

**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 EARLY AND EXPEDITED RULE 34 DISCOVERY UNDER
RULE 26(d) AND RULE 34(b)(2)(A) OF THE FEDERAL RULES OF CIVIL
PROCEDURE**

Pursuant to Rules 26(d)(1), 26(d)(2), and 34(b)(2)(A) of the Federal Rules of Civil Procedure, Plaintiff David P. Wilson respectfully requests an order from this Court allowing him to engage in limited expedited Rule 34 document discovery prior to the parties' Rule 26(f) conference. In support of this motion, Plaintiff 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 him 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 early Rule 34 discovery of two documents. Plaintiff is only asking for two (2) documents. Plaintiff respectfully requests that the Court order Defendant to produce the two documents to Plaintiff within 30 days of this filing.

I. FED. R. CIV. P. 26 AND 34 PERMIT EARLY DOCUMENT DISCOVERY

7. Conventionally, parties to civil litigation will begin discovery after they have conducted a Rule 26(f) conference.

8. Under limited circumstances when a litigant has shown good cause, the federal courts have the authority to order expedited early document discovery under Rule 26(d)(1), Rule 26(d)(2), and Rule 34(b)(2)(A) of the Federal Rules of Civil Procedure.

9. Rule 26(d)(1) provides that a court may order discovery prior to a Rule 26(f) conference.

10. Rule 26(d)(2)(A) provides that a party may request “early Rule 34 discovery,” prior to the Rule 26(f) conference, so long as the party serves the discovery request “more than 21 days after the summons and complaint are served on a party.”

11. Today, March 11, 2024, marks the first business day after the 21-day mark after the service of the summons and complaint on the Defendant, which occurred on February 16, 2024.

12. Today, Plaintiff has served a request for early Rule 34 discovery under Fed. R. Civ. Pro. 26(d)(2) on Defendant contemporaneously with the filing of this motion for limited expedited early discovery with the Court. *See* Exhibit A (Early Request

to Produce Documents under Rule 26(d) and Rule 34 of the Federal Rules of Civil Procedure).

13. Rule 34(b)(2)(A) allows a court to order the response to an early Rule 34 discovery request in a shorter amount of time than 30 days following the Rule 26(f) conference.

14. Together, these rules provide that:

RULE 26(d) TIMING AND SEQUENCE OF DISCOVERY.

(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), **except [...] when authorized [...] by court order.**

(2) *Early Rule 34 Requests.*

(A) *Time to Deliver.* **More than 21 days** after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party;

RULE 34(b)(2)(A) (2) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or—if the request was delivered under Rule 26(d)(2)—within 30 days after the parties’ first Rule 26(f) conference. **A shorter or longer time may [...] be ordered by the court.**

15. In other words, this Court has the authority under Rules 26 and 34 to order Defendant to produce to Plaintiff the two requested documents at any time prior to the Rule 26(f) conference, now that Plaintiff has waited 21 days to serve the expedited document request on Defendant.

16. Federal District Courts, including courts in the Eleventh Circuit, have adopted a “good cause” standard to determine whether movants are entitled to early

expedited Rule 34 discovery, including early production of documents, electronically stored information, and tangible things. *See, e.g., Tracfone Wireless, Inc. v. Adams*, 304 F.R.D. 672, 673 (S.D. Fla. 2015) (“Federal courts allow parties to conduct expedited discovery in advance of a Rule 26(f) conference where the party establishes “good cause” for such discovery.”); *Kone Corp. v. ThyssenKrupp USA, Inc.*, No. CIV.A. 11-465-LPS, 2011 WL 4478477, at *6 (D. Del. Sept. 26, 2011) (granting expedited discovery, including production of documents under Rule 34(b)(2)(A), after Plaintiffs showed “good cause”); *Rivera v. Parker*, No. 1:20-CV-03210-SCJ, 2020 WL 8258735, at *3 (N.D. Ga. Aug. 28, 2020).

17. In order to determine whether the moving party has shown good cause for expedited discovery, a reviewing court must consider whether the moving party’s “need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.” *Tracfone Wireless, Inc. v. Adams*, 304 F.R.D. at 673.

18. Factors that courts have considered include but are not limited to “(2) the breadth of the requested expedited discovery; (3) the reasons the moving party is requesting expedited discovery; (4) the burden on the opponent to comply with the request for expedited discovery; (5) whether the information sought expeditiously could be obtained more efficiently from some other source; (6) the extent to which the discovery process would be expedited; and (7) 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).

19. When an early Rule 34 request has been delivered and a court order for expedited discovery is sought, the court may, as it may at any point prior to and during discovery, “make whatever order about sequence and timing of discovery the necessities of a case required.” Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2047 (3d ed. 1998, updated 2023). This includes permitting expedited early discovery when the requesting party shows good cause.

II. PLAINTIFF IS REQUESTING EXTREMELY LIMITED EARLY RULE 34 DISCOVERY

20. In this case, there will likely be extensive Rule 34 document discovery of materials in the possession of the Alabama Department of Corrections concerning the nitrogen gas asphyxiation method of execution.

21. At this stage, Plaintiff is requesting extremely limited early document discovery that would take no time for Defendant to share with Plaintiff. Specifically, Plaintiff is requesting only two (2) documents. *See* ¶ 59, *infra*.

22. By way of background, there are eight large categories of Rule 34 discoverable documents in the Defendant’s possession in this case:

(1) *Documents Regarding the Creation of the Nitrogen Gas Protocol.*

23. Following the botched and failed execution of Doyle Lee Hamm on February 22, 2018, by lethal injection, elected officials in Alabama began discussing the possibility of adopting an alternative method of execution using nitrogen gas asphyxiation.

24. On March 22, 2018, Alabama Governor Kay Ivey signed into law a measure allowing the use of nitrogen gas as a method of execution in Alabama.

25. In June 2018, Alabama's statute allowing execution by nitrogen asphyxiation as an approved method of execution went into effect. Ala. Code § 15-18-82.1(b).

26. On Friday, August 25, 2023, the Attorney General filed a motion with the Alabama Supreme Court requesting an execution warrant for Mr. Kenneth Eugene Smith and attached a redacted copy of a new protocol for nitrogen gas asphyxiation.

27. On Tuesday, August 29, 2023, a correctional officer from Holman Prison, who Plaintiff identified as a Captain or Sargent with a last name sounding like "McKinsey" and an attorney with the General Counsel's Office of the Alabama Department of Corrections (ADOC) gave Plaintiff a legal document consisting of a heavily redacted copy of a new method of execution protocol for nitrogen asphyxiation. The prison official and representative of the General Counsel's office of ADOC had Mr. Wilson sign a legal document to acknowledge his receipt of the new protocol. The correctional official and employee of Defendant did not tell Mr.

Wilson that he could talk to counsel before signing the document and did not give him an opportunity to refuse to sign the legal document. Plaintiff David P. Wilson does not have a copy of that document.

28. The protocol that the ADOC released to prisoners on death row is “heavily redacted,” as Judge Huffaker wrote in his decision denying a preliminary injunction in Mr. Smith’s case. *Smith v. Hamm*, 2:23-cv-00656-RAH, Doc. 69, at p. 5.

29. In Mr. Smith’s litigation, Defendant asked for a protective order before releasing an unredacted copy of the protocol to Mr. Smith’s attorneys. Mr. Smith’s attorney’s agreed to abide by a protective order, and the Court (Huffaker, J.) entered a protective order covering documents the parties deemed confidential, *see Smith v. Hamm*, 2:23-cv-00656-RAH, Doc. 22. The Court ordered Defendant to provide the Court and Mr. Smith with an unredacted copy of the nitrogen gas execution protocol. Doc. 23. The unredacted execution protocol was later admitted as an exhibit at the hearing on December 20, 2023. Doc. 62-3.

30. Plaintiff David P. Wilson does not have an unredacted copy of the protocol, nor does he have any other avenue through which to obtain it. Plaintiff is willing to enter into a protective order regarding the document.

31. There are numerous other documents in Defendant’s possession concerning the creation of the new protocol that are relevant to this case.

(2) Documents Regarding the Construction of the Nitrogen Gas Execution Chamber.

32. Between the time that Governor Ivey signed into law the nitrogen gas method of execution and the execution of Mr. Kenneth Eugene Smith on January 25, 2024, the Alabama Department of Corrections modified the execution chamber at Holman Prison to accommodate the method of nitrogen gas asphyxiation. This involved extensive construction, renovation, purchasing and testing of equipment, including but not limited to nitrogen gas tanks, a gas mask, lines, and safety equipment for prison personnel.

33. There are likely many documents in Defendant's possession concerning the construction of the nitrogen gas execution chamber and purchase of nitrogen execution equipment that are relevant to this case.

(3) Documents Regarding the Litigation Over the Execution of Kenneth Eugene Smith.

34. The Attorney General notified Mr. Kenneth Eugene Smith that he would seek an execution warrant by nitrogen gas on Friday, August 25, 2023. From that moment until the execution of Mr. Smith on January 25, 2024, the Defendant and attorneys for Mr. Smith were actively litigating the method of execution.

35. On December 20, 2023, the parties held an evidentiary hearing in District Court in the Middle District of Alabama. Defendant requested and obtained a protective order regarding documents that the Defendant deemed confidential. Smith

v. Hamm, 2:23-cv-00656-RAH, Doc. 22. As noted earlier, the unredacted execution protocol was admitted as an exhibit at the hearing. Doc. 62-3. At the hearing, the Court examined a mask provided by Defendant. Doc. 69 at 9 n.3. The parties submitted numerous other exhibits at the hearing, many of which are not available to Plaintiff or the public. *See* Doc. 62-2 (Pl's. Ex. List); Doc. 62-59 (Defs'. Ex. List).

36. On January 10, 2024, the Court issued an opinion denying a preliminary injunction. Doc. 69. In its opinion, the Court referred to the execution protocol, to videos provided as evidence in the case, to the mask that it examined, and to other items not publicly available because they were either sealed or redacted.

37. Following the hearing and the Court's opinion, Defendant and Mr. Smith's counsel filed briefs and supplemental pleadings in this Court, the Eleventh Circuit, and the U.S. Supreme Court. Some of those documents were redacted. There also are documents attached as exhibits to pleadings that are filed under seal or redacted.

38. There are likely many other documents related to the litigation in Mr. Smith's case that are relevant to this case.

(4) Documents Regarding the Actual Execution of Kenneth Eugene Smith.

39. On January 25, 2024, Mr. Kenneth Smith was the first person to be executed by means of nitrogen asphyxiation in this country. Prior to and following the execution, there were many documents produced by Defendant and other employees of ADOC regarding the actual execution.

40. During the execution, a log with chronological notes was maintained by employees of ADOC memorializing the time when the execution began, every step of the execution, when Mr. Smith was determined to be dead, and what happened after the execution. This log typically contains contemporaneous notes of the staff who were present at Mr. Smith's execution detailing every move of every person in the execution chamber.

41. Plaintiff David P. Wilson does not have a copy of that log, nor does he have any other avenue through which to obtain it. Plaintiff is willing to enter into a protective order regarding the log.

42. After the execution, Alabama Attorney General Steve Marshall and Defendant ADOC Commissioner John Q. Hamm each gave a press conference on the execution and relied on notes that described the execution.

43. Many other documents were likely made concerning the execution and are relevant to this case.

(5) Documents Immediately Following the Execution of Kenneth Eugene Smith Assessing the Execution of Mr. Smith.

44. Following the execution of Mr. Smith, ADOC made an assessment regarding how the execution took place and whether it complied with their expectations regarding the execution.

45. Many documents were likely created during the evaluation process and are relevant to this case.

(6) *Documents Regarding the Decision to Continue with Nitrogen Gas Executions Following the Kenneth Eugene Smith Execution.*

46. Following the execution, Defendant and other employees of the State of Alabama decided to continue using the nitrogen gas method of execution.

47. Many documents were likely produced and exchanged during the decision-making process and are relevant to this case.

(7) *Documents Regarding Any New Requests to Set Execution Dates by Nitrogen Gas Asphyxiation.*

48. On February 21, 2024, the Attorney General asked the Alabama Supreme Court to set a date and issue an execution warrant for Mr. Alan Miller using nitrogen gas.

49. Many documents were likely produced by and exchanged with Defendant concerning the decision to seek another execution by nitrogen gas.

(8) *Documents Regarding the Settlement of the Previous Lethal Injection Litigation and the Adoption of the Opt-Out Forms for Lethal Injection.*

50. There is one other set of documents that may become relevant in this case. Beginning in 2012 through 2016, several plaintiffs, including David Wilson, filed § 1983 civil rights actions against the Commissioner of the Alabama Department of Corrections seeking to enjoin the State of Alabama from carrying out executions by means of lethal injection. *See, e.g. David P. Wilson v. Jefferson Dunn, et al.*, 2:16-cv-364, Doc. 1 (Complaint filed May 19, 2016) (M.D. Ala.) In 2017, those civil

rights lawsuits were consolidated into one action, and a consolidated, amended complaint was filed on November 29, 2017. *See In re: Alabama Lethal Injection Protocol Litigation*, 2:12-cv-316, Doc. 348 (Consolidated, Amended Complaint dated 11/29/17) (M.D. Ala.) On July 10, 2018, all the plaintiffs and defendants in the consolidated litigation resolved the litigation and filed a joint motion to dismiss without prejudice; all of the plaintiffs opted out of the lethal injection protocol. *See In re: Alabama Lethal Injection Protocol Litigation*, 2:12-cv-316, Doc. 427) (M.D. Ala., July 10, 2018)

51. There are many documents in Defendant's possession that concern the understandings of the parties regarding the settlement of the consolidated lethal injection litigation that may be relevant to this case.

52. It is possible that issues will arise in this case regarding what the parties understood their positions were and what they were agreeing to when they settled the litigation. For his part, when settling the litigation, Plaintiff David P. Wilson understood that he was opting out of lethal injection and preserving every right to challenge nitrogen gas asphyxiation as a method of execution. Those documents too may become relevant to this case.

53. Regarding all eight large categories of Rule 34 discoverable materials, there are likely many relevant documents (including documents created by employees, agents, independent contractors, counsel and other persons with information

potentially relevant to this matter), evidence, writings, written and recorded information, and electronically stored information (“ESI”) that will eventually need to be turned over to Plaintiff. These essentially concern every aspect of the execution protocol released by the Department of Corrections on August 25, 2023, all the planning for the execution of death-sentenced individuals by nitrogen gas, and all information related to the conducting of nitrogen executions.

The Extremely Limited Request

54. Plaintiff David P. Wilson is certainly not asking for early and expedited Rule 34 discovery concerning all these eight areas of future discovery. On the contrary, Plaintiff is requesting only two (2) PDF documents in order to allow him to formulate interrogatories, conduct depositions of the media witnesses, determine whether to add defendants or amend his complaint.

55. Plaintiff is willing to enter into a protective order regarding these documents.

56. The two documents are:

- (1) An unredacted copy of the nitrogen gas execution protocol; and
- (2) A copy of the log of the execution.

III. THERE IS GOOD CAUSE FOR EARLY RULE 34 DISCOVERY

57. Plaintiff David P. Wilson can show good cause to request limited early Rule 34 discovery under Rules 26(d)(1), 26(d)(2), and 34(b)(2)(A) of the Federal Rules of Civil Procedure.

58. First, this § 1983 action is a straightforward challenge to a new method of execution that has only been used once and concerning which there is *prima facie* evidence that it was botched. *See* Doc. 1 at p. 3-9 (media witness accounts of Mr. Smith's execution). The media reports make this § 1983 civil rights lawsuit very simple. It is unlikely that any potential motion to dismiss would succeed.

59. Second, both documents constitute materials that are covered by regular Rule 34 document discovery.

60. Third, it should take Defendant's counsel less than five minutes to locate and email the requested documents to Plaintiff.

61. Fourth, these documents are important for Plaintiff to formulate regular Rule 34 discovery motions, to prepare interrogatories, and to determine whether there is an immediate need to amend the complaint or add parties to the complaint.

62. Fifth, these two documents are critical for Plaintiff to conduct depositions of the media and ADOC witnesses. Under separate cover, Plaintiff has requested limited expedited deposition discovery under Rule 30(a)(2)(A)(iii) of the Federal Rules of Civil Procedure. *See* Doc. 10.

63. Sixth, given that the State of Alabama has moved to set a date for the execution of Mr. Alan Miller by nitrogen gas asphyxiation, it is imperative that the parties move swiftly with early limited document discovery. The constitutional rights that Plaintiff David P. Wilson is seeking to protect would be severely

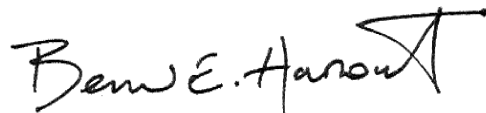
undermined by the administration of a second execution by nitrogen gas asphyxiation. Defendant would likely argue that this litigation is moot, regardless of the media accounts. There is thus an urgency to this litigation.

64. Mr. Wilson is not requesting that the parties resolve all Rule 26 initial disclosure matters or Rule 34 discovery requests by court order but is merely asking the Court to grant extremely limited early document discovery to avoid delay.

65. Plaintiff's interests 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 for limited early expedited discovery of two documents in this case and to order Defendant to produce the two documents Plaintiff requested within 30 days of this filing.

Done and signed this 11th 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" and a long, sweeping horizontal stroke at the end.

Bernard E. Harcourt
Alabama Bar Number: ASB-4316-A31B

The Initiative for a Just Society (IJS)
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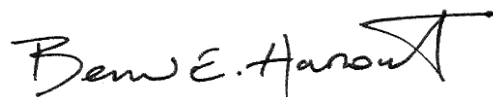
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Attorney for Plaintiff David Wilson

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 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 prominent, stylized "H" at the end.

Bernard E. Harcourt