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

JAMES EDWARD BARBER,

Plaintiff,

v.

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

Defendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court should grant Mr. Barber's motion.

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

Grasping for straws, Defendants cite a handful of cases, but none involve the facts alleged here. Indeed, *Nance v. Commissioner, Georgia Department of Corrections* involved a Georgia inmate who alleged—in the absence of ***any*** allegations that the Georgia Department of Corrections struggled to set IV lines in the past—that the IV Team would nonetheless have problems finding his veins. 59 F.4th 1149 (11th Cir. 2023). *Nance* would be relevant if ADOC had no issues starting IV lines for lethal injection executions. That is obviously not the case.

In *Bucklew v. Precythe*, an inmate argued that large tumors in his neck would obstruct his airway while lying flat on the execution gurney. 139 S. Ct. 1112, 1130-31 (2019). Mr. Barber's

[7] BMI is the same metric that the *Smith* court considered in its analysis of the issue. *See Smith*, 2022 WL 17069492, at *5.

situation bears no resemblance, given that his claim is based on the State's "pattern of superadding pain" through protracted efforts to establish IV access. *Smith*, 2022 WL 17069492, at *5. And, Defendants admit that they have not made any meaningful changes to fix that problem. Opp. at 6.

Another case, *Ferguson v. Warden, Florida State Prison*, involved a challenge to the use of certain drugs in Florida's three-drug cocktail. 493 F. App'x 22, 24 (11th Cir. 2012). The Eleventh Circuit found the challenge "speculati[ve]" because the plaintiff did not explain how the drugs subjected him to a substantial risk of serious harm. *Id.* at 25; *see also Pardo v. Palmer*, 500 F. App'x 901, 903 (11th Cir. 2012) (a "nearly identical" case to *Ferguson*). In contrast, Mr. Barber has identified the IV Team's repeated failures in setting IV lines, described how those failures "superadd pain" to the execution process, submitted affidavits from expert witnesses explaining that IV access should generally take no longer than 15 minutes and never longer than an hour, and explained that the level of pain increases with each successive attempt to find a vein. *See, e.g.*, Compl. ¶¶ 2-4, 6, 60-88, 103-04; Ex. B to Mot. ¶¶ 11, 15, 17 (Lisa St. Charles Affidavit); Ex. H ¶¶ 16-20 (Tina Roth Affidavit).

Similarly unavailing for Defendants is *Jackson v. Danberg*, an out-of-circuit decision involving a class action brought by Delaware death row inmates, who argued that Delaware's execution team was likely to disobey or violate the State's new execution protocol, creating an intolerable risk of harm to the condemned man. 594 F.3d 210, 214-15 (3d Cir. 2010). The Third Circuit noted, "[t]here is perhaps always an ethereal risk that a rogue execution team could deviate from a written protocol and depart on a whimsical frolic." *Id.* at 228 n.18. *Jackson* is counterfactual to this case. Mr. Barber has shown that he faces a substantial risk of serious harm from the IV Team ***continuing to do what they have been doing for the past year***—gratuitously subjecting inmates to pain by puncturing their bodies with needles over the course of several hours.

The last case Defendants cite in support of their "speculation" argument is *Wackerly v. Jones*, 398 F. App'x 360 (10th Cir. 2010). That out-of-circuit case is no more applicable than the others. Indeed, the Tenth Circuit held that the plaintiff had no "particular basis for questioning" the integrity of lethal injection drugs used by the State of Oklahoma. *Id.* at 363. No similar allegations are asserted here.

Lost in Defendants' efforts to rely on inapposite cases from Oklahoma, Georgia, Florida, and Delaware is the grim fact that Alabama stands alone as the sole state in the county to botch three executions in the past year. Defendants have not cited—and cannot cite—a single case that refutes Mr. Barber's argument that he faces a substantial risk of serious harm. And they do not contest (because they cannot) that nitrogen hypoxia is a method of execution that would significantly reduce the risk of pain and suffering posed by the IV Team's repeated failures. *See Smith*, 2022 WL 17069492, at *5 (finding that Mr. Smith had adequately alleged that "nitrogen hypoxia will significant reduce his pain" compared to lethal injection).

Mr. Barber is likely to satisfy both prongs of his Eighth Amendment claim. The Court should grant the injunction.

B. *Mr. Barber's Claim Is Timely.*

Perhaps recognizing that Mr. Barber's claim is likely to succeed on the merits, Defendants dedicate much of their brief to arguing that Mr. Barber's claim is time-barred. Opp. at 2-8. Defendants are wrong. Mr. Barber's motion makes clear that his claim is based on the State's recent "pattern of superadding pain through protracted efforts to establish IV access." Mot. at 1 (citing *Smith*, 2022 WL 17069492, at *5); *see also, e.g.*, Compl. ¶¶ 60-64, 100-05. This pattern arose following the botched executions of Mr. James in July 2022, Mr. Miller in September 2022, and Mr. Smith in November 2022. *See* Compl. ¶¶ 65-88. These "execution attempts . . . caused [Mr. Barber's] claim to accrue." *Smith*, 2022 WL 17069492, at *5.

Defendants ignore *Smith* entirely. *See* Opp. at 2-9. That is likely because the *Smith* court already considered Defendants' argument and rejected it. *Compare* Opp. at 2-9, *with Smith v. Comm'r*, No. 22-13781, Dkt. 12 at 27-29 (11th Cir. Nov. 14, 2022) (Appellees' Brief) (Defendants arguing on appeal that Mr. Smith's claim was time-barred because he did not allege a substantial change to the lethal injection protocol). Indeed, in finding Defendants' argument unpersuasive, the Eleventh Circuit explained that Mr. Smith's claim accrued based on the State's "pattern of superadding pain" in the executions of Mr. James and Mr. Miller. *Smith*, 2022 WL 17069492, at *5. That holding is consistent with the well-recognized principle that limitation periods begin to run when "the facts which would support a cause of action should have been apparent to any person with a reasonably prudent regard for his rights." *McNair v. Allen*, 515 F.3d 1168, 1177 (11th Cir. 2008). *Smith* proved prescient as the State later botched Smith's execution by once again failing to obtain IV access.

Aside from being foreclosed by *Smith*, another problem with Defendants' argument is that it misunderstands Mr. Barber's claim. His claim is not based on a particular change to the State's protocol. After all, following the historic failures of the previous executions, Defendants still believe there are "[n]o deficiencies" in their "execution procedures." *See* Ex. E, Defs.' Resp. to Interrogatory No. 1. Mr. Barber's claim is based instead on the fact that the last three executions all involved the IV team spending hours unsuccessfully puncturing inmates with needles all over their bodies. Compl. ¶¶ 2-4, 6, 60-88, 103-04. This fact is not only ***undisputed*** by Defendants, but they also do not put forth any evidence to show (or suggest) that the underlying problems with those executions have been addressed. To the contrary, Defendants ***admit*** that they have done nothing meaningful to ensure that Mr. Barber does not suffer the same grisly fate as those before

him. Opp. at 6. Mr. Barber filed his complaint less than a year after the botched executions and shortly after the State moved for his execution. *See* Compl. ¶¶ 48, 65, 74, 84. His claim is timely.

Defendants' reliance on *Gissendaner v. Commissioner, Georgia Department of Corrections*, 779 F.3d 1275 (11th Cir. 2015) is misplaced. *See* Opp. at 3-5. That case concerns an Eighth Amendment claim based on "factual conditions that have not changed in the past twenty-four months" as well as alleged changes to Georgia's protocol. *Gissendaner*, 779 F.3d at 1281-82. Mr. Barber's claim is based on Alabama's recent, repeated, and well-documented failures to establish IV access in the past year. That important distinction makes the "substantial change in protocol" principle inapplicable. Indeed, unlike *Gissendaner*, whose claim was not based on "any of the recent executions [Alabama] has carried out," *id.*, Mr. Barber's complaint is based on exactly that—the State superadding pain in the botched executions of Mr. James, Mr. Miller, and Mr. Smith, *see Smith*, 2022 WL 17069492, at *5.

Defendants' citation to *Boyd v. Warden, Holman Correctional Facility*, 856 F.3d 853 (11th Cir. 2017) fares no better. Similar to *Gissendaner*, *Boyd* involved an Eighth Amendment claim based on "seemingly longstanding facets of the ADOC lethal injection protocol." *Id.* at 874. By contrast, the State's "pattern of superadding pain" emerged late last year, and Mr. Barber brought his claim soon after Defendants moved to execute him by the same failed method.

For that reason, Defendants' argument that Mr. Barber could have brought his claim in April 2019 makes no sense. *See* Opp. at 8-9. In April of 2019, Defendants had not yet engaged in a pattern of botching the process of setting IV lines as they were the midst of "forty-five successful lethal injection executions" (Opp. at 11), so Mr. Barber could not have known that he faced a substantial risk of harm at that time. His claim had therefore not accrued. *See Smith*, 2022 WL 17069492, at *5. Defendants' reference to the availability of nitrogen hypoxia in April 2019 does

not change that conclusion. Opp. at 8-9. Defendants do not cite a single case stating that an Eighth Amendment claim accrues when an alternative method of execution becomes available. That is because no such case exists.

Instead, Defendants question whether the Eleventh Circuit actually concluded in *Price v. Commissioner, Department of Corrections*, 920 F.3d 1317 (11th Cir. 2019), that nitrogen hypoxia is an alternative method of execution. *See* Opp. at 8-9. That argument is frivolous: the Eleventh Circuit re-affirmed in *Smith* what it previously concluded in *Price*—that "nitrogen hypoxia is an available alternative method for method-of-execution claims." *Smith*, 2022 WL 17069492, at *5 (citing *Price*, 920 F.3d at 1328). And Defendants offer no explanation for why a lone dissenting opinion from a denial of certiorari constitutes "clear Supreme Court precedent." Opp. at 8. It does not. *See Singleton v. Comm'r of Internal Revenue*, 439 U.S. 940, 944-45 (1978) (Stevens, J.) (explaining that dissents from denial of certiorari are "the purest form of dicta").

Because Mr. Barber's claim is timely and he is likely to succeed on the merits, the Court should grant the injunction.

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

Defendants do not dispute that Mr. Barber will suffer irreparable harm without a preliminary injunction. In fact, Defendants do not even mention the irreparable injury prong in their brief. That is because they cannot offer any serious arguments on this point—Mr. Barber will unquestionably suffer irreparable harm if Defendants are not enjoined from executing him by lethal injection before this Court can resolve the merits of his claim. *See* Mot. at 14-15. Mr. Barber stands to suffer a cruel execution when a viable alternative exists. This factor counsels in favor of granting the injunction.

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

Defendants also do not dispute that: (i) the harm to them is slight compared to the irreversible harm that Mr. Barber will suffer if his injunction is denied, and (ii) the public has an interest in conducting executions in a manner that does not violate Mr. Barber's constitutional rights or result in another botched attempt. *See* Mot. at 15-16. On the first point specifically, Defendants seemingly state that nitrogen hypoxia is ready to be used for Mr. Barber's scheduled execution, Opp. at 16, so there presumably would be no delay in carrying out the execution. On the second point, the public's interest is heightened here given the trio of recent executions that set off a firestorm of public criticism, and in light of the State's short-lived "investigation" that lasted only a few short months and resulted in no meaningful changes.

Indeed, the very limited document production that Defendants have made in this case to date is replete with examples of members of the Alabama public pleading with Governor Ivey to take seriously the issues ADOC is having with IV access, and urging her and ADOC to conduct a fulsome and transparent investigation. *See, e.g.,* Ex. I at DOC_000433-34 (Dec. 6, 2022 letter from the *Montgomery Advertiser* to Governor Ivey, stating: "Alabama appears unable to perform the most serious and permanent form of government action—the taking of human life—in a manner that protects the citizens of this country in accordance with their Constitutional rights to be free from cruel and unusual punishment . . . I humbly request on behalf of the *Advertiser* that the top to bottom review of the execution process be done in the open and not hidden behind layers of bureaucracy"); Ex. J at DOC_000071 (Feb. 23, 2023 letter from coalition of attorneys and policy experts to Governor Ivey, urging Ivey and ADOC to resolve the following questions in their investigation: "What is the selection process (is it merit- or skill-based) for execution team members? What are the qualifications of the people in charge of . . . setting the I.V.s for the

execution?"); Ex. K at DOC_000422-23 (March 7, 2023 letter from the *Montgomery Advertiser* to Defendant Ivey's office stating that Defendant Hamm's 1.5 page vague letter "leaves the *Advertiser* and the public in general with few answers regarding the top to bottom review of such an important issue").

But evidence suggests ADOC's investigation was neither robust nor conducted by experts in the field of IV access. As just one example, on December 31, 2022, Governor Ivey received an unsolicited letter from a person in Ohio titled "IDEA CONCERNING DEATH ROW INMATES." *See* Ex. L at DOC_000020. In this letter, the individual, who has no professional background in IV access and is a lawyer by practice, recommends applying a warm compress to the forearm and suggests that ADOC's IV Team use this strategy for better luck starting IV lines in lethal injection executions. *See id*. This letter was elevated to the highest officials at the Office of the Governor and the Office of the Attorney General, and was sent directly to Defendant Hamm, the Commissioner of ADOC. *See* Ex. M at DOC_000232. It is unclear why Defendant Hamm would need the unsolicited advice of an attorney in Ohio about a medical procedure. Defendants' decision to elevate the letter calls into question whether government officials in Alabama take seriously their responsibility to uphold the rights afforded under the Constitution. The Court should grant the injunction.

CONCLUSION

For all these reasons, the Court should grant Mr. Barber's motion for a preliminary injunction, enjoin Defendants from executing Mr. Barber by lethal injection, and require them to execute him by the available alternative of nitrogen hypoxia.

Dated: June 27, 2023

Respectfully submitted,

/s/ *Paula W. Hinton*

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2023, I served a copy of the foregoing via the Court's CM/ECF system, which shall cause the same to be electronically transmitted to all counsel of record.

/s/ *Paula W. Hinton*
Paula Hinton