

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

<p>WILLIE B. SMITH III,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>JEFFERSON DUNN, Commissioner, Alabama Department of Corrections,</p> <p>&</p> <p>TERRY RAYBON, Warden, Holman Correctional Facility,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;">No. 2:21-cv-00099-RAH</p> <p style="text-align: center;">CAPITAL CASE</p> <p style="text-align: center;">EXECUTION DATE SET FEBRUARY 11, 2021</p>
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AMENDED COMPLAINT

Plaintiff Willie B. Smith, III is currently housed on death row at William C. Holman Correctional Facility (“Holman”). He is scheduled for execution on February 11, 2021. Up until January 29, 2021, the Alabama Department of Corrections (“ADOC”) represented to counsel for Mr. Smith, federal courts, and the Alabama Supreme Court (“ASC”) that they intended to execute Mr. Smith following Alabama statutory law and the State of Alabama’s Execution Protocol (“Original Protocol”).¹ On January 29, 2021, in response to Mr. Smith’s Motion to Reset His Execution Date Due to the COVID-19 Pandemic before the ASC, the ADOC disclosed for the first time that it had created an addendum to the protocol solely to apply to Mr.

¹ A redacted copy of the ADOC’s long-standing execution protocol is attached to this Complaint as Ex. A.

Smith's execution ("Smith Addendum").² On February 4, 2021, the ADOC changed its procedures again in an amendment to the Smith Addendum.³ Even now, the week of Mr. Smith's execution, ADOC continues to make ad hoc changes to its protocol for executing Mr. Smith. Mr. Smith asserts that the Smith Addendum and its subsequent revisions (collectively the "Smith Protocol") violate his rights under Alabama law and the First, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

Mr. Smith filed his initial three-count complaint before this Court alleging violations of 42 U.S.C. § 1983 on February 2, 2021.⁴ In a separate action, Mr. Smith filed a declaratory judgment action in State court alleging that the Alabama Department of Corrections' ("ADOC") adoption of the Smith Protocol violated Alabama law.⁵ In response to the State complaint, the ADOC filed a Motion to Dismiss arguing, in part, that Ala. Code § 6-5-440 precluded Mr. Smith from raising

² A copy of the Smith Addendum is attached to this Complaint as Ex. B.

³ A copy of the revisions is attached to this Complaint as Ex. C.

⁴ The substantial amendments in this Amended Complaint include an updated fact section, three additional state law claims (Claims Four, Five, and Six), and an Eighth Amendment constitutional claim based on new facts (Claim Seven).

⁵ Mr. Smith brought the separate action in state court as opposed to filing with this federal action out of an abundance of caution to avoid the arguments that the State made in Mr. Smith's RLUIPA case that the federal court should not exercise its supplemental jurisdiction to hear state law-based claims. *Smith v. Dunn*, Case 2:20-cv-01026-RAH, (DOC. #12, pp. 24-28) ("Defendant asserts that questions about the proper interpretation of Alabama law should be addressed to the Alabama Supreme Court.").

State law claims in State court because he had a pending federal complaint and the Federal court could have exercised supplemental jurisdiction over these claims. The State court held a hearing on the Motion to Dismiss just after it was filed on February 8, 2021, during which the State argued that abatement prevented Mr. Smith from raising these claims in a separate court while he had the pending federal complaint regarding the Smith protocol.

On February 9, 2021, the State court entered an Order granting the ADOC's Motion to Dismiss and dismissing Mr. Smith's complaint without prejudice. The Court order in its entirety reads:

Having considered Plaintiff Willie B. Smith III's Complaint and related pleadings, the Defendants' Motion to Dismiss, and the arguments of counsel, this Court finds that the State's Motion to Dismiss is well-taken. For that reason, it is hereby ORDERED that the State's motion is GRANTED and Plaintiff's Complaint is DISMISSED.⁶

The court then denied Mr. Smith's request that the court provide the basis for its dismissal.⁷ Mr. Smith now brings this action for declaratory and injunctive relief, raising both the federal claims from his initial complaint and the state court claims that he was denied the opportunity to fully and fairly litigate in state court.

JURISDICTION & VENUE

⁶ *Smith v. Dunn*, CV-2021-900139.00, Montgomery County Circuit Court.

⁷ Order Denying Plaintiff's Motion for Clarification, *Smith v. Dunn and Raybon*, No. 03-cv-2021-900139.00 (Feb. 9, 2021), at 1.

1. This is an action for declaratory and injunctive relief to redress the deprivation of Mr. Smith's rights under the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Alabama Code § 15-18-81 and § 15-18-83, and the Alabama Religious Freedom Amendment ("ARFA"), Ala. Const. Art. I, § 3.01(V).

2. This Court has jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343(a)(3), 2201, and 2202. This Court also has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

3. Venue is appropriate in the Middle District of Alabama under 28 U.S.C. § 1391(b).

PARTIES

4. Willie B. Smith III, a citizen of the United States and resident of the State of Alabama, is subject to execution by the State of Alabama pursuant to a state court judgment of conviction for capital murder.

5. Jefferson Dunn, Commissioner of the Alabama Department of Corrections ("ADOC"), is responsible for the development and implementation of the protocol and procedures governing the execution of death-sentenced prisoners in the State of Alabama.

6. Only Commissioner Dunn has the authority to alter or amend the protocol and procedures governing the execution of death-sentenced prisoners in the State of Alabama.

7. Terry Raybon, Warden of Holman, is Mr. Smith's statutory executioner.

8. Defendants are being sued in their official capacities.

CASE OR CONTROVERSY

9. There is a real and justiciable case or controversy between the parties.

ADMINISTRATIVE EXHAUSTION

10. Mr. Smith has no available administrative remedies, as “[t]he policies and procedures of the Department of Corrections for execution of persons sentenced to death shall be exempt from the Alabama Administrative Procedure Act, Chapter 22 of Title 41.” Ala. Code § 15-18-82.1(g).

FACTUAL ALLEGATIONS

Relevant Events Prior to Friday, January 29, 2021

11. On October 27, 2020—seven months into the COVID-19 pandemic—the State, through Assistant Attorney General Henry Johnson of the Capital Litigation Division, filed, in the ASC, a Motion to Set an Execution Date for Mr. Smith. While the motion recounted the details of the crime and the procedural history of the direct appeal, Rule 32 post-conviction proceedings, federal habeas litigation, and a long-pending federal suit raising challenges to the Original Protocol and the failure to reasonably accommodate his disability in adopting procedures to opt-in to nitrogen hypoxia,⁸ it made no mention of the pandemic.

12. Immediately after receiving the Motion to Set an Execution Date, Spencer Hahn, one of Mr. Smith’s attorneys, emailed Mr. Johnson expressing concern about prohibitions on all visitation—including legal visits—in place since March 2020 and

⁸ *Smith v. Dunn*, No. 2:19-cv-927-ECM-CSC (M.D. Ala.).

the Original Protocol's requirements as to contact visits the week of the execution in light of COVID-19. Mr. Johnson replied, "We expect that the execution protocol will be followed."

13. On October 27, 2020, Mr. Hahn followed up by email to Mr. Johnson:

When can we begin in-person visitation? We haven't been allowed to meet with our clients in-person since March. We can't possibly prepare for clemency, etc. without being able to meet with Mr. Smith in person well in advance of any execution date.

Have y'all checked with the Commissioner and ADOC about this? I don't know if you've ever been to the execution chamber (I've witnessed two killings, in addition to tours as part of litigation), but the viewing rooms are incredibly small (I don't know how social distancing would work, especially in the Commissioner's viewing room).

Please advise.

Thanks,

Spencer

14. Mr. Johnson responded almost immediately:

It is our understanding that attorney-client visits are being conducted only via phone call at the present time. And, again, we expect that the execution protocol will be followed.

15. On November 17, 2020, Mr. Smith filed a Response to the State's Motion to Set Execution Date in which he noted the dangers and difficulties inherent in attempting to follow the Original Protocol and conducting an execution during a pandemic.

16. On November 18, 2020, the State filed a Response to Smith’s Opposition to the State’s Motion to Set an Execution Date. In its response, the State addressed Mr. Smith’s claim “that due to COVID-19, the ADOC will be unable to safely follow its execution-week protocol,” and his citation to “provisions of the ADOC’s lethal injection protocol, including visitation during the week prior to the execution . . . [and] the admission of witnesses to the execution.” The State dismissed these concerns, promising, “[T]he ADOC will make necessary exceptions to the closure order to permit Smith visitation and other execution-week privileges.”

17. On December 1, 2020, the ASC granted the State’s motion and set Mr. Smith’s execution for February 11, 2021.

18. On December 1, 2020, Warden Raybon provided Mr. Smith with a copy of the execution order, and had Mr. Smith sign a document (notarized by the warden’s secretary, Jennifer Parker) which included the following:

I have also been advised that 8:00 a.m. beginning of business, on Monday, January 25, 2021, I am required to provide the following:

- Visitation list for the last week (No more than fifteen (15) visitors allowed. All must be approved and on visitation list, to include Spiritual Advisor).
- Witness list (Not to exceed six (6).)
- Name of next of kin, address, phone number and relationship.
- Will family claim body.
- Name address, phone number and contact person of Funeral Home to be used.
- Last will and testament.

Information:

Your visitation will be the following times beginning February 08, 2021:

Monday and Tuesday 8:30 AM to 4:00 PM
Wednesday and Thursday 8:30 AM to 4:00 PM

19. With regard to visitors the week of the execution, the Original Protocol guarantees⁹:

B. The condemned offender shall be allowed contact visits during execution week with family, friends, private clergy, and his legal representatives, as approved by the Warden.

20. The “contact visits” which “shall be allowed” during the week of an execution include physical contact with visitors. Such physical contact includes hugs, handholding (including during prayer), and otherwise being physically close.

21. On information and belief, ADOC’s pattern and practice regarding execution-week visitation has always allowed a condemned prisoner to have physical contact with visitors during the “contact visits” guaranteed under the Protocol.

22. On information and belief, the ADOC has never prevented a condemned prisoner from having up to six friends (including lawyers) and / or family members, as well as a spiritual advisor, from witnessing his or her execution as provided in the Original Protocol and statute.¹⁰

23. On the day Mr. Smith received an execution warrant, he called Mr. Hahn, who provided information and advice concerning the practices and procedures

⁹ This guarantee of visitors follows Ala. Code §15-18-81.

¹⁰ Ala. Code § 15-18-83.

employed during the week of an execution. Mr. Hahn explained what Mr. Smith and his visitors and witnesses could expect to experience.¹¹

24. Mr. Hahn described the layout of the execution chamber and witness rooms, and told Mr. Smith that he would be able to see his witnesses during the execution.¹²

25. The photograph below is an accurate representation of the execution chamber and the window visible to the immediate right of the open door is the viewing room for the condemned prisoner's witnesses (and media witnesses):



¹¹ Mr. Hahn has witnessed two executions—those of Ronald Bert Smith and Walter Leroy Moody—and has served as co-counsel in litigation surrounding Alabama's execution protocol and procedures for more than five years.

¹² The witness room for the condemned prisoner's witnesses (and media witnesses) is to the left of the condemned prisoner from his position lying strapped to the gurney.

26. On December 8, 2020, Mr. Smith’s counsel submitted a public records request to the ADOC asking, in part, for any COVID-19 policies it planned to implement during the week of the execution to protect people participating in or attending executions carried out in Alabama during the pandemic. The request also asked for “expedited processing due to the urgent need for the requested material.” After receiving none of the requested material, counsel sent a follow-up email a month later, on January 8, 2021, again stressing “the urgent need for the requested material given the public health risks involved[.]” On January 11, 2021, Assistant Attorney General Joseph “Jody” Stewart of the ADOC responded, “we are a little behind due to the holiday break, along with all the delays associated with COVID-19... [and he would] try and get a response. . . as soon as reasonably possible.”

27. On December 22, 2020, Ms. Simpson, representing the ADOC, promised a federal court that, “[o]n the night of his execution, his spiritual advisor—Pastor Wiley, if Smith so chooses—may remain with him until the time he is taken to the execution chamber, and then, if he so desires, *his spiritual advisor may witness from a viewing room.*”¹³

28. On January 20, 2021, Ms. Simpson appeared in federal court on behalf of ADOC at a hearing on Mr. Smith’s religious freedom lawsuit and argued in opposition to Mr. Smith’s attempt to have his spiritual advisor present in the

¹³ *Smith v. Dunn, et al.*, 2:20-cv-1026-RAH, ECF No. 12 at 19 [22 of 46] (M.D. Ala. Dec. 22, 2020) (emphasis added).

execution chamber. The following exchange occurred between the Court and Ms. Simpson:¹⁴

11 THE COURT: And then his spiritual advisor is allowed
12 to view from the viewing room?
13 MS. SIMPSON: Correct, Your Honor.
14 From the inmate's perspective, this would be on his
15 left-hand side. He can sit in there with members of the media,
16 with members of the inmate's family, with his attorneys, any
17 other witnesses he has selected. He will be able to see his
18 spiritual advisor within his line of sight.

29. Mr. Smith is a practicing Baptist Christian and has a close, spiritual connection with his spiritual advisor, Pastor Wiley. Access to his spiritual advisor to confidentially confide in and hold hands during prayer in the days leading up to his execution is an important aspect of his faith. Additionally, his spiritual advisor's presence during the execution to pray with Mr. Smith and provide him with spiritual comfort to help ease his transition from life to death is another critical aspect of his faith. It is important that Mr. Smith be able to see and communicate with his spiritual advisor during his execution.

30. On Sunday, January 24, 2021, pursuant to Mr. Smith's prior instruction, Sara Romano, an investigator on Mr. Smith's defense team, submitted the visitor

¹⁴ *Smith v. Dunn*, 2:20-cv-1026-RAH (M.D. Ala. Jan. 20, 2021), ECF No. 31, Tr. at 18.

and witness lists to Ms. Parker via email. The visitor list contained 15 people, and the witness list contained seven names, including Mr. Smith's spiritual advisor and his counsel. Mr. Smith designated his counsel as a witness specifically so that he can protect his rights during his execution.

31. Shortly thereafter, and still on Sunday, January 24, 2021, Ms. Romano submitted an amended version of the visitor and witness lists, adding two names to the visitor list for a total of 17 visitors.

32. Ms. Parker acknowledged receipt of the visitor and witness lists via email Monday, January 25, 2021 and did not mention anything about a reduction in the number of witnesses Mr. Smith would be allowed to have during his execution.

33. In a separate email sent on Monday, January 25, 2021, Ms. Parker gave Ms. Romano permission for Mr. Smith to add two additional visitors—Mr. Smith's mother and stepfather—to the visitation list. Again, Ms. Parker did not mention anything about a reduction in the number of witnesses Mr. Smith would be allowed to have during his execution.

34. Minutes after receiving Ms. Parker's approval, Ms. Romano emailed the second amended list containing a total of 19 visitors, which included the 15 originally submitted and the four added with Ms. Parker's permission.

35. On January 27, 2021, Ms. Parker called Mr. Hahn. Upon returning Ms. Parker's call, Mr. Hahn was told that Mr. Smith would be limited to six witnesses, counting his spiritual advisor. Ms. Parker did not provide a reason for this sudden change in the procedures. When Mr. Hahn explained that both the Original Protocol

and statute provide for six witnesses *plus* a spiritual advisor, Ms. Parker repeated the ADOC's position that Mr. Smith was limited to six witnesses in total.

36. Also on January 27, 2021—after Ms. Parker told Mr. Smith's counsel he would be limited to six witnesses at his execution— Mr. Smith filed, with the ASC, a Motion to Reset Execution Date Due to COVID-19 Pandemic, in which he noted the spike in cases and hospitalizations in Alabama and around the country that began after the execution date was set. The motion also noted that ADOC had yet to provide Mr. Smith with any information about the COVID-19 measures planned for the week and day of his execution, despite repeated requests.

37. On January 28, 2021, Mr. Hahn sent a letter to Warden Raybon asking for clarification on whether ADOC would enforce the requirement in the Original Protocol and statute permitting Mr. Smith to choose six witnesses in addition to his spiritual advisor and objecting to the reduction. The letter requested a response by noon on January 29, 2021. Mr. Hahn copied both Assistant Attorney General Lauren Simpson of the Capital Litigation Division and Mr. Stewart of the ADOC.

The Events of January 29, 2021 and After

38. At 1:55 p.m. on Friday, January 29, 2021, having received no response to his letter, Mr. Hahn emailed Ms. Simpson asking for an update. She responded almost immediately that she had “no update.” Mr. Hahn followed-up, asking “whether [ADOC was] going to respond?” He further requested that if she had not “spoken to them about it,” “would you please reach out to them?” At 2:12 p.m., Ms. Simpson responded, “I've forwarded your message[.]”

39. Less than an hour later, the State filed, with the ASC, a 29-page Objection to Smith's Motion to Reset Execution Date. In that objection, the State noted for the first time that it was reducing the total number of Mr. Smith's witnesses to *one*— inclusive of any spiritual advisor— because of the risk of COVID-19 transmission during Mr. Smith's execution. Under this new policy, Mr. Smith would have had to choose between his attorney, his spiritual advisor, and all his friends and family, including his wife, to be present when he dies.

40. Attached to that objection was an affidavit from Cheryl Price, Assistant Deputy Commissioner of Facility Operations for the ADOC, who averred that “[i]n preparation for [Mr. Smith's] execution, the Department developed the measures, attached as ‘Exhibit A,’ for conducting this execution pursuant to its COVID-19 protocols.” Also attached to the objection was a document entitled “Measures for Execution at Holman Correctional Facility During the COVID-19 Pandemic” (“Smith Addendum”).¹⁵

41. These measures are specific to Mr. Smith alone, as demonstrated in their opening paragraph, which provides: “Beginning on Monday of the execution week, the first day of visitation of the Condemned, and continuing through the date of execution (i.e., Thursday of that week), the following procedures will be implemented for the execution of *Willie B. Smith III*, during the COVID-19 Pandemic[.]” (emphasis added).

¹⁵ Ex. B.

42. Until January 29, 2021, the ADOC had taken the position that Alabama Code § 15-18-83 permitted a condemned prisoner to “choose up to six individuals – ‘relatives or friends of the condemned person’ – to witness the proceeding.”¹⁶

43. On information and belief, the ADOC has never adopted special procedures to provide a different protocol to a prisoner it plans to execute.

44. Until January 29, 2021, the ADOC had taken the position that Alabama Code § 15-18-83 permitted a condemned prisoner to “choose up to six individuals – ‘relatives or friends of the condemned person’ – to witness the proceeding.”¹⁷

45. On February 3, 2021, Mr. Smith filed this action based on the Smith Addendum.¹⁸ That same day, this Court ordered a status conference and instructed counsel for the ADOC to consider revisions and submit its final version of the proposed protocol to the Court by February 4, 2021. On February 4, 2021, the ADOC submitted a list of revisions to the Smith Addendum.

46. On February 5, 2021, Mr. Smith filed a state action in *Smith v. Dunn and Raybon*, Civil Action No. 03-CV-2021-900139.00, challenging the Smith Protocol under the Alabama Code §§ 15-18-81, 15-18-83, and the Alabama Religious

¹⁶ Br. in Opp’n to Pet’n for Cert. in *Arthur v. Dunn*, No. 16-1407 (May 25, 2017), 2017 WL 2376962, at 6-7. The ADOC further noted, “Arthur has elected to designate his lead counsel as *a* witness for his execution under this statute.” *Id.* at 7 (emphasis added).

¹⁷ Br. in Opp’n to Pet’n for Cert. in *Arthur v. Dunn*, No. 16-1407 (May 25, 2017), 2017 WL 2376962, at 6-7. The ADOC further noted, “Arthur has elected to designate his lead counsel as *a* witness for his execution under this statute.” *Id.* at 7 (emphasis added).

¹⁸ *Smith v. Dunn*, No. 2:21-cv-00099-RAH (M.D. Ala.).

Freedom Amendment (“ARFA”), Ala. Const. Art. I, § 3.01(V). In an effort to avoid delay, Mr. Smith filed these claims in state court based on the State’s position in another federal action before this Court, No. 2:20-cv-01026-RAH, that ARFA claims should be raised in state court rather than in federal court through supplemental jurisdiction.¹⁹ In the state action, the State took the opposite position, arguing instead that Mr. Smith should have raised his state law claims in federal court.²⁰ On February 9, 2021, the state court granted the State’s Motion to Dismiss without prejudice in the state court action and declined to provide the basis for its dismissal, despite Mr. Smith’s request for clarification.²¹

The Smith Protocol: the Addendum and Subsequent Revision

47. Among the new procedures in the Smith Addendum are changes to contact visits mandated by both the Original Protocol and custom. The Smith Addendum provides, “Visitors will be expected to maintain a six (6) foot distancing COVID-19 protocol [sic] at all times,” including in the visitation room where individuals will be separated by “clearly marked locations” six feet apart from one another. The revision to the Smith Addendum alters this requirement by allowing hugging and holding hands while wearing both a mask and face shield. However, “[i]f visitors are

¹⁹ Def.’s Response in Opp’n to Smith’s Emergency Motion for Prelim. Inj. And Mot. To Dismiss, *Smith v. Dunn*, No. 2:20-cv-01026-RAH (Dec. 22, 2020), at 24.

²⁰ Def.’s Mot. To Dismiss, or, in the Alternative, Motion for Summary Judgment, *Smith v. Dunn and Raybon*, No. 03-cv-2021-900139.00, (Feb. 8, 2021), at 24-27.

²¹ Order Denying Plaintiff’s Motion for Clarification, *Smith v. Dunn and Raybon*, No. 03-cv-2021-900139.00 (Feb. 9, 2021), at 1.

not in direct contact with Smith . . . , it will be strongly *suggested* that they maintain social distancing to the extent possible.”²²

48. The visiting room will hold up to 15 visitors at one time, including Mr. Smith’s counsel and spiritual advisor.

49. A prisoner’s ability to confidentially communicate with his or her counsel in the days leading up to an execution is critical. Counsel must keep the prisoner apprised of ongoing litigation and clemency efforts, and receive the prisoner’s approval and input on the numerous strategic decisions that must be made. This is particularly important now, where Mr. Smith has not had in person access to his counsel in almost a year because of ADOC’s prohibition on legal visits during the pandemic. Phone calls organized by the prison do not guarantee privileges and confidential communications and are no substitute for in person legal visits.

50. The revision to the Smith Addendum increased the witnesses allowed for Mr. Smith from one to three. This number is less than half of those Mr. Smith is entitled to under Alabama law and the Original Protocol. On February 5, 2021, Assistant Attorney General Joseph “Jody” Stewart of the ADOC called Mr. Smith’s counsel demanding that Mr. Smith submit a new request for witnesses identifying three individuals to be present at his execution. On February 9, 2021, Mr. Stewart emailed Mr. Smith’s counsel, again asking him to submit a new request designating three witnesses.

²² Ex. C, p. 2.

51. Before being revised, another new procedure contained in the Smith Addendum was the requirement that each of Mr. Smith's visitors and witnesses had a temperature of less than 100 degrees in order to enter the facility. If any of Mr. Smith's visitors, including his spiritual advisor and counsel, had a temperature of 100 degrees or more, they would be prohibited from visiting Mr. Smith and witnessing his execution, even if they subsequently present ADOC with a negative COVID-19 test..

52. Before being revised, the Smith Addendum also forbade Mr. Smith from having any visitors if Mr. Smith had a temperature of 100 degrees or higher unless "it is determined that he is not positive for COVID-19." The Addendum does not state that Mr. Smith will be tested for COVID-19 or how it will be determined whether he is infected.

53. The Smith Addendum's revisions alter the temperature requirements for Mr. Smith, his visitors, and witnesses from 100 degrees to 100.4 degrees.

54. Under the Smith Protocol, visitors and witnesses are also required to pass a COVID-19 rapid test in enter the facility. Those who test positive via rapid test will not be allowed to visit Mr. Smith or witness his execution unless they are able to provide a negative COVID-19 test from a medical provider in the community.

55. The revision to the Smith Addendum provides that Mr. Smith will be denied all visitation if he tests positive for COVID-19, though he will only be tested if he has a temperature of 100.4 degrees of higher. As recently as February 8, 2021, the State represented to this Court in a hearing on a Motion to Dismiss that ADOC

has not yet decided whether it plans to proceed with Mr. Smith's execution should he test positive for COVID-19.

56. Temperature checks do not provide information about whether a person is infected with COVID-19. Many illnesses can cause fevers, so a person who has a temperature of 100.4 degrees or more does not necessarily have COVID-19. Additionally, a person infected with COVID-19 might not have a temperature. The CDC found that 20% of symptomatic COVID-19 patients do not have a fever.²³ And by definition, all asymptomatic COVID-19 patients do not have a fever. This means that 20% of cases is a drastic underestimate of the number of active infections that do not present with fever.

57. Persons who have previously recovered from COVID-19 can receive a false positive rapid test result for a variety of reasons, including residual, non-infectious viral fragments. The Food and Drug Administration advises those administering rapid tests to "consider positive results in combination with clinical observations, patient history, and epidemiological information."²⁴ The Smith Protocol does not take any of this information into account in assessing positive rapid test results.

²³ Centers for Disease Control and Prevention, *Symptom Profiles of a Convenience Sample of Patients with COVID-19—United States, January-April 2020* (July 17, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6928a2.htm>.

²⁴ FDA, *Potential for False Positive Results with Antigen Tests for Rapid Detection of SARS-CoV-2- Letter to Clinical Laboratory Staff and Health Care Providers* (Nov. 03, 2020), <https://www.fda.gov/medical-devices/letters-health-care-providers/potential-false-positive-results-antigen-tests-rapid-detection-sars-cov-2-letter-clinical-laboratory>.

58. The Smith Protocol does not identify the rapid test manufacturer, nor the qualifications of the person(s) administering the tests. Failure to properly administer the rapid tests is another common reason for false positive results.²⁵

59. The temperature check and rapid testing policy as applied to visitors and witnesses could result in denying Mr. Smith access to his spiritual advisor and / or counsel—even if they are not infected with COVID-19—in the days leading up to and during his execution.

60. Under the Smith Protocol, witnesses are required to be within six feet of others when they are transported to the prison by an ADOC officer in an ADOC vehicle with another witness. On information and belief, witnesses may spend up to an hour in these vehicles.

61. Under the current Smith Protocol, witnesses are required to be within six feet of others when they are in the witness rooms. On information and belief, witnesses will be required to stay together in this room for at least 30 minutes.

62. Poor ventilation in the witness rooms will facilitate COVID-19 transmission even when witnesses maintain a six-foot distance from one another.²⁶

Vaccination and Herd Immunity Progress

²⁵ *Id.*

²⁶ Centers for Disease Control and Prevention, *Ways COVID-19 Spreads* (Updated Oct. 28, 2020) (finding evidence that people with COVID-19 can infect others who are more than six feet away when in enclosed spaces that had inadequate ventilation).

63. COVID-19 “[v]accinations in the United States began Dec. 14,” and as of February 4, 2021, over 35 million shots have been given.²⁷

64. If the “vaccination campaign goes well, we could approach herd immunity by summer’s end and [according to Dr. Anthony Fauci] ‘normality that is close to where we were before’ by the end of 2021.”²⁸

65. The changes in the Original Protocol adopted by the Smith Addendum and the revision will not prevent the execution from becoming a super-spreader event. Despite taking similar precautions, including mandating masks and temperature checks, recent federal executions resulted in the infection of members of the execution team, lawyers for the condemned, journalists, and at least one spiritual advisor. Following each federal execution there were also significant spikes in overall numbers of COVID-19 infections at the facility.

66. As of February 9, 2021, Holman reports 39 inmates and 32 staff currently positive with COVID-19.²⁹ Further, at the time of this filing, Mr. Smith has not had his temperature checked today by any staff or medical personnel. He did participate in visitation today. Mr. Smith also reports suffering with a headache.

Execution Problems Arising from the Smith Protocol

²⁷ The New York Times, *See How Vaccine Rollout Is Going in Your State* (Updated: Feb. 04, 2021), available at <https://www.nytimes.com/interactive/2020/us/covid-19-vaccine-doses.html> (last accessed Feb. 04, 2021).

²⁸ Alvin Powell, *Fauci says herd immunity possible by fall, ‘normality’ by end of 2021*, THE HARVARD GAZETTE (Dec. 10, 2020), available at <https://news.harvard.edu/gazette/story/2020/12/anthony-fauci-offers-a-timeline-for-ending-covid-19-pandemic/> (last accessed Jan. 31, 2021).

²⁹ See <http://www.doc.alabama.gov/covid19news> (last accessed February 9, 2021).

67. The use of personal protective equipment, namely masks and face shields, has the potential to result in an unconstitutional execution.

68. The Original Protocol requires a three-step consciousness check after the injection of the first drug (midazolam).

69. The Original Protocol (and its previous iterations) has employed the three-step consciousness check since at least 2011, when it executed Eddie Powell after changing the first drug from sodium thiopental to pentobarbital.

70. One step is to call out the prisoner's name in a loud voice.

71. Continuing an execution by administering the second (a paralytic that paralyzes the diaphragm, causing a feeling of suffocation) and third drugs (potassium chloride, which stops the heart and causes a sensation of being burned alive from the inside) without ensuring that the condemned prisoner is insensate violates the Eighth Amendment.

72. Because masks muffle speech, the name response check will be less effective and more likely to result in a failure to detect that Mr. Smith is still able to feel pain.

73. On February 9, 2021, the ADOC submitted a status report to this Court, stating that ADOC "cannot order the correctional officer who performs the consciousness assessment to remove his PPE [because t]he consciousness assessment is performed in very close quarters, with the correctional officer standing just to the left of the gurney and near the inmate's exposed face." Because

ADOC will not test Mr. Smith for COVID-19 unless he has a temperature, and will not test the officers who will be in the execution chamber, the officer conducting the consciousness assessment is incentivized to keep his PPE on during the assessment, regardless of whether the PPE needs to be removed in order to adequately determine if Mr. Smith is sensate.

74. In December, the BOP disclosed that, while “[a]ll BOP staff are required to wear face masks,” two members of the execution team responsible for putting Orlando Hall to death could not adequately communicate while wearing masks.³⁰ In that moment, BOP staff were forced to choose between keeping their masks on and potentially risking unconstitutional harm to Mr. Hall, or violating the mask mandate and threatening the health and safety of everyone else in the room. According to a BOP official, “[g]iven the critical importance of these communications, both individuals removed their masks. . . [in the execution chamber] so that they could clearly communicate.”³¹ Afterward, Mr. Hall’s spiritual advisor, who was in the execution chamber when the masks were removed, and 20 percent of the execution team tested positive for the virus.³²

³⁰ *Hartkemeyer v. Barr*, No. 2:20-cv-00336-JMS-DLP, Supp. Decl. of Rick Winter, at 2, Doc. No. 51-1 (D. Ind. July 8, 2020).

³¹ *Smith & Holm v. Barr, et. al*, No. 2:20-cv-00630-JMS-DLP, Decl. of Rick Winter, at 2, Doc. No. 33-2 (S.D. Ind. Dec. 12, 2020).

³² Michael Balsamo and Michael R. Sisak, *Execution staff have COVID-19 after inmate put to death*, AP (Dec. 8, 2020), available at <https://apnews.com/article/prisons-coronavirus-pandemic-executions-terre-haute-indiana-e80af6a566bbff50ed5e9a097c305dbb> (last accessed Jan. 31, 2021).

75. Following Corey Johnson’s execution in mid-January, BOP again reported that “[i]t was necessary for [two] staff members to remove their masks for more clear communication, including ensuring that there were no legal impediments to proceeding with the execution.”³³ BOP counsel characterized this removal of required masks as “mission-critical”³⁴ to “ensuring that the execution [could] lawfully proceed.”³⁵

76. In the most recent revision to the protocol submitted to this Court, the officer conducting consciousness checks will be allowed to use his own discretion as to whether to remove PPE during some or all of the consciousness check.

77. The remaining two steps in the consciousness check are to detect a reaction to stimuli. One is to pinch the upper back of the prisoner near the left shoulder and watch for a reaction to this painful stimulus. The other is to brush the eyelid of the prisoner and watch for a reaction to this stimulus.

78. During at least two executions since the adoption of midazolam as the first drug in the execution protocol, the ADOC has had to administer an additional dose of midazolam after prisoners reacted during the consciousness check.

³³ *Smith & Holm v. Barr, et. al*, No. 2:20-cv-00630-JMS-DLP, Def.’s Resp. to Court’s Order to Show Cause, at 2, Doc. No 63 (S.D. Ind. Jan. 15, 2021) (citing Decl. of Rick Winter at ¶¶ 6-8, Doc. No. 63-1).

³⁴ *Id.* at 3.

³⁵ *Id.* at 2.

79. The execution team has practiced and rehearsed executions under the Original Protocol for years. They now have fewer than 13 days to retrain using the Smith Addendum.

80. Mr. Smith will be the first person subject to the Smith Addendum and its compromised consciousness check.

CLAIM ONE

Defendants' plan to deviate substantially and materially from the Protocol violates Mr. Smith's fundamental right to be free from cruel and unusual punishment as guaranteed by the Fourteenth Amendment's Equal Protection Clause.

81. Mr. Smith re-alleges and incorporates by reference the allegations set forth in paragraphs 1-73 above.

82. To establish a claim for relief under the Equal Protection Clause, Mr. Smith must demonstrate that the government has subjected him to disparate treatment as compared to similarly situated persons and that such disparate treatment burdens a fundamental right, targets a suspect class, or has no rational basis.³⁶

83. Mr. Smith has a fundamental right, under the Fourteenth Amendment, to be free from cruel and unusual punishment.

³⁶ See, e.g., *Cooley v. Kasich*, 801 F. Supp. 2d 623, (S.D. Ohio 2011) (“When the disparate treatment burdens a fundamental right, strict scrutiny applies. This means that Defendants’ core deviations [from the protocol and procedures] are permissible only if they are narrowly tailored to a compelling governmental interest.”) (internal citations omitted).

84. A prisoner adequately pleads an Equal Protection Clause claim where “he alleges that Alabama has substantially deviated from its execution protocol in a manner that significantly reduces inmate safeguards.”³⁷

85. “[S]ubjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment.”³⁸

86. “Significant deviations from a protocol that protects inmates from cruel and unusual punishment can violate the Eighth Amendment.”³⁹

87. “Completing executions in a constitutional manner is a legitimate state interest. Completing them in a manner that ensures their humane nature is as well. There can be protocol deviations that will further both of these and other valuable, legitimate interests. But core deviations that introduce uncertainty and eliminate safeguards meet neither of these state interests”⁴⁰

88. The Smith Protocol’s use of masks and face shields and leaving their removal to the discretion of the officer conducting the consciousness assessment has introduced substantial and significant risk that at least one or more steps of the assessment will fail to detect whether Mr. Smith is still sensate after administration of midazolam in violation of his right to be free from cruel and unusual punishment.

³⁷ *Arthur v. Thomas*, 674 F.3d 1257, 1263 (11th Cir. 2012).

³⁸ *Id.* (brackets in original) (quoting *Baze v. Rees*, 553 U.S. 35, 49 (2008)).

³⁹ *Id.*

⁴⁰ *Cooey*, 801 F. Supp. 2d at 653.

89. Failure to ensure that a condemned prisoner is insensate prior to injecting pancuronium bromide and potassium chloride creates a substantial risk of serious harm.⁴¹

90. In failing to ensure Mr. Smith's execution follows the longstanding consciousness check set forth in the Protocol, Defendants have selectively introduced substantial risk into his execution.⁴²

91. Strict adherence to consciousness checks has been central to court determinations that lethal injection protocols satisfy the Eighth Amendment.⁴³

92. Making major last-minute changes to the Protocol introduces substantial and significant risk that Mr. Smith will be subject to cruel and unusual punishment.

93. Deviations from the Original Protocol substantially burden Mr. Smith's fundamental right to be free from cruel and unusual punishment by dispensing with necessary and long-established procedural safeguards.

⁴¹ *Baze*, 553 U.S. at 52.

⁴² *See, e.g., Cooley*, 801 F. Supp. 2d at 653 (“Defendants offer no compelling reason for selectively introducing risk into some executions but not others.”).

⁴³ *See, e.g., DeYoung v. Owens*, 646 F.3d 1319, 1327 (11th Cir. 2011) (rejecting an Eighth Amendment claim because “DeYoung’s execution, or any other under the Georgia protocol, cannot proceed until he is unconscious,” and “officials will not administer the pancuronium bromide [the second drug] but will administer more anesthetic—and conduct more consciousness checks—until the inmate has been shown to be unconscious”); *Pavatt v. Jones*, 627 F.3d 1336 (10th Cir. 2010) (upholding denial of a stay because the district court’s “findings, combined with the portion of the [Oklahoma] protocol that requires the attending physician to confirm that an inmate is unconscious prior to the administration of the final two drugs . . . support the district court’s legal conclusion”).

94. The State has offered no compelling reason for its failure to adhere to its Original Protocol.

95. Postponing the execution until it is safe to follow the Original Protocol is the only appropriate way to protect Mr. Smith's constitutional rights.

96. Defendants' failure to adhere to their procedural safeguards to assess anesthetic depth violates Mr. Smith's constitutional right to equal protection and his right to be free from cruel and unusual punishment, and creates a substantial risk that Mr. Smith will be subjected to unconstitutional pain and suffering during his execution.

CLAIM TWO

The Smith Addendum forces Mr. Smith to forgo either his Sixth Amendment right to counsel and First Amendment right to access the courts or his First Amendment right to free exercise of his religious beliefs.⁴⁴

97. Mr. Smith re-alleges and incorporates by reference the allegations set forth in paragraphs 1-73 above.

98. The Sixth Amendment guarantees Mr. Smith the right to counsel. Without the ability to meet with counsel, that right would be illusory.

99. The First Amendment guarantees Mr. Smith the right to the free exercise of his religious beliefs.

⁴⁴ Since Mr. Smith's original complaint was filed, ADOC has increased the number of witnesses from one to three. However, as detailed in Mr. Smith's Response in Opposition to Motion to Dismiss and Objection to Motion to Stay in this case, this claim is not moot due to Defendant's amply demonstrated willingness to change the protocol and the doctrine of voluntary cessation.

100. “Prisoners possess a “constitutional right of access to the courts.”⁴⁵

101. The Supreme Court has described as “intolerable that one constitutional right should have to be surrendered in order to assert another.”⁴⁶

102. With this arbitrary limitation, Mr. Smith must choose a single witness to be present for his execution. Here, it becomes a choice between having counsel present to guard his rights, or his pastor present to pray over him and be a balm to his soul. Because of the ADOC’s decision to adopt a special procedure for Mr. Smith, he is being forced to choose between constitutional rights: his First Amendment right to free exercise of religion, and his Sixth Amendment (and 28 U.S.C. § 3006A) right to counsel and First Amendment right to access to the courts.

103. The change to the Protocol regarding the number of witnesses is not designed to (nor will it) protect Mr. Smith from cruel and unusual punishment. Its only purpose is to (potentially) protect others at the expense of Mr. Smith, substantially increasing the risk that he will suffer cruel and unusual punishment.

104. Access to counsel and the courts is of heightened importance while they employ an experimental and unique procedure in executing Mr. Smith.

105. Further, limiting the number of witnesses when a substantially altered protocol is being employed for the first time increases the risk that errors or flaws will go unnoticed and uncorroborated.

⁴⁵ *Arthur v. Dunn*, 137 S. Ct. 1521, 1522 (2017) (Sotomayor, J., dissenting) (quoting *Bounds v. Smith*, 430 U.S. 817, 821 (1977)).

⁴⁶ *Simmons v. United States*, 390 U.S. 377, 394 (1968).

106. The ADOC should not be permitted to force Mr. Smith to make an intolerable choice when it created the problem it purports to remedy.⁴⁷

CLAIM THREE

Changing the Protocol to deprive Mr. Smith of physical contact with his friends, loved ones, attorneys, and spiritual advisor—as guaranteed in the Protocol and provided to every other condemned prisoner before him—violates the Equal Protection and Due Process Clauses. The change, as applied to his wife as one of his visitors, also violates Mr. Smith’s substantive due process rights inherent in his constitutional right to marry.⁴⁸

107. Mr. Smith re-alleges and incorporates by reference the allegations set forth in paragraphs 1-73 above.

108. While the ADOC was not required to adopt a policy guaranteeing contact visits during the week of an execution, because it chose to do so (and has done so for every other prisoner in Mr. Smith’s position), it must treat Mr. Smith equally under the Equal Protection and Due Process Clauses as to the policy.⁴⁹

⁴⁷ As alleged above, Mr. Smith repeatedly warned the ADOC about the risks in seeking to set an execution during a once-in-a-century pandemic. Those concerns were dismissed with promises that the Protocol would be followed, despite the pandemic. And, again, the changes are not designed to protect Mr. Smith and his constitutional rights.

⁴⁸ Since Mr. Smith’s original complaint was filed, ADOC has changed the protocol to permit Mr. Smith and his visitors to have physical contact and be as close as they wish. However, as detailed in Mr. Smith’s Response in Opposition to Motion to Dismiss and Objection to Motion to Stay in this case, this claim is not moot due to Defendant’s amply demonstrated willingness to change the protocol and the doctrine of voluntary cessation.

⁴⁹ See, e.g., *Griffin v. Illinois*, 351 U.S. 12, (1956) (while “[i]t is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all,” once the State creates such a privilege, it may not discriminate in its application without running afoul of the Due Process and Equal Protection Clauses).

109. Marriage is “a fundamental right . . . of liberty[], of privacy[], and of association[.]”⁵⁰ As such, the marital relationship between Mr. Smith and his wife is significant to assessing the impact of the Smith Addendum, and the new restrictions should be subject to strict scrutiny.

110. Mr. Smith’s right to exercise his religious beliefs is a fundamental right protected by the First Amendment, the Protocol’s contact visit guarantee, and the Religious Land Use and Institutionalized Persons Act. Preventing Mr. Smith and his spiritual advisor and any other visitors who wish to participate in religious practices necessitating contact and / or closeness violates Mr. Smith’s fundamental right to freely exercise his religious beliefs. This unequal treatment violates Mr. Smith’s right to equal protection as to free exercise of his religious beliefs. As such, it is subject to strict scrutiny.

111. Even assuming no fundamental right is implicated in the elimination of contact visits as to visitors other than Mr. Smith’s wife and spiritual advisor, there is no rational basis for treating Mr. Smith differently than every other prisoner it has executed, especially because the ADOC pushed forward with an execution while promising not to deviate from the Protocol as recently as nine days before it adopted the Smith Addendum.

CLAIM FOUR

The Smith Protocol limiting Mr. Smith to three witnesses violates his rights under Alabama Code § 15-18-83 to have his spiritual advisor in addition to six witnesses of his choosing present at his execution.

⁵⁰ *Searcy v. Strange*, 81 F. Supp. 3d 1285, 1289 (S.D. Ala. 2015) (internal citations omitted).

112. Mr. Smith re-alleges and incorporates by reference the allegations set forth in paragraphs 1-73 above.

113. Section 15-18-83(a) enumerates a list of individuals who “may be present at an execution.” This list includes “(4) The spiritual advisor of the condemned[,]” and “(7) [a]ny of the relatives or friends of the condemned person that he or she may request, not exceeding six in number.”

114. Section 15-18-83, by its plain language, grants prisoners the right to have their spiritual advisor and an additional six witnesses of their choosing present at their executions.

115. In response to Mr. Smith’s Motion to Reset Execution Date Due to the COVID-19 Pandemic, the State took the position that the use of the word “may” in the first sentence of §15-18-83(a) should be interpreted as granting prisoners only the right to “*request* that persons be allowed to witness an execution,” not the right that to have certain persons present.⁵¹

116. This reading is illogical and renders the statute meaningless. The language “may *be present*” clearly indicates the purpose of the provision is to create an enforceable requirement that the enumerated persons be allowed to attend, not merely the right to *request* attendance that can then arbitrarily be denied. Indeed, under the State’s reading of the statute, § 15-18-83(a) also grants prisoners the right to request the attendance of physicians— the third subsection in the list of

⁵¹ Objection to Mot. to Reset., at 5.

persons who may be present. But it cannot be argued that the presence of physicians at an execution depends on the request of the prisoner, which the warden then has the discretion to deny. The same is true for the presence of “the executioner and any persons necessary to assist in conducting the execution;” “the Commissioner of Corrections or his or her representative;” and “the immediate family of the victim”—all of whom are also listed as individuals who “may be present.” Indeed, the word “request” only appears within subsection seven, discussing the relatives and friends of the prisoner.

117. Reading the statute as a listing of required witnesses is the only logical interpretation. If ADOC has sole discretion to determine change number of witnesses allowed, there would be no purpose in having a statute setting out the categories and numbers of witnesses in the first place. Indeed, the exact purpose of the statute is to prevent ADOC from changing who may be present at an execution—which ADOC has now does at least three times in the last week (originally allotting Mr. Smith seven witnesses— as required by the statute— then reducing the number to six and then one, and most recently raising it to three).

118. Additionally, the language “as may be admitted by the warden,” which appears in reference to the media witnesses, is notably absent from the provisions discussing witnesses chosen by the prisoner and his spiritual advisor. Instead, the statute dictates that “the spiritual advisor of the condemned” and “[a]ny relatives or friends of the condemned person that he or she may request, not exceeding six in number” may be present, without the qualifier that the warden has the discretion to

admit them. The only qualifier placed on the spiritual advisor and the witnesses chosen by the prisoner are found in § 15-18-83(b), which states that no “convict” can be a witness to an execution.

119. Common sense explains that the statute uses the word “may,” instead of shall for instance, so that executions can be carried out when circumstances outside the control of ADOC prevent a prisoner’s designated witnesses from attending. A witness, for example, may be unable or unwilling to attend. Though § 15-18-83 does not grant prisoners the right to compel the witnesses he selects to attend, it is intended to compel ADOC to permit attendance when a prisoner requests witnesses, provided they pass specific security measures.

120. The State’s position is that “ADOC’s current COVID-19 precautions [limiting Mr. Smith to one witness] are analogous to its previous security precautions” removing witnesses who cause a disturbance or precluding witnesses who refuse to or fail to be cleared through security.⁵² These circumstances, however, involve specific individuals who were requested by the prisoner, approved by the warden, and then later prohibited from attending because of their own actions. Under the Smith Protocol, Mr. Smith will be denied the right to have statutorily guaranteed witnesses because the ADOC changed its policy to reduce the number of witnesses in each witness room. As such, the ADOC must arbitrarily select three of the witnesses from Mr. Smith’s request—which he submitted prior to the sudden changes in policy— and reject the remaining four. Alternatively, the ADOC will

⁵² *Id.*, at 5.

ignore Mr. Smith's previous request identifying seven individuals and ask him to submit a new request with three names – which ADOC has already done. Even under the State's reading of the statute, the latter would violate § 15-18-83 by forcing Mr. Smith *to request* just three witnesses.

121. ADOC's pattern of practice and custom reinforce the notion that §15-18-83 creates an enforceable requirement that certain persons be allowed to attend executions.

122. The Smith Protocol's witness limitation violates Mr. Smith's right pursuant to § 15-18-83 to have seven witnesses present, including his spiritual advisor.

CLAIM FIVE

The Smith Protocol temperature checks, witness limitation, and rapid tests, violate Mr. Smith's statutory rights under § 15-18-81 to access his lawyer, relatives, friends, and spiritual advisor the week of and during his execution.

123. Mr. Smith re-alleges and incorporates by reference the allegations set forth in paragraphs 1-73 above.

124. Section 15-18-81 grants prisoners the right to access their "*lawyer, who shall be admitted to see him when necessary. . . for the transaction of business, and the relatives, friends, and spiritual advisors* of the condemned person, who shall be admitted to see and converse with him at *all proper times*, under such reasonable rules and regulations as may be made by the Board of Corrections."

125. Counsel's presence during visitation the week of his client's execution and during the execution itself is for "the transaction of business."

126. Under ADOC's Protocol, custom, and practice, the "proper time[]" for lawyers, relatives, friends, and spiritual advisors to access prisoners is during visiting hours each day the week of their execution and, if the prisoners request, during the execution itself.

127. A policy precluding Mr. Smith from having any visitors—including his attorney and spiritual advisor—if he has a temperature of 100.4 degrees or more is not reasonable for purposes of preventing the spread of COVID-19.

128. A policy precluding individuals—including his spiritual advisor and counsel—from visiting Mr. Smith in person or attending his execution because they have a temperature of 100.4 degrees or more is not reasonable for purposes of preventing the spread of COVID-19. The fact that the ADOC changed its temperature cut-off further demonstrates its temperature check policy is not reasonable.

129. A policy precluding individuals—including Mr. Smith's spiritual advisor and counsel—from visiting Mr. Smith or attending his execution because either they or Mr. Smith have a positive rapid test without the consideration of additional clinical observations, patient history, and epidemiological information is not reasonable for purposes of preventing the spread of COVID-19. Indeed, neither the Smith Addendum nor its revisions require Mr. Smith to submit to rapid testing in order for the execution to proceed.

130. A policy limiting Mr. Smith to three witness at his execution is unreasonable under § 15-18-81. First, this policy violates § 15-18-83, and a policy

that infringes upon a prisoner's statutory rights cannot be deemed reasonable. Second, the ADOC has already represented that the "Condemned's Witness Room" has the capacity to hold only three people complying with social distancing requirements.⁵³ That was the very justification the ADOC gave for limiting Mr. Smith to one witness (since the room for Mr. Smith's witnesses is also required to hold a member of the press and a correctional officer). As such, it is not reasonable for ADOC to reduce the number of Mr. Smith's witnesses to allow for social distancing when his witnesses will not be able to socially distance within the room regardless. Third, it is not reasonable to reduce the number of witnesses for purposes of staying six feet apart when the Smith Protocol forces witnesses to be within six feet of each other—possibly for up to an hour—when they are transported to the facility by ADOC staff. Fourth, the purpose the witness limitation is to reduce the risk of spreading COVID-19, yet poor ventilation within the facility will still enable COVID-19 transmission, even if witnesses are able to remain six-feet apart. Fifth, the ADOC cannot justify denying Mr. Smith his statutory right to have seven witnesses present during his execution in order to enforce social distancing requirements while allowing contact visits with up to 16 people at a time in one room, where social distancing is merely a "strong suggest[ion]." Finally, the sheer number of times ADOC has changed its policy pertaining to witnesses—first to six, then one, now three—illustrates that there is nothing special (or reasonable) about the number three.

⁵³ Ex. B, at 4.

131. Given predictions from leading public health experts that herd immunity may take effect as early as summer, the only reasonable way to carry out Mr. Smith's execution in a way that will not threaten the public health or infringe upon his rights is to postpone the execution date.

CLAIM SIX

The Smith Protocol temperature checks and rapid testing requirement violate Mr. Smith's rights under the Alabama Religious Freedom Amendment ("ARFA"), Ala. Const. Art. I, § 3.01(V).

132. Mr. Smith re-alleges and incorporates by reference the allegations set forth in paragraphs 1-73 above.

133. The ARFA provides that "Government may burden a person's freedom of religion *only* if it demonstrates that application of the burden to the person (1) Is in furtherance of a compelling governmental interest; and (2) Is the least restrictive means of furthering that compelling governmental interest."⁵⁴

134. "[W]hat ARFA says is that *any* burden—even an incidental or insubstantial one—suffices to trigger strict scrutiny."⁵⁵

135. Under the strict-scrutiny test, a statute must be "narrowly tailored to serve a compelling state interest, and must be the least restrictive alternative available for accomplishing that interest."⁵⁶ Imposing temperature checks and rapid

⁵⁴ Ala. Const. Art. I, § 3.01(V) (emphasis added).

⁵⁵ *Thai Meditation Ass'n of Ala., Inc.*, 980 F.3d, 821, 840 (11th Cir. 2020).

⁵⁶ *Herring v. State*, 100 So. 3d 616, 625 (Ala. Crim. App. 2011) (quotations omitted).

testing which may arbitrarily prevent Mr. Smith from accessing his spiritual advisor in the days leading up to and during his execution individually and collectively burden his right to free exercise of religion.

136.

137. The government does not have a compelling interest in executing Mr. Smith during a once-in-a-century global pandemic.

138. The least restrictive means of carrying out Mr. Smith's execution while protecting the public from the spread of COVID-19 is not imposing restrictions that infringe upon Mr. Smith's statutory rights, but postponing his execution until the threat of the pandemic has subsided.

CLAIM SEVEN

The ADOC's failure to take Mr. Smith's temperature on February 9, 2021—in violation of the Smith Protocol—coupled with its refusal to test him prior to his execution violates the Eighth Amendment.

139. The ADOC has refused to state whether it will execute Mr. Smith if he is infected with COVID-19. ADOC reports four active case of COVID-19 in Holman, at least one of which is on death row. Thus, there is a potential that Mr. Smith could be executed while infected with COVID-19. Executing Mr. Smith via lethal injection while he is actively positive with COVID-19 would violate his constitutional rights to be free from cruel and unusual punishment pursuant to the Eighth Amendment to the U.S. Constitution.

140. Under the current Smith Protocol, Mr. Smith is only subject to COVID-19 testing if he has a temperature above 100.4 degrees. However, lack of a temperature

does not indicate that someone does not have COVID-19. Further, on February 9, 2021, staff at Holman failed to take Mr. Smith's temperature at all – a clear violation of the Smith Protocol requiring staff to take his temperature before he leaves the holding cell each day.

141. On January 12, 2021, a federal court granted a preliminary injunction to two death row prisoners diagnosed with COVID-19 on the basis that COVID-19 infections would cause them to suffer unconstitutional pain and suffering as they were put to death via lethal injection.⁵⁷

142. Because COVID-19 can cause lasting lung damage, a person injected with midazolam will experience the feeling of suffocating or drowning, akin to waterboarding, even more quickly and acutely than a person who had not been infected with COVID-19. Here, if Mr. Smith had COVID-19 and attendant respiratory issues, Defendants' method of execution through injection of midazolam would create a substantial risk that he would suffer flash pulmonary edema earlier in his execution process, and before brain levels of midazolam have peaked, causing Mr. Smith to suffer needless and excruciating pain before he is rendered unconscious.

143. A diagnosis of COVID-19 on top of execution via lethal injection would create significant medical complications before the end of Mr. Smith's life. Should Mr. Smith test positive for COVID-19, constitutional alternatives for execution,

⁵⁷ Memorandum Opinion, *In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145(TSC) (D.D.C. Jan. 12, 2021).

would be an injection protocol that provides for a pre-execution dose of an analgesic, or in the alternative, to enjoin Mr. Smith's execution until such time as Defendants' method of administering death sentences complies with the Eighth Amendment to the U.S. Constitution.

PRAYER FOR RELIEF

WHEREFORE, Mr. Smith respectfully requests that this Court grant the following relief:

1. Issue a permanent injunction barring the execution of Mr. Smith under the Smith Protocol;
2. Issue an injunction prohibiting the ADOC from enforcing the limitations set forth in the Smith Protocol with respect to his visitors and witnesses;
3. Order that Mr. Smith receive a COVID-19 test; and
4. Grant such other relief as this Court deems proper and just.

Respectfully submitted this 9th day of February, 2021.

/s/ Spencer J. Hahn

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2021, the foregoing has been filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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