JILL PRYOR, Circuit Judge, Dissenting:

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

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

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

I. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The supreme court shall at the appropriate time enter an order authorizing the Commissioner of the Department of Corrections to carry out the inmate's sentence of death within a time frame set by the governor . . . .

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

Doc. 1 at 23.

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

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

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

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

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

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

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

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

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

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

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

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

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

II. LEGAL STANDARD

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

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

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

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

III. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Personnel Changes

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

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

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

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

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

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

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

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

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

b. Expanded time frame

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. A stay would not substantially injure the defendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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