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

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

PLAINTIFF'S REPLY ON
MOTIONS FOR LIMITED EXPEDITED DISCOVERY

Pursuant to the Court's Order dated March 12, 2024 (Doc. 12), Plaintiff David P. Wilson respectfully submits this Reply to Defendant's Response (Doc. 14) to Plaintiff's two motions for limited expedited discovery. Plaintiff states the following:

1. Defendant misconstrues the legal standard on a motion for limited expedited discovery. Defendant takes a categorical approach, arguing that Plaintiff's motion must fail "[b]ecause Defendant has not yet filed a motion to dismiss, and because

Plaintiff has not sought a preliminary injunction." Doc. 14, p. 1; *see also* Doc. 14, p. 4 ("Defendant has not yet filed a motion to dismiss, and Plaintiff is not seeking a preliminary injunction, making expedited discovery generally inappropriate"); Doc. 14, p. 8 (same).

2. However, the legal standard on a motion for expedited discovery is not a categorical test. It is a balancing-of-interests test that weighs the needs and interests of all the parties, and seeks to accommodate the needs of the moving party against the burden on the opposing party. *See infra,* ¶ 28-32.

3. Having misconstrued the legal standard, Defendant fails to plead in his Response that there is any great burden on him to engage in extremely limited, expedited discovery. In fact, Defendant says virtually nothing of this burden in his Response.

4. And the truth of the matter is that there is no heavy burden on the Defendant. First, the burden on the Defendant to produce two (2) documents is *de minimis*. It would take counsel less than five minutes to compose an email, attach two PDF documents, and send them to Plaintiff's counsel. In fact, it would take far less time to produce the two documents than it took Defendant to draft his opposition to the motions for expedited discovery. Second, regarding Plaintiff's request for a handful of depositions, the interests of the Plaintiff and the public in conducting those depositions as soon as practicable far outweighs any burden on the Defendant,

because the Alabama Attorney General has moved the Alabama Supreme Court to set a date for a second execution by nitrogen gas in the case of Alan Miller. *See Ex parte Alan E. Miller (In re: Alan Eugene Miller v. State of Alabama)*, No. 1040564 (Ala. 2024), State of Alabama's Motion to Set an Execution Date (Feb. 21, 2024). Before the Miller execution goes forward, it is imperative to establish for the record what exactly the few media witnesses selected by the Alabama Department of Corrections saw at the Kenneth Smith execution. As Plaintiff Wilson detailed in the Complaint (Doc. 1, ¶ 5-14), those media witnesses reported that Mr. Smith writhed against the straps of the gurney while conscious for several minutes. Documenting a full account of their observations in deposition form will enable this Court and the public to evaluate what risks of torturous death the Defendant and the Attorney General are deliberately hazarding in proceeding full speed ahead with further nitrogen executions.

5. In any event, Defendant has simply not stated in his Response how, why, or what burden would outweigh Plaintiff's need for limited expedited discovery.

6. By contrast, Plaintiff has articulated compelling needs and interests supporting his request for extremely limited expedited discovery—which tips the balance of interests in his favor. *See* Doc. 10, ¶ 18-24; Doc. 11, ¶ 58-65.

I. THE PRESENT NEED FOR LIMITED EXPEDITED DOCUMENTARY DISCOVERY

7. Defendant contends that Plaintiff has not articulated a legitimate need for expedited discovery of the two documents, namely the unredacted execution protocol and the execution log. Doc. 14, ¶ 11.

8. But the State of Alabama's intervening actions explain why the execution protocol and log must be turned over to Plaintiff as quickly as possible. The State of Alabama, through its Attorney General, has:

a. declared that the execution of Kenneth Smith by nitrogen gas was a "textbook"[1] execution;

b. moved the Alabama Supreme Court to issue a second warrant for execution by nitrogen gas, in the case of Mr. Alan Miller; and

c. recommended to other states that they adopt nitrogen gas asphyxiation as a method of execution, stating: "To my colleagues across the country, many of which were watching last night, Alabama has done it.

[1] Attorney General Steve Marshall said of the Kenneth Smith execution, "what occurred last night was textbook." Mike Cason, "AG Steve Marshall on 'textbook' nitrogen execution: 'Alabama has done it and now so can you'," *AL.com* (Jan. 26, 2024), https://www.al.com/news/2024/01/ag-steve-marshall-expects-other-states-to-follow-alabamas-textbook-nitrogen-execution.html.

> And now so can you. And we stand ready to assist you in implementing this method in your states."[2]

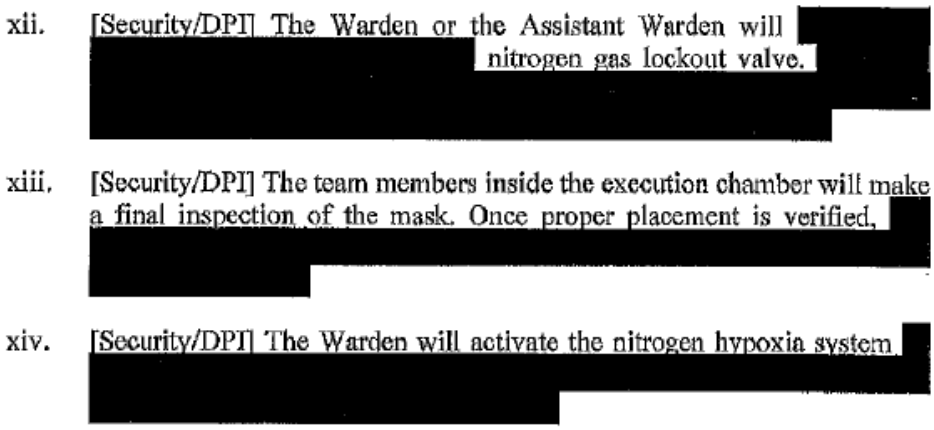
9. At this point, however, Plaintiff still does not have a copy of the "textbook"—i.e., a full, unredacted copy of the execution protocol to which the State of Alabama is referring. And without this "textbook," Plaintiff cannot proceed with this litigation in the efficient and expeditious manner required by the Federal Rules of Civil Procedure. As the Court made clear in *In re Chiquita Brands Int'l, Inc.*, No. 07-60821-CV, 2015 WL 12601043, at *4 (S.D. Fla. April 7, 2015), Rule 1 of the Federal Rules of Civil Procedure, which underlies in part the adoption of the "good cause" standard for expedited discovery, "requires that the rules 'shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.'" Plaintiff's request for expedited, limited, and accessible discovery conforms to these aims.

10. The redacted protocol that Defendant provided to Plaintiff on August 29, 2023, conceals determinative aspects of the execution procedure. Specifically, Defendant has redacted how the lockout valves responsible for controlling airflow into the mask are inspected during and directly prior to the execution; how the breathing case tubing responsible for introducing gas to the condemned person is

[2] *Id*. Incidentally, the State of Louisiana just followed Alabama's lead. *See* Julia Reinstein, "Louisiana Governor Signs Bill into Law Expanding Execution Methods to Include Nitrogen Gas," *Independent*, March 5, 2024, available at https://www.the-independent.com/news/world/americas/us-politics/louisiana-nitrogen-gas-electrocution-execution-b2507468.html

checked; how much breathing air supply is set; where the Warden inspects the entire execution from; how and by whom the final verifications on the pre-execution tasks have been carried out; and how quickly the nitrogen gas is introduced. The redactions also hide how the nitrogen valves must be manipulated; what exactly happens if they are altered; what happens after the mask has been checked; and what happens once the nitrogen hypoxia system is activated. These are the most critical parts of the execution protocol pertaining to a condemned person. They should inform the core sections of an amended complaint.

11. Critical parts of the protocol have been so thoroughly redacted that the remaining lines are virtually meaningless. For example, the last three lines before the nitrogen gas begins killing the condemned person look like Swiss cheese:



See Redacted Alabama Department of Corrections Execution Procedures at p. 16, attached as Exhibit A.

12. The next passage of the protocol begins with "After the nitrogen gas is introduced…" *Id.* at p. 17. It is impossible to understand from this redacted section what is done to the lockout valve, what happens to the condemned person after the last mask-check is conducted, and how the nitrogen gas moves through the apparatus.

13. The dearth of information in the lines directly before the nitrogen gas causes death is especially troubling, given how much is hidden regarding system preparations. For example, the paragraph outlining the pressure checks in the "Final Systems Preparations" says:

25. [redacted] verify that nitrogen gas and breathing air are present [redacted] by inspecting the pressure gauges [redacted]. Verify that the line pressure indicated by each pressure gauge is consistent with [redacted] the gas manifolds. (See Steps 6 and 12)

Id. at p. 34.

14. These redactions make it impossible to know how the pressure gauges are standardized. The final preparations for the mask assembly are likewise opaque, redacted to read:

26. Inspect the mask assembly (including the hose and attachment straps), [redacted] and the breathing gas supply tubing for damage or defects.

27. [redacted]

Id. at 34.

15. It is unclear what the breathing tubing is connected to, what happens between inspection of the mask assembly and connection of the tubing, and what needs to be checked for defects other than the breathing gas supply tubing.

16. Furthermore, key elements of the safety protocols that are required to take place before and after the execution are redacted. These safety procedures are meant to protect the prison staff and witnesses, but they also impact the execution itself. Whether or not the staff are able to competently carry out the execution is intrinsically related with how safe they feel given the protocols.

17. In addition to the unredacted execution protocol, Plaintiff also requires the execution log kept by the execution team at Holman Prison before, during, and after the execution of Kenneth Smith. The execution log should include:

a. all of the activities of Mr. Smith and the execution team the day of the execution;
b. all records of what the execution team actually did to prepare the execution chamber for the execution of Mr. Smith in the days and hours leading up to the execution;
c. everything that took place during the execution, with specific time stamps;
d. and everything that the execution team did to preserve the evidence of the execution and shut down the execution chamber after Mr. Smith was killed.

18. This log will allow Plaintiff to compare Defendant's "textbook" protocol to what actually happened during the Smith execution. This information is therefore critical for the purposes of amending Plaintiff's Complaint and moving forward. The

log is immediately necessary for Plaintiff to pinpoint which elements of Mr. Smith's torturous execution may be attributed to an unconstitutional execution protocol, and which elements can be attributed to an incompetent execution team with an already poor track record. *See* Doc. 1, ¶ 1.

19. By way of example, it is critical for Plaintiff and the Court to know how the breathing air supply and nitrogen gas supply are set up so that the condemned person is first breathing in normal air and then breathing in nitrogen, all through the same mask. Plaintiff currently does not have the full protocol to understand how this change is supposed to be carried out, or the log that would show whether the protocol was followed. Plaintiff simply knows that, as a result of the execution team's actions (which, it must be assumed, were based on the protocol), the introduction of the nitrogen gas led to Mr. Smith writhing in distress on the gurney.

20. There is no question that Mr. Smith writhed on the gurney during his execution. In order to efficiently litigate the cause of these tortured movements and expeditiously test whether the execution followed the "textbook," Plaintiff needs to know what, exactly, Alabama officials were expected to do according to their own protocol and whether the ADOC officials complied with the requirements imposed upon them.

II. THE NEED FOR A LIMITED NUMBER OF EXPEDITED DEPOSITIONS

21. In Doc. 10, at ¶¶ 18-24, Plaintiff details several reasons why he needs to conduct a limited number of expedited depositions.

22. In the second footnote of his response, Defendant characterizes Plaintiff's discussion of a study connecting trauma to memory loss as "bizarre to say the least." Doc. 14 at p. 6 n.2.

23. Plaintiff is unsure what Defendant finds so bizarre about the study: the fact that it is a Canadian scientific study or that it involves trauma associated with sexual assault—neither of which should be perplexing. The scientific consensus on the question of how trauma affects memory is international and spans myriad domains of trauma, including sexual assault. In fact, sexual assault is one of the most researched areas involving trauma and memory.

24. In any event, there is no question that witnessing someone being tortured for almost 30 minutes, writhing against physical constraints, convulsing, literally jerking the gurney around, and ultimately dying would be deeply traumatizing. And this raises the need for expeditious memorialization of the witnesses' recollections.

25. There are many other studies that Plaintiff could cite regarding the connection between trauma and memory. Myriad studies have shown that traumatic events affect memory differently than more ordinary accidents or incidents. *See, e.g.,* Deryn Strange & Melanie Takarangi, *Memory Distortion for Traumatic Events: The Role*

of Mental Imagery, 6 Frontiers in Psychiatry, 27 (2015), https://doi.org/10.3389/fpsyt.2015.00027; Sven-Åke Christianson & Elizabeth F. Loftus, *Remembering Emotional Events: The Fate of Detailed Information*, 5 Cognition and Emotion, 81 (1991), https://doi.org/10.1080/02699939108411027; Robin Kaplan, et al., *Emotion and False Memory*, 8 Emotion Review, 8, 9 (2016), https://doi.org/10.1177/1754073915601228 (traumatic experiences can hinder memory and increase vulnerability to misinformation: "With increasing emotional arousal, attention narrows to features of events that are of central importance. This results in enhanced memory for central information at the expense of peripheral details (Christianson & Loftus, 1991), a phenomenon referred to as emotional memory narrowing (Kensinger, 2009) or tunnel memory (Safer, Christianson, Autry, & Osterland, 1998)"). As the last study indicates, trauma causes a neurological trade-off between the storage of central information and peripheral information. This can have significant implications in situations such as ours, when accounts of the smaller-scale and operational details of Mr. Smith's execution (which some might view as 'peripheral') are in fact critical to determining the competency of the ADOC executioners and the legitimacy of the nitrogen gas protocol. Other studies confirm the relationship between trauma and memory loss, particularly for individuals who experienced negative emotional images, as in this case. *See* S. Porter, et al. *A Prospective Investigation of the Vulnerability of Memory for Positive and Negative*

Emotional Scenes to the Misinformation Effect, 42 Can. J. Behav. Sci., 55–61 (2010), https://doi.org/10.1037/a0016652. For a more grounded understanding of how trauma can affect memory—and why it would be important to expedite depositions of witnesses who have experienced a traumatic event (such as a botched execution) to avoid memory corruption—Plaintiff would also refer the Court to a recent *New Yorker* article about Dr. Elizabeth F. Loftus, one of the leading researchers on trauma and memory. *See* Rachel Aviv, "How Elizabeth Loftus Changed the Meaning of Memory," *New Yorker* (March 29, 2021), available at https://www.newyorker.com/magazine/2021/04/05/how-elizabeth-loftus-changed-the-meaning-of-memory. As the article emphasizes, quoting the psychiatrist Lenore Terr in 1994, "Trauma sets up new rules for memory." *Id*. It is imperative that this Court accommodate those new rules by allowing a limited number of expedited depositions in this case.

26. In the same footnote, Defendant also suggests that the Federal Rules of Evidence account for the possibility that witnesses will lose memory and allow them to consult prior written materials. *See* Doc. 14 at p. 6 n.2. The rules that Defendant cites to, Rules 612 and 803(5), assume that the witness already has written materials that might refresh their recollections.[3] But here, the Defendant's own protocols

[3] Fed. R. Evidence 612 concerns the options that an adverse party has when a witness is using written materials to refresh their memory for testimony. Rule 803(5) is a hearsay exception that likewise assumes that a written record already exists and governs its admissibility.

precluded the media witnesses from bringing any materials into the witness chamber to make contemporaneous notes. Specifically, the Defendant prohibited witnesses from bringing in any "electronic, photographic, mechanical, or artistic paraphernalia." *See* Alabama Department of Corrections, "Execution Set for Alabama Death Row Inmate Kenneth Smith: Media Advisory," (Jan. 2, 2024), https://doc.alabama.gov/NewsRelease?article=EXECUTION+SET+FOR+ALABAMA+DEATH+ROW+INMATE+KENNETH+EUGENE+SMITH. It is precisely for that reason that these depositions should be expedited to begin to create more thorough, written documentation of the first nitrogen execution.

27. By requesting expedited depositions, Plaintiff is trying to create a proper, detailed, written record. Defendant's reference to the Federal Rules of Evidence, if anything, bolsters Plaintiff's case for expedited discovery. It might be true, as Defendant suggests, that the Federal Rules of Evidence *acknowledge* that time erodes witness memory, but contrary to what Defendant suggests, they do not provide a remedy for this loss. Only expedited depositions can do that here.

III. AS A LEGAL MATTER, THE STANDARD IS NOT A CATEGORICAL TEST BUT RATHER A BALANCING-OF-INTERESTS TEST

28. While the Eleventh Circuit has not imposed a uniform legal standard, District Courts in the Eleventh Circuit, including in the Middle District of Alabama, have adopted the "good cause" standard for determining whether movants are entitled to

expedited discovery. For example, in *Alan Eugene Miller v. John Q. Hamm*, 2022 WL 12029102, at *2 (M.D. Ala. Oct. 20, 2022), District Judge R. Austin Huffaker, Jr., declared that "discovery may be expedited if the moving party establishes 'good cause.'"

29. The "good cause" standard involves a balancing of interests. Under the "good cause" standard, also known as a "reasonableness" standard, a District Court can allow expedited discovery "when the need for it outweighs the prejudice to the responding party." *In re Chiquita Brands Int'l, Inc.*, No. 07-60821-CV, 2015 WL 12601043, at *3. That is explicitly balancing language, requiring the court to consider the need for expedited discovery as well as the prejudice it could cause to respondents. It cannot consider just one and not the other.

30. Under such a balancing or weighing approach, the Court must determine whether the needs and interests of the plaintiff in expedited discovery outweigh the burdens imposed on the defendant. The 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)); *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.); *SA&H Alabama Holding, LLC v. Shoemaker*, No. 5:23-CV-01519-LCB, 2023 WL 9105651, at *1 (N.D. Ala. Nov. 28, 2023) (listing out factors courts consider when determining whether to grant expedited discovery, including "the burden on the opponent to comply with the request for expedited discovery"); *Goodwin v. D.C.*, No. 21-CV-806 (BAH), 2021 WL 1978795, at *7 (D.D.C. May 18, 2021) ("Here, the 'likely benefit' of the proposed discovery largely outweighs its burden."); *Missouri v. Biden*, No. 3:22-CV-01213, 2022 WL 2825846, at *5 (W.D. La. July 12, 2022) ("The 'good cause' analysis takes into consideration such factors as the breadth of discovery requests, the purpose for requesting expedited discovery, the burden on the defendants to comply with the requests, and how far in advance of the typical discovery process the request was made.")

31. In addition, under the "good cause" balancing approach, the Court can also consider the public interest. *See F.T.C. v. NAFSO VLM, Inc.*, No. CIV S-12-0781 KJM, 2012 WL 1131573, at *3 (E.D. Cal. Mar. 29, 2012) ("The court has broad equitable powers when the public interest is implicated by a proceeding.") In this case, there is a significant public interest in assuring a humane execution, which overwhelms any prejudice to the Defendant.

32. In sum, Defendant's categorical argument is wide of the mark. This Court should not simply tick off items on a checklist (e.g., whether the plaintiff has requested a preliminary injunction, or whether the defendant has filed a motion to dismiss) and conclude that the Plaintiff is not entitled to expedited discovery. Instead, the proper test involves a careful balancing of needs, interests, and burdens. Defendant has not pled any burdens; and Plaintiff David Wilson is not seeking broad or unlimited discovery, but rather extremely limited discovery with the goal of resolving this litigation in an efficient and expeditious manner, as provided by the Federal Rules of Civil Procedure.

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; and to produce the unredacted execution protocol and execution log of the Kenneth Smith execution.

Done and signed this 2nd day of April 2024.

Bernard E. Harcourt
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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 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:

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Bernard E. Harcourt