensitive and irreversible  
 4 election? Did that weigh on you at all?  
 5 A Well, I don't understand what time  
 6 sensitive and irreversible election  
 7 means. I mean, what's that concerning?  
 8 I mean, can you explain that?  
 9 Q Well, let me ask it a different way.  
 10 What were the things weighing  
 11 on your mind when you say that you  
 12 elected nitrogen hypoxia -- you filled  
 13 that form out?  
 14 A Is that I didn't want needles stuck in  
 15 me.  
 16 Q Okay. Do you have personal knowledge of  
 17 whether a number of death row inmates  
 18 challenged the constitutionality of  
 19 lethal injection in the mid-2000-teens?  
 20 A No, sir. I have no recollection. Like I  
 21 said, I didn't socialize with a lot of  
 22 people. I stayed to myself.  
 23 Q When the Department of Corrections

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1 adopted midazolam as the first drug -- I	1 something because he might say he is gone
2 am sorry.	2 out of town or something. But it's
3 When the Department of	3 usually just once a week.
4 Corrections adopted midazolam as the	4 Q If you had elected nitrogen hypoxia, is
5 first drug in its lethal injection	5 that the type of thing that you would
6 process, did you challenge that as being	6 told him about?
7 unconstitutional?	7 A Probably so. I don't really like to tell
8 A Not that I remember, sir. I have no	8 him stuff like that. He is real
9 recollection.	9 sensitive about that.
10 Q Who is Jeff Carr?	10 Q Okay. Do you have a clear recollection
11 A Jeff Carr, he is my half-brother. Same	11 of whether you told him or not?
12 mother, different dads.	12 A No, sir, I do not.
13 Q How often do you talk to him?	13 Q How did you find out that the State had
14 A I haven't talked to him in a long time.	14 moved to set your execution date?
15 A long time.	15 A Sir?
16 Q Okay. Who do you talk to most? Who do	16 Q How did you find out that the State of
17 you talk to most often?	17 Alabama had moved in the Supreme Court to
18 A Richard Miller.	18 set your execution date?
19 Q Who is that?	19 A Let me see. I can't even tell you that.
20 A My brother. Same mother, same father.	20 I just know, hey, Miller, they are trying
21 Q How often do you talk to him?	21 to set your execution. I think it was
22 A From, like, maybe once a week or	22 legal counsel, but I'm not sure.
23 sometimes, you know, I might skip it or	23 But I mean, like I said, I was
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1 just sitting here. Like I said, I don't	1 Q Are you doing okay, Mr. Miller, on
2 have nothing to do with a lot of people.	2 comfort needs and things like that?
3 And it could come out in the newspaper.	3 A Yeah.
4 We don't even have TV in our room.	4 Q Okay.
5 Q Let me be clear before I ask this. I am	5 (Thereupon, a discussion was
6 not asking you to divulge any legal	6 held off the record.)
7 conversation.	7 Q I am going to play for you an audio file
8 But do you recall whether the	8 that I have marked as Defendant's Exhibit
9 Warden would have told you, your lawyers,	9 Seven.
10 both? I mean, can you kind of help me?	10 (At which time, the referred-
11 A Like I said, I have no recollection.	11 to audio was marked as
12 Q Do you recall when you learned that the	12 Defendant's Exhibit No. 7 for
13 State had moved to set your execution	13 identification).
14 date?	14 MS. HUGGINS: Before you play it,
15 A No. Not the exact date, no, sir.	15 are you going to tell us what
16 Q Did you tell Richard Miller that the	16 the recording is?
17 State had moved to set your execution	17 MR. HOUTS: You know, it's going to
18 date?	18 be easier for him to listen to
19 A If I had found out, I probably would	19 it and then be able to, you
20 have.	20 know, tell me whether he can
21 Q How soon afterward would you have told	21 authenticate it.
22 him?	22 A Do you have the date when it was done?
23 A I have no recollection.	23 Q I do. This will be April the 21st.

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1 A When?  
 2 Q April the 21st of this year.  
 3 A You need these back?  
 4 Q Those are actually the official ones. Do  
 5 you need a -- there you go.  
 6 A You said April?  
 7 Q I am sorry. Yes.  
 8 A You said April?  
 9 Q April the 21st.  
 10 A Okay. That's 2022?  
 11 Q 4/21/22.  
 12 MS. HUGGINS: 4/21 --  
 13 Q Let me pull it up.  
 14 A When was that?  
 15 Q This year.  
 16 A Okay.  
 17 Q Yes. This is 4/21/22.  
 18 A Twenty-one.  
 19 Q Yeah. The 21st of April.  
 20 MS. HUGGINS: Will you tell us the  
 21 phone number? I am assuming --  
 22 Q All right. Do you recognize phone number  
 23 205.479.2618?

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1 Q I said I know that's a very deep  
 2 conversation to listen to. Do you need a  
 3 break?  
 4 A No.  
 5 Q Okay. At any point during that --  
 6 A Louder.  
 7 Q Okay. At any point during that  
 8 discussion, did y'all have a conversation  
 9 about you electing nitrogen hypoxia?  
 10 A No. I would not discuss something like  
 11 that until my legal -- that would be a  
 12 legal thing. I wouldn't be able to talk  
 13 about until after legal counsel, confirm  
 14 with legal counsel. That's something you  
 15 don't say on an open line. That's why if  
 16 you noticed in that thing, I said tell  
 17 her to call the lawyers and that way,  
 18 then, she -- my lawyers could explain to  
 19 my sister what procedural thing to -- all  
 20 death row inmates have when their date is  
 21 set.  
 22 Q Just, yes, I will mark this as  
 23 Defendant's Exhibit Seven and you

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1 A Yes, sir. That's my brother, Richard  
 2 Miller's phone number. That's my  
 3 brother.  
 4 (Audio playing).  
 5 MR. HOUTS: Let me stop.  
 6 BY MR. HOUTS:  
 7 Q Do you recognize the voices on that  
 8 recording?  
 9 A That was my brother, Richard. I've never  
 10 heard myself. I have never heard. I  
 11 sound weird.  
 12 Q It happens to everybody.  
 13 Do you recognize that as being  
 14 the call that you placed to your brother  
 15 after learning your execution date?  
 16 A I have no recollection of exactly saying  
 17 stuff like that. But, yeah, it sounds  
 18 like I would talk to him.  
 19 Q Okay. Let it play on out.  
 20 (Audio playing).  
 21 Q I know that's a deep conversation to  
 22 listen to. Do you need a break?  
 23 A What's that?

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1 identified. But just so if later on  
 2 there needs to be -- you know, that this  
 3 is the disc that I just played for you,  
 4 would you put your initials in that box  
 5 right there, please.  
 6 THE WITNESS: It is all right for me  
 7 to sign it?  
 8 MS. HUGGINS: Yes.  
 9 Q I am just asking you, like, to put  
 10 something where it's clear that this --  
 11 the disc hasn't been swapped out with  
 12 another one, that that's what we listened  
 13 to?  
 14 A Do you want me to, like, initial?  
 15 Q A-E-M, however you normally would do it.  
 16 There you go. Thank you.  
 17 All right. I am going to play  
 18 you a phone call that was also from April  
 19 the 21st to the same phone number.  
 20 A What date was that?  
 21 Q Also April the 21st. It's been marked as  
 22 Defendant's Exhibit Eight.  
 23 (At which time, the referred-

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1 to audio was marked as	1 a piece of paper about using some kind of
2 Defendant's Exhibit No. 8 for	2 gas stuff. I called those lawyers and
3 identification).	3 told them they need to call the Equal
4 (Audio playing).	4 Justice and stuff and the Public
5 A I thought my hearing -- I thought it was	5 Defenders"?
6 my hearing.	6 A Federal Defenders. I meant Federal
7 (Audio playing).	7 Defenders.
8 Q All right. Do you recognize that call	8 Q But I will play it again if you would
9 between yourself and Richard Miller?	9 like. But is that what you indicated to
10 A Yes. I know that's my brother and me.	10 your brother? She can't take down head
11 Q All right. Just so it's fresh on your	11 nods.
12 mind, I want to play that portion that	12 A Oh, yes.
13 starts at the --	13 Q All right. What are the other inmates
14 A Could you speak up, please.	14 that you spoke to?
15 Q I want to play that portion that starts	15 A Bobby Waldrop, Jarrod Taylor and, you
16 at the one minute and 15 second mark to	16 know, Gene Clemmons. I couldn't remember
17 the one minute and 38 second mark just so	17 all the guys that was sitting around that
18 it's fresh on your mind.	18 was telling me that.
19 (Audio playing).	19 Q Okay. Of those three -- Bobby Waldrop,
20 Q All right. Do you agree at the beginning	20 Jarrod Taylor, and Eugene Clemmons --
21 you said -- and I can play it again if	21 were any of them on F1 tier in June of
22 you immediate to -- "Hey, I called those	22 2018?
23 damn lawyers. Some other inmates signed	23 A Not that I have recollection, no.
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1 Q All right. You told them that your	1 lawyers that's working on the case, and
2 lawyer didn't even know what you were	2 he was just the one of the lawyers there
3 talking about. What does that mean?	3 to answer the phone. He said, well, he
4 A The lawyer -- there's many lawyers, legal	4 would have to get with another lawyer.
5 counsel. And the one I talked to was	5 And that's what I meant. It sort of
6 just one.	6 angered me because I'm like, oh, hey.
7 MS. HUGGINS: Objection as to	7 But that means that -- but then
8 privilege.	8 I don't understand that there is other --
9 Q This is a conversation with your brother;	9 they have other clients and lawyers
10 am I correct?	10 working on that. So, they get...
11 A Yes.	11 Q Why would your lawyers need to call the
12 MS. HUGGINS: In terms of the -- so,	12 Equal Justice or Federal Defenders?
13 it's fine to limit it to that.	13 A What's that?
14 But in terms of asking him to	14 MS. HUGGINS: Objection. Form.
15 go beyond this conversation and	15 Q I'll re-ask. Remember, you told your
16 what he said to other people.	16 brother, "I told them they need to call
17 Q You told your brother -- What did you	17 the Equal Justice and stuff and the
18 mean your lawyer didn't know what you	18 Public Defenders."
19 were talking about? What did you mean	19 MS. HUGGINS: Objection. Form.
20 that your lawyer didn't know what you	20 Q Do you recall that?
21 were talking about?	21 A Do I recall what? What that tape just
22 A I meant that lawyers. When I did that, I	22 said?
23 just meant like that. So, I have many	23 Q Yes.

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1 A Yes, I remember what the tape just said.  
 2 Q Why did you tell them they need to call  
 3 will Equal Justice and stuff and the  
 4 Public Defenders?  
 5 MS. HUGGINS: Objection. Privilege.  
 6 Q And you told your brother this. Why did  
 7 you tell your brother you told -- What  
 8 were you communicating to your brother?  
 9 A To let my sister call, and that way she  
 10 can call the lawyers and they can talk on  
 11 a secure line. That's how we talk. We  
 12 talk like that because we know we are  
 13 monitored. You probably should listen to  
 14 a lot of other ones and you will hear  
 15 some stuff.  
 16 But we start kidding around on  
 17 there. But I mean, I can't discuss on an  
 18 open line about --  
 19 Q Yeah, let's follow that up.  
 20 Was your sister involved in  
 21 your election of nitrogen hypoxia?  
 22 A My sister?  
 23 Q Uh-huh (positive response).

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1 MS. HUGGINS: Well, so, you are  
 2 asking it as a speculation, but  
 3 it is not really a speculation.  
 4 You are asking him if you told  
 5 them this, did you intend, and  
 6 that's clearly attorney-client  
 7 privilege communication. You  
 8 are asking whether he waived  
 9 something with his lawyers,  
 10 what communication was between  
 11 he and his lawyer.  
 12 BY MR. HOUTS:  
 13 Q Do you understand that the attorney-  
 14 client privilege belongs to the client,  
 15 to you?  
 16 A What is that, sir?  
 17 Q Do you understand that the attorney-  
 18 client privilege belongs to you?  
 19 A My understanding, yes.  
 20 Q Okay. Just to make sure that we are  
 21 clear.  
 22 A They are not going to go into detail  
 23 about the case. They are just going to

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1 A Not that I have any recollection, no.  
 2 Q But she's having conversations with your  
 3 lawyers about information relating to  
 4 your case?  
 5 A Well, you would have to talk with them.  
 6 That would be between them. I mean, we  
 7 are not going to discuss it on an open  
 8 line. If my lawyers talked to me, that  
 9 would be legal.  
 10 Q Do you allow your lawyers to talk to your  
 11 sister about your legal matters?  
 12 A I let them -- I said I have no problem  
 13 with her letting them know certain  
 14 things, but not everything.  
 15 Q Let me ask you this: If you told your  
 16 lawyers that you made a nitrogen hypoxia  
 17 election, did you intend for that  
 18 communication to remain confidential?  
 19 MS. HUGGINS: Objection. Privilege.  
 20 MR. HOUTS: May I ask what is  
 21 privileged about whether he  
 22 intended it to remain  
 23 confidential?

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1 let them know that I am all right, and  
 2 that whatever that they are on, they are  
 3 on it.  
 4 Q Okay. Take all the time you need to  
 5 consult with your counsel. But in  
 6 response -- Did you tell your lawyers  
 7 that you elected nitrogen hypoxia?  
 8 MS. HUGGINS: Objection. Privilege.  
 9 Q Okay. Is it your intent to assert in  
 10 this deposition that the answer to the  
 11 question I just asked you was intended to  
 12 remain confidential when you transmitted  
 13 it to your counsel?  
 14 MS. HUGGINS: Objection. Privilege.  
 15 I am going to instruct him not  
 16 to answer these questions.  
 17 MR. HOUTS: Okay. I mean, I have  
 18 just got to make it clear that  
 19 when we get there --  
 20 MS. HUGGINS: I understand.  
 21 BY MR. HOUTS:  
 22 Q You do not want any communication about a  
 23 nitrogen hypoxia election made to your



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1 counsel made public?  
 2 MS. HUGGINS: Objection. Privilege.  
 3 Q Have you ever communicated to your  
 4 counsel information about a nitrogen  
 5 hypoxia election that you intended to be  
 6 communicated to a third party?  
 7 MS. HUGGINS: Objection. Privilege.  
 8 Q You said you had different lawyers. When  
 9 you told your brother the lawyer didn't  
 10 know what he was talking about, which  
 11 lawyer was that?  
 12 A That's confidential, client confidential.  
 13 Q Let me ask you about the statement to  
 14 your brother that you told your lawyers  
 15 that they might be able to put a hold on  
 16 that. Was that referring to your  
 17 execution?  
 18 MS. HUGGINS: Objection to the form.  
 19 Q Let me play it for you again just to make  
 20 sure when I ask this question. Again, I  
 21 am starting at one minute and 15 seconds,  
 22 and I'm going to play to approximately  
 23 the one-minute-and-38-second mark.

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1 Q What is treated fairly?  
 2 A I mean, other people signed it like I  
 3 did, and theirs is put on hold. Why am I  
 4 being put out there, and why am I going  
 5 through this right here? Did they go  
 6 through the same thing? Did you talk to  
 7 any of them like you are talking to me?  
 8 Did you question them? Did you question  
 9 Jarrod Taylor? They never found his, but  
 10 did he go through this deposition like  
 11 I'm going through?  
 12 Q Okay. Let me show you what I have marked  
 13 as Exhibit Nine.  
 14 (At which time, the referred-  
 15 to document was marked as  
 16 Defendant's Exhibit No. 9 for  
 17 identification.)  
 18 Q It's a copy of a request for a  
 19 preliminary injunction that was filed  
 20 with the Court where your lawsuit is  
 21 pending. Have you ever seen that many  
 22 document before?  
 23 A Not to my recollection, no. If I did, I

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1 (Audio playing).  
 2 BY MR. HOUTS:  
 3 Q What did you mean by, might be able to  
 4 put some kind of hold on that?  
 5 A That wasn't by my lawyers. That was by  
 6 Bobby Waldrop and them, because they said  
 7 there's was on hold because they had  
 8 signed the same thing like I did.  
 9 Q All right. My question was: Their what?  
 10 A The nitrogen hypoxia thing that everybody  
 11 signed, that everybody was told to sign  
 12 or asked to sign.  
 13 Q But what is it that is on hold?  
 14 A Their execution.  
 15 Q Their execution.  
 16 A Until it's whatever.  
 17 Q So, let me ask you this: Is your purpose  
 18 in this litigation to put a hold on your  
 19 execution or simply to be executed by  
 20 nitrogen hypoxia?  
 21 A I don't really know how to answer that.  
 22 I don't want to die. I just want to be  
 23 treated fairly.

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1 don't remember it. If I did, I don't  
 2 remember it.  
 3 Q Do you know what the purpose of that  
 4 document is?  
 5 A No.  
 6 Q Okay. If you will flip to page 19 at the  
 7 back of that exhibit, do you see the  
 8 conclusion that reads, (as read) "For all  
 9 these reasons, the Court should grant  
 10 Mr. Miller's motion for a preliminary  
 11 injunction, enjoin Defendants from  
 12 executing Mr. Miller via lethal  
 13 injection, and declare that his nitrogen  
 14 hypoxia election be honored."  
 15 Do you see that?  
 16 A Yes, I see that. Yes, I see that.  
 17 Q What does that mean to you?  
 18 A That means I should be treated the same  
 19 way everybody else is being treated.  
 20 Q Okay. And how would that be?  
 21 A Is that they haven't set their dates.  
 22 That they tried to start setting their  
 23 dates. And when they said they signed

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1           them, the Court withdrew their however  
2           whatever it did. That's what Bobby  
3           Waldrop, Jarrod Taylor and Gene Clemmons  
4           and all them, they all said the same  
5           thing, and Barton and all them said the  
6           same thing.  
7        Q    If the Court granted that request and  
8           ordered that you could only be executed  
9           by nitrogen hypoxia on September the  
10          22nd --  
11       A    Can you speak up?  
12       Q    If the Court granted that request and  
13           said that you could only be executed by  
14           nitrogen hypoxia on September 22nd, would  
15           that satisfy you as the Plaintiff in this  
16           case?  
17       A    I don't really know how to answer that  
18           question. I don't want to die. I do  
19           want to be treated fairly.  
20       Q    Okay. But is the purpose of this  
21           litigation to avoid dying or to die by  
22           nitrogen hypoxia instead of lethal  
23           injection?

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1           individually, but the State itself cannot  
2           be sure of anything, any humane way or  
3           nothing. They can't prove a thing unless  
4           they do it their self and come back and  
5           have a séance. And then they can, okay,  
6           give us a thumb up or a thumb down.  
7        Q    So, what do you mean by certified by?  
8           Describe for me what you think the State  
9           needs to do to certify.  
10       A    Well, it's the same thing Ray Hinton, the  
11           evidence that convicted him. It set him  
12           free because when they went to get it, it  
13           disappeared. But if they was going to do  
14           something like this, they would have to  
15           actually prove beyond a doubt that it is  
16           not painful, any one of them, lethal  
17           injection or nitrous -- I keep saying  
18           nitrous. I don't mean to say it like  
19           this, nitrogen hypoxia. I say nitrogen  
20           hypoxia. I believe I am pronouncing it  
21           right -- is safe. They have got to prove  
22           it. And how are they going to prove  
23           that?

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1        A    Is to be treated fairly because the  
2           lawsuit clearly states that I signed the  
3           papers. The State hasn't been able to  
4           prove anything.  
5        Q    So, if the Court agreed that you signed  
6           the papers --  
7        A    I don't understand the question, but he  
8           goes, I don't want to die, I don't want  
9           to be stabbed with needles, I want to be  
10          treated fairly. That's everybody else  
11          being treated fairly.  
12        Q    So, if the Court agrees that you either  
13           signed the paper or probably did and says  
14           that Alabama can only execute you by  
15           nitrogen hypoxia on the 22nd, you are  
16           okay with that?  
17        A    No, not until they have it certified by  
18           an independent counsel -- independent  
19           people. It's like the same thing y'all  
20           did with that lethal injection. That's  
21           why y'all did that hypoxia stuff because  
22           y'all can't be sure of anything. The  
23           State can't be sure of anything. Not you

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1        Q    So, you didn't think it was safe when you  
2           say you elected nitrogen hypoxia?  
3        A    No. It was just an option that they gave  
4           you. And the option at the time I  
5           thought, if it was like nitrous oxide,  
6           that they wouldn't be sticking needles in  
7           me because I don't want needles stuck in  
8           me.  
9        Q    So, if you will look at Defendant's  
10          Exhibit Three and go back to paragraph  
11          45, do you disagree that if you made that  
12          election it was an irreversible election?  
13        A    So, I don't understand that.  
14        Q    You couldn't undo it?  
15        A    No. I didn't understand that, no. I  
16          mean, I know --  
17        Q    So, that didn't play a role in your  
18          decision? Knowing that it couldn't be  
19          undone did not play a role when you say  
20          you made your decision?  
21        A    If I signed it, it kept them from  
22          sticking needles in me? Yes, I would  
23          want it to be irreversible once it's been



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1 proven to be humane and not cause pain.  
 2 But I don't believe y'all have done that  
 3 for anything yet.  
 4 Q Why do you think that nitrogen hypoxia  
 5 would cause pain?  
 6 A Well, it's a gas. I am not a scientific  
 7 person, so I don't know. So, you would  
 8 have to get with professional counsel on  
 9 that. I can just assume.  
 10 Like I said, I just sort of put  
 11 it with dentists, nitrous oxide like  
 12 this. I really don't know because I have  
 13 never been under nitrous oxide or  
 14 nitrogen hypoxia, or however you  
 15 pronounce that.  
 16 Q So, if the Court granted your injunctive  
 17 relief and DOC carried out -- attempted  
 18 to carry out your execution by nitrogen  
 19 hypoxia, you would want to stop that?  
 20 A Well, it's unfair because there's no  
 21 certification. There's people who were  
 22 prior to me whose appeals have run out,  
 23 you know, they signed it like I did. Why

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1 it all at the same time.  
 2 And that means that that  
 3 Captain Emberton, or whatever his name  
 4 is, basically lied on the stand because  
 5 he said he passed them out one day and  
 6 picked them all up in one day. And now  
 7 they are saying that they got another  
 8 form. They signed it and notarized it  
 9 and gave them copies, but they didn't  
 10 come back. And they said, well, we are  
 11 going to copy yours and give you yours  
 12 too. That's the only thing we was  
 13 talking about.  
 14 So, I don't know where he  
 15 stands on stuff or why he signed it. You  
 16 would have to ask him or all the other  
 17 death row inmates who are under the same  
 18 thing and why they are not going through  
 19 the same thing. Why are they not having  
 20 a deposition like I am and being asked  
 21 these same questions and going over any  
 22 phone calls or emails, that they are  
 23 talking to people?

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1 are they not here going through the same  
 2 thing I am doing with the Court Reporter  
 3 recording this. Why did they sign it?  
 4 Did they concur like you are asking me,  
 5 do I concur, why have none of them being  
 6 put through the same process?  
 7 I am not being treated fairly.  
 8 I mean, there are prior guys, like I  
 9 said, who have had their dates set, and  
 10 yet they ain't had to go through this  
 11 deposition like I am doing.  
 12 No, you didn't find Jarrod  
 13 Taylor. I don't see him going through a  
 14 deposition or saying he went through a  
 15 deposition.  
 16 Q So, you have talked to Jarrod Taylor  
 17 about his circumstances, correct?  
 18 A No. He just told me that, you know, that  
 19 he had his notarized. He just said that  
 20 they notarized his and that was it. And  
 21 I was wanting to try to how he did that.  
 22 And he said you would have to ask the  
 23 people up front, which I thought they did

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1 Q As it relates to the allegations in your  
 2 lawsuit, what is your understanding of  
 3 why Jarrod Taylor didn't have to go  
 4 through all this?  
 5 A I have no idea.  
 6 Q You have no idea?  
 7 A No.  
 8 Q Is it still your position that you asked  
 9 for and completed a form for nitrogen  
 10 hypoxia in June of 2018?  
 11 A If that was when they passed it out, yes.  
 12 I had asked for a copy and notarization  
 13 of everything.  
 14 Q Okay. To your knowledge, did all the  
 15 forms get passed out and collected on the  
 16 same day?  
 17 A Like I tell you, sir, I am in a cell. I  
 18 don't know no other tiers. I know that  
 19 they walked passed my cell back there and  
 20 went upstairs and then left.  
 21 Did they go to other tiers? I  
 22 do not know. I could not tell you. I am  
 23 not Stretch Armstrong. I can't stretch

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1 my neck out there and see.  
 2 Q You absolutely don't know who else in  
 3 your tier elected?  
 4 A Like I said, I mean -- Like I said, I  
 5 don't socialize with people.  
 6 Q All right.  
 7 A You would have to ask them, put them on  
 8 the same thing that you are doing to me.  
 9 Q And you have asked the Federal Court to  
 10 make the State of Alabama honor your  
 11 nitrogen hypoxia election? Is that still  
 12 your position, that you want it honored?  
 13 A I would want them to honor me like they  
 14 are doing everybody else's. They put  
 15 everything else on hold.  
 16 Q Let me ask you this --  
 17 A And I have a --  
 18 Q If a correctional officer came to try to  
 19 just, as a planning precaution, fit a  
 20 mask to your face to make sure there were  
 21 no issues, is that something that you  
 22 would be cooperative with, or is that  
 23 something that would upset you?

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1 A Just make sure you are loud.  
 2 Q Yes, sir. Do you know whether Matthew  
 3 Reeves elected nitrogen hypoxia or not?  
 4 A No, sir, I do not.  
 5 Q What about Willie Smith?  
 6 A No, I do not.  
 7 Q Your complaint alleges that the State has  
 8 previously set an execution date for  
 9 others, plural, and then had to withdraw  
 10 it. Who are the other --  
 11 MS. HUGGINS: Objection to the form.  
 12 MR. HOUTS: Okay. That's fine.  
 13 Q Who are the other inmates that you know  
 14 of that have had to have execution  
 15 motions withdrawn?  
 16 A Well, I believe Bobby Waldrop, you know,  
 17 Jarrod Taylor, Gene Clemmons. I believe  
 18 they tried to set his date. And there's  
 19 some other guys. I can't recall their  
 20 names right off. And they got nicknames.  
 21 I can't recall their whole names.  
 22 I didn't have a list. But  
 23 those are the ones I've known because

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1 A It could be something that would upset  
 2 me.  
 3 Q Why is that?  
 4 A Because why ain't nobody else going  
 5 through the same thing? Why are people  
 6 prior to me, who signed it like I did,  
 7 are people who they didn't find theirs?  
 8 As in Jarrod Taylor, they never found his  
 9 or some other guys they never found. Why  
 10 they are not doing this and you asking  
 11 the same question of them? I want to be  
 12 treated fairly. I want the courts to  
 13 treat me fairly. I want the State.  
 14 Q As the Plaintiff, you would want, before  
 15 the Court orders us to do nitrogen  
 16 hypoxia, to also have to explain why we  
 17 are ready to perform your execution but  
 18 not everybody else's?  
 19 A That's right.  
 20 Q Okay. I think I asked -- If I asked you  
 21 this earlier, I am going to apologize in  
 22 advance, but I need to make sure that I  
 23 didn't miss anything.

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1 they all came to me when they set my  
 2 date.  
 3 Q Why do you believe Bobby Waldrop had his  
 4 date set and the State had to withdraw  
 5 it?  
 6 A Because he told me.  
 7 Q Why do you believe Eugene Clemmons had  
 8 his date set and they had to withdraw it?  
 9 A He told me.  
 10 Q No other basis than what you were told?  
 11 A No other basis than what I was told.  
 12 Q Since we looked at these photographs  
 13 earlier, has anything jogged your memory  
 14 that would allow you to remember anything  
 15 about this correctional officer?  
 16 A No, sir. I would have done told you.  
 17 Q You still can't describe Captain  
 18 Emberidge (sic) for me?  
 19 A (No verbal response).  
 20 Q I got an email from another one of your  
 21 lawyers today saying that you believe  
 22 that you did a grievance or a request  
 23 form in 2018. Can you tell me about

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1 that?  
 2 A What lawyer was that?  
 3 Q Mr. Specter.  
 4 A Said that I --  
 5 Q That you believed that you made an inmate  
 6 request form in 2018. And can you tell  
 7 me about that?  
 8 A It's a -- It would be a small form. It's  
 9 a thing that says, warden, captain,  
 10 whatever and all that, business office,  
 11 and all that, and you just write your  
 12 complaint. And if I did, that's what I  
 13 would have wrote, that I did not get my  
 14 copy, nor did I get a notarized copy of  
 15 what I signed. That's what I would have  
 16 sent up front.  
 17 Q You said "if I did."  
 18 A Yes.  
 19 Q "What I would have."  
 20 A Yes.  
 21 Q Why are you using those kinds of words?  
 22 A Because I can't have no recollection. I  
 23 don't have a recollection of actually

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1 Q I am sorry. The making of the request  
 2 form, if you did that, you think it would  
 3 have been in 2018?  
 4 A Yes.  
 5 Q Do you know when in 2018 you think it  
 6 would have been?  
 7 A It would have been around the time I  
 8 signed the thing or whenever they were  
 9 supposed to bring us back a copy. The  
 10 exact dates, no, I could not. I have no  
 11 recollection of that.  
 12 Q When you were sentenced to death  
 13 originally, your original death sentence  
 14 was electrocution, correct?  
 15 A Yes.  
 16 Q Were you on death row when Alabama  
 17 altered its method of execution to lethal  
 18 injection?  
 19 A Yes.  
 20 Q Do you recall that process?  
 21 A I just recalled that they was going to --  
 22 because they said like this and they said  
 23 it was supposed to have been humane.

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1 doing it, but I do do that whenever I  
 2 file complaints, and they never send me  
 3 my copies back. They never sent nothing  
 4 back when I send something up there. I  
 5 can make a carbon copy. I can go check  
 6 my records, what I've got, to see if I  
 7 have a carbon copy. But you could say I  
 8 just made that up, but I don't believe I  
 9 have.  
 10 Q But you don't have a recollection of  
 11 doing it?  
 12 A No, sir.  
 13 Q If you had done it and gotten no  
 14 response, is that something you would  
 15 talk to your lawyers about?  
 16 A Yes.  
 17 Q I want to make sure I am correct. You  
 18 think, if you did, it would have been in  
 19 2018?  
 20 A I would have no recollection, sir. If  
 21 they are not there, if I would have  
 22 called them, that would have been client  
 23 privilege.

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1 There were still questions about the  
 2 lethal injection, that that's what they  
 3 used to kill dogs. And that there was --  
 4 that's all I have recollection of.  
 5 Q What about the process of saying you want  
 6 lethal injection rather than  
 7 electrocution?  
 8 A I mean, I don't want to be electrocuted,  
 9 you know.  
 10 Q So, what did you do?  
 11 A I didn't do anything. It was  
 12 automatically. They dropped the chair,  
 13 and we are going to start killing people  
 14 with --  
 15 Q All right. So, this was a different  
 16 process used back then?  
 17 A Yes, a whole different process.  
 18 Q Okay.  
 19 A I think there might have been some kind  
 20 of thing where if you wanted the electric  
 21 chair, you could elect it like that. And  
 22 I said, who in the Hell is going to elect  
 23 that?

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1 Q All right.  
 2 A But I have no recollection. But I know  
 3 that it was mandatory, or whatever.  
 4 Q So, what did you think when you asked for  
 5 a copy and were refused a copy?  
 6 A That it was wrong.  
 7 Q And if you filed a request form and  
 8 didn't get a response, how would you have  
 9 felt about that?  
 10 A About fraud.  
 11 Q Why?  
 12 A Because I have a right to be responded to  
 13 and being treated fairly. And they have  
 14 to respond and say why did they not give  
 15 me a copy or notarized mine and other  
 16 individuals had theirs.  
 17 Q It would have made you want to do  
 18 something about it; is that right?  
 19 A Well, yes.  
 20 Q Okay. I appreciate your time in making  
 21 arrangements to come down here. If y'all  
 22 want to do your own --  
 23 MS. HUGGINS: Can I have quick

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1 A When they condemned it?  
 2 Q Yes.  
 3 A Like, finally condemned it after all the  
 4 complaints that was filed?  
 5 Q Uh-huh (positive response).  
 6 A I don't remember the exact date.  
 7 Q Okay. Do you remember when Terry Raybon  
 8 became the warden of Holman Prison?  
 9 A No.  
 10 MR. HOUTS: Okay. That's all I  
 11 have.  
 12 MS. HUGGINS: I have nothing else.  
 13 Thank you.  
 14  
 15 (Deposition concluded at  
 16 approximately 2:49 p.m.)  
 17 \* \* \* \* \*  
 18  
 19 FURTHER DEPONENT SAITH NOT  
 20  
 21  
 22  
 23

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1 question?  
 2 MR. HOUTS: Yeah.  
 3 CROSS-EXAMINATION  
 4 BY MS. HUGGINS:  
 5 Q I have a question about Defendant's  
 6 Exhibit 11. There's a notation on the  
 7 second line that says you were  
 8 transferred to Holman Prison on May 13th,  
 9 2021. Is it accurate that you were  
 10 transferred to Holman Prison on May 13th,  
 11 2021?  
 12 A Uh-uh (negative response).  
 13 Q Have you been at Holman Prison since  
 14 2000?  
 15 A It's July -- I think it was July 31st,  
 16 2000.  
 17 MS. HUGGINS: I have nothing else.  
 18 I just wanted to clear that up.  
 19 REDIRECT EXAMINATION  
 20 BY MR. HOUTS:  
 21 Q Well, do you recall when y'all were moved  
 22 out of the building that nobody can be  
 23 housed in anymore, the old death row?


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1 REPORTER'S CERTIFICATE  
 2 STATE OF ALABAMA)  
 3 TALLAPOOSA COUNTY)  
 4 I, Jeana S. Boggs, Certified Professional  
 5 Reporter and Notary Public in and for the State of  
 6 Alabama at Large, do hereby certify on Wednesday,  
 7 September 7th, 2022, that pursuant to notice and  
 8 stipulation on behalf of the Defendants, I reported  
 9 the deposition of ALAN EUGENE MILLER, who was first  
 10 duly sworn by me to speak the truth, the whole  
 11 truth, and nothing but the truth, in the matter of  
 12 ALAN EUGENE MILLER, Plaintiff, versus JOHN Q. HAMM,  
 13 in his official capacity as Commissioner, Alabama  
 14 Department of Corrections; TERRY RAYBON, in his  
 15 official capacity as Warden, Holman Correctional  
 16 Facility; STEVE MARSHALL, in his official capacity  
 17 as Attorney General, State of Alabama, Defendants,  
 18 Case Action No. 22-cv-00506, now pending in the  
 19 United States District Court for the Middle District  
 20 of Alabama; that the foregoing colloquies,  
 21 statements, questions and answers thereto were  
 22 reduced to 95 typewritten pages under my direction  
 23 and supervision; that the deposition is a true and

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1 accurate transcription of the testimony/evidence of  
 2 the examination of said witness by counsel for the  
 3 parties set out herein; that the reading and signing  
 4 of said deposition was not waived by witness and  
 5 counsel for the parties.  
 6 I further certify that I am neither of  
 7 relative, employee, attorney or counsel of any of  
 8 the parties, nor am I a relative or employee of such  
 9 attorney or counsel, nor am I financially interested  
 10 in the results thereof. All rates charged are usual  
 11 and customary.  
 12 I further certify that I am duly licensed  
 13 by the Alabama Board of Court Reporting as a  
 14 Certified Court Reporter as evidenced by the ABCR  
 15 number following my name found below.  
 16 This the 8th day of September, 2022, in  
 17 the year of our Lord.  
 18   
 19 Jeana S. Boggs, CCR  
 ACCR NO. 7, Exp 9/30/2022  
 20 Certified Court Reporter and  
 Notary Public  
 Commission expires: 8/9/2022  
 21  
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1 ERRATA SHEET  
 2 I, ALAN EUGENE MILLER, the witness herein,  
 have read the transcript of my testimony and the  
 3 same is true and correct, to the best of my  
 knowledge, with the exception of the following  
 4 changes noted below, if any:  
 5 Page / Line / Change / Reason  
 6 \_\_\_\_\_  
 7 \_\_\_\_\_  
 8 \_\_\_\_\_  
 9 \_\_\_\_\_  
 10 \_\_\_\_\_  
 11 \_\_\_\_\_  
 12 \_\_\_\_\_  
 13 \_\_\_\_\_  
 14 \_\_\_\_\_  
 15 \_\_\_\_\_  
 16 \_\_\_\_\_  
 17 ALAN EUGENE MILLER  
 18 Sworn to and subscribed before me,  
 this the \_\_\_\_ day of \_\_\_\_\_, 2022.  
 19 \_\_\_\_\_  
 20 \_\_\_\_\_  
 21 Notary Public  
 My commission expires: \_\_\_\_\_  
 22  
 23

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# EXHIBIT

# B

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**From:** Arfa, Meredith A  
**Sent:** Tuesday, July 3, 2018 11:15 AM  
**To:** GRP-TAYLOR  
**Subject:** Signed Method of Execution Election Form  
**Attachments:** Signed Method of Election.pdf

Emily/Noah: Please add the attached method of execution election form to CaseNotes and the M-Drive. Thanks!

We sent Jarrod two copies of this form; he signed both and provided one to the warden and returned the other to me.

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ELECTION PURSUANT TO ACT NO. 2018-353

Pursuant to Act No. 2018-353, if I am to be executed, I elect, subject to the objections below, among others, that it be by nitrogen hypoxia rather than by lethal injection.

I have made legal challenges to the constitutionality of the death penalty and to execution by lethal injection, and I maintain that both are unconstitutional. Furthermore, it is unconstitutional to require a person to choose between execution by lethal injection and execution by nitrogen hypoxia in the absence of relevant information regarding execution by nitrogen hypoxia and the protocol by which it will be administered. Despite these reservations, I am making this election because I understand that Act No. 2018-353 requires a decision to be made at this time.

This election is not intended to affect the status of any challenge(s) (current or future) to my convictions or sentences, nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by any method, including by nitrogen hypoxia. Nor is this election intended to waive any right to revoke my election or challenge whether the election was knowing and voluntary in light of the circumstances under which it is being made.

Dated this 28~~th~~ day of June, 2018.

Jarrod Taylor 7638  
Name / Inmate Number

Jarrod Taylor  
Signature

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Pursuant to Act No. 2018-353, if I am to be executed, I elect, subject to the objections below, among others, that it be by nitrogen hypoxia rather than by lethal injection.

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Dated this 28~~th~~ day of June, 2018.

Jareed Taylor 7638  
Name / Inmate Number

Jareed Taylor  
Signature

**From:** Arfa, Meredith A  
**Sent:** Wednesday, June 27, 2018 6:38 PM  
**To:** Arfa, Meredith A  
**Subject:** Scanned Document: Ltr to Jarrod.pdf  
**Attachments:** Ltr to Jarrod.pdf

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June 27, 2018

By Facsimile and Federal Express

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Holman Correctional Facility  
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Atmore, AL 36502

**ATTORNEY-CLIENT COMMUNICATION**  
**PRIVILEGED AND CONFIDENTIAL**

Dear Jarrod:

Enclosed please find a document that we have drafted. We would like to discuss with you the advantages and disadvantages of signing it. We have enclosed two copies of the document so that, if you ultimately decide to sign it, you can send one signed copy to the warden and return the other signed copy to us in the enclosed Federal Express envelope.

We look forward to speaking to you tomorrow at 2:30 p.m. and sharing our advice at that time.

Best Regards,

*Meredith A. Arfa*  
Meredith A. Arfa

Enclosures

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TRACEY A. ZACCONE  
TAURIE M. ZEITZER  
T. ROBERT ZOCHOWSKI, JR.

\*NOT ADMITTED TO THE NEW YORK BAR

ELECTION PURSUANT TO ACT NO. 2018-353

Pursuant to Act No. 2018-353, if I am to be executed, I elect, subject to the objections below, among others, that it be by nitrogen hypoxia rather than by lethal injection.

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Dated this \_\_\_\_ day of June, 2018.

---

Name / Inmate Number

---

Signature



ELECTION PURSUANT TO ACT NO. 2018-353

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Dated this \_\_\_\_ day of June, 2018.

---

Name / Inmate Number

---

Signature

---

**From:** Arfa, Meredith A  
**Sent:** Thursday, June 28, 2018 10:02 AM  
**To:** 097142-00001 CaseNotes  
**Subject:** FW: Fax Document: Fax Ms. Jennifer Parker  
**Attachments:** Fax Ms. Jennifer Parker.tif; Fax Confirmation.pdf

Fax to Jarrod enclosing election form. Three copies, rather than two copies, were faxed inadvertently.

Meredith A. Arfa | Associate  
Paul, Weiss, Rifkind, Wharton & Garrison LLP  
1285 Avenue of the Americas | New York, NY 10019-6064  
+1 212 373 3214 (Direct Phone) | +1 212 492 0214 (Direct Fax)  
marfa@paulweiss.com | <http://www.paulweiss.com>

-----Original Message-----

From: Lexmark Scanner  
Sent: Thursday, June 28, 2018 9:58 AM  
To: Arfa, Meredith A <marfa@paulweiss.com>  
Subject: Fax Document: Fax Ms. Jennifer Parker

Here are the results of your last fax session:

Number of Pages: 5  
Client/Matter: 097142 00001  
Scanned From: Lexmark Scanner (10.34.101.11)

Successfully Sent To:  
Manual Entry at (251) 368-8917

# Transmission Log

PAUL WEISS Thursday, 2018-06-28 09:58 212 3732819

Date	Time	Type	Job #	Length	Speed	Fax Name/Number	Pgs	Status
2018-06-28	09:55	DRVR	00601	2:06	14400	9,12513688917	5	OK -- V.17 BM31

PAUL, WEISS RIFKIND, WHARTON & GARRISON LLP  
 1285 AVENUE OF THE AMERICAS NEW YORK NY 10019 3064 (212) 373 3300

**FAX COVER SHEET**

FROM Meredith A. Aita DATE June 28 2018  
 RETURN FAX NUMBER (212) 492 0214 TOTAL NUMBER OF PAGES 4 (Including Cover Sheet)

NAME	FIRM/COMPANY	FAX NO. (LIST WITH COUNTRY)	TIME SENT
Attn: Ms Jennifer Parker	Holman State Prison	251 368-8917	

If transmission is incomplete please call (212) 373-3211 Operator

RETURN ORIGINAL TO  SENDER  RECORDS

COMMENTS

Ms Parker

The attached is an attorney-client communication and is privileged and confidential. Please deliver to Jarrod Taylor (Z-638) as early today as possible as it concerns a time-sensitive legal issue.

Thank you  
 Meredith Aita  
 Counsel for Jarrod Taylor

This message is intended only for the use of the Addressee and may contain information that is privileged and confidential. If you are not the intended recipient, you are hereby notified that any dissemination of this communication is strictly prohibited. If you have received this communication in error, please erase all copies of the message and its attachments and notify us immediately.

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**FAX COVER SHEET**

FROM: Meredith A. Arfa

DATE: June 28, 2018

RETURN FAX NUMBER: (212) 492 0214

TOTAL NUMBER OF PAGES: 4 (Including Cover Sheet)

NAME	FIRM/COMPANY	FAX NO. (LIST ALT. WHERE POSSIBLE)	TIME SENT
Attn: Ms. Jennifer Parker	Holman State Prison	251-368-8917	

If transmission is incomplete, please call: (212) 373-3214 Operator: \_\_\_\_\_

RETURN ORIGINAL TO:  SENDER  RECORDS

COMMENTS:

Ms. Parker,

The attached is an **attorney-client communication and is privileged and confidential**. Please deliver to **Jarrold Taylor (Z-638)** as early today as possible as it concerns a time-sensitive legal issue.

Thank you,  
Meredith Arfa  
Counsel for Jarrold Taylor

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TAURIE M. ZEITZER  
T. ROBERT ZOCZOWSKI, JR.

\*NOT ADMITTED TO THE NEW YORK BAR

June 27, 2018

By Facsimile and Federal Express

Jarrold Taylor Z-638  
Holman Correctional Facility  
866 Ross Road  
Atmore, AL 36502

**ATTORNEY-CLIENT COMMUNICATION**  
**PRIVILEGED AND CONFIDENTIAL**

Dear Jarrod:

Enclosed please find a document that we have drafted. We would like to discuss with you the advantages and disadvantages of signing it. We have enclosed two copies of the document so that, if you ultimately decide to sign it, you can send one signed copy to the warden and return the other signed copy to us in the enclosed Federal Express envelope.

We look forward to speaking to you tomorrow at 2:30 p.m. and sharing our advice at that time.

Best Regards,

*Meredith A. Arfa*  
Meredith A. Arfa

Enclosures

ELECTION PURSUANT TO ACT NO. 2018-353

Pursuant to Act No. 2018-353, if I am to be executed, I elect, subject to the objections below, among others, that it be by nitrogen hypoxia rather than by lethal injection.

I have made legal challenges to the constitutionality of the death penalty and to execution by lethal injection, and I maintain that both are unconstitutional. Furthermore, it is unconstitutional to require a person to choose between execution by lethal injection and execution by nitrogen hypoxia in the absence of relevant information regarding execution by nitrogen hypoxia and the protocol by which it will be administered. Despite these reservations, I am making this election because I understand that Act No. 2018-353 requires a decision to be made at this time.

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Dated this \_\_\_\_ day of June, 2018.

---

Name / Inmate Number

---

Signature

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Dated this \_\_\_\_ day of June, 2018.

\_\_\_\_\_  
Name / Inmate Number

\_\_\_\_\_  
Signature

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Dated this \_\_\_\_ day of June, 2018.

\_\_\_\_\_  
Name / Inmate Number

\_\_\_\_\_  
Signature



**From:** Arfa, Meredith A  
**Sent:** Thursday, June 28, 2018 1:07 PM  
**To:** 097142-00001 CaseNotes  
**Subject:** FW: FedEx Shipment 781615572690 Delivered

Letter to Jarrod re method of execution election.

**Meredith A. Arfa** | Associate  
**Paul, Weiss, Rifkind, Wharton & Garrison LLP**  
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**From:** TrackingUpdates@fedex.com  
**Sent:** Thursday, June 28, 2018 10:44 AM  
**To:** Arfa, Meredith A  
**Subject:** FedEx Shipment 781615572690 Delivered

## Your package has been delivered

Tracking # 781615572690

Ship date:  
Wed, 6/27/2018

**Meredith Arfa**  
Paul Weiss LLP  
New York, NY 10019  
US



Delivery date:  
Thu, 6/28/2018 9:40 am

**Mr. Jarrod Taylor**  
Z-638  
3700 HOLMAN  
ATMORE, AL 36503  
US



### Personalized Message

PSShip eMail Notification

### Shipment Facts

Our records indicate that the following package has been delivered.


**Tracking number:** 781615572690  
**Status:** Delivered: 06/28/2018 09:40  
AM Signed for By:  
J.HOLENBECK  
**Reference:** 097142.0000106136  
**Signed for by:** J.HOLENBECK

**Delivery location:** ATMORE, AL  
**Delivered to:** Receptionist/Front Desk  
**Service type:** FedEx First Overnight  
**Packaging type:** FedEx Envelope  
**Number of pieces:** 1  
**Weight:** 0.50 lb.  
**Special handling/Services:** Adult Signature Required  
Deliver Weekday  
**Standard transit:** 6/28/2018 by 2:00 pm

---

**This tracking update has been requested by:**

**Company name:** Paul Weiss LLP  
**Name:** Meredith Arfa  
**Email:** [MArfa@paulweiss.com](mailto:MArfa@paulweiss.com)

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Thank you for your business.

---

**From:** Lerer, Justin  
**Sent:** Thursday, June 28, 2018 5:02 PM  
**To:** GRP-TAYLOR  
**Subject:** Call with Jarrod

To bring everyone up to speed, earlier this afternoon, Meredith and I spoke to Jarrod about his options regarding whether to elect that he be executed by nitrogen hypoxia under Alabama Act No. 2018-353. For those who have not been involved with this issue, that Alabama act gives Jarrod until tomorrow (or possibly Monday, depending on how you count) to choose execution by nitrogen hypoxia instead of execution by lethal injection. We are still in court in the 11<sup>th</sup> Circuit, but Alabama law has set this horrible deadline.

Meredith advised Jarrod in detail about the risks and advantages of choosing the nitrogen method or staying with lethal injection, and delivered our recommendation that he elect nitrogen hypoxia. Jarrod was well-advised and decided he would choose nitrogen hypoxia.

Most people will never be involved in such a tough conversation, but Meredith did a great job.

Jarrod has not yet received our election form. He will call us when he receives it or we will speak again tomorrow at 1:30 ET, if he has not.

**Justin Lerer** | Counsel  
**Paul, Weiss, Rifkind, Wharton & Garrison LLP**  
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---

**From:** Arfa, Meredith A  
**Sent:** Thursday, June 28, 2018 6:17 PM  
**To:** Lerer, Justin; GRP-TAYLOR  
**Subject:** RE: Call with Jarrod

Jarrold just spoke with my admin. He has received and signed two copies of the election form.

**Meredith A. Arfa** | Associate  
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**Justin Lerer** | Counsel  
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---

**From:** Arfa, Meredith A  
**Sent:** Friday, June 29, 2018 4:03 PM  
**To:** Lerer, Justin; GRP-TAYLOR  
**Subject:** RE: Call with Jarrod  
**Attachments:** 12164544\_1.docx

I spoke with Jarrod earlier. He confirmed that he received and signed two copies of the election form we sent, and that this morning he gave one signed copy to Lieutenant Franklin to deliver to the warden. Jarrod sent the other signed copy back to me.

In an abundance of caution, I've prepared the attached memo for our files, memorializing the information Jarrod provided during today's call. Emily/Noah: Please file. Thanks!

**Meredith A. Arfa** | Associate  
**Paul, Weiss, Rifkind, Wharton & Garrison LLP**  
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**Meredith A. Arfa** | Associate  
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**From:** Lerer, Justin  
**Sent:** Thursday, June 28, 2018 5:02 PM  
**To:** GRP-TAYLOR <[grp-taylor@paulweiss.com](mailto:grp-taylor@paulweiss.com)>  
**Subject:** Call with Jarrod

To bring everyone up to speed, earlier this afternoon, Meredith and I spoke to Jarrod about his options regarding whether to elect that he be executed by nitrogen hypoxia under Alabama Act No. 2018-353. For those who have not been involved with this issue, that Alabama act gives Jarrod until tomorrow (or possibly Monday, depending on how you count) to choose execution by nitrogen hypoxia instead of execution by lethal injection. We are still in court in the 11<sup>th</sup> Circuit, but Alabama law has set this horrible deadline.

Meredith advised Jarrod in detail about the risks and advantages of choosing the nitrogen method or staying with lethal injection, and delivered our recommendation that he elect nitrogen hypoxia. Jarrod was well-advised and decided he would choose nitrogen hypoxia.

Most people will never be involved in such a tough conversation, but Meredith did a great job.

Jarrod has not yet received our election form. He will call us when he receives it or we will speak again tomorrow at 1:30 ET, if he has not.

**Justin Lerer** | Counsel

**Paul, Weiss, Rifkind, Wharton & Garrison LLP**

1285 Avenue of the Americas | New York, NY 10019-6064

+1 (212) 373-3766 (Direct Phone) | +1 212 492 0766 (Direct Fax)

[jlerer@paulweiss.com](mailto:jlerer@paulweiss.com) | [www.paulweiss.com](http://www.paulweiss.com)



Jarrold confirmed that he read the election form and that it looked fine to him; he commented that he would not have signed it otherwise. Jarrold also said that he had no questions about this issue or any of the information Justin and I conveyed during yesterday's call.


M.A.A.



7/30/2019

Track your package or shipment with FedEx Tracking



781618195368 



Delivered  
Tuesday 7/03/2018 at 9:51 am



**DELIVERED**

Signed for by: Y.YAWW

**GET STATUS UPDATES**  
**OBTAIN PROOF OF DELIVERY**

**FROM**  
NEW YORK, NY US

**TO**  
NEW YORK, NY US


**Shipment Facts**

**TRACKING NUMBER**  
781618195368

**SERVICE**  
FedEx Priority Overnight

**SHIPPER REFERENCE**  
097142.0000106136

**SPECIAL HANDLING SECTION**  
Deliver Weekday, No Signature  
Required

**SHIP DATE**  
  
Mon 7/02/2018

**ACTUAL DELIVERY**  
Tue 7/03/2018 9:51 am

**Travel History**

Local Scan Time 

Tuesday, 7/03/2018  
9:51 am      NEW YORK, NY      Delivered

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**From:** Arfa, Meredith A  
**Sent:** Tuesday, July 3, 2018 11:07 AM  
**To:** Arfa, Meredith A  
**Subject:** Scanned Document: Signed Method of Election.pdf  
**Attachments:** Signed Method of Election.pdf

The following attachment has been scanned and sent for distribution:

Description: Signed Method of Election  
Created By: 06136  
Client/Matter: 097142 00001  
Scanned From: Lexmark Scanner (10.34.101.11)

ELECTION PURSUANT TO ACT NO. 2018-353

Pursuant to Act No. 2018-353, if I am to be executed, I elect, subject to the objections below, among others, that it be by nitrogen hypoxia rather than by lethal injection.

I have made legal challenges to the constitutionality of the death penalty and to execution by lethal injection, and I maintain that both are unconstitutional. Furthermore, it is unconstitutional to require a person to choose between execution by lethal injection and execution by nitrogen hypoxia in the absence of relevant information regarding execution by nitrogen hypoxia and the protocol by which it will be administered. Despite these reservations, I am making this election because I understand that Act No. 2018-353 requires a decision to be made at this time.

This election is not intended to affect the status of any challenge(s) (current or future) to my convictions or sentences, nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by any method, including by nitrogen hypoxia. Nor is this election intended to waive any right to revoke my election or challenge whether the election was knowing and voluntary in light of the circumstances under which it is being made.

Dated this ~~28<sup>th</sup>~~ day of June, 2018.

Jareed Taylor Z638  
Name / Inmate Number

Jareed Taylor  
Signature

## **APPENDIX E**

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

ALAN EUGENE MILLER,

*Plaintiff,*

v.

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

*Defendants.*

Civil Action.: 2:22-cv-00506-RAH

**CAPITAL CASE**

**SCHEDULED FOR EXECUTION ON  
SEPTEMBER 22, 2022**

**PLAINTIFF'S POST-HEARING EVIDENTIARY SUBMISSION**

Pursuant to the Court's instructions at the September 12, 2022 evidentiary hearing on Plaintiff's Motion for Preliminary Injunction to Enjoin Defendants from Executing Mr. Miller Via Lethal Injection (Dkt. 28), Plaintiff Alan Eugene Miller hereby provides the following submissions:

**I. PLAINTIFF'S HEARING EXHIBITS**

<b>Exhibit No.</b>	<b>Date</b>	<b>Description</b>	<b>Appendix No.</b>
1	5/10/2021	Affidavit of Alan Eugene Miller	AM1983_0001
2	5/27/2022	State's Response to Miller's Objection to State's Motion to Set an Execution Date, <i>Miller v. State</i> , No. 1040564 (S. Ct. Ala.)	AM1983_0004
3	7/18/2022	Order, <i>Miller v. State</i> , No. 1040564 (S. Ct. Ala.)	AM1983_0012
4	9/9/2022	Defendant's Response to Plaintiff's Request for Admission (Doc. 32-3)	AM1983_0014
5	4/2019	State of Alabama Execution Procedures	AM1983_0023

<b>Exhibit No.</b>	<b>Date</b>	<b>Description</b>	<b>Appendix No.</b>
6	1/27/2022	Alabama Attorney General Steve Marshall Statement on the Execution of Murderer Matthew Reeves	AM1983_0040
7	7/28/2022	Attorney General Steve Marshall Statement on the Execution of Murderer Joe James	AM1983_0041
8	6/29/2018	Calvin Stallworth Election to be Executed by Nitrogen Hypoxia	AM1983_0043
9	9/8/2021	Order, <i>Smith v. Dunn</i> , No. 19-cv-927 (M.D. Ala.)	AM1983_0045
10	1/31/2019	Affidavit of Captain Jeff Emberton	AM1983_0048
11	2/14/2008	Testimony of Catherin Boyer, <i>State v. Miller</i> , No. CC-99-762.60 (Cir. Ct., Shelby Cnty. Ala.)	AM1983_0050
12	8/2/219	State of Alabama's Motion to Withdraw Motion to Set an Execution Date, <i>Taylor v. State</i> , No. 1991307 (S. Ct. Ala.)	AM1983_0090
13	5/26/2021	Transcript of Deposition of Cynthia Stewart, <i>Smith v. Dunn</i> , No. 19-cv-927 (M.D. Ala.)	AM1983_0093
14	5/24/2021	Transcript of Deposition of Jeff Emberton, <i>Smith v. Dunn</i> , No. 19-cv-927 (M.D. Ala.)	AM1983_0215
15	7/19/2021	Transcript of Deposition of Terry Raybon, <i>Smith v. Dunn</i> , No. 19-cv-927 (M.D. Ala.)	AM1983_0307
16	9/9/2021	Transcript of Deposition of Jeff Emberton, <i>Smith v. Dunn</i> , No. 19-cv-927 (M.D. Ala.)	AM1983_0396
17	7/9/2021	Transcript of Deposition of Jennifer Parker, <i>Smith v. Dunn</i> , No. 19-cv-927 (M.D. Ala.)	AM1983_0415
18	12/9/2021	Testimony of Jeff Emberton, Excerpt of Transcript of Motion Hearing, <i>Reeves v. Dunn</i> , No. 20-cv-27 (M.D. Ala.)	AM1983_0436
19	12/9/2021	Transcript of Motion Hearing, <i>Reeves v. Dunn</i> , No. 20-cv-27 (M.D. Ala.)	AM1983_0455

<b>Exhibit No.</b>	<b>Date</b>	<b>Description</b>	<b>Appendix No.</b>
20	12/9/2021	Testimony of Cynthia Stewart, Excerpt of Transcript of Motion Hearing, <i>Reeves v. Dunn</i> , No. 20-cv-27 (M.D. Ala.)	AM1983_0629
21	6/28/2018	Jarrold Taylor Attorney Documents	AMILLERDISC0515-22

## II. SUPREME COURT OF ALABAMA FILINGS

<b>Exhibit No.</b>	<b>Date</b>	<b>Description</b>
22	4/19/2022	State of Alabama's Motion to Set an Execution Date
23	5/18/2022	Opposition to State of Alabama's Motion to Set Execution Date
24	5/24/2022	Amended Motion to Place Under Seal Exhibit B to the State's Response to Miller's Objection to the State's Motion to Set Execution
25	5/27/2022	Order Conditionally Granting Amended Motion to Place Under Seal Exhibit B to the State's Response to Miller's Objection to the State's Motion to Set Execution
26	5/27/2022	State's Response to Miller's Objection to State's Motion to Set an Execution Date
27	6/1/2022	Reply in Support of Opposition to State of Alabama's Motion to Set Execution Date
28	7/18/2022	Order Granting State of Alabama's Motion to Set an Execution Date

## III. DEPOSITION TRANSCRIPTS

<b>Exhibit No.</b>	<b>Date</b>	<b>Description</b>
29	9/7/2022	Deposition Transcript of Alan Eugene Miller

Dated: September 12, 2022

Respectfully submitted,

/s/ J. Bradley Robertson

---

J. Bradley Robertson  
Bradley Arant Boult Cummings LLP  
One Federal Plaza  
1819 5th Ave. N., Birmingham, AL 35203  
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Tel: (213) 896-6000  
Fax: (213) 896-6600  
Email: marisol.ramirez@sidley.com

*Attorneys for Plaintiff Alan Eugene Miller*



**CERTIFICATE OF SERVICE**

I hereby certify that, on September 12, 2022, I served a copy of the foregoing via the Court's CM/ECF system, which shall cause the same to be electronically transmitted to all counsel of record.

J. Bradley Robertson \_\_\_\_\_  
J. Bradley Robertson

# **Exhibit 1**

No. 1040564 (Death Penalty)

**IN THE SUPREME COURT OF ALABAMA**

---

EX PARTE: ALAN EUGENE MILLER)

ALAN EUGENE MILLER )

Petitioner, )

v. )

STATE OF ALABAMA, )

Respondent )

---

**AFFIDAVIT OF ALAN EUGENE MILLER**

I, Alan Eugene Miller, under penalty of perjury affirm that the following is true and correct to the best of my ability:

1. I am currently incarcerated at Holman Correctional Facility in Atmore, Alabama. My inmate number is Z-672.
2. Because I have been sentenced to death, I am incarcerated on Holman's death row.
3. In June or July of 2018, a correctional officer at Holman passed out forms to individuals on death row concerning an election to be executed by nitrogen hypoxia.

4. The correctional officer said we could sign or not sign the forms. He said they would be back to pick up the forms later. I understood that to mean that a correctional officer would pick it up later.
5. I completed the form and signed it.
6. I gave my signed form to the correctional officer who was collecting the forms.
7. I gave the correctional officer my form at the same time that he was collecting forms from everyone else. The correctional officer collected my form on the same day that it was distributed to me.
8. I do not know what the correctional officer did with my form after I gave it to him.
9. I asked the correctional officer for a copy of my completed form, but the correctional officer refused to make a copy for me.
10. I also asked the correctional officer if I could have the form notarized, but he said no. I know that some other guys had their forms notarized, so I don't know why he would not permit me to get my form notarized.

Wherefore I swear under penalty of perjury, that the foregoing is true and correct to the best of my knowledge.

Alan Eugene Miller  
Alan Eugene Miller

5-10-21  
Date

State of Alabama  
County of Escambia

SUBSCRIBED and SWORN TO before me this 10<sup>th</sup> day of May, 2022.

(Seal)

Jennifer R. Parker  
NOTARY PUBLIC

My Commission Expires: My Commission Expires March 26, 2024

# Exhibit 2

**IN THE SUPREME COURT OF ALABAMA**

EX PARTE: ALAN EUGENE MILLER)	)	
ALAN EUGENE MILLER,	)	
	)	
Petitioner,	)	No. 1040564
	)	
v.	)	
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

**STATE’S RESPONSE TO MILLER’S OBJECTION TO STATE’S MOTION TO SET AN EXECUTION DATE**

Comes now the State of Alabama, by and through the Office of the Attorney General, and responds to Miller’s objection to the State’s motion to set an execution date as follows:

1. On April 19, 2022, the State moved to set an execution date for Miller, noting that his conviction and sentence are final because he has completed his direct appeal, state postconviction review, and federal habeas review.

2. On May 18, 2022, Miller filed an objection to the State’s motion, arguing that Miller timely elected to be executed by nitrogen hypoxia. In support of his objection, Miller submitted an affidavit asserting that a correctional officer at Holman passed out election forms

in June or July of 2018, that Miller completed and signed the form, and that the form was returned to a correctional officer “at the same time that he was collecting forms from everyone else.”<sup>1</sup> (Miller’s Aff. ¶ 7.)

3. But as noted by the attached affidavit from Terry Raybon, who is the Correctional Warden III at Homan Correctional Facility, there is no election form on file reflecting that Miller timely elected nitrogen hypoxia. (See Ex. A.) Further, there is no evidence offered, aside from Miller’s self-serving and uncorroborated affidavit, to show that he did, in fact, timely elect nitrogen hypoxia.

4. Miller appears to suggest his case is like that of Jarrod Taylor, attaching a copy of the State’s motion to withdraw its motion to set an execution date in that case. But the facts in *Taylor* are significantly different from Miller’s case. Most notably, there was supporting documentation—the completed and signed election form itself, plus contemporaneous emails from June 2018 that created a record of conversations counsel had with Taylor regarding election—outlining that

---

1. Miller does not indicate whether the correctional officer who passed out the election forms was the same officer who collected the completed and signed forms, nor does he make any attempt to identify the individual(s) who distributed and/or collected the forms.



Taylor had, in fact, timely elected nitrogen hypoxia. (*See Ex. B.*) No such evidence has been offered here.

Therefore, given that there is no evidence before this Court demonstrating that Miller elected nitrogen hypoxia, that there are currently no pending challenges to the validity of his duly adjudicated capital murder conviction and death sentence, and that Miller has exhausted his direct appeal, his state postconviction remedies, and his federal habeas remedies, the State respectfully requests that, pursuant to Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, this Honorable Court “enter an order fixing a date of execution” for Miller.

Respectfully submitted,

Steve Marshall  
*Attorney General*

**/s/ Audrey Jordan**  
*Assistant Attorney General*  
Counsel of Record \*

**CERTIFICATE OF COMPLIANCE**

1. I certify that this response complies with the word limitation set forth in Ala. R. App. P. 27(d). According to the word-count function of Microsoft Word, the response contains 444 words, not including the parts exempted by Ala. R. App. P. 32(c).

2. I further certify that this response complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). The motion was prepared in 14-point Century Schoolbook font.

***/s/ Audrey Jordan***  
*Assistant Attorney General*  
Counsel of Record \*

## CERTIFICATE OF SERVICE

I hereby certify that on this, the 27th day of May 2022, I electronically filed the foregoing and served a copy of the foregoing on the attorneys for Miller by electronic mail, addressed as follows:

Daniel J. Neppl  
Sidley Austin, LLP  
One Court Dearborn Street  
Chicago, Illinois 60603  
dneppl@sidley.com

Jeffrey T. Green  
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1501 K. Street, NW  
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Patrick Mulligan  
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2001 Park Place North, Suite 1500  
Birmingham, Alabama 35203  
pmulligan@bressler.com

**/s/ Audrey Jordan**  
*Assistant Attorney General*  
Counsel of Record \*

State of Alabama  
Office of the Attorney General  
501 Washington Avenue  
Montgomery, Alabama 36130-0152  
Telephone: (334) 353-4338  
Email: Audrey.Jordan@AlabamaAG.gov

# EXHIBIT

# A

**AFFIDAVIT**

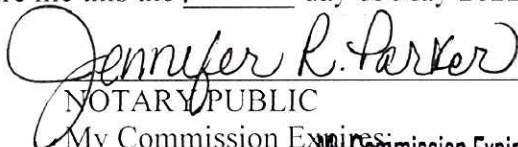
Before me, the undersigned authority, a Notary Public, in and for Escambia County and the State of Alabama at large, personally appeared Terry Raybon, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

1. My name is Terry Raybon. I am currently employed with the Alabama Department of Corrections as a Correctional Warden III at Holman Correctional Facility, Holman 3700, 866 Ross Road, Atmore, AL 36503.

2. Sometime earlier this year I reviewed the file where all of the Nitrogen Hypoxia elections forms have been maintained since June 2018 at Holman Correctional Facility to see if Inmate Alan Miller W/Z672 had submitted an election form. I found no record of Inmate Miller submitting a form. I had my administrative assistant to follow-up behind me, and she did not find any record as well. Today, May 19, 2022, after receiving an email from the Attorney General's Office, I instructed my administrative assistant to re-review our records for a submission form, after which I followed up behind her. Neither of us found a submission form from Inmate Miller.

  
WARDEN TERRY RAYBON

SWORN TO AND SUBSCRIBED before me this the 19<sup>th</sup> day of May 2022.

  
NOTARY PUBLIC  
My Commission Expires ~~My Commission Expires~~ March 26, 2024



# EXHIBIT

## B

(Filed under seal)

# **Exhibit 3**



## IN THE SUPREME COURT OF ALABAMA

July 18, 2022

1040564

Ex parte Alan E. Miller. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Alan Eugene Miller v. State of Alabama) (Shelby Circuit Court: CC-99-792; Criminal Appeals: CR-99-2282).

### ORDER

The "State of Alabama's Motion to Set an Execution Date" filed by the State of Alabama on April 19, 2022, having been submitted to this Court,

IT IS ORDERED that the Motion is GRANTED.

IT IS FURTHER ORDERED that:

1. Thursday, September 22, 2022, be fixed as the date for the execution of the convict, Alan E. Miller, who is now confined in the William C. Holman Correctional Facility Unit of the Alabama Department of Corrections prison system located in Atmore, Escambia County, Alabama;

2. The Warden of the William C. Holman Correctional Facility Unit execute the order, judgment, and sentence of law on September 22, 2022, in the William C. Holman Correctional Facility Unit by the means provided by law, causing the death of such convict;

3. The Marshal of the Appellate Courts of Alabama shall deliver, within five (5) days from the date of this Order, a certified copy of this Order to the Warden of the William C. Holman Correctional Facility Unit and make due return thereon to this Court; and

4. The Clerk of this Court shall transmit forthwith a certified copy of this Order electronically or by mailing a copy thereof by United States mail, postage prepaid, to the following:

COPY





## IN THE SUPREME COURT OF ALABAMA

July 18, 2022

- the attorney of record for Alan E. Miller;
- the Governor of Alabama;
- the Attorney General of Alabama;
- the Commissioner of the Alabama Department of Corrections;
- the Clerk of the Alabama Court of Criminal Appeals;
- the Clerk of the Shelby Circuit Court;
- the Clerk of the Supreme Court of the United States;
- the Clerk of the United States Court of Appeals for the Eleventh Circuit; and
- the Clerk of the United States District Court for the Northern District of Alabama.

**Bolin, Shaw, Bryan, Sellers, Mendheim, and Stewart, JJ.,  
concur.**

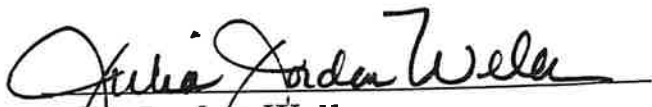
**Parker, C.J., dissents.**

**Wise and Mitchell, JJ., recuse themselves.**

I, Julia Jordan Weller, Clerk of the Supreme Court of Alabama, do hereby certify the foregoing is a full, true, and correct copy of the judgment and order of the Supreme Court of Alabama regarding Alan E. Miller as the same appears of record in this Court.

**Witness my hand and seal this 18th day of July, 2022.**



  
Julia Jordan Weller  
CLERK OF COURT  
SUPREME COURT OF ALABAMA

# **Exhibit 4**

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

ALAN EUGENE MILLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<b>Case No. <u>2:22-cv-00506-RAH</u></b>
	)	
JOHN Q. HAMM, Commissioner,	)	
Alabama Department of Corrections,	)	
<i>et al.</i> ,	)	
	)	
Defendants.	)	

**DEFENDANTS’ RESPONSE TO  
PLAINTIFF’S REQUEST FOR ADMISSIONS (Doc. 32-3)**

Defendants, by and through their undersigned counsel, respond to Plaintiff

Miller’s request for admissions (Doc. 32-3), as set forth below:

1. “Admit that Defendants did not plan a process or implement a Policy by which Election Forms were to be distributed to and collected from death row inmates at Holman, and retained after their collection.”

**As to Defendant Marshall: ADMITTED.**

**As to Defendants Hamm & Raybon: DENIED.**

*Good-faith qualification:* “Policy” or “Policies” is defined in Plaintiff’s requests as “all formal or informal protocols, policies, practices, procedures, rules and guidelines.” (Doc. 32-3 at 3.) Nitrogen hypoxia election forms were distributed to death row inmates and collected. ADOC retained those election forms that were collected from inmates. Neither Defendant Hamm nor Defendant Raybon served in

their official capacities in June 2018 when the nitrogen hypoxia election period at issue occurred. (See Exs. A (Affidavit of Capt. Jeff Emberton, dated January 31, 2019)<sup>1</sup>; B (Transcript of testimony of Cynthia Stewart, *Smith v. Dunn*, No. 2:19-cv-927 (M.D. Ala. Aug. 27, 2021)<sup>2</sup>; C (Transcript of testimony of Jeff Emberton, *Smith v. Dunn*, No. 2:19-cv-927 (M.D. Ala. Aug. 27, 2021)<sup>3</sup>; D (Testimony of Joseph G. Stewart, *Smith v. Dunn*, No. 2:19-cv-927 (M.D. Ala. Aug. 27, 2021)<sup>4</sup>; E (Transcript of testimony of Terry Raybon, *Smith v. Dunn*, No. 2:19-cv-927 (M.D. Ala. Aug. 27, 2021)<sup>5</sup>; F (Transcript of testimony of Anne Hill, *Smith v. Dunn*, No. 2:19-cv-927 (M.D. Ala. Aug. 27, 2021)<sup>6</sup>; G (Transcript of testimony of Jefferson Dunn, *Smith v. Dunn*, No. 2:19-cv-927 (M.D. Ala. Aug. 27, 2021)<sup>7</sup>; H (Deposition of Jeff Emberton, *Smith v. Dunn*, No. 2:19-cv-927 (M.D. Ala. May 24, 2021)<sup>8</sup>; I (Deposition of Jeff Emberton, *Smith v. Dunn*, No. 2:19-cv-927 (M.D. Ala. September 9, 2021)<sup>9</sup>; J (Holman Correctional Facility Nitrogen Hypoxia Election Form File)<sup>10</sup>; K (Joint Motion to Dismiss, *In re: Alabama Execution Protocol Litigation*, No. 2:12-cv-316-

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<sup>1</sup> (AMILLER1983DISC0001-0002)

<sup>2</sup> (AMILLER1983DISC0003-0037)

<sup>3</sup> (AMILLER1983DISC0038-0073)

<sup>4</sup> (AMILLER1983DISC0074-0107)

<sup>5</sup> (AMILLER1983DISC0108-0138)

<sup>6</sup> (AMILLER1983DISC0139-0148)

<sup>7</sup> (AMILLER1983DISC0149-0166)

<sup>8</sup> (AMILLER1983DISC0167-0324)

<sup>9</sup> (AMILLER1983DISC0325-0350)

<sup>10</sup> (AMILLER1983DISC0351-0400)

WKW (M.D. Ala. July 10, 2018)<sup>11</sup>; L (E-mail from Thomas Govan to AGO Capital Litigation Division, dated July 6, 2018 (REDACTED))<sup>12</sup>; M (E-mail from Thomas Govan to AGO Capital Litigation Division, dated June 28, 2018)<sup>13</sup>; N (E-mail from Thomas Govan to AGO Capital Litigation Division, dated June 27, 2018 (REDACTED))<sup>14</sup>

Defendants do not represent these documents as being exhaustive, as document collection and review is on-going. Plainly, however, Defendants have a good-faith basis for denying the requested admission under Plaintiff's definition of "Policy."

2. "Admit that then-Holman Warden Cynthia Stewart ordered Captain Jeff Emberton not to make a list of inmates who submitted an Election Form at the time that he collected the forms."

**All Defendants:** Defendants cannot truthfully admit or deny this request for admission. Prior testimony on this issue has been taken in other cases and it has been provided to Plaintiff. The subject matter of this request for admission occurred prior to Defendants Hamm and Raybon entering their official offices, the basis of their being named as defendants. *See* Exhibits A - I, referenced in the previous response.

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<sup>11</sup> (AMILLER1983DISC0401-0412)

<sup>12</sup> (AMILLER1983DISC0413-0418)

<sup>13</sup> (AMILLER1983DISC0419-0420)

<sup>14</sup> (AMILLER1983DISC0421-0448)

Defendant Marshall cannot determine with absolute certainty what happened at the time Warden Stewart and Captain Emberton interacted in June 2018, prior to the distribution of election forms.

3. “Admit that no Defendant, or any ADOC employee, made a list at the time Holman death row inmates submitted their Election Forms to the warden that memorialized which inmates turned in forms, and whether the inmates had selected nitrogen hypoxia as their method of execution.”

**All Defendants:** DENIED.

*Good-faith qualification:* See Exhibits J-N, referenced in the previous response.

4. “Admit that no Defendant, or any ADOC employee, provided confirmation to inmates that they had made a timely election to be executed by nitrogen hypoxia.”

**All Defendants:** DENIED.

*Good-faith qualification:* See, e.g., Ex. K (response to # 1); see also Doc. 18-2; Ex. P (Cynthia Stewart Response to Plaintiff Price’s Interrogatories, *Price v. Dunn*, 1:19-cv-57 (S.D. Ala. March 27, 2019)<sup>15</sup>.

5. “Admit that no Defendant implemented any Policy to ensure the retention of death row inmates’ Election Forms.”

**All Defendants:** DENIED.

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<sup>15</sup> (AMILLER1983DISC0500-0512)

*Good-faith qualification:* See Exs. J, L-O (AGO Copy File: Nitrogen Hypoxia Election Forms)<sup>16</sup>, Q (Nitrogen Hypoxia Election Form for Inmate Z-719)<sup>17</sup>.

6. “Admit that Defendants do not have a copy of Plaintiff’s Election Form submitted to the warden at Holman.”

**All Defendants:** DENIED, as Plaintiff did not submit an election form to the warden at Holman.

7. “Admit that Defendants do not have a copy of Mr. Taylor’s Election Form submitted to the warden at Holman.”

**All Defendants:** DENIED, except Defendants admit that no election form for Taylor was in the possession of the warden at Holman prior to 2019.

*Good-faith qualification:* See Exhibit R (copy of Mr. Taylor’s Election Form submitted to the warden at Holman through Taylor’s counsel).

8. “Admit that Defendants do not know whether Mr. Taylor submitted an Election Form to the warden at Holman.”

**All Defendants:** DENIED.

*Good-faith qualification:* While defendants do not know whether inmate Taylor submitted a copy of his form to the warden in 2018, he sent completed election forms

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<sup>16</sup> (AMILLER1983DISC0449-0499)

<sup>17</sup> (AMILLER1983DISC0514)

to his legal counsel and documentary evidence establishes his receipt of the blank forms from his legal counsel. At least one of these election forms was mailed to Taylor's legal counsel in June 2018. An election form (or copy) was submitted to the warden in 2019.

9. "Admit that Defendant Hamm has the authority to execute Mr. Miller via nitrogen hypoxia."

**All Defendants: DENIED**

*Good-faith qualification:* As a public official, Commissioner Hamm exercises only such authority as provided by law. As things stand, inmate Miller cannot describe the person he claims he provided an election form to, his "personal knowledge" is based entirely on things that other inmates (who did elect) have told him since the State moved to set inmate Miller's execution date, and inmate Miller cannot support any claim in his amended complaint with any information or facts that could be verified or corroborated. Because inmate Miller did NOT elect nitrogen hypoxia in 2018, Commissioner Hamm cannot execute him via nitrogen hypoxia. *See Exhibit G.*

If a court of competent jurisdiction enters an order requiring that inmate Miller's judicial execution be conducted by means of nitrogen hypoxia, Defendant Hamm would have the authority to execute inmate Miller by means of nitrogen hypoxia.



10. “Admit that Defendant Raybon has the authority to execute Mr. Miller via nitrogen hypoxia.”

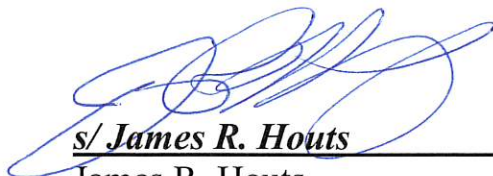
**All Defendants: DENIED**

*Good-faith qualification:* As the State’s executioner, Warden Raybon is bound to carry out judicial executions according to the authorized statutory method for each condemned inmate. As things stand, inmate Miller cannot describe the person he claims he provided an election form to, his “personal knowledge” is based entirely on things that other inmates (who did elect) have told him since the State moved to set inmate Miller’s execution date, and inmate Miller cannot support any claim in his amended complaint with any information or facts that could be verified or corroborated. Because inmate Miller did NOT elect nitrogen hypoxia in 2018, Warden Raybon cannot execute Miller’s sentence via nitrogen hypoxia.

If a court of competent jurisdiction enters an order requiring that inmate Miller’s judicial execution be conducted by means of nitrogen hypoxia and that order is not appealed by the State, however, Defendant Raybon would have the authority to execute inmate Miller by means of nitrogen hypoxia.

Submitted on this the 9<sup>th</sup> day of September, 2022,

Steve Marshall  
*Attorney General*  
BY—



***/s/ James R. Houts***

James R. Houts  
*Deputy Attorney General*

***/s Audrey Jordan***

Audrey Jordan  
*Assistant Attorney General*

**CERTIFICATE OF SERVICE**

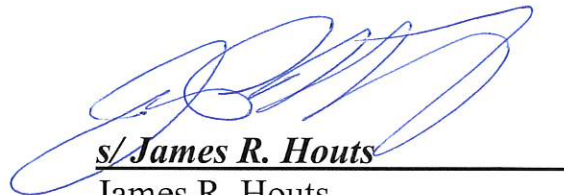
I hereby certify that on September 9, 2022, I electronically served the foregoing response to request for admissions upon counsel for the plaintiff via electronic mail, and the response to request for admissions and supporting documents by means of electronic file transfer, as follows:

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# **Exhibit 5**

**EXECUTION PROCEDURES**  
**CONFIDENTIAL**  
**April of 2019**

**I. General**

- A. This procedure establishes the responsibilities and procedures for the reception of a condemned inmate, for confinement, and for execution and day of execution preparation.
- B. This procedure identifies the responsibilities associated with an execution.
- C. This procedure outlines the forms used to ensure a professional and chronological order for executions.
- D. This document is confidential in nature and will be disseminated only to personnel having a need and right to know the contents herein.
- E. A permanent log will be kept by the [REDACTED], beginning on Monday of the week of the execution. This log will reflect any practice, maintenance, and other preparations for the execution.
- F. Alabama Code Section 15-18-82.1(f) clearly states that, notwithstanding any law to the contrary, the "prescription, preparation, compounding, dispensing, and administration of a lethal injection shall not constitute the practice of medicine, nursing, or pharmacy."

**II. Reception of Condemned Inmate**

Once an inmate has received a sentence by the court to be executed, the condemned inmate will be transferred directly from the committing county to the W. C. Holman Correctional Facility, W. E. Donaldson Correctional Facility, or the Julia Tutwiler Prison for Women. Upon arrival, he/she will be processed through regular admission procedures, to include [REDACTED]

**III. Confinement**

Upon the receipt of a condemned person at W. C. Holman Correctional Facility, the inmate shall be confined in a cell designated by the Warden until the time of his/her execution arrives. Appropriate safeguards and security measures will be maintained as directed by the Warden. Pending the invoking of the [REDACTED]-hour Death Watch, the condemned inmate will be maintained in accordance with Departmental Rules and Regulations.

#### IV. Warrant Notification

Whenever a person is sentenced to death, the clerk of the court in which the sentence is pronounced shall issue a warrant under the seal of the court for the execution of the sentence of death (source: Alabama Code Section 15-18-20). The warrant identifies: the facts of the conviction, the offense, the judgment of the court, and the time fixed for the execution. The court provides the warrant to the Marshal who delivers it to the Warden of W. C. Holman Correctional Facility (source: Alabama Code Section 15-18-80).

- A. Once the death warrant has been issued, the Warden will advise the offender as soon as possible. This will normally be done in an attempt to notify the inmate prior to an announcement by the news media.
- B. If the inmate is at the W. E. Donaldson Correctional Facility or the Julia Tutwiler Prison for Women, the Warden of the W. C. Holman Correctional Facility will notify the Warden of the other facility and request the inmate be notified.
  1. If the inmate is at the W. E. Donaldson Correctional Facility, arrangements will be made [REDACTED] to have the inmate transferred to the W. C. Holman Correctional Facility. Upon arrival at the W.C. Holman Correctional Facility, the inmate will see a physician [REDACTED] for an assessment of his vein structure.
  2. In the instance of a female inmate receiving a death warrant, the inmate will be moved to the W. C. Holman Correctional Facility [REDACTED] prior to the execution. The Warden of the Julia Tutwiler Prison for Women will have a physician assess her vein structure as soon as possible after notification of the death warrant.

#### V. Preparations (Prior to Execution week)

- A. On a day designated by the Warden, prior to execution week, the Warden and [REDACTED] will meet with the execution team.
  1. Team members will be given the opportunity to resign from the team.
  2. Details of the scheduled execution will be discussed to bring everyone up to date.
- B. If lethal injection is to be the means of execution, the Warden will notify the members of the IV team that they will be needed and schedule a time for them to view the offender's veins prior to the scheduled execution.

If it is determined that starting an IV through normal channels will not be possible due to poor vein structure, refer to Annex C for protocol.

- C. If electrocution is to be the means of execution, the Warden will instruct [REDACTED] to contact a [REDACTED] to inspect the equipment to be used for the execution.
- D. The [REDACTED] will make sure that he has the supplies necessary to carry out the execution.
- E. The Warden will notify the Warden of the G. K. Fountain Correctional Center of the upcoming execution. The Warden will request that he/she have the Media Center checked for cleanliness, make sure the grounds are groomed, and insure that the telephone lines are operational.
- F. The Warden will meet with the condemned offender and advise him of the schedule for execution week. The Warden will attempt to answer any questions the condemned may have in reference to the execution.

**VI. Preparations (Execution Week)**

- A. Members of the execution team will meet [REDACTED] to walk through the steps of the execution to include the removal of the offender from [REDACTED] to the [REDACTED] and the [REDACTED]. The Warden and [REDACTED] will rehearse their roles in the execution process at this time.
- B. On [REDACTED] of execution week, the [REDACTED] will make assignments of [REDACTED] for the [REDACTED] Death Watch.
- C. [REDACTED], the Warden and [REDACTED] will meet with the outside security team.
  - 1. The Warden will brief the team on the number of offender and victim witnesses to expect and who they are, if known at that time, as well as the number of additional visitors to expect, the names of whom will be provided to the [REDACTED]. The Warden will also advise the team about media attention, if any is expected.
  - 2. The [REDACTED] of the outside security team will make post assignments for [REDACTED]. The [REDACTED] will also assign an escort for the offender's witnesses and security for the Training Center.
- D. The Warden will check the telephone in the Commissioner's viewing room to ensure that the line is working properly.

- E. [REDACTED], the Warden's designee will contact [REDACTED] to witness the execution and pronounce the time of death.
- F. [REDACTED], the Warden or his designee will notify local law enforcement officials of the pending execution, including the State Troopers, Sheriff, and local authorities.
- G. Equipment
1. If lethal injection is to be the means of execution, [REDACTED] shall be inspected and tested [REDACTED] until the day of the execution.
  2. If electrocution is to be the means of execution, the electric chair, [REDACTED] shall be inspected [REDACTED], in accordance with established procedures, [REDACTED], the equipment will be inspected and tested three (3) times. (See Annex A for procedures and steps for testing the electric chair and equipment)(See Annex B for instructions on sponge preparation)

#### VII. Placement of Offender in the Holding Cell

A minimum of [REDACTED] officers shall be assigned to observe the condemned at all times during the [REDACTED]-hour Death Watch. If the condemned is a female, female security personnel will maintain security. No other correctional staff or civilian personnel, except medical personnel, shall be allowed in the Death Watch area without approval of the Warden or the Warden's designee. No inmates are allowed in the Death Watch area.

- A. The accused offender will be moved to the holding cell [REDACTED], unless the Warden determines he/she should be moved there sooner.
- B. [REDACTED], the execution team will begin a [REDACTED] will post outside the offender's cell. The cell to be used will be that cell [REDACTED]
1. The cell will be thoroughly inspected for any contraband prior to initial placement of the condemned offender.
  2. The [REDACTED] will ensure that all functions of the cell are working.
  3. The officers assigned to this watch will ensure, during their time on duty, that the condemned offender is under constant observation, regardless of the offender's location.



4. If an emergency should occur, the officer will initially contact the [REDACTED]. As soon as possible, thereafter, the captain of the execution team and the Warden will be contacted.

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

[REDACTED]

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

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

2. The offender will be allowed access to the telephone. The offender will advise the officer of the number he/she wishes to call and the officer will place the call. [REDACTED]

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

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

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

6. The offender's meals will be delivered to him/her by [REDACTED]

### VIII. Visitation

A. The condemned offender may submit to the Warden an extended visiting list for approval prior to execution week. The Warden will make the approval and provide this list to the officers assigned to visitation.

- B. The condemned offender shall be allowed contact visits during execution week with family, friends, private clergy, and his legal representatives, as approved by the Warden.

Visitation will be at the following times:

[REDACTED]

- C. There will be no more than fifteen (15) visitors allowed in the visitation area at any given time.
- D. The condemned offender may receive an institutional meal in the visitation area. The visitors may purchase items from the vending machines for the offender's consumption. No food will be allowed to be brought in from outside.
- E. Visitors will be allowed to leave the facility and return. They will be processed every time they enter the facility.
- F. The [REDACTED] will be available for the offender and his family. The [REDACTED] should visit with the condemned offender [REDACTED]

#### **IX. Day of the Execution**

- A. The [REDACTED] will deliver the condemned offender's breakfast meal to the door of the [REDACTED]. The [REDACTED] on that post will receive the meal and serve it to the condemned offender in the holding cell.
1. The [REDACTED] will prepare the condemned's meal. No inmate will handle the condemned's meal.
  2. The [REDACTED] will ask the condemned offender if he wishes to have a last meal prepared and explain what items are available for him.
  3. The condemned offender's last meal can be prepared from anything that is available in the institutional kitchen.
- B. At approximately [REDACTED], the officers assigned to the Death Watch will inventory the condemned offender's property. The condemned will have an opportunity to designate who he wishes his property to go to.
1. This information will be written out as a last will and testament and the condemned offender will sign the document in front of a notary public.

2. [REDACTED]

- C. Visitation may begin at [REDACTED] and proceed until approximately [REDACTED]
- D. The Warden or his/her designee will attain the funeral arrangements of the condemned. Specific information needed will be a next of kin, [REDACTED] This information will be made available to the coroner's office and to the Department of Forensic Science.
- E. [REDACTED] will prepare the necessary lethal injection solution when lethal injection is the method of execution.
- F. The Warden will meet with the victims of the condemned offender's crime [REDACTED]
- G. [REDACTED] the condemned offender will be escorted from the visitation yard [REDACTED]
1. An examination of the accused will be completed and the results recorded on a Medical Treatment Record.
  2. If the condemned offender has a spiritual advisor, that person may be escorted to [REDACTED] and remain with the condemned until the condemned is escorted to the execution chamber, at which time the spiritual advisor will then be escorted [REDACTED] or, if the spiritual advisor was requested by the condemned as a witness, [REDACTED] of the witnesses for the condemned offender.
- H. The Commissioner's telephone line to the Governor's and/or Attorney General's staff will be opened.
- I. The condemned will be escorted to the execution chamber by the execution team and strapped to the gurney.
1. If lethal injection is the means of execution, the IV Team will be escorted into the execution chamber to start the IV. The heart monitor leads will be applied to the condemned. If the veins are such that intravenous access cannot be provided, [REDACTED] will perform a central line procedure to provide an intravenous access. (See Annex C)
  2. When electrocution will be the method of execution, the inmate will be escorted to the execution chamber and placed in the chair at approximately [REDACTED] The

offender will be strapped in with the electrode attached to the offender's left leg and head.

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

1. The Warden and such persons as may be necessary to assist him in conducting the execution
2. The Commissioner of Corrections and/or his/her representative(s)
3. Two (2) physicians
4. The condemned's spiritual advisor
5. The Chaplain of the W. C. Holman Correctional Facility
6. Such news media as may be admitted by the Warden, not to exceed five (5) in number
7. Any relatives or friends of the condemned offender that he/she may request, not to exceed six (6) in number (No inmate shall be permitted to witness the execution)
8. Witnesses for the victim will be limited to immediate family members over the age of 19, not to exceed eight (8) in number. "Immediate family member" is defined to include parent(s), sibling(s), and/or children of the victim.

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

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

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

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

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

- L. The Warden will enter the execution chamber [REDACTED]. The microphone will be turned on and the Warden will read the warrant to the condemned offender.
- M. The condemned offender will be allowed to make any last remarks. Remarks should be kept to about two (2) minutes.
- N. The Warden and [REDACTED] will depart the execution chamber to the [REDACTED]. Two (2) members of the execution team will remain in the execution chamber until notified to leave by the Warden.
- O. The Warden will check with the Commissioner or his/her designee to see if there has been a last minute stay. If there has been no last minute stay, the two (2) members from the execution team remaining in the execution chamber will receive the signal to depart.
  - 1. These two (2) team members will make last minute checks of the IV lines in the case of lethal injection. One team member will exit the chamber and will [REDACTED] to the [REDACTED] signaling it is okay to proceed. The second officer, designated by the Warden, will remain in the chamber and will position himself/herself at the condemned inmate's left side.
  - 2. In the case of electrocution, the two (2) officers will make last minute adjustments to the restraining straps. The officers will place the headgear on the offender and the covering over the face. When their tasks have been completed, [REDACTED] will [REDACTED] to the [REDACTED] signaling it is okay to proceed.
- P. When the signal to proceed has been received, the following will occur:
  - 1. In the case of lethal injection, the Warden will begin administering the lethal injection solution to the condemned offender. The lethal injection solution will consist of:
    - a. 100 mL of midazolam hydrochloride – two (2) 50mL syringes
    - b. 20 mL of saline
    - c. 60 mL of rocuronium bromide
    - d. 20 mL of saline
    - e. 120 mL of potassium chloride – two (2) 60 mL syringes
  - 2. In the case of lethal injection, after the Warden administers the 100 mL's of midazolam hydrochloride and 20 mL's of saline but before he/she administers the

second and third chemicals, the one (1) team member who remained in the execution chamber will assess the consciousness of the condemned inmate by applying graded stimulation, as follows. The team member will begin by saying the condemned inmate's name. If there is no response, the team member will gently stroke the condemned inmate's eyelashes. If there is no response, the team member will then pinch the condemned inmate's arm.

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

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

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

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

1. [REDACTED] will enter the execution chamber and close the curtains.
2. The [REDACTED] will be escorted from the [REDACTED] to the [REDACTED].
3. Witnesses of the execution will be escorted from the [REDACTED] [REDACTED].
4. The Warden will escort the [REDACTED] into the [REDACTED]. The [REDACTED] will do a thorough check and pronounce a time of death.
5. The [REDACTED] will be escorted from the [REDACTED].

R. [REDACTED] will enter the execution chamber.



1. In the case of lethal injection, the IV lines and straps will be detached. The body will be placed in a body bag and onto a stretcher to be taken by van to the Department of Forensic Science for a postmortem examination.
  2. In the case of electrocution, the electrodes will be detached and the transformer will be disconnected and locked. The body will be placed in a body bag and onto a stretcher to be taken by van to the Department of Forensic Science for a postmortem examination
- S. [REDACTED] will attach a tag to the body bag and have the representatives of the Department of Forensic Science sign for receipt of the body.
- T. Members of the execution team will do a brief clean-up of the execution chamber and exit through the [REDACTED]. The following day several members of the execution team will conduct a more thorough clean-up of the execution chamber.
- X. Actions after the Execution**
- A. Press Conference - The Public Information Officer (PIO) for the Department of Corrections will advise the news media that the Order of the Court has been carried out.
1. The PIO will provide the time of death, any last words the condemned offender may have had, and if any unusual incidents occurred during the execution.
  2. News media who were unable to witness the execution will have an opportunity to ask questions of the news media members that were witnesses.
  3. Members of the condemned's family will have an opportunity to meet the press and make a statement. The victim's witnesses will also have an opportunity to appear before the news media. At no time will these two (2) groups be allowed to intermingle with each other.
- B. Interment - The body may be released to the condemned's relatives at their expense or, if the body is not claimed by friends or relatives, it will be the Department of Corrections' responsibility to bury the remains.
- C. Staff participants will be afforded the opportunity to meet with Critical Incident Debriefing Team members if they so desire.
- D. Permanent logs will be typed by [REDACTED] and sent back for signatures. Once all signatures have been obtained, the log will be forward to the Warden for review and his signature. No copies of the log will be made without permission of the Commissioner.

Annex A

Procedures and Steps for Testing the Electric Chair and Equipment

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

1. [redacted] will be present during any testing.
2. The Warden [redacted] will be present and will select [redacted] [redacted] on the execution team to be present during any testing.
3. No other personnel should be present during testing without the permission of the Warden [redacted]
4. All testing equipment [redacted] will be checked to ensure they are all in operating order.
5. All power switches will be in the "off" position.
6. All jacks and connections will be checked for cleanliness and to ensure they are free of corrosion. All leads will be checked to ensure they are intact and have no visible signs or cracking or any signs of frail ends.
7. The leads will be connected to the load bank register.
8. The [redacted] will be connected with the [redacted] [redacted] connected to the [redacted]
  - a. [redacted]
  - b. [redacted]
  - c. [redacted]
9. Make sure everyone is ready to test the equipment.
10. [redacted] will turn the power on in the equipment room.
11. [redacted] will then enter the control room and turn on the [redacted]



12. [REDACTED] will turn on the power for the equipment.
13. After making sure that everyone is clear, the switch will be thrown and the meters will be read and recorded.
14. [REDACTED] will be located in the [REDACTED]. They will read [REDACTED] and [REDACTED] from the [REDACTED].
15. [REDACTED] will be located in the execution chamber. They will read the voltage on the Simpson 360 voltage meter.
16. The process will be repeated again after a [REDACTED] wait on generator power.
17. After testing is completed, [REDACTED] will turn off all power switches and padlock all disconnect panels in the "off" position. [REDACTED] will check all padlocks to ensure they are locked.

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

## Annex B

### Procedures for Preparation and Maintenance of Sponges

1. Sponges will be soaked in a salt and water solution for a [REDACTED] prior to the time of execution. The sponges should be taken from the salt water solution approximately [REDACTED] prior to the execution.
2. Sponges will be temporarily tacked lightly to the electrodes for proper positioning. When positioned, remove the tacking stitches. When ready for use, soak the sponges in fresh water and squeeze dry. Sew sponges with black carpet thread to the screening, placing stitches not [REDACTED] apart and following around the outer edges, down the center, and around the binding posts. The object is to get a good firm contact. Do not pull the stitches too tight, thereby preventing the sponge from soaking up the solution.
3. The leg electrode will go on the left calf below the knee, placed so the binding post is on the outside making it more easily seen and reached for attaching the electrical wire. The shortened strap should be on this same side so the buckle can also be reached. When placing in position, pass the long strap around the leg and insert loosely through the buckle. Raise into position with the right hand and tighten the strap through the self-tightening buckle with the left hand. Draw the strap fairly tight but not so tight that when muscle contractions take place during electrocution there would be danger of breakage.
4. The headset will be made prior to use to approximately fit the condemned inmate's head. Adjustment will be done by means of sliding straps on each side. Place the head set on the head, being careful not to come down too far on the forehead if possible. Position the short strap with the buckle on it on the side that the operator will be working on. Pass the long strap under the chin and fasten snugly. Connect the wire to the binding post. Use number [REDACTED] insulation for both the head and leg wires. Solder the ends so they won't separate and so the barred ends will go into the hole in the posts. Use the sponges saturated in the salt solution. Squeeze enough solution out with the flat of the hand so excessive dripped will be avoided. In making electrical current contact, be careful not to burn the sponge and the outer skin of the condemned inmate.
5. After use, cut the black threads, remove the sponges, and rinse carefully in fresh water. Be very careful not to cut the tan thread that the pieces of sponge are sewn together with. Remove any black thread pieces and rinse the screws thoroughly to remove all traces of salt water or corrosion will ensue. Keep the straps soft with Neats Foot Oil.
6. Only saltwater sponges are to be used. Sponges should be stored in a clean dry place.

Annex C

IV Team – Detailed Instructions

The Warden or designee will have two (2) intravenous infusion devices placed in veins of the condemned and a saline solution available for an infusion medium. Those persons engaged in this activity will be referred to as the IV Team. For these purposes, [REDACTED] (if necessary), [REDACTED] and other [REDACTED] - as are necessary - will make up this team. The [REDACTED] will normally be [REDACTED]

- a. An IV administration set shall be inserted into the outlet of the bag of normal saline solution. Two (2) IV bags will be set up in this manner.
- b. The IV tubing shall be cleared of air and made ready for use.
- c. The standard procedure for inserting IV access will be used. If the veins are such that intravenous access cannot be provided, [REDACTED] will perform a central line procedure to provide an intravenous access.
- d. The IV tubing for both set-ups will be connected to the receiving port of the IV access - one (1) for the primary vein and the other for the secondary vein.
- e. At this point, the administration sets shall be running at a slow rate of flow (KVO), and ready for the insertion of syringes containing the lethal agents. The Warden, or his designee, shall maintain observation of both set-ups to ensure that the rate of flow is uninterrupted. NO FURTHER ACTION shall be taken until the Warden has consulted with the Commissioner regarding any last minute stay by the Governor or the courts.

**Annex D****Syringe Preparation**

The following is the syringe sequence:

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

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

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

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

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

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

**III. Syringe 3, rocuronium bromide procedure:**

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

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

Repeat procedures for syringe 2.

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

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

**Repeat the above procedures for a backup tray of syringes.**

# Exhibit 6

## NEWS RELEASE

**Steve Marshall**  
Alabama Attorney General



FOR IMMEDIATE RELEASE  
January 27, 2022

For press inquiries only, contact:  
Mike Lewis (334) 353-2199  
Page 1 of 1

### **Alabama Attorney General Steve Marshall Statement on the Execution of Murderer Matthew Reeves**

(MONTGOMERY) – Attorney General Steve Marshall issued the following statement tonight after the execution of Matthew Reeves at the William C. Holman Correctional Facility in Atmore, Alabama:

In November 1996, Matthew Reeves committed an act of cold-blooded evil, brutally murdering a good Samaritan who stopped to offer Reeves and his friends assistance after their vehicle broke down and stranded them on the side of the road. In return for Willie Johnson’s act of kindness – offering Reeves and his friends a ride and a tow to their destination – Reeves shot Johnson in the neck with a shotgun, stole \$360 from Johnson’s body, and mocked Johnson’s last moments.

There can be no doubt that a jury of his peers correctly convicted Reeves of capital murder, for which he was sentenced to death. While I regret that it has taken 24 years for Reeves to finally receive his just punishment, tonight justice has finally been served.

I ask the people of Alabama to join me in praying for Willie Johnson’s family and friends, that they might now be able to find peace and closure.

Attorney General Marshall cleared the execution to commence at 9:05 p.m.

Matthew Reeves’ time of death was 9:24 p.m.

--30--



# **Exhibit 7**



## NEWS RELEASE

**Steve Marshall**  
Alabama Attorney General



FOR IMMEDIATE RELEASE  
July 28, 2022

For press inquiries only, contact:  
Mike Lewis (334) 353-2199

Page 1 of 2

### **Attorney General Steve Marshall Statement on the Execution of Murderer Joe James**

(MONTGOMERY) – Attorney General Steve Marshall issued the following statement tonight after the execution of Joe Nathan James, Jr., at the William C. Holman Correctional Facility in Atmore, Alabama:

Justice has been served. Joe James was put to death for the heinous act he committed nearly three decades ago: the cold-blooded murder of an innocent young mother, Faith Hall.

In the years since, Joe James has tried to blame everything and everyone in an attempt to escape the consequences of his crime. He has claimed that his highly experienced trial counsel was “ineffective,” that his artful appellate counsel was “deficient,” and – in a demonstration of shocking cowardice and callousness – that his victim bore the blame for her own murder.

Tonight, Joe James finally received his just punishment.

Attorney General Marshall cleared the execution to commence at 9:04 p.m.

Joe James’ time of death was 9:27 p.m.

#### **Summary of the Facts of the Case**

On the evening of August 15, 1994, Faith Hall and Tammy Sneed were driving home after a day of shopping. As they neared Tammy’s apartment, the friends were suddenly startled by something frightening that appeared in the rearview mirror: Joe James, a former boyfriend of Faith’s who had a history of aggression and violence, was behind them, following them in his car.

Terrified, Faith and Tammy ran for the safety of Tammy’s apartment as soon as they arrived. Inside, the two friends and a neighbor frantically discussed what they should do. With Tammy’s two children also in the apartment, they decided to call the police. But it was too late. James was already at the doorstep.



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AlabamaAG.gov

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As Faith and Tammy tried desperately to hold the front door of the apartment closed, James forced his way inside. Armed with a .38-caliber pistol, James furiously confronted Faith and accused her of being disloyal and deceitful to him. Faith pleaded with James, but it quickly became clear that nothing she said would quell his rage.

Faith turned and tried to run from the room, but James followed and fired at her. He shot her in the chest and in the abdomen, before shooting her in the head.

Faith Hall died from the gunshot wounds. She was 26 years old and the mother of two young children.

Joe James fled the state but was later arrested in California and returned to Alabama to face justice. At trial, he was convicted of capital murder by a jury of his peers, who returned a unanimous verdict recommending that James be sentenced to death.

--30--

# Exhibit 8

*Rec'd  
6/29/18*



**CONFIDENTIAL**  
Jerome T. Wolf  
Senior Counsel  
jerome.wolf@dentons.com  
☎ +1 816 460 2420

Dentons US LLP  
4520 Main Street  
Suite 1100  
Kansas City, MO 64111-7700  
United States  
dentons.com

June 29, 2018

**By FedEx**

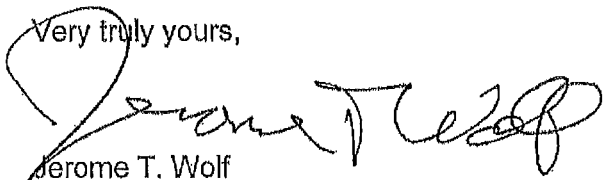
Ms. Cynthia Stewart  
Warden  
William C. Holman Correctional Facility  
Holman 3700  
Atmore, Alabama 36503-3700

Re: Calvin Stallworth, AIS00Z649

Dear Ms. Stewart:

Calvin Stallworth advises the he attempted to submit for your consideration and records an Election To Be Executed By Nitrogen Hypoxia by which he has rejected lethal injection and elected Nitrogen Hypoxia as a form of capital punishment should he be finally adjudged to receive that punishment. I understand that June 30, 2018 was the deadline to submit this Election and wanted to confirm that Mr. Stallworth submitted it prior to the deadline. The guards would not carry the election to you so I telephoned your office today and the person answering said she would send someone to pick up the election from Mr. Stallworth. Please make sure it was properly submitted by the deadline.

If you have any questions, please advise.

Very truly yours,  
  
Jerome T. Wolf  
Senior Counsel

JW/bkl  
cc: Mr. Calvin Stallworth (via Federal Express)

Maclay Murray & Spens ▶ Gallo Barrios Pickmann ▶ Mufloz ▶ Cardenas & Cardenas ▶ Lopez Velarde ▶ Rodyk ▶ Boekel ▶ OPF Partners ▶  
大成 ▶ McKenna Long

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AMILLER1983DISC002

*Rec'd  
July 9, 2018*

**AM1983\_0043**

**CONFIDENTIAL**

**ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA**

Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.

This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.

Dated this 28 day of June, 2018.

Calvin Stallworth, AIS 00Z649  
Name / Inmate Number

Calvin L. Stallworth  
Signature

JUN 29 2018

# Exhibit 9

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

WILLIE B. SMITH, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:19-cv-927-ECM-SMD
	)	
JEFFERSON S. DUNN,	)	
Commissioner, Alabama Department	)	
of Corrections, <i>et al.</i> ,	)	
	)	
Defendants.	)	

**ORDER**

Before the Court is the Joint Motion for Amended Confidentiality Order (Doc. 116) to which the parties have agreed.<sup>1</sup> The parties advise that this motion arises from the Court’s concerns expressed at the hearing on August 13, 2021, about the scope of the Agreed Confidentiality Order (“ACO”) covering discovery in this case (Doc. 66). The Court perceived the ACO as being overly broad with the “confidential” designation, resulting in some information being inappropriately deemed confidential and sealed from disclosure to the public. Subsequently, the parties revisited the ACO in this case. (*Id.*) They agreed that most of the documents that had been deemed confidential could be released, including the deposition

---

<sup>1</sup> Accompanying this motion, the parties submitted their proposed Amended Agreed Confidentiality Order (Doc. 116-1) for the Court’s consideration.

testimony taken to date. The parties advise they have narrowly tailored the information to be deemed “confidential” along these lines:

- Documents that raise prison security concerns, such as those detailing movement of security personnel around prisons or the identities of correctional officers not involved in this litigation (e.g., duty post logs, emails concerning prison scheduling and movement, lists of correctional officers).
- Documents containing the personal information of inmates not involved in this litigation (e.g., specific requests for ADA accommodation, lists of ADA-accommodated inmates, inmates’ medical information).

(Doc. 116 at 2).

The undersigned has compared the current ACO (Doc. 66) with the parties’ proposed Amended ACO (Doc. 116-1). The parties made significant changes to Numerical Paragraph 2, no longer designating “all” material produced in this case as being confidential. The parties also deleted subsections (a), (b), and (d), and amended subsections (c) and (e) of Numerical Paragraph 2. The remaining paragraphs of the original ACO are essentially unchanged in the proposed Amended ACO.

In reviewing the parties’ proposed Amended ACO, the undersigned considers the public’s interest in accessing court documents and the State’s interest in keeping confidential information involving correctional institutions—i.e., information implicating security concerns and prisoner information that is personal and sensitive. *See Braggs v. Dunn*, 382 F. Supp. 3d 1267, 1270 (M.D. Ala. 2019) (“The ‘test for



whether a judicial record can be withheld from the public is a balancing test that weighs the competing interests of the parties to determine whether there is good cause to deny the public the right to access the document.”) (quoting *F.T.C. v. AbbVie Prods., LLC*, 713 F.3d 54, 62 (11th Cir. 2013)). The undersigned finds that the proposed Amended ACO appropriately balances those interests and addresses the concerns previously raised by this Court. Accordingly, it is

ORDERED that the Joint Motion for Amended Confidentiality Order (Doc. 116) is GRANTED. The parties’ tendered Amended ACO (Doc. 116-1) will be entered contemporaneously with this Order.

DONE this 8th day of September, 2021.



---

Stephen M. Doyle  
CHIEF U.S. MAGISTRATE JUDGE

# **Exhibit 10**

**AFFIDAVIT OF CAPTAIN JEFF EMBERTON**

On January 31, 2019, Captain Jeff Emberton personally appeared before the undersigned notary public and, under oath, did solemnly swear to the following:

- (1) I am presently employed with the Alabama Department of Corrections as a Captain. I have been employed in that capacity since 2016. Prior to being a Captain, I was a Correctional Lieutenant at Decatur Community Work Center. I have been employed with the ADOC since 2000.
- (2) I am currently assigned to Holman Correctional Facility in Atmore, Alabama. I have worked at Holman since December 2016.
- (3) In mid-June 2018, after Alabama introduced nitrogen asphyxiation as a method of execution, Warden Cynthia Stewart tasked me with giving every death row inmate an election form and an envelope. If an inmate wished to be executed by nitrogen asphyxiation, he was to sign and date the form and put it in the envelope, which would be delivered to Warden Stewart.
- (4) The form I handed out stated:

**ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA**

Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.

This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.

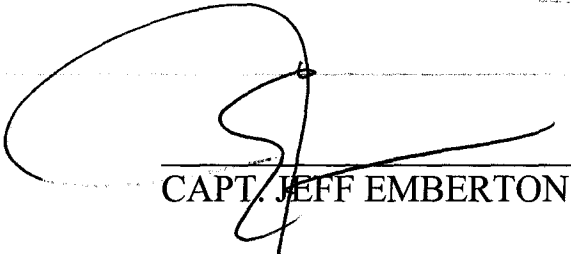
Dated this \_\_\_ day of June, 2018.

If the inmate wished to elect nitrogen asphyxiation, he would date the form, then sign his name and inmate number at the bottom.

- (5) I delivered a form and an envelope to every death row inmate at Holman as instructed.

I declare, pursuant to 28 U.S.C. § 1746, under penalty of perjury, that to the best of my knowledge, the foregoing is true and correct.

EXECUTED on this the 31st day of January 2019.

  
CAPT. JEFF EMBERTON

SUBSCRIBED AND SWORN TO before me on this the 31 day of January 2019.

  
NOTARY PUBLIC

My Commission Expires July 17, 2020  
My commission expires: \_\_\_\_\_

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THE CIRCUIT COURT OF  
SHELBY COUNTY, ALABAMA

CASE ACTION NO. CC-99-762.60

STATE OF ALABAMA,

Plaintiff,

vs.

ALAN EUGENE MILLER,

Defendant.

C A P T I O N

The above entitled cause came on to be heard  
before the Honorable G. Daniel Reeves, Judge, at the  
Shelby County Courthouse, Columbiana, Alabama, on the  
11th, 12th, 13th and 14th days of February, 2008.

1 record, please.

2 A. Catherine Leigh Boyer.

3 Q. Is that Catherine with a C?

4 A. C-a-t-h-e-r-i-n-e.

5 Q. Dr. Boyer, I placed in front of you on the rail  
6 Exhibit 18 which I understand to be your curriculum  
7 vita. Is this a current description of your educational  
8 training, your fellowships, your achedemic appointments,  
9 your presentation and training workshops and the like?

10 A. Yes, it is.

11 MR. WHITEHEAD: Your Honor, I would ask the  
12 Court to receive into evidence Exhibit 18.

13 THE COURT: 18 is admitted.

14 (Whereupon, Defendant's Exhibit Number 18 was  
15 received into evidence.)

16 BY MR. WHITEHEAD:

17 Q. Dr. Boyer, where do you practice? Where is your  
18 office located?

19 A. It's in Auburn, Alabama.

20 Q. And if I read correctly from your curriculum  
21 vitae you are a clinical and forensic psychologist.  
22 Would you explain what is the difference between a  
23 clinical psychologist and a forensic psychologist?

24 A. A clinical psychogist is someone who is trained  
25 to evaluate different kinds of mental disorders and

1 disabilities that might be anything from mental  
2 retardation to personality disorders to major mental  
3 illnesses like schiophrenia. I have a PhD in clinical  
4 psychology and the training -- and that would also  
5 include doing treatment of various conditions as well as  
6 psychological testing.

7           The forensic psychology training comes after  
8 the PhD in clinical psychology and that is a specialty  
9 area and it involves the application of psychological  
10 research, methods and techniques to different types of  
11 legal issues. And that can be both in the criminal  
12 arena and the civil arena like custody or personal  
13 injury types of cases.

14       Q. Did you receive any specialized training beyond  
15 your doctorate in the field of forensic psychology?

16       A. Yes, I did. And it's part of getting my PhD in  
17 clinical psychology I did my internship that's required  
18 of all clinical psychogists at a forensic hospital much  
19 like Taylor Hardin Hospital in Alabama. And then after  
20 I got my PhD in clinical psychology I did a two year  
21 post doctoral fellowship at the University of Southern  
22 California Insitute of Psychiatry Law in behavioral  
23 science and that included seminars conducted by  
24 attorneys and judges and forensic psychologists and  
25 psychiatrists and supervised -- supervision either doing

1 different kinds forensic evaluations.

2 Q. Did you receive or have you received any training  
3 for the use -- for conducting evaluations in the context  
4 of capital cases?

5 A. Yes, I have.

6 Q. And would you describe that for us briefly?

7 A. That was addressed to some extent in my  
8 fellowship and the years since then. I have gone to  
9 continuing education seminars on that topic.

10 Q. Now, I note on page two of your curriculum vitae  
11 that your are an Alabama Certified Forensic Examiner.  
12 What does it mean to be an Alabama Certified Forensic  
13 Examiner and how did you obtain that distinction?

14 A. In Alabama as in a few other states in the  
15 country there is a certification program and the purpose  
16 of those programs is to permit the Court and others who  
17 may be interested to know that the person with that  
18 credential has a certain basic level of expertise in  
19 forensic psychology. And in Alabama that involves doing  
20 some workshops and training at Taylor Hardin Secure  
21 Medical Facility. After the training the people who are  
22 seeking that certification will take a written test, I  
23 believe you have to score seventy percent on the written  
24 test, and the next stage the in certification is to  
25 conduct one or two court ordered evaluations of



1 competency and standing typically during which time  
2 someone who is already a certified forensic examiner  
3 observes and then supervises the report writing and if  
4 all of that goes well and meets with the expectation  
5 then this person gets the certification.

6 In order to maintain the certification we are  
7 required to do a certain amount of continuing education  
8 every year in the area of forensic psychology.

9 Q. Have you been retained previously as an expert in  
10 capital cases?

11 A. Yes.

12 Q. And approximately how many prior capital cases  
13 have you worked?

14 A. I would estimate about 14 or 15. In some of  
15 those cases it wasn't always clear that it would be  
16 charged as a capital case. In my work -- I do work  
17 equivalent to what the Taylor Hardin doctors do over in  
18 Georgia and so sometimes those are court ordered  
19 evaluations and sometimes at the stage that we do the  
20 evaluations there is still -- be, you know, a decision  
21 process at the district attorneys office as to how they  
22 are going to charge that. So sometimes I am not aware  
23 at what level that case is going to be.

24 Q. On what issues have you been retained to conduct  
25 evaluations in connection with capitals or cases that

1 MS. COKER: Objection.

2 MR. WHITEHEAD: Judge, I apologize.

3 BY MR. WHITEHEAD:

4 Q. What were you -- what were you retained to do in  
5 this case, Dr. Boyer? What were the tasks that we asked  
6 you to perform?

7 A. I was asked to do two basic things. First of all  
8 from the prospective of a psychologist who functioned as  
9 a mitigation expert to evaluate the sufficiency of the  
10 mitigation information that was presented at Mr.  
11 Miller's trial and with respect to his appeal, his  
12 direct appeal, and to conduct an evaluation of Mr.  
13 Miller of a type that I would ordinarily and other  
14 psychologist, mitigation experts would ordinarily  
15 conduct to develop the kind of psychological information  
16 about his background and his personality and his  
17 experiences that would be presented in a trial, for  
18 example, or in his sentencing.

19 Q. And what have you done in order to perform those  
20 two tasks?

21 A. I have interviewed and evaluated Mr. Miller.

22 Q. All right. You interviewed Mr. Miller himself;  
23 is that correct?

24 A. Yes.

25 Q. On how many occasions have you interviewed Mr.

1 Miller?

2 A. I saw him on three occasions at Holman prison for  
3 a total of something over seven hours and about three  
4 hours of that was in administration of some  
5 psychological tests.

6 Q. We'll talk about those tests in just a couple of  
7 minutes. Who else have you interviewed for purposes of  
8 forming your opinions in this case?

9 A. I have interviewed a variety of family members.  
10 I have interviewed his mother, Barbara Miller, his  
11 brother, Richard Miller, I talked to his sister, Cheryl  
12 Ellison or actually I should say half sister, I talked  
13 to his niece, Alicia Sanford, his cousin, Brian Miller,  
14 his uncle and aunt, George and Bonnie Carr, another  
15 uncle, Richard Carr.

16 Q. Let me suggest some additional names and see if  
17 you talked to them, a Viola Trull, T-r-u-l-l.

18 A. Right. His aunt.

19 Q. How does she pronounce her last name?

20 A. Trull, I believe.

21 Q. Did you speak to a Pamela Hand?

22 A. Yes.

23 Q. Who is Pamela Hand?

24 A. Pamela Hand is the first wife of his Uncle Perry  
25 Miller.

1 this at this point?

2 MR. WHITEHEAD: No, we are not, counsel. If  
3 you may please let me finish. I simply was going to  
4 suggest to Your Honor that there are two appellate court  
5 decisions sited in the memorandum that I think might be  
6 of assistance to Your Honor.

7 THE COURT: Then we will take some further  
8 look at it. Thank you. And I hope that at least our  
9 discussion will be fruitful and you will understand what  
10 I am wrestling with and give you an opportunity to  
11 respond to that.

12 MR. WHITEHEAD: It is always helpful to us  
13 to know what you are thinking.

14 (Lunch recess taken.)

15 BY MR. WHITEHEAD:

16 Q. Dr. Boyer, prior to the break for lunch we were  
17 talking about what you had learned from the records and  
18 the family interviews concerning some of Alan's  
19 relatives. And we talked about Perry and Uncle James.  
20 What did you learn from your review of the records from  
21 your interviews with the family concerning Alan's father  
22 Ivan Ray Miller?

23 A. Ivan Ray Miller did have a couple of criminal  
24 offenses that I found in records there, I believe a  
25 theft and larceny. He, in terms of, you know -- are you

1 taking about all the information that I gathered in  
2 total?

3 Q. Did you learn anything about any psychiatric  
4 record or mental health record for Ivan Ray?

5 A. Of Ivan Ray Miller?

6 Q. Do you recall whether or not he had seen a  
7 psychiatrist at the Cooper Green Hospital?

8 MR. HENRY JOHNSON: Your Honor, just for  
9 clarification are we talking about Ivan Miller or Ivan  
10 Ray Miller his son?

11 MR. WHITEHEAD:

12 Q. I beg your pardon. We are talking about the  
13 senior, Alan Miller's father. Thank you.

14 A. Yes. He did have a history of treatment for  
15 depression in particular as far as mental health  
16 records.

17 Q. Now were there any -- was there any information  
18 of importance that you learned from the divorce file  
19 concerning the marriage of Ivan and Barbara Miller  
20 concerning Ivan's activities?

21 A. Yes, that violence was a factor that was sited in  
22 the reason for the divorce or abuse.

23 Q. Am I correct that Barbara applied for a  
24 protective order based on the violence that she had  
25 suffered from Ivan?

1 A. Yes.

2 Q. Now, we earlier identified the records that were  
3 obtained from the Department of Human Resources, the  
4 social services records. What -- what information came  
5 from those that was of significance to you in your  
6 evaluation?

7 A. Social service records to me reflected the  
8 financial stress the family was under, the fact that  
9 they had to apply for food stamps. There was also a  
10 letter in those records that had been written by  
11 Barbara's mother to someone in the social service agency  
12 about -- that referenced the difficulties that Barbara  
13 was having, the fact that Ray -- Ivan Ray, Jr., the  
14 brother and Alan had seemed to have been briefly placed  
15 somewhere outside of Barbara's care and reflected the  
16 fact that Barbara's first two children from an earlier  
17 marriage were in her parent's care.

18 Q. Now -- in your review of the records, the  
19 educational records from Alan, do you recall what  
20 conclusions you drew from those?

21 A. The things that I noted in those records were  
22 that he generally did fairly well in school. There  
23 wasn't anything in the records to suggest that he had  
24 significant intellectual problems, that he wasn't able  
25 to do the work. What stood out for me one, that he

1 certainly had some conduct problems at times. Those  
2 were not specified. And that at times his grades were  
3 quite variable. He might go during grading period from  
4 an A to a D for example. And one of the things that you  
5 often see in the school histories of children who have a  
6 lot of disruption in the home life is that kind of  
7 variability.

8 Q. You reviewed Alan's employment records that were  
9 marked into evidence earlier?

10 A. Yes.

11 Q. What do you recall learning about Alan's work  
12 performance and employment history from the records and  
13 from the other interviews you conducted?

14 A. In general that it was good, that he was  
15 considered to be a good worker. He did have -- I do  
16 recall reading about a fight and if you are asking about  
17 sort of what I learned more broadly than just the  
18 records and it sounds like you did, that work was  
19 something that was very important to him, that he  
20 valued, he wanted to be a responsible person who was not  
21 like his father.

22 Q. Do you recall learning anything about his job  
23 performance at his most recent position in Ferguson  
24 Enterprises the months just before the shooting?

25 A. Yes. There was a good report I believe that he

1 had recently gotten a raise and was described as a good  
2 worker.

3 Q. Now, you told us about your interviews with Alan  
4 and his family members. What did you learn from those  
5 interviews with respect to Alan's upbringing?

6 A. Certainly one of the things that stands out  
7 prominently and has been described by other witnesses is  
8 the level of abuse that was present in the family from  
9 Alan's father that it was frequent, that it ranged from  
10 actual physical assaults to threats with guns and knives  
11 to the point of shooting into the floor, shooting into  
12 the wall, threats to harm, threats to kill the family,  
13 intimidating, bullying, that kind of thing. There is  
14 this element of unpredictability where he seemed that  
15 his moods would suddenly shift. There were periods that  
16 we would get on religion and, you know, go around  
17 preaching or anointing people or trying to heal people  
18 that seemed sort of bazar in terms of the standards of  
19 that family, that this was not what they were accustomed  
20 to in terms of religious practices. They seemed very  
21 erratic in terms of his work history, his jobs. He was  
22 not consistent -- consistently employed or providing for  
23 the family financially.

24 Q. I'm sorry. I interrupted. Go ahead.

25 A. I was just going to go through the list of things



1 I learned about the family unless you want to --

2 Q. No. Go ahead.

3 A. The family was certainly often in severe  
4 financial stress in terms of the types of places they  
5 lived or needed to stay from time to time with a  
6 relative. There were frequent moves which certainly  
7 uprooted the kids from one school to another or one  
8 location to another.

9 Q. What did -- what in particular did you learn  
10 about the frequency or the nature of the physical abuse  
11 that Alan received from his father, Ivan?

12 A. That it was sort of a regular thing in the  
13 family. It's not something that happened once a year or  
14 once every few years, that it was weekly often. When I  
15 asked Alan how often that he could tell me how many  
16 times his father actually hit him with his fists he said  
17 at least a thousand times. It was just so much a part  
18 of the routine that you could walk by and he suddenly  
19 reached out and just punch you for no reason. But it's  
20 -- it was a feature of -- I wouldn't say day-to-day life  
21 but it was certainly a regular feature of life in that  
22 family.

23 Q. What did you learn as a result of this abuse, the  
24 nature of the relationship between Alan and his father?

25 A. That it was very, very poor. He was afraid of

1 him. He believed that his father could potentially kill  
2 him and other people in the family. So there was a  
3 great deal of fear and anxiety and helplessness about,  
4 you know, being stuck in that situation.

5 Q. How did Alan cope with this?

6 A. Well physically in terms of, you know, how could  
7 he respond to it. There wasn't a lot, from my  
8 understanding, that he was able to do. When he got to a  
9 certain point in life and as he got older and bigger my  
10 understanding is that the level of physical abuse  
11 changed up when he became in his late teens there was  
12 not the kind of threats or beatings that he had when he  
13 was younger.

14 Psychologically he has talked about what we call  
15 dissociation, meaning he remembers times when his father  
16 would beat him and his conscious awareness of what was  
17 going on was not there. He would sort of come to  
18 himself and find that he was, you know, sore in his ribs  
19 or had bruises and couldn't remember how it happened.  
20 He sort of has the sense of mentally going away, going  
21 elsewhere sometimes during the abuse. It didn't always  
22 happen, but it did happen at times. So that was one way  
23 that psychologically he dealt with it and we know that's  
24 common when people are exposed to abuse and trauma.

25 Otherwise he was in another aspect of him that is

1 common in victims of trauma and abuse, they are in a  
2 state of constant tension and hyper alertness. He  
3 talked about having always sort of to keep an eye on his  
4 father out of the corner of his eye, not being able to  
5 relax in your own home and rest because you never knew  
6 what was going to happen or what his father was going to  
7 do. So he's always in a state of hyper alertness.

8 Q. How was Alan's relationship with his mother?  
9 What did you learn about that relationship and the  
10 significance to Alan's life history?

11 A. It was a good relationship. She was overwhelmed  
12 in terms of dealing with the finances, the children and  
13 the ongoing -- you know problems with Ivan himself and  
14 the way that he behaved. She, you know, certainly could  
15 not effectively protect her children from the abuse and  
16 Alan from the abuse. It went on despite at times her  
17 efforts to get in between and then get hurt herself.  
18 And she wasn't always there when things went on. But  
19 she -- he certainly felt love from her, concern from  
20 her. And one of the things that's prominent in what  
21 Alan and others have talked about is how she always told  
22 him that he didn't have to be like his father, that he  
23 could be better than that. And so in that sense that  
24 was an inspiration to him. That is something he strove  
25 to do and wanted to achieve.

1 have a change in school. There was a period during  
2 junior high where his father, for whatever reason,  
3 didn't want them to go out of the house and just, you  
4 know, he may have been paranoid about something at that  
5 time. But he didn't want them to go play with other  
6 people or anything like that.

7 As Barbara Miller testified Ivan's behavior sort  
8 of put other people off, neighbors and things like that.  
9 So I think that was a factor in the isolation. But the  
10 other thing I think is significant is that when you have  
11 a climate in which there is a lot of abuse one of the  
12 things that happens to victims of chronic trauma is they  
13 begin to sort of pull in and reduce their exposure to,  
14 you know, situations and places that they don't know  
15 what's going to happen. It's a sort of protective thing  
16 is to isolate and to sort of limit the scope in which  
17 one operates in the world.

18 Q. You talked about the difficulties that Alan had  
19 with his father and the stresses that he was under, what  
20 resources were there to help Alan with the difficulties  
21 in his family. In particular in dealing with his  
22 father?

23 A. Well, I couldn't find much of any. I mean  
24 certainly his mother cared about him but it's not a  
25 situation where social services were aware of the abuse

1 in the family, it's not a situation that I am aware of  
2 that police were contacted and brought into the  
3 situation. The family's financial situation and I think  
4 level of you -- when people are sort of living on the  
5 edge and barely making it in terms of basic necessities,  
6 you know, going out and being aware of like mental  
7 health resources and things like that is often a  
8 difficult thing to do and certainly financially that may  
9 have been an issue. Certainly nobody sought it out.

10           There was one incident with a referral in school  
11 early on. So that wasn't an issue. When you have --  
12 things that sometimes help kids who have been exposed to  
13 abuse are a mentor or a special person, a special  
14 teacher or coach or minister or Sunday school teacher or  
15 someone who kind of takes that child under their wing,  
16 I'm not aware of that ever happening for Alan.

17           Certainly there were relatives who were not  
18 abusive and who provided some measure of positive  
19 influence but there wasn't anything during the course of  
20 his developmental years that got him out of that  
21 situation at home in which he was being abused and  
22 threatened and often felt in fear for his life from his  
23 father.

24           Q. There has been -- you testified previously and  
25 there's been testimony from other witnesses about the

1 presence in the home of Ivan's brothers, Perry Miller  
2 and James Miller. We talked about their mental health  
3 history and their criminal history. What was the  
4 significance of that for the development of Alan Miller  
5 as a child and as a young adult?

6 A. I certainly think their mental health histories  
7 have implications in terms of genetic vulnerability. I  
8 know that in terms of Alan's exposure to them, being  
9 around them, that there were certainly times when they  
10 were in the home and Alan would have been exposed to  
11 their, you know, using drugs, you know, to all manner of  
12 problematic behaviors on their part. I really don't  
13 know the frequency. I don't know, you know, how many --  
14 how often they were there. I don't know the extent of  
15 that exposure. So I think that that undoubtedly had  
16 some impact but it's not much compared to what I think  
17 the impact of Ivan's behavior day in and day out on the  
18 family was.

19 Q. Now, you testified earlier that you reviewed the  
20 prior evaluations, mental health evaluations that was  
21 done of Alan. We started first with the one that was  
22 done by Dr. Hooper at the Taylor Hardin facility in, I  
23 believe, it was October of 1999. Did you review the  
24 Hooper report and his backup files?

25 A. Yes.

1 Q. And after you reviewed the McClaren report files  
2 I take it you reviewed the Scott and McDermick reports  
3 and files?

4 A. Yes.

5 Q. And did you agree with the assessments in the  
6 Scott and McDermick reports with respect to the severe  
7 mental illness that Alan was suffering at the time of  
8 the shootings?

9 A. I certainly in terms of the methods they used and  
10 the test Dr. McDermick gave and her description of those  
11 results I didn't find any reason to disagree with them  
12 in terms of the diagnosis of delusional disorder and the  
13 personality features that were evident.

14 Q. Now, having reviewed these files did you evaluate  
15 and assess Alan to determine if there were any other  
16 additional mental illnesses from which he suffers to  
17 understand him more broadly with respect to these  
18 shootings?

19 A. Yes.

20 Q. And what did you evaluate him for?

21 A. As I mentioned one of the things I want to look  
22 at initially was the extent to which there had been any  
23 change in his mental health status from the time I saw  
24 him to when he was previously evaluated. If there were  
25 serious differences I would need to take that into

1 account and see how that might effect the results of --  
2 or anything new I was measuring. That's one of the  
3 reasons that I gave him the personal assessment  
4 inventory that I mentioned.

5 Q. And what did that show?

6 A. Well, it showed personality and elevations on the  
7 scales that are comparable to the elevations on the  
8 prior MMPI test that had been given, things like  
9 paranoia, schizophrenia, depression. So it showed a  
10 comparability in terms of the mental health and  
11 psychopathology, you know, mental health issues that  
12 were present in the past.

13 Q. What was the significance to you of there being  
14 comparable levels of psychopathology in the tests that  
15 you administered and those that had been administered by  
16 the prior psychologists or psychiatrists?

17 A. Well, for example if he was showing, you know,  
18 extreme incoherence or extreme psychosis at the time I  
19 am seeing him now that's not something that was present  
20 previously and I would want to know how that might  
21 compromise, you know -- compromise the results that I  
22 get in making clearly different -- in a different state  
23 now. You know that would potentially invalidate for the  
24 purposes of my assessment, you know, the results that I  
25 got.



1 Q. And did you find such results?

2 A. Yes. I mean they were comparable.

3 Q. Actually wasn't thinking about it from a  
4 different prospective. Did you find any serious  
5 deterioration in his mental state or any serious change  
6 in his mental state from that as evidenced by the prior  
7 examinations?

8 A. No. And the same with the malingering as well.

9 Q. Now, did I understand you to say that one of the  
10 things that you were looking at in selecting the test  
11 that you gave him was to evaluate him for the possible  
12 presence for either a dissociative disorder or some  
13 other trauma related disorder?

14 A. Yes.

15 Q. What is a dissociative disorder?

16 A. A dissociative -- let me start by explaining what  
17 a dissociative sign or symptom is. Dissociation is a  
18 symptom, a phenomenon that commonly occurs in victims of  
19 various kinds of trauma. It can occur, you know, in  
20 combat trauma, it can occur in rape or victims of other  
21 sorts of assaults, you know serious sort of potentially  
22 life threatening kinds of events. And it can occur in  
23 victims of chronic trauma.

24 Q. When you say trauma, would that also include  
25 victims of chronic abuse?

1           A. Yes. You know physical or sexual abuse, things  
2 like that. And it is essentially a disconnecting in the  
3 normally integrated functions of consciousness and  
4 memory and perception of one's self and perceptions of  
5 your environment. Examples would be out-of-body  
6 experiences, amnesia, sort of a lack of awareness of  
7 things going on around the person, feeling as though  
8 things are in a dream, tunnel vision, just things about  
9 your voice or the way your body is or changing.

10           At the extreme end of dissociative disorders is  
11 the sort of dissociative identity disorder which is  
12 formally known as multiple personalities. So that's  
13 sort of in that same spectrum of disorders.

14           Q. And what do mental health experts understand to  
15 be sort of a classic cause of dissociative disorders?

16           A. Most often it's typically some kind of serious  
17 trauma in the person's background.

18           Q. And did -- on the basis of the investigation that  
19 you had done did you consider the abuse that Alan  
20 reported and the family members reported he had suffered  
21 from his father would constitute such a significant  
22 trauma?

23           A. Yes.

24           Q. Now, were there materials that you reviewed that  
25 suggested to you that Alan in fact might suffer from

1 either a dissociative disorder or some kind of  
2 dissociative episodes relating to trauma?

3 A. Yes.

4 Q. I know you mentioned this previously but I am  
5 correct that this was actually identified by Dr.  
6 McClaren in his report as a possibility?

7 A. Yes. He raised that as a possible condition that  
8 he had.

9 Q. Could you determine from the McClaren report or  
10 the materials in the McClaren file whether Dr. McClaren  
11 after he identified the possibility of a period of  
12 dissociation at the time of the shooting went further to  
13 conduct any additional evaluation or inquiry to follow  
14 up on that, to see whether or not that possibility in  
15 fact was more likely?

16 A. I did not see any indication of that.

17 Q. Now, in addition to Dr. McClaren's report  
18 identifying the possibility of a period of dissociation  
19 what other factors lead you to believe that Alan Miller  
20 might possibly have been suffering from a dissociative  
21 episode at the time of the shootings?

22 A. There were several things. Certainly as I became  
23 aware and as I evaluated everything of the extent of the  
24 abuse he experienced, the severity of it and the  
25 frequency of it in the family, the sort of

1     relentlessness of it, I think any time a psychologist or a  
2     psychiatrist finds that extent of abuse in someone's  
3     history it's good practice to at least begin to question  
4     the possibility of post traumatic stress disorder,  
5     dissociative disorder and to look at the kind of  
6     symptoms that you commonly find resulting from that kind  
7     of abuse history. That's one thing.

8           Q. As you reviewed the materials in the McClaren and  
9     Dr. McClaren's report, did it appear that he was aware  
10    of the nature and extent of the abuse that Alan had  
11    suffered to the extent that you subsequently became  
12    aware of it?

13           A. No.

14           Q. Now, in addition to the history of abuse as a  
15    trigger or as an indicator to you that dissociation  
16    might have been present here, what other factors did you  
17    take into account or what other pieces of evidence did  
18    you rely upon?

19           A. Well, certainly I considered the psychological  
20    testing that had been previously given because it had  
21    been fairly extensive. Yet this had not come up as any  
22    diagnoses that were previously given except for what Dr.  
23    McClaren mentioned. And none of the -- even though --  
24    for example the structured clinical interview diagnosis  
25    that Dr. McDermick gave is a comprehensive structured

1 clinical interview for a range of mental disorders, post  
2 traumatic stress disorders and dissociative disorders  
3 are not part of that instrument. So that was something  
4 specifically not looked at.

5 Now in her MMPI 2 there were a couple of  
6 supplementary scales that were significantly elevated  
7 that are associated -- that are sort of identified as  
8 post traumatic stress disorder scales. And those were  
9 evaluated. So that was one thing.

10 Q. As you reviewed the McDermick file did you see  
11 any evidence that Dr. McDermick had been made aware of  
12 the nature and extent of the physical abuse that Alan  
13 had suffered to the same extent that you subsequently  
14 had learned about it as a result of your investigation?

15 A. No, it did not appear that she did.

16 Q. What other factors lead you to suspect  
17 dissociation or post traumatic stress disorder and to  
18 follow up with additional tests?

19 A. A couple of things. Certainly the -- Mr. Miller  
20 consistently described amnesia for a certain time period  
21 surrounding the crime. And it appears to have been  
22 fairly consistently present for some months, you know,  
23 as reported to various parties, doctors who evaluated  
24 him, his attorney apparently based on a document that  
25 was sent to Taylor Hardin I believe describing the

1 attorney's observation, his behavior described in -- by  
2 police to some extent, Dr. McClaren had information  
3 about how he appeared or things that he may have said to  
4 people around that time.

5 And in addition to that though you would never  
6 want to diagnose a dissociative disorder or some kind of  
7 post traumatic dissociation just based on someone's  
8 report that they don't remember a crime that they  
9 committed. You want to look in the records and by  
10 talking to people who knew that person to find -- you  
11 know in addition to psychological testing you want to  
12 look for signs that that sort of thing has been present  
13 at other times in the person's life in addition to  
14 having the precondition of serious abuse.

15 Q. And did you obtain information from family  
16 members and other sources on that subject of whether or  
17 not Mr. Miller had previously had periods in which he  
18 had his own doubt or had appeared to have amnesia or  
19 otherwise experience what might have been dissociative  
20 episodes?

21 A. Yes.

22 Q. Going back for a moment to the claim lack of  
23 memory, did you speak to Mr. Miller when you interviewed  
24 him about whether he could remember the events of the  
25 day of the shootings?

1 Q. Do you see a reference at the bottom of that page  
2 to what Mickey Johnson reported Mr. Miller had said at  
3 the time he was actually apprehended?

4 A. Correct. He said he asked the officers if they  
5 were going to arrest him at the time that he was on his  
6 way home to go to bed.

7 Q. Does it read if they were going to charge him?

8 A. I'm sorry. Yes.

9 Q. Then also in the Hooper files would you look at  
10 me please at page 19, Exhibit 31 page 19? Am I correct  
11 that this page is a page on which notations were made by  
12 the Taylor Hardin representatives and during the period  
13 or consistent with their interview of Mr. Miller?

14 A. Yes. I mean I -- these are Dr. Hooper's notes.

15 Q. What on page 19 did you point out to me you  
16 thought was of significance and at least suggesting the  
17 hypothesis of the dissociative disorder or dissociative  
18 episode?

19 A. There were two things, one went to sleep and next  
20 memory is around the last -- in quotes is daydreams.  
21 And obviously I'm not sure exactly what he means by that  
22 but that's potentially significant. And under that he's  
23 written in some history vague of not responding, not  
24 remembering conversation.

25 Q. And do you see a reference at the top of the page

1 in which under the heading summary of alleged events?

2 A. Yes. Denies any memory.

3 Q. Denies any memory. All right. While we are in  
4 the Taylor Hardin notes -- let's move on. And did you  
5 find anything in Dr. Hooper's report itself that was  
6 consistent with or suggested to you the possibility of a  
7 dissociative episode?

8 A. Other than the lack of memory from the offense.

9 Q. Right. Actually I think I was referring to the  
10 lack of memory for the offense.

11 A. All right. Okay.

12 Q. Good. Let's turn now to what evidence you may  
13 have gleaned from materials in the McClaren file that  
14 relates to the possibility that Mr. Miller had been  
15 suffering from a dissociative episode. That's going to  
16 be in Exhibit 27 and I don't know whether you have 27  
17 there or not. And if you would start on page 27-0005,  
18 am I correct that this is one of the notations in the  
19 McClaren file that you identified for me as having some  
20 significance to you and suggesting the possibility of  
21 dissociative episode?

22 A. Yes.

23 Q. What is this page? What are these notations?

24 A. This is Dr. McClaren's notes where he is  
25 evaluating competency and under the section of the



1 write. It's not something that's used very often  
2 anymore. It used to be part of a standard battery of  
3 tests back when we used to sort of give sort of a set  
4 group of tests to everybody no matter what the situation  
5 was.

6 Q. Do you recall whether there were any responses  
7 that Mr. Miller gave to the incomplete sentences blank  
8 that were consistent with or suggestive of the  
9 possibility that he experienced periods of dissociation  
10 unrelated to the crime?

11 A. Yes. In the context of everything else, yes.

12 Q. Let's look very quickly -- do you have Exhibit 27  
13 in front of you there?

14 A. Yes.

15 Q. If you look on page 190 -- am I correct that  
16 starting on page 189 you actually have the response  
17 sheet to the Roter Incomplete Sentences Blank?

18 A. Correct.

19 Q. And this was administered by Dr. McClaren?

20 A. Yes. In his file he doesn't indicate anybody  
21 else administered the test so I presume he administered  
22 them.

23 Q. And I believe you pointed out to me on the second  
24 page Mr. Miller's response to question 17 and would you  
25 explain what that is and of what significance that might

1 have been?

2 A. The stem of the sentence is when I was a child  
3 and Mr. Miller wrote in I dreamed a lot and in  
4 parenthesis Dr. McClaren wrote day dream.

5 Q. And if you would look with me at sentence --  
6 incomplete sentence number 28 and explain to us why you  
7 identified that to me that was something that was of  
8 significance?

9 A. The sentence stem is sometimes and he's written  
10 in I forget things.

11 Q. And what would -- of what use were those  
12 responses to you in thinking about the possibility of  
13 dissociation?

14 A. Again in the content of everything else this just  
15 simply establishes a couple of things. They are sort of  
16 like red flags. People who have dissociative disorders  
17 or symptoms they are often thought by other people to  
18 look like they are day dreaming when in fact, you know,  
19 they are sort of not consciously aware of what's going  
20 on. And, you know, by itself something like I forget  
21 things isn't particularly meaningful. So again it's  
22 just, you know -- I was just looking for anything that  
23 dealt with mental problems. And it's not something that  
24 a lot of people would write just sometimes so that  
25 suggests that it certainly is something that Mr. Miller

1 was aware of with himself.

2 Q. And we've talked previously that Dr. McClaren  
3 administered the MMPI, the Minnesota Multiphasic  
4 Personality Inventory. And do I understand that one of  
5 these -- is it correct to understand that that test is  
6 scored electronically or it's machine scored?

7 A. He gave the original MMPI you could hand score or  
8 computer score it either one.

9 Q. And do I understand correctly that one of the  
10 outcomes of the test is a list of the critical items?

11 A. Yes.

12 Q. What does it mean when a particular item on the  
13 test is identified as a critical item under the MMPI?

14 A. Typically these tests are interpreted by a  
15 psychologist in light of the profile sheet which is like  
16 a chart that shows cutoff levels and you look at scales  
17 where if a person has an evaluation on a particular  
18 scale, a score that's above the cutoff that's noteworthy  
19 for considering what kind of mental disorders a person  
20 might have. You don't look at individual items in  
21 general in terms of interpreting the tests. But there  
22 are certain items -- the critical items that are  
23 selected out to call a clinician's attention to  
24 something they just might want to be aware of in  
25 thinking further about what might be going on with a

1           A. We call that clinically significant. What that  
2 means is noteworthy for you know a psychologist or a  
3 psychiatrist or mental health professional that  
4 something above that line means this is a serious  
5 problem for this person, this is within the range that  
6 you would consider for a possible disorder.

7           Q. Does it -- would another way of thinking about  
8 this be that the scores achieved by this individual are  
9 sufficiently out of the norm for all persons on whom the  
10 test has been validated, that their outlying scores are  
11 statistically significant?

12          A. Yes.

13          Q. Now, if I am looking at this correctly it appears  
14 that starting with the RTE and going over to something  
15 called the T-DIS Mr. Miller's scores were all above that  
16 statistical significance line; is that correct?

17          A. That's correct.

18          Q. Before we look at some of these sub scores,  
19 specifically what is the -- what does it mean with Mr.  
20 Miller to have a profile that looks like this?

21          A. It means that, you know, these results reflect the  
22 presence of a range of post traumatic types of symptoms  
23 that are all very much part of the post traumatic stress  
24 disorder condition. Those include re experiencing  
25 trauma which means they -- this was not so much an issue

1 for him but combined under the experience it can be  
2 intrusive memories about what happened, you know  
3 nightmares and the sense that what happened before is  
4 happening again. There are elements of avoidance, a  
5 persons efforts to avoid memories about the things that  
6 happened or to stay away from things that might bring on  
7 memories. There are elements in these categories of  
8 emotional numbing, a constriction of emotions and  
9 feelings which is something that commonly happens, you  
10 know, to people who experienced trauma. There are  
11 elements of hyper arousal and that's that state of --  
12 it's high tension, high antiexity, the state of being on  
13 hyper alert, reacting to a loud noise, startling easily,  
14 those types of things.

15 Q. You explained a moment ago that at one point that  
16 many of these scales are related, I think what the test  
17 refers to them, as index events or an index traumatic  
18 event?

19 A. Correct.

20 Q. Would you explain to the Judge what is meant by  
21 the index event and then what did Mr. Miller describe or  
22 define as his index event?

23 A. At the beginning of the test there was a list of  
24 different kinds of traumatic things that can happen, the  
25 person marks each of the ones that they felt happened to

1 them at some point in time and if there is more than one  
2 of them they are asked to identify that one event that  
3 they feel effects them and bothered them the most.

4 Q. And what did Mr. Miller identify as the single  
5 event, the index event that bothered him the most?

6 A. The beatings by his father and the threats to him  
7 and the family.

8 Q. And given the scores that he received on DAPS  
9 with respect to that index event, how significant, how  
10 serious do these scores indicate were the trauma that  
11 Mr. Miller was reporting as a result of the beatings by  
12 his father?

13 A. Very significant.

14 Q. Now, you also administered the SCID-D. And I  
15 think you told us that that was the Structured Clinical  
16 Interview Diagnosis?

17 A. The DSM 4 is sort of the diagnostic manual and  
18 it's the -- and that just means that these structured  
19 interviews are designed to look at diagnoses that are in  
20 the DSM 4 and this is the version specific to the  
21 dissociative disorders.

22 Q. Now, I believe we learned earlier that Dr.  
23 McDermick had administered a different version of the  
24 SCID when she evaluated Mr. Miller; is that correct?

25 A. Correct.

1 all cover certain basic categories, the order we do it,  
2 the specific questions we ask, you know, can vary by  
3 individual. But the advantage for structured  
4 interviews, and to the same extent psychological tests,  
5 is that it's a way of gathering information more  
6 systematically.

7 As far as structured interviews you might be  
8 looking at, you know, a particular condition and you  
9 might have one psychologist over here and a second  
10 psychologist if they are just doing their clinical  
11 interview they might ask questions definitely, they  
12 might omit some particular things to ask about and you  
13 might get two different results from each psychologist  
14 depending on what particular questions they may or may  
15 not have asked. You use the structured interview like  
16 this, you have someone who is very knowledgeable about  
17 the disorder who has been involved in the, you know,  
18 getting into the diagnostic category or researching it  
19 and that person puts together a list of questions that  
20 cover, you know, all of the different kinds of  
21 experiences that are relevant to that particular  
22 condition. And that's what this is for the dissociative  
23 disorders.

24 Q. What did Alan's answers on the SCID-D tell you?  
25 What conclusions did you draw?

1           A. He answered -- he gave examples of experiences  
2 that indicated dissociative amnesia and that's the lack  
3 of awareness, the, you know, empty periods -- empty  
4 memory for certain events at different times. He gave  
5 me examples of deep personalization and that is changes  
6 in awareness of himself that might be tunnel vision, it  
7 might be out-of-body sorts of experiences, that sort of  
8 thing. He gave examples of derealization which is the  
9 sense of things around him being changed, not being  
10 real. He gave examples of, you know, feeling like he is  
11 in a day dream, that type of thing.

12           He did not -- he denied for the most part  
13 experiences that would suggest changes in identity,  
14 that's multiple personality kind of things. He denied  
15 all of that. He denied periods where he didn't know who  
16 he was or certain changes in his identify. There is the  
17 experience of talking to himself which people have  
18 described and he is not aware of doing that. Some  
19 people might think that could suggest, you know, other  
20 personalities. That sometimes will happen when you get  
21 that kind of condition. But I didn't find much to  
22 support that. That more falls in my thinking under the  
23 dissociative amnesia, that this is something, you know,  
24 it's not clear why he does it because he doesn't  
25 remember doing it and he can't tell me about it. But



1 it's an example of something that he does that he  
2 doesn't have an awareness of.

3 Q. Did you find any evidence or did you have any  
4 evidence that Mr. Miller responding to this structured  
5 interview and providing you with the information about  
6 various episodes and events was in any way faking or  
7 exaggerating his condition?

8 A. No.

9 Q. Now, have you formed an opinion as to whether Mr.  
10 Miller suffers from a trauma related mental disorder  
11 based upon all of the work that we've talked about  
12 today?

13 A. Yes.

14 Q. And what is your opinion?

15 A. That he suffers from post traumatic stress  
16 disorder with dissociative features.

17 Q. What does that mean in laymans terms?

18 A. Basically any time you give a diagnoses --  
19 diagnostic categories are a collection of symptoms that  
20 consistently occur in the person with that condition.  
21 And the DSM 4, the diagnoses manual has listings, you  
22 know, for those. And post traumatic stress disorder  
23 involves the kind of things that we have been talking  
24 about; dissociation, amnesia, those kinds of  
25 dissociative symptoms are a part of it and can be a part

1 of it. Hyper appraisal, being tense and constantly on  
2 alert is a part of it. Emotional numbing is a part of  
3 it, emotional constriction is often described as someone  
4 who, you know, is sort of not very demonstrative of  
5 emotion. The -- the sort of being troubled by memories  
6 about the traumatic experience and there is, you know,  
7 evidence of the trauma itself, that's essential for the  
8 diagnosis as well.

9 Q. Now, have you -- on what do you base that  
10 opinion? What are the principal sources of information  
11 that led you to the conclusion that he suffered from  
12 that mental disorder?

13 A. Well, first of all there is the trauma. There is  
14 clear evidence that he was raised exposed on a routine  
15 basis to physical abuse and threats of abuse including  
16 behaviors by his father that were potentially life  
17 threatening certainly in the mind of a child. If  
18 someone is shooting a gun into the floor and threatening  
19 to kill the family that child doesn't know that they are  
20 going to be killed, you know, in the next moment or not.  
21 That creates high amounts of fear and anxiety and  
22 stress. So that element is present. That's got to be  
23 there for the diagnosis.

24 In terms of the dissociative symptoms those are  
25 evident in the testing that I gave, they are evident in

1 the family members describing how he zoned out at times  
2 and doesn't seem to be aware of what's going on around  
3 him or losing track of conversations. Mr. Miller  
4 himself just in my talking to him apart from the tests  
5 has talked about, you know, sort going away in his mind  
6 when his father would beat him. Sometimes of losing  
7 track of, you know, at work. Be riding being done on a  
8 job and not remember exactly doing that job. So he's  
9 given evidence of that in the interview.

10 And then the different things that pop up in the  
11 documents that we've talked about that he's told other  
12 doctors that they didn't look at it intensively but to  
13 the limited way that, you know -- in terms of the focus  
14 for that there are places here and there where it pops  
15 up that he has had issues with losing track of time or  
16 blank spells or memory issues. There is the MMPI items  
17 where he talked -- you know, there are all the things we  
18 have been through. And then the -- you know, the big  
19 blank spell is the time period that the offense  
20 happened.

21 Q. Now, Drs. McDermick and Scott diagnosed Mr.  
22 Miller as suffering from both a delusional disorder  
23 paranoid type. Your diagnosis is that he is also  
24 suffering from post traumatic stress disorder with  
25 dissociation. What does it mean to have all of this in

1 your mental health makeup?

2 A. Well, certainly I think the post -- the trauma  
3 related condition, I don't know when the onset was but  
4 at some point he began to have that. It's been more of  
5 a life long condition. It's sort of something that the  
6 dissociative order occurred on top of so the  
7 dissociative disorder is something different that  
8 occurred at a later point in time.

9 THE COURT: I'm going to interrupt you for  
10 just a moment. Perhaps I missed something, Dr. Boyer,  
11 but did you join in the diagnoses of these other  
12 psychologists and psychologists in the delusional  
13 disorder with paranoia?

14 A. Yes, I think that that diagnosis is well  
15 supported so I agree with that.

16 BY MR. WHITEHEAD:

17 Q. Now, Dr. Boyer, in your professional opinion, may  
18 the ability of an individual to appreciate the nature  
19 and quality or wrongfulness of his acts be impaired when  
20 the individual who commits those acts during the course  
21 of a dissociative episode?

22 A. Yes.

23 Q. Have you formed an opinion, Dr. Boyer, based upon  
24 all the materials that you reviewed and the work that  
25 you have done as to whether Alan Miller was experiencing

# **Exhibit 12**

E-Filed  
08/02/2019 01:37:00 PM  
Honorable Julia Jordan Weller  
Clerk of the Court

**IN THE SUPREME COURT OF ALABAMA**

EX PARTE: JARROD TAYLOR	)	
	)	
JARROD TAYLOR,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1991307
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

**STATE OF ALABAMA'S MOTION TO WITHDRAW  
MOTION TO SET AN EXECUTION DATE**

COMES NOW the State of Alabama and asks this Honorable Court to permit the State to withdraw its motion of July 29, 2019, requesting that Jarrod Taylor's execution be set. As grounds, the State provides as follows:

(1) On July 29, the State moved this Court to set Taylor's execution date. That motion represented that Taylor had not made a timely election of nitrogen hypoxia.

(2) Taylor's counsel called the undersigned on July 30, claiming that Taylor had, in fact, made a timely election. Counsel offered to send supporting documentation.

(3) On July 31, counsel sent the undersigned several documents, including a copy of Taylor's signed election form (dated June 28, 2018) and contemporaneous e-mails among counsel creating a record of conversations with

Taylor concerning the election. Taylor indicated to counsel on June 29, 2018, that he had signed two copies of the election form, returned one to counsel, and given the other to a particular ADOC employee to be given to Warden Stewart.

(4) The Attorney General's Office was never given this form, and counsel for the Alabama Department of Corrections did not have this form in their files. Nevertheless, the documentation provided by Taylor's counsel supports the assertion that he made a timely election of nitrogen hypoxia. The State intends to honor that election.

(5) As the ADOC is not yet prepared to proceed with an execution by nitrogen hypoxia, the State requests that it be allowed to withdraw its previous motion.

Respectfully submitted,

Steve Marshall  
*Attorney General*

**s/ Lauren A. Simpson**  
Lauren A. Simpson  
*Assistant Attorney General*  
Counsel of Record \*

Beth Jackson Hughes  
*Assistant Attorney General*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 2, 2019, a copy of the foregoing was served on counsel for Jarrod Taylor by e-mail:

Theodore V. Wells, Jr.	twells@paulweiss.com
Andrew J. Ehrlich	aehrich@paulweiss.com
Steven C. Herzog	sherzog@paulweiss.com
Justin D. Lerer	jlerer@paulweiss.com
Meredith A. Arfa	marfa@paulweiss.com
Joshua P. Myrick	josh@stankoskimyrick.com

**s/ Lauren A. Simpson**

Lauren A. Simpson  
Assistant Attorney General  
Counsel of Record \*

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Montgomery, Alabama 36130-0152  
Tel: (334) 353-1209  
Fax: (334) 353-8400  
lsimpson@ago.state.al.us



# Exhibit 13



Deposition of:  
**CONF Cynthia Stewart**

*May 26, 2021*

In the Matter of:

**Smith, Willie B., III Vs. Dunn, Jefferson,  
et al.**

**Veritext Legal Solutions**

877.373.3660 | [calendar-al@veritext.com](mailto:calendar-al@veritext.com) | 800.808.4958

PL EX 13

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

CASE NUMBER: 19-CV-00927-ECM-SMD

WILLIE B. SMITH, III,

Plaintiff,

vs.

JEFFERSON DUNN, Commissioner,

and TERRY RAYBON, Warden,

Defendants.

\* \* \* \* \*

IT IS STIPULATED AND AGREED by and  
between the parties through their respective  
counsel, that the deposition of Cynthia Stewart  
may be taken before Paul Morse, CCR, via Remote  
Videoconference, on the 26th day of May, 2021.

DEPOSITION OF CYNTHIA STEWART

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1           IT IS FURTHER STIPULATED AND AGREED  
2     that the signature to and the reading of the  
3     deposition by the witness is waived, the  
4     deposition to have the same force and effect as  
5     if full compliance had been had with all laws  
6     and rules of Court relating to the taking of  
7     depositions.

8           IT IS FURTHER STIPULATED AND AGREED  
9     that it shall not be necessary for any  
10    objections to be made by counsel to any  
11    questions except as to form or leading  
12    questions, and that counsel for the parties may  
13    make objections and assign grounds at the time  
14    of the trial, or at the time said deposition is  
15    offered in evidence, or prior thereto.

16           IT IS FURTHER STIPULATED AND AGREED  
17    that the notice of filing of the deposition by  
18    the Commissioner is waived.

19  
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23

\* \* \* \* \*

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I N D E X

EXAMINATION

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EXHIBITS FOR THE PLAINTIFF

PAGE

(There were no exhibits marked for this deposition.)

\* \* \* \* \*

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

4  
5  
6       BEFORE:

7           Paul Morse, Commissioner.

8  
9       APPEARANCES:

10           SPENCER HAHN, ESQUIRE, of FEDERAL  
11       DEFENDERS FOR THE MIDDLE DISTRICT OF ALABAMA,  
12       817 South Court Street, Montgomery, Alabama  
13       36104, appearing on behalf of the Plaintiff.

14           JOHN PALOMBI, ESQUIRE, of FEDERAL  
15       DEFENDERS FOR THE MIDDLE DISTRICT OF ALABAMA,  
16       817 South Court Street, Montgomery, Alabama  
17       36104, appearing on behalf of the Plaintiff.

18           ALLYSON DU LAC, ESQUIRE, of FEDERAL  
19       DEFENDERS FOR THE MIDDLE DISTRICT OF ALABAMA,  
20       817 South Court Street, Montgomery, Alabama  
21       36104, appearing on behalf of the Plaintiff.

22           LAUREN SIMPSON, ESQUIRE, of OFFICE OF  
23       THE ATTORNEY GENERAL, 501 Washington Avenue,

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1 Montgomery, Alabama 36104, appearing on behalf  
2 of the Defendant.

3 RICHARD ANDERSON, ESQUIRE, of OFFICE OF  
4 THE ATTORNEY GENERAL, 501 Washington Avenue,  
5 Montgomery, Alabama 36104, appearing on behalf  
6 of the Defendant.

7 ALSO PRESENT: Joshua Gray, Video

8 \* \* \* \* \*

9 I, Paul Morse, CCR, a Court Reporter of  
10 Mobile, Alabama, acting as Commissioner,  
11 certify that on this date, as provided by the  
12 Federal Rules of Civil Procedure and the  
13 foregoing stipulation of counsel, there came  
14 before me via Remote Videoconference, beginning  
15 at 9:59 a.m., Cynthia Stewart, witness in the  
16 above cause, for oral examination, whereupon  
17 the following proceedings were had:

18  
19 THE VIDEOGRAPHER: Good morning.  
20 We are going on the record at 9:59 a.m. on  
21 May 26, 2021. This is media unit one in the  
22 deposition of Cynthia Stewart Riley in the  
23 matter of Willie B. Smith, III, versus

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1 Jefferson Dunn, filed in the United States  
2 District Court for the Middle District of  
3 Alabama, Northern Division. Counsel and all  
4 present will now state their names and  
5 affiliations for the record.

6 MR. HAHN: Spencer Hahn, Federal  
7 Defenders, Middle District of Alabama for  
8 Willie Smith.

9 MR. PALOMBI: John Palombi,  
10 Federal Defenders Office, Middle District of  
11 Alabama for Willie Smith.

12 MS. DU LAC: Allyson du Lac,  
13 Federal Defenders in Middle District of Alabama  
14 for Willie Smith.

15 MS. SIMPSON: Lauren Simpson,  
16 Office of the Attorney General for the  
17 Defendants.

18 MR. ANDERSON: Richard Anderson,  
19 Office of the Attorney General for the  
20 Defendants.

21 THE VIDEOGRAPHER: All right.  
22 Will the Court Reporter please swear in the  
23 witness.



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1                   CYNTHIA STEWART,  
2           being first duly sworn, was examined and  
3           testified as follows:

4  
5                   THE COURT REPORTER: Usual  
6           stipulations?

7                   MR. HAHN: Yes.

8                   MS. SIMPSON: Yes.

9                   THE VIDEOGRAPHER: All right. We  
10          may proceed.

11                   MR. HAHN: Thank you.

12

13                   EXAMINATION

14          BY MR. HAHN:

15                   Q.       Good morning. Is it -- I want to  
16          say Ms. Stewart, but is it Ms. Riley or  
17          Ms. Stewart you prefer?

18                   A.       Ms. Stewart is fine.

19                   Q.       Okay. Ms. Stewart, my name is  
20          Spencer Hahn, and I represent Willie Smith as  
21          you just heard. And I just wanted to let you  
22          know, obviously this is a deposition, and we're  
23          here to just kind of get information and ask

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1 some questions. If you don't understand the  
2 question that I ask, please let me know and I  
3 will attempt to rephrase it. Please don't try  
4 to guess at anything. If you don't know  
5 something, it's perfectly okay to say I don't  
6 know. Again, we're just trying to get  
7 information here. So there are no right or  
8 wrong answers. There's just information.

9 If you need a break at any point, let me  
10 know. I think typically we've broken about  
11 every hour or so during our past depositions.  
12 And so I anticipate I'll ask for a break around  
13 eleven just to get refreshed a little bit here.

14 Do you have questions for me before we  
15 start?

16 A. I do not.

17 Q. Okay. Thank you. And so what is  
18 your name just for the record?

19 A. My name is Cynthia Stewart.

20 Q. Okay. And what's your age?

21 A. I am 55.

22 Q. Okay. And did you review any  
23 documents to prepare for today's deposition?

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1 A. Probably a couple weeks ago.

2 Q. Okay. And what sort of documents  
3 did you review?

4 A. I think it just was the file that  
5 was sent from the Court as far as the --  
6 talking about the deposition.

7 Q. Okay. Gotcha. And did you meet  
8 with anybody to prepare for today's deposition?

9 A. I did.

10 Q. Okay. And who did you meet with?

11 A. Ms. Simpson. Ms. Simpson, excuse  
12 me, and Mr. Anderson.

13 Q. Okay. And when was that meeting?

14 A. Last week.

15 Q. Okay. And anybody else there?  
16 Was it just Ms. Simpson and Mr. Anderson, it  
17 sounds like?

18 A. Just Ms. Simpson and Mr. Anderson.

19 Q. Okay. Okay. So they sent over a  
20 copy of your curriculum vitae. And I just  
21 figure we can kind of summarize it a little bit  
22 as we go through your background. It looks  
23 like you are presently the regional director

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1 for the Department of Corrections located in  
2 the central office in Alabama -- Montgomery,  
3 Alabama?

4 A. Correct.

5 Q. Okay. And you started that  
6 position in May of 2020?

7 A. Correct.

8 Q. Okay. Is that the position -- was  
9 that the one that Grantt Culliver held before  
10 you or is that a different regional director  
11 position?

12 A. That is --

13 Q. Or was he associate commissioner?

14 A. He was associate commissioner, so  
15 that was a different position.

16 Q. Okay. Okay. And it says that you  
17 oversee direction of operation and planning for  
18 twelve correctional facilities. What region of  
19 the state are those in?

20 A. The southern region.

21 Q. Okay. So Holman is included  
22 within that group?

23 A. Yes.

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1 Q. Okay. And it looks like you were  
2 warden at Holman Correctional Facility  
3 beginning in August of 2016?

4 A. Correct.

5 Q. And you were in that position  
6 until May of 2020 when you got the promotion?

7 A. Correct.

8 Q. Okay. When did you start working  
9 at ADOC?

10 A. I started my career with ADOC in  
11 1989.

12 Q. Okay. And what prompted -- I'm  
13 sorry?

14 A. Go ahead.

15 Q. What prompted you to start with  
16 ADOC?

17 A. Really I came in to try to make a  
18 difference within the Department, to try to  
19 help at least one person in my lifetime, to say  
20 that even though you've been incarcerated and  
21 your life may be in a downward spiral, you can  
22 still have success. And that was my ultimate  
23 goal. And I also utilized it as a stepping

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1 stone to increase my goals in life.

2 Q. And what are your goals in life?

3 A. Well, I'm -- I am obtaining them  
4 as I speak. I started at the bottom of the  
5 Department of Corrections. And I one day plan  
6 to be the commissioner.

7 Q. Nice. Well, you're definitely on  
8 the right path. It looks like you've gone up  
9 every step of the line and you continue to  
10 improve with regard to education and  
11 experience. And I wish you luck on that.

12 A. Thank you.

13 Q. What did you do before you worked  
14 for ADOC?

15 A. Before ADOC I was a manager of a  
16 jewelry store.

17 Q. Okay. And where was that, just  
18 out of curiosity?

19 A. It was in Montgomery, Alabama. It  
20 was -- the name was Wings and Things.

21 Q. Okay. And so you -- and before  
22 that what were -- what did you do?

23 A. I was a manager at a clothing

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1 store.

2 Q. Okay. So management is kind of in  
3 your background?

4 A. I'm sorry?

5 Q. So management is kind of in your  
6 background? I mean --

7 A. It is.

8 Q. -- you've gone from managing --  
9 okay. Gotcha. And how did you come to become  
10 the warden at Holman?

11 A. I was transferred to Holman from  
12 Fountain, so a direct transfer.

13 Q. Okay. Did you have any input on  
14 whether that happened, or did they just call  
15 you up one day and say you're going to Holman?

16 A. I did not have any input.

17 Q. Okay. And that's, what -- a  
18 couple miles down the road from Fountain is  
19 Holman. Right?

20 A. Yes.

21 Q. Okay. When -- when you were -- so  
22 you were warden at Fountain for about five or  
23 six years before you were warden at Holman?

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1           A.       Correct. I started at Fountain in  
2       2010 in November.

3           Q.       Okay. And prior to becoming the  
4       warden at Holman, did you know that Holman was  
5       the site of executions in Alabama?

6           A.       Yes.

7           Q.       Okay. And did you know that as  
8       warden of Holman, you become the statutory  
9       executioner for any execution that occurs?

10          A.       Yes.

11          Q.       Okay. And did anybody talk to you  
12       about, I mean, the sort of difficulties of  
13       that? I mean, that's obviously different that  
14       Fountain. That's probably the most different  
15       position you can have as a warden within the  
16       ADOC as the only person who is authorized by  
17       statute to be the executioner.

18          A.       Yes.

19          Q.       Okay. And what were your -- I  
20       guess I'll just say that you -- you conducted a  
21       number of executions while you were warden at  
22       Holman?

23          A.       Yes.



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1 Q. I think -- and I counted during  
2 your tenure, it would be -- the way I look at  
3 it, I think it would be nine -- nine people.  
4 Does that sound right?

5 A. Yeah. In between -- yes, sir.

6 Q. Okay. And the -- the first one  
7 would be Ron Smith and your last one was  
8 Nathaniel Woods?

9 A. Correct.

10 Q. Okay. And among the -- among your  
11 lengthy experience here, it doesn't look like  
12 you previously were stationed at Holman for a  
13 permanent gig before the warden position?

14 A. Correct. I never worked at  
15 Holman --

16 Q. Okay.

17 A. -- prior to my assignment.

18 Q. Gotcha. Okay. And where did you  
19 grow up?

20 A. In Montgomery, Alabama.

21 Q. Okay. I see you went to high  
22 school in Montgomery?

23 A. Yes.

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1 Q. Okay. Which high school?

2 A. Sidney Lanier.

3 Q. Okay. All right. Down the street  
4 from my office. All right. So you then  
5 graduated from Sidney Lanier. And you went on  
6 to attend it looks like Auburn University  
7 Montgomery in September of 1984?

8 A. Correct.

9 Q. Okay. And what course of study  
10 were you pursuing there?

11 A. Psychology.

12 Q. Okay. And you were there until  
13 1985 originally?

14 A. Yes.

15 Q. Okay. And were you able -- then  
16 you took a break and went back to college, and  
17 you went back to Troy University of Montgomery?

18 A. Correct.

19 Q. When did you resume your education  
20 at Troy State?

21 A. I can't recall the date that I --  
22 I can't recall.

23 Q. Okay. How many years would you

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1 say you were there? It looks like you  
2 graduated in 1999.

3 A. Yes.

4 Q. How many years prior to 1999 did  
5 you begin attending there roughly?

6 A. Four years. I was there for four  
7 years.

8 Q. Okay. So from about 1995 to -- to  
9 graduation in 1999?

10 A. Correct.

11 Q. Okay. And were you able -- I know  
12 it had been a number of years then. I think  
13 about eleven or ten years. Were you able to  
14 transfer any of your credits from Auburn  
15 University Montgomery?

16 A. I only went to Auburn maybe a  
17 year. I don't think I was able to transfer any  
18 credits to Troy. Once I started at Troy, it  
19 was an ongoing process. So I had been in  
20 school and out of school for a minute.

21 Q. Okay. I gotcha. So you went  
22 straight freshman through senior at Troy and  
23 took essentially all of your -- your credits

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1 there for the degree that you obtained?

2 A. Yes.

3 Q. Okay. And did you have -- it  
4 looks like psychology. So you continued to be  
5 interested in psychology?

6 A. Yes.

7 Q. Okay. And did you have a minor --  
8 a minor in college?

9 A. A double minor with business  
10 administration and sociology.

11 Q. Okay. Sociology. Okay. So  
12 you're interested in kind of people and society  
13 and all of that as well as management and  
14 business?

15 A. Yes.

16 Q. Okay. And why did -- I guess that  
17 may answer my question. But just out of  
18 curiosity, why did you pick psychology as your  
19 major?

20 A. Well, I like really dealing with  
21 people. And plus, it wasn't as challenging.  
22 But I really -- I really love dealing with  
23 people.

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1 Q. I was a philosophy major, so  
2 definitely I didn't have to have a lot of  
3 science for that. So I'm -- I'm with you on  
4 that. Did you have any sort of focus or area  
5 of interest within psychology or was it just  
6 general?

7 A. It was general.

8 Q. Okay. Did you have a favorite  
9 psychology course that you took?

10 A. Oh my God, that's been so many  
11 years ago. I -- I can't recall.

12 Q. I gotcha. So I guess what did  
13 they -- they made us -- in philosophy they made  
14 us take logic as our -- as our math type thing.  
15 What would it be for psychology, like  
16 statistics or something like that?

17 A. Yeah, we did have -- I had  
18 statistics. It really was...

19 Q. Okay. I've never been a big  
20 statistics calculator, I supposed. But you did  
21 well, and that's good.

22 A. I didn't start off well, but I  
23 ended well.

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1 Q. Excellent. And did you -- as part  
2 of the psychology major, did you take anything  
3 on like psychology of learning -- or psychology  
4 or theories of learning or something like that,  
5 that type of class?

6 A. I don't know. I had some theory  
7 classes, but I can't say specific what they  
8 were.

9 Q. Okay.

10 A. But I did have those classes.

11 Q. All right. Like cognitive  
12 psychology, that kind of stuff?

13 A. Yes. Yes.

14 Q. Okay. And you ended up -- after  
15 you graduated from the program there in  
16 psychology, you later went on to obtain a  
17 master's degree, it looks like, from  
18 Kaplan University in December of 2016?

19 A. Yes.

20 Q. And that was in public  
21 administration?

22 A. Yes.

23 Q. Okay. And did you have a

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1 particular focus there when you were getting  
2 your master's degree?

3 A. No.

4 Q. Okay. Did you write a thesis  
5 or -- I don't know what they call it in a  
6 master's program. A thesis or paper or  
7 something like that? A research project?

8 A. Capstone.

9 Q. Okay. Capstone. And what was  
10 your capstone project on?

11 A. It was -- it was different -- it  
12 was different than managing. And I really  
13 can't remember. But it was contrasting  
14 managing. That's all I can kind of grasp for  
15 now.

16 Q. Well, did you -- I guess it sounds  
17 like you'd have a pretty decent comparison  
18 between, you know, private sector, managing  
19 folks in a retail setting or whatnot,  
20 versus managing -- and not only -- I mean, in  
21 terms of public administration, I think prisons  
22 is probably one of those situations where it's  
23 a fairly unique position because you're not

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1 only managing employees, but you're managing a  
2 population of people who don't necessarily want  
3 to be there. Did you -- did you take any of  
4 your sort of personal job experience into  
5 account when you went in and did your capstone  
6 project?

7 A. I did.

8 Q. Okay. Other than this case, I'm  
9 guessing because you've been a warden and  
10 because you're now a director that you have  
11 been party to a lawsuit or a court action with  
12 regard to your official position?

13 A. Yes.

14 Q. Okay. Can you estimate maybe how  
15 many?

16 A. I can't.

17 Q. Well, any time somebody files like  
18 a habeas action or a 1983, they always name the  
19 warden, right, as the defendant?

20 A. Yes.

21 Q. Okay. And so those are just sort  
22 of pro forma. But were there any that were  
23 specifically against you, I suppose? Like for



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1 example, somebody alleged that you personally  
2 did something wrong?

3 A. I -- yes.

4 Q. Okay. How many of those would you  
5 estimate there were?

6 A. I'm not for sure. I am not for  
7 sure.

8 Q. Okay. More than ten, less than  
9 ten?

10 A. It could have been more than ten.

11 Q. Okay. Not hundreds, but you know,  
12 enough that you can't recall all of them?

13 A. Correct.

14 Q. Okay. A lot of these were brought  
15 by people probably representing themselves and  
16 making complaints that weren't necessarily, I  
17 guess, founded in any sort of reality?

18 A. Correct.

19 Q. Okay. Were there any that  
20 involved law firms that were representing  
21 people in a lawsuit against you for something  
22 that they say you did wrong?

23 A. I can't recall.

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1 Q. Okay. And have you ever been  
2 deposed prior to this deposition?

3 A. Yes.

4 Q. And do you recall when that  
5 happened?

6 A. Approximately maybe two years ago.

7 Q. Okay. Do you know what litigation  
8 that was?

9 A. I can't recall his name. His last  
10 name is Harris. I cannot recall his first  
11 name.

12 Q. Okay. And were you deposed in any  
13 other case that you can recall?

14 A. No, not that I can recall.

15 Q. Bragg -- Braggs v. Dunn maybe?

16 A. I testified. But I don't think I  
17 was deposed.

18 Q. Gotcha. Okay. So you have -- and  
19 you anticipated my next question which was have  
20 you ever testified in court. And so you  
21 testified in Braggs v. Dunn which concerns sort  
22 of prison conditions and that sort of thing.  
23 And when was that that you testified?

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1           A.     Approximately two years ago. Two  
2 to three years ago.

3           Q.     And have you testified in any  
4 other cases?

5           A.     No.

6           Q.     Okay. And I know you were in  
7 charge of a work release center at one point,  
8 and occasionally folks at work release walk  
9 away, that kind of thing. Did you ever  
10 experience that?

11          A.     Yes.

12          Q.     Okay. Did they ever charge those  
13 folks with escape and maybe you had to go  
14 testify at a grand jury or anything like that?

15          A.     No. The wardens usually don't.  
16 That usually is a part of our investigation  
17 department. But I have never testified.

18          Q.     So that is like a perk of being  
19 warden is you don't have to go down and testify  
20 every time somebody walks away?

21          A.     Yeah.

22          Q.     Okay.

23          A.     Yeah. I don't have to sign the

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1 warrant.

2 Q. All right. Excellent. And are  
3 you familiar -- from your time at Holman, are  
4 you familiar with the law library?

5 A. Yes.

6 Q. And I guess during your time  
7 there, there were two libraries, one for  
8 general population and one for death row?

9 A. Yes.

10 Q. Okay. And was there any real  
11 difference between the two of them in terms of  
12 access to items or -- or information?

13 A. The population -- the population  
14 in death row has a standing computer. The only  
15 difference was -- and which they did not  
16 utilize was this book that was a part of the  
17 population law library. And death row just had  
18 a computer to retrieve their information from.

19 Q. Okay.

20 A. So that's it.

21 Q. And who was in charge of, I guess,  
22 managing or supervising the death row law  
23 library at Holman in -- in your tenure there?

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1 A. Officer Phillip Brown.

2 Q. Phillip Brown?

3 A. Yes.

4 Q. And was he doing that when you  
5 started?

6 A. Yes.

7 Q. And was he doing that when you  
8 left?

9 A. Yes.

10 Q. Okay. And the -- Ms. du Lac and I  
11 were able to go and meet with Mr. -- with  
12 Warden Raybon and kind of get a look at the  
13 death row law library. It looks like it's a --  
14 it's also known as the day room for the death  
15 row folks at the time?

16 A. It is.

17 Q. Okay. And there's a single  
18 computer in the corner there on a -- on a  
19 table?

20 A. Correct.

21 Q. And that computer obviously I  
22 would guess does not have internet access?

23 A. Correct.

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1 Q. Okay. And how would updates be  
2 done for the legal information contained on  
3 that computer?

4 A. To my knowledge, information  
5 systems would come and do updates to the  
6 computer.

7 Q. Okay. Do you recall how often  
8 they would come in?

9 A. No.

10 Q. Okay. Was it more or less  
11 frequently than once a year?

12 A. I can't recall.

13 Q. Okay. And when they came in, did  
14 Officer Brown escort them over there and get  
15 things set up or did you play a role in that or  
16 anything?

17 A. I did not play a role. And I  
18 can't tell you that Officer Brown was always  
19 the person that was with them to escort them.

20 Q. Gotcha. But they didn't just go  
21 in on their own, they had somebody from  
22 Corrections escorting them obviously. Right?

23 A. Correct.

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1 Q. Okay. And were there ever any  
2 inmate law clerks for the death row library  
3 when you were warden?

4 A. I -- I -- I don't know. I can't  
5 recall.

6 Q. Okay. Would that be something  
7 that if there were such a person, that would be  
8 recorded somewhere on a list to say who -- who  
9 the law clerk -- inmate law clerk was for the  
10 death row library?

11 A. Mr. Brown should know that  
12 information. He may have used his own law  
13 clerk in population to go with him to death  
14 row. But I'm -- I'm not sure.

15 Q. Okay. And do you have any idea  
16 how -- I guess in your experience in  
17 corrections management and -- and as a  
18 supervisor in various institutions, did you  
19 ever have cause to be in charge of the law  
20 library at a facility?

21 A. I have not.

22 Q. Okay. Did you ever deal with  
23 inmate law clerks at any facility other than

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1 Holman?

2 A. As far as dealing with the -- can  
3 you expound on that? I'm sorry.

4 Q. Absolutely. So in other words, on  
5 your duties -- in your duties, did you ever  
6 happen to come upon inmate law clerks in other  
7 prisons within ADOC?

8 A. Yes, I am familiar with inmate law  
9 clerks.

10 Q. Okay.

11 A. So at other facilities, yes. But  
12 I -- I haven't worked with them directly.

13 Q. Okay. And are those typically an  
14 official position or are these -- are we  
15 talking about somebody who is just kind of off  
16 the books, kind of one of those helpful people  
17 who seems to think they know everything about  
18 the law?

19 A. No. The law clerks in most  
20 facilities are chosen by whomever is over the  
21 law library as their like assigned job.

22 Q. Okay. And obviously they have to  
23 be somebody who is trustworthy and -- and gets



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1 along with fellow inmates?

2 A. Yes.

3 Q. I mean, you wouldn't want somebody  
4 who is kind of a troublemaker or violent?

5 A. Correct.

6 Q. Or has enemies or whatnot?

7 A. Correct.

8 Q. Okay. But you're not aware of any  
9 specific person or even whether there were  
10 specific people assigned as law clerks to the  
11 death row law library during your time at  
12 Holman?

13 A. No, sir.

14 Q. Okay. Is that something you would  
15 have to approve or sign off on when they do a  
16 log of inmate job assignments?

17 A. I wasn't part of the -- that  
18 particular board.

19 Q. Okay.

20 A. Yeah.

21 Q. How -- how is that -- you said  
22 there's a board. What is that all about?

23 A. We have what we call job boards in

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1 which the inmates -- when we're trying to fill  
2 jobs for the facilities, the inmates will  
3 report, ask for a job; or either we know how  
4 many jobs are available, and we'll assign the  
5 job through the job board.

6 Q. Okay. And I think I brought into  
7 this -- I've done a number of visits at Holman.  
8 I've run into this guy, John Neal. He used to  
9 be on death row. And he -- about every other  
10 time I'm there, he's kind of like the runner  
11 who is at the front of the facility. Is that  
12 one of those types of positions where somebody  
13 would be nominated through the jobs board?

14 A. Yes, sir.

15 Q. Okay. And are the runners  
16 included in that?

17 A. Yes, sir.

18 Q. Okay. And how many runners were  
19 assigned per tier on death row when you were  
20 warden?

21 A. I don't know.

22 Q. Okay. I guess was there ever --  
23 were they in shifts, like there would be one

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1 runner out at a time per tier?

2 A. Yes. Now, you had runners out,  
3 usually maybe one to two inmates. Warden  
4 Raybon was responsible for death row and the  
5 runners.

6 Q. Gotcha.

7 A. So it could be two inmates per  
8 tier. I can't tell you. Usually it's done in  
9 shifts. But as far as knowing how many and who  
10 they are, I don't know. I only know a couple  
11 of them.

12 Q. Okay. And but they were selected  
13 through the -- through the jobs board?

14 A. Warden Raybon selects those.

15 Q. Okay.

16 A. I did not do that.

17 Q. Okay. So death row was kind of  
18 its own creature there in terms of how things  
19 were run with regard to jobs?

20 A. Correct. Because they had to be  
21 looked at. And Warden Raybon was responsible  
22 for death row.

23 Q. And that's because they're all in

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1 what's called close custody?

2 A. Yes.

3 Q. Okay. Versus say the general  
4 population, which they -- they don't even  
5 necessarily have their own cells; they're in --  
6 they're in dormitory style?

7 A. Correct.

8 Q. Okay. And at -- at Holman there's  
9 also -- I think they call it the honor dorm.  
10 Is that right?

11 A. Yes.

12 Q. And that's where I guess less  
13 violent, less troublesome, maybe older inmates  
14 are -- are sent?

15 A. Well, they have to meet criteria  
16 to get in that dorm. It was -- you know, they  
17 had to have disciplinary clear. And they also  
18 went through a board to get into that dorm.

19 Q. Okay. And so I'm looking at your  
20 curriculum vitae, and it says that among the  
21 tasks that you performed as warden at -- and  
22 actually I was going to ask you this. You list  
23 yourself as warden three, which I assume is the

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1 highest level of warden in the system?

2 A. Yes.

3 Q. Okay. And is that -- can you just  
4 run me through the differences? I assume  
5 there's also a warden two. I saw that you in  
6 the past had been a warden one but you jumped  
7 over warden two. Is there a warden two  
8 position?

9 A. No. I was fortunate to jump from  
10 a one to a three.

11 Q. Okay. So what -- what's the  
12 difference, I guess, between a warden three and  
13 a warden two?

14 A. A warden three is really the head  
15 of a major facility. And they do have a warden  
16 one. And it's possibly a warden one and a  
17 warden two that's directly under them. And you  
18 do have some warden twos that's responsible for  
19 work release and some warden ones that are  
20 responsible for work release. But three is the  
21 highest. And you can have a warden two and a  
22 warden three underneath you as your  
23 subordinates.

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1 Q. Okay. So maybe like those  
2 positions, if they were under a warden three,  
3 would be maybe the equivalent of a vice  
4 president in an organization whereas the warden  
5 three is the CEO type?

6 A. Yes.

7 Q. Okay. And did you have any  
8 wardens under you while you were at Holman?

9 A. At Holman, yes.

10 Q. Okay. And who were they?

11 A. Warden Terry Raybon was my warden  
12 two.

13 Q. Okay.

14 A. Warden Phillip Mitchell was my  
15 warden one.

16 Q. Okay. And Warden Raybon got  
17 promoted while he was there because he was a  
18 captain at one point, was he not?

19 A. Warden Raybon was a captain at  
20 Fountain under my direction.

21 Q. Okay. So did you bring him over  
22 when you came over or did he come over after?

23 A. He -- he was promoted to Holman

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1 prior to me.

2 Q. Okay. All right. And y'all got  
3 along well and worked well together?

4 A. Yes.

5 Q. Okay. Now, your resume notes that  
6 you supervised -- as warden three at Holman  
7 Facility, you supervised or managed, I'm sorry,  
8 76 correctional officers. Would that  
9 include -- I guess that would not include  
10 sergeants and lieutenants and captains and all  
11 that? Those would be within the supervisor  
12 ranks?

13 A. Well, it was like 76 -- 76  
14 correctional officers, 21 support, and 23  
15 supervisors. So the supervisors would be --  
16 would have been 23.

17 Q. Okay. And with regard to -- and  
18 the supervisors would include sergeants and  
19 lieutenants and captains and such?

20 A. Yes.

21 Q. As well as the warden two and  
22 warden one position?

23 A. Yes. I would -- I was responsible

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1 for the entire facility. However, my direct  
2 supervision would have been like the business  
3 manager and the warden, and then it goes down.  
4 Warden Raybon has maybe the captains. And the  
5 lieutenants have the sergeants. So I oversee  
6 the entire facility.

7 Q. Okay. So you were the top of the  
8 chain of command, and the directives filtered  
9 down from you?

10 A. Correct.

11 Q. Okay. Did you have a like senior  
12 staff meeting once a week or anything like  
13 that?

14 A. I had a monthly staff meeting.  
15 And then we had a Monday morning facility head  
16 meeting.

17 Q. Okay. And that would include like  
18 the captains and the -- the warden two and  
19 warden one?

20 A. Yes.

21 Q. Okay. And was that to kind of  
22 address maybe things that needed to be done or  
23 how things went the previous weeks?



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1           A.     Yes.  Talked about what happened  
2 over the weekend and the tasks which we were  
3 going to try to accomplish throughout the  
4 following week.

5           Q.     Okay.  And did you, I guess -- so  
6 you -- who was directly above you?  The person  
7 that held the position you have right now, was  
8 that your direct supervisor when you were at  
9 Holman?

10          A.     Yes.  When I started at Holman, it  
11 was Gwendolyn Moses.  And shortly afterwards,  
12 it was Cheryl Price.

13          Q.     Okay.  So for most of your time  
14 there, it was Cheryl Price that was -- was in  
15 the position that you hold now?

16          A.     Yes.

17          Q.     Okay.  And would it have been  
18 Cheryl Price in 2018?

19          A.     Yes.

20          Q.     Okay.  How often did you meet with  
21 Ms. Price about what was happening at Holman?

22          A.     We'd have a conversation maybe  
23 once or twice a week.  I know we had

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1 discussions if I needed some directions or if  
2 she had some instructions. So it wasn't like  
3 we just met once a week or once a month. It  
4 was only in the case of if I needed some  
5 direction or if she was giving some  
6 instructions. We did have wardens meetings  
7 quarterly. And the central warden meeting  
8 was -- was held maybe twice a year. But  
9 weekly, daily.

10 Q. And that would be where -- where  
11 all wardens for the region or all the wardens  
12 for the state got together and talked out what  
13 was going on with the facilities and that sort  
14 of thing?

15 A. Kind of just getting instructions,  
16 getting directions and instructions. At the  
17 regional meeting, you know, you'll tell about  
18 what's going on at your facility. But it's a  
19 smaller meeting. But at the central wardens  
20 meeting, it's everybody. So usually you're  
21 getting some form of information.

22 Q. Gotcha. Now, part of your duties  
23 you noted were to ensure that all standards for

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1 the Americans with Disabilities Act were being  
2 followed at Holman?

3 A. Yes.

4 Q. Okay. And did you receive any --  
5 I guess you must have received training in ADA  
6 standards that govern prisons?

7 A. Just information. I can't recall  
8 really receiving any standards -- I mean, any  
9 training. But regarding information, yes.

10 Q. Okay. And --

11 A. Maybe the --

12 Q. Sorry. The ADA I think came into  
13 effect in 1990 or 1991, so shortly before --  
14 shortly after you joined DOC. So it wouldn't  
15 maybe have been part of -- did you go to the  
16 APOSTC Academy or whatnot to start as a  
17 correctional officer?

18 A. Yes.

19 Q. Okay. And that's the Alabama  
20 Police Officers Standards Training Commission?  
21 I forget what that -- something like that?

22 A. Yes.

23 Q. Am I even close?

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1 A. You're close.

2 Q. Okay. Perfect. I can never  
3 remember what all those acronyms stand for.  
4 But so it definitely -- obviously if it didn't  
5 exist at the time that you started, you  
6 wouldn't have gotten the standard training that  
7 may now be offered to correctional officers  
8 when they start?

9 A. Not that I can recall, no, sir.

10 Q. Okay. Do you -- as part of your  
11 duties, did you attend regular trainings to  
12 maintain your skills?

13 A. We went to executive leadership  
14 training once I became a warden. Now, as a  
15 correctional captain and lieutenant and  
16 sergeant, I did have to go to the regional  
17 divisional training centers.

18 Q. Okay. And were those for, what do  
19 you call it, refresher or whatnot courses and  
20 that kind of thing?

21 A. Yes.

22 Q. Okay. And did that include -- I  
23 think -- do y'all have to qualify on weapons,

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1 like go out to the range and that kind of  
2 thing?

3 A. Yes.

4 Q. Okay. And it -- was that one of  
5 the things you had to do every year?

6 A. Yes.

7 Q. Okay. Was that a 40-hour one-week  
8 type thing once a year for nonmanagement, or  
9 was that shorter or longer than that?

10 A. Well, it all depends on which  
11 managerial level you're speaking of. If you're  
12 talking about from a correctional officer to a  
13 captain, it's about 40 hours. From a warden,  
14 we have executive leadership training, which is  
15 different. You go to the range on a different  
16 day with their regional training centers and  
17 qualify with your weapon. And then we'll have  
18 what we call executive leadership training,  
19 which is altogether different. It's a  
20 conference.

21 Q. Gotcha. And you would hear maybe  
22 presentations and see those PowerPoints about  
23 whatever somebody wanted to come and talk to

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1 y'all about?

2 A. Correct.

3 Q. It sounds a little like what the  
4 lawyers have to go through every year. We go  
5 and watch somebody. Some are better than  
6 others, I take it.

7 So one of the people -- so you supervise 21  
8 support staff at Holman. And that would  
9 include somebody like Ms. Parker, the warden  
10 secretary, would be with administrative staff?

11 A. Yes.

12 Q. Did that also include like the --  
13 I think they're called the ADA compliance  
14 officer or something like that?

15 A. Yes.

16 Q. Okay. And so you were in charge  
17 of -- I guess not in charge -- well, I guess in  
18 charge of the ADA compliance officer. Is that  
19 correct?

20 A. Yes.

21 Q. Okay.

22 A. Yes.

23 Q. In the first half or around 2018,

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1 the first half of 2018, do you recall would it  
2 have been Fanita Jackson?

3 A. I -- I think so, yes.

4 Q. Okay. How many -- during your, I  
5 think, approximately four years as warden --  
6 warden three at Holman, how many ADA compliance  
7 officers were there?

8 A. I can only recall one. And I'm  
9 thinking it's Ms. Jackson.

10 Q. Okay. And she was there when you  
11 started and there when you left?

12 A. No. I'm thinking I hired  
13 Ms. Jackson and terminated Ms. Jackson.

14 Q. Okay. And do you recall when you  
15 terminated Ms. Jackson?

16 A. No, sir.

17 Q. Okay. Do you recall why you  
18 terminated Ms. Jackson?

19 A. For a cell phone.

20 Q. For a cell phone?

21 A. Yes.

22 Q. Could you maybe go into that? I  
23 mean, did she -- are you saying she brought her

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1 personal cell phone into the prison or because  
2 she sold or provided a cell phone to an inmate?

3 A. No. She -- she brought her  
4 personal cell phone inside of the facility, but  
5 it was concealed. And that made it where her  
6 integrity was questioned because it wasn't an  
7 accident. She actually had it concealed.

8 Q. Gotcha. And so is that just sort  
9 of a zero tolerance thing where if somebody  
10 does that they're out, or is that a -- had she  
11 been warned or counseled about conduct before?

12 A. No. We just -- it's zero  
13 tolerance. You know, if you have an accident,  
14 you have an accident. We can kind of see  
15 that's your personal cell phone. Okay. So we  
16 still will give you a written reprimand, a  
17 possible cause for corrective action. But when  
18 you are intentionally concealing, that's  
19 against the rules.

20 Q. Absolutely. And so I -- I guess  
21 I wasn't -- I didn't know how strict it was  
22 with regard to employee cell phones. But  
23 they're not allowed to bring cell phones into



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1 the facility?

2 A. Only authorized employees.

3 Q. Okay. And so basically if you're  
4 out on the floor or I guess in the -- in the  
5 tiers, you're not supposed to have a cell phone  
6 probably for obvious reasons?

7 A. Only authorized employees.

8 Q. Okay. And that -- those were few  
9 and far between as far as the number of folks  
10 who were authorized to have a cell phone in  
11 prison?

12 A. Correct.

13 Q. Okay. And obviously inmates are  
14 not allowed to have cell phones in the facility  
15 either?

16 A. Correct.

17 Q. Okay. And they don't -- they  
18 don't have access to the internet or that sort  
19 of thing at Holman at least?

20 A. Correct.

21 Q. Okay. In the federal system  
22 there's something called CorrLinks where you  
23 can e-mail your lawyer and family members and

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1 they monitor that. There isn't some similar  
2 program at Holman right now, or during your  
3 tenure there wasn't?

4 A. No. During my tenure, no.

5 Q. Okay. So the way somebody would  
6 maybe contact their lawyer would be through a  
7 phone?

8 A. Correct.

9 Q. Okay. And there were phones  
10 assigned to each of the tiers on death row?

11 A. Correct.

12 Q. Okay. And if somebody said there  
13 were approximately 14 people per tier, is that  
14 about right on death row?

15 A. Per tier. Correct.

16 Q. Okay. And there were -- let's  
17 see. There were over 150 -- when you left  
18 Holman, they had moved the Donaldson folks from  
19 Donaldson, which was also a male death row near  
20 Birmingham, down to Holman during your tenure?

21 A. Correct.

22 Q. Okay. So that expanded your  
23 numbers by, you know, probably about 18 or 20

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1 additional male death row inmates?

2 A. Yes.

3 Q. Okay. And estimating that it's --  
4 roughly were there about 160 male death row  
5 inmates during your time when you left Holman?

6 A. Correct.

7 Q. Okay. And so there would be, I  
8 don't know -- math again, you were the  
9 statistics whiz. But math-wise, there were  
10 what, maybe eleven or twelve tiers?

11 A. Yes.

12 Q. And I think they do them by  
13 alphabet or something. Right? There's like  
14 I tier and P side and all that kind of stuff?

15 A. Yes.

16 Q. Okay. And different -- different  
17 tiers are for different maybe -- I guess one  
18 tier is dedicated to maybe -- I wouldn't call  
19 them troublemakers, but maybe I would. Folks  
20 who maybe need a little bit closer -- even  
21 though they're locked down, need a little bit  
22 closer watch than say your typical death row  
23 prisoner?

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1           A.       Well, actually if you're referring  
2       to P, sometimes on P we did maintain some  
3       people that were -- or inmates that were housed  
4       there for disciplinary reasons. But in most  
5       instances it's just -- it was death row.

6           Q.       Okay.

7           A.       We didn't actually have any  
8       specific cells or placements. So it was their  
9       cell.

10          Q.       Okay.

11          A.       There wasn't any designated -- I  
12       should say not any designated tiers.

13          Q.       Okay. And I realize I get a  
14       little off track sometimes, and I apologize for  
15       that. But I've got notes here and I'm supposed  
16       to follow them in my head here. But sometimes  
17       I get a little sidetracked. But so going back  
18       to the ADA. We were talking about Ms. Jackson,  
19       and then I got distracted by cell phones.  
20       Did -- did you interact with her a lot when she  
21       was in per position as ADA compliance officer?

22          A.       We met -- I want to say we met  
23       monthly maybe. If she had something that she

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1 really needed to discuss with me, we met then.  
2 But she didn't have -- she attended all of the  
3 Monday morning meetings and staff meetings.  
4 But just interacting like I would interact with  
5 Warden Raybon or Warden Mitchell, no.

6 Q. And -- and did she have an office  
7 there or did she have a desk? What was the  
8 deal?

9 A. She had an office. She was in the  
10 office with the PREA compliance manager. So  
11 she shared an office.

12 Q. Gotcha. And the person who was in  
13 charge of -- now, you said -- obviously you  
14 would direct information down to your wardens  
15 and then they would direct it down to captains  
16 and lieutenants and such. Was there a person  
17 supervising Ms. Jackson between you and  
18 Ms. Jackson, or was it just you directly  
19 supervising Ms. Jackson?

20 A. I was supervising Ms. Jackson.

21 Q. Okay. So as far as administrative  
22 staff, you were generally the direct supervisor  
23 for the administrative staff and provided

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1 direct instruction to them?

2 A. No, not for all.

3 Q. Okay. So we talked briefly about  
4 the Americans with Disabilities Act, ADA  
5 training. You don't recall any specific  
6 training that you received on that from ADOC?

7 A. No.

8 Q. Okay. And how -- I guess how  
9 would you -- how were you able to or how did  
10 you attempt to ensure that all standards for  
11 the Americans with Disabilities Act were being  
12 followed?

13 A. I was familiar with the standards.

14 Q. Okay.

15 A. But you know, I'm not saying the  
16 standards haven't been provided. But I just  
17 can't recall going to a training. But I'm  
18 familiar with the standards.

19 Q. And just I guess for -- what's  
20 your layman's perspective on what the ADA  
21 standards were for a prison facility?

22 A. To make sure that everything --  
23 I'm just going to use an example. Say if

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1 someone was in a housing unit with stairs and a  
2 housing unit with -- or wanted to participate  
3 in a program, we should make sure that that  
4 person was able to participate regarding a  
5 disability, whether it be mental or physical.  
6 So that's my take on what is -- what we  
7 actually dealt with, just making it accessible  
8 to each -- each party --

9 Q. Okay.

10 A. -- to all parties if they fall  
11 within the guidelines of custody.

12 Q. Gotcha. Like you didn't have to  
13 make the facility -- you're not talking about  
14 if a visitor came in and needed a hearing aid  
15 or something, you weren't responsible for them.  
16 But if they were an inmate and they needed an  
17 accommodation or accessibility, you would --  
18 you would make sure they got that?

19 A. Yes.

20 Q. Okay. And did somebody have to  
21 make an actual -- did a person have to make an  
22 actual request in order to get accessibility or  
23 accommodation?

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1           A.     Yes.  It would be through  
2     Ms. Jackson.  And Ms. Jackson really  
3     collaborated with medical.  The only time I  
4     would have been involved is if it was an issue.  
5     But Ms. Jackson actually collaborated with  
6     medical.

7           Q.     Okay.  And during your time there,  
8     who was -- it was a contract provider for  
9     medical.  Right?  Do you remember who it was?  
10    Was it Corizon at one point?

11          A.     We had Corizon and now Wexford.

12          Q.     Okay.  And do you recall, was it  
13    Corizon or Wexford that was in charge in 2018?

14          A.     I want to say it was Corizon.

15          Q.     Okay.  And so if Ms. Jackson had  
16    an issue maybe with Corizon or Wexford not  
17    appropriately providing her with what was --  
18    what she thought was necessary, she would come  
19    to you about that?

20          A.     Correct.

21          Q.     Okay.  And you mentioned mental or  
22    physical issues.  That would include  
23    psychological and -- and intellectual issues?



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1           A.       Yes.  And then she would also work  
2 with mental health if she felt like something  
3 wasn't right or if the inmate sent her a  
4 request instead of -- instead of sending it to  
5 mental health, she would refer them back to  
6 mental health.

7           Q.       And was mental health separate  
8 from the prison health like Corizon or was it  
9 part of that?

10          A.       Part of the same contract.

11          Q.       Okay.  And did you -- I guess who  
12 was in charge of supervising or whatnot the  
13 Corizon folks or the private contractors  
14 regardless of which group they were with?

15          A.       Well, they fell up under my  
16 supervision, but not actually my direction.  
17 They had an HSA, which is a health service  
18 administration personnel that reported directly  
19 to the contract personnel.  I would talk mostly  
20 with the HSA if I had any issues or concerns.  
21 We didn't provide any corrective actions.  They  
22 had an HR that -- the recommendation went from  
23 the HSA up.

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1 Q. Gotcha. So you would bring your  
2 concerns to the health service administrator,  
3 and then they would take it from there as far  
4 as their employees go?

5 A. Yes.

6 Q. Okay. And as part of the mental  
7 health services, did they have social workers  
8 on staff?

9 A. I don't think Holman had a social  
10 worker.

11 Q. Okay. And did you have a log or  
12 did Ms. Jackson or whoever was the ADA  
13 coordinator at any time keep a log of or list  
14 of prisoners who had requested or received ADA  
15 assistance?

16 A. I can't answer that. I didn't  
17 have one.

18 Q. Okay. So you didn't get like a  
19 monthly report saying, hey, this person got a  
20 wheelchair this month and this person got this  
21 or anything like that?

22 A. Not that I recall. If Ms. Jackson  
23 had one, she would have kept it on file unless

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1 I requested it. She would have provided it.

2 But I -- I cannot recall.

3 Q. Now, you mentioned the PREA,  
4 Prison Rape Elimination Act coordinator shared  
5 an office space with the ADA compliance  
6 officer?

7 A. Repeat your question again. I'm  
8 sorry.

9 Q. I'm sorry. The Prison Rape  
10 Elimination, PREA officer shared an office  
11 space with the ADA compliance officer?

12 A. Yes.

13 Q. And the reason I mention that is  
14 I'm sure that y'all do quite a bit of training  
15 on PREA stuff for the officers?

16 A. They have a yearly training that's  
17 done at the regional training centers.

18 Q. And then there's a PREA audit type  
19 thing that happens every year or so, right, of  
20 every facility?

21 A. Yes.

22 Q. Okay. So I mean, that's pretty  
23 closely monitored by a federal -- outside

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1 federal contractor who comes and -- and audits  
2 things and makes sure things are following the  
3 rules of PREA?

4 A. Yes.

5 Q. Okay. And part of that, they come  
6 and they interview staff and -- and they pick  
7 random prisoners maybe to ask them some  
8 questions and maybe do a survey and that kind  
9 of thing?

10 A. Yes.

11 Q. Is there anything similar with  
12 regard to the Americans with Disabilities Act?

13 A. Well, we do have a person that's  
14 over facilitating the audits for the ADOC.

15 Q. Okay. And would that person also  
16 audit you with regard to compliance with rules  
17 for ADA, that kind of thing?

18 A. Yes.

19 Q. Okay. And who was that person  
20 when you were warden at Holman?

21 A. I'm thinking her name was Dena  
22 Prevo.

23 Q. And do you know what -- Prevo, you

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1 say?

2 A. Prevo, yes. P-r-e-v-o I think is  
3 how you pronounce it -- spell it.

4 Q. Okay. P-r-e-v-o? P-r-e-v-o?

5 A. Yes.

6 Q. Okay. All right. Do you -- do  
7 you know what her title was?

8 A. I can't recall.

9 Q. Gotcha. How often did you -- did  
10 you see her?

11 A. I want to say maybe twice.

12 Q. All right. And what was the  
13 purpose of -- of any visit you may have had  
14 with her?

15 A. One was when we was training  
16 Ms. Jackson. And possibly one was after an  
17 audit, getting a request -- getting information  
18 regarding an audit.

19 Q. And when you say an audit, do you  
20 mean -- did she also include financial stuff or  
21 was she auditing compliance with the rules and  
22 regulations?

23 A. Compliance with ADA.

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1 Q. Okay. So if there was an ADA type  
2 audit or that sort of thing?

3 A. Yes.

4 Q. And there's a separate financial  
5 group that does financial audits. Right?

6 A. Yes.

7 Q. Okay. And do you know what caused  
8 the ADA audit to happen? Was it just routine?

9 A. I think it's routine. I think  
10 it's required.

11 Q. Okay. But not as frequently as  
12 the PREA audit type situation?

13 A. I -- I don't know the answer to  
14 that.

15 Q. Well, I mean, do you remember --  
16 the PREA folks, probably it was kind of a big  
17 deal if they showed up once a year or whatnot  
18 because they called people out of their cells  
19 to interview them?

20 A. Yeah. But they didn't show up  
21 once a year. We had a PREA audit schedule. So  
22 while I was at Holman, I can recall only maybe  
23 two times. But I can't say exactly. We are

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1 just notified when we are going to have an  
2 audit.

3 Q. Gotcha. And do you know the  
4 procedure for -- so you said Ms. Jackson or  
5 whoever is the ADA coordinator now or whoever  
6 was the ADA coordinator would receive some sort  
7 of a request for an accommodation. What was  
8 the procedure for doing that kind of a request  
9 by the inmate?

10 A. We had an ADA box in the hallway.  
11 And they would drop their lists.

12 Q. Now, and for general population,  
13 that would be, you know, you could walk right  
14 up to the box and drop it. But what about  
15 folks in death row who are locked down 23 or 23  
16 and a half hours a day?

17 A. Well, we had an ADA box in the rec  
18 room. And I can't recall if we -- you know, if  
19 we walked by and collected the sealed envelopes  
20 and dropped them in the box. I can't answer  
21 that question.

22 Q. Okay. So you're not sure -- and  
23 is the rec room different from the law library

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1 slash -- what was that place called?

2 A. It's the same room.

3 Q. Day room. Okay. So the day room,  
4 rec room, law library are the same -- are the  
5 same -- are the same room?

6 A. Uh-huh.

7 Q. Was everybody allowed to go to  
8 that rec room or day room on death row?

9 A. Unless they were on prescription  
10 single walk. But everybody was allowed at  
11 different intervals, different times unless  
12 they was on restriction.

13 Q. Okay. And do you know how they  
14 would get one of those forms and the envelopes  
15 to put into the box for the ADA stuff?

16 A. All forms were -- could be located  
17 in the -- in the death row shift office. So  
18 they would probably have to ask for it. But  
19 all the forms that are required and needed are  
20 located in the shift office.

21 Q. Okay. And do you know, were the  
22 inmates ever provided with like a -- I guess a  
23 meeting or an introduction or a training on



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1 various things like the ADA?

2 A. Can you repeat your question?

3 Q. Yeah. So were the inmates, did  
4 you ever have a seminar or some sort of way of  
5 telling them what their -- what they needed to  
6 do under the ADA, the inmates, in order to  
7 obtain an accommodation?

8 A. No, sir, not that I can recall.

9 Q. Okay. And would -- do you happen  
10 to know how long it would take to get an  
11 accommodation made? So in other words, if I  
12 requested say a wheelchair, do you know would I  
13 get it that day or would I get it a week or two  
14 weeks from then?

15 A. I -- I don't know. I wasn't a  
16 part of that process unless it was an issue.  
17 The ADA coordinator and healthcare managed  
18 those type requests.

19 Q. Okay. And do you know what -- if  
20 at all, what the process was for getting an  
21 accommodation if you had say a cognitive or  
22 learning disability?

23 A. No, sir.

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1 Q. Okay. Was there a different form  
2 for that or would they have used the same form?

3 A. I don't know.

4 Q. Okay. And if somebody did have a  
5 cognitive or learning disability, what would  
6 the accommodation be? Do you -- do you have  
7 any idea?

8 A. No, sir.

9 Q. Okay. Like have you ever had  
10 cause to or seen somebody maybe bring in a  
11 teacher, a social worker or somebody to come in  
12 and assist somebody with reading important  
13 information or that kind of thing?

14 A. No. Only -- the only thing I have  
15 seen in my tenure probably has been if you  
16 spoke Spanish, you -- we had to get someone to  
17 kind of articulate, you know, Spanish. And  
18 if -- we do have a policy doing disciplinary  
19 hearing procedures, if you feel that you cannot  
20 represent yourself due to not being able to  
21 read or write, you do ask for that and we'll  
22 provide a security staff person to assist.

23 Q. So when you say -- so if I get a

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1 write-up for maybe a cell phone or whatever  
2 causes the disciplinary and I ask for a  
3 hearing, you then provide somebody to sort of  
4 act as assistance for them in the hearing?

5 A. During the hearing they have to --  
6 the person that's charged has to tell someone  
7 that, listen, I can't read, I can't write, I'm  
8 going to need someone to assist me in the  
9 hearing.

10 Q. Gotcha. And that person would be  
11 a member of security staff?

12 A. Yes.

13 Q. Okay. Obviously not somebody who  
14 is part of the panel or whatever that is making  
15 the ultimate decision?

16 A. Correct.

17 Q. Okay. Okay. And there are --  
18 there are inmates who have difficulty with  
19 reading and writing and -- and understanding  
20 things?

21 A. I'm sure.

22 Q. Okay. Okay. And so there are  
23 people in prison, including death row, who

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1 maybe have cognitive disabilities or cognitive  
2 issues, trouble understanding and following  
3 direction, that sort of thing?

4 A. I'm sure there -- there are.

5 Q. Okay. Did you have a lot of  
6 interaction with death row inmates during your  
7 time as warden?

8 A. Not a lot. I had a -- what we  
9 call a meeting with the representative from the  
10 tier. And I would walk the tier weekly.

11 Q. And when you walked the tiers, you  
12 walked all of them once a week. Was that on  
13 the same day?

14 A. No. No.

15 Q. Okay. How long generally would it  
16 take to walk a tier?

17 A. It all depends. I didn't have to  
18 do any tier checks, so it all depends on if I  
19 stopped and maybe had a conversation with  
20 someone or if I'm just walking through and  
21 saying good morning or doing a cell inspection.  
22 So it all depends on -- anywhere from five to  
23 sometimes maybe twenty minutes.

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1 Q. Gotcha. It depends on how chatty  
2 the folks were and -- and how busy you --

3 A. And -- and the time of day.

4 Q. So do you happen to -- Willie  
5 Smith is the -- the Plaintiff in this suit. Do  
6 you have any specific memories or knowledge of  
7 Mr. Smith, having interacted with him?

8 A. No.

9 Q. Okay. Are there any people on  
10 death row who you have any -- and I'm not going  
11 to ask who they are. But are there any people  
12 on death row who stood out to you that you  
13 would be able to remember today because they  
14 were noteworthy, I suppose, in terms of their  
15 behavior?

16 A. Yes.

17 Q. Okay. I think we may represent  
18 one or two of those folks. And -- okay. So  
19 now we'll move on to -- you were warden at  
20 Holman in 2018 obviously, all of 2018?

21 A. Yes.

22 Q. Okay. And at one -- at that time  
23 there was two facilities that housed male death

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1 row prisoners, Holman and Donaldson?

2 A. Correct.

3 Q. And then there was one that houses  
4 female death row prisoners, and that's  
5 Tutwiler?

6 A. Correct.

7 Q. And in fact, in the past you  
8 worked as a supervisor at Tutwiler at one  
9 point?

10 A. Correct.

11 Q. Did you ever have any interaction  
12 with death row -- the women on death row there?

13 A. Some, yes.

14 Q. Okay. I think there -- at the  
15 time -- at least right now I think there are  
16 four. Was that about what there were when you  
17 were there?

18 A. As a correctional officer, it was  
19 four. And as a captain it was four, I want to  
20 say. No more than five.

21 Q. Right. And I think there's been  
22 one person who's gotten clemency. And maybe  
23 that happened during your time there. So there

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1 was a five. And then it went down to four  
2 when -- I think Governor Siegelman may have  
3 granted clemency to one -- one female on death  
4 row back in maybe 2000 or '01 or something like  
5 that?

6 A. Yes. Correct.

7 MR. HAHN: Is this a good time to  
8 take maybe a ten-minute break? I'm kind of  
9 ready to get up and stretch my legs. Is that  
10 okay with everybody?

11 MS. SIMPSON: Before we go off the  
12 record -- and I should have done this at the  
13 beginning, and I apologize -- because we're  
14 talking about personnel and prison facilities,  
15 I'd like to go ahead and designate this as a  
16 confidential document, please.

17 MR. HAHN: Absolutely. We  
18 absolutely concur.

19 MS. SIMPSON: Thank you.

20 THE VIDEOGRAPHER: All right. We  
21 are going off the record at 11:06 a.m. This is  
22 the end of media unit one.

23 (A break was taken.)

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1 THE VIDEOGRAPHER: All right. We  
2 are back on the record. This is the beginning  
3 of media unit two. The time is 11:16 a.m.

4 MR. HAHN: Thank you.

5 Q. (Mr. Hahn) All right.  
6 Director Stewart, thank you for letting me take  
7 a break there. And I think we had a natural  
8 breaking point there, but I had one side thing  
9 that I wanted to ask first which was, do you --  
10 did you, as part of your duties as warden at  
11 Holman, review the duty post logs?

12 A. Occasionally.

13 Q. Okay. And those would be typed up  
14 maybe from notes that people took?

15 A. Typed up from notes or from  
16 communications via telephone, via radio for  
17 the -- for the clerk. Those duties regarding  
18 reviewing the logs were delegated.

19 Q. And to whom was that sort of duty  
20 delegated?

21 A. Warden Mitchell and Warden Raybon.

22 Q. Okay.

23 A. And I think the captains actually



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1 review them and then send them up the chain.

2 But it stopped at Warden Raybon unless it was  
3 an issue or something that I wanted to double  
4 check.

5 Q. Gotcha. And the duty post logs  
6 are designed to reflect things that happened  
7 within the prison, people who come into the  
8 prison, that sort of thing?

9 A. Correct.

10 Q. Okay. So any sort of visitors or  
11 any sort of movement within the prison is noted  
12 in the duty log?

13 A. A duty log and what we have -- we  
14 have a duty log for -- post log for restrictive  
15 housing, post log for death row, and post log  
16 for population. So all of the information  
17 wouldn't be in some of those other logs. It  
18 all depended upon the area.

19 Q. Gotcha. So there's multiple duty  
20 post logs in there based on the area of the  
21 prison?

22 A. Correct.

23 Q. Okay. All right. Thank you. All

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1 right. So I think we talked about Holman,  
2 Donaldson, and Tutwiler. Given that Donaldson,  
3 Tutwiler, and Holman were the three facilities  
4 that housed death row inmates, did you have  
5 more frequent contact with the wardens at those  
6 facilities than at the other facilities?

7 A. No.

8 Q. Okay. So back in 2018 the  
9 legislature passed a law that created a new  
10 method of execution in the state of Alabama  
11 called nitrogen hypoxia. Are you familiar with  
12 that?

13 A. Yes.

14 Q. And how did you first come to  
15 learn about the nitrogen hypoxia law?

16 A. To my best recollection, it was on  
17 the news that the bill had been passed. And I  
18 think sometime in -- to the best of my  
19 recollection, it was in May -- I want to say  
20 late May, early June when we was trying to  
21 figure out a time for the attorneys to come and  
22 talk with the inmates, their clients on death  
23 row trying to get the -- trying to get a

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1 schedule for the visitation yard.

2 Q. And I happened to be one of those  
3 lawyers. It was me and John Palombi.

4 A. Right. I remember Palombi. Yeah.

5 Q. Yeah. Palombi is not -- is not  
6 forgettable. He's a great guy. But as far  
7 as -- we also had two investigators. There  
8 were four of us from the Federal Defenders  
9 office. Was it unusual for you to have  
10 gotten -- I guess how did you get notified that  
11 you were going to have to arrange a meeting  
12 with dozens of death row inmates and their  
13 counsel?

14 A. I can't recall. But I know that  
15 we had to orchestrate that. So but I can't  
16 recall how I got it. Someone -- someone  
17 instructed me.

18 Q. Would it -- suffice it to say that  
19 you probably weren't terribly thrilled with the  
20 idea of having that many people meeting with  
21 their lawyers at once?

22 A. No, it wasn't about being that.  
23 That had nothing to do with it. It was just

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1 trying to facilitate it and make sure that  
2 everyone was safe and that we had the room to  
3 accommodate.

4 Q. Gotcha. And that -- the meeting  
5 was held in what I think they call the yard,  
6 the visitation area?

7 A. Yes, sir.

8 Q. Okay. And did any other law  
9 firms, lawyers, or groups request a meeting  
10 with their clients about the nitrogen opt-in  
11 law?

12 A. No, not to my knowledge.

13 Q. Okay. And at the time in June of  
14 2018, what -- do you recall what the days were  
15 that lawyers could visit with their death row  
16 clients in person?

17 A. No, sir. My ASA, Ms. Parker,  
18 scheduled the -- the appointments.

19 Q. All right. And the policy at  
20 Holman has been to have no more than, generally  
21 speaking, three death row inmates on the yard  
22 in visitation with lawyers at a time. Is  
23 that -- does that sound about right?

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1 A. Yes, sir.

2 Q. Okay. And so obviously with 160  
3 or so male death row inmates -- although at the  
4 time I think it was probably about 140 -- you  
5 couldn't maybe meet with them all in say one  
6 week if you had every lawyer wanting to meet  
7 with every single person on death row?

8 A. Correct. Unless we had to  
9 facilitate something like what you all  
10 requested.

11 Q. Gotcha.

12 A. But I have no knowledge of anyone  
13 asking for that to be facilitated.

14 Q. Okay. And sometimes the yard is  
15 in use for a single visit with say an expert  
16 who has to do an evaluation?

17 A. Correct.

18 Q. So sometimes it might be you need  
19 an eight-hour block for a psychologist to come  
20 in and give tests and that sort of thing?

21 A. Correct.

22 Q. Okay. And sometimes those visits  
23 stretch over two days, maybe two eight-hour

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1 blocks?

2 A. I'm not for sure. I just know  
3 it's a -- I can't say because I don't do the  
4 schedule. However, I know it's a longer period  
5 of time.

6 Q. And those people sometimes have to  
7 bring in computers and things, and you have to  
8 do the approval of that sort of thing. Right?

9 A. Most of them I do. When it  
10 becomes -- when it comes to computers, I ask  
11 our legal division prior to that. But  
12 everything else I can approve.

13 Q. Perfect. Okay. So you learned  
14 about the nitrogen hypoxia law from the news.  
15 And then the next you heard about it was when  
16 you were told, hey, you've got to schedule  
17 these lawyers to come in and meet with these  
18 folks?

19 A. Correct.

20 Q. Did you receive any direction from  
21 anyone in ADOC with regard to what to do about  
22 the new law?

23 A. Can you expound?

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1 Q. Yeah. So my understanding of the  
2 new law is that it required a person to provide  
3 something in writing personally signed to the  
4 warden of the facility that was holding them  
5 asking to opt-in to nitrogen hypoxia. And  
6 obviously you as the warden would be the person  
7 receiving those documents. And I'm wondering  
8 if anybody from ADOC ever said, hey,  
9 Warden Stewart -- at the time Warden Stewart,  
10 you know, please be aware that you may be  
11 receiving some paperwork from inmates?

12 A. Yes.

13 Q. Okay. And when was that? Do you  
14 know?

15 A. I can't recall.

16 Q. Was it before or after the visit  
17 that our office had with the death row folks?

18 A. I cannot recall.

19 Q. Okay. And would that notice have  
20 been provided to you in writing or by  
21 telephone, e-mail?

22 A. More than likely it probably would  
23 have been provided by telephone. But I can't

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1 say that I -- I don't know if I just got it  
2 from their attorneys that called Ms. Parker.  
3 But I just can't recall. So I'm not going to  
4 make up anything. I can't recall.

5 Q. I appreciate that. And that was,  
6 I think, rule number two of the deposition.  
7 It's okay to not remember or know something.  
8 That's perfectly fine. All right. And then so  
9 if I said to you that that visit with the  
10 Federal Defenders and their clients happened on  
11 June 26, 2018, would that sound about right?

12 A. I know it was the last part of  
13 June.

14 Q. Okay.

15 A. But I can't be specific with the  
16 date.

17 Q. Okay. Prior to that meeting on  
18 June 26, 2018 -- or prior to that meeting,  
19 we'll call it the late June meeting between the  
20 Federal Defenders office and the prisoners, had  
21 you received any opt-in forms or any opt-in  
22 requests from any prisoner?

23 A. No.



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1 Q. Okay. And so the first time you  
2 received an opt-in form was when you received  
3 them from the Federal Defenders office after  
4 that meeting?

5 A. To the best of my recollection,  
6 yes.

7 Q. Okay. Did you communicate with  
8 anyone at Donaldson about the nitrogen opt-in  
9 law?

10 A. Not to my recollection --  
11 recollection.

12 Q. Okay.

13 A. No.

14 Q. What about at Tutwiler?

15 A. No.

16 Q. Okay. Did you communicate with  
17 anyone above you in ADOC about the nitrogen  
18 opt-in form?

19 A. Yes.

20 Q. Okay. And with whom did you  
21 consult?

22 A. I -- I had conversations with  
23 Mr. Jody Stewart.

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1 Q. Okay.

2 A. And Grantt Culliver. But I can't  
3 exactly tell you what the conversation was  
4 about.

5 Q. I understand.

6 A. But I remember talking to him,  
7 yes.

8 Q. And would those conversations have  
9 happened in June of 2018 or around that time?

10 A. Yes.

11 Q. Okay. And did they concern the  
12 form?

13 A. I can't recall.

14 Q. Okay. Do you recall if they  
15 happened before or after the Federal Defender  
16 meeting in late June?

17 A. I don't recall anything prior to  
18 the meeting with the exception of trying to  
19 facilitate giving the space, giving the  
20 timeframe, you know, the allotted space and  
21 honoring the request. Other than that, I can't  
22 recall anything else.

23 Q. Okay. And obviously Jody Stewart

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1 is with ADOC legal. Right?

2 A. Yes.

3 Q. Okay. And -- and you talked to  
4 him and Grantt Culliver about this form that  
5 was being turned in by the -- by the prisoners,  
6 the Federal Defender prisoners?

7 A. Well, not so much of the form.  
8 About facilitating the request for you all to  
9 come in and speak with your clients.

10 Q. Okay. Now, at some point you --  
11 did you cause the form to be distributed to  
12 other inmates within the facility?

13 A. When you say other inmates within  
14 the facility, what -- who are you referring to?

15 Q. The rest of death row, other death  
16 row inmates.

17 A. Yes.

18 Q. Okay. Can you sort of summarize  
19 how -- how that came to be?

20 A. I received instructions -- I can't  
21 recall from whom -- thinking it was in the best  
22 interest to ensure that each inmate on death  
23 row received the form and was afforded an

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1 opportunity to fill it out and submit it back.  
2 But I can't tell you who I spoke with for those  
3 instructions. I can't tell you the timeframe.  
4 But I know I did have a conversation regarding  
5 that.

6 Q. And when you say received  
7 instructions, that would not have been from  
8 somebody below you in the chain of command; it  
9 would have been from somebody above you?

10 A. Correct.

11 Q. Okay. So it wasn't like  
12 Warden Raybon came in and said, hey  
13 Warden Stewart, let's do this thing?

14 A. No. But I did -- I did  
15 disseminate the instructions to  
16 Captain Emberton.

17 Q. Okay.

18 A. But my instructions came from  
19 above.

20 Q. Okay. So this is not you going  
21 rogue, as they might say?

22 A. Oh no, sir.

23 Q. Okay. Because I think in some

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1 aspects of I think maybe some of the lawsuits  
2 that have been brought since then I think by  
3 Chris Price, Chris Price's attorneys and  
4 Woods's attorneys, the implication from the  
5 Attorney General's office was that this was  
6 Cynthia Stewart doing this all on her own.  
7 That would be --

8 A. No, sir.

9 Q. Okay. So that would all be  
10 incorrect?

11 A. Correct.

12 Q. So you were acting on instructions  
13 from someone above you in management?

14 A. Yes, sir.

15 Q. Okay. And you caused  
16 Captain Emberton to be sort of in charge of the  
17 distribution that you were directed to do?

18 A. Yes.

19 Q. Okay. And Captain Emberton, we  
20 deposed him the other day, and it sounds like  
21 he recalled the meeting that y'all were -- that  
22 you just discussed here when you called him.  
23 You had him come into your office?

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1           A.     I assume so. I can't recall. But  
2 more than likely, yes.

3           Q.     And do you recall what exactly you  
4 said to him?

5           A.     No, sir.

6           Q.     Do you recall, would it be  
7 accurate to say that there was a -- maybe a box  
8 provided with the -- with the blank forms and  
9 envelopes in it for distribution?

10          A.     I can't recall. But I -- I can't  
11 recall.

12          Q.     Okay.

13          A.     But he had to have the forms and  
14 the envelopes.

15          Q.     Would you have delegated -- who  
16 would you have delegated the process of copying  
17 those forms to?

18          A.     Once the inmates submitted them  
19 back, returned them back, that would have been  
20 Ms. Parker.

21          Q.     Okay. What about --

22          A.     It had to -- go ahead.

23          Q.     I was going to say, what about to

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1 create all of the blank forms, was that  
2 Ms. Parker as well?

3 A. I can't -- I don't know who  
4 created the forms. I don't know who made the  
5 copies. It could have been Ms. Parker. It  
6 could have been Captain Emberton. But I can't  
7 recall who made the copies for us.

8 Q. You don't remember going over  
9 personally to the copy machine and making these  
10 copies. Right?

11 A. No.

12 Q. Getting the envelopes and counting  
13 them?

14 A. No, sir.

15 Q. And you would have remembered if  
16 you --

17 A. Yes.

18 Q. Okay. All right. And -- all  
19 right. So -- okay. So you received forms from  
20 Federal Defender clients, signed forms from  
21 Federal Defender clients after that late June  
22 visit?

23 A. My secretary did, yes, sir.

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1 Q. Okay. And she notified you that  
2 those forms had been received?

3 A. Some of the forms, yes. I  
4 think -- I think there was a deadline on there.  
5 I'm not for sure. But she kept track of the  
6 forms and scanned them to wherever or mailed  
7 them to wherever they had to go.

8 Q. Okay. And so you maybe had her --  
9 or she would have put one into an inmate's file  
10 or that kind of thing and sent them to ADOC  
11 legal?

12 A. I assume so, yes.

13 Q. Okay. And do you know whether or  
14 not she received opt-in forms from the  
15 distribution that Captain Emberton did?

16 A. I can't say where they came from,  
17 no, sir. I can't say.

18 Q. Okay.

19 A. Because you all issued out forms  
20 as well. So I don't know if they signed them  
21 the day that you all were there or were they  
22 told to turn them in later. So I'm not for  
23 sure. I can't say.



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1 Q. Okay. And can you walk me  
2 through, typically if -- if an inmate wanted to  
3 turn in a form or some sort of a request to you  
4 or to the prison management, how would a death  
5 row inmate go about doing that?

6 A. Most of the time he -- he can drop  
7 it in the box. If not, he can give it to a  
8 staff member. And the staff member will bring  
9 it up. Plus when we do our rounds,  
10 Warden Raybon does his rounds, they can give  
11 them a request. When I do my rounds, they can  
12 give me the request. Mental health -- anyone  
13 would take a request from an inmate and make  
14 sure it's given to the right personnel.

15 Q. And when you say box, do you mean  
16 the ADA box or just -- is there a general box  
17 or is there a specific ADA box?

18 A. Both.

19 Q. Okay. And is that -- so there's  
20 an ADA box and then sort of a normal box and  
21 that's --

22 A. A request box.

23 Q. I'm sorry?

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1 A. Request.

2 Q. Okay. So there was a request box  
3 and there was an ADA box in the rec room, the  
4 day room?

5 A. Yes, sir.

6 Q. Okay. And those are -- I assume  
7 they're like bolted to the wall or something  
8 like that? They're lockbox type things?

9 A. They were, yes.

10 Q. Okay. And the only person who  
11 could get into those would be people who had  
12 keys and access to them?

13 A. Correct.

14 Q. Do you know how often those boxes  
15 were emptied?

16 A. Most of the time the request box  
17 or source box or whatever -- well, they  
18 actually turned the -- they were collected  
19 daily.

20 Q. Okay. And when -- when something  
21 was collected from one of those boxes, was it  
22 stamped received or anything or was it put into  
23 a file somewhere?

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1           A.     If it was -- if it was directed to  
2 my secretary's office, more than likely she  
3 stamped it as the date received.

4           Q.     Okay. Like one of those stamps  
5 that you can change the date on it and move it  
6 forward as time goes on?

7           A.     Yes. Or either just writing and  
8 initialing it.

9           Q.     Gotcha. All right. Did you --  
10 now, obviously after June of 2018 a couple of  
11 folks from death row attempted to, I suppose  
12 you'd call it late opt-in, opt-in after June of  
13 2018. One of those was Chris Price. Correct?

14          A.     I can't say it was Chris Price,  
15 but yes.

16          Q.     Okay. And then do you recall  
17 there was some litigation around a couple of  
18 inmates in that regard?

19          A.     I cannot recall. If we received  
20 any slips in the office, we scanned them to the  
21 appropriate person. And that was it on our  
22 part.

23          Q.     Okay. Did you talk to anyone

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1 about this nitrogen opt-in situation after  
2 the -- after June of 2018?

3 A. Can you expound? I'm sorry.

4 Q. Yeah. I guess -- I guess that's a  
5 fairly broad question. So other than prepping  
6 with Ms. Simpson and Mr. Anderson for this  
7 deposition, did you meet with anybody from ADOC  
8 legal or the Attorney General's office between  
9 July 1 of 2018 and, you know, your meeting with  
10 Ms. Simpson and Mr. Anderson about the nitrogen  
11 opt-in process, procedure, et cetera?

12 A. If I had any conversation, I can't  
13 be specific. But you know, Jody Stewart and I  
14 talked often. So I -- you know, but I can't  
15 you exactly if it was regarding forms or  
16 procedures. But being over death row, I'm  
17 quite sure I have had conversations with Jody  
18 Stewart.

19 Q. Okay. And those would be not just  
20 about nitrogen, but just general conversations  
21 about the issues that occur at death row and  
22 that sort of thing?

23 A. It could be many things, yes, sir.

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1 Q. Okay. So you don't have a  
2 specific recollection of a specific  
3 conversation with him that happened after the  
4 opt-in period, but you do -- you believe you  
5 probably did talk to him about it at some  
6 point?

7 A. Correct.

8 Q. Okay. Were you ever asked to  
9 create or write an affidavit or anything  
10 concerning the process or procedure that you  
11 went through?

12 A. Not to my recollection.

13 Q. Okay. And are you aware that  
14 Captain Emberton was asked to do an affidavit  
15 about it?

16 A. Yes.

17 Q. Okay. And were you there when  
18 Captain Emberton wrote and signed his  
19 affidavit?

20 A. No.

21 Q. Okay. Did you have any input into  
22 his affidavit?

23 A. No.

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1 Q. Okay. So you did not review it  
2 before he signed it or anything like that?

3 A. No.

4 Q. Okay. You didn't check it for  
5 typos?

6 A. No.

7 Q. Okay. And I guess that pretty  
8 much is it. Do you think that there's  
9 something that I -- that I may have attempted  
10 to ask you about, about the nitrogen situation,  
11 some information that I should have asked you  
12 for that maybe you're itching to give me? Like  
13 maybe I've asked you the wrong question or  
14 asked it the wrong way. Was there some -- do  
15 you have some specific recollection of the  
16 nitrogen hypoxia situation -- it's been a bit  
17 of a saga over the last couple years -- that I  
18 maybe -- that you want to share?

19 A. No. Mr. Hahn, I think -- I'm not  
20 confused or -- I think you asked the right  
21 questions.

22 Q. All right. Well, I'm confused  
23 sometimes. And so it's more -- it's something

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1 I'll ask juries because, you know, when you get  
2 to a jury and you ask them a question, you want  
3 to know did I forget something, did I -- is it  
4 something where if I'd asked it correctly --

5 A. Yeah. You expounded and you did  
6 well when you did that. So I'm fine.

7 Q. All right. Well, I appreciate  
8 that. Last question, I believe. And that  
9 is -- and I've got to ask this and I don't want  
10 to ask it. Do you have any disciplinary  
11 history of your own at the prison -- at ADOC?

12 A. Do I have any disciplinary  
13 history?

14 Q. Like have you ever been in  
15 trouble?

16 A. Yes.

17 Q. Okay. Anything major?

18 A. I think I had maybe two write-ups  
19 in my file. One of them was for being late to  
20 work. That was probably in 1990 maybe. And  
21 the last one I had was for the use of a state  
22 car.

23 Q. Okay. Got it. And do you recall

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1 when that was?

2 A. I want to say 2017 or '16. Well,  
3 hold on. It might have been '14.

4 Q. Was that you took a state car to  
5 maybe like get some groceries or something kind  
6 of thing?

7 A. No. I was on my lunch break and I  
8 picked up my daughter.

9 Q. Oh, okay. They don't -- that  
10 seems insane. Okay. So minor stuff.

11 A. It is. But that's okay.

12 Q. Okay. I won't ask you to comment  
13 on it -- I won't ask you to comment on that  
14 because you want to be the commissioner some  
15 day. But I will say for the record that sounds  
16 insane. Okay.

17 A. It was.

18 Q. I'll direct Ms. Stewart not to  
19 answer that question. So other than that, no  
20 major -- no major issues. And obviously you're  
21 on an upward trajectory here.

22 MR. HAHN: I don't have any other  
23 questions for you. I'm sure that Ms. Simpson



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1 or Mr. Anderson may. But I appreciate your  
2 time today. Thank you so much.

3 MS. SIMPSON: Ms. Stewart, just a  
4 few questions if you will.

5

6

EXAMINATION

7

BY MS. SIMPSON:

8 Q. I'm just going to follow-up on  
9 some things we talked about earlier. Do you  
10 know what prison jobs are open to death row  
11 inmates?

12 A. Tier runners. And most of the  
13 tier runners are responsible for cleaning like  
14 the showers and taking items from cell to cell.  
15 That's -- hall runners.

16 Q. Okay.

17 A. So that's pretty much...

18 Q. Okay. So like death row inmates  
19 don't, say, work in the kitchen or work in a  
20 shop or anything like that?

21 A. No, ma'am.

22 Q. Okay. Going back to sort of the  
23 hypoxia election period, did any inmate ask you

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1 specifically to read or explain the hypoxia  
2 election form to them?

3 A. No, ma'am.

4 Q. Okay. Would you have done so had  
5 you been asked?

6 A. Yes. Or I would have had someone  
7 else to do it. But I would ensure that it was  
8 done. But I -- I don't have a problem with  
9 reading to them.

10 Q. Okay. Do you recall receiving any  
11 sort of notification that Mr. Smith couldn't  
12 read or understand the election form?

13 A. No.

14 Q. Okay. Do you recall any expert  
15 visits monopolizing the yard during June of  
16 2018?

17 A. Yes.

18 Q. Okay. And what would that have  
19 been?

20 A. I only know one person that came.  
21 Mr. Hahn said he was there. But Mr. Palombi --  
22 if I'm pronouncing his name wrong, please  
23 forgive me -- but I recall seeing him come in.

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1 Q. Okay. So in terms of like  
2 experts, like a psychologist or something, do  
3 you recall anybody coming in and just being on  
4 the yard for a whole day by themselves besides  
5 Mr. Palombi and Mr. Hahn with the  
6 Federal Defenders?

7 A. For what?

8 Q. For like an expert visit, like  
9 someone doing a psych eval.

10 A. Oh yes.

11 Q. Okay. So there were -- so there  
12 were periods aside from the Federal Defenders  
13 meetings when the yard was not accessible to  
14 attorneys visits?

15 A. They were scheduled.

16 Q. Okay.

17 A. They were scheduled.

18 Q. Okay. So those scheduled visits  
19 did happen during June of 2018 to your  
20 recollection?

21 A. Yes.

22 Q. Okay. Do you recall denying any  
23 attorney visits during June of 2018?

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1 A. No.

2 Q. Okay.

3 A. And I don't schedule visits. But  
4 no.

5 Q. Okay. And who was in charge of  
6 scheduling visits?

7 A. Ms. Renee Parker.

8 Q. Okay. Could that be Jennifer  
9 Parker?

10 A. Yes.

11 Q. Okay. All right. Going to ADA  
12 for a minute, you said that Anita Jackson was  
13 in charge of ADA accommodation requests when  
14 you were there. Is that correct?

15 A. Correct.

16 Q. Okay. Did you as the warden have  
17 any involvement in the process by which an  
18 inmate would request ADA accommodations?

19 A. No.

20 Q. Okay. Were you as the warden  
21 specifically informed of which inmates received  
22 ADA accommodations unless you request that  
23 information?

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1 A. No.

2 Q. Did you periodically request that  
3 information?

4 A. No. Unless it was a problem and  
5 she brought it to me or something like that.  
6 But no, I didn't request it.

7 Q. Okay. Were you aware of any  
8 instance in which Mr. Smith requested or  
9 received an ADA accommodation?

10 A. No.

11 Q. If a death row inmate wanted an  
12 ADA request slip, could a tier runner or hall  
13 runner bring it to him?

14 A. Yes.

15 Q. Have you ever suggested to an  
16 inmate that he should ask for ADA  
17 accommodations?

18 A. No.

19 Q. Okay.

20 A. Unless -- can I expound?

21 Q. Please.

22 A. You know, if I see something that  
23 an inmate wanted to participate in a program

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1 and maybe was asking, you know, I'm too tired,  
2 I can't make it, I can't do anything, not so  
3 much at Holman, but at other facilities I may  
4 have spoken with him on what he needed to do.  
5 Maybe the shoes wasn't right. You need to go  
6 through ADA to get you a special pair of shoes  
7 and go through the medical services, but  
8 something general like that. I can say I have  
9 done it. But I just can't specifically say  
10 that I did that at Holman or Fountain or  
11 Tutwiler.

12 Q. Okay. And you've had a long  
13 career with DOC. Correct?

14 A. Yes.

15 Q. Okay. And at Holman did you have  
16 a list of inmates who were functionally  
17 illiterate?

18 A. No.

19 Q. Okay. And I think that -- in your  
20 experience as a correctional officer and an  
21 officer and a warden, had you ever had an  
22 inmate ask you personally for help with reading  
23 or explaining a document or form?

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1 A. Yes.

2 Q. Okay. Did this ever happen at  
3 Holman to the best of your recollection?

4 A. Yes. I'll say yes.

5 Q. Okay. Can you remember specific  
6 instances?

7 A. I can recall an inmate asking me  
8 to explain to him the disciplinary procedure  
9 process. He wasn't quite sure of the procedure  
10 process. He didn't know what the form was  
11 about. He didn't say whether or not he was  
12 illiterate or anything. But as far as  
13 explaining protocols and procedures and  
14 processes, I've -- I've done that.

15 Q. Okay. Do you have any  
16 recollection of Mr. Smith ever making such a  
17 request of you?

18 A. No.

19 MS. SIMPSON: I think -- okay. I  
20 think that's all I have. Thank you very much.

21 THE WITNESS: Okay.

22 MS. SIMPSON: Spencer, all yours.

23 THE VIDEOGRAPHER: All right. Is

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1 everybody -- everybody good?

2 MR. HAHN: One brief follow-up and  
3 then I'll be done. I promise this is one.

4

5 EXAMINATION CONTINUED

6 BY MR. HAHN:

7 Q. And Warden Stewart -- or I'm  
8 sorry. Director Stewart, just to reiterate,  
9 you don't have a specific recollection of ever  
10 interacting with Willie Smith. Correct?

11 A. Correct.

12 Q. All right.

13 MR. HAHN: That's it.

14 MS. SIMPSON: Thank you very much.

15 THE VIDEOGRAPHER: All right. We  
16 are off the record at 11:47 a.m. This  
17 concludes today's testimony given by Cynthia  
18 Stewart Riley.

19

20

21

22

23



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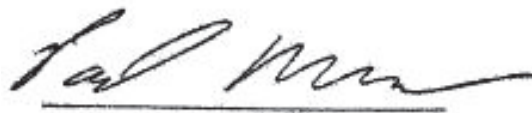
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STATE OF ALABAMA,  
BALDWIN COUNTY,

I, Paul Morse, Certified Court Reporter  
and Commissioner for the State of Alabama at  
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I further certify that I am neither of  
kin nor of counsel to the parties to the action  
nor in any manner interested in the result of  
said case.



Paul Morse, CCR

ACCR #588 Expires 9/30/21

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[00927 - answers]

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[title - way]

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[we've - zero]

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate.

The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

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# **Exhibit 14**



Deposition of:  
**CONF - Captain Jeff Emberton**

*May 24, 2021*

In the Matter of:  
**Smith, Willie B., III Vs. Dunn, Jefferson,  
et al.**

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

WILLIE B. SMITH, III, )  
Plaintiff, )

-vs- )

JEFFERSON DUNN, Commissioner,) No. 19-cv-  
Alabama Department of ) 00927-ECM-SMD  
Corrections, and TERRY )  
RAYBON, Warden, Holman )  
Correctional Facility, )  
Defendants. )

\* \* \* \* \*

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VIDEOTAPED DEPOSITION OF  
CAPTAIN JEFF EMBERTON  
VIA VERITEXT VIRTUAL ZOOM

May 24, 2021

10:02 a.m.

Montgomery, Alabama

\* \* \* \* \*

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A P P E A R A N C E S

For the Plaintiff:

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Mr. Spencer J. Hahn

Mr. John A. Palombi

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1 name and spell it for the record, please?

2 A My name is Jeff Emberton,  
3 E-M-B-E-R-T-O-N.

4 Q And how old are you?

5 A Pardon me?

6 Q How old are you?

7 A I'm 47.

8 Q And what is your education?

9 A Some college.

10 Q Where did you go to college?

11 A I went to Calhoun Community  
12 College. I also went to Bienville  
13 University.

14 Q And what is your current  
15 occupation?

16 A I'm a correctional captain at  
17 Ventress Correctional Facility.

18 Q And how long have you been doing  
19 that position?

20 A Six years.

21 Q And prior to that what was your  
22 occupation?

23 A Correctional lieutenant.

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1 Q So last year you were party to a  
2 lawsuit that involved the Department of  
3 Corrections?

4 A Yes, ma'am.

5 Q And what was the name of that  
6 case?

7 A That was Lassiter, Travis  
8 Lassiter.

9 Q And what was the subject of the  
10 lawsuit?

11 A I don't remember. It ended up  
12 being settled.

13 Q It was settled?

14 A Yeah.

15 Q And Mr. Lassiter was the  
16 Plaintiff, I assume?

17 A Yes, ma'am.

18 Q And what did he allege in his  
19 lawsuit?

20 A I'd have to see it to remember  
21 it.

22 Q What type of lawsuit was it?

23 A It was just a lawsuit. I got a

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1 notice in the mail to write an affidavit. I  
2 wrote one and submitted it, never heard back  
3 from it again.

4 Q And that was in 2020?

5 A Yes.

6 Q And had you been party to a  
7 lawsuit prior to that?

8 A Several.

9 Q Several. And were they all  
10 related to the Department of Corrections?

11 A Yes, ma'am.

12 Q And do you remember the dates of  
13 those lawsuits?

14 A I have no clue.

15 Q Would you say it was within the  
16 last ten years?

17 A Yes, ma'am.

18 Q And were you named as a  
19 Defendant in the lawsuit?

20 A Yes, ma'am.

21 Q In your individual capacity or  
22 your official capacity?

23 A My official capacity.

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1 Q And did any of those involve  
2 Holman Correctional Facility?

3 A Not that I recall.

4 Q And you did not give a  
5 deposition in any of those cases?

6 A No, ma'am. If I recall  
7 correctly, most of them had to do with  
8 disciplinary hearings.

9 Q I see. Have you ever been a  
10 party to a lawsuit in your personal capacity?

11 A No, ma'am.

12 Q Have you ever been charged with  
13 a crime?

14 A No, ma'am.

15 Q In preparation for your  
16 deposition today, did you review any  
17 documents?

18 A No, ma'am.

19 Q Did you -- in preparation for  
20 your deposition, did you review any files on  
21 your computer?

22 A Yes, ma'am.

23 Q And what were those?

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1           A     Just the files from my runners  
2     and tier runners and stuff that I had while I  
3     was at Holman.

4           Q     And in preparation for your  
5     deposition did you meet with anyone?

6           A     Not personally, not face to  
7     face; through E-mail.

8           Q     E-mail. And was that with  
9     anyone outside of the Department's legal  
10    counsel or the Attorney General's office?

11          A     No, ma'am.

12          Q     And outside of the Attorney  
13    General's office and the Department's legal  
14    counsel, did you discuss your deposition with  
15    anyone?

16          A     No, ma'am.

17          Q     And so Ms. Simpson provided us  
18    with a copy of your resume, and so I'd like  
19    to maybe discuss some of the items. It's  
20    quite extensive, so we won't go through line  
21    by line. But I wanted to ask you on your  
22    professional license certificates, skills and  
23    abilities --

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1           A     Yes, ma'am.

2           Q     -- one of the things that you  
3 listed is that you have experience working  
4 with other law enforcement agencies, judges,  
5 and various free world employers.

6           A     Yes, ma'am.

7           Q     Could you tell me a little bit  
8 about that experience?

9           A     Well, that was from my time at  
10 work release, and during escapes and stuff  
11 like that we worked hand in hand with local  
12 law enforcement, state police, and the Gulf  
13 Coast Fugitive Task Force. With that job I  
14 also had a lot of contact with outside  
15 employers as far as dealing with inmates and  
16 trying to get jobs.

17          Q     And how about judges?

18          A     That was like when we did have  
19 an escape, when they would charge them with  
20 escape, we always had to go in front of the  
21 grand jury and give testimony before they  
22 would charge them.

23          Q     It also -- you also stated that

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1 you had experience obtaining warrants.

2 A Yes, ma'am.

3 Q Could you tell me a little bit  
4 about that experience?

5 A It's the same thing with the  
6 work release. When inmates escape and stuff,  
7 if I was -- the first-shift shift commander  
8 that was usually the one that would go and  
9 obtain the warrant. So we would go down to  
10 the Circuit Clerk and get the warrant.

11 Q It also says that you and  
12 several different physicians, that you've  
13 developed and formatted forms. What type of  
14 form --

15 A Yes, ma'am.

16 Q What type of forms have you  
17 developed?

18 A Just them forms that you've  
19 seen, death row, you know, rosters and stuff  
20 like that, shift schedules and stuff.

21 Q And was the development of those  
22 forms part of your job duties, or is that  
23 something you took the initiative to do on

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1 your own?

2 A Just a little bit of both. I  
3 mean, when you have inmates in a capacity  
4 such as that, they have to have schedules.  
5 The staff coming in and out have to know when  
6 they work, when they don't work, and who's  
7 supposed to be out and who's not supposed to  
8 be out. So it was just a way to get it more  
9 familiar and a little bit easier to  
10 comprehend for staff.

11 Q So would that fall under -- You  
12 had listed that you have excellent  
13 organizational skills. Besides the forms and  
14 the schedules, what other things would you do  
15 that would fall under your organizational  
16 skills?

17 A Just keeping track of documents.  
18 If it's required that we keep documents per  
19 regulation, making sure I have a file for  
20 those files, or making sure that the  
21 captain's secretary has documents that are to  
22 be retained are properly filed.

23 Q All right. You also listed, and

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1 it looks like you've had extensive experience  
2 as a supervisor of law libraries within --

3 A Yes, ma'am.

4 Q -- the Department of  
5 Corrections. What were your duties as the  
6 law library supervisor? What types of things  
7 would you do?

8 A Just making sure the clerks had  
9 what they needed to do their job, envelopes,  
10 paper, pencils, pens. If they had an issue  
11 with the computer, you know, getting in touch  
12 with IT and getting it updated. If it  
13 crashed, getting them to come fix it.

14 Just overseeing the running of  
15 the law library. Making sure that the law  
16 clerks weren't doing things they weren't  
17 supposed to do. As far as, you know,  
18 documents on the computer that may not be  
19 authorized to be on the computer.

20 Q And how were the law clerks  
21 selected? Were you involved in that  
22 process?

23 A Yes, I mean, a lot of times,



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1 depending on where you go like Ventress,  
2 they've already got their law clerks in  
3 position, so I don't mess with it. Holman  
4 already had certain inmates that were already  
5 working in the law library, so I didn't mess  
6 with them as far as their job duties. As  
7 long as they were doing what they were  
8 supposed to do and not causing problems, I  
9 let them alone.

10 Q And do you remember who the law  
11 clerks were when you were at Holman?

12 A No, I do not remember.

13 Q But the law clerks are all also  
14 inmates; that's correct?

15 A Yes, ma'am.

16 Q Did you ever have any outside  
17 groups that come in and work, you know,  
18 within the law library?

19 A No, ma'am.

20 Q Your resume also indicated that  
21 you supervised the inmate pass committee?

22 A Yes, ma'am.

23 Q What is the inmate pass

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1 committee?

2 A Well, that has to do with work  
3 release also. Once they are at work release  
4 for 90 days, they are eligible to go on pass,  
5 and that is a leave program for the work  
6 release inmates. And it starts out at a  
7 four-hour pass, then it goes to an eight-hour  
8 pass, and then it goes to a furlough, which  
9 is three days. They can leave on Friday and  
10 come back on Sunday.

11 They have to meet certain  
12 criteria to be able to be eligible for that  
13 program: Disciplinary clearance, have a job,  
14 be going to work, and not have any kind of  
15 crime where the sheriff's department of the  
16 county that they will be going to would  
17 object to them being on pass.

18 Q So the committee consisted of  
19 you and some other folks at Corrections, and  
20 it essentially was an assessment of the  
21 inmates and their ability to, you know, have  
22 a pass to be outside; is that correct?

23 A Yes. Function without

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1 supervision.

2 Q Function without supervision.

3 A Because their supervisor, their  
4 DOC counterpart would be whoever their  
5 sponsor was. So you had to be able to, you  
6 know, you had to pass a background check, had  
7 NCIC check. They had to go through a lot of  
8 stuff to be able to be approved as a sponsor.

9 Q I see. And so you would gather  
10 that information and then make an assessment?

11 A Yes. And the ultimate, at the  
12 end, based on the committee's suggestion, it  
13 was in the Warden's hand whether or not he  
14 wanted to approve it or not.

15 Q All right. You listed, and I  
16 think it may be part of your current  
17 position, that you're in charge of  
18 confiscated cellular phones?

19 A No, that was actually -- well,  
20 yes and no. That was basically at the work  
21 release. But all captains at any facility  
22 are responsible for it. We make sure that  
23 the I and I -- well, now it's LESD, Law

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1 Enforcement Service Division, make sure that  
2 the evidence box for cell phones gets cleared  
3 out in a timely manner and that it doesn't go  
4 overfilled to where we can't put any more in  
5 it.

6 Q Obviously. And do you keep a  
7 log of that information? Like what phones?

8 A The secretary of each prison  
9 does.

10 Q You also listed a system called  
11 iTrack.

12 A Yes, ma'am.

13 Q Could you tell me a little bit  
14 about that?

15 A That's also work-release  
16 related. And that's a system that they have  
17 on the vans for your inmate van drivers that  
18 are also approved to drive inmates to and  
19 from work. And that's a program so we can  
20 pinpoint where the van's at and make sure  
21 they are not in any unauthorized areas.

22 Q I see. And so you oversaw that  
23 program?

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1 A Yes, ma'am.

2 Q Specifically, when did you work  
3 at Holman? From when to when?

4 A I started in December of '16 and  
5 I left in September of '19.

6 Q And why did you leave?

7 A To be closer to home and family.

8 Q And on your resume you list the  
9 RHU and death row.

10 A Yes, ma'am.

11 Q Can you explain to me the  
12 differences between those two?

13 A You know, death row are your  
14 convicted felons that are sentenced to death.  
15 Your restricted housing unit is just that;  
16 it's a restricted housing unit. It's inmates  
17 that have some kind of disciplinary  
18 infraction that has governed them to be  
19 segregated for a certain period of time;  
20 whether it be 30 days, 90 days, whatever the  
21 disciplinary hearing officer suggests.

22 Or you may have inmates that  
23 based on classification are maxed out. They

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1 are behind the door for however long  
2 classification manual specifies. Those  
3 inmates move in -- from RHU move in and out  
4 from segregation to general pop. Death row  
5 inmates, they are on death row. There is no  
6 population for them except the death row  
7 population.

8 Q And so, for the general  
9 population, death row aside, there is what  
10 you would consider general population, then  
11 there is segregation, and then there is the  
12 RHU?

13 A No. You would have --  
14 Segregation is the old term for RHU. Back  
15 in the day we called segregation, but we  
16 changed the name, I guess, basically to be  
17 more politically correct as restrictive  
18 housing. Because it's not actually -- I  
19 mean, it's segregated, but it's not long  
20 term.

21 Q I see. So you're explaining the  
22 difference based on whether you were working  
23 with RHU or whether you were working with

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1 death row, or were they similar?

2 A Yeah, it's totally different.

3 Q Totally different. How so?

4 A I mean, death row inmates, they  
5 are locked down 23 hours a day. You know,  
6 unless it's -- you know, you've got my tier  
7 runner, unless they are tier runner and have  
8 a job like a tier runner or law library  
9 clerk, they are locked down 23 hours a day.

10 So you've got to kind of treat  
11 them a little bit different than you would  
12 treat somebody that was just come out of  
13 general pop and is not going to be in that  
14 cell but more than 30 days. He's got a  
15 disciplinary, he's either stabbed somebody,  
16 assaulted somebody, got caught with a whole  
17 bunch of drugs or something, but he's locked  
18 down, he's not a friendly guy.

19 Death row inmates pretty much,  
20 like I said, stay in their cell. I mean,  
21 they get yard time but, I mean, that's only  
22 like an hour, maybe two hours a day.

23 Q And were you ever a shift

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1 supervisor?

2 A At Holman?

3 Q At Holman.

4 A No, ma'am.

5 Q And when you were at Holman when  
6 you arrived for your shift, your work, did  
7 you punch a time card? Do you sign in?

8 A Yes, ma'am. We have to --

9 Q I'm sorry?

10 A We have a time clock.

11 Q You have a time clock. And so  
12 it's like an old fashioned, you put the card  
13 in the machine and it stamps it?

14 A No, you have a computerized --  
15 it's computerized. You punch in your badge  
16 number, put your finger on a little scanner  
17 and it scans you in.

18 Q And while you were at Holman did  
19 you ever do the classification intake?

20 A No, ma'am.

21 Q Who did?

22 A What was his name? It started  
23 with an S. I got to think of what his name



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1 was. I can't think of his name off the top  
2 of my head. Despain, Mr. Despain.

3 Q Mister, I'm sorry, I couldn't  
4 hear you very well?

5 A Despain. I think it was  
6 D-E-S-P-A-I-N. Despain.

7 Q And that was between, as far as  
8 you know, it would have been at least between  
9 2016 to 2019?

10 A Yes, ma'am.

11 Q As far as communication at  
12 Holman, how would the staff communicate with  
13 one another? Did you use E-mail, write  
14 memos? Did you talk on the phone?

15 A All of the above.

16 Q All of the above.

17 A Depending on what shift you  
18 wanted to correspond with and what you were  
19 trying to correspond to them, it could be  
20 phone, it could be E-mail. I could stay  
21 over, come in early. You know, it just  
22 depended on what you wanted to communicate to  
23 them, you know, how you communicated with

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1       them.

2                   Q     If you were going to communicate  
3       with the Warden, let's say, would you send  
4       her an E-mail?  Would you make an  
5       appointment?  How does that go?

6                   A     Well, I mean, all Wardens that  
7       I've ever worked for have an open-door  
8       policy.  So unless it's something, you know,  
9       drastic like maybe a write-up or something,  
10      then you would set up an appointment.  But  
11      most of the time if you just wanted to have a  
12      conversation with them, they had an open-door  
13      policy.

14                            But it would just depend, like I  
15      said, it would just depend on what I wanted  
16      to talk to her about.  I mean, if it was just  
17      something short, brief, no big deal, I would  
18      probably send her an E-mail or pick up the  
19      phone and call her.  If I wanted that face-  
20      to-face interaction, then I would just go to  
21      her office and say, "Warden, do you have a  
22      minute?"

23                   Q     And when you were at Holman, how

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1 many people did you supervise?

2 A I had two lieutenants -- well,  
3 actually three lieutenants and one sergeant.

4 Q And then typically underneath --  
5 So is it captain, lieutenant, sergeant --

6 A Then officer.

7 Q And then officer. And how many  
8 officers would be typical on a shift at  
9 Holman?

10 A For just death row?

11 Q Yes, just for death row.

12 A

Governed by confidentiality  
order; Smith v. Dunn

13

14

15

16 Q And did you supervise those  
17 officers as well?

18 A Technically, yes, but actually  
19 their direct line supervisor was the sergeant  
20 or the lieutenant, whichever shift death row  
21 commander you had on duty.

22 Q And if you were, let's say,  
23 instituting a policy or kind of changing a

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1 procedure or something and you wanted to  
2 notify those officers and the sergeant and  
3 the lieutenant, would you send out or draft  
4 like a formal memorandum that they would get  
5 a copy of, or --

6 A Yes, I would form a memo or an  
7 E-mail and send the shift supervisors the  
8 E-mail, and then I would print a copy and  
9 make sure that it was in the cubicles where  
10 the cubicle operators could see it, and the  
11 officers, too. I think actually in that  
12 file, I think there is one in there that I  
13 formatted.

14 Q And was that a typical kind of  
15 format of memorandum?

16 A Yes, ma'am.

17 Q And it would have your name  
18 and--

19 A Yes, ma'am.

20 Q And when you were at Holman did  
21 you ever supervise the law clerks?

22 A The law clerks were already in  
23 place. The only thing that I would do is if

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1 they had an issue with the computer, I would,  
2 you know, reach out and make sure that IT and  
3 technology knew about it and that we could  
4 get it fixed. As far as a supervise them,  
5 actually, the shift commanders done that and  
6 they made sure the law clerks got in and out  
7 and done what they needed to do.

8 Q I see. So if the law clerk  
9 noticed that there was an issue with the  
10 computer, they would report it to someone who  
11 would then report it to you, and you would  
12 call IT?

13 A Yeah. Or, I mean, if the inmate  
14 seen me walking the tiers -- I walked the  
15 tiers all the time. [REDACTED]

Subject to confidentiality order  
in Smith v. Dunn

16 [REDACTED] so just walk through  
17 to let them see me, have intersection with  
18 me. If there was an issue with the computer  
19 or they were having problems getting to the  
20 law library, they would tell me and then I  
21 would set up, you know, tell the shift  
22 commander, hey, make sure this inmate gets to  
23 the law library.

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1 Q And who were the shift  
2 commanders when you were at Holman?

3 A Let's see. You had, you had  
4 Sergeant Lane, or Long, L-O-N-G. You had  
5 Lieutenant Banks. You actually had two  
6 Lieutenant Banks. And then you had a  
7 Lieutenant -- what was her name? I can't  
8 think of the female lieutenant that was on  
9 third shift.

10 Q You had produced this, you know,  
11 hall runner information that you had in your  
12 computer --

13 A Yes, ma'am.

14 Q -- for death row. What other  
15 information did you have in those files?

16 A That was it.

17 Q And are there additional files,  
18 or that's the only file you have for death  
19 row?

20 A That was -- when I went through  
21 my computer trying to find anything, that was  
22 all I had.

23 Q And when did you go through your

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1 files to look for that?

2 A I believe it was last week.

3 Yeah, on the 13th.

4 Q Is there anything -- I know you  
5 couldn't remember the name of the law clerk,  
6 but if we wanted to find that information, is  
7 that, you know, file somewhere as far as you  
8 know?

9 A It's probably in a memo  
10 somewhere. I mean, I couldn't tell you where  
11 to find it.

12 Q So there would be a memo that  
13 was -- that would be circulated that listed  
14 the tier runners and the law clerks and  
15 things like that?

16 A Yes.

17 Q And do you know how often that  
18 was sent around, or how often that was  
19 updated?

20 A I know that -- I don't think it  
21 was updated while I was there.

22 Q And do you remember who would  
23 have drafted that memo?

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1           A     It probably would have come out  
2     on a job board from ICS. That would just be  
3     a listing of the jobs that the inmates on  
4     death row were assigned, like hall runner,  
5     tier runner, law library clerk, tier  
6     cleaners, stuff like that.

7           Q     And what's the difference  
8     between, excuse me, the hall runner and the  
9     tier runner as far as their duties?

10          A     The hall runners actually have a  
11     little bit more contact as far as with staff.  
12     Those medical, mental health, I mean, they're  
13     the first inmates seen as you walk onto death  
14     row. They make sure the food carts get from  
15     the front gate to the tiers. Anything that,  
16     you know, we have that may be -- that we need  
17     taken to an inmate or we need, you know,  
18     whatever we need, they are right there. They  
19     are right there with us most of the day, or  
20     most of the shift.

21                     The tier runners stay on their  
22     assigned tiers and work for the inmates. You  
23     know, they heat up food, they bring them the

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1 phone, they bring them their tray. If they  
2 need cleaning supplies, they bring them  
3 cleaning supplies. I mean, the tier runners  
4 actually work mainly on the tier. The hall,  
5 main hall runners work the main hall and have  
6 interaction with myself, the lieutenant, the  
7 sergeant. You know, they have more  
8 interaction with staff.

9 Q In reviewing some of the duty  
10 post logs that were produced, there is a  
11 reference to being a [REDACTED] officer.

12 A Yes, ma'am.

Subject to confidentiality order in Smith v.  
Dunn

13 Q What does the [REDACTED]  
14 officer do?

15 A It's actually [REDACTED]  
16 and that, like, right now it's a captain or  
17 above: Captains and wardens, assistant  
18 wardens. Right now I'm call now, [REDACTED]

19 [REDACTED]  
20 they have to call us. They have to let us  
21 know [REDACTED]

22 [REDACTED]  
23 [REDACTED]

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1 [REDACTED] That's pretty  
2 much what [REDACTED] is, so someone of the  
3 executive team knows what's going on in the  
4 prison, even when we are not there.

5 Q And if you were -- if you were  
6 called [REDACTED]  
7 [REDACTED] after the resolution of that would  
8 you write some type of memo to file or that  
9 would explain what happened and how it was  
10 resolved?

11 A There would probably be what  
12 they call incident report. I wouldn't  
13 necessarily do a memo on it. And when we do  
14 incident reports for any kind of major or  
15 minor infraction, whether it be, you know,  
16 unauthorized area, you know, cell phones, you  
17 know, fights, stabbings, assaults, PREA. I  
18 mean, we do incident reports any time  
19 anything happens that disrupts the function  
20 of the prison daily operation.

21 Q If you had to guess, how many of  
22 those get filled out in a day? How many  
23 incidents, even minor ones?

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1           A     I don't know. On a bad day, 20,  
2     25. They don't just deal with inmates. I  
3     mean, they also deal with us. Like, if I had  
4     a lieutenant that wasn't doing his job, and  
5     I've done had verbal counseling with him two  
6     or three times and it's not sinking in, so  
7     now I'm going to let him read about it.

8                     I'm going to write it, I'm going  
9     to give him a correctional -- a corrective  
10    action, and I'm going to document that in the  
11    form of a 302 or an incident report. And  
12    then I'm also going to do the corrective  
13    action and submit it to the Warden. So the  
14    incident reports don't just deal with  
15    inmates. It also deals with staff, too.

16           Q     Have you ever read the consent  
17    decree that the State entered into in Braggs  
18    versus Dunn?

19           A     I do, but I don't remember what  
20    it said.

21           Q     So you did read it at some  
22    point?

23           A     Yes, ma'am.

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1 Q And how did you -- How did that  
2 come about? Were you given a copy of it?

3 A No, I actually think it had that  
4 in that, they just gave us some copies and we  
5 issued it out to the inmates.

6 Q And the consent decree kind of  
7 put in place certain changes or requirements  
8 that the Department needed to make. And so  
9 were you ever provided with any training on  
10 those changes?

11 A Yes, ma'am.

12 Q And do you remember when that  
13 was?

14 A Oh, I'd have -- No, I do not.

15 Q Can you tell me what you do  
16 remember about the training?

17 A I remember that, you know, the  
18 showers had to be accessible by wheelchair,  
19 they had to have handicap rails, according to  
20 prop themselves up on. There were required  
21 shower chairs, which it's hard to one find  
22 one that's plastic. What was the other one?  
23 Oh, if they can't read or write, they can get

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1 inmate assistance to help them read a  
2 document, or if they need to write something.  
3 But they have to be able to sign their own  
4 name and their AIS number on the form, or  
5 whatever they're writing.

6 Q So it was a requirement that  
7 they knew how to sign their name?

8 A Yes, ma'am, even if it was  
9 print. They didn't have to write it in  
10 cursive. Even if they could print it, they  
11 had to be able to print it in their own  
12 handwriting.

13 Q But if they -- but they could  
14 have someone read it to them. Let's say they  
15 didn't know how to read.

16 A Yes, ma'am.

17 Q And how would that happen?  
18 Would you all assign --

19 A Well, one, they would have had  
20 to let someone in security know that, hey, I  
21 can't read or write. And then we would say,  
22 okay. Who do you feel comfortable with  
23 reading it to you? I mean, I don't want to

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1 just pick just anybody because they may not  
2 read everything the right -- the way they  
3 want it read.

4 So they would pick somebody or  
5 they may say, "I can't read and write. I'm  
6 going to take this back to my cell and get  
7 somebody else to read it to me." And I said  
8 okay. Give it to them, they go back, they  
9 read it, they bring it back, whether it's  
10 signed or not signed. And that's the end of  
11 it.

12 Q And did you ever read something  
13 if someone didn't understand or they had a  
14 question?

15 A I have.

16 Q Do you know of other staff that  
17 would have done that also?

18 A I think any staff would have as  
19 long as, you know, they were approached in  
20 the right manner. I mean, a lot of inmates,  
21 you know, because you hand them a form and  
22 say, "hey, read this," they don't want to  
23 come out and tell you, "hey, I can't read and

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1 write," you know. So they get a little bit  
2 apprehensive, so they'll go off by themselves  
3 and let another inmate read it.

4 You know, it takes a pretty big  
5 person at, you know, let's just say my age,  
6 47, 48 years old, to say, hey, I can't read  
7 and write. I'm not just going to tell just  
8 anybody that. Sometimes I'm going to go to  
9 somebody that I'm friends with, someone that  
10 I feel comfortable with and say, "Hey, can  
11 you help me with this? You know I can't read  
12 and write."

13 Q And how many death row inmates  
14 were there?

15 A I think when I left there was  
16 157, 158, if I remember right. Subject to confidentiality order in Smith v. Dunn

17 Q And so you said you [REDACTED]  
18 [REDACTED]; is that  
19 correct?

20 A Yes, ma'am.

21 Q And so did you get to know some  
22 of the guys?

23 A Some of them. I mean, I can't

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1 (Break in proceedings.)

2 THE VIDEOGRAPHER: We are going  
3 back on the record at 11:23.

4 Q Captain Emberton, I wanted to  
5 ask you two kind of follow-up questions from  
6 some questions I was asking before. When you  
7 checked your E-mail, did you check your  
8 E-mail and see if you had any E-mails  
9 concerning the nitrogen hypoxia?

10 A Yes, and actually, I know I  
11 didn't. I mean, that was something that was  
12 just given to me in paper form. They were  
13 already printed out, there were envelopes.  
14 And I was given instructions, and that's what  
15 -- I followed those instructions.

16 Q And we had discussed, you know,  
17 if there were someone, as you said, that  
18 needed some help reading a form or  
19 assistance. And I know there is some people  
20 that just don't want to say that they can't  
21 read or they need help. But if you had  
22 someone that did, and there was a reader and  
23 that was selected by the inmates, do you

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1 remember that happening at Holman?

2 A I do not.

3 Q So you can't think of anyone on  
4 death row that had an inmate that helped them  
5 read?

6 A Huh-uh.

7 Q Okay. So I wanted to ask some  
8 specific questions just about the Holman law  
9 library. I know we've kind of been talking  
10 in general about law libraries at the DOC.  
11 But when were the inmates allowed to use the  
12 law library? How often?

13 A Well, I mean, it was daily. I  
14 mean, it was open pretty much, you know, from  
15 eight o'clock in the morning until five  
16 o'clock at night. If they needed to go to  
17 the law library or something, they would  
18 just, you know, ask the officer, hey, I need  
19 to go to the law library. You know, if it  
20 was open, you know, they would let them out  
21 and them go down there to the law library.  
22 The day room and the law library were in the  
23 same room, I mean, the law library just kind

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1 of had like a little corner of the day room.  
2 They'd put them in there and lock the door  
3 and say, "Okay. You can stay in here all day  
4 if you want."

5 Q And was that done by tiers or it  
6 was just anyone who asked?

7 A Different tiers had different  
8 days that, you know, technically was open to.  
9 But, I mean, we didn't have a whole lot of  
10 inmates that actually use a law library. I  
11 mean, if I recall, we may have had ten or 15  
12 inmates that even wanted to use the law  
13 library. So, I mean, it wasn't a big deal to  
14 me or to the staff.

15 I mean, if you needed to go down  
16 there and do something, then we would just --  
17 we'd let you out and let you go in there. I  
18 mean, as long as it wasn't tied up, there  
19 wasn't some other inmate in there using it, I  
20 mean, you could go in there and use the  
21 computer whenever you got ready. You just  
22 had to let someone know so we could let you  
23 out of your cell.

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1 Q And if -- Was there a time limit  
2 on the use of the computer?

3 A They pretty much governed that  
4 themselves. I mean --

5 Q So if someone was using it, you  
6 would have to wait until he was finished and  
7 then --

8 A Yes.

9 Q Can you recall any disagreements  
10 about that? Someone thought the other person  
11 was taking too long or --

12 A No, not on a law library  
13 computer. They all -- Pretty much everybody  
14 that used it that was trying to fight  
15 something, they all helped each other. I  
16 mean, there was no disagreements. I mean,  
17 sometimes, you know, they would be like, "I'm  
18 doing something right now."

19 "Well, what are you doing?"

20 "I'm doing Rule 32."

21 "Well, hey, I'm doing Rule 32,  
22 too. What you got?" And they would mix and  
23 match. They very rarely ever got in

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1 conflict. They helped each other out, you  
2 know, all the time.

3 Q And do you have any knowledge of  
4 when the law library shifted from books to  
5 computers?

6 A If I had to recall, I think that  
7 was '05 or '06. 2005, 2006, I think. I  
8 mean, I'm not positive. I think that's when  
9 it was.

10 Q And that would have been system-  
11 wide pretty much?

12 A Yes.

13 Q Do you know if any inmates were  
14 trained on how to use the computer?

15 A I know when we got -- when we  
16 first got ours I was at work release. And,  
17 you know, they pretty -- they sent us an  
18 E-mail, you know, about how it worked and all  
19 that kind of stuff. And I was pretty much  
20 self-taught. I mean, when IT come and  
21 installed the computers at what is now North  
22 Alabama Work Center -- it was Decatur Work  
23 Release. When we got ours, they come in and

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1 hooked it up, IT kind of showed us how to  
2 manage it and go through the program. But  
3 as far as trying to actually cipher through  
4 Lexus Nexus CD's, I pretty much taught  
5 myself.

6 Q And how did the Lexus Nexus  
7 work? They sent you --

8 A Yeah, they send you a disk. It  
9 started out Lexus Nexus would send the  
10 institutions a disk. And then, you know, we  
11 were, like, calling IT all the time saying,  
12 hey, the CD rom don't work. How are we  
13 supposed to download all these updates if the  
14 disk drive don't work? So then they switched  
15 it and now IT gets the disk and someone from  
16 IT will come down to the institution and  
17 update the computer.

18 Q Do you know how often they would  
19 come, or how often you got the CD's?

20 A In the beginning we'd get CD's  
21 about twice a year.

22 Q And is that still the system at  
23 the facility you're at today?

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1 A Yes, ma'am.

2 Q And how often do they bring the  
3 disks?

4 A We just had somebody there, I  
5 think it was two weeks ago updating the  
6 system. We had some problems with the  
7 computer and, you know, the law library clerk  
8 come and asked me if I could contact IT for  
9 them, that the computer was messed up. She  
10 actually brought the updates when they came  
11 to look at the computer.

12 Q But before that it would have  
13 been months before there was a CD --

14 A Yes.

15 Q -- with the information?

16 A Yes, ma'am.

17 Q On the computer in the law  
18 library there is two -- and I'm really not  
19 very good at the computer myself. But there  
20 is two icons. One is for the Lexus Nexus,  
21 and then the other is just the folder marked  
22 "law library." And there is some information  
23 in there, looks like maybe for local rules

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1 for the courts or forms, if you were going to  
2 fill out something per se. Do you know who,  
3 you know, who gathered that information and  
4 put it on the computer?

5 A I mean, it would have had to  
6 have been somebody, you know, that had the  
7 information they had to get it from  
8 somewhere. A lot of times we will network  
9 between prisons, like, an inmate may ask me  
10 for a form that I don't know about or I don't  
11 have. I may call Bullock and say, "Hey,  
12 who's doing your law library? Who's managing  
13 your law library?"

14 "Well, so and so is."

15 "Well, do you have this form?"

16 "Oh, yeah, I got that form."

17 And then, you know, they'll E-mail it to me  
18 or they'll E-mail it to whoever is managing  
19 the law library and say, "This is the form."  
20 And then we'll either put it on a jump drive  
21 and put it on a computer form in that folder  
22 or, you know, we may call IT and say, "Hey,  
23 listen, can you put this on the computer next

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1 time you come?" But the inmates don't have  
2 means to print it off. So, you know, I may  
3 even keep the form and print it off when they  
4 need it.

5 Q So if the inmate was doing some  
6 research and they, for example, wanted to  
7 print off a case, how would they do that  
8 without a printer?

9 A Well, one, they can't. I mean,  
10 and unless you got -- Some of them cases are  
11 four or five hundred pages long. And unless  
12 you got a ton of money on your account, you  
13 ain't fixing to get no copies because it's  
14 like 50 cents a page. So they better have a  
15 whole lot of pens and a whole lot of paper.

16 Q And you mentioned that you kind  
17 of were self-taught on the Lexus system that  
18 the DOC uses. And so have you ever been  
19 asked for assistance on how to use the Lexus  
20 system?

21 A I mean, when they first come out  
22 when I was at the work release, I pulled in  
23 who we had working in the law library and

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1           Q    Did you find the law library was  
2    used for a -- as a day room quite a bit?  
3    Like for --

4           A    Only they were in the same  
5    general area. I mean, you may be over in the  
6    corner on the law library computer, but  
7    you're still going to have a table probably  
8    five or six feet away from you where guys are  
9    playing Domino's. You know, it was in the  
10   same general area because of space  
11   constraints.

12                   Holman is a very old prison,  
13   probably one of the oldest prisons in the  
14   system. And as far as just having a  
15   designated space for that, we didn't have it.  
16   So we had to use what space was common for  
17   the inmates to where they pretty much had  
18   readily access to it whenever they wanted  
19   access to it.

20                   Just like the day room. If they  
21   wanted to go to the day room and play  
22   Domino's or whatever, we would let them go.  
23   We needed to find an area that was commonly

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1 accessed and easily accessed that anybody  
2 could go down there and use it when they got  
3 ready. The chapel was not a good area for  
4 them to meet because that's time constraints.  
5 There's certain things going on in the Chapel  
6 just about every hour during the day. So  
7 that wasn't a good idea, so we moved it to  
8 the day room to where everybody had access  
9 pretty much for eight hours.

10 Q If they left their cell to go to  
11 the day room or the law library, however they  
12 were going to use it that day, was that --  
13 would that go [REDACTED] ?

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14 A It would probably -- Some of  
15 them were [REDACTED] And  
16 that pretty much was everything. I mean, it  
17 was day room, the law library computer. You  
18 know, it was whatever you wanted to use that  
19 was in that day room. I mean, sometimes it  
20 would be [REDACTED] and  
21 sometimes [REDACTED] if  
22 you wanted to go, we just let you go. We  
23 didn't really say, well, it's not your day, N

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1 tier is in there. But, you know, if you  
2 wanted to go, we'd kind of let you go.

3 Q And did you have to record that  
4 somewhere so that you knew kind of where they  
5 were?

6 A Not really. I mean, we pretty  
7 much knew where they were. I mean, we didn't  
8 log it anywhere. Because the way Holman is  
9 set up, I mean, the day room is right there  
10 in front of the cube. I mean, you can look  
11 out the window of the cube and look right  
12 into the day room and count how many inmates  
13 are in there and who's in there.

14 Q In some of the documents that  
15 State gave us there were slips for something  
16 called a legal kit. Can you tell me --

17 A Yes.

18 Q -- what --

19 A Paper, envelopes, carbon paper,  
20 and one manila envelope.

21 Q Did the envelopes have stamps on  
22 it?

23 A Yes, one. One envelope had one

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1 stamp on it.

2 Q Do you remember the day that  
3 some attorneys from our office came to Holman  
4 to meet with all of our clients in a large  
5 group?

6 A (No response.)

7 Q It would have been the end of  
8 June 2018.

9 A Yes, I do remember that.

10 Q So you were working that day?

11 A Yes, ma'am. And I actually  
12 think, if you're the same law firm, y'all had  
13 a list of about 80 that wanted to come talk  
14 to y'all, but it ended up being, like, only  
15 25 or 30 showed up.

16 Q And so we provided you with a  
17 list of who we wanted to meet with?

18 A Yes, if I recall correctly, yes.

19 Q And do you know what happened to  
20 that list?

21 A I have no earthly idea.

22 Q And I believe that was on June  
23 26th, is my recollection. Did you --

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1 A I don't recall.

2 Q I know, I don't expect you to.  
3 That's a long time ago. But do you remember  
4 if you worked the days after that?

5 A I did. I think that was  
6 actually on a Wednesday. Wednesday or a  
7 Thursday, if I remember correctly.

8 Q Yeah, I'd have to look it up  
9 myself. I think it was a Wednesday, Tuesday  
10 or Wednesday I think. And so what were your  
11 normal work hours?

12 A I worked from 7:00 to 4:00.

13 Q 7:00 a.m. to 4:00 p.m.?

14 A Yes, ma'am.

15 Q And did you work Monday to  
16 Friday?

17 A Monday through Friday.

18 Q And you didn't -- did you ever  
19 work on the weekends?

20 A Very rarely.

21 Q And can you tell me what you  
22 remember about that meeting, how that came  
23 about?

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1           A     I just remember that I was -- I  
2     can't remember -- I don't remember how it  
3     came about. I just remember being told that  
4     an attorney group was coming to speak to the  
5     inmates about the new policy, or new law  
6     change on the form that we had given out or  
7     whatever. And that there was some inmates  
8     that they wanted to talk to.

9           Q     And were you involved in their,  
10    I guess, transport may be the word, but from  
11    their cells to the visitation room?

12          A     Yes, ma'am.

13          Q     And were they moved one by one?

14          A     I think they were -- we brought  
15    them down as a group.

16          Q     And so you had a list and you --  
17    Did you all ask people, hey, do you want to  
18    come down, meet with your lawyer, and they  
19    could say --

20          A     Yes or no. I mean, actually, I  
21    think -- I'm trying to think. Was that  
22    Southern Poverty?

23          Q     No, it's the Federal Defenders.

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1           A     Yes, we went down there and  
2     said, hey, listen, your -- you know, these  
3     folks are here to talk to y'all. Do you want  
4     to go talk to them? And they either said yes  
5     or no or I got my own attorney or whatever.  
6     So, I mean, we gave them the choice. We  
7     can't make them go. So they were given the  
8     opportunity to go. If they wanted to go,  
9     they went; if they didn't, then we just said  
10    that one didn't want to come.

11           Q     And did you all have a list of  
12    people that didn't want to come, or did maybe  
13    it was checked off?

14           A     Yeah. I mean, the ones that  
15    went were either highlighted or checked off,  
16    but I couldn't tell what happened to that  
17    list. I mean --

18           Q     So at some point the Warden gave  
19    you a copy of a form, an election form. Do  
20    you remember that?

21           A     Well, actually, what I think it  
22    was was it in a box, they were in a box. And  
23    there was a whole bunch of them forms and a

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1 whole bunch of them envelopes that I was, you  
2 know, and that's how I got it.

3 Q Where were those?

4 A Where did I pick them up at?

5 Q (Nods, indicating yes.)

6 A In the conference room at  
7 Holman.

8 Q So how did you know to come and  
9 get them? Did someone call you?

10 A Warden called me on the phone  
11 and said come to my office, I need to talk to  
12 you.

13 Q And did you go to her office and  
14 speak with her?

15 A I did.

16 Q And what was that conversation?  
17 What was said?

18 A I walked in and she, you know,  
19 normal greeting, how is your day, how's  
20 things going? Good. Is death row quiet?  
21 Yes, ma'am. She goes, "Well, you know, the  
22 law changed." And I said, "Yeah, I heard  
23 something about that on the news." And she

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1 went through a little bit about how it had  
2 changed and stuff, and she said, "Now we have  
3 a task."

4 And I said, "What's that?" She  
5 said, "There's a box in there in the  
6 conference room that's got these election  
7 forms on it and an envelope." She said, "I  
8 need you to take and deliver them one form  
9 and one envelope to each inmate. Then they  
10 need to fill the form out and put it in an  
11 envelope and seal it."

12 And I said, "Okay." I said,  
13 "Do they need to write their name on it?"

14 "No, nothing. We don't want to  
15 know anything about how they elected. It's  
16 all private. Don't document it, don't write  
17 nobody's name down, who took it, who didn't  
18 take it. It's all private. This is  
19 something, you know, completely private."  
20 She said they can fill the form out, make  
21 their election, put it in the envelope, seal  
22 it, and then turn it back in, drop it back  
23 in the box." And I said okay. That's what I

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1 did.

2 Q Do you know how many copies  
3 there were?

4 A I do not know.

5 Q But by the time you got them,  
6 they were already copied and in a box and  
7 ready to go?

8 A Yes.

9 Q So what did you do after that?

10 A I carried the box to death row  
11 and I went, you know, tier to tier, giving  
12 them the same spiel I was just given. You  
13 know, hey, the law changed. You now have a  
14 choice. This is an election form. Here's an  
15 envelope. Don't write nothing on the  
16 envelope. Fill out the form, put it in the  
17 envelope, and seal it and I'll be back this  
18 afternoon to get it. And I went through tier  
19 to tier, made my rounds passing them forms  
20 out. Then when I was done, I went back to my  
21 office.

22 Q And so did you -- you gave that  
23 to every person as you went to the tier?

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1           A     Well, I mean, I probably didn't  
2     give it to every person because the cells are  
3     so close together. I mean, I probably done  
4     it to three or four at the time.

5           Q     Oh, see, because they have the  
6     bars. So you could speak --

7           A     Yeah, they don't have a steel  
8     door. They have bars, so they can hear  
9     everything going on.

10          Q     Right. I see. And so you  
11     personally handed those, a form and an  
12     envelope, to each person?

13          A     Yes, ma'am.

14          Q     And was that regardless of  
15     whether they were our client or not? You  
16     just gave them to everybody?

17          A     Yes, ma'am. It did not matter.  
18     And a lot of them said that. A lot of them  
19     said, hey, they're not -- I'm not talking to  
20     them. I don't have nothing to say to them.  
21     I got my own attorney. I'll send this to my  
22     attorney. I don't want to talk to anybody  
23     but my attorney.

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1                   And a lot of inmates refused to  
2                   turn them back in because of that same thing.  
3                   You go back by and -- I think I went back by  
4                   that afternoon right before I went home and I  
5                   said, "Hey, I'm collecting up them forms."

6                   "Well, I got to send it to my  
7                   attorney. I ain't signing nothing until my  
8                   attorney sees it."

9                   Okay. I mean, I didn't count  
10                  how many I got back. I didn't count, you  
11                  know, anything like that. They were  
12                  developed in the box. If they didn't turn  
13                  one in, they just didn't turn one in.

14                 Q     And after you collected the  
15                 forms, what did you do with them?

16                 A     I carried them back to the  
17                 conference room, put the box back on the  
18                 table, and told Ms. Steward that I was done.

19                 Q     And so in your instructions did  
20                 you advise people that if they weren't -- if  
21                 they didn't want to elect nitrogen, they  
22                 didn't need to do anything, or were they  
23                 supposed to sign the form and say I don't

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1 want it?

2 A I think if I remember -- and I  
3 haven't seen that form in several years. So  
4 I think it was either there was one -- an  
5 election or refusal. I can't remember  
6 exactly how the form was formatted. So they  
7 were supposed to, I think, print their name  
8 at the top, name and AIS number, make an  
9 election whether they wanted it or didn't  
10 want it, and then sign it at the bottom, or  
11 however they wrote their name.

12 Q And were these forms ever given  
13 to the tier runners to distribute?

14 A No.

15 Q And what if someone was asleep?

16 A I just set it -- I would set the  
17 envelope and the form in their bar, in the  
18 bars in their cell. I would knock on the  
19 cell, hey, there is a form here I need you to  
20 fill out. You need to get up and get it.  
21 And I would just sit in the bars for them to  
22 see.

23 Q And do you remember, like, what

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1 time of day this was? A morning, afternoon?

2 A This was probably mid morning.  
3 Probably nine, ten o'clock in the morning.

4 Q And then you left for the day,  
5 you said, around 4:00 usually.

6 A Um-hum. Then I probably -- I  
7 went to lunch. I think I came back after  
8 lunch and picked them up.

9 Q And then after that did you have  
10 anymore conversations about those forms?

11 A Not that I recall.

12 Q So did anyone ask you any  
13 questions about the form?

14 A No. I mean, not really. I  
15 mean, I think the biggest question -- or not  
16 necessarily question, a comment was, you  
17 know, how does the State plan on doing this?  
18 Well, I had no clue. I mean, the law had  
19 just changed. I mean, I don't even know how  
20 they are going to do what the procedures are  
21 for doing it. I said I just know what we,  
22 what I was told to do was pass out them  
23 election forms. I said, other than that I

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1 have no knowledge, no information to give  
2 you.

3 Q And so when you left for the  
4 day, you told the Warden, look, you know,  
5 here's what I got so far, that's it, and then  
6 you left?

7 A Yes, ma'am.

8 Q You did not get any additional  
9 signed forms after that?

10 A No, not that I recall. I don't  
11 even recall exactly what our time frame was  
12 on that. If we only had the day or if we  
13 had, like, several days. I don't recall  
14 getting anything after I turned the box in  
15 that day.

16 Q And so you -- at the time you  
17 handed out the form, you didn't know whether  
18 there was a due date for when they had to  
19 sign it?

20 A I mean, there was, but I can't  
21 remember what it was. I mean, everything we  
22 do has pretty much got a deadline.

23 Q Did you, when you were talking

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1 with the guys, did you tell them, hey, you  
2 have to do this today or next week?

3 A Yeah, I'd need it by, if it was  
4 that day or if it was, hey, I need this by  
5 the end of day before I leave or, hey, I need  
6 this first thing in the morning, it's got to  
7 be turned in by lunch tomorrow. There was  
8 some sort of time frame put on them to have  
9 it turned in.

10 Q And do you remember what that  
11 was?

12 A I do not.

13 Q But to your knowledge you didn't  
14 receive any additional forms after that day?

15 A Not that I recall. I mean, I  
16 don't remember exactly what the time frame  
17 was on that. But, I mean, depending on when  
18 the time frame was, I mean, I may not have  
19 even turned the box in that evening. But  
20 from what I recall, it was only that day we  
21 had.

22 Q And did you notify the  
23 lieutenant and the sergeants that that's what

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1 was going on?

2 A No. No.

3 Q And did the Warden draft a memo  
4 to let --

5 A Do what?

6 Q Did the Warden put out a memo to  
7 the staff to let them know that these forms  
8 were handed out?

9 A No.

10 Q Do you have any other  
11 recollections of that day?

12 A No, not really. I mean, they  
13 were all, you know -- that was probably their  
14 first interaction with the law change. And,  
15 I mean, everybody was kind of on pins and  
16 needles after that date, you know, just  
17 trying to figure out, you know, how policy  
18 was going to change, how procedure was going  
19 to change, what was going to happen, how was  
20 -- you know, just inmates and staff just  
21 throwing around, you know, ideas of, you  
22 know, "Okay. I get this. We do a lethal  
23 injection now. Do you realize what it -- I

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1 mean, how are they going to convert the death  
2 chamber into something to do -- to be gas  
3 related?" I mean, it was just conversations,  
4 you know, of how it was going to happen, what  
5 was going to happen, you know, stuff like  
6 that.

7 Q And do you remember if this  
8 occurred the day after our office came and  
9 met with our clients, or couple of days  
10 later, or do you --

11 A I think from the time I passed  
12 out that form, for at least about a month,  
13 that was the topic of conversation.

14 Q And when you passed out the  
15 form, that was after we came and met with  
16 those 30-odd people?

17 A I don't remember the time frame  
18 of when that -- it was sometime in June.

19 Q And did the Warden advise you on  
20 where that form came from, or did she create  
21 the form?

22 A No, she didn't create it. It  
23 come from somewhere in Montgomery.

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1           Q     And then there came a time in  
2     January of 2019 that you were asked to sign  
3     an affidavit. Do you remember that?

4           A     Yes, ma'am. Yes, ma'am.

5           Q     How did that come about?

6           A     I mean, I really don't remember  
7     the ins and outs of how. I just remember  
8     being -- I can't remember if it was if I was  
9     told or -- I don't remember getting it. I  
10    tried to search. I didn't get no E-mail on  
11    it. But it was just that, hey, listen, we  
12    need you to write an affidavit on when you  
13    passed them forms out for the election. And  
14    I wrote an affidavit the best of my  
15    knowledge.

16          Q     So the affidavit, you wrote it  
17    yourself?

18          A     Yes, ma'am.

19          Q     And was it reviewed?

20          A     Reviewed by?

21          Q     Well, before you signed it do  
22    you know if anyone reviewed it?

23          A     I know my secretary reviewed,

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1 looked at it to make sure that it looked, you  
2 know, presentable. And then I signed it and  
3 I think I actually sent it to the DOC  
4 attorney. I can't remember what her name  
5 was.

6 Q And what was your secretary's  
7 name?

8 A Well, Jennifer -- Dadgum, I  
9 can't even think of her last name now. I'd  
10 have to look it up to get her full name. She  
11 was actually the Warden's secretary.

12 Q And could that be Jennifer  
13 Parker?

14 A That's it. Thank you, ma'am.

15 Q You're welcome. So you -- Did  
16 you type the affidavit yourself?

17 A I did.

18 Q So you typed the affidavit and  
19 then you asked Jennifer Parker just to, you  
20 know, make sure it looked okay?

21 A Yes, just look over this,  
22 because she deals with that kind of stuff day  
23 in and day out, so I just kind of look over

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1 this make sure -- I pretty much had a format  
2 from previous legal stuff. And I was, "Just  
3 look at that and make sure I'm right and I've  
4 not got it all jacked up."

5 Q And was Jennifer Parker the only  
6 person that you showed it to before you sent  
7 it to the legal department?

8 A Yes, ma'am.

9 Q So the Warden didn't review  
10 it?

11 A No, ma'am. No. I gave it to  
12 Ms. Parker to send downtown. And I can't say  
13 that the Warden didn't walk in there and look  
14 at it, but I didn't give it to her. I just  
15 told her, hey, I got that affidavit done,  
16 Ms. Parker is sending it for me.

17 Q Did the Warden, not someone from  
18 the legal department, but did the Warden talk  
19 to you about why they needed this affidavit?

20 A Not that I recall.

21 Q Did she or did anyone maybe  
22 suggest what kind of language or what it  
23 should say, or these are all your own words?

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1 A These are all my own words.

2 Q I notice in the affidavit you  
3 used the terminology asphyxiation -- Say that  
4 20 times.

5 A Yeah.

6 Q Asphyxiation as opposed to  
7 hypoxia.

8 A Um-hum.

9 Q Do you remember why that was?

10 A I do not.

11 Q What's your understanding of  
12 what, how nitrogen asphyxiation operates?

13 A I really actually have no  
14 knowledge. I have no clue.

15 Q How about nitrogen hypoxia? Do  
16 you know how that works?

17 A Not really. I mean, I've  
18 YouTube'd it a couple of times, but not  
19 really.

20 Q And do you believe asphyxiation  
21 and hypoxia to be the same thing or different  
22 things?

23 A It's probably different. I

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1 mean, I'm not real sure. And that was  
2 probably just a -- one of them Microsoft Word  
3 autocorrect-type things right there, and I  
4 just didn't catch it.

5 Q Have you ever testified  
6 regarding this affidavit?

7 A No, ma'am.

8 Q Have you ever given a deposition  
9 about this affidavit?

10 A No, ma'am.

11 Q If you were estimating -- I'm  
12 not asking for an exact number, but if you  
13 were estimating, how long do you think it  
14 took to hand out all those 160 forms?

15 A I think it was about an hour  
16 and-a-half.

17 Q Hour and-a-half. Do you  
18 remember which tier you started on?

19 A Oh, I started on F tier.

20 Q And was the envelope just blank  
21 or did it have the Warden's name on it?

22 A I think it was just blank.

23 Q So they wouldn't -- Absent your

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1 instruction, there would be no indication on  
2 the envelope that it needed to go back to the  
3 Warden?

4 A No. It was just a legal-size  
5 white blank envelope.

6 Q But you told them it has to go  
7 back to the Warden?

8 A No, I never told -- I just told  
9 them I needed it back by the end of the day.

10 Q I see. Okay. So you needed it  
11 back, but they didn't necessarily know that  
12 it was going to be to the Warden?

13 A They did not.

14 Q Have you ever read the nitrogen  
15 hypoxia statute?

16 A I have not.

17 MS. DU LAC: Lauren, if it's  
18 okay with you, why don't we take maybe five  
19 minutes, and then I think we'll be able to  
20 wrap this up.

21 MS. SIMPSON: Okay. Sure.

22 MS. DU LAC: Okay.

23 THE VIDEOGRAPHER: We are going

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1 off the record at 12:12.

2 (Break in proceedings.)

3 THE VIDEOGRAPHER: We are going  
4 back on the record at 12:21.

5 Q Captain Emberton, just a few  
6 more questions. I wanted to talk a little  
7 bit about the -- how the phone system works  
8 on the tiers.

9 A Um-hum.

10 Q So I believe they are cordless  
11 phones; is that correct?

12 A Yes, ma'am.

13 Q And where are those phones  
14 physically located on the tier?

15 A At the entrance of each tier,  
16 the bottom tier and the top tier, right there  
17 as you come up the stairs to the tier, or as  
18 the front gate of the tier.

19 Q And that would be, like, the  
20 docking station or charging station or  
21 whatever?

22 A Yes, ma'am.

23 Q And walk me through the process

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1 of how to use the phone. Like, if I'm in my  
2 cell and I would like to use the phone, how  
3 does that happen?

4 A The inmate would just, you know,  
5 you'd have your tier runner, that's one of  
6 their responsibilities. You would just say,  
7 "Hey, I need to make a phone call." And the  
8 inmate tier runner would say, "Hey, well,  
9 inmate so and so is on it right now. As soon  
10 as he's off of it, I'll bring it to you."  
11 When that inmate got off, he'd bring him the  
12 phone. Say, "Here's the phone," and they  
13 made their phone call.

14 Q And how does the -- I know how  
15 my clients call me, but if they were calling  
16 their mom, let's say, do they -- that gets  
17 charged to their account or is it a collect  
18 call, or how does that work?

19 A It can -- Either one. I mean,  
20 actually it gets charged to their phone  
21 account. They put money on their phone  
22 account however often they get money.

23 Q I see. And so if it is -- if

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1 they want to make a call to their attorney,  
2 then how does that work? There is a code or  
3 -- help me there.

4 A Yeah, I think they -- At the  
5 beginning of the phone prompt, it asks them  
6 are you trying to attempt to contact your  
7 attorney, press nine, or pound or something  
8 like that, and they hit that. And it  
9 automatically switched them to a secure non-  
10 recorded line.

11 Q And does the system verify that  
12 you're calling an attorney?

13 A Yes. I'm not sure how all that  
14 in and out works on that end.

15 Q But presumably there is -- Is  
16 there a first list or a form in which a  
17 person would put their attorney's information  
18 so that the Department would know that they  
19 are calling their attorney?

20 A I'm not aware of one. Probably,  
21 if I had to speculate, which is not real good  
22 to do, it was probably based on a way when  
23 they answered the phone, if it didn't say,

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1       hey, my name is Jennifer and I'm at -- you  
2       know, this is Clark and Clark law firm, I  
3       mean, it would automatically cut it off if it  
4       didn't hear the acknowledgement.

5                       I mean, I'm not sure. That's  
6       just the way that I would, you know, think it  
7       would work because when the phone system, if  
8       an inmate calls you and you're on the other  
9       phone talking to somebody else, the system  
10      can sense that three-way communication and  
11      will automatically flag the phone call.

12                    Q     And so how many people are on--

13                    A     Ma'am.

14                    Q     How many cells are on a tier?

15                    A     14.

16                    Q     So there is 14 people sharing  
17      one phone?

18                    A     Yes.

19                    Q     And is that also, the phone use,  
20      is that also kind of self-regulated, if you  
21      will? Meaning, could I hog the phone if I  
22      wanted to, or do I have to share?

23                    A     I mean, if you wanted to. But a

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1 lot of these guys on death row have been  
2 doing time for years together. So, I mean,  
3 they're really pretty much, you know, pretty  
4 considerate of one another. I mean, you  
5 have, you know, certain times you get one guy  
6 trying to hog it and, you know, lieutenant or  
7 officers goes down there and say, "Hey, are  
8 you talking to your mom? Dude down here  
9 needs to call his attorney. Can he get five  
10 minutes?" You know, sometimes we have  
11 intervene, but very rarely do we have to  
12 intervene on something like that.

13 Q And is there a time where they  
14 can't use the phone?

15 A There is -- The phones turn off  
16 at 10:00. They come on at 9:00 and they cut  
17 off at 10:00 at night.

18 Q Do you know Willie Smith?

19 A I don't know. I mean, I didn't  
20 really know who he was until I seen a picture  
21 of him. He didn't -- I mean, the name didn't  
22 ring a bell until I seen a picture of him.

23 Q And when did you see a picture

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1 of him?

2 A Last week.

3 Q Last week. Okay. So you don't  
4 remember having had any conversations with  
5 him?

6 A No, ma'am. I mean, I probably  
7 did, but nothing that stands out as, you  
8 know, something would imprint on my mind.

9 Q And at one point he was a tier  
10 runner; is that right?

11 A Yes, ma'am.

12 Q Okay. But you would not have  
13 had a lot of interaction with him as a tier  
14 runner. You were saying that primarily you  
15 dealt more with hall runners?

16 A Yes. I mean, it just depends.  
17 I mean, I don't have a whole lot of  
18 interaction with him, but him being a tier  
19 runner, you know, I might say, hey, Willie,  
20 go get me so and so. But as far as day in,  
21 day out, all day long, no, huh-uh.

22 Q So you wouldn't have -- You  
23 don't remember having had any kind of

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1 extended conversation with him?

2 A No, ma'am.

3 Q And you didn't remember what he  
4 looked like?

5 A Huh-uh.

6 Q Until last week?

7 A Yeah.

8 Q Okay. Have you ever been  
9 subject to a disciplinary action by the  
10 Department?

11 A Yes.

12 Q When was that?

13 A Last year.

14 Q And what was the cause of that?  
15 What happened?

16 A We had a -- an inmate that was  
17 unaccounted for. We went in to a bed roster  
18 and actually identified the inmate that was  
19 unaccounted for. I was actually covering the  
20 2:00 to 10:00 shift for another -- for the  
21 captain that's assigned to that shift. He  
22 was out sick with COVID, so I was covering  
23 his shift for him. And the Warden at the

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1 time thought that the time frame that we used  
2 -- that we took in discovering that was too  
3 long.

4 Q And so that was not at Holman?

5 A No, that was at Ventress.

6 Q Okay. And what was the form of  
7 discipline? A reprimand or --

8 A Yeah, I had a written reprimand  
9 out of that.

10 Q And is that the only time, or  
11 has there been other times?

12 A Yeah, I think I got wrote up two  
13 or three times at Holman.

14 Q And what were those for?

15 A Well, one was -- one was failure  
16 to follow supervisor's instructions. I was  
17 advised to do a evaluation on a sergeant, and  
18 I was actually fixing to go on vacation and  
19 the sergeant was off. So I gave the  
20 evaluation to a lieutenant to fill out, and  
21 he didn't fill it out. So I got wrote up  
22 because it wasn't done.

23 Q And was that -- Did you also get

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1 a written reprimand?

2 A No, I think I got a counseling  
3 session on that.

4 Q Then how about the other two,  
5 one or two?

6 A Oh, it's been so long, ma'am, I  
7 couldn't even -- without looking at them, I  
8 couldn't tell you what those were. Those  
9 were way before them other ones.

10 Q And how about before your tenure  
11 at Holman?

12 A No, ma'am.

13 Q No? So Holman was where you got  
14 your first disciplinary?

15 A Yes, ma'am.

16 MS. DU LAC: Well, Captain  
17 Emberton, I want to thank you for your time  
18 today. That's all the questions I have for  
19 right now. Lauren, I probably -- I would  
20 leave his deposition open only because we  
21 have some outstanding document requests.  
22 But--

23 MS. SIMPSON: Sure.

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1 MS. DU LAC: But I thank you for  
2 your time, Captain. I appreciate it.

3 THE WITNESS: You're welcome.  
4 Thank you.

5 MS. SIMPSON: And we'll try to  
6 keep the cross brief here.

7  
8 EXAMINATION BY MS. SIMPSON:

9 Q Captain Emberton, earlier on you  
10 were asked about your career prior to coming  
11 to the Department of Corrections, correct?

12 A Yes, ma'am.

13 Q Do you have any military  
14 service?

15 A I do.

16 Q Can you tell us about that?

17 A I served in the military from  
18 1992 to 1997.

19 Q So what did you do between the  
20 military and coming to the DOC?

21 A I worked in General Electric  
22 building refrigerators. My stepdad owns a  
23 construction company; I worked for him for a

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1 little bit off and on. And that -- I left in  
2 '97, and I started the process of getting  
3 hired with the Department in '99.

4 Q I think we may have covered this  
5 earlier. But just to be clear, though, while  
6 you were at Holman did you have any  
7 relationship with Willie Smith?

8 A No.

9 Q You were asked earlier on a bad  
10 day how many incident reports there might be.  
11 Can we flip that around? On a good day how  
12 many incident reports might you have?

13 A Three or four.

14 Q You gave us some speculation  
15 earlier about how the phone system works. Do  
16 you remember that?

17 A Yes, ma'am.

18 Q Do you actually know for a fact  
19 how the phone system flags attorney calls?

20 A No, ma'am.

21 Q Okay. Let's talk about hypoxia  
22 for a bit. Did you have any involvement in  
23 the process by which nitrogen hypoxia was

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1 added to our State methods of execution?

2 A No, ma'am.

3 Q Were you made aware of the 30-  
4 day hypoxia election period in June 2018?

5 A Yes.

6 Q When were you made aware of  
7 that?

8 A I couldn't give you an exact  
9 date.

10 Q Was it in June?

11 A It was June. Around the middle  
12 part of June.

13 Q And how were you made aware?

14 A Warden Stewart told me about the  
15 form.

16 Q So that would have been -- So  
17 your only -- I'm sorry, you were made aware,  
18 then, of the election period at the time you  
19 were told to pass out the forms?

20 A Yes, ma'am.

21 Q Before Warden Stewart directed  
22 you to pass out the forms and envelopes, were  
23 you given any instructions or orders

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1 concerning nitrogen hypoxia or the election  
2 period?

3 A No, ma'am.

4 Q Do you have any particular  
5 memory of giving a form in an envelope to  
6 Mr. Smith?

7 A No, ma'am.

8 Q Do you remember Mr. Smith asking  
9 you any questions about the form?

10 A No.

11 Q Do you recall Mr. Smith  
12 expressing that he could not read the form?

13 A No.

14 Q Changing topics a little bit  
15 here. Let's talk about the ADA for a minute.  
16 You said earlier on that if the inmate needed  
17 ADA assistance, he could request a form; is  
18 that correct?

19 A Yes, ma'am.

20 Q And that the tier runners would  
21 obtain them from cubicles or shift  
22 officers?

23 A Yes, ma'am.

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1 Q Okay. So the inmate just had to  
2 ask a tier runner for a form; is that  
3 correct?

4 A Yes.

5 Q Okay. And the tier runners  
6 would know where to get it?

7 A Yes, ma'am.

8 Q Did you ever have a situation  
9 where an inmate needed a form and the tier  
10 runner did not give it to him?

11 A No.

12 Q You also testified earlier about  
13 some inmates with obvious ADA issues like  
14 needing a walker. Do you remember that?

15 A Yes, ma'am.

16 Q Okay. Can you just  
17 automatically look at a person and  
18 automatically know that they have an ADA  
19 disability always from sight?

20 A No, ma'am.

21 Q Do you know of any inmates in  
22 your time at Holman or at Ventress who have  
23 ADA accommodations that wouldn't necessarily

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1 check him out.

2 Q Do these sick call slips go by  
3 the tier runners as well?

4 A Yes.

5 Q Do the inmates fill out sick  
6 call forms, or does someone else fill the  
7 forms out for them?

8 A They fill them out.

9 Q Do you ever know about Mr. Smith  
10 filling out a sick call form?

11 A No, ma'am.

12 Q Is there a commissary at Holman?

13 A There is.

14 Q What is a commissary?

15 A It's kind of like the inmate's  
16 store. It's where they order, you know,  
17 Cokes, chips, sandwiches. I mean, just  
18 pretty much general junk food.

19 Q All right. Is that open to all  
20 inmates: Death row inmates, general --

21 A Yes.

22 Q Okay. How does an inmate on  
23 death row go about purchasing items from the

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1 Commissary?

2 A There is a form that they have  
3 to fill out. They put their name and AIS  
4 number on it. They turn it in, they give it  
5 to the tier runner, the tier runner drops it  
6 in the snack line or the canteen box, and  
7 then the canteen manager comes and picks them  
8 up every morning.

9 Q Is that the kind of form that,  
10 again, an inmate would fill out by himself?

11 A Yes.

12 Q Are you aware of any instance in  
13 which Mr. Smith was unable to fill out the  
14 commissary form?

15 A Not to my knowledge.

16 Q Are inmates told how much money  
17 they have left available?

18 A Yes.

19 Q How does that work?

20 A Usually, like when I order  
21 something on Monday, on Tuesday -- I'm going  
22 to get a receipt and that receipt will tell  
23 you how much you spent and how much is left

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1 on your account.

2 Q We talked earlier a little bit  
3 about legal kits. How does an inmate request  
4 a legal kit?

5 A They either ask the shift  
6 lieutenant or they ask one of the law clerks.

7 Q And would that, again, be  
8 something by a tier runner?

9 A Yes.

10 Q If an inmate requests a legal  
11 kit, is it only for his use, or could he give  
12 it to another inmate?

13 A He can give it to any inmate he  
14 wanted to give it to, or he can use it.

15 Q Are inmates limited to the  
16 number of legal kits they can have?

17 A One a month.

18 Q Okay. In your experience as a  
19 correctional officer, have you ever had an  
20 inmate ask you for your help in reading or  
21 explaining a document or form to him?

22 A Maybe a couple of times, but not  
23 very often.

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1 Q Did it ever happen, to your  
2 recollection, at Holman?

3 A No, ma'am.

4 Q And I guess you wouldn't have  
5 any recollection of Mr. Smith ever making  
6 such a request?

7 A No, ma'am, not to me.

8 Q Do you have any recollection of  
9 death row inmates asking other inmates for  
10 help with reading forms?

11 A Yeah. I mean, like I said  
12 before, they help each other out. They're  
13 more comfortable with each other. They'll  
14 talk about their ailments to each other  
15 quicker than they will to us.

16 MS. SIMPSON: I think that is  
17 all that I have.

18 THE WITNESS: Okay.

19 MR. CRENSHAW: I'm not sure if  
20 you asked that.

21 MS. SIMPSON: Okay. That's all  
22 I have.

23 MS. DU LAC: I just have two

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1 follow-up, just quick follow-up questions,  
2 and then we'll let you go, I promise.

3

4 RE-EXAMINATION BY MS. DU LAC:

5 Q So you were speaking with  
6 Ms. Simpson about these ADA request forms,  
7 and if I understood what you said, if I'm in  
8 my cell and I would like to make a request  
9 for an accommodation, I would ask the tier  
10 runner; the tier runner would go to the cube  
11 and then bring those forms back. Is that  
12 correct?

13 A Yes. And it's not necessarily  
14 the actual ADA forms. It's just a request  
15 slip, inmate request that they fill out. And  
16 the only thing, the request slip has got  
17 their name, their AIS number, and what cell  
18 they are in. And then it has at the bottom  
19 it's kind of like a notebook, notebook paper  
20 that says request, and they have to write  
21 down or, you know, write the best they can of  
22 what they are actually requesting and who  
23 it's to.

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1 Q I see. But so they could make  
2 an ADA request on that form?

3 A Yes.

4 Q Or could they use that form to  
5 request a formal ADA form?

6 A Yes. They use that form to make  
7 a formal request. That's when the -- when  
8 the ADA manager gets that request form from  
9 the inmate for assistance, she'll actually  
10 meet with the inmate.

11 Q I see. And so -- but those,  
12 there are two different forms, right? There  
13 is one that's a formal ADA inmate request  
14 form, and then there is one that's kind of a  
15 more general request slip --

16 A Yes.

17 Q -- they they can also do?

18 A Yes.

19 Q And so after they fill that out,  
20 how does it get to the ADA coordinator?

21 A There is an ADA box in the  
22 hallway that says "ADA" on it, and they just  
23 drop it in that box.

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1 Q Okay. And then someone will  
2 come and pick that up?

3 A Yeah. The ADA manager comes  
4 every morning and empties that box out.

5 Q Every morning?

6 A Every morning.

7 Q And you said that, to your  
8 knowledge, Willie Smith had never asked you  
9 to help him read something?

10 A No, not to my knowledge.

11 Q But as you said, they -- the  
12 guys kind of have this informal, you know,  
13 help each other kind of thing, so you  
14 wouldn't necessarily know if someone had  
15 helped him read forms?

16 A No, ma'am. That's correct.

17 MS. DU LAC: Okay. That's all  
18 the I have.

19 MS. SIMPSON: I have just one  
20 last follow-up, if I may.

21

22 RE-EXAMINATION BY MS. SIMPSON:

23 Q Do you know of Willie Smith ever

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1        requesting and receiving -- I'm sorry.  
2        Retract that. Sorry. Already asked. Sorry.  
3        I'm done. That's it for me.

4                    THE VIDEOGRAPHER: Okay. This  
5        concludes the deposition of Captain Jeff  
6        Emberton. We are going off the record at  
7        12:49.

8                    (The deposition of Captain Jeff  
9        Emberton was concluded at 12:49 p.m. on  
10       Monday, May 24, 2021.)  
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1 STATE OF ALABAMA )  
2 )  
3 COUNTY OF MADISON)  
4  
5

6 I, the undersigned, hereby certify  
7 that the foregoing pages, numbered 1 through  
8 129, inclusive, contain a full, true, and  
9 correct transcript of the oral deposition of  
10 CAPTAIN JEFF EMBERTON, as the same was by me  
11 taken down in shorthand on the date and at  
12 the place heretofore set out and thereafter  
13 by me reduced to typewriting.

14  
15 I further certify that immediately  
16 prior to testifying CAPTAIN JEFF EMBERTON was  
17 by me duly sworn as set out above.

18  
19 I further certify that I am neither  
20 attorney or counsel for, nor related to or  
21 employed by any of the parties to the action  
22 in which this deposition is taken, and  
23 further that I am not a relative or employee

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1 of any attorney employed by the parties  
2 hereto, or financially interested in the  
3 action.

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This the 7th day of June, 2021.



Jacqueline Bufford Careathers, CCR, RPR

Certified Court Reporter #305

Expires: 9/30/21

Commissioner for the

State of Alabama at Large

My Commission expires: 1/15/24

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# **Exhibit 15**

1           IN THE UNITED STATES DISTRICT COURT  
2           FOR THE MIDDLE DISTRICT OF ALABAMA  
3                   NORTHERN DIVISION  
4           CASE NUMBER 19-cv-00927-ECM-SMD  
5                   CAPITAL CASE  
6                   NO EXECUTION DATE SET

7  
8 WILLIE B. SMITH, III,  
9           PLAINTIFF,  
10 VS.  
11 JEFFERSON DUNN, Commissioner,  
12 Alabama Department of Corrections,  
13 &  
14 TERRY RAYBON, Warden,  
15 Holman Correctional Facility,  
16           DEFENDANTS.

17  
18  
19                   \*\*\*CONFIDENTIAL\*\*\*  
20           REMOTE VIDEO TELECONFERENCE  
21           DEPOSITION OF TERRY RAYBON  
22                   MONDAY, JULY 19, 2021  
23                   JOB NUMBER 4589141

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STIPULATION

IT IS STIPULATED AND AGREED by and between the parties through their respective counsel, that the remote video teleconference deposition of TERRY RAYBON may be taken before Donna Winters, Commissioner and Notary Public, State of Alabama at Large, at Office of the Attorney General, 501 Washington Avenue, Montgomery, Alabama 36130, on the 19th day of July, 2021 commencing at 10:05 a.m.

REMOTE VIDEO TELECONFERENCE  
DEPOSITION OF TERRY RAYBON

1           IT IS FURTHER STIPULATED AND AGREED that  
2 the signature to and the reading of the  
3 deposition by the witness is waived, the  
4 deposition to have the same force and effect as  
5 if full compliance had been had with all laws and  
6 rules of Court relating to the taking of  
7 depositions.

8           IT IS FURTHER STIPULATED AND AGREED that it  
9 shall not be necessary for any objections to be  
10 made by counsel as to any questions, except as to  
11 form or leading questions, and that counsel for  
12 the parties may make objections and assign  
13 grounds at the time of the trial, or at the time  
14 said deposition is offered in evidence or prior  
15 thereto.

16           IT IS FURTHER STIPULATED AND AGREED that  
17 notice of filing of this deposition by the  
18 Commissioner is waived.

19           In accordance with Rule 5(d) of Alabama  
20 Rules of Civil Procedure, as amended, effective  
21 May 15, 1988, I, Donna Winters, am hereby  
22 delivering to Allyson R. du Lac, Esquire, the  
23 original transcript of the oral testimony taken

1 on the 19th day of July, 2021, along with  
2 exhibits.

3 Please be advised that this is the same and  
4 not retained by the Court Reporter, nor filed  
5 with the Court.

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I N D E X

EXAMINATION BY: PAGE NUMBER

Ms. du Lac	8 - 71
	83 - 86
Mr. Anderson	71 - 83
	87 - 88

A P P E A R A N C E S:

FEDERAL DEFENDERS FOR THE MIDDLE DISTRICT  
OF ALABAMA, by Ms. Allyson R. du Lac and Mr.  
Spencer J. Hahn, Assistant Federal Defenders, 817  
South Court Street, Montgomery, Alabama 36104,  
appearing for the Plaintiff.

OFFICE OF THE ATTORNEY GENERAL, by Mr.  
Richard Anderson and Ms. Lauren Simpson,  
Assistant Attorney Generals, 501 Washington  
Avenue, Montgomery, Alabama 36130, appearing for  
the Defendants.

ALSO PRESENT: Karen Kelley, Videographer.

1 I, Donna Winters, a Court Reporter of  
2 Birmingham, Alabama, acting as Commissioner, and  
3 a Notary Public for the State of Alabama at  
4 Large, certify that on this date, as provided by  
5 Rule 30 of the Alabama Rules of Civil Procedure,  
6 and the foregoing stipulation of counsel, there  
7 came before me, TERRY RAYBON, witness in the  
8 above cause, for oral examination, whereupon the  
9 following proceedings were had:

10

11 VIDEOGRAPHER: Good morning. We're going  
12 on the record at 10:05 a.m. on July 19, 2021.  
13 This is media unit one in the video-recorded  
14 deposition of Terry Raybon in the matter of  
15 Willie B. Smith, III versus Jefferson Dunn,  
16 Commissioner, Alabama Department of Corrections,  
17 and Terry Raybon, Warden, Holman Correctional  
18 Facility, filed in the United States District  
19 Court for the Middle District of Alabama,  
20 Northern Division, case number 19-cv-00927-ECM  
21 SMD. This deposition is being held via Zoom. My  
22 name is Karen Kelley, I'm the videographer. The  
23 court reporter is Donna Winters, both with

1 Veritext. If counsel and all present could  
2 please introduce yourself, after which the court  
3 reporter will swear in the witness.

4 MS. du LAC: Good morning, Allyson du Lac  
5 on behalf of the Plaintiff, Willie Smith. Sorry,  
6 I should also state on the record that we have  
7 interns working in our office this summer, and  
8 they are here watching the deposition.

9 MR. HAHN: Spencer Hahn, Assistant  
10 Federal Defender for Willie B. Smith.

11 MR. ANDERSON: This is Richard Anderson,  
12 Assistant Attorney General for DOC and the  
13 Respondents.

14 MS. SIMPSON: Lauren Simpson, Office  
15 of the Attorney General, also for the Defendants.

16  
17 TERRY RAYBON,  
18 having been first duly sworn, was examined  
19 and testified as follows:

20

21 MR. ANDERSON: Before we get started, just  
22 as we've done with previous depositions, we would  
23 like to have this deposition made confidential.



1 MS. du LAC: No objection.

2

3 EXAMINATION BY MS. du LAC:

4 Q. Good morning, Warden Raybon. My name is  
5 Allyson du Lac, I'm representing Willie Smith in  
6 this matter. This is a deposition, so I'll be  
7 asking you questions which you must answer  
8 truthfully unless your attorney advises you not  
9 to answer. If you don't understand --

10 MR. ANDERSON: Counsel, can I interrupt  
11 just a second? I'm sorry, we didn't settle  
12 whether we were going to agree to the usual  
13 stipulations on this deposition. I know we have  
14 previously. Is that a problem for y'all?

15 MS. du LAC: No, that's fine.

16 Q. Warden, if you don't understand any of my  
17 questions, I want you to, you know, please say  
18 so, and I will rephrase the question, okay?

19 A. No problem. I understand.

20 Q. So can you state your full name for the  
21 record and spell it, please?

22 A. Terry Lewis Raybon, R-A-Y-B-O-N.

23 Q. And what is your current address?

1 A. 866 Ross Road, Atmore, Alabama 36502.

2 Q. And what is your age?

3 A. I'm 58.

4 Q. And what is your education?

5 A. I have two master's degrees in criminal  
6 justice and public administration.

7 Q. And what is your current occupation?

8 A. I'm a correctional officer -- correction,  
9 Correctional Warden III for the Department of  
10 Corrections.

11 Q. And have you ever been deposed before?

12 A. Yes.

13 Q. When?

14 A. In the last couple years and several years  
15 ago.

16 Q. And what matters were you deposed in?

17 A. I can't remember exactly which they were.

18 Q. So there was one, you said, in the last few  
19 years, and then there was one prior?

20 A. It was dealing with an inmate, but I can't  
21 tell you which one it was without going back and  
22 look.

23 Q. You say you've been deposed twice?

1 A. Several years ago, yes, with a different  
2 agency. Correct.

3 Q. Have you ever been charged with a crime?

4 A. No.

5 Q. Have you ever been a party to a lawsuit,  
6 aside from I understand as the warden at Holman,  
7 you obviously are going to be the defendant in  
8 several different capacities; but besides that,  
9 have you ever been a party to a lawsuit?

10 A. Civil lawsuit, yes, but I can't remember  
11 exactly which one.

12 Q. And what type of lawsuit was that?

13 A. It was a civil case.

14 Q. And what was your role in that case?

15 A. I believe I was the defendant. It was a  
16 civil car accident.

17 Q. Any other matters where you've been a party  
18 to a lawsuit?

19 A. Not that I can recall. There could have  
20 been, but nothing sticks out in my mind right  
21 now.

22 Q. In preparation for this deposition, did you  
23 review any documents?

1 A. Not particularly, no.

2 Q. In preparation for the deposition, did you  
3 meet with anyone?

4 A. Yes, I did.

5 Q. Who was that?

6 A. I met via phone with Mr. Anderson, as well  
7 as Ms. Simpson.

8 Q. And when was that?

9 A. Last Monday.

10 Q. We were provided with a copy of your most  
11 recent resume. Did you provide that to, I guess,  
12 Ms. Simpson?

13 A. Yes, I did.

14 Q. So the copy we have is the most recent  
15 copy?

16 A. Yes, I assume. I know what I gave her,  
17 what I e-mailed, what I e-mailed them. I don't  
18 know what you have in your hand.

19 Q. Well, I'm going to assume that she  
20 forwarded to me whatever you had sent her. Let's  
21 walk through your resume for a minute. I noticed  
22 that you had some military service?

23 A. Yes.

1 Q. When was that?

2 A. I started out in 1981 through 2006.

3 Q. That's certainly a long period of time, but  
4 could you tell us what some of your duties were?

5 A. Wow. I was commissioned -- in 1981, I  
6 joined the National Guard in Tennessee. Because  
7 I had high school ROTC, I came in as a sergeant  
8 for pay purposes, but I was still an ROTC cadet  
9 at Vanderbilt University ROTC program. And I was  
10 commissioned in 1982 as a 2nd Lieutenant  
11 Ordinance, and I served there in the Tennessee  
12 National Guard until I came out of college in  
13 1985, and then I joined the Alabama National  
14 Guard 1343rd Engineer Battalion in Athens,  
15 Alabama. And then I went from there to -- I was  
16 promoted to Captain, I served as a Company  
17 Commander of the 168th Engineer Company, and I  
18 stayed there until I was promoted to Major. Then  
19 I went to the 167th COSCOM unit in Birmingham;  
20 and during that time, I was activated and served  
21 on the G357 staff at Fort McPherson Forces  
22 Command. Then I came back from there, and I  
23 served as the Safety Officer at the TSC, 167th

1 TSC, and then I retired from there in 2006.

2 Q. During your time in the National Guard, was  
3 that full-time employment or part-time  
4 employment?

5 A. That was part-time.

6 Q. And how many hours would you estimate you  
7 worked per week?

8 A. You're talking about part-time? It was  
9 once a month.

10 Q. Once a month?

11 A. It was one weekend a month and two weeks in  
12 the summer.

13 Q. And one of the duties that you listed when  
14 you were a Major, was that you served as one of  
15 the lead planners for the GTMO detainee mission  
16 in Cuba?

17 A. That's correct.

18 Q. Could you tell us what you did as far as  
19 that?

20 A. I can tell you stuff that wasn't  
21 classified. Basically, we sourced units to fill  
22 the mission down there at GTMO during that time  
23 that I was on active duty. When I say "sourced

1 units," we had a mission requirement and we  
2 sourced as far as trying to see which units were  
3 available to fill those requirements.

4 Q. And why did you leave the military?

5 A. Why did I leave active duty, or what are  
6 you referring to?

7 Q. Well, you have retired; is that correct?

8 A. Correct.

9 Q. And why did you retire?

10 A. Because I wanted to retire. It was time to  
11 go.

12 Q. And upon your departure from the military,  
13 where did you work?

14 A. Department of Corrections.

15 Q. And that was in 2000, your full-time  
16 position?

17 A. 2004.

18 Q. 2004?

19 A. Right. When I came off active duty, June  
20 2004.

21 Q. And you have worked at the Department ever  
22 since?

23 A. Yes.

1 Q. And why did you want to work at the  
2 Department of Corrections?

3 A. I felt like I could make a difference.

4 Q. In what way?

5 A. With my education and experience and doing  
6 my job.

7 Q. And besides your military service, National  
8 Guard service, and your employment with the  
9 Department of Corrections, where else have you  
10 worked?

11 A. I worked for the Department of -- Athens  
12 Police Department, Sheriff's Department, and the  
13 Department of Public Safety.

14 Q. When was that?

15 A. Which one?

16 Q. The Department of Public Safety.

17 A. From 1985 to 1999.

18 Q. And why did you leave?

19 A. Termination, violation of policy.

20 Q. So you were -- I'm sorry, termination and  
21 what else?

22 A. Because of violation of policy.

23 Q. And what policy was that?



1 A. I can't get into specifics, because I don't  
2 know what the specifics are right now, without  
3 looking back and seeing exactly what they were.

4 Q. In a more general sense, what happened?

5 A. I'm not going to answer that.

6 Q. You're not going to answer that?

7 A. No, I'm not.

8 Q. Is there a reason you're not going to  
9 answer that?

10 A. Because I don't want to answer it.

11 Q. Besides the Department of Public Safety,  
12 you also listed two other positions. Where was  
13 that?

14 A. Athens Police Department and the Huntsville  
15 County Sheriff's Department.

16 Q. What was your position at the police and  
17 sheriff's department?

18 A. A reserve sheriff's deputy and then a  
19 patrolman for the police department.

20 Q. What does a reserve sheriff's deputy do?

21 A. You ride with an active deputy and provide  
22 assistance or support to them; and during that  
23 time, I also served as a jailer part-time.

1 Q. And to go back to the Department of Public  
2 Safety, when you were there, what was your  
3 position?

4 A. State trooper.

5 Q. You were a state trooper?

6 A. Correct.

7 Q. So your career at the Department of  
8 Corrections began in 2004?

9 A. 2000.

10 Q. 2000, okay. And where was your first  
11 assignment?

12 A. Donaldson Correctional.

13 Q. And how long were you at Donaldson?

14 A. The first time, I was there until I went on  
15 active duty in 2002; then I came back in 2004,  
16 then 2005 I left and went to the training  
17 division at St. Clair Correctional, and I was  
18 there until 2009, then I came back to Donaldson  
19 and got promoted to a lieutenant. I stayed there  
20 until 2011, when I got promoted to captain and  
21 went to Fountain Correctional, and then I was  
22 promoted to Warden I at Fountain, and then to  
23 Warden II at Holman, and then I got promoted to

1 Warden III at Holman.

2 Q. So what year did you first start working at  
3 Holman?

4 A. 2014.

5 Q. So you've been there approximately seven  
6 years?

7 A. Correct, seven years in September.

8 Q. In reviewing your resume, it appeared, you  
9 know, as you've kind of made it up the ranks as  
10 far as warden status at Holman, that your duties  
11 have not changed, so I was curious as to what the  
12 difference was between Warden I and Warden II and  
13 Warden III.

14 A. Well, they've changed to some extent  
15 because there's more responsibility as far as you  
16 still have to do the same duties, but you still  
17 have more responsibility because everyone else is  
18 up under you, have to answer such things as we're  
19 talking about right now.

20 Q. And who is your direct supervisor at  
21 Holman?

22 A. She's not at Holman, she's in central  
23 office. It would be our regional director,

1 Cynthia Stewart.

2 Q. So Ms. Stewart is who you report to  
3 directly?

4 A. Correct.

5 Q. And at Holman, do you have to punch a  
6 timecard or a time clock of any kind?

7 A. Yes, I do.

8 Q. And how does that work? What system is  
9 that?

10 A. We have a telephone system. You can also  
11 punch in on the computer as well.

12 Q. And that would show what time you arrive at  
13 the facility?

14 A. It will show what time you clocked in,  
15 because once I get in my state car from the state  
16 property where I reside during the week, I'm on  
17 duty. The log would actually show the time that  
18 I reported to the facility.

19 Q. I see. So the log would be different than  
20 the time records?

21 A. Correct.

22 Q. And the difference would be the time you  
23 get in your state car --

1 A. The time to drive there, three to five  
2 minutes.

3 Q. I see. At Holman, obviously when you  
4 started, it had general population and death row?

5 A. Had general population, death row, and  
6 segregation, which has since been renamed to  
7 restrictive housing.

8 Q. And did you have different duties depending  
9 on which area you were overseeing at the time?

10 A. Yes.

11 Q. And what were the differences?

12 A. Well, the differences with the population,  
13 you have more dealing with population inmates;  
14 therefore, you're dealing with death row inmates.

15 Then, of course, restrictive housing or  
16 segregation, there were inmates that were in  
17 segregation for various reasons, either  
18 administrative segregation or disciplinary  
19 segregation, so you have different duties as far  
20 as meeting their needs or meeting things that  
21 they are entitled to, or the requests that come  
22 from those different areas.

23 Q. And when you were overseeing death row,

1 what were your duties?

2 A. There was various duties as far as the  
3 cleanliness. There was a captain that was in  
4 charge of that area, so he answered to me as far  
5 as his direct supervisor, so there were things I  
6 had to monitor as far as making sure that the  
7 areas are clean and making sure that I walked the  
8 areas as far as doing my different rounds various  
9 times of the week; also addressing whatever  
10 concerns inmates had as far as via request slip  
11 or direct contact with them when I would come by  
12 their cell, and making sure those things were in  
13 place, as well as making sure that the logs were  
14 monitored and checked and making sure that the  
15 captain was doing what he was supposed to do.

16 Q. And who is currently the captain over death  
17 row?

18 A. Right now the current captain, which is  
19 over security, period, is Captain Johnny McNeal.

20 Q. In your current position as warden, how  
21 many people do you oversee?

22 A. I can't tell you exactly, but it's less  
23 than 100 but it's more than 50. I can't tell you

1 exactly, without going back and looking at the  
2 manning logs.

3 Q. Do you all have staff meetings?

4 A. Yes, we do.

5 Q. When are those; are they monthly, weekly?

6 A. They're monthly.

7 Q. And who attends those?

8 A. It's open to everyone, but it's mainly for  
9 department heads and the security supervisors.

10 Q. Would a corrections officer ever attend one  
11 of those meetings?

12 A. It's open to them. They have before, yes.

13 Q. Generally does the meeting have an agenda,  
14 or can people suggest things they would like to  
15 talk about?

16 A. It has both. It has an agenda, and then  
17 people can -- you go around the room and ask if  
18 anyone has anything to add.

19 Q. Do you run those meetings?

20 A. Yes. I do now.

21 Q. And prior, when the warden was Warden  
22 Stewart, there were also those meetings?

23 A. Yes.

1 Q. And are there minutes of those meetings?

2 A. There should be. A secretary has those,  
3 yes.

4 Q. And is that Jennifer Parker?

5 A. Yes.

6 Q. So she would take minutes during the  
7 meeting?

8 A. She would record, and then she would also  
9 take notes as well.

10 Q. Record, an audio recording?

11 A. She would have an audio recording, and she  
12 would take notes, and she would go back and take  
13 notes from the audio recording.

14 Q. And what kind of things would you discuss  
15 in those meetings?

16 A. It varied. Just different issues that were  
17 going on at the time, whether it be security  
18 issues or whether it be dealing with maintenance,  
19 kitchen, mental health, medical, whatever is  
20 going on at that time that needed to be  
21 addressed.

22 Q. Would you discuss training, for example?

23 A. You would not discuss it in an open



1 meeting. You would discuss it with the various  
2 security supervisors if there was a need for  
3 training or addressing annual training attendance  
4 or something along that line.

5 Q. Have you ever done classification intake?

6 A. No.

7 Q. Who does that at Holman?

8 A. Classification. Are you talking about the  
9 person?

10 Q. Right. Yes.

11 A. Right now, we only have two people assigned  
12 there. One of them is Patrick Odom, and the  
13 other one is Penny Emmons, but it's varied as far  
14 as who was there at the time. Sometimes --

15 Q. And those -- oh, I'm sorry. And those  
16 persons report to you?

17 A. Not directly. The classification  
18 supervisor does, which now is Mr. Odom. He just  
19 got promoted on July 1st, so he reports directly  
20 to me now.

21 Q. What forms of communication are used at  
22 Holman? Do you send out e-mails, do you post  
23 memos? How do you communicate with the staff?

1 A. All of the above. Verbal communication,  
2 e-mails, memos, whatever it calls for at the  
3 time.

4 Q. And is that true also of information you  
5 would get from Montgomery, let's say, from the  
6 main office?

7 A. Yes. Yes, that is true.

8 Q. Have you ever read the consent decree that  
9 was issued in 2016 in the Braggs v. Dunn case?

10 A. I've read through it, but as far as the  
11 specifics of it, I could not tell you. But I've  
12 read through it, yes.

13 Q. Do you remember when you would have read  
14 through that?

15 A. No, not exactly, but somewhere within the  
16 last three to four years.

17 Q. And were you provided any training on the  
18 conditions that were agreed to in the consent  
19 decree?

20 A. We were provided some training during  
21 several wardens' meetings, yes, we were.

22 Q. How often do you have warden meetings?

23 A. It varies. At least once a quarter, but it

1 varies. There may be a meeting of the facility  
2 heads, but there also will be a meeting where all  
3 wardens come in, and that's maybe twice a year;  
4 but I can't tell you, because it varies. There's  
5 no specific time.

6 Q. And what kind of things would you meet  
7 about at the wardens' meeting?

8 A. Whatever issues are going on at that time,  
9 whether it be restrictive housing, whether it be  
10 mental health, whether it be equipment,  
11 disciplinary actions, whatever the case may be.  
12 It varies.

13 Q. And how many death row inmates are there  
14 currently?

15 A. Without looking -- I've been gone for a  
16 week, and I know we had an inmate that was -- his  
17 case was overturned, and we've still got one  
18 inmate that's at St. Clair, and we also have  
19 another inmate that's out to court or he just  
20 came back from being out to court. We do have  
21 one still out to court, that went out last week.  
22 Somewhere around 162, I think, but I could not  
23 tell you exactly without looking at the manning

1 this morning. I haven't been to the facility, so  
2 I can't tell you exactly.

3 Q. When you were at Donaldson, did you ever  
4 work with death row inmates there?

5 A. Yes, I did.

6 Q. What were your duties as far as death row  
7 at Donaldson?

8 A. It was about the same thing you would do  
9 with your restrictive housing or your population  
10 inmates. You just made sure you patrolled the  
11 area and made sure that they got the things that  
12 they were entitled to, and made sure that the  
13 areas were clean and you address any concerns  
14 they had when you walked through, as far as  
15 making sure that they got the things that they  
16 were entitled to. At the time I was there, there  
17 was only 24 inmates there.

18 Q. As far as your current position at Holman,  
19 how well do you know the inmates on death row?

20 A. What do you mean, how well do I know them?

21 Q. Well, do you stop and chat with them if  
22 they're --

23 A. When I walk through and do my rounds,

1 they'll find me, okay, with different concerns  
2 they may have, or just want to talk about various  
3 things, whether it be sports or whatever the case  
4 may be. But as far as interact as far as knowing  
5 the ins and outs of every 162 inmates down there,  
6 I can't tell you specifics about them, because I  
7 make it a habit of not looking into their cases  
8 until execution time, because I do not want to  
9 have a preconceived attitude towards them because  
10 of their crime, so I do not do that. So as far  
11 as knowing some of their needs or knowing some of  
12 their behavior problems as far as some of those  
13 that do have behavior issues, I know that by  
14 being around them, and by also when I was a  
15 Warden II, having to do my rounds out there. I  
16 still do rounds now as the warden, but I don't do  
17 as many because there's other duties that I have  
18 to answer to.

19 Q. And when you say that you would walk and  
20 make your rounds, how often do you do that?

21 A. I do that at least twice a week. I walk  
22 out there at least twice a week, sometimes more,  
23 depending on what's going on at the facility and

1 depending on other things that I'm involved in.

2 Q. Was that true of when you were a Warden II,  
3 did you walk more or less?

4 A. I walked every day when I was a Warden II,  
5 unless something was going on that kept me from  
6 not doing it, but I made it a habit to try to  
7 walk every day.

8 Q. And would it be fair to say that some of  
9 the inmates on death row have mental health  
10 issues?

11 A. That's true of the whole prison system,  
12 some of them do. I can't tell you specifically  
13 which ones. I know some that do have acute  
14 problems, but as far as everybody, I can't tell  
15 you how many it is. But some of them do, yes.

16 Q. Do you know of any death row inmates that  
17 are confined to a wheelchair?

18 A. Yes.

19 Q. And how many of those are there?

20 A. I know of at least two, maybe three. You  
21 have one inmate that had a stroke, and then  
22 there's another inmate that had some other  
23 issues, but I can't tell you -- I know one

1 particularly, Mr. Slapwell, but I cannot tell you  
2 the names of the others right now. But I know  
3 there's two, maybe three.

4 Q. Do you know of any inmates on death row  
5 that have cognitive disabilities; for example,  
6 learning disabilities?

7 A. Not specifically, no.

8 Q. Do you think there probably are some?

9 A. I'm sure there's a possibility there are,  
10 yes.

11 Q. And would you agree with me that the death  
12 row population education is quite varied? You  
13 might have some that didn't finish eighth grade,  
14 and you might have some that went all the way  
15 through college?

16 A. That's true of the whole prison system, to  
17 include death row.

18 Q. During your tenure at Holman, how many  
19 executions have there been?

20 A. Oh, man. Without going back and looking at  
21 it, I cannot tell you exactly. There's been at  
22 least ten, but I cannot tell you exactly how  
23 many, without going back and looking at it. I

1 don't keep a tally.

2 Q. Have you ever witnessed an execution?

3 A. Yes.

4 Q. How many?

5 A. Like I said, I can't tell you exactly how  
6 many, but I know it's at least ten.

7 Q. So you have witnessed every execution that  
8 they had when you were working at Holman?

9 A. Since I've been there, yes.

10 Q. One of the tasks on your resume is that you  
11 develop written documents. What type of  
12 documents do you develop?

13 A. SOPs, directives, memos.

14 Q. And help me, what is an SOP?

15 A. Just a standard operation procedure.

16 Q. And you also issue directives, you said?

17 A. Correct.

18 Q. Your resume also lists that you monitor  
19 inmates so that problems are identified?

20 A. Yes.

21 Q. What type of problems do you usually  
22 identify?

23 A. Well, behavior problems. I mean, you see



1 inmates that are agitated about various things,  
2 and you address those things, whether it be  
3 someone that needs -- have a need that they've  
4 put in a request that hasn't been met. You try  
5 to address it along that line before it becomes a  
6 major problem.

7 Q. You also list that you counsel inmates.  
8 What type of counseling do you do with inmates?

9 A. Behavior issues or if somebody just wants  
10 to talk.

11 Q. So perhaps if you were walking around on  
12 your rounds and you notice something, you might  
13 stop and talk to someone?

14 A. Correct.

15 Q. It appears from some of the documents that  
16 the Department has produced to us, that there  
17 were periods of time where you were an on-call  
18 duty officer?

19 A. Correct.

20 Q. What is that?

21 A. It's after-hours. On weekends, of course,  
22 is after-hours, after 5:00 p.m. on Friday; but  
23 during the week, anytime after 5:00 p.m. is

1 after-hours. When an incident occurs, any type  
2 of Class B or Class A incident occurs, then the  
3 supervisor on duty will call the on-call and  
4 report the incident, and you can either take the  
5 information that they're providing you with  
6 as-is, or you give them some input as far as how  
7 to handle the situation, or you may have to come  
8 report to the facility, depending on what the  
9 incident is, and then you report that up the  
10 chain to my supervisor, who reports it up to her  
11 supervisor, and so on.

12 Q. And what's an example of a Class A  
13 incident?

14 A. An inmate death.

15 Q. And what's an example of a Class B  
16 incident?

17 A. If you find a cell phone, it's a Class B,  
18 or if you find a weapon, that's a Class B, or if  
19 you have a fight among two inmates, either with  
20 or without a weapon, that's a Class B incident.

21 Q. As the on-call duty officer, how often  
22 would you get a call?

23 A. It varies. You could have a weekend where

1 you wouldn't get a call, or you have a weekend  
2 where you get five or six calls in one night. It  
3 just depends on what was going on at that time.

4 Q. We're going to change topics for a moment.

5 I wanted to ask you about -- as you know, this  
6 case is about the Americans with Disabilities  
7 Act, so I wanted to ask you, what is the  
8 Americans with Disabilities Act?

9 A. It's making sure that inmates that have  
10 impairments are able to get accommodations so  
11 they can be able to interact or be able to have  
12 the same services or same -- as other inmates.

13 Q. And what type of impairments do you run  
14 across most often?

15 A. Guys that have disabilities as far as  
16 walking, as far as having assistance with a cane,  
17 or having a wheelchair disability, or hearing. I  
18 think one inmate has a problem with his eyes. So  
19 those are things you run across.

20 Q. Does the Americans with Disabilities Act  
21 apply to employees and inmates?

22 A. Yes, it does.

23 Q. So do you oversee Americans with

1 Disabilities Act requests from both inmates and  
2 employees?

3 A. I don't oversee those, per se. I mean, I  
4 have to answer different questions if they're not  
5 addressed, but we have an ADA coordinator that  
6 oversees that. He gets the requests. Actually  
7 the requests may come from Medical and then it  
8 goes to him from there, or it could come in  
9 through him and he refers it to Medical, or the  
10 case may be, depending on what the request is.

11 Q. Is it the case that Medical almost always  
12 reviews these requests?

13 A. Almost always, yes.

14 Q. Can you think of a disability where Medical  
15 wouldn't review the request?

16 A. If it's something that the inmate is  
17 requesting accommodation with, that does not have  
18 anything to do with his physical impairment,  
19 then, no, Medical wouldn't review that. You do  
20 have some cases that are not Americans with  
21 Disabilities issues or things that are addressed  
22 in the Americans with Disabilities Act that may  
23 come in, so they wouldn't review those. But

1 almost always, the ones that come in do go  
2 through Medical.

3 Q. For example, would HIV be a disability  
4 under the Americans with Disabilities Act?

5 A. I can't answer. Without looking at the  
6 Act, I can't answer that. I don't know.

7 Q. I'm sorry, you say you couldn't answer that  
8 without looking at --

9 A. Without looking at the Americans with  
10 Disabilities Act and see if it's included in  
11 there, I don't know, because I've never had an  
12 issue come up with an inmate as far as HIV. I  
13 mean, I understood that there was a decree that  
14 they had, a lawsuit that they won where they were  
15 all housed in one particular facility and now  
16 they're housed different places throughout the  
17 system.

18 Q. Tell us about your training on the  
19 Americans with Disabilities Act. Is it once a  
20 year, twice a year, never?

21 A. The officers receive training I think -- I  
22 can't tell you exactly how many times a year, how  
23 many times they receive it, once a year, every

1 two years, or something along that line; but what  
2 we do, our ADA coordinator, he provides various  
3 training during our staff meetings, as well as  
4 other times when there needs to be training, he  
5 will provide that training, and has been since  
6 the position was allocated, I think as long as  
7 maybe three years ago when the position was  
8 allocated. They've provided training at various  
9 times, and of course there's training in the  
10 curriculum at the annual training, but without  
11 talking to the training director, I cannot tell  
12 you when that training occurs.

13 Q. But you said you have an annual training?

14 A. The officers may have an annual training.  
15 I don't specifically have an annual training. We  
16 talk about it at various times during the  
17 wardens' meetings when issues come up, and  
18 we also -- like I say, the ADA coordinator, he  
19 provides training during the staff meetings, and  
20 of course I'm present during those staff meetings  
21 and listen to it. If I have an issue or a  
22 question about it, I do have the decree in my  
23 office behind my desk that I can refer back to,

1 but I also sometimes will talk to the ADA  
2 coordinator about different issues; and if he  
3 doesn't know, then I'll talk to the state  
4 coordinator.

5 Q. And who is the current ADA coordinator at  
6 Holman?

7 A. Richard Lewis.

8 Q. And who was the ADA coordinator prior to  
9 Mr. Lewis?

10 A. The acting ADA coordinator for a period of  
11 time was William DeSpain.

12 Q. Prior to Mr. DeSpain, who was the  
13 coordinator?

14 A. I cannot think of her name. It was a  
15 female. I'll have to go back and look, but I  
16 cannot think of her name. She was terminated, so  
17 I can't think of her name.

18 Q. Do you know, why was she terminated?

19 A. I don't know exactly without looking at  
20 the -- I wasn't the one that did the  
21 recommendation. At the time, Ms. Stewart, she  
22 worked directly for Ms. Stewart, so without going  
23 back and looking at the recommendation, I could

1 not tell you. I don't know.

2 Q. Were you involved in the hiring process for  
3 Mr. Lewis?

4 A. Yes, I was involved in the interview  
5 process and made the recommendation to  
6 Operations, and they approved his hiring.

7 Q. How many candidates did you interview?

8 A. Two, I think, maybe three. I know it was  
9 at least two.

10 Q. If you could please explain the process for  
11 requesting an accommodation, if you were an  
12 inmate.

13 A. There are -- in each area of the facility,  
14 you have what we call request ADA boxes that they  
15 can place a request in. They're outside the  
16 shower area and various places inside the death  
17 row area. At the time before we moved death row,  
18 there were places on the hallway there that they  
19 could also put those in. But also, during the  
20 rounds of the ADA coordinator, as well as the  
21 rounds of the officers, the supervisors, as well  
22 as myself, inmates have an opportunity to give  
23 those requests to us and we will forward those



1 requests up to ADA, same thing you would do with  
2 your sick call requests. If someone had an  
3 opportunity that they was not able to put it in  
4 the box, they could either give it to the officer  
5 as they made their rounds, give it to me as I  
6 make my rounds, the captain or the supervisor  
7 when they make their rounds, or the nurse, when  
8 they're doing pill call, they can also have an  
9 opportunity to give those requests to them.

10 Q. And is there a specific form separate from  
11 the sick call form?

12 A. Yes, there is.

13 Q. Where would you get one of those?

14 A. You can get one from the law clerk. You  
15 get one of those -- you get them out of the --  
16 like I said, when someone walks around, you can  
17 request one of those forms. Someone will bring  
18 one to you, just like a sick call form. They're  
19 readily available at various places, but if you  
20 don't have one, you can request one as people  
21 walk around, they can bring it. Or you can put a  
22 request on a request slip and someone can bring  
23 you one as well.

1 Q. And who is the current law clerk?

2 A. We don't have a specific law clerk in death  
3 row. You have an officer, Officer Phillip Brown,  
4 that handles those duties. If anyone has a  
5 request for anything that they cannot get in the  
6 law library there in death row, then Officer  
7 Brown can get that for them and get a copy of it  
8 for them.

9 Q. And has this process for making an ADA  
10 accommodation request changed over time, or has  
11 it always been this way?

12 A. I don't know, to be specific with you,  
13 because I wasn't directly involved in it until I  
14 was promoted to Warden III. I can't answer that  
15 as far as it's changed or it's been the same.  
16 I'm sure it's been maybe one or two things  
17 possibly could have changed, but the whole  
18 process basically -- has been maybe tweaked a  
19 little bit, but I can't think of anything right  
20 now that has specifically changed, but I can't  
21 say without a doubt that it hasn't.

22 Q. So you and Mr. Lewis haven't kind of sat  
23 down and talked about, you know, "These are some

1 changes we would like to make," and the process?

2 A. No. We haven't talked about no changes,  
3 no, not specific changes, no.

4 Q. Do you know at Holman if there are any  
5 persons who are considered readers?

6 A. I don't understand what you mean by  
7 "readers."

8 Q. Readers is listed as one of the aides that  
9 can be provided to folks under the Americans with  
10 Disabilities Act, so it would be someone that  
11 could read to someone who doesn't know how to  
12 read.

13 A. I don't know of anyone that's been assigned  
14 as a reader, per se. I'm sure that inmates, in  
15 their interaction with each other, they may have  
16 someone explain something to them; but as far as  
17 specifically, I don't know of a case.

18 Q. Do you know if there is someone that's  
19 designated as a tutor?

20 A. No.

21 Q. The person that you are speaking about, who  
22 would be the ADA coordinator initially, would her  
23 name have been Bonita Jackson?

1 A. Yes. That was her, yes.

2 Q. Do you know when she left?

3 A. No, I don't.

4 Q. One of the things that you listed on your  
5 resume is that you are trained in aerosol  
6 chemical weapons, or you're an instructor of  
7 aerosol chemical weapons.

8 A. I was. I'm not certified now, but when I  
9 was a -- worked in training, I was. That means  
10 pepper spray, or at the time we called -- it was  
11 Sabre Red. It went from there to -- from Freeze  
12 Plus P to Sabre Red.

13 Q. You also have an APOSTC instructor  
14 certification. What does that entail?

15 A. Let me see which one you're talking about.  
16 Say that again. Oh, that's APOSTC, Alabama Peace  
17 Officers' Standards and Training Commission  
18 instructor. I was certified as an instructor in  
19 1996.

20 Q. What was part of that instruction?

21 A. Well, you go through a week of lesson plans  
22 and giving presentations and stuff along that  
23 line. You get certified at the end of it.

1 Q. And is that required?

2 A. No, it's not required. It's required if  
3 you want to be an instructor, but it's not  
4 required for you to be a correctional officer or  
5 a police officer.

6 Q. Do you have any involvement with tier  
7 runners?

8 A. Not directly, no.

9 Q. Are you involved with the assignment  
10 process, how they're selected?

11 A. Say that again, with the what process?

12 Q. With the assignment process or the  
13 selection process.

14 A. I have oversight as far as now that I'm the  
15 Warden III, if there's someone out there that  
16 they're placing as a tier runner that I do not  
17 feel like is a good candidate, then I will say  
18 "No" as far as approve or disapprove.

19 Q. How often do they change?

20 A. It varies. You have some guys that will  
21 get disciplinary action and, of course, they'll  
22 be fired from that job, and then you hire someone  
23 else to take their place, depending on what the

1 situation is.

2 Q. Earlier you mentioned the duty logs. Do  
3 they reflect anything else besides just when you  
4 enter and exit the prison?

5 A. Everything that goes on on that shift  
6 should be in that duty log. As far as the  
7 activities that are going on, the pill calls, the  
8 counts, the people entering or exiting the  
9 facility, as far as different various classes or  
10 different various religious services, whatever  
11 the case may be, whatever goes on during that  
12 day. Depending on which area it is, is which log  
13 it will be reflected on.

14 Q. And who authors the duty logs?

15 A. What do you mean who is the author, who  
16 writes it?

17 Q. Right. Who would record the information  
18 that goes into the duty log?

19 A. Whoever is assigned as the shift clerk,  
20 whoever is assigned as the cube operator where  
21 the logs are kept, in those various areas.

22 Q. And if there is some visitation, is that  
23 reflected anywhere in the duty log?

1 A. It's reflected in the shift clerk's log, as  
2 well as in the tower log when the people are  
3 entering the facility through the front tower.  
4 It also could be what area they're coming from.  
5 If they're coming from death row, the death row  
6 rover or death row cube operator should place in  
7 the log who those individuals are that's going to  
8 visitation.

9 Q. So the tower has a separate log?

10 A. Yes.

11 Q. And that would reflect anyone that entered  
12 the facility from the main entrance?

13 A. Correct, and exit as well.

14 Q. Do you know Willie Smith?

15 A. When you say "know," what do you mean by  
16 know? Do I know who he is?

17 Q. Do you know who he is?

18 A. Yes. I know who he is, yes.

19 Q. Have you spoken to him before?

20 A. Yes, I have.

21 Q. How many times?

22 A. I can't -- I didn't keep a number. I mean,  
23 more than -- more than five, more than ten. I

1 couldn't tell you exactly how many times, no.

2 Q. Did your conversations mostly have to do  
3 with his execution that was scheduled in  
4 February?

5 A. We did have a conversation around that, but  
6 there are some other times that we talked, too,  
7 as I made my rounds on the tiers. I mean, he  
8 would joke or he would also talk about sports and  
9 stuff like that, or if he had a request, but I  
10 couldn't tell you what the specific request may  
11 have been. It may have been something as simple  
12 as getting some cleaning solution for his cell or  
13 something along that line, or making sure that he  
14 had some clean -- a change of his prison uniform,  
15 or whatever. I can't tell you the specifics of  
16 it, but the conversation with the warden would  
17 just be about the execution, though.

18 Q. And would that be the case when you were  
19 the warden of the facility or prior to that?

20 A. Both.

21 Q. Did you discuss your deposition with him?

22 A. No, I haven't talked with him about my  
23 deposition.



1 MS. du LAC: Mr. Anderson, we've been going  
2 for about an hour, so why don't we take a break.

3 MR. ANDERSON: That sounds good to me.

4 MS. du LAC: Is that good with everyone?

5 VIDEOGRAPHER: We're going off the record  
6 at 11:01.

7 (Whereupon, at this time a short break  
8 was taken.)

9 VIDEOGRAPHER: We're going back on the  
10 record at 11:20.

11 Q. Warden Raybon, I want to shift our focus  
12 for a moment and talk about documents that are  
13 kept at Holman. Do you have any documents that  
14 reference -- scratch that. Let me ask you, when  
15 you have a memo, when you draft a memo that we  
16 talked about earlier, is it sent directly to the  
17 staff, or do you run that by someone else?

18 A. You're talking about in my capacity now?

19 Q. Yes.

20 A. Or previously? No, it goes directly to the  
21 staff or directly to whoever it's addressed to,  
22 because I am the head of the facility there, so I  
23 don't run it by anyone else. I may have someone

1 to look at it as far as proofread it; other than  
2 that, no.

3 Q. Do you ever copy someone in the legal  
4 department?

5 A. Not for a memo addressing something at  
6 Holman, no.

7 Q. And who is your contact at the legal  
8 department at ADOC?

9 A. Oh, man, there's several. You've got  
10 Carrie McCullom, Jody Stewart, Bart Harmon,  
11 Carrie Shaw. It depends on what the situation is  
12 or what the case is.

13 Q. So those attorneys handle different issues,  
14 if you will, that arise at the facility?

15 A. I wouldn't say issues. All of them handle  
16 the same issues, per se, but if it's anything  
17 dealing with death row, it's going to go through  
18 one of two people. My dealings has been with --  
19 previously it was Anne Hill, but she's the chief  
20 of staff now, but prior to that, after her it was  
21 dealing with Jody Stewart and now Carrie Shaw,  
22 who is the general counsel.

23 Q. In the last six months or so, were you

1 asked to look for documents related to this case?

2 A. They were addressed to me and my secretary,  
3 as far as I could not tell you exactly which one  
4 of the documents were, but my secretary got  
5 something that came in through Legal to look for.  
6 Some stuff came from the AG's office as well.

7 Q. So did you look for documents?

8 A. I didn't look for them specifically, but I  
9 directed someone else to look for them since they  
10 were back, several years back. We've had to go  
11 to the area where we store those documents and  
12 had someone look for them.

13 Q. And would that include e-mails?

14 A. I don't know about the e-mails.

15 Q. Does your assistant have access to your  
16 e-mails?

17 A. No. Not my e-mails, no.

18 Q. So if you had an e-mail that was relevant  
19 to this case, no one has looked for it at this  
20 point; is that correct?

21 A. Not that I'm aware of. What year are you  
22 talking about, 2018, or are you talking about  
23 now?

1 Q. Whatever you were instructed by the AG or  
2 ADOC Legal, those documents. Let me put it this  
3 way. When a review of documents was conducted by  
4 your office, who checked your e-mails?

5 A. I checked my e-mails, but I can't remember  
6 what the parameters were as far as the time  
7 periods were, but I did not find anything in my  
8 e-mails, if that's what you're asking.

9 Q. So you found no relevant documents in your  
10 e-mails?

11 A. No.

12 Q. As far as the law library, when are the  
13 inmates allowed to use the law library?

14 A. At various times. It's assigned by their  
15 living area. You can't allow 162 inmates to go  
16 in there at one time because of the size of the  
17 area, so you assign them by their -- when they  
18 were over in the old death row, you assigned them  
19 by tiers, but now they're assigned by whichever  
20 tier they're on in K, L, M, which is K tier, L  
21 tier, and M tier.

22 Q. What are the hours that the library is  
23 available?

1 A. I think right now we've got them divided in  
2 morning and afternoon, 8:00 to 4:00 on some days  
3 and 12:00 to 4:00 on other days. I would have to  
4 look at the schedule, because we revised the  
5 schedule since they moved out to a different  
6 area. I would have to go back and look at that.  
7 I don't have it in front of me.

8 Q. Is there a law librarian?

9 A. No. You have an officer that's assigned to  
10 address those issues that inmates may have or  
11 requests that they may have, that goes around and  
12 does notary for them, as well as fills their  
13 request for what they call a law kit, which is  
14 paper and stuff like that.

15 Q. And that's Officer Brown currently?

16 A. Correct. Correct.

17 Q. Was it always Officer Brown?

18 A. Since I've been there, it has been.

19 Q. So Officer Brown --

20 A. It could have been someone else, but  
21 Officer Brown is the only one I remember.

22 Q. And to your knowledge, does Officer Brown  
23 have any legal training?

1 A. Not legal training, per se, no.

2 Q. How many folks at one time can go to the  
3 law library? Is there a limit?

4 A. Well, you don't want to put no more than  
5 twenty people inside that area at one time, and I  
6 think that's the most we've had in there. Most  
7 times you have far less than that, because  
8 everybody -- when they were assigned by tier in  
9 the old death row, you only had 28 cells over  
10 there, and everybody on those tiers were not  
11 allowed to go at one time because you had some of  
12 those guys that were on single walk, so they  
13 could not go with those guys that were on group  
14 walk. So you wouldn't have as many inmates over  
15 there. Even on given days, you would probably  
16 have maybe 10 to 15 inmates that actually want to  
17 go.

18 Q. So could someone who is on single walk use  
19 the law library?

20 A. He could, but he would have to be in there  
21 by himself because he's on single walk. If he  
22 requests to use it, most of the time all they  
23 want to do is when Officer Brown comes around,

1 those guys that have been on single walk and  
2 those guys that are on indefinite single walk  
3 because of enemy situations, they request stuff  
4 through Officer Brown. But if they do request to  
5 use the law library, they put in a request, and  
6 then we'll assign them a time to use it by  
7 theirself.

8 Q. There was a point in time, and maybe it's  
9 always been the case since you have been there,  
10 where the law library shifted from books to a  
11 computer system.

12 A. Yes.

13 Q. Were there books?

14 A. There were never books in death row. As  
15 far as I can -- as long as I've been there,  
16 there's been a computer there, but if they  
17 requested something out of those books that were  
18 in population, then Officer Brown could get that  
19 for them. And a lot of times the law clerks that  
20 were assigned in population could get that  
21 information for Officer Brown or Officer Brown  
22 could get it himself, get the copies for them.

23 Q. So there is a law clerk in the general

1 population?

2 A. There was. There's not one now.

3 Q. Right. And why is it that there was a law  
4 clerk in general population and there wasn't a  
5 law clerk on death row?

6 A. I don't know. I couldn't answer that for  
7 you.

8 Q. And did you develop the current SOP for the  
9 law library?

10 A. No. It was already in place. We revised  
11 it some, but it was already in place.

12 Q. Do you know when it was revised?

13 A. No, I don't.

14 Q. Would Officer Brown also be known as the  
15 law library supervisor, or is there someone  
16 different?

17 A. No, we don't have a law library supervisor.

18 Q. Did you or any of the officers, including  
19 Officer Brown, receive any training on the  
20 computer system that's in the law library?

21 A. I didn't receive any training. It's a PC,  
22 is all I know. It's a PC, and the documents are  
23 on the computer there. Officer Brown could have.



1 I don't know. I'm not aware if he did or not.

2 Q. Do you know if the inmates on death row  
3 ever received training on the computer system?

4 A. No, I don't know.

5 Q. Do you know who at the Department's  
6 information system is responsible for the library  
7 equipment, the PC --

8 A. No, I don't. I just know the information  
9 system is responsible. As far as which person, I  
10 do not know.

11 Q. How often do they come to Holman?

12 A. Probably once every couple years they may  
13 make an update, or whenever updates come  
14 available, they will bring those down and change  
15 the hard drives out.

16 Q. If someone is looking at the computer and  
17 let's say, for example, they found a statute that  
18 they would like to print to take back to their  
19 cell, how would they do that?

20 A. You can't print it from the computer. They  
21 have to request through Officer Brown that he  
22 prints that statute for them.

23 Q. And how much does it cost to print a

1 statute?

2 A. I don't know exactly. I would have to  
3 check with the business office on that.

4 Q. But there's a fee per page?

5 A. I don't -- I don't recall if there's a fee  
6 or not, because if you make it available to  
7 them -- I don't -- I can't answer that right now.  
8 I would have to look back and see. I don't know  
9 if it's required or not. It depends on if  
10 they're indigent or whatever. I can't tell you  
11 that right now.

12 Q. How is the library on death row different  
13 from the general population library?

14 A. What do you mean?

15 Q. As far as materials, what's available,  
16 sites.

17 A. They have the same hard drive. I mean, the  
18 computers are almost exactly the same; maybe a  
19 different type of PC, but it still has the same  
20 documents in there.

21 Q. Do you know what system they use?

22 A. As far as what? What do you mean, what  
23 system?

1 Q. As far as doing legal research.

2 A. I don't know the name of the system, no, I  
3 don't. You're talking about as far as the  
4 software?

5 Q. Right.

6 A. I don't know the name of it, no.

7 Q. Do you know how often the software is  
8 updated?

9 A. I think I answered that. I don't know when  
10 they do it.

11 Q. I'm sorry, could you repeat what you just  
12 said?

13 A. I said I thought I answered that. You  
14 asked me earlier how often do they come and  
15 update the system. I don't know how many times  
16 they update it; once a year, once every two  
17 years, I don't know. I just know when the  
18 updates are available, they come and change out  
19 the hard drives.

20 Q. Were you working the week of June 24, 2018?

21 A. I recall I was, yes.

22 Q. Do you remember what days?

23 A. What days I worked?

1 Q. Uh-huh.

2 A. Without going back and looking at my  
3 timecard, I can't tell you. I don't recall me  
4 being on leave or anything during that time. I'm  
5 not saying I wasn't, but I don't recall.

6 Q. Do you remember, there was a day, I believe  
7 it was June 26th, where two attorneys and two  
8 investigators from our office came and met  
9 collectively with about 40 or so death row  
10 inmates. Do you remember that?

11 A. I recall it occurring, but as far as me  
12 being there and observing it, I don't recall me  
13 observing it, but I do recall it happening, yes.

14 Q. And do you know why they were there?

15 A. Not particularly. I mean, it was something  
16 dealing with the declaration for the gas, as far  
17 as -- for execution purposes.

18 Q. Have you ever seen an election form for the  
19 opt-in and the nitrogen hypoxia?

20 A. I've seen the form, yes. I can't tell you  
21 what was on it, but I've seen it.

22 Q. Do you know where it came from?

23 A. No, I don't.

1 Q. Where have you seen it?

2 A. I saw it -- I think I was in Warden  
3 Stewart's office when I saw it.

4 Q. And was that in June of 2018?

5 A. I don't know when it was. Particularly  
6 exactly when it was, no, I can't tell you, but I  
7 remember seeing it in her office.

8 Q. You just saw it, or did she show it to you?

9 A. I saw it. I can't remember her showing it  
10 to me or not, but I remember me seeing it.

11 Q. So it was sitting on her desk or it was on  
12 a table or where?

13 A. I don't know, ma'am. I just remember me  
14 seeing it. I don't remember where exactly it  
15 was, if she put it in my hand or I looked at it  
16 on her desk or it was something that I just saw  
17 on her desk. I don't remember. I remember  
18 seeing the document, however.

19 Q. Did you ever give a copy of that form to  
20 any inmate on death row?

21 A. No, I did not.

22 Q. Do you know if someone else did?

23 A. My recollection, Captain Emerton did.

1 Q. And why did he do that?

2 A. He was instructed to pass those out through  
3 Warden Stewart, who was instructed from someone  
4 else either at central office -- it was either  
5 from our operations or from Legal, somebody from  
6 the central office directed Ms. Stewart to do it,  
7 and she directed him to do it.

8 Q. Were you involved in that process at all?

9 A. No, I wasn't. I was just recovering from  
10 knee surgery at that time. I think I was still  
11 on light-duty. I had had a knee replacement at  
12 that time.

13 Q. And did you have a conversation with Warden  
14 Stewart about that?

15 A. Vaguely, but I don't remember what the  
16 conversation was about exactly.

17 Q. Do you remember when you had a conversation  
18 with her about that?

19 A. No, I don't.

20 Q. Where were you when you had this  
21 conversation?

22 A. I think it was in her office.

23 Q. Was it before or after the form had been

1 passed out?

2 A. I don't recall, ma'am, when it was exactly,  
3 because I don't know when the forms were passed  
4 out, to be honest with you.

5 Q. Have you ever seen a form that was actually  
6 signed?

7 A. I've seen a copy of one that was signed.

8 Q. And when did you see that?

9 A. Sometime I guess after it was signed. I  
10 don't remember exactly what day it was or what  
11 month it was either, but I remember seeing a copy  
12 of one that was signed.

13 Q. And do you know what happened to the signed  
14 copies?

15 A. No, I don't.

16 Q. Do you recall if the warden issued a memo  
17 about that?

18 A. I'm pretty sure she did not issue a memo  
19 about that. I wasn't privy to a memo that she  
20 issued. I'm pretty sure she didn't. I don't  
21 recall her issuing a memo and giving it out or  
22 cc'ing us on it, no.

23 Q. Has any of the inmates on death row asked

1 you about it?

2 A. Not me, no. Not specifically, no.

3 Q. Have any of them asked you about nitrogen  
4 hypoxia?

5 A. No.

6 Q. Do you know what nitrogen hypoxia is?

7 A. Yes, I know what it is.

8 Q. What is it?

9 A. It's a gas that you inhale, and if you  
10 inhale too much of it, you become unconscious.

11 Q. And how do you inhale it?

12 A. That could be -- I don't know, ma'am. If  
13 the tank is open or if you inhale it directly,  
14 all those things could happen as far as inhaling  
15 it. It's like oxygen, you can either get it out  
16 here in the air or you can breathe it through a  
17 mask, you know.

18 Q. Are you involved in the current nitrogen  
19 hypoxia protocol development?

20 A. I'm not involved in the development --

21 MR. ANDERSON: I'm going to go ahead and  
22 object to this just on the grounds that it's not  
23 relevant to the purpose of this deposition.



1 Q. Okay, Warden, you can answer.

2 A. I think I just answered it.

3 Q. I'm sorry, I couldn't hear you.

4 Mr. Anderson was speaking at the same time.

5 A. Well, I'm not involved in direct  
6 development of it, protocol.

7 Q. Have you been consulted about it?

8 A. What do you mean by "consulted"?

9 Q. Has anyone asked you about nitrogen  
10 hypoxia?

11 A. Anyone specifically you're asking about?

12 Q. Anyone.

13 A. I mean, it's been discussed but not in  
14 detail, ma'am, because it's state law, so it's  
15 been discussed.

16 Q. And has there been a separate facility that  
17 was constructed for nitrogen hypoxia?

18 MR. ANDERSON: I'm going to direct the  
19 witness not to answer any further questions about  
20 nitrogen protocol, which is the subject of an  
21 entirely different issue than what we're here for  
22 today.

23 MS. du LAC: Mr. Anderson, what's your

1 objection for the record?

2 MR. ANDERSON: That is not relevant to this  
3 proceeding, that it is the subject of privileged  
4 materials, that this is an inappropriate inquiry  
5 that is beyond the scope of this litigation, and  
6 we just do not believe it should be inquired into  
7 in this proceeding.

8 MS. du LAC: And what is the privilege,  
9 just so we have that for the record?

10 MR. ANDERSON: I'm not a party to that  
11 litigation. I know that there is, you know,  
12 confidential documents that we can't get into  
13 without court involvement. We don't have that  
14 right now, and it's just beyond the scope of this  
15 litigation.

16 MS. du LAC: So for the record, you  
17 instructed the witness not to answer based on  
18 relevancy, some type of privilege, and that it's  
19 inappropriate. Is that correct?

20 MR. ANDERSON: That's correct.

21 Q. Did you ever see the January 2019 affidavit  
22 that Captain Emerton signed?

23 A. Are you addressing me?

1 Q. Yes, sir.

2 A. No. No, I did not.

3 Q. Do you know about it?

4 A. I vaguely remember someone asking me if he  
5 had sent an affidavit in. He's no longer  
6 assigned to Holman, so I don't have conversation  
7 with him.

8 Q. Have you ever drafted an affidavit during  
9 your employment at Holman?

10 A. Several. Several.

11 Q. For what purpose?

12 A. Different lawsuits, various lawsuits.

13 Q. What were they regarding?

14 A. Ma'am, I can't tell you specifically  
15 because I don't remember all of them, but they  
16 were various ones, whatever complaint the inmate  
17 was alleging that occurred at Holman.

18 Q. Did you ever see Captain Emerton's  
19 affidavit?

20 A. No.

21 Q. Are you familiar with the federal statutes  
22 regarding civil rights? It's generally referred  
23 to as a 1983.

1 A. I'm vaguely aware of it, but being familiar  
2 with it, I can't -- I'm not familiar with it.

3 Q. Have you ever been the plaintiff in a 1983  
4 action?

5 A. What is a 1983 action?

6 Q. A civil rights complaint in federal court.

7 A. No, not that I'm aware of.

8 Q. Have you ever sued the Alabama Department  
9 of Public Safety?

10 A. Yes, I did. Yes.

11 Q. And one of those -- I believe one of the  
12 things that that case involved was a violation of  
13 your civil rights. Do you remember now?

14 A. Maybe vaguely, yes. That's been 21 years  
15 ago, ma'am, so vaguely, yes.

16 Q. And what was that lawsuit about?

17 A. Ma'am, again, I'm not going to get into my  
18 prior employment. I'm not going to get into  
19 that.

20 Q. So you are refusing to answer the question?

21 A. Yes, ma'am.

22 Q. Did the Complaint also involve an invasion  
23 of privacy claim?

1 A. Again, ma'am, I'm not going to answer that.

2 Q. Do you believe that that lawsuit is part of  
3 a public record?

4 A. Well, if it is, there's copies that you can  
5 obtain, ma'am. I'm not aware of what's going on  
6 with that.

7 Q. And why are you refusing to answer the  
8 question?

9 A. I just am. I don't think it has any  
10 relevance here.

11 Q. Does it involve your termination as a state  
12 trooper?

13 A. Ma'am, I'm not going to get into answering  
14 those questions about something that happened in  
15 my career 21 years ago. It does not involve the  
16 Department of Corrections.

17 Q. Did you disclose that information to the  
18 Department of Corrections?

19 A. I'm sure they obtained that information,  
20 ma'am.

21 Q. So the Department of Corrections did know  
22 the substance of that lawsuit and your  
23 termination?

1 A. I don't know if they did or not, ma'am.

2 Q. Well, did you fill out an application when  
3 you applied for your position at the Department  
4 of Corrections?

5 A. I'm sure I did. State of Alabama  
6 application, yes.

7 Q. Did it ask for your prior employment?

8 A. Yes, it did.

9 Q. Did it ask if you had ever had any  
10 disciplinary issues or problems --

11 A. On the back -- I'm sure a copy of the State  
12 of Alabama application is available on the  
13 state -- on the personnel website, which has all  
14 those things you're asking me on there.

15 Q. No, I'm asking you if you disclosed that  
16 information.

17 A. Yes, ma'am, I did.

18 Q. So the Alabama Department of Corrections  
19 knew of the reason for your termination when they  
20 hired you?

21 A. It was on the application, ma'am.

22 Q. Did you also file a Right to Sue with the  
23 EEOC?

1 A. I don't recall if I did or not. My  
2 attorney may have.

3 Q. And who is Cary B. Sutton?

4 A. He worked for the Department of Public  
5 Safety, ma'am.

6 Q. And was he a defendant in your lawsuit?

7 A. In his capacity, yes.

8 Q. And how about Mr. Michael Sullivan?

9 A. In his capacity, yes.

10 Q. Warden Raybon, I just want to give you one  
11 more opportunity if you want to answer the  
12 questions that were posed to you that you've  
13 refused to answer.

14 A. I'm not going to answer those questions,  
15 ma'am, because there's no relevance to this case.

16 Q. Would you like a moment to speak with your  
17 counsel, maybe?

18 A. No, ma'am, I don't need a moment.

19 MS. du LAC: Would counsel like a moment to  
20 speak with his client?

21 MR. ANDERSON: Warden Raybon, do you  
22 consider that this involves irrelevant private  
23 matters?

1 THE WITNESS: Yes, private.

2 MR. ANDERSON: And that is your position as  
3 a private individual, that discussion of these  
4 matters would touch on irrelevant private  
5 considerations?

6 THE WITNESS: Yes.

7 MR. ANDERSON: So you are refusing to  
8 answer the questions?

9 THE WITNESS: Yes.

10 MS. du LAC: Well, I think I'm done for the  
11 moment, unless Mr. Anderson has some  
12 cross-examination.

13

14 EXAMINATION BY MR. ANDERSON:

15 Q. Warden Raybon, first of all, I want to ask  
16 you, you were asked earlier about communications  
17 with DOC Legal, and I believe you referred to  
18 Carrie Shaw as the general counsel. Is Carrie  
19 McCullom --

20 A. Carrie McCullom, yes.

21 Q. You talked about your familiarity with  
22 Willie Smith, correct?

23 A. Yes.



1 Q. And you have spoken with him on a number of  
2 occasions, you're not sure how many; is that  
3 right?

4 A. Correct.

5 Q. How long have you known him or known who he  
6 is?

7 A. Since I guess probably maybe three or four  
8 months after I arrived at Holman. Doing your  
9 different rounds, you met different inmates, and  
10 he was one of the inmates.

11 Q. And what sort of things have you talked to  
12 him about?

13 A. Various things. I mean, at that time  
14 sports or -- he was a runner at one time, too, on  
15 one of the tiers, so a conversation came up with  
16 that, maybe, but just various general stuff. Or  
17 like he had a request for some cleaning solution  
18 or to get some new clothes or something along  
19 that line, that's all the conversation was.

20 Q. Do you recall a conversation with him about  
21 stimulus payments?

22 A. Yes. In my capacity now, yes. I guess it  
23 was after he got stay in execution, he was asking

1 about when he could get the release of his funds  
2 from his stimulus check.

3 Q. So he was aware that he was due to receive  
4 a federal stimulus payment?

5 A. Yes.

6 Q. And he was aware when he hadn't actually  
7 received the funds that should have come to him?

8 A. Yes.

9 Q. During your conversations, has Smith ever  
10 told you that he couldn't understand what you  
11 were saying --

12 A. No.

13 Q. -- or that he needed help understanding  
14 what you were saying?

15 A. He has never brought that to my attention,  
16 no.

17 Q. And you could understand him when he  
18 communicates?

19 A. Oh, yes.

20 Q. And you just mentioned or you've talked  
21 about him being a tier runner. To the extent of  
22 your knowledge, did he always seem to understand  
23 the duties of his position?

1 A. As far as I know, yes. As far as I knew,  
2 because I think he was on a particular shift and  
3 he was assisting them as far as the breakfast  
4 meal, I think it was.

5 Q. Are you aware of whether Mr. Smith was  
6 taking any classes or participated in any classes  
7 while he was at Holman?

8 A. They had a Project Hope class that is on  
9 every Wednesday. It's in the law library, and  
10 there's several inmates that are in there, and  
11 I've seen him in there on different various  
12 occasions. As far as what his participation was,  
13 I can't tell you, but I've seen him in there.

14 Q. Do you know generally what Project Hope is  
15 about?

16 A. Actually I can't tell you exactly what it's  
17 about or how it originated, but what I've seen  
18 them discuss is various case law. I mean, you  
19 have various inmates that are actually taking a  
20 lead in different classes.

21 Q. As warden at Holman, is one of your  
22 responsibilities serving death warrants?

23 A. Yes.

1 Q. Did you serve Willie Smith with his most  
2 recent death warrant in this case?

3 A. Yes, I did.

4 Q. Could you describe to me what's involved in  
5 serving a death warrant?

6 A. Of course, during that time, prior to  
7 getting inmates, you get the classification of  
8 the individual, medical, mental health. The  
9 chaplain, myself, and the captain that's over  
10 that area, they will bring the inmate down to my  
11 office to give him a copy of the warrant, and you  
12 read the warrant, and then you ask him if he has  
13 any questions; and then after that, he signs a  
14 memo which details the information that he has to  
15 respond back to me within two weeks, such as the  
16 visitation, witnesses of the execution, along  
17 that line. And the only question he had, was he  
18 was being placed on single walk, so he questioned  
19 why he was being placed on single walk. I  
20 explained to him once a warrant came out, he had  
21 to be placed on single walk. He pleaded with me  
22 not to place him on single walk.

23 Q. So he is given a written form to fill out.

1 Did he seem to understand what that was about?

2 A. Yes, he understood. He signed it.

3 Q. I want to ask you a little bit about --

4 we've talked about ADA issues today. Inmates who

5 believe they have a disability can request help

6 by filling out a form; is that correct?

7 A. That's correct.

8 Q. Like they would fill out a medical

9 assistance form, I think a sick call form, as you

10 called it?

11 A. Yes.

12 Q. But the ADA form is a different form?

13 A. That's a different form, yes.

14 Q. But both of those forms are available to

15 the inmates?

16 A. Yes, they are.

17 Q. And when they fill out either form, it

18 typically goes into a box on the hall?

19 A. Yes, or they can hand it to someone as

20 well.

21 Q. Now, if an inmate needed a form, you

22 described various ways they could get it. They

23 could ask for medical personnel to bring them

1 one, they could ask for an officer. Could a tier  
2 runner bring them a form?

3 A. We try not to do that, but they could. If  
4 it's available somewhere where they can pick it  
5 up, they can bring it to them; but as far as  
6 turning it in, sometimes tier runners do turn  
7 them in to us and we'll place them in the right  
8 hands they need to be placed in.

9 Q. So tier runners would know where the forms  
10 come from?

11 A. Yes.

12 Q. And where to put them?

13 A. Right. Because the tier runner, especially  
14 the main hall runners have access; or actually  
15 they don't have access, per se, but they know  
16 where the shift office is and that's where the  
17 supervisors are, and they can ask one of the  
18 supervisors to forward those.

19 Q. And the warden and tier runners have to be  
20 able to communicate?

21 A. Yes.

22 Q. And to understand instructions?

23 A. Correct.

1 Q. Are you aware of any occasions on which Mr.  
2 Smith was unable to do his job as a tier runner  
3 because he couldn't understand what he was asked  
4 to do?

5 A. I'm not aware of any, no.

6 Q. And you're not aware of any situations in  
7 which Mr. Smith was unable to communicate with  
8 corrections officers or inmates?

9 A. No.

10 Q. And to be clear, you're not aware of any  
11 occasion on which Mr. Smith has ever requested an  
12 ADA accommodation, orally or in writing, are you?

13 A. No, I'm not.

14 Q. There were some questions earlier about law  
15 clerks and why death row didn't have a law clerk,  
16 general pop has a law clerk. Death row inmates  
17 usually have attorneys, correct?

18 A. Correct. Correct.

19 Q. And that's maybe not the case for gen pop?

20 A. Correct.

21 Q. And death row inmates are able to have  
22 visitation with their attorneys?

23 A. Correct.

1 Q. And they can have telephone communication  
2 with their attorneys?

3 A. Correct.

4 Q. Let me go back to the ADA issues and  
5 requests for assistance or accommodation. Prison  
6 staff could also proactively offer help if they  
7 saw a need?

8 A. Yes. Yes. And we encourage them to.

9 Q. And we've talked about your familiarity and  
10 your interactions with Mr. Smith. Did you ever  
11 see anything, over the years that you have known  
12 him and the times that you have spoken with him,  
13 that suggested to you that he wasn't able to  
14 understand you or that he wasn't able to  
15 understand written documents or needed help  
16 understanding?

17 A. No. Not in my conversation with him, not  
18 at all.

19 Q. A specific example would be the form that  
20 you gave him with the death warrant?

21 A. Yes.

22 Q. So you've never seen any indication  
23 personally that indicated that he needed any sort



1 of accommodation?

2 A. No, I have not.

3 Q. And I'm sure during your career in  
4 corrections, you have had some experience -- I  
5 think, actually, we talked about this on  
6 direct -- you have had experience with people  
7 with mental disabilities?

8 A. Yes.

9 Q. Physical disabilities?

10 A. Right.

11 Q. And people have clear indications of those?

12 A. Yes.

13 Q. And you saw none of those in Mr. Smith?

14 A. No. If we had, I would have got him some  
15 help or referred him to Mental Health, and I  
16 haven't had occasion to do that.

17 Q. We talked about the request forms and sick  
18 call forms just a minute ago. If an inmate had a  
19 long history of appropriately using sick call  
20 forms or request forms to get things he needed or  
21 wanted, would that make you more or less likely  
22 to think that he needed some special  
23 accommodations?

1 A. Less likely.

2 Q. Let me ask you, go back to one other  
3 subject we talked about, you were asked about  
4 earlier, e-mails. You testified about looking on  
5 your computer for e-mails. Are you aware of  
6 whether the central office also did an e-mail  
7 search?

8 A. I recall hearing someone say they did, yes.

9 Q. You weren't involved in it?

10 A. I wasn't involved in it, no.

11 Q. I think I've established this, but I want  
12 to ask you, your conversations with Willie Smith,  
13 you have actually had some substantive  
14 conversations with him?

15 A. Yes.

16 Q. Not just passing in the hall, "Hey,  
17 Willie," "Hey, Warden"?

18 A. Right.

19 Q. Just a moment. For instance, when you were  
20 giving Mr. Smith the death warrant and associated  
21 forms, were you able to observe whether Mr. Smith  
22 could read or write?

23 A. He held the form, you know, and I asked him

1 did he have any questions, did he understand what  
2 it was saying, and he said he understood. As a  
3 matter of fact, when he walked in the room, he  
4 said he knew -- he knew what it was about.

5 Q. And that would suggest to you that he was  
6 able to read the form?

7 A. Yes.

8 Q. Would interaction with filling out sick  
9 call forms tend to suggest to you that the inmate  
10 could read them and write out requests --

11 A. Yes.

12 Q. -- that would indicate he could read and  
13 write?

14 A. Yes, to me.

15 Q. Let me ask you about ADA accommodation  
16 requests. You talked about most requests would  
17 go to Medical?

18 A. Yes.

19 Q. Or be forwarded to Medical?

20 A. Right.

21 Q. If the request seemed to involve a mental  
22 issue, would it go to Medical or would it go to  
23 Mental Health?

1 A. It would go to Mental Health.

2 Q. And it would be more or less the same  
3 process, but on the mental side instead of the  
4 physical side?

5 A. Correct.

6 MR. ANDERSON: I think that's all I have.

7 MS. du LAC: Okay, Warden, just a few  
8 follow-up questions, and then we should be done  
9 today.

10

11 RE-EXAMINATION BY MS. du LAC:

12 Q. Mr. Anderson asked you about the  
13 conversation you had with Willie about stimulus  
14 payments. Is Willie the only person on death row  
15 that has asked you about stimulus payments?

16 A. No, he's not.

17 Q. If you were to guess, how many folks have  
18 asked you about that?

19 A. More than five, less than 20.

20 Q. So would it be fair to say this is a topic  
21 of interest in conversation amongst people on  
22 death row?

23 A. I couldn't say just among people on death

1 row. I mean, it's probably a topic throughout  
2 the prison; but as far as specifically death row,  
3 I can't say just specifically death row.

4 Q. We talked briefly about his duties as a  
5 tier runner. On an average day, what would a  
6 tier runner do?

7 A. Picking up trays or cleaning areas. Some  
8 guys that are locked in their cells, they may be  
9 able to get something for them that they may need  
10 as far as something from the shift office or  
11 something, take some food and put it in a  
12 microwave for them, or something along that line,  
13 various duties that they would do on that tier.

14 Q. So fairly basic skills, if you would?

15 A. Well, yes, I guess basic as far as filling  
16 those duties, I guess, yes.

17 Q. In your tenure at Holman, whether it be as  
18 warden or Warden II, have you ever seen anyone  
19 that was accommodated for a learning disability?

20 A. I haven't had anyone to put in a request  
21 for a learning disability, to be honest with you,  
22 or it come to our attention that someone needed  
23 help with a learning disability, I haven't had

1 occasion to know.

2 Q. If someone were to request an  
3 accommodation, would you consider that a medical  
4 issue or a mental health issue?

5 A. It would go through -- it depends on if  
6 they're on the mental health caseload, which  
7 would be through Wexpert, or if someone is not,  
8 then it would go through our psyche associate.

9 Q. I see, okay. And that would be true of  
10 just basic learning disability?

11 A. Yes.

12 Q. Are you aware of what Mr. Smith's IQ is?

13 A. No.

14 Q. When you brought him to your office, as far  
15 as reading the death warrant to him, and you, I  
16 think, testified that he understood or you  
17 believed him to understand the form; is that  
18 correct?

19 A. That's correct.

20 Q. When he signed the form, that was after it  
21 was read to him, correct?

22 A. Yes.

23 Q. So you actually read it to him?

1 A. I read the form, and he had a copy as well  
2 right there in front of him. He appeared to be  
3 going along as I read it.

4 Q. And then he had the ability to ask any  
5 questions he wanted to; is that correct?

6 A. Yes, he did. Yes.

7 Q. So when he left, it was your understanding  
8 that he understood the form as signed and that he  
9 was able to ask all the questions he wanted to?

10 A. He was given the opportunity to ask  
11 questions. The only question he asked was about  
12 being placed on single walk.

13 Q. And do you know when the election forms  
14 were handed out on death row, if they were read  
15 to the inmates?

16 A. Ma'am, I wasn't present when it was, when  
17 they were handed out.

18 Q. Did you ever hear that the form was  
19 individually read to inmates?

20 A. No. I wasn't aware either way.

21 MS. du LAC: I think that's all I have,  
22 Warden. Thank you very much.

23 THE WITNESS: Thank you.

1 MR. ANDERSON: One follow-up question.

2

3 RE-EXAMINATION BY MR. ANDERSON:

4 Q. Regarding the form that he was required to  
5 fill out for the death warrant reading, does that  
6 touch on prison procedures and prison functions  
7 such as visitation?

8 A. The death warrant itself, you know, talks  
9 about the execution, but there is a memo that we  
10 put out to them giving them a time period to get  
11 certain things back to my office, and we give  
12 them two weeks, two weeks prior to the execution  
13 to get those things back. Those things are  
14 basically your visitation list as well as any  
15 witnesses that you want to witness the execution,  
16 because there has to be a background check done  
17 on those. We want them to have long enough to  
18 get those things in.

19 Q. That's not a voluntary form?

20 A. No, it's not voluntary.

21 Q. It's information you've got to have back  
22 from the inmate in order to --

23 A. If we don't, then we'll go with what we



1 have.

2 MR. ANDERSON: Okay. That's all I have.

3 VIDEOGRAPHER: This concludes the  
4 deposition of Terry Raybon. We're going off the  
5 record at 12:10.

6 (Whereupon, at this time the  
7 deposition was concluded at 12:10 p.m.)

8 FURTHER DEPONENT SAITH NOT.

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# **Exhibit 16**



Deposition of:  
**Captain Jeff Emberton ,**  
**CONTINUATION**

*September 9, 2021*

In the Matter of:  
**Smith, Willie B., III Vs. Dunn, Jefferson,**  
**et al.**

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

CIVIL ACTION NO. 19-cv-00927-ECM-SMD  
CAPITAL CASE NO EXECUTION DATE SET

WILLIE B. SMITH III,  
Plaintiff,  
V.

JEFFERSON DUNN, Commissioner, Alabama  
Department of Corrections,  
&  
TERRY RAYBON, Warden, Holman  
Correctional Facility,  
Defendants.

VIDEO DEPOSITION  
OF  
CAPTAIN JEFF EMBERTON  
September 9, 2021

REPORTED BY: Teresa Turquitt Davis  
Certified Court Reporter,  
Registered Professional  
Reporter and Notary Public

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S T I P U L A T I O N

IT IS STIPULATED AND AGREED, by and between the parties, through their respective counsel, that the deposition of CAPTAIN JEFF EMBERTON may be taken before Teresa Turquitt Davis, Commissioner, Certified Court Reporter, Registered Professional Reporter and Notary Public;

That the signature to and reading of the deposition by the witness is waived, the deposition to have the same force and effect as if full compliance had been had with all laws and rules of Court relating to the taking of depositions;

That it shall not be necessary for any objections to be made by counsel to any questions, except as to form or leading questions, and that counsel for the parties may make objections and assign grounds at the time of trial, or at the time said deposition is offered in evidence, or prior thereto.

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A P P E A R A N C E S

FOR THE PLAINTIFF:

Ms. Allyson R. du Lac  
and Mr. Spencer J. Hahn  
Attorneys at Law  
FEDERAL DEFENDERS FOR THE  
MIDDLE DISTRICT OF ALABAMA  
817 South Court Street  
Montgomery, Alabama 36104

FOR THE DEFENDANT:

Ms. Lauren Simpson and Mr. Richard Anderson  
Attorneys at Law  
Attorney General's Office  
State of Alabama  
501 Washington Avenue  
Montgomery, Alabama 36104

OTHERS PRESENT:

Joshua Gray, videographer

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I N D E X

INDEX OF EXAMINATION

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1 I, Teresa Turquitt Davis, a Certified  
2 Court Reporter and Registered Professional Reporter  
3 of Birmingham, Alabama, and a Notary Public for the  
4 State of Alabama at Large, acting as Commissioner,  
5 certify that on this date, as provided by the  
6 Federal Rules of Civil Procedure of the United  
7 States District Court, and the foregoing  
8 stipulation of counsel, there came before me via  
9 remote videoconference, on September 9, 2021,  
10 commencing at 10:13 A.M., CAPTAIN JEFF EMBERTON,  
11 witness in the above cause, for oral examination,  
12 whereupon the following proceedings were had:

13  
14 THE VIDEOGRAPHER: We are going on  
15 the record at 10:13 A.M. on September 9th, 2021.  
16 This begins media unit one in the deposition of  
17 Captain Jeff Emberton in the matter of Willie B.  
18 Smith versus Jefferson Dunn and Terry Raybon filed  
19 in the United States District Court for the Middle  
20 District of Alabama, Northern Division. Counsel  
21 will now state their names and affiliations for the  
22 record.

23 MS. DU LAC: Allyson du Lac, Federal

1 Defenders Office on behalf of plaintiff Willie  
2 Smith.

3 MR. HAHN: Spencer Hahn, Federal  
4 Defenders Office on behalf of Mr. Smith.

5 MS. SIMPSON: Lauren Simpson, Office  
6 of the Attorney General for the defendants.

7 MR. EMBERTON: Correctional Captain  
8 Jeff Emberton.

9 THE VIDEOGRAPHER: Will the -- go  
10 ahead.

11 MS. DU LAC: And we have Richard  
12 Anderson also at the Office of the Attorney General  
13 for the defendants.

14 THE VIDEOGRAPHER: All right. Will  
15 the court reporter please swear in the witness.

16  
17 CAPTAIN JEFF EMBERTON,  
18 having been first duly sworn, was examined and  
19 testified as follows:

20  
21 EXAMINATION BY MS. DU LAC:

22 Q. Good morning, Captain Emberton.

23 A. Good morning.

1 Q. You may remember, we had a deposition  
2 back in May 24th.

3 A. Yes, ma'am.

4 Q. Do you remember that?

5 A. Yes, ma'am.

6 Q. And then you also recently testified  
7 at an evidentiary hearing --

8 A. Yes, ma'am.

9 Q. -- on the 27th of August?

10 A. Yes, ma'am.

11 Q. I wanted to ask you a couple of  
12 questions because there's been an issue that came  
13 up regarding the affidavit that you drafted in  
14 January of 2019.

15 A. Yes, ma'am.

16 Q. So just for the record, I want to  
17 make sure you remember the affidavit we are  
18 discussing. It was signed on January 31st of 2019  
19 regarding the election form for nitrogen hypoxia  
20 that was distributed.

21 A. Yes, ma'am.

22 Q. And do you remember the circumstances  
23 regarding that affidavit?

1           A.       What do you mean by as far as  
2       circumstances?

3           Q.       How did it come about that you  
4       drafted an affidavit?

5           A.       I was advised that there was some  
6       litigation surrounding that election form and that  
7       they needed me to write a affidavit stating what I  
8       did with the form.

9           Q.       Okay. And who advised you that that  
10      needed to be done?

11          A.       I don't recall. It may have been Ms.  
12      Parker. It may have been Ms. Simpson. I don't  
13      remember who exactly told me.

14          Q.       And once you were asked to draft an  
15      affidavit, what did you do?

16          A.       If I recall right, I mean it's been a  
17      long time since I wrote it, I typed it up and took  
18      it to Ms. Parker and she revised it or done  
19      whatever she does with affidavits. And then when  
20      her and Ms. Simpson were done with it, they called  
21      me back to the office to sign it.

22          Q.       And when you say when Ms. Simpson was  
23      done with it, was Ms. Simpson there?

1 A. I don't recall.

2 Q. When you drafted the affidavit, were  
3 you by yourself or you were with someone else?

4 A. I don't recall who exactly, if  
5 anybody was with me. I think I was in my office,  
6 if I recall correctly.

7 Q. And you drafted that by yourself?

8 A. If I recall correctly, if my memory  
9 doesn't fail me, yes, I did.

10 Q. And the affidavit was completely your  
11 words?

12 A. If I recall correctly, you know, I  
13 draft a lot of stuff and it's been a long time ago.  
14 If I recall correctly, I typed it myself.

15 Q. And did you discuss it with anyone?

16 A. I think me and Ms. Simpson had  
17 discussed it, you know, later on.

18 Q. When you say later on, you mean days  
19 later, weeks later, months later?

20 A. I don't remember the time frame.

21 Q. But was it the same day?

22 A. I don't recall.

23 Q. I also wanted to ask you if you --

1 from May 24th when you had your deposition to  
2 August the 27th when you testified at the  
3 evidentiary hearing, did you do anything to refresh  
4 your recollection?

5 A. No.

6 Q. Did you review any documents?

7 A. No, ma'am.

8 Q. Did you have any discussions with  
9 other DOC staff persons?

10 A. No, ma'am.

11 Q. On May 24th, I asked you at your  
12 deposition if you knew Willie Smith.

13 A. Uh-huh.

14 Q. And your answer was, "I don't know.  
15 I mean, I didn't really know who he was until I  
16 seen a picture of him." Do you remember that?

17 A. Yes, ma'am.

18 Q. And I'm asking because when you  
19 testified on August 27th, you had a very clear  
20 memory of Mr. Smith.

21 A. Uh-huh.

22 Q. You said you spoke with him every  
23 day, you walked by his cell, you asked how he was

1 doing. You remembered items that were in his cell,  
2 reading materials. So I'm just asking, what or how  
3 did your memory get refreshed between May 24th and  
4 August 27th.

5 A. You know, I'm not real good with  
6 names. I mean, there was 178 inmates on that  
7 thing. And unless I see a name or see a picture, I  
8 may not know a name with a face. But when I see  
9 them, I remember certain, you know, characteristics  
10 about them or I remember dealing with them in the  
11 past. Not saying everybody.

12 But Willie Smith was my runner. I  
13 mean, I had interactions with him. I may not have  
14 known his name, but when I seen him, yeah, I  
15 remember him, I didn't -- you know, until I went  
16 back and started looking for stuff for this case as  
17 far as paperwork, any kind of, you know, all my  
18 death row stuff where I had runner rosters and  
19 stuff, yeah, that is Willie Smith, I do remember  
20 him. But it was taking his face, seeing his face  
21 to be able to remember who exactly he was.

22 Q. And did you review those records  
23 before or after your deposition on May 24th?

1 A. Before.

2 Q. So when I asked you on May 24th if  
3 you knew him, you said you really didn't know who  
4 he was and that you did not remember having  
5 conversations with him.

6 A. I mean it may have just been that I  
7 was trying to place a face with a name, but I do  
8 remember having conversations with him.

9 Q. And you remember the items that he  
10 had in his cell?

11 A. I mean they all had newspapers and  
12 magazines and, you know, different items, mail. I  
13 mean their cells were -- always had a lot of stuff  
14 in them, and I mean --

15 Q. And so that was -- I'm sorry, I  
16 didn't mean to interrupt you.

17 A. And I mean I remember -- I mean  
18 Willie was my runner. We kept a lot of stuff in  
19 the runners' cells like cleaning supplies,  
20 different odds and end stuff that we used, the  
21 tiers used, the inmate used on the tier.

22 So if Willie needed something, he  
23 would always either come to my office and ask for



1 it or he would send me something, you know, another  
2 inmate would come and tell me hey, listen, Willie  
3 need this, you know, our tier need this, and I  
4 would take it to Willie.

5 Q. And was Willie Smith a runner the  
6 entire time you were employed at Holman?

7 A. I think he had a break. I don't  
8 remember exactly why he took a break, but he was  
9 out -- he was not a runner for a period of months  
10 and I don't remember why.

11 Q. Do you remember if he was a tier  
12 runner in June of 2018 when the form was passed  
13 out?

14 A. I would have to go back and look at  
15 my rosters to be able to even make a guess at that.

16 Q. As far as your affidavit from  
17 January 31st of 2019, it states that you delivered  
18 a form and an envelope to every death row inmate at  
19 Holman as instructed?

20 A. Yes, ma'am.

21 Q. What were your specific instructions  
22 regarding the delivery of the form?

23 A. From what I recall, is that I was

1 instructed that that form and that envelope needed  
2 to go to every inmate on death row.

3 Q. And were you instructed that you  
4 personally had to deliver each form or that you  
5 were to make sure that everyone got one?

6 A. I interpreted my instructions as I  
7 needed to ensure that they all got one, which meant  
8 I needed to personally go cell to cell and make  
9 sure every inmate got a form and an envelope.

10 Q. And you did that?

11 A. Yes, ma'am.

12 Q. And the forms were never given to  
13 tier runners to pass out?

14 A. No. No, ma'am.

15 Q. Do you remember if Jeffrey Lee was a  
16 tier runner in June of 2018?

17 A. I would have to look at my roster to  
18 see. I can't recall.

19 Q. Would it surprise you to know that  
20 some of the former tier runners remember that you  
21 had given them the forms to pass out?

22 A. No, because that didn't happen.

23 MS. DU LAC: Lauren, I'm going to

1 take a break just for a minute.

2 MS. SIMPSON: Okay.

3 MS. DU LAC: If you don't mind and  
4 that may be all we have today.

5 MS. SIMPSON: Okay.

6 THE VIDEOGRAPHER: All right. We are  
7 going off the record at 10:25 A.M.

8 (Brief pause.)

9 THE VIDEOGRAPHER: All right. We are  
10 back on the record at 10:27 A.M.

11 MS. DU LAC: Captain Emberton, that  
12 is all the questions I have for you today. I want  
13 to thank you for reappearing for deposition.

14

15 EXAMINATION BY MS. SIMPSON:

16 Q. And Captain Emberton, I have just a  
17 few questions for you, please.

18 A. Yes, ma'am.

19 Q. All right. Again, we are talking  
20 about an affidavit that you wrote two and a half  
21 years ago, correct?

22 A. Yes, sir.

23 Q. You said on August 27th that you have

1 done a number of affidavits in your time at DOC.

2 Can you recall how many you have drafted?

3 A. Well, I would have to go back and  
4 look at my file on my computer to tell you, but  
5 it's -- I mean from disciplinaries to inmate  
6 complaints, I have drafted a lot.

7 Q. Okay. Do you remember the particular  
8 circumstances of every single affidavit you have  
9 written?

10 A. No, ma'am.

11 Q. Okay. But when you write an  
12 affidavit, you wouldn't sign something that you  
13 didn't believe was accurate, correct?

14 A. Yes, ma'am.

15 Q. Do you read and review all your  
16 affidavits before signing them?

17 A. Yes, ma'am.

18 Q. Do you have any reason to believe at  
19 this date that your January 31st, 2019 affidavit is  
20 inaccurate?

21 A. No, ma'am.

22 Q. Okay. Would you -- so do you  
23 remember me coming to visit Holman to talk to you

1 about this affidavit?

2 A. I do.

3 Q. Okay. Do you remember when that  
4 occurred?

5 A. No, I don't.

6 Q. Would you have any reason to doubt me  
7 if I said it was on January 31st, 2019?

8 A. No.

9 Q. Okay. And, again, you don't have any  
10 particular recollection -- excuse me, of every  
11 single detail of your affidavits, correct?

12 A. No, ma'am.

13 Q. Before your August 27th testimony,  
14 did you review your deposition transcript from May?

15 A. No, ma'am, I didn't.

16 Q. Okay. That's fine. Did we do any  
17 further preparation with you between your May  
18 deposition and your August testimony?

19 A. Not that I recall.

20 Q. Okay.

21 MS. SIMPSON: Allyson, I believe  
22 that's all we have.

23 MS. DU LAC: Well, then we are done

1 for the day.

2 THE VIDEOGRAPHER: All right. Give  
3 me one moment. We are off the record at 10:29 A.M.  
4 This concludes today's deposition.

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# **Exhibit 17**



Deposition of:  
**CONF Jennifer Parker**

*July 9, 2021*

In the Matter of:

**Smith, Willie B., III Vs. Dunn, Jefferson,  
et al.**

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Page 1

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

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5  
6       CIVIL ACTION NO.: 19-cv-00927-ECM-SMD

7  
8       WILLIE B. SMITH, III,

9               Plaintiff,

10       v.

11       JEFFERSON DUNN, Commissioner, Alabama

12       Department of Corrections,

13       &

14       TERRY RAYBON, Warden, Holman Correctional

15       Facility,

16               Defendants.

17

18

19       REMOTE VIDEOCONFERENCE DEPOSITION

20                       TESTIMONY OF:

21                       JENNIFER PARKER

22                       July 9, 2021

23                       \*CONFIDENTIAL\*

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Page 2	<p>1           S T I P U L A T I O N S</p> <p>2           IT IS STIPULATED AND AGREED</p> <p>3 by and between the parties through their</p> <p>4 respective counsel that the deposition of</p> <p>5 JENNIFER PARKER may be taken via remote</p> <p>6 videoconference before Lane C. Butler, a</p> <p>7 Court Reporter and Notary Public for the</p> <p>8 State at Large, from Holman Correctional</p> <p>9 Facility, on the 9th day of July, 2021,</p> <p>10 commencing at approximately 10:00 a.m.</p> <p>11           IT IS FURTHER STIPULATED</p> <p>12 AND AGREED that the signature to and the</p> <p>13 reading of the deposition by the witness</p> <p>14 is waived, the deposition to have the</p> <p>15 same force and effect as if full</p> <p>16 compliance had been had with all laws and</p> <p>17 rules of Court relating to the taking of</p> <p>18 the depositions.</p> <p>19           IT IS FURTHER STIPULATED</p> <p>20 AND AGREED that it shall not be necessary</p> <p>21 for any objections to be made by counsel</p> <p>22 to any questions except as to form or</p> <p>23 leading questions and that counsel for</p>	Page 4
Page 3	<p>1           A P P E A R A N C E S</p> <p>2</p> <p>3 FOR THE PLAINTIFF (via remote</p> <p>4 videoconference):</p> <p>5</p> <p>6 John A. Palombi, Esq.</p> <p>7 Spencer J. Hahn, Esq.</p> <p>8 Allyson R. du Lac, Esq.</p> <p>9 FEDERAL DEFENDERS FOR THE MIDDLE DISTRICT</p> <p>10 OF ALABAMA</p> <p>11 817 South Court Street</p> <p>12 Montgomery, Alabama 36104</p> <p>13 john_palombi@fd.org</p> <p>14 spencer_hahn@fd.org</p> <p>15 allyson_dulac@fd.org</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p>	Page 5
Page 3	<p>1 the parties may make objections and</p> <p>2 assign grounds at the time of trial or at</p> <p>3 the time said deposition is offered in</p> <p>4 evidence, or prior thereto.</p> <p>5           In accordance with the Federal</p> <p>6 Rules of Civil Procedure, I, Lane C.</p> <p>7 Butler, am hereby delivering to John A.</p> <p>8 Palombi, Esq., the original transcript of</p> <p>9 the oral testimony taken the 9th day of</p> <p>10 July, 2021.</p> <p>11           Please be advised that this is</p> <p>12 the same and not retained by the Court</p> <p>13 Reporter, nor filed with the Court.</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p>	Page 5
Page 5	<p>1           A P P E A R A N C E S (continued)</p> <p>2</p> <p>3 FOR THE DEFENDANTS (via remote</p> <p>4 videoconference):</p> <p>5</p> <p>6 Lauren Simpson, Esq.</p> <p>7 Richard Anderson, Esq.</p> <p>8 ALABAMA ATTORNEY GENERAL'S OFFICE</p> <p>9 501 Washington Avenue</p> <p>10 Montgomery, Alabama 36104</p> <p>11 lauren.simpson@alabamaag.gov</p> <p>12</p> <p>13</p> <p>14 ALSO PRESENT (via remote</p> <p>15 videoconference):</p> <p>16</p> <p>17 Darin Weaver, videographer</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p>	Page 5

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<p style="text-align: right;">Page 6</p> <p>1                    I N D E X</p> <p>2</p> <p>3 EXAMINATION BY:                    PAGE NO.</p> <p>4 Mr. Palombi                            10</p> <p>5 Ms. Simpson                            38</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10                    E X H I B I T S</p> <p>11</p> <p>12 No exhibits were marked or offered.</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p>	<p style="text-align: right;">Page 8</p> <p>1 Audio and video recording will continue</p> <p>2 to take place unless all parties agree to</p> <p>3 go off the record. This is Media Unit 1</p> <p>4 of the videorecorded deposition of</p> <p>5 Jennifer Parker taken by the counsel for</p> <p>6 the plaintiff in the matter of Willie B.</p> <p>7 Smith, III, v. Jefferson Dunn,</p> <p>8 Commissioner, Alabama Department of</p> <p>9 Corrections, filed in the United States</p> <p>10 District Court for the Middle District Of</p> <p>11 Alabama, Northern Division, Case No.</p> <p>12 19-cv-00927-ECM-SMD.</p> <p>13        This deposition is taking place</p> <p>14 via Zoom. My name is Darin Weaver from</p> <p>15 the firm Veritext Legal Solutions</p> <p>16 Alabama. I am the videographer. The</p> <p>17 court reporter is Lane Butler, also from</p> <p>18 Veritext Legal Solutions Alabama. I am</p> <p>19 not authorized to administer an oath, I'm</p> <p>20 not related to any party in this action,</p> <p>21 nor am I financially interested in the</p> <p>22 outcome.</p> <p>23        Counsel and all present in the</p>
<p style="text-align: right;">Page 7</p> <p>1                    I, Lane C. Butler, a Court</p> <p>2 Reporter and Notary Public, State of</p> <p>3 Alabama at Large, acting as Notary,</p> <p>4 certify that on this date, pursuant to</p> <p>5 the Alabama Rules of Civil Procedure and</p> <p>6 the foregoing stipulation of counsel,</p> <p>7 there came before me via remote</p> <p>8 videoconference from Holman Correctional</p> <p>9 Facility, commencing at approximately</p> <p>10 10:00 a.m., on the 9th day of July, 2021,</p> <p>11 JENNIFER PARKER, witness in the above</p> <p>12 cause, for oral examination, whereupon</p> <p>13 the following proceedings were had:</p> <p>14</p> <p>15        THE VIDEOGRAPHER: We're going</p> <p>16 on the record. The time is 10:00 a.m.</p> <p>17 Today is Friday, July 9th, 2021. Please</p> <p>18 note the microphones are sensitive and</p> <p>19 may pick up private conversations,</p> <p>20 whispering, and cellular interference.</p> <p>21 Please turn off all cell phones and place</p> <p>22 them away from the microphones, as they</p> <p>23 may interfere with deposition audio.</p>	<p style="text-align: right;">Page 9</p> <p>1 room and everyone attending remotely will</p> <p>2 now state their appearance and</p> <p>3 affiliation for the record. If there are</p> <p>4 any objections to proceeding, please</p> <p>5 state them at the time of your</p> <p>6 appearance, beginning with the noticing</p> <p>7 attorney.</p> <p>8        MR. PALOMBI: John Palombi,</p> <p>9 Assistant Federal Defender, representing</p> <p>10 Willie Smith.</p> <p>11        MR. HAHN: Spencer Hahn,</p> <p>12 Assistant Federal Defender, representing</p> <p>13 Willie Smith.</p> <p>14        MS. Du LAC: Allyson du Lac,</p> <p>15 Assistant Federal Defender, representing</p> <p>16 Willie Smith.</p> <p>17        THE WITNESS: Jennifer Parker,</p> <p>18 administrative assistant, Holman</p> <p>19 Correctional Facility.</p> <p>20        MS. SIMPSON: Lauren Simpson,</p> <p>21 Office of the Attorney General, for the</p> <p>22 defendants.</p> <p>23        THE VIDEOGRAPHER: Will the</p>

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<p style="text-align: right;">Page 10</p> <p>1 court reporter please swear in the 2 witness. 3 4 JENNIFER PARKER, 5 being first duly sworn, 6 was examined and testified as follows: 7 8 THE COURT REPORTER: Thank you. 9 And, attorneys, usual 10 stipulations? 11 MR. PALOMBI: Yes, that's fine. 12 MS. SIMPSON: Yes, ma'am. 13 Before we begin, pursuant to the 14 agreement, we would like to designate 15 this deposition confidential. 16 17 EXAMINATION BY MR. PALOMBI: 18 Q. Good morning, Ms. Parker. 19 A. Good morning. 20 Q. If there are -- if there are -- 21 at any time if there's a question you 22 don't understand or you can't hear me, 23 please stop me. I'll -- I'll repeat it.</p>	<p style="text-align: right;">Page 12</p> <p>1 A. -- files. 2 Q. And what was your position at 3 the Department of Corrections before this 4 one? 5 A. I was the assistant warden 6 secretary before this position. 7 Q. And -- 8 A. And -- 9 Q. -- before that? 10 A. Before that, captain's 11 secretary. And before that, I was shift 12 clerk for a brief moment. And before 13 that, I was a mailroom clerk. 14 Q. Okay. And you -- you took over 15 your present position when? 16 A. May 1st, 2013. 17 Q. Okay. You took over for Ms. 18 Godwin? 19 A. Yes. Yes, sir. 20 Q. All right. So you were in this 21 position as the warden's secretary in 22 June of 2018; correct? 23 A. Yes, correct.</p>
<p style="text-align: right;">Page 11</p> <p>1 If I -- you know, "I don't know" is an 2 acceptable answer to a question, so if 3 you don't know, just say you don't know. 4 A. Yes. 5 Q. First of all, what is your -- I 6 believe you stated it, but what is your 7 present title? 8 A. Administrative Assistant III, 9 assistant warden secretary -- I'm sorry, 10 warden secretary. 11 Q. I was going to say, don't demote 12 yourself. We -- we really know "run the 13 prison" is the real title. But what are 14 those job responsibilities? 15 A. I just assist the warden in 16 whatever way needed, be it paperwork, 17 memos, handling personnel issues, 18 whatever -- basically, whatever comes up. 19 Q. Are you in charge of keeping 20 basically the files for the prison, paper 21 records? 22 A. I keep the personnel or staff -- 23 Q. Okay.</p>	<p style="text-align: right;">Page 13</p> <p>1 Q. Okay. Do you remember -- I'll 2 take you back to the last week of June of 3 2018. Do you remember a unusual 4 visitation that week? 5 A. Yes, sir. I'm not particular on 6 the date, but I remember there was -- the 7 last week in June, there was a particular 8 visitation. 9 Q. And that -- that visitation 10 involved -- and just to clarify, you are 11 the person that all visits have to be 12 arranged through? 13 A. Correct, yes, sir. I schedule 14 all the legal -- the legal visits. 15 Q. And that visit involved 16 approximately 30 to 40 death row inmates? 17 A. Well, according to my records 18 and my recollection, I don't have -- did 19 not schedule any particular inmates. I 20 scheduled for the federal defenders to 21 come to see some inmates. And I didn't 22 have the -- the list of names. 23 Q. How did --</p>

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<p style="text-align: right;">Page 14</p> <p>1 A. It was a special -- special 2 visit. 3 Q. How did that list get provided, 4 the -- the names of the inmates who came 5 to visit? 6 A. I am not altogether sure. I 7 just knew I blocked off a section of time 8 in my appointment book for the special 9 visit. 10 Q. And -- 11 A. But I'm not sure how the names 12 -- who provided the names. 13 Q. Did -- by the way, just did you 14 review any documents prior to this 15 deposition? 16 A. No more than what our legal 17 counsel asked for. 18 Q. So, let's go back to that. So 19 we go -- go back to that week. The -- 20 this visit happened with -- with 21 attorneys from the federal defenders' 22 office, and that included me and Mr. 23 Hahn. And after those visits were over,</p>	<p style="text-align: right;">Page 16</p> <p>1 did you get some of those forms in from 2 other inmates? 3 A. Yes, sir. 4 Q. Okay. Now, also, after that 5 visit, were you ever tasked with making a 6 number of copies of that form, of a blank 7 version of that form? 8 A. No. No, sir. 9 Q. Did -- were you aware that the 10 warden asked that that form -- a blank 11 version of that form be passed out to all 12 death row inmates? 13 A. No, sir. I'm -- I'm not aware 14 of that. I just -- and when they were 15 sent to me, I'm not sure where they came 16 from. I knew some came in the mail, you 17 know, to the inmates. But I'm not sure 18 where all of the rest of them came from. 19 I'm not sure. 20 Q. But when you got them, you filed 21 them -- you filed -- 22 A. Yes. I put -- 23 Q. -- the originals and sent copies</p>
<p style="text-align: right;">Page 15</p> <p>1 we did -- were you given forms that were 2 signed by inmates opting into nitrogen 3 hypoxia? 4 A. Yes, sir. 5 Q. What did you do with those 6 forms? 7 A. I actually have those forms in a 8 file, and I sent -- scanned a copy of 9 each file to our legal counsel. And I 10 got the original -- I have the original 11 in a file. 12 Q. And was it sent -- did you send 13 those files just generically to general 14 counsel for the department, or was there 15 a specific contact? 16 A. Was there -- excuse me? I 17 couldn't understand. 18 Q. A specific contact person that 19 you sent those files to? 20 A. A specific contact person. 21 Q. Who was that person? 22 A. That was Mr. Joseph Stewart. 23 Q. Thank you. So after that visit,</p>	<p style="text-align: right;">Page 17</p> <p>1 to Mr. Stewart? 2 A. Yes, sir. I date-stamped them 3 when I received them and sent the -- 4 scanned and sent the -- a copy to Mr. 5 Stewart. 6 Q. You said earlier -- you said 7 earlier that, you know, you're the person 8 who arranges the legal visits. Do you -- 9 A. Yes, sir. 10 Q. Do you also arrange visits for 11 anyone else that's coming to Holman? 12 Contractors, experts, anything like that? 13 A. Just experts that are scheduled 14 by the attorneys. But contractors, no. 15 Q. So they -- they just show up. 16 Do they make any kind of arrangements 17 with anyone to show up? 18 A. The contractors? 19 Q. Yes. 20 A. I believe they have to -- 21 whoever they're coming -- what they're 22 coming for, it has to be cleared through 23 the warden.</p>

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<p style="text-align: right;">Page 18</p> <p>1 Q. Okay. But in general, if 2 somebody is coming to see an -- an inmate 3 at the facility, they must go through 4 you? 5 A. Correct. 6 Q. Okay. So, was it -- it was 7 always -- were you specifically told by 8 the warden that -- that you were to keep 9 all these forms and what you were to do 10 with them? 11 A. Not specifically by the warden. 12 It was -- I received an -- this 13 information from Mr. Stewart to -- once 14 we received them, to make sure I sent him 15 a copy. And I just automatically keep 16 all to hang on to the originals. 17 Q. Okay. 18 A. And I just put them in the file, 19 secured file. 20 Q. Do you remember any inmate that 21 tried to rescind an opt-in form? 22 A. I have. I believe there was 23 maybe one I recall. And I have that --</p>	<p style="text-align: right;">Page 20</p> <p>1 Q. So I want to switch to something 2 else, and that's concerning forms that 3 are provided inmates through -- 4 concerning the Americans With 5 Disabilities Act. Are you the person who 6 keeps any forms, any forms that are 7 submitted asking for an accommodation? 8 A. No, sir. 9 Q. So those forms do not go to the 10 warden's office? 11 A. If they come to the warden's 12 office, I'm not the person that retains 13 them. I don't -- I'm not the person that 14 handles the ADA forms. So, you know, if 15 they came up to her for whatever reason, 16 or him, once the warden did whatever they 17 needed to do, she would send it back to 18 whoever it's supposed to go to. 19 Q. Who is the person -- who do you 20 understand is the person that's supposed 21 to keep all those forms? 22 A. The ADA coordinator. 23 Q. Do you -- and the present ADA</p>
<p style="text-align: right;">Page 19</p> <p>1 that information as well rescinding. 2 Q. And was their communication with 3 whether that was going to be allowed? 4 Did -- were you involved in communicating 5 that information to Mr. Stewart or to the 6 warden, which was Cynthia Stewart at the 7 time? 8 A. No. I just -- once I received 9 that -- the notice that he wanted to 10 rescind, I sent that copy as well to Mr. 11 Stewart and just filed the original. 12 Q. Okay. 13 A. Document sending. 14 Q. Just out of curiosity, have you 15 ever met Willie Smith? 16 A. Excuse me? 17 Q. Have you ever met Willie Smith? 18 A. Not personally met him. Just he 19 was brought up to the warden's office I 20 think sometime this year. 21 Q. Possibly when they read him the 22 execution warrant? 23 A. Yes, sir.</p>	<p style="text-align: right;">Page 21</p> <p>1 coordinator is Mr. Lewis? 2 A. Yes, sir. 3 Q. And before that, do you remember 4 Ms. Phnita Jackson? 5 A. Yes, I remember her. 6 Q. And she was -- do you remember 7 the other ADA coordinators? 8 A. No. I think she -- Ms. -- Ms. 9 Jackson was the -- that's the only person 10 that I know that officially held the 11 title, as far as I remember. 12 Q. Were there interim people in 13 between Ms. Jackson and Mr. Lewis? 14 A. Yes. Mr. William DeSpain, who 15 no longer works for the department, kind 16 of stepped in and filled in. 17 Q. So he was in the -- he was in 18 between those two? 19 A. Yes. He -- he was actually 20 classification supervisor. He just 21 filled in to -- to keep that paperwork 22 done. 23 Q. Okay. So I want to -- I want to</p>



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<p style="text-align: right;">Page 22</p> <p>1 clar- -- clarify, or I want to attempt to  2 clarify one thing. So you did not have  3 anything to do with passing out blank, or  4 copying or anything with blank copies of  5 forms distributed to inmates, death row  6 inmates?  7 A. No, sir.  8 Q. When something is distributed to  9 death row inmates, to all the inmates,  10 whether it's a form or something like the  11 newsletter, how is that done?  12 A. I'm not sure. I'm not sure if  13 the shift commander or the captain -- I'm  14 really not sure because I only work up  15 front. I don't know too much of anything  16 on how things are done in the -- in the  17 back.  18 Q. So, did you -- were you aware  19 that those forms were passed out?  20 A. No. Like I said, I'm not sure.  21 As far as the forms about the election?  22 Q. Uh-huh. The forms about --  23 sorry, I should have made that clear.</p>	<p style="text-align: right;">Page 24</p> <p>1 not sure.  2 Q. But they're not handled by you?  3 A. No, sir.  4 Q. All right.  5 A. No, sir.  6 Q. In January of 2019, one of the  7 things -- well, let me preface this. One  8 of the things you listed as your duties  9 is that you occasionally type affidavits.  10 In early 2019, I believe January,  11 possibly February, did you type an  12 affidavit for Captain Emberton?  13 A. I might have. I type so many,  14 I'm sure I have.  15 Q. That would have been about --  16 about passing out the opt-in forms.  17 A. I'm really not sure. I would  18 have to look back over my affidavits, but  19 I -- I might have, or he might have  20 typed -- some type -- some he typed  21 himself, but I can't recall which  22 particular ones.  23 Q. Okay. So he's -- so it's fair</p>
<p style="text-align: right;">Page 23</p> <p>1 The forms about the nitrogen election,  2 yes.  3 A. No, sir. Like I said, I -- I  4 didn't know. I'm -- I'm assuming that  5 some were brought by the federal  6 defenders. And like I said, some, I was  7 told, came in the mail. I'm not sure how  8 any others got to them.  9 Q. Did the warden ever ask you to  10 do anything -- ask you specifically to do  11 anything related to the blank forms or  12 anything beyond what you've asked us? Or  13 did that all come from Mr. "Jody" Joseph  14 Stewart?  15 A. I can't recall the warden asking  16 me to do any- -- anything with the forms.  17 Q. So, now I'll -- I'll switch --  18 I'll switch back to -- I'll switch back  19 to the -- the ADA forms. So those forms  20 are all handled -- are those forms all  21 handled by shift commanders or captains  22 and the ADA coordinator?  23 A. I would assume so. I'm really</p>	<p style="text-align: right;">Page 25</p> <p>1 to say you do a lot of affidavits?  2 A. Yes, sir.  3 Q. Okay. So that's also part of  4 your -- that's also part of your duties?  5 A. Yes, sir.  6 Q. So -- okay. Is part of your  7 duties, does it involve ordering things  8 -- ordering things for the prison or  9 handling how stuff gets ordered, the  10 paperwork involved?  11 A. No, sir.  12 Q. Where does that -- where does  13 that go through?  14 A. Any ordering of supplies or  15 items for the facility is handled through  16 our business office.  17 Q. Would that include also things  18 for the law library?  19 A. It might. I don't have anything  20 to do with the law library, so I'm not  21 sure what all supplies is needed. So I'm  22 not sure, you know, what that would  23 involve. So I'm not sure if that -- it's</p>

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<p style="text-align: right;">Page 26</p> <p>1 possible.</p> <p>2 Q. So, you said earlier that -- you</p> <p>3 said earlier that if a -- if a contractor</p> <p>4 or somebody like that is coming in, that</p> <p>5 person doesn't arrange to come in through</p> <p>6 you. They arrange that through whoever</p> <p>7 they're working with?</p> <p>8 A. Correct. If some -- if a</p> <p>9 contractor's coming here like for the</p> <p>10 lights, that's something that maintenance</p> <p>11 -- so the maintenance would get with the</p> <p>12 warden and say that a contractor needs to</p> <p>13 come in and work on the lights outside.</p> <p>14 So it just depends on what particular</p> <p>15 area, you know, they're -- the contractor</p> <p>16 needed to work on.</p> <p>17 Q. You might know -- you might know</p> <p>18 they're there, but they don't arrange it</p> <p>19 through you?</p> <p>20 A. Correct.</p> <p>21 Q. Would that also include</p> <p>22 employees of the department's IT section?</p> <p>23 If they were coming in to do something</p>	<p style="text-align: right;">Page 28</p> <p>1 A. Yes, sir.</p> <p>2 Q. Okay. By the way, have you ever</p> <p>3 been deposed before?</p> <p>4 A. No, sir.</p> <p>5 Q. Okay. So when -- and going back</p> <p>6 to -- to 2018, that -- that whole week,</p> <p>7 or that week when that -- when that visit</p> <p>8 happened, was Mr. Joseph Stewart ever at</p> <p>9 Holman?</p> <p>10 A. I can't recall. I can't recall</p> <p>11 from back.</p> <p>12 Q. Okay. But did he usually call</p> <p>13 or e-mail the warden?</p> <p>14 A. Both. He would call or e-mail.</p> <p>15 Q. The warden's phone calls all</p> <p>16 come through you; correct?</p> <p>17 A. No, sir. He has a direct -- he</p> <p>18 has a direct line. If he's not in the</p> <p>19 office, I would pick up his line, but he</p> <p>20 has his -- his own line.</p> <p>21 Q. Okay. And when you sent the</p> <p>22 forms to him, did you e-mail those, fax</p> <p>23 those, mail them? How did you do that?</p>
<p style="text-align: right;">Page 27</p> <p>1 with a computer in the law library, would</p> <p>2 they arrange that through you? Or who</p> <p>3 would they arrange that through?</p> <p>4 A. They would arrange that through</p> <p>5 the warden. It would say -- you know,</p> <p>6 let us know that they need to come and do</p> <p>7 whatever, and they would just let the</p> <p>8 warden know that they're coming.</p> <p>9 Q. So -- so if it's an employee of</p> <p>10 the department, that person just</p> <p>11 basically could show up?</p> <p>12 A. They could. But normally, they</p> <p>13 would also check in, I mean, beforehand,</p> <p>14 just to make sure that someone would be</p> <p>15 there to let them -- get them to where</p> <p>16 they need to go to work on a particular</p> <p>17 area.</p> <p>18 Q. So if you have to go somewhere</p> <p>19 other than the front offices, you would</p> <p>20 have to be escorted?</p> <p>21 A. Correct.</p> <p>22 Q. To -- to that lo- -- to that</p> <p>23 location?</p>	<p style="text-align: right;">Page 29</p> <p>1 A. I e-mailed.</p> <p>2 Q. Okay. So any -- any of the</p> <p>3 signed opt-in forms were scanned in and</p> <p>4 e-mailed to him?</p> <p>5 A. Yes, sir.</p> <p>6 Q. Okay. And just clarifying, you</p> <p>7 don't remember if he was actually</p> <p>8 physically at Holman that week?</p> <p>9 A. I -- I can't recall, because,</p> <p>10 you know, you -- like I said, I'm up</p> <p>11 front on phone calls, and so I don't</p> <p>12 really see everyone that comes in.</p> <p>13 Q. Okay.</p> <p>14 A. So he might have -- he might</p> <p>15 have been there, but I just don't recall.</p> <p>16 Q. Not everybody stops and waves</p> <p>17 like we do when we come in?</p> <p>18 A. No, sir. No, sir. Sometimes</p> <p>19 I'm on the phone and I'm just paying</p> <p>20 attention to the phone and don't really</p> <p>21 see who comes by.</p> <p>22 Q. And would it -- actually, how</p> <p>23 often would -- would Mr. Joseph Stewart</p>




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<p style="text-align: right;">Page 30</p> <p>1 come to the facility?  2 A. Not very often.  3 Q. All right. So --  4 A. Not very --  5 Q. -- it would be a rare thing if  6 he showed up?  7 A. Yes. You know, he wouldn't just  8 show up unless it was just something  9 particular.  10 Q. All right.  11 MR. PALOMBI: Lauren, can we  12 take a break for about five minutes?  13 MS. SIMPSON: Sure.  14 Q. Ms. -- Ms. Parker, we're going  15 to take a break for about five minutes,  16 and then we'll come -- come back on the  17 record.  18 A. Yes, sir.  19 THE VIDEOGRAPHER: Going off the  20 record. The time is 10:24 a.m.  21 (Break taken.)  22 THE VIDEOGRAPHER: We're going  23 back on the record. The time is 10:34</p>	<p style="text-align: right;">Page 32</p> <p>1 death row but have been resentenced to  2 life without parole treated? Are they  3 treated as death row inmates or general  4 population if they're --  5 A. They're -- they're -- once  6 they're resentenced, they're population.  7 But a lot of times, they're transferred  8 to another facility, so we don't really  9 have a whole lot of interaction once  10 they're resentenced.  11 Q. You said you maintain the  12 personnel files. Do you maintain inmate  13 administrative files as well?  14 A. No, sir.  15 Q. Who maintains those?  16 A. As far as --  17 Q. Just any -- the generic inmate  18 administrative files, the -- the files  19 that -- you know, the documents that are  20 signed when they arrive at the facility,  21 things like that, who keeps those?  22 A. They're -- they're scanned into  23 their file through classification, but I</p>
<p style="text-align: right;">Page 31</p> <p>1 a.m.  2 Q. (By Mr. Palombi) Thank you.  3 Ms. Parker, I just have a few  4 more questions on a --  5 A. Sure.  6 Q. -- couple of subjects. Just is  7 there a rule about how many visits are  8 allowed to be going on on the visiting  9 yard at one time?  10 A. Yes, sir. We try just to book  11 no more than three.  12 Q. Are there often exceptions to  13 that rule?  14 A. Not often. It just depends on  15 if -- if it's normally from -- someone  16 from the same firm needs to see someone  17 different, we'll -- we'll put maybe four  18 out, you know, four at -- at the top.  19 But no death row and population at the  20 same time at all. You know, if we got  21 population, we'll just have population  22 inmates. Death row, it's just death row.  23 Q. And how are inmates who were on</p>	<p style="text-align: right;">Page 33</p> <p>1 -- I believe the main -- I don't know if  2 they keep the actual paper files here or  3 are they sent to central records. I'm  4 not sure. But I know our classification  5 department, if it's something that they  6 signed while they're here, it is scanned  7 into their file on the computer, and they  8 may maintain the paper file here  9 somewhere as well --  10 Q. The --  11 A. -- in classification --  12 Q. Oh, go ahead. Finish, please.  13 A. I said, in classification  14 office.  15 Q. The rule about how many inmates  16 can visit at once, was that in place in  17 June 2018?  18 A. Yes, sir. That's been in place  19 since -- I mean, when I took the  20 position, I was told that. Even before I  21 took the position, when I filled in for  22 Ms. Godwin, that was -- I was always told  23 that. So whenever I scheduled, you know,</p>

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<p style="text-align: right;">Page 34</p> <p>1 filled in for her and I scheduled 2 appointments, I had to make sure I didn't 3 schedule any more than that. 4 Q. Uh-huh. If the warden has a 5 project where the warden needs like a lot 6 of copies made of something, is that 7 something you do or is that something 8 that someone else does? 9 A. Well, if I'm not busy doing 10 something else, I would. But sometimes 11 she would have someone from another 12 office help her, you know, make copies if 13 it's a lot of copies, because sometimes 14 I'm doing affidavits or legal visits or 15 researching for the affidavits. So it 16 just depends on what it is. 17 Q. Who fills in for you if you're 18 -- if you're busy or not available or 19 something? You do get to go on 20 vacations, I presume. 21 A. Well, the -- we have another 22 secretary who kind of fills in with just 23 scheduling appointments. But as far as</p>	<p style="text-align: right;">Page 36</p> <p>1 that box came from or who provided him 2 that box of forms? 3 A. No, sir. I have no knowledge of 4 that. 5 Q. I want to take you to another 6 incident. Do you remember being asked to 7 pull or find any opt-in forms for a 8 Jarrod Taylor? 9 A. I might have been. Can't really 10 recall right now, but it's possible. I 11 would have to look back over my -- my 12 documentation. 13 Q. Did you -- when you got an 14 opt-in form from an inmate, did you send 15 that to anyone other than Mr. Stewart? 16 A. No, sir. 17 Q. And what did you do -- if you 18 received a form to opt in after June 19 2018, what did you do with that form? 20 A. If I got one, I would put it in 21 the file with the rest of the forms, if I 22 got any. I don't recall ever getting 23 any. If I did, they would all be kept in</p>
<p style="text-align: right;">Page 35</p> <p>1 the other paperwork, they're not familiar 2 with certain things that I do because I 3 -- they have not been trained and I've 4 not been given the okay to train. So I 5 sometimes go on vacation, and sometimes I 6 don't. 7 Q. So if you're -- 8 A. I really don't have a backup. 9 Q. Okay. That was -- that was 10 going to be my next question. If you are 11 not there, there's -- there's no backup 12 person? 13 A. No, sir. We have another -- 14 like I said, we have another secretary 15 now, but she's out sick. So she just 16 does certain things like schedule visits, 17 and that's it. She doesn't do the 18 affidavits or anything else. 19 Q. We understand that when blank -- 20 the blank opt-in forms were handed out to 21 the inmates in June of 2018, that they 22 were in a box for Captain Emberton to 23 hand out. Would you have known where</p>	<p style="text-align: right;">Page 37</p> <p>1 the same location. 2 Q. Did -- were you instructed to do 3 anything different with those forms if 4 you received them after June 2018? 5 A. No, sir. 6 Q. So if you received one of those 7 forms today, you'd send it on to Mr. 8 Stewart like you were instructed to back 9 then? 10 A. Yes, sir. And put the original 11 in the -- in the file. 12 Q. Did you create a list of anybody 13 who opted in and who submitted a form to 14 the warden? 15 A. No, sir, I didn't. I did not 16 create a list. 17 Q. So you -- basically, you got the 18 forms, sent the forms to Mr. Stewart, and 19 you then put the forms in a file at 20 Holman? 21 A. Yes, sir. 22 Q. Were there -- and the warden 23 never had you do anything else with those</p>

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<p style="text-align: right;">Page 38</p> <p>1 forms?                  2 A. No, sir.                  3 MR. PALOMBI: That's all the                  4 questions I have right now. I may have a                  5 couple after Lauren is done, assuming                  6 Lauren has questions.                  7 MS. SIMPSON: Just very briefly                  8 here.                  9                  10 EXAMINATION BY MS. SIMPSON:                  11 Q. Ms. Parker, you said earlier                  12 today that some of the election forms                  13 came in the mail. By that, do you mean                  14 the U.S. mail or do you mean mail                  15 collected by the tier runners?                  16 A. No. Mail -- the U.S. mail,                  17 FedEx and --                  18 Q. U.S. mail?                  19 A. Yes.                  20 Q. Okay.                  21 A. Mostly FedEx because they got --                  22 had to get here quickly, so they were --                  23 we had a -- a large FedEx.</p>	<p style="text-align: right;">Page 40</p> <p>1 off the record. The time is 10:43 a.m.                  2 This concludes today's testimony given by                  3 Jennifer Parker. The total number of                  4 media units is one and will be retained                  5 by Veritext Legal Solutions Alabama.                  6                  7 END OF DEPOSITION                  8 (10:43 a.m.)                  9                  10                  11                  12                  13                  14                  15                  16                  17                  18                  19                  20                  21                  22                  23</p>
<p style="text-align: right;">Page 39</p> <p>1 Q. Okay. So you did receive some                  2 of these inmate opt-in forms by FedEx?                  3 A. They -- well, the inmates                  4 received them through FedEx, and then                  5 they sent them to us once they signed                  6 them.                  7 Q. Okay. And just in general, do                  8 you have any involvement in making any                  9 sort of decisions about ADA requests for                  10 accommodation?                  11 A. No. No, I do not.                  12 Q. Okay.                  13 MS. SIMPSON: That's all I have,                  14 John.                  15 MR. PALOMBI: I don't have                  16 anything else.                  17 Thank you, Ms. Parker.                  18 THE WITNESS: You're welcome.                  19 MS. SIMPSON: Thank you, Ms.                  20 Parker.                  21 THE WITNESS: You're welcome.                  22 Thank you.                  23 THE VIDEOGRAPHER: We're going</p>	<p style="text-align: right;">Page 41</p> <p>1 CERTIFICATE                  2 STATE OF ALABAMA )                  3 COUNTY OF JEFFERSON )                  4 I hereby certify that the above                  5 and foregoing proceeding was taken down                  6 by me by stenographic means, and that the                  7 content herein was produced in transcript                  8 form by computer aid under my                  9 supervision, and that the foregoing                  10 represents, to the best of my ability, a                  11 true and correct transcript of the                  12 proceedings occurring on said date at                  13 said time.                  14 I further certify that I am                  15 neither of counsel nor of kin to the                  16 parties to the action; nor am I in                  17 anyway interested in the result of said                  18 case.                  19                   20 LANE C. BUTLER, RPR, CRR, CCR                  21 CCR# 418 -- Expires 9/30/21                  22 Commissioner, State of Alabama                  23 My Commission Expires: 2/11/25</p>

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[party - signed]

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate.

The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

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THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

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# Exhibit 18

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

MATTHEW REEVES

Plaintiff,

v.

CASE NO: 2:20-CV-27-RAH

JEFFERSON DUNN, et al.,

Defendants.

\*\*\*\*\*

MOTION HEARING

\*\*\*\*\*

BEFORE THE HONORABLE R. AUSTIN HUFFAKER, JR., UNITED STATES DISTRICT JUDGE, at Montgomery, Alabama, on Thursday, December 9, 2021, commencing at 8:34 a.m.

APPEARANCES

FOR THE PLAINTIFF:

Mr. Spencer Jay Hahn  
Ms. Allyson Renee DuLac  
Mr. John Anthony Palombi  
Ms. Lucie T. Butner  
FEDERAL DEFENDERS  
817 South Court Street  
Montgomery, Alabama 36104

FOR THE DEFENDANTS:

Mr. Richard Dearman Anderson  
Ms. Beth Jackson Hughes  
Ms. Polly Spencer Kenny  
OFFICE OF THE ATTORNEY GENERAL  
Capital Litigation Division  
501 Washington Avenue  
Montgomery, Alabama 36130

**PL EX 18**

1 these forms?

2 MR. ANDERSON: I wish we knew the details of that,  
3 Your Honor. We do not. We are not aware of anyone who has  
4 that knowledge.

5 THE COURT: We don't know who made the instruction; we  
6 just know that it was made?

7 MR. ANDERSON: We know that Ms. Price recalls  
8 receiving that instruction -- not Ms. Price. I'm sorry. I  
9 misspoke. Ms. Stewart.

10 JEFF EMBERTON

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

14 DIRECT EXAMINATION

15 BY MS. DULAC:

16 Q. Captain Emberton, how are you?

17 A. Pretty good, ma'am. How are you?

18 Q. I'm good. Thank you. Can you please state your name and  
19 spell it for the court reporter.

20 A. Jeff Emberton, E-m-b-e-r-t-o-n.

21 Q. And can you state your occupation?

22 A. Correctional captain.

23 Q. And how long have you held that position?

24 A. Since 2016.

25 Q. And in preparation for your testimony today, did you

1 review any documents?

2 A. No, ma'am.

3 Q. And did you meet with anyone?

4 A. No. I spoke with the attorneys. That's it.

5 Q. And we've spoken before so I won't go into all the  
6 questions we've gone through before, but just for the judge's  
7 reference, how long have you worked for the Department of  
8 Corrections?

9 A. 22 and a half years.

10 Q. And at what point did you work at Holman Correctional  
11 Facility?

12 A. From 2016 to 2019.

13 Q. And at what point or how long did you work on death row,  
14 specifically?

15 A. The whole three years I was there.

16 Q. And did you always have the same job classification?

17 A. Yes, ma'am. While at Holman?

18 Q. Yes, while you were at Holman.

19 A. Yes, ma'am.

20 Q. Have you had training on the Americans with Disabilities  
21 Act?

22 A. Yes, ma'am.

23 Q. And how often do you or have you had that training?

24 A. We get refresher training every year.

25 Q. And is that training for you as an employee or for you to



1 recognize or how to assist persons that are in custody with the  
2 Department of Corrections?

3 A. I mean, it's just part of our annual training we go to  
4 every year.

5 Q. Have you ever assisted someone to complete an ADA  
6 accommodations request?

7 A. Not that I recall.

8 Q. In June of 2018, you were contacted by your warden,  
9 Cynthia Stewart?

10 MR. ANDERSON: Your Honor, I don't want to slow things  
11 down unnecessarily, but I do want to object to the leading  
12 nature of some of these questions.

13 THE COURT: Well, the objection's overruled on this  
14 one. We just need to move some of these things along. I don't  
15 think this is really a disputed issue.

16 Q. (Ms. DuLac, continuing:) Captain, why don't you -- and  
17 I'm sure you know where we're going because this has been the  
18 subject of many conversations between you and I. What I'd like  
19 for you to do is just tell the Court in June of 2018, you were  
20 contacted by Warden Stewart regarding an election form, and she  
21 instructed you to distribute the election form. Can you tell  
22 the Court what she advised you to do and what you did, please?

23 A. She advised me to make sure that every inmate on death row  
24 received an election form and an envelope. I proceeded to  
25 death row and made sure that every inmate on death row received

1 an envelope and an election form.

2 Q. And what did -- how did you make sure that every inmate  
3 received it?

4 A. I personally handed them the form and the envelope.

5 Q. And did every person take the form and the envelope out of  
6 your hand?

7 A. Some of them did. Some of them were asleep and I just  
8 tapped them on their foot and laid the form in the bars of  
9 their cell door.

10 Q. So you may or may not have, in fact, made eye contact with  
11 every person?

12 A. I may or may not.

13 Q. And did you have a list that you kept of all the persons  
14 that were on death row that day that you gave a form to?

15 A. No.

16 Q. Do you have any records of any kind of who you gave a form  
17 to?

18 A. No.

19 Q. And did you make any statements to the inmates as you gave  
20 them the form?

21 A. Other than -- I can't remember exactly what it was my  
22 timeframe was, but I gave them a timeframe of when I needed the  
23 forms back.

24 Q. And when was that?

25 A. I can't recall.

1 Q. Was it -- could you give me an approximate time? Was it  
2 that day? Was it next month?

3 A. If I had to -- I think it was at the end of the week. I'm  
4 not totally correct or sure if it was the end of the week or  
5 not.

6 Q. And what day did you perform this task?

7 A. On the date they were given to me.

8 Q. The day after they were given to you?

9 A. No. The day of.

10 Q. Oh, the day of. Okay.

11 A. Yes.

12 Q. And when were they given to you?

13 A. That morning.

14 Q. And what day of the month were they given to you?

15 A. June.

16 Q. June. And do you remember June what?

17 A. I don't remember the date.

18 Q. So you know that it was June of 2018, but you don't  
19 remember what day. Do you remember what day of the week?  
20 Monday? Tuesday?

21 A. I do not recall.

22 Q. Did you work the weekends?

23 A. I did not.

24 Q. So it would have been Monday through Friday?

25 A. Yes, ma'am.

1 Q. Did you work at night or during the day?

2 A. During the day.

3 Q. I'm sorry?

4 A. During the day.

5 Q. So it would have been during the daytime hours Monday  
6 through Friday sometime in June of 2018?

7 A. If I'm correct, yes.

8 Q. And did anyone ask you any questions?

9 A. Not really.

10 Q. And do you have any memory of any specific inmates that  
11 you handed the form to?

12 A. No, not really. I mean, I don't have -- they all got one.  
13 I don't have anybody that just stands out in my mind that --

14 Q. And to your knowledge, were any of the inmates out of the  
15 facility that day?

16 A. I can't recall.

17 Q. If they were out of the facility, would they have received  
18 a form?

19 A. Probably not. But they don't go anywhere very often  
20 anyway that they're not back by the end of the day.

21 Q. Let's say they were at a free-world hospital, for example.  
22 Surgery. Would they have gotten a form when they came back?

23 A. I wouldn't have given them one.

24 Q. If they were at court, for example, where they would have  
25 been at a county jail for several days, would they have gotten

1 a form when they came back?

2 A. If they were out that week, probably not.

3 Q. Okay. Did you provide these forms to the warden at  
4 Donaldson?

5 A. I did not.

6 Q. Did you provide these forms to the warden at Tutwiler?

7 A. No, ma'am.

8 Q. Do you know at the time if there was a death row inmate at  
9 St. Clair?

10 A. No, ma'am.

11 Q. Did you ever speak with Warden -- I believe his name is  
12 Gordy at the Donaldson Correctional Facility?

13 A. No, ma'am.

14 Q. Did you speak with the warden at Tutwiler?

15 A. No, ma'am.

16 Q. Did Warden Stewart ask you what you said to the inmates  
17 when you handed out the form?

18 A. No, ma'am.

19 Q. Do you have any training in identifying persons with  
20 cognitive deficiencies?

21 A. No, ma'am.

22 Q. You've recently filed an affidavit in this case.

23 A. Yes, ma'am.

24 Q. What were the circumstances of you being asked to file  
25 this affidavit or draft an affidavit?

1 A. I was just asked by one of the attorneys to -- if I knew  
2 who Matthew Reeves was and if I had any contact while I was on  
3 death row, and I said yes, sir. And they said that he needed  
4 an affidavit based on the same case as before.

5 Q. And did you draft this affidavit yourself?

6 A. I think I actually wrote it out and sent it to him and it  
7 was -- they modified it a little bit. I think the format was  
8 off.

9 Q. And you discuss that Mr. Reeves was a problematic inmate.  
10 What did you mean by that?

11 A. Inmate Reeves stayed in a lot of trouble. He did not get  
12 along well with other inmates. He stayed on what we call  
13 single walk for a long time. I tried to give Inmate Reeves  
14 several opportunities to, I guess, be a little bit more  
15 productive. He was a tier runner for a short period of time,  
16 and he just -- he was not a good fit.

17 Q. Do you remember if he was on P block in June of 2018?

18 A. He was.

19 Q. And what's the distinction on P block as far as -- I'm  
20 sorry. That was a terrible question.

21 If you're on P block, are you allowed interaction with  
22 others or are you in segregation or how does that work?

23 A. Death row doesn't really technically have a segregation  
24 because they're all locked down 23 hours a day, but the ones  
25 that cannot function in a tier with other inmates, that's where

1 we put them because they are isolated.

2 Q. So at the time Mr. Reeves would have been isolated from  
3 other inmates?

4 A. Other than the other ones on that tier that -- you know,  
5 we had about 20-something inmates on that tier at the time that  
6 just could not live with any of the other inmates.

7 Q. And so I guess maybe my question is how does P block  
8 differ from the other tiers as far as inmates having  
9 interaction with others?

10 A. P block is off by itself.

11 Q. Okay.

12 A. When you -- and it's kind of hard to picture. If you walk  
13 it, when you go on to a tier, you have two sides with a two  
14 story on each side, an upstairs and a downstairs. And P block  
15 on that side, you've only got that one side. There's no one  
16 else around them. That upstairs and the downstairs is all  
17 there is.

18 Q. Do you remember when you passed out those forms if you did  
19 P block first or if you did it last or --

20 A. I don't recall.

21 MS. DULAC: I think that's all I have for today.

22 Thank you.

23 THE COURT: Any cross?

24 CROSS-EXAMINATION

25 BY MR. ANDERSON:

1 Q. Good afternoon, Captain Emberton. I'm Rich Anderson. I  
2 represent the defendants here. I've got a few questions for  
3 you.

4 There's been some discussion in this case of duty logs or  
5 day logs from Holman. Would they routinely show all movements  
6 of inmates?

7 A. Not all the time.

8 Q. Okay. Might they show, you know, a certain number of  
9 inmates moved from one place to another but not who they were?

10 A. They can.

11 Q. And they might not even reflect an inmate's movement just,  
12 say, to the day room or something like that?

13 A. They may not.

14 Q. Now, you know -- when you were at Holman, you knew death  
15 row pretty well?

16 A. Yes, sir.

17 Q. You didn't need a list of inmates to find your way to  
18 every cell, did you?

19 A. No, sir.

20 Q. I assume -- did you just go from cell to cell until you  
21 covered the whole thing?

22 A. Yeah. Just depending on whichever mood I was in where I  
23 started, if I started at the back or the front. It just  
24 depends on how I wanted to do it that day.

25 Q. Now, you said that the inmates didn't really ask you any



1 questions about the form, but do you recall testifying in the  
2 Smith litigation that, in fact, some of the inmates had asked  
3 you some questions about -- and you offered an explanation of  
4 the form?

5 A. Some of them asked me, you know, when I walked up there  
6 what I had, or they made the comment -- when I told them, you  
7 know, they would all chime in, well, we ain't signing anything  
8 until we send it to our attorney. I mean, that was just  
9 general...

10 Q. Do you recall testifying that -- you said that the  
11 warden -- I'm sorry.

12 You told the inmates that the law had changed and now the  
13 inmates had a choice and that they needed to fill out the form?

14 A. Yes. They needed to sign it and give it back to me.

15 Q. So you offered that explanation to at least some of the  
16 inmates?

17 A. I made the announcement on each tier.

18 Q. On each tier, okay. I want to talk to you briefly about  
19 your affidavit, Captain Emberton. Do you recall that I  
20 actually e-mailed you a draft affidavit?

21 A. Actually, I do. Yes, sir.

22 Q. And asked you to look over it and make sure it agreed with  
23 what our conversation was and what your memory was; is that  
24 correct?

25 A. Yes, sir.

1 Q. And you signed it and sent it back to me, correct?

2 A. Yes, sir.

3 Q. How many affidavits have you signed or drafted in your  
4 career?

5 A. A whole lot.

6 Q. Okay. And you don't remember the circumstances of every  
7 one?

8 A. No, sir.

9 Q. Okay. But when you sign an affidavit, you want to make  
10 sure that it's correct. That's the important thing to you,  
11 true?

12 A. Yes.

13 Q. Now, you testified earlier that Mr. Reeves was not a good  
14 fit as a tier runner. Isn't it true that it's because  
15 Mr. Reeves was, among other things, scamming other inmates?

16 A. That's true.

17 Q. Okay. Was Mr. Reeves charging them for the services he  
18 was supposed to provide for free?

19 A. He was.

20 Q. Tell me a little bit about that.

21 A. Like I said before, the rest of the inmates are locked  
22 down for 23 hours a day, so they don't have a whole lot of  
23 access to anything. The microwave, the phone, the ice cooler,  
24 or anything like that, they don't have access. That's what the  
25 tier runners are for is to be able to run them errands for the

1 other inmates. Matthew Reeves would charge inmates to go do  
2 that stuff for them.

3 Q. So if an inmate wanted a plate of food taken to the  
4 microwave --

5 A. He'd charge them.

6 Q. And he's not supposed to do that?

7 A. No, sir.

8 Q. You were asked some questions about P block generally, and  
9 I think in your affidavit you indicated that the correction  
10 officers tend to have more interaction with people in P block  
11 than in other tiers, correct?

12 A. Yes, sir.

13 Q. Can you tell us kind of why that is?

14 A. Because not being an actual restrictive housing unit, it  
15 is our problematic inmates, the ones that we cannot -- that  
16 need to be isolated to where we can deal with them one on one.  
17 That's why they have a whole lot more, because you have those  
18 type of inmates over there throwing feces, throwing other  
19 stuff. I mean, they're constantly -- there's constantly  
20 something, an incident going on on that block.

21 Q. Now, Mr. Reeves specifically, you know him, correct?

22 A. Yes, sir.

23 Q. You have memories of him. Did he ever ask you to read  
24 anything for him?

25 A. No, sir.

1 Q. Did he ever tell you, Captain Emberton, I can't read?

2 A. Not that I recall.

3 Q. But some inmates do have problems reading, true?

4 A. Some do.

5 Q. And in your experience, oftentimes -- particularly on  
6 death row -- inmates will prefer to turn to each other for  
7 assistance?

8 A. That's correct.

9 Q. And, of course, particularly on death row again, they've  
10 all got their lawyers, right?

11 A. Yes, sir.

12 Q. And inmates have access to a telephone, correct?

13 A. Yes, sir.

14 Q. And they can make legal calls or personal calls, et  
15 cetera, as needed?

16 A. Yes, sir.

17 Q. Do you recall what you told the inmates to do with the  
18 form?

19 A. Not right off the top of my head.

20 Q. If you had previously testified that you told them to fill  
21 out the form and put it in the envelope, seal it, and you'd be  
22 back to collect it --

23 A. That sounds about correct.

24 Q. Did anybody ask you to read the form to them?

25 A. No, sir.

1 Q. Do the inmates ever ask you for legal advice?

2 A. They try.

3 Q. If an inmate asks you for legal advice, what do you tell  
4 them?

5 A. That's not in my scope of my job.

6 Q. Do you have any reason to believe that Matthew Reeves  
7 can't read?

8 A. No, sir.

9 Q. Or can't write?

10 A. No, sir.

11 Q. Are you aware of whether Mr. Reeves has, in fact,  
12 written -- made written communications to ADOC staff and Holman  
13 staff throughout his time at Holman?

14 A. Not that I'm aware. I mean, I've never received anything.

15 Q. Okay. At Holman, on Holman death row, the inmate policy  
16 manual, it's kept in the library, correct?

17 A. Yes, sir.

18 Q. If an inmate wanted a copy of it, can he get a copy of it?

19 A. He can.

20 Q. I just want to make sure I haven't missed something, so if  
21 you'll bear with me just a second, we can get you done.

22 Did any hall runners or tier runners assist you in passing  
23 out the forms?

24 A. No, sir.

25 Q. Okay. Is that because Warden Stewart had ordered you to

1 do it personally?

2 A. Yes, sir.

3 Q. And you take those kind of orders seriously?

4 A. Yes, sir.

5 Q. So if the warden tells you -- the big boss warden, Warden  
6 III -- tells you to hand one of these out to everybody, you're  
7 going to make sure you do that yourself?

8 A. Yes, sir.

9 Q. And in your experience, do inmates sometimes refuse to  
10 sign forms?

11 A. All the time.

12 Q. And inmates sometimes just don't want to cooperate with or  
13 have anything to do with the correctional officers?

14 A. That's true.

15 Q. Do they sometimes ignore you?

16 A. A lot of times.

17 Q. During your time at Holman death row, did you ever see any  
18 other inmate helping Mr. Reeves with reading?

19 A. No.

20 Q. Did you ever see any correctional officer helping him with  
21 reading?

22 A. No, sir.

23 Q. Did you ever see any of the mental health staff helping  
24 him with reading?

25 A. No, sir.

1 MR. ANDERSON: That's all I have, Your Honor.

2 THE COURT: Any redirect?

3 MS. DULAC: Briefly, I promise. I know every lawyer  
4 says that, but I mean it.

5 REDIRECT EXAMINATION

6 BY MS. DULAC:

7 Q. Captain Emberton, I think when we spoke a couple months  
8 back, we talked about the law library, and I know you had  
9 previously done a lot of work in there, and you mentioned to me  
10 that sometimes the computer does not always work there.

11 A. It depends. Sometimes it -- it goes in and out, correct.

12 Q. Right. So there might be times where a person doesn't  
13 always have access to information that's on the computer in the  
14 law library. Is that true?

15 A. At times.

16 Q. And you referenced that you sometimes have read to persons  
17 on death row. They've asked you to read things to them?

18 A. No, I have not.

19 Q. No, you have not?

20 A. Huh-uh.

21 Q. Okay. And then the last thing, you had mentioned that  
22 sometimes the guys, they kind of turn to each other if they  
23 need assistance?

24 A. Yes, ma'am.

25 Q. If Mr. Reeves is on P side, you mentioned that sometimes

1 those folks are not necessarily in the -- in a good way, right?

2 A. Yes, ma'am.

3 Q. They throw feces and other mental health issues, perhaps,  
4 so they may not turn to one another. Is that a fair statement?

5 A. No. Because when it comes down to legal stuff, when it  
6 comes down to death row stuff, legal stuff, they're going to  
7 find a way to communicate. They're going to lay down some  
8 common grounds and communicate about what each one's attorney  
9 says and stuff like that. They're going to communicate. Their  
10 reference comes to other prison stuff where they can't get  
11 along.

12 Q. I see. Okay. Thank you.

13 MR. ANDERSON: Nothing further from defendants, Your  
14 Honor.

15 THE COURT: You can be excused, Captain.

16 THE WITNESS: Thank you, sir.

17 THE COURT: Thank you.

18 Any further witnesses, counsel?

19 MR. HAHN: No, Your Honor. Thank you.

20 THE COURT: Let me ask you about your exhibits that  
21 you attached to your preliminary injunction. Are you offering  
22 those?

23 MR. HAHN: We are, Your Honor.

24 THE COURT: Are there any objections to those?

25 MS. HUGHES: No, Your Honor. And we'd also like to



# Exhibit 19

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

MATTHEW REEVES

Plaintiff,

v.

CASE NO: 2:20-CV-27-RAH

JEFFERSON DUNN, et al.,

Defendants.

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MOTION HEARING

\*\*\*\*\*

BEFORE THE HONORABLE R. AUSTIN HUFFAKER, JR., UNITED STATES DISTRICT JUDGE, at Montgomery, Alabama, on Thursday, December 9, 2021, commencing at 8:34 a.m.

APPEARANCES

FOR THE PLAINTIFF:

Mr. Spencer Jay Hahn  
Ms. Allyson Renee DuLac  
Mr. John Anthony Palombi  
Ms. Lucie T. Butner  
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FOR THE DEFENDANTS:

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**PL EX 19**

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Proceedings reported stenographically;  
transcript produced by computer

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(The following proceedings were heard before the Honorable  
R. Austin Huffaker, Jr., at Montgomery, Alabama, on Thursday,  
December 9, 2021, commencing at 8:34 a.m.)

(Call to order of the Court.)

THE COURT: You can be seated.

All right. Let's go ahead and take appearances this  
morning. For Mr. Reeves?

MS. DULAC: Allyson DuLac on behalf of Matthew Reeves.

MR. HAHN: Spencer Hahn on behalf of Matthew Reeves.

MR. PALOMBI: John Palombi on behalf of Matthew  
Reeves.

MS. BUTNER: Lucie Butner on behalf of Matthew Reeves.

THE COURT: It's good to finally see some faces. I  
know we've talked on the telephone a few times over the past  
year.

Okay. For DOC defendants?

MS. HUGHES: Beth Hughes.

MS. KENNY: Polly Kenny.

MR. ANDERSON: Richard Anderson.

THE COURT: All right. I've got really three motions  
today. Two are discovery related. One is the preliminary

1 injunction.

2 Let me ask you, on the preliminary injunction,  
3 obviously we're going to have a witness here by video. Who is  
4 that going to be?

5 MS. BUTNER: That's Dr. Kathleen Fahey, Your Honor.

6 THE COURT: Any other witnesses from your end today?

7 MR. HAHN: Yes, Your Honor. We'll be calling Richard  
8 Lewis.

9 THE COURT: He's the ADA coordinator?

10 MR. HAHN: Yes, sir.

11 Isaac Moody, who's a correctional officer; Jeff  
12 Emberton, who is a correctional captain; Deidre Prevo, she is  
13 with the ADOC; Cheryl Price, also with the ADOC; Lori McCulloch  
14 with the ADOC; and Cynthia Stewart, also with the ADOC.

15 Thank you, Your Honor.

16 THE COURT: Okay. How about from DOC's end?

17 MS. HUGHES: Judge, we may call -- we are calling Jody  
18 Stewart from the Department of Corrections, and we may call Mr.  
19 Palombi. That's it.

20 MR. ANDERSON: In addition to -- it's possible that we  
21 might call one of the witnesses identified by the plaintiff if  
22 they don't end up calling them.

23 THE COURT: Now, you said Mr. Palombi. What would be  
24 the purpose for calling him?

25 MR. ANDERSON: Your Honor, the purpose of calling

1 Mr. Palombi would be to inquire into one issue that's kind of  
2 threaded throughout this case, which is the origin of the  
3 election form and how it got to Holman Prison. It is -- as  
4 plaintiff has acknowledged, it is a form that was prepared by  
5 the Federal Defenders, and part of this Court's inquiry is into  
6 whether the form itself, distribution of the form, was a  
7 program.

8 I think a relevant factor in that is the question of  
9 where the forms came from. We would like to see -- you know,  
10 we've done some investigation on our end and haven't been able  
11 to determine where the forms that were distributed came from,  
12 and we wanted to inquire of Mr. Palombi, who was one of the  
13 people who took them to Holman, about that process.

14 Also, there's a secondary issue in this case which  
15 deals with the question of Mr. Reeves' ability to read.  
16 Mr. Reeves, in his complaint, has put into issue the question  
17 of whether he has the ability to read, and we believe that  
18 Mr. Palombi may have some relevant information regarding  
19 reading materials that if there were any privilege to it, it  
20 would be waived by injecting the issue into the lawsuit.

21 THE COURT: Have you two talked about calling  
22 Mr. Palombi?

23 MR. ANDERSON: We, a week ago during our informal  
24 telephone conference, brought up the fact that we may be  
25 calling Mr. Palombi.

1 THE COURT: Mr. Palombi?

2 MR. PALOMBI: Your Honor, while Mr. Anderson is  
3 correct that a week ago they mentioned it, there had been no  
4 reference to, again, any discussion about any of those topics  
5 until just now. This is the first time we're actually hearing  
6 the topics that they suggest that I would testify on. In fact,  
7 we didn't learn until 4:40 yesterday afternoon that they were  
8 actually continuing to think to call me.

9 We would object. Where that form came from is --  
10 obviously, that form was prepared for our clients, and  
11 therefore we would object on work product privilege.

12 And as for anything concerning my discussions with  
13 Mr. Reeves or whether -- or my observations with Mr. Reeves, we  
14 certainly have not waived any of those subjects by the fact  
15 that we question whether Mr. Reeves can read a specific form.  
16 Rather, this is about his ADA disability. This is about  
17 whether he has a cognitive disability that would have prevented  
18 him from reading that form.

19 My knowledge is absolutely gained through this  
20 representation and would be privileged, and we would object to  
21 me being called in any way, shape, or form, particularly as I  
22 am also counsel of record for Mr. Reeves and have been counsel  
23 of record for Mr. Reeves since this case began.

24 THE COURT: Would it be correct that each and every  
25 occasion in which you met with Mr. Reeves in person or spoke

1 with him on the telephone, you were acting in an  
2 attorney-client relationship capacity?

3 MR. PALOMBI: Yes, Your Honor. We've met with him at  
4 Holman, I have had phone conversations with him, and those were  
5 all as attorney-client.

6 THE COURT: Okay. Well, we'll get more into the weeds  
7 on this later.

8 Is there something else on this, Mr. Anderson, that  
9 you want --

10 MR. ANDERSON: Yes, Your Honor. Just briefly, a  
11 couple of things.

12 One, during our phone conference we did discuss that  
13 we wanted to inquire into the origins of the form and how it  
14 was created, how it got to Holman Prison.

15 A couple other things I'd like to point out --

16 THE COURT: What's the relevance of that? Because  
17 you've been down this road already in the Smith case to some  
18 extent, and at least from my observation of what's been filed  
19 with me is that Federal Defenders drafted this form, presented  
20 it to their clients. Obviously they probably sat down and  
21 talked about it with some of their clients, maybe not with  
22 others. But your client gave an order or a directive or an  
23 instruction from Montgomery -- we don't know who it was,  
24 necessarily -- down to Holman, and from there the form was  
25 copied, what, 50 times, put in an envelope, and then handed out

1 to everybody on death row.

2 Isn't that -- I mean, that's undisputed, isn't it?

3 MR. ANDERSON: Well, that's just it, Your Honor.

4 We've come across some evidence that suggests that the form was  
5 not copied by ADOC, and in fact, the Federal Defenders may have  
6 brought enough copies of the form for everyone on death row,  
7 not simply their clients, and that's the evidence that I want  
8 to ask --

9 THE COURT: Well, did your client make the decision to  
10 put these forms in the hands of everybody on death row?

11 MR. ANDERSON: Yes, Your Honor. Ms. Stewart is the  
12 one who directed Captain Emberton to distribute it.

13 THE COURT: And the purpose of that was to assist  
14 these individuals who were on death row who fell within the  
15 30-day election window, to assist them with the ability to make  
16 the election timely if they so chose?

17 MR. ANDERSON: I can't speculate as to what the  
18 purpose was or certainly not testify as to what the purpose was  
19 at this point. I know that that was done, Your Honor. We  
20 simply believe that it was relevant to determine how -- you  
21 know, if these were passed out, if these were forms that were  
22 delivered to the prison by another entity, I thought that could  
23 affect the calculus of whether this was a program.

24 THE COURT: It seems to me if we're going to talk  
25 about relevance, the real inquiry is why your client did what



1 it did. Because when I look at it, I know we can argue about  
2 whether it was a service or a program, but they were trying --  
3 they did decide to do it. And when they decided to do it, they  
4 stepped into the world of the ADA, and we probably wouldn't be  
5 here today and we probably wouldn't have been having the  
6 disputes -- or at least Judge Marks wouldn't have been having  
7 the disputes in the Smith case that she did had DOC never  
8 handed those forms out. But unfortunately, what's been done is  
9 done and ADOC's having to deal with the consequences of that.

10 MR. ANDERSON: And the second part of the thing I  
11 wanted to add to this, Your Honor, is regarding waiver of  
12 privilege. Much like in the Strickland case, ineffective  
13 assistance of counsel case where a plaintiff or petitioner in  
14 those cases puts into question the effectiveness of his counsel  
15 and puts things having to do with representation into  
16 controversy, you can have a limited waiver of the privilege to  
17 the extent that it's relevant. We think that it's in this case  
18 a very narrow, very narrow waiver.

19 One of the things we would like to ask Mr. Palombi  
20 about is manifestly not an attorney-client communication. It  
21 has to do with reading material that is not related to this  
22 case.

23 The second issue is that if plaintiff is contending  
24 that he's unable to read or has limited reading ability, we  
25 just really believe that it is very highly relevant, the

1 question of whether he has -- you know, what he's been reading  
2 and whether he has reading materials provided to him, wherever  
3 the source is from. And in this case we've, again, found some  
4 indications that he may have received non-case-related reading  
5 materials from counsel, which we think is relevant.

6 THE COURT: Is the evidence going to be that the form  
7 that was handed to him, that it came from DOC or from  
8 Mr. Palombi?

9 MR. ANDERSON: As to the first point on the  
10 distribution, no, Your Honor, we do not have any evidence that  
11 Mr. Palombi handed Mr. Reeves a form.

12 THE COURT: We'll talk about it later. I think you've  
13 got an uphill battle on being able to ask Mr. Palombi those  
14 kinds of questions.

15 MR. ANDERSON: Okay.

16 THE COURT: And if you've got some case law to support  
17 it, I'll take a look at it, but I do think you've got an uphill  
18 battle on it.

19 Okay. Let's talk about these two discovery motions.

20 First, Mr. Anderson, on the motion to limit discovery,  
21 I've read through it. You've got this request that's  
22 triggered -- was it OIT with the State that goes and pulls all  
23 these e-mails, and you've got at least 50,000 hits?

24 MS. HUGHES: Yes, sir.

25 THE COURT: And you're having to go through all of

1 those?

2 MS. HUGHES: Correct.

3 THE COURT: Because there are lawyers who have had the  
4 last name Reeves, among other things.

5 MS. HUGHES: There was a correctional officer who had  
6 the name Reeves. It was overwhelming.

7 THE COURT: So what has been produced so far?

8 MS. HUGHES: We have produced 325 e-mails. We  
9 withheld 155 as privileged, and we've provided the privilege  
10 log to the plaintiffs. That left us with 1,721 e-mails. 640  
11 of those, I think -- it's either 640 or 670 -- were cube  
12 e-mails that we would not turn over. We have not had an  
13 opportunity to review them all, but those are something that we  
14 would not turn over because they're a security risk.

15 We've got 634 of the Holman agenda e-mails. That's a  
16 daily use letter which contains menus, updates on facility  
17 rules, and a copy of the daily activities list.

18 We've got 408 mental health e-mails with a list of  
19 appointments for each inmate for that day, and that would, of  
20 course, require extensive redactions because of the other  
21 inmates that are listed on that.

22 We have 106 daily activities e-mails, and that also  
23 includes inmates who have medical appointments who would also  
24 have to be redacted, the random inmate drug test sheets,  
25 mailroom logs of mail received by the inmates, and single walk

1 list. And a lot of that would also have to be redacted.

2 THE COURT: So is the issue at this point redaction of  
3 e-mails?

4 MS. HUGHES: And just going through the -- still going  
5 through the 1,721. We would also, if we were going to produce  
6 this, we would have to copy each e-mail, we have to Bates stamp  
7 each e-mail, they have to be redacted, and then another  
8 privilege log created.

9 THE COURT: So this is not a circumstance -- when I  
10 stepped out here, I was thinking there's 50 or 60,000 e-mails  
11 that still need to be searched through. You've done that  
12 search. You've now --

13 MS. HUGHES: Narrowed it.

14 THE COURT: -- put them in buckets, whether you call  
15 them cube logs or mental health.

16 MS. HUGHES: Right.

17 THE COURT: So really what we're talking about is the  
18 time and the effort that it takes to go through those, redact,  
19 print them, et cetera.

20 MS. HUGHES: Right. And we think that there's very  
21 little relevance to the plaintiff's case.

22 THE COURT: Well, what you may think is relevant or  
23 not relevant may be -- you know, opinions differ on that.

24 MS. HUGHES: Right.

25 THE COURT: Are you still undertaking efforts to

1 review and produce those records?

2 MS. HUGHES: We have not done that.

3 THE COURT: You have not?

4 MS. HUGHES: We have not continued to do that.

5 THE COURT: Why is that?

6 MS. HUGHES: Because we've been preparing for the  
7 hearing, and we've got attorneys that were -- the attorneys  
8 that were doing that have an Eleventh Circuit brief due and a  
9 hearing next week herself.

10 THE COURT: Well, just because you've got this hearing  
11 and because you have other work going on is not an excuse to  
12 bring things to a halt.

13 When you were reviewing the e-mails, who was involved  
14 in that?

15 MS. HUGHES: Lauren Simpson.

16 THE COURT: Okay. Is she still involved?

17 MS. HUGHES: Yes.

18 THE COURT: Who on your side wants to respond?

19 MS. DULAC: Your Honor, I think really you've touched  
20 upon kind of the key issue, which is that, one, you know, it's  
21 not as though we filed a motion to compel, and we're not  
22 claiming that they have failed to turn something over timely.  
23 It's that they have said they're not going to turn these things  
24 over because they didn't think they are useful or that they are  
25 material to us. And my response has always been to Ms. Hughes,

1 we make that determination whether they're useful to us or not.  
2 I mean, I certainly could walk through this list and tell you  
3 why they could be useful to our case.

4 THE COURT: All right. Why don't you do that.

5 MS. DULAC: Well, the daily activities, as far as  
6 Mr. Reeves' medical appointments, I mean, did he see mental  
7 health? On what day? For what? You know, mental health is at  
8 issue here.

9 Did he -- you know, the Holman agenda, what did he do?  
10 They raised an issue in their reply about Project Hope. What  
11 knowledge did he have regarding the nitrogen hypoxia in  
12 meetings that they had?

13 The inmate drug test. They've submitted an affidavit  
14 that said that he was -- you know, they believe that he was  
15 selling narcotics. Is he a narcotics user?

16 I mean, the mail room, legal mail. Was he receiving  
17 legal mail? They assert that he could have talked to his  
18 lawyer. What day did he get legal mail?

19 I mean, besides that, what I would say is that in the  
20 Smith case, for example, they produced all these documents to  
21 us pursuant to a confidentiality that we have signed.

22 THE COURT: Were these documents produced in the Smith  
23 case, Ms. Hughes?

24 MS. HUGHES: I'm not -- I don't know the answer to  
25 that, Judge. I produced everything --

1 THE COURT: Will a confidentiality order address some  
2 of your concerns at least as it relates to the information that  
3 you want to redact?

4 MS. HUGHES: Sir? I'm sorry.

5 THE COURT: Would a confidentiality order -- maybe  
6 there's one already entered in the case, but --

7 MS. HUGHES: I don't think so, Judge, because we still  
8 have to review them for relevance and privilege, and I can't  
9 just turn over DOC records that we have not reviewed.

10 And as far as the mental health files, that's all in  
11 his institutional file, which we have turned over to the  
12 plaintiffs.

13 THE COURT: Does DOC maintain logs, for example, that  
14 show if Mr. Reeves attended some meetings by Project Hope?

15 MS. HUGHES: They do not.

16 THE COURT: They do not maintain those logs?

17 MS. HUGHES: They do not have -- they do not keep a  
18 record of who attends.

19 And another thing, Judge, when we -- on December 1st  
20 when we first talked to the plaintiffs, we didn't ask -- we  
21 asked that they help us narrow the search, and what we got was  
22 useless, basically, because they said to start in 1998. Well,  
23 that's when he entered the prison, and we have all those  
24 e-mails. And also to search all the relevant people at Holman.  
25 That's 23 years' worth of people who have had contact with Mr.

1 Reeves since he's been incarcerated.

2 THE COURT: Well, I think what we're going to be  
3 hearing about today is his lifetime of interactions with the  
4 mental health system, so whether he's been in the system 23  
5 years or 2 years, it seems to me it's all kind of fair game and  
6 somewhat relevant.

7 Part of the problem, at least my observation, is that  
8 these requests have been made, but the time window for  
9 production is so narrow that I think both of y'all -- both  
10 parties are at fault for the timeframe because this lawsuit's  
11 been going on since 2020, and the discovery request should have  
12 been -- could have been made last year.

13 Flip side, you know, the State's the one that asked  
14 for the death warrant to be issued knowing that this lawsuit  
15 was out there. And when they did that, it doesn't take a  
16 rocket scientist to know that it's going to require everybody  
17 to devote the manpower to litigate the issues that are going to  
18 come with this.

19 So here's what I'm going to do at least with respect  
20 to that. I want DOC to continue reviewing these records. I  
21 want you to devote the appropriate time to review these  
22 records, meaning no sandbagging on it. If Ms. Simpson is the  
23 one tasked with reviewing these, then that's going to be what  
24 she needs to -- start when she gets to work in the morning, and  
25 that's what she's going to do all day until it's time to go



1 home.

2 And then at the end of every day, I want there to be a  
3 production to Mr. Reeves' side as to what is ready to be  
4 produced in terms of a redacted form, and I want this going on  
5 every day.

6 MS. HUGHES: Yes, sir.

7 THE COURT: And then I want a certification or  
8 something filed with me so that I can monitor and make sure  
9 that your end is doing what they're supposed to be doing.

10 MS. HUGHES: Yes, sir.

11 THE COURT: And that means if there is a log that's to  
12 be -- if you're maintaining a privilege log and you're updating  
13 it daily, turn that over. That way we can just keep this  
14 moving on a rollout basis. I don't see there being any other  
15 way to kind of move through these kind of records.

16 MS. HUGHES: Yes, sir.

17 THE COURT: Ms. DuLac, anything else on that  
18 particular issue?

19 MS. DULAC: No, Your Honor. Thank you.

20 THE COURT: Okay. The other issue is the 30(b)(6)  
21 deposition. I've read it.

22 Is there anything else -- Ms. DuLac, you filed the  
23 motion -- that your end wants to say on the 30(b)(6) deposition  
24 of Ms. Price?

25 MS. DULAC: Your Honor, the only other thing I would

1 say is, as you point out, we are in a very compressed  
2 timeframe. I understand that. And that's why we only asked  
3 for one deposition when we asked for expedited discovery, and  
4 we did so because we had not previously had a Rule 30(b)(6)  
5 deposition in this case or in Mr. Smith's case. And as you can  
6 see today and probably will see going forward, there is a lot  
7 of discrepancies in what witnesses have testified and what the  
8 theory is from the defendants regarding events that have  
9 happened at Holman over the years, like the distribution of  
10 forms and so on. And so it was very important to us to have  
11 the deposition testimony from a 30(b)(6) witness to bind the  
12 Department.

13 THE COURT: Here's the problem I've got, okay. It may  
14 have been Mr. Palombi that said it on a telephone call that you  
15 all are not ADA lawyers -- maybe Mr. Hahn. I don't want to put  
16 words in Mr. Palombi's mouth.

17 MR. HAHN: No, Your Honor. I profess my ignorance a  
18 lot, and that was me.

19 THE COURT: Your 30(b)(6) notice was not a compliant  
20 30(b)(6) notice. It did not contain a list of topics that I  
21 would typically expect there to be. So when I read through  
22 your motion and then I read through the deposition where you  
23 criticize DOC's witness for not being prepared to answer  
24 certain questions, the first thing I started looking for is the  
25 30(b)(6) notice and the list of topics that went along with it,

1 and there wasn't. So I have a hard time seeing how you can  
2 criticize DOC for putting up a witness who is unable to address  
3 particular topics when those topics were never specifically  
4 asked for to begin with.

5 MS. DULAC: Your Honor, if I could address that just  
6 for a moment. And I agree; it was a very generic 30(b)(6)  
7 notice. However, it was filed with our motion to expedite, and  
8 the defendants did not file any objection to it. When you  
9 issued your order and you granted us the ability to serve it on  
10 them, they didn't file any objection. When we had our meet and  
11 confer conference in advance of the deposition, they did not  
12 file -- they did not raise any objection.

13 They are the ones that advised us they were going to  
14 produce Ms. Price and that she would be able to speak on behalf  
15 of the Department. And so halfway through the deposition  
16 then say, well, your deposition notice wasn't appropriately  
17 specific I think is not necessarily in good faith. And if that  
18 was the objection, then you would object and allow the witness  
19 to answer that she didn't know. But instead, Mr. Anderson  
20 objected and instructed the witness not to answer, and that is  
21 improper.

22 THE COURT: What question did he actually instruct her  
23 not to answer? Because I didn't really see a flat-out  
24 instruction like that. I thought I saw at least on some of  
25 those "to the extent you know, you can answer," but we're not

1 going to get in there and argue about admissions and denials  
2 with respect to allegations made in your complaint. You know,  
3 because answers are -- those are not drafted up by clients.  
4 They're drafted up by lawyers and it's work product, and  
5 usually it's a culmination of the lawyer's knowledge base that  
6 that lawyer is getting from a variety of sources. But I didn't  
7 necessarily see a question that was asked that was  
8 fact-specific. It seemed to me that you were just arguing with  
9 the witness.

10 MS. DULAC: Well, what I asked Ms. Price was about her  
11 answer or the Department's answer where they made the  
12 statement, "Defendants deny that Reeves' placement was due to  
13 any intellectual/cognitive deficiency."

14 I mean, that's a factual statement and it's not, by  
15 the way, even really responsive to the complaint. The  
16 allegation in the amended complaint was Mr. Reeves was placed  
17 in special education classes. That's it. One sentence.

18 THE COURT: Well, here's why I say it's argumentative,  
19 because that's not necessarily knowledge or a burden of proof  
20 that the DOC has. That's really more of an evidentiary  
21 allegation -- or a factual allegation from your end. I'm  
22 struggling with why you were quarrelling with the DOC witness  
23 over something that's really your burden of proof.

24 But here's going to be my ruling on the motion. I'm  
25 going to deny it. I don't think it was a proper 30(b) (6)

1 notice. The burden is on you to provide a proper 30(b)(6)  
2 notice on it, and when you send a very nonspecific one, it does  
3 not surprise me at all that you're going to get "I don't know"  
4 answers or "I can't answer that" to particular categories of  
5 questions if you never asked for those to begin with.

6 Now, I understand we may hear from Ms. Price today,  
7 and you can ask some of those questions again today and we'll  
8 just kind of go along with that. A lot of those questions -- I  
9 think some of the questions you were asking of Ms. Price were  
10 questions that really would have been more appropriate to ask  
11 of an ADA coordinator that I think you're going to call as a  
12 witness today, so you may very well get the answers that you  
13 were seeking to begin with.

14 Anything else on those two discovery motions?

15 MS. DULAC: Your Honor, what I would say is that today  
16 the defendants have provided us with notice that the person  
17 they're going to put on for the Department with the most  
18 knowledge of the defendants' answer, affirmative defenses, and  
19 discovery responses are Ms. Price.

20 THE COURT: Okay.

21 MR. ANDERSON: And may I speak on that briefly, Your  
22 Honor? This is in regard to a notice they provided us  
23 yesterday about wanting to call 30(b)(6) witnesses. And I  
24 think Your Honor has already got the point I was going to make,  
25 which is that we as counsel have independent knowledge that the

1 defendants don't have. Counsel in answering a pleading has a  
2 duty under Rule 11 to make sure that the factual allegations  
3 and the admissions are founded on the evidence and that denials  
4 are founded on the evidence.

5           There are many objective allegations of fact in the  
6 answer that are based on information -- and, you know, that  
7 call for information outside of the knowledge of ADOC. And  
8 counsel in their duty to the Court and just out of even just  
9 sheer judicial economy as a practical matter, if we know  
10 there's evidence of something that's alleged in a complaint,  
11 we're not going to deny it just because our client doesn't have  
12 information on it.

13           So in this case I do want to make sure -- I think the  
14 Court gets this -- that the State does not contend -- excuse  
15 me. The defendants do not contend that Ms. Price has full  
16 knowledge of the factual basis of every denial or admission in  
17 the complaint, but she is familiar with the fact that counsel  
18 assisted in drafting this document, if that makes any sense.

19           THE COURT: Well, here's my point on it. Ms. DuLac,  
20 if you wanted a 30(b)(6) witness from DOC to testify to  
21 particular factual assertions in the answer, that should have  
22 been set out in the notice to begin with. That way they can go  
23 track down the particular witness who can address those  
24 questions, whether it's how many ADA claims have been filed on  
25 the cell block or who the ADA coordinator is, whatever it is.

1 I think it begins with an obligation on your end to properly  
2 identify it, even if they don't call you out later. So that's  
3 why I'm denying that motion.

4 Okay. Anything else on discovery issues?

5 Okay. Mr. Hahn, Mr. Palombi, I don't know who's  
6 taking the lead on your end, but this is your motion for  
7 preliminary injunction, so we can move into that.

8 MR. HAHN: Yes, Your Honor. I believe that Ms. Butner  
9 is going to examine Dr. Fahey. Thank you, Your Honor.

10 THE COURT: So we're going to begin with Dr. Fahey; is  
11 that correct?

12 MS. BUTNER: Mr. Reeves, the plaintiff, calls  
13 Dr. Kathleen Fahey.

14 DR. KATHLEEN FAHEY

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

18 THE COURT: Let me ask this while it's sticking in my  
19 mind. Has Mr. Reeves been given the Beta III test by anybody  
20 at any time?

21 MR. ANDERSON: Not that the defendants are aware of,  
22 Your Honor.

23 THE COURT: Okay.

24 MR. HAHN: Not that we're aware of, Your Honor.

25 THE COURT: Okay.

1 short because of what's going on today, so if I can get out  
2 there and do what I need to do at 11:30, I can be back here  
3 pretty quick.

4 MR. HAHN: Thank you, Your Honor. And again, I don't  
5 want to rush --

6 THE COURT: I've set aside the entire day today for  
7 this.

8 MR. HAHN: Thank you, Your Honor. I appreciate it.

9 THE COURT: Okay.

10 MR. HAHN: We will call Issac Moody.

11 And, Your Honor, just to be clear, now that we're  
12 getting into fact witnesses, we're going to invoke the rule to  
13 the extent anyone's in the courtroom.

14 THE COURT: The rule is invoked. I don't see anybody  
15 else in here.

16 MR. HAHN: Thank you, Your Honor.

17 THE COURT: If you all see somebody that's going to be  
18 a witness come in here, I'll have to defer to you to call it to  
19 my attention.

20 MR. HAHN: Absolutely, Your Honor. Thank you.

21 ISSAC MOODY

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

25 DIRECT EXAMINATION



1 BY MR. HAHN:

2 Q. Good morning, Mr. Moody.

3 A. Good morning.

4 Q. Would you please state and spell your name for the record.

5 A. Issac Moody. I-s-s-a-c, M-o-o-d-y.

6 Q. Mr. Moody, do you recall signing an affidavit concerning  
7 the Mr. Reeves -- the Matthew Reeves case?

8 A. Yes, sir, I do.

9 Q. Okay. And that was on November 19th?

10 A. Yes, sir.

11 Q. Of this year?

12 A. Uh-huh.

13 Q. Did you read it carefully before you signed it?

14 A. I did.

15 Q. Okay.

16 MR. HAHN: I'm going to go ahead and put up on the  
17 Elmo what is in the record as Document 42-8.

18 Q. Mr. Moody, if you could look at this. Does this appear to  
19 be the document that you signed?

20 A. Yes, sir, it is.

21 Q. Okay. Mr. Moody, I'm a little bit confused. In this  
22 document, your name is spelled -- your first name is spelled  
23 with one S and two A's, and just now you spelled it with two  
24 S's and one A?

25 A. Well, I guess I -- that's an oversight of mine, but my

1 name is spelled with two S's.

2 Q. All right. And in fact, throughout this document, would  
3 you dispute the representation that throughout this document  
4 your first name is spelled with one S and two A's?

5 A. Yeah. It's spelled with two S's.

6 Q. All right. Did you type the document or did someone else  
7 type it?

8 A. Somebody else did it.

9 Q. Okay. And can you just briefly describe how you came to  
10 write the affidavit?

11 A. How did I come to write it?

12 Q. Well, just -- I mean, I'm assuming that nobody just showed  
13 up one day with a prewritten affidavit for you?

14 A. No, they didn't. They didn't.

15 Q. Okay.

16 A. I was questioned about -- I was asked some questions about  
17 Inmate Matthew Reeves.

18 Q. Okay. What sorts of questions?

19 A. Did I have any -- about my interaction with him, did I  
20 know him, and as my affidavit state, I have dealt with him for  
21 a number of years.

22 Q. Okay. And based on those conversations that you had, this  
23 affidavit reflects what you told the person?

24 A. It does.

25 Q. Okay. And who was the person you told this to?

1 A. A State's attorney. One of the Department of Corrections  
2 attorneys.

3 Q. Okay. So a Department of Corrections attorney?

4 A. Yeah.

5 Q. Could it have been Jody Stewart?

6 A. Yes, sir.

7 Q. Okay. So you have been a correctional officer at Holman  
8 since 2000?

9 A. April 2000.

10 Q. April 2000. And you were -- have you always been assigned  
11 to Holman Correctional?

12 A. All of my career. All of my 21 and a half years.

13 Q. Okay. Is that because you like Holman particularly?

14 A. Not particularly because I like it. That's where I work  
15 and that's where I make my living at.

16 Q. Got you. And do you have a long commute to get there?

17 A. I do. My hometown is like 75 miles from Holman, but I  
18 live on state property.

19 Q. Okay. Excellent. And at one point Holman had more  
20 inmates than it does now, right?

21 A. It did.

22 Q. And can you tell us when that changed?

23 A. That changed -- a couple of years ago it changed from like  
24 900 to about -- we house about 300 now.

25 Q. And that consists of death row of about 160?

1 A. Yeah, 160.

2 Q. And the honor dorm of the remainder?

3 A. Yeah. And Echo Unit, the remainder of the inmates, they  
4 work in the -- like the tag plant and the sewing factory.

5 Q. And I am not from Alabama, so when I first got here and I  
6 heard tag, I couldn't understand what that meant. Those are  
7 license plates?

8 A. They make license plates. Every license plate in the  
9 state of Alabama is made at Holman.

10 Q. I did not know that. Would you say that most of your time  
11 has been spent on death row during your career?

12 A. About 20 -- a little over 20 years of my time spent at  
13 Holman was on segregation and death row.

14 Q. Okay. And so segregation was for those general population  
15 inmates who are not on death row but were behavioral problems  
16 or otherwise needed to be isolated?

17 A. Yes, sir.

18 Q. And were they housed in the same general location as death  
19 row?

20 A. No, sir. They were in different buildings.

21 Q. Okay. Were death row inmates ever in segregation?

22 A. Sir?

23 Q. Were death row inmates ever in segregation in the area  
24 where general population segregation was?

25 A. No, sir. Not until recently.

1 Q. Okay.

2 A. Recently it has -- what was the segregation unit now,  
3 that's where the death row inmates are housed.

4 Q. Got you.

5 A. It used to be segregation.

6 Q. Before you came to work for Department of Corrections,  
7 what did you do?

8 A. I worked several jobs. I was like a -- the last job  
9 before the Department of Corrections, I worked for Honda  
10 Al-Lock, which made locks. And before that I had my own little  
11 trucking business.

12 Q. Okay. At like a long-haul trucking?

13 A. No, sir. I didn't do long hauls. I just did like only in  
14 Alabama.

15 Q. Okay. And where was the Honda Lock America located?

16 A. Selma, Alabama.

17 Q. And that's where Mr. Reeves is from, right?

18 A. Yes, sir.

19 Q. Did you know Mr. Reeves at all before this?

20 A. I did not.

21 Q. Do you know any of his family?

22 A. I did not.

23 Q. Okay. Do you have any experience working in education?

24 A. No, sir.

25 Q. Do you have a degree in any sort of academic subject?

1 A. No, I do not.

2 Q. Okay. Do you have any particular expertise in literacy?

3 A. No, sir.

4 Q. Okay. What about psychology?

5 A. No, sir.

6 Q. Early childhood development?

7 A. No, sir.

8 Q. Okay. Have you ever acted as maybe a volunteer to help  
9 people learn how to read?

10 A. No, I have not.

11 Q. Okay. In the course of your duties at Holman, have you  
12 ever distributed legal mail?

13 A. I have.

14 Q. Okay. Can you briefly describe how legal mail is  
15 distributed?

16 A. Legal mail is distributed -- you take the -- you take it  
17 to his cell. He signs for it. He has to sign for it. And  
18 then you open it to make sure there's no contraband in it, but  
19 you have to open it in his presence.

20 Q. All right. And you're not supposed to read it?

21 A. No, sir.

22 Q. You're just checking for anything that's not appropriate?

23 A. Yes, sir.

24 Q. Okay. And is it unusual for a death row prisoner to  
25 receive legal mail?

1 A. No, it's not.

2 Q. Do they all pretty much receive legal mail?

3 A. I wouldn't say all, but from time to time most of them  
4 receive some from their attorneys.

5 Q. Got you. And do their cases tend to drag on?

6 A. Their cases?

7 Q. Yes.

8 A. I'm not really sure how long their cases drag, but yeah.

9 Q. But maybe an inmate will get a piece of legal mail one  
10 year and then 10 years later he'll still be getting legal mail?

11 A. It's possible.

12 Q. And Mr. Reeves was already on death row in Holman when you  
13 started in April of 2000?

14 A. I can't really remember whether he was there when I got  
15 there or not, but he's -- I know he's been there for a number  
16 of years.

17 Q. Got you. And would you have any reason to dispute that he  
18 arrived at Holman prior to your time?

19 A. I'd have no reason to dispute it.

20 Q. Okay. You don't have a specific recollection of the first  
21 time you met Mr. Reeves?

22 A. I don't.

23 Q. Okay. And in your affidavit you state that you, quote,  
24 "have frequently spoke and interacted with Mr. Reeves  
25 throughout my time at Holman."

1 A. That's correct.

2 Q. Okay. Can you tell us a little bit about what y'all talk  
3 about?

4 A. Just generally talking. He may talk to me about  
5 basketball. Just general conversation. Nothing specifically,  
6 just -- because I communicate with all -- you know, I'm in  
7 contact with all of them, so he may come up and just start  
8 talking about anything. Nothing specific.

9 Q. Are you an Auburn or an Alabama fan?

10 A. Neither.

11 Q. Neither, okay. Neutrality. Do y'all ever talk about  
12 sports rivalries or anything like that? Is that the kind of  
13 thing --

14 A. I don't talk about -- I'm not a sports person, so I've  
15 never talked -- you saying did I talk about that with Matthew  
16 Reeves?

17 Q. Yeah.

18 A. No.

19 Q. Okay. But mostly you recall conversations about maybe  
20 basketball and that sort of thing?

21 A. Yeah. Like out on the ball yard. I take them out to the  
22 ball yard where they exercise and stuff like that, so he may  
23 just come talk of anything in general. You know, just start  
24 talking.

25 Q. All right. Anything particularly academic about what



1 y'all talk about?

2 A. No, sir.

3 Q. Okay. So it's just general conversation?

4 A. Just general conversation.

5 Q. Is that different than any other inmate that you interact  
6 with?

7 A. No different than any other inmate.

8 Q. Okay. Do you typically talk about books?

9 A. No, sir.

10 Q. Okay. Even with Mr. Reeves?

11 A. No, sir.

12 Q. Okay. Now, also in your affidavit, you note that "from my  
13 interactions with him, he appears to be able to read and  
14 write."

15 A. I have no reason to say that he can't read or write. I  
16 can't say that I've saw him doing it, but I've saw him with  
17 writing material and stuff before in the past, so I would have  
18 no reason to think that he couldn't.

19 Q. But you haven't ever specifically seen him write  
20 something?

21 A. No, sir. Not specifically.

22 Q. And have you ever seen him specifically reading something?

23 A. Not specifically.

24 Q. So when your affidavit says that from your interactions  
25 with him, quote, "he appears to be able to read and write" --

1 A. He -- I always notice him have like some type material in  
2 his hand, so I would have no reason to think that -- I never  
3 saw him getting nobody else to write nothing for him.

4 Q. And is it unusual to observe inmates on death row with  
5 legal materials or legal mail?

6 A. It's not unusual, no.

7 Q. Would you estimate how many of the folks on death row do  
8 not have any sort of written material in their cells?

9 A. Very few.

10 Q. Okay.

11 A. Very few.

12 Q. Would very few be fewer than five?

13 A. Yeah. It wouldn't -- not over five. All of them got some  
14 type material.

15 Q. Now, when they're moved to segregation, they don't get to  
16 take their materials with them, correct?

17 A. When they do what, now?

18 Q. When they get moved to segregation temporarily.

19 A. When they get -- if he's not disruptive, they can still  
20 take some stuff with them.

21 Q. All right. And your affidavit also notes that, quote,  
22 "During my years at Holman, I've encountered inmates who I  
23 would consider 'slow' or of low intelligence."

24 A. I have.

25 Q. Okay. Were they on death row?

1 A. Yes, sir. There are some on death row.

2 Q. Okay. And are any of them still there?

3 A. Yeah, it's some still there.

4 Q. Okay. Can you give me the names of those folks?

5 A. No, sir, I can't.

6 MS. HUGHES: Object. Relevance to the names.

7 THE COURT: You want him to identify inmates on death  
8 row who in his opinion have low intelligence?

9 MR. HAHN: Yes. So that I can ask him to compare them  
10 to Mr. Reeves, perhaps.

11 MS. HUGHES: You don't need the names to do that.

12 THE COURT: What's your objection other than  
13 relevance?

14 MS. HUGHES: It invades the privacy of those inmates.

15 THE COURT: He's speaking as a correctional officer  
16 and not as a mental health counselor, so I'll allow question.

17 MR. HAHN: Thank you, Your Honor.

18 Q. (Mr. Hahn, continuing:) So can you please provide the  
19 names of the death row inmates, either current or past, who you  
20 believe to be slow or of low intelligence?

21 A. All of them or just one?

22 Q. All of them, please.

23 A. I can't -- I doubt if I can name all of them.

24 Q. Would there -- is it more than ten?

25 A. I can't put a number on it. I don't know exactly how many

1 it would be because I never really thought of it.

2 Q. I guess let me get into this, then. What caused you to  
3 believe these inmates in particular were slow or of low  
4 intelligence?

5 A. Because of their actions and the way they act and always  
6 getting other inmates to do stuff for them or something to that  
7 fact.

8 Q. So getting people to do work for you, is that what you're  
9 saying?

10 A. The way they act, you could just tell that they were slow.

11 Q. Got you. So maybe they look stereotypically like somebody  
12 who you would consider to be intellectually disabled?

13 A. Yeah, and that -- and then me having to take them to see  
14 mental health and stuff like -- that's what I consider.

15 Q. And are you aware Mr. Reeves is on the mental health  
16 caseload?

17 A. No, I'm -- no, I'm not.

18 Q. And if you knew that Mr. Reeves was on the mental health  
19 caseload, would that play into your determination, your  
20 layperson opinion regarding his intelligence?

21 A. No, not necessarily. Because mostly all of them talk to  
22 mental health at some time, but it's the actions what I --  
23 their actions what -- the reason why I would determine whether  
24 they're slow, their conversation, the way they act. That's the  
25 way I determine it. But I'm not a specialist in that.

1 Q. All right. And so you don't -- you couldn't say with  
2 confidence that Mr. Reeves -- what Mr. Reeves' intelligence  
3 level is?

4 A. I could not.

5 Q. Okay. And it's entirely possible that Mr. Reeves is slow  
6 or of low intelligence?

7 A. It could possibly -- possibly.

8 MS. HUGHES: Objection. Calls for speculation.

9 THE COURT: Well, these are areas that you brought  
10 forward in the affidavit that's been filed, so I'll allow it.

11 A. Possibly, yeah.

12 Q. (Mr. Hahn, continuing:) You think it's possible?

13 A. Anything is possible.

14 Q. So can you just give me the names of three inmates who you  
15 believe are slow or of low intelligence on death row?

16 A. Let me think. I have to think about that.

17 Michael Sockwell.

18 Q. Michael -- I'm sorry -- what?

19 A. Michael Sockwell. Stephon Lindsay.

20 Three, let me think of someone else. Let me think.

21 Michael Lewis.

22 Q. Michael Lewis is a bit of an acquired taste, am I right?

23 A. Pardon?

24 Q. Michael Lewis can be a bit of a troublemaker?

25 A. Yes, sir.

1 Q. Okay. So when you determined that -- or in your opinion  
2 that those three inmates and others were slow or of low  
3 intelligence, it was what you saw of them physically?

4 A. Yeah, what they -- what I see, them physically, and the  
5 way they act.

6 Q. Okay. Can you provide just an example of what a slow or  
7 low intelligence person acts like?

8 A. Just -- I ain't know I had to do all this, but what I  
9 consider them to be slow, they just don't speak well. They  
10 act -- they act kind of slow. That's what I consider.

11 Q. Got you. And would it surprise you to hear that on  
12 intake, Mr. Reeves, according to DOC records, was believed to  
13 suffer from mild what they call retardation at the time?

14 A. Would it do what, now?

15 Q. Would it surprise you to learn that on intake, Mr. Reeves  
16 was designated as being mildly -- as suffering from mild  
17 retardation?

18 A. That would surprise me about Matthew Reeves.

19 Q. Okay. All right. Did more officers work at Holman when  
20 you started in 2000 or do more work there now?

21 A. It was more when I started than now.

22 Q. Okay. And do you believe Holman to be understaffed in  
23 June of 2018?

24 A. I do.

25 Q. Okay. And that was pretty common knowledge, right?

1 A. Yes, sir.

2 Q. Okay. As part of dealing with that understaffing, runners  
3 are employed?

4 A. They are.

5 Q. Okay. And runners are folks -- are inmates who do some  
6 distribution work?

7 A. They are.

8 Q. So they might deliver meals or --

9 MS. HUGHES: Objection to the leading.

10 MR. HAHN: Okay.

11 THE COURT: Restate your question.

12 MR. HAHN: I will indeed.

13 I always forget that here I am on direct. I  
14 apologize. A career on cross.

15 Q. (Mr. Hahn, continuing:) Can you describe what runners do  
16 at Holman?

17 A. Runners are used to assist in feeding, passing out ice,  
18 passing the meal trays out. That's what they're used for.

19 Q. Do they ever distribute nonlegal mail?

20 A. No.

21 Q. Do they ever distribute any sort of forms or paperwork?

22 A. No.

23 Q. Okay. Not once?

24 A. No. They are not to do that.

25 Q. Okay. But they do distribute the canteen order forms,

1 right?

2 A. Yeah. They can take a blank order form to the other  
3 inmates.

4 Q. Okay. So there's no prohibition on them distributing  
5 certain forms?

6 A. Not a blank store form.

7 Q. Okay. And then they can collect that blank store form  
8 after it's been filled out?

9 A. Normally the officers -- normally the officers are to pick  
10 it up, but sometimes -- it wouldn't be out of the ordinary for  
11 them to pick them up and bring it to you.

12 Q. Got you. Were you on duty in late June of 2018?

13 A. Pardon?

14 Q. Were you on duty at Holman at any point in the last week  
15 of June 2018?

16 A. June 20?

17 Q. 2018. Just the month, June of 2018?

18 A. Yes, I was at work. I should have been there.

19 Q. Okay. And do you work day shift?

20 A. Yeah, I work days.

21 Q. Okay. That starts, what, around 6:00 a.m. or so?

22 A. Yeah, they start at 6:00 a.m.

23 Q. Okay. And you were there at the same shift as Captain  
24 Emberton?

25 A. Yes, sir.



1 Q. Okay. And you've walked death row, right?

2 A. Many times, yes.

3 Q. Okay. And this is the death row that existed in June of  
4 2018, not the new building?

5 A. Yes, sir.

6 Q. Okay. And can you estimate how long it would take you to  
7 walk to every cell in death row and hand a piece of paper to  
8 somebody in that cell?

9 A. Probably about 30 minutes.

10 Q. 30 minutes?

11 A. Yes, sir.

12 Q. To walk all the tiers?

13 A. All tiers.

14 Q. And give 160 folks?

15 A. Yeah.

16 Q. Okay. Do you have any knowledge of how the election  
17 form -- do you know what the nitrogen election form is?

18 A. The what form?

19 Q. I'm going to ask you, but I'm guessing that it's no. Do  
20 you know anything about the nitrogen election form for nitrogen  
21 hypoxia?

22 A. I'm not familiar with it.

23 Q. Okay. So you didn't participate in distributing it, then?

24 A. I did not.

25 Q. Okay. And you didn't witness it get distributed?

1 A. Huh-uh.

2 Q. Okay. Have you received -- you've received training about  
3 the Americans with Disabilities Act, right?

4 A. Yes, sir.

5 Q. And you do that annually?

6 A. Not annually, but I have had some training in it.

7 Q. Got you. And have you ever been -- do you recall an  
8 inmate by the name of Kurt Taylor?

9 A. Kurt Taylor. The name sounds familiar.

10 Q. Would it refresh your recollection if I told you that he  
11 filed a lawsuit against you and other Department of Corrections  
12 officials?

13 A. I'm familiar with Kurt Taylor. Yeah. He was -- but I'm  
14 not familiar with --

15 MS. HUGHES: Object to the relevance.

16 THE COURT: What's the point you're trying to make?

17 MR. HAHN: Yes, Your Honor. I apologize.

18 I was going to ask -- and I will represent to the  
19 Court that the basis of this is Kurt Taylor versus Richard  
20 Allen, Number 1:07-CV-794-CGM. It's a Southern District of  
21 Alabama case in which, among other defendants, Officer Moody  
22 was sued and alleged to have violated the ADA rights of this  
23 inmate. Now, the suit was dismissed for filing purposes based  
24 on a filing fee issue, but I wanted to just inquire as to his  
25 knowledge of the ADA.

1 THE COURT: Let's keep it short on this issue.

2 MR. HAHN: It will be very short, Your Honor.

3 Q. (Mr. Hahn, continuing:) Does that refresh your  
4 recollection at all?

5 A. It's not uncommon for inmates to file lawsuits against us,  
6 and Kurt Taylor's name sounds familiar. But as far as the  
7 case, I'm not familiar with it.

8 Q. All right. And that was -- it was filed in 2007 and the  
9 amended complaint was filed in 2009, so that's been a long  
10 time.

11 Now, do you recall in the course of your training on the  
12 ADA learning that difficulty reading is considered a  
13 disability?

14 A. Yes, sir.

15 Q. Okay. Now, are you now a member of the execution team?

16 MS. HUGHES: Objection to the relevance, Your Honor.

17 THE COURT: What is the relevance?

18 MR. HAHN: I can explain it, Your Honor.

19 THE COURT: Okay.

20 MR. HAHN: It's my belief and understanding from  
21 speaking with folks that members of the execution team receive  
22 additional pay for serving on the execution team and for every  
23 execution that occurs.

24 MS. HUGHES: That's also very privileged and that's a  
25 secure --

1 THE COURT: Again, what's the relevance to the ADA  
2 case that we're here about?

3 MR. HAHN: Yes, Your Honor. If Mr. Reeves were to be  
4 executed on January 27th and if Officer Moody were a member of  
5 the execution team, there would be a pecuniary benefit in that  
6 execution occurring on January 27th.

7 MS. HUGHES: Judge, we never disclose who are members  
8 of the execution team, and Mr. Hahn is very aware of that.

9 MR. HAHN: I will note, Your Honor, that members of  
10 the execution team parade around when they do their rounds, and  
11 our clients know who the members of the execution team are.  
12 It's not a secret. We're not to disclose them, obviously,  
13 outside, but I've seen and I know who members of the execution  
14 team are. I don't particularly know that Officer Moody is from  
15 personal knowledge.

16 THE COURT: I don't see the relevance of it, so  
17 objection sustained. Let's go to the next point.

18 MR. HAHN: All right. One second, Your Honor.

19 Thank you, Your Honor. And I apologize. I went over  
20 my 20.

21 THE COURT: Any cross?

22 MS. HUGHES: Yes, sir.

23 THE COURT: How long do you think?

24 MS. HUGHES: I don't think it will be longer than ten  
25 minutes.

1 THE COURT: Okay.

2 MS. HUGHES: We can certainly wait, Judge.

3 THE COURT: You're on the clock. I'd like to go ahead  
4 and get this witness finished so he doesn't have to wait around  
5 for the rest of us.

6 CROSS-EXAMINATION

7 BY MS. HUGHES:

8 Q. Good morning, Officer Moody.

9 A. Good morning.

10 Q. I'm Beth Hughes from the Attorney General's Office.

11 When you were talking about your affidavit, could it have  
12 been that you talked to attorneys from the Attorney General's  
13 Office?

14 A. That's correct. It could have been.

15 Q. And that was a conversation over the phone; is that  
16 correct?

17 A. Yes, ma'am, it was.

18 Q. And you see Matthew Reeves on a daily basis; is that  
19 correct?

20 A. Yes, ma'am.

21 Q. And in your affidavit, you said he's a problematic inmate.  
22 Can you tell me what a problematic inmate is?

23 A. Always into something with the other inmates or even, you  
24 know -- he just has a little smart attitude.

25 Q. And was Mr. Reeves frequently put on P tier?

1 A. He was.

2 Q. And what is P tier?

3 A. P tier is kind of -- it's like when one get in trouble on  
4 death row, that's where he's placed.

5 Q. And you've seen Mr. Reeves walking around with a legal  
6 pad, correct?

7 A. I have.

8 Q. Maybe as recently as a couple of days ago he was walking  
9 around with a legal pad; is that correct?

10 A. That's correct.

11 Q. Does Mr. Reeves ever get legal mail?

12 A. I'm not sure at this time right here, because when they  
13 pass legal mail out now, I'm not around because they pass -- I  
14 work first shift and they pass the mail out on second shift, so  
15 I haven't saw any.

16 Q. What do you recall -- you've seen reading materials in  
17 Mr. Reeves' cell; is that correct?

18 A. I have. I did an inspection and a search of his cell, and  
19 I have saw reading material.

20 Q. Would it surprise you that on other mental health forms in  
21 the Department of Corrections that Matthew Reeves has -- it's  
22 noted that Matthew Reeves has normal intelligence?

23 A. Would it surprise me?

24 Q. Uh-huh.

25 A. No, ma'am.

1 Q. Mr. Reeves has never asked you to read something for him,  
2 has he?

3 A. No, ma'am. Never.

4 Q. And Mr. Reeves has never asked you to write something for  
5 him, has he?

6 A. No, ma'am.

7 Q. Have you seen inmates helping other inmates read on death  
8 row?

9 A. I have.

10 Q. But you've never -- have you ever witnessed another inmate  
11 reading to Mr. Reeves?

12 A. No, ma'am.

13 Q. Does Mr. Reeves understand instructions that you give him?

14 A. Very well.

15 Q. Do you know if Mr. Reeves has told anybody he couldn't  
16 read?

17 A. I've never heard -- known of him telling anyone that he  
18 couldn't read.

19 Q. Is he able to communicate his needs to people at the  
20 prison?

21 A. Very well.

22 Q. And does he interact with other inmates?

23 A. Yes, ma'am, he does.

24 Q. Have you seen him interacting recently since he's been put  
25 on the single walk?

1 A. I have.

2 Q. What did you see?

3 A. I see him -- I've seen him recently just talking to  
4 another inmate, telling him what channel to put the TV on.

5 Q. And what happened with that?

6 A. What happened with it? Well, the inmate couldn't find the  
7 channel he want, and he got mad and slammed the door.

8 Q. And when we were talking about slow inmates, do you think  
9 that a slow inmate is somebody who can't read or needs help  
10 with reading?

11 A. I would think so.

12 Q. Because of the way they talk?

13 A. Yes, ma'am.

14 MS. HUGHES: That's all I have, Judge.

15 MR. HAHN: Your Honor, I have one redirect question.

16 THE COURT: All right. One question.

17 MR. HAHN: Thank you, Your Honor.

18 REDIRECT EXAMINATION

19 BY MR. HAHN:

20 Q. Michael Lewis, who you testified is one of the slower, low  
21 intelligence inmates, he pretty much lives on P side, correct?

22 A. Yes, sir.

23 Q. Thank you.

24 THE COURT: Thank you, Officer Moody.

25 THE WITNESS: Yes, sir.



1 THE COURT: Okay. Let's take a lunch break.

2 MR. ANDERSON: Your Honor, if we could, I think we may  
3 have one more redirect question.

4 RECROSS-EXAMINATION

5 BY MS. HUGHES:

6 Q. Are there inmates on P tier that you don't consider are  
7 slow?

8 A. There are.

9 MS. HUGHES: That's all.

10 THE COURT: All right. It's 11:30 now. Let's take  
11 about an hour. Let's have your next witness at 12:30. Can you  
12 do that?

13 MR. HAHN: Thank you, Your Honor. Yes, Your Honor.

14 THE COURT: Is this something we can finish up today?

15 MR. HAHN: Crossing my fingers, Your Honor. I've  
16 learned long ago not to make promises to judges that I don't  
17 know with certainty that I can keep, but we are going at a  
18 pretty good clip here.

19 THE COURT: Okay.

20 MR. HAHN: Thank you, Your Honor.

21 (A recess was taken from 11:31 a.m. until 12:31 p.m.)

22 THE COURT: Who is your next witness going to be?

23 MS. BUTNER: That's Lori McCulloch.

24 THE COURT: Do we need to talk about anything before  
25 we begin, counsel?

1 MS. KENNY: Your Honor, just for housekeeping, we  
2 would offer the snippet of the phone call as Defendant's  
3 Exhibit A so that the record will have that. And we've talked  
4 to your staff about how to accomplish that.

5 THE COURT: Okay. Any objections?

6 MR. HAHN: No, Your Honor.

7 THE COURT: It's admitted. Anything else, counsel?

8 MS. KENNY: No, Your Honor.

9 THE COURT: You can come up, ma'am.

10 LORI MCCULLOCH

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

14 DIRECT EXAMINATION

15 BY MS. BUTNER:

16 Q. Hello, Ms. McCulloch.

17 A. Hey.

18 Q. And just so I make sure I'm saying it right, do you say  
19 McCulloch or McCulloch?

20 A. McCulloch.

21 Q. Okay. My name is Lucie Butner. I'm an attorney for the  
22 plaintiff.

23 A. Okay.

24 Q. Could you please state your name and spell it for the  
25 court reporter.

1 A. It's Lori, L-o-r-i -- Lee, L-e-e -- McCulloch,  
2 M-c-C-u-l-l-o-c-h.

3 Q. And where are you currently employed?

4 A. For the Alabama Department of Corrections.

5 Q. And how long have you been employed with them?

6 A. Eight years.

7 Q. What is your title or position with the Department of  
8 Corrections?

9 A. My classification is a planning and economic development  
10 specialist, but I'm basically a grants administrator for the  
11 most part and do the records disposition authority as one of my  
12 tasks.

13 Q. And just before we kind of get into more detail there, you  
14 were designated by defendants as a 30(b)(6) witness, which  
15 means you're answering on behalf of the defendants as a whole  
16 today --

17 A. Yes, ma'am.

18 Q. -- in answers to the questions. Okay. Just wanted to be  
19 clear on that. So I'm asking you in that capacity.

20 A. Sure.

21 Q. And the specific category is knowledge and memorialization  
22 of recordkeeping and procedures.

23 A. Yes.

24 Q. So to back up a little bit, you said -- I failed to write  
25 down exactly what you said in addition to grant writing. What

1 is the term you used for the records work that you do?

2 A. It's our records disposition authority.

3 Q. Thank you.

4 A. I'm the administrator of that.

5 Q. And what are your duties as part of that?

6 A. You know, it's basically approving or declining a request  
7 to destroy records and to make sure that we preserve them as  
8 we're supposed to.

9 Q. And what did you do to prepare for testimony today?

10 A. Nothing, really.

11 Q. Do you know anything about the subject matter of the  
12 lawsuit today?

13 A. Very little.

14 Q. Did you meet with any attorneys or review any documents in  
15 preparation for your testimony today?

16 A. I spoke to an attorney, just explaining that I was to come  
17 here, but I didn't review anything.

18 Q. I'd like to ask you some questions about the Department's  
19 recordkeeping as a whole. Could you describe for me, if you  
20 know, what is the agency records administrator for the  
21 Department of Corrections? Do you know what that title implies  
22 and what the duties of that role are?

23 A. Well, that's my title --

24 Q. Right.

25 A. -- for that. Yes, ma'am. I mean, I know what I'm

1 supposed to do.

2 Q. I'd like to ask you now specifically about recordkeeping  
3 at Holman Correctional Facility to the extent it might deviate  
4 from any sort of general policies. Can you --

5 MR. ANDERSON: Your Honor, I'm going to object. This  
6 is outside of what we had designated as a subject for this  
7 witness. I don't know if she knows anything about the  
8 recordkeeping at Holman specifically. But the sole designation  
9 that we got was defendants' knowledge of and memorialization of  
10 its recordkeeping policy and procedures, and we have put up the  
11 person who knows the institutional policy. I don't know how  
12 much knowledge she has about what is done exactly at Holman,  
13 but I know she knows policy.

14 THE COURT: Well, if you don't know how much she  
15 knows, we won't know until she's asked the question and  
16 answered it.

17 You can proceed.

18 MS. BUTNER: Thank you.

19 Q. (Ms. Butner, continuing:) Can you tell me about the  
20 recordkeeping and retention policy as it relates to officer  
21 staffing? How records regarding officers would be created and  
22 retained.

23 A. What kind of records?

24 Q. Records related to attendance of employees at work, who  
25 might be assigned on a given day to attend, employee

1 scheduling, and those kinds of records.

2 A. There are officer logs, duty logs, that are retained. And  
3 to tell you the number of years they're kept, I'd have to refer  
4 to the RDA because there are so many different timeframes for  
5 different documents. But I can say there's been nothing  
6 destroyed for -- I don't want to tell you incorrectly, but I  
7 know since 2017, and it could be prior to that, but I believe  
8 2017, everything's been under a litigation hold.

9 Q. And is that a broad policy?

10 A. Yes.

11 Q. That -- a litigation hold? And how is a litigation hold  
12 put in place?

13 A. I don't know if there's something formal. I don't know.

14 Q. So nothing has been destroyed since 2017 due to that  
15 litigation hold; is that -- regarding officer duty logs; is  
16 that correct?

17 A. Correct.

18 Q. Can you describe what a litigation hold is, generally?

19 A. No.

20 Q. So there's no description of what is required under policy  
21 in order to comply with a litigation hold?

22 A. I don't have a legal background, so I don't want to  
23 misstate anything. I have documents from our legal division  
24 that have pretty clearly defined none of this is allowed to be  
25 destroyed because we're under a litigation hold.

1 Q. So the legal division makes that determination, not the  
2 records division?

3 A. True. Yes.

4 Q. If records were discovered to be missing that were  
5 expected to be kept -- so let's say records of something basic  
6 that would be kept of record such as healthcare records or  
7 something that would be kept in the normal course of Department  
8 of Corrections' care for an inmate, is there an audit process  
9 to determine either the accuracy or completion of general  
10 records like that in the Department of Corrections?

11 A. No.

12 Q. Is there an audit process that occurs as part of a  
13 litigation hold that you're aware of?

14 A. Not that I'm aware of.

15 Q. Is there a system as part of department policy on  
16 recordkeeping that can verify the accuracy of recordkeeping?

17 A. Outside of my job, which is really just to make sure that  
18 what we do destroy or pass to archives and history meets the  
19 criteria that we agree to, I don't know if anybody at the  
20 facilities or in operations has anything like that in place.

21 Q. So that would be outside of the general policy and would  
22 be something that would occur in operations; is that fair?

23 A. Yes.

24 Q. And do you work directly -- your department or your  
25 function work directly with operations at individual

1 institutions?

2 A. No. Well, I communicate with them if they request  
3 something from me.

4 Q. Okay. Can you give me an example of what type of request  
5 you're referring to in regards to what operations might request  
6 from you?

7 A. Well, for instance, if they have a change in personnel and  
8 there's somebody new at that facility that's going to be in  
9 charge of trying to store their records, and then, you know, at  
10 a certain time know that they've got things that have met the  
11 retention period and ask to destroy them, you know, I'll work  
12 with that person to get them trained on what our policy is.

13 And again, like I said, though, since 2017 it's been box  
14 it, label it, but you can't do anything with it.

15 And on occasion there will be somebody who contacts me  
16 because they feel like they've got records that are just  
17 unimportant for anything related to an inmate or staff or  
18 anything like that, and they'll ask if they can destroy them  
19 and we'll have those conversations, but...

20 Q. What criteria are there for those requests to destroy  
21 records outside of a timeframe? So let's say records older  
22 than ten years might be destroyed, but are there other  
23 criterion that you use to answer whether or not something can  
24 be destroyed?

25 A. Well, there are certain records that are permanent, and



1 then the ones -- I mean, anything outside of the permanent  
2 records does have a retention period.

3 Q. What records are permanent, if you can give some examples?

4 A. Well, an inmate's file, anything that has to do with --  
5 you know, there's a certain part of it where -- fingerprints,  
6 pictures. Inmates' files are pretty much permanent. Our  
7 administrative regulations are permanent.

8 Q. What about personnel files?

9 A. Personnel files at our facilities?

10 Q. Of let's say for a Department of Corrections employee.

11 A. Okay. At the facilities, they have to maintain it -- and  
12 again, I don't want to misspeak, but I'd have to look at it to  
13 verify --

14 Q. Sure.

15 A. -- but they keep it there until an employee has been gone  
16 a certain amount of time.

17 But the whole file is still kept with Department of  
18 Corrections in HR, so even if it's not at that individual  
19 facility, it's in HR.

20 Q. Does it ever occur that records are -- permanent records,  
21 for example, are discovered to be missing or misplaced?

22 A. Not that I'm aware.

23 Q. Is there a policy if that were to happen that prescribes  
24 what you would do or how you would memorialize something like  
25 that?

1 A. Permanent records, if they're permanent, if they get to a  
2 point where they're permanent and they're no longer really  
3 accessed, they're supposed to be transferred to archives and  
4 history. If they're things that we still review, we keep them  
5 on site.

6 MS. BUTNER: Just one moment.

7 We have nothing further.

8 THE COURT: Any cross on this witness?

9 MR. ANDERSON: Very, very briefly, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. ANDERSON:

12 Q. Ms. McCulloch, I think I was that attorney you spoke with.

13 A. Yes, sir.

14 Q. Rich Anderson with the Attorney General's Office.

15 You were asked about the litigation holds, and you said  
16 you didn't want to misspeak or mischaracterize things that  
17 legal has told you. What does it mean to you, practically  
18 speaking?

19 A. That we have lawsuits that they don't want to chance any  
20 documents being gone that, you know, might be needed.

21 Q. And you've been asked a number of questions about  
22 different records. How many different kinds of records does  
23 ADOC have, like categories?

24 A. Our RDA is divided up basically by Accounting; Human  
25 Resources; Operation s, which Operations is going to include

1 inmates, staff, the division I work under, Research and  
2 Planning. Within each of those divisions, especially  
3 Operations, there's -- Operations could have hundreds of  
4 different types of records. They're anything from, you know,  
5 maintenance, vendors.

6 Q. Hundreds of different categories?

7 A. Yes.

8 Q. And you don't know all of them off the top of your head, I  
9 assume?

10 A. No.

11 Q. Okay. And they may have different retention periods?

12 A. They do.

13 Q. Okay. But to your knowledge, currently essentially the  
14 rule is don't destroy it; box it up?

15 A. Yes. That's correct.

16 MR. ANDERSON: That's all I have.

17 THE COURT: Any further questions, Ms. Butner?

18 MS. BUTNER: No, Your Honor.

19 THE COURT: You can be excused, ma'am. Thank you.

20 THE WITNESS: Thank you.

21 THE COURT: Your next witness?

22 MR. PALOMBI: Your Honor, we'll call Richard Lewis.

23 RICHARD LEWIS

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

1 follows:

2 DIRECT EXAMINATION

3 BY MR. PALOMBI:

4 Q. Good afternoon, Mr. Lewis.

5 A. Good afternoon.

6 Q. Good to see you again. I might ask you -- this is just  
7 because of me -- to make sure you could speak up a little. I  
8 have no idea why my hearing aids are being a little iffy today,  
9 but they are, so if you could just make sure you speak up  
10 because I just want to make sure I hear your answers.

11 Anyway, could you spell your name -- full name -- for the  
12 court reporter.

13 A. Yes. It's Richard, R-i-c-h-a-r-d, Lewis, L-e-w-i-s.

14 Q. Thank you. What is your present job?

15 A. My present job is the ADA coordinator for Holman  
16 Correctional Facility.

17 Q. Do you have any other responsibilities at Holman?

18 A. No.

19 Q. On any committees or anything?

20 A. Well, I'm on the Critical Crisis Committee.

21 Q. Okay. How long have you been in that job?

22 A. Since 16 October, 2020.

23 Q. All right. So you're lucky. You're not going to be asked  
24 about 2018. When was your position created?

25 A. I couldn't tell you.

1 Q. Were you the first ADA coordinator?

2 A. No.

3 Q. So it was created sometime before?

4 A. (Witness indicated.)

5 Q. Do you know why your position was created?

6 A. Yes. It was created because of the court case Braggs  
7 versus Dunn, and it's because the ADA accommodates all inmates  
8 with impairment.

9 Q. All right. Let's go into that, inmates with impairment.  
10 Can you tell me roughly how many requests for accommodation  
11 you've processed since you've been at Holman?

12 A. Yes. Approximately 23.

13 Q. Have any of those requests for accommodation been for  
14 difficulties reading?

15 A. No.

16 Q. Have any of those requests for accomodation been for any  
17 cognitive -- and by cognitive, I mean cognitive as opposed to  
18 physical issues?

19 A. No.

20 Q. When you started in October 2020, the prison had a larger  
21 population than it does now, correct?

22 A. Yes.

23 Q. About how many more people did it have then than it does  
24 now?

25 A. Well, when I came on board it only had what it has right

1 now. I think it's 320, somewhere in that number. And I think  
2 before then they had 1,000 or better.

3 Q. And still even with that extra population, you had no  
4 inmates requesting an accommodation for cognitive issues?

5 A. Again, I stated when I came on board it was only with 300  
6 and something, so no, I did not.

7 Q. So what is the process at Holman if you get -- if an  
8 inmate requests any type of accommodation?

9 A. When they request an accomodation, I receive the  
10 accomodation form. Within ten days -- ten working days -- I  
11 have to make sure I get some type of answer. I take it and see  
12 where it need to go. Most likely it will go to medical,  
13 request some medical attention or something like that. They  
14 request a wheelchair or a CPAP machine or requesting a cane or  
15 some -- might have an amputee that need an adjustment to his  
16 prosthetic or something like that, and I'll make sure they just  
17 accommodate it.

18 Once I turn it over to medical, medical will get it back  
19 to me. Within that time, I will go back and brief the inmate,  
20 and upon briefing him, he will sign it and then the follow up  
21 procedure would be done through medical.

22 Q. And you have how many days to turn that over?

23 A. Ten days, but just ten days from the time he give it to  
24 the time I receive it until I get it back to him. But it might  
25 take a little longer because medical might take a little

1 longer, but I will go down there and inform the person his  
2 medical is taking longer than that period of time, so I will  
3 intentionally keep him informed.

4 Q. Is an inmate required to go to sick call in order to start  
5 this process?

6 A. No. We have forms available, which is -- request for  
7 accommodation is available in the shift's office. Also it's  
8 available in my office and also it's available in the cube.  
9 All they have to do is ask for an accommodation form and he  
10 will be given one, which he'll fill out, and he can place it in  
11 a box that's readily available in his local area.

12 Q. And you said you do not approve the requests?

13 A. No, I do not -- yes, I approve it after the process have  
14 been done. Like if somebody requests, let's say, a prosthetic  
15 adjustment, now, I'm not going to approve it, but what I will  
16 do is I will send it to medical, let medical make a statement  
17 and medical say, well, okay, then we'll get ahold of our expert  
18 and get his adjustment done, and they will send it back to me.  
19 Now, at that time I would approve it and take it down to the  
20 inmate, talk with him about it, let him sign it, and take it  
21 back and put it in his permanent record and I will file it.

22 Q. Is it possible -- I guess next question is do you have the  
23 power to -- do you deny requests?

24 A. Yes. I do deny some that I see. Some requests, like if  
25 an inmate is on single walk, he take accomodation form and say

1 I request to be moved off of single walk, I have nothing to do  
2 with single walk. They go out walking. I have nothing to do  
3 with that. So what I would do at that time, I would read it, I  
4 would bring it to the warden's attention that this was sent to  
5 me, and then I would deny it and I will send it back to the  
6 inmate. The inmate might -- at that time he have 30 days from  
7 that time if I deny it to send it forward to my next higher  
8 headquarters, which would be up here in Montgomery.

9 Q. But let's say it's for something like a CPAP machine. If  
10 an inmate requests a CPAP machine, do you have the authority to  
11 deny that request?

12 A. No. Why would I?

13 Q. But if they ask for one, you just start -- you start the  
14 process?

15 A. I will start the process. I will turn it over to medical.  
16 Medical will handle the CPAP. I don't have the authority to  
17 authorize or to even get a CPAP, so I would follow procedures  
18 to get him what he needed to be accommodated with.

19 Q. And if you -- now, we've talk ed about inmates making  
20 requests. Have you ever had a situation where you have seen a  
21 need, that an inmate has a need, and taken action?

22 A. Yes.

23 Q. Could you describe that situation?

24 A. Well, I know I have walked down -- and I visit often, go  
25 down and visit the inmates and talk with them. I mean the ones



1 that's on the ADA list. And I have seen an inmate that was  
2 walking kind of one-sided, and I pulled him to the side and I  
3 asked him what was wrong, you know, why he was walking like  
4 that. He said that he had a hip injury and he's unable to walk  
5 properly, and I suggested that he go to sick call and talk with  
6 them, tell them that he's having problems with his hips and all  
7 this here, and see can they get him a cane. And then at that  
8 time I followed up with medical and told them a certain inmate  
9 was going to come down and see them and what it was that I saw  
10 what was wrong with him and could they work with -- you know,  
11 what they would expect to see down there.

12 Once he got down there, they saw him and he was  
13 accommodated with a cane. At that time he was added to my ADA  
14 list to look after because any type of assistance that an  
15 inmate receives as far as physical, any type of physical care  
16 or a problem that he might have, I have to accommodate. So at  
17 that time he was added to my list.

18 Q. And you provide reports of these accommodations?

19 A. Yes.

20 Q. Do you do that monthly? Quarterly? Yearly?

21 A. We have monthly reports that we send forward and also  
22 quarterly.

23 Q. Do you remember signing an affidavit in relation to this  
24 case?

25 A. Yes.

1 MR. PALOMBI: Your Honor, this is in the record  
2 already as Document 42-8.

3 Q. (Mr. Palombi, continuing:) And paragraph 6, that first  
4 sentence, Mr. Lewis, you say, "ADOC employs a formal process  
5 for requests for accomodation." Is that the process you just  
6 described to the Court?

7 A. Yes.

8 Q. Now, the second sentence in that references Document 27.1  
9 in the case, and that was an inmate request slip. Do you  
10 remember reviewing that slip?

11 A. Oh, that slip of paper. Yes, I do.

12 Q. Can you describe to the Court -- an inmate request slip is  
13 a fairly regular form, right?

14 A. It's a fairly regular form to just fill out for an inmate  
15 to make any type of request on anything he feel he might need  
16 or information he might want.

17 Q. Okay. So it's not -- it's a request for just about  
18 anything?

19 A. Yes.

20 Q. Is this the -- I was trying to center it and get that  
21 title up there.

22 Is this the form you were referring to when you were  
23 discussing the inmate request slip in your affidavit?

24 A. Yes.

25 Q. And you remember seeing this form?

1 A. Yes.

2 Q. In this form -- what you say in your affidavit is that  
3 this document would not be considered a formal written request  
4 for accomodation.

5 A. Yes.

6 Q. Why wouldn't it be?

7 A. Well, it's not a formal request because he's not actually  
8 -- he's asking for paperwork to be done for him through another  
9 channel other than ADA. A formal request to me is an actual  
10 accomodation form. But if somebody send me this and needed --  
11 you know, wanted assistance for reading or something like that,  
12 I would usually assist them if I could, but it's not a formal  
13 request because it's -- procedures are followed by the request  
14 for accommodation form that are in place for that type of  
15 procedure.

16 This form here can be addressed almost by anyone.  
17 Requests for accommodations are only addressed through me to  
18 get accommodated for.

19 Q. Now, this form is dated 2015, which is obviously five  
20 years before you started working. And in this form Mr. Reeves  
21 said, I wanted to have something read to him, but the officer  
22 he requested said he didn't have time.

23 If you received a form like this today, what action would  
24 you take?

25 A. Well, technically, this form wouldn't come to me, but if I

1 was to receive it, I would go --

2 Q. Let's say you were to receive it.

3 A. Okay. If I were to receive it, I'd go down there and talk  
4 with him and see what does he need.

5 Q. So would you assist the inmate in getting whatever  
6 document he requested? Would you assist them in getting that  
7 read?

8 A. No. I don't have that much latitude, so I would have to  
9 go in and talk with the warden to see what his recommendation  
10 is.

11 Q. So if an inmate asked to have a document read, you would  
12 not read it to them?

13 A. If he needed my assistance to read a document that is  
14 appropriate and all that there, I would assist him, yes.

15 Q. And ADA accommodations are not -- they're not necessarily  
16 permanent, are they?

17 A. What do you mean?

18 Q. For example, let's say -- we've heard reference a couple  
19 times to the basketball courts at Holman. Let's say an inmate  
20 is out playing basketball and breaks his leg and needs  
21 assistance, whether that be crutches or something after  
22 breaking their leg. An ADA request for something like crutches  
23 or a wheelchair, that could be temporary, correct, because  
24 their leg could get better?

25 A. In some cases, yes.

1 Q. And in some cases, obviously, the person, whatever the  
2 condition is, is permanent and is never going to improve?

3 A. Right.

4 Q. Are there situations where inmates who have accommodations  
5 need accommodations for certain things but not others?

6 A. Yes.

7 Q. Can you give an example of one of those?

8 A. Well, if an inmate needs -- let's say has a cane but then  
9 he does not need a wheelchair at that time.

10 Q. Okay. And accommodations can also include actual changes  
11 in the physical layout of the prison, can they not?

12 A. What do you mean?

13 Q. If there's a need for a ramp or something like that.

14 A. Yes.

15 Q. I just wanted to double-check this again. If an inmate --  
16 if you were walking those tiers and an inmate says to you,  
17 Mr. Lewis, I can't read this, would you -- you would find a way  
18 to assist them?

19 A. Yes, as long as it's appropriate.

20 Q. That's all, Mr. Lewis.

21 A. Okay.

22 CROSS-EXAMINATION

23 BY MS. HUGHES:

24 Q. Good afternoon, Mr. Lewis.

25 A. Good afternoon.

1 Q. Although you were not the ADA coordinator in 2018, there  
2 was a running list of inmates with accommodations at Holman in  
3 2018; is that correct?

4 A. Yes.

5 Q. Is Matthew Reeves' name on that list?

6 A. No.

7 Q. Have you reviewed the ADA files that you have at Holman?

8 A. Yes.

9 Q. Did you find any evidence that Mr. Matthew Reeves has ever  
10 made a request for an ADA accommodation?

11 A. No.

12 Q. He's not made a request for an ADA accommodation for  
13 reading, for example, has he?

14 A. No.

15 Q. I'm going to put this form back up so you can see it  
16 again.

17 A. Okay.

18 Q. What request was made in this inmate request form?

19 A. To me, he was just making a statement. To me, he was just  
20 making a statement saying that an officer did not accommodate a  
21 request he asked of him.

22 Q. Was that a request to bring some papers back to him?

23 A. Right.

24 Q. Is that a request for an ADA accomodation?

25 A. No.

1 Q. Inmates make requests or ask for things all the time,  
2 correct?

3 A. Yes, ma'am.

4 Q. But they're not all ADA requests; is that correct?

5 A. No, they're not.

6 Q. Because an ADA accommodation is meant to correct a  
7 disability; is that correct?

8 A. Yes, ma'am.

9 Q. For instance, a blind inmate who needs Braille material or  
10 a hearing-impaired inmate who needs hearing aids, that would be  
11 an ADA accomodation?

12 A. Yes.

13 Q. Or I can't walk and I need a cane, that would be a request  
14 for an ADA accomodation?

15 A. Yes.

16 Q. But not I'm feeling lazy and I want to be carried to the  
17 day room. That wouldn't be a request for accommodation?

18 A. No, ma'am.

19 Q. Are you familiar with the inmate handbook?

20 A. No.

21 Q. You're not familiar with the inmate handbook that's kept  
22 in --

23 A. Oh, yeah. The inmate handbook, yes. I'm very familiar  
24 with that handbook.

25 Q. Where is it kept at Holman?

1 A. It's kept -- well, I have one in my office, as a matter of  
2 fact, and it's kept in the cube and it's kept in the law office  
3 down there and on death row itself.

4 Q. And does it contain a section concerning the ADA?

5 A. Yes. It's labeled "Disabilities."

6 Q. And that's available for all the inmates, correct?

7 A. All the inmates, in hardcopy and on the computer.

8 Q. Okay. If you had a request for a reading accomodation,  
9 that would be something that you would accommodate?

10 A. Yes.

11 Q. And if you had a request for a cognitive deficiency, that  
12 would be also something that you would accommodate?

13 A. Yes.

14 Q. And there is an appeal process when you deny an ADA  
15 accomodation; is that correct?

16 A. Yes.

17 Q. And that goes to the statewide ADA coordinator; is that  
18 correct?

19 A. Yes, ma'am.

20 Q. Are you required to check on the special needs inmates on  
21 a monthly basis?

22 A. I'm required to check on them on a weekly basis.

23 Q. On a weekly basis. And then you have to write a report on  
24 a monthly basis; is that correct?

25 A. On a monthly basis I have to send a report forward.



1 Q. Okay. And you can make a request for an accommodation  
2 with an inmate request slip; is that correct?

3 A. Yes.

4 Q. And you could -- and an inmate can tell an officer or a  
5 staff member that they need an accomodation, and that would be  
6 brought to your attention; is that correct?

7 A. Yes.

8 Q. And is getting papers returned to an inmate an ADA  
9 accomodation?

10 A. Yes.

11 Q. Getting papers returned to him?

12 A. No. It's not ADA responsibilities. That's something that  
13 the correction officers would take care of.

14 Q. And when a ramp is built for an ADA accomodation, who goes  
15 out and makes sure that it's to the required specifications?

16 A. I do.

17 Q. Okay. So you know what the ramp's -- I guess what the  
18 incline of the ramp is supposed to be?

19 A. Yes.

20 Q. You have to go out there and actually take a tape measure  
21 and measure it?

22 A. Yes. We got certain measurements and heights it has to be  
23 to accommodate a wheelchair.

24 Q. Let's go back to this inmate request slip that we've asked  
25 you about. Take a look at it. It doesn't say I can't read,

1 does it?

2 A. No, ma'am.

3 Q. And does it say I don't understand the papers?

4 A. No, it does not.

5 Q. Does it say please read the papers to me?

6 A. No, it does not.

7 Q. What does it ask on that last line?

8 A. On --

9 Q. The last line of his -- what he said, starting with "so."

10 A. It says, "So you won't bring the papers back to me."

11 MS. HUGHES: That's all I have, Judge.

12 REDIRECT EXAMINATION

13 BY MR. PALOMBI:

14 Q. Mr. Lewis, is difficulty reading or inability to read a  
15 disability under the ADA?

16 A. Yes.

17 Q. And is an inmate required to first make a request for  
18 accommodation before you can take any action in any situation?

19 A. Well, in any situation -- well, that's the only way I  
20 know, that he make a request. So either he tells someone, an  
21 officer, that he's having a problem, and I will go down and  
22 talk with him and let him know what the procedures he need to  
23 follow to get accommodated.

24 Q. On direct examination, you testified that there was a  
25 situation where you made an observation --

1 A. Right.

2 Q. -- and so you initiated the process. The inmate did not  
3 initiate the process, correct?

4 A. Yes.

5 Q. Thank you.

6 MR. PALOMBI: No further questions.

7 MS. HUGHES: Just one more question.

8 RECROSS-EXAMINATION

9 BY MS. HUGHES:

10 Q. If you saw an inmate with reading materials, you wouldn't  
11 think that he needed an accomodation, would you?

12 A. No.

13 MR. PALOMBI: No further questions.

14 THE COURT: Mr. Lewis, I've got one question for you.  
15 As it concerns that inmate request form that Mr. Reeves  
16 completed that we just showed you, if that exact same language  
17 was put by Mr. Reeves on a form that said ADA request form,  
18 would you have treated that as an accommodation request?

19 THE WITNESS: Yes.

20 THE COURT: Okay.

21 MR. HAHN: Your Honor, just for clarity on the  
22 record -- I'm a former appellate attorney and trial attorney --  
23 that was Document 27-1 that we've all been talking about, the  
24 inmate request slip. Thank you.

25 THE COURT: All right. You can be excused, sir.

1 Thank you.

2 THE WITNESS: Okay.

3 MS. HUGHES: Judge, one more question?

4 THE COURT: Ms. Hughes, is this a question in response  
5 to the question that I just asked?

6 MS. HUGHES: Yes, sir.

7 THE COURT: Okay.

8 RECROSS-EXAMINATION

9 BY MS. HUGHES:

10 Q. Mr. Lewis, what disability would you accommodate on that  
11 form if it had been made on an inmate request form -- or on an  
12 ADA accommodation form?

13 A. Well, all I would have did is deny that and inform the  
14 warden of it and took it back and briefed the inmate on the  
15 form.

16 Q. Thank you, sir.

17 THE COURT: You can be excused now, sir.

18 THE WITNESS: Okay.

19 THE COURT: Thank you.

20 Who's your next witness?

21 MR. HAHN: Your Honor, we will call Cynthia Stewart  
22 next.

23 CYNTHIA STEWART

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

1 follows:

2 DIRECT EXAMINATION

3 BY MR. HAHN:

4 Q. Good afternoon, Ms. Stewart.

5 A. Good afternoon.

6 Q. Good to see you again. Spencer Hahn, in case you don't  
7 remember. I think we've talked a few times.

8 Can you please state and spell your name for the record.

9 A. My name is Cynthia Stewart. C-y-n-t-h-i-a, S-t-e-w-a-r-t.

10 Q. And what is your current title?

11 A. Regional director.

12 Q. And that's for the Alabama Department of Corrections?

13 A. Yes.

14 Q. And is that over a particular set of prisons?

15 A. Yes. The southern region.

16 Q. Okay. And is Holman one of those prisons?

17 A. Yes.

18 Q. Okay. And prior to that -- immediately prior to that,  
19 what was your position?

20 A. I was the Warden III assigned to Holman Correctional  
21 Facility.

22 Q. Okay. And that Warden III is the highest ranking warden?

23 A. Yes.

24 Q. Okay. So you were in charge of Holman Correctional  
25 Facility?

1 A. Yes.

2 Q. And there are other levels of warden who may have assisted  
3 you in that position?

4 A. Yes.

5 Q. And when did you -- when were you warden at Holman, Warden  
6 III?

7 A. From August 16th, 2016, until roughly March 2020.

8 Q. Okay. So you were present and in charge of Holman  
9 Correctional Facility in June of 2018?

10 A. Yes.

11 Q. And I know you've been asked about this a lot, and I'm  
12 going to try not to go too long on this, but do you recall the  
13 distribution of an election form?

14 A. Yes.

15 Q. Okay. And I'm going to go ahead and put on the Elmo a  
16 form. Does this appear to be the form that we've talked about  
17 in the past?

18 A. I'm not for sure.

19 Q. Okay.

20 A. I know it was an election form.

21 Q. Okay. And how did that form come to be distributed at  
22 Holman?

23 A. I was instructed to have the form distributed.

24 Q. Okay. So this was not you acting on your own?

25 A. No.

1 Q. And when you say instructed, that means somebody above you  
2 in the chain of command?

3 A. Yes.

4 Q. Okay. And I believe in the past you've testified that you  
5 couldn't recall specifically who that was?

6 A. Correct.

7 Q. Does that lack of memory continue today?

8 A. Yes.

9 Q. Okay. But you are certain that it was someone above you  
10 in the chain?

11 A. Yes.

12 Q. Okay. How did you happen to get the forms that were  
13 distributed?

14 A. I can't recall. My secretary may have had them. I didn't  
15 have the form myself.

16 Q. Okay. And maybe I can just ask you, like, is there a  
17 process by which forms or materials are distributed to inmates?  
18 I may be able to narrow that down. I realize that was a  
19 wide-open question.

20 Let's say, for example, central office says we need to  
21 distribute a certain form to everyone in the facility. Whose  
22 job is it to get you that form?

23 A. If we have to disseminate any information to an inmate  
24 from the central office, they will send the forms to us.

25 Q. Okay. Sufficient copies for you to distribute?

1 A. Not necessarily. They can send one.

2 Q. And then y'all have a photocopier there at Holman?

3 A. I'm sorry?

4 Q. There's a photocopier at Holman?

5 A. Yes, it is.

6 Q. All right. Do you know Inmate Matthew Reeves?

7 A. Not for real, no.

8 Q. Got you. Can I ask you in June of 2018, did at any time  
9 you read an election form to any inmate at Holman?

10 A. No.

11 Q. Okay. And you didn't call an inmate to your office to  
12 read them a form?

13 A. No.

14 Q. Okay. And that's something that would stick out in your  
15 mind?

16 A. Well, I know I didn't, so I'm not going to say it's going  
17 to stick in my mind. I did not.

18 Q. You have no doubts about that. All right.

19 Now, you have been called -- I know you had personal  
20 knowledge of some of this, but you've also been called as a  
21 Rule 30(b)(6) witness, so for the next few questions I'll be  
22 asking you -- and there are only a few -- you're answering on  
23 behalf of the Department of Corrections. Do you understand?

24 A. Yes.

25 Q. Okay. And was that role of yours as a 30(b)(6) witness



1 explained to you a little bit by counsel?

2 A. Yes.

3 Q. Okay. So can you describe to me what the responsibilities  
4 are for maintaining duty post logs?

5 A. On a daily basis, the shift, after they complete their  
6 tour of duty, will submit the duty post logs to the captain,  
7 and then the captain will review the duty post logs, the one  
8 assigned to that particular shift, and they will then turn them  
9 over to either the warden secretary or the captain secretary  
10 for the warden -- assistant warden to review. And after that,  
11 they will be given to one of the secretaries to file.

12 Q. And those files are maintained for -- as far as you know,  
13 for as long as -- how long are those files --

14 A. We have a retention SO regulation, and I had a retention  
15 officer at Holman, so I'm not familiar with the timeframe. But  
16 we did have a person assigned to retention.

17 Q. And do you recall who in June of 2018 was that retention  
18 officer?

19 A. I believe it was Mary Messer.

20 Q. Mary -- I'm sorry?

21 A. Mary M-e-s-s-e-r.

22 Q. Thank you. And is she a corrections officer or something  
23 else?

24 A. She's not a correctional officer. She's an assistant  
25 ASA/support personnel.

1 Q. Got you. And within those duty post logs are inmate  
2 movements throughout the day?

3 A. Yes.

4 Q. So if an inmate gets moved from, say, his or her cell on  
5 death row to the yard for a visit, that will be documented in  
6 the duty post log?

7 A. Yes.

8 Q. Okay. And if an inmate is, say, moved from his or her  
9 cell to attend, say, a meeting of Project Hope, that would be  
10 reflected in the logs?

11 A. Not necessarily with one particular inmate. It may be  
12 that it will be noted as religious service began for whichever  
13 services may be, but not for a specific inmate unless he had an  
14 attorney visit or something to that nature. But not for just a  
15 program call. It would just be for the particular program.

16 Q. Okay. And do you maintain or did Holman in June of 2018  
17 maintain a list of all members of, say, Project Hope?

18 A. I am not for sure. I'm not for sure.

19 Q. Okay. And if I represent to you that on -- I'm trying to  
20 find it here -- that some duty post logs reflect specific  
21 inmate names as being taken to Project Hope meetings in June of  
22 2018, would you have any reason to doubt that that is the case?

23 A. I don't have any reason to doubt. It all depends on who  
24 was doing the log. But the correct way is to announce that  
25 that project is being done or that religious service is being

1 conducted.

2 Q. Got you. And do these types of meetings ever occur during  
3 the course of count?

4 A. What type of meetings?

5 Q. And I apologize. I'm sort of assuming knowledge here that  
6 may not be out there.

7 Every day there are regular counts done of the number of  
8 inmates who are present in the facility?

9 A. Correct.

10 Q. Okay. And part of the reason that y'all keep track of  
11 inmate movement through the duty logs is to know who's in and  
12 who's out of the prison?

13 A. Correct.

14 Q. Including inmates?

15 A. Correct.

16 Q. So you can have an accurate count?

17 A. Correct.

18 Q. Okay. Is it unusual for duty post logs to go missing for  
19 a particular shift?

20 A. Well, unusual? I can't say it's -- I don't want to use  
21 the term unusual, but it does happen.

22 Q. Okay. And what happens when it -- in your role as a  
23 supervisor either currently or when you were warden of the  
24 facility, when it came to your attention that duty post logs  
25 were missing, what, if any, action was taken?

1 A. We'll try to locate the duty post log. Of course, you  
2 know, we do a lot of -- the duty post log will go from one  
3 station to another, but I, if it was brought to my attention,  
4 will try to locate that duty post log.

5 Q. Got you. And so the person responsible ultimately for  
6 maintaining complete and accurate records of all records  
7 required to be maintained at Holman in June of 2018, would that  
8 have been the records retention officer, Mary Messer, or would  
9 that have been someone else?

10 A. Ms. Messer.

11 Q. Okay. And so ultimately you mentioned a procedure by  
12 which these duty post logs and other documents would go through  
13 the captain and then to either the captain's secretary or  
14 warden's secretary, and then after that the next stop would  
15 have been with Ms. Messer?

16 A. No.

17 Q. Okay. What would the next step have been?

18 A. It would have been for the assistant warden, Warden II, to  
19 review.

20 Q. Got you.

21 A. And then it would have gone to Ms. Messer for retention.

22 Q. Okay. So all duty post logs are reviewed by -- or at the  
23 time, at least, are reviewed by one of the wardens at the  
24 facility?

25 A. The deputy, yes.

1 Q. Okay.

2 MR. HAHN: If I could have just one second.

3 Q. Okay. So do you have any independent knowledge or  
4 institutional knowledge -- either way at this point -- as to  
5 why the duty post log for -- well, let me withdraw that  
6 question.

7 Do you recall the visit that the Federal Defenders had on  
8 June 26th of 2018 concerning the election form?

9 A. Yes.

10 Q. And that was a -- this was actually like a fairly unusual  
11 occurrence?

12 A. Yes.

13 Q. And was that because a large number of inmates were all in  
14 the yard at once?

15 A. Well, yes.

16 Q. Okay. And that was a time where attorneys from the  
17 Federal Defenders office came in and reviewed paperwork with  
18 their clients?

19 A. They came in and met with their clients, yes.

20 Q. Okay. And after that meeting, did you receive a stack of  
21 election forms?

22 A. I do not recall. Not me personally.

23 Q. Okay. Got you. And who was your secretary at the time?

24 A. Jennifer Parker.

25 Q. Okay. And do you have any idea why the duty post log for

1 that particular shift when the Federal Defenders came -- I  
2 believe it's called an A day shift -- why that duty post log is  
3 missing from the records?

4 A. No.

5 Q. All right. I am going to briefly, just for illustration  
6 purposes, put on the Elmo something that in discovery is  
7 Defendant's Discovery Disclosure Bates stamp 012980. It  
8 appears to be -- okay.

9 Do you see the document on the Elmo?

10 A. I do.

11 Q. Does that appear to be a duty post log?

12 A. Yes.

13 Q. Okay. And can you read to me the entry for 8:15 a.m. on  
14 6/20 of 2018?

15 A. Yes. Death row inmates are released for Project Hope at  
16 this time, and it has G1 Jeffrey Lee, G18 Jesse Phillips, F7  
17 Nicholas Smith, F18 Bart Johnson, and F20 Sherman Collins.

18 Q. Thank you. Matthew Reeves' name is not on that list,  
19 correct?

20 A. No.

21 MR. HAHN: I have nothing further, Your Honor. Thank  
22 you.

23 THE COURT: Any cross?

24 MR. ANDERSON: Yes, Your Honor.

25 CROSS-EXAMINATION

1 BY MR. ANDERSON:

2 Q. Good morning, Ms. Stewart. I'm Rich Anderson for the  
3 State of Alabama -- well, for defendants.

4 A. Good afternoon.

5 Q. I'm sorry. I'm used to being for the State.

6 When you were the warden at Holman, as warden it would be  
7 your practice to walk the tiers occasionally, correct?

8 A. Correct.

9 Q. And inmates could and did make requests for things  
10 directly to you, true?

11 A. Correct.

12 Q. But Matthew Reeves never made any requests of you, did he?

13 A. I don't recall.

14 Q. Okay. Did Matthew Reeves ever ask you to read something  
15 for him?

16 A. No.

17 Q. Okay. Did anybody ever tell you Matthew Reeves is having  
18 trouble reading; he needs some help?

19 A. No.

20 Q. Okay. Project Hope, that's an inmate-led organization,  
21 isn't it?

22 A. I'm really not familiar with Project Hope. I was thinking  
23 it was more of a religious faith-based --

24 Q. If I tell you that the name of the organization, the full  
25 name, is Project Hope to Abolish the Death Penalty, does that

1 ring any bells?

2 A. (Witness indicated.)

3 Q. Okay. Would you expect a duty post log to show the  
4 movements of every inmate on every day?

5 A. No.

6 Q. Okay. I just want to show you another duty post log, if  
7 you don't mind, and tell me if indeed this looks like a Holman  
8 duty post log. Can you see it on the screen in front of you?

9 A. I do, yes.

10 Q. Okay. Does that appear to be a document you're  
11 familiar -- the type of document you're familiar with?

12 A. Yes.

13 Q. Okay. I just want to show you an example down at the  
14 bottom of the page. At 7:40 and 7:50 a.m., does that indicate  
15 that some inmates were walked?

16 A. Yes.

17 Q. Okay. And what does it tell you about those inmates?

18 A. That it was seven inmates on single walk. For 7:40, death  
19 row inmates -- rover placed seven death row inmates for single  
20 walk. That's on the walk yard and it was seven. At 7:50 they  
21 began to group walk.

22 Q. It doesn't give you all their names, does it?

23 A. No.

24 Q. Was it the universal practice in handling these duty post  
25 logs to list every inmates' movement when it was a group of



1 inmates doing something?

2 A. No, unless it was something specific.

3 Q. Okay.

4 A. But no.

5 Q. And certainly you don't know who every member of Project  
6 Hope is?

7 A. No.

8 Q. All right. And you don't know who members of Project Hope  
9 might talk to, do you?

10 A. No.

11 Q. Are you aware of Matthew Reeves ever making a request for  
12 ADA accomodation during your time at Holman?

13 A. No.

14 MR. ANDERSON: Just a moment.

15 Q. And you were shown a little while ago an excerpt from a  
16 duty post log that showed several inmates going to a Project  
17 Hope meeting, correct --

18 A. Yes.

19 Q. -- that opposing counsel showed you?

20 A. Yes.

21 Q. Do you have any reason to believe that that list is the  
22 exclusive list of the membership of Project Hope?

23 A. Can you rephrase that? I'm sorry.

24 Q. Do you have any reason to think that those five people are  
25 it as far as it comes to Project Hope, that those are the only

1 members?

2 A. I have no idea.

3 Q. Do you know if Project Hope has a formal membership?

4 A. I have no idea.

5 MR. ANDERSON: That's all I have, Your Honor.

6 THE COURT: Any redirect?

7 MR. HAHN: No, Your Honor. Thank you. And this  
8 witness can be excused, please.

9 THE COURT: Okay. You can be excused, ma'am. Thank  
10 you.

11 MR. PALOMBI: Our next witness, Your Honor, will be  
12 Deidre Prevo.

13 DEIDRE PREVO

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

17 DIRECT EXAMINATION

18 BY MR. PALOMBI:

19 Q. Good afternoon, Ms. Prevo.

20 A. Good afternoon.

21 Q. Nice to see you in person actually this time. I'm just  
22 going to ask you to make sure you lean into the microphone.  
23 It's more to help me make sure I hear your answers.

24 Could you state and spell your name for the court  
25 reporter.

1 BY MS. HUGHES:

2 Q. An inmate can use an inmate request slip to make a request  
3 for an accomodation; is that correct?

4 A. Yes.

5 MS. HUGHES: That's it.

6 THE COURT: Let's take a break.

7 You can be excused, ma'am. Thank you.

8 Let's take about a 10-minute break.

9 (A recess was taken from 2:09 p.m. until 2:22 p.m.)

10 THE COURT: You can be seated.

11 Anything we need to talk about before we move into our  
12 next witness? DOC lawyers?

13 MR. ANDERSON: Nothing from us, Your Honor.

14 MR. HAHN: No, Your Honor.

15 THE COURT: All right. Who's your next witness?

16 MS. DULAC: The plaintiff calls Cheryl Price.

17 CHERYL PRICE

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

21 DIRECT EXAMINATION

22 BY MS. DULAC:

23 Q. Good afternoon, Ms. Price.

24 A. Good afternoon.

25 Q. Can you please state your name and spell it for the

1 record?

2 A. Cheryl Price. C-h-e-r-y-l. Last name P-r-i-c-e.

3 Q. And for the record, can you state your title at the  
4 Alabama Department of Corrections?

5 A. I serve as an assistant deputy commissioner.

6 Q. And how long have you held that position?

7 A. Since roughly December of 2020.

8 Q. And before that, what was your position with the  
9 Department?

10 A. I had the title of regional director.

11 Q. And did your region include Holman Correctional?

12 A. At one point it did, yes.

13 Q. And when was that?

14 A. It depends on which time of the year.

15 Q. Okay. Did that include in 2018?

16 A. Yes, it did.

17 Q. And are you aware today that you're appearing as a Rule  
18 30(b)(6) witness as to specific topics?

19 A. Yes.

20 Q. And those topics include the factual basis for the  
21 defendants' answer, the factual basis for the defendants'  
22 affirmative defenses, the defendants' response to certain  
23 discovery requests, differences in the 2002 electrocution  
24 versus lethal injection election process, differences between  
25 the 2018 lethal injection versus nitrogen hypoxia election

1 process, and then the identification of notes, memoranda, and  
2 other written evidence regarding the distribution of the  
3 nitrogen hypoxia election form?

4 A. I was not provided with a list in that form, but I am  
5 aware of the fact that I am appearing as a 30(b)(6) for the  
6 Alabama Department of Corrections today.

7 Q. And what did you do to prepare for today's testimony?

8 A. I met with my attorneys and I also reviewed a number of  
9 documents.

10 Q. And what were those documents?

11 A. Those items included, but not necessarily limited to,  
12 Inmate Reeves' medical file, documents from his institutional  
13 file, the testimonies of some defendants, in some cases their  
14 actual affidavits as well.

15 Q. I'm going to show you a document. I don't think it's been  
16 marked yet by the plaintiff, but the title of it is The  
17 Election to be Executed by Nitrogen Hypoxia. It is the  
18 document that I think we've been referring to quite a bit over  
19 the course of the day.

20 Do you recognize that document?

21 A. Only based on the title that's here.

22 Q. I'm sorry? I couldn't hear you.

23 A. Only based on the title that is listed here, The Election  
24 to be Executed by Nitrogen Hypoxia.

25 Q. Have you ever seen this document before?

1 A. I may have seen a document similar to this one. Yes.

2 Q. And do you remember where you have seen that?

3 A. Only in the documents that I reviewed in preparation.

4 Q. And the document that you saw, was it similar to this or  
5 had it been -- was there a signature on it?

6 A. There was a signature on the one that I saw.

7 Q. Do you remember whose signature that was?

8 A. It was two of the other inmates from Holman Prison that  
9 had signed off on a document.

10 MS. DULAC: Your Honor, at this time the plaintiff  
11 would move to mark this as Exhibit 3.

12 THE COURT: Any objection?

13 MR. ANDERSON: No objection, Your Honor.

14 THE COURT: It's admitted.

15 Q. (Ms. DuLac, continuing:) Ms. Price, so one of our first  
16 topics is about the process that the Department of Corrections  
17 implemented regarding the nitrogen hypoxia election. And so  
18 the law went into effect -- or the change of the law went into  
19 effect June 1st, but prior to that, what procedures, if any,  
20 did the Department put into place regarding the election  
21 process?

22 A. You mentioned June 1st --

23 Q. Of 2018. I'm sorry.

24 A. Okay. And if you could repeat your question as to --

25 Q. Sure. The law in Alabama changed and it allowed for

1 inmates to make an election of their method of execution by  
2 nitrogen hypoxia, and they were allowed as of June 1st to make  
3 that election in writing to the warden of the facility where  
4 they were located.

5 And my question is prior to June 1st when the  
6 Department -- when that change was going to go into effect,  
7 what process did the Department put in place in regards to that  
8 change in the law?

9 A. I'm not aware of a process that we put into place.

10 Q. Was there a protocol that was put into place?

11 A. No.

12 Q. I'm going to show you a document which is a privilege log  
13 that was produced to us. I'm not sure the best way to do this.  
14 There we go. It was produced in discovery by the defendants.  
15 It's page 15 of their privilege log.

16 I would direct your attention to Item 41340, just halfway  
17 down the page. There's an e-mail from May 24th of 2018, so  
18 that would be prior to the June 1st date, and the subject of  
19 the e-mail is the protocol for the hypoxia election period. It  
20 shows you as a recipient of this e-mail.

21 So now having maybe refreshed your recollection, do  
22 you remember what the Department's protocol was going to be for  
23 the hypoxia election period?

24 MR. ANDERSON: Your Honor, I'm going to object to this  
25 question. This is a question about a privilege log. This is

1 an attempt to pierce the privilege that's been asserted. It's  
2 an improper question. Ms. Price, one, is not an attorney and  
3 wasn't involved in producing the privilege log, so the State  
4 objects to what is a blatant attempt to pierce privilege.

5 MS. DULAC: Well, Your Honor, I'm not --

6 THE COURT: Are you claiming it was an improper  
7 privilege assertion as it concerns this e-mail, Ms. DuLac?

8 MS. DULAC: No, no. I'm not asking about the subject  
9 of the e-mail. What I'm asking about is what was the protocol  
10 generally. I mean, what --

11 THE COURT: You asked that question. She said she was  
12 not aware of a protocol or a process.

13 MS. DULAC: Right. And now I'm asking her if this  
14 privilege log refreshes her memory that, in fact, there was a  
15 protocol.

16 THE COURT: Outside of what may have been discussed or  
17 communicated between the recipients of that e-mail?

18 MS. DULAC: Right. Yes, Your Honor.

19 THE COURT: Can you answer that question in the  
20 context of nothing that was actually said or discussed or  
21 written on that e-mail about whether there was a protocol  
22 concerning nitrogen hypoxia?

23 THE WITNESS: I do not recall, sir.

24 Q. (Ms. DuLac, continuing:) And so to your knowledge, you  
25 don't remember a procedure or a protocol that the Department of



1 Corrections had in place prior to June 1st of 2018?

2 MR. ANDERSON: Asked and answered, Your Honor.

3 MS. DULAC: I'm just trying to clean it up because  
4 it's a little --

5 THE COURT: Go ahead and ask your question.

6 Q. (Ms. DuLac, continuing:) I'm just asking you, so you  
7 don't remember if there was a policy or a procedure or a  
8 protocol, anything in place prior to June 1st?

9 A. As I previously stated, I'm not aware of a protocol.

10 Q. And are you aware of any protocol after June 1st?

11 A. I am not aware of a protocol.

12 Q. Were there any discussions amongst staff at the Department  
13 of Corrections regarding how to handle elections for people who  
14 wanted to elect nitrogen hypoxia?

15 A. To my knowledge, I am not aware of that type discussion,  
16 no.

17 Q. Was there a procedure in place as to how to log in forms  
18 that -- or pieces of paper or however someone wanted to make an  
19 election, was there a procedure in place as to how that would  
20 happen?

21 A. No. The agency did not establish a procedure for that.

22 Q. Was there any discussion amongst the wardens who were the  
23 ones that were to receive the elections regarding how they were  
24 to handle it at a facility level?

25 A. I'm not aware of the discussion that took place at the

1 facility level.

2 Q. So there was not a directive from DOC to the individual  
3 wardens?

4 A. No, there was not.

5 Q. And so according to the record, sometime after June 26th  
6 this election form that was Plaintiff's Exhibit 3 was  
7 distributed at Holman Correctional Facility. Is that your  
8 understanding?

9 A. Are you saying after June 26th of 2018?

10 Q. Yes, ma'am.

11 A. At some point, according to the testimony I reviewed from  
12 then Warden Stewart, yes, they did pass that out there at  
13 Holman.

14 Q. Was that form distributed anywhere else in the Department  
15 of Corrections?

16 A. There was a different form also there at Holman that at  
17 least two other inmates had. There was a version of the form  
18 for at least one inmate at Tutwiler, and there was the same  
19 form or a very similar form there at Donaldson was  
20 disseminated.

21 Q. If the Department distributed the form to inmates at  
22 Holman, why wouldn't they distribute it to everyone?

23 MR. ANDERSON: Object to the form of the question.  
24 There's been no testimony that the Department distributed the  
25 form at Holman.

1 THE COURT: I'll let her answer the question if she  
2 understands it. Objection's overruled.

3 A. Could you repeat your question, please?

4 Q. Sure. If the Department, through its warden, Ms. Stewart,  
5 distributed the form at Holman Correctional to persons on death  
6 row, then why wasn't it distributed to all persons on death row  
7 in Alabama?

8 A. In everything that I have looked at, there was nothing  
9 that came out from the Department going out to all of the  
10 facilities where there were death row inmates. In reviewing  
11 the testimony from then Warden Stewart, she did have forms and  
12 she did have someone to pass them out there. Warden Gordy, who  
13 was the warden at Donaldson, passed out the form there. I'm  
14 not certain how Tutwiler came about their form.

15 Q. Right. But my question is why weren't those forms passed  
16 out to everyone at Tutwiler, for example?

17 A. I can't answer that question because I'm not aware of any  
18 order or direction from the central office to pass out that  
19 form.

20 Q. Has anyone asked? For example, has anyone asked the  
21 warden at Tutwiler, why did you not pass out those forms?

22 A. Because I'm not aware of anyone asking the warden at  
23 Tutwiler. There may have been discussion with her as well.  
24 But there was no reason for us to pass out that form.

25 Everything that I reviewed is that the attorneys at Holman

1 did come in and meet with their clients and they gave them  
2 forms. Attorneys did go to Donaldson and they met with their  
3 clients. So I'm not exactly certain how that form was  
4 disseminated around the state.

5 Q. And when you say attorneys, which attorneys do you mean?  
6 I'm sorry. Just for the record.

7 A. If memory serves, it would have been the Federal Defenders  
8 attorneys that went into Holman. I'm not sure at the other  
9 facilities.

10 Q. And why did Warden Gordy distribute that form at  
11 Donaldson?

12 A. I am not certain why he disseminated that form. I did  
13 not -- I don't recall seeing his -- or exactly what was said in  
14 his affidavit.

15 Q. And was he directed by someone at the Department of  
16 Corrections to do that?

17 A. Not to my knowledge, no.

18 Q. So he did that of his own volition?

19 A. That I cannot testify to. Only based on his testimony.  
20 I'm not certain how he came about the form or who told him to  
21 pass them out.

22 Q. Is this of concern to the Department that there wasn't  
23 uniformity in the distribution of this form?

24 A. I'm not certain I understand your question.

25 Q. Well, this is now the subject of two lawsuits, and so my

1 question is, is the Department concerned that an election form  
2 that was distributed was not uniformly distributed throughout  
3 its facilities?

4 A. No. There is no concern there in that respect because I  
5 accept the testimony from then Warden Stewart who said that she  
6 was told to pass this form out. She simply does not recall who  
7 told her to pass it out. The agency had no reason to  
8 disseminate this form. The attorneys who met with their  
9 clients ensured that their clients had those forms.

10 Q. But the attorneys I think that you're referring to don't  
11 represent everyone at Holman; is that correct?

12 A. I'm not certain who they represent at Holman.

13 Q. And following the disclosure that these forms were  
14 distributed by Warden Stewart or through her agent, Captain  
15 Emberton, was there an investigation that was conducted by the  
16 Department?

17 A. There was not an investigation, per se. Questions and  
18 discussions were asked and discussions were held -- questions  
19 were asked and discussions were held about that.

20 Q. And do you know who was questioned?

21 A. Not specifically. The defendants in this case, because  
22 that's when all of that came to light, but most importantly,  
23 the then Warden Stewart.

24 Q. And was there a system in place to confirm whether someone  
25 received this form or not?

1 A. At which location?

2 Q. At Holman, for example.

3 A. According to the documents, it was Captain Emberton that  
4 then Warden Stewart passed the forms off to for him to  
5 disseminate.

6 Q. And when he handed the forms out, did he keep track of who  
7 he gave them to?

8 A. Not to my knowledge. There was no real documentation for  
9 that other than him keeping up or passing out the forms to each  
10 of the inmates who were on death row at that time.

11 Q. And so the inmate never signed any receipt that he had  
12 received the form?

13 A. I am not aware of a receipt being signed.

14 Q. And are there other forms that inmates receive from the  
15 Department where they have to sign a receipt that they had  
16 received it?

17 A. Which forms?

18 Q. For example, a disciplinary report. Let's say you receive  
19 a disciplinary.

20 A. When the inmate receives a disciplinary, he does sign or  
21 he could refuse to sign.

22 Q. But either way, there is a place for him to either refuse  
23 to sign or sign that he received that and he has that  
24 information?

25 A. There is a place on the disciplinary form that requires

1 his signature, and if he does not sign, then they will state  
2 refused to sign.

3 Q. But when the form was -- the election form was distributed  
4 at Holman, there is no record of who received it or if they  
5 received it; is that correct?

6 A. That is correct.

7 Q. Were people in the administration, people like yourself at  
8 the Department, informed that the law had changed?

9 A. I was made aware that the law had changed.

10 Q. And do you remember when that was?

11 A. No, I do not recall the exact date.

12 Q. Do you remember if it was before the law changed or after  
13 the law changed?

14 A. I don't understand your question.

15 Q. I mean, were you informed that, hey, the law is changing  
16 and so soon you may hear about, you know, election forms or  
17 people that are wanting to elect nitrogen hypoxia as their  
18 method of execution, or did you hear about it a year later?

19 A. I do not recall specifically what I was told about that  
20 other than, yes, we did have discussion that the law was  
21 changing, but there was no discussion at that point about  
22 having the inmates to make an election. No.

23 Q. Were you employed at the Department when the law changed  
24 from electrocution to lethal injection?

25 A. Yes, I was.

1 Q. And do you remember what the process was during that  
2 period?

3 A. No, I do not.

4 Q. As the 30(b)(6) witness, did you speak with anybody about  
5 how the Department handled that process?

6 A. As the 30(b)(6) witness today?

7 Q. Yes.

8 A. I did not discuss with anyone about the then electrocution  
9 process.

10 Q. Were you aware that you were going to be asked about that  
11 at the hearing today?

12 A. About what, specifically?

13 Q. About the differences between the 2002 electrocution  
14 versus lethal injection election process.

15 MR. ANDERSON: I'm going to object to the question.  
16 For one thing, that sentence makes no sense. The differences  
17 between the 2002 electrocution versus lethal injection process.  
18 What differences?

19 THE COURT: I'll let her answer the question.  
20 Objection overruled.

21 A. Can you ask your question again, please?

22 Q. Sure. I was just wondering if you had been advised that  
23 you were going to be asked questions about that today and that  
24 you were the 30(b)(6) witness on that topic.

25 A. But when you say "that" --



1 Q. Regarding the election process when the law changed and  
2 the method of execution went from electrocution to lethal  
3 injection in 2002.

4 THE COURT: Why don't you rephrase your question. I'm  
5 having a hard time understanding it myself.

6 When you say advise, are you talking about from  
7 Mr. Anderson or one of the lawyers in preparation for today?

8 MS. DULAC: Right. I mean, Mr. Anderson or counsel  
9 for the defendants advised that she would be the 30(b)(6)  
10 witness on this topic, and so she doesn't know the answer and  
11 so I'm just asking her did anyone tell her that she should know  
12 the answer to these questions. That's all.

13 THE COURT: That kind of gets into what I would  
14 consider attorney-client communications.

15 MR. ANDERSON: And as far as that goes, again, Your  
16 Honor, I point out that this topic is nonsensical. The topic  
17 makes no sense.

18 THE COURT: Well, can you ask the question in a format  
19 that does not require her to disclose any type of communication  
20 that one of the lawyers for DOC may have had with her?

21 MS. DULAC: I'm just trying to ascertain whether she  
22 was prepared for her testimony today, and she does not appear  
23 to be prepared for her testimony on this particular topic.  
24 That's all.

25 THE COURT: You've made your point on that. Let's

1 move on to the next one.

2 Let me ask y'all both something. This has been  
3 sticking in my head. And I don't know that this is the  
4 witness. When we talk about election forms that were handed  
5 out at Holman by DOC personnel, were they handed out to  
6 everybody on death row, including inmates that had already met  
7 with the Federal Defenders and executed forms in connection  
8 with those meetings, or are we talking about inmates who did  
9 not meet with the Federal Defenders?

10 MR. ANDERSON: From the defendants' perspective in  
11 relation to Captain Emberton who testified about this in the  
12 Smith litigation -- and I think has submitted an affidavit in  
13 this case -- they were handed out to everyone on death row  
14 regardless of whether they had been involved in the mass  
15 meeting that the Federal Defenders held.

16 THE COURT: Okay. So I think somebody showed a call  
17 or a duty log, and it showed Mr. Palombi or Mr. Hahn, one of  
18 you, coming in through the gate on the 24th -- well, whatever  
19 date you did. And assuming you sat down with clients and  
20 perhaps had some of them sign forms, those same individuals  
21 could have received another form from DOC within a matter of  
22 days?

23 MR. ANDERSON: That Captain Emberton may have passed  
24 out a second form to them. Yes, sir.

25 THE COURT: Okay. I've got it.

1 Q. (Ms. DuLac, continuing:) Ms. Price, I think perhaps I can  
2 drill down this question a little bit better regarding the  
3 electrocution versus lethal injection versus nitrogen hypoxia.  
4 And I think the distinction is that when the law changed in  
5 2002, it was that electrocution was the method of execution and  
6 it was changing to lethal injection. Is that your  
7 understanding?

8 A. That is my understanding, yes.

9 Q. All right. And so if you did not elect to keep  
10 electrocution as your method, the default became lethal  
11 injection. Is that your understanding?

12 A. When you say -- you're speaking in reference to the  
13 inmates on death row at that time?

14 Q. Yes, ma'am.

15 A. It is my understanding that --

16 MR. ANDERSON: Your Honor, I'm also going to object to  
17 the relevance of the 2002 election process, if there was one.

18 THE COURT: Objection's overruled. You can answer the  
19 question.

20 A. That was the change to lethal injection. There was no  
21 need to pass out a form. That was all up to the inmate because  
22 when the statute changed, that was made clear.

23 Q. (Ms. DuLac, continuing:) That's right. And so if you  
24 wanted the new method, lethal injection, then you didn't need  
25 to do anything, correct?

1 A. That is correct.

2 Q. Which is the opposite of how the nitrogen hypoxia election  
3 was; is that correct?

4 A. In some portions of it, yes.

5 Q. Right. Because if you wanted nitrogen hypoxia, this time  
6 you had to actually fill out a form and make an affirmative  
7 election, correct?

8 A. That is correct.

9 Q. And Mr. Reeves has been on death row since 1998; is that  
10 correct?

11 A. I believe that is correct. I don't recall the exact date,  
12 but he has been there for quite some time.

13 Q. And that would be prior to the change in 2002 with  
14 electrocution versus lethal injection, correct?

15 A. I'm sorry. I don't understand your question.

16 Q. He would have been on death row prior to 2002?

17 A. Yes, he was.

18 MS. DULAC: That's all I have for the moment.

19 THE COURT: Any cross?

20 MR. ANDERSON: Yes, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. ANDERSON:

23 Q. Good afternoon, Ms. Price. Thank you for coming in.

24 A. Good afternoon.

25 Q. I'm going to have a few questions for you. I'm Rich

1 Anderson. I'm with the Attorney General's Office representing  
2 the defendants here.

3 The first thing I want to -- I want to clear something up.  
4 You were asked a moment ago whether you had to fill out a form  
5 to elect nitrogen hypoxia. In fact, you didn't have to fill  
6 out any particular form, did you?

7 A. No.

8 Q. You could write on a piece of paper "I elect nitrogen  
9 hypoxia" and deliver it to the warden?

10 A. That is correct.

11 Q. In fact, to the extent there's any process to the election  
12 of either nitrogen hypoxia or of electrocution versus lethal  
13 injection, it's set up by the statute in both cases, isn't it?

14 A. Yes, it is.

15 Q. And the legislature in enacting both of those statutes, in  
16 neither one of those statutes did it create any requirements  
17 for the Department of Corrections, correct?

18 A. That is correct.

19 Q. And it certainly didn't set out any particular form that  
20 had to be filled out, correct?

21 A. That is correct.

22 Q. Earlier you testified about questions that had been asked  
23 and discussions that had been had about the process of passing  
24 out forms at Holman, about the fact that forms were handed out  
25 at Holman. Those questions were asked in the context of the

1 Smith litigation primarily; is that correct?

2 A. That is correct.

3 Q. And maybe to a lesser degree in the Christopher Price  
4 litigation a couple of years ago?

5 A. Correct.

6 Q. But there was never any like inspector general, formal  
7 investigation of how the forms ended up being passed out?

8 A. No. As I previously stated, there was no formal  
9 investigation, just discussions and questions.

10 Q. And mostly probably lawyers trying to figure out what  
11 happened, right?

12 A. Mostly, yes.

13 Q. Do you know where Warden Stewart got the forms that  
14 Captain Emberton passed out?

15 A. No, I do not.

16 Q. Would you have been in Ms. Stewart's chain of command at  
17 the time?

18 A. Indirectly, yes.

19 Q. Do you recall giving any instructions to her to pass out  
20 any sort of form?

21 A. I did not give her any instructions.

22 Q. Are you aware of any agency-wide instruction to either  
23 Warden Stewart or any other warden to hand out forms to  
24 facilitate the election process?

25 A. No, I am not aware.

1 Q. Do you know Matthew Reeves?

2 A. I do.

3 Q. Okay. We talked the other day during your deposition  
4 about a memorable encounter that you had with Mr. Reeves, and I  
5 think it was earlier this year. Do you recall that?

6 A. Yes, I do.

7 Q. I assume that was at Holman Prison?

8 A. Yes, it was.

9 Q. And while you were at Holman Prison, Mr. Reeves asked you  
10 a question. Could you tell us about that?

11 A. I was actually on the unit walking and talking with the  
12 inmates, and he was seated at a table with other inmates  
13 playing a game -- either checkers or dominos or something like  
14 that -- and he questioned me with a bit of an irate tone about  
15 the inmate phones. He was complaining because when you picked  
16 up the phone on one tier, an inmate on the other side could  
17 actually hear that phone conversation. And because of his  
18 tone, I had to speak sternly to him and have him to change his  
19 tone, which he did, and then I answered his question and told  
20 him that we were aware of it and we were making some  
21 adjustments with the phone.

22 Q. So he didn't have any problem communicating to you the  
23 problem he had, true?

24 A. No, he did not.

25 Q. You understood him fine?

1 A. Yes, I did.

2 Q. And you communicated to him what Holman and ADOC was doing  
3 to address the problem, and he understood you --

4 A. Yes, he did.

5 Q. -- as far as you could tell?

6 A. Yes.

7 Q. Now, you're aware that both of the statutory election  
8 provisions, both the one that took effect in 2002 for  
9 electrocution versus lethal injection and the one that took  
10 effect in 2018 for lethal injection and nitrogen hypoxia, both  
11 of those required the inmate to take action, correct?

12 A. That is correct.

13 Q. And you're not aware of any formal ADOC-wide process or  
14 program or anything that was devised to be communicated to all  
15 death row inmates to facilitate their fulfilling their  
16 statutory obligation, are you?

17 A. No, I'm not.

18 Q. Are you familiar with the inmate handbook?

19 A. Yes, I am.

20 Q. And are inmate handbooks made available to all prisoners  
21 in ADOC custody?

22 A. They are not passed out to them to each have one in their  
23 hand, but the inmate handbook is posted in the library,  
24 hardbound copies, and/or it is actually on the computer so that  
25 they can access the handbook from the library computers.



1 Q. And to your knowledge, the inmate handbook contains a  
2 section regarding ADA accommodations and how inmates can get  
3 help?

4 A. Yes, it does.

5 MR. ANDERSON: Just a moment.

6 Nothing further, Your Honor.

7 THE COURT: Any redirect?

8 REDIRECT EXAMINATION

9 BY MS. DULAC:

10 Q. Ms. Price, Mr. Anderson just asked you about whether or  
11 not the inmates could just write it on a sheet of paper, did  
12 they need an actual form, and your testimony was they could  
13 just write it on a sheet of paper. And my question was were  
14 they notified of that?

15 A. Which inmates?

16 Q. Any inmates. Did the Department notify death row inmates  
17 that they could write their nitrogen hypoxia election on a  
18 sheet of paper?

19 A. No, not to my knowledge. The Department did not do  
20 anything to tell the death row inmates about that election.

21 Q. Except for they gave them a form?

22 A. No. The warden at Holman had a form that she  
23 disseminated. The warden at Donaldson had a form that he  
24 disseminated. And as I mentioned, I am not certain where the  
25 inmate at Tutwiler got her form. And also the other two

1 inmates at Holman that had different forms, I'm not sure where  
2 they got those forms from either.

3 Q. So is it your position that the Department did not give  
4 the forms to inmates at Holman? I just want to make sure that  
5 we're clear on this point.

6 A. According to the testimony from then Warden Stewart, she  
7 doesn't know who told her to pass out those forms. She is  
8 saying that it came from someone in her chain. I'm not certain  
9 where the forms came from.

10 Q. But she was directed to do it by someone within the  
11 Alabama Department of Corrections; is that correct?

12 A. According to her testimony, yes. But I don't know who  
13 that person was.

14 Q. And when you met with Matthew Reeves earlier this year,  
15 did he read anything to you?

16 A. The encounter I had with Inmate Reeves was, as I  
17 mentioned, in the day room area, and he was seated at the table  
18 playing a game with the other inmates.

19 Q. So he did not read anything to you?

20 A. No, he did not.

21 MS. DULAC: Thank you. No further questions.

22 THE COURT: Let me make sure I'm clear on this,  
23 Ms. Price. Other than the election form that was handed out on  
24 death row and what may have been told to those inmates at the  
25 same time, DOC undertook no other efforts to inform death row

1 inmates of the change in the law and how they could go about  
2 electing into nitrogen hypoxia?

3 THE WITNESS: Correct.

4 THE COURT: And then as it concerns -- we've talked  
5 about Holman and Tutwiler. Donaldson has death row inmates?

6 THE WITNESS: Yes. They did at that time.

7 THE COURT: Are there any other facilities that did?

8 THE WITNESS: No.

9 THE COURT: Okay. You can proceed.

10 MR. ANDERSON: Just a couple questions, Your Honor.

11 RECROSS-EXAMINATION

12 BY MR. ANDERSON:

13 Q. Ms. Price, inmates have rights to file appeals, legal  
14 appeals, right?

15 A. That is correct.

16 Q. They file habeas petitions, they file Rule 32s, they file  
17 direct appeals, and all of these are things that they have a  
18 legal right to do, correct?

19 A. Correct.

20 Q. ADOC doesn't advise them on what to file, do they?

21 A. No, we do not.

22 Q. Would it be their lawyers who advise them what to file?

23 A. I would hope so.

24 Q. Does ADOC allow its inmates to have access to their  
25 attorneys?

1 A. Oh, yes, sir.

2 Q. They have telephonic access, true?

3 A. Yes, they do.

4 Q. They have visitation access if they want it, true?

5 A. Yes.

6 Q. One other question about the encounter, the time you met  
7 Mr. Reeves and you were talking to him about the telephones and  
8 he was expressing his concern and you corrected him.

9 Was he able to multitask, continue playing his game  
10 and participate with the other people, or did he just seem to  
11 not be able to handle that?

12 A. Oh, no. He was able to continue with the game.

13 Q. Okay.

14 MR. ANDERSON: That's all I have, Your Honor.

15 THE COURT: We can excuse this witness, Ms. DuLac?

16 MS. DULAC: Yes, Your Honor.

17 THE COURT: Thank you, Ms. Price.

18 THE WITNESS: Thank you.

19 THE COURT: Who's your next witness?

20 MS. DULAC: Your Honor, our last witness is Captain  
21 Jeff Emberton.

22 THE COURT: Let me ask this of both lawyers, and I  
23 think I know the answer. Is anybody going to be able to  
24 testify or can anybody, in fact, testify as to why the  
25 instruction or order was given from Montgomery to hand out

1 these forms?

2 MR. ANDERSON: I wish we knew the details of that,  
3 Your Honor. We do not. We are not aware of anyone who has  
4 that knowledge.

5 THE COURT: We don't know who made the instruction; we  
6 just know that it was made?

7 MR. ANDERSON: We know that Ms. Price recalls  
8 receiving that instruction -- not Ms. Price. I'm sorry. I  
9 misspoke. Ms. Stewart.

10 JEFF EMBERTON

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

14 DIRECT EXAMINATION

15 BY MS. DULAC:

16 Q. Captain Emberton, how are you?

17 A. Pretty good, ma'am. How are you?

18 Q. I'm good. Thank you. Can you please state your name and  
19 spell it for the court reporter.

20 A. Jeff Emberton, E-m-b-e-r-t-o-n.

21 Q. And can you state your occupation?

22 A. Correctional captain.

23 Q. And how long have you held that position?

24 A. Since 2016.

25 Q. And in preparation for your testimony today, did you

1 review any documents?

2 A. No, ma'am.

3 Q. And did you meet with anyone?

4 A. No. I spoke with the attorneys. That's it.

5 Q. And we've spoken before so I won't go into all the  
6 questions we've gone through before, but just for the judge's  
7 reference, how long have you worked for the Department of  
8 Corrections?

9 A. 22 and a half years.

10 Q. And at what point did you work at Holman Correctional  
11 Facility?

12 A. From 2016 to 2019.

13 Q. And at what point or how long did you work on death row,  
14 specifically?

15 A. The whole three years I was there.

16 Q. And did you always have the same job classification?

17 A. Yes, ma'am. While at Holman?

18 Q. Yes, while you were at Holman.

19 A. Yes, ma'am.

20 Q. Have you had training on the Americans with Disabilities  
21 Act?

22 A. Yes, ma'am.

23 Q. And how often do you or have you had that training?

24 A. We get refresher training every year.

25 Q. And is that training for you as an employee or for you to

1 recognize or how to assist persons that are in custody with the  
2 Department of Corrections?

3 A. I mean, it's just part of our annual training we go to  
4 every year.

5 Q. Have you ever assisted someone to complete an ADA  
6 accommodations request?

7 A. Not that I recall.

8 Q. In June of 2018, you were contacted by your warden,  
9 Cynthia Stewart?

10 MR. ANDERSON: Your Honor, I don't want to slow things  
11 down unnecessarily, but I do want to object to the leading  
12 nature of some of these questions.

13 THE COURT: Well, the objection's overruled on this  
14 one. We just need to move some of these things along. I don't  
15 think this is really a disputed issue.

16 Q. (Ms. DuLac, continuing:) Captain, why don't you -- and  
17 I'm sure you know where we're going because this has been the  
18 subject of many conversations between you and I. What I'd like  
19 for you to do is just tell the Court in June of 2018, you were  
20 contacted by Warden Stewart regarding an election form, and she  
21 instructed you to distribute the election form. Can you tell  
22 the Court what she advised you to do and what you did, please?

23 A. She advised me to make sure that every inmate on death row  
24 received an election form and an envelope. I proceeded to  
25 death row and made sure that every inmate on death row received

1 an envelope and an election form.

2 Q. And what did -- how did you make sure that every inmate  
3 received it?

4 A. I personally handed them the form and the envelope.

5 Q. And did every person take the form and the envelope out of  
6 your hand?

7 A. Some of them did. Some of them were asleep and I just  
8 tapped them on their foot and laid the form in the bars of  
9 their cell door.

10 Q. So you may or may not have, in fact, made eye contact with  
11 every person?

12 A. I may or may not.

13 Q. And did you have a list that you kept of all the persons  
14 that were on death row that day that you gave a form to?

15 A. No.

16 Q. Do you have any records of any kind of who you gave a form  
17 to?

18 A. No.

19 Q. And did you make any statements to the inmates as you gave  
20 them the form?

21 A. Other than -- I can't remember exactly what it was my  
22 timeframe was, but I gave them a timeframe of when I needed the  
23 forms back.

24 Q. And when was that?

25 A. I can't recall.



1 Q. Was it -- could you give me an approximate time? Was it  
2 that day? Was it next month?

3 A. If I had to -- I think it was at the end of the week. I'm  
4 not totally correct or sure if it was the end of the week or  
5 not.

6 Q. And what day did you perform this task?

7 A. On the date they were given to me.

8 Q. The day after they were given to you?

9 A. No. The day of.

10 Q. Oh, the day of. Okay.

11 A. Yes.

12 Q. And when were they given to you?

13 A. That morning.

14 Q. And what day of the month were they given to you?

15 A. June.

16 Q. June. And do you remember June what?

17 A. I don't remember the date.

18 Q. So you know that it was June of 2018, but you don't  
19 remember what day. Do you remember what day of the week?  
20 Monday? Tuesday?

21 A. I do not recall.

22 Q. Did you work the weekends?

23 A. I did not.

24 Q. So it would have been Monday through Friday?

25 A. Yes, ma'am.

1 Q. Did you work at night or during the day?

2 A. During the day.

3 Q. I'm sorry?

4 A. During the day.

5 Q. So it would have been during the daytime hours Monday  
6 through Friday sometime in June of 2018?

7 A. If I'm correct, yes.

8 Q. And did anyone ask you any questions?

9 A. Not really.

10 Q. And do you have any memory of any specific inmates that  
11 you handed the form to?

12 A. No, not really. I mean, I don't have -- they all got one.  
13 I don't have anybody that just stands out in my mind that --

14 Q. And to your knowledge, were any of the inmates out of the  
15 facility that day?

16 A. I can't recall.

17 Q. If they were out of the facility, would they have received  
18 a form?

19 A. Probably not. But they don't go anywhere very often  
20 anyway that they're not back by the end of the day.

21 Q. Let's say they were at a free-world hospital, for example.  
22 Surgery. Would they have gotten a form when they came back?

23 A. I wouldn't have given them one.

24 Q. If they were at court, for example, where they would have  
25 been at a county jail for several days, would they have gotten

1 a form when they came back?

2 A. If they were out that week, probably not.

3 Q. Okay. Did you provide these forms to the warden at  
4 Donaldson?

5 A. I did not.

6 Q. Did you provide these forms to the warden at Tutwiler?

7 A. No, ma'am.

8 Q. Do you know at the time if there was a death row inmate at  
9 St. Clair?

10 A. No, ma'am.

11 Q. Did you ever speak with Warden -- I believe his name is  
12 Gordy at the Donaldson Correctional Facility?

13 A. No, ma'am.

14 Q. Did you speak with the warden at Tutwiler?

15 A. No, ma'am.

16 Q. Did Warden Stewart ask you what you said to the inmates  
17 when you handed out the form?

18 A. No, ma'am.

19 Q. Do you have any training in identifying persons with  
20 cognitive deficiencies?

21 A. No, ma'am.

22 Q. You've recently filed an affidavit in this case.

23 A. Yes, ma'am.

24 Q. What were the circumstances of you being asked to file  
25 this affidavit or draft an affidavit?

1 A. I was just asked by one of the attorneys to -- if I knew  
2 who Matthew Reeves was and if I had any contact while I was on  
3 death row, and I said yes, sir. And they said that he needed  
4 an affidavit based on the same case as before.

5 Q. And did you draft this affidavit yourself?

6 A. I think I actually wrote it out and sent it to him and it  
7 was -- they modified it a little bit. I think the format was  
8 off.

9 Q. And you discuss that Mr. Reeves was a problematic inmate.  
10 What did you mean by that?

11 A. Inmate Reeves stayed in a lot of trouble. He did not get  
12 along well with other inmates. He stayed on what we call  
13 single walk for a long time. I tried to give Inmate Reeves  
14 several opportunities to, I guess, be a little bit more  
15 productive. He was a tier runner for a short period of time,  
16 and he just -- he was not a good fit.

17 Q. Do you remember if he was on P block in June of 2018?

18 A. He was.

19 Q. And what's the distinction on P block as far as -- I'm  
20 sorry. That was a terrible question.

21 If you're on P block, are you allowed interaction with  
22 others or are you in segregation or how does that work?

23 A. Death row doesn't really technically have a segregation  
24 because they're all locked down 23 hours a day, but the ones  
25 that cannot function in a tier with other inmates, that's where

1 we put them because they are isolated.

2 Q. So at the time Mr. Reeves would have been isolated from  
3 other inmates?

4 A. Other than the other ones on that tier that -- you know,  
5 we had about 20-something inmates on that tier at the time that  
6 just could not live with any of the other inmates.

7 Q. And so I guess maybe my question is how does P block  
8 differ from the other tiers as far as inmates having  
9 interaction with others?

10 A. P block is off by itself.

11 Q. Okay.

12 A. When you -- and it's kind of hard to picture. If you walk  
13 it, when you go on to a tier, you have two sides with a two  
14 story on each side, an upstairs and a downstairs. And P block  
15 on that side, you've only got that one side. There's no one  
16 else around them. That upstairs and the downstairs is all  
17 there is.

18 Q. Do you remember when you passed out those forms if you did  
19 P block first or if you did it last or --

20 A. I don't recall.

21 MS. DULAC: I think that's all I have for today.

22 Thank you.

23 THE COURT: Any cross?

24 CROSS-EXAMINATION

25 BY MR. ANDERSON:

1 Q. Good afternoon, Captain Emberton. I'm Rich Anderson. I  
2 represent the defendants here. I've got a few questions for  
3 you.

4 There's been some discussion in this case of duty logs or  
5 day logs from Holman. Would they routinely show all movements  
6 of inmates?

7 A. Not all the time.

8 Q. Okay. Might they show, you know, a certain number of  
9 inmates moved from one place to another but not who they were?

10 A. They can.

11 Q. And they might not even reflect an inmate's movement just,  
12 say, to the day room or something like that?

13 A. They may not.

14 Q. Now, you know -- when you were at Holman, you knew death  
15 row pretty well?

16 A. Yes, sir.

17 Q. You didn't need a list of inmates to find your way to  
18 every cell, did you?

19 A. No, sir.

20 Q. I assume -- did you just go from cell to cell until you  
21 covered the whole thing?

22 A. Yeah. Just depending on whichever mood I was in where I  
23 started, if I started at the back or the front. It just  
24 depends on how I wanted to do it that day.

25 Q. Now, you said that the inmates didn't really ask you any

1 questions about the form, but do you recall testifying in the  
2 Smith litigation that, in fact, some of the inmates had asked  
3 you some questions about -- and you offered an explanation of  
4 the form?

5 A. Some of them asked me, you know, when I walked up there  
6 what I had, or they made the comment -- when I told them, you  
7 know, they would all chime in, well, we ain't signing anything  
8 until we send it to our attorney. I mean, that was just  
9 general...

10 Q. Do you recall testifying that -- you said that the  
11 warden -- I'm sorry.

12 You told the inmates that the law had changed and now the  
13 inmates had a choice and that they needed to fill out the form?

14 A. Yes. They needed to sign it and give it back to me.

15 Q. So you offered that explanation to at least some of the  
16 inmates?

17 A. I made the announcement on each tier.

18 Q. On each tier, okay. I want to talk to you briefly about  
19 your affidavit, Captain Emberton. Do you recall that I  
20 actually e-mailed you a draft affidavit?

21 A. Actually, I do. Yes, sir.

22 Q. And asked you to look over it and make sure it agreed with  
23 what our conversation was and what your memory was; is that  
24 correct?

25 A. Yes, sir.

1 Q. And you signed it and sent it back to me, correct?

2 A. Yes, sir.

3 Q. How many affidavits have you signed or drafted in your  
4 career?

5 A. A whole lot.

6 Q. Okay. And you don't remember the circumstances of every  
7 one?

8 A. No, sir.

9 Q. Okay. But when you sign an affidavit, you want to make  
10 sure that it's correct. That's the important thing to you,  
11 true?

12 A. Yes.

13 Q. Now, you testified earlier that Mr. Reeves was not a good  
14 fit as a tier runner. Isn't it true that it's because  
15 Mr. Reeves was, among other things, scamming other inmates?

16 A. That's true.

17 Q. Okay. Was Mr. Reeves charging them for the services he  
18 was supposed to provide for free?

19 A. He was.

20 Q. Tell me a little bit about that.

21 A. Like I said before, the rest of the inmates are locked  
22 down for 23 hours a day, so they don't have a whole lot of  
23 access to anything. The microwave, the phone, the ice cooler,  
24 or anything like that, they don't have access. That's what the  
25 tier runners are for is to be able to run them errands for the



1 other inmates. Matthew Reeves would charge inmates to go do  
2 that stuff for them.

3 Q. So if an inmate wanted a plate of food taken to the  
4 microwave --

5 A. He'd charge them.

6 Q. And he's not supposed to do that?

7 A. No, sir.

8 Q. You were asked some questions about P block generally, and  
9 I think in your affidavit you indicated that the correction  
10 officers tend to have more interaction with people in P block  
11 than in other tiers, correct?

12 A. Yes, sir.

13 Q. Can you tell us kind of why that is?

14 A. Because not being an actual restrictive housing unit, it  
15 is our problematic inmates, the ones that we cannot -- that  
16 need to be isolated to where we can deal with them one on one.  
17 That's why they have a whole lot more, because you have those  
18 type of inmates over there throwing feces, throwing other  
19 stuff. I mean, they're constantly -- there's constantly  
20 something, an incident going on on that block.

21 Q. Now, Mr. Reeves specifically, you know him, correct?

22 A. Yes, sir.

23 Q. You have memories of him. Did he ever ask you to read  
24 anything for him?

25 A. No, sir.

1 Q. Did he ever tell you, Captain Emberton, I can't read?

2 A. Not that I recall.

3 Q. But some inmates do have problems reading, true?

4 A. Some do.

5 Q. And in your experience, oftentimes -- particularly on  
6 death row -- inmates will prefer to turn to each other for  
7 assistance?

8 A. That's correct.

9 Q. And, of course, particularly on death row again, they've  
10 all got their lawyers, right?

11 A. Yes, sir.

12 Q. And inmates have access to a telephone, correct?

13 A. Yes, sir.

14 Q. And they can make legal calls or personal calls, et  
15 cetera, as needed?

16 A. Yes, sir.

17 Q. Do you recall what you told the inmates to do with the  
18 form?

19 A. Not right off the top of my head.

20 Q. If you had previously testified that you told them to fill  
21 out the form and put it in the envelope, seal it, and you'd be  
22 back to collect it --

23 A. That sounds about correct.

24 Q. Did anybody ask you to read the form to them?

25 A. No, sir.

1 Q. Do the inmates ever ask you for legal advice?

2 A. They try.

3 Q. If an inmate asks you for legal advice, what do you tell  
4 them?

5 A. That's not in my scope of my job.

6 Q. Do you have any reason to believe that Matthew Reeves  
7 can't read?

8 A. No, sir.

9 Q. Or can't write?

10 A. No, sir.

11 Q. Are you aware of whether Mr. Reeves has, in fact,  
12 written -- made written communications to ADOC staff and Holman  
13 staff throughout his time at Holman?

14 A. Not that I'm aware. I mean, I've never received anything.

15 Q. Okay. At Holman, on Holman death row, the inmate policy  
16 manual, it's kept in the library, correct?

17 A. Yes, sir.

18 Q. If an inmate wanted a copy of it, can he get a copy of it?

19 A. He can.

20 Q. I just want to make sure I haven't missed something, so if  
21 you'll bear with me just a second, we can get you done.

22 Did any hall runners or tier runners assist you in passing  
23 out the forms?

24 A. No, sir.

25 Q. Okay. Is that because Warden Stewart had ordered you to

1 do it personally?

2 A. Yes, sir.

3 Q. And you take those kind of orders seriously?

4 A. Yes, sir.

5 Q. So if the warden tells you -- the big boss warden, Warden  
6 III -- tells you to hand one of these out to everybody, you're  
7 going to make sure you do that yourself?

8 A. Yes, sir.

9 Q. And in your experience, do inmates sometimes refuse to  
10 sign forms?

11 A. All the time.

12 Q. And inmates sometimes just don't want to cooperate with or  
13 have anything to do with the correctional officers?

14 A. That's true.

15 Q. Do they sometimes ignore you?

16 A. A lot of times.

17 Q. During your time at Holman death row, did you ever see any  
18 other inmate helping Mr. Reeves with reading?

19 A. No.

20 Q. Did you ever see any correctional officer helping him with  
21 reading?

22 A. No, sir.

23 Q. Did you ever see any of the mental health staff helping  
24 him with reading?

25 A. No, sir.

1 MR. ANDERSON: That's all I have, Your Honor.

2 THE COURT: Any redirect?

3 MS. DULAC: Briefly, I promise. I know every lawyer  
4 says that, but I mean it.

5 REDIRECT EXAMINATION

6 BY MS. DULAC:

7 Q. Captain Emberton, I think when we spoke a couple months  
8 back, we talked about the law library, and I know you had  
9 previously done a lot of work in there, and you mentioned to me  
10 that sometimes the computer does not always work there.

11 A. It depends. Sometimes it -- it goes in and out, correct.

12 Q. Right. So there might be times where a person doesn't  
13 always have access to information that's on the computer in the  
14 law library. Is that true?

15 A. At times.

16 Q. And you referenced that you sometimes have read to persons  
17 on death row. They've asked you to read things to them?

18 A. No, I have not.

19 Q. No, you have not?

20 A. Huh-uh.

21 Q. Okay. And then the last thing, you had mentioned that  
22 sometimes the guys, they kind of turn to each other if they  
23 need assistance?

24 A. Yes, ma'am.

25 Q. If Mr. Reeves is on P side, you mentioned that sometimes

1 those folks are not necessarily in the -- in a good way, right?

2 A. Yes, ma'am.

3 Q. They throw feces and other mental health issues, perhaps,  
4 so they may not turn to one another. Is that a fair statement?

5 A. No. Because when it comes down to legal stuff, when it  
6 comes down to death row stuff, legal stuff, they're going to  
7 find a way to communicate. They're going to lay down some  
8 common grounds and communicate about what each one's attorney  
9 says and stuff like that. They're going to communicate. Their  
10 reference comes to other prison stuff where they can't get  
11 along.

12 Q. I see. Okay. Thank you.

13 MR. ANDERSON: Nothing further from defendants, Your  
14 Honor.

15 THE COURT: You can be excused, Captain.

16 THE WITNESS: Thank you, sir.

17 THE COURT: Thank you.

18 Any further witnesses, counsel?

19 MR. HAHN: No, Your Honor. Thank you.

20 THE COURT: Let me ask you about your exhibits that  
21 you attached to your preliminary injunction. Are you offering  
22 those?

23 MR. HAHN: We are, Your Honor.

24 THE COURT: Are there any objections to those?

25 MS. HUGHES: No, Your Honor. And we'd also like to

1 introduce ours.

2 THE COURT: That was the same question I was going to  
3 ask of you. Any objections from your end, Mr. Hahn?

4 MR. HAHN: What's good for the goose is good for the  
5 gander, Your Honor.

6 THE COURT: All right. They're all admitted, both  
7 sides.

8 Okay, Mr. Anderson. Do you have any witnesses?

9 MR. ANDERSON: The only witness I think that we would  
10 call is John Palombi, the issue we brought up earlier, Your  
11 Honor.

12 THE COURT: And identify for me exactly what it is you  
13 want to question Mr. Palombi about.

14 MR. ANDERSON: One of the issues that has come up --  
15 and this touches a little bit on the expert evidence that was  
16 provided this morning by Ms. Fahey regarding reading materials,  
17 specifically her lack of knowledge of other things that  
18 Mr. Reeves has read and how it might inform this Court's view  
19 of her credibility. As I say, I would be happy to make a  
20 proffer of what I expect to be able to show, but it would not,  
21 I don't believe, invade attorney-client privilege on that  
22 issue.

23 THE COURT: The form that you want to ask Mr. Palombi  
24 about is which form exactly?

25 MR. ANDERSON: Well, there's two separate issues, Your

1 Honor. There is the questions we had about the form and how  
2 they came to be at Holman Prison, whether the Federal Defenders  
3 brought 50 copies or 200 copies, essentially.

4 And then the secondary issue was with whether  
5 Mr. Palombi specifically had provided nonlegal reading  
6 materials to his client. And I would be happy to make, as I  
7 say, a brief proffer about --

8 THE COURT: Why don't you make a proffer. One of the  
9 things about putting lawyers on the stand is sometimes you  
10 better watch what you ask for, because you may just get it.

11 MR. ANDERSON: I understand, Your Honor.

12 The two things that we have come across is there is  
13 Project Hope to Abolish the Death Penalty, which you've heard  
14 referred to a few times. We expect to be able to show some  
15 evidence of a business record from Project Hope in the form of  
16 meeting minutes that were posted to Facebook with an  
17 interaction from Mr. Palombi. Those meeting minutes indicate  
18 Project Hope thanking the Federal Defenders and Mr. Palombi  
19 specifically for bringing not only enough copies of the form  
20 for their clients, but for everyone.

21 The second issue relates to inmate phone calls that  
22 were provided the other day -- yesterday or day before,  
23 yesterday I think -- and a statement by Mr. Reeves himself that  
24 Mr. Palombi had sent him -- and I apologize for the  
25 colloquialism, Your Honor, but a big-ass brief about the Creek



1 Indians and their history around here and plantations and  
2 lawsuits and kind of curious about what that might be. It  
3 sounded like somewhat academic or historical reading material  
4 that would be strange to provide to someone who is alleged to  
5 be functionally illiterate.

6 THE COURT: Well, I'll hear from Mr. Palombi or Mr. --

7 MR. PALOMBI: Your Honor, we would still object to me  
8 being called as a witness in this matter. Things that I send  
9 to Mr. Reeves is certainly within the attorney-client  
10 privilege. What Mr. Anderson said before, if his theory is  
11 correct, any attorney representing somebody in an ADA suit  
12 would have to testify in those cases about what they talked to  
13 their client about. That's in effect what Mr. Anderson wants  
14 out of this situation.

15 And with respect to the form, Your Honor, again, this  
16 was client-related business. The Department of Corrections has  
17 had three years to figure out how this form was passed out and  
18 they haven't figured it out, and asking me at this point,  
19 again, would invade what we did in visiting with our clients  
20 specifically that day.

21 THE COURT: What if Mr. Anderson wants to ask you  
22 questions about when you did sit down with your clients and  
23 presented them the form and ask you questions about the  
24 conversations you had with your clients about what that form  
25 meant and how many times you may have read it compared to the

1 testimony that I've heard that -- whereas you may have on the  
2 one hand sat down with your clients, explained the form, read  
3 it to them maybe once, twice, three times, DOC didn't do that;  
4 they just handed the form out with no context of what it means.  
5 That's the kind of things where you better watch what you ask  
6 for, because you may just get it.

7           The Project Hope, did you go make a presentation to  
8 the Project Hope group and did that group include individuals  
9 who were not your client or clients?

10           MR. PALOMBI: No, Your Honor.

11           THE COURT: No?

12           MR. PALOMBI: No.

13           THE COURT: They were all your clients?

14           MR. PALOMBI: Project Hope meets, if I'm not mistaken,  
15 every Wednesday morning in the prison. It is members that are  
16 in the prison. I can say to the Court I have never made a  
17 presentation to members of Project Hope as that group.

18           THE COURT: And I draw a distinction between you  
19 sending your client, Mr. Reeves, materials versus you showing  
20 up at a Project Hope meeting and made a presentation to some  
21 individuals who may have been clients, other individuals who  
22 may not have been.

23           MR. PALOMBI: Correct. And --

24           THE COURT: And if there were individuals who were not  
25 clients, then I don't think that would necessarily be protected

1 by privilege.

2 MR. PALOMBI: I can tell the Court that I have made no  
3 presentation to a group that I -- that did not involve -- that  
4 was not my clients.

5 THE COURT: Okay. All right. Mr. Anderson, anything  
6 else on your proffer?

7 MR. ANDERSON: No, Your Honor.

8 THE COURT: I don't see where I'm going to allow you  
9 to call Mr. Palombi, to be honest with you.

10 All right. Anybody else?

11 MS. HUGHES: No, sir, Your Honor.

12 THE COURT: I had a couple of questions, and I just  
13 want to make sure I'm straight on the story. We know that DOC  
14 handed out these forms to everybody on death row. There is a  
15 dispute as to who exactly handed those forms out, whether it  
16 was Captain Emberton, as he says, or a hall runner, as  
17 Mr. Reeves says in his affidavit. Is that an accurate  
18 assessment there?

19 MR. ANDERSON: I believe that is accurate, Your Honor.

20 THE COURT: And so one of the issues I've got to  
21 decide is whether DOC's decision to hand those forms out in the  
22 manner and in the context in which they did constitutes a  
23 service or a program. Fair enough?

24 MR. ANDERSON: I think that's fair enough, Your Honor.

25 THE COURT: Mr. Anderson, tell me why that does not

1 constitute a service or a program.

2 MR. ANDERSON: Your Honor, it is not a -- it wasn't a  
3 formalized process. It was -- and probably the most key part  
4 of it, it is not something that was necessary in order to  
5 elect.

6 As Judge Marks had said in the Smith litigation, other  
7 inmates elected, made what is very much a legal decision about  
8 their case through their attorneys. Mr. Reeves had access to  
9 his counsel. There was no statutory requirement that a program  
10 be developed. There was no ADOC-wide or no evidence of an  
11 ADOC-wide decision to implement a program. ADOC did not draft  
12 a form. The form was drafted by other attorneys.

13 You know, at the end of the day, all that really was  
14 required was for Mr. Reeves to write on a piece of paper or on  
15 the back of an inmate request form or on a piece of a legal pad  
16 or whatever, I elect nitrogen hypoxia. So, you know, to the  
17 extent -- the handing out of this election form, as we've  
18 called it, was not a key or integral part of making the  
19 election. It didn't deny him the ability to participate in the  
20 election. You know, any alleged violation attached to it would  
21 not have prevented him from getting --

22 THE COURT: But isn't the problem that DOC was not  
23 obligated to do anything under the statute?

24 MR. ANDERSON: Correct, Your Honor.

25 THE COURT: But they decided to do it, and they

1 decided to do it for everybody on death row. And in doing  
2 that, they were providing a service to everybody on death row  
3 for purposes of making that election.

4 MR. ANDERSON: Your Honor, again, the defendants in  
5 this case -- who are the face of ADOC, the commissioner and the  
6 warden -- did not institute a program. We do know and we don't  
7 contest that the then warden at Holman ordered the form to be  
8 passed out, but we are -- we remain unsatisfied that that  
9 informal process is sufficiently formalized to be a --

10 THE COURT: Your position is what they did does not  
11 rise to a sufficient level to constitute a program.

12 MR. ANDERSON: Correct, Your Honor.

13 THE COURT: My observation is that, you know, is this  
14 probably a circumstance of no good deed goes unpunished or as  
15 an unintended consequence.

16 Anything else you want to say on it on your end,  
17 Mr. Hahn, Ms. DuLac, Mr. Palombi?

18 MR. HAHN: No, Your Honor. We just thank the Court  
19 for your time.

20 We would ask -- we're going to order the transcript.  
21 And my apologies in advance to the court reporter that I tend  
22 to talk a little fast, and I usually apologize at the very  
23 beginning. But we would ask for the opportunity to do some  
24 post-hearing briefing.

25 THE COURT: I'm going to give you until next Friday to

1 give me a supplemental brief with respect to what happened  
2 today and the impact. I don't need you to rehash what you've  
3 already filed. It's today's events, okay?

4 MR. HAHN: And just one other question, Your Honor.  
5 You had ordered the defendants to provide progress reports and  
6 sort of rolling discovery. To the extent that we were to  
7 obtain information that we wanted to offer --

8 THE COURT: You can supplement.

9 MR. HAHN: Thank you, Your Honor.

10 THE COURT: Can we all agree that this is -- there is  
11 no evidence in this case that Mr. Reeves actually made an  
12 accommodation request?

13 MR. ANDERSON: Correct, Your Honor.

14 THE COURT: So we're just proceeding down the road  
15 that did he have a disability and was it obvious?

16 MR. HAHN: Yes, with respect to this form, Your Honor.

17 THE COURT: With respect to this form.

18 MR. ANDERSON: That's correct.

19 THE COURT: I'm just trying to -- I want us to get on  
20 the same page of what is in dispute and what's not.

21 MR. ANDERSON: And in all candor, the State believes  
22 that the clearest and strongest failure in Mr. Reeves' case is  
23 his failure to establish that there was an obvious -- there was  
24 a need and it was an obvious need.

25 THE COURT: We've got an affidavit from him. For

1 me -- I'll be honest with you -- my struggle is we're talking  
2 about an individual who has claimed to have an obvious  
3 disability, but I've never seen this individual. I haven't  
4 heard him. He's not -- he hasn't testified here today.  
5 Nobody's taken his deposition, so I don't have the ability to  
6 gauge for myself this individual, so I have to take it upon  
7 what the experts say in their respective reports and so forth.  
8 I just want to be upfront with you all on that. That was a  
9 strategic election presumably made by both sides on it.

10 Am I correct in at least taking from his affidavit or  
11 declaration that if he knew back in June 2018 what he knows now  
12 about the election form, he would have signed it and returned  
13 it back in June of 2018?

14 MR. HAHN: That is correct, Your Honor.

15 THE COURT: So assuming that's his position now, then  
16 somebody has sat down and read it to him?

17 MR. HAHN: I have, Your Honor.

18 THE COURT: So is his accomodation request really a  
19 moot issue at this point?

20 MR. HAHN: Well, an accommodation, Your Honor, within  
21 the timeframe so that it could be an effective election. So I  
22 think it's not moot in terms of --

23 THE COURT: A prospective -- he's certainly not  
24 seeking at this point an order from me requiring that somebody  
25 sit down with him and read the form two or three times, read it

1 slowly, read it forwards, backwards, and then ask him questions  
2 about how he understands it?

3 MR. HAHN: Correct, Your Honor. If this Court were to  
4 rule in his favor, we would provide the Court -- I'm sorry --  
5 we would provide the warden of Holman Correctional Facility  
6 with an executed form within whatever timeframe was given.

7 THE COURT: Okay. Is that fair enough, Mr. Anderson?

8 MR. ANDERSON: I think, Judge, we've actually argued  
9 that precise point in one of our pleadings, that the  
10 accommodation is really moot at this point since he's made that  
11 declaration.

12 THE COURT: So we're looking at was the ADA violated  
13 in that four-day, five-day period of time when that form was  
14 handed to him, and if it was, what are the ramifications from  
15 that.

16 I went back and read the election statute. I read it  
17 a couple of times. Does the statute preclude DOC from  
18 accepting an out-of-time election?

19 MR. ANDERSON: Your Honor, the statute prescribes no  
20 role for ADOC or the commissioner or the warden in the election  
21 process. Their participation in it -- they have no  
22 participation in it. Their description in it is purely  
23 passive. The statute places entirely on the prisoner the  
24 responsibility of delivering to the warden an election in  
25 writing. That's about all there is. There is no requirement



1 that the warden accept it or that the warden effectuate it or  
2 that the warden record it or that he even accept it.

3 THE COURT: Well, DOC has to honor it if the election  
4 is made within 30 days, right?

5 MR. ANDERSON: Correct.

6 THE COURT: My takeaway is that's the only requirement  
7 really made of the statute, is that if a death row inmate gives  
8 an election form, for example, to the warden and does so within  
9 30 days, DOC has to follow that election. Fair enough?

10 MR. ANDERSON: That would be an effective election if  
11 it is delivered to -- I mean, not to be flippant.

12 THE COURT: DOC does not have any discretion. They've  
13 got to accept it and honor it, right?

14 MR. ANDERSON: Within that period.

15 THE COURT: The flip side is, well, is there anything  
16 in this statute or any other statute that would prevent or  
17 preclude DOC from honoring an inmate's post-period election to  
18 be executed by nitrogen hypoxia?

19 MR. ANDERSON: The defendants would have no authority  
20 to do so because the only way to create the valid election is  
21 to do it within the statutory election period. They don't have  
22 a role in -- because they don't have a role in confirming  
23 something or validating it, injunctive relief wouldn't be  
24 effective against these defendants because they -- you know,  
25 the injunction would almost have to be against the statute

1 itself because all of the action is from the inmate's  
2 perspective to create the effective election.

3 THE COURT: Are you saying that DOC has no discretion  
4 whatsoever outside of that window to honor an inmate's choice?

5 MR. ANDERSON: No statutory discretion, Your Honor.

6 THE COURT: Mr. Hahn?

7 MR. HAHN: If I could just briefly clarify, Your  
8 Honor. I believe that they have admitted that there is  
9 authority for that, and I would direct the Court's attention to  
10 Document 21, the amended complaint, paragraph 8, and then  
11 Document 52, the answer to that complaint, paragraph 8. And I  
12 will just briefly read paragraph 8 as slowly as I can.

13 Paragraph 8, "Only Commissioner Dunn has the authority  
14 to alter, amend, or make exceptions to the protocol and  
15 procedures governing the execution of death sentence prisoners  
16 in the state of Alabama." The defendants' response to that was  
17 "admitted." That same language was relied upon in the Smith  
18 case by the Eleventh Circuit to say that this was a redressable  
19 injury, that same type of admission.

20 And so we would point to that in addition to the lack  
21 of statutory prohibition.

22 MR. ANDERSON: I'd be happy to speak to that, Your  
23 Honor.

24 THE COURT: And that was an issue, and I actually  
25 wanted some particular briefing on the redressability issue.

1 So, Mr. Anderson, address the redressability, because I'm stuck  
2 on it, obviously. Eleventh Circuit addressed it, albeit very  
3 briefly, in the Smith case.

4 MR. ANDERSON: As we pointed out in our brief about  
5 the redressability -- I guess the first thing I want to say is  
6 I want to address what Mr. Hahn just said about the complaint  
7 and the answer.

8 The only person with any discretion in the realm of  
9 executions is the commissioner, who has some statutory  
10 discretion over certain limited areas that are defined by  
11 statute. None of that means that the warden is statutorily  
12 empowered to willy-nilly change anything about the election  
13 process. Among his powers that he has discretion over are not  
14 the power to accept a late election.

15 With redressability, kind of the key problem here is  
16 just that there: The defendants in this case -- the warden of  
17 Holman Correctional Facility and the commissioner at the  
18 Department of Corrections -- don't have the power to redo the  
19 statutory election period.

20 And the plaintiff has cited to a Second Circuit  
21 decision regarding a state entity -- not an individual sued in  
22 his official capacity, but a state entity -- wherein -- this  
23 was the Mary Jo case -- wherein the claimed injury was caused  
24 by a statute over which the entity had authority. Regardless,  
25 you know, there is a distinguishing circumstance with what the

1 statute is and the role in that case.

2 And the other problem is that it is a Second District  
3 case and that it is dealing with a state entity as opposed to  
4 individuals sued in their individual capacity. And we think --  
5 as we said in our brief, we think probably better informative  
6 for this Court's decision and certainly more controlling is  
7 Eleventh Circuit precedent dealing with redressability in suits  
8 against individually named -- or rather, individuals acting in  
9 their official capacity.

10 And we've cited, Your Honor, to a couple of cases  
11 there that we rely on. One of which was the Support Working  
12 Animals case, which was a reported Eleventh Circuit decision  
13 addressing whether the attorney general of Florida was an  
14 appropriate redressable defendant in a case involving a  
15 not-yet-enforced gambling statute or gambling amendment. The  
16 theory was the attorney general was the chief law enforcement  
17 officer of the state and more or less could be injunctively  
18 ordered not to enforce a statute.

19 But the Eleventh Circuit point ed out that the  
20 plaintiffs' injuries arose not from the attorney general's  
21 actions -- and this is actually traceability rather than  
22 redressability, but as Your Honor knows, the two are often  
23 quite intertwined in circumstances. The plaintiffs' injuries  
24 arose not from the attorney general's actions on the CRC but  
25 rather from the independent action of third parties not before

1 the Court, namely the Florida voters who independently approved  
2 the amendment at the ballot box.

3 And we have a somewhat similar situation here, where  
4 it's really the legislature which enacted this law and the  
5 governor who passed it and didn't give any power to the warden  
6 to ignore it. So the warden lacks that statutory ability to  
7 redress the injury just in the same way that the attorney  
8 general in --

9 THE COURT: Were these arguments made with the  
10 Eleventh Circuit in Smith?

11 MR. ANDERSON: I don't know that we cited -- as Your  
12 Honor's aware, the briefing schedule in Smith was, again, quite  
13 compressed. I don't know if we cited Support Working Animals  
14 or this controlling precedent in our brief to the Eleventh  
15 Circuit. I did not write that brief, so I can't say, Your  
16 Honor.

17 I would also point to a similar case from another  
18 reported decision from the Eleventh Circuit, which is 974 F.3d  
19 1236, Jacobson v. Florida Secretary of State, where the  
20 secretary of state was the named defendant acting in his  
21 official capacity, and the Court found that there was no  
22 redressability against him.

23 And, I mean, that's the problem we have here is that  
24 their injury, such as it is, arises from Mr. Reeves' failure to  
25 take advantage of the opportunity provided to him by the

1 statute. And indeed, we don't even know that he failed to take  
2 advantage of it for that reason because we know that he had the  
3 assistance of counsel. We know that he communicated with  
4 counsel. We don't know what they said, but Mr. Reeves has  
5 certainly not taken the opportunity in his declaration to say  
6 my counsel never told me.

7 But at its heart, what we really have is it's a legal  
8 decision about an individual inmate's case, the choice of  
9 execution. It is a perfect example of the kind of thing you  
10 would talk to your lawyer about, and you wouldn't rely on an  
11 outside party to tell you what to do.

12 THE COURT: Well, that's speculation. It may be  
13 educated speculation. It's still speculation.

14 As I read the Eleventh Circuit's opinion, the one from  
15 October 15, it was only two sentences long, but they found  
16 redressability here.

17 MR. ANDERSON: And, Your Honor --

18 THE COURT: Are you suggesting that I cannot -- that I  
19 can ignore it?

20 MR. ANDERSON: Well, Your Honor, one, it is not a  
21 reported case so it is not a controlling case. And I would  
22 also note that the analysis that the Eleventh Circuit engaged  
23 in, which was essentially we believe that an order from the  
24 district court would make it more likely that he would get  
25 relief, that kind of analysis was rejected in Support Working

1 Animals, a reported case, where the Court, you know, demanded  
2 more than just some possibility that the order would get the  
3 right result.

4 And this is part of the problem here is, as alluded to  
5 in the Smith case, Alabama defendants, if ordered to do  
6 something by a federal court after an appeal and the order is  
7 final, we're going to find a way to do it. But that doesn't  
8 mean that such an order should issue or that under the doctrine  
9 of redressability it would be proper. And I think that may  
10 have, kind of our statements in Smith, certainly colored the  
11 Eleventh Circuit's decision. They relied on the fact that we  
12 allegedly conceded that in the Smith case when I think it's a  
13 little finer point than that.

14 But, Your Honor, we have laid out our issue on  
15 redressability in our briefing, and I think that speaks to our  
16 position. I suppose that's all I have.

17 THE COURT: Mr. Hahn, Mr. Palombi, anything you want  
18 to say on this particular issue?

19 MR. HAHN: Your Honor, just one thing.

20 You had mentioned statutes, and as I was sitting here  
21 looking at the amended complaint, it occurred to me that I had  
22 cited a statute about administrative exhaustion. And that does  
23 give the Department an exemption from the Alabama  
24 Administrative Procedure Act. It's Alabama Code 15-18-82.1(g).  
25 It does indicate that the legislature wanted to give as much

1 authority as possible to the Department of Corrections to do  
2 what they needed.

3 But with that, nothing else, Your Honor.

4 THE COURT: What is the status -- Mr. Anderson can  
5 probably answer it better -- as to the nitrogen hypoxia  
6 protocol? It's been a work in progress. You all have been  
7 telling me this for -- ever since I've been on the bench for  
8 two years. I've been following it closely in the Burton case,  
9 but the Burton case is now gone, so I have no idea what's going  
10 on.

11 MS. HUGHES: We are still working. I think we are  
12 very close to having a protocol. I think that we could in the  
13 first three or four months of next year have everything  
14 completely ready to go. We're still -- I mean, we are the  
15 first state -- we will be the first state to have a nitrogen  
16 hypoxia protocol, so we are being very cautious and making sure  
17 that especially the correctional officers and the staff at  
18 Holman are protected and that -- I mean, we are working very  
19 hard to see that everyone will not be injured or harmed by  
20 this.

21 THE COURT: Your client's election for nitrogen  
22 hypoxia, is it a qualified election or an unqualified one? And  
23 I am strictly thinking -- asking hypothetically -- that if by  
24 chance they were to allow Mr. Reeves to be executed by nitrogen  
25 hypoxia, is there yet going to be another battle about whether



1 it's a constitutional -- whether it's cruel and unusual  
2 punishment?

3 MR. HAHN: Yes, Your Honor. So I'm going to say this  
4 as briefly as possible and with as little obfuscation as  
5 possible. I would note that we believe the form was a benefit  
6 and the form contained a reservation of rights. However, I  
7 feel confident in saying that given the injunction phase in  
8 terms of pretrial, the type of equitable relief that we would  
9 be seeking, I think it would be within this Court's power and  
10 authority to make it a conditional. That assuming he accepts  
11 the protocol that they develop, he would have to waive his  
12 right to a challenge right now, at least insofar as they were  
13 able to do it before the trial in this case finished.

14 So I know that wasn't as clear or brief as I promised,  
15 but...

16 THE COURT: Another question, and I didn't hear any  
17 evidence about it, is the -- they call it the Braggs consent  
18 decree or the Dunn consent decree. Does it have any  
19 application in this case?

20 MR. HAHN: We would argue, Your Honor, that given the  
21 fact that in the documents that were filed there, which I  
22 believe we attached, there was a notation that the Federal  
23 Defenders and I think Equal Justice or Southern Poverty Law  
24 Center had raised some concerns about testing of death row  
25 inmates, given Atkins issues. But what ended up happening was

1 the parties agreed to carve them out, but in doing so noted  
2 that they were going to treat death row inmates exactly as they  
3 had always been treated, which included testing them. And they  
4 represented in that document that they had tested all death row  
5 inmates.

6 So we would argue that it does inform things and it  
7 does sort of provide a little bit of a basis for why a 75 IQ  
8 number is significant with regard to cognitive difficulties,  
9 because there's no difference between a death row inmate with a  
10 71 or a 68 and a general population inmate with a 71 or a 68  
11 IQ.

12 THE COURT: So is DOC obligated to test Mr. Reeves  
13 under the consent decree?

14 MR. HAHN: I do not believe that they are obligated to  
15 under the consent decree, Your Honor.

16 MR. ANDERSON: And, Your Honor, we would dispute the  
17 allegation, I suppose, or the interpretation Mr. Hahn offers.  
18 The document he refers to that postdates the consent decree,  
19 which is a report from the parties on why they're dismissing  
20 the death row aspect of the mental health issues, ADOC, the  
21 document notes that -- I believe it says ADOC has provided  
22 mental health testing or intellectual disability testing and  
23 that it can be refused. I think that was always their  
24 position. But there is no evidence whatsoever that ADOC has  
25 ever administered an intellectual disability or IQ or, you

1 know, WAIS-IV or Beta or any test of that sort to Mr. Reeves,  
2 much less that there is broad, widespread testing of death row  
3 inmates.

4 Frankly, I'm not sure why that pleading, which was  
5 drafted by both sides, has that phrase in there, but it doesn't  
6 comport with reality.

7 THE COURT: The consent decree references a Beta III  
8 testing. He has not undergone a Beta III testing; is that  
9 right?

10 MR. ANDERSON: Correct, Your Honor.

11 MR. HAHN: Correct, Your Honor.

12 It also mentions -- I think the Beta III is a shorter  
13 test, a screening test. And they say that if somebody gets a  
14 score below 75 and there's some doubt, they're supposed to do  
15 the WAIS or something like that. They talk about more  
16 extensive testing depending on how close you are to the 75.

17 I would note just briefly, Your Honor, that  
18 defendants' -- Jefferson Dunn was the respondent in the habeas,  
19 and they proffered evidence of an IQ test performed by the  
20 expert for the State of Alabama in defending that suit, and  
21 that expert I believe came up with a 68 IQ score for Mr.  
22 Reeves, and that predated the form. So to the extent that  
23 there was testing, whether we're going to quibble about whether  
24 it was the State of Alabama or Commissioner Dunn, he accepted  
25 that and offered that to the Court in proceedings in which he

1 was a named party.

2 THE COURT: The tests that have been performed on him,  
3 are any of those functionally equivalent to the Beta III test?

4 MR. ANDERSON: No, Your Honor.

5 MR. HAHN: They're more involved, Your Honor.

6 THE COURT: Okay. And here's why I'd asked about it.  
7 You all are -- I know you're not ADA lawyers. You've made that  
8 painfully clear. I'm learning that. There is also the line of  
9 cases and doctrine under ADA case law about "regarded as  
10 disabilities." And when I read this consent decree, one of my  
11 initial knee jerks was, well, has DOC agreed in the consent  
12 decree that they will regard as intellectually disabled anybody  
13 that tests at a level of 75 or below on the Beta III? And if  
14 that is true, then DOC has to make accommodations whether that  
15 person is truly disabled or not.

16 MR. ANDERSON: And we would say, Your Honor, that it  
17 is not actually what the consent decree says. The consent  
18 decree -- and I also note happily and proudly that I did not  
19 write the consent decree, but I will endeavor to interpret it.

20 The section on intellectual disability begins on page  
21 29 and runs for several pages setting out different categories  
22 of inmates, including current inmates, inmates who arrive at  
23 DOC eight months after the effective settlement, and inmates  
24 who arrive between the date of the settlement and eight months.  
25 And they have essentially three different ways to deal with

1 them.

2           They also -- there is discussion that the 75 score and  
3 various scores in several sections of this -- and this is also  
4 -- I'm sorry. And I wish that this was not a problem for us  
5 and also for the Court, but the headings in the consent decree  
6 don't seem to match up with the index, so I'm not sure what  
7 happened there.

8           But on page 39 in Section 2 is followed by 2 little I,  
9 small Roman numeral, 1 through 5 over the next couple of pages.  
10 And it sets out a number of different conditions, including  
11 analysis by mental health experts and consideration of adaptive  
12 functioning and adaptive deficits and also the requirement that  
13 the onset be before 18. Just to point out that the Braggs  
14 consent decree is not a simple matter of the ADOC deeming  
15 someone to be intellectually disabled at a certain level. It's  
16 a more complicated inquiry than that, Your Honor.

17           THE COURT: How else am I to interpret -- this is on  
18 page 30: "Current inmates who have no record of a test score  
19 from a Beta III test administered by or at the request of ADOC  
20 will be tested using the Beta III within three months following  
21 the inmate's next annual or semiannual classification review,  
22 whichever is earlier. The results of that testing will be  
23 placed on the OHS module after receipt of those results, and  
24 those who score 75 or less will be determined to have an  
25 intellectual disability and no further testing will be

1 required."

2 That's the source of my concern about -- or statement  
3 about being regarded as disabled, is that by virtue of this  
4 consent decree, DOC, in effect, has contractually agreed to a  
5 certain level or category of person that will be regarded as or  
6 determined to have an intellectual disability.

7 MR. ANDERSON: And, Your Honor, I would say that what  
8 that says is that further testing will not be required, which  
9 would be, you know, a WAIS or one of the other tests that's  
10 mentioned.

11 But I do note that on that same page beginning on  
12 Subsection 5, there's the provision regarding appropriately  
13 licensed mental health professionals using guidelines to  
14 determine the criteria in identifying individuals with  
15 intellectual disabilities. And it's here where we discuss  
16 about adaptive deficits and you don't have significant adaptive  
17 deficits whether your onset was before -- was or was not before  
18 the age of 18. And we believe that this modifies or is an  
19 additional condition to the Subsection 2. We read all of these  
20 together, Your Honor, and not as a simple once you have a Beta  
21 test of 75, that's it.

22 But moreover, Your Honor, the Braggs consent decree is  
23 limited and is not a general application for the very reason  
24 that at the insistence of the Federal Defenders, the counsel on  
25 the other side here, that death row inmates be carved out. At

1 the end of the day, it's an agreement with inmates represented  
2 by counsel that we'll do this for you, for these parties to the  
3 agreement, which is the class action for non-death row inmates.

4 So to read that as somehow establishing a duty towards  
5 a death row inmate doesn't follow, Your Honor, because these  
6 inmates were specifically carved out by Judge Thompson's order,  
7 Document -- I think it was 727 or 729. It was the immediately  
8 previous or immediately prior document in which he notes how  
9 the carve-out process happened and that it happened. Because  
10 of that, we don't believe it can be fairly read that ADOC has  
11 entered into any kind of obligation that extends to death row  
12 inmates. The terms of that settlement, frankly, are not  
13 relevant to the question of whether a death row inmate has a  
14 disability.

15 THE COURT: Mr. Hahn, do you know why death row  
16 inmates were carved out?

17 MR. HAHN: Your Honor, I believe that there was some  
18 concern that Atkins would come into play. We did not represent  
19 Mr. Reeves at the time. He was not represented by Federal  
20 Defenders or the SPLC, so he would not have been part of that.

21 I will note that it is kind of -- when that's the  
22 subject of the litigation and you've got the other side giving  
23 tests willy-nilly, it becomes kind of concerning.

24 I would like to note from my brief introduction to  
25 contracts in law school that I know contracts are construed

1 against the drafter. We were not the drafter of this contract,  
2 Your Honor. When the Court does consider, as it pointed out,  
3 that this is kind of a contract, I would just -- that's the  
4 hornbook law that I remember.

5 I will note the regarded as, I would note that in the  
6 records upon his arrival at Holman, according to Appendix 36,  
7 DOC designated him as having, quote, "mild retardation." So  
8 somebody there as early as 1999 regarded him as mildly  
9 retarded. And at the time, that was the phrase. I'm not  
10 trying to be offensive here. It's now intellectually disabled.

11 THE COURT: So the actual evidence -- and let's talk  
12 about it, because I haven't heard anything really new today --  
13 about him having an intellectual disability, we've got -- it's  
14 all the expert reports. Dr. Renfro and Goff and -- no, King.  
15 It wasn't Renfro, but King. What is it about these particular  
16 experts that establish your argument that he's intellectually  
17 disabled, at least to the extent that he needed this kind of  
18 accomodation?

19 MR. HAHN: Yes, Your Honor.

20 Well, so the argument -- and I guess that he's  
21 intellectually disabled, I believe the evidence shows that this  
22 form was ninth, tenth, eleventh-grade level.

23 THE COURT: I get that it's an eleventh-grade level  
24 form and that he may be functioning at a literacy or  
25 readability level of somewhere in the fourth -- maybe the first



1 grade, third, fourth, fifth grade. I get all that.

2 MR. HAHN: Okay. And so are you asking about the  
3 obviousness based on --

4 THE COURT: The obviousness, yes.

5 MR. HAHN: Yes, sir, Your Honor.

6 And so what I would note is a couple of things.  
7 First, going back to the contract. I promised not to talk  
8 about Doc 728. The reason it is relevant is it goes to show  
9 what they knew or should have known and what was present in the  
10 minds of the DOC and Commissioner Dunn in 2016 when they  
11 drafted this, and that was that they know or they consented or  
12 conceded that inmates -- and there's no reason to believe that  
13 a death row inmate is different from a general population  
14 inmate with regard to intelligence and whether they're  
15 disabled, and certainly no reason to read the ADA that way.  
16 But that they acknowledge that a 75 score on an IQ test  
17 rendered them subject to the ADA protections.

18 And I would note on page 31 of that, they talk about  
19 if an inmate scores at less than the seventh grade level on the  
20 WRAT, appropriate assessments will be performed to determine  
21 developmental disability status. So they've put cutoffs in  
22 there and counsel for DOC put cutoffs in there that I think  
23 informed the decisionmaking process when you look at the form  
24 that was distributed and the evidence that was presented.

25 And then you go back to his arrival at Holman, you've

1 got official records which they maintain. They regard him as  
2 designated as having mild retardation; again, the term of art  
3 at the time, is now intellectually disabled.

4 Then four and a half years later in 2003, he's  
5 described as having, quote, "learning disabilities," end quote.  
6 That's Appendix 37.

7 And nearly four years after that, he was described by  
8 Holman staff as, quote, "slow," end quote and, quote, "possibly  
9 cannot read," end quote. App 38.

10 So there is evidence spanning years that show that  
11 they knew or should have known that Mr. -- and did regard  
12 Mr. Reeves as someone with a disability, a cognitive  
13 disability. And so from his intake to 2016 when they decided  
14 that 75 would be their cutoff in that lawsuit, that all informs  
15 what they knew or should have known.

16 And so we would submit to this Court that for purposes  
17 of whether we can show a significant likelihood of success on  
18 the merits sufficient to get a preliminary injunction here,  
19 that this is sufficient to establish that.

20 THE COURT: Do either of you know why 75 was selected  
21 as the cutoff in the Braggs litigation?

22 MR. ANDERSON: Your Honor, one thing I do know is that  
23 it was not drafted by the ADOC lawyers. It's the product of  
24 negotiation between two parties. And as Your Honor knows,  
25 nobody ever gets everything they want in a negotiation. Why it

1 was picked, I don't know why that number was chosen over any  
2 other.

3 But what I do know is, again, that this is not a -- to  
4 use this contract analogy, which I don't think is correct  
5 because it's not a contract, it is a settlement agreement that  
6 was given effect by a federal judge that specifically carved  
7 out from its effect and from its applicability in toto death  
8 row inmates. Not merely death row inmates represented by the  
9 Federal Defenders at the time, but the entirety of death row.  
10 So again, I don't want there to be any blurred lines over the  
11 applicability of the Braggs consent decree.

12 I also want to note that there is some cherry-picking  
13 going on when --

14 THE COURT: I think both of y'all are cherry-picking.

15 MR. ANDERSON: -- with the records. And I would note  
16 that the first record that we find that mentions anything about  
17 Mr. Reeves' intellectual functioning is normal intellectual  
18 functioning from 7/24 of '98. We have one speculative  
19 document, the 7/28/98, that says he may have limited  
20 intellectual disabilities.

21 But, Your Honor, all of this talking back and forth  
22 about records and cherry-picking of records of whether he has  
23 limited reading ability. One thing, Your Honor has heard him  
24 read. You have heard an expert opine that he only reads at a  
25 second grade level and then hear him reading a more advanced

1 document. We don't know the upper limit, actually, objectively  
2 of what he can do. We don't know whether he can read well  
3 enough to know that a document is a legal document and is  
4 something his counsel could talk about. We don't have evidence  
5 on that.

6 THE COURT: Let me ask you this.

7 MR. ANDERSON: Yes, Your Honor.

8 THE COURT: From DOC's point of view, from a full IQ  
9 standpoint, what would be the cutoff score, the line, from an  
10 intellectual disability to not being -- and I mean, I know --  
11 I've read all the Atkins cases, been involved in some of them.  
12 I'm aware of kind of the 70 and there's standard deviations and  
13 things like that. But the purpose of the intellectual  
14 disability, the level that we're talking about here under the  
15 ADA, what kind of numbers are we talking about?

16 MR. ANDERSON: The first thing that we -- in talking  
17 about this and the IQ scores are that IQ scores don't establish  
18 intellectual functioning, intellectual disability, or lack of  
19 it. It involves more factors than that. And as Your Honor's  
20 aware from having seen the Atkins cases, particularly as  
21 related to Mr. Reeves, both the state courts and the district  
22 court and the Eleventh Circuit have all agreed that he is not,  
23 in fact, intellectually disabled based on all of the evidence.

24 THE COURT: Well, for purposes of an Atkins claim, but  
25 this is a little bit different.

1 MR. ANDERSON: Agreed, Your Honor. But if we are  
2 looking at the question of whether a disability is obvious to  
3 the defendants, you know, what we have is a body of evidence  
4 that shows that it's anything but obvious. We have evidence  
5 that Mr. Reeves reads. We have evidence that he doesn't ask  
6 for assistance reading. We have evidence that he's in  
7 communication with his attorneys. We have evidence that he  
8 fills out forms and communicates his needs clearly. We have  
9 evidence that he interacts with people in an understandable  
10 way. We have heard from several correctional officers -- or a  
11 couple of correctional officers and several correctional  
12 officials who have had interactions with Mr. Reeves, none of  
13 whom observed anything to cue them in that this is someone who  
14 alleges he cannot read or that he needs any accommodation at  
15 all.

16 So that, Your Honor -- we started off with what's the  
17 obviousness and what's the evidence of obviousness, and we  
18 think that's the evidence, that there is no obviousness here.

19 MR. HAHN: You had asked about the 75, Your Honor.  
20 Real quick, I just want to say I have no idea where it came  
21 from, but it appears that they were probably trying to build a  
22 margin of error in. But I just wanted to -- I didn't think I  
23 heard that get answered there.

24 THE COURT: As it concerns the obviousness, Mr. Hahn,  
25 I guess from your point of view, it's really these reports that

1 were and are in the custody of DOC?

2 MR. HAHN: Yes, Your Honor. And the arguments that  
3 Commissioner Dunn and his counsel made against Mr. Reeves in  
4 which they said, well, yes, he doesn't meet the old standard on  
5 Atkins, he doesn't get the benefit of the new standard, and  
6 under AEDPA deference, you need to confirm his convictions.

7 There's a bunch of lenses you have to look through  
8 when you get to that, but the reality is they had an IQ score  
9 of sub 70 from their own expert; the same expert who said he  
10 had a fifth grade reading level. I don't know how much clearer  
11 the obviousness can be. They had four months before the  
12 distribution of this form. Commissioner Dunn was served with  
13 the amended habeas petition which set forth the evidence of the  
14 testing and why his counsel believed him to satisfy the Atkins  
15 standard, or the newer version that they were arguing should  
16 apply.

17 So I'm not sure that there's ever been a time where  
18 somebody's put on notice with an official legal document saying  
19 here's our evidence that he is slower or intellectually  
20 disabled, which we don't have to show he's intellectually  
21 disabled. I don't want to go down that road. But we have to  
22 show he has a disability.

23 But they had four months beforehand. They and their  
24 general counsel, ADOC, were served with this document, and then  
25 they have their own records which they have been relying on in

1 Rule 32 and going forward to challenge the level of impairment  
2 that he had.

3 So we would argue that it was obvious. They had court  
4 pleadings. They were making representations to the courts.  
5 They went to the United States Supreme Court on it, Your Honor.

6 THE COURT: Let me ask this to you as an officer of  
7 the court. You did go down and meet with some of your clients  
8 about the election form?

9 MR. HAHN: Yes, Your Honor, and --

10 THE COURT: Or was it you, Mr. Palombi? I have no  
11 idea.

12 MR. HAHN: So I can explain. We actually organized  
13 this. Ms. Simpson and at the time Mr. Govan were on the other  
14 side, and Judge Watkins called us all in. We'd filed a lethal  
15 injection lawsuit, and in it we had alleged nitrogen hypoxia.  
16 And in the time between us filing that and going through  
17 discovery, the legislature passed the law.

18 Judge Watkins, being a fairly common sense guy, called  
19 the parties into an informal conference in his room and said  
20 how is this case not moot, because y'all have elected in  
21 your -- I consider that it looks like an election to me.  
22 They've passed a statute. We said, well, Judge, we probably  
23 want to get some paperwork done on this before we move to  
24 dismiss. It's going to be difficult to get to see all of our  
25 clients in a short timeframe. This was early June, and we had

1 nine plaintiffs at that point.

2 And I said to the judge, Judge, I'm concerned that if  
3 we only go and talk to nine clients, we're doing a disservice  
4 to our remaining three dozen clients. So he ordered or  
5 encouraged the ADOC to facilitate our visit. And so we went  
6 and visited on June 26th, took the form, and went over it with  
7 all of our clients who were present at Holman with the  
8 exception of two. And then we -- Mr. Palombi went up to  
9 Donaldson and met with our clients there, and then one of our  
10 attorneys who's no longer there went to Tutwiler to meet with  
11 our one female death row inmate.

12 So this was sort of a procedure -- Mr. Stewart, Jody  
13 Stewart, assistant general counsel for DOC, actually arranged  
14 the whole thing. It was unusual. It was Mr. Palombi, me, an  
15 investigator from our office no longer there named Terry  
16 Deep -- who actually went to Berkeley Law but prefers to  
17 investigate -- and a social worker investigator that we have,  
18 Sarah Romano. We all went and met with our clients and  
19 answered their questions.

20 MR. ANDERSON: Your Honor, may I address something?

21 THE COURT: You may.

22 MR. ANDERSON: The allegation that the commissioner  
23 has imputed knowledge of everything that happens in a habeas  
24 litigation, much less in a Rule 32 litigation, is absurd. Your  
25 Honor probably knows that the proper defendant in a habeas



1 litigation is the person who officially has custody of the  
2 inmate, but the practical thing is that the attorney general  
3 has and always has represented the State of Alabama in all  
4 habeas actions.

5 To the extent the -- you know, even if a copy was  
6 actually served on the commissioner -- and I'm not even sure if  
7 it was, but if it was, it would only inform him of allegations  
8 and nothing more. The litigation is handled by our office. As  
9 Your Honor knows, counsel often has access to information that  
10 clients don't have, obtained through various sources. And  
11 again, the whole point of the litigation below or much of the  
12 point of the litigation below was establishing that he is not  
13 intellectually disabled. So I find it hard to see how that  
14 could put anyone on notice, much less a pro forma habeas  
15 defendant, of an obvious need for an accomodation.

16 THE COURT: Are you saying he's not a proper party?

17 MR. ANDERSON: In this action, Your Honor?

18 THE COURT: Uh-huh.

19 MR. ANDERSON: No, Your Honor. I'm referring to the  
20 habeas action.

21 THE COURT: Okay.

22 MR. HAHN: If I could just briefly speak on that, Your  
23 Honor? I promise, briefly.

24 I can't find it in front of me, but in the request for  
25 admissions that we made, they responded and admitted that ADOC

1 general counsel was served a copy of the -- and I'll represent  
2 that to the Court. I can provide it under cover.

3 MR. ANDERSON: If we said that -- and I don't have any  
4 reason to doubt that it happened.

5 MR. HAHN: Thank you.

6 THE COURT: All right. Some of these medical forms  
7 that --

8 Maybe, Mr. Anderson, you're the one that filed them.  
9 No. It was just in the general inmate file.

10 -- that purport to have handwriting of his, I do  
11 question whether that really is, in fact, his handwriting.  
12 There's a lot of forms where he's asking about Ultram. It's in  
13 very good handwriting, if not better than mine.

14 What is DOC's position as to whether those were  
15 actually written by him or by somebody else?

16 MS. KENNY: So, Your Honor, there are some forms that  
17 are called inmate -- or sick call forms and medical record  
18 request forms. Those are in Mr. Reeves' handwriting. Then  
19 there's a corollary form that is -- I can't remember -- nurse  
20 encounter or something like that that correlates to that sick  
21 request or that request that is written in some medical  
22 personnel's handwriting.

23 MR. ANDERSON: Two sides of the same encounter, Your  
24 Honor, I think is what --

25 MS. KENNY: Right. So you put in a sick request slip

1 to be seen, and then, you know, maybe the next day you get  
2 seen, and the nurse does the intake. That's what it's called,  
3 I think a nurse intake form. The nurse does the intake, and  
4 that's where you'll see quotes from like the nurse is quoting  
5 what he's telling the nurse. But they sort of correlate to  
6 each other. It's two forms for each encounter.

7 MR. ANDERSON: And I would note additionally, Your  
8 Honor, to the extent there's any question about whether  
9 Mr. Reeves has written documents that he's submitted, we  
10 haven't heard anything from Mr. Reeves on that, so I don't  
11 think there's any evidence that it's not his handwriting.

12 THE COURT: Well, both of you could have brought him  
13 in or whatever. Talking about cherry-picking documents, you  
14 know, those are presumably being cherry-picked, and you're  
15 asking me to draw some inferences from them as to his level of  
16 intelligence, and I'm just going to have to determine whether  
17 that's his handwriting and he wrote those or somebody else on  
18 the cell block did.

19 MR. ANDERSON: Just one thing about cherry-picking,  
20 Your Honor. As I understand it, we submitted every single one  
21 of the written forms.

22 THE COURT: That's where I think I pulled it from, was  
23 the file that --

24 MR. ANDERSON: I think so. I think Your Honor has a  
25 complete picture of those.

1 THE COURT: Here's what I also want you to do in your  
2 supplemental submissions is pinpoint for me the references, the  
3 entries that you say support the disability or not so if  
4 there's a nurse's note that says mildly retarded or functioning  
5 at a low intelligence level -- I know you did it to some  
6 extent, but to the extent there's more things you have  
7 discovered in preparations for today, just give me the record  
8 cites, okay? Just give me the CliffsNotes, the highlights of  
9 it so I can go right to it in one --

10 MR. ANDERSON: So just to understand, if we have  
11 previously submitted it, you would like us to cite back to the  
12 previous submission rather than putting it back in again?

13 THE COURT: I want it as simple in front of me as  
14 possible, so I would prefer that you not cite back to your old  
15 brief.

16 MR. ANDERSON: Okay.

17 THE COURT: Let's just pull it all together, old  
18 brief, new evidence, into one source for me.

19 MR. HAHN: And just to clarify, Your Honor, if there's  
20 one document out of something that is reflective of that, we  
21 would attach that to the brief?

22 THE COURT: Well, you don't have to attach it if it's  
23 already in the record. If you would just have the record cite  
24 to it, Doc 42-1 at 15. That way I know exactly where to look.

25 MR. HAHN: Thank you, Your Honor. And can I ask --

1 THE COURT: Also, when you do that cite, interpret  
2 whatever it is you want me to take from it, because odds are  
3 it's handwriting. You may be able to interpret it and you  
4 might, but I may not be able to. So just give me the context  
5 of what it's saying.

6 MR. HAHN: And I believe Your Honor set a Friday  
7 deadline, close of business; is that correct?

8 THE COURT: Next week, yes.

9 MR. HAHN: Next Friday. And we'll order an expedited  
10 copy of the transcript from today.

11 THE COURT: He's heard you. He's going to get right  
12 on it, right, Blanton?

13 MR. HAHN: We will pay anything. We will pay  
14 literally anything for it to get it on time.

15 THE COURT: And then on that discovery issue, you all  
16 need to be looking at those records and turning them over every  
17 day.

18 MS. HUGHES: Yes, sir.

19 THE COURT: I am not happy about the fact that you  
20 brought that record review to a screeching halt.

21 MS. HUGHES: We will start on it today.

22 MR. ANDERSON: Your Honor, we apologize for that. It  
23 is strictly a question of limited resources in a small division  
24 of our office.

25 THE COURT: Well, again, you know, when decisions are

1 made by the State with ongoing litigation, you better be able  
2 to ramp up, because you know what's coming. So limited  
3 resources doesn't quite cut it with me.

4 MR. HAHN: We appreciate your time today, Your Honor,  
5 and the court staff's time in leaving the Christmas thing a  
6 little bit early here.

7 THE COURT: It's unfortunate that the holidays are  
8 here, but it is what it is on that. Let's get moving. I'll  
9 try to get you an order out as quickly as I possibly can.

10 MR. HAHN: Thank you, Your Honor.

11 MR. PALOMBI: Thank you.

12 THE COURT: All right. We're adjourned. I thank you  
13 all. I appreciate it.

14 MR. ANDERSON: Thank you, Your Honor.

15 (Proceedings concluded at 4:42 p.m.)  
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COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

This 15th day of December, 2021.

/s/ Blanton Callen

Official Court Reporter

Registered Professional Reporter

# **Exhibit 20**



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

MATTHEW REEVES

Plaintiff,

v.

CASE NO: 2:20-CV-27-RAH

JEFFERSON DUNN, et al.,

Defendants.

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MOTION HEARING

\*\*\*\*\*

BEFORE THE HONORABLE R. AUSTIN HUFFAKER, JR., UNITED STATES DISTRICT JUDGE, at Montgomery, Alabama, on Thursday, December 9, 2021, commencing at 8:34 a.m.

APPEARANCES

FOR THE PLAINTIFF:

Mr. Spencer Jay Hahn  
Ms. Allyson Renee DuLac  
Mr. John Anthony Palombi  
Ms. Lucie T. Butner  
FEDERAL DEFENDERS  
817 South Court Street  
Montgomery, Alabama 36104

FOR THE DEFENDANTS:

Mr. Richard Dearman Anderson  
Ms. Beth Jackson Hughes  
Ms. Polly Spencer Kenny  
OFFICE OF THE ATTORNEY GENERAL  
Capital Litigation Division  
501 Washington Avenue  
Montgomery, Alabama 36130

**PL EX 20**

1 Thank you.

2 THE WITNESS: Okay.

3 MS. HUGHES: Judge, one more question?

4 THE COURT: Ms. Hughes, is this a question in response  
5 to the question that I just asked?

6 MS. HUGHES: Yes, sir.

7 THE COURT: Okay.

8 RECROSS-EXAMINATION

9 BY MS. HUGHES:

10 Q. Mr. Lewis, what disability would you accommodate on that  
11 form if it had been made on an inmate request form -- or on an  
12 ADA accommodation form?

13 A. Well, all I would have did is deny that and inform the  
14 warden of it and took it back and briefed the inmate on the  
15 form.

16 Q. Thank you, sir.

17 THE COURT: You can be excused now, sir.

18 THE WITNESS: Okay.

19 THE COURT: Thank you.

20 Who's your next witness?

21 MR. HAHN: Your Honor, we will call Cynthia Stewart  
22 next.

23 CYNTHIA STEWART

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

1 follows:

2 DIRECT EXAMINATION

3 BY MR. HAHN:

4 Q. Good afternoon, Ms. Stewart.

5 A. Good afternoon.

6 Q. Good to see you again. Spencer Hahn, in case you don't  
7 remember. I think we've talked a few times.

8 Can you please state and spell your name for the record.

9 A. My name is Cynthia Stewart. C-y-n-t-h-i-a, S-t-e-w-a-r-t.

10 Q. And what is your current title?

11 A. Regional director.

12 Q. And that's for the Alabama Department of Corrections?

13 A. Yes.

14 Q. And is that over a particular set of prisons?

15 A. Yes. The southern region.

16 Q. Okay. And is Holman one of those prisons?

17 A. Yes.

18 Q. Okay. And prior to that -- immediately prior to that,  
19 what was your position?

20 A. I was the Warden III assigned to Holman Correctional  
21 Facility.

22 Q. Okay. And that Warden III is the highest ranking warden?

23 A. Yes.

24 Q. Okay. So you were in charge of Holman Correctional  
25 Facility?

1 A. Yes.

2 Q. And there are other levels of warden who may have assisted  
3 you in that position?

4 A. Yes.

5 Q. And when did you -- when were you warden at Holman, Warden  
6 III?

7 A. From August 16th, 2016, until roughly March 2020.

8 Q. Okay. So you were present and in charge of Holman  
9 Correctional Facility in June of 2018?

10 A. Yes.

11 Q. And I know you've been asked about this a lot, and I'm  
12 going to try not to go too long on this, but do you recall the  
13 distribution of an election form?

14 A. Yes.

15 Q. Okay. And I'm going to go ahead and put on the Elmo a  
16 form. Does this appear to be the form that we've talked about  
17 in the past?

18 A. I'm not for sure.

19 Q. Okay.

20 A. I know it was an election form.

21 Q. Okay. And how did that form come to be distributed at  
22 Holman?

23 A. I was instructed to have the form distributed.

24 Q. Okay. So this was not you acting on your own?

25 A. No.

1 Q. And when you say instructed, that means somebody above you  
2 in the chain of command?

3 A. Yes.

4 Q. Okay. And I believe in the past you've testified that you  
5 couldn't recall specifically who that was?

6 A. Correct.

7 Q. Does that lack of memory continue today?

8 A. Yes.

9 Q. Okay. But you are certain that it was someone above you  
10 in the chain?

11 A. Yes.

12 Q. Okay. How did you happen to get the forms that were  
13 distributed?

14 A. I can't recall. My secretary may have had them. I didn't  
15 have the form myself.

16 Q. Okay. And maybe I can just ask you, like, is there a  
17 process by which forms or materials are distributed to inmates?  
18 I may be able to narrow that down. I realize that was a  
19 wide-open question.

20 Let's say, for example, central office says we need to  
21 distribute a certain form to everyone in the facility. Whose  
22 job is it to get you that form?

23 A. If we have to disseminate any information to an inmate  
24 from the central office, they will send the forms to us.

25 Q. Okay. Sufficient copies for you to distribute?

1 A. Not necessarily. They can send one.

2 Q. And then y'all have a photocopier there at Holman?

3 A. I'm sorry?

4 Q. There's a photocopier at Holman?

5 A. Yes, it is.

6 Q. All right. Do you know Inmate Matthew Reeves?

7 A. Not for real, no.

8 Q. Got you. Can I ask you in June of 2018, did at any time  
9 you read an election form to any inmate at Holman?

10 A. No.

11 Q. Okay. And you didn't call an inmate to your office to  
12 read them a form?

13 A. No.

14 Q. Okay. And that's something that would stick out in your  
15 mind?

16 A. Well, I know I didn't, so I'm not going to say it's going  
17 to stick in my mind. I did not.

18 Q. You have no doubts about that. All right.

19 Now, you have been called -- I know you had personal  
20 knowledge of some of this, but you've also been called as a  
21 Rule 30(b)(6) witness, so for the next few questions I'll be  
22 asking you -- and there are only a few -- you're answering on  
23 behalf of the Department of Corrections. Do you understand?

24 A. Yes.

25 Q. Okay. And was that role of yours as a 30(b)(6) witness

1 explained to you a little bit by counsel?

2 A. Yes.

3 Q. Okay. So can you describe to me what the responsibilities  
4 are for maintaining duty post logs?

5 A. On a daily basis, the shift, after they complete their  
6 tour of duty, will submit the duty post logs to the captain,  
7 and then the captain will review the duty post logs, the one  
8 assigned to that particular shift, and they will then turn them  
9 over to either the warden secretary or the captain secretary  
10 for the warden -- assistant warden to review. And after that,  
11 they will be given to one of the secretaries to file.

12 Q. And those files are maintained for -- as far as you know,  
13 for as long as -- how long are those files --

14 A. We have a retention SO regulation, and I had a retention  
15 officer at Holman, so I'm not familiar with the timeframe. But  
16 we did have a person assigned to retention.

17 Q. And do you recall who in June of 2018 was that retention  
18 officer?

19 A. I believe it was Mary Messer.

20 Q. Mary -- I'm sorry?

21 A. Mary M-e-s-s-e-r.

22 Q. Thank you. And is she a corrections officer or something  
23 else?

24 A. She's not a correctional officer. She's an assistant  
25 ASA/support personnel.

1 Q. Got you. And within those duty post logs are inmate  
2 movements throughout the day?

3 A. Yes.

4 Q. So if an inmate gets moved from, say, his or her cell on  
5 death row to the yard for a visit, that will be documented in  
6 the duty post log?

7 A. Yes.

8 Q. Okay. And if an inmate is, say, moved from his or her  
9 cell to attend, say, a meeting of Project Hope, that would be  
10 reflected in the logs?

11 A. Not necessarily with one particular inmate. It may be  
12 that it will be noted as religious service began for whichever  
13 services may be, but not for a specific inmate unless he had an  
14 attorney visit or something to that nature. But not for just a  
15 program call. It would just be for the particular program.

16 Q. Okay. And do you maintain or did Holman in June of 2018  
17 maintain a list of all members of, say, Project Hope?

18 A. I am not for sure. I'm not for sure.

19 Q. Okay. And if I represent to you that on -- I'm trying to  
20 find it here -- that some duty post logs reflect specific  
21 inmate names as being taken to Project Hope meetings in June of  
22 2018, would you have any reason to doubt that that is the case?

23 A. I don't have any reason to doubt. It all depends on who  
24 was doing the log. But the correct way is to announce that  
25 that project is being done or that religious service is being



1 conducted.

2 Q. Got you. And do these types of meetings ever occur during  
3 the course of count?

4 A. What type of meetings?

5 Q. And I apologize. I'm sort of assuming knowledge here that  
6 may not be out there.

7 Every day there are regular counts done of the number of  
8 inmates who are present in the facility?

9 A. Correct.

10 Q. Okay. And part of the reason that y'all keep track of  
11 inmate movement through the duty logs is to know who's in and  
12 who's out of the prison?

13 A. Correct.

14 Q. Including inmates?

15 A. Correct.

16 Q. So you can have an accurate count?

17 A. Correct.

18 Q. Okay. Is it unusual for duty post logs to go missing for  
19 a particular shift?

20 A. Well, unusual? I can't say it's -- I don't want to use  
21 the term unusual, but it does happen.

22 Q. Okay. And what happens when it -- in your role as a  
23 supervisor either currently or when you were warden of the  
24 facility, when it came to your attention that duty post logs  
25 were missing, what, if any, action was taken?

1 A. We'll try to locate the duty post log. Of course, you  
2 know, we do a lot of -- the duty post log will go from one  
3 station to another, but I, if it was brought to my attention,  
4 will try to locate that duty post log.

5 Q. Got you. And so the person responsible ultimately for  
6 maintaining complete and accurate records of all records  
7 required to be maintained at Holman in June of 2018, would that  
8 have been the records retention officer, Mary Messer, or would  
9 that have been someone else?

10 A. Ms. Messer.

11 Q. Okay. And so ultimately you mentioned a procedure by  
12 which these duty post logs and other documents would go through  
13 the captain and then to either the captain's secretary or  
14 warden's secretary, and then after that the next stop would  
15 have been with Ms. Messer?

16 A. No.

17 Q. Okay. What would the next step have been?

18 A. It would have been for the assistant warden, Warden II, to  
19 review.

20 Q. Got you.

21 A. And then it would have gone to Ms. Messer for retention.

22 Q. Okay. So all duty post logs are reviewed by -- or at the  
23 time, at least, are reviewed by one of the wardens at the  
24 facility?

25 A. The deputy, yes.

1 Q. Okay.

2 MR. HAHN: If I could have just one second.

3 Q. Okay. So do you have any independent knowledge or  
4 institutional knowledge -- either way at this point -- as to  
5 why the duty post log for -- well, let me withdraw that  
6 question.

7 Do you recall the visit that the Federal Defenders had on  
8 June 26th of 2018 concerning the election form?

9 A. Yes.

10 Q. And that was a -- this was actually like a fairly unusual  
11 occurrence?

12 A. Yes.

13 Q. And was that because a large number of inmates were all in  
14 the yard at once?

15 A. Well, yes.

16 Q. Okay. And that was a time where attorneys from the  
17 Federal Defenders office came in and reviewed paperwork with  
18 their clients?

19 A. They came in and met with their clients, yes.

20 Q. Okay. And after that meeting, did you receive a stack of  
21 election forms?

22 A. I do not recall. Not me personally.

23 Q. Okay. Got you. And who was your secretary at the time?

24 A. Jennifer Parker.

25 Q. Okay. And do you have any idea why the duty post log for

1 that particular shift when the Federal Defenders came -- I  
2 believe it's called an A day shift -- why that duty post log is  
3 missing from the records?

4 A. No.

5 Q. All right. I am going to briefly, just for illustration  
6 purposes, put on the Elmo something that in discovery is  
7 Defendant's Discovery Disclosure Bates stamp 012980. It  
8 appears to be -- okay.

9 Do you see the document on the Elmo?

10 A. I do.

11 Q. Does that appear to be a duty post log?

12 A. Yes.

13 Q. Okay. And can you read to me the entry for 8:15 a.m. on  
14 6/20 of 2018?

15 A. Yes. Death row inmates are released for Project Hope at  
16 this time, and it has G1 Jeffrey Lee, G18 Jesse Phillips, F7  
17 Nicholas Smith, F18 Bart Johnson, and F20 Sherman Collins.

18 Q. Thank you. Matthew Reeves' name is not on that list,  
19 correct?

20 A. No.

21 MR. HAHN: I have nothing further, Your Honor. Thank  
22 you.

23 THE COURT: Any cross?

24 MR. ANDERSON: Yes, Your Honor.

25 CROSS-EXAMINATION

1 BY MR. ANDERSON:

2 Q. Good morning, Ms. Stewart. I'm Rich Anderson for the  
3 State of Alabama -- well, for defendants.

4 A. Good afternoon.

5 Q. I'm sorry. I'm used to being for the State.

6 When you were the warden at Holman, as warden it would be  
7 your practice to walk the tiers occasionally, correct?

8 A. Correct.

9 Q. And inmates could and did make requests for things  
10 directly to you, true?

11 A. Correct.

12 Q. But Matthew Reeves never made any requests of you, did he?

13 A. I don't recall.

14 Q. Okay. Did Matthew Reeves ever ask you to read something  
15 for him?

16 A. No.

17 Q. Okay. Did anybody ever tell you Matthew Reeves is having  
18 trouble reading; he needs some help?

19 A. No.

20 Q. Okay. Project Hope, that's an inmate-led organization,  
21 isn't it?

22 A. I'm really not familiar with Project Hope. I was thinking  
23 it was more of a religious faith-based --

24 Q. If I tell you that the name of the organization, the full  
25 name, is Project Hope to Abolish the Death Penalty, does that

1 ring any bells?

2 A. (Witness indicated.)

3 Q. Okay. Would you expect a duty post log to show the  
4 movements of every inmate on every day?

5 A. No.

6 Q. Okay. I just want to show you another duty post log, if  
7 you don't mind, and tell me if indeed this looks like a Holman  
8 duty post log. Can you see it on the screen in front of you?

9 A. I do, yes.

10 Q. Okay. Does that appear to be a document you're  
11 familiar -- the type of document you're familiar with?

12 A. Yes.

13 Q. Okay. I just want to show you an example down at the  
14 bottom of the page. At 7:40 and 7:50 a.m., does that indicate  
15 that some inmates were walked?

16 A. Yes.

17 Q. Okay. And what does it tell you about those inmates?

18 A. That it was seven inmates on single walk. For 7:40, death  
19 row inmates -- rover placed seven death row inmates for single  
20 walk. That's on the walk yard and it was seven. At 7:50 they  
21 began to group walk.

22 Q. It doesn't give you all their names, does it?

23 A. No.

24 Q. Was it the universal practice in handling these duty post  
25 logs to list every inmates' movement when it was a group of

1 inmates doing something?

2 A. No, unless it was something specific.

3 Q. Okay.

4 A. But no.

5 Q. And certainly you don't know who every member of Project  
6 Hope is?

7 A. No.

8 Q. All right. And you don't know who members of Project Hope  
9 might talk to, do you?

10 A. No.

11 Q. Are you aware of Matthew Reeves ever making a request for  
12 ADA accomodation during your time at Holman?

13 A. No.

14 MR. ANDERSON: Just a moment.

15 Q. And you were shown a little while ago an excerpt from a  
16 duty post log that showed several inmates going to a Project  
17 Hope meeting, correct --

18 A. Yes.

19 Q. -- that opposing counsel showed you?

20 A. Yes.

21 Q. Do you have any reason to believe that that list is the  
22 exclusive list of the membership of Project Hope?

23 A. Can you rephrase that? I'm sorry.

24 Q. Do you have any reason to think that those five people are  
25 it as far as it comes to Project Hope, that those are the only

1 members?

2 A. I have no idea.

3 Q. Do you know if Project Hope has a formal membership?

4 A. I have no idea.

5 MR. ANDERSON: That's all I have, Your Honor.

6 THE COURT: Any redirect?

7 MR. HAHN: No, Your Honor. Thank you. And this  
8 witness can be excused, please.

9 THE COURT: Okay. You can be excused, ma'am. Thank  
10 you.

11 MR. PALOMBI: Our next witness, Your Honor, will be  
12 Deidre Prevo.

13 DEIDRE PREVO

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

17 DIRECT EXAMINATION

18 BY MR. PALOMBI:

19 Q. Good afternoon, Ms. Prevo.

20 A. Good afternoon.

21 Q. Nice to see you in person actually this time. I'm just  
22 going to ask you to make sure you lean into the microphone.  
23 It's more to help me make sure I hear your answers.

24 Could you state and spell your name for the court  
25 reporter.



# **Exhibit 21**

ELECTION PURSUANT TO ACT NO. 2018-353

Pursuant to Act No. 2018-353, if I am to be executed, I elect, subject to the objections below, among others, that it be by nitrogen hypoxia rather than by lethal injection.

I have made legal challenges to the constitutionality of the death penalty and to execution by lethal injection, and I maintain that both are unconstitutional. Furthermore, it is unconstitutional to require a person to choose between execution by lethal injection and execution by nitrogen hypoxia in the absence of relevant information regarding execution by nitrogen hypoxia and the protocol by which it will be administered. Despite these reservations, I am making this election because I understand that Act No. 2018-353 requires a decision to be made at this time.

This election is not intended to affect the status of any challenge(s) (current or future) to my convictions or sentences, nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by any method, including by nitrogen hypoxia. Nor is this election intended to waive any right to revoke my election or challenge whether the election was knowing and voluntary in light of the circumstances under which it is being made.

Dated this 28<sup>th</sup> day of June, 2018.

Jareed Taylor 7638  
Name / Inmate Number

Jareed Taylor  
Signature

---

**From:** Arfa, Meredith A  
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June 27, 2018

By Facsimile and Federal Express

Jarrod Taylor Z-638  
Holman Correctional Facility  
866 Ross Road  
Atmore, AL 36502

**ATTORNEY-CLIENT COMMUNICATION**  
**PRIVILEGED AND CONFIDENTIAL**

Dear Jarrod:

Enclosed please find a document that we have drafted. We would like to discuss with you the advantages and disadvantages of signing it. We have enclosed two copies of the document so that, if you ultimately decide to sign it, you can send one signed copy to the warden and return the other signed copy to us in the enclosed Federal Express envelope.

We look forward to speaking to you tomorrow at 2:30 p.m. and sharing our advice at that time.

Best Regards,

*Meredith A. Arfa*  
Meredith A. Arfa

Enclosures

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\*NOT ADMITTED TO THE NEW YORK BAR

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Fax to Jarrod enclosing election form. Three copies, rather than two copies, were faxed inadvertently.

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The attached is an attorney-client communication and is privileged and confidential. Please deliver to Jarrod Taylor (7-638) as early today as possible as it concerns a time-sensitive legal issue.

Thank you  
 Meredith Allen  
 Counsel for Jarrod Taylor

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COMMENTS:

Ms. Parker,

The attached is an **attorney-client communication and is privileged and confidential**. Please deliver to **Jarrold Taylor (Z-638)** as early today as possible as it concerns a time-sensitive legal issue.

Thank you,  
Meredith Arfa  
Counsel for Jarrod Taylor

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Letter to Jarrod re method of execution election.

Meredith A. Arfa | Associate  
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Wed, 6/27/2018

Meredith Arfa  
Paul Weiss LLP  
New York, NY 10019  
US

Delivery date:  
Thu, 6/28/2018 9:40 am

Mr. Jarrod Taylor  
Z-638  
3700 HOLMAN  
ATMORE, AL 36503  
US



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**Signed for by:** J.HOLENBECK



**Delivery location:** ATMORE, AL  
**Delivered to:** Receptionist/Front Desk  
**Service type:** FedEx First Overnight  
**Packaging type:** FedEx Envelope  
**Number of pieces:** 1  
**Weight:** 0.50 lb.  
**Special handling/Services:** Adult Signature Required  
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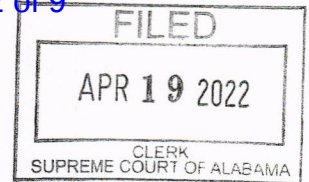
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# **Exhibit 22**



**IN THE SUPREME COURT OF ALABAMA**

EX PARTE: ALAN EUGENE MILLER)

ALAN EUGENE MILLER, )

Petitioner, )

No. \_\_\_\_\_

v. )

STATE OF ALABAMA, )

Respondent. )

**STATE OF ALABAMA'S  
MOTION TO SET AN EXECUTION DATE**

Pursuant to Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, the State of Alabama respectfully moves this Honorable Court to set an execution date for carrying out Alan Eugene Miller's lawfully imposed sentence of death.

Miller has been on death row since 2000 for the capital murder of Lee Holdbrooks, Scott Yancey, and Terry Lee Jarvis. *Miler v. State*, 913 So. 2d 1148, 1151 (Ala. Crim. App. 2004). Miller gunned down his coworkers, Holdbrooks and Yancey, before driving to his former place of employment and gunning down his former coworker, Jarvis. As set out more fully below, Miller's conviction and sentence are final because he has completed his direct appeal, state postconviction review, and federal

habeas review. Accordingly, the State seeks an order from this Court permitting it to carry out his death sentence.

**I. Miller has fully exhausted his appeals.**

**A. Statement of Facts.**

On the morning of August 5, 1999, Alan Eugene Miller drove to his place of employment, entered the business, and shot and killed two of his coworkers, Lee Holdbrooks and Scott Yancey. *Miller*, 913 So. 2d at 1154. Yancy was shot three times and found slumped underneath his desk, while Holdbrooks was shot six times and found “lying face down in the hallway at the end of a bloody ‘crawl trail,’ indicating that he had crawled 20-25 feet down the hall in an attempt to escape his assailant.” *Id.* at 1154. As Miller was leaving the business, another coworker arrived and asked Miller to put the gun down. *Id.* Miller refused, told the coworker to get out of his way, then walked to his truck and drove away. *Id.*

Shortly thereafter, Miller arrived at his former place of employment, walked inside to the sales counter, and called out for Terry Jarvis. *Id.* at 1155. When Jarvis emerged from his office, Miller fired several shots at him. A witness to the shooting testified that when Miller came around the sales counter, the witness fled the business and heard

another gunshot moments later. *Id.* Jarvis was shot five times, including a gunshot to the heart after he had already fallen to the floor. *Id.* at 1156.

### **B. Trial and Direct Appeal.**

In 2000, a Shelby County jury found Miller guilty of the capital murder of two or more persons committed by “one act or pursuant to one scheme or course of conduct.” *Miller*, 913 So. 2d at 1151. Thereafter, the jury unanimous found beyond a reasonable doubt that this crime was especially heinous, atrocious, or cruel compared to other capital offenses and recommended by a 10–2 vote that Miller be sentenced to death. *Id.* The trial court agreed with the jury’s recommendation and sentenced Miller accordingly. *Id.*

On direct appeal, the Court of Criminal Appeals initially remanded Miller’s case for the trial court to amend its sentencing order to provide additional findings and to make specific findings of fact regarding the claims raised during the post-trial hearing. *Miller*, 913 So. 2d at 1151–53. After the trial court issued an amended order, the Court of Criminal Appeals affirmed Miller’s conviction and sentence of death. *Id.* at 1171. This Court denied certiorari on May 27, 2005, and the United States

Supreme Court did likewise on January 9, 2006. *Miller v. Alabama*, 546 U.S. 1097 (2006) (mem.).

**C. State postconviction proceeding.**

In 2006, Miller timely filed, through counsel, his postconviction Rule 32 petition and a subsequent amendment. *Miller v. State*, 99 So. 3d 349, 352 (Ala. Crim. App. 2011). After summarily dismissing as procedurally barred most of Miller's claims, the trial court held an extensive evidentiary hearing on Miller's ineffective assistance of appellate counsel claim on February 11–14 and August 6, 2008. *Id.* at 353. Following the hearing, the trial court denied postconviction relief. *Id.*

The Court of Criminal Appeals affirmed the trial court's decision. *Miller*, 99 So. 3d at 426. After initially granting certiorari on one claim, this Court quashed the grant and denied certiorari on Miller's remaining claims on June 22, 2012. *Id.* at 351.

**D. Federal habeas litigation.**

After his unsuccessful attempt to obtain relief in the state courts, Miller filed a petition for writ of habeas corpus in the United States

District Court for the Northern District of Alabama. Following briefing, the district court entered a memorandum opinion and final judgment denying Miller habeas corpus relief. *Miller v. Dunn*, 2:13-cv-00154, 2017 WL 1164811, at \*74 (N.D. Ala. Mar. 29, 2017).

Thereafter, the Eleventh Circuit Court of Appeals granted Miller's motion for certificate of appealability on four issues:

1. Whether Miller's sentence violated *Ring v. Arizona*, 536 U.S. 584 (2002), when, after the jury unanimously found the existence of an aggravating factor, the trial judge exercised his discretion and sentenced Miller to death;
2. Whether Miller's sentence violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985), when the trial court instructed the jury that it had to unanimously find the existence of an aggravating factor to recommend a death sentence and that its sentencing recommendation was advisory;
3. Whether Miller received ineffective assistance of counsel when counsel made the strategic decision to withdraw Miller's insanity defense; and
4. Whether Miller received ineffective assistance of counsel when counsel did not present duplicative testimony at the penalty phase.

The circuit court, after briefing and oral argument, affirmed the district court's denial of relief. *Miller v. Comm'r, Ala. Dep't of Corrs.*, 826 F. App'x 743 (11th Cir. 2020). Miller subsequently filed a petition for writ

of certiorari, which the Supreme Court denied on October 4, 2021. *Miller v. Dunn*, 142 S. Ct. 123 (2021) (mem.).

There are currently no pending challenges to the validity of Alan Eugene Miller’s duly adjudicated capital murder conviction and death sentence. Miller has exhausted his direct appeal, his state postconviction remedies, and his federal habeas remedies. As such, it is time for his death sentence to be carried out. Pursuant to Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, the State respectfully requests that this Honorable Court “enter an order fixing a date of execution” for Miller.

Respectfully submitted,

Steve Marshall  
*Attorney General*

---

**Audrey Jordan**  
*Assistant Attorney General*  
Counsel of Record \*



## **CERTIFICATE OF COMPLIANCE**

I certify that this motion complies with the word limitation set forth in Ala. R. App. P. 27. This motion contains 1,015 words, including all headings, footnotes, and quotations, and excluding the parts of the motion exempted under Ala. R. App. P. 32(c).

I further certify that this motion complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). This motion was prepared in 14-point Century Schoolbook font.

## CERTIFICATE OF SERVICE

I hereby certify that on this, the 19th day of April 2022, I electronically filed the foregoing and served a copy of the foregoing on the attorneys for Miller by electronic mail, addressed as follows:

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Counsel of Record \*  
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Telephone: (334) 353-4338  
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# **Exhibit 23**



Petitioner Alan Eugene Miller (“Petitioner” or “Mr. Miller”) opposes the State’s Motion to Set an Execution Date.

## INTRODUCTION

Mr. Miller timely elected to be executed by nitrogen hypoxia. Given that the State of Alabama (the “State”) has yet to set a protocol for execution by nitrogen hypoxia, it is premature to set an execution date for Mr. Miller.

In March 2018, Alabama added nitrogen hypoxia as an alternative execution method. *See* 2018 Ala. Laws Act 2018-353; Ala. Code § 15-18-82.1(b). Death-row inmates have “one opportunity to elect that his or her death sentence be executed by . . . nitrogen hypoxia.” Ala. Code § 15-18-82.1(b). If an inmate’s certificate of judgment from the Alabama Supreme Court affirming a sentence of death was “issued before June 1, 2018, the election must be made and delivered to the warden within 30 days of that date.” *Id.* § 15-18-82.1(b)(2). The statute does not specify the type or manner of writing required to elect.

## ARGUMENT

### I. Mr. Miller Timely Elected Execution by Nitrogen Hypoxia And His Election Should Be Honored

Mr. Miller elected in writing to be executed via nitrogen hypoxia by the 30-day deadline and his election should be honored.

Mr. Miller is incarcerated at Holman Correctional Facility in Atmore, Alabama. *See* Exhibit 1, Affidavit of Alan Eugene Miller (“Ex. 1”) ¶ 1. “In June or July of 2018, a correctional officer at Holman passed out forms to individuals on death row concerning an election to be executed by nitrogen hypoxia.” *Id.* ¶ 3. Mr. Miller completed, signed, and returned “the form to the correctional officer who was collecting the forms.” *Id.* ¶¶ 5-6. Mr. Miller “gave the correctional officer [his] form at the same time that [the correctional officer] was collecting forms from everyone else.” *Id.* ¶ 7. The correctional officer collected Mr. Miller’s form on the same day that the form was distributed to Mr. Miller. *Id.* Mr. Miller asked the correctional officer for a copy of the completed form, but the officer refused to make a copy. *Id.* ¶ 9. Mr. Miller also asked the correctional officer to have the form notarized but the correctional officer also refused. *Id.* ¶ 10. Mr. Miller does not know what the correctional officer did with his form after Mr. Miller gave it to the

officer. *Id.* ¶ 8. Even if Mr. Miller was refused the right to retain a copy of his election form, his timely election should still be honored. *See, e.g.*, Exhibit 2, State of Alabama’s Motion to Withdraw Motion To Set An Execution Date, *Taylor v. State*, No. 1991307 (Ala. Aug. 2, 2019) ¶ 4 (“Ex. 2”) (acknowledging individual made timely election of execution by nitrogen hypoxia even though Alabama Department of Corrections did not have election form in its files).

## **II. Setting An Execution Date Would Be Premature**

The State has not yet presented a protocol for execution by nitrogen hypoxia. *See Reeves v. Dunn*, No. 2:20-cv-027-RAH, 2022 WL 84376, at \*3 (M.D. Ala. Jan. 7, 2022). As a result, and because Mr. Miller timely requested execution by nitrogen hypoxia, an execution date for Mr. Miller should not be set at this time. *See, e.g.*, Ex. 2 ¶ 5 (withdrawing motion to set an execution date because State was not yet prepared to proceed with an execution by nitrogen hypoxia).

## **CONCLUSION**

For the reasons set forth herein, the State’s Motion to Set an Execution Date should be denied.

Dated: May 18, 2022

Respectfully submitted,

/s/ Daniel J. Neppl

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Phone: (312) 853-7334  
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Email: dneppl@sidley.com



## CERTIFICATE OF COMPLIANCE

Pursuant to Ala. R. App. P. 32(d), I hereby certify that: (i) this document complies with the word limit of Ala. R. App. P. 27(d) and 32(b)(5) because, excluding the parts of the document exempted by Ala. R. App. P. 32(c), and based upon the word-processing system used to prepare this document, this document contains 580 words, and (ii) this document complies with the font and type style requirements of Ala. R. App. P. 32(a)(7) because the font of the documents is set in Century Schoolbook 14.

/s/ Daniel J. Neppl  
Daniel J. Neppl

## CERTIFICATE OF SERVICE

I certify that on May 18, 2022, a copy of the attached document was served by electronic mail and by postage-prepaid first-class mail on:

Audrey Jordan  
Office of the Attorney General  
State of Alabama  
501 Washington Avenue  
Montgomery, AL 36130  
Phone: (334) 353-4338  
Email: Audrey.Jordan@AlabamaAG.gov

/s/ Daniel J. Nepl  
Daniel J. Nepl

# **Exhibit 1**

No. 1040564 (Death Penalty)

**IN THE SUPREME COURT OF ALABAMA**

---

EX PARTE: ALAN EUGENE MILLER)

ALAN EUGENE MILLER )

Petitioner, )

v. )

STATE OF ALABAMA, )

Respondent )

---

**AFFIDAVIT OF ALAN EUGENE MILLER**

I, Alan Eugene Miller, under penalty of perjury affirm that the following is true and correct to the best of my ability:

1. I am currently incarcerated at Holman Correctional Facility in Atmore, Alabama. My inmate number is Z-672.
2. Because I have been sentenced to death, I am incarcerated on Holman's death row.
3. In June or July of 2018, a correctional officer at Holman passed out forms to individuals on death row concerning an election to be executed by nitrogen hypoxia.

4. The correctional officer said we could sign or not sign the forms. He said they would be back to pick up the forms later. I understood that to mean that a correctional officer would pick it up later.
5. I completed the form and signed it.
6. I gave my signed form to the correctional officer who was collecting the forms.
7. I gave the correctional officer my form at the same time that he was collecting forms from everyone else. The correctional officer collected my form on the same day that it was distributed to me.
8. I do not know what the correctional officer did with my form after I gave it to him.
9. I asked the correctional officer for a copy of my completed form, but the correctional officer refused to make a copy for me.
10. I also asked the correctional officer if I could have the form notarized, but he said no. I know that some other guys had their forms notarized, so I don't know why he would not permit me to get my form notarized.

Wherefore I swear under penalty of perjury, that the foregoing is true and correct to the best of my knowledge.

Alan Eugene Miller  
Alan Eugene Miller

5-10-21  
Date

State of Alabama  
County of Escambia

SUBSCRIBED and SWORN TO before me this 10<sup>th</sup> day of May, 2022.

(Seal)

Jimmie R. Parker  
NOTARY PUBLIC

My Commission Expires: My Commission Expires March 26, 2024

# Exhibit 2

E-Filed  
08/02/2019 01:37:00 PM  
Honorable Julia Jordan Weller  
Clerk of the Court

**IN THE SUPREME COURT OF ALABAMA**

EX PARTE: JARROD TAYLOR	)	
	)	
JARROD TAYLOR,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1991307
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

**STATE OF ALABAMA'S MOTION TO WITHDRAW  
MOTION TO SET AN EXECUTION DATE**

COMES NOW the State of Alabama and asks this Honorable Court to permit the State to withdraw its motion of July 29, 2019, requesting that Jarrod Taylor's execution be set. As grounds, the State provides as follows:

(1) On July 29, the State moved this Court to set Taylor's execution date. That motion represented that Taylor had not made a timely election of nitrogen hypoxia.

(2) Taylor's counsel called the undersigned on July 30, claiming that Taylor had, in fact, made a timely election. Counsel offered to send supporting documentation.

(3) On July 31, counsel sent the undersigned several documents, including a copy of Taylor's signed election form (dated June 28, 2018) and contemporaneous e-mails among counsel creating a record of conversations with



Taylor concerning the election. Taylor indicated to counsel on June 29, 2018, that he had signed two copies of the election form, returned one to counsel, and given the other to a particular ADOC employee to be given to Warden Stewart.

(4) The Attorney General's Office was never given this form, and counsel for the Alabama Department of Corrections did not have this form in their files. Nevertheless, the documentation provided by Taylor's counsel supports the assertion that he made a timely election of nitrogen hypoxia. The State intends to honor that election.

(5) As the ADOC is not yet prepared to proceed with an execution by nitrogen hypoxia, the State requests that it be allowed to withdraw its previous motion.

Respectfully submitted,

Steve Marshall  
*Attorney General*

**s/ Lauren A. Simpson**  
Lauren A. Simpson  
*Assistant Attorney General*  
Counsel of Record \*

Beth Jackson Hughes  
*Assistant Attorney General*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 2, 2019, a copy of the foregoing was served on counsel for Jarrod Taylor by e-mail:

Theodore V. Wells, Jr.	twells@paulweiss.com
Andrew J. Ehrlich	aehrich@paulweiss.com
Steven C. Herzog	sherzog@paulweiss.com
Justin D. Lerer	jlerer@paulweiss.com
Meredith A. Arfa	marfa@paulweiss.com
Joshua P. Myrick	josh@stankoskimyrick.com

**s/ Lauren A. Simpson**

Lauren A. Simpson  
*Assistant Attorney General*  
Counsel of Record \*

State of Alabama  
Office of the Attorney General  
501 Washington Avenue  
Montgomery, Alabama 36130-0152  
Tel: (334) 353-1209  
Fax: (334) 353-8400  
lsimpson@ago.state.al.us

# **Exhibit 24**

**IN THE SUPREME COURT OF ALABAMA**

EX PARTE: ALAN EUGENE MILLER)	)	
	)	
ALAN EUGENE MILLER,	)	
	)	
Petitioner,	)	
	)	No. 1040564
v.	)	
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

**AMENDED MOTION TO PLACE UNDER SEAL  
EXHIBIT B TO THE STATE’S RESPONSE TO MILLER’S  
OBJECTION TO THE STATE’S MOTION TO SET EXECUTION**

Comes now the State of Alabama and respectfully moves this Honorable Court to place Exhibit B to the State’s Response to Alan Eugene Miller’s Objection to the State’s Motion to Set Execution under seal.

1. On April 19, 2022, the State moved to set an execution date for Miller, noting that his conviction and sentence are final because he has completed his direct appeal, state postconviction review, and federal habeas review.

2. On May 18, 2022, Miller filed an objection to the State’s motion, arguing that Miller timely elected to be executed by nitrogen

hypoxia. Attached to Miller's objection was the State's motion to withdraw its motion to set an execution date in the Jarrod Taylor case.

3. In its response to Miller's objection, the State plans to attach Exhibit B, which contains confidential communications unrelated to Miller from the *Taylor* case. These communications, including communications between Taylor and his counsel and among his counsel, were provided to the State to demonstrate that Taylor had timely elected nitrogen hypoxia. Given the nature of these communications, this exhibit contains sensitive information that should be available only for this Court's review, and access to same should be restricted. Thus, to protect these confidential communications, the State respectfully requests that Exhibit B be filed and placed under seal.

Wherefore, the State respectfully requests that this Court order Exhibit B to the State's Response to Miller's Objection to the State's Motion to Set Execution be placed under seal.

Respectfully submitted,

Steve Marshall  
*Attorney General*

**/s/ Audrey Jordan**  
*Assistant Attorney General*  
Counsel of Record \*

## **CERTIFICATE OF COMPLIANCE**

1. I certify that this motion complies with the word limitation set forth in Ala. R. App. P. 27(d). According to the word-count function of Microsoft Word, the motion contains 266 words, not including the parts exempted by Ala. R. App. P. 32(c).

2. I further certify that this motion complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). The motion was prepared in 14-point Century Schoolbook font.

**/s/ Audrey Jordan**  
*Assistant Attorney General*  
Counsel of Record \*

## CERTIFICATE OF SERVICE

I hereby certify that on this, the 24th day of May 2022, I electronically filed the foregoing and served a copy of the foregoing on the attorneys for Miller by electronic mail, addressed as follows:

Daniel J. Nepl  
Sidley Austin, LLP  
One Court Dearborn Street  
Chicago, Illinois 60603  
dnepl@sidley.com

Jeffrey T. Green  
Sidley Austin, LLP  
1501 K. Street, NW  
Washington, DC 2005  
jgreen@sidley.com

Patrick Mulligan  
Bressler, Amery & Ross, P.C.  
2001 Park Place North, Suite 1500  
Birmingham, Alabama 35203  
pmulligan@bressler.com

***/s/ Audrey Jordan***

*Assistant Attorney General*  
Counsel of Record \*

State of Alabama  
Office of the Attorney General  
501 Washington Avenue  
Montgomery, Alabama 36130-0152  
Telephone: (334) 353-4338  
Email: Audrey.Jordan@AlabamaAG.gov

# **Exhibit 25**





## IN THE SUPREME COURT OF ALABAMA

May 27, 2022

1040564

Ex parte Alan E. Miller. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Alan Eugene Miller v. State of Alabama) (Shelby Circuit Court: CC-99-792; Criminal Appeals: CR-99-2282).

### ORDER

The “Amended Motion to Place Under Seal Exhibit B to the State’s Response to Miller’s Objection to the State’s Motion to Set Execution” filed by the State of Alabama on May 24, 2022, having been fully considered,

IT IS ORDERED that the Motion is conditionally GRANTED pending further review of this Court.

Witness my hand and seal this 27th day of May, 2022.

A handwritten signature in cursive script that reads "Julia Jordan Miller".

Clerk of Court,  
Supreme Court of Alabama

**FILED**  
**May 27, 2022**  
**Clerk of Court**  
**Supreme Court of Alabama**

# **Exhibit 26**

**IN THE SUPREME COURT OF ALABAMA**

EX PARTE: ALAN EUGENE MILLER)	)	
	)	
ALAN EUGENE MILLER,	)	
	)	
Petitioner,	)	
	)	No. 1040564
v.	)	
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

**STATE’S RESPONSE TO MILLER’S OBJECTION TO STATE’S MOTION TO SET AN EXECUTION DATE**

Comes now the State of Alabama, by and through the Office of the Attorney General, and responds to Miller’s objection to the State’s motion to set an execution date as follows:

1. On April 19, 2022, the State moved to set an execution date for Miller, noting that his conviction and sentence are final because he has completed his direct appeal, state postconviction review, and federal habeas review.

2. On May 18, 2022, Miller filed an objection to the State’s motion, arguing that Miller timely elected to be executed by nitrogen hypoxia. In support of his objection, Miller submitted an affidavit asserting that a correctional officer at Holman passed out election forms

in June or July of 2018, that Miller completed and signed the form, and that the form was returned to a correctional officer “at the same time that he was collecting forms from everyone else.”<sup>1</sup> (Miller’s Aff. ¶ 7.)

3. But as noted by the attached affidavit from Terry Raybon, who is the Correctional Warden III at Homan Correctional Facility, there is no election form on file reflecting that Miller timely elected nitrogen hypoxia. (See Ex. A.) Further, there is no evidence offered, aside from Miller’s self-serving and uncorroborated affidavit, to show that he did, in fact, timely elect nitrogen hypoxia.

4. Miller appears to suggest his case is like that of Jarrod Taylor, attaching a copy of the State’s motion to withdraw its motion to set an execution date in that case. But the facts in *Taylor* are significantly different from Miller’s case. Most notably, there was supporting documentation—the completed and signed election form itself, plus contemporaneous emails from June 2018 that created a record of conversations counsel had with Taylor regarding election—outlining that

---

1. Miller does not indicate whether the correctional officer who passed out the election forms was the same officer who collected the completed and signed forms, nor does he make any attempt to identify the individual(s) who distributed and/or collected the forms.

Taylor had, in fact, timely elected nitrogen hypoxia. (*See Ex. B.*) No such evidence has been offered here.

Therefore, given that there is no evidence before this Court demonstrating that Miller elected nitrogen hypoxia, that there are currently no pending challenges to the validity of his duly adjudicated capital murder conviction and death sentence, and that Miller has exhausted his direct appeal, his state postconviction remedies, and his federal habeas remedies, the State respectfully requests that, pursuant to Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, this Honorable Court “enter an order fixing a date of execution” for Miller.

Respectfully submitted,

Steve Marshall  
*Attorney General*

**/s/ Audrey Jordan**  
*Assistant Attorney General*  
Counsel of Record \*

**CERTIFICATE OF COMPLIANCE**

1. I certify that this response complies with the word limitation set forth in Ala. R. App. P. 27(d). According to the word-count function of Microsoft Word, the response contains 444 words, not including the parts exempted by Ala. R. App. P. 32(c).

2. I further certify that this response complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). The motion was prepared in 14-point Century Schoolbook font.

***/s/ Audrey Jordan***  
*Assistant Attorney General*  
*Counsel of Record \**

## CERTIFICATE OF SERVICE

I hereby certify that on this, the 27th day of May 2022, I electronically filed the foregoing and served a copy of the foregoing on the attorneys for Miller by electronic mail, addressed as follows:

Daniel J. Neppl  
Sidley Austin, LLP  
One Court Dearborn Street  
Chicago, Illinois 60603  
dneppl@sidley.com

Jeffrey T. Green  
Sidley Austin, LLP  
1501 K. Street, NW  
Washington, DC 2005  
jgreen@sidley.com

Patrick Mulligan  
Bressler, Amery & Ross, P.C.  
2001 Park Place North, Suite 1500  
Birmingham, Alabama 35203  
pmulligan@bressler.com

**/s/ Audrey Jordan**  
*Assistant Attorney General*  
Counsel of Record \*

State of Alabama  
Office of the Attorney General  
501 Washington Avenue  
Montgomery, Alabama 36130-0152  
Telephone: (334) 353-4338  
Email: Audrey.Jordan@AlabamaAG.gov

# EXHIBIT

# A



**AFFIDAVIT**

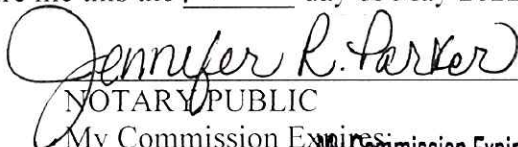
Before me, the undersigned authority, a Notary Public, in and for Escambia County and the State of Alabama at large, personally appeared Terry Raybon, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

1. My name is Terry Raybon. I am currently employed with the Alabama Department of Corrections as a Correctional Warden III at Holman Correctional Facility, Holman 3700, 866 Ross Road, Atmore, AL 36503.

2. Sometime earlier this year I reviewed the file where all of the Nitrogen Hypoxia elections forms have been maintained since June 2018 at Holman Correctional Facility to see if Inmate Alan Miller W/Z672 had submitted an election form. I found no record of Inmate Miller submitting a form. I had my administrative assistant to follow-up behind me, and she did not find any record as well. Today, May 19, 2022, after receiving an email from the Attorney General's Office, I instructed my administrative assistant to re-review our records for a submission form, after which I followed up behind her. Neither of us found a submission form from Inmate Miller.

  
WARDEN TERRY RAYBON

SWORN TO AND SUBSCRIBED before me this the 19<sup>th</sup> day of May 2022.

  
NOTARY PUBLIC  
My Commission Expires ~~My Commission Expires~~ March 26, 2024



# EXHIBIT

## B

(Filed under seal)

# **Exhibit 27**



## ARGUMENT

### I. **The Court Should Remand This Matter to the Circuit Court to Resolve the Factual Dispute of Whether Mr. Miller Submitted an Election Form.**

In his opening brief, Petitioner Alan Miller argued that setting an execution date was premature because he had timely submitted an election form opting into execution by nitrogen hypoxia, and that the State had not yet set a protocol for implementing such a procedure. *See* Pet'r Opp. at 2-3. In support of this argument, Mr. Miller attested through a sworn affidavit that he completed, signed, and returned the election form given to him by a correctional officer at Holman Correctional Facility, and that despite requests from Mr. Miller, the officer refused to allow the form to be copied or notarized. *See id.* at 2 (citing Ex. A. ¶¶ 9-10).

The State's response to Mr. Miller's motion and affidavit confirms that setting an execution date at this time is improper. The State claims, through the affidavit of Warden Terry Raybon, that no record of Mr. Miller's form exists. *See* State's Resp. ¶ 3. Yet in making that assertion, the State has created a *quintessential factual dispute* that must be resolved by a circuit court. Indeed, Mr. Miller has presented evidence

through his own affidavit that: (1) in June or July of 2018, a correctional officer at Holman passed out election forms to individuals on death row, (2) Mr. Miller received, completed, and signed a form, (3) the correctional officer collected the form at the same time that he collected forms from everyone else, (4) Mr. Miller did not know what the officer did with the form, and (5) the officer refused to make a copy of the form or allow the form to be notarized. *See* Pet'r Ex. 1 ¶¶ 3-10. In stark contrast, Warden Raybon—who was not the warden at the time Mr. Miller submitted his form—claims that he and his assistant reviewed the election forms on file and neither of them found a record of Mr. Miller's copy. *See* State's Ex. A ¶ 2; *Smith v. Dunn*, No. 19-cv-927-ECM, 2021 WL 4396272, at \*2 (M.D. Ala. Sept. 24, 2021) (explaining that Cynthia Stewart served as the warden during the relevant time period), *appeal pending*, No. 21-13514 (11th Cir. Oct. 14, 2021).

These varying accounts of what happened to Mr. Miller's form present a factual conflict that must be resolved, especially in light of the weighty issue at the heart of the dispute—the manner in which Mr. Miller is to be executed by the State. And, importantly, the circuit court, with its ability to conduct evidentiary hearings and weigh conflicting

testimony, is the only court that can resolve this issue. *See Smiley v. State*, 52 So. 3d 565, 568 (Ala. 2010) (explaining that appellate courts do not have the ability to reconcile conflicting evidence); *Giles v. State*, 875 So. 2d 334, 335 (Ala. Crim. App. 2003) (remanding to circuit court for further factual development in light of inconsistent record). To this point, the circuit court can receive and consider the evidence at issue here, weigh Mr. Miller's statements against the State's conflicting version of events, and make specific factual findings. In doing so, the court would be able to resolve important questions that Warden Raybon's affidavit raises but does not answer, such as what chain of custody existed from the time the election forms were collected to when they were put in the State's file, and why the State has not been able to locate multiple election forms submitted by people on death row, including Mr. Taylor's, in addition to Mr. Miller's.

This Court should therefore remand to the circuit court to resolve the narrow dispute surrounding Mr. Miller's election form.<sup>1</sup>

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<sup>1</sup> Remand is also appropriate because it is consistent with the process other courts follow in a similar context—including resolving disputes under 42 U.S.C. § 1983 as to whether a person who is incarcerated filed a grievance. Indeed, when an inmate alleges violations against the State and affixes an affidavit to his court filing—as Mr. Miller did here—courts in Alabama must assume the truth of those statements at the motion to dismiss stage. *See*

## **II. The State's Failure to Follow Any Rules or Guidance Regarding the Election Forms Creates Unwarranted Disparities Among Inmates and Violations of Mr. Miller's Due Process Rights.**

In addition to the fact that the State's brief and Warden Raybon's affidavit confirms that an evidentiary hearing is needed, both documents also demonstrate that the State is not following any rules or processes regarding whose election forms will be honored, and that as a result, Mr. Miller's due process rights are being violated.

By way of background, the Alabama statute providing for execution by nitrogen hypoxia states that if an inmate's certificate of judgment from the Alabama Supreme Court was issued before June 1, 2018, then the inmate has 30 days from that date to submit to the warden in writing his election to be executed accordingly. Ala. Code § 15-18-82.1(b)(2). Notably,

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*Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008). If those statements conflict with the State's version of events, then the lower court must "make specific findings in order to resolve the disputed factual issues." *Id.* Consistent with this rule, the Eleventh Circuit has repeatedly remanded cases when the lower court initially failed to credit an inmate's sworn affidavit. *See, e.g., Jenkins v. Sloan*, 826 F. App'x 833, 839-40 (11th Cir. 2020) (concluding that district court erred by failing to "credit[] the plaintiff's versions of events as true"); *White v. Staten*, 672 F. App'x 919, 924 (11th Cir. 2016) (directing lower court to resolve factual dispute regarding whether prisoner filed a grievance); *Palmore v. Tucker*, 522 F. App'x 717, 719 (11th Cir. 2013) ("[T]he district court was required, at least initially, to take Mr. Palmore's version of events as true. But that does not appear to have happened in this case.") (citations omitted).



however, the statute does not specify the type or manner of writing required. Nor does it delineate a process for collecting or storing the election forms.

In the absence of such guidance—and notwithstanding the fact that the Alabama Department of Corrections has declined to promulgate any accompanying regulations—several inmates have publicly described the time at Holman from June to July of 2018 as extremely disorganized. For example, one inmate has alleged that several individuals on death row never received an election form prepared by the Federal Defenders for the Middle District of Alabama, and that the inmates who did were not notified by the form of the 30-day deadline. *See Saunders v. Hamm*, No. 20-CV-456-WKW, 2022 WL 493693, at \*2 (M.D. Ala. Feb. 17, 2022). What’s worse, the inmate also alleges that the warden of Holman at the time was responsible for ensuring that everyone received a copy of the form but that she failed to establish a process for doing so. *Id.*

Against this chaotic backdrop, the State’s attempt to distinguish *Taylor v. State* rings hollow. *See State’s Resp.* ¶4. In that case, the State is honoring Mr. Taylor’s election form—even though the State misplaced it—because confidential attorney-client emails regarding Mr. Taylor’s

election exist. *Id.* But nowhere in the statute (or anywhere else for that matter) does the law allow missing election forms to be honored if an inmate can show that he conferred with his attorneys at the time of election. To honor Mr. Taylor's election but not Mr. Miller's is entirely arbitrary and a byproduct of the State's failure to put in place any rules or guidance governing the election process. And, it speaks to the fundamental unfairness of accommodating inmates who documented their correspondence with counsel during the election period while discrediting those who did not. More than that, though, the subjective nature by which the State is picking and choosing which election forms will be honored is a flagrant violation of Mr. Miller's due process rights.

In the end, the State has misplaced both Mr. Taylor's form and Mr. Miller's form. Yet, as of now, only Mr. Taylor will be executed by his preferred method. That cannot stand. This Court should remand to the circuit court for an evidentiary proceeding.

## CONCLUSION

For the reasons set forth herein, the State's Motion to Set an Execution Date should be denied and the matter should be remanded to the circuit court.

Dated: June 1, 2022

Respectfully submitted,

/s/ Daniel J. Neppl

Daniel J. Neppl  
*Pro Hac Vice*  
Sidley Austin LLP  
One South Dearborn Street  
Chicago, IL 60603  
Phone: (312) 853-7334  
Fax: (312) 853-7036  
Email: dnepppl@sidley.com

## CERTIFICATE OF COMPLIANCE

Pursuant to Ala. R. App. P. 32(d), I hereby certify that: (i) this document complies with the word limit of Ala. R. App. P. 27(d) and 32(b)(5) because, excluding the parts of the document exempted by Ala. R. App. P. 32(c), and based upon the word-processing system used to prepare this document, this document contains 1395 words, and (ii) this document complies with the font and type style requirements of Ala. R. App. P. 32(a)(7) because the font of the documents is set in Century Schoolbook 14.

/s/ Daniel J. Neppl  
Daniel J. Neppl

## CERTIFICATE OF SERVICE

I certify that on June 1, 2022, a copy of the attached document was served by electronic mail and by postage-prepaid first-class mail on:

Audrey Jordan  
Office of the Attorney General  
State of Alabama  
501 Washington Avenue  
Montgomery, AL 36130  
Phone: (334) 353-4338  
Email: Audrey.Jordan@AlabamaAG.gov

/s/ Daniel J. Nepl  
Daniel J. Nepl

# **Exhibit 28**



## IN THE SUPREME COURT OF ALABAMA

July 18, 2022

1040564

Ex parte Alan E. Miller. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Alan Eugene Miller v. State of Alabama) (Shelby Circuit Court: CC-99-792; Criminal Appeals: CR-99-2282).

### ORDER

The “State of Alabama’s Motion to Set an Execution Date” filed by the State of Alabama on April 19, 2022, having been submitted to this Court,

IT IS ORDERED that the Motion is GRANTED.

IT IS FURTHER ORDERED that:

1. Thursday, September 22, 2022, be fixed as the date for the execution of the convict, Alan E. Miller, who is now confined in the William C. Holman Correctional Facility Unit of the Alabama Department of Corrections prison system located in Atmore, Escambia County, Alabama;
2. The Warden of the William C. Holman Correctional Facility Unit execute the order, judgment, and sentence of law on September 22, 2022, in the William C. Holman Correctional Facility Unit by the means provided by law, causing the death of such convict;
3. The Marshal of the Appellate Courts of Alabama shall deliver, within five (5) days from the date of this Order, a certified copy of this Order to the Warden of the William C. Holman Correctional Facility Unit and make due return thereon to this Court; and
4. The Clerk of this Court shall transmit forthwith a certified copy of this Order electronically or by mailing a copy thereof by United States mail, postage prepaid, to the following:



## IN THE SUPREME COURT OF ALABAMA

July 18, 2022

- the attorney of record for Alan E. Miller;
- the Governor of Alabama;
- the Attorney General of Alabama;
- the Commissioner of the Alabama Department of Corrections;
- the Clerk of the Alabama Court of Criminal Appeals;
- the Clerk of the Shelby Circuit Court;
- the Clerk of the Supreme Court of the United States;
- the Clerk of the United States Court of Appeals for the Eleventh Circuit; and
- the Clerk of the United States District Court for the Northern District of Alabama.

**Bolin, Shaw, Bryan, Sellers, Mendheim, and Stewart, JJ., concur.**

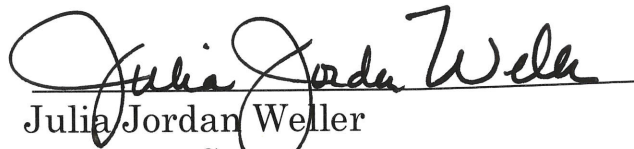
**Parker, C.J., dissents.**

**Wise and Mitchell, JJ., recuse themselves.**

I, Julia Jordan Weller, Clerk of the Supreme Court of Alabama, do hereby certify the foregoing is a full, true, and correct copy of the judgment and order of the Supreme Court of Alabama regarding Alan E. Miller as the same appears of record in this Court.

**Witness my hand and seal this 18th day of July, 2022.**



  
Julia Jordan Weller  
CLERK OF COURT  
SUPREME COURT OF ALABAMA



# **Exhibit 29**

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

ALAN EUGENE MILLER,  
Plaintiff,

CIVIL ACTION

VS.

FILE NO. 22-cv-00506

JOHN Q. HAMM, in his official  
capacity as Commissioner,  
Alabama Department of Corrections;

TERRY RAYBON, in his official  
capacity as Warden, Holman  
Correctional Facility;

STEVE MARSHALL, in his official  
capacity as Attorney General,  
State of Alabama,

Defendants.

\* \* \* \* \*

**COPY**

\* \* \* \* \*

DEPOSITION OF **ALAN EUGENE MILLER**, taken on  
behalf of the Defendants, pursuant to the  
stipulations set forth herein, before Jeana S.  
Boggs, Certified Court Reporter and Notary Public,  
at the offices of Holman Correctional Facility, 866  
Ross Road, Atmore, Alabama, commencing at  
approximately 1:03 p.m., Wednesday, September 7th,  
2022.

Boggs Reporting & Video LLC  
800.397.5590 www.boggsreporters.com

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and

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2 STIPULATIONS

3 It is hereby stipulated and agreed by and  
4 between counsel for the respective parties and the  
5 witness that the deposition of ALAN EUGENE MILLER is  
6 taken pursuant to notice and stipulation on behalf  
7 of the Defendants; that all formalities with respect  
8 to procedural requirements are waived; that said  
9 deposition may be taken before Jeana S. Boggs,  
10 Certified Professional Reporter and Notary Public in  
11 and for the State of Alabama At Large, without the  
12 formality of a commission; that objections to  
13 questions, other than objections as to the form of  
14 the questions, need not be made at this time, but  
15 may be reserved for a ruling at such time as the  
16 deposition may be offered in evidence or used for  
17 any other purpose as provided for by the Federal  
18 Rules of Civil Procedure.

19 It is further stipulated and agreed by and  
20 between counsel representing the parties in this  
21 case that the filing of the deposition of ALAN  
22 EUGENE MILLER is hereby waived and that said  
23 deposition may be introduced at the trial of this

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1 case or used in any other manner by either party  
2 hereto provided for by the Statute, regardless of  
3 the waiving of the filing of same.

4 It is further stipulated and agreed by and  
5 between the parties hereto and the witness that the  
6 signature of the witness to this deposition is  
7 hereby not waived.

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1 THE COURT REPORTER: Okay. Usual  
2 stipulations?

3 MR. HOUTS: Yes, so stipulated.

4 MS. HUGGINS: Yes. But we want to  
5 make sure that we are also  
6 reserving our right to review  
7 and make corrections to the  
8 transcript.

9 THE COURT REPORTER: Okay. Would  
10 you raise your right hand as  
11 best you can.

12 Do you solemnly swear,  
13 or affirm --

14 THE WITNESS: Speak a little louder.

15 THE COURT REPORTER: Do you solemnly  
16 swear, or affirm, that the  
17 testimony you are about to give  
18 in this cause will be the  
19 truth, the whole truth and  
20 nothing but the truth, so help  
21 you God?

22 THE WITNESS: Yes.

23 THE COURT REPORTER: Okay.



1 MS. HUGGINS: Before we get started,  
2 can I just state on the record,  
3 too, that Mr. Miller has  
4 difficulty hearing. So, you  
5 are going to have to speak very  
6 loudly especially since we are  
7 wearing masks.

8 \*\*\*

9 **ALAN EUGENE MILLER,**

10 was called as a witness, having first been duly  
11 sworn by Jeana S. Boggs, Certified Court Reporter  
12 and Notary Public in and for the State of Alabama  
13 at Large, was examined and testified as follows,  
14 to-wit:

15  
16 DIRECT EXAMINATION

17 BY MR. HOUTS:

18 Q Yeah. And, Mr. Miller, it looks like  
19 from this table we are about  
20 three-and-a-half, four feet apart. If it  
21 would help you to hear me better, do you  
22 mind if I lower my mask a little bit?

23 A No. I have no problem.

1 Q Okay. As long as there's no COs in here,  
2 maybe I won't get a disciplinary for it.

3 All right. As I said earlier,  
4 Mr. Miller, my name is James Houts,  
5 H-O-U-T-S. I am a deputy attorney  
6 general for the State of Alabama. And I  
7 am representing the Defendants named in  
8 your lawsuit.

9 Have you ever been deposed  
10 before?

11 A No.

12 Q Okay. Have you ever testified in court  
13 before?

14 A No.

15 Q Okay. So, it looks like y'all have been  
16 talking with the Court Reporter  
17 beforehand. It's very difficult for  
18 court reporters to keep up with two  
19 people who talk at once.

20 So, today, I am going to ask  
21 that you let me finish asking the  
22 question before beginning your answer.  
23 And, likewise, I will extend the courtesy

1 of waiting until I believe you are done  
2 before speaking. And if you are not,  
3 say, hey, Houts, stop talking.

4 A Okay.

5 Q She also has a difficulty translating  
6 non-verbal communication into the written  
7 word. So, if it calls for a yes or no,  
8 you know, say "yes" or "no". She can't  
9 really write down headshakes or nods.

10 A Okay.

11 Q The most important thing is, this only  
12 works if you truly understand what I am  
13 asking you before you provide an answer.  
14 So, if I ask you a question and you are  
15 not quite certain what I mean by  
16 anything, I would rather you ask me for  
17 clarification than just guess what I was  
18 trying to say.

19 A Okay.

20 Q It won't offend me if you ask me to  
21 clarify something.

22 A Okay.

23 Q And we have a limited amount of time this

1           afternoon. I don't think it will take  
2           four hours, but I am going to try to get  
3           us on the road. But after about an hour  
4           or an hour and 15 minutes, if you need a  
5           break, just let us know. And there's  
6           restrooms. We will get the correctional  
7           officers and take care of that.

8                           All right. Are you ready?

9           A     Yes, sir.

10                           MS. HUGGINS: Can I ask you one  
11                           other thing for the record?

12                           MR. HOUTS: Sure.

13                           MS. HUGGINS: Mr. Miller is  
14                           diabetic. I don't expect that  
15                           to be an issued. But I just  
16                           wanted to alert you to it now.

17           Q     Absolutely. I mean, if there's anything  
18                           that you have concerns about as far as --

19           A     I am all right. I'm all right.

20           Q     All right. I show you how little I know  
21                           about that, but I do think I have -- I  
22                           thought I had some Altoids but maybe I  
23                           didn't. Sorry.

1 All right. So, prior to this  
2 deposition, have you talked to anyone who  
3 has assisted you with getting ready to be  
4 questioned today?

5 A You mean like talked -- I talked to Kelly  
6 Huggins.

7 Q Okay. Without disclosing the nature of  
8 any discussions, other than Kelly  
9 Huggins, has any other attorney helped  
10 you prepare for your deposition today?

11 A No.

12 Q Okay. Did you talk to any family members  
13 about your deposition today?

14 A No, I did not.

15 Q Okay.

16 THE WITNESS: Sorry about that.

17 Q What about any other inmates confined  
18 here at Holman?

19 A I asked somebody last night named Sean,  
20 asked me, said he thought the 11th Court  
21 Circuit give me an appeal.

22 I said, "No." I said, "I was  
23 talking to my lawyer, and I got a

1 deposition tomorrow, and I can't talk  
2 about it." And that's all I said.

3 Q Okay. Did you look at any documents  
4 prior to your deposition to sort of help  
5 you prepare to testify?

6 A No. But I know they said something about  
7 emails, and I looked at the emails. I  
8 don't see nothing in there that's wrong  
9 with it.

10 Q Okay. Who -- The documents that you  
11 looked at, whose emails were they?

12 A Gabriela (phonetic) -- I don't know how  
13 to pronounce it.

14 Q So, your secured message is on the  
15 tablet?

16 A Yeah.

17 Q Okay.

18 A I would have to get them and go over it.  
19 And then Zoosman, he is a Rabbi.

20 THE COURT REPORTER: I'm sorry.

21 Who?

22 THE WITNESS: His name is Zoosman,  
23 Z-O-O-S-M-A-N.

1           A     He is a Rabbi that's against the death  
2                   penalty and he always writes all the  
3                   inmates, not just one inmate, telling you  
4                   you're not alone and all that. And that  
5                   there, he will show you -- send you  
6                   pictures of pep rallies where people are  
7                   protesting the death penalty. And that's  
8                   about it.

9           Q     Okay. Well, I am going to show you what  
10                  I have marked for today's proceeding as  
11                  Defendant's Exhibit One.

12                                 (AT WHICH TIME, THE REFERRED-  
13                                 TO DOCUMENT WAS MARKED AS  
14                                 DEFENDANT'S EXHIBIT NO. 1 FOR  
15                                 IDENTIFICATION.)

16          Q     And it's the original complaint filed in  
17                  Federal Court, you know, that started  
18                  your lawsuit. Can you just take a minute  
19                  to review it.

20                                 So, you just turned to the  
21                  third page. If you need to review the  
22                  rest of it, that's -- but let me just ask  
23                  a question now.

1                   Based on what you have seen, do  
2                   you recognize that document at all?

3           A     No.

4           Q     Okay. So, keep looking.

5           A     Okay. Keep on reading?

6           Q     Well, I mean, I will ask it a different  
7                way.

8                   Prior to a complaint being  
9                   filed in Federal Court on your behalf,  
10                  did you review the complaint underlying  
11                  your lawsuit?

12          A     I got something sent in the mail. I  
13                would have to relook at it again to see  
14                if it's like this. Because I don't  
15                remember it like that. Because I don't  
16                understand this legal jargon and stuff.  
17                So, I would have to compare it with -- I  
18                didn't bring anything with me. I left it  
19                up at the...

20          Q     Okay. So, you remember reviewing a  
21                document. Was that before or after the  
22                lawsuit was filed?

23          A     It was after.



1 Q After the lawsuit?

2 A Yeah.

3 Q All right. If you will look at the  
4 second paragraph on the first page.

5 A What's that?

6 Q If you will look at the second paragraph  
7 on the first page of that document.

8 A Yep. Nitrogen hypoxia?

9 Q Yes. When is the first time that you  
10 gained personal knowledge of the fact  
11 that nitrogen hypoxia had been added to  
12 Alabama law as an alternate method of  
13 execution?

14 A I can't remember. I cannot remember.

15 Q All right. If I don't try to tie you  
16 down to a specific date, do you remember  
17 about when you first gained personal  
18 knowledge?

19 A It could have been around 2018 or  
20 something or prior to that on television  
21 and through Project Cope, or something  
22 like that, because just like these little  
23 teletype things that they send to let

1 people know what's happening all over the  
2 country. If it happened in Oklahoma or  
3 if there's an execution date in Texas,  
4 then they --

5 Q Okay. Are you aware that one of the  
6 claims in your lawsuit relates to the  
7 process of electing nitrogen hypoxia here  
8 at Holman Correctional Facility?

9 A Yes, sir.

10 Q All right. In relation to that election  
11 time, do you remember when that was?

12 A It was in 2018.

13 Q Do you remember when in 2018?

14 A Around June or July.

15 Q Okay. In relation to that time, how long  
16 before then had you known that nitrogen  
17 hypoxia had been added as an alternate  
18 method of execution?

19 A I didn't really know if they certified it  
20 or not until they came around with the  
21 paper.

22 Q Okay. I am going to hand you another  
23 document that has been marked as

1 Defendant's Exhibit Two for purposes of  
2 your deposition. If you will take a  
3 minute to review that document.

4 (At which time, the referred-  
5 to document was marked as  
6 Defendant's Exhibit No. 2 for  
7 identification).

8 MR. ROBERTSON: Yes. Thank you.

9 BY MR. HOUTS:

10 Q All right. Do you recognize that  
11 document?

12 A Yes, sir.

13 Q Okay. And did you sign that document?

14 A Yes, sir.

15 Q Is everything contained in that affidavit  
16 still true, accurate and correct based on  
17 your personal knowledge?

18 A Yes, sir, from my recollection.

19 Q All right. Just to clear one thing up,  
20 on the third page, if you will turn to  
21 where you signed, if you will look, you  
22 will see that the Notary provided a date  
23 of May 10, 2022. You provided a date of

1 May 10, 2021. Was that --

2 A Oh, that was an error on my part.

3 Q This was this year, not last year?

4 A Yes.

5 Q Okay. All right. If you will look at  
6 paragraph three of your affidavit, the  
7 bottom of the first page, do you agree  
8 with me that your third recitation in  
9 your affidavit is that in June or July of  
10 2018 a correctional officer at Holman  
11 passed out forms to individuals on death  
12 row concerning an election to be executed  
13 by nitrogen hypoxia?

14 A Yeah. But it wasn't within 30 days.  
15 They said they was going to pick it up  
16 that day. Pick it up.

17 Q Okay.

18 A It wasn't no 30 days. They didn't say  
19 you had 30 days nothing.

20 Q Okay. Well, I am going to start -- Do  
21 you know who that correctional officer  
22 was?

23 A No, not at the time.

1 Q You say not at the time. What about now?

2 A I mean, some guys said his name was  
3 Emberidge (phonetic). I said, hey, I  
4 said, man, there were so many captains.  
5 I say, I can't remember.

6 Q Okay. So, you said Emberidge (phonetic)?

7 A Yeah. Emberidge (phonetic) or something  
8 like that. They've got a guy named  
9 Curfman (phonetic). And I guess -- I  
10 don't keep up with them.

11 Q All right. And you said something in  
12 your previous response. If I understood  
13 you correctly, you used the term  
14 "captain." You used the term "captain"?

15 A Yeah.

16 Q Does that apply to the individual you are  
17 talking about?

18 A Yeah. It would be Captain Emberidge  
19 (phonetic), or whatever. They changed so  
20 many people down here.

21 Q Okay. So, walk me through. How did you  
22 figure out -- If you didn't know  
23 originally, how did you figure out who it

1 was?

2 A Well, they told me later on. They said  
3 when all this came up about setting the  
4 dates, and that's it.

5 Q You said "they" told you later on. Who  
6 are "they"?

7 A A dude named Bob Waldrop. He said his  
8 name was Emberidge (phonetic). And I  
9 told him I didn't remember. I said, "I  
10 suggest you remember it better than I do.  
11 I don't."

12 Q Okay. How did Bobby Waldrop know who it  
13 was?

14 A Because you would have to ask him, sir.

15 Q Okay. So, you are basing the allegation  
16 that it was a Captain Emberidge  
17 (phonetic) on something you were told by  
18 Inmate Bobby Waldrop?

19 A Yeah. That he testified in court -- that  
20 he testified in Federal Court, or  
21 something like that, on the stand that he  
22 passed them out to every individual that  
23 day and picked them up that same day,

1           picked them up right after a certain  
2           amount of time and picked them up. And I  
3           said, I told him, I didn't remember who  
4           the guy that picked it up.

5           Q    So, you said earlier you signed your  
6           affidavit on May the 10th of 2022,  
7           correct? And you referred to a  
8           correctional officer in paragraph three;  
9           am I correct about that? So, does that  
10          mean that you weren't informed of the  
11          belief of Bobby Waldrop that it was  
12          Captain Emberidge (phonetic) until after  
13          you signed your affidavit?

14                MS. HUGGINS: Objection to the form.

15          Q    In relation to the execution of your  
16          affidavit, did Bobby Waldrop tell you  
17          Captain Emberidge (phonetic) before or  
18          after you signed your affidavit?

19          A    Way after.

20          Q    Way after?

21          A    No, it would have been this right here --  
22          you mean this little thing here I signed?  
23          It was before. It was when -- when

1 the -- when they tried to set my date,  
2 and I told them I signed that paper. And  
3 he said like that. And I told him I  
4 don't know who the damn captain was. I  
5 said, I don't remember four years ago.  
6 And he said it was Captain Emberidge  
7 (phonetic). He said he testified in  
8 Federal Court.

9 Q So, it was before you signed your  
10 affidavit?

11 A This right here, yes.

12 Q All right. So, why did you say a  
13 correctional officer?

14 A Because I didn't know, and I still don't  
15 know. But I know they said like that. I  
16 haven't seen any kind of court report  
17 that said that.

18 Q All right. So, still on paragraph three,  
19 you say, June or July of 2018, can you  
20 narrow down when you say you made  
21 your election any further than that?

22 A Can you repeat that?

23 Q Are you able to narrow down the time that



1           you say you elected nitrogen hypoxia more  
2           than just June or July of 2018?

3           A     No.  No, I cannot.

4           Q     And why is that?

5           A     I can't remember something four years  
6           ago, the exact date four years ago.  I  
7           can go by this.

8           Q     Do you remember what day of the week it  
9           was?

10          A     No, I do not.

11          Q     Do you remember any other event that  
12          occurred around then that would help you?

13          A     Nope.  No, sir, I do not.  Sorry about  
14          that.

15          Q     All right.  If you will turn the page and  
16          look at paragraph four and just review it  
17          for me.

18          A     Turn to page four?

19          Q     Uh-huh (positive response).  I am sorry.  
20          Paragraph four.  It's the next page.  
21          Page two of your affidavit.

22          A     Oh, okay.

23          Q     Paragraph four of your affidavit,

1 Mr. Miller.

2 A Okay. Okay.

3 Q Your affidavit.

4 A Oh, okay. Okay.

5 Q So, do I understand this correctly that  
6 this correctional officer passed these  
7 forms out and said they would be back to  
8 collect them later?

9 A Yes. Yes.

10 Q Did they indicate that it would be them  
11 personally that picked them up?

12 A No. Just said it would be picked up  
13 later because they come on a tier, and  
14 they yell out, and then they will pass  
15 the forms out. Then they will come back  
16 later, somebody would pick them up.

17 Q You say "they"?

18 A Be another correctional officer or the  
19 trustees. So, I don't know. I just  
20 stick my -- I know I just stick mine back  
21 in the door and then go lay back down.

22 Q But in this case, it wasn't a trustee?

23 A Not that I have recollection of.

1 Q Are you familiar with the position of  
2 tier runner?

3 A What's that?

4 Q Are you familiar with the position of  
5 tier runner?

6 A It's a guy that passes out the ice and  
7 the trays when they -- when it's feeding  
8 time. And then he does -- you know, mops  
9 the outside and sweeps it up, passes out  
10 a broom and stuff and does what the  
11 officers tell him to do.

12 Q What about legal forms?

13 A They will pass them out with the officers  
14 standing there. He will walk down and  
15 stick it in everybody's door while the  
16 guy is hollering at the top of his lungs.  
17 The correctional officer is hollering at  
18 the top of his lungs.

19 Q Did the correctional officer who passed  
20 out the form to you say anything else  
21 about the form?

22 A Not that I have any recollection of.

23 Q You say not that you have any

1           recollection. Were you paying attention  
2           when he did it?

3           A     Yeah. He was just hollering out that you  
4           had to sign this thing right here, and it  
5           had to be turned in, and it had to be  
6           picked up. And then when he came back  
7           by, it had to be picked up, and you had  
8           to have it signed.

9           Q     Okay. And the next paragraph, paragraph  
10          five, you indicate that you completed the  
11          form and signed it. Can you tell me what  
12          all you did between receiving the  
13          election form and when you say you  
14          completed and signed it?

15          A     I probably read it. My recollection is I  
16          read it and I signed it.

17          Q     Based on your recollection, how long did  
18          that take?

19          A     I -- I couldn't tell you, sir. That's  
20          four years ago. If you had of came four  
21          years from now and asked me to remember  
22          what we are doing right now, I wouldn't  
23          even remember. I probably wouldn't even

1 remember your name or anybody else's  
2 name. That's why I said "correctional  
3 officer" because I wasn't sure of the  
4 name.

5 And, you know, just because he  
6 told me the guy's name, it might not have  
7 been the same person they came one  
8 his tier. They might have had a  
9 different officer on each tier. I wasn't  
10 on each tier.

11 So, I could not tell you if it  
12 was the same officer who went to each  
13 tier. He said he did. But I have no  
14 recollection because I am in a cell. So,  
15 I don't go get to walk around the tiers.

16 Q So, today, you don't have the ability to  
17 even say whether it took you longer than  
18 an hour --

19 A No.

20 Q -- to make this decision or less than an  
21 hour?

22 A No, sir.

23 Q Did you talk to anybody about that form

1 before you completed and signed it?

2 A I don't remember.

3 THE WITNESS: Am I loud enough?

4 THE COURT REPORTER: (Nodding in the  
5 affirmative).

6 Q Did you seek out legal advice about that  
7 form?

8 A I would have to go back through the  
9 records or have my records looked on the  
10 form records to see if I did or not.

11 Q So, you have no recollection?

12 A No recollection. I am sorry. No  
13 recollection, sir.

14 Q What about family? Did you ask your  
15 family?

16 A It might have been later. I have no  
17 recollection.

18 Q Do you recall speaking to anyone about  
19 whether or not you should make an  
20 election for nitrogen hypoxia?

21 MS. HUGGINS: Objection.

22 A Not that I have -- I don't have any  
23 recollection.

1 Q What do you remember about the form?

2 A Not really much. It's just -- you know,  
3 I thought it was called "nitrous." And  
4 it was nitrogen, and that's basically all  
5 I remember. And then asking -- you know,  
6 tell everybody asking. I said I wanted a  
7 copy of it and it notarized. And that's  
8 about it.

9 Q Okay. Why did you ask for the form to be  
10 notarized?

11 A So, I can have legal documentation if  
12 something would ever be asked.

13 Q Explain that to me how having the form  
14 that you turned in notarized would be  
15 legal documentation for you?

16 A Well, I really couldn't answer that. I  
17 am not legal minded, but I am always  
18 just -- I want it notarized, because I  
19 figured it was, like, legal like that.  
20 So, if they notarized it, they would have  
21 to acknowledge that they did everything  
22 they said they did. There would be some  
23 kind of record. And they can't say, oh,

1 we can't find it; we don't know where  
2 it's at, oh, excuse us.

3 Q Okay.

4 A Then it's my word against their word.  
5 And that's my understanding of notarizing  
6 something and asking for a copy.

7 Q So, if you will look at your paragraph  
8 six of your affidavit, do you agree that  
9 it says that you gave your signed form to  
10 the correctional officer who was, quote,  
11 collecting the forms?

12 A That would be my recollection. Like I  
13 said, I stuck it in the door, and they  
14 would come by and pick it up.

15 Q And if you look at number seven, you  
16 stated that you did that at the same time  
17 the correctional officer was collecting  
18 forms from everyone else. Is that  
19 accurate?

20 A That would be accurate. Well, it would  
21 be accurate to my recollection because  
22 they have got 14 cells up, 14 cells down.  
23 So, he would walk down there and walk



1 back, walk upstairs, walk down and walk  
2 back.

3 Q Okay. How did you know that he was  
4 collecting the forms from everybody else?

5 A Huh?

6 Q How did you know that he was collecting  
7 the forms from everybody else?

8 A Well, I was hoping he was. Because you  
9 don't walk by somebody's cell because I  
10 was up in -- I don't remember what cell  
11 it was, but he was walking by everybody's  
12 cell.

13 Q Okay.

14 A Walked down and walked back.

15 Q Okay. Who else's form did he collect  
16 that you saw him collect?

17 A I don't even remember what tier I was on.  
18 So, I cannot give you no recollection of  
19 that. You would have to go through the  
20 prison and ask them for that.

21 Q Can you provide me the name of a single  
22 inmate who you saw provided an election  
23 form to that correctional officer?

1 A Not really, no. I just assumed.

2 Q All right. You just said that you don't  
3 recall where you were housed at the time.  
4 Let me see if I can help you out.

5 Do you know if you were housed  
6 in F1-6A back in June of 2018?

7 A F1-6A?

8 Q Uh-huh (positive response). Let me show  
9 you your Inmate Movement History and ask  
10 if anything on that page helps refresh  
11 your recollection.

12 A Oh, okay. Yeah. Because when they moved  
13 me from F1-6A, my toilet exploded.

14 Q Okay. But that shows that from  
15 January 4th of 2017 until September of  
16 2018, you were in F1-6A; is that --

17 A Yeah.

18 Q Okay. So, knowing that you were in the F  
19 tier at the time, does that help you  
20 recollect the other inmates?

21 A There was -- I think there was a guy  
22 named Kelly that was -- would have been  
23 F5. But like I said, I'm not sure of my

1           recollection. And I think a guy named  
2           Nicholas Smith was on the other side in  
3           F7 -- F1-7.

4           Q    Was there a period where F1-7A was empty?

5           A    I have no recollection of that.

6           Q    Okay. So, if during the entirety of  
7           June 2018 F1-7A was an empty cell, you  
8           have no recollection of that fact?

9           A    F1-7A? Not really, no.

10          Q    Okay. Do you know Christopher Hyde?

11          A    Christopher Hyde?

12          Q    Hyde.

13          A    Yeah. I mean, I know him, but I know his  
14          name.

15          Q    Do you know him being assigned to F1-5A?

16          A    He was -- It wouldn't have been while I  
17          was next door to him. It would have been  
18          when I was in F3. I'm not sure. I don't  
19          have any recollection, but I know who you  
20          are talking about, because he got in a  
21          fight with somebody. There was a fight  
22          or something, and they moved him from --  
23          they was throwing poop on each other.

1 Q So, you say when you were in F1-6A --

2 A F1-3A.

3 Q When you were in F1-6A, you are saying  
4 Christopher Hyde was never your next  
5 door?

6 A No. I think it was -- I think it was a  
7 guy named Kelly.

8 Q How certain are you of that?

9 A Huh?

10 Q How certain are you of that?

11 A I am not certain, sir.

12 Q What about Matthew Reeves; do you know  
13 him?

14 A I know who you are talking about.

15 Q Do you recall whether he was housed in  
16 F1-8A?

17 A I know he was in the cell. I never  
18 walked down to the end. You go to your  
19 cell. You go in your cell, and they shut  
20 the doors.

21 Q Did you talk to any other inmates about  
22 the nitrogen hypoxia election the day  
23 that you say you got the form and filled

1           it out and turned in it?

2           A     Not that I have recollection of it.

3           Q     Can you give me the name of a single  
4           other inmate on your tier who elected  
5           nitrogen hypoxia?

6           A     No.

7           Q     So, I want to be clear. When you say  
8           that you turned the form in to a  
9           correctional officer at the same time he  
10          was collecting forms from everyone  
11          else --

12          A     It doesn't mean they signed the form.  
13          You know, I didn't look at each form and  
14          say, oh, he signed this form, and you can  
15          turn the form back in because he wanted  
16          the form either signed or not signed.

17          Q     What was the length of the form?

18          A     What's that?

19          Q     What was the length of the form?

20          A     I couldn't tell you that.

21          Q     When you elected nitrogen hypoxia as a  
22          means of a judicial execution when you  
23          signed that form, what did nitrogen

1 hypoxia mean to you?

2 A What did it mean to me? That I wouldn't  
3 have to be stabbed with needles.

4 Q Okay. But as a mechanism of death, what  
5 is nitrogen hypoxia?

6 A I thought it would be simpler. I  
7 wouldn't be stabbed like that or have  
8 allergic reactions to the chemicals that  
9 they said was in the lethal injection.

10 Q I want you to explain why you thought  
11 that. What allowed you to make that  
12 decision?

13 A Because of other things that people said  
14 about the other inmates who died of it of  
15 lethal injection, how they -- I mean, how  
16 other inmates, you know, had reactions or  
17 they had, like, an allergic reaction to  
18 it. And, again, like I said, they stab  
19 you with needles and stuff.

20 Q I understand that. But you say you  
21 elected nitrogen hypoxia. What did that  
22 mean to you? How would you die if you  
23 elected nitrogen hypoxia?

1 A I thought you just went to sleep.

2 Q Okay. And where did you get that  
3 information from?

4 A I just guessed it. I thought it would be  
5 you go to the dentist or something. I  
6 mean, I wasn't sure.

7 Q If you weren't sure, what was it about it  
8 that made you feel comfortable enough to  
9 make the election that you say you made?

10 A I really couldn't tell you.

11 Q All right. If you will look at paragraph  
12 nine of your affidavit, this kind of  
13 relates back to when you said you had  
14 asked for it to be notarized. I want to  
15 talk about the part where you say you  
16 asked for a copy and were denied a copy.  
17 When did that exchange occur? Was it  
18 after you had turned the form in or  
19 before? At the same time? Can you put  
20 that into context.

21 A Before I signed it, I said I wanted a  
22 copy and I wanted it notarized, and I  
23 wanted it back. And he never said

1 anything to anybody that I know of. He  
2 just said it needed to be signed and  
3 turned in, and he was supposed to be back  
4 to pick it up, my recollection.

5 Q So, this would have been at the time the  
6 form was being handed out?

7 A What's that?

8 Q So, you are saying this was done at the  
9 time the form was being handed out?

10 A Yes. Everybody was screaming it out.  
11 Hey, I want a copy, or you ask for a copy  
12 and asked that it to be notarized.

13 Q Describe how you turned the form in to  
14 the correctional officer.

15 A Just stuck it in the door.

16 Q Like, as he was there? Before he got  
17 there?

18 A Before he got there and stuck it in the  
19 door, and they come by and they pick it  
20 up. And then I yelled I wanted a copy.  
21 And he just kept -- the guy kept walking  
22 on by. And I said: When are they going  
23 to get a copy and notarize it? Nothing.



1 Q Tell me about everybody screaming on the  
2 tier. Like, what screaming?

3 A Some of them -- Some people wanted to  
4 talk to their lawyers, wanted to have  
5 time to talk to their lawyers. But,  
6 like, there is only one phone for 28  
7 guys.

8 Q All right. Who was doing that?

9 A Huh?

10 Q Who was doing that? Which --

11 A This guy is yelling. And I can't  
12 distinguish an individual voice. I  
13 couldn't have recollection, but I do know  
14 that people were hollering.

15 Q After he distributed -- this correctional  
16 officer distributed the form and left,  
17 y'all didn't talk about it amongst  
18 yourselves?

19 A No, I didn't. I just sat there and  
20 looked at it. I didn't socialize with  
21 people. I don't socialize with too many  
22 people now.

23 Q Were you represented by counsel at the

1 time?

2 A What's that?

3 Q Were you represented by counsel at the  
4 time?

5 A To my recollection, yes.

6 Q Did you call them?

7 A I would have to go back over the records  
8 and see. If I did, if they weren't  
9 there, it would be on the records. My  
10 recollection is I probably did.

11 Q Why do you say "probably did"?

12 A Because if anything wants me to sign, I  
13 am going to call legal counsel.

14 Q Are you sure that?

15 A My recollection is that's what I usually  
16 do.

17 Q So, you have no clear recollection of  
18 doing it?

19 A No, sir. No, sir.

20 Q All right. Look at the same paragraph --  
21 I am sorry -- paragraph ten of  
22 Defendant's Exhibit Two. And am I  
23 correct that you indicate under oath that

1           some other guys had their forms  
2           notarized?

3           A     Yes.

4           Q     Who were those other guys?

5           A     Well, I know Jarrod Taylor, and a guy  
6           named Barton. But this was way after it  
7           was formed after -- it was signed and it  
8           was all signed and picked up.

9           Q     Let's talk about Jarrod Taylor. How do  
10          you know his was notarized?

11          A     What's that?

12          Q     How do you know Jarrod Taylor's was  
13          notarized?

14          A     He told me.

15          Q     When did he tell you?

16          A     Well, he told me, you know, prior. I  
17          don't know the exact date, but he told  
18          me, hey, do you remember I told you they  
19          signed mine? I said, yeah. And I had to  
20          ask how come they did not notarized  
21          everybody else's.

22          Q     So, when was this conversation?

23          A     I couldn't tell you. It was after they

1           tried to set my date.

2           Q    What about Charles Burton?  When did you  
3           talk to him?

4           A    I don't know if his name is Charles  
5           Burton.  But he came and told me that I  
6           wasn't alone.  Man, he said like that.  
7           And he said, they signed mine.  He said,  
8           they notarized his.  I said, okay.  And  
9           he just said that they just notarized  
10          his.  That's all he said.

11          Q    When was that conversation?

12          A    I couldn't tell you the exact date, but I  
13          was in my cell.  They had already locked  
14          me down.  It was after they had already  
15          gave me the death sentence.

16          Q    Was it already after they asked to have  
17          your date set?

18          A    No.  It was after they -- they handed me  
19          the --

20          Q    After your date was actually set?

21          A    After set, they came back and put me in  
22          the -- they wouldn't let me walk.  They  
23          keep you in single walk.

1 Q All right. When you say some other guys,  
2 is there any other guys than Jarrod  
3 Taylor or the Barton or Burton that you  
4 referred it?

5 A No. Those are the only ones.

6 Q And so, the basis of your knowledge that  
7 their forms were notarized is what they  
8 told you?

9 A Is what they told me. Yes. That is my  
10 recollection.

11 Q I am going to show you what I marked as  
12 Defendant's Exhibit Three.

13 (At which time, the referred-  
14 to document was marked as  
15 Defendant's Exhibit No. 3 for  
16 identification.)

17 Q And this is the amended complaint that  
18 was filed in your lawsuit.

19 MS. HUGGINS: Can I interrupt you  
20 real quickly. Are we going to  
21 mark this?

22 MR. HOUTS: Yeah. I just wanted to  
23 use it to his recollection. If

1 y'all would like for me to mark  
2 it, I would be more than happy  
3 to.

4 MS. HUGGINS: Can you mark it  
5 please? You keep a copy of it  
6 anyway. The next one will be  
7 11.

8 So, just for purposes of  
9 the record, the transcript,  
10 when I showed him his Inmate  
11 Movement History, that will  
12 be a document that has been  
13 marked as Defendant's Exhibit  
14 11.

15 (At which time, the referred-  
16 to document was marked as  
17 Plaintiff's Exhibit No. 11  
18 for identification.)

19 BY MR. HOUTS:

20 Q May I see that, Mr. Miller, the Movement  
21 History. Thank you. I am sorry.

22 What were you saying, sir?

23 A I didn't mean try to -- like that, it

1 looks like the same as this one.

2 Q Okay. So, you may not be able to answer  
3 this. But have you seen a copy of that  
4 document prior to today?

5 A Not -- not that I know of.

6 Q So, if I asked you to identify the  
7 differences between the two documents,  
8 would you be able to answer that  
9 question?

10 A No, sir, I could not.

11 Q All right. If you will turn to page  
12 34 -- I am sorry, paragraph 34. I'm  
13 getting real bad about that.

14 Paragraph 34 of Defendant's  
15 Exhibit Three.

16 A Okay.

17 Q Okay. Do you see in paragraph 34 it  
18 makes reference to a news article in the  
19 Montgomery Advertiser back in 2019?

20 A You said 34?

21 Q Paragraph 34, yes, sir.

22 A It just says, "In the absence of such  
23 guidance -- and notwithstanding the fact

1           that ADOC has declined to" -- whatever  
2           that word is -- "promulgate any..." It  
3           don't say nothing about --

4           Q    If you'll look at the --

5           A    Okay. I see it now. Okay.

6           Q    All right. Have you ever read that  
7           article?

8           A    No, sir, not to my recollection.

9           Q    So, if I asked you to tell me what  
10          aspects of what is talked about in that  
11          article apply to your situation, could  
12          you tell me the answer?

13          A    No, sir, I could not.

14          Q    All right. If you will turn the page and  
15          look at paragraph 41, do you know who  
16          Captain Emberton is?

17          A    No, sir, I do not.

18          Q    Describe him for me.

19          A    Describe him? I couldn't.

20          Q    Is he a black man or a white man?

21          A    I couldn't tell you that. Probably be  
22          black because that's who all the last  
23          captains were, were all black. The last



1 white guy was -- dang, I forgot his name.

2 I think it was Watts. It was Captain

3 Bishop.

4 Q Is Captain Emberton tall or short?

5 A I couldn't -- I have no recollection of  
6 that.

7 Q Is he fat or skinny?

8 A I couldn't tell you. If I remembered  
9 that, I would remember anything else.

10 Q Is he muscular?

11 A Like I said, sir, I don't have a  
12 recollection.

13 Q Do you remember what hairstyle he has?

14 A No. No, I do not.

15 Q So, to the extent the complaint talks  
16 about Captain Emberton's alleged role in  
17 the process, that information did not  
18 come from you at all?

19 A What's that?

20 Q The information in here about Captain  
21 Emberton did not come from you?

22 A Nope, because I told them I did not -- I  
23 could not remember the guy's name.

1 Q All right. If you will look at paragraph  
2 50, I just want to be clear about one  
3 thing.

4 It looks like a masculine  
5 reference is being made to the prison  
6 official. Can you tell us whether the  
7 correctional officer that you are talking  
8 about was a male or a female?

9 A No, sir, I have no recollection. I don't  
10 think it was a female, but like I said, I  
11 have no recollection of that.

12 Q It could have been a female; you just  
13 don't know?

14 A No. I would remember if it was a female.  
15 I don't believe it was a female. If it  
16 was, then she would have been a dyke.  
17 She would have been a muscular woman to  
18 look like a man.

19 Q Can you remember anything peculiar about  
20 this person's appearance?

21 A No, sir. As I told you, I have no  
22 recollection.

23 Q How long have you been in the custody of

1 the Alabama Department of Corrections?

2 A July of -- I think it was July 31st of  
3 2000.

4 Q So, over 20 years?

5 A 22 years. It would be about right at 22  
6 years.

7 Q All right. I am going to show you what I  
8 have marked as Defendant's Exhibit Four.

9 (At which time, the referred-  
10 to photograph was marked as  
11 Defendant's Exhibit No. 4 for  
12 identification.)

13 Q Do you recognize the uniform that the  
14 individuals depicted in that photograph  
15 are wearing?

16 A It just looks like a correctional thing.

17 Q Are those Alabama Department of  
18 Correction's uniforms?

19 A They look like it. I couldn't even tell  
20 you right now what they are wearing.  
21 They used to wear a different type. I  
22 think it was a button-up shirt. The old  
23 ones used to be buttoned up.

1 Q All right. Let me show you --

2 A The only reason I know that is I watched  
3 them pull a dead body out.

4 Q Let me show what I have marked as  
5 Defendant's Exhibit Five.

6 (At which time, the referred-  
7 to photograph was marked as  
8 Defendant's Exhibit No. 5 for  
9 identification.)

10 Q Do you recognize the uniform that the  
11 individuals in that photograph are  
12 wearing?

13 A Uh-huh (positive response).

14 Q What kind of uniforms are those?

15 A They just look like correctional  
16 officers. Just like those, they had  
17 changed them. But I couldn't tell you  
18 exactly when they changed them.

19 Q Okay. One last picture, Defendant's  
20 Exhibit Six.

21 (At which time, the referred-  
22 to photograph was marked as  
23 Defendant's Exhibit No. 6 for

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identification).

Q Do you recognize the uniforms that are being worn by the individuals in those photographs?

A It looks like because they got that patch on the side. They had some that was dark colored because you have got, like, classification. You have got some that was -- I am not -- I don't want to go over an explanation. But some of them, they could not do nothing but set in a cube. I don't understand what they mean by that, but they said -- I asked before. I said, why she can't come out. She has to be escorted out and put back in. The only thing she does is push the buttons. I mean, that's my understanding and a different color. I think that was like that when I first got here. They had a different color like that.

Q In your personal experience as an inmate in the custody of the Department of Corrections, do you have familiarity with

1           seeing correctional officers in a uniform  
2           that looks like the uniform in  
3           Defendant's Exhibit Six?

4           A     I believe when I first got here.

5           Q     Okay. But not since then?

6           A     My recollection ain't like this because I  
7           don't keep up with it. But I know they  
8           have changed uniforms like they changed  
9           ours from white to this.

10          Q     Just to be totally clear, not since you  
11          first got here, have you seen the  
12          uniforms in Defendant's Exhibit Six?

13          A     I believe when they executed a guy, my  
14          window is right out and I can look out  
15          there when they bring the dead body out.  
16          And I believe they are wearing that.

17          Q     Okay. The individual that collected your  
18          form, what kind of uniform were they  
19          wearing?

20          A     I told you I had no recollection of what  
21          it looked like or what he was wearing or  
22          anything like that, sir.

23          Q     So, you can't describe the duty uniform

1           that they were wearing?

2           A     No.

3           Q     How did you know that the person was a  
4           Captain?

5           A     What was the person like that? I didn't  
6           know it at the time. But afterwards like  
7           that, they said -- like I said, Bobby  
8           Waldrop said the captain said he did it.  
9           And I said, I don't believe so. I said,  
10          I don't remember him saying he was a  
11          captain. I just remembered him yelling  
12          out that you have got to sign these  
13          forms, and they would have somebody come  
14          by and pick them back up.

15          Q     Okay. If you will look at those pictures  
16          again, Defendant's Exhibits Four, Five  
17          and Six, do you agree that each type of  
18          uniform has the officer's last name  
19          depicted on it?

20          A     Some of them do. Not everybody. Even  
21          right now some of them don't have their  
22          name on it.

23          Q     Okay. Well, what about the person that

1           you say collected your form?

2           A     I couldn't remember, sir.  If I did that,  
3                 I would have remembered the name and what  
4                 he looked like and all that.

5           Q     All right.  If you will turn to paragraph  
6                 45 of Defendant's Exhibit Three.

7           A     You said 45?

8           Q     Yes, sir.  Did you personally consider  
9                 the election for nitrogen hypoxia a grave  
10                decision?

11          A     I don't really know how to answer that.  
12                I really don't know how to answer that,  
13                sir.  You know, it's my life.  And I know  
14                I didn't want to be stabbed with needles  
15                and everything like that.

16                         And then at the time, I would  
17                         have thought it would have been a more  
18                         humane thing because I sort of did it  
19                         myself as it could be like you go to the  
20                         dentist, even though I have never been  
21                         under gas at a dentist.  But I've heard  
22                         other people say that you just go under,  
23                         and you come back out.  But this one you



1 ain't going to come back out of.

2 Q What about the part that refers to it as  
3 a time sensitive and irreversible  
4 election? Did that weigh on you at all?

5 A Well, I don't understand what time  
6 sensitive and irreversible election  
7 means. I mean, what's that concerning?  
8 I mean, can you explain that?

9 Q Well, let me ask it a different way.  
10 What were the things weighing  
11 on your mind when you say that you  
12 elected nitrogen hypoxia -- you filled  
13 that form out?

14 A Is that I didn't want needles stuck in  
15 me.

16 Q Okay. Do you have personal knowledge of  
17 whether a number of death row inmates  
18 challenged the constitutionality of  
19 lethal injection in the mid-2000-teens?

20 A No, sir. I have no recollection. Like I  
21 said, I didn't socialize with a lot of  
22 people. I stayed to myself.

23 Q When the Department of Corrections

1           adopted midazolam as the first drug -- I  
2           am sorry.

3                               When the Department of  
4           Corrections adopted midazolam as the  
5           first drug in its lethal injection  
6           process, did you challenge that as being  
7           unconstitutional?

8           A    Not that I remember, sir. I have no  
9           recollection.

10          Q    Who is Jeff Carr?

11          A    Jeff Carr, he is my half-brother. Same  
12          mother, different dads.

13          Q    How often do you talk to him?

14          A    I haven't talked to him in a long time.  
15          A long time.

16          Q    Okay. Who do you talk to most? Who do  
17          you talk to most often?

18          A    Richard Miller.

19          Q    Who is that?

20          A    My brother. Same mother, same father.

21          Q    How often do you talk to him?

22          A    From, like, maybe once a week or  
23          sometimes, you know, I might skip it or

1 something because he might say he is gone  
2 out of town or something. But it's  
3 usually just once a week.

4 Q If you had elected nitrogen hypoxia, is  
5 that the type of thing that you would  
6 told him about?

7 A Probably so. I don't really like to tell  
8 him stuff like that. He is real  
9 sensitive about that.

10 Q Okay. Do you have a clear recollection  
11 of whether you told him or not?

12 A No, sir, I do not.

13 Q How did you find out that the State had  
14 moved to set your execution date?

15 A Sir?

16 Q How did you find out that the State of  
17 Alabama had moved in the Supreme Court to  
18 set your execution date?

19 A Let me see. I can't even tell you that.  
20 I just know, hey, Miller, they are trying  
21 to set your execution. I think it was  
22 legal counsel, but I'm not sure.

23 But I mean, like I said, I was

1           just sitting here. Like I said, I don't  
2           have nothing to do with a lot of people.  
3           And it could come out in the newspaper.  
4           We don't even have TV in our room.

5           Q    Let me be clear before I ask this. I am  
6           not asking you to divulge any legal  
7           conversation.

8                                But do you recall whether the  
9           Warden would have told you, your lawyers,  
10          both? I mean, can you kind of help me?

11          A    Like I said, I have no recollection.

12          Q    Do you recall when you learned that the  
13          State had moved to set your execution  
14          date?

15          A    No. Not the exact date, no, sir.

16          Q    Did you tell Richard Miller that the  
17          State had moved to set your execution  
18          date?

19          A    If I had found out, I probably would  
20          have.

21          Q    How soon afterward would you have told  
22          him?

23          A    I have no recollection.

1 Q Are you doing okay, Mr. Miller, on  
2 comfort needs and things like that?

3 A Yeah.

4 Q Okay.

5 (Thereupon, a discussion was  
6 held off the record.)

7 Q I am going to play for you an audio file  
8 that I have marked as Defendant's Exhibit  
9 Seven.

10 (At which time, the referred-  
11 to audio was marked as  
12 Defendant's Exhibit No. 7 for  
13 identification).

14 MS. HUGGINS: Before you play it,  
15 are you going to tell us what  
16 the recording is?

17 MR. HOUTS: You know, it's going to  
18 be easier for him to listen to  
19 it and then be able to, you  
20 know, tell me whether he can  
21 authenticate it.

22 A Do you have the date when it was done?

23 Q I do. This will be April the 21st.

1 A When?

2 Q April the 21st of this year.

3 A You need these back?

4 Q Those are actually the official ones. Do  
5 you need a -- there you go.

6 A You said April?

7 Q I am sorry. Yes.

8 A You said April?

9 Q April the 21st.

10 A Okay. That's 2022?

11 Q 4/21/22.

12 MS. HUGGINS: 4/21 --

13 Q Let me pull it up.

14 A When was that?

15 Q This year.

16 A Okay.

17 Q Yes. This is 4/21/22.

18 A Twenty-one.

19 Q Yeah. The 21st of April.

20 MS. HUGGINS: Will you tell us the  
21 phone number? I am assuming --

22 Q All right. Do you recognize phone number  
23 205.479.2618?

1           A     Yes, sir. That's my brother, Richard  
2                     Miller's phone number. That's my  
3                     brother.

4                                     (Audio playing).

5                     MR. HOUTS: Let me stop.

6 BY MR. HOUTS:

7           Q     Do you recognize the voices on that  
8                     recording?

9           A     That was my brother, Richard. I've never  
10                    heard myself. I have never heard. I  
11                    sound weird.

12          Q     It happens to everybody.

13                                    Do you recognize that as being  
14                    the call that you placed to your brother  
15                    after learning your execution date?

16          A     I have no recollection of exactly saying  
17                    stuff like that. But, yeah, it sounds  
18                    like I would talk to him.

19          Q     Okay. Let it play on out.

20                                    (Audio playing).

21          Q     I know that's a deep conversation to  
22                    listen to. Do you need a break?

23          A     What's that?

1 Q I said I know that's a very deep  
2 conversation to listen to. Do you need a  
3 break?

4 A No.

5 Q Okay. At any point during that --

6 A Louder.

7 Q Okay. At any point during that  
8 discussion, did y'all have a conversation  
9 about you electing nitrogen hypoxia?

10 A No. I would not discuss something like  
11 that until my legal -- that would be a  
12 legal thing. I wouldn't be able to talk  
13 about until after legal counsel, confirm  
14 with legal counsel. That's something you  
15 don't say on an open line. That's why if  
16 you noticed in that thing, I said tell  
17 her to call the lawyers and that way,  
18 then, she -- my lawyers could explain to  
19 my sister what procedural thing to -- all  
20 death row inmates have when their date is  
21 set.

22 Q Just, yes, I will mark this as  
23 Defendant's Exhibit Seven and you



1 identified. But just so if later on  
2 there needs to be -- you know, that this  
3 is the disc that I just played for you,  
4 would you put your initials in that box  
5 right there, please.

6 THE WITNESS: It is all right for me  
7 to sign it?

8 MS. HUGGINS: Yes.

9 Q I am just asking you, like, to put  
10 something where it's clear that this --  
11 the disc hasn't been swapped out with  
12 another one, that that's what we listened  
13 to?

14 A Do you want me to, like, initial?

15 Q A-E-M, however you normally would do it.  
16 There you go. Thank you.

17 All right. I am going to play  
18 you a phone call that was also from April  
19 the 21st to the same phone number.

20 A What date was that?

21 Q Also April the 21st. It's been marked as  
22 Defendant's Exhibit Eight.

23 (At which time, the referred-

1 to audio was marked as  
2 Defendant's Exhibit No. 8 for  
3 identification).

4 (Audio playing).

5 A I thought my hearing -- I thought it was  
6 my hearing.

7 (Audio playing).

8 Q All right. Do you recognize that call  
9 between yourself and Richard Miller?

10 A Yes. I know that's my brother and me.

11 Q All right. Just so it's fresh on your  
12 mind, I want to play that portion that  
13 starts at the --

14 A Could you speak up, please.

15 Q I want to play that portion that starts  
16 at the one minute and 15 second mark to  
17 the one minute and 38 second mark just so  
18 it's fresh on your mind.

19 (Audio playing).

20 Q All right. Do you agree at the beginning  
21 you said -- and I can play it again if  
22 you immediate to -- "Hey, I called those  
23 damn lawyers. Some other inmates signed

1 a piece of paper about using some kind of  
2 gas stuff. I called those lawyers and  
3 told them they need to call the Equal  
4 Justice and stuff and the Public  
5 Defenders"?

6 A Federal Defenders. I meant Federal  
7 Defenders.

8 Q But I will play it again if you would  
9 like. But is that what you indicated to  
10 your brother? She can't take down head  
11 nods.

12 A Oh, yes.

13 Q All right. What are the other inmates  
14 that you spoke to?

15 A Bobby Waldrop, Jarrod Taylor and, you  
16 know, Gene Clemmons. I couldn't remember  
17 all the guys that was sitting around that  
18 was telling me that.

19 Q Okay. Of those three -- Bobby Waldrop,  
20 Jarrod Taylor, and Eugene Clemmons --  
21 were any of them on F1 tier in June of  
22 2018?

23 A Not that I have recollection, no.

1 Q All right. You told them that your  
2 lawyer didn't even know what you were  
3 talking about. What does that mean?

4 A The lawyer -- there's many lawyers, legal  
5 counsel. And the one I talked to was  
6 just one.

7 MS. HUGGINS: Objection as to  
8 privilege.

9 Q This is a conversation with your brother;  
10 am I correct?

11 A Yes.

12 MS. HUGGINS: In terms of the -- so,  
13 it's fine to limit it to that.  
14 But in terms of asking him to  
15 go beyond this conversation and  
16 what he said to other people.

17 Q You told your brother -- What did you  
18 mean your lawyer didn't know what you  
19 were talking about? What did you mean  
20 that your lawyer didn't know what you  
21 were talking about?

22 A I meant that lawyers. When I did that, I  
23 just meant like that. So, I have many

1 lawyers that's working on the case, and  
2 he was just the one of the lawyers there  
3 to answer the phone. He said, well, he  
4 would have to get with another lawyer.  
5 And that's what I meant. It sort of  
6 angered me because I'm like, oh, hey.

7 But that means that -- but then  
8 I don't understand that there is other --  
9 they have other clients and lawyers  
10 working on that. So, they get...

11 Q Why would your lawyers need to call the  
12 Equal Justice or Federal Defenders?

13 A What's that?

14 MS. HUGGINS: Objection. Form.

15 Q I'll re-ask. Remember, you told your  
16 brother, "I told them they need to call  
17 the Equal Justice and stuff and the  
18 Public Defenders."

19 MS. HUGGINS: Objection. Form.

20 Q Do you recall that?

21 A Do I recall what? What that tape just  
22 said?

23 Q Yes.

1 A Yes, I remember what the tape just said.

2 Q Why did you tell them they need to call  
3 will Equal Justice and stuff and the  
4 Public Defenders?

5 MS. HUGGINS: Objection. Privilege.

6 Q And you told your brother this. Why did  
7 you tell your brother you told -- What  
8 were you communicating to your brother?

9 A To let my sister call, and that way she  
10 can call the lawyers and they can talk on  
11 a secure line. That's how we talk. We  
12 talk like that because we know we are  
13 monitored. You probably should listen to  
14 a lot of other ones and you will hear  
15 some stuff.

16 But we start kidding around on  
17 there. But I mean, I can't discuss on an  
18 open line about --

19 Q Yeah, let's follow that up.

20 Was your sister involved in  
21 your election of nitrogen hypoxia?

22 A My sister?

23 Q Uh-huh (positive response).

1 A Not that I have any recollection, no.

2 Q But she's having conversations with your  
3 lawyers about information relating to  
4 your case?

5 A Well, you would have to talk with them.  
6 That would be between them. I mean, we  
7 are not going to discuss it on an open  
8 line. If my lawyers talked to me, that  
9 would be legal.

10 Q Do you allow your lawyers to talk to your  
11 sister about your legal matters?

12 A I let them -- I said I have no problem  
13 with her letting them know certain  
14 things, but not everything.

15 Q Let me ask you this: If you told your  
16 lawyers that you made a nitrogen hypoxia  
17 election, did you intend for that  
18 communication to remain confidential?

19 MS. HUGGINS: Objection. Privilege.

20 MR. HOUTS: May I ask what is  
21 privileged about whether he  
22 intended it to remain  
23 confidential?

1 MS. HUGGINS: Well, so, you are  
2 asking it as a speculation, but  
3 it is not really a speculation.  
4 You are asking him if you told  
5 them this, did you intend, and  
6 that's clearly attorney-client  
7 privilege communication. You  
8 are asking whether he waived  
9 something with his lawyers,  
10 what communication was between  
11 he and his lawyer.

12 BY MR. HOUTS:

13 Q Do you understand that the attorney-  
14 client privilege belongs to the client,  
15 to you?

16 A What is that, sir?

17 Q Do you understand that the attorney-  
18 client privilege belongs to you?

19 A My understanding, yes.

20 Q Okay. Just to make sure that we are  
21 clear.

22 A They are not going to go into detail  
23 about the case. They are just going to



1           let them know that I am all right, and  
2           that whatever that they are on, they are  
3           on it.

4           Q     Okay. Take all the time you need to  
5           consult with your counsel. But in  
6           response -- Did you tell your lawyers  
7           that you elected nitrogen hypoxia?

8           MS. HUGGINS: Objection. Privilege.

9           Q     Okay. Is it your intent to assert in  
10          this deposition that the answer to the  
11          question I just asked you was intended to  
12          remain confidential when you transmitted  
13          it to your counsel?

14          MS. HUGGINS: Objection. Privilege.

15                 I am going to instruct him not  
16                 to answer these questions.

17          MR. HOUTS: Okay. I mean, I have  
18                 just got to make it clear that  
19                 when we get there --

20          MS. HUGGINS: I understand.

21 BY MR. HOUTS:

22          Q     You do not want any communication about a  
23          nitrogen hypoxia election made to your

1 counsel made public?

2 MS. HUGGINS: Objection. Privilege.

3 Q Have you ever communicated to your  
4 counsel information about a nitrogen  
5 hypoxia election that you intended to be  
6 communicated to a third party?

7 MS. HUGGINS: Objection. Privilege.

8 Q You said you had different lawyers. When  
9 you told your brother the lawyer didn't  
10 know what he was talking about, which  
11 lawyer was that?

12 A That's confidential, client confidential.

13 Q Let me ask you about the statement to  
14 your brother that you told your lawyers  
15 that they might be able to put a hold on  
16 that. Was that referring to your  
17 execution?

18 MS. HUGGINS: Objection to the form.

19 Q Let me play it for you again just to make  
20 sure when I ask this question. Again, I  
21 am starting at one minute and 15 seconds,  
22 and I'm going to play to approximately  
23 the one-minute-and-38-second mark.

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(Audio playing) .

BY MR. HOUTS:

Q What did you mean by, might be able to put some kind of hold on that?

A That wasn't by my lawyers. That was by Bobby Waldrop and them, because they said there's was on hold because they had signed the same thing like I did.

Q All right. My question was: Their what?

A The nitrogen hypoxia thing that everybody signed, that everybody was told to sign or asked to sign.

Q But what is it that is on hold?

A Their execution.

Q Their execution.

A Until it's whatever.

Q So, let me ask you this: Is your purpose in this litigation to put a hold on your execution or simply to be executed by nitrogen hypoxia?

A I don't really know how to answer that. I don't want to die. I just want to be treated fairly.

1 Q What is treated fairly?

2 A I mean, other people signed it like I  
3 did, and theirs is put on hold. Why am I  
4 being put out there, and why am I going  
5 through this right here? Did they go  
6 through the same thing? Did you talk to  
7 any of them like you are talking to me?  
8 Did you question them? Did you question  
9 Jarrod Taylor? They never found his, but  
10 did he go through this deposition like  
11 I'm going through?

12 Q Okay. Let me show you what I have marked  
13 as Exhibit Nine.

14 (At which time, the referred-  
15 to document was marked as  
16 Defendant's Exhibit No. 9 for  
17 identification.)

18 Q It's a copy of a request for a  
19 preliminary injunction that was filed  
20 with the Court where your lawsuit is  
21 pending. Have you ever seen that many  
22 document before?

23 A Not to my recollection, no. If I did, I

1 don't remember it. If I did, I don't  
2 remember it.

3 Q Do you know what the purpose of that  
4 document is?

5 A No.

6 Q Okay. If you will flip to page 19 at the  
7 back of that exhibit, do you see the  
8 conclusion that reads, (as read) "For all  
9 these reasons, the Court should grant  
10 Mr. Miller's motion for a preliminary  
11 injunction, enjoin Defendants from  
12 executing Mr. Miller via lethal  
13 injection, and declare that his nitrogen  
14 hypoxia election be honored."

15 Do you see that?

16 A Yes, I see that. Yes, I see that.

17 Q What does that mean to you?

18 A That means I should be treated the same  
19 way everybody else is being treated.

20 Q Okay. And how would that be?

21 A Is that they haven't set their dates.  
22 That they tried to start setting their  
23 dates. And when they said they signed

1           them, the Court withdrew their however  
2           whatever it did. That's what Bobby  
3           Waldrop, Jarrod Taylor and Gene Clemmons  
4           and all them, they all said the same  
5           thing, and Barton and all them said the  
6           same thing.

7           Q     If the Court granted that request and  
8                    ordered that you could only be executed  
9                    by nitrogen hypoxia on September the  
10                  22nd --

11          A     Can you speak up?

12          Q     If the Court granted that request and  
13                  said that you could only be executed by  
14                  nitrogen hypoxia on September 22nd, would  
15                  that satisfy you as the Plaintiff in this  
16                  case?

17          A     I don't really know how to answer that  
18                  question. I don't want to die. I do  
19                  want to be treated fairly.

20          Q     Okay. But is the purpose of this  
21                  litigation to avoid dying or to die by  
22                  nitrogen hypoxia instead of lethal  
23                  injection?

1 A Is to be treated fairly because the  
2 lawsuit clearly states that I signed the  
3 papers. The State hasn't been able to  
4 prove anything.

5 Q So, if the Court agreed that you signed  
6 the papers --

7 A I don't understand the question, but he  
8 goes, I don't want to die, I don't want  
9 to be stabbed with needles, I want to be  
10 treated fairly. That's everybody else  
11 being treated fairly.

12 Q So, if the Court agrees that you either  
13 signed the paper or probably did and says  
14 that Alabama can only execute you by  
15 nitrogen hypoxia on the 22nd, you are  
16 okay with that?

17 A No, not until they have it certified by  
18 an independent counsel -- independent  
19 people. It's like the same thing y'all  
20 did with that lethal injection. That's  
21 why y'all did that hypoxia stuff because  
22 y'all can't be sure of anything. The  
23 State can't be sure of anything. Not you

1 individually, but the State itself cannot  
2 be sure of anything, any humane way or  
3 nothing. They can't prove a thing unless  
4 they do it their self and come back and  
5 have a séance. And then they can, okay,  
6 give us a thumb up or a thumb down.

7 Q So, what do you mean by certified by?  
8 Describe for me what you think the State  
9 needs to do to certify.

10 A Well, it's the same thing Ray Hinton, the  
11 evidence that convicted him. It set him  
12 free because when they went to get it, it  
13 disappeared. But if they was going to do  
14 something like this, they would have to  
15 actually prove beyond a doubt that it is  
16 not painful, any one of them, lethal  
17 injection or nitrous -- I keep saying  
18 nitrous. I don't mean to say it like  
19 this, nitrogen hypoxia. I say nitrogen  
20 hypoxia. I believe I am pronouncing it  
21 right -- is safe. They have got to prove  
22 it. And how are they going to prove  
23 that?



1 Q So, you didn't think it was safe when you  
2 say you elected nitrogen hypoxia?

3 A No. It was just an option that they gave  
4 you. And the option at the time I  
5 thought, if it was like nitrous oxide,  
6 that they wouldn't be sticking needles in  
7 me because I don't want needles stuck in  
8 me.

9 Q So, if you will look at Defendant's  
10 Exhibit Three and go back to paragraph  
11 45, do you disagree that if you made that  
12 election it was an irreversible election?

13 A So, I don't understand that.

14 Q You couldn't undo it?

15 A No. I didn't understand that, no. I  
16 mean, I know --

17 Q So, that didn't play a role in your  
18 decision? Knowing that it couldn't be  
19 undone did not play a role when you say  
20 you made your decision?

21 A If I signed it, it kept them from  
22 sticking needles in me? Yes, I would  
23 want it to be irreversible once it's been

1 proven to be humane and not cause pain.

2 But I don't believe y'all have done that

3 for anything yet.

4 Q Why do you think that nitrogen hypoxia  
5 would cause pain?

6 A Well, it's a gas. I am not a scientific  
7 person, so I don't know. So, you would  
8 have to get with professional counsel on  
9 that. I can just assume.

10 Like I said, I just sort of put  
11 it with dentists, nitrous oxide like  
12 this. I really don't know because I have  
13 never been under nitrous oxide or  
14 nitrogen hypoxia, or however you  
15 pronounce that.

16 Q So, if the Court granted your injunctive  
17 relief and DOC carried out -- attempted  
18 to carry out your execution by nitrogen  
19 hypoxia, you would want to stop that?

20 A Well, it's unfair because there's no  
21 certification. There's people who were  
22 prior to me whose appeals have run out,  
23 you know, they signed it like I did. Why

1 are they not here going through the same  
2 thing I am doing with the Court Reporter  
3 recording this. Why did they sign it?  
4 Did they concur like you are asking me,  
5 do I concur, why have none of them being  
6 put through the same process?

7 I am not being treated fairly.  
8 I mean, there are prior guys, like I  
9 said, who have had their dates set, and  
10 yet they ain't had to go through this  
11 deposition like I am doing.

12 No, you didn't find Jarrod  
13 Taylor. I don't see him going through a  
14 deposition or saying he went through a  
15 deposition.

16 Q So, you have talked to Jarrod Taylor  
17 about his circumstances, correct?

18 A No. He just told me that, you know, that  
19 he had his notarized. He just said that  
20 they notarized his and that was it. And  
21 I was wanting to try to how he did that.  
22 And he said you would have to ask the  
23 people up front, which I thought they did

1           it all at the same time.

2                           And that means that that  
3           Captain Emberton, or whatever his name  
4           is, basically lied on the stand because  
5           he said he passed them out one day and  
6           picked them all up in one day. And now  
7           they are saying that they got another  
8           form. They signed it and notarized it  
9           and gave them copies, but they didn't  
10          come back. And they said, well, we are  
11          going to copy yours and give you yours  
12          too. That's the only thing we was  
13          talking about.

14                           So, I don't know where he  
15          stands on stuff or why he signed it. You  
16          would have to ask him or all the other  
17          death row inmates who are under the same  
18          thing and why they are not going through  
19          the same thing. Why are they not having  
20          a deposition like I am and being asked  
21          these same questions and going over any  
22          phone calls or emails, that they are  
23          talking to people?

1 Q As it relates to the allegations in your  
2 lawsuit, what is your understanding of  
3 why Jarrod Taylor didn't have to go  
4 through all this?

5 A I have no idea.

6 Q You have no idea?

7 A No.

8 Q Is it still your position that you asked  
9 for and completed a form for nitrogen  
10 hypoxia in June of 2018?

11 A If that was when they passed it out, yes.  
12 I had asked for a copy and notarization  
13 of everything.

14 Q Okay. To your knowledge, did all the  
15 forms get passed out and collected on the  
16 same day?

17 A Like I tell you, sir, I am in a cell. I  
18 don't know no other tiers. I know that  
19 they walked passed my cell back there and  
20 went upstairs and then left.

21 Did they go to other tiers? I  
22 do not know. I could not tell you. I am  
23 not Stretch Armstrong. I can't stretch

1 my neck out there and see.

2 Q You absolutely don't know who else in  
3 your tier elected?

4 A Like I said, I mean -- Like I said, I  
5 don't socialize with people.

6 Q All right.

7 A You would have to ask them, put them on  
8 the same thing that you are doing to me.

9 Q And you have asked the Federal Court to  
10 make the State of Alabama honor your  
11 nitrogen hypoxia election? Is that still  
12 your position, that you want it honored?

13 A I would want them to honor me like they  
14 are doing everybody else's. They put  
15 everything else on hold.

16 Q Let me ask you this --

17 A And I have a --

18 Q If a correctional officer came to try to  
19 just, as a planning precaution, fit a  
20 mask to your face to make sure there were  
21 no issues, is that something that you  
22 would be cooperative with, or is that  
23 something that would upset you?

1 A It could be something that would upset  
2 me.

3 Q Why is that?

4 A Because why ain't nobody else going  
5 through the same thing? Why are people  
6 prior to me, who signed it like I did,  
7 are people who they didn't find theirs?  
8 As in Jarrod Taylor, they never found his  
9 or some other guys they never found. Why  
10 they are not doing this and you asking  
11 the same question of them? I want to be  
12 treated fairly. I want the courts to  
13 treat me fairly. I want the State.

14 Q As the Plaintiff, you would want, before  
15 the Court orders us to do nitrogen  
16 hypoxia, to also have to explain why we  
17 are ready to perform your execution but  
18 not everybody else's?

19 A That's right.

20 Q Okay. I think I asked -- If I asked you  
21 this earlier, I am going to apologize in  
22 advance, but I need to make sure that I  
23 didn't miss anything.

1 A Just make sure you are loud.

2 Q Yes, sir. Do you know whether Matthew  
3 Reeves elected nitrogen hypoxia or not?

4 A No, sir, I do not.

5 Q What about Willie Smith?

6 A No, I do not.

7 Q Your complaint alleges that the State has  
8 previously set an execution date for  
9 others, plural, and then had to withdraw  
10 it. Who are the other --

11 MS. HUGGINS: Objection to the form.

12 MR. HOUTS: Okay. That's fine.

13 Q Who are the other inmates that you know  
14 of that have had to have execution  
15 motions withdrawn?

16 A Well, I believe Bobby Waldrop, you know,  
17 Jarrod Taylor, Gene Clemmons. I believe  
18 they tried to set his date. And there's  
19 some other guys. I can't recall their  
20 names right off. And they got nicknames.  
21 I can't recall their whole names.

22 I didn't have a list. But  
23 those are the ones I've known because



1           they all came to me when they set my  
2           date.

3           Q     Why do you believe Bobby Waldrop had his  
4           date set and the State had to withdraw  
5           it?

6           A     Because he told me.

7           Q     Why do you believe Eugene Clemmons had  
8           his date set and they had to withdraw it?

9           A     He told me.

10          Q     No other basis than what you were told?

11          A     No other basis than what I was told.

12          Q     Since we looked at these photographs  
13          earlier, has anything jogged your memory  
14          that would allow you to remember anything  
15          about this correctional officer?

16          A     No, sir. I would have done told you.

17          Q     You still can't describe Captain  
18          Emberidge (sic) for me?

19          A     (No verbal response).

20          Q     I got an email from another one of your  
21          lawyers today saying that you believe  
22          that you did a grievance or a request  
23          form in 2018. Can you tell me about

1           that?

2           A     What lawyer was that?

3           Q     Mr. Specter.

4           A     Said that I --

5           Q     That you believed that you made an inmate  
6           request form in 2018. And can you tell  
7           me about that?

8           A     It's a -- It would be a small form. It's  
9           a thing that says, warden, captain,  
10          whatever and all that, business office,  
11          and all that, and you just write your  
12          complaint. And if I did, that's what I  
13          would have wrote, that I did not get my  
14          copy, nor did I get a notarized copy of  
15          what I signed. That's what I would have  
16          sent up front.

17          Q     You said "if I did."

18          A     Yes.

19          Q     "What I would have."

20          A     Yes.

21          Q     Why are you using those kinds of words?

22          A     Because I can't have no recollection. I  
23          don't have a recollection of actually

1           doing it, but I do do that whenever I  
2           file complaints, and they never send me  
3           my copies back. They never sent nothing  
4           back when I send something up there. I  
5           can make a carbon copy. I can go check  
6           my records, what I've got, to see if I  
7           have a carbon copy. But you could say I  
8           just made that up, but I don't believe I  
9           have.

10          Q     But you don't have a recollection of  
11                doing it?

12          A     No, sir.

13          Q     If you had done it and gotten no  
14                response, is that something you would  
15                talk to your lawyers about?

16          A     Yes.

17          Q     I want to make sure I am correct. You  
18                think, if you did, it would have been in  
19                2018?

20          A     I would have no recollection, sir. If  
21                they are not there, if I would have  
22                called them, that would have been client  
23                privilege.

1 Q I am sorry. The making of the request  
2 form, if you did that, you think it would  
3 have been in 2018?

4 A Yes.

5 Q Do you know when in 2018 you think it  
6 would have been?

7 A It would have been around the time I  
8 signed the thing or whenever they were  
9 supposed to bring us back a copy. The  
10 exact dates, no, I could not. I have no  
11 recollection of that.

12 Q When you were sentenced to death  
13 originally, your original death sentence  
14 was electrocution, correct?

15 A Yes.

16 Q Were you on death row when Alabama  
17 altered its method of execution to lethal  
18 injection?

19 A Yes.

20 Q Do you recall that process?

21 A I just recalled that they was going to --  
22 because they said like this and they said  
23 it was supposed to have been humane.

1           There were still questions about the  
2           lethal injection, that that's what they  
3           used to kill dogs. And that there was --  
4           that's all I have recollection of.

5           Q    What about the process of saying you want  
6           lethal injection rather than  
7           electrocution?

8           A    I mean, I don't want to be electrocuted,  
9           you know.

10          Q    So, what did you do?

11          A    I didn't do anything. It was  
12          automatically. They dropped the chair,  
13          and we are going to start killing people  
14          with --

15          Q    All right. So, this was a different  
16          process used back then?

17          A    Yes, a whole different process.

18          Q    Okay.

19          A    I think there might have been some kind  
20          of thing where if you wanted the electric  
21          chair, you could elect it like that. And  
22          I said, who in the Hell is going to elect  
23          that?

1 Q All right.

2 A But I have no recollection. But I know  
3 that it was mandatory, or whatever.

4 Q So, what did you think when you asked for  
5 a copy and were refused a copy?

6 A That it was wrong.

7 Q And if you filed a request form and  
8 didn't get a response, how would you have  
9 felt about that?

10 A About fraud.

11 Q Why?

12 A Because I have a right to be responded to  
13 and being treated fairly. And they have  
14 to respond and say why did they not give  
15 me a copy or notarized mine and other  
16 individuals had theirs.

17 Q It would have made you want to do  
18 something about it; is that right?

19 A Well, yes.

20 Q Okay. I appreciate your time in making  
21 arrangements to come down here. If y'all  
22 want to do your own --

23 MS. HUGGINS: Can I have quick

1 question?

2 MR. HOUTS: Yeah.

3 CROSS-EXAMINATION

4 BY MS. HUGGINS:

5 Q I have a question about Defendant's  
6 Exhibit 11. There's a notation on the  
7 second line that says you were  
8 transferred to Holman Prison on May 13th,  
9 2021. Is it accurate that you were  
10 transferred to Holman Prison on May 13th,  
11 2021?

12 A Uh-uh (negative response).

13 Q Have you been at Holman Prison since  
14 2000?

15 A It's July -- I think it was July 31st,  
16 2000.

17 MS. HUGGINS: I have nothing else.

18 I just wanted to clear that up.

19 REDIRECT EXAMINATION

20 BY MR. HOUTS:

21 Q Well, do you recall when y'all were moved  
22 out of the building that nobody can be  
23 housed in anymore, the old death row?

1 A When they condemned it?

2 Q Yes.

3 A Like, finally condemned it after all the  
4 complaints that was filed?

5 Q Uh-huh (positive response).

6 A I don't remember the exact date.

7 Q Okay. Do you remember when Terry Raybon  
8 became the warden of Holman Prison?

9 A No.

10 MR. HOUTS: Okay. That's all I  
11 have.

12 MS. HUGGINS: I have nothing else.  
13 Thank you.

14

15

16 (Deposition concluded at  
17 approximately 2:49 p.m.)

18

\* \* \* \* \*

19

FURTHER DEPONENT SAITH NOT

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21

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1 R E P O R T E R ' S C E R T I F I C A T E

2 STATE OF ALABAMA)

3 TALLAPOOSA COUNTY)

4 I, Jeana S. Boggs, Certified Professional  
5 Reporter and Notary Public in and for the State of  
6 Alabama at Large, do hereby certify on Wednesday,  
7 September 7th, 2022, that pursuant to notice and  
8 stipulation on behalf of the Defendants, I reported  
9 the deposition of ALAN EUGENE MILLER, who was first  
10 duly sworn by me to speak the truth, the whole  
11 truth, and nothing but the truth, in the matter of  
12 ALAN EUGENE MILLER, Plaintiff, versus JOHN Q. HAMM,  
13 in his official capacity as Commissioner, Alabama  
14 Department of Corrections; TERRY RAYBON, in his  
15 official capacity as Warden, Holman Correctional  
16 Facility; STEVE MARSHALL, in his official capacity  
17 as Attorney General, State of Alabama, Defendants,  
18 Case Action No. 22-cv-00506, now pending in the  
19 United States District Court for the Middle District  
20 of Alabama; that the foregoing colloquies,  
21 statements, questions and answers thereto were  
22 reduced to 95 typewritten pages under my direction  
23 and supervision; that the deposition is a true and

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1 accurate transcription of the testimony/evidence of  
2 the examination of said witness by counsel for the  
3 parties set out herein; that the reading and signing  
4 of said deposition was not waived by witness and  
5 counsel for the parties.

6 I further certify that I am neither of  
7 relative, employee, attorney or counsel of any of  
8 the parties, nor am I a relative or employee of such  
9 attorney or counsel, nor am I financially interested  
10 in the results thereof. All rates charged are usual  
11 and customary.

12 I further certify that I am duly licensed  
13 by the Alabama Board of Court Reporting as a  
14 Certified Court Reporter as evidenced by the ABCR  
15 number following my name found below.

16 This the 8th day of September, 2022, in  
17 the year of our Lord.

18 15/Jeana S. Boggs  
19 Jeana S. Boggs, CCR  
20 ACCR NO. 7, Exp 9/30/2022  
21 Certified Court Reporter and  
Notary Public  
Commission expires: 8/9/2022

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E R R A T A S H E E T

I, ALAN EUGENE MILLER, the witness herein, have read the transcript of my testimony and the same is true and correct, to the best of my knowledge, with the exception of the following changes noted below, if any:

Page / Line /	Change	/ Reason
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\_\_\_\_\_  
ALAN EUGENE MILLER

Sworn to and subscribed before me,  
this the \_\_\_\_ day of \_\_\_\_\_, 2022.

\_\_\_\_\_  
Notary Public  
My commission expires:\_\_\_\_\_

**MR. HOUTS: [10]**  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

ALAN EUGENE MILLER,  
Plaintiff,

Vs. CASE NO.: 2:22cv506-RAH

JOHN Q. HAMM, et al.,  
Defendants.

\* \* \* \* \*

EVIDENTIARY HEARING

\* \* \* \* \*

BEFORE THE HONORABLE R. AUSTIN HUFFAKER, JR., UNITED STATES  
DISTRICT JUDGE, at Montgomery, Alabama, on Monday,  
September 12, 2022, commencing at 9:10 a.m.

APPEARANCES

FOR THE PLAINTIFF: Ms. Mara Klebaner  
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APPEARANCES, Continued:

FOR THE DEFENDANTS: Mr. James R. Houts  
Ms. Audrey Kathleen Jones Jordan  
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\* \* \* \* \*

Proceedings reported stenographically;  
transcript produced by computer

\* \* \* \* \*

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\* \* \* \* \*

(The following proceedings were heard before the Honorable  
R. Austin Huffaker, Jr., United States District Judge, at  
Montgomery, Alabama, on Monday, September 12, 2022,  
commencing at 9:10 a.m.):

(Call to Order of the Court)

THE COURT: All right. Good morning. We're here in  
the case of Alan Eugene Miller versus John Q. Hamm, Terry  
Raybon, and Steve Marshall, case number 22cv506. Let me take  
appearances from all of the lawyers.

MS. KLEBANER: Good morning, Your Honor. Mara Klebaner

1 from Sidley Austin for Mr. Miller.

2 THE COURT: And I know I've got a lot of lawyers on  
3 your side. Who's going to predominantly do most of the  
4 speaking?

5 MS. KLEBANER: I will be doing most of the speaking, as  
6 well as my colleague here.

7 MR. SPECTOR: Good morning, Your Honor. Steven Spector  
8 for Mr. Miller.

9 MS. HUGGINS: Good morning. Kelly Huggins for  
10 Mr. Miller.

11 MR. NEPPL: Good morning, Your Honor. I'm Daniel Nepl  
12 for Mr. Miller.

13 MR. ROBERTSON: Good morning, Your Honor. Brad  
14 Robertson from Bradley Arant for Mr. Miller.

15 MS. MOORE: I'm not an attorney.

16 THE COURT: Well, who are you anyway?

17 MS. MOORE: I'm Arianna Moore.

18 THE COURT: Okay. And then we've got Mr. Miller here  
19 today; is that correct, sir?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Okay. For the defendants?

22 MR. HOUTS: Good morning, Your Honor. James Houts for  
23 defendants.

24 MS. JORDAN: Audrey Jordan for the defendants.

25 THE COURT: I've read all the filings, including those

1 over the weekend. Somebody give me an outline of where we're  
2 going to go this morning in terms of testimony and evidence.

3 MS. KLEBANER: So, Your Honor, if we may, plaintiff has  
4 prepared an affirmative presentation of legal arguments and key  
5 pieces of evidence we would like to submit to the Court this  
6 morning. We would also like to then call Mr. Miller for live  
7 testimony, and then probably it would make sense to have the  
8 defendants present whatever arguments and evidence they have as  
9 well.

10 THE COURT: Okay. So from a live testimony  
11 perspective, it's going to be Mr. Miller, and that's it?

12 MS. KLEBANER: We also have several transcripts we  
13 would like to read into the record.

14 THE COURT: Are these transcripts from depositions  
15 taken last week or depositions taken in other cases?

16 MS. KLEBANER: Other cases that were tendered to us in  
17 discovery from defendants.

18 THE COURT: How about on the defense side?

19 MR. HOUTS: We may call one witness, simply because we  
20 can't reach an agreement to agree what other death row inmates  
21 Sidley Austin was representing during the election period, so to  
22 introduce documents showing public record of which inmates they  
23 were representing, and then probably a list of elections and  
24 whether those clients elected or not. And I believe that would  
25 be all we have other than legal argument, Your Honor.

1 THE COURT: So was Mr. Miller represented back in June  
2 of 2018?

3 MR. HOUTS: By Sidley Austin. Yes, Your Honor.

4 MS. KLEBANER: Yes. He was represented by Sidley  
5 Austin, and we are not contesting the fact that Mr. Miller was  
6 represented by his attorneys at Sidley Austin during that time.  
7 However, we do believe what defendants want to introduce is  
8 irrelevant and not probative to any of the issues in this case.  
9 I'll let defendants speak for themselves, but they're trying to  
10 introduce evidence of other Sidley clients on Holman death row  
11 and to infer some sort of facts about Mr. Miller based on the  
12 actions that other Sidley clients took, which we believe is  
13 entirely inappropriate.

14 THE COURT: I know one of the competitor -- comparator  
15 inmates was Mr. Taylor, I believe. And in his circumstance he  
16 waived the attorney-client privilege for purposes of perhaps  
17 corroborating his position about submitting the election form.  
18 Has there been a waiver of the attorney-client privilege  
19 concerning communications between Mr. Miller and -- whether it's  
20 the Sidley Austin firm or any other attorneys that he may have  
21 had at that time or thereafter?

22 MS. KLEBANER: No, Mr. Miller does not waive his  
23 attorney-client privilege on this issue.

24 THE COURT: But he was represented and did have legal  
25 counsel --

1 MS. KLEBANER: Yes.

2 THE COURT: -- during the election period and  
3 afterwards?

4 MS. KLEBANER: Yes.

5 THE COURT: Okay. Mr. Houts, anything you want to add  
6 to that?

7 MR. HOUTS: I would just add premarked for admission  
8 today by plaintiffs was Exhibit 8, another inmate who was  
9 represented by counsel who believed that they were experiencing  
10 difficulty in submitting a form. I believe it was a central  
11 piece of the filing that my friends made yesterday. Again, I  
12 don't see how it's not probative and relative as to what Sidley  
13 did when Mr. Stallworth's attorney took active steps to protect  
14 Mr. Stallworth's rights during the election process. So you  
15 can't have it both ways, Your Honor. That's our only concern.

16 THE COURT: Address this for me, Mr. Houts. And you  
17 had alluded to it during our phone call a week and a half ago  
18 about an announcement in October. I'm assuming that has to do  
19 with nitrogen hypoxia. Maybe I'm assuming incorrectly. Where  
20 does the State stand in terms of the nitrogen hypoxia protocol?

21 MR. HOUTS: Very careful how I say this, Your Honor,  
22 because Commissioner Dunn -- I mean, that's the one thing I  
23 think we agree on: That's his responsibility.

24 I will say if the Court enters a narrowly drawn,  
25 tailored injunction saying go forth only with nitrogen hypoxia,

1 that it is very, very likely that Mr. Miller would be executed  
2 by nitrogen hypoxia.

3 THE COURT: On September 22nd?

4 MR. HOUTS: Correct.

5 THE COURT: So the physical facilities are ready to go,  
6 and there is a protocol in place for it ready to go. And if the  
7 outcome of this proceeding is that it should go forward by  
8 nitrogen hypoxia, it is very likely that the execution will go  
9 forward on September 22nd, this year, by nitrogen hypoxia.

10 MR. HOUTS: Again, two things I will point out. One,  
11 that is Commissioner Hamm's decision because there are things --  
12 for example, we asked Mr. Miller during his deposition as a  
13 planning precaution whether he would agree to have correctional  
14 officials fit a mask to his face to make sure it was the  
15 appropriate size, and he said that would very much be a problem  
16 for him. So to avoid any allegations of impropriety during this  
17 lawsuit, that has not occurred.

18 The other thing I would say is we are under an  
19 obligation when we get a final protocol --

20 And when we talk about protocol, I want to be clear  
21 about one thing. You know, we talk about this document that  
22 says from the time the death warrant is issued until the press  
23 conference afterwards, how DOC is going to conduct an execution.

24 The nitrogen hypoxia protocol has to be nested within  
25 an existing electrocution protocol and lethal injection

1 protocol. And we've agreed in the Charles Burton case that when  
2 there is a final protocol, to turn it over to counsel within  
3 five days. That nesting has not occurred because we were  
4 allowing ADOC to focus on Mr. Miller's case. That does not mean  
5 that the nitrogen hypoxia portion is not prepared and ready to  
6 be nested, but you have to go through and make sure there are no  
7 conflicts.

8           So the protocol is there. And I'm not going to say  
9 it's final, because I don't want Mr. Burton's counsel saying  
10 "Why don't we have it," because it hasn't been nested. But if  
11 Your Honor says move forward on the 22nd, I believe Commissioner  
12 Hamm would be prepared to do that, but he has a very important  
13 obligation to be comfortable himself with making that decision.

14           THE COURT: And the Charles Burton case is a spiritual  
15 advisor case, if I remember. Were you involved in that case? I  
16 know I was.

17           MR. HOUTS: I was not, Your Honor. I was made aware of  
18 that obligation.

19           MS. KLEBANER: Your Honor, if I could respond to that  
20 briefly.

21           THE COURT: Yes.

22           MS. KLEBANER: I think I just heard Mr. Houts say that  
23 they do not have a final nitrogen hypoxia protocol, and that the  
24 only way they would use nitrogen hypoxia to execute Mr. Miller  
25 on September 22nd is if they had a binding order from this Court

1 to do so, and we believe it is very inappropriate to rush that  
2 process. If they are not otherwise ready to use nitrogen  
3 hypoxia, it doesn't make sense to have an arbitrary sooner  
4 deadline of September 22nd, just because that's the date when  
5 Alabama Supreme Court set Mr. Miller's execution for.

6 THE COURT: Well, your injunctive relief is only  
7 requesting that I enjoin the execution by lethal injection.  
8 You're not asking me to enjoin it by any other means other than,  
9 I guess, through nitrogen hypoxia. So I don't --

10 MS. KLEBANER: That's correct. Our concern here is  
11 that we have -- defense counsel has reached out to us and asked  
12 if Mr. Miller would be willing to waive his claims if nitrogen  
13 hypoxia was used on him on the 22nd. To us this is very  
14 alarming; that it indicates the State is not otherwise ready to  
15 proceed with nitrogen hypoxia. We know they've been trying  
16 since 2018. We know they've represented in this court as  
17 recently as last year that it would have been ready last year.  
18 Couple of weeks ago they said it would be ready this October.

19 We don't know. We have no visibility on what's going  
20 on on the State side of things. But it seems that there is some  
21 sort of a holdup and they are not able to finish their protocol.  
22 So what we are concerned about is Mr. Miller's case being used  
23 as some sort of test case where they were to proceed with a  
24 court order and go forth with some sort of immunity over an  
25 untested protocol that isn't quite ready yet.



1 THE COURT: So is your position that you may have a  
2 problem with an execution by nitrogen hypoxia if that is the  
3 decision that I make?

4 MS. KLEBANER: I think we just need more information  
5 from defendants. If they were willing to share with us, even in  
6 an ex parte manner with Your Honor, what the current state of  
7 their protocol is and how close they are. It's very hard for us  
8 to evaluate, without knowing that, what we could agree to.

9 THE COURT: Sounds to me they're pretty close. They  
10 don't want to make an official stance because it triggers some  
11 issues that really are not applicable in this courtroom here  
12 today but may be applicable to some other folks.

13 So would it be fair to say that it is from your  
14 perspective an unknown issue as to whether you and your client  
15 would have a challenge to the method of execution employed by  
16 nitrogen hypoxia?

17 MS. KLEBANER: I will say this litigation is not a  
18 method case. We are not challenging the method of lethal  
19 injection or nitrogen hypoxia. It's not about the method of  
20 execution. So this litigation is not about that. However, we  
21 don't want to create a situation where in this litigation we  
22 waive any sort of claims, because this is just about the due  
23 process and the equal protection and arbitrary and capricious  
24 issue here.

25 THE COURT: You've got some things you've got to tip

1 toe around.

2           Since we're talking about the subject, tell me, what  
3 exactly is the Eighth Amendment claim that you've got here?  
4 This is, by your admission, not a method of execution case.  
5 What is your Eighth Amendment claim?

6           MS. KLEBANER: So the Eighth Amendment claim is cruel  
7 and unusual punishment by way of the arbitrary and capricious  
8 theory. The Supreme Court has been clear that in effecting a  
9 death penalty sentence, the State cannot do so in a way that is  
10 arbitrary or capricious. So our argument is that the State here  
11 is treating like inmates on Holman's death row differently in an  
12 arbitrary and capricious way in terms of determining whose  
13 nitrogen hypoxia election forms will be honored.

14           THE COURT: So the arbitrary and capricious aspect is  
15 strictly as to the election issue, and it is -- you're not  
16 making an allegation or assertion that nitrogen hypoxia would be  
17 a less painful means of execution than lethal injection?

18           MS. KLEBANER: No, not in this litigation. This is  
19 about the imposition of the death sentence here in this  
20 litigation is arbitrary and capricious because of the way that  
21 they arrived at their decision to execute Mr. Miller, despite  
22 the fact that he elected nitrogen hypoxia. It is not  
23 challenging their protocol for nitrogen hypoxia because we don't  
24 know what that is yet.

25           THE COURT: I had asked this of the lawyers during our

1 last hearing. Do you agree that your end has a remedy or a  
2 cause of action in state court via mandamus to require the State  
3 to follow the pertinent statute on the election?

4 MS. KLEBANER: Your Honor, we took that comment to  
5 heart that you made at our last hearing. We did do extensive  
6 research and diligence on this issue. We have concluded that it  
7 does not make sense to file a writ of mandamus, given that the  
8 Alabama Supreme Court has already spoken directly on  
9 Mr. Miller's case. So we don't feel that any Alabama trial  
10 court could really say anything differently about it.

11 THE COURT: Well, that doesn't really answer my  
12 question. My question is, is there a remedy there?

13 MS. KLEBANER: No, we don't believe there is actually a  
14 remedy --

15 THE COURT: Why is that? It may not be a winner, but  
16 is there a remedy there? Do you have the ability to go into the  
17 Circuit Court of Montgomery County and name Mr. Hamm,  
18 Mr. Raybon, and Mr. Marshall and say your client executed the  
19 election form, did so timely, and the State is refusing to  
20 acknowledge and follow that? Do you have the ability to go into  
21 state court and ask for a mandamus remedy with the state court  
22 judge?

23 MS. KLEBANER: Your Honor, while we might have the  
24 physical ability to do so, such an effort would be futile. So  
25 for purposes of measuring whether there is a remaining remedy,

1 the question is whether there is anything meritorious left that  
2 counsel could do. And in this case it would be equivalent to  
3 filing a frivolous lawsuit, essentially, if we went to an  
4 Alabama trial court and tried to get them to overturn the  
5 Alabama Supreme Court's decision from a couple months ago. So  
6 in our opinion, at this juncture, that would be futile.

7 THE COURT: Is it futile or frivolous? I mean,  
8 that's -- that's two different things.

9 MS. KLEBANER: You're right. Those are two different  
10 things. I think it's more futile than frivolous.

11 THE COURT: Okay. So there would be a legitimate  
12 claim. I understand the timeline does not allow for that to  
13 work out, and that's probably the basis for the futility  
14 argument. But let's just assume this was filed six months ago.  
15 There would be a colorable claim there?

16 MS. KLEBANER: If it was filed six months ago -- I'm  
17 just thinking where we were six months ago because it's now  
18 September. So six months ago, we would have still been actively  
19 litigating this in front of the Alabama Supreme Court. So in  
20 that instance, I think it would have been even more futile to  
21 initiate a new action in a trial court in state court there.

22 THE COURT: Well, I've thought about this. You've got,  
23 really, two moving parts there. One, potentially a mandamus  
24 type claim initiated with a state trial court, and the other is  
25 what gets filed with the Alabama Supreme Court when the State

1 moves to set an execution date.

2           Nothing has been presented to me as to what happened  
3 with the Alabama Supreme Court. I don't know what was filed,  
4 what was said, what was said in response, what arguments were  
5 made. But what I've taken from the pleadings initiated by the  
6 lawyers is that something was said by somebody which at least  
7 drew a dissent, an unexplained dissent, by one of the Alabama  
8 Supreme Court justices. That seems to me that's really a  
9 different issue than the mandamus matter that I'm talking with  
10 you about.

11           MS. KLEBANER: Your Honor, if you would like to see the  
12 dissent itself, that is in the binder that is on your bench  
13 right now. In terms of the dissent, there's not a lot of  
14 substance there. One justice did dissent. It's in your binder  
15 as Plaintiff's Exhibit 3.

16           But in terms of what Mr. Miller's counsel did at the  
17 Alabama Supreme Court, so just to walk through a bit of the  
18 timeline, after the State moved to set a date -- that was on  
19 April 19th -- we then responded to that action in the Alabama  
20 Supreme Court, explaining -- filing an affidavit on behalf of  
21 Mr. Miller; explained that he had elected nitrogen hypoxia and  
22 proceeding with the lethal injection would be improper and  
23 unconstitutional.

24           The State responded to that. We filed a reply brief.  
25 We asked for an evidentiary hearing. The Alabama Supreme Court

1 rejected our request for that evidentiary hearing and set the  
2 execution date.

3 THE COURT: And what if the Alabama Supreme Court  
4 concluded that there was a question of fact as it -- I mean,  
5 what -- where do they stand in terms of a fact-finding process  
6 when it's initiated with them to begin with? Do they remand it  
7 back to some sort of trial court for findings of fact and then  
8 it comes back up, or do they just make the call based on what's  
9 submitted to them?

10 MS. KLEBANER: Well, in our case, they did not -- in  
11 our case they did not accept our request, but we asked for a  
12 remand to the trial court for a factual finding because we  
13 raised a factual issue. The Supreme Court did deny that  
14 request, but normally they would remand back to the trial court  
15 for factual findings like that.

16 THE COURT: Mr. Houts, since we're on the subject,  
17 what's your position?

18 MR. HOUTS: My first position is plaintiffs can't have  
19 it both ways. As I recall -- and it's been a long week, Your  
20 Honor, but it was either in plaintiff's response to the motions  
21 to dismiss or the response they filed yesterday on the  
22 preliminary injunction -- I guess surreply -- they have both  
23 said that the Supreme Court didn't actually address the issue,  
24 and then they have said that the Supreme Court did to show, you  
25 know, no remedy or inadequate remedy. And at some point they

1 have to choose which it is. And if it didn't, then they would  
2 go to circuit court and request certiorari or mandamus. If it  
3 did, then that changes a lot of the equation on the equal  
4 protection claim as well as the procedural due process claim.

5 I would like to just briefly go back because we  
6 understand that this could be reviewed multiple levels up. I do  
7 believe I recall very clearly in our September 2nd phone  
8 conference extending an offer to my friends that if Mr. Miller  
9 had any concerns Eighth Amendment-wise about nitrogen hypoxia --  
10 because he's claiming to have elected, which would indicate a  
11 belief that it's constitutional but he's just afraid that  
12 Alabama doesn't know how to do it correctly -- that we would be  
13 more than happy to listen to those concerns and engage in a  
14 conversation to make sure that we could allay those concerns. I  
15 again on September 7th at the deposition reiterated that. And  
16 that was after a phone call in the evening of the 2nd where Your  
17 Honor asked us to get together and discuss discovery, and I  
18 again brought it up.

19 At no point before today have my friends agreed to talk  
20 to us about any concern they have about nitrogen hypoxia and our  
21 ability to conduct a lawful and constitutional execution. So I  
22 believe that plays into Your Honor's decision as to grant the  
23 injunction.

24 And if the Court does grant the injunction, I think it  
25 plays into any court down the road looking at whether, you know,

1 any further litigation is intended to delay or stall the  
2 execution. Because they've had plenty of time to talk to us,  
3 and they keep putting it off and keep putting it off and keep  
4 putting it off. But then they show up in court and say, oh, we  
5 have legitimate concerns, we just don't want to share them.

6           So as for the protocol, because I know this is going to  
7 come up, the State is preparing a protocol that will be public  
8 facing, so we can quit squabbling over what aspects of the  
9 protocol are public or secret. Other things will be put into  
10 more training and procedural issues that will be easier to  
11 distinguish so that for a lethal injection case, for example, we  
12 don't have to turn over a document that has a lot of sensitive  
13 information about nitrogen hypoxia.

14           But what we are also going to end the practice of is  
15 plaintiffs grading DOC's homework and "We don't know what our  
16 Eighth Amendment claim is, but if we get a chance to look at  
17 your protocol, we're sure we can come up with one." If they  
18 have legitimate concerns that anybody would have about nitrogen  
19 hypoxia, and it has to be a certain way or it will not be  
20 constitutional, they can bring those concerns to us now. They  
21 can bring those concerns to Your Honor now. It does not take  
22 looking at DOC documents to know whether they have a legitimate  
23 concern. What they want is a chance to develop a claim where  
24 they do not currently have one, and we are not going to  
25 participate in that conduct any longer.



1           So if my friends have an Eighth Amendment claim that  
2 they are concerned about, I have welcomed them -- on September  
3 2nd twice and on September 7th -- to reach out to me, and I  
4 extend that offer again today. But it's not grade my homework.  
5 It's tell me what legitimate concerns you have about nitrogen  
6 hypoxia.

7           And then I would ask my friends whether they would  
8 agree to admit Defendants' Exhibit 4, which is an email exchange  
9 over a course of a month between Ms. Huggins and Jody Stewart at  
10 DOC.

11           MS. KLEBANER: I think this is on a different subject.  
12 Would you like me to address what he just said?

13           THE COURT: We have lots of moving parts and --

14           MR. HOUTS: The reason I'm asking first is Mr. Miller's  
15 counsel have previously reached out to DOC with concerns that  
16 would relate both to his current claim about electing as well as  
17 his claim about whether this is going to be constitutional if he  
18 is executed by nitrogen hypoxia.

19           Back in 2001, his counsel -- Mr. Miller's being asked  
20 to sign a form he thinks is going to waive his rights to sue the  
21 prison. He's being kept on single walk. Can y'all look into  
22 it? And over the course of a month, DOC was very responsive and  
23 addressed the issue. And it turns out Mr. Miller was wrong  
24 about what's going on.

25           I think that applies here because this idea that we

1 have not been responsive or he couldn't have done what  
2 Mr. Stallworth's counsel did and say, hey, is my election valid,  
3 did y'all get it in time, three years ago after Mr. Taylor.  
4 This just goes to the heart of the matter that we're blaming  
5 ADOC for something that defendant was represented by counsel; it  
6 was clearly a sentencing issue that was personal to that  
7 defendant. And so they're saying that ADOC lost his paperwork.  
8 If that's true, his counsel could have inquired. And then,  
9 based on the phone call you'll hear later today, it looks like  
10 his lawyers lost his paperwork as well, Your Honor.

11 THE COURT: Okay.

12 MS. KLEBANER: Mr. Houts just said a lot on a couple of  
13 different subjects. I don't know if you've had a chance to look  
14 at this exhibit that he's talking about. If you would like to  
15 look at it --

16 THE COURT: Let me ask you, are there stipulated  
17 exhibits, or are there going to be some contested exhibits?

18 MS. KLEBANER: So we have shared all of our exhibits  
19 beforehand. Of course, if Your Honor would like to look at  
20 this, Mr. Houts can give it to you, and I can talk about it.  
21 But I was going to go back and talk about some of the comments  
22 he made about our supposed protocol challenge.

23 THE COURT: Would it give me better context to go ahead  
24 and hear the live testimony that you anticipate presenting, and  
25 then we can talk about emails and so forth?

1 MS. KLEBANER: So we'll do it whatever order you want  
2 to take it, and certainly listening to Mr. Miller himself talk  
3 about his experiences will give you a good amount of context. I  
4 also still do have sort of a more holistic presentation of our  
5 claims, including some evidence we could look at before you hear  
6 from Mr. Miller, but however you want to proceed is fine.

7 THE COURT: Well, I certainly want to hear the  
8 arguments from counsel. The question is whether I want to go  
9 ahead and hear that now or after the testimony. I'm inclined to  
10 go ahead and hear the testimony, and then we can -- because I  
11 think some of the testimony is going to weave into what some of  
12 the arguments are going to be. So I guess if you're ready, I  
13 will hear whatever your first item of evidence is, whether  
14 that's live testimony, excerpts from depositions, or exhibits.

15 MS. KLEBANER: All right. So let's -- if you're okay  
16 with this order of things, I'll start with our nonlive  
17 testimony, and then we'll conclude with Mr. Miller testifying.

18 THE COURT: Okay.

19 MS. KLEBANER: All right.

20 THE COURT: Now, are you getting ready to read  
21 depositions or just give me some highlights on --

22 MS. KLEBANER: Highlights. Highlights. Do you mind if  
23 I use --

24 THE COURT: That's fine. I can read deposition  
25 testimony upstairs just as well as I can hear it down here.

1 MS. KLEBANER: Fair enough.

2 Can you hear me okay?

3 THE COURT: I can.

4 MS. KLEBANER: So you have on your bench there a binder  
5 of plaintiff's exhibits which I will be referring to, as well as  
6 a binder of all the discovery that we received from the  
7 defendants, which is organized more by Bates stamp than anything  
8 else.

9 So the first thing I would like to pull up here is  
10 Plaintiff's Exhibit 4. So these are defendants' responses to  
11 Mr. Miller's requests for admission, and if I could draw your  
12 attention to number seven and number eight. We asked defendants  
13 to admit that the defendants do not have a copy of Mr. Taylor's  
14 election form submitted to the warden at Holman. Their response  
15 is they deny, except they admit that no election form for Taylor  
16 was in the possession of the warden at Holman prior to 2019.

17 Then moving on to number eight, we asked them to admit  
18 defendants do not know whether Mr. Taylor submitted an election  
19 form to the warden at Holman. They deny, with the qualification  
20 that while they do not know whether Inmate Taylor submitted a  
21 copy of his form to the warden in 2018, he sent completed  
22 election forms to his legal counsel, and documentary evidence  
23 establishes receipt of the blank forms from his legal counsel.  
24 At least one of these election forms was mailed to Taylor's  
25 legal counsel in June 2018. An election form or copy was

1 submitted to the warden in 2019.

2           So you'll hear defendants --

3           Would you permit a bit of argument on either side of  
4 these exhibits or --

5           THE COURT: To give me a context or where it fits,  
6 absolutely.

7           MS. KLEBANER: You'll hear defendants argue today that  
8 Mr. Miller and Mr. Taylor, Mr. Jarrod Taylor, are not similarly  
9 situated for equal protection purposes. Both Mr. Taylor and  
10 Mr. Miller are inmates at Holman. Both have been sentenced to  
11 death by the State of Alabama. Both submitted their nitrogen  
12 hypoxia election forms to Holman's warden. Both were subject to  
13 attorney general motions to set the execution dates by lethal  
14 injection. And both had election forms lost by defendants.

15           But these answers to the requests for admission show  
16 how they were treated differently by defendants. Rather than  
17 treat both men equally, defendants recognize Mr. Taylor's  
18 election and not Mr. Miller's. Their basis for doing so is that  
19 Mr. Taylor provided attorney-client communications regarding his  
20 election, while Mr. Miller has not.

21           Nowhere in the statute are defendants permitted to  
22 substitute a missing election form with privileged  
23 attorney-client communications. The statute is clear. The only  
24 relevant consideration in determining whether to honor an  
25 inmate's election is if the inmate timely submitted his election

1 to the warden in writing. Defendants are trying to rewrite the  
2 statute. So if you look to these responses to Mr. Miller's  
3 requests for admission, defendants admit that the Holman warden  
4 did not have an election form for Mr. Taylor in his possession  
5 prior to 2019. That's number seven.

6 So up until 2019, according to defendants, Mr. Miller  
7 and Mr. Taylor were exactly the same. The warden did not have  
8 either of their election forms. Defendants even admit in their  
9 response to number eight that they do not know whether  
10 Mr. Taylor submitted an election form to the warden in 2018 at  
11 all.

12 The only difference between Mr. Miller and Mr. Taylor  
13 is that in 2019, Mr. Taylor's lawyers sent privileged  
14 attorney-client communications to the State. And that's proven  
15 in the answer to our request for admission number eight. The  
16 difference between these two men is the equal protection  
17 violation the defendants are committing against Mr. Miller.

18 So this goes to our point, Your Honor, that given how  
19 Mr. Miller and Mr. Taylor are similarly situated and how  
20 defendants have no rational basis to treat them differently,  
21 Mr. Miller is likely to succeed on his equal protection claim.

22 MR. HOUTS: Your Honor, may I interject here?

23 If we're going to go this route, instead of having a  
24 laundry list of things where while ago I guess I took you on a  
25 ride of the countryside, could I please respond so that I don't

1 have to keep a laundry list of everything that I need to?  
2 Because otherwise, it puts me at a disadvantage of not being  
3 able -- I mean, when I stand up, going, if you'll remember back.

4 If the Court doesn't want to do it, it's fine.

5 THE COURT: It's her burden, so we'll let her go  
6 through. You just need to take good notes.

7 MR. HOUTS: Yes, sir. Thank you.

8 MS. KLEBANER: So just so we're all on the same page, I  
9 will walk through the evidence now and will do sort of a  
10 holistic argument at the end. Okay.

11 All right. Plaintiff's next piece of evidence is  
12 Exhibit Number 5 in that binder. These are the execution  
13 procedures as of April of 2019. These were made public in a  
14 different case in this district. And Your Honor, this exhibit  
15 is relevant to the argument that defendants have made that they  
16 are not sufficiently personally each involved in Mr. Miller's  
17 execution going forward to be proper defendants in this lawsuit.

18 So just as a little bit of context, defendants have  
19 made claims about how Mr. Miller hasn't sufficiently alleged  
20 their personal involvement in these events. But they're  
21 overlooking much of Mr. Miller's pleadings and, of course, their  
22 own knowledge of their personal roles leading up to and during  
23 the election.

24 In support of their knowledge of their upcoming roles  
25 in Mr. Miller's execution, we'd like to introduce Exhibit 5.

1 And if you turn to section nine of that exhibit, which starts,  
2 Day of the Execution. And you turn to page 8, internally  
3 paginated 8 on the exhibit, and you'll see there are several  
4 examples of the specific roles that each defendant plays on the  
5 day of the execution itself.

6 So on page 8, there is a list of people who will be in  
7 the execution witness room. That is the commissioner of the  
8 department of corrections and the warden. If you look at letter  
9 O, it reads, "The warden will check with the commissioner or his  
10 or her designee to see if there's been a last-minute stay. If  
11 there's been no last-minute stay, two members from the execution  
12 team remaining in the execution chamber will receive a signal to  
13 depart." That, again, is further evidence of the warden and the  
14 commissioner's role in the process.

15 And if you look at letter P, there is a very detailed  
16 description of the warden's role in administering the execution  
17 himself personally. Those details are in letter P in terms of  
18 how he administers the solution to the person who's been  
19 executed.

20 And then just to flip back to page 7 of this document,  
21 letter H also within section nine, letter H explains how there's  
22 a telephone line, an open line between the commissioner and the  
23 governor or the attorney general for the duration of the  
24 execution.

25 Two more exhibits on a similar point, Your Honor, are



1 Plaintiff's Exhibits 6 and 7. So I'll put 6 up just as a  
2 sample. Here at the top you see it's a news release from  
3 Attorney General Marshall announcing an execution. He gives a  
4 brief summary of the facts of the case, and at the bottom he  
5 writes, "Attorney General Marshall cleared the execution to  
6 commence at 9:05." That's Plaintiff's Exhibit 6.

7 Plaintiff's Exhibit 7 has the same. This is a  
8 different announcement for a different execution. You'll see  
9 about halfway down the page, "Attorney General Marshall cleared  
10 the execution to commence at 9:04."

11 So in addition to having an open line with the  
12 commissioner through the duration of the execution, Attorney  
13 General Marshall clearly plays some sort of last-step clearance  
14 process in the execution itself. So he has a final say in  
15 whether the execution proceeds.

16 Now if we could turn to Plaintiff's Exhibit 8.  
17 Mr. Houts previewed this a bit for us, but this is something  
18 that we received on Friday night in discovery from the State.  
19 It's a letter from the attorneys at Dentons of Mr. Calvin  
20 Stallworth, who is also on Holman death row. I won't read it  
21 out loud if you don't want me to, Your Honor, but the gist of  
22 this letter is that Mr. Stallworth's attorney is writing to the  
23 warden at the time, Cynthia Stewart, to inform her that although  
24 Mr. Stallworth attempted to turn in his election form, the  
25 guards prevented him from doing so.

1           So the key sentence here: "I understand that June  
2 30th, 2018, was the deadline to submit this election and wanted  
3 to confirm that Mr. Stallworth submitted it prior to the  
4 deadline. The guards would not carry the election to you, so I  
5 telephoned your office today, and the person answering said she  
6 would send someone to pick up the election from Mr. Stallworth.  
7 Please make sure it was properly submitted by the deadline."

8           So Mr. Stallworth had a slightly different experience  
9 than Mr. Miller. For Mr. Stallworth, a prison official refused  
10 to collect his election form. For Mr. Miller, a prison official  
11 collected his election form, and at some point one of the  
12 defendants lost it.

13           THE COURT: Well, that kind of goes back to my question  
14 earlier as to -- I guess your law firm's -- you're with Sidley  
15 Austin; right?

16           MS. KLEBANER: Yes.

17           THE COURT: Your law firm's representation of  
18 Mr. Miller at this same time frame, presumably there were  
19 communications between your firm and him. We have in the case  
20 of Mr. Stallworth affirmative communications between his  
21 attorney and DOC. And then there was a decision in Mr. Taylor's  
22 case to waive the attorney-client privilege.

23           Kind of put it back to you. If there were  
24 communications perhaps that would be beneficial to his position  
25 on the election form, were there any? And of course, you don't

1 have to answer that because that's a decision on your client's  
2 part. And if there were communications that would corroborate  
3 his decision to elect nitrogen hypoxia, why not waive the  
4 privilege and provide that proof?

5 MS. KLEBANER: So Mr. Miller is standing by his right  
6 to attorney-client privilege in this case. And it is entirely  
7 outside of the bounds of the statute passed by the Alabama state  
8 legislature to say that the real burden of evidence in terms of  
9 whether someone turned in their election form is not whether  
10 they have a copy in their files, but whether they have some sort  
11 of communication from an attorney confirming it  
12 contemporaneously. There's nothing to that effect in the  
13 statute, and it will be inappropriate to create some sort of  
14 precedent or incentive for the State to start digging into  
15 privileged communications in order to start honoring election  
16 forms properly.

17 THE COURT: Well, aren't you going to put the issue to  
18 me today in terms of testimony from Mr. Miller, whether he did,  
19 in fact, complete the election form and submit it to them?  
20 You're going to, I assume, elicit that testimony here on the  
21 stand.

22 MS. KLEBANER: Yes.

23 THE COURT: And I would assume that the State's going  
24 to contest that in some form or fashion. And so we also have  
25 the issue of credibility of the witness here on the stand. And

1 when we get into the issue of credibility, then we get into the  
2 issue of contradicting or corroborating evidence on that. One  
3 way to corroborate that would be perhaps a communication between  
4 Mr. Miller and his attorneys at that time about making the  
5 affirmative election and say, well, here, Judge. It's not just  
6 him saying it. Here's him communicating with his lawyers saying  
7 it. Or maybe a letter between him and his brother back then.

8           And I know somebody submitted some telephone calls, a  
9 telephone call between him and his brother right after the State  
10 moved to set his execution in which the substance of the  
11 communication would be something to the sort of, I don't know  
12 why they're moving to execute me by lethal injection when four  
13 years ago, I had elected to be executed by nitrogen hypoxia.  
14 Doesn't all that kind of have relevance on his credibility on  
15 that end?

16           MS. KLEBANER: Sure.

17           So just to take each of your comments point by point,  
18 in terms of assessing Mr. Miller's credibility, it is our hope  
19 that Your Honor, with the benefit of both his original  
20 affidavits submitted in the Alabama Supreme Court, the  
21 deposition testimony that was taken last week with Mr. Miller,  
22 and the live testimony that he will present to Your Honor today,  
23 that that will itself assist in your credibility determination.

24           In addition, we have strong corroborating evidence  
25 just, for example, in this letter from Mr. Stallworth's attorney

1 that the process, whatever was going on at Holman death row with  
2 regards to these election forms at that time was so deficient  
3 that forms were getting lost or rejected or turned away or  
4 somehow misfiled.

5           So between Mr. Stallworth's case, Mr. Jarrod Taylor's  
6 case in which the State also lost his election forms, and some  
7 other pieces of evidence that we're going to walk through today,  
8 we believe we do have corroborating evidence that really  
9 substantiates Mr. Miller's account.

10           And then on that last point you mentioned in terms of  
11 what other sort of contemporaneous evidence we may have, you  
12 know, we received some documents from defendants in discovery,  
13 but much of what we asked for was not there. So we had asked  
14 for all of his contemporaneous grievance forms -- so those are  
15 slips that a prisoner can submit if they feel something sort of  
16 wasn't done properly -- and we don't have any of his grievance  
17 forms for that period of time. We asked for the period from  
18 June to December 2018 so we could evaluate whether he had sort  
19 of made any notation or writing about this. Those are  
20 exclusively in ADOC's custody, not ours.

21           They also didn't turn over any phone logs of the calls  
22 that he placed around that time. Those are also exclusively in  
23 their custody. The only two phone calls that we have are those  
24 that the State used as exhibits in the deposition and that we  
25 will play today, which are two phone calls that Mr. Miller had

1 with his brother in April of 2021. And those do serve as their  
2 own form of corroborating evidence to what Mr. Miller is going  
3 to testify about, but the State simply has not given us any of  
4 the corroborating evidence of what Mr. Miller was doing at the  
5 time.

6 THE COURT: Okay. You can proceed.

7 MS. KLEBANER: Okay. So that was the Stallworth  
8 letter.

9 THE COURT: Let me ask you this since -- was there a  
10 privilege log produced on your end to the State? And I know  
11 we're under a very compressed time frame; but when we do talk  
12 about privileges, in a perfect world where we do have the  
13 benefit of time, oftentimes privilege logs are produced. Has  
14 one been produced in this case?

15 MS. KLEBANER: We did not produce a privilege log in  
16 this case, Your Honor.

17 THE COURT: Okay.

18 MS. KLEBANER: Defendants didn't ask for one.

19 THE COURT: If one was produced, would it at least  
20 reflect that there were communications between Mr. Miller and  
21 his counsel in June of 2018? Don't need to know the substance  
22 of those, but would those at least show that there were  
23 communications?

24 MS. KLEBANER: You know, I can't say definitively  
25 because we haven't made one because one wasn't requested of us.

1 We certainly could, if Your Honor wanted to see one, make one to  
2 the best of our ability. We would have to -- it would involve a  
3 lot of going back into the records.

4 THE COURT: You can proceed.

5 MS. KLEBANER: Okay. So at this point I would like to  
6 play these two phone calls that I had just previewed for you  
7 that we received in deposition exhibits. And I don't know if  
8 Mr. Houts has that set up on his computer ready to go, but I'll  
9 just sort of preview for you our thinking about them, and then  
10 we'll play them. Then I'm sure Mr. Houts is very likely to play  
11 them in his cross-examination of Mr. Miller. So you'll probably  
12 hear these phone calls a couple of times today.

13 Just as a bit of a preview, defendants have recordings  
14 of two very emotionally charged phone calls that Mr. Miller had  
15 with his brother two days after the attorney general moved to  
16 set Mr. Miller's execution date. So just as a reminder, the  
17 attorney general moved to set his date on April 19th. These are  
18 two phones call, the only two phone calls that the State has  
19 produced to us in discovery in this case, and these are calls on  
20 April 21st between Mr. Miller and his brother. His name is  
21 Richard.

22 The phone calls are, as far as we can tell, defendants'  
23 best evidence that Mr. Miller didn't elect nitrogen hypoxia in  
24 June of 2018. Which in our position -- in our opinion, really  
25 speaks to the weakness of their position because, again, these

1 are phone calls from April of 2021.

2           So the first phone call is Defendants' Exhibit 2  
3 today. And part of the audio might be a little hard to catch,  
4 it's a little fuzzy, but it's essentially Mr. Miller informs his  
5 brother -- this is the first phone call Mr. Miller made to his  
6 brother, Richard, after finding out that the State had set an  
7 execution date. The very first call.

8           Mr. Miller informs his brother Richard that the State  
9 moved to set his execution date. The brothers discuss intense  
10 emotional topics, such as who from Mr. Miller's family would be  
11 present at the execution, how Mr. Miller could make out a will,  
12 how Richard should handle Mr. Miller's remains, including where  
13 Mr. Miller should be buried.

14           So if we could play Defendants' Exhibit 2.

15           (Audio call played.)

16           MS. KLEBANER: So, Your Honor, that's the first of two  
17 phone calls that we received from the state in this -- in  
18 discovery in this case.

19           THE COURT: Is there by chance a transcript?

20           MS. KLEBANER: Unfortunately, there is not. As you  
21 could telling, the audio file is corrupted, and it's hard to  
22 make out a lot of it. Probably you were able to hear some of  
23 the key parts, such as the discussion of who from Mr. Miller's  
24 family would be in the execution chamber. So his brother,  
25 Richard, said, I'll be there. I'm not going to let you be there



1 alone. You might have caught that part. Then you may have also  
2 heard them talking about what we think may have been like an  
3 insurance issue or a funeral insurance and how Mr. Miller could  
4 make out a will. There was also discussion of cremation; how  
5 Richard should handle Mr. Miller's remains; putting the remains  
6 in a vase and burying the remains with their mother. So that  
7 was that phone call.

8           The second phone call is Defendants' Exhibit 3. It's  
9 a lot shorter and, unfortunately, the audio does not get any  
10 better. It almost gets worse. It's difficult to make out, but  
11 it sounds like Mr. Miller is trying to explain to Richard, his  
12 brother, that he feels he is entitled to some sort of stay of a  
13 lethal injection execution because he elected nitrogen hypoxia,  
14 and he told his lawyers a long time ago that he had chosen, in  
15 his words, "gas stuff."

16           So if we could play Defendants' Exhibit 3.

17           (Audio recording played.)

18           MS. KLEBANER: All right. So that was the second call.  
19 Obviously, it's not the clearest audio. It's not -- we're not  
20 really able to tell exactly what he said. And really, to that  
21 point is what makes it so strange. The defendants point to the  
22 two calls you just heard as some sort of proof that Mr. Miller  
23 didn't sign a nitrogen hypoxia election form in 2018. That's  
24 nonsense. The only comment Mr. Miller made about nitrogen  
25 hypoxia in those calls was only in the second call, and he said

1 he chose gas a long time ago, which is completely consistent  
2 with his allegations in this litigation. It's also very  
3 troubling the defendants had this evidence, which corroborates  
4 Alan's affidavit that he filed in the Alabama Supreme Court, yet  
5 even today they're still seeking his execution by lethal  
6 injection.

7           Defendants have made several comments about how the  
8 true purpose of this litigation is somehow to delay his  
9 execution or to avoid that ultimate penalty, but the comments on  
10 these calls were made in the emotional aftermath of Attorney  
11 General Marshall's motion for an execution date. The State has  
12 been implying with Your Honor that Mr. Miller was plotting some  
13 sort of deceitful long-term legal strategy about lying about his  
14 hypoxia election in order to launch a secret Eighth Amendment  
15 challenge to the nitrogen hypoxia protocol, but that's not what  
16 these phone calls show. They reflect Mr. Miller's genuine  
17 reaction to shocking news. Those are those two calls.

18           So just in terms of planning, Your Honor, I have one  
19 last little bit of evidence. Then we have reading the  
20 deposition transcripts and then the live testimony.

21           THE COURT: Okay.

22           MS. KLEBANER: So I can turn to the next exhibit.  
23 Actually, this is Exhibit --

24           Just a couple last points on Exhibit 4, which are the  
25 responses to the RFAs. Let me see if I've still got it in order

1 here.

2           So, Your Honor, just returning briefly to Plaintiff's  
3 Exhibit 4, just to walk through a bit more in these responses to  
4 the RFAs.

5           If you could turn to response number two where we  
6 ask --

7           Could we turn the Elmo back on? Sorry.

8           In RFA number two we ask defendants to admit that the  
9 then warden of Holman at the time, Cynthia Stewart, ordered  
10 Captain Jeff Emberton not to make a list of inmates who  
11 submitted an election form at the time that he collected those  
12 forms. And we will go into all this in more detail,  
13 particularly when we go through the transcripts.

14           But their response is, they say they don't know what  
15 instruction Warden Stewart made to Captain Emberton about not  
16 making a list of who returned their forms. And they say this  
17 because defendants, on this top line of page 4, cannot determine  
18 with absolute certainty what happened at the time Warden Stewart  
19 and Captain Emberton interacted in 2018. So they don't know  
20 what happened between those two individuals in June of 2018 when  
21 the election form process or lack thereof was underway.

22           And then if we could turn to number six, which is on  
23 page 5. We asked to admit that defendants do not have a copy of  
24 plaintiff's election form submitted to the warden at Holman.  
25 They have denied this unequivocally, without any sort of

1 good-faith qualification. Plaintiff did not submit an election  
2 form to the warden at Holman.

3           So they weren't sure about what happened in June 2018  
4 when it came to conversations between the warden and Captain  
5 Emberton, but they are a hundred percent certain what happened  
6 in June 2018 when it comes to Mr. Miller's particular election  
7 form.

8           And then if we could turn once more to number eight  
9 where we asked defendants to admit that they do not know whether  
10 Mr. Taylor submitted an election form to the warden at Holman.  
11 Their response is, "While defendants do not know whether Inmate  
12 Taylor submitted a copy of his form to the warden in 2018, he  
13 sent completed election forms to his legal counsel, and  
14 documentary evidence establishes his receipt of the blank forms  
15 from his legal counsel. At least one of those election forms  
16 was mailed to Taylor's legal counsel in June 2018. An election  
17 form or copy was submitted to the warden in 2019."

18           So they don't know whether Mr. Taylor submitted a copy  
19 of his form to the warden in 2018. How is it possible  
20 defendants do not know if they had Mr. Taylor's form in 2018,  
21 but they do know with certainty that they didn't have  
22 Mr. Miller's form?

23           There is a theme in this case in the discovery we've  
24 received and the answers to the interrogatories and the requests  
25 for admissions. The defendants only have certain knowledge of

1 things when it is convenient for them to do so.

2 Your Honor, if we could turn to reading portions of the  
3 transcript into the record. My associate can play the part of  
4 the -- I don't know where you would like her, if you would like  
5 her up on the witness stand or at the table with the microphone.

6 THE COURT: How much is it?

7 MS. KLEBANER: Well, we've got five transcripts. I  
8 tried to be very judicious in what we are reading; but in order  
9 to set enough context and foundation for it, I think the whole  
10 thing, all five transcripts, could take maybe 45 minutes.

11 THE COURT: Okay. You can stand, and you can sit right  
12 there. Just make sure you have the microphone in front of you.  
13 And the green light is on; right?

14 MS. KLEBANER: So she has a copy in front of her of the  
15 transcripts. And then I also would like to pass up to Your  
16 Honor or to someone --

17 This is a demonstrative, Mr. Houts, that we shared with  
18 you this morning.

19 It's a summary of the transcript testimony that we'll  
20 be walking through today.

21 Give me a minute, Your Honor. Let me get my papers in  
22 order.

23 So the first transcript we'll be reading from, Your  
24 Honor, is Plaintiff's Exhibit 13 in your binder. This is from  
25 the deposition of Cynthia Stewart on May 26th, 2021, in another

1 case in this district.

2 In terms of skipping a bit of the background for the  
3 sake of efficiency, I could represent that Ms. Stewart was the  
4 warden of Holman Correctional Facility during the time of the  
5 nitrogen hypoxia election process if Mr. Houts wouldn't object  
6 to that.

7 MR. HOUTS: No objection.

8 MS. KLEBANER: So it's our understanding, and this is  
9 what she represented in the deposition, that she started in that  
10 position in August of 2016, and that position ended in May of  
11 2020. So that's the time period that she's discussing in this  
12 testimony, if I can represent that as well, Mr. Houts.

13 So we'll start the reading on page 61, line 3. So I  
14 will be the questioner, and she'll be giving the answers.

15 (Ms. Klebaner and Ms. Moore reading:)

16 Q. And do you know the procedure for -- so you said Ms. Jackson  
17 or whoever is the ADA coordinator now or whoever was the ADA  
18 coordinator would receive some sort of a request for  
19 accommodation. What was the procedure for doing that kind of a  
20 request by an inmate?

21 A. We had an ADA box in the hallway, and they would drop their  
22 lists.

23 Q. Now, for general population, that would be -- you know, you  
24 could walk right up to the box and drop it. But what about  
25 folks in death row who are locked down 23 or 23 and a half hours

1 a day?

2 A. Well, we had an ADA box in the rec room, and I can't recall  
3 if we, you know -- if we walked by and collected the sealed  
4 envelopes or dropped them in the box. I can't answer that  
5 question.

6 Q. Okay. So you're not sure -- and is the rec room different  
7 from the law library, slash, what was that place called?

8 A. It's the same room.

9 Q. Day room. Okay. So the day room, rec room, law library are  
10 the same? Are the same room?

11 A. Uh-huh.

12 Q. Was everybody allowed to go to that rec room or day room on  
13 death row?

14 A. Unless they were on restriction, single walk, but everybody  
15 was allowed at different intervals, different times, unless they  
16 was on restriction.

17 Q. Okay. And do you know how they would get one of those forms  
18 and the envelopes to put into the box for the ADA stuff?

19 A. All forms were -- could be located in the -- in the death  
20 row shift office. So they would probably have to ask for it.  
21 But all the forms that are required and needed are located in  
22 the shift office.

23 MS. KLEBANER: Okay. And now we can skip ahead, Your  
24 Honor, to page 72. I'll start at line 8.

25 Q. Okay. So back in 2018, the legislature passed a law that

1 created a new method of execution in the State of Alabama called  
2 nitrogen hypoxia. Are you familiar with that?

3 A. Yes.

4 Q. And how did you first come to learn about the nitrogen  
5 hypoxia law?

6 A. To my best recollection, it was on the news that the bill  
7 had been passed. And I think sometime in -- to the best of my  
8 recollection, it was in May, I want to say late May, early June,  
9 when we was trying to figure out a time for the attorneys to  
10 come and talk with the inmates, their clients on death row,  
11 trying to get the -- trying to get a schedule for the visitation  
12 yard.

13 MS. KLEBANER: Okay. And we can then skip to page 76,  
14 and I'll start on line 13.

15 Q. So you learned about the nitrogen hypoxia law from the news,  
16 and the next you heard about it was when you were told, hey,  
17 you've got to schedule these lawyers to come in and meet with  
18 these folks?

19 A. Correct.

20 Q. Did you receive any direction from anyone in ADOC with  
21 regard to what to do about the new law?

22 A. Can you expound?

23 Q. Yeah. So my understanding of the new law is that it  
24 required a person to provide something in writing, personally  
25 signed, to the warden of the facility that was holding them,



1 asking to opt in to nitrogen hypoxia. And obviously, you as the  
2 warden would be the person receiving those documents. I'm  
3 wondering if anyone -- anybody from ADOC ever said, hey, Warden  
4 Stewart, at the time Warden Stewart, you know, please be aware  
5 that you may be receiving some paperwork from inmates?

6 A. Yes.

7 Q. Okay. And when was that? Do you know?

8 A. I can't recall.

9 Q. Was it before or after the visit that our office had with  
10 the death row folks?

11 A. I cannot recall.

12 Q. Okay. And would that notice have been provided to you in  
13 writing or by telephone, email?

14 A. More than likely it probably would have been provided by  
15 telephone, but I can't say that I -- I don't know if I just got  
16 it from their attorneys that called Ms. Parker, but I just can't  
17 recall so I'm not going to make up anything I can't recall.

18 MS. KLEBANER: Okay. And then I will pick this back up  
19 at line eight.

20 Q. And then so if I said to you that that visit with the  
21 federal defenders and their clients happened on June 26th, 2018,  
22 would that sound about right?

23 A. I know it was the last part of June.

24 Q. Okay.

25 A. But I can't be specific with the date.

1 Q. Prior to that meeting on June 26, 2018, or prior to that  
2 meeting, we'll call it the late June summer -- the late June  
3 meeting between the federal defender's office and the prisoners,  
4 had you received any opt-in forms or any opt-in requests from  
5 any prisoner?

6 A. No.

7 Q. Okay. So the first time you received an opt-in form was  
8 when you received them from the federal defender's office after  
9 that meeting?

10 A. To the best of my recollection, yes.

11 MS. KLEBANER: Okay. And then I'll skip to line 16.

12 Q. Did you communicate with anyone above you in ADOC about the  
13 nitrogen opt-in form?

14 A. Yes.

15 Q. Okay. And with whom did you consult?

16 A. I had conversations with Mr. Jody Stewart.

17 Q. Okay.

18 A. And Grantt Culliver, but I can't exactly tell you what the  
19 conversation was about.

20 Q. I understand.

21 A. But I remember talking to him, yes.

22 Q. And would those conversations have happened in June of 2018  
23 or around that time?

24 A. Yes.

25 Q. Okay. And did they concern the form?

1 A. I can't recall.

2 Q. Okay. Do you recall if they happened before or after the  
3 federal defender meeting in late June?

4 A. I don't recall anything prior to the meeting with the  
5 exception of trying to facilitate giving the space, giving the  
6 time frame, you know, the allotted space and honoring the  
7 request. Other than that, I can't recall anything else.

8 Q. And obviously, Jody Stewart is with ADOC legal; right?

9 A. Yes.

10 Q. And you talked to him and Grantt Culliver about this form  
11 that was being turned in by the prisoners, the federal defender  
12 prisoners?

13 A. Well, not so much of the form. About facilitating the  
14 request for you-all to come in and speak with your clients.

15 Q. Okay. Now, at some point you -- did you cause the form to  
16 be distributed to other inmates within the facility?

17 A. When you say "other inmates within the facility," what --  
18 who are you referring to?

19 Q. The rest of death row. Other death row inmates.

20 A. Yes.

21 Q. Okay. Can you sort of summarize how -- how that came to be?

22 A. I received instructions, I can't recall from who, thinking  
23 it was in the best interest to ensure that each inmate on death  
24 row received the form and was afforded an opportunity to fill it  
25 out and submit it back. But I can't tell you who I spoke with

1 for those instructions, I can't tell you the time frame, but I  
2 know I did have a conversation regarding that.

3 Q. And when you say you received instructions, that would not  
4 have been from somebody below you in the chain of command, it  
5 would have been from somebody above you?

6 A. Correct.

7 Q. Okay. So it wasn't like Warden Raybon came in and said,  
8 Hey, Warden Stewart, let's do this thing?

9 A. No, but I did disseminate the instructions to Captain  
10 Emberton.

11 Q. Okay.

12 A. But my instructions came from above.

13 Q. Okay. So this is not you going rogue, as they might say.

14 A. Oh, no, sir.

15 MS. KLEBANER: So we'll pick it back up on the next  
16 page, 83, at line 12.

17 Q. So you were acting on instructions from someone above you in  
18 management?

19 A. Yes, sir.

20 Q. And you caused Captain Emberton to be sort of in charge of  
21 the distribution that you were directed to do?

22 A. Yes.

23 Q. And Captain Emberton, we deposed him the other day, and it  
24 sounds like he recalled the meeting that y'all were -- that you  
25 just discussed here when you called him. You had him come into

1 your office?

2 A. I assume so. I can't recall. But more than likely, yes.

3 Q. And do you recall what exactly you said to him?

4 A. No, sir.

5 Q. Do you recall, would it be accurate to say that there was  
6 a -- maybe a box provided with the blank forms and envelopes in  
7 it for distribution?

8 A. I can't recall, but I -- I can't recall.

9 Q. Okay.

10 A. But he had to have the forms and the envelopes.

11 Q. Would you have delegated -- who would you have delegated the  
12 process of copying those forms to?

13 A. Once the inmate submitted them back, returned them back,  
14 that would have been Ms. Parker.

15 Q. What about --

16 MS. KLEBANER: Well, we can skip that. Okay. So we'll  
17 skip to line 23.

18 Q. I was going to say, what about to create all of the blank  
19 forms? Was that Ms. Parker as well?

20 A. I can't -- I don't know who created the forms. I don't know  
21 who made the copies. It could have been Ms. Parker, it could  
22 have been Captain Emberton, but I can't recall who made the  
23 copies for us.

24 Q. You don't remember going over personally to the copy machine  
25 and making these copies; right?

1 A. No.

2 Q. Getting the envelopes and counting them?

3 A. No, sir.

4 Q. And you would have remembered if you --

5 A. Yes.

6 Q. All right. So okay. So you received forms from the federal  
7 defender clients, signed forms from federal defender clients  
8 after that late June visit?

9 A. My secretary did. Yes, sir.

10 Q. And she notified you that those forms had been received?

11 A. Some of the forms, yes. I think -- I think there was a  
12 deadline on there. I'm not for sure. But she kept track of the  
13 forms and scanned them to wherever or mailed them to wherever  
14 they had to go.

15 Q. And so you maybe had her -- or she would have put one into  
16 an inmate's file or that kind of thing and sent them to ADOC  
17 legal?

18 A. I assume so, yes.

19 Q. And do you know whether or not she received opt-in forms  
20 from the distribution that Captain Emberton did?

21 A. I can't say where they came from. No, sir, I can't say.

22 Q. Okay.

23 A. Because you-all issued out forms as well, so I don't know if  
24 they signed them the day that you-all were there, or were they  
25 told to turn them in later. So I'm not for sure. I can't say.

1 Q. And can you walk me through typically if an inmate wanted to  
2 turn in a form or some sort of request to you or to prison  
3 management, how would a death row inmate go about doing that?

4 A. Most of the time he -- he can drop it in the box. If not,  
5 he can give it to a staff member, and the staff member will  
6 bring it up. Plus when we do our rounds, Warden Raybon does his  
7 rounds, they can give him a request. When I do my rounds, they  
8 can give me the request. Mental health, anyone would take a  
9 request from an inmate and make sure it's given to the right  
10 personnel.

11 Q. And when you say "box," do you mean the ADA box, or just --  
12 is there a general box, or is there a specific ADA box?

13 A. Both.

14 Q. And is that -- so there is an ADA box and then sort of a  
15 normal box, and that's --

16 A. A request box.

17 MS. KLEBANER: So we'll pick it up at page 88, line 2.

18 Q. So there was a request box, and there was an ADA box in the  
19 rec room, the day room?

20 A. Yes, sir.

21 Q. And those are -- I assume they're, like, bolted to the wall  
22 or something like that? They're lock box type things?

23 A. They were, yes.

24 Q. And the only person who could get into those would be people  
25 who had keys and access to them?

1 A. Correct.

2 Q. Do you know how often those boxes were emptied?

3 A. Most of the time the request box or source box or  
4 whatever -- well, they actually turned -- they were collected  
5 daily.

6 Q. And when something was collected from one of those boxes,  
7 was it stamped "received" or anything or was it put into a file  
8 somewhere?

9 A. If it was, if it was directed to my secretary's office, more  
10 than likely she stamped it as the date received.

11 Q. Like one of those stamps that you can change the date on it  
12 and move it forward as time goes on?

13 A. Yes, or either just writing and initialing it.

14 MS. KLEBANER: And then we'll pick it back up on line  
15 23 of this same page.

16 Q. Did you talk to anybody about this nitrogen opt-in situation  
17 after the -- after June 2018?

18 A. Can you expound? I'm sorry.

19 Q. I guess that's a fairly broad question. So other than  
20 prepping with Ms. Simpson and Mr. Anderson for this deposition,  
21 did you meet with anybody from ADOC legal or the Attorney  
22 General's office between July 1 of 2018 and, you know, your  
23 meeting with Ms. Simpson and Mr. Anderson about the nitrogen  
24 opt-in process, procedure, et cetera?

25 A. If I had any conversation, I can't be specific. But, you



1 know, Jody Stewart and I talked often, so I -- you know, but I  
2 can't -- you exactly -- if you -- if it was regarding forms or  
3 procedures. But being over death row, I'm quite sure I've had a  
4 conversation with Jody Stewart.

5 Q. And those would be not just about nitrogen, but general  
6 conversations about the issues that occur at death row and that  
7 sort of thing?

8 A. Many things. Yes, sir.

9 Q. So you don't have a specific recollection of a specific  
10 conversation with him that happened after the opt-in period, but  
11 you do -- you believe you probably did talk to him about it at  
12 some point?

13 A. Correct.

14 Q. Were you ever asked to create or write an affidavit or  
15 anything concerning the process or procedure that you went  
16 through?

17 A. Not to my recollection.

18 Q. And are you aware that Captain Emberton was asked to do an  
19 affidavit about it?

20 A. Yes.

21 Q. And were you there when Captain Emberton wrote and signed  
22 his affidavit?

23 A. No.

24 Q. Did you have any input into his affidavit?

25 A. No.

1 Q. So you did not review it before he signed it or anything  
2 like that?

3 A. No.

4 Q. You didn't check it for typos?

5 A. No.

6 MS. KLEBANER: That's it for the deposition testimony  
7 of the former warden of Holman, Cynthia Stewart.

8 So the next portions that we would like to read into  
9 the record come from Plaintiff's Exhibit 14. This is a  
10 transcript of the deposition of Jeff Emberton. You've also  
11 heard him referred to as Captain Emberton. This deposition took  
12 place on May 24th, 2021.

13 We'll start on page 22, just for a quick bit of  
14 foundation.

15 Q. Specifically when did you work at Holman, from when to when?

16 A. I started in December of '16, and I left in September of  
17 '19.

18 Q. And why did you leave?

19 A. To be closer to home and family.

20 Q. And on your resume you list the RHU and death row.

21 A. Yes, ma'am.

22 Q. Can you explain to me the differences between these two?

23 A. You know, death row are your convicted felons that are  
24 sentenced to death.

25 MS. KLEBANER: Okay. And then we'll pick it up on the

1 next page, 23, starting at line 21.

2 Q. So you're explaining the difference based on whether you  
3 were working with RHU or whether you were working with death  
4 row, or were they similar?

5 A. Yeah. It's totally different.

6 Q. Totally different. How so?

7 A. I mean, death row inmates, they're locked down 23 hours a  
8 day, you know, unless it's -- you know, you've got my tier  
9 runner. Unless they are a tier runner and have a job like a  
10 tier runner or a law library clerk, they are locked down 23  
11 hours a day.

12 MS. KLEBANER: And picking it back up on line 19,  
13 please.

14 A. Death row inmates pretty much, like I said, stay in their  
15 cell. I mean, they get yard time, but, I mean, that's only like  
16 an hour, maybe two hours a day.

17 MS. KLEBANER: Okay. And then we'll skip ahead to page  
18 83. I'll start on line 18.

19 Q. So at some point the warden gave you a copy of a form, an  
20 election form. Do you remember that?

21 A. Well, actually, what I think it was, was it in a box. They  
22 were in a box. And there was a whole bunch of them forms and a  
23 whole bunch of envelopes that I was, you know -- and that's how  
24 I got it.

25 Q. Where were those?

1 A. Where did I pick them up at?

2 Q. Yes.

3 A. In the conference room at Holman.

4 Q. So how did you know to come and get them? Did someone call  
5 you?

6 A. Warden called me on the phone and said, come to my office.  
7 I need to talk to you.

8 Q. Did you go to her office and speak with her?

9 A. I did.

10 Q. And what was that conversation? What was said?

11 A. I walked in and she, you know, normal greeting: How was  
12 your day? How's things going? Good. Is death row quiet? Yes,  
13 ma'am. She goes, "Well, you know, the law changed." And I  
14 said, "Yeah, I heard something about that on the news."

15 And she went through a little bit about how it had changed  
16 and stuff, and she said, "Now we have a task." And I said,  
17 "What's that?" She said, "There's a box in there in the  
18 conference room that's got these election forms on it and an  
19 envelope." She said, "I need you to take and deliver them, one  
20 form and one envelope, to each inmate. Then they need to fill  
21 the form out and put it in an envelope and seal it."

22 And I said, "Okay." I said, "Do they need to write their  
23 name on it?"

24 "No, nothing. We don't want to know anything about how they  
25 elected. It's all private. Don't document it. Don't write

1 nobody's name down. Who took it, who didn't take it. It's all  
2 private. This is something, you know, completely private." She  
3 said, "They can fill the form out, make their election, put it  
4 in the envelope, seal it, and then turn it back in, drop it back  
5 in the box." And I said okay. That's what I did.

6 Q. Do you know how many copies there were?

7 A. I do not know.

8 Q. But by the time you got them, they were already copied and  
9 in a box and ready to go?

10 A. Yes.

11 Q. So what did you do after that?

12 A. I carried the box to death row and I went, you know, tier to  
13 tier, giving them the same spiel I was just given. You know,  
14 hey, the law changed. You now have a choice. This is an  
15 election form. Here's an envelope. Don't write nothing on the  
16 envelope. Fill out the form, put it in the envelope and seal  
17 it, and I'll be back this afternoon to get it. And I went  
18 through tier to tier and made my rounds, passing them forms out.  
19 And when I was done, I went back to my office.

20 Q. So did you -- you gave that to every person as you went to  
21 the tier?

22 A. Well, I mean, I probably didn't give it to every person  
23 because the cells are so close together. I mean, I probably  
24 done it to three or four at a time.

25 Q. Oh, see, because they have the bars, so you could speak?

1 A. Yeah. They don't have a steel bar -- a steel door. They  
2 have bars. So they can hear everything going on.

3 Q. I see. And so you personally handed those, a form and an  
4 envelope, to each person?

5 A. Yes, ma'am.

6 Q. And was that regardless of whether they were our client or  
7 not? You just gave them to everybody?

8 A. Yes, ma'am. It did not matter. And a lot of them said  
9 that. A lot of them said, "Hey, they're not -- I'm not talking  
10 to them. I don't have nothing to say to them. I got my own  
11 attorney. I'll send this to my attorney. I don't want to talk  
12 to anybody but my attorney."

13 And a lot of inmates refused to turn them back in because of  
14 that same thing. You go back by, and I think I went back by  
15 that afternoon right before I went home, and I said, "Hey, I'm  
16 collecting them forms." "Well, I got to send it to my attorney.  
17 I ain't signing nothing until my attorney sees it." Okay. I  
18 mean, I didn't count how many I got back. I didn't count, you  
19 know, anything like that. They were developed in the box. If  
20 they didn't turn one in, they just didn't turn one in.

21 Q. And after you collected the forms, what did you do with  
22 them?

23 A. I carried them back to the conference room, put the box back  
24 on the table, and told Ms. Stewart that I was done.

25 Q. And so in your instructions, did you advise people that if

1 they weren't -- if they didn't want to elect nitrogen, they  
2 didn't need to do anything, or were they supposed to sign the  
3 form and say, I don't want it?

4 A. I think, if I remember -- and I haven't seen that form in  
5 several years. So I think it was either there was one -- an  
6 election or refusal. I can't remember exactly how the form was  
7 formatted. So they were supposed to, I think, print their name  
8 at the top, name and AIS number, make an election whether they  
9 wanted it or didn't want it, and then sign it at the bottom or  
10 however they wrote their name.

11 Q. And were these forms ever given to the tier runners to  
12 distribute?

13 A. No.

14 Q. And what if someone was asleep?

15 A. I just set it -- I would set the envelope and the form in  
16 their bar, in the bars in their cell. I would knock on the  
17 cell, hey, there's a form here I need you to fill out. You need  
18 to get up and get it. And I would just sit in the bars for them  
19 to see.

20 Q. And do you remember, like, what time of day this was, a  
21 morning, afternoon?

22 A. This was probably midmorning, probably nine, ten o'clock in  
23 the morning.

24 Q. And then you left for the day, you said, around four  
25 usually?

1 A. Uh-huh. Then I probably -- I went to lunch. I think I came  
2 back after lunch and picked them up.

3 MS. KLEBANER: We'll pick it back up on page 91, line  
4 three.

5 Q. So when you left for the day, you told the warden, look, you  
6 know, here's what I got so far, that's it, and then you left?

7 A. Yes, ma'am.

8 Q. You did not get any additional signed forms after that?

9 A. No, not that I recall. I don't even recall exactly what our  
10 time frame was on that, if we only had a day or if we had, like,  
11 several days. I don't recall getting anything after I turned  
12 the box in that day.

13 Q. And so you -- at the time you handed out the form, you  
14 didn't know whether there was a due date for when they had to  
15 sign it?

16 A. I mean, there was, but I can't remember what it was. I  
17 mean, everything we do has pretty much got a deadline.

18 MS. KLEBANER: Then we'll move ahead to page 92, line  
19 13.

20 Q. But to your knowledge, you didn't receive any additional  
21 forms after that day?

22 A. Not that I recall. I mean, I don't remember exactly what  
23 the time frame was on that. But, I mean, depending on when the  
24 time frame was, I mean, I may not have even turned the box in  
25 that evening. But from what I recall, it was only that day we



1 had.

2 Q. And did you notify the lieutenant and the sergeants that  
3 that was what was going on?

4 A. No. No.

5 Q. And did the warden draft a memo to let --

6 A. Do what?

7 Q. Did the warden put out a memo to the staff to let them know  
8 that these forms were handed out?

9 A. No.

10 MS. KLEBANER: I think that's it. That's it for  
11 Captain Emberton. That's two of five, Your Honor.

12 All right. So the next portion the plaintiff would  
13 like to read into the record is Plaintiff's Exhibit 15. This is  
14 the transcript of the deposition of Terry Raybon. This was  
15 taken July 19th, 2021. And this is Plaintiff's Exhibit 15. So  
16 we'll start on page 18. This is Terry Raybon.

17 Q. So what year did you first start working at Holman?

18 A. 2014.

19 Q. So you've been there approximately seven years?

20 A. Correct. Seven years in September.

21 Q. In reviewing your resume, it appeared, you know, as you've  
22 kind of made it up the ranks as far as warden status at Holman,  
23 that your duties have not changed, so I was curious as to what  
24 the difference was in Warden I and Warden II and Warden III.

25 A. Well, they've changed to some extent because there's more

1 responsibility as far as you still have to do the same duties,  
2 but you still have more responsibility because everyone is up  
3 under you. Have to answer such things as we're talking about  
4 right now.

5 Q. And who is your direct supervisor at Holman?

6 A. She's not at Holman, she's in central office. It would be  
7 our regional director, Cynthia Stewart.

8 Q. So Ms. Stewart is who you report to directly?

9 A. Correct.

10 MS. KLEBANER: Then we'll move ahead. We'll pick it  
11 back up on page 58 on line 20.

12 Q. Were you working the week of June 24th, 2018?

13 A. I recall I was, yes.

14 Q. Do you remember what days?

15 A. What days I worked?

16 Q. Uh-huh.

17 A. Without going back and looking at my timecard, I can't tell  
18 you. I don't recall me being on leave or anything during that  
19 time. I'm not saying I wasn't, but I don't recall.

20 Q. Do you remember there was a day, I believe it was June 26th,  
21 where two attorneys and two investigators from our office came  
22 and met collectively with about 40 or so death row inmates? Do  
23 you remember that?

24 A. I recall it occurring, but as far as me being there and  
25 observing it, I don't recall me observing it. But I do recall

1 it happening, yes.

2 Q. And do you know why they were there?

3 A. Not particularly. I mean, it was something dealing with the  
4 declaration for the gas as far as -- for execution purposes.

5 Q. Have you ever seen an election form for the opt in and the  
6 nitrogen hypoxia?

7 A. I've seen the form, yes. I can't tell you what was on it,  
8 but I've seen it.

9 Q. Do you know where it came from?

10 A. No, I don't.

11 Q. Where have you seen it?

12 A. I saw it -- I think I was in Warden Stewart's office when I  
13 saw it.

14 Q. And that was in June of 2018?

15 A. I don't know when it was, particularly exactly when it was,  
16 no, I can't tell you, but I remember seeing it in her office.

17 Q. You just saw it, or did she show it to you?

18 A. I saw it. I can't remember her showing it to me or not, but  
19 I remember me seeing it.

20 Q. So it was sitting on her desk or was it on a table or where?

21 A. I don't know, ma'am. I just remember me seeing it. I don't  
22 remember where exactly it was, if she put it in my hand or I  
23 looked at it on her desk or it was something that I just saw on  
24 her desk. I don't remember. I remember seeing the document,  
25 however.

1 Q. Did you ever give a copy of that form to any inmate on death  
2 row?

3 A. No, I did not.

4 Q. Do you know if someone else did?

5 A. My recollection, Captain Emberton did.

6 Q. And why did he do that?

7 A. He was instructed to pass those out through Warden Stewart,  
8 who was instructed from someone else either at central office --  
9 it was either from our operations or from legal. Somebody from  
10 the central office directed Ms. Stewart to do it, and she  
11 directed him to do it.

12 Q. Were you involved in that process at all?

13 A. No, I wasn't. I was just recovering from knee surgery at  
14 that time. I think I was still on light duty. I had had a knee  
15 replacement at that time.

16 Q. And did you have a conversation with Warden Stewart about  
17 that?

18 A. Vaguely, but I don't remember what the conversation was  
19 about exactly.

20 Q. Do you remember when you had a conversation with her about  
21 that?

22 A. No, I don't.

23 Q. Where were you when you had this conversation?

24 A. I think it was in her office.

25 Q. Was it before or after the form had been passed out?

1 A. I don't recall, ma'am, when it was exactly, because I don't  
2 know when the forms were passed out, to be honest with you.

3 Q. Have you ever seen a form that was actually signed?

4 A. I've seen a copy of one that was signed.

5 Q. And when did you see that?

6 A. Sometime I guess after it was signed. I don't remember  
7 exactly what day it was or what month it was either, but I  
8 remember seeing a copy of one that was signed.

9 Q. And do you know what happened to the signed copies?

10 A. No, I don't.

11 Q. Do you recall if the warden issued a memo about that?

12 A. I'm pretty sure she did not issue a memo about that. I  
13 wasn't privy to a memo that she issued. I'm pretty sure she  
14 didn't. I don't recall her issuing a memo and giving it out or  
15 cc'ing us on it, no.

16 MS. KLEBANER: And that's all on that one. All right.  
17 So that was Terry Raybon.

18 The next portion of transcript that we'd like to read  
19 into the record, Your Honor, is Plaintiff's Exhibit 17. This is  
20 a transcript of the deposition of Jennifer Parker that took  
21 place -- again, all these depositions are from the same case.  
22 This deposition took place on July 9th, 2021. And we'll start  
23 on page 11 of the deposition of Jennifer Parker, Plaintiff's  
24 Exhibit 17.

25 Q. First of all, what is your -- I believe you stated it, but

1 what is your present title?

2 A. Administrative Assistant III, assistant warden secretary --

3 I'm sorry, warden secretary.

4 Q. I was going to say, don't demote yourself. We really know  
5 "run the prison" is the real title. But what are those job  
6 responsibilities?

7 A. I just assist the warden in whatever way needed, be it  
8 paperwork, memos, handling personnel issues, whatever.  
9 Basically, whatever comes up.

10 Q. Are you in charge of keeping basically the files for the  
11 prison, paper records?

12 A. I keep the personnel or staff --

13 Q. Okay.

14 A. -- files.

15 MS. KLEBANER: Then we'll move to page 14, line 18.

16 Q. So we go -- go back to that week. This visit happened with  
17 attorneys from the federal defender's office, and that included  
18 me and Mr. Hahn. And after those visits were over, we did --  
19 were you given forms that were signed by inmates opting in to  
20 nitrogen hypoxia?

21 A. Yes, sir.

22 Q. What did you do with those forms?

23 A. I actually have those forms in a file, and I sent -- scanned  
24 a copy of each file to our legal counsel. And I got the  
25 original -- I have the original in a file.

1 Q. And was it sent -- did you send those files just generically  
2 to general counsel for the department, or was there a specific  
3 contact?

4 A. Was there -- excuse me? I couldn't understand.

5 Q. A specific contact person that you sent those files to?

6 A. A specific contact person.

7 Q. Who was that person?

8 A. That was Mr. Joseph Stewart.

9 Q. Thank you. So after that visit, did you get some of those  
10 forms in from other inmates?

11 A. Yes, sir.

12 Q. Now, also after that visit, were you ever tasked with making  
13 a number of copies of that form, of a blank version of that  
14 form?

15 A. No. No, sir.

16 Q. Did -- were you aware that the warden asked that that form,  
17 a blank version of that form, be passed out to all death row  
18 inmates?

19 A. No, sir. I'm -- I'm not aware of that. I just -- and when  
20 they were sent to me, I'm not sure where they came from. I knew  
21 some came in the mail, you know, to the inmates. But I'm not  
22 sure where all the rest of them came from. I'm not sure.

23 Q. But when you got them, you filed them -- you filed --

24 A. Yes. I put --

25 Q. -- the originals and sent copies to Mr. Stewart?

1 A. Yes, sir. I date stamped them when I received them and sent  
2 the -- scanned and sent the -- a copy to Mr. Stewart.

3 Q. You said earlier that, you know, you're the person who  
4 arranges the legal visits. Do you --

5 A. Yes, sir.

6 MS. KLEBANER: And then we'll pick it back up on page  
7 18, line 6.

8 Q. So it was -- it was always -- were you specifically told by  
9 the warden that you were to keep all these forms and what you  
10 were to do with them?

11 A. Not specifically by the warden. It was -- I received an --  
12 this information from Mr. Stewart to -- once we received them,  
13 to make sure I sent him a copy. And I just automatically keep  
14 all to hang on to the originals.

15 Q. Okay.

16 A. And I just put them in the file, secured file.

17 MS. KLEBANER: And then we'll pick this back up on page  
18 35, line 19.

19 Q. We understand that when blank -- the blank opt-in forms were  
20 handed out to the inmates in June of 2018, that they were in a  
21 box for Captain Emberton to hand out. Would you have known  
22 where that box came from or who provided him that box of forms?

23 A. No, sir. I have no knowledge of that.

24 Q. I want to take you to another incident. Do you remember  
25 being asked to pull or find any opt-in forms for a Jarrod



1 Taylor?

2 A. I might have been. Can't really recall right now, but it's  
3 possible. I would have to look back over my -- my  
4 documentation.

5 Q. When you got an opt-in form from an inmate, did you send  
6 that to anyone other than Mr. Stewart?

7 A. No, sir.

8 Q. And what did you do -- if you received a form to opt in  
9 after June 2018, what did you do with that form?

10 A. If I got one, I would put it in the file with the rest of  
11 the forms if I got any. I don't recall ever getting any. If I  
12 did, they would all be kept in the same location.

13 Q. Were you instructed to do anything different with those  
14 forms if you received them after June 2018?

15 A. No, sir.

16 Q. So if you received one of those forms today, you would send  
17 it on to Mr. Stewart like you were instructed to back then?

18 A. Yes, sir. And put the original in the -- in the file.

19 Q. Did you create a list of anybody who opted in and who  
20 submitted a form to the warden?

21 A. No, sir, I didn't. I did not create a list.

22 Q. So you -- basically, you got the forms, sent the forms to  
23 Mr. Stewart, and you then put the forms in a file at Holman?

24 A. Yes, sir.

25 Q. Were there -- and the warden never had you do anything else

1 with those forms?

2 A. No, sir.

3 MS. KLEBANER: That's it for the testimony of  
4 Ms. Jennifer Parker.

5 The fifth and final excerpts that plaintiff will read  
6 into the record are located in Plaintiff's Exhibit 19. This is  
7 a long one. We're not going to be reading nearly all of it, but  
8 it's a transcript of a motion hearing in Reeves versus Dunn in  
9 front of Your Honor back on December 9th, 2021. And we'll be  
10 reading specifically the testimony of one individual whose name  
11 is Cheryl Price. Her testimony starts on page 158.

12 So this is the December 9th, 2021, testimony of Cheryl  
13 Price. And I'll start on page 159, line three.

14 Q. For the record, can you state your title at the Alabama  
15 Department of Corrections.

16 A. I serve as an assistant deputy commissioner.

17 Q. And how long have you held that position?

18 A. Since roughly December of 2020.

19 Q. And before that, what was your position with the department?

20 A. I had the title of regional director.

21 MS. KLEBANER: Your Honor, I pause because I realize I  
22 should tell you, she was the 30(b)(6) witness. So that's the  
23 context here, even though she started in December of 2020.

24 So I'll resume reading from the record.

25 Q. And did your region include Holman Correctional?

1 A. At one point it did, yes.

2 Q. And when was that?

3 A. It depends on which time of the year.

4 Q. Okay. Did that include in 2018?

5 A. Yes, it did.

6 Q. And are you aware today that you're appearing as a Rule  
7 30(b)(6) witness as to specific topics?

8 A. Yes.

9 Q. And those topics include the factual basis for the  
10 defendants' answer, the factual basis for the defendants'  
11 affirmative defenses, the defendants' response to certain  
12 discovery requests, differences in the 2002 electrocution versus  
13 lethal injection election process, differences between the 2018  
14 lethal injection versus nitrogen hypoxia election process, and  
15 then the identification of notes, memoranda, and other written  
16 evidence regarding the distribution of the nitrogen hypoxia  
17 election form?

18 A. I was not provided with a list in that form, but I am aware  
19 of the fact that I am appearing as a 30(b)(6) for the  
20 department -- for the Alabama Department of Corrections today.

21 MS. KLEBANER: And we'll move down to line 15.

22 Q. I'm going to show you a document. I don't think it's been  
23 marked yet by the plaintiff, but the title of it is The Election  
24 to be Executed by Nitrogen Hypoxia. It is the document that I  
25 think we've been referring to quite a bit over the course of the

1 day. Do you recognize that document?

2 A. Only based on the title that's here.

3 MS. KLEBANER: And we can skip down to line 23.

4 A. Only based on the title that is listed here, The Election to  
5 be Executed by Nitrogen Hypoxia.

6 Q. Have you ever seen this document before?

7 A. I may have seen a document similar to this one. Yes.

8 Q. And do you remember where you have seen that?

9 A. Only in the documents that I reviewed in preparation.

10 MS. KLEBANER: Then we'll pick it back up at line 15.

11 Q. Ms. Price, so one of our first topics is about the process  
12 that the Department of Corrections implemented regarding the  
13 nitrogen hypoxia election. And so the law went into effect or  
14 the change of the law went into effect June 1st, but prior to  
15 that, what procedures, if any, did the department put into place  
16 regarding the election process?

17 A. You mentioned June 1st --

18 Q. Of 2018.

19 A. Okay. And if you could repeat your question as to --

20 Q. The law in Alabama changed and it allowed for inmates to  
21 make an election of their method of execution by nitrogen  
22 hypoxia, and they were allowed as of June 1st to make that  
23 election in writing to the warden of the facility where they  
24 were located.

25 And my question is, prior to June 1st when the department --

1 when that change was going to go into effect, what process did  
2 the department put in place in regards to that change in the  
3 law?

4 A. I'm not aware of a process that we put into place.

5 Q. Was there a protocol that was put into place?

6 A. No.

7 MS. KLEBANER: We'll move to page 163 at the bottom,  
8 line 24.

9 Q. And so to your knowledge, you don't remember a procedure or  
10 a protocol that the Department of Corrections had in place prior  
11 to June 1st of 2018?

12 MS. KLEBANER: And then we'll skip the next few lines.

13 A. As I previously stated, I'm not aware of a protocol.

14 Q. And are you aware of any protocol after June 1st?

15 A. I am not aware of a protocol.

16 Q. Were there any discussions among staff at the Department of  
17 Corrections regarding how to handle elections for people who  
18 wanted to elect nitrogen hypoxia?

19 A. To my knowledge, I am not aware of that type discussion, no.

20 Q. Was there procedure in place as to how to log in forms  
21 that -- or pieces of paper or however someone wanted to make an  
22 election, was there procedure in place as to how that would  
23 happen?

24 A. No. The agency did not establish a procedure for that.

25 Q. Was there any discussion amongst the wardens who were the

1 ones that were to receive the elections regarding how they were  
2 to handle it at a facility level?

3 A. I am not aware of the discussion that took place at the  
4 facility level.

5 Q. So there was not a directive from DOC to the individual  
6 wardens?

7 A. No, there was not.

8 Q. And so according to the record, sometime after June 26th  
9 this election form that was Plaintiff's Exhibit 3 was  
10 distributed at Holman Correctional Facility. Is that your  
11 understanding?

12 A. Are you saying after June 26th of 2018?

13 Q. Yes, ma'am.

14 A. At some point, according to the testimony I reviewed from  
15 then Warden Stewart, yes, they did pass that out there at  
16 Holman.

17 MS. KLEBANER: We'll move to page 168 at the bottom,  
18 line 24.

19 Q. And was there a system in place to confirm whether someone  
20 received this form or not?

21 A. At which location?

22 Q. At Holman, for example.

23 A. According to the documents, it was Captain Emberton that  
24 then Warden Stewart passed the forms off to for him to  
25 disseminate.

1 Q. And when he handed the forms out, did he keep track of who  
2 he gave them to?

3 A. Not to my knowledge. There was no real documentation for  
4 that other than him keeping up or passing out the forms to each  
5 of the inmates who were on death row at the time.

6 Q. And so the inmate never signed any receipt that he had  
7 received the form?

8 A. I am not aware of a receipt being signed.

9 Q. And are there other forms that inmates receive from the  
10 department where they have to sign a receipt that they had  
11 received it?

12 A. Which forms?

13 Q. For example, a disciplinary report. Let's say you receive a  
14 disciplinary.

15 A. When the inmate receives disciplinary, he does sign or he  
16 could refuse to sign.

17 Q. But either way, there is a place for him to either refuse to  
18 sign or sign that he received that and he has that information?

19 A. There is a place on the disciplinary form that requires his  
20 signature, and if he does not sign, then they will state refused  
21 to sign.

22 Q. But when the form was -- the election form was distributed  
23 at Holman, there was no record of who received it or if they  
24 received it; is that correct?

25 A. That is correct.

1 MS. KLEBANER: Okay. And we'll go down to line 15 on  
2 this same page.

3 Q. I mean, you were informed that, hey, the law is changing,  
4 and so soon you may hear about, you know, election forms or  
5 people that are wanting to elect nitrogen hypoxia as their  
6 method of execution, or did you hear about it a year later?

7 A. I do not recall specifically what I was told about that  
8 other than, yes, we did have discussion that the law was  
9 changing, but there was no discussion at that point about having  
10 the inmates to make an election. No.

11 MS. KLEBANER: Okay. We'll move ahead to page 176,  
12 line three.

13 Q. The first thing I want to -- I want to clear something up.  
14 You were asked a moment ago whether you had to fill out a form  
15 to elect nitrogen hypoxia. In fact, you didn't have to fill out  
16 any particular form, did you?

17 A. No.

18 Q. You could write on a piece of paper, "I elect nitrogen  
19 hypoxia" and deliver it to the warden?

20 A. That is correct.

21 MS. KLEBANER: We'll turn to the next page, 177 at  
22 line six.

23 Q. But there was never any, like, inspector general, formal  
24 investigation of how the forms ended up being passed out?

25 A. No. As I previously stated, there was no formal



1 investigation, just discussions and questions.

2 Q. And mostly probably lawyers trying to figure out what  
3 happened; right?

4 A. Mostly, yes.

5 Q. Do you know where Warden Stewart got the forms that Captain  
6 Emberton passed out?

7 A. No, I do not.

8 Q. Would you have been in Ms. Stewart's chain of command at  
9 that time?

10 A. Indirectly, yes.

11 Q. Do you recall giving any instructions to her to pass out any  
12 sort of form?

13 A. I did not give her any instructions.

14 Q. Are you aware of any agency-wide instruction to either  
15 Warden Stewart or any other warden to hand out forms to  
16 facilitate the election process?

17 A. No, I am not aware.

18 MS. KLEBANER: And that's it for that last transcript.

19 THE COURT: Tell me when you're at a good stopping  
20 point for a break. We've been going for about two hours.

21 MS. KLEBANER: Sure, Your Honor.

22 THE COURT: Right now?

23 MS. KLEBANER: We can do it now. I can give a little  
24 bit of summary of the testimony --

25 THE COURT: Let's take a break, and we'll pick up with

1 your summary. It is right at 11:00, so let's take about a  
2 15-minute break.

3 MS. KLEBANER: Okay. Thank you.

4 (Recess was taken from 10:58 a.m. until 11:19 a.m., after  
5 which proceedings continued, as follows:)

6 MS. KLEBANER: Thank you, Your Honor. So Mara Klebaner  
7 again for Mr. Miller.

8 Just to pick up where we had left off with the  
9 transcript testimony of five sort of key players in the nitrogen  
10 hypoxia election form distribution, collection, and retention  
11 process. Your Honor should have a demonstrative up on the bench  
12 with you labeled Plaintiff Demonstrative, the first line of  
13 which says "Step One, Who Ordered the Distribution." Do you  
14 have that up there?

15 THE COURT: I do.

16 MS. KLEBANER: Okay. So the purpose of this  
17 demonstrative -- probably hard to get the whole thing on here --  
18 just a summary to walk us all through sort of the varying  
19 positions that these individuals took on what procedure or lack  
20 thereof was being implemented at Holman with regard to these  
21 election forms.

22 In particular if I could call your attention to that  
23 second bullet point on step one, the 30(b)(6) witness,  
24 Ms. Price, said the agency did not establish a procedure for  
25 that when she was asked how to log in forms from those who

1 wanted to make an election, whereas defendants in this  
2 litigation have represented -- they deny that they did not plan  
3 a process or implement a policy by which election forms were to  
4 be distributed, collected, and retained. So we have a pretty  
5 stark conflict there in terms of their position on collection  
6 and retention and any sort of logging of the forms themselves.

7           And I won't read this whole form to Your Honor, but  
8 just a couple more highlights.

9           If you look down to step two, Captain Emberton  
10 testified that he distributed the election forms to each death  
11 row inmate in mid-June 2018 with some significant sort of  
12 caveats to that. If someone was sleeping on death row, he would  
13 set the form in the bars of their cell and walk away. And he  
14 also testified that he sometimes gave forms out to multiple  
15 people at a time through the bars of their cell. And warden --  
16 now Warden Raybon does not know when those forms were passed  
17 out.

18           In terms of timeline, moving on to step three, Captain  
19 Emberton testified repeatedly that he thinks it took place over  
20 the course of one day; that he dropped off the forms in the  
21 morning and picked them up either after he came back from lunch  
22 or before he left work for the day. Alternately, he testified  
23 that it might have been perhaps more along a time frame of a  
24 week.

25           Then in terms of collecting the forms, step four, the

1 warden at the time, Cynthia Stewart, testified that her  
2 assistant, Ms. Parker, kept track of all those forms as they  
3 came into the office; scanned them to wherever or mailed them to  
4 wherever they had to go.

5 She also testified that some inmates might not have  
6 turned a form in to Captain Emberton, but may have dropped a  
7 completed form in a request box in the rec room that could have  
8 been collected daily, or could have given it directly to a staff  
9 member when the staff members were doing rounds.

10 And then on the last page of this demonstrative, we  
11 highlighted that Ms. Parker, the subordinate -- Warden Stewart's  
12 assistant, noticed that some of the election forms were coming  
13 in through the mail, so via U.S. Mail and FedEx. So this was  
14 yet another stream in which they were receiving these nitrogen  
15 hypoxia election forms.

16 In terms of who has a list of the finalized forms,  
17 Captain Emberton said that he was told not to make a list  
18 because the information was private, so he made no list or  
19 record of any kind regarding which inmates received an election  
20 form or turned one back in.

21 Meanwhile, the Alabama Attorney General's office -- and  
22 this is in defendants' discovery, and I can give you the  
23 citation to find this in your defendants' discovery binder if  
24 you would like it. The Alabama Attorney General's office has  
25 been keeping its own list of election forms, apparently, this

1 whole time, separate and apart from ADOC.

2           Your Honor, you have a second binder on your bench  
3 that's called Defendants' Discovery Responses and Production.  
4 I'd just like to call your attention briefly to tab two in that  
5 binder, which are the defendants' responses to plaintiff's  
6 interrogatories.

7           If you turn to interrogatory number three: "Identify and  
8 describe the policies and/or processes used by Holman or ADOC  
9 staff to memorialize the information contained in the Holman  
10 death row inmates' completed election forms." The answer,  
11 starting in the third paragraph: "The answer to this  
12 interrogatory may further be determined by examining the  
13 affidavit of Captain Jeff Emberton," and then it goes on to list  
14 all the transcripts that were produced to us in discovery.

15           So if you look at this question, interrogatory number  
16 three and the answer that defendants gave to it, they don't even  
17 attempt to assemble these various and at times conflicting  
18 answers into a coherent narrative. They merely cite to the  
19 transcripts and their interrogatory responses, transcripts from  
20 other litigation, and say, maybe you can figure out what  
21 happened based on these transcripts, but we don't know what  
22 happened in June 2018.

23           MR. HOUTS: Your Honor, may I interpose an objection  
24 real quick, just a concern? It's my understanding under our  
25 local rules that opposing counsel owe me a phone call before

1 bringing a discovery dispute to the Court.

2 THE COURT: Well, if the assertion is it's an  
3 insufficient interrogatory, you lodge an objection. And if they  
4 believe it's an improper objection, the next means would be to a  
5 conference and then a motion to compel. It's related to the  
6 discovery issue that we had last week and the observation that  
7 I've had that we've had to compact a lot of this, in my opinion  
8 somewhat unnecessarily, because of the date certain things were  
9 filed. I understand, Mr. Houts, what your position is.

10 MR. HOUTS: Thank you, Your Honor.

11 THE COURT: Okay. You can proceed.

12 MS. KLEBANER: So just further to the same point, if  
13 you look at sort of the end of their answer to interrogatory  
14 number three, that last paragraph: "Because Plaintiff Miller's  
15 allegations involve activities occurring more than four years  
16 ago, when other individuals were serving in the named ADOC  
17 defendants' positions, and due to limited amount of time  
18 defendants have had to respond to the expedited discovery  
19 requested by plaintiff, ADOC defendants are otherwise unable to  
20 answer this interrogatory further in the time period provided."

21 And, again, the interrogatory that they're saying  
22 they're unable to answer because it was from June 2018 is a  
23 request to identify the policies or processes used by Holman or  
24 ADOC to memorialize the information contained in the Holman  
25 death row inmates' completed election forms. They're saying

1 they don't know what happened in June 2018 with respect to  
2 keeping track of the forms. Yet even with all this doubt about  
3 what happened more than four years ago, defendants are certain,  
4 100 percent certain, that their process was constitutionally  
5 sufficient and they didn't lose Mr. Miller's election form.

6 So, Your Honor, at this point, I would like to move  
7 into evidence plaintiff's exhibits in the binder that you have  
8 in front of you, as well as Defendants' Exhibits 2 and 3. And  
9 those are the phone calls that we played earlier.

10 THE COURT: Is there any objection?

11 MR. HOUTS: No, Your Honor. She moved them --

12 THE COURT: Well, what exactly are we moving? I've got  
13 two binders.

14 MS. KLEBANER: So you have one binder with defendants'  
15 discovery. I'm not talking about that. The plaintiff's exhibit  
16 binder, so that's Exhibits 1 through 20 in plaintiff's exhibit  
17 binder. And then Defendants' Exhibits 2 and 3, which are the  
18 CDs of the recorded phone calls.

19 THE COURT: Is there any objection?

20 MR. HOUTS: No, Your Honor.

21 THE COURT: So those are admitted. As it concerns the  
22 discovery binder from the defendants, are you moving to admit  
23 those or --

24 MS. KLEBANER: Yes. So turning to that, there is a  
25 portion of this that I would like to move to admit, just the

1 interrogatories. So if you turn -- that's tab two in your  
2 binder. And we are keeping track, and we will send your  
3 courtroom deputy --

4 THE COURT: Just so that we're clear on the record, I  
5 have -- they are tabbed. They are not tabbed as tab one, two,  
6 three, and four.

7 MS. KLEBANER: The tab says Defendant Response to  
8 Plaintiff Interrogatories.

9 THE COURT: All right, Mr. Houts. Do you have an  
10 objection to the admission of the defendants' response to  
11 plaintiff's interrogatories?

12 MR. HOUTS: No, Your Honor.

13 THE COURT: Okay. That's admitted.

14 MR. HOUTS: May I approach to --

15 THE COURT: You may. That's the audios?

16 MR. HOUTS: Yes, Your Honor.

17 MS. KLEBANER: And then, Your Honor, this is not with  
18 us in court today, but you had mentioned and was reflecting -- I  
19 was thinking about how the docket in the Alabama Supreme Court  
20 proceeding is under seal. If you would like, we can provide the  
21 Court with all of the Supreme Court briefing on this issue.

22 THE COURT: I would like to see it.

23 MS. KLEBANER: Okay. So would you like us to just send  
24 that directly to your deputy?

25 THE COURT: Well, is it something that needs to be in



1 the record? I would think it would be.

2 MS. KLEBANER: Yeah. I mean, we're happy to move it  
3 into the record, too. I just don't have physical copies of it  
4 with me right now.

5 THE COURT: Mr. Houts, are you following the  
6 conversation?

7 MR. HOUTS: I'm sorry, Your Honor.

8 THE COURT: I didn't think you were.

9 MR. HOUTS: I was distracted.

10 THE COURT: She has asked whether I would like to see  
11 copies of what was filed with the Alabama Supreme Court. I said  
12 yes, I would like to see it. The follow-up question was, are  
13 you admitting it as part of the evidentiary submission. She  
14 does not have a paper copy of it today. She would like to  
15 submit it to us electronically. And that's about where we are  
16 on it.

17 So the question to you is, do you have a position one  
18 way or another from the admission of those filings in these  
19 proceedings?

20 MR. HOUTS: Are we specifically talking about  
21 Mr. Taylor's filings, Your Honor, what we termed to the Court  
22 under seal as to Mr. Taylor?

23 MS. KLEBANER: These would be for Mr. Miller's case.

24 THE COURT: That's what I was thinking. In  
25 Mr. Miller's case.

1           MR. HOUTS: I've seen in this case the motion to set  
2 the execution date, the response, Mr. Miller's affidavit, and  
3 Warden Raybon's affidavit. The only thing I'm not sure of is  
4 Exhibit B that was filed under seal. And the reason being, it  
5 contained that material from the attorneys who made a limited  
6 waiver in that case; that made a limited waiver of privilege in  
7 that case. We do not feel comfortable turning over their  
8 limited waiver in that case in this case, but if you'll look at  
9 our discovery, we did turn over things that were not intended to  
10 be confidential and kept from third parties. And that would be  
11 the FedEx transmissions, the fax confirmation sheets,  
12 Mr. Miller's signed form that was turned over to us. Anything  
13 that would not fit in the four corners of privilege, we have  
14 turned over. But absent Mr. Taylor's counsel saying we will --  
15 limited waiver in this other case, too, I don't know that I have  
16 that authority, Your Honor.

17           THE COURT: Let's talk about the limited waiver in the  
18 case of Mr. Taylor. Was that limited waiver put in writing, or  
19 was it some sort of oral communication between counsel? What  
20 can I look to that would define what was meant by a limited  
21 waiver?

22           MR. HOUTS: Right offhand, I mean, I would be guessing  
23 if I responded. I know I've had a conversation about it, but  
24 I'm afraid that what I tell Your Honor would be an incorrect  
25 recollection.

1 I mean, I can certainly look into it and -- because I  
2 know that some of that information was in the motion to file  
3 under seal. I know that some of this took place around the time  
4 that Mr. Taylor's counsel were communicating with counsel in  
5 that case, which did not include myself, Your Honor.

6 THE COURT: Okay. Outside of what may give you concern  
7 from a potential violation of a sealed order or the  
8 attorney-client issue, do you have a problem or a concern or an  
9 objection with her submitting to me the filings with the Alabama  
10 Supreme Court?

11 MR. HOUTS: Except for that Exhibit B, no, Your Honor.

12 THE COURT: Okay. So that we have those in the record,  
13 can you file those at some point today after we're finished or  
14 have those filed?

15 MS. KLEBANER: Yes. We will have all the briefing in  
16 the Alabama Supreme Court filed.

17 As to Mr. Houts' comment about privilege over the  
18 communication between Mr. Taylor's lawyer and defendants, he  
19 said that they were only able to share like the FedEx receipts,  
20 those sorts of neutral documents; but we received in discovery  
21 the communication from his lawyers directly from Paul, Weiss, so  
22 at this point I think it's been waived and can be entered into  
23 the record.

24 THE COURT: Mr. Houts?

25 MR. HOUTS: First time hearing of it, Your Honor. I

1 would need to confirm that and make sure that it's been waived  
2 on his end. But obviously, bearing the lead, if the other side  
3 has affirmatively waived it, then that would alleviate our  
4 concerns of being accused of violating an agreement.

5 MS. KLEBANER: Sorry. This is in Your Honor's  
6 binder --

7 THE COURT: What's the Bates stamp number on it?

8 MS. KLEBANER: Yes. The --

9 THE COURT: If there is a Bates stamp. I don't know.

10 MS. KLEBANER: The stamp is DISC0518. Actually one  
11 page before, DISC0517. This is the letter from Mr. Taylor's  
12 attorney to Mr. Taylor at Holman. We received this in discovery  
13 on Friday night. Continues on to the next page in terms of  
14 internal communications confirming that a fax was sent from his  
15 lawyers.

16 MR. HOUTS: Rather than explain why I don't -- I mean,  
17 that was a public-facing document that was processed through the  
18 prison.

19 But I will go back again, Your Honor. I very clearly  
20 wrote a request to my friends that if they believed that I had  
21 inadvertently disclosed any privileged material, that I intended  
22 to claw it back. To please contact me at their earliest and  
23 return the item without inspecting it.

24 At some point, we need to follow the rules of discovery  
25 here. And if I tell you that I had three and a half days to

1 turn something over, if you think it's privileged, let's talk  
2 about it. The first I'm hearing about it is in front of Your  
3 Honor, and it's very uncomfortable not having time to address it  
4 beforehand, Your Honor.

5 MS. KLEBANER: So to that point, Your Honor, just to be  
6 very clear, we do not view this as a privileged communication.  
7 We did not think this was something that we received  
8 inadvertently. We thought this was the defendants complying  
9 with their discovery mandates from this Court and turning over  
10 communications that clearly have -- the privilege for which has  
11 been at least partially waived because defendants possess it.  
12 So we certainly did not think that this was an inadvertent  
13 disclosure, or we wouldn't have brought it up in this context.  
14 We thought this was an intentional effort at transparency by the  
15 defendants to explain the basis of Mr. Taylor's decision.

16 THE COURT: Mr. Houts, when this was produced along  
17 with what I presume would be responses to requests for  
18 production, you know, sometimes lawyers put -- we put a whole  
19 bunch of boilerplate objections and statements at the front and  
20 sometimes put language in there giving us the ability to claw  
21 back documents that may have been produced inadvertently. Was  
22 any of that in the request for production responses that you  
23 submitted?

24 MR. HOUTS: I believe it was. If it was not, it was in  
25 an email to my -- I mean, again, because of the manner that we

1 were doing it, Your Honor, but it was definitely communicated.  
2 I think it is actually in the response to production.

3           And my concern, again, Your Honor, is we are bending  
4 over backwards, asking ourselves, is it a confidential  
5 communication, or does it concern something that the client  
6 intended to turn over to a third party? You know, in which  
7 case, it was not ever going to fall within that confidentiality  
8 clause.

9           Your Honor has already heard a phone call where  
10 Mr. Miller told his brother, I told y'all a long time ago, and  
11 they didn't know what I was talking about. His brother is not  
12 covered by the attorney-client privilege. He has said on a  
13 phone call that says it's recorded --

14           THE COURT: Right, and I understand that. I understand  
15 that. The question is this handful of documents here that were  
16 the very end of your document production.

17           First off, Ms. Klebaner, are you offering that as  
18 evidence today?

19           MS. KLEBANER: We certainly think it's relevant, yes.

20           THE COURT: Well, again, are you offering it? It's not  
21 a matter of whether it's relevant. Are you offering it?

22           MS. KLEBANER: Yes, we're offering it as evidence.

23           THE COURT: Mr. Houts, are you objecting?

24           MR. HOUTS: If they're going to say that constitutes a  
25 waiver that's going to allow them to further get into these

1 communications, then I'm going to object because I asked for an  
2 opportunity to look into it before ending up in this position.  
3 If they're not going to pursue it any further, I would not  
4 object.

5 THE COURT: Once it's in, it's in. And they can ask  
6 statements and make inferences from it.

7 So you're objecting that it shouldn't come in from the  
8 get-go because if I'm interpreting your position correctly, it's  
9 that these documents should not have been produced to begin with  
10 because you obtained them under some sort of limited waiver  
11 which would tie your hands as to what you can do with those  
12 documents and who you can show them to.

13 MR. HOUTS: I'm saying in the two or three minutes I've  
14 had to be surprised with it, I'm uncomfortable making a  
15 permanent decision, especially when I requested them to let me  
16 know if they felt like it was going to be privileged material.

17 So at this point, I mean, if they're saying it's --

18 THE COURT: It's not their position to determine what's  
19 privileged. It's your position to determine what's privileged.  
20 And if they were a set of documents that you had a concern  
21 about, that's -- and we're not talking about a lot, we're  
22 talking about three or four pages of documents -- that's  
23 something you-all could have had a discussion about before  
24 today.

25 I'm inclined to allow it. And if you think it is in

1 violation of some sort of agreement on your end, you can file a  
2 motion to seal it, and then we can just make it for our eyes  
3 only. I don't see anything in it that's particularly super  
4 secret because it's all over the filings in this case, and  
5 probably in the media as well, that he had made an election and  
6 that it was lost, and that the State withdrew the warrant. And  
7 that seems to be that's kind of what that letter speaks to.

8 MR. HOUTS: I'm simply trying to do right by  
9 Mr. Taylor's counsel, Your Honor. And I want the Court to  
10 understand that.

11 If the Court would just simply let me add an additional  
12 objection, which would be relevance. We've already heard that  
13 Mr. Miller does not intend to offer evidence similar to  
14 Mr. Taylor; that either it doesn't exist, or if it does, he's  
15 going to assert the privilege. So knowing that privileged  
16 material was turned over is -- I would just add a relevance  
17 objection, Your Honor.

18 THE COURT: It's noted.

19 MS. KLEBANER: Would you like me to respond to that  
20 objection?

21 THE COURT: You can. I think I understand what the  
22 relevance is, but you can --

23 MS. KLEBANER: It's relevant to the Fourteenth  
24 Amendment and the Eighth Amendment claim in they were similarly  
25 situated. This is evidence of how they were treated differently



1 and arbitrary and capricious carrying out of a death penalty  
2 sentence.

3 THE COURT: So for purposes the record, we need to put  
4 a number to it.

5 MS. KLEBANER: If I could suggest the Bates stamp  
6 should begin -- flipping back a few pages is sort of the  
7 beginning where they had his election form. DISC0515 through  
8 DISC5022.

9 THE COURT: And what exhibit number would we attach to  
10 that?

11 MS. KLEBANER: Let's see. So our exhibits ended at 2,  
12 so we would attach this as Plaintiff's Exhibit 21. I'm sorry.  
13 Our exhibits ended at 20. We would attach this as Plaintiff's  
14 Exhibit 21.

15 THE COURT: That exhibit is admitted.

16 MS. KLEBANER: So, Your Honor -- sorry. I didn't know  
17 if you were reading.

18 THE COURT: No. You can proceed.

19 MS. KLEBANER: At this point, we would move to -- we  
20 have gotten plaintiff's exhibits into the record as well as  
21 Defendants' Exhibits 2 and 3. Those are the audio recordings.  
22 And plaintiffs -- it's now time to call Mr. Miller himself to  
23 the stand. And my colleague will be doing that, so I'll step  
24 down, with your permission.

25 THE COURT: Okay.

1 ALAN EUGENE MILLER

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

5 DIRECT EXAMINATION

6 BY MR. SPECTOR:

7 Q. Can you please state your name for the record.

8 A. Alan Eugene Miller.

9 Q. Mr. Miller, how old are you?

10 A. I'm 57.

11 Q. Are you currently incarcerated at the William C. Holman  
12 Correctional Facility?

13 A. Yes.

14 Q. Where is the Holman Correctional Facility?

15 A. Atmore, Alabama.

16 Q. What is your inmate ID number?

17 A. Z674.

18 Q. And have you ever testified in a courtroom before?

19 A. Take that back. Z672. I'm sorry about that.

20 Q. Have you ever testified in a courtroom before?

21 A. No, sir.

22 Q. Mr. Miller, it's my understanding that sometimes you have  
23 trouble hearing; is that right?

24 A. Yes.

25 Q. Okay. So if I ask you a question, and you can't hear it or

1 you do not understand the question, just let me know and I'll  
2 slow down or I'll reask the question. Is that okay?

3 A. Okay.

4 Q. And I want to clarify one more thing before we go a little  
5 bit further, which is, the court reporter won't be able to take  
6 down head nods. So if I ask you a question that's a yes or no  
7 question, just simply say your answer one way or the other.

8 A. Okay.

9 Q. So let's talk a little bit about lethal injection. Do you  
10 know whether lethal injection is the primary way that executions  
11 are carried out in Alabama?

12 A. Not really, since they keep wishy-washing on it.

13 Q. Do you know whether lethal injections involve the use of a  
14 needle?

15 A. Yes, sir.

16 Q. And do you know where on your body a needle is injected  
17 during a lethal injection?

18 A. I presumed it was in your arm.

19 Q. And have you ever had a needle jabbed into your arm while  
20 incarcerated at Holman?

21 A. Yes.

22 Q. And have you had a needle jabbed into your arm before June  
23 of 2018?

24 A. Yes.

25 Q. Was it to draw blood?

1 A. Yes, sir.

2 Q. Can you tell us a little bit about that experience.

3 A. It was painful. They have a hard time finding my veins.  
4 And they'll poke around or stick it in there, move it around, or  
5 sometimes they'll nick a nerve, or they'll pull it out and go  
6 after the hands or the other arm. And then they'll send me  
7 somewhere to sit down for a while or -- and they work my arm,  
8 like curls or something. Then call me back, go back at it  
9 again.

10 Q. So I want to make sure I understand it. They start with  
11 your arm; is that right?

12 A. Yes, sir.

13 Q. And then if they -- if it doesn't work, they move to your  
14 hand?

15 A. Yes.

16 Q. Okay. And so it sounds like there have been times where  
17 they have tried to draw blood, and it doesn't work the first  
18 time, so they move elsewhere onto your hand?

19 A. Yes. Yes, sir.

20 Q. So that would be multiple times them jabbing you with a  
21 needle to draw blood?

22 A. Yes.

23 Q. And you also mentioned that they once hit a nerve.

24 A. Yes.

25 Q. Can you tell us a little bit about that experience.

1 A. It's like somebody hitting your elbow or something and  
2 it's -- it was painful, and it can leave a big old bruise.  
3 Bigger than the ones that normally come up when they poke it.

4 Q. Can you describe for the Court how it makes you feel when  
5 you get -- when these experiences happen, when you get jabbed  
6 with a needle multiple times?

7 A. It doesn't feel good. I don't feel -- like feeling like a  
8 pin cushion.

9 Q. And so you were saying a little bit earlier that when you've  
10 been jabbed in the past, days after there might be a bruise; is  
11 that right?

12 A. Yes, sir.

13 Q. Where exactly on your arm is that bruise?

14 A. Inside of your elbow.

15 Q. Can you describe for the Court the size of the bruise?

16 A. It can cover the whole -- where you bend your elbow right  
17 there, it can cover the whole thing. And then it will be  
18 wherever they stabbed you the other times, just a little bitty  
19 bruise or yellow, where discoloring and stuff. But sometimes  
20 when it hit that nerve, it stays for a while.

21 Q. And what's a while to you?

22 A. More than a couple of days.

23 Q. And so you were saying earlier that sometimes when you've  
24 had blood drawn, they've moved you to a different room?

25 A. Yeah. It's just -- it's another room. They lock you in.

1 It's a little bit like a little cage, and you'll sit there.  
2 They'll think you need to calm down or -- like that. And  
3 they'll ask you to work your hands. They'll sit there and tell  
4 you to work your hands or something like that, or they'll sit  
5 there and let you do it in there. You'll sit there, like you're  
6 pumping weights or something.

7 Q. So if you can recall, how long has that whole process taken  
8 to get blood drawn in the past?

9 A. Been about 30 minutes. You know, so I don't have a watch.

10 Q. And if you were to look down at your hand right now and your  
11 arms right now, are you able to visibly see your veins?

12 A. Not really. You can, like, see some green a little bit, but  
13 they don't poke out.

14 Q. Okay. So taking all of that in, how would you describe your  
15 experiences with needles?

16 A. Painful and -- you know, just don't like them.

17 Q. Okay. So you've told us that you do not like needles. I  
18 want to go back to asking about Holman now, as well as your  
19 sentence. Have you been sentenced to death?

20 A. Yes, sir.

21 Q. And because you've been sentenced to death, are you housed  
22 on death row at Holman?

23 A. Yes, sir.

24 Q. And do correctional officers work at Holman?

25 A. Yes, sir.

1 Q. And do correctional officers work on death row at Holman?

2 A. Yes, sir.

3 Q. Do multiple correctional officers work on death row at  
4 Holman?

5 A. Yes, sir.

6 Q. Do you know over time whether correctional officers who work  
7 on death row get swapped out for other correctional officers?

8 A. Yes, sir. There's, I guess, some kind of training, and they  
9 get transferred somewhere else, or they retired and somebody  
10 takes their place.

11 Q. Okay.

12 A. Or somebody's sick or something like that, they bring  
13 somebody else in from somewhere else.

14 Q. Were you housed on death row in June and July of 2018?

15 A. Yes, sir.

16 Q. Were other inmates besides you housed on death row in June  
17 and July of 2018?

18 A. Yes, sir.

19 Q. Do you remember the layout of the cell you were in around  
20 that time period?

21 A. Just like a 4 by 8 and I think maybe 9 foot -- 9 foot in  
22 height or 8 foot in height. When you walk in, if you walked  
23 into mine, the bed was on the right to the wall, all the way to  
24 the back, and then the toilet was right there in front of the  
25 door. Then right over the bed there's a table at the foot of

1 the bed. You walk in, the door shuts behind you, you turn  
2 around and stick your hands out, and they undo your hands.

3 Q. So if I understand your testimony correctly, there's a bed  
4 next to the wall. And the bed could face the door -- or the  
5 bars to the cell?

6 A. Well, it depends on how you're laying on the bed.

7 Q. Let's say you were laying facing the cell bars.

8 A. You would be looking at the back of the cell.

9 Q. When you were in your cell in 2000 -- in June of 2018, where  
10 did you primarily sit while you were in there?

11 A. Usually with my head towards the back, by the toilet.

12 Q. Okay. Can you describe what the door of your cell looked  
13 like at the time?

14 A. Just bars.

15 Q. Just bars?

16 A. Just door -- well, I'm not looking at the doors over on the  
17 side. But straight ahead of you is my table, and then there's  
18 bars, and then there's the door, bars.

19 Q. And was there somewhere on the bars where you could leave  
20 things for others to pick up?

21 A. Well, in between the bars on what they call a bean hole.  
22 It's where they stick your food tray. Everybody just calls it a  
23 bean hole.

24 Q. And could you leave documents in the bean hole?

25 A. Yes.



1 Q. And is that where you typically left things, in the bean  
2 hole, for things to be picked up?

3 A. Yes, sir. Yes, sir.

4 Q. Including documents?

5 A. Yes, sir.

6 Q. When you were in that cell around June of 2018, could you  
7 hear prison guards when they were yelling something out loud?

8 A. If they was real loud.

9 Q. Why were they yelling when they did?

10 A. Sometimes telling the guys to not be up there, you know,  
11 what -- when they go do -- in count they caught them doing  
12 something or caught them, you know, doing something that's  
13 against the rules, and then they're getting cussed back out or  
14 something like that. So you just -- you phase it out.  
15 Sometimes you can't understand it, but you can hear the  
16 hollering.

17 Q. If guards were making an announcement, did they yell?

18 A. Yes.

19 Q. You said this a little bit earlier, but I want to just  
20 clarify. How loud are we talking when they yell?

21 A. They cut off the fans. They'll cut off the fans that's in  
22 the main halls because them fans sound like a helicopter or a  
23 plane. They cut them off and they'll all scream "on the floor"  
24 or something like that. They'll scream like and they'll tell  
25 you to listen. There ain't going to be a walk today or

1 somebody's -- like church people might be there and they're  
2 going to come see you. Get dressed and get decent. Make sure  
3 your cell is presentable, you know. And be polite. Don't be  
4 naked. Don't wear your underwear, talking to them. Stand in  
5 front of the door.

6 Q. And so if you are in your cell and you are facing your cell  
7 door -- the bars to the cell, could you see somebody standing in  
8 front of those bars?

9 A. If they was standing in front of it, yes.

10 Q. Could you see somebody if they were down the hall?

11 A. No.

12 Q. And are cell layouts on death row generally pretty similar?

13 A. Yes.

14 Q. We're going to move now to the nitrogen hypoxia form. Do  
15 you recall around June of 2018 receiving a form that concerned  
16 execution by nitrogen hypoxia?

17 A. Yes. I mean, I remember seeing a form, you know, form for  
18 it.

19 Q. And when you received the form, did you read it?

20 A. Yes.

21 Q. So I want you to take us back to when you received the form  
22 in June of 2018. Is that okay?

23 A. Yeah.

24 Q. Okay. At the time you read this form in June of 2018 or so,  
25 what did you think that execution by nitrogen hypoxia would be

1 like?

2 A. Like nitrous oxide. You go to the dentist or, you know,  
3 like a -- I wouldn't go to a plastic surgeon, but like a  
4 dentist, you know, they put you to sleep, and then they add  
5 something to it and put you out.

6 Q. And why did you think that?

7 A. Well, I mean, you know, it's a gas. I used to work with gas  
8 at a welding place, and I delivered medical oxygen and stuff. I  
9 delivered to dentist offices and plastic surgery offices and  
10 hospitals and medical supply places.

11 Q. So before you were incarcerated, you worked in a position  
12 where you were exposed to nitrous?

13 A. Yes.

14 Q. And when you saw that the form involved nitrous, did you  
15 make an association?

16 A. Yes. That's what I did.

17 Q. When you read the election form in June of 2018, did you  
18 want to be executed by lethal injection?

19 A. Not really. I didn't want to be stabbed with needles and  
20 stuff.

21 Q. So when you read the form in 2018, did you have a preference  
22 of being executed by nitrogen hypoxia or lethal injection?

23 A. I didn't really want to be executed at all, but I -- you  
24 know, I didn't want to be stabbed with needles. I thought they  
25 was getting rid of the lethal injection.

1 Q. And did you sign the nitrogen hypoxia form that you received  
2 from Holman?

3 A. Yes, sir.

4 Q. Did you return the form after you signed it?

5 A. Yes. I stuck it in the door.

6 Q. In the door, are you referring to the bean hole?

7 A. The bean hole.

8 Q. And did you return the signed form the same day that you  
9 received it?

10 A. Yes.

11 Q. Did you have any reason to believe around that time that you  
12 could have returned the form days later or weeks later?

13 A. No.

14 Q. And why is that?

15 A. Because it was -- it's a State form. The State said that --  
16 the guy hollered out that we're going to be back to pick them  
17 up. He's going to pick them up or we're going to pick them up.  
18 I told you, I remember the guy yelling, saying that he's going  
19 to place something in the doors, and then put it back in the  
20 door, and they going to be by and pick it back up.

21 Q. Do you remember the name of that person who was yelling?

22 A. No.

23 Q. And you testified earlier that there are multiple correction  
24 officers who work on death row at Holman?

25 A. Yes, sir.

1 Q. And you testified earlier that you returned the signed form  
2 around June of 2018?

3 A. Yes, sir, to my recollection.

4 Q. Do you know how many years ago that was?

5 A. It was 2018 -- it's two -- that's like right around four  
6 years or so ago.

7 Q. And over the past four years, have correctional officers who  
8 work on death row changed?

9 A. Yes.

10 Q. Did you ever ask a correctional officer for a copy of your  
11 signed form?

12 A. Yes. When the guy yelled it out, he was going to be passing  
13 it out, I yelled back, I want it notarized and copied.

14 Q. Did you receive a copy of the form?

15 A. No, I did not.

16 Q. Did you receive a copy -- I'm sorry. Was your form  
17 notarized, to your knowledge?

18 A. No, sir.

19 Q. Do you know what happened to your form after it was  
20 collected?

21 A. No, I do not.

22 Q. So in the months and years following your submission of that  
23 form, have you ever seen a copy of your election form?

24 A. No, sir.

25 Q. Did any prison staff at Holman ever confirm with you orally

1 that they have a copy of your form?

2 A. No, sir.

3 Q. Now, did any prison staff at Holman ever confirm with you in  
4 writing that they have a copy of your form?

5 A. No, sir.

6 Q. Before the State of Alabama moved to set your execution date  
7 in April of 2022, this year, did anybody at Holman ever tell you  
8 that your form was lost?

9 A. No, sir.

10 MR. SPECTOR: No further questions at this time.

11 CROSS-EXAMINATION

12 BY MR. HOUTS:

13 Q. Good morning, Mr. Miller. We met last week. My name is  
14 James Houts. I work for the State of Alabama.

15 A. Yes, sir.

16 Q. So I want to make sure I understand you correctly. When the  
17 person passed the forms out, you said, I want mine copied and  
18 notarized.

19 A. (Witness nods head.)

20 Q. When you turned the form in, you said you stuck it in the  
21 bean hole?

22 A. Yes. Yes, sir. I'm sorry.

23 Q. Do you recall me asking you last week to describe the  
24 appearance of the officer who picked up your form?

25 A. Yes.

1 Q. Were you able to do that?

2 A. No, sir.

3 Q. Did you know if they were tall or short?

4 A. No, sir.

5 Q. Did you know if they were fat, skinny, or muscular?

6 A. No, sir.

7 Q. Could you describe a hair style for me?

8 A. Nope.

9 Q. Were you able to see what kind of DOC uniform they were  
10 wearing?

11 A. Nope.

12 Q. Could you tell me if they were African American, white,  
13 another person of color?

14 A. No, sir. I mean, I think it was a black guy, but, like I  
15 said, I had no recollection. I just heard them hollering out  
16 and they was going to pick it up. I stuck it in the bean hole.  
17 I laid back down because of my ankle.

18 Q. So how do you know your form didn't get taken by a tier  
19 runner?

20 A. Well, sir, because he said he's going to pick them up. He's  
21 going to pick them up. He yelled it out that I'm going to be  
22 by -- or we're going to be by, and I just assumed that's going  
23 to be correctional officers.

24 Q. But that leads to -- how are you certain that the person who  
25 picked your form up from the bean hole knew that you wanted a

1 copy and wanted it notarized?

2 A. Because I yelled it out.

3 Q. But you said you yelled it out when it was passed out.

4 A. Yeah.

5 Q. And you don't know whether the person that picked it up was  
6 the same person, do you?

7 A. No, sir.

8 Q. Did that not cause you to want to ask a question?

9 A. Well, no, sir. I mean, if -- like I said, I didn't see --  
10 remember like that. From some kind of thing that you showed me,  
11 that this Emberton said he passed them out. He passed out  
12 everything to death row. So, okay. Somebody in the  
13 correctional picked it up. So he didn't say that only I. He  
14 just says it's going to be picked up. He said I in there or we  
15 or something like that. Like I said, I don't really recall.

16 Why are inmates going to touch another inmate's stuff that's  
17 supposed to be the State's? Because they -- they -- I believe  
18 they claimed that they didn't have any hall runners out. I  
19 think that because that's in the paperwork. But, I mean, like I  
20 said, I don't know. I stuck it back in the door. I've done  
21 that before. I stuck my envelopes in the door and laid down.  
22 Wake up, they're gone.

23 Q. Do you remember an instance back in late last year, 2021,  
24 where there was an altercation and you were placed on single  
25 walk?



1 A. My -- you know, recollecting, a guy tried to stab me.

2 Q. But as a result of that, were you placed in single walk?

3 A. Yes.

4 Q. Were you asked to sign a living agreement?

5 A. Not at first.

6 When I was attacked, they had an investigation. A Captain  
7 McNeil and a Sergeant Kervin. They investigate. They got  
8 cameras. They asked me for my testimony. They'll separate us.  
9 They did this. They also inspect you for injuries, and you give  
10 your testimony. And they'll say, you know, we got cameras, and  
11 we're going to talk to everybody.

12 Well, they did the investigation. Captain McNeil came back  
13 to me and told me. And I got the documents in my cell. He  
14 said, you didn't do anything. Only thing we're going to do,  
15 going to stay the night. He said, what you're going to be given  
16 is a citation. It's going to show that you didn't -- we talked  
17 to the witnesses. The videotapes concur. We found another --  
18 we found another shank on the guy, and this is like the fourth  
19 or fifth time. The guy's name is Brandon Benjamin. And he  
20 said, you do not sign nothing. But when he comes up to get off  
21 single walk, you would be asked to come down there. Could you  
22 live with him. But you would not have to sign it. He would  
23 have to sign it. He said, they might ask you to sign it, but  
24 only if you say -- if you don't agree, he can't come out. But I  
25 was not going to be forced to sign nothing because I wasn't

1 aggressive. It showed -- the evidence showed I had no choice  
2 but to defend myself.

3 Q. Let me show you a document. I want to see if I can refresh  
4 your recollection. I'm referring to Defendants' Exhibit 4 that  
5 was turned over to my colleagues earlier this week. And I want  
6 you to look at an email that's signed by Ms. Huggins. I would  
7 like for you to read that and tell me if it refreshes your  
8 recollection about you being asked to sign a form.

9 A. Yes. They actually kept me on single walk and said that  
10 they was reinvestigating. A Katrina Brown, the assistant  
11 warden, said they was reinvestigating. I asked her what was  
12 they reinvestigating. And I said, it's already been  
13 investigated. Been signed off by Captain McNeil and Sergeant  
14 Kervin.

15 Q. So you know those three correctional officers' names; right?  
16 Ms. Brown, Kervin, and who was the other? McNeil?

17 A. Because I have documents with their name on it. And she  
18 came to my door and talked to me. And it ain't the first time  
19 she came. She came to my door prior to this, knocking, asked me  
20 was I all right, and I was okay. She got a real squeaky voice.  
21 Weird voice. The others never come by my door. And remember,  
22 that's from my old place. This is a new place.

23 Q. I want you to understand, Mr. Miller, I'm not asking you to  
24 get into the specifics of any discussion. But how did you get  
25 Ms. Huggins the information that she needed to reach out to DOC?

1 A. How did I do what?

2 Q. How did you get Ms. Huggins that information that she needed  
3 to reach out to the Department of Corrections?

4 A. I called her.

5 Q. So you spoke to her on the phone?

6 A. Yes.

7 Q. Let's talk about that just real quickly. The information  
8 that she passed along to DOC, when you told her that, it was  
9 okay with you for her to reveal that information to the  
10 Department of Corrections?

11 A. I'm not getting to where you're going.

12 Q. Well, do you agree that Ms. Huggins is telling DOC about  
13 things that she's learned from you in that email?

14 A. It was information that she could have actually asked for,  
15 and they would have gave it to her.

16 Q. But my question is, did she get the information from you?

17 A. Yes.

18 Q. And you didn't have any problem with her turning that  
19 information over to the Department of Corrections?

20 A. What information is that? It's that I was attacked by  
21 somebody?

22 Q. Well, if you'll look down, what about the part where it says  
23 that you think you're being asked to give up your right to sue  
24 the prison?

25 A. They asked it like this, and I thought because -- they had

1 like this. And I was not aggressor. I was told I never had to  
2 sign nothing. Now they was wanting me to sign. They thought I  
3 was going to sue them because I was being attacked.

4 Q. I understand. And I understand that's why you asked your  
5 lawyer, I'm afraid they're trying to make me give up. But you  
6 didn't mind her telling DOC about your concern in that regard,  
7 did you?

8 A. No. I mean, like I said, I was attacked by an individual.

9 Q. And I want you to look at the top there where -- again, it's  
10 Ms. Huggins to Mr. Stewart at DOC. Do you see where it says  
11 that you ultimately signed that agreement?

12 A. Yes, sir.

13 Q. Was that accurate?

14 A. Yes, sir.

15 Q. And it says that you now understand that it didn't contain a  
16 provision that said you couldn't sue the prison. Is that  
17 accurate?

18 A. Yes, sir.

19 Q. So when you contacted Ms. Huggins with your concerns, was  
20 she able to get them addressed for you?

21 A. After a long, long time.

22 Q. You were in court earlier when Defendants' Exhibit Number 3  
23 was played. I want to make sure I understand correctly. You  
24 told your brother that when you mentioned some other inmates  
25 signing a form about some gas stuff, your lawyers didn't know

1 what you were talking about. Is that accurate?

2 A. What -- what -- I think that might be client confidential --  
3 I had just learned some information, and I couldn't tell my  
4 brother that I found out somebody signed it before me and signed  
5 it after me, and I thought it was just one time. It was one  
6 time signing. And I'm finding out that other people was able to  
7 get -- and sign or turn it in whenever they felt like turning it  
8 in. And that's it.

9 I said -- you know, if you listen to that, it tells him, get  
10 them to call the lawyer. Get them to call the lawyers, and the  
11 lawyers might be able to discuss it. They're not going to go  
12 into detail, I can't go into detail, but that's what it was. I  
13 was learning information I didn't know at the time.

14 And they didn't -- they didn't know that, so -- like that,  
15 so that's just something I just said.

16 Q. Do you agree last week you did not know the identity of  
17 anyone else in your tier block from June 2018 that signed an  
18 election form? Do you agree?

19 A. No, sir.

20 Q. Since that time, have you learned of any names of anybody  
21 that was in your tier block that elected?

22 A. Well, you know, let me see. Who's all on my -- I got -- I  
23 guess not really. I know that Matthew Reeves didn't -- he  
24 didn't sign it. I didn't know it at the time. I don't go  
25 around asking these guys. They don't give the information free.

1 I got people coming to me and saying, oh, don't worry, Miller.  
2 You signed it like everybody else. And I'm, okay. And then  
3 like this. And then they go, oh, I didn't sign it. We don't --  
4 he just didn't -- I didn't look at everybody's signature. I  
5 didn't ask them. That's their business.

6 Q. So do you understand the Court has an important, weighty  
7 decision to make today?

8 A. Yes.

9 Q. And do you understand that your affidavit is one of the  
10 items that he's been asked to consider?

11 A. Yes.

12 Q. To the extent that your affidavit says that you turned your  
13 form in to the correctional officer who was collecting the other  
14 forms from the inmates --

15 A. Yes, sir.

16 Q. -- was that based on your personal knowledge or did you make  
17 an assumption?

18 A. Well, he said that he was going to pick them up or we was  
19 going to pick them up. So that means -- at the time -- like I  
20 said, no recollection. I stuck it in the door. I laid back  
21 down because I have a hurt ankle.

22 Q. All right. When you --

23 A. Nobody else was on the hall that I could see.

24 Q. When you were asked last week about describing the  
25 correctional officer, did you respond that it's been four years,

1 you can't remember that far back?

2 A. Yes, sir. I mean, I can't, like, remember individual's  
3 descriptions.

4 Q. So if the passage of four years keeps you from remembering  
5 anything, that's not expected to change moving forward, is it?  
6 You're not going to --

7 A. I don't know. It just depends on what it is.

8 Q. You're not going to recall their identity next month, are  
9 you?

10 A. I mean, it depends on who they are. Like if you talk to me,  
11 if I met you four years ago, I might look at you, like, oh, and  
12 you say, oh, remember, I was that assistant district attorney.  
13 Oh, okay. Like that. Okay. Dawn on me.

14 But to sit here -- if I seen this judge, if I go out and  
15 walk around, I might look at him, like, maybe I seen him  
16 somewhere. Okay.

17 I got inmates in there. Because we no longer have TVs in  
18 our cell. I never even seen them before. There's guys there  
19 ain't never seen -- said, Miller, I thought you had done -- I  
20 thought -- they thought they let you go. I said, no. I said, I  
21 just been in a cell.

22 Q. If we were to go look for that person, you couldn't --  
23 again, you can't tell me whether they're tall or short?

24 A. No.

25 Q. You can't tell me what color hair that they had?

1 A. Who is this person?

2 Q. The person that took your form you say.

3 A. Yeah.

4 Q. You can't give me any description at all.

5 MR. SPECTOR: Objection. Asked and answered.

6 THE COURT: Overruled.

7 A. No, sir, I couldn't.

8 Q. I appreciate your time.

9 MR. HOUTS: Do y'all object to moving 4 in since it was  
10 referred to?

11 MR. SPECTOR: I don't think so.

12 THE COURT: No objection?

13 MR. SPECTOR: No objection.

14 MR. HOUTS: May I move 4 in, Your Honor?

15 THE COURT: What's the number?

16 MR. HOUTS: Defendants' Exhibit 4.

17 THE COURT: Any objection?

18 MS. KLEBANER: No.

19 MR. SPECTOR: No.

20 THE COURT: Counsel, any follow-up questions for  
21 Mr. Miller?

22 MR. SPECTOR: Yes, Your Honor.

23 REDIRECT EXAMINATION

24 BY MR. SPECTOR:

25 Q. So, Mr. Miller, counsel showed you an email involving Kelly



1 Huggins, and I want to show you part of that email. It's the  
2 one right here. Can you read the first two sentences?

3 A. "Would it be possible for you to email me the living  
4 agreement? Mr. Miller does not have a copy of the agreement  
5 that he has been asked to sign."

6 Is that --

7 Q. Yes.

8 A. Okay.

9 Q. Thank you. So you did not have -- at some point in time,  
10 you did not have a copy of the living agreement that you had  
11 been asked to sign?

12 A. Yes.

13 Q. In 2018, June, when you were given the nitrogen hypoxia  
14 form, did you have an opportunity to read that form before you  
15 signed it?

16 A. Yes, sir.

17 MR. SPECTOR: No further questions.

18 MR. HOUTS: One question.

19 THE COURT: Okay.

20 MR. HOUTS: Can I ask it from here?

21 THE COURT: You may.

22 RE-CROSS-EXAMINATION

23 BY MR. HOUTS:

24 Q. In response to what you just looked at, was Ms. Huggins able  
25 to get you a copy of that agreement to look at?

1 A. After quite a long time. I think another -- another month  
2 or two, I believe it was. My recollection, it was another month  
3 or two.

4 Q. She worked it out for you?

5 A. They basically had to.

6 Q. Okay. Thank you.

7 MR. SPECTOR: Thank you.

8 THE COURT: I've got a few.

9 Mr. Miller, did you see the person who actually picked  
10 up your form when you put it in the bean hole?

11 PLAINTIFF MILLER: No, sir.

12 THE COURT: Never saw that person?

13 PLAINTIFF MILLER: No, sir.

14 THE COURT: You said earlier that you wanted the form  
15 notarized and copied?

16 PLAINTIFF MILLER: Yes, sir.

17 THE COURT: Why did you want it notarized?

18 PLAINTIFF MILLER: So I can have a copy, and then I  
19 can, you know, send what they wanted me to sign to the lawyer --  
20 you know, to the lawyers, but I can have my copy.

21 THE COURT: Had you ever --

22 PLAINTIFF MILLER: And the State would have to have --  
23 the State would have to prove that they had a certification.

24 THE COURT: Had you ever asked for any other forms to  
25 be notarized?

1 PLAINTIFF MILLER: Yes.

2 THE COURT: Like what?

3 PLAINTIFF MILLER: A DNA thing. I asked for it to be  
4 notarized and signed. It was not done. And I can prove that  
5 other people had it -- where they had it signed but not  
6 notarized.

7 THE COURT: And I don't want to know what you and your  
8 attorneys may have discussed, but did you ever tell anyone that  
9 you wanted your execution to be by nitrogen hypoxia or the gas?  
10 Did you ever tell anybody that?

11 PLAINTIFF MILLER: I told my brother that I believed I  
12 preferred it to being stabbed with needles and that I believe  
13 it's like nitrous oxide.

14 THE COURT: Other than telling your brother about that,  
15 have you told anybody else?

16 PLAINTIFF MILLER: No, sir.

17 THE COURT: After you signed the form, did you tell  
18 anybody that you had made the decision to die by the gas or  
19 nitrogen?

20 PLAINTIFF MILLER: No, sir.

21 THE COURT: So the first person you ever told, aside  
22 from what you may have had -- talked with the lawyers, was your  
23 brother during that phone call?

24 PLAINTIFF MILLER: Would be election -- to my  
25 recollection.

1 THE COURT: That's all I have, counsel. Does anybody  
2 have any follow-up questions on that?

3 MR. SPECTOR: No, Your Honor.

4 THE COURT: Mr. Houts?

5 MR. HOUTS: No, Your Honor.

6 THE COURT: He can be excused.

7 MS. KLEBANER: Your Honor, so having concluded  
8 Mr. Miller's testimony, it makes sense at this point to move  
9 into the oral argument phase.

10 THE COURT: Why don't we take a break for lunch? That  
11 way you can collect your thoughts, defense counsel can collect  
12 theirs, you can make your arguments, and then I have some  
13 questions as well. So it is --

14 Well, Mr. Houts, are you going to offer any testimony  
15 or evidence?

16 MR. HOUTS: Y'all will not stipulate to the other  
17 clients that is now on the record by counsel?

18 MS. KLEBANER: So Mr. Houts just asked me if we would  
19 stipulate to the fact that Sidley has represented other inmates  
20 on Holman's death row.

21 If you have specific exhibits that you want to talk  
22 about, I'm happy to look at them. In general, we don't think  
23 it's necessary to sort of authenticate a public pleading that  
24 has the signature block of a Sidley attorney on it. We think  
25 that the document speaks for itself, and of course, we think

1 it's not probative to anything at issue here today.

2 But what in particular would you --

3 MR. HOUTS: I'll say if the Court will accept -- if  
4 they'll move 5 through 18, and then allow us to introduce what  
5 you pointed out earlier, our copy of the election forms, the AGO  
6 copy, then that would allow me to make my argument as far as --

7 Unlike the federal defenders and others who had  
8 multiple clients that were electing, to our knowledge, we know  
9 Matthew Reeves did not elect because he came into court and  
10 said, I didn't elect. We know Willie Smith did not elect  
11 because he came into court and said, I didn't elect. And then  
12 none of the others have elected either.

13 And we do think that that is probative because, you  
14 know, if a federal defender came to us and said, you know, I  
15 elected and here's all the information -- and I believe my  
16 friend is here. If he told me as a professional lawyer under  
17 the rules of professional conduct, I know because I was there in  
18 the courtyard and I did this, I would take him seriously because  
19 he can't lie to me. So that's all the reason we're asking to  
20 put this in, is so that the Court can understand that  
21 defendants' decision making, especially Defendant Marshall, was  
22 complex and was multidimensional governmental decision making.

23 THE COURT: Let's back up. I want to make sure I  
24 understand what we're talking about.

25 We were talking -- we started off talking about the

1 Sidley Austin firm and some sort of stipulation about them  
2 representing other death row inmates. So you have exhibits that  
3 would confirm, presumably, that they represented other death row  
4 inmates at that time?

5 MR. HOUTS: James Barber, Your Honor, Willie Smith,  
6 Matthew Reeves, Charlie Washington.

7 MS. KLEBANER: Just to be clear -- sorry -- what we're  
8 talking about, these are pleadings that were filed -- public  
9 pleadings that were filed in other court cases.

10 THE COURT: That would prove that fact, that they --  
11 that firm represented other death row inmates at that time.

12 MR. HOUTS: June 2018. Yes, Your Honor.

13 THE COURT: And is that a disputed issue, Ms. Klebaner?

14 MS. KLEBANER: No. So without having -- I'm not  
15 looking individually at the documents that he's talking about,  
16 but if -- we would agree that if a Sidley Austin attorney signed  
17 a pleading on behalf of someone, then that was because they were  
18 representing them.

19 THE COURT: So do we have a stipulation that your law  
20 firm represented at least those three death row inmates at that  
21 time?

22 MR. HOUTS: I'm sorry. May I use the Elmo? I want to  
23 respond to her saying there -- I would like to show an email  
24 from counsel that says they will not stipulate to these records;  
25 that Sidley will not admit that they have represented any other

1 client. I'm tired of asking the easy way and being accused of  
2 making it harder than it has to be.

3 THE COURT: Well, Ms. Klebaner, let me just put it  
4 right at you. Are you agreeing to that stipulation, or are you  
5 contesting it and, therefore, requiring Mr. Houts to put on  
6 evidence of it?

7 MS. KLEBANER: So I just want to be clear what we're  
8 talking about. His email asked us to confirm a specific list of  
9 six or seven people that he hasn't mentioned here today. You  
10 know, obviously, we don't want to make anything harder than it  
11 has to be. We'll stipulate to whoever we represented publicly.  
12 But I just -- I would want to read the sentence that he's asking  
13 us to agree to so that we understand what it is exactly he wants  
14 us to --

15 THE COURT: Well, you're going to have a lunch break to  
16 talk it out further to see if you can reach an agreement on  
17 that. There is a stipulation, or is there not, that the Sidley  
18 Austin law firm did represent Mr. Miller during the election  
19 period in June of 2018; correct?

20 MS. KLEBANER: Yes.

21 THE COURT: That is not disputed?

22 MS. KLEBANER: No, it is not.

23 THE COURT: Okay. What other documents, Mr. Houts, do  
24 we have an issue with?

25 MR. HOUTS: Simply the AGO copy file of the election

1 forms. And there are, I believe, three emails we provided you  
2 that showed that those forms were being transmitted to us in  
3 June. And if they'll stipulate to those, then we won't need to  
4 call a witness.

5 THE COURT: That who submitted election forms to --

6 MR. HOUTS: When Holman would receive the election  
7 forms, Ms. Parker that you heard about during -- would email  
8 them to Mr. Stewart. Mr. Stewart would forward them to the  
9 Capital Litigation Division of the office. There are some  
10 portions of the emails that are redacted, talking about specific  
11 cases; but other than that, the attachments that were sent, each  
12 inmate's forms that were stamped in were sent to DOC and then to  
13 the Capital Litigation Division. We kept our own file. We have  
14 turned over the forms, not necessarily the interoffice legal  
15 stuff.

16 THE COURT: So what are we trying to prove?

17 MR. HOUTS: Again, that no Sidley Austin client that  
18 was represented in the election period elected. If Mr. Miller  
19 did what he says he did, he would be the only Sidley Austin  
20 client that has elected.

21 MS. KLEBANER: Just to speak to that point, Your Honor,  
22 and stepping back a little bit from the specific documents he's  
23 talking about. Because without knowing the Bates numbers, it's  
24 very difficult to respond to, you know, sort of references to  
25 three or four emails.



1           As the Court and defendants are well aware, each  
2 client's decisions in a legal case are made based on very  
3 individual and personal and specific factors to them,  
4 particularly so with the issue that we're discussing here today  
5 of whether to actively participate in the State's attempt to  
6 execute you by electing the form of your own execution.

7           It's completely inappropriate to say that this Court  
8 can infer anything about Mr. Miller's actions based on the  
9 actions of other clients of Sidley Austin. This is not an  
10 argument that the Attorney General would ever make in a  
11 commercial litigation. It's inappropriate to say that we can  
12 know anything about any one party because they have the same  
13 lawyer as a different person in a different situation.

14           MR. HOUTS: You mentioned Matthew Reeves. You  
15 mentioned -- or I think I mentioned Willie Smith. But as I  
16 said, we already know that they came into a federal courthouse  
17 and filed a complaint that said, I would have elected. I would  
18 have elected. I just didn't know. Absolutely had no chance to  
19 elect. ADA violation. Represented by Sidley Austin.

20           They're accusing the Alabama Department of Corrections  
21 and the Attorney General of violating Mr. Miller's  
22 constitutional rights when they were engaged to be his counsel,  
23 and we already know two other of their clients have told this  
24 Court, I did not elect during that time period. And if you  
25 believe those clients, could be because of Sidley Austin, Your

1 Honor.

2 THE COURT: Let me ask you this, Mr. Houts. What are  
3 the circumstances on the Taylor election? I'm a little confused  
4 as to what exactly happened.

5 MR. HOUTS: I'm going by the documents I have provided,  
6 Your Honor. One, their lawyers -- or his lawyers knew, there  
7 has been a mistake. Mr. Taylor elected. We don't have an  
8 election form.

9 THE COURT: Let's just stop right there. He received  
10 the form on death row from Captain Emberton?

11 MR. HOUTS: He received it from his lawyers.

12 THE COURT: From his lawyers.

13 MR. HOUTS: He received multiple copies of a blank  
14 form. And the reason our interrogatories and admissions were  
15 answered the way they were in such a short time is we're not  
16 agreeing that Mr. Taylor actually turned it in to the warden in  
17 June of 2018. We've never actually been able to fully  
18 investigate that.

19 What we do know is that he received multiple copies of  
20 the form, and it looks, based on the records, that his attorneys  
21 got multiple copies of the form back. It is very possible  
22 Mr. Taylor thought his lawyers were going to turn his form in  
23 for him and mailed it back to them. They thought he was  
24 complying with the statute by turning it in to the warden.

25 Our point was we were not going to rely on that

1 technicality where there was so much corroborating evidence that  
2 he elected in June of 2018. It would make no sense to go, well,  
3 if you sent the form back to your lawyer thinking they were  
4 going to do it for you, tough. Again, that goes back to the  
5 equal protection claim of the decision the Attorney General made  
6 had a very rational basis.

7 But that's the difference, Your Honor, is his counsel  
8 knew he made the election because they had notes, records,  
9 Federal Express receipts, fax confirmation receipts. Completely  
10 different situation than what's presented by Mr. Miller.

11 THE COURT: So Mr. Taylor's election is not similar to  
12 Mr. Miller in that Mr. Taylor was on death row, received an  
13 envelope and a piece of paper from Captain Emberton, filled it  
14 out, put it back in the bean hole. It was picked up by  
15 somebody, presumably Captain Emberton, and then it was brought  
16 to the warden's office where it was processed by Ms. Parker,  
17 then scanned, and then e-mailed up here to Montgomery. His  
18 election was not that process.

19 MR. HOUTS: And that's my point, Your Honor. His  
20 election -- he did not show up with the other inmates and the  
21 documents being scanned, but we know that he mailed copies of a  
22 completed form to his lawyers. Now, whether he accidentally  
23 thought they were going to file it and sent all the forms, we  
24 don't know.

25 THE COURT: So the form that he received would have

1 come from his attorneys?

2 MR. HOUTS: They faxed it to him. Yes, Your Honor.

3 THE COURT: And I think I saw the form in here. It's  
4 different than the form that I've seen that I think was put  
5 together by the federal defenders in substance.

6 MS. KLEBANER: Your Honor, if I may. This is just  
7 not -- this goes to the heart of the issue we've been having in  
8 this case of defendants substituting, instead of statutory  
9 language, their own sort of ad hoc process as they go in terms  
10 of who they find credible; what behind-the-scenes action they  
11 think sufficiently corroborates what happened.

12 What Mr. Houts just referred to as a technicality in  
13 Mr. Taylor's process, the active turning the form in to the  
14 warden, that's the whole statute. That's what entitles someone  
15 to elect nitrogen hypoxia in the State of Alabama. It's not a  
16 technicality. It's the entire basis for how this decision is  
17 supposed to be made, and not in these sort of backroom  
18 negotiations with the lawyers for the inmates on death row about  
19 who can prove what via privileged communications.

20 THE COURT: So, Mr. Houts, let's go back to  
21 Mr. Taylor's circumstance. Are the facts that the election form  
22 that he received, presumably read and signed, was that provided  
23 by his legal counsel?

24 MR. HOUTS: It was, Your Honor. I found it.

25 THE COURT: And then he mailed or sent back to his

1 legal counsel the executed forms in lieu of giving that executed  
2 form to the warden or some other correctional officer at Holman?

3 MR. HOUTS: That is -- please understand, Judge, I take  
4 my duty of candor very seriously. I have not been able to, you  
5 know, drill down on that, and I don't even know if Mr. Taylor  
6 would talk to me.

7 But all I can tell you is it appears to us that  
8 multiple forms ended back up with his lawyers from the materials  
9 that we got. That suggests to me that there is a circumstance  
10 where he just mailed it back to his lawyers, thinking they were  
11 going to take care of it. It doesn't mean he had to have given  
12 it to the warden.

13 I'm not saying he didn't, but we can't admit or deny.  
14 We're not finders of fact when it's an official capacity  
15 defendant who wasn't even in office at the time that this  
16 occurred. It's not our job to go through and read depositions  
17 and resolve factual conflicts. I'm just telling you, that is a  
18 possibility.

19 THE COURT: Well, when the State withdrew the motion or  
20 petition with respect to Mr. Taylor, was it based upon what his  
21 lawyers had provided, or was it based upon the State finding an  
22 election form that Mr. Taylor had, in fact, given the warden or  
23 correctional officer?

24 MR. HOUTS: It was absolutely based on the fact that  
25 the corroborating circumstances indicated that he elected. And

1 rather than litigate that, what you just said, Your Honor, the  
2 Attorney General made a decision, which he is required to do by  
3 statute, and that was to withdraw the petition.

4 THE COURT: So did the State simply honor his intent to  
5 elect rather than honoring an actual election in the context of  
6 giving or providing a form to the warden or to the State?

7 MR. HOUTS: I don't know how to answer that. I mean, I  
8 wasn't there in that decision making process. I can  
9 certainly -- I think that it was a decision not to stand on that  
10 technicality. I mean, I don't know anyone who would say, tough.  
11 You intended to elect, but the warden didn't get it.

12 I feel very confident saying that if Mr. Miller showed  
13 up with his counsel saying, here's what we sent him, here are  
14 the notes of our conversations, here's where we FedEx'd it,  
15 here's where we got it back, that he would get the same exact  
16 result that Mr. Taylor got. But instead Your Honor has been  
17 kind of exposed to what we have been exposed to, which is  
18 absolutely stonewall. He can't remember anything, can't  
19 describe anybody, can't help you go find somebody that can  
20 resolve this for you. Just got to take his word for it. And by  
21 the way, he found out all this information from other inmates.

22 Because we haven't gotten there yet. Captain  
23 Emberton -- looked at the deposition. He doesn't know -- he's  
24 told other people, I don't know that it was him. And if you  
25 look at the complaint, everything about him goes back to Reeves'

1 allegations, not Mr. -- Mr. Miller doesn't know if we should  
2 even spend time talking about Captain Emberton, because he  
3 doesn't know if it was Captain Emberton at all.

4 MS. KLEBANER: Your Honor.

5 THE COURT: Hold up.

6 Well, Captain Emberton is not here to testify today.  
7 What would be the answer if he was asked, did you pick up a  
8 completed form from Mr. Miller?

9 MR. HOUTS: I believe his most recent answer would have  
10 been, I can't -- I don't know if I did or didn't. You know, I  
11 have good reason to believe that his most recent answer -- you  
12 know, because, again, it's like Mr. Miller said. It's four  
13 years ago. You know, if he had called Ms. Huggins in July of  
14 2018 to ask her to help, this would have been a much different  
15 situation.

16 I feel the same way as Mr. Miller. I agree with him.  
17 Asking me to go back four years and find out what happened is  
18 very unfair to the defendants.

19 THE COURT: Okay.

20 MS. KLEBANER: If I may just respond to some of that.

21 A minute ago Mr. Houts said he doesn't know anybody who  
22 would hold someone to a technicality when it's so clear what  
23 their intent was to elect. I know three people who would do  
24 that, and they're the defendants in this litigation.

25 We have submitted affidavits, deposition testimony,

1 live testimony today by Mr. Miller, as well as extensive  
2 corroborating evidence as to the chaotic mess, frankly, that was  
3 the Holman facility's nitrogen hypoxia election distribution,  
4 collection, and retention process. And this issue of whether --

5 THE COURT: Well, what was chaotic about the process  
6 employed by Emberton collecting and then giving them to  
7 Ms. Parker, and then her scanning them and sending them up to  
8 Montgomery?

9 MS. KLEBANER: That is, as far as we can understand,  
10 one part of it. There also, as Ms. Parker testified, were  
11 people who were sending in signed forms through the mail. She  
12 was receiving signed forms in the mail.

13 Ms. Stewart also testified that there were people --

14 THE COURT: But that's different, though. Let's just  
15 talk about the process on death row.

16 MS. KLEBANER: Sure.

17 THE COURT: What was chaotic about that process?

18 MS. KLEBANER: It took place in the course of one day.  
19 So people were supposed to have, under the statute, a minimum,  
20 obviously, of 30 days. It became effective on June 1st. They  
21 had to make their elections by June 30th. As Captain Emberton  
22 testified to extensively, he was asked to hand out the forms in  
23 the morning and get them back at the end of the day. And  
24 Alan -- Mr. Miller's testimony today confirmed that. Someone  
25 had told him, I'm going to come back and collect these at the



1 end of the day today.

2           So to say that Mr. Miller should be prejudiced because  
3 there isn't some sort of real-time evidence of his communication  
4 with his attorney over the course of a couple of hours, given  
5 the reality of Mr. Miller's living conditions -- he lives on 24  
6 hour lockdown. He can't, if he gets a form in the morning, run  
7 and create a paper record that same day. That's just not an  
8 option for people on death row at Holman.

9           THE COURT: Are we aware of any death row inmates who  
10 completed the form on the day that Captain Emberton handed them  
11 out and collected them where those forms have been lost?

12           MS. KLEBANER: We don't know what the exact conditions  
13 were with Mr. Stallworth -- so that was Plaintiff's Exhibit 8 --  
14 where a guard refused to collect his election form and give it  
15 to the warden's office. You know, we just received that in  
16 discovery on Friday night. We don't know if that was sort of in  
17 the same group of people who got their forms from Captain  
18 Emberton.

19           THE COURT: Mr. Houts, do you know?

20           MR. HOUTS: This goes back to the problem of time, Your  
21 Honor. Captain Emberton can't tell you what date it was. What  
22 we do know is that the federal defenders, I believe, began on  
23 the 26th -- I believe you'll see a number -- yes. All right.  
24 So like 25, 26 forms on the 26th.

25           But this idea that -- this is the other problem we have

1 of it all happened on a day. Well, you will see forms from the  
2 26th, the 27th, the 28th, and the 29th. Mr. Stallworth's form  
3 is signed on the 28th. And if you'll look at their exhibit, the  
4 gentleman calls on the 29th. We don't know what time he called.  
5 His letter doesn't actually arrive until July 9th. But by that  
6 time, Ms. Parker had stamped it in on the 29th. So to assume  
7 that it wasn't being collected and brought up ordinarily, and  
8 Mr. Stallworth was just being extra cautious by contacting his  
9 lawyer because it mattered to Mr. Stallworth to make sure that  
10 it got in on time -- but this idea that you're going to see  
11 federal defender inmates and then everybody else was all on one  
12 day is belied by the election forms, Your Honor. It was  
13 occurring on the 26th, 7th, 8th, and 9th.

14 THE COURT: Well, and I'm just -- again, I'm trying to  
15 come back down to -- the statute gives no direction necessarily  
16 as to how these forms are to come in. And so you have forms  
17 that are given to Captain Emberton as he's collecting them,  
18 walking down death row. You have forms that are probably  
19 e-mailed in by lawyers. You have forms that are probably mailed  
20 in. You may even have had forms that were personally delivered  
21 by lawyers. So you have all these different means and  
22 mechanisms.

23 But we have Mr. Miller, who says the way he executed  
24 and returned the form was from his cell, on his own, on the same  
25 day that presumably Captain Emberton made the announcement and

1 handed the forms out. And there is an allegation that the  
2 process was dysfunctional.

3           So to kind of come back to what I had asked earlier,  
4 you know, what was dysfunctional about the process that involved  
5 Captain Emberton and the means in which he collected them and  
6 passed them on to Ms. Parker and then they went up to  
7 Montgomery, if there was any dysfunction with that at all?

8           MR. HOUTS: I don't believe that there was, Your Honor.  
9 I mean, again, what you see here is inmates -- one inmate filed  
10 a form and then asked to rescind the form within the time period  
11 and was allowed to rescind the form. So this idea that  
12 Mr. Miller --

13           And, again, I want to stress that he says in his  
14 affidavit it's the person that was collecting the forms, and yet  
15 he doesn't know when anyone else on his tier block elected. He  
16 can't tell us -- I mean, we can't verify anything he says. He  
17 can't tell the Court anything the Court can verify. So I'm  
18 having a very hard time accepting this description of a chaotic  
19 process when plaintiff can't tell me anything about that time  
20 period.

21           MS. KLEBANER: If I may. Your question was in regards  
22 to what was chaotic about the Emberton form distribution  
23 process. So just to answer your question, again, we can't -- I  
24 think it just defies reality to say that that process taking  
25 place over the course of several hours of one business day would

1 possibly be constitutionally sufficient.

2           Also Emberton testified and we read into the record  
3 that he did not give -- he did not know if everyone got a form  
4 on Holman death row. He testified to that. He also said that  
5 some people were sleeping when he came by to drop off forms. So  
6 obviously, that's another significant area of deficiency in  
7 terms of ensuring the process.

8           THE COURT: Mr. Houts, I assume your end, with respect  
9 to Mr. Miller, would have gone back and searched the logs and  
10 records of who had made -- may have paid Mr. Miller a visit  
11 during the month of June 2018 and whether those logs would show  
12 that anybody from Sidley Austin came and paid him a visit?

13           MR. HOUTS: Well, Your Honor, it would also include  
14 phone calls. And I will say, more so because of the time  
15 crunch, there are some interesting phone calls from that time  
16 period that he makes that we would intend to use if it goes any  
17 further. But, again, I was worried about not getting yelled at  
18 by the Court for not getting enough stuff turned over. I'll  
19 just be honest with you.

20           THE COURT: Are you going to present any more evidence  
21 today?

22           MR. HOUTS: If the standard is substantial likelihood  
23 of success on the merits, I don't know that I will, Your Honor.  
24 Because, I mean, absolutely no disrespect to the Court, but  
25 after Mr. Miller testified, one, I don't see how there is a

1 substantial likelihood of success on the merits. If he's not  
2 going to remember anything that's going to give anybody any help  
3 to track down what he says happened to him, this doesn't get  
4 better with time.

5 In fact, it goes back to what the defendants have  
6 already asked Your Honor to do, which is to rule that everything  
7 she's talking about that was wrong with the process in her  
8 opinion goes back to one time: June 2018. And Matthew Reeves  
9 and Willie Smith both filed their lawsuits within two years of  
10 June 2018, putting everybody else in the legal community on  
11 notice, hey, there might be a problem here. And Mr. Miller sat  
12 on his rights and now says, well, I can't remember what happened  
13 four years ago. I think you should. And that's highly unfair  
14 to the defendants.

15 And we're asking for a statute of limitations  
16 dismissal, or at least for the Court to say that the statute of  
17 limitations issue is so compelling that it would warrant against  
18 injunctive relief in this case.

19 THE COURT: What is the government's position -- and  
20 this is just hypothetical. Tier runners are other inmates;  
21 right? And let's say the tier runner for that day did not like  
22 Mr. Miller. They had a beef in the yard or whatever. And the  
23 tier runner saw this form in the bean hole and thought to  
24 himself, I'm going to get you. And he takes that form, doesn't  
25 give it to the warden, doesn't give it to Emberton, doesn't give

1 it to anybody else, and takes it and throws it in the trash can.  
2 Where are we?

3 MR. HOUTS: It's not a 1983, Your Honor. That's not  
4 action under color of state law.

5 THE COURT: Okay. Ms. Klebaner?

6 MS. KLEBANER: In your hypothetical, the action under  
7 color of state law would be the decision to effectuate a process  
8 of this magnitude with so little forethought and oversight. So  
9 simply handing a form into the bars of someone's cell and  
10 walking away and saying, you know, whichever one of these are  
11 still here in the bars of these cells when we get back in five  
12 hours, those are the guys who will have their elections honored.  
13 That's constitutionally deficient.

14 THE COURT: Well, what about had your client, after he  
15 signed the form and laid back down in the bed, he just sat there  
16 at the end of the bed until Captain Emberton came back by and  
17 then physically handed the form to Captain Emberton? Would that  
18 be sufficient?

19 MS. KLEBANER: Sorry. What was the question again?

20 THE COURT: Instead of him filling out the form,  
21 putting it in the bean hole, and then laying down, perhaps  
22 falling asleep so that he doesn't know who picked it up, instead  
23 of doing that he stayed awake, sat on the end of the bed, and  
24 then when Captain Emberton came by, he gave it to him through  
25 the bean hole right there and then. Would we have a

1 constitutional problem then?

2 MS. KLEBANER: Yes. My answer would be the same. That  
3 would still be seriously deficient in terms of procedural due  
4 process. Because as we heard from Captain Emberton's testimony,  
5 he was instructed by the warden to not make any sort of list of  
6 who received the forms; who returned the forms. So to just say,  
7 here's a box of forms, pass them out, see how many you can sort  
8 of gather at the end of the day, but don't keep any records  
9 about who got a form and who turned the form back in, that  
10 process is insufficient.

11 THE COURT: What makes the process deficient from the  
12 standpoint of the need to create a list? We keep talking about  
13 lists and logs. From what I've read and you've showed me today,  
14 the forms were collected, they were given to Ms. Parker, she  
15 scanned them, she put the originals in each of the inmate's  
16 files, and then she sent a copy up to Montgomery. What's the  
17 issue with the log or the list to begin with?

18 MS. KLEBANER: Sure. So the importance of some sort of  
19 overarching recordkeeping of these forms comes into play when  
20 you consider that forms were coming in from multiple different  
21 sources at multiple different times of the day. So some were  
22 coming in from U.S. Mail, some were coming in from FedEx, some  
23 were being faxed by lawyers, some were being e-mailed by  
24 lawyers, some were being handed in person. Some, as we learned  
25 in the testimony of Warden Stewart, were being slipped into drop

1 boxes in the rec room. So without some sort of overarching  
2 organization for all these forms that were coming in in vastly  
3 different ways, this process seemed that it was just --

4 THE COURT: All right. Well, let's assume they were  
5 keeping a list and putting -- what should they have done with  
6 it? I mean, there would be a list of what forms came in. How  
7 would that change the outcome?

8 MS. KLEBANER: Well, presumably they would have logged  
9 from the beginning of the process, here's everyone on death row  
10 who received a form. Here's when they received it. Here's an  
11 assurance that it was put into their hand and they weren't  
12 sleeping and it could have been taken out of the bars of their  
13 cell. And here's when we received that form back, either signed  
14 or unsigned, on this day and at this time, and we got it from  
15 their hands and not from a slot in their cell or a drop box in  
16 the rec room or any other sort of variety of methods you could  
17 try to use to get something near the warden.

18 THE COURT: So are you saying that they should have put  
19 this list and then somebody should have gone back on death row  
20 and then talked with each and every inmate on death row and  
21 said, hey, I have you on this list as making the election, or I  
22 have you -- you're not on the list for making the election, and  
23 then confirming it with that individual at that point?

24 MS. KLEBANER: Yes.

25 THE COURT: And should they have done that before the



1 election period closed?

2 MS. KLEBANER: They should have certainly done it  
3 before the election period closed. They should have done it  
4 especially after the election period closed to make sure they  
5 weren't missing anything. And from everything we've heard  
6 today, it sounds like they did neither.

7 THE COURT: Okay. So doesn't that get us into a  
8 statute of limitations problem?

9 MS. KLEBANER: Not at all, Your Honor, because the  
10 issue here is that Mr. Miller didn't know what was going on  
11 behind the scenes. He couldn't know what track they were  
12 keeping or what sort of logs they had internally at the warden's  
13 office. All he knew was that a representative of the prison  
14 came to him and said, you got to sign this form by the end of  
15 the day. He did so. And then four years later, here we are.  
16 So he learned of the deprivation of his rights once the Alabama  
17 Supreme Court proceedings had been initiated by Attorney General  
18 Marshall.

19 THE COURT: What exactly is the deprivation here? Is  
20 it the loss of the form back in June of 2018? Is it the State's  
21 decision to move for an execution in April of this year by  
22 lethal injection? What exactly is the deprivation?

23 MS. KLEBANER: So the deprivation is in Mr. Miller's  
24 liberty interest created by the Alabama state statute in being  
25 able to elect execution by nitrogen hypoxia. That's his liberty

1 interest that was deprived.

2 At the point at which he became aware of that  
3 deprivation was once he realized that the Supreme Court  
4 proceeding was not the result of some sort of clerical error,  
5 once he had pushed back and said, hey, I think you guys have  
6 made a mistake here, I elected -- I was one of the nitrogen  
7 hypoxia guys, and once it became clear that the Attorney General  
8 was pursuing his execution by lethal injection despite that  
9 fact, that's when he realized the deprivation had occurred.

10 THE COURT: So did the deprivation first occur no later  
11 than the close of the 30-day period in 2018? I understand he  
12 may not have known about it, but did the deprivation occur then?

13 MS. KLEBANER: Well, it depends on which sort of claim  
14 you're talking about. If you're talking about -- you know, it's  
15 hard because we lack so much of this information about sort of  
16 like when his form was lost or what the exact factual  
17 circumstances were surrounding how his form disappeared from  
18 defendants' possession. So it's a little hard to say when that  
19 moment happened. We don't know. It could have been lost in the  
20 years after that it was turned in as well.

21 THE COURT: Mr. Houts, do you have a position?

22 MR. HOUTS: Well, first, I have a position that  
23 Mr. Miller said that plaintiffs can't even put it in our hands  
24 to begin with. He can put it in a bean hole. And so I would  
25 disagree with my friend's assessment that assumes that we had

1 it.

2 He should have known with his comparator, Jerry Taylor,  
3 February 2019. And it's been two years since then. He should  
4 have known with the Willie Smith lawsuit that there were -- I  
5 mean, considering how many of those depositions you had to  
6 listen to today, which shows that this was going on and people  
7 were talking about it in 2019. In 2020.

8 THE COURT: What is it he should have known because of  
9 the Willie Smith litigation or the Matthew Reeves?

10 MR. HOUTS: Their procedural due process claim only  
11 works if they couldn't write a letter, like Ms. Huggins did to  
12 DOC, and say, look. My client was asleep when it was picked up.  
13 He heard what happened to Jarrod Taylor. Could you put his mind  
14 at rest and tell us that his election is with y'all? And they  
15 didn't. You don't get to wait until your execution date is set  
16 and then go, oh, yeah, I just remember, I elected nitrogen  
17 hypoxia.

18 If they knew all of these terrible, chaotic things were  
19 going on, and reading all the newspaper articles they're citing  
20 in their complaint, all they had to do was pick up the phone or,  
21 better yet, use an email and say, hey, can you guys just put our  
22 minds at rest? Tell us that we elected.

23 And again, Mr. Miller, who was already upset that he  
24 didn't get his copy and his notary that he didn't ask for  
25 because he wasn't there when the guy walked by the bean hole, he

1 had reason to say, why didn't I get my copy?

2 THE COURT: If he signs the form, turns it in, and he  
3 thinks he has properly elected execution or death by nitrogen  
4 hypoxia, why would he have any concern whatsoever about what's  
5 going on with Matthew Reeves or Willie Smith, who are both  
6 trying to get the same thing that he thinks in his heart of  
7 hearts and his mind of minds that he has already got?

8 MR. HOUTS: According to Mr. Miller, because when it  
9 was being passed out, he said he wanted a copy and he wanted it  
10 notarized, and according to his lawsuit, he never got either.  
11 So right there, a reasonable person would go, well, dadgummit,  
12 why didn't they do that? I need to find out. I need to call  
13 Ms. Huggins and get her on the case as to why I'm not getting  
14 what I need to legally protect myself. And Mr. Miller did not  
15 do that.

16 THE COURT: Okay.

17 MS. KLEBANER: If I could respond to that.

18 THE COURT: It is almost 1:00. I'm hungry. I think  
19 you all are as well. Why don't we take about an hour break, and  
20 we'll come back at 2:00. Then we can continue our discussion,  
21 and you can -- and if you've got a presentation, you can make  
22 it, or argument. You as well, Mr. Houts. Okay?

23 We're in recess.

24 (Recess was taken from 12:52 p.m. until 2:01 p.m., after  
25 which proceedings continued, as follows:)

1 THE COURT: Okay. I've got a few more questions I want  
2 to ask, but --

3 THE COURTROOM DEPUTY: Your Honor, the defendant is  
4 not --

5 THE COURT: Oh, he's not? Okay. I'm sorry.

6 (Brief pause in the proceedings)

7 THE COURT: Ms. Klebaner, are you up or is it somebody  
8 else on your side on argument?

9 MS. KLEBANER: So I'm happy to proceed with  
10 Mr. Miller's oral arguments. I don't know if defendants have  
11 any more evidence they want to present.

12 THE COURT: Mr. Houts, any more evidence from your end?

13 MR. HOUTS: I think we worked it out, Your Honor. I  
14 would like to move Defendants' Exhibit 1, which is Mr. Miller's  
15 entire deposition from last week, in.

16 THE COURT: Any objection?

17 MS. KLEBANER: No objection to the deposition  
18 transcript.

19 MR. HOUTS: And I know that there is an objection, I  
20 believe it's just to relevance, but I would just move 5 through  
21 18. That's Defendants' 5 through 18.

22 MS. KLEBANER: I don't have 5 through 18. It's the  
23 pleadings? Okay.

24 MR. HOUTS: Do you need a copy?

25 MS. KLEBANER: No. I just wanted to check what it was.

1 It's the pleadings?

2 MR. HOUTS: Yes. And it's simply showing James Barber,  
3 Willie Smith, Matthew Reeves, Wayne Travis, Darrell Turner, Troy  
4 Washington, and David Wiggins were all death row inmates  
5 represented by attorneys employed by Sidley Austin both before  
6 and after the election period in June of 2018.

7 MS. KLEBANER: So we agree with that stipulation.  
8 However, for two of the individuals he just mentioned, it's  
9 probably relevant for the Court to know that they were not at  
10 Holman in 2018. So for what it's worth, Mr. Barber and  
11 Mr. Turner were at Donaldson, not Holman, during the election  
12 process. But again, we agree to a stipulation that Sidley  
13 represented those individuals, although we do not think it's  
14 relevant to this action.

15 THE COURT: Objection's overruled. Defendant's  
16 Exhibits 1 and 5 through 18 are admitted. And if I recall,  
17 Defendants' Exhibits 2 and 3 were the audios?

18 MS. KLEBANER: Yes.

19 MR. HOUTS: Yes, Your Honor.

20 THE COURT: What was Exhibit 4?

21 MR. HOUTS: That was the email between Ms. Huggins and  
22 Mr. Stewart. And -- well, no. It was Jody Stewart. Did I move  
23 that in already?

24 THE COURTROOM DEPUTY: I have it here. Has it been  
25 moved in? Has it been offered?

1 MR. HOUTS: If not, I'll go ahead --

2 THE COURT: If you didn't, go ahead and do it again.

3 MR. HOUTS: I would offer it at this time, Your Honor.

4 THE COURT: I would assume, since it's admitted, there  
5 was no -- was there an objection?

6 MS. KLEBANER: We don't object to it being admitted.  
7 We do think it's irrelevant.

8 THE COURT: It's admitted.

9 Any other witnesses or exhibits from the defendants?

10 MR. HOUTS: The last would be Defendants' Exhibit 22,  
11 which is simply the Attorney General's copy file of election  
12 forms. And I have disclosed to my colleagues that it does  
13 include a form for Jarrod Taylor, which, obviously, would not  
14 have been there prior to February or March of 2019. But other  
15 than that, this is the file we have of the election forms that  
16 were returned.

17 MS. KLEBANER: And we do not object to moving that into  
18 evidence; however, we would just like to note for the record  
19 that not all of those forms are date and time stamped in  
20 accordance with the procedure such that we would have expected  
21 to see time stamps on all those forms, but not all of them have  
22 time stamps on them.

23 THE COURT: It's admitted.

24 MR. HOUTS: May I approach?

25 THE COURT: You may.

1           Let me ask you this, because I did read through those  
2 forms as well. And there's forms dated the 26th, 27th, and  
3 28th. Is there any observation that I should make as to who  
4 executed what on any of those particular days? Were any of  
5 those inmates on the same tier as Mr. Miller? Were those -- I  
6 mean, is there anything for me to take away from that? And I  
7 don't know. Maybe there is, maybe there's not.

8           MS. KLEBANER: Was that for me or Mr. --

9           THE COURT: Both of you.

10          MR. HOUTS: I have pulled the institutional count  
11 paperwork from where Mr. Miller was. We discussed in his  
12 deposition, he was in F tier. People did move around in F tier.  
13 However, once Mr. Miller admitted that he didn't actually see  
14 the person that picked up his form, and that when he said the  
15 person was picking up the form from everyone else he was just  
16 assuming, that that wasn't his personal knowledge, it became  
17 less of a priority for me. There's something unique about the  
18 only people who elected on his tier block, and, you know, he  
19 can't tell me more than what he told Your Honor today. That was  
20 a dead end. I had to focus on other things to get ready for  
21 today. But I don't believe there's anything to draw from that,  
22 Judge, because he doesn't know anything. He's told Your Honor  
23 he doesn't know anything.

24          MS. KLEBANER: Your question was whether there's any  
25 factual findings we need to make about the other men who turned



1 in their election forms and whose forms the defendants still  
2 have possession of. Mr. Miller is not planning on introducing  
3 any evidence in terms of the location of where those men were on  
4 death row.

5 THE COURT: Okay. Mr. Houts, I've just -- I just have  
6 these things that keep running through my head. If Mr. Miller  
7 did timely turn in the form and put it in the bean hole and it  
8 was picked up by a tier runner, and the tier runner threw it  
9 away but later said, yeah, I threw it away, I didn't like  
10 Mr. Miller, would the State honor his election?

11 MR. HOUTS: That's a difficult hypothetical, Your  
12 Honor. Because, again, is there indicia of reliability that go  
13 along with the tier runner's admission, or is it like we heard  
14 on the phone call, nothing I can do about it, what can I do, and  
15 all of a sudden, hey, some other guys told me about this form  
16 they filled out. I don't know if I can stop my election, but  
17 maybe I can, but my lawyers don't know what I'm talking about.  
18 I mean, because that's what we're dealing with here.

19 And do I think that somebody could come up and go,  
20 look, I took his form, and prove that it happened the way that  
21 Mr. Taylor was able to prove that it happened? It's possible,  
22 Judge. But that's not what happened here, Your Honor. And,  
23 again, Mr. Miller can't even say it was a State actor in this  
24 case.

25 And so the fallback is, well, it's because of all these

1 terrible procedures is why he can't. And all those procedures  
2 were in place or should have been in place, according to them,  
3 in June of 2018. There have been multiple instances since then  
4 that would have put a reasonable person on notice that they  
5 needed to protect themselves, and Mr. Miller has not done that.

6 So that's my concern, Judge. Maybe after Jarrod  
7 Taylor, if it had happened, but that -- you know --

8 THE COURT: So the answer is you don't know?

9 MR. HOUTS: Because it's a hypothetical -- I don't  
10 speak for the Attorney General, you know, on how he would  
11 exercise his discretion, Your Honor. I mean, I usually take my  
12 marching orders from the Attorney General.

13 THE COURT: And what if Mr. Miller's form was to be  
14 found tomorrow in the bottom of the filing cabinet where there  
15 were inmate files? Would the State honor it?

16 MR. HOUTS: Again, if Ms. Parker said, absolutely, you  
17 know, here it is, it was wadded up, I believe that they would.  
18 I mean, if it was absolutely no indication of manipulation of  
19 the system. But, again, that's not what we have here. I  
20 mean --

21 THE COURT: What if during lunch Ms. Klebaner met with  
22 Mr. Miller, and they agreed to waive the attorney-client  
23 privilege and produce to you an email or a letter from  
24 Mr. Miller that falls within the window and say, look, here is  
25 corroborating proof that his intent was to elect? Would you

1 honor his election?

2 MR. HOUTS: His intent was to elect, but he didn't fill  
3 out the form and submit it?

4 THE COURT: No. He filled out the form, but you didn't  
5 get it.

6 MR. HOUTS: They got it and there's contemporaneous --  
7 you're saying the same situation as Mr. Taylor? Absolutely we  
8 would. Yes, Your Honor. Same situation with Mr. Taylor, we  
9 would honor that.

10 THE COURT: Okay. If I was to conclude that he did  
11 timely elect, do you lose or do you still win?

12 MR. HOUTS: Under which cause of action, Your Honor?

13 THE COURT: Any of them. I mean, we're here on a  
14 preliminary injunction.

15 MR. HOUTS: I still don't see even a substantial  
16 likelihood of proving that it ended up in ADOC custody  
17 because -- versus what's in the complaint and what was in his  
18 affidavit: I just stuck it in the bean hole, and I never asked  
19 any follow-up questions. So at this point, I'm not even sure  
20 that the correct official defendants have been named or the  
21 people who -- it's a negligent loss. We've actually briefed  
22 Your Honor on the fact that negligence would not support a cause  
23 of action. At most you would have to show an inadequate  
24 postdeprivation remedy. And I think we've proven today that if  
25 Ms. Huggins would have picked up the phone or sent an email to

1 DOC, DOC are reasonable folks. And when she had an issue with  
2 him being in single walk and needing to sign a living  
3 arrangement, Mr. Stewart helped them.

4 THE COURT: If DOC are reasonable folks, and the  
5 nitrogen protocol is ready and he can be executed on September  
6 22 of this year by nitrogen hypoxia, why not allow him to be  
7 executed by the method he has filed a lawsuit over?

8 MR. HOUTS: Because of the same point I've made over  
9 and over in our filings, Judge. Public officials don't have  
10 unfettered discretion. And I'll point out the protocol.

11 I hope it makes Your Honor sleep better at night  
12 knowing that before the warden proceeds, the governor's office  
13 chimes in to confirm that no clemency action has taken place,  
14 and the Attorney General confirms that there are no stays or  
15 injunctions that have occurred that the warden needs to know  
16 about.

17 That doesn't mean the Attorney General has unfettered  
18 discretion to stick his nose in Commissioner Hamm's business of  
19 running correctional facilities and executing judicial  
20 sentences. Each has their own role to play, and we are all  
21 bound by statute.

22 The difference in a lawsuit is if Your Honor looks at  
23 the facts and says, I believe truly a substantial likelihood  
24 that this happened, that he's not just making it up, trying to  
25 stop his execution, we are required to follow Your Honor's

1 order. But we can't just make up our minds that we're going to  
2 ignore a statute.

3 THE COURT: So your position is there's no discretion.  
4 The statute has to be followed.

5 MR. HOUTS: We can't disregard the statute because we  
6 don't like it. Yes, Your Honor.

7 THE COURT: If the statute has to be followed, then how  
8 do you -- how do you account for the Taylor election? Because  
9 he didn't follow the statute.

10 MR. HOUTS: The same way we would any time somebody is  
11 litigating something, and we can choose to go forward in the  
12 Supreme Court or go forward in this court or settle. I mean,  
13 and that goes back, again, to General Marshall --

14 THE COURT: Was the statute followed with the Taylor  
15 election? Let's get right down to it.

16 MR. HOUTS: We don't know.

17 THE COURT: You don't know?

18 MR. HOUTS: We know that the warden didn't have a copy.  
19 I mean, again, that goes back to our answers of, are you asking  
20 the current commissioner and warden to say absolutely they know  
21 everything about what happened, and the form went to the  
22 warden's office and got lost, or simply it's possible that  
23 happened, it's probably more likely that he sent the forms to  
24 his attorney?

25 But in any litigation, we have the right to go, you

1 know what? We are going to compromise because the facts in this  
2 case warrant this outcome.

3           So when you start talking about lawsuits, this Court,  
4 you know, can order us to do a lot of things that are contrary  
5 to the statute, and it's a lawful order, and we're going to do  
6 it, Your Honor. But that doesn't mean that that gives us the  
7 right to leave this courtroom and go, even without a court  
8 order, I don't like how that law was written. I'm just going to  
9 do it this other way because I know better than the Alabama  
10 Legislature. And that's just not how a government works,  
11 federal or state, Your Honor.

12           MS. KLEBANER: Would you like me to respond to that?

13           THE COURT: Why don't you?

14           MS. KLEBANER: So Mr. Houts just now emphasized several  
15 times the importance of adhering closely to the text of the  
16 statute and to not rewriting it as we go and not interpreting it  
17 depending on what we feel on any given day, but he also  
18 emphasized that the Attorney General used his discretion in the  
19 Jarrod Taylor case.

20           THE COURT: Let me stop you, because I want to follow  
21 up with Mr. Houts on this point.

22           If you don't have discretion, how is the State able to  
23 settle a lawsuit for anything other than what the clear and  
24 precise terms of the statute would require?

25           MR. HOUTS: Your Honor, the Supreme Court has said that

1 in the 1983 situation, for example, Your Honor can order us to  
2 do something that would be contrary to our statute or would not  
3 be authorized by our statute because that's within the essence  
4 of the power of the Court to act under 1983.

5           Similarly, let's say we believe that we can prove  
6 facts, as we do here, that an election wasn't made; that this is  
7 all being made up at the last minute. Then we can say, you know  
8 what? We're going to let you take that to the Court because  
9 you're going to find out that the Court sees the evidence the  
10 way that we do.

11           If there's a question as to whether the Court would or  
12 not, again, I go back to lawyers compromise cases all the time  
13 and go, it's not worth fighting over. Your evidence is  
14 compelling enough that we are going to offer to settle with you.  
15 That's the nature of litigation. And that's --

16           I mean, a concern of mine is, and we haven't had time  
17 to fully explore or brief it, Your Honor, but it would make --  
18 it would concern me for a federal court to try to order an  
19 Attorney General to use his discretion a certain way in criminal  
20 cases, to make decisions a certain way, when there is no  
21 allegation that he is intentionally targeting anyone on the  
22 basis of race or gender or any other prohibited category. I  
23 mean, that --

24           THE COURT: Well, don't we have the issue of the State  
25 potentially exercising discretion in one circumstance, and

1 that's Mr. Taylor because there was no court order there, and  
2 then coming in court here and saying, well, there is no  
3 discretion?

4 MR. HOUTS: That's in the same sense, two people are  
5 suing the State for some type of tort or employment related, and  
6 they think that they're exactly alike, like, oh, I'm just like  
7 this other person. Attorney General says, no. This person gave  
8 me A through Z evidence, and I don't want to defend that. I  
9 don't want to look like I'm standing on this technicality,  
10 because it's pretty clear what happened here. But you're making  
11 it up. I'm going to make you try it in court. We do that all  
12 the time.

13 And the only thing Your Honor has to go by to say it's  
14 the same situation is the word of somebody that's told you it's  
15 four years ago. I can't remember anything. Don't even know  
16 that it ended up in the hands of a State actor. But believe me.  
17 Even though I didn't say it on the telephone, believe me that  
18 this is what happened.

19 I mean, his affidavit is wrong. He told the Court in  
20 February, I saw the person get it that was picking up all the  
21 other forms. You heard him today: I don't know if that's true  
22 or not. I assumed.

23 THE COURT: Ms. Klebaner, I cut you off, but you can  
24 proceed.

25 MS. KLEBANER: To respond to that?



1 THE COURT: Respond. Yes, ma'am.

2 MS. KLEBANER: Okay. I don't have much further other  
3 than what we've already said.

4 In terms of Mr. Taylor's election form, we know that  
5 they were similarly situated. We know that ADOC did not have  
6 Mr. Taylor's election form when everyone else's forms were  
7 collected in June of 2018.

8 THE COURT: Were they similarly situated in particular  
9 to Mr. Taylor if he did not put an executed election form in the  
10 hands of either the warden or a DOC officer within the 30-day  
11 window?

12 MS. KLEBANER: They are similarly situated in that they  
13 both elected nitrogen hypoxia, and the State lost both of their  
14 forms. So although one may have been using the bean hole or the  
15 space in between the bars in his cell and one may have been  
16 using a different method to get it to the warden, their sort of  
17 legal postures were the same when they were before the Alabama  
18 Supreme Court. And the Attorney General used its discretion  
19 very differently in one case versus the other, solely on the  
20 basis of privileged attorney-client communications.

21 THE COURT: Okay. If this is a 50-50 call, as so often  
22 questions of fact are, do you win or lose at the preliminary  
23 injunction stage?

24 MS. KLEBANER: Win due to the gravity of the  
25 circumstances here.

1           The Supreme Court has held consistently for several  
2 decades now that the higher the stakes and the slower moving the  
3 process, the greater due process must be afforded to the  
4 individual. So we've discussed this in our briefing. But, for  
5 example, in the situation of a high-speed police car chase, due  
6 process necessarily compresses to a very small amount of time  
7 and necessarily a very small amount of process that can be  
8 afforded to someone.

9           In a very slow-moving proceeding such as this where, as  
10 it is said, you know, the State will always get their man,  
11 Mr. Miller is in custody. We are not contesting his death  
12 sentence. Given the extreme stakes here, which is the method by  
13 which he will be executed, if Your Honor feels it is a 50-50  
14 call, it should go to Mr. Miller.

15           THE COURT: Well, should there be -- and maybe this is  
16 kind of what Mr. Houts is getting at as well. It is a  
17 high-stakes situation. You're talking about a party, that being  
18 your client, who is an inmate sentenced to death whose date is  
19 coming.

20           I'm taking from Mr. Houts' position about the need for  
21 corroborating evidence that there should be some sort of  
22 presumption against the inmate when the inmate tells you what  
23 he -- what he says happened. Do you follow what I'm saying?  
24 And should there be any type of presumption that enters into the  
25 mix for purposes of me determining whether he's telling the

1 truth or not? Because it is high stakes, because he is an  
2 inmate, he has everything to gain by making up a story.

3 MS. KLEBANER: I will just say there certainly is no  
4 such legal presumption against people on death row when they  
5 testify as to their circumstances while they were incarcerated.

6 But in this case, Mr. Miller's testimony is completely  
7 uncontroverted. It's unrebutted. In his live testimony today  
8 he said that he elected nitrogen hypoxia, and the State -- none  
9 of the defendants have produced a single shred of evidence to  
10 contradict that.

11 So going into a preliminary injunction, when the Court  
12 has to take well-pleaded allegations and facts as true at this  
13 stage, it is appropriate to enter a preliminary injunction  
14 because his testimony is completely unconverted.

15 THE COURT: Okay. Mr. Houts, a question I've got is  
16 identify for me the evidence that the State contends -- and I'm  
17 just calling defendants the State -- controverts his testimony  
18 here today.

19 MR. HOUTS: The first would be when Your Honor listens  
20 to the second call and it begins, hey, I talked to some other  
21 inmates, and they signed this form about some type of gas stuff.  
22 And I told my lawyers they need to call the Equal Justice -- and  
23 I will admit, it's unclear whether he says "initiative" or "and  
24 stuff," and the public defenders -- which you'll see in his  
25 deposition, he says he means the federal defender. I'm not sure

1 that it could stop my execution or stop it, but they might be  
2 able to put a halt to it. But my lawyer didn't know what I was  
3 talking about. And I said, I told you that a long time ago.  
4 And that was an unprivileged statement made to his brother.

5           So I go back to the first thing is, can't even keep the  
6 story -- either his lawyers knew or they didn't. And he told  
7 his brother that they didn't. He didn't say, I signed. He  
8 said, these other inmates I talked to signed this form about  
9 some -- it might stop my execution. You'll see him talking  
10 about wanting to stop his execution, like he doesn't want to die  
11 on the 22nd. And I understand that, but his victims did not  
12 want to die when he shot them. And so that's not even an issue  
13 here.

14           The difference between him and Jarrod Taylor is Jarrod  
15 Taylor involved his lawyers in the process. He was smart. He  
16 actually worked with his counsel.

17           But what you'll hear in the first call is Mr. Miller  
18 say, I'm okay with what my lawyer's told me. Nothing I can do  
19 about it. What can I do?

20           The fact that they're asserting privilege to Your Honor  
21 means that whatever was said was never intended to be turned  
22 over to anyone, and we know a nitrogen hypoxia form would have  
23 to be turned over to a third party.

24           THE COURT: Are you saying that I should -- that I'm  
25 allowed to take a negative inference from the invocation of the

1 privilege?

2 MR. HOUTS: I'm saying what you can take from it is  
3 they are affirmatively saying that unlike Jarrod Taylor -- Your  
4 Honor will not be receiving the same evidence that the  
5 defendants got from Jarrod Taylor. He is not going to be the  
6 same as Jarrod Taylor in that regard.

7 So the one thing Your Honor knows today is if the Court  
8 finds it relevant that Jarrod Taylor decided to give defendants  
9 corroborating evidence from his attorneys, you know, plaintiffs  
10 have drawn a line in the sand and said, we're different from  
11 Jarrod Taylor. And the Court will have to decide, you know, if  
12 that's going to be relevant to his equal protection. We believe  
13 it is, because any Attorney General is going to be allowed to  
14 rely on that and decide whether it's worthwhile to litigate an  
15 issue or resolve the issue between the parties.

16 THE COURT: Okay. Any other controverting evidence?

17 MR. HOUTS: Well, the fact that he can't tell me  
18 whether the correctional officer was skinny, fat, muscular,  
19 tall, short, what kind of hair. You know, he's barely confident  
20 that it's a male versus a female. Might be either.

21 He never saw it go into the hands of a person acting  
22 under color of state law. He lied in his deposition by saying  
23 that he gave it to the guy who was collecting the forms from the  
24 other inmates. And we know that he didn't see the guy, and we  
25 know that he doesn't know who the other inmates were given the

1 forms, and he didn't see anybody else turn in a form.

2           So I think the fact that at this point we've  
3 established they lied in his affidavit and said what he assumed  
4 and not what he had personal knowledge of would also be relevant  
5 to the Court's decision.

6           THE COURT: And I'll ask you kind of the same question  
7 I asked Ms. Klebaner. Given the stakes of the litigation, given  
8 where we are with the execution date ten days away, should there  
9 be a heightened level of scrutiny by me as to the veracity of  
10 the person who's making these statements under oath? Mr. Houts?

11           MR. HOUTS: I thought you --

12           THE COURT: No, that's to you. It's to you.

13           MR. HOUTS: Of course, substantial likelihood of  
14 success on the merits means just that: Substantial. And it  
15 means that the evidence in front of Your Honor means we're going  
16 to have a trial, but why are we having a trial because the State  
17 should be settling it like they did with Taylor.

18           So yes, I do believe that somebody that comes in at the  
19 last minute, after 22 years, and tells his brother on the phone,  
20 some other guys signed. I don't know if they can stop it, but I  
21 told them to call these other lawyers that might help them,  
22 absolutely I think Your Honor can consider that.

23           Again, it shows that the purpose of this isn't to have  
24 us honor his nitrogen election that he claims to have made,  
25 because he's already told Your Honor he doesn't want nitrogen

1 either. He wants the Court to stop his execution because it's  
2 an untested method, and he doesn't know how the State is going  
3 to do it. He wants it both ways.

4           So I think that that all speaks to reasons the Court  
5 should be questioning his veracity: That this happened on the  
6 eve of his execution; that he never attempted at all to have a  
7 state remedy applied; he didn't ask his lawyer to look into it;  
8 he didn't file a petition for certiori or a mandamus. He did  
9 nothing. And I think all of that comes back to he does not have  
10 a substantial likelihood of success on the merits.

11           THE COURT: If it's a fact question, where is the  
12 appropriate forum for that to be resolved? Is that me? Is that  
13 in the state? And I know we kind of touched on it this morning.  
14 Is that with the Alabama Supreme Court?

15           MR. HOUTS: If it were a fact question and he was  
16 pursuing state remedies, then that would be the circuit court  
17 where he files the extraordinary writ. Here, now that he's  
18 filed his 1983, it would be this court.

19           I don't know if this was Your Honor's question, but  
20 it's not limited to a fact question. If you go, absolutely he  
21 filed it so far outside the statute of limitations, there is no  
22 doubt, you can decide as a matter of law that there is no  
23 substantial likelihood of success on the merits under laches.

24           MS. KLEBANER: If I could respond.

25           THE COURT: Please.

1 MS. KLEBANER: So you had asked Mr. Houts what evidence  
2 he had to rebut Mr. Miller's uncontroverted testimony. As far  
3 as I could follow, Mr. Houts said their rebuttal evidence are  
4 the phone calls that we heard in court today.

5 Mr. Houts purported to read his interpretation of the  
6 audio on that call. We certainly do not concede to his, you  
7 know, self-made transcript of that call. I think we all heard  
8 the very distorted audio. I don't think that we should take in  
9 the record what Mr. Houts heard in that call as what the call  
10 was. We can play it again if Your Honor would like to hear it  
11 again.

12 But to say that a phone call on April 21st, two days  
13 after the Alabama Supreme Court moved -- two days after the  
14 Attorney General moved an Alabama Supreme Court to set his  
15 execution date -- Mr. Miller called his brother twice on the  
16 21st, and the second time that day that he called his brother he  
17 said, I told my lawyers I had chosen gas a long time ago or  
18 something to that effect. That that somehow undermines his  
19 testimony that he had made the nitrogen hypoxia election is just  
20 sort of baffling. It's corroborating evidence of what  
21 Mr. Miller has been saying in this case all along.

22 Mr. Houts also said that Mr. Miller lied in his  
23 deposition. He didn't lie. He said that he knew the guard was  
24 collecting forms because they were yelling out that they were  
25 collecting forms.



1           As Mr. Miller testified to in his direct examination,  
2 you can't see much from the perspective of a prison cell, so he  
3 couldn't see what was going on up and down the row. So a lot of  
4 information he gathers is auditory. He has described to the  
5 best of his ability his understanding of what happened in the  
6 prison that day. And when you live in a cell for 23 hours a day  
7 the way that Mr. Miller does, you have to assume that state  
8 officials are doing what they say they're going to do. So if  
9 someone told Mr. Miller, here's this form, fill it out, I'm  
10 going to come back at the end of the day and pick it up,  
11 Mr. Miller has no choice but to rely on that assumption because  
12 he can't leave the four walls of his cell.

13           THE COURT: If you were going to play the game of  
14 technicalities, and presumably it's Captain Emberton, and he  
15 says, I'm going to come back by and take these forms back up,  
16 was putting the executed form in the bean hole sufficient?

17           MR. HOUTS: I want to stop the Court right there.  
18 Absolutely inappropriate to say the presumption is it's Captain  
19 Emberton. Both for preliminary injunction purposes and for the  
20 1983 lawsuit, the burden starts there and it remains there, and  
21 we aren't presuming anything when he says he never saw it go  
22 into anyone's hands. You know, and in that I will vigorously  
23 defend my official capacity defendants in that regard; that  
24 we're not going to assume anything like that, because he doesn't  
25 know. He says everything he learns -- and you'll see it -- came

1 from Bobby Wayne Waldrep, Gene Clemons, and Jarrod Taylor after  
2 we moved for his execution in the Supreme Court.

3           And one other thing that occurred to me, Your Honor,  
4 about laches and us talking about all this. If you'll recall,  
5 when I gave you the e-messages that said "my attorneys say I  
6 have to wait" back in late July, early August, there was a  
7 filing that day or the very next day assuring Your Honor that we  
8 were taking it out of context, and there was important context  
9 that needed to be provided to explain what's going on that we  
10 didn't have. Now that the evidence is over, it just occurred to  
11 me, you can rule on laches because I didn't hear any context  
12 given as to why his attorney said, let's wait until a month  
13 before his execution to spring this on the State.

14           And, again, I go back to it doesn't have to be a  
15 factual issue, Your Honor. It can be laches. It can be, don't  
16 wait until 30 days out and have your client say he can't give  
17 you details because it happened four years ago, but y'all should  
18 know all this. It happened four years ago.

19           THE COURT: We're going to get to that, and maybe right  
20 now is the time to do it.

21           Let me ask you this, Ms. Klebaner. The Sidley Austin  
22 firm did represent Mr. Miller during the election period in June  
23 of 2018; correct?

24           MS. KLEBANER: Yes.

25           THE COURT: What would have been the scope of

1 representation at that point?

2 MS. KLEBANER: My understanding -- I was not on the  
3 legal team -- I was not at Sidley Austin at that point, but they  
4 were representing him in his criminal appeals.

5 THE COURT: Were there still ongoing criminal appeals  
6 at that time?

7 MS. KLEBANER: Yes. My understanding -- and someone  
8 else on the team could speak better to this, but my  
9 understanding is that team was heavily focused on an ongoing  
10 criminal appeal.

11 THE COURT: Are there any records of actual telephone  
12 calls with Mr. Miller in the June 2018 time frame?

13 MS. KLEBANER: Defendants have not turned any over to  
14 us in discovery. We don't know what they have.

15 THE COURT: How about on your end?

16 MS. KLEBANER: Does Sidley Austin have records of  
17 telephone calls? Nothing that's not -- that we are -- nothing  
18 that isn't privileged, and we haven't otherwise produced a  
19 privilege log in this case.

20 THE COURT: The existence of phone calls would not be  
21 privileged.

22 MS. KLEBANER: Right.

23 THE COURT: So did phone calls occur?

24 MS. KLEBANER: To the best of my knowledge, there were  
25 phone calls with the client in that period of time, but we

1 don't -- I don't have anything formalized in a privilege log  
2 before me.

3 THE COURT: Okay. Another question I've got for you is  
4 what do you contend would be the due process that should have  
5 been available for him in terms of the election form?

6 MS. KLEBANER: Well, it's difficult to say because it's  
7 not Mr. Miller's burden to create constitutionally sufficient  
8 processes within Holman, but certainly some sort of process  
9 wherein someone, anyone at Holman or ADOC or the AG's office was  
10 keeping track of who all on death row received their forms, when  
11 they received them, who turned them back in, who refused to turn  
12 it back in and when. Anything to indicate that each person even  
13 received a form in the first place.

14 Certainly with respect to Mr. Miller, anything to  
15 indicate when forms were turned in and to whom and where they  
16 went once they were turned in.

17 THE COURT: If you've got a problem with it, it's that  
18 there was no means implemented to corroborate with him what his  
19 election was; is that fair? So that he would know.

20 MS. KLEBANER: Sorry. Could you ask in a different  
21 way?

22 THE COURT: Really, the critique about the due process  
23 is all things being considered in the context of what we're here  
24 about today, it's that there was no means or process employed  
25 that resulted in some sort of confirmation or notification to

1 him within that election period that he had elected nitrogen  
2 hypoxia.

3 MS. KLEBANER: Yes. There was no sort of follow-up to  
4 say, we received your election. Here we've got it. Nothing  
5 that would put him on notice that they had lost it. Yes, you're  
6 correct.

7 THE COURT: All right. Let's talk about laches a  
8 little bit. And Mr. Houts, that's -- you kind of brought it to  
9 the table, so I'll hear from you on that.

10 MR. HOUTS: Well, it's an interesting follow-up from  
11 the conversation you just had with my friend. If that's true  
12 and if their version of events is correct, and it was just a  
13 madhouse circus at the prison during June of 2018, they were on  
14 notice -- I mean, he has admitted that he would be on notice  
15 that I asked for copies and notary, and I just stuck it in the  
16 bar. Never got copies and the notary.

17 So with that description of the due process that he was  
18 entitled, my next step would be, so when does a reasonable  
19 person who is scared of needles make sure that that nitrogen  
20 hypoxia form got turned in? Because I didn't see it get turned  
21 in. I didn't see the person pick it up.

22 I would say that the two-year statute of limitations  
23 governing tort actions in Alabama would be the first reasonable  
24 time, because Alabama has said that's how long you have when  
25 somebody takes away physical ability or commits a tort.

1           After Jarrod Taylor said --

2           THE COURT: Well, let me stop you. How would the fact  
3 that he asked for a copy and for it to be notarized put him on  
4 notice that the State did not have it to begin with? I  
5 understand that would put him on notice if maybe there was some  
6 defect by the fact that there was no notary on the form, but the  
7 fact that it was refused, does that put him on notice of all  
8 potential problems with his election or just the potential  
9 problems of which he was aware at that moment?

10           MR. HOUTS: I suppose I would have a problem with that,  
11 too, Your Honor, the fact that he says it was refused. But as I  
12 understand his testimony now and last week, I just told the guy  
13 passing the form out I want these things. And I don't know who  
14 picked up my form, but I never got either of them. So not only  
15 do I not know who picked up my form, I never got the copy I said  
16 I wanted to somebody -- I never got a copy. And he told, I  
17 think, Your Honor today, to protect himself. To protect my  
18 legal rights. And so that's why. He admitted he wanted it. He  
19 wanted to do it legal. He wanted to know that he had  
20 protection.

21           So by his own admission, he knows that what he is doing  
22 is trying to, you know, concrete his claim. And if the State  
23 didn't provide him what he asked to do that, and that was all he  
24 could do, then that would be an inadequate remedy. But Your  
25 Honor has also seen today that he has very capable lawyers who

1 will call DOC when he brings things to their attention and will  
2 get results for him when they do that. So I go back to when  
3 this stuff comes up with Mr. Taylor, that's your sign that you  
4 need to be making sure, hey, can you tell us whether our  
5 election form is there?

6           When the stuff comes up with Mr. Reeves and Mr. Smith  
7 that they're relying on to say that it was a circus atmosphere,  
8 that was within the statute of limitations. That would have  
9 been enough to go, so let's make sure our client's rights are  
10 protected.

11           Instead what we have is a decision to wait exactly one  
12 month prior to the execution, and then we have a plaintiff who  
13 says, of course I don't remember anything. That was four years  
14 ago. How do you expect me to remember anything?

15           He's suing two people who weren't even in their  
16 official positions then, saying it's their fault; that they need  
17 to go out and find all this stuff and do his work for him. And  
18 he has done absolutely nothing to vindicate his rights; to  
19 protect himself. He can't even tell Your Honor the first detail  
20 that could be corroborated.

21           THE COURT: Well, what could he have filed a suit on in  
22 July of 2018? At that point he's made a request for a copy.  
23 He's made a request that it be notarized. So his lawsuit would  
24 be, I asked the State for a notarized copy. They refused to  
25 give it to me and, therefore, I'm suing you for that?

1           MR. HOUTS: It would be calling Ms. Huggins and saying,  
2 I asked for a copy and a notary, and they're not giving it to  
3 me. I really hate needles, and I'm really afraid they're going  
4 to do something mean to me. Please make sure my nitrogen  
5 hypoxia form got turned in.

6           Now, if Ms. Huggins did what she did for him and what  
7 Your Honor saw earlier, you know, we learned of this discrepancy  
8 back then and, you know, we see where it goes. If they say, you  
9 know what, Ms. Huggins, we're not going to tell you anything  
10 about that, then your lawsuit is, I asked for a copy, I asked  
11 for a notary, my lawyer asked for post turn-in confirmation, and  
12 the State is just -- they're meanies. They're refusing to give  
13 it to me, and I have a right to know whether my choice to elect  
14 nitrogen hypoxia is being honored. I think that's a claim all  
15 day long, Your Honor.

16           THE COURT: Do you have a position on it?

17           MS. KLEBANER: I do. So Mr. Houts is saying that the  
18 statute of limitations sort of started to run the day -- all  
19 this happened in one day. That Captain -- we don't know who  
20 exactly it was, but someone told Mr. Miller, here's your form.  
21 This is to elect nitrogen hypoxia. Fill it out. I'll be back  
22 to pick it up by the end of the day.

23           Mr. Miller says, I want this copied and notarized. The  
24 guy refuses. Mr. Miller leaves it in the bean hole, and as far  
25 as he knows, that's how he turned in his form.



1           The idea that the refusal to have the form copied and  
2 notarized would have started the clock running, like that would  
3 have been the moment that Mr. Miller knew or should have known  
4 that he had been injured, just really -- it's just too much of a  
5 stretch, Your Honor.

6           Mr. Miller doesn't have a right to have things copied  
7 and notarized at will in the prison. You know, people there  
8 request notarization of various forms, and they get denied all  
9 the time. It certainly would not have been, as Mr. Houts just  
10 said, a claim all day long if he had filed a lawsuit after  
11 having not had a single form copied and notarized when he  
12 doesn't have a right to that form. So the idea that that  
13 particular very brief exchange would have put Mr. Miller on  
14 notice that they were going to lose his form, I think, really  
15 just defies credibility.

16           And then as to Mr. Taylor, there was nothing in  
17 Mr. Taylor's litigation that ever suggested defendants had lost  
18 other people's forms. All their filings in that litigation were  
19 very specific to Mr. Taylor's circumstances, and so there was  
20 nothing that Mr. Miller could have learned by following that  
21 litigation about his own case. They certainly didn't make any  
22 statements about, you know, the department in general is having  
23 trouble coming up with an exhaustive list of who turned what in.

24           THE COURT: You keep saying they lost Mr. Taylor's  
25 form, but is there any evidence of that?

1 MS. KLEBANER: The evidence we have is the  
2 uncontroverted evidence that Mr. Miller has given today and in  
3 his deposition and in his affidavit.

4 THE COURT: That Mr. Taylor's form was lost?

5 MS. KLEBANER: Sorry. I thought you asked me what our  
6 evidence was that Mr. Miller's form was lost.

7 THE COURT: No, that Mr. Taylor's form was lost.

8 MS. KLEBANER: That Mr. Taylor's form was lost? Well,  
9 I assume it was lost, because the Attorney General moved to set  
10 an execution date via lethal injection for him and then  
11 rescinded that.

12 THE COURT: Well, wouldn't it have been equally likely  
13 that it was never lost, it was just submitted to the State after  
14 the period, and the State decided to exercise some discretion as  
15 part of settlement negotiations to honor his intent to timely  
16 execute? Wouldn't that be an equally --

17 MS. KLEBANER: It's very possible that that's what  
18 happened, and they did say in their responses to our requests  
19 for admission that they don't know whether Mr. Taylor submitted  
20 an election form in 2018 at all. They only know that they  
21 received one in 2019. Which really underscores our equal  
22 protection point here, Your Honor, that they used very broad  
23 sort of discretionary notions of honoring the intent of one  
24 person and not wanting to catch one person up on, as Mr. Houts  
25 described it, a technicality. But for Mr. Miller, that

1 technicality is a September 22nd lethal injection execution  
2 date. So these two men are being treated very, very  
3 differently.

4 THE COURT: Well, it kind of goes back into this  
5 corroborating evidence. They're saying, look, if you're saying  
6 they're similar, they're both represented by counsel at the same  
7 time. There's communications. Provide the same type of  
8 corroborating evidence of that intent that does exist for  
9 Mr. Taylor. If it exists for Mr. Miller, show it. And if they  
10 honored it in Mr. Taylor's circumstance, I would assume they  
11 would honor it here.

12 MS. KLEBANER: Your Honor, on this point all I can say  
13 is that we can't take a negative inference from Mr. Miller's  
14 declining to share attorney-client privileged information, and  
15 he cannot be obliged to do so. Certainly not in a statute that  
16 gives no indication that exceptions will or should be made for  
17 people who waive what is one of the most fundamental rights in  
18 our society, to confidential communications with your lawyers.

19 And under Mr. Houts' theory of statute of limitations  
20 or just laches more generally, as long as defendants had a very  
21 disorganized process for handing out forms, as long as people  
22 were requesting copies and notarizations and guards were saying  
23 no, under that theory all they had to do was wait two years, and  
24 then in August 2020 they could have moved to execute everyone by  
25 lethal injection who had elected nitrogen hypoxia, and none of

1 them would have had a claim. They would have all been time  
2 barred because they all should have been on notice because the  
3 process was disorganized and they didn't get their form  
4 notarized.

5 THE COURT: Well, you use the term "process was  
6 disorganized" pretty broadly. If I take Mr. Miller's testimony  
7 as true, he got the form, he read it, and he turned it in to the  
8 bean -- and left it in the bean hole. So no matter what the  
9 disorganization would have been otherwise, it worked for him.  
10 He got it. And he turned it in the only way he knew how at that  
11 point, which was to leave it -- well, I guess he could have left  
12 it in the bean hole, which he says he did, or personally hand it  
13 to a correctional officer.

14 I would assume that the better argument on your end  
15 about the disorganized process is what happened afterwards and  
16 that everything is coming in from different directions. There  
17 is -- it's -- they're coming in from the cell block, it's coming  
18 in in the mail, the facsimile machine, and there's no real  
19 method to that madness of gathering it all, putting it in a  
20 spreadsheet, and then what you do with that information. I  
21 assume that's where you're going with that.

22 MS. KLEBANER: You are correct in that certainly there  
23 were glaring deficiencies on the collection and retention end.  
24 But I would also say it's not that the process was sufficient up  
25 until the point when Mr. Miller was handed the form, because as

1 we have heard, also in completely uncontroverted testimony,  
2 someone handed Mr. Miller that form in the morning and said, you  
3 have until this afternoon to fill it out. So we can't say that  
4 that front end of the process, of compressing what was supposed  
5 to be at a minimum a 30-day election period into the course of  
6 several hours, that that was sufficient on its own.

7 THE COURT: I agree, there are some issues with the way  
8 that 30-day period was handled. And I think the Supreme Court  
9 has sounded on that as well, or at least somebody has that I  
10 recall. Mr. Houts?

11 MR. HOUTS: I'm not the smartest lawyer in the room,  
12 Judge, but I thought there was an exchange earlier between you  
13 and my colleague that when we talk about the breakdown in the  
14 process, that if the State doesn't confirm a list, go back to  
15 the inmates at the conclusion of June of 2018 or shortly  
16 thereafter to make sure we got a good accounting, that that's a  
17 violation, absolutely. But when I tell Your Honor that if his  
18 lawyer calls in June or July 2018 to say, can you just confirm  
19 that my client is on y'all's list that this happened, it's  
20 not -- she can't say that it's a violation.

21 And again, I go back to, can we at least narrow down --  
22 procedural due process is flexible and malleable enough. Can we  
23 please at least narrow down what we're dealing with? Because  
24 when she tells you they should have given him a list at the end  
25 of the election period, it's a violation. When I say, if we

1 turn down his lawyer's reasonable request for confirmation,  
2 there's nothing wrong with that. And I find it hard enough to  
3 keep up with this. I mean, I just need to know what -- which it  
4 is, Your Honor.

5 THE COURT: Okay. Well, why don't we just move into  
6 your presentation? I know we've been back and forth and  
7 probably have touched on a lot of things.

8 MS. KLEBANER: Sure. All right. Do you mind if I  
9 stand here?

10 THE COURT: You can come up to the lectern, or you can  
11 stay at the desk over there or table.

12 MS. KLEBANER: I'm pretty tall, so I like the  
13 heightened surface.

14 Your Honor, Alabama law gives death row inmates a  
15 choice in their method of execution. They can accept the  
16 statutory default of lethal injection, or they can elect to be  
17 executed by nitrogen hypoxia, which is a lethal gas procedure  
18 that some believe will be less painful than lethal injection.

19 The nitrogen hypoxia election law took effect June 1st,  
20 2018. Mr. Miller had until June 30th, 2018, to submit a written  
21 election of nitrogen to Holman's warden. Mr. Miller complied  
22 with that requirement within the very limited options available  
23 to someone on a 23-hour-a-day lockdown who has no ability to  
24 walk over to the warden's office and turn in the form himself.

25 A prison official dropped off an election form to

1 Mr. Miller at his cell and told Mr. Miller he'll be back to pick  
2 up the form later that day. Mr. Miller executed the form and  
3 left the form in the designated collection area in his cell bars  
4 known as the bean hole.

5 Four years later, Mr. Miller learns that Defendant  
6 Attorney General Marshall had just moved the Alabama Supreme  
7 Court to set his execution date. And that motion was entirely  
8 silent as to the method of execution.

9 Knowing that lethal injection was the default method of  
10 execution in Alabama, but also knowing that Mr. Miller had  
11 submitted a nitrogen hypoxia election form, this development was  
12 very confusing for Mr. Miller and his legal team. And we heard  
13 that confusion from Mr. Miller himself in the Defense Exhibit 3,  
14 the recording where he says he told the lawyer a long time ago  
15 that he had elected gas.

16 This is itself corroborating evidence. He said it  
17 before he filed his court filings. He said it before he filed  
18 his affidavit. There's every reason to believe that statement  
19 is credible. That is not the statement of someone who just  
20 learned about nitrogen hypoxia from other inmates moments  
21 before. He said this to his brother privately, in a very  
22 emotional phone call two days after learning the State was  
23 trying to execute him via lethal injection. Not to his lawyer,  
24 not to the Attorney General, not to the Court.

25 For Mr. Miller and his attorneys, the best

1 understanding of what had happened was that the State just made  
2 the same mistake with Mr. Miller as it had made with Jarrod  
3 Taylor in 2019. With Mr. Taylor the State also moved for a  
4 lethal injection execution date because defendants had lost or  
5 never received Mr. Taylor's nitrogen hypoxia election form. But  
6 realizing their mistake, and acknowledging the importance of  
7 getting to Mr. Taylor's true intent and to not trip him up or  
8 execute him improperly on a technicality, Attorney General  
9 Marshall withdrew his motion to set Mr. Taylor's execution date.

10 Not so with Mr. Miller. With Mr. Miller, defendants  
11 doubled down in Alabama Supreme Court, insisting that he did not  
12 elect nitrogen hypoxia. And they're tripling down in this  
13 Court, again insisting that they know for certain Mr. Miller did  
14 not elect nitrogen hypoxia and his rights could not have been  
15 violated. What was a technicality only for Mr. Taylor is a  
16 September 22nd lethal injection for Mr. Miller.

17 The central assertion in this lawsuit, in Mr. Miller's  
18 affidavit, in his deposition, and in his live testimony today,  
19 is that Mr. Miller timely elected nitrogen hypoxia. Defendants  
20 have no evidence to disprove the truthfulness of that assertion.  
21 Mr. Miller's testimony is unrebutted and corroborated by the  
22 phone call with his brother that we all heard today. Therefore,  
23 Mr. Miller is entitled to preliminary injunction to protect him  
24 from imminent irreparable harm at the defendants' hands.

25 As we know, the legal standard on a motion for



1 preliminary injunction in terms of considering evidence is that  
2 the Court must accept all well pleaded allegations as true and  
3 all affidavits attached to the complaint as true at this stage.  
4 Mr. Miller's allegations are well pleaded, and the State has  
5 come up with no evidence to controvert the affidavit,  
6 deposition, and live testimony by Mr. Miller. Therefore, at  
7 this stage, the Court must accept as true that Mr. Miller timely  
8 returned his nitrogen hypoxia election form to the warden within  
9 his physical abilities.

10           So as we know, there are four factors the Court must  
11 consider on a motion for preliminary injunction. Defendants do  
12 not even contest three out of those four factors. They do not  
13 even contest that those three of the four weigh in Mr. Miller's  
14 favor. Those uncontested factors are that irreparable injury  
15 will result unless the injunction is issued, that the threatened  
16 injury to Mr. Miller outweighs whatever damage the proposed  
17 injunction might cause the defendants, and that the injunction  
18 would not be adverse to the public interest.

19           There's only one of the four preliminary injunction  
20 factors that defendants contest, and that is the likelihood of  
21 success on the merits. Their argument on this front, as we've  
22 heard today, is simply to adopt the arguments from their motion  
23 to dismiss.

24           As we know, Mr. Miller has alleged three claims in his  
25 amended complaint: Violation of procedural due process under

1 the Fourteenth Amendment, violation of equal protection of law  
2 under the Fourteenth Amendment, and violation of the right to be  
3 free from arbitrary and capricious punishment under the Eighth  
4 Amendment. Mr. Miller need only show one claim is likely to  
5 succeed in order for the Court to grant his motion, but all  
6 three of Mr. Miller's three claims are likely to succeed.

7 THE COURT: What is your best -- if you were to rank  
8 the three, what would your rank be?

9 MS. KLEBANER: If I were to rank? Three-way tie for  
10 first place.

11 I will not reject the premise of your question. If I  
12 were to rank the three, equal protection, number one; arbitrary  
13 and capricious, number two; procedural due process, number  
14 three.

15 THE COURT: And rest assured, I'm going to ask  
16 Mr. Houts the same question.

17 MS. KLEBANER: Sounds good.

18 So turning first to the merits of the procedural due  
19 process claim. The Fourteenth Amendment prohibits the  
20 deprivation of life, liberty, or property without due process of  
21 law. The Alabama code at issue here contains a State-created  
22 liberty interest for death sentenced inmates in Alabama to  
23 choose one of two State-sanctioned execution methods.

24 As the Court evaluates whether Mr. Miller has a  
25 likelihood of success on the merits of his procedural due

1 process claim, please keep in mind that there is not one rigid  
2 pleading standard for a procedural due process claim. As the  
3 Supreme Court often says, due process is a flexible concept that  
4 varies with the particular situation.

5           Even under the Grayden three-part summary judgment  
6 standard, it's clear Mr. Miller has a procedural due process  
7 claim under all three parts: Number one, a deprivation of a  
8 constitutionally protected liberty or property interest; number  
9 two, a State action; and number three, constitutionally  
10 inadequate process. Indeed, defendants do not even contest the  
11 first and third factors are met. They only contest State  
12 action, and even then only with respect to Attorney General  
13 Marshall. Therefore, Defendants Raybon and Hamm have both  
14 conceded that Mr. Miller satisfied Grayden's three-part test for  
15 procedural due process claim.

16           Defendants' efforts to disregard Mr. Miller's nitrogen  
17 hypoxia election reflect their total failure to put in place any  
18 written rules or guidance whatsoever governing the election  
19 process. There are no written rules or guidance for  
20 distributing election forms, for collecting such forms, or for  
21 storing such forms. Defendants have lost inmates' election  
22 forms and have no coherent process for honoring some misplaced  
23 forms while disregarding others. All this indicates a strong  
24 likelihood of success on the procedural due process claim.

25           Turning to Mr. Miller's equal protection claim,

1 Mr. Miller has a strong likelihood of success on the merits of  
2 his equal protection claim. He is being subjected to disparate  
3 treatment compared to similarly situated death row inmates at  
4 Holman who, like Mr. Miller, submitted election forms indicating  
5 their preferences to be executed by nitrogen hypoxia.

6 Mr. Jarrod Taylor and Mr. Miller are both death row  
7 inmates at Holman who submitted election forms. Defendants lost  
8 or never received both men's election forms. Defendants moved  
9 to set both men's executions by lethal injection in Alabama  
10 Supreme Court. But rather than treat Mr. Taylor and Mr. Miller  
11 equally, defendants recognized Mr. Taylor's election and not  
12 Mr. Miller's election because Defendant Marshall received copies  
13 of attorney-client communications from around the time of  
14 Mr. Taylor's election.

15 An equal protection claim requires that Mr. Miller be  
16 treated disparately from other similarly situated persons and  
17 that the disparate treatment is not rationally related to a  
18 legitimate government interest. Defendants' conduct is not  
19 rationally related to a legitimate government interest. The  
20 government does not gain or protect anything by requiring  
21 inmates to show attorney-client communications in order for  
22 their election forms to be honored.

23 Attorney General Marshall argues he satisfied rational  
24 basis review by weighing Mr. Miller's affidavit against the  
25 "quantum of evidence," his phrase, that Mr. Taylor provided.

1 That's a confession that Defendant Marshall deviated from the  
2 statutory language setting forth when an election form should be  
3 honored. It's an admission that he arbitrarily selected which  
4 inmates had met the requirements of the statute, in Mr. Houts'  
5 language, using his own discretion, and to honor Mr. Taylor's  
6 intent and to avoid punishing him on a technicality.

7           Mr. Miller is similarly situated to Mr. Taylor.  
8 Defendants have argued extensively in their briefings that  
9 they're insufficiently similar for equal protection purposes,  
10 but as we've established, both are inmates at Holman; both have  
11 been sentenced to death by the State of Alabama; both submitted  
12 their nitrogen hypoxia election forms to Holman's warden; both  
13 were subject to Attorney General motions to set their execution  
14 dates by lethal injection; and both had election forms lost or  
15 never received by defendants. These two men need not be  
16 identical under Eleventh Circuit case law, since the identical  
17 requirement only applies in situations where there is a complex,  
18 multifaceted government decision at issue, which is not the case  
19 here.

20           Nowhere in the statute are defendants permitted to  
21 substitute a missing election form with privileged  
22 attorney-client communications. The statute is clear the only  
23 relevant consideration in determining whether to honor an  
24 inmate's election is if the inmate timely submitted his election  
25 to the warden in writing. Defendants are trying to rewrite the

1 statute so that it says something different entirely.

2 Defendants should not be allowed to do this.

3           The only difference between Mr. Miller and Mr. Taylor  
4 is that in 2019, Mr. Taylor's lawyers sent privileged  
5 attorney-client communications to the State. And that's  
6 Plaintiff's Exhibit 21 that we entered today.

7           The difference between these two men is the equal  
8 protection violation that defendants are committing against  
9 Mr. Miller. Given how Mr. Miller and Mr. Taylor are similarly  
10 situated and how defendants have no rational basis to treat them  
11 differently, Mr. Miller is likely to succeed on his equal  
12 protection claim.

13           Lastly, with regard to Mr. Miller's Eighth Amendment  
14 claim. The Eighth Amendment prohibits cruel and unusual  
15 punishments. Punishment may be cruel and unusual when it is  
16 carried out arbitrarily or capriciously. Each defendant has a  
17 constitutional responsibility to apply its capital punishment  
18 statutes in a manner that avoids the arbitrary and capricious  
19 infliction of the death penalty.

20           Defendants argue Mr. Miller's Eighth Amendment claim  
21 must be dismissed because the arbitrary and capricious theory is  
22 concerned with the imposition of a sentence of death only.  
23 Defendants believe that the imposition of a sentence of death  
24 here is long over, finished more than two decades ago when  
25 Mr. Miller was sentenced. But there is no case law to support

1 that. Defendants haven't cited a single case that says your  
2 right to be free from arbitrary and capricious infliction of a  
3 death sentence stops when that sentence is first imposed and  
4 affirmed.

5           A quick hypothetical shows why defendants' rule would  
6 be absurd. Say, for example, Alabama has a death row with 100  
7 men on it. Say all these death row inmates were sentenced to  
8 death 30 years ago, and all their appeals had been finished for  
9 a long time. Now say the Attorney General announces that of  
10 these 100 men, he will only move to set execution dates for the  
11 men who are Black, or he will only move to set execution dates  
12 for the men who can't read or any other illegitimate factor.  
13 Obviously, the way in which the State chooses who on death row  
14 will be executed and when and how cannot be arbitrary and  
15 capricious, even though their criminal sentences are final.

16           Further undercutting this argument, Defendant Marshall  
17 admitted in his motion to dismiss that his motion in the Alabama  
18 Supreme Court to set Mr. Miller's execution date was part of the  
19 sentencing process. Attorney General Marshall stated that he  
20 was carrying out a prosecutorial function when he moved for  
21 Mr. Miller's execution date, and that his alleged immunity from  
22 money damages -- his immunity from money damages extends to  
23 continuations of the sentencing process such as his decision to  
24 seek Miller's execution dates. And defendants have repeatedly  
25 characterized the Alabama Supreme Court proceeding as a criminal

1 sentence proceeding.

2 Defendants are clearly still in the process of  
3 implementing the death penalty against Mr. Miller. This Eighth  
4 Amendment claim is likely to succeed as against all actors.

5 THE COURT: I don't think it's disputed, but you agree  
6 that the rational basis test applies?

7 MS. KLEBANER: I'm sorry?

8 THE COURT: You do agree the rational basis test  
9 applies on equal protection?

10 MS. KLEBANER: Yes.

11 THE COURT: Okay. I do not have any questions right  
12 now.

13 MS. KLEBANER: I would like to address the variety of  
14 arguments that defendant Attorney General Marshall has made in  
15 briefing regarding his own alleged immunity in this proceeding.  
16 He's tried in several ways to immunize himself from judicial  
17 review of his actions. He claims he did not perform a single  
18 state action with respect to Mr. Miller, and thus cannot be  
19 liable under procedural due process. This is wrong. Losing the  
20 election form, pursuing Mr. Miller's execution by lethal  
21 injection in Alabama Supreme Court, continuing to pursue  
22 Mr. Miller's execution by lethal injection in this court, and  
23 having an active role in the execution process itself are all  
24 state actions.

25 Defendant Marshall has also claimed he cannot be named



1 in an injunction because he has no role in Mr. Miller's  
2 execution at this point. This is incorrect. We know that he  
3 has an active role in the execution process himself, personally,  
4 and that he continues to have a role in pursuing Mr. Miller's  
5 execution in this court and in the Alabama Supreme Court if any  
6 proceedings were to be brought there.

7           Finally, Defendant Marshall claims he cannot be a  
8 defendant in an action for declaratory and injunctive relief  
9 because he's entitled to prosecutorial immunity for his actions.  
10 This is wrong. Prosecutorial immunity provides immunity only  
11 for money damages, not declaratory and injunctive relief.  
12 Mr. Miller is not asking for money from the Attorney General or  
13 any other defendant.

14           One final point, Your Honor. Defendants have  
15 suggested to this Court that Mr. Miller should agree to the  
16 least restrictive alternative, in their words, of a nitrogen  
17 hypoxia execution on September 22nd. This attempt by defendants  
18 to ask Mr. Miller to agree to an execution by nitrogen hypoxia  
19 before the State finalizes its protocol is inappropriate.  
20 Mr. Miller exercised his statutory right to elect execution by  
21 nitrogen hypoxia rather than lethal injection. He did not agree  
22 to be experimented on or to waive all objections to the manner  
23 in which the State attempted to use nitrogen hypoxia.

24           Just because Mr. Miller won't agree to be experimented  
25 on on a rush basis to execute him by September 22nd doesn't mean

1 he's trying to avoid responsibility for his actions. This  
2 lawsuit does not seek to overturn Mr. Miller's criminal  
3 conviction or his death penalty sentence, nor does this lawsuit  
4 challenge whether lethal injection or nitrogen hypoxia are  
5 constitutional methods of execution. It simply seeks a court  
6 order that defendants must follow Alabama state law and honor  
7 Mr. Miller's nitrogen hypoxia election. Treating him like they  
8 treat all the other men who turned their forms in.

9           Because Mr. Miller is likely to succeed on all three  
10 of his claims, the Court should enter the preliminary injunction  
11 in his favor today.

12           THE COURT: Before you sit down, Mr. Miller's position  
13 is that he wants to be executed by nitrogen hypoxia. He just  
14 doesn't know if he's going to like the particular method that  
15 the State has put together. Is that fair?

16           MS. KLEBANER: Mr. Miller wants to be in the same legal  
17 position as every other person who elected nitrogen hypoxia in  
18 June of 2018.

19           THE COURT: So when the election window was opened in  
20 June of 2018, at that point he knew nothing more about nitrogen  
21 hypoxia than he does today.

22           MS. KLEBANER: Well, as you heard him testify today, he  
23 had had prior experience delivering gas to medical offices, and  
24 he has an understanding of what that procedure is like in terms  
25 of sedating someone for, say, a dental procedure or for plastic

1 surgery. He mentioned both of those procedures. So he had an  
2 understanding based on his intense dislike of needles and his  
3 knowledge of that sort of medical method of sedation that that  
4 was his preference based on his understanding at that time.

5 Yes.

6 THE COURT: Could there be any inference to be drawn by  
7 the fact that as we sit here today, he may not be so willing to  
8 go forward with nitrogen hypoxia next week, and he would have  
9 still had that lack of knowledge back in June 2018, which could  
10 have been a basis to not sign or make an election back then  
11 because he didn't really know anything about it?

12 MS. KLEBANER: I understand the question, and, no, Your  
13 Honor, I don't think we can infer anything about the very narrow  
14 statutory question before us today based on any emotions that  
15 are happening this week. All we are here in court today and in  
16 this litigation to do is to seek vindication of Mr. Miller's  
17 right to be treated like everybody else who elected nitrogen  
18 hypoxia in June of 2018. No more and no less.

19 THE COURT: Okay. Thank you.

20 MR. HOUTS: Good afternoon, Your Honor.

21 So I attended a CLE where you were on a judicial panel  
22 with Judge Burke from the Northern District, technology in the  
23 courtroom. And on the subject of writing, Your Honor made a  
24 comment about don't be one of those lawyers that if there's four  
25 points to a test, you have to contest all four. And I hope

1 that, you know, an attempt at doing a good deed doesn't go  
2 unpunished.

3 My friend is correct. We focused on substantial  
4 likelihood of success on the merits because there is none. And  
5 at the time we filed, we did stay away from the harm to  
6 defendants or the public interest, because the Court's correct.  
7 If we are allowed to execute him on the 22nd using nitrogen  
8 hypoxia pursuant to a lawful order -- I'm not saying we can go  
9 out and ignore the statute because we don't like it. But if the  
10 Court truly was swayed today by what it heard, you know, that  
11 would be correct. But what we've heard today is, I don't want  
12 to be the first.

13 THE COURT: Well, let me ask you this. If by chance --  
14 and, again, this is a hypothetical question. If by chance I was  
15 to issue an order enjoining an execution by preliminary  
16 injunction and, therefore, requiring it by nitrogen hypoxia, is  
17 the State going to appeal?

18 MR. HOUTS: That really is above my pay grade, Your  
19 Honor. I know that when I was being very careful with my words  
20 earlier, you know -- my friend is saying, oh, rushing and  
21 unplanned. And, you know, believe it or not, Commissioner Hamm  
22 takes his position very serious and his obligations under the  
23 law very serious. Attorney General Marshall does. And unless  
24 they are absolutely certain, you know, that it's time, it would  
25 not go forward. But every indication is it's time. And

1 therefore, you know, as long as there's not a 1983 filed, which  
2 would prove the very point that what we're trying to do is stop  
3 an execution, I don't know that it would get appealed.

4           But my friends keep talking about, like, as if  
5 Mr. Miller has the right to not be the first. And after being  
6 asked multiple times -- I mean, inert gas asphyxiation is a  
7 relatively straightforward mechanism of death, and you can find  
8 a lot of information on it from OSHA, from the FAA. Tons of  
9 sources.

10           So if anyone has identified a way that it can go awry,  
11 you know, I've said, come to me and talk. Because remember, in  
12 an Eighth Amendment claim, you have to give a feasible and  
13 readily available alternative. And if they've got ideas, we  
14 will absolutely listen to them.

15           What we will not do is give them materials that they  
16 spend the next week going through, trying to find something that  
17 they can get somebody to say that maybe this would happen. They  
18 either know what they're concerned about or they have no  
19 concerns. And all I'm asking is if you have legitimate  
20 concerns, come to us, and we will talk. But, yes, he has no  
21 right to not be the first.

22           He says he wants to get treated like everybody else.  
23 Everyone else who elected nitrogen hypoxia, somebody was going  
24 to be the first.

25           THE COURT: Well, again, let's assume for purposes of

1 this question I was to agree with the requested relief by them.  
2 When would the -- when would your end produce a copy or make a  
3 copy available of the protocol, the nitrogen hypoxia protocol?  
4 Certainly you're not going to get to the day of the execution  
5 and not have produced the protocol in some form or fashion,  
6 would you?

7 MR. HOUTS: I don't mean -- you know, when we talk  
8 about a protocol, it first came up in the lethal injection sense  
9 when we switched the first drug. And it was -- counsel said  
10 because of this, there's a significant risk of pain, so we need  
11 to know X, Y, and Z. And so we said, okay. We'll provide you  
12 X, Y, and Z.

13 Now, as Your Honor is probably aware, it's since  
14 come -- you know, let's go through the protocol and see what we  
15 can try to poke holes in. And that's where I go back to even  
16 when we release the protocol, there will be information that  
17 people would legitimately want to know if they had a specific  
18 thing that they're concerned about. And that information isn't  
19 going to be made public until someone says, this is our concern.  
20 We think there's a substantial likelihood or significant  
21 likelihood of pain, and we want to make sure y'all aren't going  
22 to do this, you know, mess up this way.

23 So no, they're not entitled to a protocol simply  
24 because they're going to be executed by that method. They need  
25 to come and say, even though we voluntarily elected nitrogen

1 hypoxia -- because that's what he's saying if you believe him,  
2 Your Honor, is he voluntarily elected because he thought it was  
3 going to be constitutional -- but his hesitation is X. If you  
4 don't do X, he thinks he's going to be exposed to severe pain,  
5 and here's our information why we think he's right.

6 THE COURT: How does he get it? When would he get it?

7 MR. HOUTS: We would --

8 THE COURT: Is the State's position he doesn't get it  
9 because he never made the election to begin with?

10 MR. HOUTS: Well, yeah. I mean, if you recall us  
11 talking about the deposition, hey, as a planning precaution, if  
12 the Court were to grant it, can we fit your face for the mask,  
13 make sure the mask fits properly? He said, I would have a  
14 problem with that.

15 Well, that goes back to if your Eighth Amendment  
16 concern is whether the mask fits properly, will vent carbon  
17 dioxide to prevent hypercapnia, for example, that would be a  
18 claim where somebody could say, hey, we're worried. Well, we'll  
19 fit the mask. Let's see how that mask fits and make sure. But  
20 so far, Mr. Miller doesn't want to do that.

21 And so that's where I go back to if they're really  
22 concerned about Eighth Amendment issues, talk to us. Because if  
23 you file a lawsuit, you're going to have to give us a feasible  
24 and readily available alternative anyway, unless your intent is  
25 to stop the execution. You know, based on current Eighth

1 Amendment law, we should actually be somewhat partners in this.  
2 THE COURT: Well, but I asked her the same question.  
3 Should I draw an inference or can I draw an inference as to his  
4 willingness to execute an election form four years ago by how  
5 he's acting now as it concerns the efforts the State may be  
6 making to proceed in a manner consistent with a nitrogen hypoxia  
7 election? In other words, now he's -- you're trying to fit him  
8 for a mask, and he's saying, no, no, no. I mean, can I take  
9 that into account as to whether he really willingly executed a  
10 form for that manner four years ago?

11 MR. HOUTS: I believe Your Honor has to take that into  
12 account, especially when you get to laches. As recently as  
13 earlier this year in Nance, the Supreme Court goes back to  
14 federal courts should not countenance last-minute efforts to  
15 avoid execution, delay tactics, anything like that.

16 And Your Honor has before you those messages that my  
17 attorneys say we have to wait to file 30 days to put everybody  
18 in a time crunch. That directly goes to laches. You were told  
19 you would get some important context. You didn't get it.  
20 Neither did the State.

21 The next is, oh, I really don't like needles. I want  
22 nitrogen because I worked around it, I understand it's going to  
23 be great, but I can't be the first one.

24 I mean, that's absolutely relevant to laches, and I  
25 believe the Court is obligated to consider it and obligated to



1 act on it.

2 THE COURT: I guess kind of on the same issue, is it --  
3 you've heard testimony from Mr. Miller today about his  
4 hesitation to needles, but his familiarity with nitrous oxide at  
5 the dentist office. But on the other hand, you're arguing and  
6 pointing out, well, when we try to fit him for a mask for  
7 nitrogen, he's expressing concern about that. Does that  
8 undermine his credibility?

9 MR. HOUTS: Your Honor, if you read the deposition, he  
10 says, I don't want to die. I mean, he's just that honest. He  
11 goes, I don't want to die on the 22nd. That clearly says he's  
12 trying -- I mean, you know, and you read into that with his  
13 phone call with his brother where he says, it might be able to  
14 stop the execution. I don't know if it will.

15 And while I'm thinking about that, I go back to if it  
16 was that important what he told his lawyer -- and my friends  
17 keeps leaving out the next sentence, which was, and my lawyers  
18 didn't even know what I was talking about. If this were so  
19 important to him, I would think the people who would know more  
20 than anybody else would be his lawyers.

21 So that's why we did not spend a lot of time on the  
22 harm or public interest portion. On its face Mr. Miller makes  
23 a great claim that there is not going to be any harm. If we  
24 take him at his word, that he is right, I would ask the Court to  
25 be a little concerned about the fractures and fissures you're

1 seeing in that position today and in his deposition.

2           The other thing that I've had a concern about, because  
3 I knew we were going to argue law at the end, is we just sort of  
4 assume that ADOC had an obligation to do anything. I've read  
5 the statute multiple times, and the only person who has an  
6 affirmative obligation to do anything is the inmate who wants to  
7 elect. And Your Honor heard in the depositions and testimony  
8 that they read, there were inmates screaming, I ain't signing  
9 that. I got to talk to my lawyer. My lawyer told me not to  
10 sign anything.

11           Again, if there's one thing that ADOC is, it's averse  
12 to litigation because God knows, they have enough of it.

13           So let's ask the question: If a statute doesn't give  
14 ADOC the ability to go to a represented person and start making  
15 them sign forms and do things that their lawyers are telling  
16 them not to do, where is the lawfulness in that? Of the State  
17 actors saying, you go put a gun to his head and tell him he has  
18 to sign the form and say yes or no?

19           THE COURT: What's the unlawfulness of the State  
20 honoring a late election under the statute?

21           MR. HOUTS: Because the statute was clear, 30 days.

22           THE COURT: Does the statute preclude the State from  
23 honoring a late election? Or is it silent and therefore the  
24 State would have discretion?

25           MR. HOUTS: I mean, absent the circumstances of Taylor,

1 which is, I did everything that I was supposed to. You know,  
2 I'm a prisoner -- all the complaints that you've heard. I was  
3 locked down 23 hours a day. But look at all these things I did  
4 to get this in the hands of the warden. Why doesn't the warden  
5 have it?

6           And in that case, you know, I think we've shown, we're  
7 going to compromise in litigation on that. But that doesn't  
8 mean we get to rewrite the statute. A Court can't even rewrite  
9 the statute. It can strike down unconstitutional portions of  
10 the statute, but we don't get to tell the legislature how we  
11 think they did their job. The legislative branch is a coequal  
12 branch of government. And the executive branch enforces the  
13 law, and they have some discretion in interpreting the law, but  
14 what we're being asked to do is just white out parts of the law  
15 that we don't like.

16           And that's not what we did with Mr. Taylor. We elected  
17 not to go to the mattresses and spend a lot of time and money  
18 litigating what was very obviously -- I mean, he signed a form.  
19 We talk about equal protection and who's similar to who. We  
20 have a form for Mr. Taylor, and we have a form that was signed  
21 in 2018 in June by Mr. Taylor. It's in our possession. We  
22 don't have one for Mr. Miller. Mr. Taylor involved his lawyers  
23 in the process of making an election. And to the best I can  
24 tell, Mr. Miller did not, or if they were involved, they forgot  
25 about it.

1 THE COURT: Well, if we're talking Mr. Taylor and the  
2 statute, the statute not only requires him to make the election,  
3 but also to put it in the hands of the warden; right?

4 MR. HOUTS: It does.

5 THE COURT: Okay. And in Mr. Taylor's circumstance, I  
6 really haven't seen any evidence one way or another that answers  
7 the precise question of whether the election form was timely put  
8 in the hands of the warden.

9 MR. HOUTS: If Your Honor believed he stuck it in the  
10 bean hole, and Captain Emberton said, yeah, I picked it up, and  
11 I remember very clearly Mr. Miller's form being in the stack  
12 that I had when I dropped it in that box, I don't know why  
13 Warden Stewart is saying she doesn't have it, and we go, well,  
14 it's too bad because she did have it at the end of June 2018,  
15 are you telling me this Court, under its powers under 1983,  
16 would not order us and find or give declaratory relief that he  
17 executed it and served it on the warden or was prevented from  
18 doing so?

19 I mean, that's the question. You know, are we going to  
20 litigate that Jarrod Taylor was prevented from giving his form  
21 to the warden, or are we going to say, yeah, this is very clear,  
22 he was doing everything he could to get it in the hands of the  
23 warden?

24 And that's what we do as lawyers. I mean, I'm sure  
25 Your Honor at this point in the day wished we would have settled

1 this case so you wouldn't have spent an entire day listening to  
2 us.

3 THE COURT: It comes up with the job description, as  
4 I'm learning.

5 Mr. Miller's position is the State lost Mr. Taylor's  
6 form, and therefore he's similarly situated in respects. Is the  
7 State's position that it was lost or it was not lost, or you  
8 just don't know because you haven't investigated it?

9 MR. HOUTS: We just don't know. I mean, the quantum of  
10 proof that was admitted -- like if he didn't turn it in to the  
11 warden because he thought his lawyers were going to do it, for  
12 example, you know, that wouldn't comply with the statute.

13 But, I mean, would you respect me, Your Honor, if I  
14 came in here and stood on that ground in a 1983 case and said,  
15 it's too bad that he didn't know his lawyers weren't going to  
16 send it in for him like Mr. Stallworth's lawyer did or like  
17 federal defenders did? It didn't get there in June, so he's  
18 just out of luck? I think Your Honor would get very angry with  
19 me. Your Honor would grant the relief requested.

20 So our job is to screen these cases and not to waste  
21 your time unless it's like Mr. Miller who says, trust me. All  
22 these terrible things happened to me for four years. And I've  
23 protected myself in other cases, but this is just one that  
24 caught me off guard, and it just so happens it caught me off  
25 guard right before my execution.

1 I mean, of course we're going to defend that, Your  
2 Honor, because there's absolutely no corroborating evidence, no  
3 veracity to -- I mean, it's night and day to us because  
4 Mr. Taylor provided us with reliable evidence, and Mr. Miller  
5 has been shown to have already provided unreliable evidence to  
6 this Court.

7 But going back to my original point, I still say if  
8 the statute didn't require all of the inmates of death row to do  
9 anything, it only applied to those that said, you know what, I  
10 think nitrogen hypoxia would be better, so I'm going to  
11 voluntarily elect, those are the only people that had to worry  
12 about that statute. Now, ADOC tried to make sure everybody was  
13 aware of it. But this idea that we needed to come up with a  
14 list, that the burden wasn't put on the inmate under the  
15 statute, that the person wanting to elect wasn't the one given  
16 the affirmative duty under law, is a very dangerous one to  
17 somehow shift to ADOC all of the problems of the world when  
18 we're dealing with people who are represented by counsel on  
19 serious and grave criminal matters who are going to get a  
20 little antsy if correctional officers are seen as trying to  
21 pressure people into making grave decisions about their  
22 election.

23 So I go back to the only thing that matters, then, is,  
24 what did the State do for the people who did say, I wanted  
25 nitrogen hypoxia, and turned their form in, which would be

1 Mr. Miller? The statute does nothing to alleviate Mr. Miller of  
2 the responsibilities of a normal human being to follow up and  
3 make sure that if you don't like this, and you don't see who  
4 gets your form and somebody -- you think you're entitled to a  
5 copy and a notary, and you don't get it, to say, I don't think  
6 that's right. I'm going to -- you know, I'm going to protect my  
7 rights. I'm going to call my lawyer. I'm going to make sure.

8           And I go back to -- I'm still scratching my head, that  
9 why is it that DOC owed him a list at the end of June or the  
10 beginning of July, but if his lawyer had called in July and  
11 said, you know, can you confirm that he elected, and we said,  
12 you know, no, we're not going to tell you anything, that that's  
13 not actionable? The other is his lawyers then turned down -- I  
14 mean, it boggles the mind, Judge, that one is a constitutional  
15 violation and one isn't. It would have resolved Mr. Miller's  
16 problem of not being able to remember anything, according to  
17 him, four years later, and expecting us to figure it out for  
18 him.

19           I would just say the Department of Corrections is a  
20 custodian. It is not a parent, and it is definitely not his  
21 lawyer. And what Your Honor has seen today is Mr. Stallworth's  
22 lawyer was involved in the decision. The federal defenders were  
23 heavily involved in their clients' decision. I think the  
24 federal defenders got a little angry with DOC for co-opting  
25 their form. Other lawyers definitely played a role in this.

1           And for Miller's counsel to put all of this off on DOC  
2 and then try to use the privilege, you know, as -- y'all should  
3 have done all this. Well, what did y'all do? And they're using  
4 it as a sword and a shield. And that's fine, but the problem  
5 with using it -- if it's used as a shield, what they're clearly  
6 communicating to Your Honor is if he told us anything, it was  
7 never intended to be disclosed to anybody else. It was to  
8 remain confidential.

9           And when you look at four, Mr. Miller said, hey, I've  
10 been put in single walk, and I'm being asked to sign something I  
11 think wants me to give up my right to sue DOC. That concern  
12 wasn't there. Ms. Huggins typed out an email to Jody and Carrie  
13 McCollum and said, can we work this out? This is what my client  
14 told me.

15           So, again, I would go back to I think the Court has a  
16 right to question whether the privilege is being used as both a  
17 sword and a shield in this case. It's not critical to the  
18 outcome, but it does add some flavor to the mix, Your Honor.

19           And then finally, we're not in 12(b)(6) land anymore  
20 where we have to assume that everything is true. Your Honor's  
21 heard enough today that unless you're just willing to believe --  
22 if you have a philosophy that I always believe people at first,  
23 just it's the best way to do business, there's no way you can  
24 actually believe what Mr. Miller has said, that he didn't tell  
25 anybody in the entire world about his election because, God



1 knows, that could cause problems if it was proven that he said  
2 he did and then somebody, you know, poked holes in it to show  
3 he's lying. He doesn't want to take a risk of describing the  
4 person he says took his form because then if it's proven that,  
5 you know, no such person existed, or if he says it was Officer  
6 Brown and it was Officer Brown's off day, that creates some  
7 problems for him as well, so he just does the next best thing  
8 and says, I don't know who took it. I just know I put it in the  
9 door. And I know I said this other stuff in my affidavit, but I  
10 was just assuming or that's what Bobby Wayne Waldrep told me.

11           And the Attorney General doesn't have to accept that.  
12 This Court doesn't have to accept that. And in fact, in the  
13 posture we're in right now for a preliminary injunction by a  
14 prisoner, the Court is required to reject it because it's not a  
15 substantial amount of evidence that shows that he is likely to  
16 succeed if this case were to go forward.

17           And one reason I can say that with confidence is he's  
18 already made it clear he doesn't remember a single thing from  
19 four years ago. That's not going to improve if he's still alive  
20 in three months or 12 months or 24 months. That's not going to  
21 change.

22           And that's why if it's unfair to him to have to go  
23 back four years and think, I would definitely ask Your Honor to  
24 think about the fairness to Commissioner Hamm, who took office  
25 in January of this year, and Warden Raybon, who took office in I

1 believe 2021. That asking them to go back and being fact finder  
2 and decision maker for things that other people did four years  
3 ago is patently unfair. And that's what the statute of  
4 limitations has been designed to prevent against.

5 So If Your Honor has any questions --

6 THE COURT: I think you will acknowledge this, but  
7 would you agree that there is a liberty interest at stake in  
8 terms of the election under the statute?

9 MR. HOUTS: That's one area I've been wanting the time  
10 to do more research, but I've been busy with -- there is some  
11 sort of interest there, and it's hard for me to define, like,  
12 where or how -- how to make it tangible. Because the election  
13 form itself is not the interest, but it is what he says would  
14 have convinced him or protected him. But if the form is it,  
15 then negligent loss is failed to his case. But if that's what  
16 verified or showed his election, then, again, I go back to all  
17 the procedural due process had to be formed around that form  
18 getting to the warden and being kept by the warden. All that  
19 happened in June of 2018.

20 THE COURT: Under the rational basis test, the basis  
21 for treating Mr. Miller differently from Mr. Taylor, identify  
22 for me and for the record what the State's position is as to  
23 exactly what that interest is.

24 MR. HOUTS: Talking about the rational basis?

25 THE COURT: Rational basis. Yes.

1           MR. HOUTS: Well, I mean, I always look at it as you  
2 have to say that what -- in Defendant Marshall's case, the  
3 Supreme Court, what he did was irrational. That when someone  
4 came in and said, I'm waiving the privilege, here's a signed  
5 form from June 2018, here's where we faxed the blank form to the  
6 prison, here's where we mailed the stuff to the prison, here's  
7 where he mailed it back, here are our notes talking about how  
8 hard it was to have that conversation with him. For him to go,  
9 oh, we probably need to charge ahead, only if the Court thinks  
10 that's irrational, you know, could Mr. Miller prevail.

11           And I will say, when my friend gave the example in  
12 defending the Eighth Amendment claim of my boss saying, oh,  
13 we're going to not move on African Americans, or we're going to  
14 always move on African Americans and not white people, that's an  
15 equal protection claim. That's not Eighth Amendment. I mean,  
16 because it is arbitrary and capricious and treats different  
17 people based on protected statuses, that's going to be wrapped  
18 up in a 1983 as an equal protection claim. That's not going to  
19 be an imposition of the death penalty claim.

20           And I go back to what we've -- I'm sure Your Honor is  
21 tired of me saying this, but, again, they keep saying implement,  
22 implement, implement. And if you read case law for arbitrary  
23 and capricious, it's impose, impose, impose. And the death  
24 penalty here was imposed a long time ago.

25           THE COURT: Well, let's go back again to my rational

1 basis question for there being a difference between those two.  
2 Is it that there is corroborating evidence on Mr. Taylor's part  
3 when in Mr. Miller's end there is not? Is it that Mr. Taylor  
4 has produced or did produce a written election form with a date  
5 on it and Mr. Miller has not, or is it something different?

6 MR. HOUTS: Well, I mean, obviously, it's hard to -- we  
7 couldn't have made a comparison before Mr. Miller made his  
8 claim. So we're looking back and going, what are the things  
9 that we were looking at?

10 But the first I will start with is Mr. Taylor's counsel  
11 were not hesitant or qualified in their -- like, we think you  
12 made a mistake. There's been an election here. They knew.  
13 They knew that he had made an election.

14 There was another difference as well. And that is the  
15 first time the State even told a federal court or anyone  
16 publicly that we were moving closer to being prepared to do a  
17 nitrogen hypoxia was I believe in this -- not Your Honor's  
18 court, but in this court, the Middle District, through three  
19 status reports filed with the Court throughout 2021 which were  
20 not in existence with Mr. Taylor.

21 But I think in October and November of last year, we  
22 talked about the system being installed, reviewed by safety  
23 experts, and that we were beginning work on a protocol which got  
24 interrupted by change in commissioner. But that's the  
25 difference here.

1           So when we're contacted by counsel, it's not like, we  
2 know he elected. Y'all have messed up. It's like, he thinks he  
3 elected. Y'all look for a form.

4           The other problem is if you listen to those two phone  
5 calls, I want Your Honor to think about one other thing. His  
6 lawyers don't know what he's talking about, by his own  
7 admission. He says, I've talked to some other inmates. They  
8 elected about this gas stuff. They can't be executed. So I've  
9 told my lawyers, well, if they get in touch with EJI and federal  
10 defenders, maybe they can stop my execution.

11           The problem is at that point he was assuming that he  
12 was going to be lethally injected, but no one ever called the  
13 state DOC and said, are y'all really going to do your first  
14 nitrogen hypoxia execution? Where is the protocol? The  
15 conversation we had earlier. We're not going to let you do this  
16 until you tell us how you're going to do it.

17           We just entirely skipped that step because everybody  
18 involved knew that he didn't elect, but let's claim he did and  
19 see if it gets us anywhere. And that's why, when we indicated,  
20 yeah, we're prepared, that changed the game because that's not  
21 what he really wants. But we are at that point.

22           So, you know, if Your Honor found his testimony today  
23 believable, highly credible, and you're sure there is a  
24 substantial likelihood of success on the merits, I would go back  
25 to my original point, which is, under the PLRA, we would be

1 entitled to an injunction that's limited only to stopping lethal  
2 injection and allowing nitrogen hypoxia to go forward.

3 THE COURT: Well, as it concerns his testimony, you  
4 don't have any direct controverting evidence. I mean, he's come  
5 in and said he signed the form, turned it in, and he's taking  
6 the position that it was taken up by whomever the correctional  
7 officer was. You haven't come in and rebutted that with  
8 testimony from that same correctional officer who says, I walked  
9 down the cell block, and it wasn't there. So we don't have a  
10 rebuttal with direct testimony in that form, so, I mean, aren't  
11 you really just attacking his credibility through all these  
12 other things that were -- that could have existed at that time  
13 or statements he was making years later?

14 MR. HOUTS: I mean, let's talk about it in terms of the  
15 pleading standards that we are briefing in Twombly and Ashcroft  
16 versus Iqbal. Supreme Court says if you say a man punched me in  
17 the face, but you don't tie the man to the defendant, that  
18 that's not good enough. You say, oh, they came up with some  
19 racist policies and applied them to me. That's not good enough.  
20 Like, how are they involved? How are the policies racist?  
21 We've got to go a little bit further.

22 And he says, a guy passed out some forms, and a guy  
23 collected my form and told me he wouldn't notarize it and he  
24 wouldn't copy it. But that's not what -- even now it's changing  
25 to, well, I think I said that when he passed out the form, and I

1 don't know who picked it up. And to me, that goes directly to  
2 veracity.

3           It's like pleading and saying, no, I turned a form in.  
4 Okay. Well, who did you turn it in to? I don't know. What  
5 color skin did they have? I don't know. Man or female? I  
6 don't know. Maybe a guy probably. Fat? Skinny? I don't know.  
7 Are you going to ever remember? No. If that's the pleading  
8 standard -- but we've got to be able to figure out who did it.

9           And when I asked him about Captain Emberton because of  
10 his name being all over the complaint, but yet linked to Reeves,  
11 he says, I don't know if that's who it is. That's what Bobby  
12 Wayne Waldrep told me. Well, can you describe them for me? No.

13           Why should I assume it's Captain Emberton when he  
14 cannot describe Captain Emberton to me even today? And you  
15 recall, Your Honor, when we were talking about his incident on  
16 the single walk, I think he threw out three names without  
17 blinking an eye there. Said, oh, yeah, Warden Brown, Officer  
18 Brown, and Ms. McKenzie did whatever. He had no problem  
19 remembering that. So I think we're very much entitled to  
20 question both his veracity and whether his affidavit actually  
21 says anything.

22           THE COURT: Well, let's just assume that he put the  
23 form in the bean hole and he fell asleep, and some correctional  
24 officer came by at some point and picked it up. Is the State's  
25 position that that would be sufficient for purposes of him

1 meeting his obligations under the statute?

2 MR. HOUTS: If it's a negligent loss -- again, I go  
3 back, are we talking about the claim here -- I mean, at best, if  
4 it was negligently lost, what relieved him of the obligation to  
5 say, I didn't get a list or confirmation that I confirmed, like,  
6 please give me confirmation? I mean, I seriously have a  
7 problem, Your Honor, with this idea that ADOC is custodian,  
8 parent, lawyer, all of the above. At some point Mr. Miller  
9 needs to call his lawyer and say, get on this for me. He needs  
10 to ask for confirmation that we got it, and then if we deny it,  
11 then come to Your Honor and tell Your Honor what bad people we  
12 are.

13 But to say we're bad people because we didn't cater to  
14 his every whim, when it was his right, the statute gave him the  
15 option, put no obligation on us other than to accept the form,  
16 that's my problem here. We're wanting to say that DOC is the  
17 solver of all the world's problems, but the statute says nothing  
18 other than give it to the warden, but, inmate, you have to  
19 decide. You have to make a personal written election. You have  
20 to deliver it to the warden. It's not the other way around,  
21 Judge.

22 THE COURT: Anything else, Mr. Houts?

23 MR. HOUTS: No, Your Honor. I appreciate your time and  
24 your patience.

25 THE COURT: Oh, I did not ask you, in fairness. Of the



1 three claims, what's your strongest and what's your weakest?

2 MR. HOUTS: Grounds of dismissal, Eighth Amendment. I  
3 just do not agree with my colleagues that infliction is the  
4 standard as opposed to imposition of the punishment itself.

5 Next would be equal protection because this is a class  
6 of one. The decision to compromise a case, if you're going to  
7 say that what lawyers do is one dimensional, then it's going to  
8 be a problem for a lot of the legal community.

9 Procedural due process is problematic just because, you  
10 know, again, it's malleable. As I said earlier, we're nailing  
11 Jello to the wall. And until you tell me what the procedural  
12 due process you were denied is and what the adequate state  
13 remedy you think should have existed that you didn't have is,  
14 we're talking in circles to the point I'm not going to --

15 I say, we didn't give you a list. Why didn't you call?  
16 Well, that wouldn't have been actionable if we had called and  
17 you had turned us down. But the fact that you didn't give us a  
18 list, that's actionable.

19 I mean, at some point we have to start talking in  
20 specifics when we talk about procedural due process. Otherwise,  
21 we're just going to talk circles around each other for the next  
22 week.

23 THE COURT: Thank you.

24 MS. KLEBANER: If I could respond to some of those  
25 points.

1 THE COURT: You may.

2 MS. KLEBANER: So maybe I'll just take the sort of most  
3 easily isolated issue of everything that I just heard, and we  
4 can knock this out of the way first.

5 Mr. Houts in his closing statement referred several  
6 times to messages from Mr. Miller to an unidentified person,  
7 saying, we've got to put everyone in a time crunch. My lawyers  
8 say we have to wait until -- to file at the last minute.

9 What he's referencing are exhibits to the defendants'  
10 opposition to Mr. Miller's motion for expedited discovery. So  
11 those are exhibits to docket number 33. So they're docket  
12 numbers 33-1, 33-2, and 33-3. He's never moved to enter them  
13 into evidence in this hearing today. Moreover, he has grossly  
14 mischaracterized the nature of the messages and the contents  
15 within them.

16 This is a message -- a series of -- it's three sort of  
17 text messages, maybe email messages, between Mr. Miller and a  
18 pen pal of his in Europe. In the first message --

19 Would you like me to put it on the Elmo so you can see it?  
20 I don't want you to have to --

21 THE COURT: Now, these have been admitted or have not  
22 been?

23 MS. KLEBANER: They have not been admitted. They're on  
24 the docket as exhibits to an opposition to Mr. Miller's motion  
25 for expedited discovery. But since Mr. Houts has been talking

1 about them at length, I --

2 THE COURT: Let me ask you all this. As it concerns  
3 the preliminary injunction that we're here for today, are the  
4 parties asking me to only consider what has been presented  
5 today, or do you also want me to consider whatever may have been  
6 attached to the pleadings and to the complaint?

7 MS. KLEBANER: So from Mr. Miller's perspective, his  
8 exhibits today include everything that was attached to the  
9 complaint. So as long as Your Honor is considering the full  
10 briefings in this case on the two -- well, there's three motions  
11 to dismiss, but on both the motions to dismiss and on the motion  
12 for preliminary injunction, all the exhibits that we submitted  
13 here today as well as the pleadings themselves, that's the  
14 universe. And that's the only reason why we've sort of gone on  
15 this detour of these messages that he's talking about, because  
16 they have not been moved into evidence. And if you want, we can  
17 talk about the content of it, but it's, with context, just not  
18 pertinent to this at all.

19 THE COURT: Can you just give me the highlights or the  
20 Cliff Note version, as they used to say?

21 MS. KLEBANER: The Cliff Note version is this is  
22 Mr. Miller chatting with a European woman, making very, very  
23 high-level comments about how some lawyer told him he has to  
24 wait about something. And it's dated August of 2022, which I  
25 suppose is why Mr. Houts keeps referring to it. But there's

1 absolutely nothing in any of these exhibits that references  
2 nitrogen hypoxia or his execution or an election form or lethal  
3 injection. There's truly no indication that any of these are  
4 relevant to what's happening.

5           So I just want to be clear that these messages that  
6 Mr. Houts is referencing both are not evidence today, and they  
7 also just have no bearing whatsoever on the issue of statute of  
8 limitations or laches.

9           Okay. So I'll put that to the side.

10           Mr. Houts discussed several times this issue of  
11 Mr. Miller's reaction to Mr. Houts pulling out a gas mask at his  
12 deposition. I believe that Mr. Miller's deposition transcript  
13 is Defendants' Exhibit 1, so you have that transcript in front  
14 of you, Your Honor. And I recommend that rather than accepting  
15 the characterization of it, that you look to Mr. Miller's words  
16 themselves. If you don't mind, I'll put them up here on the  
17 screen for this particular exchange.

18           So on page 85, represents -- where I've marked here.  
19 Mr. Houts said -- and he was holding up a gas mask while he did  
20 this -- "If a correctional officer came to try to just, as a  
21 planning precaution, fit a mask to your face to make sure there  
22 were no issues, is that something that you would be cooperative  
23 with, or is that something that would upset you?"

24           Mr. Miller responds: "It could be something that would  
25 upset me."

1           Mr. Houts asks: "Why is that?"

2           And he responds: "Because ain't nobody else going  
3 through the same thing. Why are people prior to me who signed  
4 like I did or people who they didn't find theirs, as in Jarrod  
5 Taylor, they never found his, or some other guys never found,  
6 why they are not doing this and you asking the same question of  
7 them? I want to be treated fairly. I want the courts to treat  
8 me fairly."

9           This exchange is not some sort of refusal on behalf of  
10 Mr. Miller to cooperate with ADOC or with the execution process  
11 more broadly or with the nitrogen hypoxia protocol development  
12 more specifically. He says he would be upset if they fitted him  
13 with the means of his own execution, which as a preliminary  
14 matter, I think is a very natural human reaction and shouldn't  
15 be used to read into the veracity of his testimony about what  
16 happened in June of 2018 when someone's holding a gas mask in  
17 your face. He said he would be upset because no one else is  
18 being subjected to the same thing.

19           And that is the heart of this lawsuit. Mr. Miller is  
20 asking to be treated as every other man who elected nitrogen  
21 hypoxia. No one else has been fitted with a gas mask. No one  
22 else has been asked to subject themselves to that kind of  
23 treatment and asked if they would cooperate or if it would upset  
24 them.

25           So it is true that Mr. Miller said "It could be

1 something that would upset me" in response to that question, but  
2 it's not some sort of broader refusal to cooperate. It goes to  
3 the heart of his equal protection claim, Your Honor.

4           Mr. Houts also mentioned the idea of cooperation in  
5 this case; that if counsel for Mr. Miller has any ideas of how  
6 to make the nitrogen hypoxia protocol safer, we should share  
7 them with the State. It is, of course, not the burden of the  
8 people to be executed to craft a constitutionally sufficient  
9 protocol for the State of Alabama in terms of how to use an  
10 untested method of execution for the first time.

11           Mr. Houts also represented several times that  
12 Mr. Miller has no right to see the protocol before his  
13 execution, and that they won't make it public even if Your Honor  
14 orders nitrogen hypoxia execution. This flies in the face of  
15 even the barest amount of judicial review of an exercise of a  
16 tremendous amount of power by the defendants. To say they will  
17 not under any circumstances release the protocol to the Court in  
18 order to have some sort of oversight or review of how they're  
19 going to try to kill someone for the first time with a new  
20 method is emblematic of sort of how we got to this position this  
21 close to the execution date. They don't want to share what they  
22 have, what they don't have, be it in terms of election forms or  
23 protocol or where they are with that protocol.

24           THE COURT: Well, let me stop you, and let me ask you  
25 this. If I was to issue an order enjoining the execution by

1 lethal injection but allowing it to go forward by nitrogen  
2 hypoxia, are you going to come in to court again with me and ask  
3 for a motion to stay as for the nitrogen hypoxia execution?

4 MS. KLEBANER: If you were to issue -- can you say it  
5 again?

6 THE COURT: Sure. If I give you the relief that I  
7 understand you're asking, which is to preclude an execution by a  
8 lethal injection, that would, therefore, allow the execution to  
9 go forward by nitrogen hypoxia because there is no order  
10 enjoining it. Are you going to come back into court here in  
11 this proceeding in this manner and then ask me to stay the  
12 execution by nitrogen hypoxia because you don't know what the  
13 protocol is?

14 MS. KLEBANER: If we receive that relief, then that  
15 puts Mr. Miller in the same category as every other person on  
16 Holman death row whose election forms defendants are honoring.  
17 And we have the list of those people now that was tendered to us  
18 in discovery. So it will be that list of people plus Mr. Miller  
19 who have elected in to nitrogen hypoxia and have to be treated  
20 equally under the statute.

21 THE COURT: Well, somebody has to be the first.

22 MS. KLEBANER: Yes. And I will -- just to pick up on  
23 that point, I heard Mr. Houts say he doesn't want to be the  
24 first. This is a lawsuit about not wanting to be the first.  
25 We're not arguing that Mr. Miller has a right to not be the

1 first. We're not asking to not be the first. We're asking that  
2 his original election be honored, and that any decisions that  
3 ADOC has to make after that decision is recognized flow  
4 naturally from there.

5 But we first have to acknowledge that he made an  
6 election for nitrogen hypoxia, and then the State has to  
7 exercise its own judgment about whether it's ready to use that  
8 method to execute someone. And from everything that we've heard  
9 today, it does not sound like they are, although they are very  
10 insistent that they will not share the protocol with the Court  
11 or with anyone who might be subjected to it, so it's very hard  
12 to speculate where they are in that process.

13 One more point, Your Honor, just briefly. Mr. Houts  
14 said ADOC had no obligation to do anything under this statute.  
15 Of course, that's not true. They have obligations under the  
16 Constitution. They're holding men in their custody. And if  
17 they have a statutory right to something, ADOC has to see that  
18 it's provided, and of course, they have to ensure their  
19 constitutional rights. So to say that ADOC are not his lawyers,  
20 you know, not his mom or dad, that they have no obligation to do  
21 anything, really gives short shrift to their constitutional  
22 obligations in this case.

23 THE COURT: Let me ask you about your interpretation of  
24 the statute. The State is obligated to honor a timely election,  
25 that being an election for nitrogen hypoxia within 30 days.



1 Does the statute preclude the State from honoring a late  
2 election, or do they have discretion?

3 MS. KLEBANER: It's silent on that question.

4 THE COURT: And because it's silent, does that mean  
5 they have discretion?

6 MS. KLEBANER: It appears that they are exercising  
7 discretion, yes, Your Honor. And that is the heart of one of  
8 our challenges here today, that they are exercising discretion  
9 in an irrational way based on whether or not they have  
10 privileged client-attorney communications.

11 And on that same point, Your Honor, Mr. Houts had  
12 mentioned -- he was sort of describing the attitude of  
13 Mr. Taylor's lawyers and how they snapped to attention the  
14 second they saw the filing in the Alabama Supreme Court, and  
15 they immediately provided those privileged communications, and  
16 that those were the examples of a person -- someone whose  
17 lawyers were very straightforward or earnest in protecting the  
18 election choice. Mr. Miller wasn't hesitant after the Attorney  
19 General moved to set his execution date in the Alabama Supreme  
20 Court. As soon as he moved to set that date, his counsel  
21 reached out to ADOC on the assumption, honestly, that a mistake  
22 had been made, and then began filing motions in opposition.

23 So this sort of characterizing -- to go even a step  
24 beyond, we want privileged attorney-client communications to go  
25 a step beyond into, well, we think these lawyers acted in a

1 better way, it's inappropriate, and it's also just not true in  
2 this case. The second that they filed that motion, Mr. Miller  
3 and his legal team sprung into action.

4 THE COURT: Mr. Houts, maybe it's no longer an issue,  
5 but does the State still have any issue concerning the  
6 timeliness of when the preliminary injunction request was made?  
7 I mean, now we're further down the road from when we talked  
8 about it before the discovery request, but is there any issue  
9 from the State's point of view that the preliminary injunction  
10 request was filed when it was?

11 MR. HOUTS: Again, Your Honor, that would go -- all of  
12 it falls under that laches consideration. But to us the more  
13 important is -- and Your Honor hit on it in our conference on  
14 the 2nd. What was it about this that took until August the  
15 22nd? If your client doesn't know anything about what happened  
16 and you expect the Department of Corrections and the Attorney  
17 General to do all of your discovery for you, why are you  
18 depriving us of that time and waiting until the --

19 So the fact that they waited longer for the preliminary  
20 injunction request, yes, Your Honor. The fact that when we  
21 said, please give us a more specific statement so we can better  
22 help winnow down the issues and help the Court to focus on  
23 what's truly important here, and we get, it's really good  
24 enough, but we'll just change a few -- all of it speaks to, I  
25 have not had more than six or seven hours of sleep in a week and

1 a half, Your Honor, because I'm doing everything I can to  
2 accommodate the Court and to even accommodate my friends because  
3 it's my job. That's what I'm supposed to do.

4 But do I wish that they would have done it July 15th  
5 and given us plenty of time? Absolutely.

6 Do I think the Court is required to consider that?  
7 Absolutely.

8 I think if you read all of the Supreme Court and  
9 Eleventh Circuit decisions on laches, you will see their  
10 decisions to wait are almost always negative to the outcome;  
11 adverse to the outcome. And I do want the Court to consider  
12 that. Yes, Your Honor.

13 THE COURT: I'll give you a word on that as well.

14 MS. KLEBANER: Yeah. And we absolutely appreciate how  
15 the last-minute nature of these death penalty decisions in  
16 Alabama creates a substantial burden on this Court and its  
17 resources, and we want to assure you there was absolutely no  
18 delay in the filing of Mr. Miller's lawsuit. We got the  
19 decision from the Alabama Supreme Court on July 18th, so we  
20 certainly couldn't have filed anything before July 18th because  
21 we were actively litigating it in the highest court in the State  
22 of Alabama.

23 THE COURT: So you acknowledge, then, that the Supreme  
24 Court could have come away with a decision in which they agreed  
25 with whatever objection Mr. Miller lodged with them; is that

1 accurate?

2 MS. KLEBANER: I think so, yeah. I mean, they had a  
3 huge amount of discretion at that particular procedural posture.  
4 They could have remanded for a fact hearing back to the trial  
5 court. I think that probably would have been the most likely  
6 outcome in our favor.

7 THE COURT: And presumably, because of the objection,  
8 whatever it was that was lodged, you drew at least one dissent.  
9 I'm assuming that's why Judge Parker dissented. I don't know.  
10 Doesn't that undermine the due process position on your end?

11 MS. KLEBANER: Not at all, because our argument is not  
12 about whether the Alabama Supreme Court gave us a fair shake.  
13 It's about the process that defendants enacted, or the lack of  
14 process, rather, in terms of enacting their constitutional  
15 responsibility to get these nitrogen hypoxia liberty interest  
16 forms to the inmates and back from the inmates. That's the  
17 process that was deficient here.

18 THE COURT: Okay. Anything else on your end?

19 MS. KLEBANER: No, unless you have any other questions.

20 THE COURT: Mr. Houts, anything else on your end?

21 MR. HOUTS: No, Your Honor. Thank you for your time.

22 THE COURT: Do you have a copy of Mr. Miller's  
23 deposition transcript electronically that you can email my  
24 chambers?

25 MS. KLEBANER: Yes. Sure.

1 MR. HOUTS: I believe we do, Your Honor.

2 THE COURT: If you-all could have it emailed today, be  
3 sure to copy opposing counsel on it. And email a copy of a  
4 travel transcript if you have it. That way I'm not looking at a  
5 one-inch page of deposition transcripts. Email both, but I'd  
6 like to have a travel as well, four per page.

7 MR. HOUTS: I believe we have one. I'll have to go  
8 back and look, Your Honor. I can't swear to it.

9 MS. KLEBANER: We have both the condensed, four per  
10 page, and the one per page. We'll send you both.

11 THE COURT: Okay. That would be great.

12 And then also, I know we had talked about it before  
13 lunch, but filing with me a copy of what was filed with the  
14 Alabama Supreme Court. And if there needs to be something  
15 that's redacted in terms of some privacy, some confidentiality,  
16 please do it, but I would like to see that.

17 MS. KLEBANER: So we will send you all filings from the  
18 Alabama Supreme Court. If we're sending them to your chambers,  
19 I don't see what would need to be redacted on the issue of  
20 the -- there was one attachment to a pleading. I think that was  
21 the State's objection, too, but --

22 THE COURT: Well, it needs to make its way into the  
23 record as well, so whatever gets e-mailed to me also needs to be  
24 filed with the Court.

25 MR. HOUTS: I was able to confirm over lunch, Your

1 Honor. We will just go ahead and put Mr. Taylor -- ran the  
2 privilege thing to the ground, and we're just going to put the  
3 materials in, if that's okay.

4 I'm sure y'all wouldn't object.

5 So we'll just file all of the materials -- what was  
6 Exhibit B in the Supreme Court.

7 THE COURT: So the sooner you can get that filed with  
8 me, the better.

9 MR. HOUTS: Yes, Your Honor.

10 THE COURT: And just like you, you may have had six or  
11 eight hours of sleep for the past two weeks, and you probably  
12 equally -- that's going to impact my chambers as well for the  
13 next few days. So please don't sit on that. Okay? All right.

14 MS. KLEBANER: So I just want to be certain. We're  
15 going to send you all the briefings in the Alabama Supreme Court  
16 proceeding, we're going to send you all the exhibits from today,  
17 and we're going to send you Mr. Miller's deposition transcript,  
18 which is Exhibit 1, but also the full page and the four page.

19 THE COURT: Yes, please. And do this. Send my office  
20 a separate email saying that you sent it, because sometimes  
21 things get hung up and disappear in the internet world because  
22 of the size of the attachments. So at least you get an  
23 acknowledgment from us that we've received it. Okay?

24 MS. KLEBANER: Yes.

25 THE COURT: All right. Well, thank you all. I

1 appreciate the arguments. We're adjourned for the day. Thank  
2 you.

3 (Proceedings concluded at 4:04 p.m.)

4 \* \* \* \* \*

5 COURT REPORTER'S CERTIFICATE

6 I certify that the foregoing is a correct transcript  
7 from the record of the proceedings in the above-entitled matter.

8 This 15th day of September, 2022.

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/s/ Patricia G. Starkie  
Registered Diplomate Reporter  
Certified Realtime Reporter  
Official Court Reporter

## **APPENDIX G**



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

ALAN EUGENE MILLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 2:22-cv-506-RAH
	)	[WO]
JOHN Q. HAMM, Commissioner,	)	
Alabama Department of Corrections,	)	
<i>et al.</i> ,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

**I. INTRODUCTION**

In 2018, Alabama passed a law granting death row inmates an opportunity to elect their execution by a new method, nitrogen hypoxia, in lieu of Alabama’s default method, lethal injection. This case presents another occasion for the Court to consider the downstream effects of an Alabama Department of Corrections official’s decision to distribute to death row inmates a form by which inmates could elect their execution by nitrogen hypoxia. Plaintiff Alan Eugene Miller claims that he timely submitted a nitrogen hypoxia election form, but the Defendants claim they have no record of Miller’s form in their files. Miller is scheduled to be executed by lethal injection on September 22, 2022.

Miller is a death row inmate in the custody of the Alabama Department of Corrections (ADOC) at Holman Correctional Facility (Holman).<sup>1</sup> On August 22, 2022, he filed this lawsuit under 42 U.S.C. § 1983 against Defendants John Q. Hamm, the Commissioner of the ADOC; Terry Raybon, the Warden at Holman; and Steve Marshall, Attorney General of the State of Alabama (collectively, the State or Defendants). All Defendants are sued in their official capacities.

In his Amended Complaint (Doc. 18), Miller alleges that the State violated his constitutional rights by failing to honor his nitrogen hypoxia election. Miller alleges that he timely made such an election in 2018, but the State cannot locate any record that he did so. He seeks declaratory and injunctive relief.

This matter is before the Court on Miller's Motion for Preliminary Injunction (Doc. 28), wherein Miller seeks to enjoin the State from executing him by lethal injection and a declaration that his nitrogen hypoxia election be honored. The motion has been fully briefed (Docs. 42, 48), and the parties have submitted hundreds of pages of evidence. On September 12, 2022, the Court conducted an evidentiary hearing, during which it heard Miller's live testimony and oral argument from counsel on the motion. The State presented no live testimony in response. This matter is ripe for review.

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<sup>1</sup> Holman is the primary correctional facility for housing death row inmates in Alabama and is the only facility in the state that performs executions.

For the following reasons, Miller’s Motion for Preliminary Injunction is due to be granted.

## II. BACKGROUND

“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 a preliminary injunction are taken as true.’” *Alabama v. U.S. Dep’t of Com.*, 546 F. Supp. 3d 1057, 1063 (M.D. Ala. 2021) (alteration in original) (quoting *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976)). “At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is ‘appropriate given the character and objectives of the injunctive proceeding.’” *Levi Strauss & Co. v. Sunrise Int’l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) (quoting *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986)).

### A. Miller’s Capital Litigation History

In 2000, Miller was convicted of the capital murder of Lee Holdbrooks, Scott Yancey, and Terry Lee Jarvis. By a vote of 10–2, the jury recommended that Miller be sentenced to death. The trial court adopted the jury’s recommendation and imposed a death sentence. Miller’s conviction and sentence were affirmed by the Alabama Court of Criminal Appeals in 2004. *Miller v. State*, 913 So. 2d 1148 (Ala. Crim. App. 2004). The Alabama Supreme Court denied certiorari, and the Alabama

Court of Criminal Appeals issued Miller's certificate of judgment on May 27, 2005. *Miller v. State*, 99 So. 3d 349, 352 (Ala. Crim. App. 2011). The United States Supreme Court likewise denied certiorari. *Miller v. Alabama*, 546 U.S. 1097 (2006) (mem.).

On May 19, 2006, Miller filed a petition under Alabama Rule of Criminal Procedure 32 for postconviction relief and subsequently filed an amended petition on April 4, 2007. *Miller v. State*, 99 So. 3d 349, 353 (Ala. Crim. App. 2011). On May 5, 2009, the state circuit court denied Miller's petition, which the Alabama Court of Criminal Appeals later affirmed. *Id.* at 353, 426. After initially granting certiorari, the Alabama Supreme Court quashed the grant and denied certiorari on June 22, 2012. *Miller v. Dunn*, No. 2:13-cv-154, 2017 WL 1164811, at \*9 (N.D. Ala. Mar. 29, 2017).

In January 2013, Miller filed a petition for habeas relief in the United States District Court for the Northern District of Alabama, which was denied in March 2017. *Id.* The United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of habeas relief in August 2020. *Miller v. Comm'r, Ala. Dep't of Corr.*, 826 F. App'x 743 (11th Cir. 2020) (per curiam). The United States Supreme Court denied certiorari in October 2021. *Miller v. Dunn*, 142 S. Ct. 123 (2021) (mem.).

## **B. Backdrop of the Present Action**

### *1. Nitrogen Hypoxia Becomes an Alternative Method of Execution*

On June 1, 2018, Alabama Act 2018-353 went into effect. *See* 2018 Ala. Laws Act 2018-353; ALA. CODE § 15-18-82.1(b). This law granted death row inmates one opportunity to elect nitrogen hypoxia as their method of execution, in lieu of Alabama’s default method, lethal injection. ALA. CODE § 15-18-82.1(b). The nitrogen hypoxia election process requires an inmate to make that election in writing and deliver it to his or her warden within thirty days after a certificate of judgment has been issued affirming the inmate’s conviction. *Id.* Inmates, like Miller, whose certificates of judgment issued prior to June 1, 2018, had from June 1 until July 2, 2018,<sup>2</sup> to elect nitrogen hypoxia in writing to the warden. *Id.* at § 15-18-82.1(b)(2).

Any writing from the inmate is sufficient under the statute. An inmate’s failure to elect nitrogen hypoxia within the thirty-day period operates as a waiver of that method of execution.

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<sup>2</sup> Alabama law states that the “[t]ime within which any act is provided by law to be done must be computed by excluding the first day and including the last. However, if the last day is Sunday, . . . the last day also must be excluded, and the next succeeding secular or working day shall be counted as the last day within which the act may be done.” ALA. CODE § 1-1-4. Excluding June 1, 2018, the day the statutory period began to run, the thirty-day period expired on July 1, 2018. July 1, 2018 was a Sunday, and thus could not be counted as the last day. Thus, under Alabama rules of construction, the statutory period to elect nitrogen hypoxia was from June 1, 2018, through July 2, 2018.

## *2. Background Regarding Distribution of the Election Form*

On June 26, 2018, attorneys with the Federal Defenders for the Middle District of Alabama's Capital Habeas Unit traveled to Holman to meet with their clients, notify them of the change in the law, and answer questions regarding nitrogen hypoxia. During this meeting, the Federal Defenders provided a typewritten form that their clients could sign and submit to the warden to effectuate a nitrogen hypoxia election.

Sometime after this June 26 meeting, but before the statutory deadline of July 2, 2018, Holman's then-warden, Cynthia Stewart, obtained the Federal Defenders' election form, and at the direction of someone above her at the ADOC, she instructed Correctional Captain Jeff Emberton to distribute a copy of the form along with a blank envelope to every inmate on Holman's death row. Captain Emberton then distributed a blank form to each death row inmate and collected the forms from inmates later the same day.

## *3. Miller's Execution Date Is Set*

With Miller's appeals of his conviction and death sentence exhausted, on April 19, 2022, Attorney General Marshall moved the Alabama Supreme Court to set Miller's execution date. (Doc. 52-22.) On May 18, 2022, Miller filed an objection to the State's motion, arguing that setting an execution date was premature because Miller had timely elected execution by nitrogen hypoxia, and the State had

not yet established a protocol for conducting nitrogen hypoxia executions. (Doc. 52-23.) In support of his objection, Miller submitted an affidavit asserting that in June or July of 2018, a correctional officer at Holman passed out forms to individuals on death row concerning an election to be executed by nitrogen hypoxia, that Miller completed and signed the form, and that he returned the form to a correctional officer “at the same time that he was collecting forms from everyone else.” (Doc. 18-1.)

Attorney General Marshall responded to Miller’s opposition on May 27, 2022, claiming there was no evidence that Miller had elected execution by nitrogen hypoxia. (Doc. 18-3.) To support his position, Attorney General Marshall filed an affidavit from Warden Raybon, asserting that the ADOC’s nitrogen hypoxia file had no record of an election form from Miller. (*Id.* at 8.)

Miller then filed a reply brief asserting that the State’s response created a factual dispute regarding the existence of Miller’s election form and requesting the case be remanded to an Alabama trial court to resolve the dispute. (Doc. 52-27.) On July 18, 2022, the Alabama Supreme Court, over a dissent from the Chief Justice, granted the State’s motion and set Miller’s execution for September 22, 2022.<sup>3</sup> (Doc. 52-28.)

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<sup>3</sup> Chief Justice Parker dissented without explanation.

#### 4. Miller's § 1983 Lawsuit

In his Amended Complaint, Miller brings three causes of action against the Defendants in their official capacities. (Doc. 18.) First, Miller claims the Defendants violated his procedural due process rights under the Fourteenth Amendment “by failing to ensure an adequate procedure for protecting his election to be executed by nitrogen hypoxia.” (*Id.* at 15.)

Second, Miller alleges the Defendants violated his right to equal protection under the Fourteenth Amendment by treating him differently from similarly situated death row inmates at Holman who, like Miller, timely submitted nitrogen hypoxia election forms. (Doc. 18 at 17.) One inmate mentioned by Miller was Jarrod Taylor, who had his execution motion withdrawn by Attorney General Marshall in 2019 after Taylor claimed that he had elected nitrogen hypoxia. (Doc. 18-2.) Neither the Attorney General's Office nor the ADOC could find Taylor's election form in their files. (*Id.* at 3.) Nonetheless, the Attorney General decided to withdraw the motion because Taylor produced documents and communications with his lawyer that, according to the Attorney General, “support[ed] the assertion that he made a timely election of nitrogen hypoxia,” and the ADOC was not prepared to proceed with an execution by nitrogen hypoxia. (*Id.* at 2–3.)

Finally, Miller claims the Defendants' decision to execute him by lethal injection rather than nitrogen hypoxia is arbitrary and capricious in violation of the



Eighth Amendment. (Doc. 18 at 18–19.) Miller does not assert a method of execution challenge as to lethal injection or nitrogen hypoxia.

Miller asks the Court to declare that he “timely submitted his election form pursuant to Ala. Code § 15-18-82.1(b) and opted into execution by nitrogen hypoxia,” and that the Defendants’ decision to execute Miller by lethal injection rather than nitrogen hypoxia violates his Eighth and Fourteenth Amendment rights. (*Id.* at 19.) Additionally, Miller asks the Court to enter an injunction requiring the Defendants to honor his nitrogen hypoxia election and enjoining the Defendants from executing him with the current lethal injection protocol. (*Id.* at 19–20.) Each Defendant has filed a motion to dismiss Miller’s Amended Complaint. (Docs. 21, 30, 35.)

On September 1, 2022, Miller filed a Motion for Preliminary Injunction asking this Court to enjoin the Defendants from executing Miller via lethal injection and to declare that his nitrogen hypoxia election be honored. (Doc. 28.) On September 2, 2022, Miller filed a Motion for Expedited Discovery, (Doc. 32), which the Defendants partially opposed, (Doc. 33). The Defendants attached to its partial opposition messages or emails between Miller and a pen-pal, (Docs. 33-1, 33-2, 33-3), including one in which Miller states in relevant part: “Lawyers saying same thing got to wait,” (Doc. 33-1). The Court ordered the Defendants to answer Miller’s Interrogatories and Requests for Admission and to produce documents the

Defendants had agreed in their response to produce, as well as a small subset of email communications regarding Miller's election form that the Defendants could locate with reasonable diligence. The Court also ordered Miller to produce documents in his possession relating to his claims or request for preliminary injunction and any documents he intended to introduce at the September 12 evidentiary hearing. On September 7, 2022, counsel for the Defendants deposed Miller at Holman. (Doc. 52-29.)

*5. Evidence Presented at the September 12, 2022 Hearing*

At the evidentiary hearing, Miller presented recordings of two phone calls he made to his brother on April 21, 2022, two days after his execution date was requested. In the first call, he informed his brother that his execution date had been requested. The two discussed whether Miller's brother would be present for the execution, as well as drafting a will, ensuring that Miller's remains would be cremated, and the handling of his remains. During the second call, Miller mentioned a piece of paper about "gas stuff," that Miller called his lawyers and told them they needed to call "the Equal Justice and stuff, and the public defenders" and that "they might be able to halt, put a hold on that," and that he told his lawyers "a long time ago" but his "lawyer did not even know what [he] was talking about."<sup>4</sup>

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<sup>4</sup> At Miller's deposition, the State's counsel asked Miller if he agreed he had said, "Some other inmates signed a piece of paper about using some kind of gas stuff. I called those lawyers and told them they need to call the Equal Justice and stuff and the Public Defenders." (Doc. 52-29 at 66–

Without objection from the Defendants, Miller read into the record parts of several depositions from another case, *Smith v. Dunn*, Case No. 19-cv-927-ECM (M.D. Ala.), including those from Cynthia Stewart, who served as Holman’s warden during the election period (Doc. 52-13); Captain Jeff Emberton, who served at Holman during the election period (Doc. 52-14); Warden Raybon, who served at Holman during the election period (Doc. 52-15); and Jennifer Parker, Warden Stewart’s secretary during the election period (Doc. 52-17).

During her May 26, 2021 deposition, Cynthia Stewart testified she first learned of the new nitrogen hypoxia law through the news, that she was told to expect forms electing the method from inmates, and that prior to the late June meeting between the Federal Defenders and their clients at Holman, she did not receive any election forms. (Doc. 52-13 at 74, 78–80.) Warden Stewart testified that her secretary, Jennifer Parker, kept track of inmates’ completed election forms and scanned them to wherever they had to go. (*Id.* at 88.) Additionally, Warden

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67.) Miller responded: “Federal Defenders. I meant Federal Defenders.” (*Id.* at 67.) The State’s counsel then asked Miller, “But is that what you indicated to your brother?”, to which Miller responded, “Oh, yes.” (*Id.*) At the evidentiary hearing, however, Miller’s counsel insisted that Miller said he had told his lawyers a long time ago that he had chosen gas, “or something to that effect.” (Doc. 58 at 161, 176.) The Court listened to the audio at the hearing and numerous times after the hearing. The audio is not clear, and it is difficult to understand parts of it. The Court cannot ascertain with certainty what was said in the call. Given the audio quality, reasonable factfinders could reach different conclusions about the contents of the call.

Regarding the lawyer not knowing what he was talking about, Miller explained in his deposition that “there’s many lawyers, legal counsel. And the one I talked to was just one.” (Doc. 52-29 at 68.)

Stewart testified that she received instructions from someone higher in the chain of command at the ADOC in Montgomery to distribute election forms to inmates so that they could elect nitrogen hypoxia as their method of execution, but she could not recall who gave her this instruction. (*Id.* at 83–84.) She instructed Captain Emberton to distribute the forms, although she could not recall who made the copies of the blank forms for distribution. (*Id.* at 84–87.) She also could not recall what day Captain Emberton distributed the forms, and she did not know whether Ms. Parker received the forms distributed by Captain Emberton. (*Id.* at 88.) Warden Stewart testified that inmates could give their completed forms to a staff member, give the forms to her when she made rounds through the facility, or they could place their forms in a locked collection box, which was emptied daily and given to the warden’s secretary. (*Id.* at 89–91.)

During his May 24, 2021 deposition, Captain Emberton testified that Warden Stewart directed him to distribute election forms to every Holman death row inmate. According to Captain Emberton, Warden Stewart told him there was a box of election forms and envelopes on the conference room table and that he was to distribute a form and envelope to each inmate. He said she instructed him not to write anything down, not to write anyone’s name down, and not to keep track of who submitted a form. (Doc. 52-14 at 52–55.) Captain Emberton could not recall what day he distributed the forms. He testified that he went to death row, explained to the

inmates that the law had changed and they now had a choice in their execution method, and if they wanted to choose, they were to fill out a form and he would return later in the day to pick it up. (*Id.* at 55–56.) He said he gave this “spiel” to three or four inmates at a time because their cells were close together. (*Id.* at 55–56.) He personally handed a form to each inmate unless the inmate was asleep, in which case he knocked on the cell door to try to wake the inmate up and left the form in the bars of the cell. (*Id.* at 56, 58.) Also, if the inmate was not in his cell at the time, that inmate did not receive a form. Captain Emberton recalled distributing the forms in the morning. He recalled coming back after lunch and collecting the forms, and then he returned the box with the collected forms to the conference room table and told Warden Stewart that he was finished. (*Id.* at 57.) However, Captain Emberton later testified in the same deposition that he did not remember the timeline for collection and that he may not have turned the box of forms in that evening. (*Id.* at 61.) He did not count how many forms were returned to him. (*Id.* at 57.) He testified that tier runners did not distribute the forms. (*Id.* at 58.) He also testified that he did not recall receiving any additional forms after that day. (*Id.* at 60.) He did not tell lieutenants or sergeants that he distributed the forms, and Warden Stewart did not send out a memo to staff about it. (*Id.* at 61–62.) He also explained that Holman death row inmates are locked down in their cells 23 hours a day. (*Id.* at 20.)

Warden Raybon has served as a warden at Holman since 2014. (Doc. 52-15 at 18–19.) During his July 19, 2021 deposition, Warden Raybon echoed Warden Stewart’s testimony that she had directed Captain Emberton to distribute election forms after receiving instructions to do so from the central office. (*Id.* at 60–62.) Warden Raybon recalled seeing an election form in Warden Stewart’s office, but he could not recall if she showed it to him, if he saw it on her desk, or something else. (*Id.* at 60–61.)

During her July 9, 2021 deposition, Jennifer Parker testified that she received election forms the last week of June 2018; that she scanned and emailed a copy of each form to ADOC’s legal counsel, Jody Stewart, in Montgomery; and that she placed the originals of the forms in a file. (Doc. 52-17 at 6–7.) Ms. Parker recalled receiving a stack of election forms after the Federal Defenders’ late June visit and that she knew some forms came in the mail. (*Id.* at 7.) Otherwise, Ms. Parker said she was unaware of where the forms she received came from. (*Id.*) Ms. Parker was not aware that blank forms had been distributed to every death row inmate at Holman. She said that she did not create a list of inmates who submitted an election form. (*Id.* at 12.) She could not recall Warden Stewart asking her to do anything with the forms.

Without objection from the Defendants, Miller also presented a transcript of ADOC Assistant Deputy Commissioner Cheryl Price’s testimony from the hearing

held by this Court on December 9, 2021, in *Reeves v. Dunn*, Case No. 20-cv-27-RAH (M.D. Ala.). Ms. Price served as a Rule 30(b)(6) witness for the ADOC. (Doc. 52-19 at 92–93.) She testified that she was not aware of any protocol the ADOC established regarding the nitrogen hypoxia election process, nor was she aware of any discussion among staff about how to handle nitrogen hypoxia elections. (*Id.* at 97.) She also testified that she was not aware of any procedure in place regarding how to log forms or pieces of paper from inmates who elected nitrogen hypoxia. (*Id.*) She said there was no directive from the ADOC to the individual wardens. (*Id.* at 98.) She said she had no knowledge of Captain Emberton keeping track of who he gave election forms to, nor was she aware of any inmate being asked to sign a receipt that they received the form. (*Id.* at 102.)

At the evidentiary hearing, Miller took the stand and testified. He testified unequivocally that he does not like needles. He explained that, prior to June 2018, someone at the ADOC who tried to insert a needle into his arm to draw blood had trouble finding a vein. (Doc. 58 at 92–93.) According to Miller, they “poke” the needle around, move it around, “sometimes they’ll nick a nerve, or they’ll pull it out and go after the hands or the other arm.” (*Id.* at 93.) Miller estimated that the entire process to draw his blood took 30 minutes. (*Id.* at 95.) He described the experience as “painful” and “feeling like a pin cushion.” (*Id.* at 93–94.) Afterwards, Miller had

a large bruise covering the area inside his elbow that lasted a couple days. His testimony on this subject was uncontroverted.

In his testimony, Miller also recalled that in June 2018, a correctional officer yelled down the hallway to announce that he was handing out forms for the inmates to sign and that he would return later that day to collect them. Miller did not know which correctional officer made the announcement. He explained that he was lying in his bed with his head against the rear wall of the cell during this time. He also said that he was unable to see out of his cell and down the hallway, and due to the cell's design, he could only see directly in front of his cell. Miller was told after-the-fact that Captain Emberton had distributed forms to all the inmates.

Miller testified that he recalled receiving the form and reading it, and he said the words "nitrogen hypoxia" reminded him of "nitrous" or "nitrous oxide," the gas that dentists give patients. (*Id.* at 99–100.) He testified that he used to deliver medical supplies to dentist and plastic surgery offices and that is how he knew about nitrous oxide. (*Id.* at 100.) As he explained, with the nitrous oxide one gets at the dentist, "they put you to sleep." (*Id.*) He explained that he wanted to elect nitrogen hypoxia because, while he did not want to die at all, he was particularly concerned about dying by lethal injection due to his fear of needles and his past negative experiences with them. (*Id.*)



Miller could not recall how long he thought about nitrogen hypoxia before deciding to sign the form. He testified that he signed the form and placed it in a slot between the bars where ADOC staff could collect forms, colloquially known as the “bean hole.” (*Id.* at 97, 101.) He testified, without contradiction, that he typically left documents in the bean hole to be picked up. (*Id.* at 98.) He did not know who collected the election form or what happened to the form after it was collected. He said he had yelled down the hallway saying he wanted the form notarized and a copy for himself, but he did not receive a copy or follow up on his request.

On cross-examination by the State, Miller testified that he lay down after placing the form in the bean hole because he had ankle pain. Miller was unable to describe the correctional officer who passed out the forms, and he said he was unsure whether the same officer both dropped off and collected the form. He also discussed the second phone call with his brother in April 2022, explaining that he had “found out somebody signed it before me and signed it after me, and I thought it was just one time. It was one time signing. And I’m finding out that other people was able to . . . sign or turn it in whenever they felt like turning it in.” (*Id.* at 110.)

In addition, Miller explained that his attorneys had contacted the ADOC in 2021 when he was placed in “single walk” due to a stabbing incident, but he said he was cleared of all wrongdoing by prison officials. The State introduced an email exchange between Miller’s counsel and the ADOC regarding Miller and his

counsel's concerns with the ADOC's internal disciplinary procedures. The emails concerned the attack by another inmate which resulted in Miller's assignment to single walk and counsel's concerns that Miller was being treated unfairly during the process.

Evidence was also submitted regarding two other Holman death row inmates who raised complaints about their completed election forms. First, Jarrod Taylor claimed that he gave his completed election form to an ADOC staff member (Lieutenant Franklin) during the statutory election period with instructions to give the form to the warden, (Doc. 51-2 at 22), but the State was unable to find Taylor's form in its files when it moved to set his execution date in 2019. Second, Calvin Stallworth claimed that he gave his completed election form to an ADOC staff member (an unnamed guard) during the statutory election period, but the individual refused to deliver the form to Warden Stewart. (Doc. 52-8 at 2–3.) Mr. Stallworth's form was ultimately delivered to the warden.

#### *6. Status of Alabama's Execution Protocol for Nitrogen Hypoxia*

When the Alabama Code was amended to add nitrogen hypoxia as an alternative method of execution, and throughout the June 2018 election period, the ADOC had not yet developed a protocol for performing nitrogen hypoxia executions. In a December 2021 hearing before this Court in a different case concerning nitrogen hypoxia election forms, counsel for the ADOC represented that

the protocol should be ready within the first three or four months of 2022. (Doc. 78 at 219 in *Reeves v. Dunn*, Case No. 20-cv-27-RAH (M.D. Ala.)) During the September 2, 2022 status and scheduling conference in this case, counsel for the State represented that prior to the filing of this lawsuit, the State anticipated making an announcement with respect to the nitrogen hypoxia protocol in October. (Doc. 39 at 21.) Subsequently, on September 8, 2022, the State represented in its Response in Opposition to Plaintiff’s Motion for a Preliminary Injunction that if this Court were to issue an injunction requiring Miller’s execution by nitrogen hypoxia, the execution still could be conducted on September 22, 2022. (*See* Doc. 42 at 10.) At the September 12, 2022 evidentiary hearing, counsel for the State stated that, if the Court enjoined Miller’s execution by lethal injection, it was “very likely” the ADOC could execute Miller by nitrogen hypoxia on September 22, 2022. (Doc. 58 at 57–58.) On September 15, 2022, the State filed an affidavit from Commissioner Hamm, in which the Commissioner represented that the ADOC is *not* prepared to execute Miller by nitrogen hypoxia on September 22, 2022.

Suffice it to say, the readiness of the protocol and of the ADOC to conduct executions by nitrogen hypoxia has been a moving target. In this case specifically, the Court has received inconsistent information along the way from the State. In any event, the Court accepts as true Commissioner Hamm’s sworn statement that the ADOC cannot execute Miller by nitrogen hypoxia on September 22, 2022. The

Court notes that while nitrogen hypoxia may not be available on September 22, 2022, the State has not said when it expects the protocol to be ready. From all that appears, the State intends to announce its readiness to conduct executions by nitrogen hypoxia in the upcoming weeks.

### III. JURISDICTION AND VENUE

The Court has original subject matter jurisdiction 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.

### IV. DISCUSSION

“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). Miller is entitled to a preliminary injunction if he demonstrates (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 Defendants; and (4) that the injunction would not be adverse to the public interest. *Ne. Fla. Chapter of Ass’n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1284 (11th Cir. 1990). 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 “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). Miller, 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).

#### **A. Substantial Likelihood that Miller Timely Elected Nitrogen Hypoxia**

All parties agree that, to evaluate Miller’s likelihood of success on the merits, a material issue of fact must first be resolved: whether Miller timely elected nitrogen hypoxia—or, at this stage, whether it is substantially likely that Miller timely elected nitrogen hypoxia. The State agrees that this Court is the proper factfinder to make this determination.<sup>5</sup>

The Defendants have not filed answers to the Amended Complaint, instead filing motions to dismiss. But it appears to the Court, based on a review of the record, that Warden Raybon’s affidavit—attached to Miller’s Amended Complaint—creates a factual dispute, at least as to whether Miller timely submitted

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<sup>5</sup> At the evidentiary hearing, the Court inquired of the State’s counsel, “If it’s a fact question, where is the appropriate forum for that to be resolved?” (Doc. 58 at 160.) Counsel responded, “Here, now that [Miller’s] filed his 1983, it would be this court.” (*Id.*)

the form.<sup>6</sup> Warden Raybon attests that he and his secretary looked in the file where election forms have been stored since June 2018, and they did not find an election form for Miller. (Doc. 18-3 at 8.) Additionally, the State produced in discovery documents purporting to comprise all the nitrogen hypoxia election forms the ADOC has received, none of which is a completed form from Miller. These documents were part of Miller’s evidentiary submission at the September 12 hearing. Like Warden Raybon’s affidavit, these documents—along with Miller’s affidavit, deposition testimony, and hearing testimony—create a factual dispute, at least as to whether Miller timely submitted the nitrogen hypoxia election form. The Court notes that the State did not expressly identify either the nitrogen hypoxia file or the completed forms as potentially rebutting Miller’s testimony. Nonetheless, in light of this factual dispute, the Court must weigh the evidence presented and assess Miller’s credibility in order to determine whether it is substantially likely that he timely elected nitrogen hypoxia.

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<sup>6</sup> Miller argues that the State “ha[s] yet to provide any evidence that Mr. Miller did not submit an election form.” (Doc. 48 at 3.) However, in the proceedings before the Alabama Supreme Court, Miller took the position that Warden Raybon’s affidavit and Miller’s affidavit “present[ed] a factual conflict that must be resolved,” necessitating a remand to an Alabama trial court to conduct an evidentiary hearing and weigh the conflicting testimony. (Doc. 52-27 at 4–5.) To the extent Miller now contends that Warden Raybon’s affidavit is insufficient to create a factual dispute, such a contention would be inconsistent with Miller’s earlier position when litigating before the Alabama Supreme Court.

Having listened to Miller's live testimony and observed his demeanor, and having compared Miller's live testimony with his deposition and affidavit, and with no direct contradicting evidence from the State that is specific to Miller, the Court finds substantially credible Miller's testimony that he timely submitted a nitrogen hypoxia election form. Miller says he followed the instructions for submitting an election form that were given by the correctional officer<sup>7</sup> who distributed the forms. In accordance with those instructions, Miller filled out the election form and turned it in the same day by placing it in the bars of his cell (the bean hole), where he typically placed documents for retrieval and where it was picked up by a prison official. At the hearing, the State did not dispute that placing a form in the bean hole was a proper means of delivering an election form to the warden. Miller's description of the instructions he received is consistent with Captain Emberton's testimony<sup>8</sup> from another case that he distributed forms to all death row inmates one

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<sup>7</sup> Although Miller could not remember details about who distributed the forms and could not say that it was Captain Emberton, the Court finds it more likely than not that it was Captain Emberton. Another possibility is that there was a second mass form distribution event at Holman. But the Court is aware of no evidence that would support an inference that a second form distribution occurred at Holman. Indeed, Warden Stewart's and Captain Emberton's deposition testimony is clear that the ADOC's distribution of forms at Holman was a single event undertaken by Captain Emberton at Warden Stewart's direction. Nonetheless, the Court acknowledges that Miller cannot identify Captain Emberton as the correctional officer who distributed the election form to him.

<sup>8</sup> At the hearing, counsel for the State was quick to correct the Court when the Court suggested that Captain Emberton was the officer who would have handed out and collected Miller's form. (*See* Doc. 58 at 162.) As such, in challenging a suggestion that Captain Emberton was the person who handed out and collected the forms, including Miller's form, the State has created a gap in the chain of custody as it concerns the collection of the forms at the time Miller says he submitted his form.

morning and told them he would return to collect the forms later that day, and that he did pick the forms up later that day.

A consistent theme animates Miller's narrative regarding why he elected nitrogen hypoxia in lieu of lethal injection: his dislike of, and desire to avoid, contact with needles. Miller consistently testified in his deposition and at the hearing that he elected nitrogen hypoxia to avoid being "stabbed" with needles. (Doc. 52-29 at 38, 56, 57; Doc. 58 at 100.) At the hearing, Miller elaborated that he had prior bad experiences at Holman where someone struggled to insert a needle into his arm, causing him to be poked and prodded in an experience he described as "painful" and "feeling like a pin cushion" and that left him with a large bruise that lasted several days. (Doc. 58 at 92–94.) This testimony was uncontroverted. In his deposition, Miller explained that he had heard other inmates had allergic reactions to the lethal injection and that by electing nitrogen hypoxia, he would avoid "allergic reactions to the chemicals that they said was in the lethal injection." (Doc. 52-29 at 38.) The Court finds compelling and credible Miller's consistent explanation that he elected nitrogen hypoxia primarily to avoid needles.

Miller also explained that, based on some limited knowledge of "nitrous" or "nitrous oxide" that is used at the dentist and plastic surgery offices, he thought nitrogen hypoxia would be less painful because "you just went to sleep," (*Id.* at 38–39), "they put you to sleep," (Doc. 58 at 100), or "you just go under," (Doc. 52-29



at 56). He explained the basis of his belief was hearing about others' experiences with gas at the dentist and his prior employment experience delivering equipment to dentist and plastic surgery offices. Thus, Miller "thought" that nitrogen hypoxia would be "a more humane thing." (*Id.*) The Court finds this testimony compelling and credible.

Here, the State does not articulate what circumstances legally meet the definition of "delivery to the warden" and what circumstances do not. Nor does the State argue that putting an election form in the bean hole is insufficient to accomplish delivery to the warden. Nor does the State present any testimonial evidence from Captain Emberton or any other correctional officer who affirmatively stated that Miller did not submit a form when that officer collected the forms from death row after having handed them out.<sup>9</sup> The State simply argues that Miller did not do what he now claims he did because the State does not have a copy of Miller's completed form in its nitrogen hypoxia file. Thus, the Court now turns to the State's arguments for why Miller's testimony should be disbelieved.

Although not expressly identifying it, the State produced two pieces of evidence suggesting that Miller did not elect nitrogen hypoxia. First, an affidavit

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<sup>9</sup> The State does not contend that Captain Emberton, Warden Raybon, or any other witness whose testimony the State wished to present was unable to appear at the evidentiary hearing, nor does the State contend that any such witness was unable, due to the expedited nature of the proceedings, to provide a declaration for the State to offer into evidence.

from Warden Raybon, who was not called as a witness at the evidentiary hearing, states that he and his secretary looked in one place for Miller's form and could not find it. Second, the State produced emails where Jennifer Parker sent ADOC Legal in Montgomery copies of completed election forms that she had received, and a form signed by Miller was not among them. Neither piece of evidence directly rebuts Miller's testimony that he signed the form and put it in the bean hole; rather, each piece only potentially indirectly rebuts Miller's testimony that he delivered the form to the warden by signing the form and putting it in the bean hole.

Where, as here, Miller followed the instructions he says he was given for submitting his election form (and these instructions are consistent with those Captain Emberton gave), and the State does not argue that his submission would be legally insufficient, the State's evidence that his form is not among its records "does not mean it was not received . . . . It could have simply been misplaced after receipt or even misfiled." *Cf. Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1241 (11th Cir. 2002) (analyzing receipt in the context of mailing a document that was properly addressed, stamped, and mailed, which creates a rebuttal presumption of receipt); *id.* at 1240 (explaining that the presumption of receipt is "not a conclusive presumption of law, but a mere inference of fact, founded on the probability that the officers of

the government will do their duty and the usual course of business” (citation omitted)).<sup>10</sup>

Here, the Court has before it no evidence of a standardized policy or procedure for ADOC officials to collect and transmit completed forms to Jennifer Parker for logging and retention, nor is there evidence of a chain of custody from the time forms were collected by Captain Emberton or other ADOC officials. The evidence only reflects that Ms. Parker received completed election forms, scanned and sent copies to Jody Stewart at ADOC Legal, and put the original forms in a file. But other than a stack of forms she received after the Federal Defenders’ visit and forms that arrived by mail, Ms. Parker did not know where completed election forms came from. Ms. Parker also testified that she was unaware that blank forms had been distributed to all death row inmates at Holman.

Thus, there is no evidence of how, or even if, forms collected by Captain Emberton or other ADOC officials made their way to Ms. Parker for filing and storing. Captain Emberton said he did not tell the lieutenants and sergeants that he distributed the forms and that Warden Stewart did not send out a memo to staff. And evidence suggests that two Holman death row inmates had problems after turning in their election forms to ADOC staff: (1) Jarrod Taylor gave his completed election

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<sup>10</sup> The Court does not suggest that a *presumption* of receipt applies here. Nonetheless, the Court finds *Barnett’s* discussion instructive in evaluating the weight of the State’s evidence.

form to Lieutenant Franklin and explained it needed to be given to the warden, but the State was unable to find Taylor's form in its file; and (2) Calvin Stallworth gave his completed election form to a guard, but the guard refused to deliver the form to Warden Stewart. This evidence suggests that what Miller claims the ADOC did—or failed to do—after he turned in his form was not unique to him. Other than looking in a file and reviewing emails where copies of completed election forms were transmitted, the State has not explained any efforts it undertook to collect all of the forms from death row inmates, how all of these forms were aggregated, or how the forms made their way into its nitrogen hypoxia file or to ADOC Legal in Montgomery. Nor has the State showed any efforts it undertook to look for a form signed by Miller or to investigate what might have happened to the form.

While prior deposition testimony from Captain Emberton was presented about his collection of election forms, during the hearing, counsel for the State was quick to argue against any inference that Captain Emberton was the individual who collected completed forms from Miller's tier at the time Miller claims that they were collected.<sup>11</sup> As such, the State has all but argued away any relevance, from the State's perspective, that Captain Emberton has to Miller's election.

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<sup>11</sup> The following exchange occurred at the evidentiary hearing:

THE COURT: If you were going to play the game of technicalities, and presumably it's Captain Emberton, and he says, I'm going to come back by and take these forms back up, was putting the executed form in the bean hole sufficient?

Because Miller followed the instructions he says he was given for submitting his election form, because there is no evidence of a chain of custody establishing how inmates' completed election forms made their way to Jennifer Parker and into the nitrogen hypoxia file, and because there is evidence suggesting that the State was unable to find Taylor's form despite his giving the form to an ADOC official to give to the warden, that Warden Raybon could not find Miller's form in one location is weak evidence that Miller did not timely submit a form. *Cf. Barnett*, 283 F.3d at 1242 (explaining that an office employee's mere assertion that the office never received a completed form in the mail is insufficient to rebut the presumption of receipt without, for example, the employee setting forth their personal knowledge of office procedures for processing received mail).<sup>12</sup> Similarly, that Miller's form was not among the forms Ms. Parker emailed to ADOC Legal is weak evidence that Miller did not timely submit a form. Even in the absence of testimony from Captain Emberton or another ADOC official that Miller did not leave a form in the bean hole or otherwise submit a form, if there was evidence that Captain Emberton and other ADOC officials who received election forms routinely followed a particular

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MR. HOUTS: I want to stop the Court right there. *Absolutely inappropriate to say the presumption is it's Captain Emberton.*

(Doc. 58 at 162 (emphasis added).)

<sup>12</sup> Again, the Court does not suggest that a presumption of receipt applies here. Rather, the Court finds *Barnett's* discussion instructive in evaluating the weight of the State's evidence.

protocol, such as taking the forms directly to Ms. Parker or following some other process to get the forms into Ms. Parker's custody, the State's evidence likely would be stronger. However, the Court sees no such evidence in the present record.

Instead of rebutting head-on Miller's testimony about submitting the form by placing it in the bean hole, the State attacks the weight and credibility of Miller's testimony in six ways: (1) Miller has refused to corroborate his testimony with attorney–client privileged communications at the time of his election in June 2018; (2) Miller remembers very few details about the day he says he made the election; (3) Miller purportedly testified that it is not “fair” that he be executed by nitrogen hypoxia now because other inmates elected “before” him; (4) Miller's second phone call with his brother on April 21, 2022, was the first time Miller mentioned nitrogen hypoxia in a conversation; (5) according to the State, Miller lied in his affidavit about giving his election form to the person who was collecting forms from the other inmates; and (6) Miller has said he does not want to die, has recently expressed concerns about being executed by nitrogen hypoxia, and has stated that he does not want to be executed by that method until an independent evaluation has been performed. The Court will address each of the State's positions in turn.

*First*, the State attacks the weight of Miller's testimony on the grounds that Miller will not corroborate his testimony by waiving the attorney–client privilege and disclosing communications with his counsel from June 2018. The State points

out that in 2021, Miller allowed his attorneys to communicate with the ADOC about concerns he had shared with them about his “single walk” status, which, according to the State, suggests that Miller has been willing to waive the privilege in the past if he believed it would help him. Here, attorney–client privileged communications would be probative if Miller and his attorneys discussed his decision to elect or not elect nitrogen hypoxia. However, “[a]ny such inference would intrude upon the protected realm of the attorney-client privilege.” *Parker v. Prudential Ins. Co. of Am.*, 900 F.2d 772, 775 (4th Cir. 1990) (per curiam). While corroborating evidence can boost the weight afforded to a witness’s testimony, the Court declines to draw any negative inference about the weight owed to Miller’s testimony based on his decision not to waive the attorney–client privilege. “The privilege was created to protect the right to effective counsel,” and “[t]o protect that interest, a client asserting the privilege should not face a negative inference about the substance of the information sought.” *Id.* That Miller may have waived the privilege on a different occasion concerning a different matter does not change the analysis, nor does it bear on Miller’s credibility.

*Second*, the State argues Miller is not credible because he remembers so few details about the day he says he made his nitrogen hypoxia election. The State points out that Miller could not identify which correctional officer distributed the forms, nor could he recall the officer’s height, race, hairstyle, or uniform color. He also

could not remember the exact date he signed the form or how long he thought about it before he signed it. But as Miller explained, the election happened over four years ago, which is why he cannot remember many details. Moreover, Miller's level of recollection is consistent with that of other ADOC officials involved in distributing election forms at Holman who testified in 2021—closer in time to the election period than now. For starters, neither Warden Stewart nor Captain Emberton could recall the date the forms were distributed. Additionally, Warden Stewart testified that someone above her in the chain of command told her to distribute election forms, but she could not recall who that was. And she also could not recall who made the copies of the blank forms to be distributed. Warden Raybon testified that he saw the election form in Warden Stewart's office, but he did not remember how or where he saw it—whether she showed it to him, whether it was on her desk, or something else. Captain Emberton testified that he collected the forms from inmates the same day he distributed them and then returned the box of forms to the conference room table. However, later in the same deposition, he backtracked and said he did not remember the timeline for collection and that he may not have turned the box of forms in that evening. When the Court asked the State's counsel what Captain Emberton would say if he were asked if he picked up a completed form from Miller, counsel responded:

I believe his most recent answer would have been . . . I don't know if I did or didn't. . . . [I]t's like Mr. Miller said. It's four years ago. . . . I



feel the same way as Mr. Miller. I agree with him. Asking me to go back four years and find out what happened is very unfair to the defendants.

(Doc. 58 at 128.) In sum, key individuals in addition to Miller who were involved in the form distribution process in 2018 generally do not recall many details—even critical ones, like who told Warden Stewart to pass out the forms—due to the passage of time.

Also, Miller's testimony reflects that his primary source of information that day was auditory rather than visual due to the design of his cell. His unrebutted testimony demonstrates that he could not see much beyond his cell except directly in front of the bars and that he heard a correctional officer announce that he was about to distribute forms. Again, this testimony is consistent with Captain Emberton's testimony that he did not speak to each inmate individually, although the State's attorney was quick to correct the Court that it cannot be inferred that Captain Emberton was the one who collected the forms on Miller's tier. Thus, Miller's inability to produce a physical description of the officer who passed out the forms is also attributable to Miller's limited ability to see outside of his cell. Also, although Miller cannot remember how long he thought about the form before signing it, his testimony demonstrates that he had a small window of time to do so, as the officer announced that he would be back later in the day to collect the forms. Thus,

it is not surprising that Miller cannot recall more details given the short time in which the process occurred.

The Court has also considered whether the gravity of the decision embodied in signing the election form would leave a strong impression on an inmate who signed it, such that an inmate would or should have a better recollection than Miller of the circumstances surrounding his election. Maybe, maybe not. In this particular case, Miller's testimony reflects a fairly straightforward decision-making process about electing nitrogen hypoxia that was primarily animated by a desire to avoid being stabbed with needles, as opposed to a complex or thoughtful decision or desire to affirmatively elect nitrogen hypoxia as his method of execution. Thus, the Court finds Miller's inability to recall details to be consistent with his single-minded focus on avoiding contact with needles, and no different from the nature of the deposition testimony provided by ADOC officials. In sum, under the circumstances presented here, Miller's inability to recall more details about his election does not undermine the weight or credibility of his testimony.

*Third*, the State contends that Miller "subconsciously" admitted that he did not timely elect nitrogen hypoxia because he testified in his deposition that it would not be "fair" to execute him by hypoxia at the present moment because other inmates, such as Bobby Waldrop, Jarrod Taylor, and Eugene Clemons, elected "before" him. (Doc. 42 at 6.) According to the State, Miller admitted that he does not have personal

knowledge of when other inmates elected and that he does not remember exactly when he elected. (*Id.*) Thus, according to the State, he could only be talking about those who elected “before” him because he knows he did not elect in 2018. (*Id.*)

The Court’s examination of Miller’s deposition transcript reveals that the State has misrepresented Miller’s testimony. Miller did not say it would be unfair to execute him now because other inmates elected before him.<sup>13</sup> Instead, Miller testified: “There’s people who were prior to me whose appeals have run out, you know, they signed it like I did. Why are they not here going through the same thing I am doing with the Court Reporter recording this.” (Doc. 52-29 at 82–83.) Elsewhere, Miller stated that “other people signed it like [he] did” and their executions have been “put on hold.” (*Id.* at 76.) Miller did specifically mention Jarrod Taylor, but Miller said: “Did you question Jarrod Taylor? They never found his [form], but did he go through this deposition like I’m going through?” (*Id.*) Thus, Miller’s actual deposition testimony is that he believes it is unfair for the State to treat him differently than other inmates who elected nitrogen hypoxia by making only him sit for a deposition and putting others’ executions on hold but not his. Moreover, Miller testified that he learned after the election period that some inmates elected before him and some elected after him, when he had previously thought it

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<sup>13</sup> It would be one thing if the State had argued that the Court should draw those inferences from Miller’s testimony, but the State represented these statements as Miller’s actual testimony. (*See* Doc. 42 at 6.)

was a “one time signing.” (Doc. 58 at 110.) This is supported by the record, which reflects that inmates submitted election forms on different days within the statutory period. Thus, to the extent Miller’s comment about inmates “who were prior to me” refers to inmates who elected before him,<sup>14</sup> the Court cannot construe this comment as an admission that Miller elected after the statutory period expired. The Court perceives nothing in Miller’s deposition testimony that would support the inference that Miller subconsciously admitted that he elected nitrogen hypoxia after June 2018, and thus the Court finds the State’s argument unconvincing.

*Fourth*, the State argues that Miller’s second April 21, 2022 phone call with his brother undermines Miller’s testimony. The State points out that this second phone call is the first time “gas stuff”—nitrogen hypoxia—had come up in conversation. According to the State, if Miller had truly elected nitrogen hypoxia,

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<sup>14</sup> It could also refer to inmates who elected nitrogen hypoxia and who exhausted their appeals before Miller did, such as Bobby Waldrop, Jarrod Taylor, and Eugene Clemons. For Bobby Waldrop, the Eleventh Circuit affirmed the district court’s denial of federal habeas relief on September 26, 2017. *Waldrop v. Comm’r, Ala. Dep’t of Corr.*, 711 F. App’x 900 (11th Cir. 2017) (per curiam). The U.S. Supreme Court denied certiorari on October 1, 2018. *Waldrop v. Dunn*, 139 S. Ct. 118 (2018) (mem.). For Jarrod Taylor, the district court denied federal habeas relief and denied a certificate of appealability (COA) on January 25, 2018, *Taylor v. Dunn*, No. 14-cv-0439, 2018 WL 575670 (S.D. Ala. Jan. 25, 2018), and denied Taylor’s motion to alter or amend on March 12, 2018, *Taylor v. Dunn*, No. 14-cv-0439, 2018 WL 1308947 (S.D. Ala. Mar. 12, 2018). The Eleventh Circuit denied Taylor’s motion for a COA on October 5, 2018. *Taylor v. Ala. Dep’t of Corr.*, No. 18-11523-P, 2018 WL 8058904 (11th Cir. Oct. 5, 2018). The U.S. Supreme Court denied certiorari on May 13, 2019. *Taylor v. Dunn*, 139 S. Ct. 2016 (2019) (mem.). Finally, for Eugene Clemons, the Eleventh Circuit affirmed the district court’s denial of federal habeas relief on July 30, 2020. *Clemons v. Comm’r, Ala. Dep’t of Corr.*, 967 F.3d 1231 (11th Cir. 2020). The U.S. Supreme Court denied certiorari on June 7, 2021. *Clemons v. Dunn*, 141 S. Ct. 2722 (2021) (mem.). These inmates’ appeals all were exhausted before Miller’s appeals, which were exhausted in October 2021. *See Miller v. Dunn*, 142 S. Ct. 123 (2021) (mem.).

he would have brought it up immediately in the first call with his brother. The State also contends that Miller's purported reference to "some other inmates" electing nitrogen hypoxia and having their executions put on hold is evidence that *Miller* did not elect and that he is claiming he elected to try to delay his execution. The Court does not agree. First, on this record, that Miller's first call with his brother in April 2022 did not mention a method of execution and instead was an emotional discussion of logistics surrounding Miller's death does not, in the Court's view, undermine Miller's testimony that he elected nitrogen hypoxia in June 2018. Second, even assuming the State's interpretation of the call is correct (and the Court maintains that the audio is unclear), this is not definitive evidence that Miller did not timely elect. Indeed, a reference to "some other inmates" would be consistent with Miller's narrative that the State has not set execution dates for other inmates who elected nitrogen hypoxia and the State is treating him differently because it has set *his* execution date.

*Fifth*, according to the State, Miller also lied in his affidavit about giving his election form to the official who was collecting forms from the other inmates because Miller later testified that he did not actually see the official and did not see anyone else turn in the form. Not so. Miller testified that he knew the official was collecting forms because the official had announced he would return later to collect the forms. And as noted above, Miller's testimony demonstrates that much of the

information he gathered is auditory rather than visual. Given that Miller is confined to his cell 23 hours a day, it is reasonable for him to believe that prison officials do what they say they will do. Thus, if an official told Miller, “here’s this form, fill it out, I’m going to come back later today day and pick it up,” Miller can reasonably rely on that statement and infer that the official did in fact return to pick it up, because Miller cannot leave the four walls of his cell. Thus, the Court cannot agree with the State that Miller lied in his affidavit on this basis.

*Sixth*, the State argues that Miller is not credible because he says he does not want to die and recently expressed concerns about being executed by nitrogen hypoxia, pointing out that there is no protocol and expressing his belief that it would not be fair to execute him by nitrogen hypoxia until an independent expert evaluates and approves the protocol. The State also contends that, when asked at his deposition if he would agree to allow a correctional officer to fit him with a mask as a planning precaution for a nitrogen hypoxia execution, Miller refused. According to the State, Miller’s statements demonstrate that his true goal is to delay his execution. But an inmate’s decision to elect nitrogen hypoxia over lethal injection does not preclude the possibility that the inmate would have concerns about a nitrogen hypoxia execution. This is especially so in this case, given Miller’s testimony that he elected nitrogen hypoxia because he wanted to avoid needles and “thought” nitrogen hypoxia meant he would just go to sleep. It simply does not

follow from Miller's election of nitrogen hypoxia in June 2018 that he would have no reservations about whatever protocol the State eventually adopted. In the Court's view, Miller's recent statements expressing concern about being executed by nitrogen hypoxia have little bearing on the veracity of Miller's testimony that he made a timely election in June 2018.

And as for the mask-fitting, the State once again has misrepresented Miller's testimony. Counsel for the State asked Miller if fitting a mask to his face was "something that you would be cooperative with, or is that something that would upset you?" (Doc. 52-29 at 86.) Miller responded, "It could be something that would upset me," explaining that it was "[b]ecause why ain't nobody else going through the same thing? Why are people prior to me, who signed like I did, are people who they didn't find theirs? As in Jarrod Taylor, . . . Why they are not doing this and you asking the same question of them? I want to be treated fairly." (*Id.* at 87.) In the Court's view, this exchange does not reflect Miller's refusal to cooperate with the ADOC in the execution process broadly or the nitrogen hypoxia protocol development more specifically. Instead, Miller said he would be upset because no one else who elected nitrogen hypoxia is being subjected to mask-fitting. Moreover, the Court agrees with Miller's counsel that it is a natural human reaction to be upset about the prospect of being fitted with the means of one's own execution. Thus, in the Court's view, Miller's statements in response to the query about mask-fitting

have no bearing on the veracity of his testimony that he made a timely election in June 2018.

In sum, both in live testimony before the Court and in deposition testimony, Miller has presented consistent, credible, and uncontroverted direct evidence that he submitted an election form in the manner he says was announced to him by the ADOC. His testimony about how forms were distributed and then collected on the same day is consistent with Captain Emberton's testimony in an earlier case. Miller has also presented evidence that the ADOC lacked any standardized protocol or rules regarding the collection and transmittal of inmates' completed election forms, which is circumstantial evidence supporting Miller's theory that the ADOC lost or misplaced his form after he turned it in. Miller has also presented evidence that the ADOC has likely lost or misplaced an inmate's completed election form on another occasion, which further circumstantially credits his narrative. On the other hand, the State does not directly rebut Miller's sworn, and consistent, testimony. Nor has the State established a chain of custody for the election forms, which could have called into doubt the veracity of Miller's testimony. Rather, the State's arguments are based on weak circumstantial evidence (that Miller's form is not in the State's files and Miller's phone call with his brother), improper inferences (about Miller's invocation of the attorney–client privilege), misrepresentations about Miller's



testimony, and—at bottom—the State’s subjective belief that Miller did not timely elect because he has a motive to try to delay his execution.

The Court has seriously considered the possibility that Miller did not in fact timely elect nitrogen hypoxia but now claims to have done so only to delay his looming execution. The Court cannot definitively rule out this possibility. But at this stage, an inmate in Miller’s position is not required “to prove his case once and for all.” *Hamm v. Comm’r, Ala. Dep’t of Corr.*, No. 18-10473, 2018 WL 2171185, at \*4 (11th Cir. Feb. 13, 2018). The Court has considered and weighed all of the evidence, including Miller’s own testimony, which was not directly rebutted by the State with any testimony from an ADOC official, including Captain Emberton, stating that Miller did not leave a form in the bean hole when the official collected election forms, nor indirectly rebutted by the State with evidence of a chain of custody for submitted forms or a standardized procedure followed by ADOC officials in collecting and transmitting completed election forms to Ms. Parker. The Court has also assessed Miller’s credibility at this stage in light of the evidence presented, and in light of the evidence *not* presented by the State, and it has carefully considered the State’s arguments about Miller’s credibility separately and together. Having carefully considered the foregoing, the Court concludes that, on this record as it currently exists, it is substantially likely that Miller timely elected nitrogen hypoxia. Further discovery and evidence may result in a different outcome on the

election issue, but that is a different inquiry for a different day under a different standard.

## **B. Substantial Likelihood of Success on Miller’s Legal Claims**

Resolving the factual dispute over whether Miller timely elected does not end the substantial-likelihood-of-success inquiry. The Court must now evaluate the merits of his legal claims. To obtain a preliminary injunction, a plaintiff “must demonstrate a substantial likelihood of prevailing on at least one of the causes of action he has asserted.” *Alabama v. U.S. Army Corps of Eng’rs*, 424 F.3d 1117, 1134 (11th Cir. 2005).<sup>15</sup>

### *1. Equal Protection*

A plaintiff may successfully allege a violation of his equal protection rights as a “class of one” by showing “that [he] has been intentionally treated differently

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<sup>15</sup> Each Defendant filed a motion to dismiss for failure to state a claim, raising several arguments. None of their arguments persuade the Court that Miller is not substantially likely to succeed on the merits of his equal protection and procedural due process claims. For example, Defendant Marshall’s invocation of prosecutorial immunity is misplaced because the immunity applies only to claims for money damages, *see Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000), and Miller does not seek money damages from Defendant Marshall (or any Defendant). Additionally, Defendant Raybon’s argument that he cannot be held liable under a *respondeat superior* theory is misplaced because that argument is relevant only to an individual capacity claim for money damages. *See Hartley v. Parnell*, 193 F.3d 1263, 1269 (11th Cir. 1999). Again, Miller does not seek money damages from Defendant Raybon; rather, Miller is suing Defendant Raybon in his official capacity because Raybon stands in the shoes of Warden Stewart for purposes of official capacity liability and because Raybon is Miller’s statutory executioner. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) (“Suits against state officials in their official capacity . . . should be treated as suits against the State. Indeed, when officials sued in this capacity in federal court die or leave office, their successors automatically assume their roles in the litigation.” (citation omitted)). Additionally, the Court addresses, and ultimately rejects, Raybon’s and Hamm’s statute of limitations argument below.

from others similarly situated and that there is no rational basis for the difference in treatment.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). “[W]here the challenged governmental decision is simple or one-dimensional—for example, where the decision involves the application of a single criterion to a single issue—making out a ‘class of one claim’ is generally easier than in cases where governmental action is ‘multi-dimensional, involving varied decisionmaking criteria applied in a series of discretionary decisions made over an extended period of time.’” *Leib v. Hillsborough Cnty. Pub. Transp. Comm’n*, 558 F.3d 1301, 1307 (11th Cir. 2009) (citation omitted). When the governmental decision is simple or one-dimensional, the “similarly situated requirement” may be analyzed “succinctly and at a high order of abstraction.” *Grider v. City of Auburn*, 618 F.3d 1240, 1265 (11th Cir. 2010) (citation omitted). The plaintiff must nevertheless show that he is similar to the party of comparison in all legally relevant respects. *See Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1204–07 (11th Cir. 2007).

Since no fundamental right is at stake here, nor do the parties assert such, the rational basis test applies to Miller’s equal protection claim. “The rational basis test asks (1) whether the government has the power or authority to regulate the particular area in question, and (2) whether there is a rational relationship between the government’s objective and the means it has chosen to achieve it.” *Leib*, 558 F.3d at 1306.

The parties focus heavily on whether Miller is similarly situated to Jarrod Taylor. But Miller also makes the broader argument that he is similarly situated to all inmates who timely elected nitrogen hypoxia, (Doc. 18 at 17, ¶ 94; Doc. 58 at 181), and that there is no rational basis to treat him differently than any inmate who timely elected, (*see* Doc. 58 at 22–23). The Court finds that this is the proper inquiry.

The State's arguments focus on why it withdrew its motion to set Taylor's execution but declined to withdraw the motion to set Miller's execution. But the question is whether it would violate Miller's equal protection rights if the State executed him by lethal injection even though he timely elected nitrogen hypoxia, while not pursuing execution by lethal injection for other inmates who timely elected nitrogen hypoxia. It is substantially likely, if not certain, that it would.

All § 15-18-82.1(b) requires for a nitrogen hypoxia election is an inmate's writing delivered to his or her warden within the proscribed time period. An inmate who complies with the statutory requirements is similarly situated in all legally relevant respects to every other inmate who complies with the statutory requirements. *See Griffin Indus.*, 496 F.3d at 1204–07; *see also Price v. Comm'r, Ala. Dep't of Corr.*, 920 F.3d 1317, 1325 (11th Cir. 2019) (*per curiam*) (suggesting that inmates who timely elected nitrogen hypoxia are similarly situated to one another). Thus, having timely elected nitrogen hypoxia, Miller is similarly situated to every other inmate who timely elected nitrogen hypoxia. There is no evidence or

argument that the State has executed by lethal injection any inmate who timely elected nitrogen hypoxia. The Court can conceive of no rational basis to treat Miller differently. The State's belief that Miller has not proven his case to the *State's* satisfaction is irrelevant. The State is not the exclusive arbiter of whether an inmate has made a proper and timely election. The State does not argue otherwise, and it agreed that this Court is the proper factfinder to determine whether it is substantially likely that Miller timely elected. Thus, what matters here is the Court's determination that Miller timely elected in compliance with the statute (or, more accurately, that it is substantially likely he did). Because there is no rational basis for the State to execute Miller by lethal injection where he has provided sufficient evidence at this stage that he timely elected nitrogen hypoxia, Miller is substantially likely to succeed on his equal protection claim.

## *2. Procedural Due Process*

Although it is sufficient that Miller has demonstrated a substantial likelihood of success on his equal protection claim, the Court also concludes that he has demonstrated a substantial likelihood of success on his procedural due process claim.

The Court will first address Raybon's and Hamm's arguments that Miller's procedural due process claim is barred by the statute of limitations,<sup>16</sup> as a

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<sup>16</sup> Attorney General Marshall did not advance a statute of limitations argument in his motion to dismiss.

determination that the claim is time-barred would affect Miller's ability to demonstrate entitlement to a preliminary injunction, *cf. Henyard v. Sec'y, DOC*, 543 F.3d 644, 647 (11th Cir. 2008) (per curiam) (concluding the district court did not err in determining that the plaintiff's claims were barred by the statute of limitations and that thus the plaintiff had not shown a substantial likelihood of success on the merits). As explained below, the Court concludes that this argument is unavailing because Miller brought this claim well within the applicable two-year statute of limitations.

Raybon and Hamm bear the burden to establish the applicability of a statute of limitations affirmative defense. *See Blue Cross & Blue Shield of Ala. v. Weitz*, 913 F.2d 1544, 1552 (11th Cir. 1990). A plaintiff is not required to negate a statute of limitations defense in his complaint. *See La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004). "[A] Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate only if it is 'apparent from the face of the complaint' that the claim is time-barred." *Id.* (citation omitted).

The statute of limitations for a § 1983 claim is governed by the personal injury law of the state in which the cause of action arose. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). Here, the parties agree that, under Alabama law, the limitations period is two years. ALA. CODE § 6-2-38(1). The parties also agree that the statute begins to run, or a claim accrues, when Miller "knew or should have known of his injury

and its cause.” *Carter v. City of Montgomery*, 473 F. Supp. 3d 1273, 1307 (M.D. Ala. 2020) (quoting *Burt v. Martin*, 193 F. App’x 829, 830 (11th Cir. 2006)); *see also Rozar v. Mullis*, 85 F.3d 556, 561–62 (11th Cir. 1996) (holding that a claim accrues when “the facts which would support a cause of action [were] apparent or should [have been] apparent to a person with a reasonably prudent regard for his rights”). The parties disagree, however, as to exactly when Miller “knew or should have known” that his claim had accrued.

On one hand, Miller asserts that he knew or should have known of his injury on May 27, 2022—when the State told Miller for the first time that they did not have his election form and would not honor his nitrogen hypoxia election. On the other hand, Raybon and Hamm contend that Miller should have known that he was injured years ago, outside of the statute of limitations, in three ways: (1) Miller should have known that the State lost his election form because he was not given a notarized copy of his election form like he requested in 2018; (2) Miller should have known that the State lost his election form because, as Miller claims, the 2018 form collection process was “extremely disorganized”; and (3) Miller should have known the State lost his election form after the proceedings in Alabama Supreme Court on the State’s motion to set an execution date for Jarrod Taylor.

Raybon’s and Hamm’s arguments miss the mark. Their accrual theories operate under the same basic logic: Miller should have known that the State had lost

his election form because of the “inadequacies in the [election form] processes and procedures.” (Doc. 30 at 10.) But this argument ignores the elements of Miller’s due process claim. While a procedural due process claim requires a showing of a “constitutionally-inadequate process,” it first requires a “deprivation of a constitutionally-protected liberty interest,” that is, an injury. *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). And here, Miller had no reason to know that the State had refused to honor his right to elect nitrogen hypoxia until the moment the State informed him that it had no record of his election form.<sup>17</sup>

While the disorganized process could give rise to the third element of a procedural due process claim (procedural inadequacy), it would not have given rise to a viable action, as required for the statute to run, because this information does not make “apparent” to a “reasonably prudent” person that Miller himself had been

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<sup>17</sup> Raybon and Hamm repeatedly assert that proceedings involving the State’s attempt to set an execution date for another death row inmate, Jarrod Taylor, put Miller on notice that the Defendants lost or misplaced Miller’s election form. But those proceedings provided Miller no such notice. First, Raybon and Hamm cite no authority for the proposition that Miller has a duty to investigate his own injuries by surveying Alabama Supreme Court proceedings pertaining to the setting of another death row inmate’s execution. Second, even if Miller had reviewed the public filings in Taylor’s proceedings—and nothing in the Amended Complaint suggests that he did—nothing in those public filings affirmatively indicates that the ADOC lost Taylor’s election form. Third, even if those public filings did establish that the ADOC lost Taylor’s election form and caused Miller to have concerns about the safety of his election, the outcome of Taylor’s case likely would alleviate concerns for a reasonable person in Miller’s position. After all, the State recognized Taylor’s nitrogen hypoxia election and withdrew its motion to set his execution. An inmate in Miller’s shoes analyzing Taylor’s proceedings reasonably would have presumed the same treatment would be afforded to him if the State were also unable to locate his election form. Accordingly, Raybon’s and Hamm’s argument that Taylor’s proceedings put Miller on notice that he was injured is misguided.



deprived of his protected interest in electing nitrogen hypoxia, *i.e.*, that Miller himself had been injured. *See Rozar*, 85 F.3d at 562. After all, Miller says he turned in the election form in the manner announced to him, and therefore Miller would have been “justifiably ignorant” as to whether the State subsequently would be unable to locate his election form, especially since the State did not notify the inmates, their attorneys, or anyone else of the outcome or status of their hypoxia elections. *Cf. id.* at 560–62 (holding that plaintiffs “should have known” of a constitutional injury—thereby triggering the statute of limitations—because they were not “justifiably ignorant” to the injury, where one of the plaintiffs observed the injury, the injury was published in a local newspaper, the injury was posted at a courthouse, and a public meeting was held concerning the injury). It defies credulity for the State to say Miller should have known that he was injured in 2018 on the basis that Miller should have known that the State was likely to lose or be unable to locate Miller’s election form, refuse to honor his election, move for his execution, and deprive Miller of his protected liberty interest.<sup>18</sup>

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<sup>18</sup> The essence of Raybon’s and Hamm’s accrual theory boils down to their belief that Miller had an affirmative duty to ask his attorneys to confirm with the ADOC that Miller’s election form had not been lost. In other words, Raybon and Hamm request a rule that has a presumption that the State erroneously lost an election form, even though the form was submitted the way the State’s agent asked for it to be submitted and the State does not argue that the way Miller submitted the form is legally defective. The Court will not entertain such a rule that requires inmates to speculate as to whether they have been injured despite following their custodian’s instructions.

Raybon and Hamm have failed to meet their burden of demonstrating that the statute of limitations bars Miller's claim. At this stage, the Court finds that Miller's procedural due process claim accrued on May 27, 2022, when a reasonable inmate in Miller's shoes would have known that he was injured and that he had a viable cause of action. And because Miller filed suit four months after his claim accrued, Miller's claim is within the applicable two-year statute of limitations and is not time-barred. The State provides no persuasive argument otherwise.

Moving to the claim itself, "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of" the Fourteenth Amendment's Due Process Clause. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). A successful procedural due process claim requires "proof of three elements: (1) the deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Grayden*, 345 F.3d at 1232.

Miller contends that his protected liberty interest is his statutorily-permitted choice to be executed by nitrogen hypoxia. The Court concludes that this is a protected liberty interest, although the State's counsel at the evidentiary hearing would not concede this issue. The Court also notes that, while Miller's cause of action accrued in May 2022 when he first learned the State would not honor his nitrogen hypoxia election, the deprivation of this interest is state action and is not

complete unless and until the State executes Miller by lethal injection in contravention of his nitrogen hypoxia election.

Where the State can feasibly provide a predeprivation hearing before depriving a person of liberty, it generally must do so regardless of the adequacy of a postdeprivation remedy. *See Zinermon v. Burch*, 494 U.S. 113, 132 (1990); *Barr v. Johnson*, 777 F. App'x 298, 301 (11th Cir. 2019) (“Generally speaking, procedural due process requires that the state give the individual notice and an opportunity to be heard *before* a deprivation.” (emphasis added)). “Conversely, in situations where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake, or where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest, postdeprivation remedies might satisfy due process.” *Zinermon*, 494 U.S. at 132 (citation omitted). Thus, predeprivation process is the general rule. Turning to adequacy, courts consider three factors in determining whether the process provided is adequate:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335; *accord Worthy v. City of Phenix City*, 930 F.3d 1206, 1223 (11th Cir. 2019).

Executing Miller by lethal injection when he has timely elected nitrogen hypoxia is substantially likely to violate his procedural due process rights. Assuming without deciding that predeprivation process would be unduly burdensome or not feasible, no adequate postdeprivation remedy exists. An execution is final; there are no do-overs or give-backs. Thus, an order directing the State to posthumously honor Miller's election would be utterly inadequate. Compensation to Miller's estate also would not be an adequate remedy, as the harm is not monetary in nature.

To the extent it is relevant what could have been done up to this point to prevent the deprivation of Miller's liberty interest, the Court finds it substantially likely that Miller was entitled to predeprivation process and that the predeprivation process afforded here, which is virtually none, is constitutionally inadequate. The private interest at stake is great—a person's choice in the way he will die at the State's hands. Given the procedures used, the risk of erroneous deprivations is high. There was no established process for collecting election forms. There is no chain of custody establishing how forms submitted in any fashion made their way to Ms. Parker for logging and retention. Other than looking in two places (the nitrogen hypoxia file and the emails), the State has presented no evidence of any investigation into what might have happened to Miller's form. It has not even presented any evidence that it queried Captain Emberton or any other pertinent correctional

officers about Miller and his claimed submission of an election form. Additional safeguards would be of obvious value in ensuring that all properly submitted nitrogen hypoxia election forms are retained, that all properly submitted elections are honored, and that no inmate who properly elected nitrogen hypoxia is executed by lethal injection. The State does not argue that additional safeguards would be unduly burdensome or costly, nor does the State argue that it is not feasible to provide predeprivation process.<sup>19</sup> Rather, the State argues that the statute imposes no duty on the State to do anything.<sup>20</sup> But the Alabama statute does not dictate the constitutional due process floor. Therefore, the Court finds that Miller is substantially likely to succeed on the merits of his procedural due process claim.<sup>21</sup>

Because Miller must show a substantial likelihood of success on only one of his claims for purposes of his preliminary injunction motion, the Court pretermits any discussion of his Eighth Amendment claim.

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<sup>19</sup> The State does argue that the negligent loss of an election form does not give rise to an actionable due process claim because predeprivation process is not feasible in those circumstances. But the deprivation Miller complains of is about more than the negligent loss of a form. It is about the deprivation of his right to choose a nitrogen hypoxia execution and the State's plans to carry out his execution by lethal injection in contravention of his choice.

<sup>20</sup> The Court disagrees that the statute imposes *no* duty. The statute at least imposes a duty upon the State to accept an inmate's written election form that is delivered to his or her warden.

<sup>21</sup> To the extent that predeprivation process was not feasible or would be unduly burdensome, or if the predeprivation process afforded here was constitutionally adequate, the Court agrees with the State that Miller has an adequate postdeprivation remedy because he could seek a writ of mandamus in a state circuit court. But, for the reasons explained earlier, the Court emphasizes that no adequate postdeprivation remedy exists to cure the deprivation of Miller's liberty interest once the deprivation is complete: when an execution by lethal injection is carried out.

### C. Irreparable Injury

Miller will likely suffer irreparable injury if an injunction does not issue because he will be deprived of the ability to die by the method he chose and instead will be forced to die by a method he sought to avoid and which he asserts will be painful. “An injury is ‘irreparable’ only if it cannot be undone through monetary remedies.” *City of Jacksonville*, 896 F.2d at 1285. Money would not remedy Miller’s injury because his injury is not monetary. Rather, it is the loss of his “final dignity”—to choose how he will die. *See Smith v. Comm’r, Ala. Dep’t of Corr.*, No. 21-13581, 2021 WL 4916001, at \*5 (11th Cir. Oct. 21, 2021) (Pryor, J., concurring); *cf. Ramirez v. Collier*, 142 S. Ct. 1264, 1282 (2022) (concluding that inmate likely faced irreparable injury in the absence of an injunction allowing his spiritual advisor to audibly pray and lay hands on him during his execution; explaining that “[c]ompensation paid to [the inmate’s] estate would not remedy this harm, which is spiritual rather than pecuniary”). And according to his unrebutted testimony, Miller dislikes needles and has had bad experiences with them because it has been difficult to find a vein. The State does not contest that executing Miller by lethal injection as opposed to nitrogen hypoxia would cause him irreparable injury. Accordingly, the Court finds that the likelihood of irreparable injury weighs in favor of injunctive relief.

#### **D. Balance of Harms**

The balance of harms also weighs in Miller’s favor. Miller does not seek an “open-ended stay of execution”; rather, he requests a tailored injunction effectively requiring the State to execute him by nitrogen hypoxia. *Cf. Ramirez*, 142 S. Ct. at 1282 (reaching a similar conclusion in a case involving an inmate’s request to engage in religious exercise with a spiritual advisor during the execution). Also, the State and the public have an interest in conducting executions in a manner that does not violate an inmate’s constitutional rights. *See Ray v. Comm’r, Ala. Dep’t of Corr.*, 915 F.3d 689, 702 (11th Cir. 2019). The State and the public also have an interest in the State following its own law generally and in the State honoring an inmate’s valid election of nitrogen hypoxia more specifically—an election afforded to inmates by the Alabama Legislature.

The State represented through Commissioner Hamm’s recent affidavit that the ADOC is not prepared to execute Miller by nitrogen hypoxia on September 22, 2022, although the State’s response to Miller’s Motion for Preliminary Injunction and counsel’s statements during the evidentiary hearing suggested the State *could* conduct the execution by nitrogen hypoxia. Thus, the Court recognizes the practical reality that granting the relief Miller seeks will likely have the incidental effect of delaying Miller’s execution. But that delay is attributable to the State, not Miller, and it appears to be a short delay. After all, the State allowed inmates to elect

nitrogen hypoxia in June 2018 and has since slowly moved to create a method and protocol of performing executions by nitrogen hypoxia, and the State just recently appears to be ready to announce its plan to begin conducting executions by nitrogen hypoxia. Thus, as soon as the State announces its readiness, the State can move forward with Miller's execution by his chosen method.

The Court concludes that any delay resulting from granting the relief sought here will minimally harm the State and the public, and that any such harm is greatly outweighed by the harm to Miller if an injunction does not issue. To be sure, "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). But the State has not argued that the harm to the public interest counsels against injunctive relief here. The State "will get its man in the end," *see Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting), and any delay in carrying out Miller's execution is attributable to the State's continued inability to perform executions by nitrogen hypoxia. That the State is not yet prepared to execute anyone by nitrogen hypoxia does not mean it will harm the State or the public to honor Miller's timely election of nitrogen hypoxia. By contrast, if an injunction does not issue, Miller will be irrevocably deprived of his choice in how he will die—a choice the Alabama Legislature bestowed upon him. Additionally, Miller will be in no different position than the other death row inmates who elected



nitrogen hypoxia, including inmates whose appeals were exhausted prior to Miller's appeals (*e.g.*, Waldrop, Taylor, and Clemons).

In sum, the Court concludes that any potential harm to the State or the public in granting Miller his requested relief is greatly outweighed by the harm that will likely befall Miller in the absence of such relief.

#### **E. Delay**

The Court must also address the State's argument that Miller is not entitled to a preliminary injunction because he intentionally delayed in bringing this lawsuit. "A court considering a stay [of execution] 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.'" *Hill*, 547 U.S. at 584 (citation omitted). In support of its argument, the State cites emails or instant messages between Miller and a pen-pal where, according to the State, Miller told the pen-pal that his lawyers said he has to "wait" to file his legal challenge.

A closer examination of the messages does not support the State's contention. In the first message, Miller states in relevant part: "Lawyers saying same thing got to wait." (Doc. 33-1.) In response, Miller's pen-pal writes: "Your attorney say we have to wait...?" (Doc. 33-2.) Miller responds: "No I have not heard from my layers [sic] after a I [sic] called last." (Doc. 33-3.) Importantly, the State did not ask Miller

about these messages either in his deposition or at the evidentiary hearing, despite the State's procurement of them prior to both events.

All the messages indicate is that Miller's lawyers said they "got to wait." They do not reference nitrogen hypoxia or lethal injection. These messages simply do not support the conclusion or inference that Miller or his lawyers were waiting *to file this lawsuit*. Even if they did, that would not compel the conclusion or inference that the "wait" was undertaken in order to intentionally delay or prejudice the State or the Court. Thus, the messages do not support the State's position that Miller intentionally delayed bringing this lawsuit.

The State also points to Miller's testimony that he thinks he should not be executed until after the inmates who elected "before" him and after an independent expert approves Alabama's nitrogen hypoxia system. According to the State, this evidence shows that Miller's true goal is to delay his execution, and that the timing of his lawsuit sought to help achieve that goal. First, as explained above, Miller did not testify that he thinks he should not be executed until after the inmates who elected "before" him. Moreover, the Court finds Miller's statements to be weak evidence that he intentionally delayed filing this lawsuit. And his statements are not dispositive because the prayer for relief in his Amended Complaint, along with his Motion for Preliminary Injunction, expressly request that his hypoxia election be honored and that the State be enjoined from executing him by lethal injection.

Considering all of the circumstances, the Court concludes that Miller did not inexcusably delay filing this lawsuit such that it militates against granting his requested relief. As an initial matter, Miller does not seek a stay of execution; rather, he seeks a tailored injunction effectively requiring the State to execute him by nitrogen hypoxia. Turning to the circumstances preceding the filing of this lawsuit, Miller first learned the State could not locate a record of his election form and did not intend to honor his election on May 27, 2022. Thereafter, Miller asked the Alabama Supreme Court to remand the matter to an Alabama trial court for a hearing to resolve the factual dispute. On July 18, 2022, the Alabama Supreme Court entered an order setting Miller's execution for September 22, 2022. Miller filed this lawsuit thirty-four days later and four weeks before his scheduled execution. Miller argues that it would have offended traditional principles of federalism and comity if he had run to federal court while the matter was being litigated before the Alabama Supreme Court. The State does not argue otherwise.

The Court agrees with Miller and concludes that "it was not unreasonable for [him] to attempt to exhaust his state remedies by completing litigation on the State's motion to set his execution date before filing his section 1983 lawsuit here." *See Hamm*, 2018 WL 2171185, at \*2.<sup>22</sup> Additionally, Miller argues that after his execution date was set, his lawyers needed time to research and evaluate his

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<sup>22</sup> While the Court recognizes that *Hamm* is nonbinding, the Court finds its analysis persuasive.

constitutional claims, perform due diligence, and secure local counsel. The State does not argue that his lawyers took an unreasonable amount of time to perform those tasks. Under these circumstances, the Court finds that Miller did not unreasonably delay bringing this lawsuit.

Again, Miller filed this lawsuit four weeks before his scheduled execution. In the interim, the Court was able to hold an evidentiary hearing during which Miller testified and was subject to cross-examination. Additionally, the State was able to depose Miller before the hearing. The State does not argue that it was prejudiced by the timing of the briefing on the preliminary injunction motion or the evidentiary hearing. The State does not argue, for example, that the timing rendered the State unable to secure evidence it wished to introduce or the attendance of witnesses to testify at the hearing.

Additionally, and most importantly, Miller has met his burden of showing a substantial likelihood that he timely elected and that he can succeed on his claims, that he likely faces irreparable injury, and that the balance of harms weighs in his favor. Consequently, any delay in bringing this lawsuit does not militate against the entry of injunctive relief. *Cf. Smith v. Comm’r, Ala. Dep’t of Corr.*, 844 F. App’x 286, 294 (11th Cir. 2021) (in case where an inmate sought to have his spiritual advisor in the room during his execution, explaining that a delay is not dispositive and concluding that “any delay [was] not so weighty” because the inmate was likely

to succeed on his legal claim and, without an injunction, the ADOC would likely execute the inmate without his spiritual advisor present as he passes, and that there is “no do-over in this scenario”). And Miller filing suit earlier would not change the reality that the State is not ready to execute anyone by nitrogen hypoxia.

Miller has shown, based on the evidence presented, a substantial likelihood of success on the merits of his Fourteenth Amendment claims, a likelihood of irreparable injury without an injunction, and that the balance of harms weighs in his favor. Therefore, Miller has established his entitlement to a preliminary injunction that prevents the State from executing him by any method other than nitrogen hypoxia.

## V. CONCLUSION

For the foregoing reasons, it is ORDERED as follows:

1. The Motion for Preliminary Injunction (Doc. 28) is GRANTED; and
2. The Defendants and their agents are hereby ENJOINED from executing Alan Eugene Miller by any method other than nitrogen hypoxia until further order from this Court.

DONE, on this the 19th day of September, 2022.

/s/ R. Austin Huffaker, Jr.  
R. AUSTIN HUFFAKER, JR.  
UNITED STATES DISTRICT JUDGE

## **APPENDIX H**

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

ALAN EUGENE MILLER, )  
 )  
 Plaintiff, )  
 )  
 v. ) Case No. 2:22-cv-506-RAH  
 )  
 JOHN Q. HAMM, *et al.*, )  
 )  
 Defendants. )

**DEFENDANT’S MOTION TO STAY PENDING APPEAL**

Plaintiff Alan Eugene Miller is an Alabama death row inmate who is scheduled to be executed on September 22, 2022. On April 19, 2022, the State of Alabama asked the Alabama Supreme Court to schedule the date for execution of Miller’s sentence. On July 18, the Alabama Supreme Court set Miller’s execution for September 22.

Miller did not file his 42 U.S.C. § 1983 lawsuit in this Court until August 22, just one month prior to his scheduled execution. DE1, DE18. Miller then inexplicably waited one more week, three weeks before his scheduled execution, to file a motion for preliminary injunction, asking this Court to enjoin Defendants from executing him by any method other than nitrogen hypoxia. DE28. The parties fully briefed this motion and this Court conducted an evidentiary hearing on September 12.

On September 19, this Court granted Miller’s motion for preliminary injunction, finding that Miller has successfully demonstrated that he is entitled to a preliminary injunction because he has shown a substantial likelihood of success on the merits and that the equities favor Miller. DE62:61 (hereafter, “Op.”). This Court then enjoined Defendants from “executing Alabama Eugene Miller by any method other than nitrogen hypoxia until further order from this Court.” *Id.*

Defendants respectfully request a stay of the Court’s judgment to allow Defendants to pursue an appeal with the United States Court of Appeals for the Eleventh Circuit and, if necessary, the United States Supreme Court. In support, Defendants submit the following.

### **INTRODUCTION**

Alan Miller claims that in 2018 he filled out a form in which he elected execution by nitrogen hypoxia. The State, however, has no record of him having done so, and accordingly scheduled him to be executed via lethal injection. Miller argues that by allegedly misplacing his method-of-execution form and ignoring his execution preference, the State has deprived him of his constitutional rights to procedural due process and equal protection under the Fourteenth Amendment.

Neither claim has merit. Miller’s allegations sound only in negligence, which is categorically insufficient to rise to the level of a constitutional deprivation. Even more damning is the fact that Miller has had over two months to avail himself of an



adequate state-law remedy—here, the writ of mandamus—yet inexcusably has declined to do so. He cannot attack the State’s process as constitutionally deficient when he failed to avail himself of it.

And Miller’s “class of one” claim fares even worse. Miller claims he is similarly situated to other prisoners who have opted for nitrogen hypoxia and is being treated differently for no rational reason. This is plainly incorrect. First, the State has no record of Miller’s supposed decision, which immediately distinguishes him from other inmates who elected nitrogen hypoxia. Second, aside from self-serving testimony, Miller has offered no evidence to show that he turned in a method-of-execution form. This materially distinguishes Miller even from the one other inmate who claimed the State did not receive his form, Jarrod Taylor, for Taylor brought forward substantial evidence to support his assertion that he had properly submitted his election. And because the State has myriad rational reasons to require reliable evidence before crediting a prisoner’s assertion—particularly where that assertion implicates his sentence—Miller’s “class of one” claim goes nowhere.

Worse still, Miller could have brought suit as soon as July 18, 2022, when the Alabama Supreme Court set his execution date. Yet he followed the playbook of many death-row inmates, waiting to the last minute to file his claims. Miller’s

execution is scheduled for September 22. This Court stay its preliminary injunction order.

## **STATEMENT OF THE CASE**

### **A. The Introduction Of Nitrogen Hypoxia As A Method Of Execution.**

On March 22, 2018, Governor Kay Ivey signed Alabama Laws Act 2018-353, which made nitrogen hypoxia a statutorily approved method of execution in Alabama. Pursuant to Alabama Code §15-18-82.1(b)(2), as modified by the act, an inmate whose conviction was final before June 1, 2018, had thirty days from that date to inform the warden of the correctional facility in which he was housed that he was electing to be executed by nitrogen hypoxia.

The law did not include any provision requiring that any individual be given special notice of its enactment, nor did it specify how an inmate should make an election, other than to require the election be made “personally,” “in writing,” and “delivered to the warden of the correctional facility” within thirty days of the triggering date. Ala. Code §15-18-82.1(b)(2). The Alabama Department of Corrections (“ADOC”) had no statutory duty to create an election program, and it had no authority to change the terms of the statute. ADOC’s only duty was to receive timely notices of election from inmates who wished to elect hypoxia.

On June 22, 2018, an attorney with the Federal Defenders for the Middle District of Alabama drafted an election form, which was given to death-row inmates

represented by that organization on June 26. Affidavit of John A. Palombi at 2, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Mar. 29, 2019), ECF No. 29-3. Cynthia Stewart, then the Warden of Holman Correctional Facility, where Miller was an inmate, directed Captain Jeff Emberton to give every death-row inmate a copy of the form and an envelope in which he could return it to the warden, should he decide to elect. DE52-10; DE62:6 (hereafter “Op.”). Emberton did so, Op.6, explaining to each inmate—in the district court’s summation—“that the law had changed and they now had a choice in their execution method, and if they wanted to choose, they were to fill out a form and he would return later in the day to pick it up,” Op.12-13 (citing DE52-14:55-56). The form was distributed to every death-row inmate at Holman by June 27. About fifty inmates turned in forms. DX22. Although the form was provided to every death row inmate at Holman, *see* DE56-14:10–13, “a lot of inmates refused to turn them back in,” DE52-14:57-1–2, because they wanted to speak with counsel. DE52-14:56-19–23.

**B. The State Schedules Miller’s Execution.**

On April 19, 2022, the State of Alabama asked the Alabama Supreme Court to schedule the date for execution of Miller’s sentence. Miller’s counsel subsequently contacted the Office of the Alabama Attorney General and asked whether Miller had elected nitrogen hypoxia during the 2018 election period.

After the Attorney General’s Office informed Miller’s counsel that ADOC possessed no nitrogen hypoxia election form for Miller, Miller filed an affidavit in the Alabama Supreme Court, on May 18, claiming to have made an election in “June or July 2018” by giving his form “to the correctional officer who was collecting the forms.” DE18-1:3. Miller further alleged that his form was turned in to this “correctional officer” “at the same time that he was collecting the forms from everyone else.” *Id.* Miller asked the Alabama Supreme Court to refrain from setting his execution date.

On July 18, 2022, the Alabama Supreme Court issued an order for Miller’s judicial execution to be carried out on September 22, 2022. Inexplicably, Miller did not file his §1983 lawsuit until August 22, just one month before his scheduled execution. On August 4—two weeks after the Alabama Supreme Court’s issuance of Miller’s execution warrant and two weeks prior to the filing of his complaint—Miller confided in a pen pal that his attorneys had told him he had “to wait.” DE33-1:2. In a responsive filing, Miller assured the district court that it lacked “important context” to determine whether this was an admission of unreasonable delay. DE34:1. Such “important context,” however, was never produced.

**C. This Court Stays Miller’s Execution; Defendants Appeal.**

Yesterday, this Court stayed Miller’s execution on the theory that (1) he likely suffered a constitutional deprivation as a “class of one” under the Equal Protection

Clause, and (2) his procedural due process rights were likely harmed because he alleges the State lost his method-of-execution form. Op.62. Because Miller’s execution is scheduled for September 22, 2022, Defendants now seek a stay from this Court, and a ruling by **12:00 PM CT on September 21**.

### **STANDARD OF REVIEW**

When deciding whether to grant a stay, courts consider: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Swain v. Junior*, 958 F.3d 1081, 1088 (11th Cir. 2020).

Rule 62(c) of the Federal Rules of Civil Procedure and Rule 8(a) of the Federal Rules of Appellate Procedure provide the following factors when considering a stay application:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.

While the first factor is often the most important, “the movant may also have his motion granted upon a lesser showing of a ‘substantial case on the merits’ when ‘the balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor

of granting the stay.” *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (alterations in original) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)). As to the likelihood of the Defendants prevailing on appeal, the standard of review for a grant or denial of a motion for a preliminary injunction was recently explained in *Smith v. Comm’r, Ala. Dep’t of Corr.*, No. 21-13581, 2021 WL 4916001, at \*3 (11th Cir. Oct. 21, 2021), *cert. denied sub nom. Smith v. Dunn*, 142 S. Ct. 12, 211 L. Ed. 2d 224 (2021). As the Eleventh Circuit explained:

Because “[t]he grant or denial of a preliminary injunction is a decision within the sound discretion of the district court,” our “review of such a decision is very narrow.” *Revette v. Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers*, 740 F.2d 892, 893 (11th Cir. 1984) (*per curiam*). Accordingly, we will not reverse the district court’s ruling “unless there is a clear abuse of discretion.” *Id.* An abuse of discretion occurs when the district court makes factual findings that are clearly erroneous, follows improper procedures, or applies the incorrect legal standard. *See Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016).

*Id.* The Eleventh Circuit has also held that an abuse of discretion occurs when it “ignores or misunderstands the relevant evidence, [or] bases its decision upon considerations having little factual support.” *Glock v. Glock, Inc.*, 797 F.3d 1002, 1006 (11th Cir. 2015); *quoting FTC v. AbbVie Prods. LLC*, 713 F.3d 54, 61 (11th Cir. 2013).

### **SUMMARY OF THE ARGUMENT**

This Court should stay its preliminary injunction order.

Miller's constitutional theories are foreclosed by clear precedent. First, Miller's procedural due process claim fails because everyone agrees that Miller has an adequate state-law remedy he has never taken advantage of: the writ of mandamus. Because "the writ of mandamus would be available under state law to [Miller], and because ... mandamus would be an adequate remedy to ensure that [Miller] was not deprived of his due process rights, ... [Miller] has failed to show that inadequate state remedies were available to him to remedy any alleged procedural deprivations." *Cotton v. Jackson*, 216 F.3d 1328, 1333 (11th Cir. 2000). Separate and apart from that black-letter law, the procedural harm Miller alleges is negligence, which "simply [does] not implicate[]" the Due Process Clause. *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

Second, Miller's equal protection "class of one" claim suffers equally fatal defects. Miller is not similarly situated to other State prisoners who elected nitrogen hypoxia (or even to Taylor who claimed he elected nitrogen hypoxia *and* that Defendants misplaced his form) because the State has no reliable evidence that Miller elected nitrogen hypoxia. In the same vein, the State has an eminently rational interest in verifying its prisoners' allegations, which easily justifies treating Miller differently from those inmates. Miller therefore fails to satisfy either necessary element of his "class of one" claim.

Finally, the equities favor the State. Because Miller could have brought his claim earlier yet decided to wait, the State’s “significant interest in enforcing its criminal judgments,” *Nelson v. Campbell*, 541 U.S. 637, 650 (2004), outweighs Miller’s purported interest in nitrogen hypoxia.

## **ARGUMENT**

### **I. Miller’s Constitutional Theories Fail on the Merits.**

#### **A. Miller’s Procedural Due Process Argument Fails as a Matter of Law.**

##### **1. Miller Declined to Avail Himself of the State’s Process, Dooming His Procedural Due Process Argument.**

“In procedural due process claims, the deprivation by state action of a constitutionally protected interest in ‘life, liberty, or property’ is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*.” *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). “Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.” *Id.*

“When a state procedure is inadequate, no procedural due process right has been violated unless and until the state fails to remedy that inadequacy.” *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994). “Again and again, [the Eleventh Circuit] has repeated the basic rule that a procedural due process claim can exist only



if no adequate state remedies are available.” *Flagship Lake Cnty. Dev. No. 5, LLC v. City of Mascotte, Fla.*, 559 F. App’x 811, 815 (11th Cir. 2014) (collecting cases). “This directive is not an exhaustion requirement. Instead, this directive is a recognition that procedural due process violations do not even exist unless no adequate state remedies are available.” *Cotton*, 216 F.3d at 1331 n.2 (citations omitted).

Critically, where a plaintiff can petition for “the writ of mandamus ... under state law,” the availability of the writ is “an adequate remedy to ensure that Plaintiff was not deprived of his due process rights” and in turn a plaintiff “has failed to state a claim for a procedural due process.” *Id.* at 1333. “In *Cotton*, [the Eleventh Circuit] stated that, even if the plaintiff has no specific legal remedy, the ability to seek a writ of mandamus in the state supreme court may be a sufficient remedy to a local government’s alleged procedural due process violation.” *Randel v. Rabun Cnty. Sch. Dist.*, No. 21-12760, 2022 WL 1195655, at \*2 (11th Cir. Apr. 22, 2022). There, “*the mere possibility* that the state supreme court could have issued a writ of mandamus in his favor was a sufficient process.” *Id.* (emphasis added). “Thus, “[i]f adequate state remedies were available but the plaintiff failed to take advantage of them, the plaintiff cannot rely on that failure to claim that the state deprived him of procedural due process.” *Flagship Lake Cnty.*, 559 F. App’x at 814–15 (quoting *Cotton*, 216

F.3d at 1331-33); *see also, e.g., Club Madonna, Inc. v. City. of Miami Beach*, 924 F.3d 1370, 1378-79 (11th Cir. 2019).

These decisions are fatal to Miller’s procedural due process claim. As the State explained below, there is no doubt that “the facts pleaded in [Miller’s] amended complaint [DE18] establish that he could have sought a petition for writ of mandamus directed to Defendant Hamm in state court.” DE35:4. In response, because Miller could not deny that state law provides him the opportunity to petition for mandamus, he attempted to cast the State’s argument as “gamesmanship” and assert that “this argument is entirely inappropriate” because “a plaintiff does not need to ‘prove’ a lack of post-deprivation hearing at the pleading stage.” DE45:14-15.

This is confused, as mandamus would be a *predeprivation* remedy if Miller would only seek it. Eleventh Circuit precedent leaves no doubt that a state-law writ of mandamus constitutes “an adequate remedy to ensure that Plaintiff was not deprived of his due process rights,” meaning that where, as here, the writ is available, a plaintiff “has failed to state a claim for a procedural due process,” *Cotton*, 216 F.3d at 1333. Because Alabama state law provided Miller the opportunity to seek a writ of mandamus, Miller’s procedural due process claim is a non-starter. *Cotton*, 216 F.3d at 1333.

The Court’s decision seemed to overlook this dispositive issue, cursorily addressing in a two-sentence footnote the critical question whether the availability of the writ of mandamus constitutes adequate process:

To the extent that predeprivation process was not feasible or would be unduly burdensome, or if the predeprivation process afforded here was constitutionally adequate, the Court agrees with the State that Miller has an adequate postdeprivation remedy because he could seek a writ of mandamus in a state circuit court. But, for the reasons explained earlier, the Court emphasizes that no adequate postdeprivation remedy exists to cure the deprivation of Miller’s liberty interest once the deprivation is complete: when an execution by lethal injection is carried out.

Op.53 n.21.

Though the Court “agrees with the State” that mandamus constitutes an adequate remedy, it simultaneously dismisses the adequacy of this remedy because “no adequate postdeprivation remedy exists to cure the deprivation of Miller’s liberty interest once the deprivation is complete.” *Id.* The Court, however, inexplicably deemed mandamus relief a “*postdeprivation* remedy” even though Miller could seek to use it *predeprivation*. Miller’s neglect of this predeprivation remedy does not transform it into a postdeprivation remedy; instead, that neglect forecloses Miller’s due process claim. He cannot attack the State’s process by declining to avail himself of it. *Cotton*, 216 F.3d at 1333.

**2. Miller’s complaint alleges negligence, which cannot amount to a constitutional deprivation.**

Miller’s procedural due process claim also fails because he has alleged only a species of negligence, not a constitutional deprivation. The Supreme Court has been unequivocal: “[T]he Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.” *Daniels*, 474 U.S. at 328. Moreover, predeprivation safeguards are inapplicable in situations where the State is “unable to anticipate and prevent a random deprivation of a liberty interest.” *Zinermon*, 494 U.S. at 132. “It would do no good for the State to have a rule telling its employees not to lose mail by mistake, and it ‘borders on the absurd to suggest that a State must provide a hearing to determine whether or not a corrections officer should engage in negligent conduct.’” *Id.* at 137.

Miller never explained what about the State’s process violated the Constitution. Instead, he alleged that Defendants violated his procedural due process rights because they “failed to create and maintain an accurate accounting of who timely submitted election forms and failed to implement a reviewable process for determining whether an election had been made.” DE18:14.

But aside from alleging that the prison’s operations are “messy” (DE18:14), Miller cannot identify what aspects of the process itself were inadequate. As the district court explained, Defendants provided prisoners with forms to indicate their preferred method of execution and then stored these completed forms for safe

keeping. Op.22; *see also* Op.14. The record shows that there were roughly 160 death-row inmates at the time the Legislature passed Ala. Code §15-18-82.1, *see* DE52-13:51; DE52-15:27, and method-of-execution election forms were provided to “every death row inmate,” DE52-10:1-2. To date, only two prisoners have alleged that ADOC misplaced their forms. *See* Op.8, 40. Allegations that two forms went missing do not amount to a violation of the Constitution.

This Court rejected the claim that “negligent loss of an election form does not give rise to an actionable due process claim” on the theory that “the deprivation Miller complains of is about more than the negligent loss of a form”; “[i]t is about the deprivation of his right to choose a nitrogen hypoxia execution and the State’s plans to carry out his execution by lethal injection in contravention of his choice.” Op.53 n.19.

But while the substantive “deprivation Miller complains about” is ultimately “his right to choose nitrogen hypoxia” (*id.* n.21), this is a procedural due process claim, which means that in addition to the alleged “constitutionally-protected ... property interest”—*i.e.*, the alleged “right to choose nitrogen hypoxia”—Miller must *also* show “constitutionally-inadequate process.” *Benison*, 5 F.4th at 1232. By collapsing the asserted “property interest” and the “process,” this Court erroneously elided analysis of the *procedural* right Miller alleges. Because the only

“constitutionally-inadequate process” Miller even *alleges* amounts to nothing more than negligence, Miller’s procedural due process claim fails as a matter of law.

**B. Miller fails to satisfy the necessary requirements of his “class of one” Equal Protection claim.**

A “class of one” claim requires a plaintiff to show (1) “that [he] has been intentionally treated differently from others similarly situated,” and (2) “that there is no rational basis for the difference in treatment.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Both prongs are necessary to the success of a “class of one” plaintiff’s claim, but Miller meets neither.

**1. Miller has failed to identify any inmate with whom he is similarly situated.**

A “class of one” claim cannot survive unless individuals are similar in all “factors relevant to an objectively reasonable governmental decisionmaker.” *Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1204 (11th Cir. 2007). “The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons *who are in all relevant respects alike*.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added).

No “class of one” claim can survive when the government applies the same test to all individuals. Plaintiffs must show that the government applied a wholly different test to the plaintiff versus other individuals. *See Olech*, 528 U.S. at 565 (conditioning water provision on a 33-foot easement for plaintiff but only 15-foot

easements from other property owners); *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441, 445-47 (assessing plaintiff's property at 100 percent of its value and other properties at 55 percent).

The level of identity required between comparators depends on the relevant variables for comparison. If the government applies a "one-factor" analysis, then individuals must be similar as defined by that one factor. In *Olech*, for example "the only relevant factor was the size of the easement required in return for connection to the municipal water supply." *Griffin*, 496 F.3d at 1203. But when the government applies a multifactor test involving discretionary determinations, individuals must be "*prima facie* identical in all relevant respects." *Campbell*, 434 F.3d at 1314. "This is a more difficult standard to meet." *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1265 (11th Cir. 2010); *see also, e.g., Leib v. Hillsborough County Pub. Transp. Commn.*, 558 F.3d 1301, 1307 (11th Cir. 2009) (no Equal Protection violation in multidimensional decision to impose restrictions on a bar that violated multiple regulations but not other bars that didn't appear to violate those same regulations); *Campbell*, 434 F.3d 1306 (11th Cir. 2006).

Here, Defendants applied the same, multifactor standard to all death row inmates seeking nitrogen hypoxia: the inmate must have either (1) an election form in ADOC's records or (2) credible evidence that the inmate timely completed and submitted the form to the warden. Aside from Miller, all death row inmates seeking

nitrogen hypoxia thus far have met these requirements. Miller did not. *See* DE18-3 (warden's affidavit that ADOC's nitrogen hypoxia file had no record of an election form from Miller). Even Taylor, the other inmate who claimed to have made an election form but whose form ADOC did not possess, showed credible evidence from his attorney that the form had been timely completed.

Defendants' decision involved the sort of "subjective, individualized determinations" that make any "class of one" claim difficult. *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 604 (2008). Faced with Miller's claim that an election form existed despite its nonexistence in ADOC's records, Defendants had to determine the credibility of Miller's claims. These determinations implicated several factors, such as Miller's inability to describe the prison official who collected his form, *see* DE58:98-110, and his complete lack of evidence apart from a self-serving affidavit, *see* Op.30-31; DE18:1. Because ADOC did not possess Miller's form and because Miller offered no evidence that he had completed a form aside from a self-serving affidavit, Miller was not similarly situated to other inmates.

But even if Defendants' test is characterized as simple or one-dimensional, they still applied the same simple test to all inmates: show credible evidence of a timely form. Miller is the only one to fail this test. Thus, Miller's "class of one" claim must fail.



In reaching the opposite conclusion, this Court committed at least two reversible errors. *First*, the Court mischaracterized Defendants' decision as "simple or one-dimensional" when Defendants were making subjective, individualized determinations about credibility. Op.43. As explained above, Miller cannot make the demanding showing of being "identical in all relevant respects" to other inmates in all the subjective factors that went into Defendants' evaluation of credibility. *Campbell*, 434 F.3d at 1314. But *second*, even if Defendants' decision was simple and one-dimensional, the Court still erred in concluding that Miller was identically situated with other inmates. In fact, Miller was the only inmate to fail to present (1) any election form in ADOC's records *and* (2) any evidence, apart from a self-serving affidavit, that he completed a timely election form. DE18-3 (no form from Miller in record); DE58:98-110 (inability to describe official); Op.30-31 (undisputed allegation of refusal to corroborate testimony); DE18:1 (Miller's affidavit). Whether an inmate presents evidence to support a claim as substantial as Miller's is obviously "relevant to an objectively reasonable governmental decisionmaker," *Griffin Industries, Inc.*, 496 F.3d at 1204, making this distinction dispositive.

**2. Defendants have a rational interest in requiring strong evidence to support prisoners' claims.**

But even if Miller was similarly situated to other death row inmates, Defendants have a rational basis to treat him differently. Rational basis review "is a paradigm of judicial restraint." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314

(1993). “A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations.” *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993). So long as a “rational policymaker could believe” the decision would further a legitimate state objective, the decision must be upheld. *Cook v. Bennett*, 792 F.3d 1294, 1301 (11th Cir. 2015).

These principles apply in full force to a plaintiff’s equal protection “class of one” claim. In such circumstances, the court must examine the “full variety of factors that an objectively reasonable governmental decisionmaker would have found relevant in making the challenged decision.” *Griffin*, 496 F.3d at 1203. If any rational basis could support a legitimate state objective, then the claim fails.

Though there are many rational bases on which to differentiate individuals, two bear emphasis here. *First*, the State may reasonably differentiate individuals based on its confidence in their credibility. In *Campbell*, the city was skeptical of plaintiff’s building proposal because plaintiffs failed to consistently bring a sketch of the proposed building to Planning Commission meetings. 434 F.3d at 1316-17. The commission was also nervous that the provided sketch, made with a pencil, “would have allowed any of the proposed building locations to be changed easily.” *Id.* In contrast, the other property developer provided site plans, an architect, and an

engineer at every meeting by the Planning Commission, bolstering the developer's credibility. *Id.* “[T]he nature of the presentations Echols made would inspire more confidence than the Campbells’ rather nonchalant approach,” and this difference provided a rational basis for approving one project and not the other. *Id.*

*Second*, the government may rationally differentiate individuals based on the State’s own record evidence. In *Knight v. Baptist Hosp. of Miami, Inc.*, the Eleventh Circuit looked to the different employment records of the plaintiff nurse and another nurse in an Equal Protection claim. 330 F.3d 1313, 1315–19 (11th Cir. 2003). Despite the plaintiff’s claims that both she and the other nurse had the same job performance problems, the government had a rational basis to treat them differently because their records showed differences in job performance and tardiness. *Id.* The Court emphasized that the decision to place the plaintiff on leave was “based on a review of her entire record” and “documented instances” of her performance problems. *Id.* at 1317. Regardless of the plaintiff’s self-serving claims, “the record [did] not indicate” that the plaintiff had the same degree of problems as the other nurse. *Id.* at 1318.

Here, Defendants relied on multiple rational criteria to treat Miller differently from other death row inmates. First, unlike other death row inmates, ADOC does not have Miller’s form. DE18-3. Like the government employer in *Knight*, which relied on its records to justify differential treatment of employees, here Defendants

reasonably relied on their records to differentiate between death row inmates. Defendants had a process for collecting forms, DE52-13:74-80, and it is rational to doubt the existence of a form that does not show up in ADOC's records. And as in *Campbell*, where plaintiffs failure to "provide a record" supporting their allegations was evidence of a rational basis for differential treatment, 434 F.3d at 1315, here ADOC's lack of a form is evidence suggesting that Miller—unlike his fellow inmates—did not complete the form at all. That evidentiary distinction distinguishes Miller from other inmates, and the State's interest in verifying its prisoners' claims is self-evidently rational. *See, e.g., Superintendent, Massachusetts Correctional Instn., Walpole v. Hill*, 472 U.S. 445, 454-55 (1985) (recognizing "the legitimate institutional needs of assuring the safety of inmates and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation").

The same principled distinction in credibility also differentiates Miller from Taylor. Whereas Taylor alleged he had completed a method-of-execution form and presented substantial evidence to support his claim, DE28:7, Miller offers no evidence aside from a self-serving affidavit, DE18:1. It is not unreasonable for the State to find a last-minute, self-serving affidavit less persuasive than the robust evidence presented by Taylor. *Compare* Op.30-31 (undisputed allegation of Miller's refusal to corroborate testimony with attorney-client communications), *and* DE18:1

(Miller’s affidavit), *with* DE28:7 (undisputed statements that Taylor’s counsel (1) filed a motion informing Defendants that Taylor had made a timely election and (2) provided Defendants with attorney-client communications from around the time of the election period). *See also, e.g., Williams v. City of Dothan, Ala.*, 745 F.2d 1406, 1415 n.9 (11th Cir. 1984) (“[S]ubjective and possible self-serving evidence must be viewed with a skeptical eye unless it is supported by more objective facts in the record.”). The State’s finding is all the more reasonable where Miller proved unable to answer questions about the warden who collected his form and to come forward with any evidence of his timely completed form. DE58:98-110.

This Court erred when it could “conceive of no rational basis to treat Miller differently.” Op.45. The court’s reasoning rested on the premise that “[t]he State is not the exclusive arbiter of whether an inmate has made a proper and timely election.” *Id.* But the State need not be “the exclusive arbiter” of truth to come to reasonable, evidence-based conclusions, and rational basis does not require that those conclusions are infallible. Just the opposite. As noted above, “courts are compelled under rational-basis review to accept a legislature’s generalizations *even when there is an imperfect fit between means and ends*”; indeed, “[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.” *Heller*, 509 U.S. at 321 (internal citations, quotation marks omitted). The Constitution does not prevent Defendants

from applying rational criteria to determine which inmates have likely completed a timely form and which have not.

## **II. The Equities Favor The State.**

This Court should also stay its order based on the balance of the equities. Miller is scheduled to be executed in two days. His gamesmanship should not be rewarded.

“In deciding whether to grant a stay of execution, courts must consider whether such a challenge could have been brought earlier or otherwise reflects a prisoner’s attempt at manipulation.” *Nance v. Ward*, 142 S. Ct. 2214, 2225 (2022) (quotations omitted). Federal courts must also consider the State’s strong interest in proceeding with its criminal judgment. *See Long v. Sec’y, Dep’t of Corrs.*, 924 F.3d 1171, 1176 (11th Cir. 2019).

On August 4—two weeks after the Alabama Supreme Court’s issuance of Miller’s execution warrant and two weeks prior to the filing of his complaint—Miller confided in a pen pal that his attorneys had told him he had “to wait.” DE33-1:2. In a responsive filing, Miller assured the district court that it lacked “important context” to determine whether this was an admission of unreasonable delay. DE34:1. But this “important context” never came.

The Court gave this critical fact short shrift and gave counsel credit for waiting until Miller’s execution date was set to begin planning for the event that they might

not prevail before the Alabama Supreme Court. Finally, the Court concluded its order with the observation that “Miller filing suit earlier would not change the reality that the State is not ready to execute anyone by nitrogen hypoxia.” Op.61. But that means that Miller’s delay in bringing a claim has helped him *succeed* in delaying his execution. That Miller’s gambit would lead to delay in carrying out his lawful sentence was reason to deny his preliminary injunction motion.

### CONCLUSION

This Court should stay its preliminary injunction.

Respectfully submitted,

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*Attorney General*

*/s/ Beth Jackson Hughes*

Beth Jackson Hughes

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Audrey Jordan

*Alabama Assistant Attorneys General*

*Counsel for Defendants*

September 20, 2022

**CERTIFICATE OF SERVICE**

I certify that on September 20, 2022, I served a copy of the foregoing upon all counsel of record via the Court's CM/ECF system.

Respectfully submitted,

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## **APPENDIX I**

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

ALAN EUGENE MILLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 2:22-cv-506-RAH
	)	[WO]
JOHN Q. HAMM, Commissioner,	)	
Alabama Department of Corrections,	)	
<i>et al.</i> ,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

**I. INTRODUCTION**

Plaintiff Alan Eugene Miller is a death row inmate in the custody of the Alabama Department of Corrections (ADOC) at Holman Correctional Facility (Holman).<sup>1</sup> On August 22, 2022, Miller filed this lawsuit under 42 U.S.C. § 1983, asserting three causes of action against the Commissioner of the ADOC, the Warden of Holman, and the Alabama Attorney General (collectively, the State or Defendants), in their official capacities, for deprivation of his constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution. (Doc. 1.) Miller sought declaratory and injunctive relief.

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<sup>1</sup> Holman is the primary correctional facility for housing death row inmates in Alabama and is the only facility in the state that performs executions.

Prior to Miller filing this lawsuit, the Alabama Supreme Court scheduled Miller's execution for September 22, 2022. On September 19, 2022, this Court granted Miller's Motion for Preliminary Injunction (hereinafter, PI Order) and enjoined the Defendants and their agents from executing Miller "by any method other than nitrogen hypoxia until further order from this Court." (Doc. 62 at 61.) When this Court entered its PI Order, it did not stay the injunction pending appeal.

On September 20, 2022, the State appealed the PI Order to the Eleventh Circuit Court of Appeals. (Doc. 63.) Later in the day, the State filed a Motion to Stay Pending Appeal in this Court, requesting a ruling by 12:00 p.m. CDT on September 21, 2022. (Doc. 67.) This matter is ripe for review.

For the following reasons, the State's Motion to Stay Pending Appeal is due to be denied.

## **II. JURISDICTION AND VENUE**

The Court has original subject matter jurisdiction 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. STANDARD OF REVIEW**

The general rule is that "[t]he filing of a notice of appeal . . . divests the district court of control over those aspects of the case involved in the appeal." *Pac. Ins. Co. v. Gen. Dev. Corp.*, 28 F.3d 1093, 1097 n.7 (11th Cir. 1994) (per curiam)

(alteration in original) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)). However, Federal Rule of Civil Procedure 62(d) provides an exception to this rule, permitting a district court, in its discretion, to “suspend, modify, restore, or grant an injunction” during the pendency of the appeal. FED. R. CIV. P. 62(d). “A district court may, therefore, proceed as provided by such rule without leave of the court of appeals to grant or stay an injunction pending an appeal.” 30 Am. Jur. 2d Executions and Enforcement of Judgments § 41 (2021).

In deciding whether to stay an injunction pending appeal, the Court uses a four-part test: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.*, 210 F.3d 1309, 1313 (11th Cir. 2000) (per curiam). “Courts rarely stay a preliminary injunction pending appeal given that the test for a stay is so similar to the test for a preliminary injunction.” *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1032 (N.D. Fla. 2018). The State, as the stay applicant, is held to the same demanding standard required for Miller to obtain injunctive relief. The State must, “by a clear showing,” carry the burden of

persuasion on all four requirements. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).

#### IV. DISCUSSION

Having reviewed the pending motion, the Court finds that the State has not carried its burden by a clear showing. Less than two days ago, in its PI Order, this Court meticulously analyzed the record evidence, applied the required constitutional standards, and implemented the well-settled, four-part test utilized in the Eleventh Circuit for evaluating motions for injunctive relief, ultimately finding that Miller was substantially likely to succeed on the merits of his equal protection and procedural due process claims and that the equities weighed in his favor.

The factors the Court considered before granting Miller injunctive relief are nearly identical to the factors it must now consider in deciding whether to stay the injunction. *See Detzner*, 347 F. Supp. 3d at 1032. Granting the State's motion would require the Court to reanalyze those factors and yet reach an entirely opposite result.

The Court found in its PI Order that Miller—not the State—is likely to succeed on the merits of his equal protection and procedural due process claims. Inextricably intertwined with this finding was the Court's determination that, based on the evidence presented, including Miller's live testimony at the evidentiary hearing, it is substantially likely that Miller timely elected an execution by nitrogen hypoxia. If the injunction is not enforced, Miller would be irreparably injured

because the State would be permitted to execute him by lethal injection on September 22, 2022, in contravention of his state-created interest in choosing to die by nitrogen hypoxia. And, although the Court recognized in its PI Order the State's strong interest in enforcing its criminal judgments, the Court found that the public interest lies in ensuring (1) that executions are not carried out in an unconstitutional manner, (2) that the State follows its laws generally, and (3) that the State honors an inmate's valid election of nitrogen hypoxia. The Court also found that any harm to the public is greatly outweighed by the harm to Miller if an injunction does not issue.

Before turning to the State's arguments in its stay motion, the Court wishes to highlight one of its findings in the PI Order, which the State overlooks in its motion. In his Amended Complaint, Miller asked the Court to declare that he "timely submitted his election form pursuant to Ala. Code § 15-18-82.1(b) and opted into execution by nitrogen hypoxia." (Doc. 18 at 19.) In its opposition to Miller's Motion for Preliminary Injunction, the State expressly argued that Miller was not substantially likely to show that he timely elected nitrogen hypoxia. And at the evidentiary hearing, the State agreed that this Court is the proper factfinder to determine whether Miller timely elected. (Doc. 58 at 160.) The parties—including the State—agreed that determining whether it is substantially likely that Miller timely elected was a key issue in evaluating Miller's entitlement to a preliminary injunction. And after considering all of the evidence presented and counsels'

arguments, the Court concluded it is substantially likely that Miller timely elected nitrogen hypoxia. Notably, the State does not argue that the Court's finding was clearly erroneous. Rather, the State presents legal arguments as if the Court had not made that finding. With that background, the Court now turns to the State's arguments in its stay motion.

*First*, equal protection. The State argues that it has a rational basis for requiring evidence corroborating an inmate's testimony when it evaluates whether an inmate timely elected nitrogen hypoxia. But the State views Miller's equal protection claim through the wrong lens. The question is not whether the State has a rational basis for requiring corroborating evidence when the *State* evaluates an inmate's assertion that he elected. As the Court explained in its PI Order, "the question is whether it would violate Miller's equal protection rights if the State executed him by lethal injection even though he timely elected nitrogen hypoxia, while not pursuing execution by lethal injection for other inmates who timely elected nitrogen hypoxia." (Doc. 62 at 44.)<sup>2</sup>

In its stay motion, the State argues that it has a rational basis only to dispute the veracity of Miller's allegations that he timely elected nitrogen hypoxia—*not* that

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<sup>2</sup> All the nitrogen hypoxia election statute requires is an inmate's writing delivered to his or her warden within the proscribed time period. *See* ALA. CODE § 15-18-82.1(b). The State has not argued that the manner in which Miller delivered his form to the warden was legally insufficient; rather, the State maintains that he did not do so at all.

it has a rational basis to treat Miller differently (by executing him by lethal injection) *if* his allegations are true. In essence, the State contends that notwithstanding the Court’s factual finding that it is substantially likely Miller timely elected nitrogen hypoxia, Miller’s equal protection rights would not be violated if he were executed by lethal injection because the *State* wants more corroborating evidence.<sup>3</sup> That result would be absurd and legally untenable. Moreover, it would require the Court to substitute the State as the factfinder after the State expressly requested that *this Court* sit as the factfinder.

In its PI Order, the Court concluded that it is “substantially likely, if not certain,” that “it would violate Miller’s equal protection rights if the State executed him by lethal injection even though he timely elected nitrogen hypoxia, while not pursuing execution by lethal injection for other inmates who timely elected nitrogen hypoxia.” (Doc. 62 at 44.) The State has failed to persuade the Court that this conclusion was wrong. Indeed, the Court has not articulated a rational basis for treating Miller differently from other inmates who timely elected *if Miller timely elected*—and again, the Court found it substantially likely that he did.

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<sup>3</sup> Moreover, the Court’s determination was based on much more than reading Miller’s and Warden Raybon’s affidavits and looking in the State’s nitrogen hypoxia file. The Court listened to Miller’s live testimony and considered a large amount of evidence surrounding the nitrogen hypoxia election period and election form distribution at Holman.



*Second*, procedural due process. The State argues that Miller’s procedural due process claim fails because he has an adequate postdeprivation remedy: seeking a writ of mandamus in an Alabama state trial court. But the State appears to have ignored the portion of the Court’s PI Order explaining that the deprivation of Miller’s rights is not complete unless and until his execution is carried out by lethal injection in contravention of his nitrogen hypoxia election. (*Id.* at 50–51.) No adequate postdeprivation remedy exists for such a deprivation, (*see id.* at 52), and the State does not argue otherwise.

And the Court acknowledges, as before, that a negligent loss alone cannot give rise to an actionable due process claim. But, as the Court explained before, “the deprivation Miller complains of is about more than the negligent loss of a form. It is about the deprivation of his right to choose a nitrogen hypoxia execution and the State’s plans to carry out his execution by lethal injection in contravention of his choice.” (*Id.* at 53 n.19.) Thus, the Court finds the State’s arguments unavailing, and the Court discerns no error in its prior finding that Miller is substantially likely to succeed on his procedural due process claim.

*Third*, delay. The State quotes language from a Supreme Court decision that “[i]n deciding whether to grant a stay of execution, courts must consider whether such a challenge could have been brought earlier or otherwise reflects a prisoner’s attempt at manipulation.” (Doc. 67 at 24 (quoting *Nance v. Ward*, 142 S. Ct. 2214,

2225 (2002)).) True, the Supreme Court has stated on multiple occasions that “[a] court considering a stay [of execution] 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.’” *Hill*, 547 U.S. at 584 (citation omitted); *see also Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (discussing the “strong equitable presumption against the grant of a stay”). But Miller did not seek or obtain an open-ended stay of execution. Rather, he sought and obtained a narrowly tailored injunction designed to remedy the specific harm of which he complains: the State’s refusal to honor his nitrogen hypoxia election and its plans to execute him by lethal injection. That Miller’s execution by nitrogen hypoxia cannot be carried out on September 22, 2022, is attributable to the State, not Miller.

Importantly, the State still does not contest that Miller likely faces irreparable injury without an injunction. Nor does the State argue, let alone show, that the harm occasioned by a (short) delay in carrying out Miller’s execution outweighs the irreparable harm to Miller. The Court stands by its prior determination that Miller did not inexcusably delay filing this lawsuit such that it counsels against granting injunctive relief. And the Court reiterates that any delay here<sup>4</sup> does not militate

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<sup>4</sup> Moreover, courts have typically found that an inmate unreasonably delayed in bringing their claim where the inmate sought a stay mere days before their scheduled execution, *see, e.g., Woods v. Comm’r, Ala. Dep’t of Corr.*, 951 F.3d 1288, 1293 (11th Cir. 2019) (concluding inmate was not

against injunctive relief because Miller has met his burden of showing a substantial likelihood that he timely elected and that he can succeed on his claims, that he likely faces irreparable injury, and that the balance of harms weighs in his favor. *Cf. Smith v. Comm’r, Ala. Dep’t of Corr.*, 844 F. App’x 286, 294 (11th Cir. 2021) (in case where an inmate sought to have his spiritual advisor in the room during his execution, explaining that a delay is not dispositive and concluding that “any delay [was] not so weighty” because the inmate was likely to succeed on his legal claim and, without an injunction, the ADOC would likely execute the inmate without his spiritual advisor present, and that there is “no do-over in this scenario”).

Finally, the State argues that the Court should grant a stay under an alternative formulation of the test, which requires a “substantial case on the merits” and that the equities weigh heavily in favor of granting a stay. *See Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). The State has not demonstrated its entitlement to a stay under this alternative test because the State has not shown that it has a

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justified in waiting to seek a stay ten days before execution date and this delay counseled against the grant of a stay), or where the inmate could have brought their claim much earlier, *see, e.g., Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (vacating stay of execution and explaining that the inmate’s claim could have been brought “more than a decade ago”). Those circumstances are a far cry from this case, where Miller first learned that the State could not locate his election form in May 2022, and where he filed his lawsuit four weeks before his scheduled execution and his preliminary injunction motion three weeks before. And “it was not unreasonable for [Miller] to attempt to exhaust his state remedies by completing litigation on the State’s motion to set his execution date before filing his section 1983 lawsuit here.” *Hamm v. Comm’r, Ala. Dep’t of Corr.*, No. 18-10473, 2018 WL 2171185, at \*2 (11th Cir. Feb. 13, 2018).



## **APPENDIX J**

No. 22-13136-P

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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ALAN EUGENE MILLER, Plaintiff-Appellant,

v.

COMMISSIONER, Alabama Department of Corrections, et al.,  
Defendants-Appellees.

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On Appeal from the United States District Court for the  
Middle District of Alabama (Case No. 2:22-cv-00506-RAH)

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**DEFENDANTS-APPELLANTS' EMERGENCY MOTION  
TO STAY PRELIMINARY INJUNCTION**

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September 20, 2022

**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that the following listed persons and parties may have an interest in the outcome of this case:

1. Anderson, Richard Dearman—counsel for the appellants
2. Hamm, John Q.—Commissioner, Alabama Department of Corrections (appellant)
3. Houts, James Roy—counsel for the appellants
4. Huffaker, R. Austin—United States District Judge for the Middle District of Alabama
5. Huggins, Kelly J.—counsel for the appellee
6. Hughes, Beth Jackson—counsel for the appellants
7. Jordan, Audrey Kathleen Jones—counsel for the appellants
8. Klebaner, Mara—counsel for the appellee
9. LaCour, Edmund G.—Solicitor General, State of Alabama
10. Marshall, Steve—Attorney General, State of Alabama (appellant)
11. Miller, Alan Eugene—appellee
12. Neppl, Daniel J.—counsel for the appellee
13. Ramirez, Marisol—counsel for the appellee
14. Raybon, Terry—Warden, Holman Correctional Facility (appellant)
15. Robertson, J. Bradley—counsel for the appellee
16. Spector, Stephen—counsel for the appellee

17. Wilson, Thomas—Deputy Solicitor General, State of Alabama

Undersigned also certifies that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

*s/ Edmund G. LaCour Jr.*  
Edmund G. LaCour Jr.  
*Solicitor General*



## STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary. Miller's execution is scheduled to take place *in two days*, September 22, and briefing is unlikely to conclude until shortly before his execution. Holding oral argument would thus even further limit the time this Court has to consider the case and that the Supreme Court has to consider any emergency motions.

And, in any event, oral argument would not be useful; the district court's order granting Miller's preliminary injunction straightforwardly contravened this Court and the Supreme Court's binding precedent and on those bases is due to be stayed and eventually reversed. *See* FED. R. APP. P. 34(a)(2).

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## INTRODUCTION

Alan Miller claims that in 2018 he filled out a form in which he elected execution by nitrogen hypoxia. The State, however, has no record of him having done so, and accordingly scheduled him to be executed via lethal injection. Miller argues that by allegedly misplacing his method-of-execution form and ignoring his execution preference, the State has deprived him of his constitutional rights to procedural due process and equal protection under the Fourteenth Amendment.

Neither claim has merit. Miller's allegations sound only in negligence, which is categorically insufficient to rise to the level of a constitutional deprivation. Even more damning is the fact that Miller has had over two months to avail himself of an adequate state-law remedy—here, the writ of mandamus—yet inexcusably has declined to do so. He cannot attack the State's process as constitutionally deficient when he failed to avail himself of it.

And Miller's "class of one" claim fares even worse. Miller claims he is similarly situated to other prisoners who have opted for nitrogen hypoxia and is being treated differently for no rational reason. This is plainly incorrect. First, the State has no record of Miller's supposed decision, which immediately distinguishes him from other inmates who elected nitrogen hypoxia. Second, aside from self-serving testimony, Miller has offered no evidence to show that he turned in a method-of-execution form. This materially distinguishes Miller even from the one other inmate who

claimed the State did not receive his form, Jarrod Taylor, for Taylor brought forward substantial evidence to support his assertion that he had properly submitted his election. And because the State has myriad rational reasons to require reliable evidence before crediting a prisoner's assertion—particularly where that assertion implicates his sentence—Miller's "class of one" claim goes nowhere.

Worse still, Miller could have brought suit as soon as July 18, 2022, when the Alabama Supreme Court set his execution date. Yet he followed the playbook of many death-row inmates, waiting to the last minute to file his claims. Miller's execution is scheduled for September 22. This Court should grant a stay of the district court's preliminary injunction by **5:00 PM ET on September 21**.

### **STATEMENT OF THE CASE**

#### **A. The Introduction Of Nitrogen Hypoxia As A Method Of Execution.**

On March 22, 2018, Governor Kay Ivey signed Alabama Laws Act 2018-353, which made nitrogen hypoxia a statutorily approved method of execution in Alabama. Pursuant to Alabama Code §15-18-82.1(b)(2), as modified by the act, an inmate whose conviction was final before June 1, 2018, had thirty days from that date to inform the warden of the correctional facility in which he was housed that he was electing to be executed by nitrogen hypoxia.

The law did not include any provision requiring that any individual be given special notice of its enactment, nor did it specify how an inmate should make an



election, other than to require the election be made “personally,” “in writing,” and “delivered to the warden of the correctional facility” within thirty days of the triggering date. Ala. Code §15-18-82.1(b)(2). The Alabama Department of Corrections (“ADOC”) had no statutory duty to create an election program, and it had no authority to change the terms of the statute. ADOC’s only duty was to receive timely notices of election from inmates who wished to elect hypoxia.

On June 22, 2018, an attorney with the Federal Defenders for the Middle District of Alabama drafted an election form, which was given to death-row inmates represented by that organization on June 26. Affidavit of John A. Palombi at 2, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Mar. 29, 2019), ECF No. 29-3. Cynthia Stewart, then the Warden of Holman Correctional Facility, where Miller was an inmate, directed Captain Jeff Emberton to give every death-row inmate a copy of the form and an envelope in which he could return it to the warden, should he decide to elect. DE52-10; DE62:6 (hereafter “Op.”). Emberton did so, Op.6, explaining to each inmate—in the district court’s summation—“that the law had changed and they now had a choice in their execution method, and if they wanted to choose, they were to fill out a form and he would return later in the day to pick it up,” Op.12-13 (citing DE52-14:55-56). The form was distributed to every death-row inmate at Holman by June 27. About fifty inmates turned in forms. DX22. Although the form was provided to every death row inmate at Holman, *see* DE56-14:10–13, “a lot of inmates

refused to turn them back in,” DE52-14:57-1–2, because they wanted to speak with counsel. DE52-14:56-19–23.

**B. The State Schedules Miller’s Execution.**

On April 19, 2022, the State of Alabama asked the Alabama Supreme Court to schedule the date for execution of Miller’s sentence. Miller’s counsel subsequently contacted the Office of the Alabama Attorney General and asked whether Miller had elected nitrogen hypoxia during the 2018 election period.

After the Attorney General’s Office informed Miller’s counsel that ADOC possessed no nitrogen hypoxia election form for Miller, Miller filed an affidavit in the Alabama Supreme Court, on May 18, claiming to have made an election in “June or July 2018” by giving his form “to the correctional officer who was collecting the forms.” DE18-1:3. Miller further alleged that his form was turned in to this “correctional officer” “at the same time that he was collecting the forms from everyone else.” *Id.* Miller asked the Alabama Supreme Court to refrain from setting his execution date.

On July 18, 2022, the Alabama Supreme Court issued an order for Miller’s judicial execution to be carried out on September 22, 2022. Inexplicably, Miller did not file his §1983 lawsuit until August 22, just one month before his scheduled execution. On August 4—two weeks after the Alabama Supreme Court’s issuance of

Miller’s execution warrant and two weeks prior to the filing of his complaint—Miller confided in a pen pal that his attorneys had told him he had “to wait.” DE33-1:2. In a responsive filing, Miller assured the district court that it lacked “important context” to determine whether this was an admission of unreasonable delay. DE34:1. Such “important context,” however, was never produced.

**C. The District Court Stays Miller’s Execution; Defendants Appeal.**

On the night of September 19, 2022, the district court stayed Miller’s execution on the theory that (1) he likely suffered a constitutional deprivation as a “class of one” under the Equal Protection Clause, and (2) his procedural due process rights were likely harmed because he alleges the State lost his method-of-execution form. Op.62.

Defendants filed their stay motion with the district court on September 20. *See* DE67. The court has thus far “failed to afford the relief requested.” Fed. R. Civ. P. 8(a)(1)-(2). Because Miller’s execution is scheduled for September 22, 2022, Defendants now seek a stay from this Court, and a ruling by **5:00 PM ET on September 21**.

**STANDARD OF REVIEW**

When deciding whether to stay the district court’s preliminary injunction, this Court reviews the underlying legal conclusions *de novo* and any findings of fact for clear error. The Court considers: “(1) whether the stay applicant has made a strong

showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Swain v. Junior*, 958 F.3d 1081, 1088 (11th Cir. 2020).

### SUMMARY OF THE ARGUMENT

This Court should stay the district court’s flawed preliminary injunction.

Miller’s constitutional theories are foreclosed by clear precedent. First, Miller’s procedural due process claim fails because everyone agrees that Miller has an adequate state-law remedy he has never taken advantage of: the writ of mandamus. Because “the writ of mandamus would be available under state law to [Miller], and because ... mandamus would be an adequate remedy to ensure that [Miller] was not deprived of his due process rights, ... [Miller] has failed to show that inadequate state remedies were available to him to remedy any alleged procedural deprivations.” *Cotton v. Jackson*, 216 F.3d 1328, 1333 (11th Cir. 2000). Separate and apart from that black-letter law, the procedural harm Miller alleges is negligence, which “simply [does] not implicate[]” the Due Process Clause. *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

Second, Miller’s equal protection “class of one” claim suffers equally fatal defects. Miller is not similarly situated to other State prisoners who elected nitrogen

hypoxia (or even to Taylor who claimed he elected nitrogen hypoxia *and* that Defendants misplaced his form) because the State has no reliable evidence that Miller elected nitrogen hypoxia. In the same vein, the State has an eminently rational interest in verifying its prisoners' allegations, which easily justifies treating Miller differently from those inmates. Miller therefore fails to satisfy either necessary element of his "class of one" claim.

Finally, the equities favor the State. Because Miller could have brought his claim earlier yet decided to wait, the State's "significant interest in enforcing its criminal judgments," *Nelson v. Campbell*, 541 U.S. 637, 650 (2004), outweighs Miller's purported interest in nitrogen hypoxia.

## ARGUMENT

### **I. Miller's Constitutional Theories Fail on the Merits.**

#### **A. Miller's Procedural Due Process Argument Fails as a Matter of Law.**

##### **1. Miller Declined to Avail Himself of the State's Process, Dooming His Procedural Due Process Argument.**

"In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due*

*process of law.*” *Zinerman v. Burch*, 494 U.S. 113, 125 (1990). “Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.” *Id.*

“When a state procedure is inadequate, no procedural due process right has been violated unless and until the state fails to remedy that inadequacy.” *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994). “Again and again, this Court has repeated the basic rule that a procedural due process claim can exist only if no adequate state remedies are available.” *Flagship Lake Cnty. Dev. No. 5, LLC v. City of Mascotte, Fla.*, 559 F. App’x 811, 815 (11th Cir. 2014) (collecting cases). “This directive is not an exhaustion requirement. Instead, this directive is a recognition that procedural due process violations do not even exist unless no adequate state remedies are available.” *Cotton*, 216 F.3d at 1331 n.2 (citations omitted).

Critically, where a plaintiff can petition for “the writ of mandamus ... under state law,” the availability of the writ is “an adequate remedy to ensure that Plaintiff was not deprived of his due process rights” and in turn a plaintiff “has failed to state a claim for a procedural due process.” *Id.* at 1333. “In *Cotton*, [this Court] stated that, even if the plaintiff has no specific legal remedy, the ability to seek a writ of mandamus in the state supreme court may be a sufficient remedy to a local government’s alleged procedural due process violation.” *Randel v. Rabun Cnty. Sch. Dist.*, No. 21-12760, 2022 WL 1195655, at \*2 (11th Cir. Apr. 22, 2022). There, “*the mere*

*possibility* that the state supreme court could have issued a writ of mandamus in his favor was a sufficient process.” *Id.* (emphasis added). “Thus, “[i]f adequate state remedies were available but the plaintiff failed to take advantage of them, the plaintiff cannot rely on that failure to claim that the state deprived him of procedural due process.” *Flagship Lake Cnty.*, 559 F. App’x at 814–15 (quoting *Cotton*, 216 F.3d at 1331-33); *see also, e.g., Club Madonna, Inc. v. City. of Miami Beach*, 924 F.3d 1370, 1378-79 (11th Cir. 2019).

These decisions are fatal to Miller’s procedural due process claim. As the State explained below, there is no doubt that “the facts pleaded in [Miller’s] amended complaint [DE18] establish that he could have sought a petition for writ of mandamus directed to Defendant Hamm in state court.” DE35:4. In response, because Miller could not deny that state law provides him the opportunity to petition for mandamus, he attempted to cast the State’s argument as “gamesmanship” and assert that “this argument is entirely inappropriate” because “a plaintiff does not need to ‘prove’ a lack of post-deprivation hearing at the pleading stage.” DE45:14-15.

This is confused, as mandamus would be a *predeprivation* remedy if Miller would only seek it. Eleventh Circuit precedent leaves no doubt that a state-law writ of mandamus constitutes “an adequate remedy to ensure that Plaintiff was not deprived of his due process rights,” meaning that where, as here, the writ is available, a plaintiff “has failed to state a claim for a procedural due process,” *Cotton*, 216 F.3d

at 1333. Because Alabama state law provided Miller the opportunity to seek a writ of mandamus, Miller's procedural due process claim is a non-starter. *Cotton*, 216 F.3d at 1333.

The district court missed all of this, shunting into a two-sentence footnote the critical question whether the availability of the writ of mandamus constitutes adequate process:

To the extent that predeprivation process was not feasible or would be unduly burdensome, or if the predeprivation process afforded here was constitutionally adequate, the Court agrees with the State that Miller has an adequate postdeprivation remedy because he could seek a writ of mandamus in a state circuit court. But, for the reasons explained earlier, the Court emphasizes that no adequate postdeprivation remedy exists to cure the deprivation of Miller's liberty interest once the deprivation is complete: when an execution by lethal injection is carried out.

Op.53 n.21.

The court's analysis is difficult to understand. The court "agrees with the State" that mandamus constitutes an adequate remedy, but simultaneously dismisses the adequacy of this remedy because "no adequate postdeprivation remedy exists to cure the deprivation of Miller's liberty interest once the deprivation is complete." *Id.* The court, however, inexplicably deemed mandamus relief a "*postdeprivation* remedy" even though Miller could seek to use it *predeprivation*. Miller's neglect of this predeprivation remedy does not transform it into a postdeprivation remedy; instead,



that neglect forecloses Miller’s due process claim. He cannot attack the State’s process by declining to avail himself of it. *Cotton*, 216 F.3d at 1333.

**2. Miller’s complaint alleges negligence, which cannot amount to a constitutional deprivation.**

Miller’s procedural due process claim also fails because he has alleged only a species of negligence, not a constitutional deprivation. The Supreme Court has been unequivocal: “[T]he Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.” *Daniels*, 474 U.S. at 328. Moreover, predeprivation safeguards are inapplicable in situations where the State is “unable to anticipate and prevent a random deprivation of a liberty interest.” *Zinermon*, 494 U.S. at 132. “It would do no good for the State to have a rule telling its employees not to lose mail by mistake, and it ‘borders on the absurd to suggest that a State must provide a hearing to determine whether or not a corrections officer should engage in negligent conduct.’” *Id.* at 137.

Miller never explained what about the State’s process violated the Constitution. Instead, he alleged that Defendants violated his procedural due process rights because they “failed to create and maintain an accurate accounting of who timely submitted election forms and failed to implement a reviewable process for determining whether an election had been made.” DE18:14.

But aside from alleging that the prison’s operations are “messy” (DE18:14), Miller cannot identify what aspects of the process itself were inadequate. As the

district court explained, Defendants provided prisoners with forms to indicate their preferred method of execution and then stored these completed forms for safe keeping. Op.22; *see also* Op.14. The record shows that there were roughly 160 death-row inmates at the time the Legislature passed Ala. Code §15-18-82.1, *see* DE52-13:51; DE52-15:27, and method-of-execution election forms were provided to “every death row inmate,” DE52-10:1-2. To date, only two prisoners have alleged that ADOC misplaced their forms. *See* Op.8, 40. Allegations that two forms went missing do not amount to a violation of the Constitution.

Yet again, the court offered only a footnote’s worth of analysis on a critical issue. The court rejected the claim that “negligent loss of an election form does not give rise to an actionable due process claim” because, the court reasoned, “the deprivation Miller complains of is about more than the negligent loss of a form”; “[i]t is about the deprivation of his right to choose a nitrogen hypoxia execution and the State’s plans to carry out his execution by lethal injection in contravention of his choice.” Op.53 n.19.

But while the substantive “deprivation Miller complains about” is ultimately “his right to choose nitrogen hypoxia” (*id.* n.21), this is a procedural due process claim, which means that in addition to the alleged “constitutionally-protected ... property interest”—*i.e.*, the alleged “right to choose nitrogen hypoxia”—Miller must *also* show “constitutionally-inadequate process.” *Spencer v. Benison*, 5 F.4th 1222,

1232 (11th Cir. 2021). By collapsing the asserted “property interest” and the “process,” the district court erroneously elided analysis of the *procedural* right Miller alleges. Because the only “constitutionally-inadequate process” Miller even *alleges* amounts to nothing more than negligence, Miller’s procedural due process claim fails as a matter of law.

**B. Miller fails to satisfy the necessary requirements of his “class of one” Equal Protection claim.**

A “class of one” claim requires a plaintiff to show (1) “that [he] has been intentionally treated differently from others similarly situated,” and (2) “that there is no rational basis for the difference in treatment.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Both prongs are necessary to the success of a “class of one” plaintiff’s claim, but Miller meets neither.

**1. Miller has failed to identify any inmate with whom he is similarly situated.**

A “class of one” claim cannot survive unless individuals are similar in all “factors relevant to an objectively reasonable governmental decisionmaker.” *Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1204 (11th Cir. 2007). “The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons *who are in all relevant respects alike*.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added).

No “class of one” claim can survive when the government applies the same test to all individuals. Plaintiffs must show that the government applied a wholly different test to the plaintiff versus other individuals. *See Olech*, 528 U.S. at 565 (conditioning water provision on a 33-foot easement for plaintiff but only 15-foot easements from other property owners); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445-47 (1923) (assessing plaintiff’s property at 100 percent of its value and other properties at 55 percent).

The level of identity required between comparators depends on the relevant variables for comparison. If the government applies a “one-factor” analysis, then individuals must be similar as defined by that one factor. In *Olech*, for example “the only relevant factor was the size of the easement required in return for connection to the municipal water supply.” *Griffin*, 496 F.3d at 1203. But when the government applies a multifactor test involving discretionary determinations, individuals must be “*prima facie* identical in all relevant respects.” *Campbell*, 434 F.3d at 1314. “This is a more difficult standard to meet.” *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1265 (11th Cir. 2010); *see also, e.g., Leib v. Hillsborough County Pub. Transp. Commn.*, 558 F.3d 1301, 1307 (11th Cir. 2009) (no Equal Protection violation in multidimensional decision to impose restrictions on a bar that violated multiple regulations but not other bars that didn’t appear to violate those same regulations); *Campbell*, 434 F.3d 1306 (11th Cir. 2006).

Here, Defendants applied the same, multifactor standard to all death row inmates seeking nitrogen hypoxia: the inmate must have either (1) an election form in ADOC's records or (2) credible evidence that the inmate timely completed and submitted the form to the warden. Aside from Miller, all death row inmates seeking nitrogen hypoxia thus far have met these requirements. Miller did not. *See* DE18-3 (warden's affidavit that ADOC's nitrogen hypoxia file had no record of an election form from Miller). Even Taylor, the other inmate who claimed to have made an election form but whose form ADOC did not possess, showed credible evidence from his attorney that the form had been timely completed.

Defendants' decision involved the sort of "subjective, individualized determinations" that make any "class of one" claim difficult. *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 604 (2008). Faced with Miller's claim that an election form existed despite its nonexistence in ADOC's records, Defendants had to determine the credibility of Miller's claims. These determinations implicated several factors, such as Miller's inability to describe the prison official who collected his form, *see* DE58:98-110, and his complete lack of evidence apart from a self-serving affidavit, *see* Op.30-31; DE18:1. Because ADOC did not possess Miller's form and because Miller offered no evidence that he had completed a form aside from a self-serving affidavit, Miller was not similarly situated to other inmates.

But even if Defendants' test is characterized as simple or one-dimensional, they still applied the same simple test to all inmates: show credible evidence of a timely form. Miller is the only one to fail this test. Thus, Miller's "class of one" claim must fail.

In reaching the opposite conclusion, the district court committed at least two reversible errors. *First*, the district mischaracterized Defendants' decision as "simple or one-dimensional" when Defendants were making subjective, individualized determinations about credibility. Op.43. As explained above, Miller cannot make the demanding showing of being "identical in all relevant respects" to other inmates in all the subjective factors that went into Defendants' evaluation of credibility. *Campbell*, 434 F.3d at 1314. But *second*, even if Defendants' decision was simple and one-dimensional, the district court still erred in concluding that Miller was identically situated with other inmates. In fact, Miller was the only inmate to fail to present (1) any election form in ADOC's records *and* (2) any evidence, apart from a self-serving affidavit, that he completed a timely election form. DE18-3 (no form from Miller in record); DE58:98-110 (inability to describe official); Op.30-31 (undisputed allegation of refusal to corroborate testimony); DE18:1 (Miller's affidavit). Whether an inmate presents evidence to support a claim as substantial as Miller's is obviously "relevant to an objectively reasonable governmental decisionmaker," *Griffin Industries, Inc.*, 496 F.3d at 1204, making this distinction dispositive.

**2. Defendants have a rational interest in requiring strong evidence to support prisoners' claims.**

But even if Miller was similarly situated to other death row inmates, Defendants have a rational basis to treat him differently. Rational basis review “is a paradigm of judicial restraint.” *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993). “A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations.” *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993). So long as a “rational policymaker could believe” the decision would further a legitimate state objective, the decision must be upheld. *Cook v. Bennett*, 792 F.3d 1294, 1301 (11th Cir. 2015).

These principles apply in full force to a plaintiff's equal protection “class of one” claim. In such circumstances, the court must examine the “full variety of factors that an objectively reasonable governmental decisionmaker would have found relevant in making the challenged decision.” *Griffin*, 496 F.3d at 1203. If any rational basis could support a legitimate state objective, then the claim fails.

Though there are many rational bases on which to differentiate individuals, two bear emphasis here. *First*, the State may reasonably differentiate individuals based on its confidence in their credibility. In *Campbell*, the city was skeptical of plaintiff's building proposal because plaintiffs failed to consistently bring a sketch

of the proposed building to Planning Commission meetings. 434 F.3d at 1316-17. The commission was also nervous that the provided sketch, made with a pencil, “would have allowed any of the proposed building locations to be changed easily.” *Id.* In contrast, the other property developer provided site plans, an architect, and an engineer at every meeting by the Planning Commission, bolstering the developer’s credibility. *Id.* “[T]he nature of the presentations Echols made would inspire more confidence than the Campbells’ rather nonchalant approach,” and this difference provided a rational basis for approving one project and not the other. *Id.*

*Second*, the government may rationally differentiate individuals based on the State’s own record evidence. In *Knight v. Baptist Hosp. of Miami, Inc.*, this Court looked to the different employment records of the plaintiff nurse and another nurse in an Equal Protection claim. 330 F.3d 1313, 1315–19 (11th Cir. 2003). Despite the plaintiff’s claims that both she and the other nurse had the same job performance problems, the government had a rational basis to treat them differently because their records showed differences in job performance and tardiness. *Id.* The Court emphasized that the decision to place the plaintiff on leave was “based on a review of her entire record” and “documented instances” of her performance problems. *Id.* at 1317. Regardless of the plaintiff’s self-serving claims, “the record [did] not indicate” that the plaintiff had the same degree of problems as the other nurse. *Id.* at 1318.



Here, Defendants relied on multiple rational criteria to treat Miller differently from other death row inmates. First, unlike other death row inmates, ADOC does not have Miller’s form. DE18-3. Like the government employer in *Knight*, which relied on its records to justify differential treatment of employees, here Defendants reasonably relied on their records to differentiate between death row inmates. Defendants had a process for collecting forms, DE52-13:74-80, and it is rational to doubt the existence of a form that does not show up in ADOC’s records. And as in *Campbell*, where plaintiff’s failure to “provide a record” supporting their allegations was evidence of a rational basis for differential treatment, here ADOC’s lack of a form is evidence suggesting that Miller—unlike his fellow inmates—did not complete the form at all. That evidentiary distinction distinguishes Miller from other inmates, and the State’s interest in verifying its prisoners’ claims is self-evidently rational. *See, e.g., Superintendent, Massachusetts Correctional Instn., Walpole v. Hill*, 472 U.S. 445, 454-55 (1985) (recognizing “the legitimate institutional needs of assuring the safety of inmates and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation”).

The same principled distinction in credibility also differentiates Miller from Taylor. Whereas Taylor alleged he had completed a method-of-execution form and

presented substantial evidence to support his claim, DE28:7, Miller offers no evidence aside from a self-serving affidavit, DE18:1. It is not unreasonable for the State to find a last-minute, self-serving affidavit less persuasive than the robust evidence presented by Taylor. *Compare* Op.30-31 (undisputed allegation of Miller’s refusal to corroborate testimony with attorney-client communications), *and* DE18:1 (Miller’s affidavit), *with* DE28:7 (undisputed statements that Taylor’s counsel (1) filed a motion informing Defendants that Taylor had made a timely election and (2) provided Defendants with attorney-client communications from around the time of the election period). *See also, e.g., Williams v. City of Dothan, Ala.*, 745 F.2d 1406, 1415 n.9 (11th Cir. 1984) (“[S]ubjective and possible self-serving evidence must be viewed with a skeptical eye unless it is supported by more objective facts in the record.”). The State’s finding is all the more reasonable where Miller proved unable to answer questions about the correctional officer who collected his form or to come forward with any evidence of his timely completed form. DE58:98-110.

The district court erred when it could “conceive of no rational basis to treat Miller differently.” Op.45. The court’s reasoning rested on the premise that “[t]he State is not the exclusive arbiter of whether an inmate has made a proper and timely election.” *Id.* This premise is as unremarkable as it is irrelevant. Of course the State is not “the exclusive arbiter” of truth, and it has never made any such claim. But the State need not be “the exclusive arbiter” of truth to come to reasonable, evidence-

based conclusions, and rational basis does not require that those conclusions are infallible. Just the opposite. As noted above, “courts are compelled under rational-basis review to accept a legislature’s generalizations *even when there is an imperfect fit between means and ends*”; indeed, “[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.” *Heller*, 509 U.S. at 321 (internal citations, quotation marks omitted). The Constitution does not prevent Defendants from applying rational criteria to determine which inmates have likely completed a timely form and which have not.

## **II. The Equities Favor The State.**

The district court abused its discretion when it found that the balance of the equities weighed in Miller’s favor. Miller is scheduled to be executed in two days. His gamesmanship should not be rewarded.

“In deciding whether to grant a stay of execution, courts must consider whether such a challenge could have been brought earlier or otherwise reflects a prisoner’s attempt at manipulation.” *Nance v. Ward*, 142 S. Ct. 2214, 2225 (2022) (quotations omitted). Federal courts must also consider the State’s strong interest in proceeding with its criminal judgment. *See Long v. Sec’y, Dep’t of Corrs.*, 924 F.3d 1171, 1176 (11th Cir. 2019).

On August 4—two weeks after the Alabama Supreme Court’s issuance of Miller’s execution warrant and two weeks prior to the filing of his complaint—Miller confided in a pen pal that his attorneys had told him he had “to wait.” DE33-1:2. In a responsive filing, Miller assured the district court that it lacked “important context” to determine whether this was an admission of unreasonable delay. DE34:1. Such “important context,” however, was not produced during the evidentiary hearing.

The court all but ignored this fact and instead concluded its order with the odd observation that “Miller filing suit earlier would not change the reality that the State is not ready to execute anyone by nitrogen hypoxia.” Op.61. But that means that Miller’s delay in bringing a claim has helped him *succeed* in delaying his execution. That Miller’s gambit would lead to delay in carrying out his lawful sentence was reason to deny his preliminary injunction motion.

### CONCLUSION

This Court should stay the district court’s preliminary injunction.

Respectfully submitted,

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September 20, 2022

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations set forth in FED. R. APP. P. 27(d)(2) because it contains 5,097 words, including all headings, footnotes, and quotations, and excluding the parts of the brief exempted under FED. R. APP. P. 32(f) and 11th Cir. R. 32-4.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 20, 2022, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will serve electronic notice upon all counsel or record.

*s/ Edmund G. LaCour Jr.*

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## **APPENDIX K**



[DO NOT PUBLISH]

In the  
United States Court of Appeals  
For the Eleventh Circuit

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No. 22-13136

Non-Argument Calendar

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ALAN EUGENE MILLER,

Plaintiff-Appellee,

*versus*

COMMISSIONER, ALABAMA DEPARTMENT OF  
CORRECTIONS,  
WARDEN, HOLMAN CORRECTIONAL FACILITY,  
ATTORNEY GENERAL, STATE OF ALABAMA,

Defendants-Appellants.

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Appeal from the United States District Court  
for the Middle District of Alabama  
D.C. Docket No. 2:22-cv-00506-RAH

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Before JORDAN, ROSENBAUM, and LUCK, Circuit Judges.

PER CURIAM:

In June of 2018, Alabama enacted legislation providing for nitrogen hypoxia as an alternative method of execution in lieu of lethal injection, which is the default method. *See* ALA. CODE § 15-18-82.1(b). Those capital defendants who had been previously sentenced to death had 30 days, or until July 2, 2018, to elect nitrogen hypoxia as the method of execution. The election had to be in writing and submitted to the warden of the correctional facility. Failure to elect nitrogen hypoxia as the method of execution during that 30-day period operated as a waiver of that method of execution. *See* § 15-18-82.1(b)(1)-(2).

Sometime in June of 2018, the warden at Holman Correctional Facility ordered that election forms be provided to all inmates who had been sentenced to death. Prison officials at Holman then collected the forms from inmates who elected nitrogen hypoxia as the method of execution. *See generally Price v. Comm'r*, 920 F.3d 1317, 1323-24 (11th Cir. 2019). But the officials decided not to create or keep a list of those inmates who had turned in an election form choosing nitrogen hypoxia. *See* D.E. 62 at 13-15.

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It has been four years since Alabama provided for nitrogen hypoxia as an alternative method of execution. But it still does not have a protocol for carrying out executions through nitrogen hypoxia. As a result, no one has been put to death pursuant to that method.

## I

Alan Eugene Miller, an inmate at Holman, is under sentence of death for the 1999 murders of Lee Michael Holdbrooks, Christopher S. Yancey, and Terry Lee Jarvis. His convictions and sentences have been affirmed on direct appeal and on state and federal collateral review. *See Miller v. State*, 913 So. 2d 1148 (Ala. Crim. App. 2004); *Miller v. State*, 99 So. 3d 349 (Ala. Crim. App. 2011); *Miller v. Comm’r*, 826 F. App’x 743 (11th Cir. 2020).

Mr. Miller alleged that he provided officials at Holman with a timely written election form choosing nitrogen hypoxia as the method of execution. When his execution was set for September 22, 2022, he filed an action pursuant to 42 U.S.C. § 1983 asserting equal protection and due process claims and seeking to prevent the State from executing him other than by nitrogen hypoxia. The State said that it does not have any record of Mr. Miller submitting an election form and maintained that he did not provide such a form to officials at Holman.

The district court held an evidentiary hearing on Mr. Miller’s motion for a preliminary injunction. Mr. Miller testified at the hearing that he had filled out the election form choosing nitrogen

hypoxia as the method of execution and put it in a slot between the bars in his cell to be picked up.

Finding Mr. Miller “substantially credible,” the district court found that it was substantially likely that he had filled out a timely election form choosing nitrogen hypoxia as the method of execution because of his “single-minded focus on avoiding contact with needles” and that he left it between the bars of his cell to be picked up. *See* D.E. 62 at 23-25, 34. The district court also rejected the State’s arguments as to why Mr. Miller should be disbelieved. For example, with respect to the State’s contention that it did not have a copy of any election form submitted by Mr. Miller, the district court found that the absence of a copy did not mean it was not received, as it could have been simply misplaced after receipt or misfiled. *See id.* at 25-26. The district court explained that there was “no evidence of a standardized policy or procedure” for officials at Holman “to collect and transmit completed forms . . . for logging and retention,” nor was there “evidence of a chain of custody from the time forms were collected[.]” *Id.* at 27. And there was evidence indicating that two other Holman inmates had problems after turning in their election forms: Jarrod Taylor gave his completed form to a Holman official but the State “was unable to find [his] form in its file,” and Calvin Stallworth “gave his completed election form to a guard, but the guard refused to deliver the form” to the warden. *See id.* at 27-28. The district court also noted that the State did not present any evidence from the Holman

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officials who picked up election forms in Mr. Miller’s tier. *See id.* at 28-29.<sup>1</sup>

Based on its factual findings, the district court concluded that Mr. Miller established a substantial likelihood of success on his equal protection and due process claims. It granted preliminary injunctive relief prohibiting the State from executing him by any method other than nitrogen hypoxia.

First, the district court ruled that Mr. Miller made out a “class of one” equal protection claim under *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), and its progeny, including *Leib v. Hillsborough County Public Transportation Commission*, 558 F.3d 1301, 1307 (11th Cir. 2009). Mr. Miller was intentionally being treated differently from others similarly situated—i.e., those inmates who had also turned in a timely form electing nitrogen hypoxia as the method of execution—and there was no rational basis for the difference in treatment:

[H]aving timely elected nitrogen hypoxia, [Mr.] Miller is similarly situated to every other inmate who timely elected nitrogen hypoxia. There is no evidence or argument that the State has executed by lethal injection any inmate who timely elected nitrogen hypoxia . . . [and there was] no rational basis to treat [Mr.] Miller differently. The State’s belief that [Mr.]

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<sup>1</sup> The district court further discussed and rejected six other arguments made by the State as to why Mr. Miller should not be found credible. *See id.* at 30-41.

Miller has not proven his case to the *State's* satisfaction is irrelevant. The State is not the exclusive arbiter of whether an inmate has made a proper and timely election. The State does not argue otherwise, and it is agreed that this Court is the proper factfinder to determine whether it is substantially likely that [Mr.] Miller timely elected.

D.E. 62 at 44-45.

Second, the district court ruled that Mr. Miller was likely to succeed on his procedural due process claim, which required a showing of three elements—the deprivation of a constitutionally-protected liberty or property interest; state action; and constitutionally-inadequate process. *See Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). He had a statutorily-created liberty interest in choosing to be executed by nitrogen hypoxia. *See* D.E. 62 at 50. The deprivation of this interest through execution by lethal injection, moreover, constituted state action, and the deprivation would not be complete until the execution was carried out. *See id.* at 50-51. And no adequate post-deprivation remedy (e.g., a writ of mandamus) existed because execution is final and a post-execution order for the State to honor Mr. Miller's election would be meaningless. *See id.* at 52.

The State now appeals the district court's preliminary injunction and asks us to stay it pending appeal. We agree with the district court that the State is not entitled to a stay, *see* D.E. 70 at 3-11, and deny its motion.

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## II

In reviewing a motion to stay a preliminary injunction, we consider the following matters: “(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies.” *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). *See also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (same). The first two factors “are the most critical.” *Nken*, 556 U.S. at 434; *Lee*, 915 F.3d at 1317. “It is not enough that the chance of success on the merits be better than negligible . . . . By the same token, simply showing some possibility of irreparable injury . . . fails to satisfy the second factor.” *Nken*, 556 U.S. at 434-35 (internal quotation marks omitted).

The district court, in granting a preliminary injunction, did not definitively rule on the merits of Mr. Miller’s claims. We likewise do not conclusively resolve the merits of the State’s appeal. Because a preliminary injunction is reviewed under the deferential abuse of discretion standard, *see Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018), the narrow question before us is whether the State has made a “strong showing” that the district court abused its discretion. The “abuse of discretion standard allows for a range of choice for the district court, so long as the choice does not constitute a clear error of judgment.” *United States v. Frazier*, 387 F.3d

1244, 1259 (11th Cir. 2004) (en banc) (cleaned up). In other words, the district court’s decision “is given an unusual amount of insulation from appellate review for functional reasons.” *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1169 (2017) (internal quotation marks omitted).

### III

“[L]ike other stay applicants,” the State here “must satisfy all of the requirements for a stay.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006). So “[f]ailure to show any of the four factors is fatal[.]” *Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009).

One of the things the State must show—and one of the two most important—is that it will suffer irreparable harm if a stay is not granted. *See Lee*, 915 F.3d at 1317. Significantly, the State’s motion for a stay is devoid of any argument or assertion concerning irreparable harm. *See* Motion to Stay at ii-iii (Table of Contents). Indeed, the term irreparable harm is nowhere to be found in the motion (except in a paragraph setting out the standard for a stay). Because the State has not argued, much less shown, that it will suffer irreparable harm absent a stay, it has abandoned any such contention. *See, e.g., Lapaix v. Atty. Gen.*, 605 F.3d 1138, 1145 (11th Cir. 2010) (“Generally, when an appellant fails to offer argument on an issue, that issue is deemed abandoned.”). As it is not our job to make that argument for the State—which has the burden—its motion for a stay must be denied for this reason alone. *See Am. C.L. Union*, 557 F.3d at 1198.



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In an abundance of caution, however, we will address the State’s arguments concerning one of the bases for the preliminary injunction—Mr. Miller’s equal protection claim—and discuss the State’s argument about the balance of equities.<sup>2</sup>

#### IV

Before addressing the equal protection claim, we point out one very important thing. And that is that the State does not challenge, as clearly erroneous, *any* of the district court’s factual findings. This includes the critical finding that it is substantially likely that Mr. Miller timely submitted a written election form choosing nitrogen hypoxia to officials at Holman. Although the State tries at different points to cast doubt on the strength of Mr. Miller’s evidence, it never argues that the district court’s factual findings are unsupported by the record.<sup>3</sup>

That is, we think, because on this record the State cannot show that any findings are clearly erroneous. *See Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2349 (2021) (“If the district court’s view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first

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<sup>2</sup> Because we conclude that the district court did not abuse its discretion in ruling that Mr. Miller was substantially likely to prevail on his equal protection claim, we need not address the due process claim.

<sup>3</sup> As the district court put it in denying the State’s motion for a stay pending appeal, the State “presents legal arguments as if [it] had not [found that Mr. Miller timely submitted his election form for nitrogen hypoxia].” D.E. 70 at 6.

instance.”); *Todorovic v. U.S. Att’y Gen.*, 621 F.3d 1318, 1325 (11th Cir. 2010) (“Credibility determinations, so far as they involve demeanor, have . . . been characterized as largely ‘unreviewable.’”) (citations omitted). As we explain below, some of the arguments made by the State are undermined in whole or in part by its acceptance of the district court’s factual findings.

#### A

The State argues that Mr. Miller cannot make out his “class of one” equal protection claim because he is not similarly situated to other capital inmates at Holman who submitted timely election forms. As the State sees things, Mr. Miller is different than those other inmates because (a) prison officials had election forms for them and (b) even Mr. Taylor, the inmate for whom officials did not have a form, had “credible evidence from his attorney that the form had been timely completed.” Motion to Stay at 24.

We are not tasked with making any definitive pronouncements on the merits of Mr. Miller’s equal protection claim. We are reviewing only the district court’s evaluation of substantial likelihood of success, and our review is the deferential abuse of discretion standard. *See Cafe 207, Inc. v. St. Johns Cnty.*, 989 F.2d 1136, 1137 (11th Cir. 1993) (“Whether the district court’s determination of this point [substantial likelihood of success on the merits] is right or wrong, the record before us indicates no abuse of discretion.”); *Di Giorgio v. Causey*, 488 F.2d 527, 528-29 (5th Cir. 1973) (“[O]n appeal from a preliminary injunction[,] this Court does not concern itself with the merits of the controversy. . . . No attention is paid to the merits of the controversy beyond that necessary to

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determine the presence or absence of an abuse of discretion[.]”). With that standard in mind, we turn to the State’s argument.

To prevail on a “class of one” equal protection claim, a plaintiff must ultimately show that he was intentionally treated differently from others “similarly situated” and that there is no rational basis for the difference in treatment. *See Olech*, 528 U.S. at 564. Where the challenged state action is one-dimensional, such that it involves a “single answer to a single question,” we analyze the “similarly situated” requirement “succinctly and at a high order of abstraction.” *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1203 (11th Cir. 2007). For a multi-dimensional action, the similarly situated comparators “must be *prima facie* identical in all relevant aspects.” *Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006). A multi-dimensional action, we have explained, “involve[s] varied decisionmaking criteria applied in a series of discretionary decisions made over an extended period of time.” *Griffin*, 496 F.3d at 1203.

The State argues that the nitrogen hypoxia election determination requires a multi-dimensional analysis because it involved a “multifactor standard” of looking at whether officials had a record of a capital inmate’s election or whether there was credible corroborating evidence that the inmate timely completed and submitted an election form. But even if the State correctly characterized the factors that it deemed relevant, the number of factors considered is not dispositive in deciding what degree of similarity is required. *See id.* Nor are the State’s purported factors determinative here, considering the district court’s unchallenged finding of fact that it

is substantially likely that Mr. Miller timely elected execution by nitrogen hypoxia. Given that uncontroverted finding—which the State agreed the district court was entitled to make—Mr. Miller’s credibility is not at issue for purposes of determining whether he is similarly situated to other inmates who submitted a timely election form.

Moreover, the determination prescribed by Ala. Code. § 15-18-82.1(b), was always binary: Did an inmate timely elect for execution by nitrogen hypoxia? If so, that inmate was to be executed by nitrogen hypoxia. The provision on its face does not give the State any discretion in the matter. *See* D.E. 58 at 150 (The Court: “So your position is there’s no discretion. The statute has to be followed.” [The State]: “We can’t disregard the statute because we don’t like it. Yes, your honor.”). Put differently, the “single question” here was whether Mr. Miller timely elected execution by nitrogen hypoxia. And the “single answer,” according to the district court, was yes. *See Griffin*, 496 F.3d at 1203. Mr. Miller’s claim therefore demanded a one-dimensional analysis for purposes of determining similarity.

The State further argues that, even at the level of abstraction of a one-dimensional analysis, the relevant comparators were all capital inmates who showed credible evidence (in the State’s eyes) of a timely election. But, again, the district court’s uncontested finding of fact controls. Mr. Miller was “substantially credible,” and the district court believed his testimony that he timely submitted an election form for nitrogen hypoxia. He is therefore similarly

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situated to other capital inmates who turned in a timely election form. The State has not shown that the district court abused its discretion.

One more point is worth mentioning. The officials at Holman chose not to keep a list or log of those inmates who submitted election forms, and the State cannot now blame Mr. Miller for that institutional decision. What the State is asking for is blind acceptance of its position that Mr. Miller did not submit a timely election form because he had no corroborating evidence that satisfied the State.

### B

The State also contends that it acted rationally because it could demand certain corroborating evidence from an inmate that he submitted a timely election form. And despite having lost one inmate's election form, the State maintains that only it could determine what was sufficiently corroborating and what was not.

At its core, the State's argument attempts to circumvent the district court's finding that it is substantially likely that Mr. Miller timely submitted his form electing nitrogen hypoxia, without challenging the finding as clearly erroneous. The State apparently takes an *ex ante* view of the world, looking only at whether it acted reasonably according to its understanding of the circumstances prior to the preliminary injunction hearing. But this is not the proper approach in a legal regime where facts are proved in court.

At the preliminary injunction hearing, Mr. Miller was required to prove by a preponderance of the evidence that he turned

in the form in June of 2018. He did that to the district court’s satisfaction. *See* D.E. 62 at 23 (finding it substantially likely that Mr. Miller “timely submitted a nitrogen hypoxia election form”). When a district court, sitting as the trier of fact, determines that X did Y at some point in the past, it is not “creating” a new reality. It is instead, determining what *actually happened* at that prior point in time. If the finding of X doing Y goes unchallenged—as it does here—then that is what the past consisted of for appellate purposes.

The State relies on two Eleventh Circuit cases in support of its argument that its *ex ante* determinations can serve as a reasonable basis for different treatment. *See Campbell*, 434 F.3d at 1316-17; *Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1315-19 (11th Cir. 2003). Neither supports the State’s position.

In *Campbell*, the panel held that Rainbow City had a rational basis to deny tentative approval of the plaintiff’s proposed building project because it “did not comply with the requirements for tentative approval[,]” and to approve another project that complied with all of the requirements. *See* 434 F.3d at 1316-17. In contrast, here Mr. Miller acted identically to the similarly situated class of inmates—all of them timely submitted the form electing to be executed by nitrogen hypoxia.

*Knight* does not apply here, as it is not a “class of one” equal protection case. The plaintiff in *Knight* brought an employment discrimination claim under Title VII, not an equal protection claim. *See* 330 F.3d at 1314. The panel did not reach the question of whether the employer had a rational basis for the alleged disparate

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treatment; instead, it determined that the white employee was not similarly situated to the plaintiff. *See id.* at 1317-18.<sup>4</sup>

Given the district court’s unchallenged finding that it is substantially likely that Mr. Miller timely submitted the election form for nitrogen hypoxia, he was similarly situated to the other inmates who did the same thing. The district court did not abuse its discretion in concluding that Mr. Miller established a substantial likelihood of success on his equal protection claim.

## V

The State argues that the district court abused its discretion when it found that the balance of the equities weighed in Mr. Miller’s favor. The State attacks Mr. Miller’s delay in bringing a claim by characterizing it as a “gambit” and as “gamesmanship” that should not be “rewarded.” Motion to Stay at 21-22. In particular, the State focuses on a couple of messages between Mr. Miller and a pen-pal as evidencing an admission by Mr. Miller of his “unreasonable delay.” Because the State’s argument ignores the district court’s findings of fact, we conclude there was no abuse of discretion.

“[C]ourts must balance the competing claims of injury and must consider the effect on each party of the granting or

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<sup>4</sup> A “class of one” claim is not cognizable in the employment context at all. *See Engquist v. Or. Dep’t of Agr.*, 553 U.S. 591, 598 (2008) (“[T]he class-of-one theory of equal protection does not apply in the public employment context.”).

withholding of the requested relief.” *Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (internal quotation marks and citation omitted). In balancing the harms, the district court here expressly acknowledged the competing interests at issue. On one hand, Mr. Miller was not seeking an “open-ended stay of execution,” but a “tailored injunction effectively requiring the State to execute him by nitrogen hypoxia”—an option given to death row inmates by Alabama law. D.E. 62 at 55. On the other hand, the district court recognized that “[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence.” *Id.* at 56 (quoting *Hill*, 547 U.S. at 584). In balancing these interests, the district court concluded that any potential harm to the State or the public in granting Mr. Miller’s requested relief—i.e., requiring the State to execute him by nitrogen hypoxia—is greatly outweighed by the harm that will likely befall Mr. Miller in the absence of such relief. *See* D.E. 62 at 56-57. Significantly, the district court explained that the State did not argue “that the harm to the public interest counsels against injunctive relief here.” *Id.* at 56. Given the district court’s explanation, and considering the State’s (a) failure to challenge the finding that it is substantially likely that Mr. Miller turned in his election form and (b) inability to execute Mr. Miller by nitrogen hypoxia on September 22, 2022, the



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district court did not abuse its discretion in balancing the equities. There was no clear error of judgment.<sup>5</sup>

As noted, the State focuses its argument exclusively on a series of messages by Mr. Miller, but that single-minded focus fails. Contrary to the State's suggestion, these messages were not "ignored" by the district court. The district court specifically discussed the messages between Mr. Miller and his pen-pal (where Mr. Miller wrote that his lawyers said they "got to wait"). See D.E. 62 at 57-58. The district court explained that these messages "do not reference nitrogen hypoxia or lethal injection" and simply "do not support the conclusion or inference that [Mr.] Miller or his lawyers were waiting *to file this lawsuit*." *Id.* at 58 (emphasis in original). The district court thus concluded that the messages did not "support the State's position that [Mr.] Miller intentionally delayed bringing this lawsuit." *Id.*

The State's argument essentially ignores the district court's factual finding on this point. Based on that unchallenged finding, the district court did not err in concluding that Mr. Miller did not "intentionally delay[ ] bringing this lawsuit." *Id.* See *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) ("A finding that is plausible in light of the full record—even if another is equally or more so—must govern.") (citation and internal quotation marks omitted);

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<sup>5</sup> We note, as well, that "the State intends to announce its readiness to conduct executions by nitrogen hypoxia in the upcoming weeks." D.E. 62 at 20. Any delay in Mr. Miller's execution will therefore be short.

*Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (“Where there are two permissible views of the evidence, the fact-finder’s choice between them cannot be clearly erroneous.”).

The State also asserts that the “context” of the messages was not “produced during the evidentiary hearing” by Mr. Miller. *See* Motion to Stay at 31. But as the district court noted, the State had the opportunity to question Mr. Miller about the messages both at his deposition and at the evidentiary hearing but failed to do so. *See* D.E. 62 at 57-58. Given the State’s own failure to examine Mr. Miller about the messages, we cannot accept the State’s argument that “Mr. Miller’s delay in bringing a claim has helped him *succeed* in delaying his execution.” Motion to Stay at 31.

As the district court explained, the delay here is attributable to the State. *See* D.E. 62 at 55. This determination was also not a clear error of judgment. Mr. Miller only wants to die via his chosen method. More than four years after giving inmates the option of choosing nitrogen hypoxia as a method of execution, the State has yet to come up with or implement a protocol for carrying out executions pursuant to that method. “That [Mr.] Miller’s execution by nitrogen hypoxia cannot be carried out on September 22, 2022, is attributable to the State, not [Mr.] Miller.” D.E. 70 at 9.

Finally, the district court did not abuse its discretion in concluding that that Mr. Miller did not bring his claims “in a dilatory manner.” *Ray v. Comm’r, Alabama Dep’t of Corr.*, 915 F.3d 689, 702 (11th Cir. 2019). When the Attorney General asked the Alabama Supreme Court to set an execution date for him, Mr. Miller

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objected. He asserted that he had timely submitted an election form for nitrogen hypoxia and asked for a trial court to make factual findings on the issue. The Alabama Supreme Court rejected his request on July 18, 2022, and it was only then that Mr. Miller filed his suit in federal court just a few weeks later.<sup>6</sup>

As the district court explained, the State did not argue that Mr. Miller's lawyers took an unreasonable amount of time to research and evaluate his constitutional claims, perform due diligence, and secure local counsel after Mr. Miller's execution date was set. *See* D.E. 62 at 59-60. Indeed, the district court observed that although Mr. Miller filed his lawsuit four weeks before his execution, (1) it was able to hold an evidentiary hearing where Mr. Miller testified and was subject to cross examination, and (2) the State was able to depose Mr. Miller before the hearing. *See id.* at 60. The district court also noted that the State did not argue that it was prejudiced in any way by the timing of the briefing on the preliminary injunction motion or the evidentiary hearing. *See id.* Even now, the State does not make any argument that it has suffered any irreparable harm.

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<sup>6</sup> It respects state sovereignty more, not less, to file in state court first. Finding delay in Mr. Miller's use of the state court system would only encourage litigants to skip state court and move directly to federal court. Indeed, for his due process claim Mr. Miller had to seek available and adequate state remedies. *See generally McKinney v. Pate*, 20 F.3d 1550, 1562-63 (11th Cir. 1994) (en banc).

In sum, the district court did not abuse its discretion in finding that the balance of the equities weighed in Mr. Miller's favor.

## VI

In 2018, Alabama gave capital inmates the option of choosing nitrogen hypoxia as a method of execution. More than four years have passed, and the State still does not have in place a protocol for carrying out executions through nitrogen hypoxia.

Prison officials at Holman chose not to keep a log or list of those inmates who submitted an election form choosing nitrogen hypoxia. They lost or misplaced the election form submitted by another inmate at Holman, Mr. Taylor, and a prison guard did not turn in the form of a third inmate, Mr. Stallworth. The district court found, following an evidentiary hearing, that it is substantially likely that Mr. Miller submitted a timely election form even though the State says that it does not have any physical record of a form. The State does not challenge that factual finding, and has completely failed to argue (much less show) that it will suffer irreparable harm. For the reasons set forth in this order, the State's emergency motion for a stay of the district court's preliminary injunction is denied.

**MOTION FOR STAY DENIED.**

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LUCK, J., Dissenting

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LUCK, Circuit Judge, dissenting:

Alan Miller was convicted and sentenced to death for murdering Lee Holdbrooks, Christopher Yancy, and Terry Jarvis in 1999. Three days before Miller's sentence was finally going to be carried out, the district court enjoined the state from executing him by lethal injection. Today, the day fixed for the execution, the court has denied the state's motion to stay the district court's injunction. I respectfully dissent.

"A court considering whether to issue a stay considers four factors: (1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Swain v. Junior*, 958 F.3d 1081, 1088 (11th Cir. 2020) (quotation omitted). Applying the stay factors to this case, I would stay the district court's injunction.

*Likelihood of success on the merits*

The district court concluded that Miller was likely to succeed on two of his 42 U.S.C. section 1983 claims: (1) a "class of one" equal protection claim alleging that the state treated him differently from similarly situated death row inmates at Holman Correctional Facility who timely submitted nitrogen hypoxia election forms; and (2) a procedural due process claim alleging that the state failed to ensure an adequate procedure for protecting his election

to be executed by nitrogen hypoxia. I agree with the state that Miller is not likely to succeed on either claim.

“Class of one” equal protection claim

The equal protection clause provides that “[n]o [s]tate shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. A class of one claim “does not allege discrimination against a protected class.” *Leib v. Hillsborough Cnty. Pub. Transp. Comm’n*, 558 F.3d 1301, 1306 (11th Cir. 2009). Instead, a class of one claim asserts that an individual was “irrationally singled out”—without regard for his or her membership in any group—for discrimination. *Engquist v. Oregon Dep’t of Agr.*, 553 U.S. 591, 601 (2008).

To succeed on a class of one claim, a petitioner must show (1) “that [he] has been intentionally treated differently from others similarly situated” and (2) “there is no rational basis for the difference in treatment.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Miller has failed to meet *both* prongs: Miller has not shown that he was similarly situated to other death row inmates who elected nitrogen hypoxia as their execution method. And, to the extent he was similarly situated to the other death row inmates, the state had a rational basis to treat him differently.

First, Miller was not similarly situated to the other inmates. To be similarly situated, the comparators “must be *prima facie* identical in all relevant respects.” *Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006). This requirement is important

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because, “at their heart, equal protection claims, even class of one claims, are basically claims of discrimination.” *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1207 (11th Cir. 2007). “To maintain this focus on discrimination, and to avoid constitutionalizing every state regulatory dispute, we are obliged to apply the ‘similarly situated’ requirement with rigor.” *Id.*

Miller has not shown that he is “identical in all relevant respects” to the other death row inmates who elected nitrogen hypoxia as their execution method. *See Campbell*, 434 F.3d at 1314. The state based its execution-method decision on one of two “relevant respects”: (1) an election form filed within thirty days of an inmate’s conviction becoming final electing nitrogen hypoxia as his execution method; or (2) contemporaneous documents (from the inmate’s election period) showing that the inmate timely elected nitrogen hypoxia.<sup>1</sup> It’s through these documents that the state ensures that the inmate’s election was timely. And Miller is the only inmate that had neither of these things. Unlike the fifty or so others that elected nitrogen hypoxia as their execution method, the state had no record of Miller’s election form or contemporaneous documents—setting him apart from the others.

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<sup>1</sup> There’s no requirement that the contemporaneous documents have to be attorney-client communications, as Miller argues. They could be anything else that shows the inmate timely elected nitrogen hypoxia as the execution method.

Miller has not pointed to any other death row inmate who the state decided to execute by nitrogen hypoxia without an election form in the state's official records or some contemporaneous documents showing an election. And Miller has not pointed to any other death row inmate who the state decided to execute by lethal injection with an election form in the state's official records or some contemporaneous documents showing that the inmate elected to be executed by nitrogen hypoxia. This is fatal to his class of one equal protection claim because "[d]ifferent treatment of dissimilarly situated persons does not violate the equal protection clause." *Griffin*, 496 F.3d at 1207 (quotation omitted).

Second, even if Miller was similarly situated to the other death row inmates, Miller failed to show that the state had "no rational basis for the difference in treatment." *Griffin*, 496 F.3d at 1207. Here, the state had a rational basis to treat Miller differently because, unlike every other death row inmate who elected nitrogen hypoxia, the state didn't have an election form or contemporaneous documents showing a timely election by Miller in its official records. Miller was the only inmate to have neither. Without an election form or contemporaneous documents, the state had a rational basis to doubt Miller's election (even if Miller elected nitrogen hypoxia as his method of execution, as the district court found).

Miller, like every death row inmate, was given a form in June 2018 to elect nitrogen hypoxia as his method of execution. Prison officials distributed the forms to every death row inmate, including Miller, and collected them that day or the next. The state



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has in its records the election forms of about fifty death row inmates that were collected by prison officials. But none from Miller. The state also has contemporaneous documents from other death row inmates showing that they made a timely election. But none from Miller.

It may be, as the district court found, that Miller did, in fact, timely elect nitrogen hypoxia as his method of execution. But without an election form or contemporaneous documents showing an election—like the state had for every other death row inmate that elected nitrogen hypoxia—the state had a rational reason to treat Miller differently. Because the state had election forms and contemporaneous documents from every other inmate, it was rational for the state to have more “confidence” in the other inmates’ elections than in Miller’s, who had nothing other than his word years later. *See Campbell*, 434 F.3d at 1317 (explaining that, even if the developers were similarly situated, there was a rational basis for different treatment partly because “the presentations [one developer] made would inspire more confidence than the [other developer’s] rather nonchalant approach”). And because the state had a rational basis to treat Miller differently than the other death row inmates who elected nitrogen hypoxia, the state was likely to succeed on his class of one equal protection claim.

In response, Miller contends that the state “waived” its argument that it had a “rational basis to execute Miller by lethal injection” even if he “timely submitted his election for execution by nitrogen hypoxia.” According to Miller, the state “admitted below

that if Miller timely submitted his form, they cannot execute him by lethal injection.” Not so. Before the district court, the state made the same argument it has made here: that even if Miller did file the form, Miller “was not similarly situated” to other inmates and the state had a “rational basis” for treating him differently. The state argued that, even “[a]ccepting as true [Miller’s] factual averments” that he filed the election form, the state “treated Miller differently . . . because Miller did not provide the same quantum of evidentiary proof that an election was made in 2018.” As the state explained in its response to Miller’s preliminary injunction motion, Miller’s claims “fail on their merits, . . . even assuming Miller did make a proper election.” There was no waiver here.

#### Procedural due process claim

A section “1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process.” *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). “[O]nly when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise.” *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc). “This rule (that a section 1983 claim is not stated unless inadequate state procedures exist to remedy an alleged procedural deprivation) recognizes that the state must have the opportunity to remedy the procedural failings of its subdivisions and agencies in the appropriate fora—agencies, review boards, and state courts

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before being subjected to a claim alleging a procedural due process violation.” *Cotton v. Jackson*, 216 F.3d 1328, 1331 (11th Cir. 2000) (quotation omitted).

Here, the district court concluded that Miller had a “protected liberty interest in his statutorily-permitted choice to be executed by nitrogen hypoxia” and that “the deprivation of this interest is state action and is not complete unless and until the [s]tate executes Miller by lethal injection in contravention of his nitrogen hypoxia election.” I’ll assume the district court is right on both counts. Even so, Miller had a pre-deprivation process for challenging the state’s attempted deprivation of his liberty interest and the process was constitutionally adequate.

Under Alabama law, Miller could have sought a petition for writ of mandamus in state court directing the state to accept his election of nitrogen hypoxia. See Ally Windsor Howell, *Tilley’s Alabama Equity* § 29:1 (5th ed.) (“The writ of mandamus is proper when the plaintiff is owed a clear legal duty that the defendant refuses to perform.”). “If adequate state remedies were available but [Miller] failed to take advantage of them, [he] cannot rely on that failure to claim that the state deprived him of procedural due process.” See *Cotton*, 216 F.3d at 1331. That’s what happened here. The “the writ of mandamus” was “available” to Miller “under state law,” and it was “an adequate remedy to ensure that [he] was not

deprived of his due process rights.” *See id.* at 1333.<sup>2</sup> Because Miller didn’t take advantage of his available and adequate remedy to challenge his method of execution election, the state was also likely to succeed on Miller’s procedural due process claim.

*Weighing of the equitable interests*

“The remainder of the factors we apply when considering a stay amount to a weighing of the equitable interests of [Miller], the [state], and the public.” *Ray v. Comm’r, Ala. Dep’t of Corr.*, 915 F.3d 689, 701 (11th Cir. 2019).<sup>3</sup> On the state and the public’s side

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<sup>2</sup> In his response to the state’s stay motion, Miller says that he sought a different pre-deprivation remedy. “Miller already sought a remedy in the Alabama Supreme Court in opposing the [s]tate’s motion to set an execution date and requesting a remand for an evidentiary hearing on the issue of his election.” If Miller had an adequate, available remedy in state court, and sought it, he could not have been deprived of procedural due process. *See James v. Att’y Gen.*, 2022 WL 2952492, at \*8 (11th Cir. July 26, 2022) (“Because James had notice that the Alabama Supreme Court was considering setting his execution date and an opportunity to be heard on why it shouldn’t set the date, his procedural due process rights were not violated.”). So long as the “state remedy was capable of providing [Miller] with all the relief warranted,” it is constitutionally adequate. *See McKinney*, 20 F.3d at 1564; *see also Cotton*, 216 F.3d at 1331 (“[T]he state procedure must be able to correct whatever deficiencies exist and to provide plaintiff with whatever process is due.”). Because Miller already had the opportunity in front of the Alabama Supreme Court to contest his method of execution election, this is another reason the state is likely to succeed on his procedural due process claim.

<sup>3</sup> Miller argues that the state “conceded . . . at the district court that [it does] not . . . contest that these factors weigh in Miller’s favor.” Although the state “focused on substantial likelihood of success on the merits,” it never conceded that the equitable interests favored Miller. And in its response to the

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of the scale, “the Supreme Court has recognized [that] the state, the victim, and the victim’s family . . . ‘have an important interest in the timely enforcement of [Miller’s] sentence.’” *See Brooks v. Warden*, 810 F.3d 812, 825 (11th Cir. 2016) (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). “[E]quity must be sensitive to the [s]tate’s strong interest in enforcing its criminal judgments without undue interference from the federal courts.” *Hill*, 547 U.S. at 584.

“In considering the factors of harm to other parties and the public interest, we [also] must be mindful of a prisoner’s unjustified delay in seeking a stay of execution.” *Woods v. Warden, Holman Corr. Facility*, 952 F.3d 1251, 1256 (11th Cir. 2020). “The Supreme Court has made clear that ‘[l]ast-minute stays should be the extreme exception, not the norm, and the last-minute nature of an application that could have been brought earlier, or an applicant’s attempt at manipulation, may be grounds for denial of a stay.’” *Id.* (alteration in original) (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019)). Indeed, there’s “a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” *Hill*, 547 U.S. at 584 (quotation omitted).

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preliminary injunction motion, the state argued that there was a strong equitable presumption against granting a stay because of Miller’s delay in filing his claims.

Two of our cases illustrate the strong presumption. In *Woods*, the inmate “uncovered evidence that cast[] doubt on his convictions and sentence.” 952 F.3d at 1254. The uncovered evidence “was largely discovered by mid-February.” *Id.* at 1256. But the inmate did not file his stay motion until March 3. *Id.* at 1254. We found the approximately three-week delay (mid-February to March 3) “abusive” and concluded that the inmate could not “obtain a stay.” *Id.* at 1256. “Even considering the purportedly new evidence that” the inmate “describe[d] in the affidavit attached to his motion,” we explained, he “has still inexcusably delayed because that evidence was largely discovered by mid-February.” *Id.*

And in *In re Hutcherson*, the state gave notice in June, and then again in September, that it intended to seek an execution date. 468 F.3d 747, 749–50 (11th Cir. 2006). Still, the inmate did not move to stay his execution until October 20. *Id.* at 748. We declined to grant a stay because, “[i]n spite of [the] notice,” the petitioner waited about a month (September to October 20) “to file his motion to stay pending this court’s ruling on his application to file a successive habeas petition.” *Id.* at 750. The inmate’s “need for a stay of execution,” we said, was “directly attributable to his own failure to bring his claims to court in a timely fashion.” *Id.* Applying the “strong equitable presumption,” we denied the stay. *Id.* (quotation omitted).

There was a similar delay in this case. Miller had notice that the state sought to execute him by lethal injection in May 2022. And the Alabama Supreme Court fixed the execution date on July

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18, 2022. But Miller didn't file his complaint until August 22, 2022: three months after he knew the state didn't have any records of his nitrogen hypoxia election and more than a month after the Alabama Supreme Court fixed the date of his execution. And Miller waited another ten days to file his stay motion. As in *Woods* and *Hutcherson*, the delay in filing his claims and seeking a stay was directly attributable to Miller's own failure to bring his claims to court in a timely fashion. And, as in both cases, Miller could have brought his claims sooner to allow consideration of the merits, but he didn't.

So, because of the delay directly attributable to Miller, there's a strong presumption against staying the execution. And, on top of the strong presumption, the state and the public have a strong and important interest in executing the judgment. Against the strong presumption and strong and important interest, the district court weighed Miller's interest in not being executed in violation of his rights and the "incidental effect" a stay would have on delaying the execution. But, as discussed above, the state has shown a substantial likelihood that Miller will not succeed on his equal protection and procedural due process claims. And, as we said long ago, "[e]ach delay, for its span, is a commutation of a death sentence to one of imprisonment." *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir. 1983).

In the end, the weight of the equitable interests come out in favor of the state and the public's right to timely enforcement of Miller's sentence. Because the state has shown a substantial

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likelihood that it would succeed on Miller's equal protection and procedural due process claims, and the equitable interests weigh in favor of staying the district court's preliminary injunction, I would grant the state's motion.



**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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

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Clerk of Court

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Case Style: Alan Eugene Miller v. Commissioner, Alabama Department of Corrections, et al  
District Court Docket No: 2:22-cv-00506-RAH

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The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas  
Phone #: (404) 335-6171

MOT-2 Notice of Court Action