

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

DAVID P. WILSON,)	
)	
Plaintiff)	Case No. 2:24-cv-00111-ECM
)	
v.)	
)	
JOHN Q. HAMM, Commissioner,)	*DEATH PENALTY CASE*
Alabama Department of Corrections,)	
)	
Defendant.)	

**MOTION FOR LIMITED EXPEDITED DISCOVERY UNDER RULE
30(a)(2)(A)(iii) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

Pursuant to Rule 30(a)(2)(A)(iii) of the Federal Rules of Civil Procedure, Plaintiff David P. Wilson respectfully requests an order from this Court allowing him to take a limited number of depositions of select key witnesses to the execution by nitrogen asphyxiation of Kenneth Eugene Smith. In support of this motion, Plaintiff now states the following:

1. Plaintiff David P. Wilson filed a § 1983 civil rights action against the Commissioner of the Alabama Department of Corrections on February 15, 2024,

challenging the use of nitrogen asphyxiation as a method of execution under the Eighth and Fourteenth Amendments to the United States Constitution. (Doc. 1)

2. Plaintiff served a copy of the complaint, notice of lawsuit, and request to waive service of a summons on counsel for the Defendant on February 16, 2024.

3. On February 23, 2024, counsel for Defendant, Assistant Attorney General Richard D. Anderson, waived service of the summons and accepted service of the complaint. (Doc. 7)

4. Plaintiff's counsel has communicated with Defendant's counsel and requested to schedule a Rule 26(f) conference pursuant to the Federal Rules of Civil Procedure, which require parties to conduct the 26(f) conference "as soon as practicable." Fed. R. Civ. Pro. 26(f)(1).

5. Defendant's counsel informed Plaintiff's counsel that it would be impracticable for them to schedule a Rule 26(f) conference at this time.

6. While Plaintiff's counsel understands Defendant's position, the circumstances of this case necessitate limited expedited discovery with regard to the deposition of select witnesses to Mr. Smith's execution.

7. This § 1983 action is a simple and straightforward challenge to a new method of execution that will turn substantially on the testimony of a limited number of key witnesses—especially the media witnesses and employees of the Alabama Department of Corrections who were present at the execution. There were only five

official media witnesses, and these individuals will be primarily relied upon to give an account of what actually happened during Mr. Smith's nitrogen asphyxiation. Preserving and perpetuating their testimony is therefore imperative. It is also important to expeditiously depose the individuals employed by the Alabama Department of Corrections ("ADOC") who were present and witnessed the execution.

8. Given the already-existing media coverage of Mr. Smith's execution, it is unlikely that a motion to dismiss would be successful if one were filed. Marty Roney of the *Montgomery Advertiser*, for instance, recounted that "Kenneth Eugene Smith appeared to convulse and shake vigorously for about four minutes after the nitrogen gas apparently began flowing through his full-face mask in Alabama's death chamber. It was another two to three minutes before he appeared to lose consciousness, all while gasping for air to the extent that the gurney shook several times.... Smith writhed and convulsed on the gurney. He appeared to be fully conscious when the gas began to flow. He took deep breaths, his body shaking violently with his eyes rolling in the back of his head.... Smith clenched his fists, his legs shook under the tightly tucked-in white sheet that covered him from his neck down. He seemed to be gasping for air." Marty Roney, "Nitrogen gas execution: Kenneth Smith convulses for four minutes in Alabama death chamber," *Montgomery Advertiser* (Jan. 25, 2024),

<https://www.montgomeryadvertiser.com/story/news/local/alabama/2024/01/25/four-minutes-of-convulsions-kenneth-smith-executed-with-nitrogen-gas/72358038007>; *see also* Kim Chandler, “Alabama Executes a Man with Nitrogen Gas, the First Time the New Method Has Been Used,” *Associated Press* (Jan. 26, 2024), available at <https://apnews.com/article/nitrogen-execution-death-penalty-alabama-699896815486f019f804a8afb7032900> (“The execution took about 22 minutes from the time between the opening and closing of the curtains to the viewing room. Smith appeared to remain conscious for several minutes. For at least two minutes, he appeared to shake and writhe on the gurney, sometimes pulling against the restraints. That was followed by several minutes of heavy breathing, until breathing was no longer perceptible”); Ivana Hrynkiw, “Alabama Executes Kenneth Eugene Smith by New Nitrogen Gas Method for 1988 Murder of Pastor’s Wife,” *AL.com* (Jan. 25, 2024, 11:00 a.m. (published); Jan. 26, 2024, 12:42 p.m. (updated)), available at <https://www.al.com/news/birmingham/2024/01/alabama-to-execute-kenneth-smith-with-untested-nitrogen-gas-tonight.html> (“The gas appeared to start flowing at approximately 7:58 p.m. Smith visibly shook and writhed against the gurney for around two minutes. His arms thrashed against the restraints. He breathed heavily, slightly gasping, for approximately seven more minutes. [...] Smith appeared to stop breathing at 8:08 p.m.”); *see generally* Doc. 1 at p. 3-9 (other media witness accounts of Mr. Smith’s execution).

9. These and other media reports make this § 1983 civil rights lawsuit very straightforward, and it is unlikely that any potential motion to dismiss would succeed. But these reports also make it imperative that a limited number of depositions of media witnesses and ADOC employees be taken before the witnesses' memories begin to fade.

10. Plaintiff now seeks the court's permission to conduct a limited number of depositions of key witnesses to Mr. Kenneth Smith's execution on January 25, 2024, including:

- a. Ralph Chapoco, reporter with the *Alabama Reflector*;
- b. Kim Chandler, reporter with the *Associated Press*;
- c. Ivana Hrynkiw, reporter with *AL.com*;
- d. Lauren Layton, reporter with WHNT;
- e. Marty Roney, reporter with the *Montgomery Advertiser*;
- f. Cynthia Stewart Riley, Alabama Department of Corrections Regional Director;
- g. Terry Raybon, Warden of Holman Correctional Facility;
- h. John Q. Hamm, Commissioner of the Alabama Department of Corrections;
- i. and any other employees of the Alabama Department of Corrections present at the execution of Mr. Kenneth Smith.

I. FED. R. CIV. P. 30(A)(2)(A)(III) PERMITS DISCOVERY AT THIS TIME

11. Conventionally, parties to civil litigation will begin discovery by depositions once they have conducted a Rule 26(f) conference. Under limited circumstances when a litigant has shown good cause, the federal courts can allow depositions to commence before the Rule 26(f) conference under Rule 30(a)(2)(A)(iii).

12. Rule 30(a)(2)(A)(iii) of the Federal Rules of Civil Procedure provides, in pertinent part:

Rule 30. Depositions by Oral Examination

(a) WHEN A DEPOSITION MAY BE TAKEN.

(2) *With Leave*. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(iii) the party seeks to take the deposition before the time specified in Rule 26(d)

13. Federal District Courts, including courts in the Eleventh Circuit, have adopted a “good cause” standard to determine whether movants are entitled to expedited depositions under Rule 30. *See, e.g., In re Chiquita Brands Int’l, Inc.*, No. 07-60821-CV, 2015 WL 12601043, at *4 (S.D. Fla. Apr. 7, 2015); *TracFone Wireless, Inc. v. Holden Property Services LLC*, 299 F.R.D. 692 (S.D. Fla. 2014) (Torres, J.); *Pulsepoint, Inc. v. 7657030 Canada Inc.*, 2013 WL 12158589, *1 (S.D. Fla. Oct. 31, 2013) (Matthewman, J.).

14. Over the past two decades, district courts have moved away from the more stringent test outlined in *Notaro v. Koch*, 95 F.R.D. 403 (S.D.N.Y. 1982) and toward

the “good cause standard.” See *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 327 (S.D.N.Y. 2005) (finding that the flexible good cause standard was better aligned with Rule 30 itself, which does not outline a stringent test).

15. In order to show good cause, a reviewing court must consider “the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances,” and should find good cause when “the need for expedited discovery in consideration of the administration of justice” outweighs “the prejudice to the responding party.” *Itamar Med. Ltd. v. Ectosense nv*, No. 20-60719-CIV, 2021 WL 12095084, at *2 (S.D. Fla. Sept. 29, 2021); *In re Chiquita Brands Int'l, Inc.*, No. 07-60821-CV, 2015 WL 12601043, at *4 (quoting *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 327 (S.D.N.Y. 2005)).

16. Factors that courts have considered include but are not limited to: “the reasons the moving party is requesting expedited discovery,” “whether the information sought expeditiously could be obtained more efficiently from some other source,” “the extent to which the discovery process would be expedited,” and “whether a motion to dismiss for failure to state a claim is pending.” *SA&H Alabama Holding, LLC v. Shoemaker*, No. 5:23-CV-01519-LCB, 2023 WL 9105651, at *1 (N.D. Ala. Nov. 28, 2023); *Courthouse News Serv. v. Harris*, No. CV ELH-22-548, 2022 WL 3577255, at *4 (D. Md. Aug. 18, 2022).

II. THERE IS GOOD CAUSE FOR LIMITED EXPEDITED DEPOSITIONS OF CERTAIN KEY WITNESSES

17. Plaintiff David P. Wilson has good cause to request limited expedited deposition discovery under Rule 30(a)(2)(A)(iii).

18. The media witnesses to Mr. Smith's execution are few in number—five in total—and they were assigned the task of witnessing and remembering (effectively, of visually memorizing) how the execution was carried out. Upon information and belief, the witnesses were not allowed to bring cellphones, pens, pencils, paper, or watches into the viewing room. As a result, they could only use their minds to record what they saw. It is imperative that the parties preserve their accounts of the execution as quickly as possible so that accurate details may be captured before their memories fade.

19. While any litigant risks losing material evidence as witnesses' memories fade over time, this issue is especially critical in the present case. Mr. Smith's execution is the only nitrogen asphyxiation execution that the State of Alabama has ever carried out. Thus, apart from Mr. Smith who is now deceased, the select witnesses whom Plaintiff seeks to depose represent the scant few people who have first-hand evidence regarding the experience of nitrogen asphyxiation. Unlike many other civil rights lawsuits—in which witnesses often continue to experience the rights violation, or a large group of individuals know about or have experienced the violation—this case

involves a small number of witnesses whose experiences are not shared with any other individuals and are critical to the resolution of the litigation.

20. Witnessing a traumatic event, such as an execution, can affect a person's memory. Two portions of the brain are primarily at play: (1) the hippocampus, and (2) the amygdala. The hippocampus is responsible for putting experience into chronological order and into perspective; it is necessary for forming new "explicit" memories—which are what we normally think of as "memory" (something we can consciously recall). Over time (typically two full sleep cycles), memory "fragments" (or "traces") are consolidated and stabilized, and converted into long-term memories stored in different parts of the neocortex. The amygdala, by contrast, is part of the limbic system and is thought to encode "implicit" memory—i.e., memories that are unconscious and tied to stress, fear, or threat, which affect cognition and behavior. When a person experiences trauma, the stress and fear hormones (cortisol and adrenaline) heighten activation of the amygdala, while simultaneously impairing hippocampal function. Before the hippocampus is fully impaired, however, there is a "flashbulb" effect—the immediate surge of adrenaline causes the hippocampus to encode certain memories intensely at the onset of the traumatic event. Following this, if the stress, threat, or fear continues, the hippocampus is temporarily impaired by the constant flood of stress hormones and there may be less encoding. That is why people who experience a traumatic event might remember the onset of the event

clearly, but after that say “it was all a blur.” Meanwhile, the amygdala continues to encode implicit memories, but these memories lack the context and chronology provided by the hippocampus. As a result, traumatic experiences can impair long-term memory. *See* Lori Haskell and Melanie Randall, “The Impact of Trauma on Adult Sexual Assault Victims,” Minister of Justice and Attorney General of Canada (2019), available at https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf. In order to avoid any deterioration of long-term memory in this case, which involves the witnessing of a traumatic event, it is imperative to conduct the depositions as soon as practicable.

21. In addition, the media organizations in question are likely to move to quash any subpoena that is served on the media witnesses, leading to substantial delays in discovery. The *Associated Press*, for example, moved to quash the subpoena by the State of Alabama served on media witness Kim Chandler in *In Re: Alabama Lethal Injection Protocol Litigation*, CASE #: 2:12-cv-00316-WKW-CSC (M.D. Ala. 2018) under Code of Alabama 1975 § 12-21-142 (“Alabama Reporter’s Shield Law”) and the constitutionally-based common law reporter’s privilege. While Plaintiff is confident that media witnesses cannot claim a reporter’s privilege with regard to what they saw at the execution, Plaintiff is concerned about the delay that

litigating the privilege will inevitably cause.¹ Indeed, the litigation surrounding the *Associated Press*'s motion to quash Ms. Chandler's deposition took over two months to resolve, involving extensive briefing by the *Associated Press* and the State of Alabama, and oral argument before the District Court. *See* Motion to Quash Witness Subpoena to Kim Chandler at p. 1, *In Re: Alabama Lethal Injection Protocol Litigation* ("witness deposition subpoena issued March 2, 2018"); Order granting motion to quash subpoena, issued May 14, 2018, *In Re: Alabama Lethal Injection Protocol Litigation*.

22. In terms of weighing the parties' interests, it is also important to recognize the fact that the urgency of preserving the witnesses' memories is an artifact of Defendant's policies, which prohibit witnesses from bringing in any "electronic, photographic, mechanical, or artistic paraphernalia" into the witness room. Alabama Department of Corrections, "Execution Set for Alabama Death Row Inmate Kenneth Eugene Smith: Media Advisory," (Jan. 2, 2024), <https://doc.alabama.gov/NewsRelease?article=EXECUTION+SET+FOR+ALABAMA+DEATH+ROW+INMATE+KENNETH+EUGENE+SMITH>. The problems necessitating expedited discovery are, in truth, of Defendant's own making.

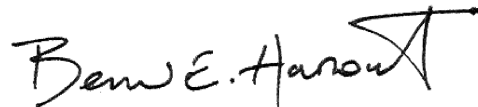
¹ The State of Alabama was correct when they wrote in their response to Ms. Chandler's motion to quash that a reporter's privilege, whether under Alabama statute or constitutionally-based common law, does not extend beyond the right to maintain the anonymity of confidential sources. *See* Defendants' Response to Kim Chandler's Motion to Quash Witness Subpoena or, in the Alternative, Defendants' Motion In Limine at 9, *In Re: Alabama Lethal Injection Protocol Litigation* (M.D. Ala. 2018). Media witnesses in this case likewise are not entitled to quash a subpoena to testify about what they witnessed since it does not concern confidential sources.

23. Mr. Wilson is not requesting that the parties resolve all Rule 26 initial disclosure matters by court order, but is merely asking the Court to grant limited expedited depositions of select witnesses to ensure that both parties have the discovery necessary to resolve this straightforward matter in a just and efficient manner before the information is lost.

24. Plaintiff's interests in minimizing possible memory loss by the scant few media and ADOC witnesses, and in guarding against the likely delay from expected litigation surrounding the media witnesses vastly outweigh any possible prejudice to Defendant, and therefore constitute good cause to request limited expedited deposition discovery.

WHEREFORE, Plaintiff David P. Wilson respectfully moves the Court to grant permission to schedule depositions of the media and ADOC witnesses, including Ralph Chapoco, Kim Chandler, Ivana Hrynkiw, Lauren Layton, Marty Roney, Cynthia Stewart Riley, Terry Raybon, John Q. Hamm, and any other employees of the Alabama Department of Corrections present at the execution of Kenneth Eugene Smith.

Done and signed this 8th day of March 2024.

A handwritten signature in black ink that reads "Bernard E. Harcourt". The signature is written in a cursive style with a prominent, stylized initial "B".

Bernard E. Harcourt

Alabama Bar Number: ASB-4316-A31B

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2024, the foregoing motion has been electronically filed with the Clerk of the Court and a copy has been electronically mailed to counsel for Defendant:

Richard D. Anderson, Esq.
Office of the Attorney General
Capital Litigation Division
501 Washington Avenue
Montgomery, AL 36130

A handwritten signature in black ink that reads "Bernard E. Harcourt". The signature is written in a cursive style with a large, stylized initial "B" and a long horizontal stroke at the end.

Bernard E. Harcourt